

Chapter 4

Evidence in support of the current legislative and regulatory framework

4.1 This chapter considers the evidence to the committee in support of the current legislative and regulatory framework.

Economic considerations

4.2 In its submission to the committee, the Australia and New Zealand Banking Group (ANZ) highlighted the importance of foreign direct investment for Australia's continued economic growth and future prosperity. ANZ argued that many sectors in the Australian economy, such as agriculture, require very high levels of capital investment. It noted that foreign direct investment is a significant source of much-needed capital, yet attracting capital investment from foreign entities and individuals is a competitive process. Highlighting that Australia is one of many mid-sized economies competing for the attention of potential investors, ANZ made the point that Government policy settings can do a great deal to help or hinder foreign investment in this country.¹

4.3 ANZ estimated that, by 2050, the shortfall between capital requirements and available domestic capital in the agricultural sector is likely to be \$850 billion. Given the mismatch between available domestic capital and the projected investment needs of the sector, attracting foreign investment is a workable solution to the lack of a sufficient domestic pool of capital.² ANZ argued that, in an increasingly competitive global environment, the Government's foreign investment review framework needs to ensure that Australia remains an internationally attractive destination for foreign direct investment:

Australia needs to be an attractive destination among the nations competing for capital. In relation to the agricultural sector, Australia is estimated to account for less than five per cent of global institutional investment. Competition for institutional agricultural investment is increasing with nations in Asia, South America and Africa seeking investment to develop their economies.³

4.4 ANZ further suggested that the current foreign investment review framework, in which the Treasurer determines whether a proposed investment satisfies the national interest criterion, strikes an appropriate balance between the legitimate demands of national security and the need to attract sufficient levels of foreign direct

1 Australia and New Zealand Banking Group, *Submission 2*, p. 2.

2 Australia and New Zealand Banking Group, *Submission 2*, pp. 1–2.

3 Australia and New Zealand Banking Group, *Submission 2*, p. 2.

investment. Therefore, ANZ highlighted the point that any changes to the framework must ensure that foreign investment is not restricted.⁴

4.5 In its submission to the Northern Territory Legislative Assembly's Port of Darwin Select Committee, the Port of Darwin Project Steering Committee echoed many of the key points raised by the ANZ. According to the Steering Committee, the expansion of the Port of Darwin was not only vital to future economic development in the Northern Territory, but was imperilled by the fact that the territory government has limited capacity to raise sufficient capital.⁵

4.6 The Northern Territory had assessed the strategic opportunities for the Port of Darwin and the need for capital investment to increase its capacity in 2012 with the release of the Greater Darwin Plan 2012. The Plan identified the future of the Port of Darwin as '[a]n international hub for exports, education and health services, tourism, operations and maintenance'. A subsequent submission to the Joint Parliamentary Committee on Northern Australia by the Darwin Port Corporation included recommendations that the Federal Government assists in identifying opportunities to secure funding for the Port's expansion. Subsequent applications to Infrastructure Australia for funding were not successful. The NT Government was advised by the Commonwealth to consider privatisation of the Port. In response to this advice, the NT Government established the Port of Darwin Select Committee to investigate other ways of securing funding for the Port:

To be able to address the infrastructure need, the Northern Territory must be prepared to test and investigate alternative forms of infrastructure funding and financing, including private investment. This is critical if we want to be in a position to meet the infrastructure requirement of the future and be well positioned to seize economic opportunities as they arise.⁶

4.7 For the Project Steering Committee, in the absence of public funds becoming available, private capital investment, including from international sources, represented the best possible avenue for the future development of both the Port of Darwin and those elements of the Northern Territory economy, such as the livestock industry, that are critical to the territory's future prosperity.

4.8 The NT Government concluded that a viable partnership with a private sector investor should be its chief aim. In particular, the viability of any leasing arrangement would require the development of an effective regulatory regime, one that balances the longer term interest of the NT with the commercial imperatives faced by a private port operator.

4 Australia and New Zealand Banking Group, *Submission 2*, p. 2.

5 Port of Darwin Select Committee, Legislative Assembly of the Northern Territory, *Port of Darwin Lease Model*, April 2015, p. 3, <http://www.nt.gov.au/lant/parliamentary-business/committees/pod/Reports.shtml> (accessed 9 December 2015).

6 Port of Darwin Project Steering Committee, *Submission to the Port of Darwin Select Committee*, p. 3.

4.9 In order to achieve a balance between public and private interests, the steering committee recommended that the NT Government adopt a hybrid regulatory regime by combining a generally light-handed approach to regulation with the introduction of an independent price and access regulator. The steering committee suggested that this entity should have the right to recommend that the Minister adopt a more heavy-handed approach to regulating the port operator. The final decision would rest with the Minister, rather than the regulator.⁷

4.10 According to the steering committee, a hybrid regulatory framework, which combined light regulation with the threat of a more heavy-handed approach, would help to ensure the NT Government's dual aims: attracting private investment to ensure the viability of the Port of Darwin into the future, while ensuring that the interests of Territorians are also protected by effective regulation:

The light-handed regulatory framework sets the high level parameters within which a port operator is expected to operate while at the same time providing the flexibility and autonomy for the operator to make commercial decisions aimed at increasing the value of its investment through trade growth and business expansion. The threat of more heavy-handed regulation has been demonstrated to work in other jurisdictions in managing reckless pricing or access behaviour.⁸

4.11 The steering committee also pointed out that, in addition to the NT Government's own regulatory regime, the ACCC possesses the authority to intervene if a port client requests a review of a decision taken by the operator.⁹

4.12 On the basis of the steering committee's recommendation, the NT Parliament passed the *Port of Darwin Act 2015* and the *Ports Management Act 2015*. Together, these acts are intended to allow for the creation of an independent pricing and access regulator.¹⁰

National security and national interest considerations

4.13 In evidence at the committee's hearing on 15 December 2015, Mr Dennis Richardson, Secretary of the Department of Defence, strongly defended the role of the department in providing due diligence in relation to the lease of the Port of Darwin and the sale of the port operator. In particular, Mr Richardson defended the department's contribution to the process of evaluation that eventually led to the FIRB's determination that the lease of the Port land and sale of the Port Corporation would be exempt under the Act.

7 Port of Darwin Project Steering Committee, *Submission to the Port of Darwin Select Committee*, p. 10.

8 Port of Darwin Project Steering Committee, *Submission to the Port of Darwin Select Committee*, p. 10.

9 Port of Darwin Project Steering Committee, *Submission to the Port of Darwin Select Committee*, p. 10.

10 For an overview of both acts, see http://www.austlii.edu.au/au/legis/nt/num_act/poda201510o2015214/index.html#s3

4.14 Mr Richardson informed the committee that, after becoming aware of the Northern Territory Government's decision to lease the Port of Darwin, the department closely examined the implications of a private company leasing and operating the port. The evaluation involved contributions from the Australian Signals Directorate (ASD) and the Defence Security Agency (DSA).¹¹ Mr Richardson also noted that, after criticisms of the lease were raised in the media, he tasked the directors of the Defence intelligence agencies to re-examine the issue:

That [the review process] involves consultation with the Australian Signals Directorate. I think ASIO were separately approached by the Treasury and, of course, they have statutory responsibility in that area. It involved consultation with the Australian Defence agencies and it involved consultation with the three services. Then, as I said, after it became public and there was a lot of criticism of it, I became concerned that we might have missed something. So as a backstop, I specifically tasked the directors of the Defence intelligence agencies to bring together some people from different parts of the intelligence community to make sure we had not missed anything.¹²

4.15 Further, Mr Richardson maintained that the department fully completed its due diligence obligations on a range of strategic and operational matters, including:

- examining whether the lease could expose the Port of Darwin to cyber-attack;
- whether the lease increased the risk of the theft of intellectual property;
- the risk of the Port being shut down in a time of heightened internal tensions; or
- the risk that the lease could facilitate a degradation, through asymmetrical means, of elements of Australia's national security systems or infrastructure.¹³

4.16 Mr Richardson also confirmed that the department signed a comprehensive deed of licence with the NT Government in respect of Australian naval interests at the Port of Darwin. Further, Mr Richardson pointed out that the deed is one of the most comprehensive contracts of its type negotiated by the department. He noted that, precisely because the Port of Darwin is of strategic significance, the department 'exercised great care with the deed of licence'.¹⁴

4.17 According to Mr Richardson, the due diligence carried out by the department, across the full range of issues raised by the decision to lease the Port of Darwin,

11 Mr Dennis Richardson, Department of Defence, *Committee Hansard*, 15 December 2015, p. 19.

12 Mr Dennis Richardson, Department of Defence, *Committee Hansard*, 15 December 2015, p. 15.

13 Mr Dennis Richardson, Department of Defence, *Committee Hansard*, 15 December 2015, p. 13.

14 Mr Dennis Richardson, Department of Defence, *Committee Hansard*, 15 December 2015, p. 11.

ensured that FIRB was provided with comprehensive and accurate strategic and operational advice.¹⁵

4.18 In his evidence to the committee, Mr Duncan Lewis, Director-General of the Australian Security Intelligence Organisation (ASIO), reiterated Mr Richardson's contention that all due diligence was appropriately conducted, and that the proposed lease raised no security-related concerns. Mr Lewis also confirmed that ASIO, as a contributing agency to FIRB's review process, provided security advice to the Treasury and the Department of Defence.¹⁶

4.19 In particular, Mr Lewis observed that ASIO, as part of the Australian Government's collective knowledge base, was closely involved in assessing the potential national security issues raised by the proposed lease.¹⁷ On the basis of a thorough security assessment, which also included an examination of the security risks posed by the Landbridge Group itself, ASIO concluded that the proposal did not raise any concerns. Mr Lewis continued:

I am satisfied that all of my officers who were involved—and they were involved, as I described, for a very long time—took into consideration all of the aspects that are likely and that we could foresee, at any rate, might present a security problem. That would include all of the ways in which the port was operating, including its management structures, its ownership structures and so on. We came to the conclusion, as I think I have made plain, that there was no reason, based on security consideration at any rate, as to why this transaction should not go forward with the two deeds in question and with the mitigations in place.¹⁸

15 Mr Dennis Richardson, Department of Defence, *Committee Hansard*, 15 December 2015, p. 13.

16 Mr Duncan Lewis, Australian Security Intelligence Organisation, *Committee Hansard*, 15 December 2015, p. 26.

17 Mr Duncan Lewis, Australian Security Intelligence Organisation, *Committee Hansard*, 15 December 2015, p. 25.

18 Mr Duncan Lewis, Australian Security Intelligence Organisation, *Committee Hansard*, 15 December 2015, p. 28.

