

THE REGULATION OF FOREIGN INVESTMENT IN AUSTRALIA. By MICHAEL SEXTON & ALEXANDER ADAMOVICH. [NSW: C.C.H. Australia Ltd. 1981.]

THE growth of public consciousness on economic matters in Australia was one of the significant features of the seventies. Nowhere was this more marked than on the question of the need for more Federal regulation of particular sectors of the economy. Areas such as restrictive trade practices, transfer of securities *etc.*, which had hitherto relatively enjoyed the *laissez-faire* privilege of non-government intervention were increasingly made subject to Federal control or supervision. The entry of private foreign capital into Australia which reached record levels in this decade also came under similar scrutiny. Public demands for more controls were based on the belief that an under-checked entry of private foreign investment would have adverse effects on such matters as

- (i) the country's balance of payments;
- (ii) the stability of the national currency vis-a-vis the currency of other countries;
- (iii) the local ownership of property; and
- (iv) national economic planning.

The legal regime partly born out of this economic phenomenon was intended to counter the above stated dangers. It is basically premised on protecting the national interest. Unlike several developing countries, the legal machinery governing foreign investment in Australia is not to be found in a single comprehensive code. Instead it is spread among statutes, regulations and policy guidelines issued by the Federal Government.

The chief value of this work is that it brings for the first time the essential features of this regulating framework for examination

within a single volume. It fulfills a vital need for literature in this area and should find itself greatly welcomed by all those having an interest in the legal regulation of foreign enterprise in Australia.

The Australian legal scheme on foreign investment rests on four basis:

- (i) Foreign Investment Guidelines;
- (ii) Federal Foreign Takeovers Act (FTA);
- (iii) Foreign Exchange Regulations; and
- (iv) Customs (Prohibited Exports) Regulations.

Guidelines

These are policy statements lacking theoretical legal force. They are administered by a non-statutory body — the Foreign Investment Review Board (FIRB) — attached to the Treasury. The practical enforceability of these guidelines is ensured through use of exchange control and customs approval. FIRB screens applications by foreign interests for establishment of new businesses or diversification of existing businesses provided the project (except in certain circumstances) involves an investment of \$5 million or more. The general criterion for examination of proposals is economic benefit to Australia. In particular, it is relevant whether proposals would result in an increase in employment or in an introduction of new technology. Usually, approval is given subject to certain conditions such as the need for a high level of Australian equity in the project either at its commencement or at an initial stage.

Some sectors of the economy are subject to special restrictions e.g. the mineral industry, largely due to a prevailing high concentration of foreign ownership. One significant principle confined exclusively to the natural resources area is *naturalisation*. This implies that a foreign owned company will be permitted to commence a mineral venture (generally disallowed) if it agrees to be designated as a naturalizing company.

To qualify as a naturalizing investor it must satisfy the following pre-conditions:

- (i) a minimum 25 percent Australian equity in the company;
- (ii) amendment of the company's articles of association to provide for a board of directors a majority of whose members are Australian citizens; and
- (iii) A public declaration to increase Australian equity to 51 per cent within a set time period and to have regular discussions with FIRB on steps being taken to achieving 51 per cent Australian ownership.

Foreign Takeovers Act

This is a complex piece of legislation administered by the Treasurer on the advice of the FIRB. Its policy objective is to prevent foreign takeovers of Australian companies (having assets of \$2 million or more) that would cause detriment to the national interest. 'National

interest' is not defined in the Act. But it is usually interpreted by the FIRB to mean economic benefit to Australia. The general criterion for screening a takeover proposal is whether it would produce net economic benefits in the context of the particular industry where the Australian company is located.

Approval may sometimes be granted with conditions attached. Between July 1, 1979 - June 30, 1980 there were 1060 notified proposals. 745 were unconditionally approved, 303 were subject to conditions, 12 were rejected. The conditions may range from a requirement for a higher level of Australian equity to be phased-in after approval has been granted to a freezing of foreign equity at the level achieved by the takeover. Sometimes Federal or State environmental standards may also be required to be met.

Exchange Control Regulations

These regulations govern the inflow and outflow of funds from Australia and are made pursuant to the Commonwealth Banking Act (1959). They are administered by the Reserve Bank. All proposals for establishing new businesses require foreign exchange approval for incoming funds at some stage. As a result these regulations can sometimes be used to ensure compliance with the Foreign Investment Guidelines.

Customs (Prohibited Exports) Regulations

These regulations, setting out the items for which federal government approval is necessary prior to export, are made under the Customs Act 1901. They too can be used as a sanction to ensure the enforceability of the guidelines especially in the minerals area which require export approval for their products.

The above is a gist of the bases the authors have examined in detail under separate heads in this work. They clearly lay down the theoretical foundation and the historical reasons for the presence of these bases in the legal scheme. Even practical approaches adopted by the administration and practical problems met in the scheme have come under scrutiny. For examples, the authors contend that FIRB is more interested in appearance rather than actual Australian control of the enterprise. Once FIRB is assured of a substantial proportion of Australian equity, it fails to show a corresponding concern at where policy direction lies in the overall project. Further the FIRB or the Foreign Investment Division of the Treasury does not regularly monitor the carrying out of conditions over a period of time. Consequently only major cases tend to get investigated for breaches of the conditions of approval.

The authors also discuss the effects of taxation and the role of the state governments in regulating foreign investment in separate chapters. At present the Federal Government plays the dominant role. However various state governments have their own incentive schemes which compete with each other, and regulations which at times are inconsistent with that of the Federal Government. Such a situation creates confusion and FIRB is now bent on achieving a uniform set of Foreign Investment regulations throughout Australia. But this quest has met with opposition. For example, the Western Australian and Queensland state governments prefer to see some of the Federal require-

ment, particularly those relating to Australian equity, reduced thereby ensuring fewer barriers to projects specifically in the minerals industry proposed for their states.

The last chapter of the book is a discussion of the future of Foreign Investment Regulation. The observations though speculative may prove to be valid. The authors predict an increased complexity of regulations for the eighties especially due to the increasing tendency of government to intervene in order to influence economic development. The authors also draw attention to the foreign investment policy of the Australian Labour Party. Labour Party government would be committed in the areas of petroleum and natural gas to establishing a state organization to participate in the development of Australia's oil and gas resources. To be designated as the Australian Hydrocarbon Corporation, this proposed statutory body will have strategic as well as commercial objectives and may operate independently or in joint venture with private companies. It will be a conduit towards eventual government involvement directly in oil and gas projects.

As a matter of general criticism this work would have profited more from a separate discussion of the security of investment. What are the legal remedies available to an investor if there is an administrative repudiation of approval by the FIRB after the project has been launched or if more conditions are imposed by FIRB in the mid-term of the project? Is he expected to comply with them however harsh they may be or are legal remedies available to thwart such attempts?

Though the authors have expressly excluded a discussion of franchise agreements in the chapter on the role of state governments, the reviewer submits that a work of this nature merits an examination of that feature since franchise agreements sometimes play a crucial role in influencing a decision to invest. They are essentially contracts between a state government and a mining venture encompassing a series of mutual rights and obligations. Generally under these agreements the state government undertakes to provide the infra structure in terms of provision of water, railways, telecommunication etc. in return for capital investment in a less developed area on the part of the investor. In the past there have been several breaches of such agreements by state governments through administrative action or parliamentary repudiation. An investor would be interested to know what his remedies would be and how it could get them enforced if similar breaches were to occur again.

It must also be noted that unlike in several other resource-rich countries the Australian foreign investment scheme does not contain explicit guarantees against expropriation or harassment of foreign investments through change of tax and allied laws. The absence of such provisions is explicable on historical grounds. However, it is moot question whether the increasing government supervision of private sector conduct would generate demands for such guarantees at least on the part of some foreign investors in the future.

The failure to discuss these issues does not in any way detract from the importance of the book. It is a timely contribution to an area which is increasingly attracting the attention of both the international business community as well as the Australian legal profession.