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**Australian Government**  
**Department of Defence**

**Senate Economic References Committee Inquiry into  
the Foreign Investment Review Framework**

**Department of Defence  
Written Submission – Amended version**

**16 February 2016**

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**Inquiry into the Foreign Investment Review Framework  
Senate Economic References Committee**

**Submission – Amended version**

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**Attachments:**

- A. Map of Darwin Defence related infrastructure
- B. Port of Darwin – including areas transferred to Landbridge

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**Inquiry into the Foreign Investment Framework  
Senate Economic References Committee**

**Submission (Amended version) by the Department of Defence**

**Executive Summary**

This submission is provided by the Department of Defence (Defence) to the Senate Economic References Committee Inquiry into the Foreign Investment Framework. The Terms of Reference for the Inquiry are:

That the following matter be referred to the Economics References Committee for inquiry and report by 4 February 2016:

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:

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

Defence has recently dealt with several high profile foreign investments, including the Northern Territory Government's lease of the commercial Port of Darwin, the proposed sale of the Kidman properties, and the NSW Government's lease of Transgrid's electricity transmission network. This submission covers Defence's involvement in these three foreign investment activities, focusing on the nature of Defence's engagement with the infrastructure or company in question. Defence is regularly consulted on foreign investments in Australian infrastructure and companies to ensure that Defence's views are taken into account in the consideration of Foreign Investment applications that are relevant to Defence's interests.

Defence, and other agencies, provide advice to the Department of the Treasury on foreign investment applications that are referred to it by Treasury. In preparing Defence's advice to Treasury on foreign investment applications, internal consultation occurs across Defence, to ensure that the implications for Defence of the proposed investment are identified and examined.

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*Defence's engagement with the foreign investment review process*

- Regulation of foreign investment through the Foreign Investment Review Board screening process is led by the Department of the Treasury, while policy towards critical infrastructure is led by the Attorney-General's Department. Defence works closely with these, and other relevant agencies, to ensure that Defence's interests are taken into account during consideration of foreign investment proposals.
- There has been an increase in the number and sophistication of foreign investment proposals, leading to a greater number of foreign investment proposals being referred by the Treasury to Defence.
- While the review system generally works well the Government is examining options (in consultation with the States and Territories) to ensure that future sales of critical infrastructure by state and territory governments to privately owned investors can be formally reviewed by the Foreign Investment Review Board.

Port of Darwin

*Defence's consideration of Landbridge's foreign investment application*

- Defence does not have security concerns with Landbridge operating the commercial Port of Darwin under a lease from the Northern Territory Government. The Port is a commercial Port, operated to facilitate trade. HMAS Coonawarra and the NT Government's Multi-User Barge Ramp, towards which Defence is contributing funding in return for guaranteed access, are not within the commercial port areas leased to Landbridge.
- Defence was advised in May 2015 that Landbridge was a potential bidder. As part of the Foreign Investment Review Board (FIRB) process, in July 2015 the Treasury requested Defence assess the Landbridge FIRB proposal. Defence undertook due diligence of the Landbridge bid with internal stakeholders, including the Services and then Intelligence and Security Group, with no objections raised to the proposal, noting that Defence interests in accessing the Port of Darwin are maintained through a Deed of Licence with the NT Government.
- 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. This was conveyed to the Treasury. Defence was not required to provide a formal response to the FIRB proposal on Landbridge as this was rescinded by the Treasury due to an exemption under the Foreign Acquisition and Takeovers Act 1975 (Cth) relating to the sale of state and territory owned assets. Defence would have continued to raise no objections to the Landbridge application, had the application continued through the full foreign investment process. Defence was advised by the NT Government of the lease to Landbridge a few hours before the Chief Minister's announcement on 13 October 2015.

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- After the public announcement of the lease and the public commentary, the Secretary of Defence tasked the Director of the Defence Intelligence Organisation to lead a review of the assessment that the port lease to Landbridge did not raise security concerns. This review confirmed the earlier assessment.

*Defence's perspectives on the NT Government's privatisation process*

- Defence was consulted by the Northern Territory Government on the plans to privatise the commercial Port of Darwin. Defence was advised by the NT Government in early 2014 of its plan to seek private investment into the commercial Port of Darwin.
- In anticipation of the Port privatisation occurring, Defence negotiated a new legally-binding Deed of Licence with the Northern Territory Government for Defence access to the commercial Port of Darwin for the next fifteen years with two five year options to extend. The Deed, signed 13 May 2015, addresses Defence's interests in access and use of the commercial Port of Darwin.
- A key aspect of maintaining the effective delivery of services to Defence, no matter who operates the port, is the robust governance regime that underpins the Deed of Licence and the privatisation process. These include:
  - a. The strategic safeguards for Defence come in the form of legislation, such as the *Defence Act 1903* (Cth) and the *NT Ports Management Act 2015*, which provide the high level, legal framework to ultimately assure Defence's rights and in particular, access in the event of a declared Defence emergency. The *NT Ports Management Act 2015* precludes the port operator from discriminating against any port user. Commercial regulation and oversight is provided by the NT Utilities Commission which acts as the Regulator
  - b. The Deed of Licence, which governs the operational level relationship between the port operator and Defence and formally sets out how access rights will be applied and governs the rules and behaviour that both sides must adhere to.
  - c. Defence representation on the Port Operations Committee. The Port Operations Committee will be a forum to discuss, and where necessary, resolve any issues and conflicts relating to operational and planning issues within the Port.
  - d. Day to day interaction will be delivered by the routine work of the port operator and Defence staff, most notably the Naval Harbourmaster. Under the protection of the governance framework, this applies the Deed of Licence on a day to day basis.
- Port Operators do not have the authority to allow visits by foreign naval vessels. **The sole authority for such visits is vested in the Commonwealth Government.** Foreign naval ships seeking to enter Australia's internal waters or ports, or otherwise remain within Australia's territorial sea, need to have a diplomatic clearance to do so. A diplomatic clearance for a visit by a foreign naval vessel

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can only be issued with the approval of the Minister for Defence or her delegate within the Department of Defence.

- As advised by the Secretary in his evidence to the Committee on 15 December 2015, it is standard operating procedure for all naval vessels to turn off all sensitive emitters before entering a commercial port, regardless of the location or operator of the port.
- Defence is satisfied that, from its perspective, all relevant strategic and specific defence issues have been properly assessed in respect of Landbridge's lease of Darwin Port.

Proposed sale of S. Kidman & Co. Pty Ltd

- The Woomera Prohibited Area (WPA) is a major strategic asset and Australia's most important weapons testing range, making a significant contribution to our national security.
- The WPA provides Defence with a unique capability for the testing and evaluation of war materiel because of its size (at over 122,000km<sup>2</sup>), remoteness, low population density and quiet electromagnetic environment. Other countries, with Australia's approval, also use the WPA for testing.
- These factors combined with other operational security measures allow Defence to conduct sensitive weapons and other advanced military technology testing in a relatively secure physical and electronic environment, with reduced prospects of security risk or compromise. As such, the secure environment of the WPA must be maintained.
- As part of the Foreign Investment Review Board process, Defence was consulted by the Department of the Treasury concerning the potential sale of the shareholdings of S. Kidman & Co Limited to foreign persons. In response, Defence advised that it had national security concerns due to one part of the portfolio – the Anna Creek station – being partly within the WPA.
- On 19 November 2015, the Treasurer announced that the acquisition by foreign persons of S. Kidman & Co Limited in its current form was inconsistent with the national interest. The Treasurer's decision was taken given the size and significance of the total portfolio of Kidman properties, along with national security issues around access to the WPA.

Transgrid

- On 25 November 2015, the New South Wales (NSW) Government announced that the Australian led NSW Electricity Networks consortium was the successful bid for the lease of Transgrid's electricity transmission network.
- The Treasury has the lead for all Foreign Investment Review Board applications. Consultation with Defence and other stakeholders ensured national interest considerations were taken into account.

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**Inquiry into the Foreign Investment Framework  
Senate Economic References Committee**

**Submission by the Department of Defence**

**Northern Territory Government lease of the commercial Port of Darwin**

Port of Darwin

1. The Darwin harbour is a naturally occurring deep-water port, capable of handling a diverse range of vessel types and cargo including cruise ships, live animal exports, bulk minerals, and bulk fuel.
2. The boundaries of the Harbour are outlined in the figure below.



3. Within these boundaries, the package leased by the Northern Territory (NT) Government to Landbridge principally comprises of interests in the major assets and operations of:

- East Arm Wharf
- Darwin's Marine Supply Base
- Fort Hill Wharf
- Access to shipping channels within the Port
- Provision of pilotage services within the Port
- Land and waters adjacent to the East Arm Wharf for future development, and

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- Land on which the Bulk Fuel Terminal sits (the facility itself is owned and operated by Vopak Terminal Darwin Pty Ltd).
4. At the Port of Darwin, East Arm and Fort Hill Wharves are used regularly for visiting Australian and foreign flagged naval vessels. Defence maintains additional interests in Darwin Harbour, which include areas and functions outside the remit and control of the Port Operator, Landbridge Group Company Limited (Landbridge).

### Defence Activity in Darwin Harbour

5. Darwin Harbour is strategically important for supporting Australian Defence Force (ADF) maritime operations across Australia's northern approaches, and will continue to be important in the future, particularly when mounting maritime operations into the region. The Larrakeyah and HMAS Coonawarra (Coonawarra) facilities and the Multi-User Barge Ramp are not within the commercial port areas leased to Landbridge.

### Coonawarra

6. Darwin is home to Coonawarra, which is the home port for 10 Armidale Class Patrol Boats, plus a number of support craft operated under contract by Defence Maritime Services. Coonawarra provides administrative and maintenance facilities for home-ported vessels and support to visiting ships.

7. The Defence owned Larrakeyah Barracks area, which includes Coonawarra, provides the main Defence owned footprint in the centre of Darwin, and is outside of the lease of the commercial Port of Darwin. However, the naval base is currently not large enough to accommodate Major Fleet Units and so both Australian and foreign vessels berth at Fort Hill Wharf in the commercial Port of Darwin and it is therefore specifically included in the current Deed of Licence.

8. To accommodate Major Fleet Units at Defence facilities outside of the commercial Port of Darwin in future, Navy is proposing to build a new, approximately 250m-long wharf at Coonawarra. This project has achieved first pass approval from the Government and is now undergoing detailed business case development. The project is planned to be submitted for Parliamentary Works Committee approval in September 2017 and (subject to approval) is currently due for completion around 2021/22. The new wharf would enable the berthing of Major Fleet Units and support to the new class of Offshore Patrol Vessels. This Defence owned and operated wharf capacity will reduce the Navy's demand for berths in the commercial port. It will also provide far greater flexibility for supporting future major exercises and operations.

### Multi-User Barge Ramp Facility

9. The Multi-User Barge Ramp Facility, which is not in the area leased to Landbridge, is designed to provide Defence with close to 24 hours-a-day capability to load and unload watercraft in support of the Navy's Landing Helicopter Docks (HMAS Canberra and HMAS Adelaide), as well as other amphibious ships, irrespective of tides in Darwin. As the tidal range in the Port of Darwin restricts the



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use of fixed berths for loading the Navy's new amphibious ships, Defence decided to make a contribution of \$16.1 million towards a new, NT Government owned, Multi-User Barge Ramp Facility (not leased to Landbridge) adjacent to East Arm Wharf. This new infrastructure is planned to be completed in July 2016.

10. The Multi-User Barge Ramp Facility is owned by the Land Development Corporation, an agency of the NT Government, and includes the ramp itself, to which Defence has made a direct contribution, as well as the Common User Area, which is a 9 hectare site linked to the ramp by a dedicated access road. Defence's investment will guarantee a minimum 60 days access to the Multi-User Barge Ramp Facility annually, to meet all envisaged operational and routine commitments for the next 20 years, with the option of two further 5 year extensions. Defence access includes use of the ramp and the access road and a dedicated 2 hectare site within the Common User Area for use as a military staging area.

11. The Multi-User Barge Ramp Facility is an important component to support the loading of the Navy's amphibious vessels and Defence's access arrangements are entirely separate from the Landbridge commercial lease agreement for use of the port. The Multi-User Barge Ramp Facility is another element in the suite of capabilities available to Defence in Darwin and it should be seen as a complementary capability to the commercial port access agreement.

### Fuel Storage in Darwin

12. The age-degradation of Defence fuelling infrastructure at the Defence Fuel Installation – Maritime and Fort Hill Wharf, together with the expanding leisure facilities at the Waterfront, all contributed to the decision to close the Defence facility at Stokes Hill and fuelling operations in the Waterfront precinct ceased in 2014. Since the decommissioning of the Defence Fuel Installation - Maritime, Navy specific fuel has been supplied from leased tanks at the Koninklijke Vopak N.V. Bio-Diesel Terminal at East Arm Port and Defence is in the process of finalising a long term commercial contract (not necessarily with Koninklijke Vopak N.V.) for the ongoing supply of fuel to Navy in Darwin. This is due for decision first quarter 2016.

13. Darwin fuel storage requirements are part of the broader Defence fuel supply chain considerations and as such are distinct from the port access agreement. However, access to East Arm Wharf as an option for the fuelling of Navy Major Fleet Units was a key issue in initial negotiations for the Deed of Access between Defence and Darwin Ports.

14. Defence is also considering investing in dedicated fuelling infrastructure at East Arm Wharf to guarantee unfettered access for the loading of the Self Propelled Water & Fuel Lighter, which is used to provide fuel to Coonawarra, vessels berthed in the naval base, at Fort Hill Wharf or at anchor. This initiative will be considered in the context of the development of the East Arm Wharf long term master plan.

### Defence Use of the Commercial Port of Darwin

15. In addition to the Defence-controlled facilities, the commercial port plays an important role as part of a range of support options available in Darwin. Fort Hill

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Wharf provides Defence with a Major Fleet Unit capable berth adjacent to the recreational centre of the city, and so it is ideal for operational stand down visits where only limited mounting or loading activity is required. Ships can also be fuelled at this berth using the Navy's Self Propelled Water and Fuel Lighter or road tanker, operating remotely from the commercial fuelling points located at East Arm Wharf.

16. East Arm Wharf is the main commercial wharf in Darwin. Opened in 2000, it has 750 metres of quay line and is located some 4km across the harbour, or 17km by road, to the south-east of Fort Hill Wharf. Owing to its location and busy commercial demands, Defence access to this wharf is mainly limited to fuelling or operational visits that require the significant loading and unloading of equipment. Use of this wharf is envisaged as a complement to the Multi-User Barge Ramp Facility, which is outside of the leased commercial Port of Darwin, for amphibious mounting operations.

17. Defence now has access to a suite of facilities to support both operational and exercise activity in Darwin. The commercial port provides support for major, biennial exercises such as Exercise Talisman Sabre and Exercise Kakadu, where it plays host to a large number of Australian and foreign force elements. NT Government and privately owned or operated infrastructure provides a flexible, yet cost effective method of delivering assured access to meet both routine and contingent tasking. A map showing the main areas of current Defence activity in Darwin is at attachment A. Detailed plans of the areas leased to Landbridge are at attachment B.

2011 Deed of Licence

18. Defence access to the Port of Darwin was originally governed by a Deed of Licence signed in 2001. This provided berthing and access to a Roll On-Roll Off facility at Fort Hill Wharf, berthing at Stokes Hill and Iron Ore Wharves and use of fuelling infrastructure in the Waterfront precinct to enable operations at the Stokes Hill Defence Fuel Installation - Maritime. This agreement provided assurances to support the delivery of Defence services at the Darwin Waterfront.

19. This original Deed of Licence was updated in 2011, as owing to excessive upkeep costs, the Roll On-Roll Off Facility at Fort Hill Wharf had fallen into disrepair and had been decommissioned. The Iron Ore Wharf had also been removed and Stokes Hill Wharf was no longer deemed suitable for berthing Navy vessels. These decisions were also inserted into the 2011 amendment to the Deed, which had been due to run until 2018.

2015 Deed of Licence

20. Defence was advised by the NT Government in early 2014 of its plan to seek private investment into the commercial Port of Darwin. The NT Government first approached Defence in early 2014 in order to formalise a working arrangement in support of plans to develop new bulk fuel storage facilities in Darwin. On 3 March 2014, the NT Chief Minister wrote to Defence to advise that his Government was looking at options to introduce private sector investment in the Port of Darwin. Correspondence between Defence and the NT Government followed. This

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correspondence established the need for a new agreement to guarantee Defence rights of access during the privatisation process.

21. Following extensive engagement and negotiation with NT representatives, an updated 'Deed of Licence for Access to the Port of Darwin' was signed on 13 May 2015. This new Deed aligns with the *NT Ports Management Act 2015*, which governs the terms of the port privatisation and its subsequent operation.

22. The Deed of Licence provides that Defence will have the right to request access to East Arm Wharf as required for the purposes of fuelling naval vessels as well as access for berthing ships in support of mounting operations or exercises. All requests for access to East Arm Wharf will be made with due regard to ongoing commercial activity at the port. Defence will also be granted access to East Arm Wharf, as and when required, for the purposes of loading the Navy's Self Propelled Water and Fuel Lighter. Where Defence requires access to the port during a peak period or an operational contingency adversely impacts the commercial interests of other port users, Defence may incur a liability to make demurrage payments.

23. A key aspect of maintaining the effective delivery of services to Defence, no matter who operates the port, is the robust governance regime that underpins the Deed of Licence and the privatisation process. Defence's agreement with the NT Government and the port operator can be viewed in four separate layers.

a. The strategic safeguards for Defence come in the form of legislation, such as the *Defence Act 1903* (Cth) and the *NT Ports Management Act 2015*, which provide the high level, legal framework to ultimately assure Defence's rights and in particular, access in the event of a declared Defence emergency.

b. The Deed of Licence, which governs the operational level relationship between the port operator and Defence and formally sets out how access rights will be applied and governs the rules and behaviour that both sides must adhere to. The Deed is a legally binding document and provides all of the necessary access that Defence requires to meet both routine and operational requirements. This includes priority use of the port in the event of a contingency.

c. Defence representation on the Port Operations Committee. Also represented on the Port Operations Committee are the Darwin Port Corporation (controlled by the NT Government), the Regional Harbourmaster (appointed by the NT Government), the Naval Harbourmaster (a Royal Australian Navy Officer), the Port Operator (Landbridge) and other parties with an interest in the operation of the wharf precinct. The Port Operations Committee will be a forum to discuss, and where necessary, resolve any issues and conflicts relating to operational and planning issues within the Port.

d. Day to day interaction will be delivered by the routine work of the port operator and Defence staff, most notably the Naval Harbourmaster. Under the protection of the governance framework, this applies the Deed of Licence on a day to day basis and provides the practical process for the booking of berths and routine access for Defence vessels.

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24. The privatisation of the Port of Darwin on a 99 year lease was announced on 13 October 2015. Under the terms of the lease agreement, the obligations of the Defence Deed of Licence transferred to the new private operator. The lease provides an 80% stake to Landbridge, a Chinese owned company, and started on 16 November 2015. The remaining 20% stake will be retained by the NT Government and is to be transferred to a suitable Australian investor within 5 years. This meets the NT Chief Minister's pledge to retain a meaningful amount of the port's ownership in Australian hands.

### Governance of Port Operations

25. As the Port Operator, Landbridge is responsible for the management of the commercial Port of Darwin, which includes Fort Hill Wharf, East Arm Wharf and the adjacent land encompassing the Darwin Industry Fuel Terminal (facility itself owned and operated by Koninklijke Vopak N.V.). As well as the wharves, the Port Operator is also responsible for the maintenance of channels, pilotage, towage and management of the Vessel Traffic System to ensure safe operation of the port.

26. The Regional Harbourmaster, is appointed by the NT Government and is responsible for overseeing the safe operation of all NT ports including Darwin. The role is essentially regulatory and together with the NT Utilities Commission, retains step-in rights relating to the operation of the port, which covers port access, pricing and the setting of exclusive zones. The Regional Harbourmaster is also responsible for the licensing of all port appointed pilots. The Regional Harbourmaster is the NT Government representative on the Port Operations Committee and is uniquely placed to identify breaches or shortcomings in the operation of the port.

27. Operational oversight for Defence activity in Port of Darwin is provided by the Naval Harbourmaster. The Naval Harbourmaster, also known as the Port Services Manager (PSM) at Coonawarra, is a naval officer who provides support to ADF vessels visiting the port and manages operational, day to day liaison between Defence and the port authorities, including the management of berth bookings and notice of Defence vessel movements. This role does not override the authority of the Port Operator, which approves the entry and movement of larger ships in the commercial port, largely for safety purposes. The Naval Harbourmaster is also a standing member of the Port Operations Committee.

28. The Port Operations Committee, with representation from both the Regional and Naval Harbourmasters, will meet with the Landbridge, at least 3 times a year to discuss any operational issues, with the first meeting scheduled for 1 March 2016. Additional Defence personnel will also attend these meetings as needed. On a broader level, Defence will also continue engagement with the NT Government through regular discussions and consultations.

29. Further legislative oversight is provided by the NT Utilities Commissioner and statutory protection by the *NT Ports Management Act 2015*. This Act specifically precludes the port operator from discriminating against any customer or port user. Commercial regulation and oversight is provided by the NT Utilities Commission which acts as the Regulator and can represent any concerns to the NT Transport

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Minister and Parliament. The Regulator is charged with representing any concerns over, “the provision of access to prescribed services or charges fixed in relation to the provision of prescribed services<sup>1</sup>”.

30. The new Port Operator is required to adhere to the International Ship and Port Facility Security (ISPS) Code that is an amendment to the Safety of Life at Sea (SOLAS) Convention on minimum security arrangements for ships, ports and government agencies. The ISPS Code prescribes responsibilities to governments, shipping companies, shipboard personnel, and port/facility personnel to detect security threats and take preventative measures against security incidents affecting ships or port facilities used in international trade. The Code is enacted through the *Maritime Transport and Offshore Security Act 2005* and provides a standardised framework to ensure the security of ships and port facilities.

31. In addition, the commercial port of Darwin is a security regulated port, where certain areas of the port have been declared as maritime security zones. Access into these zones requires a Maritime Security Identification Card, which personnel can only obtain by successfully completing a background check, including vetting by the Australian Security Intelligence Organisation.

32. The Australian Government responsibility for the regulation of preventive security is vested in the Department of Infrastructure and Regional Development, with investigative responsibilities held by the Australian Federal Police. This provides further Commonwealth oversight and is part of the Australian, State and Territory Government’s Critical Infrastructure Resilience Strategy<sup>2</sup>, which aims to protect infrastructure assets which support Australia’s economic well-being, and play a part in national defence and security.

33. There are already two precedents for Defence’s interaction with privatised ports, as both Adelaide and Brisbane were sold to commercial concerns in 2001 and 2010 respectively. These two ports have been identified as secondary mounting bases for amphibious capability and so, as Defence use is not as frequent as in Darwin, the requirement for a binding agreement was not as great. Defence rights and interests in Adelaide and Brisbane are recognised in individual ‘Letters of Co-operation’ which are not legally binding. Therefore, while the State or Territory statutory protection across all 3 ports is similar, even with foreign ownership, Defence’s access rights in Darwin are far more clearly defined and protected by the 2015 Deed of Licence.

34. Defence’s relationship with all Australian commercial ports is conducted in accordance with the ‘Guiding Principles for ADF Access to National Ports’. This document has been regularly reviewed and updated over the past 10 years, with the last version signed by Defence and with Ports Australia in 2014. While not legally binding, it does provide a basis for mutual understanding and the development of individual agreements between Defence and port authorities around Australia wherever necessary.

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<sup>1</sup> NT Ports Management Act 2015 – Para 119-121

<sup>2</sup> Critical Infrastructure Resilience Strategy: Plan. Commonwealth of Australia 2015.

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Constitutional and legislative bases of access by the Australian Government

35. The Australian Constitution provides the Commonwealth Parliament with the power to make laws with respect to the defence of the Commonwealth and of the States, and also for the government of any territory such as the Northern Territory.

36. The scope of the constitutional defence power is not fixed but depends on the international and political threat that is faced at the time. That is, the types of Defence measures that fall within the scope of this power depend on whether the climate is one of peace or war. Based on previous uses of the defence power, in extreme circumstances (such as a declaration of war or significant threat to the Australian community) the Government could legislate to obtain access rights over critical infrastructure. This may require the Commonwealth to pay compensation to the owners or operators of the port.

37. Additionally, section 63 of the Defence Act contains a general power for defence purposes. It states that the Governor-General may do all matters and things deemed by him or her to be necessary or desirable for the efficient defence and protection of the Commonwealth or of any State. Again, the scope of this statutory power would be dependent on the circumstances, including the nature of the threat faced, but could include steps to ensure access to the commercial Port of Darwin for defence purposes if this were necessary. This would probably need to be supported by regulations under the Defence Act and compensation may need to be paid.

38. In the current climate, Defence will rely on its contractual rights of access under the Deed of Licence which, as discussed above, are reinforced by Northern Territory legislation.

Landbridge and the Foreign Investment Review Board

39. Defence was first consulted by the NT Government on the plans to possibly privatise the commercial Port of Darwin in February 2014. In anticipation of the Port privatisation occurring, Defence negotiated a new legally binding Deed of License with the NT Government for Defence access to the commercial Port of Darwin for the next fifteen years with two five year options to extend. The Deed, signed on 13 May 2015, addressed Defence's interest in access to and use of the commercial Port of Darwin.

40. As part of preparations for the consideration of any potential Foreign Investment Review Board (FIRB) application, in April 2015 Defence undertook consultation internally and with other relevant Departments on the long term lease of the commercial Port of Darwin, specifically seeking to determine if there would be any concerns from a Defence perspective associated with the privatisation process. At this meeting, stakeholders were informed that a number of bidders, including foreign investors, could be expected. Defence stakeholders were requested to examine the impact such a transaction may have on Defence interests.

41. During the on-going communications between the NT and Australian Governments, Defence was advised in May 2015 that Landbridge was a potential

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bidder. On 8 July 2015 as part of the Foreign Investment Review Board (FIRB) process, the Treasury requested Defence assess the Landbridge FIRB proposal which was subsequently provided to internal Defence stakeholders for assessment. Defence undertook due diligence of the Landbridge bid with internal stakeholders including the Services and then Intelligence and Security Group revealing no objections to the proposal, noting that Defence interests in accessing the Port of Darwin are maintained through the recently agreed Deed of Licence with the NT Government.

42. 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. This was conveyed to the Treasury. Defence was not required to provide a formal response to the FIRB proposal on Landbridge as this was rescinded by the Treasury due to an exemption under the *Foreign Acquisition and Takeovers Act 1975* (Cth) relating to the sale of state and territory owned assets. Defence would have continued to raise no objections to the Landbridge application, had the application continued through the full foreign investment process.

43. Defence was advised by the NT Government of the lease to Landbridge a few hours before the Chief Minister's announcement on 13 October 2015.

44. As stated during Defence appearance before the Senate inquiry on 15 December 2015, the Secretary of Defence subsequently tasked the Director of the Defence Intelligence Organisation to coordinate an additional review utilising expertise from the intelligence community. This review confirmed earlier assessments.

45. At the Supplementary Budget Estimates Hearing on 21 October 2015, the Secretary of Defence stated "I note that it is a commercial port; it is not a naval base", with the Chief of the Defence Force highlighting that information gathering on ship movements could be easily done from publically accessible areas of the Port precinct. As stated at the 15 December Senate Committee hearing, classified capabilities, including key emitters, are not used in any commercial ports by Australian naval vessels.

Broader strategic considerations

46. Contrary to the claims of some public commentators, Port Operators do not have the authority to allow visits by foreign naval vessels without the Australian Government's approval.

47. Foreign naval ships seeking to enter Australia's internal waters or ports, or otherwise remain within Australia's territorial sea, need to have a diplomatic clearance to do so. A diplomatic clearance for a visit by a foreign naval vessel can only be issued with the approval of the Minister for Defence or her delegate within the Department of Defence.

48. Defence considers claims that the Landbridge lease could be used by the PLA Navy to further its strategic interests lack credibility.

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49. Defence also considers claims that the Landbridge lease could be used for espionage purposes also lack credibility. For instance, it is standard operating practice for all naval vessels to switch off sensitive emitters before entering commercial ports regardless of location or the port operator.

United States issues

50. Public statements by the United States Embassy to Australia have confirmed the United States was aware of the Northern Territory Government's intent to lease the Port of Darwin. The Embassy has also confirmed that their concerns over potential security considerations, the details of the lease, and the Federal government's review of both have been resolved.

51. On 15 December 2015, the United States Embassy in Canberra issued a Facebook message stating:

Today a Senate inquiry examined the lease of the Port of #Darwin. The United States was aware of the Northern Territory Government's intent to lease the Port of Darwin. Our concerns had to do with potential security considerations, the details of the lease, and the Federal government's review of both. We have since had substantial subsequent discussions about those concerns, which have been resolved. We are now moving forward together -- as mature friends and allies do. #USwithAUS

52. The Secretary of Defence has stated publicly that it would have been sensible to advise the United States in advance of the Landbridge lease, although this would not have made any difference to the outcome.

**Kidman Decision**

What the decision was

53. On 19 November 2015, the Treasurer announced that the acquisition by foreign persons of S. Kidman & Co Limited in its current form was inconsistent with the national interest. The Treasurer's decision was taken given the size and significance of the total portfolio of Kidman properties, along with national security issues around access to the Woomera Prohibited Area.

54. The Kidman portfolio is made up of 12 properties across Australia in Queensland, Western Australia, South Australia and Northern Territory. One of these is Anna Creek station in South Australia, which is also the largest cattle station in the world. About half of the station (9, 500km<sup>2</sup>) lies within the area declared as the Woomera Prohibited Area.

Importance of the Woomera Prohibited Area

55. The Woomera Prohibited Area (WPA) is a major strategic asset and Australia's most important weapons testing range, making a significant contribution to our national security.



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56. The WPA provides Defence with a unique capability for the testing and evaluation of war materiel because of its size (at over 122,000km<sup>2</sup> it is about the size of England and is the largest land-based test range in the Western world), remoteness, low population density and quiet electromagnetic environment.

57. These factors combined with other operational security measures allow Defence to conduct sensitive weapons and other advanced military technology testing - including with our allied partners - in a relatively secure physical and electronic environment, with reduced prospects of security risk or compromise. As such, the secure environment of the WPA must be maintained.

58. Within its legislative framework, Defence maintains a system of co-existence with non-Defence users within the WPA. For pastoralists whose properties are within the WPA, Defence may grant permission to enter and remain in the WPA under the *Defence Force Regulations 1952*. This permission may be subject to conditions necessary for the protection of people, property and official secrets as set out in regulations 35(4) and (5). In considering the possible grant of access conditions or permission to non-Defence users, Defence will consider (among other matters) the security implications of any foreign control or interest that an applicant may have.

### Defence position

59. As part of the Foreign Investment Review Board process, Defence was consulted by the Department of the Treasury concerning the potential sale of the shareholdings of S. Kidman & Co Limited to foreign persons.

60. In response, Defence advised that it had national security concerns due to one part of the portfolio – the Anna Creek station – being partly within the WPA.

### **Transgrid**

61. On 25 November 2015, the New South Wales (NSW) Government announced that the Australian led NSW Electricity Networks consortium was the successful bid for the lease of Transgrid's electricity transmission network.

62. The Treasury has the lead for all Foreign Investment Review Board applications. Consultation with Defence and other stakeholders ensured national interest considerations were taken into account.

63. On 25 November 2015, the Treasurer announced that he had agreed the foreign investment applications associated with the lease of the Transgrid assets, subject to conditions and undertakings from the bidders. These safeguards are more stringent than any previous conditions imposed on acquisitions of critical infrastructure.

### **Additional Scrutiny of Foreign Investment in Critical Infrastructure**

64. The foreign investment framework is designed to foster economic benefit, progress and development through facilitating foreign investment in Australia while ensuring the protection of Australia's national interests.

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65. Regulation of foreign investment through the Foreign Investment Review Board screening process is led by the Department of the Treasury, while policy towards critical infrastructure is led by the Attorney-General's Department. Defence works closely with these, and other relevant agencies, to ensure that Defence's interests are taken into account during consideration of foreign investment proposals.

66. There has been an increase in the number and sophistication of foreign investment proposals, leading to a greater number of foreign investment proposals being referred by the Treasury to Defence. While the review system generally works well the Government is examining options (in consultation with the States and Territories) to ensure that future sales of critical infrastructure by state and territory governments to privately owned investors can be formally reviewed by the Foreign Investment Review Board.