

The Senate

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Economics  
References Committee

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Foreign investment review framework

Interim report

February 2016

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Printed by the Senate Printing Unit, Parliament House, Canberra.

# Senate Economics References Committee

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## **Abbreviations**

ACCC	Australian Competition and Consumer Commission
ANZ	Australia and New Zealand Banking Group
ASD	Australian Signals Directorate
ASIO	Australian Security Intelligence Organisation
ASPI	Australian Strategic Policy Institute
CEO	Chief Executive Officer
DSA	Defence Security Agency
FIRB	Foreign Investment Review Board
FTA	Free Trade Agreement
MUA	Maritime Union of Australia
NT	Northern Territory





# Chapter 1

## Introduction

### Referral of inquiry

1.1 On 25 November 2015, the Senate referred the following matter to the Senate Economics References Committee (committee) for inquiry and report by 4 February 2016:

An examination of the foreign investment review framework, including the 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.<sup>1</sup>

### Conduct of inquiry

1.2 In accordance with its usual processes, the committee advertised the inquiry on its website, and wrote to relevant organisations and individuals in order to invite submissions.

1.3 To date, the committee has received 17 submissions and has conducted one public hearing, held on 15 December 2015 in Canberra. The names of witnesses who appeared at the hearing are listed at Appendix 1.

1.4 During the hearing, the committee heard evidence on the decision, which came into effect on 16 November 2015, by the Northern Territory Government to grant a 99-year lease over the Port of Darwin to the Landbridge Group.

1.5 The committee acknowledges the organisations and individuals that have made contributions to the inquiry so far through submission and appearance at the hearing.

### Purpose and structure of interim report

1.6 This interim report focusses on term of reference (a), the decision to grant a 99-year lease over the Port of Darwin to Landbridge Group. It considers evidence

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1 *Journals of the Senate*, No. 129, 25 November 2015, p. 3482.

provided in submissions to the committee, along with evidence given at the 15 December 2015 public hearing.

1.7 Drawing on the Port of Darwin matter, the interim report makes preliminary recommendations reflecting concerns raised in evidence regarding the Foreign Investment Review Board (FIRB), Australia's Foreign Investment Review Framework and recent regulatory changes and the decision-making process.

1.8 Chapter 2 provides an overview of the Port of Darwin lease process and the winning bidder, the Landbridge Group. Chapter 3 details the foreign investment review framework and in particular, the role of FIRB in relation to foreign investment in Australia. Chapter 4 considers the evidence before the committee in support of the foreign investment framework with focus on the Port of Darwin lease process. Chapter 5 considers the concerns raised in evidence regarding the framework and its processes as well as evidence in support of changes to the legislative and regulatory framework. Chapter 6 provides the committee's view and a recommendation.

## Chapter 2

### Lease of the Port of Darwin to the Landbridge Group

2.1 The Northern Territory (NT) Government's decision to lease the Port of Darwin for a period of 99 years, along with its decision to sell a controlling stake in the port operator, involved a number of stages. These stages occurred within two distinct phases. First, the decision to lease the port, rather than sell it outright, and second, the bidding process that led to Landbridge Group being awarded the lease and acquiring a controlling stake in the port operator (now known as Darwin Port). This chapter provides an overview of structure and operations of the Port of Darwin prior to the lease; the lease process undertaken by the NT Government; and the successful Landbridge bid, including the company's engagement with the foreign investment review framework.

2.2 The decision of the NT Government to lease parts of the Port of Darwin to the Landbridge Group came into effect on 16 November 2015.

2.3 Prior to the NT Government's decision, the port was operated by the Darwin Port Corporation. According to information made public by the NT Government, the areas of the Port of Darwin that have been leased to the Landbridge Group (Landbridge) are:

- East Arm Wharf;
- Darwin Marine Supply Base;
- Fort Hill Wharf (which is used for cruise ships and Defence vessels);
- Commercial shipping channels within the port area;
- The Bulk fuel terminal, which is leased to VOPAK.<sup>1</sup>

2.4 A number of areas of the port do not form part of the lease agreement, and these will continue to be owned and operated by the NT Government. These include:

- Stokes Hill Wharf;
- Fisherman's Wharf;
- Hornibrook's Wharf; and
- Frances Bay Mooring Basin, including Sadgroves Creek moorings.

2.5 As a business division of the NT Government, the Darwin Port Corporation was established under its own enabling legislation, the *Darwin Port Corporation Act*

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1 Department of the Chief Minister, Northern Territory Government, *Darwin Port Lease*, [http://dcm.nt.gov.au/darwin\\_port\\_lease/areas\\_of\\_the\\_port\\_to\\_be\\_leased](http://dcm.nt.gov.au/darwin_port_lease/areas_of_the_port_to_be_leased) (accessed 9 December 2015).

(Darwin Port Act).<sup>2</sup> In accordance with the requirements of the Act, the Darwin Port Corporation held sole responsibility for the management and operation of the port. Headed by a Chief Executive Officer (CEO), the corporation was ultimately responsible to the Northern Territory Parliament through the Minister for Infrastructure. It employed 85 full-time staff.<sup>3</sup>

2.6 In order to fulfil its responsibilities under the Darwin Port Act, the corporation's activities were underpinned by a corporate governance framework that included an Advisory Board; a Port Management Group; and a variety of subordinate committees. The latter provided advice to the Port Management Group and the CEO. The Advisory Board consisted of seven members, including the corporation's CEO. The Board's members were appointed by the Minister for Infrastructure for a period of three years. The Advisory Board also provided advice on strategic matters referred to it by the CEO. The Board was required to consider these matters from a largely commercial perspective, yet also had to take into account the NT Government's wider strategic objectives, including national and international trade development.<sup>4</sup>

2.7 In addition to the Advisory Board, which was established through legislation, the second major component of the corporation's governance framework was the Port Management Group. Formed by the senior leadership group of the Darwin Port Corporation, and headed by the CEO, the Port Management Group held primary responsibility for managing the strategic direction of the corporation. Its responsibilities included the following:

- Delivery and performance monitoring of corporate objectives in accordance with the Corporate Plan;
- Strategic issues and priorities in relation to organisational development and planning;
- Determining and implementing policy in a manner that is consistent with Government's overall transport objectives;
- Monitoring budget and resource allocation within the Corporation; and
- The exchange of corporate knowledge and dissemination of decisions and other information throughout the corporation.<sup>5</sup>

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2 *Darwin Port Corporation Act*, available at [http://www5.austlii.edu.au/cgi-bin/download.cgi/cgi-bin/download.cgi/download/au/legis/nt/consol\\_act/dpca282.pdf](http://www5.austlii.edu.au/cgi-bin/download.cgi/cgi-bin/download.cgi/download/au/legis/nt/consol_act/dpca282.pdf) (accessed 9 December 2015). It should be noted that, in preparation for the lease of parts of the Port of Darwin, the *Darwin Port Corporation Act* was recently amended by the Northern Territory Parliament. The amended act came into force in July 2015.

3 Darwin Port Corporation, <https://www.darwinport.com.au/about-corporation/port-management-group>, (accessed 9 December 2015).

4 Darwin Port Corporation, <https://www.darwinport.com.au/about-corporation/port-management-group>, (accessed 9 December 2015).

5 Darwin Port Corporation, <https://www.darwinport.com.au/about-corporation/port-management-group>, (accessed 9 December 2015).

2.8 As part of its responsibilities as the operator of the Port of Darwin, the corporation oversaw the management and strategic expansion of port and logistics services, including, for instance, livestock exports; dry bulk imports and exports; container and general cargo services; offshore oil and gas rig services; petroleum, avgas and other bulk liquids; and services for cruise ships, naval vessels and Australian customs vessels.

2.9 Upon the commencement of the lease on 16 November 2015, the Darwin Port Corporation, which was a wholly-owned business division of the NT Government, was replaced by a new corporate entity, Darwin Port. This is the business name that will represent the operations of Darwin Port Operations Pty Ltd and Darwin Port Pilotage Pty Ltd, both of which are part of the Landbridge Group.

2.10 Although operational responsibility for the port has been transferred to a new corporate entity, Darwin Port, there is continuity in management. At the time of writing, the former CEO of the Darwin Port Corporation, Mr Terry O'Connor, continues to manage the operations of the new company.

### **Port of Darwin lease process**

2.11 According to the NT Government's submission to the NT Legislative Assembly Port of Darwin Select Committee inquiry, the decision to lease parts of the Port of Darwin rested on two principal factors: significant growth in demand for the port's services – with new usage records set over the last four years – and the need to meet future growth projections.<sup>6</sup>

2.12 In evidence to the Legislative Assembly's Select Committee, the Northern Territory's Coordinator General, Mr Garry Barnes reported that successive Australian Governments have rejected applications, made through Infrastructure Australia, for additional capital funding to meet the current and future infrastructure needs of the Port of Darwin. Advice given to the NT Government by the Federal Government was that the Port of Darwin was better suited to privatisation than to continue operating as a Government owned facility.<sup>7</sup>

2.13 The Port of Darwin Select Committee advised the NT Government that the Port of Darwin could find itself at full operational capacity in the near future. Given the Federal Government's decision not to fund further capital investment in the Port, the NT Government sought urgent expert advice on the best way to secure capital investment to increase the Port's capacity. The expert advice sought was to consider funding options for the Port of Darwin, given its unique features, including:

- its small size, compared with other ports around Australia;

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6 Port of Darwin Project Steering Committee – Northern Territory Government, *Submission to the Port of Darwin Select Committee*, [http://www.nt.gov.au/lant/parliamentary-business/committees/pod/Submissions/Number\\_4\\_Northern\\_Territory\\_Government.pdf](http://www.nt.gov.au/lant/parliamentary-business/committees/pod/Submissions/Number_4_Northern_Territory_Government.pdf) (accessed 9 December 2015).

7 Mr Greg Barnes, Coordinator General, *Transcript of Evidence, Port of Darwin Select Committee, Legislative Assembly of the Northern Territory*, 31 March 2015, p. 12.

- its utilisation by many different industries, such as mining and cattle transport; and
- the need for significant, and correspondingly costly, infrastructure upgrades.<sup>8</sup>

2.14 In early 2014, the NT Government hired Flagstaff Partners, a company that had earlier advised the Victorian Government on the Port of Melbourne lease project. Flagstaff Partners recommended that a long term lease would be the best option to expand and develop the Port of Darwin.<sup>9</sup>

2.15 Throughout 2014, further reports were prepared for the NT Government by independent consultants, including Deloitte Access Economics; GHD; Environmental Resource Management; and Price Waterhouse Coopers. The expert reports examined those sectors likely to drive future economic growth in the NT, such as the Oil and Gas sector, along with the key commercial, financial, accounting, tax, environmental and engineering issues raised by the lease or privatisation of the port. Minter Ellison acted as the NT Government's legal advisor for the lease transaction.<sup>10</sup>

2.16 In addition to consulting with a range of external experts on the scope and shape of a potential privatisation of the port, the NT Government also appointed a Port of Darwin Project Steering Committee, whose primary responsibility was to examine ways in which a public/private partnership might facilitate the development of the port's infrastructure.<sup>11</sup>

2.17 In January 2015, the NT Government launched an exploratory process to gauge the level of national and international private sector interest in the Port of Darwin. Thirty-three private investors, including Landbridge, registered their interest in leasing the port.<sup>12</sup>

2.18 In February 2015, the NT Legislative Assembly unanimously agreed to appoint a Port of Darwin Select Committee. The committee held two public hearings (31 March and 1 April 2015) where a range of public and private sector stakeholders, including Patrick Stevedoring and the Maritime Union of Australia gave evidence. The Select Committee's report was tabled in April 2015.<sup>13</sup>

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8 Department of the Chief Minister, Northern Territory Government, *Research into the lease process*, [http://dcm.nt.gov.au/darwin\\_port\\_lease/research](http://dcm.nt.gov.au/darwin_port_lease/research) (accessed 9 December 2015).

9 Department of the Chief Minister, Northern Territory Government, *Research into the lease process*, [http://dcm.nt.gov.au/darwin\\_port\\_lease/research](http://dcm.nt.gov.au/darwin_port_lease/research) (accessed 9 December 2015).

10 Department of the Chief Minister, *Research into the lease process*, [http://dcm.nt.gov.au/darwin\\_port\\_lease/research](http://dcm.nt.gov.au/darwin_port_lease/research) (accessed 9 December 2015).

11 Department of the Chief Minister, *Research into the lease process*, [http://dcm.nt.gov.au/darwin\\_port\\_lease/research](http://dcm.nt.gov.au/darwin_port_lease/research) (accessed 9 December 2015).

12 Northern Territory Government, *Submission 16*, p. 4.

13 Legislative Assembly of the Northern Territory Port of Darwin Select Committee, *Port of Darwin Lease Model*, April 2015, [http://www.nt.gov.au/lant/parliamentary-business/committees/pod/Port\\_of\\_Darwin\\_Report.pdf](http://www.nt.gov.au/lant/parliamentary-business/committees/pod/Port_of_Darwin_Report.pdf) (accessed 9 December 2015).

2.19 In the course of its inquiry, the select committee explored a number of potential lease models, in order to examine the benefits and pitfalls of private investment in the Port of Darwin. Its final report included 18 separate recommendations, including, most importantly:

- that a component of the lease be kept in the control of an Australian entity; and
- that the Government consult with FIRB and the Department of Defence in relation to the strategic and security risks that a potential international investor might present.<sup>14</sup>

### **Landbridge bid**

2.20 Landbridge Industry Australia Pty Ltd is a subsidiary of the Shandong Landbridge Group, which has substantial interests in port logistics, petrochemicals, timber trading and processing, and real estate development businesses. The company engages in petrochemical products' processing, sale, storage, importing, transportation, and other services, and has further interests in petrochemical refining, warehousing and logistics, oils sale, port transportation, and international trade. It also engages in the wholesale and retail business of gasoline, diesel, kerosene, and other oil products. Additionally, it provides property development, property management, and construction services, while also having an involvement in ocean shipping supply, trade, and hotel services. Shandong Landbridge Group is a private company owned by two Chinese national shareholders. It was founded in 2001 and is based in Rizhao, China.<sup>15</sup>

2.21 In its submission to the committee, as well as in evidence at the committee's hearing on 15 December 2015, Landbridge Infrastructure Australia provided an overview of its interactions with FIRB.

2.22 After initially expressing its interest in a lease over the Port of Darwin in December 2014, Landbridge first met with FIRB on 19 June 2015, in order to indicate its interest in submitting a bid for the port lease.<sup>16</sup>

2.23 Landbridge observes that, in late June 2015, it submitted a notification to FIRB in relation to both the port lease and the purchase of shares in the port operator. According to Landbridge, this 'dual' notification was provided because the granting of

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14 Legislative Assembly of the Northern Territory, *Port of Darwin Select Committee Report: Port of Darwin Lease Model*, April 2015, p.13, <http://www.nt.gov.au/lant/parliamentary-business/committees/pod/Reports.shtml> (accessed 9 December 2015).

15 For a detailed overview of Shandong Landbridge Group, see 'Company Overview of Shandong Landbridge Group', *Bloomberg Business*, <http://www.bloomberg.com/research/stocks/private/snapshot.asp?privcapId=33920707> (accessed 9 December 2015).

16 Landbridge Infrastructure Australia Pty. Ltd., *Submission 17*, p. 3.

the lease and the purchase of shares in the port operator would be treated differently under the provisions of the *Foreign Acquisitions and Takeovers Act 1975* (the Act).<sup>17</sup>

2.24 On 8 July 2015, Landbridge submitted its initial FIRB application, in which it noted that it was still unclear whether the port manager would be an exempt corporation from the need to gain approval. Therefore, it enclosed a notice under section 26 of the Act for the acquisition of shares. Landbridge further clarified that:

At this stage in the transaction, the bid price had not been allocated between the lease and the shares. This is because the allocation depended on the specific assets to be leased and the value of the shares in the Port Manager. Landbridge did not have the required information about the Port Manager to allow it to form a view on the allocation of value at this time.<sup>18</sup>

2.25 According to Landbridge's evidence, it was contacted by FIRB on 11 September 2015. FIRB informed the company that it was in the process of seeking confirmation from the NT Government about the allocation of the bid price. According to Landbridge:

What price the Northern Territory Government allocated to the share component of the transaction would guide whether or not the share transaction required FIRB approval. Landbridge was not involved in discussions with FIRB and the Northern Territory Government about the allocation of value for the shares. The Northern Territory Government informed the Committee at the hearing that the value of the transaction was verified by the Auditor-General of the Northern Territory Government, and that this information was provided to FIRB.<sup>19</sup>

2.26 On 15 September 2015, FIRB contacted Landbridge to inform the company that a 99-year lease of the Port of Darwin and the purchase of shares in the port operator would be exempt under Section 12A(7)(a) of the Act.<sup>20</sup> Section 12A(7)(a) of the Act exempts assets owned by State, Territory or local governments from its provisions.

2.27 Section 12A(7)(a) has been removed from the Act, but remains in force under the Foreign Acquisitions and Takeovers Regulation 2015. State, Territory and local government assets continue to be exempt from FIRB scrutiny, except in cases where the purchase is being made by a foreign government.

2.28 On 13 October 2015, the Hon. Adam Giles MLA, Chief Minister of the NT, announced that the Landbridge Group was successful in its bid for a 99-year lease over the Port of Darwin. The NT Government selected Landbridge as its private sector

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17 Landbridge Infrastructure Australia Pty. Ltd., *Submission 17*, p. 3.

18 Landbridge Infrastructure Australia Pty. Ltd., *Submission 17*, p. 4.

19 Landbridge Infrastructure Australia Pty. Ltd., *Submission 17*, p. 4.

20 Landbridge Infrastructure Australia Pty. Ltd., *Submission 17*, p. 4.



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partner after a competitive bidding process, which included final and binding bids from a number of Australian and international companies.<sup>21</sup>

2.29 The total price of the lease package, which also includes a controlling stake in the port operator, now known as Darwin Port, came to \$506 million. The lease commenced on 16 November 2015 and will expire on 15 November 2114.<sup>22</sup>

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21 The Hon. Adam Giles MLA, Chief Minister of the Northern Territory, 'NT Government selects Landbridge as its partner for the Port of Darwin', Media Release, 13 October 2015, available at <http://newsroom.nt.gov.au/mediaRelease/15788> (accessed 9 December 2015).

22 'NT Government selects Landbridge as its partner for the Port of Darwin', Media Release, 13 October 2015, available at <http://newsroom.nt.gov.au/mediaRelease/15788> (accessed 9 December 2015).



# Chapter 3

## Foreign investment review framework

3.1 This chapter provides an overview of the foreign investment review framework, including recent legislative and regulatory changes, and considers the Government's Foreign Investment Policy. It also examines the responsibilities of FIRB.

3.2 The foreign investment review framework comprises the *Foreign Acquisitions and Takeovers Act 1975* (the Act), its associated regulations and Australia's Foreign Investment Policy. In addition, two further Acts inform the way in which FIRB administers the review process:

- *The Foreign Acquisitions and Takeovers Fees Impositions Act 2015*.
- *Register of Foreign Ownership of Agricultural Land Act 2015*.<sup>1</sup>

### Foreign Investment Review Board

3.3 As a non-statutory agency tasked with advising the Treasurer and the Government, FIRB was established in 1976 under the *Foreign Acquisitions and Takeovers Act 1975* (the Act).<sup>2</sup>

3.4 FIRB's primary responsibility is to examine proposals for foreign investment in Australia that are subject to the Act. It is also responsible for providing the Treasurer with advice on the operation of, and compliance with, the requirements set out in the Act. Since it is not a statutory agency, however, FIRB is only empowered to provide advice to the Government of the day, with the Treasurer exercising final responsibility for making a determination on all proposals for foreign investment that fall under the Act.<sup>3</sup>

3.5 In order to provide a framework for the implementation of the Act and its associated regulations, the Commonwealth Government produced a Foreign Investment Policy, which guides the Government's decision-making process in relation to proposals for foreign investment. FIRB has responsibility for providing advice to the Treasurer in relation to the policy and its effective administration.

3.6 FIRB consists of five part-time members, including a Chairman, Mr Brian Wilson, who was appointed to the position in 2012. In addition to the part-time members, FIRB also includes a full-time Executive Member, Mr Robert Donnelly, who currently heads the Foreign Investment and Trade Policy Division within the

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1 For an overview of both acts, see: [http://www5.austlii.edu.au/au/legis/cth/num\\_act/faatfia2015515/](http://www5.austlii.edu.au/au/legis/cth/num_act/faatfia2015515/) and <https://www.comlaw.gov.au/Details/C2015C00620>, respectively.

2 Foreign Investment Review Board (FIRB), *About FIRB*, <https://firb.gov.au/about/> (accessed 11 January 2016).

3 FIRB, *About FIRB*, <https://firb.gov.au/about/> (accessed 11 January 2016).

Treasury. The division provides secretariat support to FIRB, a responsibility that includes the day-to-day administration of the Government's Foreign Investment Policy.<sup>4</sup>

3.7 Since its commencement in 1975, the Act has been amended on four occasions, beginning in 1976. It was further amended in 1989 (*Foreign Takeovers Amendment Act 1989*); in 2010 (*Foreign Takeovers Amendment Act 2010*); and, most recently, in 2015 (*Foreign Acquisitions and Takeovers Legislation Amendment Act 2015*).

3.8 The most recent review of the Act was requested by the Government on 6 October 2015. The Committee was unable to establish the Government's reasons for requesting a review at this time, but notes that its timing coincides with FIRB's advice that the Port of Darwin sale was not subject to review, as it fell under the exemptions listed in Section 12(7)(a) of the Act.

3.9 The most recently amended version of the Act entered into force on 1 December 2015. This introduced a number of changes to the operation of Australia's foreign investment review framework, including, for example, lowering the threshold for foreign investments in agribusinesses to \$55 million.<sup>5</sup>

### **Exemption of Commonwealth, state and territory businesses and land**

3.10 The 2015 Amendment Act removed Section 12A(7)(a)(b), which explicitly exempted from Government scrutiny any acquisition of Australian land that was owned by the Commonwealth, a State or a Territory or local governing body, or by a corporation that was constituted for a public purpose by a law of the Commonwealth, a State or a Territory.

3.11 Despite the removal of Section 12A(7)(a)(b) from the Act, however, an equivalent provision has been included in the Foreign Acquisitions and Takeovers Regulation 2015.

3.12 Regulation 31 explicitly exempts from FIRB's scrutiny any acquisition of land that is owned by the Commonwealth, a State, a Territory or a local governing body. Regulation 31 also places beyond FIRB's competence the acquisition of an Australian

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4 At the time of writing, in addition to the Chairman, Mr Brian Wilson, and the Executive Member, Mr Robert Donnelly, FIRB comprises the following part-time members: Mr Michael D'Ascenzo, who was appointed in January 2013; Mr Patrick Secker, who was appointed to FIRB in December 2013; Ms Alice Williams, whose appointment commenced in July 2015; and Mr David Irvine, whose term began in December 2015. In addition, Mr David Peever's appointment to the Board was announced in December 2015. He took up his position on 1 February 2016.

5 The Hon. Joe Hockey, MP, Treasurer of the Commonwealth of Australia, 'Government Strengthens the Foreign Investment Framework', *Media Release*, 2 May 2015, <http://jbh.ministers.treasury.gov.au/media-release/034-2015/>

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business that is carried on (whether alone or together with one or more other persons) by the Commonwealth, a State, a Territory or local governing body.<sup>6</sup>

3.13 These exemptions apply to foreign-owned entities and foreign persons, but do not come into force if the land is acquired by a foreign government. In the case of a proposed investment by a foreign government, regardless of the value or type of that investment, assessment by FIRB is still triggered by default. In effect, this means that a monetary threshold of \$0 applies to any proposed investment by a foreign government.

3.14 In evidence at the committee's hearing on 15 December 2015, Mr Robert Donnelly, FIRB's Executive Member, explained that the provision in the regulations is equivalent to the previous Section 12A(7)(a)(b) in the Act:

For all intents and purposes, it acts in the same way. The provision in the regs, regulation 31, might be a little difficult to follow because this is not a stand-alone section, but it says the excluded provisions do not apply in relation to an Australian business that is carried on—I am paraphrasing—or the acquisition of an interest in Australian urban [sic] land from any one of the following persons: the Commonwealth, a state, a territory or a local governing body, or an entity wholly owned by the Commonwealth, a state, a territory or a local governing body.<sup>7</sup>

### **Thresholds for FIRB consideration**

3.15 The Act and its associated regulations provide the basis for the Australian Government's policy on the assessment of proposals for foreign investment. The policy document, which is publically available on FIRB's website, sets out the thresholds, both financial and jurisdictional, that determine whether an investment proposal must be considered by FIRB.<sup>8</sup> It also provides an overview of the assessment process that is undertaken by FIRB in the event that a proposed investment requires Government approval.

3.16 On the basis of the current policy, which was released in December 2015 and reflects recent changes to the Act and the regulations, all proposals for foreign investment are subject to a financial threshold test. The level of the threshold is dependent on the sector of the economy in which a foreign individual or entity proposes to make an investment. For example, a general business acquisition is

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6 *Foreign Acquisitions and Takeovers Regulation 2015*, reg. 31(1). In addition, regulation 31 also stipulates that land acquired from an entity controlled by the Commonwealth, a State, a Territory or a local governing body is exempt from further scrutiny.

7 Mr Robert Donnelly, Department of Treasury, *Committee Hansard*, 15 December 2015, p. 39.

8 The policy documents that outline the conditions of FIRB's involvement, along with the process that is followed if an assessment is required, can be accessed at:  
<https://firb.gov.au/resources/policy-documents/>

exempt from Government scrutiny if the total value of the purchase or investment is \$252 million or less.<sup>9</sup>

3.17 The policy also provides for further exemptions in specific sectors if the potential investor is from a country with which Australia has signed a Free Trade Agreement (FTA). At the time of writing, Chile, China, Korea, Japan, New Zealand and the United States are able to acquire an Australian business in a non-sensitive sector without Government review, up to a threshold of \$1.094 billion.<sup>10</sup> Investors from these nations are accorded the status of 'agreement country investors'.<sup>11</sup>

3.18 However, where a business is classified as 'sensitive', the lower threshold of \$252 million applies<sup>12</sup>, even if the investor is from an agreement country. According to the policy, 'sensitive' businesses include:

- media and telecommunications;
- transport;
- defence and military related industries and activities;
- encryption and securities technologies and communication systems;
- the extraction of uranium or plutonium; and
- the acquisition of nuclear facilities.<sup>13</sup>

3.19 Further, if a foreign investor proposes to acquire more than a five per cent stake in any Australian media enterprise, then that proposal, regardless of the investor's status or the overall value of the investment, will require Government authorisation through the review process.

3.20 The general threshold of \$252 million does not apply if an investor from a non-agreement country applies to acquire a stake in land that has been defined as 'sensitive'. In these cases, assessment by FIRB is triggered at the lower threshold of \$55 million. Developed commercial land can be designated as 'sensitive' if one or more of the following criteria apply to it at the time that an investor seeks to acquire an interest in that land:

- the land will be leased to the Commonwealth, a State, a Territory or a Commonwealth, State or Territory body;
- the land will be fitted out specifically for a business of the following kinds:
  - the storage of bulk data;

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9 Treasurer, *Australia's Foreign Investment Policy* (as at December 2015), p. 13, [http://firb.tspace.gov.au/files/2015/09/Australias\\_Foreign\\_Investment\\_Policy\\_December\\_2015\\_v2.pdf](http://firb.tspace.gov.au/files/2015/09/Australias_Foreign_Investment_Policy_December_2015_v2.pdf) (accessed 18 January 2016).

10 Treasurer, *Australia's Foreign Investment Policy*, December 2015, p. 2.

11 Treasurer, *Australia's Foreign Investment Policy*, December 2015, p. 2.

12 Treasurer, *Australia's Foreign Investment Policy*, December 2015, p. 13.

13 Treasurer, *Australia's Foreign Investment Policy*, December 2015, p. 4.

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- the supply of training or human resources to the Australian Defence Force or other defence forces;
  - the manufacture or supply of military goods, equipment or technology to the Australian Defence Force or other defence forces;
  - the manufacture or supply of goods, equipment or technology able to be used for a military purpose;
  - the development, manufacture or supply of, or the provision of services to, encryption and security technologies and communications systems; or
  - the extraction of, or the holding of rights to extract, uranium or plutonium or the operation of nuclear facilities.
- land that will be fitted out to store, handle or dispose of biological agents on the List of Security-sensitive Biological Agents (within the meaning of the *National Health Security Act 2007*);
  - where an authorisation under law of the Commonwealth, a State or a Territory will allow materials that are regulated under that law to be produced or stored on the land;
  - the land will be under prescribed airspace (within the meaning of section 81 of the *Airports Act 1996*);
  - a mine, oil, gas well, quarry or similar operation will operate on the land;
  - a stored communication (within the meaning of the *Telecommunications (Interception and Access) Act 1979*) will be stored on the land;
  - the failure of part of a telecommunications network unit (within the meaning of the *Telecommunications Act 1997*) on the land would result in telephone or internet services not being provided on other land;
  - servers critical to an Authorised Deposit-taking Institution (within the meaning of the *Banking Act 1959*) or a stock exchange in Australia will be stored on the land; or
  - land used for public infrastructure (defined as an airport or airport site; a port; infrastructure for public transport (whether or not the infrastructure is operated or owned by a Commonwealth, State or Territory body) or a system or facility that is used to provide various services to the public, including the generation, transmission distribution or supply of electricity; the supply of gas; the storage, treatment or distribution of water; or the treatment of sewerage.<sup>14</sup>

3.21 As a result of recent changes, foreign investors who do not possess 'agreement country' status must apply for authorisation if they wish to invest in agricultural land

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14 Treasury, answer to question on notice, 15 December 2015 (received 11 January 2016).

and the cumulative value of the investment – including the portion for which they are seeking authorisation – is greater than \$15 million. Investors from Chile, the United States and New Zealand, in accordance with Australia's FTA obligations, have access to the higher exemption threshold of \$1.094 billion.<sup>15</sup>

3.22 The threshold for foreign investment in agribusinesses has been lowered to \$55 million, regardless of the overall value of the business. This threshold applies if a foreign investor stands to gain a direct or controlling interest in an agribusiness, which the policy defines as a stake in the company of at least 10 per cent or the 'ability to influence, participate in or control' the business.<sup>16</sup> Consistent with Australia's FTA commitments, an exemption threshold of \$1.094 billion applies to investors from the United States, New Zealand and Chile.<sup>17</sup>

3.23 Investors from China, Japan and Korea, though having agreement country status for general business acquisitions, are subject to lower limits for agricultural land and agribusiness acquisitions.

3.24 The foreign investment review framework, as a tool for assessment, is based on a national interest test which is applied irrespective of the nature of the proposed investment and the threshold that applies to it. The review framework is designed to further Australia's national interest by ensuring that a proper balance is struck between the need to encourage significant foreign investment – across a range of sectors of the economy – and the equally important need to ensure that the nation's strategic and national security interests are advanced and protected.

### **National interest**

3.25 The Act confers upon the Treasurer the power to decide in each case whether a particular investment would be contrary to the national interest. However, as the Act, associated regulations and policy document do not provide a definition of the 'national interest', this remains a matter that is open to interpretation.

3.26 The legislation empowers the Treasurer with a significant degree of discretion in interpreting and applying the requirements of the Act and the regulations. According to the policy, the discretion of the Treasurer to decide in each case whether a particular investment would be contrary to the national interest provides flexibility to maximise investment flows while 'protecting Australia's interests'.<sup>18</sup>

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15 Treasurer, *Australia's Foreign Investment Policy*, December 2015, p. 4.

16 Treasurer, *Australia's Foreign Investment Policy*, December 2015, p. 4.

17 Treasurer, *Australia's Foreign Investment Policy*, December 2015, p. 4.

18 Treasurer, *Australia's Foreign Investment Policy*, December 2015, p. 1.



## 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.<sup>1</sup>

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.<sup>2</sup> 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.<sup>3</sup>

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

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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.<sup>4</sup>

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.<sup>5</sup>

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.<sup>6</sup>

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.

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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.<sup>7</sup>

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.<sup>8</sup>

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.<sup>9</sup>

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.<sup>10</sup>

### **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.

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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](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).<sup>11</sup> 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.<sup>12</sup>

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.<sup>13</sup>

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'.<sup>14</sup>

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,

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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.

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ensured that FIRB was provided with comprehensive and accurate strategic and operational advice.<sup>15</sup>

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.<sup>16</sup>

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.<sup>17</sup> 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.<sup>18</sup>

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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.



## Chapter 5

### Evidence in support of change to the legislative or regulatory framework

5.1 This chapter considers evidence to the committee which raised concerns regarding the current regime and supports a change to the framework on the basis of economic, national security and national interest factors.

#### Economic considerations

5.2 A number of submitters to the inquiry suggested that the lease of the Port of Darwin raised questions about the long term consequences of allowing critical infrastructure to be either owned or leased by private sector actors.

5.3 In its submission, Victoria University's Institute of Supply Chain and Logistics maintained that the Port of Darwin lease highlighted the potential economic consequences of allowing foreign-owned interests to acquire controlling stakes in Australian land, infrastructure assets or companies:

Further research conducted by the Institute indicates that the general public may not be fully aware of the extent and ramifications of this shift in ownership in businesses that are critical to Australian trade. The main driver for overseas owners is to maximise return on the considerable investment that they have made to acquire assets, with perhaps little concern or knowledge of what is best for Australia's interests...A number of ports...have increased their service charges substantially since being privatised. As these ports have a monopoly position in servicing their hinterland, port users have no choice but to pay these increased charges in order to get their products to and from the port.<sup>1</sup>

5.4 Dr Gennadi Kazakevitch, Deputy Head of the Economics Department at Monash University, also highlighted the potential consequences of allowing foreign investors to acquire significant holdings in Australian companies or infrastructure. Dr Kazakevitch argued that the current foreign investment review process does not adequately consider the governance arrangements of foreign-owned firms seeking to invest in Australia.<sup>2</sup> Dr Kazakevitch maintained that the framework does not sufficiently examine the extent to which a foreign government might be in a position to influence (directly or indirectly) the commercial decisions of a foreign company that owns or operates a business in this country:

Particularly, the 1975 Act does not imply [sic] the FIRB to look into the proportion of foreign government ownership in such a company; involvement of a foreign government in a company's decision making (particularly, through the government's representation on the FIRB of directors); taking government's orders that limit a company's commercial

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1 Victoria University, Institute for Supply Chain and Logistics, *Submission 3*, p. 2.

2 Dr Gennadi Kazakevitch, *Submission 5*, p. 2.

independence, or complying with legislations [sic] beyond the ones that normally regulate commercial decision making.<sup>3</sup>

5.5 These submitters suggested that the current foreign investment review framework requires amendment to address some of the potentially significant economic and political consequences of foreign direct investment in the Australian economy.

5.6 The Maritime Union of Australia (MUA), in a submission to the Northern Territory's Legislative Assembly select committee inquiry, argued that any investment in the Port of Darwin by a private operator will disadvantage some port users. In particular, the MUA questioned the ability of the Australian Competition and Consumer Commission (ACCC) to intervene effectively in any dispute between port users and a private port operator.<sup>4</sup>

5.7 According to the MUA, the arguments in favour of the lease of the Port of Darwin neglected the real-world record of private port operators' investment strategies. It cited the case of Flinders Ports, the private operator of Port Adelaide. The MUA alleged that, while Flinders Ports has made a number of significant investments in Port Adelaide's infrastructure, it has done so in an unbalanced and potentially anti-competitive manner.<sup>5</sup>

5.8 By using its substantial profits from the operation of the port to expand into stevedoring services, the MUA suggests that Flinders Ports has become, in effect, a landlord and a competitor to those companies, such as Patrick and Qube, which also provide stevedoring services at Port Adelaide. According to the MUA, this 'dual' position leaves the door open to infrastructure investment that unfairly advantage the subsidiary companies that are owned by the port operator:

Flinders Ports does have a better record of investing in port infrastructure [compared with other private port operators]. However, the logic of privatisation does mean that investment appears to have been made in an unbalanced way that disadvantages other port users...One result of the expansion of Flinders Ports into stevedoring is that it is effectively both a landlord and a competitor to Patrick and Qube. The ACCC warns against such an outcome in ports.<sup>6</sup>

5.9 Although the NT Government suggested that the ACCC could act as a final arbiter in any dispute between the port operator and the port user, the MUA cast doubt

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3 Dr Gennadi Kazakevitch, *Submission 5*, p. 2.

4 Maritime Union of Australia, *Submission to the Port of Darwin Select Committee, Legislative Assembly of the Northern Territory*, 11 March 2015, p. 2, [http://www.nt.gov.au/lant/parliamentary-business/committees/pod/Submissions/Number\\_3\\_Maritime\\_Union\\_of\\_Australia.pdf](http://www.nt.gov.au/lant/parliamentary-business/committees/pod/Submissions/Number_3_Maritime_Union_of_Australia.pdf) (accessed 9 December 2015).

5 Maritime Union of Australia, *Submission to the Port of Darwin Select Committee, Legislative Assembly of the Northern Territory*, 11 March 2015, p. 17.

6 Maritime Union of Australia, *Submission to the Port of Darwin Select Committee, Legislative Assembly of the Northern Territory*, 11 March 2015, p. 17.



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on this contention. It cited a recent ACCC analysis of stevedoring at Australian ports, *Container Stevedoring Monitoring Report – October 2014*.<sup>7</sup>

5.10 In that report, the ACCC made clear that ports, largely by virtue of their nature as major pieces of critical infrastructure, are usually monopoly or near-monopoly assets. This provides their operators with considerable market power.<sup>8</sup> The ACCC recommended that any government planning to privatise a major piece of critical infrastructure, whether on the base of a long-term lease or an outright sale, must construct a regulatory framework that does not attempt to make the asset more attractive to a potential buyer. In particular, the ACCC took the view that a price monitoring mechanism does not provide an effective restraint on the exercise of market power:

...regulatory arrangements should be determined before the sale, to provide greater regulatory certainty to the purchaser. Governments must carefully consider the form of regulation that is appropriate. A price monitoring regime may be favoured by a government seeking to maximise the sale price. However, in the ACCC's experience, price monitoring does not provide an effective constraint on the exercise of market power, including monopoly power.<sup>9</sup>

5.11 The MUA argued that a leased Port of Darwin has the potential to produce an anti-competitive operating environment. It suggested that the NT Government's decision to lease the Port of Darwin to Landbridge amounted to a transfer of monopoly market power. The MUA maintained that the consequences of this decision are unlikely to be curtailed by a regulatory framework that is based on price monitoring.

### **National security and national interest considerations**

5.12 In its submission to the committee, the Australian Strategic Policy Institute (ASPI) observed that Australia's foreign investment review framework is a multifaceted process that involves a number of discrete and complex steps. Many decisions will touch upon a range of interconnected issues, from national security to the implications of a proposed investment for Australia's competition policy. According to ASPI, the NT's decision to lease the Port of Darwin – and FIRB's response to that decision – highlighted a number of flaws in the review process.

5.13 ASPI maintained that the current framework privileges an expedited review process, whose primary aim is to facilitate a high degree of foreign direct investment. The unintended consequence of this 'structural' bias is to limit the critical attention that

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7 Australian Consumer and Competition Commission, *Container Stevedoring Monitoring Report No. 16*, <https://www.accc.gov.au/system/files/ACCC%20stevedoring%20report%202014.pdf>, (accessed 9 December 2015).

8 Australian Consumer and Competition Commission, *Container Stevedoring Monitoring Report No. 16*, p. 21.

9 Australian Consumer and Competition Commission, *Container Stevedoring Monitoring Report No. 16*, p. 21.

is paid to the national security implications of some foreign investment proposals.<sup>10</sup> As ASPI made clear in its submission:

Our view is that the current legislative and regulatory framework to manage foreign investment is inadequate in a number of respects. Current arrangements do not give sufficient consideration to the national security implications of foreign direct investment, especially as it relates to critical infrastructure.<sup>11</sup>

5.14 According to ASPI, Australia's foreign investment review framework suffers from two interconnected problems. Firstly, the process for assessing foreign investment proposals is largely ad-hoc and lacks sufficient rigour and transparency. Secondly, this lack of procedural clarity brings with it the unintended consequence that governmental oversight, especially at its highest levels, including the National Security Committee of Cabinet, is at times inadequate in critical cases. ASPI maintained that national security concerns are the most likely to be overlooked as a result of a flawed assessment process, and this places the integrity of the review framework in doubt:

The processes for assessing investment proposals are ad-hoc, lack transparency and rigor and do not give government sufficient oversight in critical cases. As is very apparent from recent experience the result is that decisions to proceed – or not to proceed – with specific foreign investment requests are poorly explained to the public and give rise to confusion about how the government has exercised decision-making powers.<sup>12</sup>

5.15 Further, ASPI argued that the flaws in the process are the result of a number of gaps in FIRB's capacity to analyse the likely implications of foreign investment proposals. Among the more significant issues highlighted by ASPI are the following:

- The lack of a statutory basis for FIRB, which means that it cannot be separated from the Treasury, and is therefore, denied sufficient independence in its decision-making processes.
- The fact that FIRB only advises the Treasurer, and therefore does not report, through the Treasurer, to the National Security Committee of Cabinet.
- FIRB's secretariat appears to lack staff with the professional expertise required to make policy recommendations on national security matters.
- FIRB lacks a properly defined concept of critical infrastructure, which reveals a wider failing on the part of the Government.<sup>13</sup>

5.16 ASPI's criticisms of the current process for reviewing proposals for foreign investment, along with its suggested recommendations to address these shortcomings,

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10 Australian Strategic Policy Institute, *Submission 4*, p. 2

11 Australian Strategic Policy Institute, *Submission 4*, p. 2.

12 Australian Strategic Policy Institute, *Submission 4*, pp. 2–3.

13 Australian Strategic Policy Institute, *Submission 4*, pp. 3–6.

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focus on the need to ensure that FIRB does not neglect the national security component of the national interest equation.

5.17 In particular, given the fact that the Government's policy document explicitly defines an approach to assessment that avoids 'hard and fast rules'<sup>14</sup> in favour of a case-by-case assessment, ASPI argued that the current review framework allows national security matters to be effectively sidelined. In part, this is because FIRB's secretariat does not appear to possess sufficient expertise in national security assessments to provide advice that considers more than the economic implications of a proposed investment. ASPI continued:

The current FIRB relies on Defence and the intelligence agencies to advise on the national security impacts of investment...The best way to deal with this situation is to strengthen the FIRB's internal capabilities to advise on national security matters. This will still require drawing on other departments to provide intelligence and other assessments, but it will at least make it possible for the FIRB to ask informed questions...To offer a sense of scale, a statutorily independent FIRB could function with a workforce of twenty to thirty APS staff, of which perhaps ten people might have professional expertise in traditional Treasury domains and ten be seconded from other agencies to work on defence, intelligence, critical infrastructure and national security assessments...<sup>15</sup>

5.18 According to ASPI, another primary fault of the current process is the fact that the concept of critical infrastructure is not a primary consideration in the assessment of proposals for investment.<sup>16</sup> ASPI argued that the concept of critical infrastructure must be central to FIRB's advice to the Treasurer. According to Mr Peter Jennings, Executive Director of ASPI, in leasing the Port of Darwin Australia ceded effective strategic control over a major national security and critical infrastructure asset:

Australia's strategic interests, including responding to increasingly assertive Chinese maritime behaviour in the South and East China seas, now have to be balanced against the reality of operating out of a harbour run by a company whose website proclaims it is "contributing its best to ... realising the great rejuvenation of the Chinese dream". The Port of Darwin lease raises hard questions about the specifics of the deal and how Australian governments make sensible decisions on national security when considering foreign investment proposals.<sup>17</sup>

5.19 ASPI argued that, by ensuring that the concept of critical infrastructure is at the forefront of the review process, it is less likely that national security implications,

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14 Treasurer, *Australia's Foreign Investment Policy*, December 2015, p. 1, [http://firb.gov.au/files/2015/09/Australias\\_Foreign\\_Investment\\_Policy\\_December\\_2015\\_v2.pdf](http://firb.gov.au/files/2015/09/Australias_Foreign_Investment_Policy_December_2015_v2.pdf) p. 1 (accessed 18 January 2016).

15 Australian Strategic Policy Institute, *Submission 4*, p. 4.

16 Australian Strategic Policy Institute, *Submission 4*, p. 6.

17 Peter Jennings, 'Darwin: Port in A Storm', *The Strategist*, 6 November 2015, <http://www.aspistrategist.org.au/darwin-storm-in-a-port/>, (accessed 9 December 2015).

as one component of the national interest equation, will be either overlooked or downplayed.<sup>18</sup> The idea of critical infrastructure departs from the contention that infrastructure is little more than a purely physical asset, to which a straightforward monetary value can be assigned. As ASPI explained, the concept of critical infrastructure implies that some infrastructure assets are vital elements of Australia's national security framework:

From a strategic perspective the assessed dollar value of an element of critical infrastructure may not be the most relevant factor in considering the national security value of a potential foreign investment. There is, after all, only one Port of Darwin regardless of its commercial valuation. 'Infrastructure' shouldn't be thought of as only physical assets, but also production systems and networks. This includes such areas as maritime ports and airports, communications systems, power generation, distribution and transmission, hospitals and medical facilities, critical industrial capabilities used to support the Australian Defence Force, and essential Government infrastructure.<sup>19</sup>

5.20 ASPI further observed that, as the development and administration of the Government's critical infrastructure policy is the responsibility of the Attorney General's Department, it is important that strong ties between FIRB and the department are fostered and maintained.

5.21 Therefore, in order for these changes to occur and to incorporate national security concerns as an integral part of the evaluation of foreign direct investment, ASPI argued that the Government's framework for the assessment of foreign investment proposals must undergo further legislative, regulatory and administrative reform.

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18 Australian Strategic Policy Institute, *Submission 4*, p. 7.

19 Australian Strategic Policy Institute, *Submission 4*, p. 7.

# Chapter 6

## Committee's view and recommendation

6.1 Australia's foreign investment framework must deliver investment that is in the national interest. To achieve this objective, the framework itself must be robust and consistent in its application. It should instil confidence in the Australian public that the systems and processes in place to consider foreign investment applications are effective. It must also provide foreign investors with the confidence that the process for evaluating investment proposals is both efficient and transparent.

6.2 The committee recognises that the key concerns raised in relation to the foreign investment review framework, which came to the fore during the Port of Darwin lease process, relate to the transparency, adequacy, comprehensiveness and timeliness of the review process itself.

6.3 In particular, the committee notes that one of the most significant points of contention in respect of the review framework is the extent to which the facilitation of foreign direct investment overrides national security considerations.

6.4 The capacity of FIRB to provide informed and effective national security-related advice to the Treasurer is a matter of concern.

6.5 The committee recognises that the processes followed by FIRB in assessing proposals for foreign investment require more detailed consideration. As a case in point, the inquiry into the Port of Darwin lease brought to light a number of concerns in relation to the Foreign Investment Review Framework that currently governs decision-making in Australia:

- FIRB, as a non-statutory authority, does not have independent authority to review proposed acquisitions in relation to Australia's long term strategic interests.
- The FIRB process appears to be ad hoc, run on a case by case basis. Consistency in approach and decision making along with the desired transparency and certainty that investors require, was not demonstrated.
- It remains the case under the new regulations that State, Territory and Local Government owned assets, irrespective of their strategic importance, remain exempt from Foreign Investment Review Board scrutiny.
- The Port of Darwin lease announcements indicated that strategic partners such as the US were not necessarily fully advised of developments.

6.6 The committee recognises that regulating foreign investment is a complex and constantly changing policy area that will continue to challenge Australian governments in managing the balance between securing the benefits of such investments without jeopardising Australia's long term strategic interests. As such, the Foreign Investment Review arrangements need to be strengthened in their capacity to support assessments while also ensuring that they can continue to be responsive to new and emerging challenges.

6.7 In light of these concerns, the committee intends to undertake a full review of the current arrangements with a view to considering whether FIRB should be strengthened by being made into a statutory authority with a permanent, dedicated specialised staff. Consideration should also be given to the overall process and stakeholder engagement around such decisions.

6.8 Furthermore, the committee notes that a number of recent legislative and policy changes, which significantly alter Australia's foreign investment regime, have been introduced with seemingly arbitrary thresholds introduced for different investors and types of investments. The first task of a statutory Foreign Investment Review Board could be to develop a clear definition of what is meant by the 'national interest' and on this basis to review the regulations, restrictions and exemptions of the current framework.

6.9 The committee also intends to investigate the current thresholds guiding Government scrutiny of foreign investments in the agricultural sector to ensure that clear and transparent principles can be demonstrated to justify specific thresholds and eligibility rules.

6.10 In relation to agricultural investments, concerns have been raised regarding the investment screening threshold for agricultural land and agribusiness. What requires further consideration is whether these are likely to curtail the flow of investment into Australia's agricultural industry.

6.11 In order to continue its examination of the foreign investment review framework and comprehensively review the current arrangements as well as consider the remaining inquiry terms of reference, the committee recommends that the Senate extend the inquiry reporting date.

### **Recommendation 1**

**6.12 The committee recommends that the Senate extend the inquiry reporting date to 8 April 2016.**

**Senator Chris Ketter**

**Chair**

## **Additional comments by Coalition Senators**

1.1 Coalition Senators do not support the position set out in the majority interim report that the scope of the current inquiry be expanded to encompass a re-examination of the recent legislative changes to Australia's Foreign Investment Review Framework.

1.2 In justifying this decision, the committee states that (6.8) ‘... a number of recent legislative and policy changes, which significantly alter Australia’s foreign investment regime, have been introduced with seemingly arbitrary thresholds introduced for different investors and types of investments.’ The committee also implies that the recent changes to Australia’s foreign investment regime lack clarity and transparency and threaten to curtail the flow of investment into Australia’s agricultural industry (6.9–10).

1.3 Before addressing these claims we note that given the focus of this inquiry on foreign investment in Australian assets of strategic or national significance it is curious that nowhere in the interim report is there clear reference to the Treasurer’s public statements making clear his intention to introduce further amendments to the Foreign Acquisitions and Takeovers Legislation Amendment Bill 2015 to ensure proper federal government oversight of foreign investment proposals in critical national infrastructure. For example, at his 10 December 2015 press conference Treasurer Morrison said:

[T]he Government will be proceeding with our regulatory change to ensure that strategic critical infrastructure assets at a state and territory level will be subject to FIRB processes regardless of whether it's a state owned enterprise, foreign investor or otherwise. This is a process we put in place some months ago and have been consulting with the states and territories. ... This will mean, of course, that we will seek to work very promptly with the states and territories where there are acquisitions that relate to those types of assets and there needs to be, I think, a very professional and efficient and high-priority response from FIRB to those requests and some preparatory work done with states and territories also to ensure that the process moves as smoothly as possible. We welcome foreign investment in this country, but it must be consistent with the national interest and state and territory Treasurers certainly support those principles and I think there was very good consensus on having a very workable system.

1.4 The Treasurer went on to note the appointments to the FIRB board in early December, in particular, David Irvine and David Peever, both of whom, the Treasurer noted, bring great experience in the area of security and the strategic national interest and add to the existing very strong commercial expertise on the board. Mr Morrison stated that:

When you have a strong FIRB doing its job, applying the rules, protecting the national interest, that can only build confidence in foreign investment in this country and that's what the Government is doing.<sup>1</sup>

1.5 This oversight notwithstanding, the claims by the committee (6.8-10) about the changes introduced via the Foreign Acquisitions and Takeovers Legislation Amendment Bill 2015 highlight a lack of appreciation of the rigorous and extensive policy development processes underpinning the recent changes, which included widespread public consultation and consideration of a range of views from stakeholders.

1.6 For example, the lowering of the threshold for foreign investment in agribusiness — from \$252 million (as at 1 January 2015, indexed) to \$55 million (as at 1 January 2016, indexed) — is based on a commonsense definition of agribusiness that captures primary production businesses and first stage processors (including meat, poultry, seafood, dairy, fruit & vegetable processing, and sugar, grains and oils & fat manufacturing). This change, along with the other changes to Australia's foreign investment regime were developed and examined through a number of mechanisms including:

- the development of the Coalition policy discussion paper on foreign investment in 2011-2012;
- the Senate Rural Regional Affairs and Transport References Committee inquiry which endorsed the key elements of the current policy in its June 2013 report Foreign Investment and the National Interest;
- the Senate Economics Legislation Committee inquiry and report of October 2015, Foreign Acquisitions and Takeovers Legislation Amendment Bill 2015; and
- a Regulation Impact Statement (RIS) was prepared and certified by the Treasury under the Australian Government's best practice regulation requirements. As part of this process, extensive additional public consultation was undertaken with a broad range of stakeholders on all elements, the details of which are set out in the RIS. The RIS was assessed as compliant and consistent with best practice by the Office of Best Practice Regulation.

1.7 In June 2011, in response to growing community expressions of unease about the apparent increase in foreign investment in agricultural land and agribusinesses, the Coalition Opposition formed a Coalition Working Group to investigate options to strengthen the rules governing the sale of agricultural land and agribusinesses to foreign entities. This led to the Coalition Opposition put out a public discussion paper in August 2012, "Foreign Investment in Australian agricultural land and agribusiness".

1.8 The paper looked at examples of Australian agricultural land values, which made it clear that the then \$244 million threshold that applied was far too high. The

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1 Morrison 2015, <http://sjm.ministers.treasury.gov.au/transcript/067-2015/>



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paper also looked at foreign investment rules in a range of other countries - for example, that in NZ any proposed acquisition of agricultural land over 5 hectares had to be approved. The Coalition WG discussed a range of possible new scrutiny threshold levels for agricultural land, and settled on \$15 million (cumulative) as a more realistic but also reasonable level. The \$53 million threshold recommended for agribusinesses was chosen to correlate with the then \$53 million level used for FIRB scrutiny of proposed foreign purchases of commercial real estate. With annual indexation, this \$53 million has been adjusted to \$55 million (as at 1 January 2015).

1.9 The exceptions to the new thresholds for agricultural and agribusiness are those related to foreign investment thresholds included in FTAs (or the specific investment agreement with NZ) already in existence before the September 2013 election of the Coalition Government with:

- USA, NZ and Chile: \$1,094 million (as at 1 January 2015, indexed annually)
- Singapore and Thailand: \$50 million (fixed minimum level).

1.10 Given that any change to these thresholds in these pre-existing FTAs would require renegotiation of each agreement and possible request for compensation in case of changing the thresholds, it was recognised that this could be a time-consuming and possibly expensive exercise. However, in all the FTAs concluded by the Coalition government, the lower thresholds for agricultural land and agribusiness have been included, namely in KAFTA, JAEPA and ChAFTA, and are also expected to apply to TPP partners who do not already have pre-existing FTAs with Australia which allow higher thresholds. (The 12 countries party to the Trans-Pacific Partnership Agreement are: Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, Peru, New Zealand, Singapore, the United States and Vietnam.)

1.11 In addition, it is surprising that the Committee interim report appears to find credible the claims by some that the lower FIRB scrutiny thresholds for agricultural land and agribusiness will deter genuine foreign investors in Australian agricultural assets. Over the past decade, agricultural assets have become increasingly attractive to global investors as an asset class, and Australia remains one of the most attractive destinations for such foreign investment. In today's twenty-first century world, the story of agriculture has changed dramatically, with global food and fibre demand projected to almost double by 2050 to feed and clothe a world population of almost 10 billion. Good quality agricultural and water assets in stable geographical locations will become increasingly scarce resources, and foreign investors and many foreign governments can see this.

1.12 The Opposition, and some vested interests, have made the assertion that these new measures by the government would deter foreign investment in Australian agriculture. Anyone who follows trends in investment in Australian agriculture would know that there has been no diminution of foreign investor interest which continues apace. Finally it should be noted that it was not the purpose of the Coalition changes to deter foreign investment — rather the purpose was to provide greater clarity and certainty about foreign investment trends to reassure the Australian community, and as noted above, represents the Coalition Government delivering on its September 2013 election commitments.

1.13 In conclusion, given the extensive, rigorous and transparent public policy development and assessments processes associated with the Coalition's broader foreign investment changes highlighted above, the only realistic conclusion that can be drawn from the majority committee's stated intention to re-examine the recent changes to Australia's Foreign Investment Review Framework is unlikely to be an effective use of scarce committee resources.

**Senator Matthew Canavan**  
**Committee Member**

**Senator Sean Edwards**  
**Deputy Chair**

# **Appendix 1**

## **Public hearing and witnesses**

### **Canberra, 15 December 2015**

DONELLY, Mr Robert, First Assistant Secretary, Foreign Investment and Trade Policy Division, Department of Treasury.

HARTLAND, Ms Kerri, Deputy Director-General, Australian Security Intelligence Organisation.

HUGHES, Mr Michael Colin (Mike), Director, Landbridge Infrastructure Australia Pty Ltd.

JENNINGS, Mr Peter, Executive Director, Australian Strategic Policy Institute.

LEWIS, Mr Duncan Edward, AO, DSC, CSC, Director-General, Australian Security Intelligence Organisation.

MURPHY, Mr Jason Warrick, Acting Branch Official, Maritime Union of Australia.

O'CONNOR, Mr Terrence Joseph, Chief Executive, Darwin Port.

RICHARDSON, Mr Dennis AO, Secretary, Department of Defence.

RYAN, Ms Jodie, Under Treasurer, Northern Territory Department of Treasury and Finance.

TAN, Ms Anne, Acting Coordinator-General and Port of Darwin Project Lead, Northern Territory Office of Major Projects, Infrastructure and Investment.

THOMAS, Mr Trevor, Principal Adviser, Foreign Investment and Trade Policy Division, Department of Treasury.

THOMAS, Rear Admiral Clint, Commander Joint Logistics, Department of Defence.

