

**SUBMISSION FROM THE NORTHERN TERRITORY GOVERNMENT TO THE
SENATE ECONOMICS REFERENCES COMMITTEE'S
INQUIRY INTO THE FOREIGN INVESTMENT REVIEW FRAMEWORK
JANUARY 2016**

Background

The Senate Economics References Committee (the Committee) held public hearings in Canberra on Tuesday, 15 December 2015. The Northern Territory Government (NT Government) was represented by Ms Jodie Ryan, Under Treasurer, and Ms Anne Tan, Acting Coordinator-General, Office of Major Projects, Infrastructure and Investment. This submission expands on the evidence provided by Ms Ryan and Ms Tan and places on the public record the NT Government's comprehensive process for the long-term lease of the Port of Darwin.

The submission also provides the NT Government's views on the foreign investment review framework's application to Australian assets of strategic and national significance in the context of control by foreign owned interests.

It is noted that the NT Government was somewhat surprised that the public hearing process appeared to solely focus on the 99-year-lease over the Port of Darwin, given that the Terms of Reference included two other transactions.

Port of Darwin Lease Transaction Process

The Northern Territory is a small jurisdiction with limited capacity to fund infrastructure. The infrastructure task – to grow the economy, facilitate new industry and generate jobs – is large, and beyond the Northern Territory's capacity to unilaterally support. Continuous approaches to the Commonwealth Government for infrastructure funding assistance have been rejected.

The NT Government has long advocated its strong view that if Australia is to continue to increase productivity and maintain its economic competitiveness, our approach to infrastructure prioritisation and investment has to recognise the requirement for a significant step-increase in economic and social infrastructure investment outside of the major Eastern seaboard population and economic centres.

There needs to be acknowledgement that Northern Australia has a developing and not mature economy and the Northern Territory must accelerate its rate of economic development to secure its contribution to a competitive and productive Australia. Without transformational infrastructure investment, new projects will be development constrained and potential infrastructure bottlenecks will drive project investment offshore.

Traditional infrastructure investment prioritisation and selection tools such as the cost benefit analysis (CBA) disadvantage regional and remote Australian projects given our inherently higher costs structures compounded by small population size.

The Northern Territory, and as is increasingly the case with all other state and territory governments, needs to investigate alternative forms of infrastructure funding if we want to be able to meet the needs of the future and be well positioned to seize economic opportunities as they arise.

Given this, the Northern Territory made a decision in late 2013 to test private sector interest in partnering with the NT Government to invest in and operate the Port of Darwin, particularly as the asset is under-utilised and has significant potential for further trade development and growth.

The outcomes sought by the Northern Territory through this process were:

- a partnership with a private operator which has a vision for growth and development of the port which is aligned with that of the NT Government
- a private sector partner to invest new capital into the Northern Territory economy
- to realise the value inherent in an NT Government asset to allow capital to be recycled into new productivity and growth enhancing infrastructure.

At no point was the NT Government interested in anything but a full and detailed regulatory consideration of all potential bidders.

The Long-term Lease Transaction

In early 2014, the NT Government engaged Flagstaff Partners as lead advisor to initially scope opportunities for private investment, and subsequently for the long-term lease of the Port.

The initial scoping study was considered by the NT Government in mid-2014. At that time, a decision was made to undertake more detailed internal investigations and analysis on the scope of the transaction to establish assets which could be put to the market under a long-term lease arrangement.

In late 2014, the NT Government undertook market testing to assess market appetite for the long-term lease transaction. At that time, the NT Government had formed a preliminary view on the asset package and the high level terms and conditions which it sought to have included in the long-term lease arrangement. This was what was tested in the discussions with potential private sector proponents.

In February 2015, the Chief Minister announced that a Parliamentary Select Committee would review the proposed legislation enabling the lease transaction, and would report on options for enhancing the lease model to ensure that a private sector partner is focused on growth and development of the port, has competitive prices, and follows best practice in safety, environmental and operational efficiency.

This was a 10 week process and the Parliamentary Select Committee invited and received submissions from port users, including the livestock industry, Australian Customs and Border Protection Services and unions.

The Parliamentary Select Committee handed down its recommendations in April 2015 and the Chief Minister responded in support of all recommendations, including that in the case of foreign investment in a lease over the Port of Darwin:

- a) a component of the lease be kept in the control of an Australian Entity
- b) the NT Government consult with the Foreign Investment Review Board (FIRB) and the Department of Defence regarding security or strategic risks that a proposed partner may present.

As part of the transaction process, the NT Government required bidders to retain a minimum level of Australian equity – being 20% – and a precondition that final binding bids receive Commonwealth Government regulatory, including FIRB clearances. This was on the basis that advice from relevant Commonwealth officials was that FIRB would coordinate advice from other Australian security agencies before it made a recommendation to the Commonwealth Treasury.

At no point in the process was the NT Government interested in anything but a full and detailed consideration of potential bidders by FIRB and Commonwealth regulatory agencies.

The Northern Territory Parliamentary Select Committee process resulted in an overall delay to the transaction timeframes of some three months. However, the NT Government made a decision not to expedite the Indicative Bids and Binding Bids processes, notwithstanding the delay, recognising the significance of the transaction for the Northern Territory.

The Indicative Bids Phase for the project commenced in May 2015 and closed at the end of June 2015. A shortlist of bidders were invited to participate in the Binding Bids Phase which commenced in July 2015 and concluded at the end of September 2015. In July 2015, the identity of shortlisted bidders was provided to FIRB and the Australian Competition and Consumer Commission to enable these agencies to undertake the due diligence they required.

Transaction Structure

The transaction is for a 99 year lease of the Port of Darwin. The physical assets included in the transaction are the:

- East Arm Wharf
- Fort Hill Wharf
- Marine Supply Base
- Bulk Fuel Terminal
- Corporate Office Facilities
- a site for future development.

These assets comprise a subset of the commercial port assets of the former Darwin Port Corporation, and adjacent land.

Consistent with other recent port transactions in Queensland, New South Wales and as proposed for the Port of Melbourne, the transaction is structured as a grant of a lease of Northern Territory land (with the Northern Territory as landlord) together with an operating agreement which governs the rights and obligations of the port operator and the Northern Territory. This involves the concurrent entry into a Port Lease (over land assets) as well as the acquisition of an entity called Port Manager that contains the operations (employees and operating arrangements)

The port investor will operate the port under a 'landlord model' – that is the port operator provides the civil infrastructure and is responsible for maintenance of port assets, provision of pilotage services, and direction of vessel movement and scheduling among other tasks, and consequently has the right to charge for port use, while stevedores that are tenants of the port operator are responsible for handling of goods, and loading and unloading of vessels.

A series of contractual documentation supports the transaction. As is the case with similar transactions elsewhere, the transaction documents are mostly commercially confidential.

The documents contain a range of safeguards for the Northern Territory. This includes providing capacity for the Northern Territory to step-in under certain circumstances, primarily where port stewardship and maintenance obligations have not been fulfilled or where there is risk to safety or the environment.

The documents also require that the port operator recognises the existing Deed of Licence between the Department of Defence and the NT Government, which outlines commitments in relation to specific access requirements for Defence. Defence's rights under the *Defence Act 1903* are also specifically noted, acknowledging that the Act would prevail in any event.

In relation to port stewardship, the Port Operator has an obligation to ensure that the port is operated as a port and is available for international and interstate shipping. The Port Operator must also only use the land for port related purposes. A breach of these obligations allows the Northern Territory to terminate the port lease.

There are extensive port asset maintenance obligations in accordance with good operating practice and specific minimum service life obligations. There are also specific obligations in relation to dredging, port development, scheduling and maintaining adequate vessel traffic, and communications systems.

Two Stage Bid Process

The NT Government received:

- 33 Registrations of Interest
- 11 Indicative Offers
- three Binding Bids.

Evaluation for the two stage bidding process was undertaken by a committee comprised of a sub-group of the NT Government Port Project Steering Committee and independent experts. A probity advisor oversaw all bidder engagement and the evaluation process. The probity advisor has issued a clear probity report.

An independent ports expert, Mr Stephen Bradford, previous Chief Executive Officer of the Port of Melbourne, was also engaged to participate in and advise on the due diligence site visits undertaken by the NT Government.

As indicated above, the NT Government's objective through the process was to identify a long-term partner. Price was a relevant consideration but, importantly, the bidder's structure, track record and approach to partnership with the Northern Territory were all critical elements of the bid evaluation process.

In this regard, the evaluation process considered, among other things:

- the bidder's commitment to a minimum 20% Australian equity
- the bidder's strategy for the future development of the Port of Darwin and its contribution to the economic development of the Northern Territory
- the particular contribution that the bidder will make to the success of the strategy, including any commercial relationships, operational experience and capabilities which the bidder is uniquely placed to leverage and the mechanism by which this contribution can be secured.

All bidders were required to submit evidence relating to identity and ownership structure, capability, experience, operational track record and financial capacity. Supplementary evidence and clarifications of bidders were sought where submissions were deemed inadequate in relation to specific matters.

Due Diligence Investigations

Comprehensive and extensive due diligence consistent with established precedent on other similar transactions was undertaken on all bidding parties, including Landbridge.

In addition to referee checks, a team which included an independent port expert visited the port operations of shortlisted bidders, including Landbridge's port and petrochemical facility in Rizhao (People's Republic of China), and undertook extensive local and international inquiries through the NT Government's legal advisor and credit reporting agencies.

Landbridge Proposal

The NT Government determined that the Landbridge Group proposal was superior and an economic game changer for the Northern Territory.

In addition to a competitive bid price, the Landbridge Group also committed to:

- maintaining its head office and principal place of business in Darwin
- ensuring local Northern Territory residents are given fair and equal opportunity to be considered for employment opportunities, including maintaining a workforce at the port which is comprised of a majority of employees who live in the Northern Territory and a majority of senior management resident in the Northern Territory
- no forced redundancies over the term of the current enterprise agreements
- ensuring Northern Territory businesses are given fair and reasonable access to procurement opportunities

- revenue sharing for super profits
- binding capital investment undertakings of \$35 million for new growth infrastructure over the first five years and \$120 million over the next 15 years
- further investment in the Northern Territory community through promoting trade links between China and Darwin
- local community sponsorship.

Landbridge also agreed to all of the safeguards contained in the transaction documentation, and as successful proponent will also be subject to the legislative protections and safeguards.

The Northern Territory's due diligence investigations and referee checks revealed no issues with the Landbridge bid that would cause the Northern Territory not to nominate Landbridge as the successful investment partner.

The Northern Territory takes comfort from the robust safeguards in the lease design that address the legitimate concerns that either Landbridge or any other proponent could otherwise take actions that jeopardise economic or strategic outcomes for the Northern Territory or Australia.

There is every indication that our choice has been a good one. The Landbridge Group is fast becoming a part of the Northern Territory business community (as has the Japanese with Inpex and the Americans with Marines rotations) and Darwin and the Northern Territory becoming part of the maritime silk road.

The NT Government took comfort in its due diligence investigations which showed that the Landbridge Group as the owner of sensitive strategic infrastructure (petrochemical plant and port) engaged security staff who had responsibility for safety and emergency response work at the facility.

In China, the state firefighting service is part of the military. Landbridge's security staff are required to receive training from the firefighting service which is an integral part of Landbridge's emergency response capability.

As is the norm in Australia, key business figures are invited to participate on government strategic and economic development boards given the valuable contribution which they are able to make. Our advice is that this is no different in China.

Engagement with FIRB

In December 2014, the NT Government met with the Department of Treasury (FIRB) representatives to provide details about the proposed long-term lease transaction. Further discussions took place in April 2015, with a face-to-face meeting occurring in May 2015 when the Northern Territory provided an update on the Indicative Bids Process. The departments of Defence and the Attorney-General were also represented at this meeting.

Due to the high level of international bidder interest, the NT Government took the step of providing bidders with more specific direction around FIRB requirements. In this regard, we expressly commissioned expert advice about the *Foreign Acquisitions and Takeovers Act* (FATA) and issued, to all bidders, advice which highlighted FATA and FIRB requirements. This advice was finalised in consultation with FIRB.

In June 2015, FIRB participated in a workshop with the NT Government and Defence on the transaction documents and the Government's step-in rights.

The Northern Territory was advised in July 2015 that Landbridge had submitted an application for FIRB approval and provided comments as requested by FIRB. At the time, the position in relation to whether FIRB approval was required for the Landbridge bid was unclear as the final value attributed to the special purpose vehicle to be purchased by the successful bidder was not yet finalised. This value was determined when the end of financial year statements for the Darwin Port Corporation were finalised and independently audited by the Northern Territory Auditor-General.

The asset value threshold ultimately meant that Landbridge was not legally required to seek FIRB approval, given that the consideration paid for the port operator was substantially under the FIRB threshold of \$252 million.

Consequently, in September 2015, Landbridge was advised in writing by FIRB that its proposal under the Port of Darwin transaction was exempt from the Commonwealth Government's foreign investment policy.

Engagement with Defence and Security Agencies

The NT Government engaged extensively with Commonwealth Government security agencies throughout the transaction process. Following verbal advice about the Northern Territory's proposal relating to the Port of Darwin, in March 2014, the Chief Executive Officer of the Department of the Chief Minister formally alerted the Department of Defence to the process which had commenced to secure a private operator for the Port of Darwin.

In May 2014, a process update was provided at the Defence NT Government Consultative Forum. In December 2014, as part of the market testing exercise, a half day briefing was organised with representatives from the Commonwealth Treasury, Defence, Border Protection and Customs to provide details about the proposed long-term lease transaction.

Throughout 2015, the engagement process continued and the Department of the Attorney-General was also involved in briefings.

The NT Government was very conscious of the importance of continued Defence access to the Port of Darwin and, over this period, negotiations were also progressing on the Deed of Licence for Defence access and use of Port of Darwin wharves. This process commenced in earnest in March 2014 and culminated in the existing Deed of Licence being executed in May 2015. The Deed recognises Defence's maritime requirements in the Port of Darwin.

In June 2015, as transaction documents were being finalised, the NT Government met with and provided opportunity for Defence to have input into transaction documents. In this regard, the transaction documents, at the request of the Department of Defence, address issues raised by the Department of Defence, specifically in respect of no discrimination in vessel scheduling and access to port land for the purposes of assessing security.

The Department of Defence advised the NT Government that Landbridge had provided them briefings on its intention to bid for the long-term lease of the Port of Darwin.

Throughout the process, the Department of Defence continually noted that it had no concerns with bids received from all bidders including those from overseas investors.

The NT Government recognised that engagement with the US Defence Force was principally a role for the Department of Defence and the Department of Foreign Affairs and Trade; however, the Darwin Port Corporation discussed the transaction, in general terms, at stakeholder meetings, including with US Defence Force officials, throughout the transaction process.

Regulatory Structure

Specific legislation supporting the transaction are the *Port of Darwin Act* and the *Ports Management Act*. The *Port of Darwin Act* authorises a long-term lease of the port to a private operator and the *Ports Management Act* provides for aspects of the management and operation of Northern Territory ports including the Port of Darwin.

In addition to facilitating operation of the Port of Darwin by a private operator, the *Ports Management Act* is designed to serve as the overarching regulatory framework for all Northern Territory ports.

The *Ports Management Act* incorporates a regulatory regime which seeks an optimal balance of the objectives of safeguarding the NT Government's interests and maximising investor interest and value. It also addresses concerns about the possible exercise of monopoly power.

The NT Government has retained the regional harbourmaster role, an oversight role focused on safety in the harbor, to ensure that it continues to have ultimate regulatory control over this important function.

A comprehensive statutory regime for independent regulation of access and price monitoring has been established. The price and access regime is overseen by an independent statutory regulator, the Northern Territory Utilities Commission. The initial form of regulation is price monitoring. The regime includes a mechanism which enables the Minister to impose a more intrusive form of price and access regulation on the recommendation of the regulator and following public consultation.

In relation to access regulation, under the *Ports Management Act*, the operator must not engage in conduct which prevents or hinders access or unfairly differentiates between users. This requirement is enforceable by the regulator or private person or entity through a court of competent jurisdiction.

In relation to price regulation, regulations will support the form of price regulation (initially price monitoring with the threat of more heavy handed price regulation) and the Regulator will issue pricing principles. The Regulator will conduct a review of the regime within three years of commencement and every five years thereafter.

The *Ports Management Act* gives the Northern Territory comprehensive visibility of the port operator's decision about price and granting access to key port services. The legislation requires the Northern Territory Utilities Commission to monitor prices for prescribed services, allowing access to vessels and vehicles.

Foreign Investment Review Framework

Foreign Investment is welcomed

Unlocking the vast economic potential of remote and regional Northern Australia is in the economic and social interests of the Northern Territory, and the nation as a whole.

The Northern Territory has abundant gas and mineral resources, water, substantial opportunity for agriculture and aquaculture ventures, and a unique natural landscape for further expanding its tourism industry. It is also strategically positioned to benefit from the expanding Asian economies.

Historically, infrastructure funding has not favoured Northern Australia or the Northern Territory, with the result that a significant infrastructure deficit now exists. Conditions well below those expected in first world countries are evident in many parts of the Northern Territory, directly affecting both the standard of living and the capacity for residents to engage and contribute to national productivity.

The Northern Territory is a small jurisdiction and its capacity to build infrastructure, facilitate new industry and generate jobs is limited. Unlike the rest of Australia, the Northern Territory is a growing and emerging economy. Its small population, large land mass, and lower base level of infrastructure means that it has similar, if not greater infrastructure needs when compared with more populous and developed states. As a small and developing economy, the Northern Territory has little ability to generate the level of funds required to drive its large infrastructure need. The Northern Territory is, therefore, heavily reliant on and welcoming of private sector investment, including foreign investment.

In recognition of the importance of making pre-emptive investment, the Northern Territory built and invested in the Port of Darwin. This has ensured that the Northern Territory is positioned to leverage opportunities which would be lost if port infrastructure was not available to support private sector investment.

With time, effort and investment by the NT Government, the Port of Darwin has become a key and strategic piece of economic infrastructure for the Northern Territory, but also a strategic asset for Australia more broadly.

However, the Port of Darwin needs additional investment if it is to continue to catalyse economic growth. Despite numerous submissions over the years by the NT Government, the Commonwealth Government has, to date, failed to provide any funding to expand and grow Port of Darwin infrastructure. It became very clear that private capital and investment is not just necessary but critical.

Given this, and while recognising the broader strategic significance of this Northern Territory asset, the NT Government took the decision to lease the Port of Darwin to a private operator able to make the necessary investment in and to grow trade through the Port.

The NT Government was agnostic of the identity of the investor provided our objectives for the transaction (outlined above) could be achieved. We recognised that foreign investment, including from our Asian neighbours, was a very real possibility, and was of the view that existing free trade agreements with Asia, Europe and the United States of America would strongly support the investment attraction task.

There has been and continues to be strong bipartisan support for free trade agreements, recognising the broader economic benefits for Australia which flow from these. The Commonwealth Government has been a strong leader in fostering trade growth and in removing barriers which impede the flow of goods and services between countries.

Similarly, strong Commonwealth Government leadership in Australia's foreign investment policy, including in clearly promoting the significant tangible benefits from foreign investment and in removing barriers to foreign investment would send a consistent signal to our trading partners that Australia welcomes both trade and foreign investment, and is truly open for business.

Commonwealth Government Role in Strategically Significant Infrastructure

While the Northern Territory acknowledges and is mindful of ensuring robust national interest scrutiny, it must also be recognised that without private investment, the Northern Territory is not positioned to continue to make investment in necessary infrastructure and services. Unless the Commonwealth Government is prepared to provide funding, private investment in economic assets will continue to be necessary.

The Commonwealth Government cannot continue to refuse to invest in infrastructure, particularly in small jurisdictions which do not have the capacity to make the required investments, yet assert that the asset is strategically significant and apply a public interest test when the jurisdiction decides to seek private investment in that asset. If an asset is truly of national strategic significance, the Commonwealth Government must have a financial role in its initial funding and continued growth.

That is, the Commonwealth Government cannot continue to refuse to invest in Northern Territory infrastructure ahead of the demand curve on the basis that a cost benefit assessment does not exceed a predetermined ratio, and then assert that the infrastructure, being strategically significant, needs to continue to be controlled and operated by the NT Government. While the NT Government supports the application of a national interest test, when such scrutiny results in a blocking of the transaction, the Commonwealth Government must step-up with financial support.

Consistent Application of National Interest Test

Policy and process certainty is critical for investors. The Commonwealth Government process for review of foreign investment needs to continue to be open, transparent, and consistently applied, irrespective of the country of origin of the investor.

Similarly, the test applied to review of foreign investment in existing infrastructure should logically apply equally to foreign investment in new infrastructure. While it is acknowledged that determining whether a greenfield investment will ultimately deliver assets characterised as critical or strategic infrastructure can be difficult, lower levels of scrutiny of foreign investments in greenfield projects could subsequently result in potentially problematic ownership or control arrangements which the FIRB process is aimed at addressing.

The NT Government submits that the model of scrutiny over foreign investment in new infrastructure projects which could ultimately be considered to be strategically significant should be no different to that for foreign investment in established infrastructure.

Consultation with States and Territories

While the Northern Territory acknowledges that foreign investment scrutiny is a Commonwealth Government responsibility, the process for assessment of foreign investment proposals needs to be undertaken in a transparent and consultative manner, including in conjunction with the jurisdictions involved. Collaboration in the review would best deliver process certainty and review objectives.

The NT Government urges reconsideration of the policy of not distributing FIRB applications to the jurisdiction in which the project is based. While probity considerations mean that more care needs to be taken in ensuring that the application is treated appropriately in the jurisdiction leading the project, this should not result in the lead jurisdiction being excluded from the consultation process.