Senate Inquiry on Foreign Investment Review Framework

Submission by

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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.

The main issue with the current foreign investment review regime is the concept of "foreign interest".

The Foreign Acquisition and Takeovers Act 1975 deals with the "foreign persons" and "corporations" that are seeking to acquire a the whole or a part of an Australian Business or merging a foreign business/corporation with an Australian one. Such a transaction is supposed to be subjected to review by the Foreign Investment Review Board if the value of this transaction exceeds a certain bar (while different bars may be applied to different industries).

Meanwhile, there are no details, stipulated by the Act, on the nature of a "foreign corporation" seeking approval for a merger with or acquisition of an Australian entity.
The default consideration is that Australia's foreign counterparts are similar to Australian ones. They are profit seeking portfolio investors and/or also company control seeking direct investors. In either case, they make independent business decisions. Apart from compliance with international, Australian and their home countries' business and taxation laws, they are not

reporting to or taking directions/directives from any government. Neither their decisions are based on any other than commercial reasons.

This default consideration tends to ignore at least three aspects.

1. The multiplicity of the forms ownership and the extent of sovereign involvement in foreign companies seeking merger or acquisition in Australia.

   Particularly, the 1975 Act does not imply the FIRB to look into the proportion of foreign government's ownership in such a company; involvement of a foreign government in company's decision making (particularly, through government's representation on the board of directors); taking government's orders that limit company's commercial independence, or complying with legislations beyond the ones that normally regulate commercial activities.

   This issue can be addressed through the development and provision of "foreign interest independence test" with an emphasis on the magnitude of sovereign ownership and sovereign involvement in foreign company's decision-making.

2. Foreign interest in Australian essential infrastructure.

   Since 1975, due to privatisation and/or allowing for competitive entry, a considerable proportion of Australia's essential infrastructure facilities has become independently owned and controlled. Those are transport (airlines, airports, ports, railways, and automobile roads); telecommunications (telephone and internet service providers); postal services; and energy (generation and networks).

   In normal circumstances, it would not matter, who owns or leases an infrastructure facility (such as Port of Darwin). However, in addition to the above-mentioned "foreign interest independence test", a case-by-case security risk assessment is need where sovereign interest is involved.

   The case of Port of Darwin has also highlighted an issue of the lack of coordination between the state (territory) and federal levels of government. While the Northern Territory government was driven by fiscal considerations, the federal matter of national security was not given sufficient attention. The federal involvement in otherwise state (territory) matters should be agreed on with the states and territories and included in the revised legislation.

3. Foreign investment assessment with regard to different countries.

   Since 1975, the picture of the world has dramatically changed. Until late 1980s, Australia's investing partners were mostly persons and companies from developed market economies with similar values and similar

perception of independent entrepreneurship. Economic transition in post-communist countries, market reforms in one-party controlled countries, and emerging developing market economies have created a variety of economic systems with very different suvergn involvement in running economies and companies. Therefore “foreign interest independence test” and security risk assessment should be done with a strong consideration of where (which country) a foreign investor is coming from. This requires a well-structured analysis of the forms ownership and governance of the countries foreign investments are coming to Australia from.