



**Australian Government**  

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**The Treasury**

Senate Economics References Committee

Submission to the Inquiry into the Foreign  
Investment Review Framework

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Manager  
Communications  
The Treasury  
Langton Crescent Parkes ACT 2600  
Email: [medialiaison@treasury.gov.au](mailto:medialiaison@treasury.gov.au)

# CONTENTS

EXECUTIVE SUMMARY .....	1
INTRODUCTION.....	3
AUSTRALIA’S FOREIGN INVESTMENT REVIEW FRAMEWORK .....	5
<b>Importance of foreign investment to the Australian economy .....</b>	<b>5</b>
<b>The need for a review mechanism.....</b>	<b>5</b>
Alternative approaches.....	6
<b>Australia’s foreign investment reforms.....</b>	<b>7</b>
<b>Overview of the foreign investment framework.....</b>	<b>8</b>
Coverage .....	8
Application fees.....	9
Penalties for non-compliance .....	10
Statutory timeframe .....	10
<b>The screening process undertaken by FIRB .....</b>	<b>10</b>
Initial examination .....	10
Consultation arrangements .....	11
National interest factors .....	11
Decision making process.....	12
FOREIGN INVESTMENT IN CRITICAL INFRASTRUCTURE AND PROTECTING AUSTRALIA’S NATIONAL SECURITY .....	13
<b>Foreign investment reforms and critical infrastructure .....</b>	<b>13</b>
<b>Gatekeeper role .....</b>	<b>14</b>
<b>Discussion of specific cases .....</b>	<b>14</b>
Port of Darwin.....	14
TransGrid.....	16
S. Kidman & Co. Limited.....	18
CONCLUSION.....	19
ATTACHMENT A .....	20
<b>Terms of reference for the Inquiry into the Foreign Investment Review</b>	
<b>Framework.....</b>	<b>20</b>
Terms of reference.....	20



## EXECUTIVE SUMMARY

1. The purpose of this submission is to outline the operation of Australia's foreign investment framework, including recent changes to the legislation, and to outline the stated policy rationale behind the framework. The ability of Treasury to comment on individual cases is limited by our commitment to maintain strict standards of confidentiality in the handling of information provided by applicants. However, to assist the Committee, we have provided factual summaries of the assessment processes that were undertaken in relation to the three foreign investment proposals that are the subject of the Inquiry.
2. The Government welcomes foreign investment because it plays an important and beneficial role in the Australian economy.
3. Foreign investment proposals are reviewed on a case-by-case basis to ensure they are not contrary to Australia's national interest. The foreign investment review framework is designed to strike a balance between ensuring that Australia remains an attractive investment destination, while maintaining community confidence in foreign investment and protecting Australia's interests.
4. The Treasurer has the power to block foreign investment proposals or apply conditions to the way proposals are implemented to ensure they are not contrary to the national interest.
5. While Australia's foreign investment framework has been in operation largely in its current form since the mid-1970's, recent growth in applications to the Foreign Investment Review Board (FIRB) and changing investment patterns created pressure to review the framework (particularly in relation to agriculture and residential real estate).
6. The Government responded by implementing significant reforms that strengthen the integrity of the foreign investment framework. While the focus of the reform package was on residential real estate and agriculture, it included important changes that have improved the Government's ability to scrutinise investments that potentially raise national security issues.
7. The screening process that is undertaken when assessing a foreign investment application is rigorous. In relation to the proposed acquisition of S. Kidman & Co. Limited, the lease of TransGrid and the lease of the Port of Darwin, extensive consultation with other government departments and national security agencies, as well as engagement with the vendors, was undertaken. In each case, national security considerations were carefully examined and where necessary, mechanisms were put in place to protect Australia's interests.
8. The Government is working with the States and Territories to ensure that future sales of critical infrastructure by Australian governments and their entities to privately-owned investors can be formally reviewed by the Treasurer. This will require an amendment to the *Foreign Acquisitions and Takeovers Regulation 2015*. The Government is working to have this amendment in place by March 2016.



## INTRODUCTION

1. Australia's foreign investment review framework is set by the legislative framework and is supported by Australia's Foreign Investment Policy (the Policy) and Guidance Notes on the specific application of the law.
  - The legislative framework comprises the *Foreign Acquisitions and Takeovers Act 1975* (Act), the *Foreign Acquisitions and Takeovers Fees Imposition Act 2015* (Fees Imposition Act) and their associated regulations.
  - The Policy outlines the Government's approach to administering the foreign investment framework, including national interest considerations, while the Guidance Notes provide more specific information on how the framework applies for different types of acquisitions and different investors.
  - The legislation, Policy and Guidance Notes are available on the FIRB website at: <http://firb.gov.au/resources/>.
2. The framework allows the Treasurer to review foreign investment proposals (that meet certain criteria) on a case-by-case basis to ensure that they are not contrary to Australia's national interest. The Treasurer has the power to block foreign investment proposals or apply conditions to the way proposals are implemented to ensure they are not contrary to the national interest.
3. When making foreign investment decisions, the Treasurer is advised by the FIRB, which examines foreign investment proposals and advises on the national interest implications. The FIRB is a non-statutory body and its functions are advisory only. Responsibility for making decisions rests with the Treasurer.
4. The FIRB is supported by a secretariat in Treasury's Foreign Investment and Trade Policy Division and the Australian Taxation Office (ATO). The Secretariat is responsible for the day-to-day administration of the framework, with the head of Treasury's Foreign Investment and Trade Policy Division also the Executive Member of the FIRB.
5. As part of the Government's recent foreign investment reforms, the ATO has assumed responsibility for administering foreign investment in residential real estate, collecting application fees and managing the foreign ownership of agricultural land register. Treasury has retained responsibility for business, agriculture and commercial land applications. The recent reforms are discussed in more detail below.





# AUSTRALIA'S FOREIGN INVESTMENT REVIEW FRAMEWORK

## Importance of foreign investment to the Australian economy

6. Foreign investment plays an important and beneficial role in the Australian economy because it helps drive economic growth, creates skilled jobs, improves access to overseas markets and enhances productivity.
7. Australia has historically relied on foreign capital to finance the shortfall between national investment and national saving. By supplementing Australia's national saving, foreign investment allows Australia to enjoy higher living standards now (by financing current consumption) and into the future (by providing finance for investment which in turn should lead to higher growth in national income and hence living standards) than would otherwise be sustainable.
8. Foreign direct investment is an important component (along with portfolio equity investment and debt finance) in helping to finance the shortfall between national investment and national saving. In the absence of foreign direct investment, Australian businesses might be able to offset this partially by accessing portfolio equity investment by foreigners and foreign borrowing from unrelated or third parties. While each of these has a role to play, greater reliance on other forms of external finance (particularly debt finance) would expose the economy to more risk.
  - Direct investment is generally regarded as a stable form of capital because it usually involves a substantial longer term commitment from the investor, whereas debt finance and portfolio investment can be recalled relatively quickly.
  - The return on direct investment is generally dependent on profitability, which means that foreign investors share in project risks. With debt finance, the capital and interest must generally be repaid, regardless of performance.
9. Importantly, foreign direct investment not only assists the domestic firms receiving the capital injection, it has significant positive spillover effects on the broader economy. It provides additional capital for economic growth, creates new employment opportunities and supports existing jobs, improves consumer choice and promotes healthy competition among Australia's industries.
10. It can also help deliver improved competitiveness and productivity by introducing new technology, providing much needed infrastructure, allowing access to global supply chains and markets and enhancing Australia's skills base.

## The need for a review mechanism

11. Notwithstanding the benefits of foreign investment to the economy, there is a need to review foreign investment proposals to ensure they are consistent with Australia's national interest.

12. The foreign investment review framework is designed to strike a balance between ensuring that Australia remains an attractive investment destination, while maintaining community confidence in foreign investment and protecting Australia's national interest. To achieve this, the Government reviews foreign investment proposals on a case-by-case basis and the Act empowers the Treasurer to prohibit an investment if satisfied it would be contrary to the national interest.
13. The national interest, and what would be contrary to it, is not defined in the Act. Instead, the Act confers upon the Treasurer the power to decide in each case whether a particular investment would be contrary to the national interest.
14. While the general presumption is that foreign investment is beneficial given the important role it plays in Australia's economy, the national interest assessment is designed to provide discretion to the Government to balance sensitivities against the benefits of foreign investment. The national interest test is a negative test meaning the presumption is that foreign investment proposals will be allowed to proceed unless found to be contrary to the national interest.
15. The framework ensures foreign investment proposals are considered in a timely, holistic and consistent manner while maintaining flexibility to consider proposals on a case-by-case basis. It is designed to maximise investment flows while serving to protect Australia's national interest.

#### *Alternative approaches*

16. The foreign investment review framework has been criticised for its lack of transparency because it is based on a case-by-case analysis (rather than rigid rules). This has led to calls to codify the national interest so that the criteria are prescribed in legislation. This would be similar to the approach adopted by New Zealand.
17. While such a model may provide investors with more certainty, the current case-by-case approach provides flexibility. This flexibility is fundamental to the operation of the foreign investment framework because the national interest is difficult to define and can change over time.
18. The current approach of providing guidance in the Policy allows the Government to easily amend its guidance on factors potentially impacting the national interest as it evolves, while still providing sufficient clarity to potential investors. This flexibility is also important to ensure that the Australian public remains confident in the foreign investment review process (that is, it is able to capture different sensitivities as they arise).
19. A codified national interest test with a rigid set of criteria incorporated into the legislative framework risks being inflexible, prescriptive and may require ongoing amendments (such amendments may be difficult to implement because Australia's free trade agreement commitments would limit the Government's ability to make subsequent changes). Further, enshrining specific national interest factors in legislation may expose the Government to an increased risk of litigation, as well as provide additional avenues for opponents of an investment to challenge it.

20. When the *Foreign Takeovers Act* passed into law in 1975, the Second Reading Speech described the intention not to prescribe national interest criteria in the following way:

*I come now to the question of criteria for judging whether a foreign takeover proposal would be against the national interest. The criteria have not been incorporated into the Bill; this is because the criteria must be flexible in their interpretation and application and it has been found that it would be impracticable, consistent with the need for such flexibility, to express the criteria with the precision required by legislative form.*

21. It has also been suggested that the FIRB be made an independent statutory decision maker (rather than the Treasurer) to depoliticise the process.
22. Foreign investment is a sensitive issue for the Australian community and one of the key purposes of the framework is to reassure the community that particular foreign investment proposals are being scrutinised and community views are being considered. While it is a decision for government whether it wishes to delegate such powers to an independent statutory decision maker, the long standing view of successive governments has been that such judgements on the national interest are better made at the political level.

## Australia's foreign investment reforms

23. While Australia's foreign investment framework has been in operation largely in its current form since the mid 1970s, recent growth in applications and heightened community sensitivity over certain types of foreign investment (in particular agriculture and residential real estate) was placing pressure on the framework and had the potential to undermine confidence that foreign investment is in the national interest.
24. The Government responded to these concerns by introducing reforms to strengthen the integrity of the framework. The reforms that commenced on 1 December 2015 provide stronger enforcement of the rules and a better resourced system with clearer rules for foreign investors. The reforms included:
- increased enforcement of the residential real estate rules by establishing a dedicated unit within the ATO to review cases and strengthen compliance;
  - stricter and more flexible penalties to make it easier to pursue foreign investors that breach the rules;
  - application fees to ensure that Australian taxpayers no longer have to fund the cost of administering the system;
  - increased scrutiny around agricultural investments by lowering the applicable thresholds;
  - improved transparency through a comprehensive register of foreign ownership of agricultural land that commenced collecting data from 1 July 2015; and
  - an overhaul of the legislation to make it more modern and clearer.
25. The Government has also negotiated with the States and Territories to use land titles data to expand the register to include all land, including residential real estate. As part of the parliamentary passage of the foreign investment reforms, the Government also agreed to pass legislation by 1 December 2016 to establish a register of foreign ownership of water entitlements.

## Overview of the foreign investment framework

### Coverage

26. The Act enables the Treasurer to make a broad range of orders in relation to actions that a foreign person is proposing to take or has already taken.
27. A foreign person is generally:
  - an individual that is not ordinarily resident in Australia; or
  - a foreign government or foreign government investor; or
  - a corporation, trustee of a trust or general partner of a limited partnership where an individual not ordinarily resident in Australia, foreign corporation or foreign government holds a substantial interest of at least 20 per cent; or
  - a corporation, trustee of a trust or general partner of a limited partnership in which two or more foreign persons hold an aggregate substantial interest of at least 40 per cent.
28. The Act does not provide the Treasurer with a power to 'approve' investment proposals. Rather, when the Treasurer is notified that a foreign person is proposing to take an action covered by the foreign investment framework, the Treasurer may:
  - decide to not object;
  - allow the action to proceed provided the person complies with one or more conditions; or
  - decide that taking the action would be contrary to the national interest and make an order prohibiting the proposal.
29. If the investment has already occurred, and the Treasurer is satisfied it is contrary to the national interest, the Treasurer may make an order requiring the investor to dispose of the investment. The Act also allows the Treasurer to impose legally enforceable conditions in such circumstances as an alternative to a disposal order.
30. Generally, proposals to acquire an interest of 20 per cent or more in any business valued at over \$252 million must be notified to the FIRB for examination.
  - Consistent with Australia's free trade agreement commitments, a \$1,094 million threshold applies to investors from Chile, China, Japan, Korea, New Zealand and the United States.
  - However, the \$252 million continues to apply for these investors if investing in sensitive businesses. Sensitive businesses include media; telecommunications; transport; defence and military-related industries; and the extraction of uranium or plutonium or the operation of nuclear facilities.
31. Lower thresholds apply to agricultural investments and investments in the media sector.
32. In addition, foreign persons must notify and get prior approval before acquiring certain interests in Australian land. Further information on the specific notification requirements for each investment type is available in Guidance Note 34 at: <http://firb.gov.au/resources/guidance/gn34/>.

### *Foreign Government Investors*

33. A long-standing feature of the foreign investment framework is that there are additional requirements in place for foreign government investors. A 'foreign government investor' is:
- a foreign government or separate government entity;
  - a corporation or trustee of a trust, or a general partner of a limited partnership in which:
    - : a foreign government or separate government entity holds a substantial interest of at least 20 per cent; or
    - : foreign governments or separate government entities of more than one foreign country (or parts of more than one foreign country) hold an aggregate substantial interest of at least 40 per cent.
34. In addition to the requirements discussed above for non-government investors, all foreign government investors generally require prior approval to acquire a direct interest in an Australian business (that is, generally an investment of at least 10 per cent) regardless of the value of the investment (that is, a \$0 threshold applies).
35. Foreign government investors also need approval to start a new business, acquire an interest in land or to acquire a legal or equitable interest in a tenement or an interest of at least 10 per cent in securities in a mining, production or exploration entity.
36. Further, some exemptions which apply to non-government investors do not apply to foreign government investors. For example, interests acquired directly from a state or territory government do not usually require foreign investment approval. However, this exemption does not apply to foreign government investors so that the FIRB can formally examine such acquisitions.
37. These additional requirements apply to all foreign government investors, regardless of their country of origin (Australia has not provided preferential treatment to any foreign government investors through free trade agreements).

### *Application fees*

38. One of the key changes that took effect on 1 December 2015 was the introduction of application fees. Under the Fees Imposition Act, fees are generally payable by any person who makes an application under the Act.
39. Application fees for business proposals generally range from \$25,000 to \$100,000 depending on the size of the proposed transaction. The Treasurer may waive or remit the fee if satisfied that it is not contrary to the national interest to do so. Applications are not considered made until the applicable fee has been paid or the fee has been waived or remitted.
40. Further information on the fees is available in Guidance Note 30 at: <http://firb.gov.au/resources/guidance/gn30/>.

### *Penalties for non-compliance*

41. The Government's approach when administering the framework is to work with investors to resolve non-compliance. However, if needed, the Act provides strict penalties, including civil and criminal penalties, for foreign persons that do not comply with the requirements in the legislation.
42. Foreign persons that breach the Act in relation to a business or non-residential real estate investment face a maximum criminal penalty of 3 years imprisonment, \$135,000 fine or both. The maximum penalty for a company is a \$675,000 fine. Civil pecuniary penalties are also available, with the maximum civil penalty of \$225,000 for a company.

### *Statutory timeframe*

43. Consistent with the need to provide certainty to investors, the Act requires that a decision be made within 30 calendar days of an application being lodged and provides up to a further 10 calendar days for the applicant to be advised of the decision. If a decision has not been made within this time and the applicant has not been advised, the application is deemed to be 'approved' since 'no objection' to the proposal has been made.
44. As it is sometimes not possible to make a decision on a particular proposal within the statutory time limit, the Treasurer can issue an interim order extending the timeframe up to a further 90 days. Interim Orders are normally only issued if a proposal is complicated or where insufficient information has been provided.
45. If the applicant considers the timeframe for assessing their case is insufficient, or they do not wish for an interim order to be made (which has to be published in the Commonwealth of Australia Gazette), they can voluntarily extend the period. There is no limit on the number of times the decision period can be extended.

### **The screening process undertaken by FIRB**

46. The examination of foreign investment proposals is rigorous. The assessment process seeks to ensure that particular proposals are not contrary to Australia's national interest. In fulfilling this objective, the FIRB secretariat and where appropriate the FIRB examine proposals with a view to identifying any sensitivities regarding the national interest, and determining whether these sensitivities can be mitigated or managed.
47. The sections below outline the screening process that is undertaken by Treasury in its role as the FIRB secretariat. Most applications are screened within the 30 day statutory period, although longer periods may be required for complex cases.

### *Initial examination*

48. Proposals are initially examined by Treasury. The FIRB has direct and early involvement in significant or sensitive applications.
49. The preliminary assessment seeks to determine whether an application meets the notification requirements for a proposal in so far as the Act applies, whether the application contains sufficient detail and ensures that the correct application fee has been paid. Timing is also considered, including any deadlines that are commercially important to investors.

50. The applicants or their representatives may be contacted to discuss their proposal at an early stage. This is particularly likely where a proposal is complex, information is inadequate, or the proposal raises potential national interest sensitivities.
51. If it is unclear whether the proposed investor is a foreign government investor, Treasury will seek additional information from the applicant to help make an assessment of its status. The information provided by the applicant is then checked against assessments provided by Australia's Overseas Posts, the security agencies and third party databases.

#### *Consultation arrangements*

52. A fundamental part of the examination process is consultation with other government departments and agencies so that the Treasurer receives whole of government advice on potential national interest issues. Treasury consults with Australian, state and territory government departments, national security agencies and authorities with responsibilities relevant to the proposal.
53. Advice and comments provided by such agencies are important in assessing the implications of proposals and in particular, in determining whether they potentially raise any national interest issues. For example, advice from the relevant national security agencies is relied upon for assessments as to whether an investment raises national security concerns.

#### *National interest factors*

54. Once all of the feedback has been received from consultation partners, Treasury will prepare formal advice to the Treasurer (or another decision maker that has been delegated by the Treasurer) on the proposal and any national interest issues. Significant or sensitive applications are considered and discussed in detail by the FIRB before the advice is finalised.
55. While the national interest test has not been codified in the Act, to provide certainty for investors, the Government has provided general guidance on the national interest factors that are typically considered when assessing foreign investment proposals.
56. The Policy indicates that the Government considers a range of factors when assessing the national interest including: national security, competition, taxation, impact on the economy and the community and the character of the investor.
57. The relative importance of these factors can vary depending upon the nature of the target enterprise. Investments in enterprises that are large employers or that have significant market share may raise more sensitivities than investments in smaller enterprises. However, investments in small enterprises with unique assets or in sensitive businesses may also raise concerns.
58. The impact of the investment is also a consideration. An investment that enhances economic activity such as by developing additional productive capacity or new technology is less likely to be contrary to the national interest.
59. The national interest test also recognises the importance of Australia's market-based system, where entities are responsive to interest holders and where investment and sales decisions are driven by market forces.

60. Where a proposal involves a foreign government investor, the Government also considers if the investment is commercial in nature or if the investor may be pursuing broader political or strategic objectives that may be contrary to Australia's national interest. This includes assessing whether the prospective investor's governance arrangements could facilitate actual or potential control by a foreign government, including through the investor's funding arrangements.

*Decision making process*

61. Treasury's approach is to work closely with applicants. If a foreign investment proposal raises potential national interest concerns, these concerns are discussed with the applicant and the applicant is provided an opportunity to comment and have these considered. If they propose mitigating actions these will also be taken into account.
62. Where the Treasurer considers that an application raises no national interest concerns or that any concerns are adequately addressed by conditions, the applicant is notified in writing of no objection or no objection subject to conditions. Once an applicant receives a no objection or no objection subject to condition notification, the applicant may proceed with the proposal.
63. If national interest concerns remain and may not be able to be addressed, the proposal may be blocked by the Treasurer.



## FOREIGN INVESTMENT IN CRITICAL INFRASTRUCTURE AND PROTECTING AUSTRALIA'S NATIONAL SECURITY

64. Unlike some other countries, such as the United States and Canada, Australia does not have a specific national security-based assessment process for foreign investment. The national interest assessment undertaken by FIRB is much broader. While national security considerations are an important element of the national interest, the assessment process in Australia considers a broader range of issues and the Treasurer has significant discretion to take action against an investment proposal beyond national security concerns.
65. The foreign investment framework has broad coverage, and captures a wide range of investment types in all sectors of the Australian economy. However, there is recognition in the framework that some investors and some sectors may require closer scrutiny and mechanisms have been built into the system to facilitate this. For example:
  - The additional requirements for foreign government investors (that is, \$0 thresholds);
  - The carve-out from the higher \$1,094 million screening threshold for free trade agreement partners when investing in sensitive businesses is assessed under a lower \$252 million threshold; and
  - The carve-out from the higher \$252 million screening threshold for commercial land when investing in sensitive commercial land, such as mines and critical infrastructure, is assessed under a lower \$55 million threshold.

### Foreign investment reforms and critical infrastructure

66. In addition to these existing requirements, the Government's ability to scrutinise investments that potentially raise national security issues was strengthened as part of the recent reforms to the foreign investment framework.
67. One of the key changes was that the additional requirements for foreign government investors (that were previously only covered by the Policy) have now been incorporated into the legislative framework. This provides greater legal certainty to Government and allows for legally enforceable conditions to be imposed on these applications.
68. The introduction of application fees resulted in the Government providing additional funding to Treasury for foreign investment work. This additional funding, combined with the transfer of the residential real estate functions to the ATO and the removal of routine cases from the system, has enabled Treasury to devote more resources to screening of sensitive cases, including those that may pose potential national security risks. Treasury now has around 50 staff working on foreign investment issues, including some staff with national security expertise.
69. In addition, the ability of the FIRB to advise on national security issues was recently strengthened by the appointment of Mr David Irvine. Mr Irvine brings considerable national security expertise as a former Director-General of both the Australian Security Intelligence Organisation (ASIO) and the Australian Secret Intelligence Service (ASIS).

## Gatekeeper role

70. It is important to note that while the assessment process undertaken by FIRB plays an important role in helping to protect Australia's interests, FIRB's involvement is generally limited to the upfront assessment. Unless conditions are imposed on an investment, there is limited ability under the framework to influence post-establishment conduct by the investor.
71. Once through the foreign investment review process, investors are generally treated the same as domestic investors under Australia's laws. This means that Australia relies on its other regulatory frameworks (for example, corporations, tax and competition laws) to address any subsequent national interest concerns.

## Discussion of specific cases

72. Maintaining confidentiality is fundamental to the operation of the foreign investment framework as information provided by applicants is one of the key sources of information used to assess the national interest. The release of sensitive commercial information could cause significant harm for foreign investors and discourage future disclosure of information. This would hinder the Government's ability to assess the national interest.
  - The Act provides that unauthorised disclosure of protected information is an offence subject to a maximum of two years imprisonment, 120 penalty units, or both.
73. While the Treasurer may issue a press release when making a decision on a significant foreign investment proposal that is in the public domain (or applicants may issue their own media statements), it is a long-standing policy that Treasury generally does not comment on the application of the foreign investment review framework as it applies or could apply to particular cases.
74. However, to aid the Committee's Inquiry, we have summarised factual information below that is already on the public record around the assessment processes that were undertaken in relation to the three foreign investment applications that are the subject of the Inquiry. In providing these summaries we have ensured that no information is included which conflicts with the confidentiality requirements of the foreign investment framework or is commercially sensitive to any applicant.

### *Port of Darwin*

75. The Port of Darwin is a naturally occurring deep-water port that is a major export terminal for the resources and livestock industries and a significant base for the Royal Australian Navy, visiting foreign marines, and the Australian Customs and Border Protection Service.
76. The Northern Territory Government announced the privatisation of the Port of Darwin under a 99 year lease to Landbridge Group (Landbridge) on 13 October 2015. Landbridge, a Chinese-owned company, was selected by the Northern Territory Government as the successful bidder following a competitive bid process.
77. The lease provides an 80 per cent stake to Landbridge, and came into effect on 16 November 2015. The remaining 20 per cent stake will be retained by the Northern Territory Government and is to be transferred to an Australian investor within five years.

78. Treasury first engaged with the Department of Defence and the Northern Territory Government on the privatisation in December 2014. Treasury and the Department of Defence continued to work closely with the Northern Territory Government in the months leading up to the privatisation of the Port of Darwin.
79. In recognition that the Port of Darwin is critical infrastructure, Treasury sought to engage early with a number of agencies to identify potential concerns that may arise from the privatisation. In addition to our ongoing engagement with the Department of Defence, Treasury also engaged with other relevant Government agencies and no concerns were raised.
80. On receipt of foreign investment applications from potential foreign bidders, including from Landbridge, Treasury consulted with relevant Government agencies (including the Department of Defence) on each application. Agencies that are consulted have an opportunity to raise matters of potential concern.
81. Treasury was aware early on in the process that the lease of the Port of Darwin to private foreign investors could be exempt from the Act (depending on how the Northern Territory Government chose to structure the lease) because interests acquired directly from Australian governments do not require foreign investment approval. Treasury informed the Northern Territory Government, the Department of Defence and relevant Commonwealth agencies of the potential for Landbridge's application to be exempt.
82. In undertaking our examination of Landbridge's application and before determining that the application was exempt Treasury:
  - undertook due diligence to satisfy ourselves that Landbridge is a private investor in accordance with the foreign investment framework; and
  - sought legal advice from the Australian Government Solicitor on the application of the exemption under the Act to the proposed structure of the lease.
83. The structure of the sale of the Port of Darwin meant that only foreign government investors required foreign investment approval.
  - The structure of the privatisation of the Port of Darwin by the Northern Territory Government involved:
    - : the grant of a long-term lease of the port, land and infrastructure (Port Lease) to be acquired directly from the Northern Territory Government; and
    - : the sale of Darwin Port Operations Pty Ltd (Port Operator), a prescribed corporation under the *Corporations Act 2001* which holds the non-land assets of the Port business.
  - The Port Lease was exempt under section 12A(7)(a) of the Act (which provides an exemption for acquisitions of Australian urban land acquired directly from a State or Territory). Since 1 December 2015, a similar exemption has applied under the new legislative framework – see section 31 of the *Foreign Acquisitions and Takeovers Regulation 2015*).
  - The acquisition of an interest in the Port Operator would only require approval if the company was valued at more than the notifiable threshold of \$252 million.
  - The Northern Territory Government formally advised Treasury on 15 September 2015 that the Port Operator's assets were less than \$252 million.

84. The Department of Defence informed Treasury that it had renegotiated a Deed of Licence with the Northern Territory Government for Defence access to the Port of Darwin for the next 15 years with an option to extend to 25 years. Defence has indicated to the Inquiry that that it undertook due diligence of the Landbridge bid, noting that its interests in accessing the Port of Darwin are maintained through the Deed of Licence. Defence concluded that there were no concerns with the leasing of the commercial Port of Darwin and that Defence had no concerns with Landbridge's application.
85. While advice was provided to the Treasurer on several other foreign investment applications for the Port of Darwin, Treasury was not required to provide formal advice on the Landbridge application because of the exemption for interests acquired directly from a government. Treasury had completed nearly all of our normal assessment processes, other than providing formal advice to the Treasurer.

### *TransGrid*

86. In June 2014, the NSW Government announced its intention to privatise the State's electricity distribution and transmission networks. The NSW Government intends to conduct the privatisations in three phases:
- First phase: 99-year lease of 100 per cent of TransGrid, the State's electricity transmission network (completed);
  - Second phase: 99-year lease of 50.4 per cent of Ausgrid, an electricity distribution network covering Eastern Sydney, the Hunter Valley and the Central Coast (currently underway); and
  - Third phase: 99-year lease of 50.4 per cent of Endeavour Energy, an electricity distribution network covering Western Sydney, the Blue Mountains, the Southern Highlands and the Illawarra region (yet to occur).
87. In recognition that the NSW electricity networks are critical infrastructure, Treasury engaged with the NSW Government and relevant Commonwealth agencies for over 12 months to ensure that national interest considerations were addressed.
88. On receipt of foreign investment applications from bidders, Treasury consulted broadly across the Commonwealth. Consulted agencies had the opportunity to raise matters of potential concern.
- After careful consideration of each proposal, advice on each bidder was provided to the Treasurer.
89. All foreign bidders for the lease of TransGrid required approval under the Act. This requirement occurred because of the specific transaction structure adopted by the NSW Government (which was different to the structure of the Port of Darwin transaction) which meant that the exemption for acquisitions from governments did not apply to the entire TransGrid transaction.

90. In addition, all foreign bidders contained sufficient participation by foreign government investors to also require approval under the Policy in place at the time. On 25 November 2015, the NSW Government announced that the Australian-led NSW Electricity Networks consortium was the successful bidder for the lease of TransGrid's electricity transmission network. The consortium comprises:
- Caisse de dépôt et placement du Québec, a Canadian public pension fund – 24.99 per cent;
  - Hastings, as manager of the Utilities Trust of Australia – 20.02 per cent;
  - Tawreed Investments Limited, the infrastructure investment arm of the Abu Dhabi Investment Authority – 19.99 per cent;
  - Wren House Infrastructure, a wholly owned subsidiary of the Kuwait Investment Authority – 19.99 per cent; and
  - Spark Infrastructure, an ASX-listed owner and operator of Australian energy infrastructure – 15.01 per cent.
91. As a result of the close engagement with Commonwealth agencies and the NSW Government, a broad range of safeguards were implemented, involving:
- conditions imposed by the NSW Government on the licence that the successful consortium is required to hold to operate the TransGrid transmission network;
  - conditions imposed by the Treasurer, which he considered necessary when granting foreign investment approval to the consortium's bid; and
  - undertakings sought by the Treasurer and given by the consortium.
92. These safeguards are more stringent than any previous conditions imposed on similar acquisitions of critical infrastructure to address national interest considerations. The safeguards ensure that:
- the operation and control of TransGrid's transmission system and telecommunications business are undertaken solely from within Australia. Maintenance is also to be undertaken in Australia unless it is not possible to do this on reasonable commercial terms;
  - electricity supply data and personal information are accessible from and held solely within Australia;
  - individual foreign members of the consortium maintain their interests in TransGrid at no more than 50 per cent;
  - 50 per cent of TransGrid's board comprise Australian citizens and residents;
  - TransGrid has an independent chairperson and an independent director on the board who are Australian citizens and residents, one of whom is required for all board quorums;
  - senior personnel in critical positions hold appropriate security clearances; and

- annual reporting takes place:
  - : to the NSW Government, certifying compliance with NSW's critical infrastructure licence conditions; and
  - : to the FIRB, certifying compliance with all of the safeguards.

93. Treasury is now working with the NSW Government on the next phase of the privatisations.

#### *S. Kidman & Co. Limited*

94. S. Kidman & Co. Limited (Kidman) operates 10 cattle stations, a bull breeding stud farm and a feedlot covering 101,411 square kilometres across regional Queensland, Western Australia, South Australia and the Northern Territory. This amounts to approximately 1.3 per cent of Australia's land area and is Australia's largest private landholding. Kidman owns and manages a long term average herd of 185,000 cattle which represents about 1 per cent of Australia's beef herd. Its geographically widespread pastoral portfolio provides flexibility in managing seasonal conditions and access to end markets. The majority of the properties are pastoral leases from the relevant State and Territory governments.
95. The portfolio has been extensively marketed since mid-2015 and Kidman and their advisers engaged with Treasury at an early stage to understand the obligations of any foreign purchasers. Foreign bidders required prior approval as the transaction involved the acquisition of agricultural land in excess of \$15 million. While it was some months before any formal applications were received, Treasury began engaging with relevant consultation partners from that time to ensure any sensitive issues were identified early. Treasury also maintained regular contact with the seller throughout the process. As formal applications were received from short-listed foreign bidders, consultation focussed on the detail of those proposals.
96. One of the properties in the Kidman portfolio is Anna Creek station in South Australia, which is also the largest cattle station in the world. About half of the station lies within the area declared as the Woomera Prohibited Area (WPA). The WPA is a major strategic asset and Australia's most important weapons testing range, making a significant contribution to our national security.
97. Given the unique capabilities which the WPA facilitates, the possibility of foreign access to the WPA was a matter of particular concern in assessing the implications of applications from foreign investors to acquire Kidman. This assessment involved detailed examination and consultation with national security agencies including the Department of Defence.
98. On 19 November 2015, the Treasurer announced that the acquisition by foreign persons of Kidman in its current form was inconsistent with the national interest because of the size and significance of the total portfolio of properties, along with national security issues around access to the WPA. As noted, the WPA weapons testing range makes a unique and sensitive contribution to Australia's national defence and it is not unusual for governments to restrict access to sensitive areas on national security grounds.
99. The Treasurer has indicated that any future alternate proposal or set of proposals will be considered on its merits to ensure that any sale is on terms that are not contrary to Australia's national interest.

## CONCLUSION

100. The foreign investment review framework is designed to strike a balance between ensuring that Australia remains an attractive investment destination, while maintaining community confidence in foreign investment and protecting the national interest.
101. The Government has implemented significant reforms to strengthen the integrity of the foreign investment framework. While the focus of the reform package was on residential real estate and agriculture, it included important changes that have improved the Government's ability to scrutinise investments that potentially raise national security issues.
102. The screening process that is undertaken when assessing a foreign investment application is rigorous. In relation to the proposed acquisition of S. Kidman & Co. Limited, the lease of TransGrid and the lease of the Port of Darwin, extensive consultation with other government departments and national security agencies, as well as engagement with the vendors, was undertaken. In each case, national security considerations were carefully examined and where necessary, mechanisms were put in place to protect Australia's interests.
103. The Government is working with the States and Territories to ensure that future sales of critical infrastructure by Australian governments and their entities to privately-owned investors can be formally reviewed by the Treasurer. This will require an amendment to the *Foreign Acquisitions and Takeovers Regulation 2015*. The Government is working to have this amendment in place by March 2016.

## ATTACHMENT A

### Terms of reference for the Inquiry into the Foreign Investment Review Framework

On 25 November 2015, the Senate referred an inquiry into the foreign investment review framework to the Senate Economics References Committee for inquiry and report by 4 February 2016.

#### *Terms of reference*

An examination of the foreign investment review framework, including powers and processes of the Foreign Investment Review Board, in relation to Australian assets of strategic or national significance being subject to lease or purchase by foreign owned interests, and whether there ought to be any legislative or regulatory changes to that framework to ensure Australia's national interest is being adequately considered, with particular reference to:

- the decision by the Northern Territory Government to grant a 99-year-lease over the Port of Darwin to Landbridge Group;
- the planned lease by the New South Wales Government of TransGrid;
- the decision by the Treasurer to block the sale of S Kidman and Co on national interest grounds; and
- any other related matters.