

ACT ICA of 1940

SECTION 8(b)(1)

RULE _____

DATE July 29, 1999

July 29, 1999
Our Ref. No. 98-457-CC
The First Australia
Fund, Inc.
File No. 811-4438

RESPONSE OF THE OFFICE OF CHIEF COUNSEL
DIVISION OF INVESTMENT MANAGEMENT

Your letter dated May 26, 1999 requests our assurance that we would not recommend enforcement action to the Commission under Section 8(b)(1) of the Investment Company Act of 1940 ("Act") if The First Australia Fund, Inc. (the "Fund") implements a concentration policy that would permit it to invest, under certain conditions, up to 35% of its total assets in the securities of any industry.

Facts

The Fund is a non-diversified, closed-end investment company. The Fund's principal investment objective is long-term capital appreciation by investing primarily in equity securities of Australian companies that are listed on the Australian Stock Exchange and included in the Australian All Ordinaries Index (the "Index"). The Index is comprised of various sub-indices, which are designed to represent particular industries such as Banks and Finance, Transport, Oil and Gas, and Building and Construction. The Index is established and maintained by The Australian Stock Exchange, which is not an affiliated person of the Fund or an affiliated person of an affiliated person of the Fund. ^{1/}

The Fund invests no more than 25% of its total assets in the equity securities of issuers in a particular industry or group of industries. The industry classifications used by the Fund are the same as those used by the Index. Although the Fund invests primarily in securities included in the Index, it is actively managed and is not an index fund.

Since the Fund's inception in December 1985, and until approximately two years ago, no industry represented more than 16% of the entire Index. It was thus possible for the Fund's manager to attempt to outperform the Index by underweighting or overweighting the Fund's investments in any particular industry on the basis of its judgment as to the relative prospects for a particular industry. At least one industry, however, recently has represented nearly 25% of the Index. The Fund's manager seeks to continue to have the ability to overweight or underweight the Fund's investments in any particular industry, even to the extent of investing more than 25% of the Fund's total assets in an industry.

^{1/} Telephone conversation between Jana M. Cayne of the staff and Margaret A. Bancroft of Dechert Price & Rhoads, counsel to the Fund, on May 27, 1999.

The Fund proposes to implement a new concentration policy to permit it to invest up to 35% of its total assets in the equity securities of issuers in a particular industry or any one group of industries if, at the time of investment, that industry represents 20% or more of the Index. 2/ This would allow the Fund to continue to overweight or underweight a particular industry, with a maximum investment of 35% in any one industry, consistent with the Fund's investment policies and objectives.

Analysis

Section 8(b)(1) of the Act requires an investment company ("fund") to recite in its registration statement, among other things, whether it reserves the freedom to concentrate investments in a particular industry or group of industries. If such freedom is reserved, Section 8(b)(1) requires the fund to include a statement briefly indicating, insofar as is practicable, the extent to which the fund intends to concentrate its investments. We have taken the position that a fund is concentrated if it invests more than 25% of the value of its total assets in any one industry. 3/ Section 13(a)(3) of the Act requires a fund to obtain shareholder approval to change its concentration policy.

Section 8(b)(1) permits a fund to implement a concentration policy that allows for some degree of discretion, provided that the circumstances under which the manager may exercise its discretion to change the fund's concentration status are described, to the extent practicable, in the fund's registration statement. To satisfy this standard, we believe that a fund must clearly describe, in as much detail as is practicable, the circumstances under which the fund may concentrate its investments. 4/ You state that the Fund's proposed

2/ The Fund's shareholders approved a policy to this effect on May 14, 1998.

3/ See Investment Company Act Release No. 9011 (Oct. 30, 1975).

4/ We have interpreted Section 8(b)(1) as requiring:

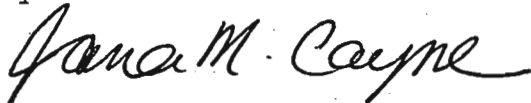
that the registrant need only briefly indicate, "insofar as is practicable, the extent to which the registrant intends" to [concentrate investments]. To the extent that specification is practicable, however, it is the duty of the company to furnish statements of policy or intention which are specific, precise and informative.

See Investment Company Act Release No. 167 (July 23, 1941) ("Release No. 167").

concentration policy describes, insofar as practicable, the extent to which the Fund intends to concentrate in an industry by setting clear, objective limitations on the manager's ability to freely concentrate in an industry.

We agree. Our conclusion is based specifically on your representations that: (1) the Fund's principal investment objective is to invest primarily in equity securities of Australian companies that are included in the Index; (2) the Index is established and maintained by an unaffiliated third party and is widely recognized; (3) an industry must represent more than 20% of the Index before the manager may invest more than 25% of the Fund's total assets in that industry; and (4) the manager cannot invest more than 35% of the Fund's total assets in that industry. We believe that, under these circumstances, the Fund's proposed concentration policy is consistent with Section 8(b)(1) of the Act.

Our position is based on the facts and circumstances set forth in your letter. Any different facts and circumstances may require different conclusions.



Jana M. Cayne
Senior Counsel

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May 26, 1999

BY FEDERAL EXPRESS

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Associate Director and Chief Counsel
Office of the Chief Counsel
Division of Investment Management
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549

Re: Implementation of New Concentration Policy by The First
Australia Fund, Inc.

Dear Mr. Scheidt:

We are counsel to The First Australia Fund, Inc., a non-diversified closed-end investment company organized under the laws of Maryland (the "Fund"). The Fund's principal investment objective is long-term capital appreciation through investment primarily in equity securities of Australian companies listed on the Australian Stock Exchange and included in the Australian All Ordinaries Index. Its secondary investment objective is current income.

We hereby request that the Staff of the Division of Investment Management of the Securities and Exchange Commission not recommend enforcement action if the Fund were to implement a concentration policy which would permit it to invest between 25% and 35% of its total assets in the securities of any one industry sector if, at the time of investment, that industry sector represents 20% or more of the Australian All Ordinaries Index (the "new concentration policy").

Douglas J. Scheidt, Esq.

May 26, 1999

Page 2

The Australian All Ordinaries Index is made up of various sub-indices, such as Banks and Finance, Transport, Oil and Gas and Building and Construction, all of which are constructed to be representative of particular industry sectors. The Index, which is widely recognized, is established and maintained by The Australian Stock Exchange. The Australian Stock Exchange is not an affiliated person of the Fund or any affiliate of the Fund.

Since the Fund's inception in December 1985 and until approximately two years ago, no industry sector represented more than 16% of the entire Index. Thus, it was possible for the Fund's Manager to underweight or overweight the Fund's investments in any particular sector on the basis of its judgment as to the relative prospects for outperformance in a particular sector. However, some of these sectors are becoming larger. For example, the Banks and Finance sector of the Index has grown through consolidations and sheer outperformance to nearly 22% of the Index. That secular change means that, absent implementation of the new concentration policy, the Fund will be unable to overweight the Fund's portfolio to this important component of the Index. Instead, contrary to its policy of actively managing the Fund, it could, at best, so long as the Banks and Finance sector does not top 25%, merely match the Index. And, if that sector were to grow to greater than 25%, it would be forced to underweight the sector. Similarly, other sectors of the Index may also come to represent close to 25% of the Index, presenting the Manager with the same inability to match or overweight the sector.

Given the fact that the Fund is not an index fund, but is instead actively managed, the Fund's Manager proposed that the Fund adopt the new concentration policy as a means of providing flexibility but within clearly defined limits. The new concentration policy was approved unanimously by the Board of Directors. The Board also voted to put the new concentration policy to the shareholders for a vote, with implementation of the new policy conditioned on shareholder approval and concurrence by the Staff of the Division of Investment Management.

The new concentration policy was favorably received by the Fund's shareholders. At the Fund's annual meeting of shareholders held on May 14, 1998, 6,713,783.3752 shares were voted in favor of the new concentration policy. A total of 2,686,864.2034 shares were voted against the policy and 297,804.2789 abstentions were recorded.

Discussion

Over the years, the Division of Investment Management has developed a comprehensive set of guidelines for investment companies registering offerings of their shares, including a guideline setting forth the Division's position on concentration of investments by funds in particular industries.¹ Currently, the guidelines are collated in Release No. IC 13436² (the "1983

¹. The guidelines were initially developed to aid registrants in complying with registering shares on Form N-8B-1. Release No. IC-7221 (June 9, 1972). While Form N-8B-1 has been rescinded (Release No. IC-10378, August 28, 1978), the guidelines were not withdrawn because the guidelines were believed to be of on-going utility.

². August 12, 1983.

Douglas J. Scheidt, Esq.

May 26, 1999

Page 3

Release”). As noted by the Division, the guidelines are intended to be a compilation and adaptation of Commission releases and Staff positions and interpretations. The preface to the guidelines observes that the policies embodied in the guidelines can be changed as, among other things, experience or altered factual situations so require.

For the reasons set forth below, we are of the opinion that the new concentration policy complies with the Division’s existing position on concentration and with Sections 8(b)(1) and 13(a)(3) of the Investment Company Act of 1940 (the “1940 Act”).

The Division’s policy on concentration is synthesized in Guide 19 of the 1983 Release. That Guide first stipulates that investment of more than 25% of the value of a fund’s assets in any one industry represents concentration, thereby providing an objective and universal benchmark. Guide 19 then goes on to state:

“Freedom of action to concentrate pursuant to management’s investment discretion, without shareholder approval, has been considered by the staff to be prohibited by sections 8(b)(1) and 13(a)(3) of the 1940 Act, unless the statement of investment policy clearly indicates when and under what specific conditions any changes between concentration and non-concentration would be made. Statements of concentration policy pursuant to which registrants reserve the right to concentrate in particular industries ‘without limitation if deemed advisable and in the best interest of the shareholders’ are viewed as failing to comply with section 8(b)(1).”

As discussed below and as set forth in the proxy statement recommending that the shareholders adopt the new concentration policy, the Board of Directors believes that the new concentration policy sets meaningful, objective limits on the freedom of the Fund to concentrate its assets in any particular industry that can be, and, in fact, were evaluated by the shareholders when they approved the new concentration policy.

The new concentration policy sets clear, objective limitations on the Manager’s ability freely to concentrate in any industry sector. First, an industry sector must come to represent more than 20% of the Index. Second, even then the Manager cannot invest more than 35% of the Fund’s assets in such sector. While it is understood that a policy on concentration which simply gives a fund unbridled authority to concentrate or not concentrate in any industry is meaningless and, therefore can be viewed by the Staff as prohibited by Section 8(b)(1) and 13(a)(3) of the 1940 Act, in our opinion, the new concentration policy complies with Guide 19 in that it “clearly indicates when and under what specific conditions any changes between concentration and non-concentration would be made.” Moreover, the new concentration policy is clearly distinguishable from statements of concentration policy pursuant to which funds reserve the right to concentrate in particular industries “without limitation, if deemed advisable and in the best interests of shareholders,” a formulation that the Staff, in Release No. IC-9011 (October 30, 1975) once again indicated, failed, in its view, to comply with Section 8(b)(1) of the 1940 Act.

Douglas J. Scheidt, Esq.
May 26, 1999
Page 4

Should the Staff of the Division of Investment Management concur with our opinion, before implementing the new concentration policy, the Fund would spell out implementation of the new concentration policy in a press release. It would also, on an on-going basis, advise its shareholders, through its quarterly shareholder reports, whether the portfolio, at any quarter end is concentrated in any industry sector, giving the percentage of such concentration. The language in the quarterly reports would read as follows:

The Fund may invest between 25% and 35% of its total assets in the securities of any one industry sector if, at the time of investment, that industry sector represents 20% or more of the Australian All Ordinaries Index.

[then add one of the following]

At the end of the [] quarter, 199X, the Fund did not have more than 25% of its assets invested in any industry sector.

or

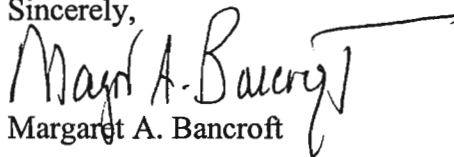
At the end of the [] quarter, 199X, the Fund had XX% of its assets invested in the X sector. The X sector represents X% of the Australian All Ordinaries Index.

Conclusion

Based upon the foregoing, we hereby respectfully request that the SEC Staff agree not to recommend any enforcement action to the Securities and Exchange Commission under Section 8(b)(1) or 13(a)(3) if the Fund were to implement its new concentration policy in accordance with the terms of this request.

If you have any questions or wish to discuss this request further, please do not hesitate to contact the undersigned at the offices of Dechert Price & Rhoads, 30 Rockefeller Plaza, New York, New York 10112, or by telephone at 212-698-3590.

Sincerely,


Margaret A. Bancroft

cc: Mercer Bullard, Esq.
Barry D. Miller, Esq.
Keith A. O'Connell, Esq.
David L. Wills