

Chapter 3

Critical infrastructure and the foreign investment review process

Port of Darwin lease

3.1 In its interim report, the committee considered the Northern Territory Government's decision to lease the Port of Darwin to Landbridge Group (a Chinese company). The committee detailed evidence which raised concerns about the adequacy and comprehensiveness of the FIRB review process in relation to the Port of Darwin matter. The evidence brought to the fore questions about the transparency, adequacy, comprehensiveness and timeliness of the review process itself.¹

3.2 The committee's examination of the Port of Darwin lease brought to light a number of concerns in respect of the review framework's capacity to assess the risks and benefits of foreign investment proposals from both national security and economic development perspectives. In particular, the following issues were highlighted:

- 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 appeared to be ad hoc, operating on a case by case basis. Consistency in approach and decision making, along with the desired transparency and certainty that investors and the Australian public require, was not demonstrated.
- The Port of Darwin lease announcements indicated that strategic partners such as the US were not necessarily fully advised of developments.²

3.3 The committee took the view that FIRB's assessment processes, especially in relation to the sale or lease of critical infrastructure assets, such as the Port of Darwin, Transgrid or S. Kidman and Co. Ltd, required further examination in terms of their capacity to protect and further Australia's national interest.

Transgrid lease

3.4 In June 2014, the Premier of New South Wales (NSW), the Hon. Mike Baird MP, announced that the NSW Government intended to lease 49 per cent of the state's electricity network as part of its *Rebuilding NSW* plan. Mr Baird went on to announce that the proceeds of the lease arrangement, projected to total \$20 billion, would be

1 Senate Economics References Committee, *Foreign Investment Review Framework: Interim Report*, February 2016, p. 29.

2 Senate Economics References Committee, *Foreign Investment Review Framework: Interim Report*, February 2016, p. 29.

used to fund 'once-in-a-generation' investments in productivity enhancing infrastructure across NSW.³

3.5 The plan to lease 49 per cent of the state's electricity network assets called for the entirety of Transgrid to be leased to private investors. As the largest single electricity provider in NSW, Transgrid is responsible for the management and operation of around 12,800 kilometres of transmission lines and underground cables. It connects generators, distributors and end users in both NSW and the Australian Capital Territory (ACT), and possesses links with Queensland and Victoria for the facilitation of interstate energy trading.⁴

3.6 The NSW Government's leasing policy also included the proposal to lease 50.4 per cent of two other state-owned electricity providers, Ausgrid and Endeavour Energy. All three leases would be offered over a period of 99 years.⁵ Essential Energy, a state-owned corporation responsible for building, operating and maintaining NSW's electricity grid, was not included in the government's leasing plans.⁶

3.7 After the March 2015 state election, legislation enabling the lease transactions was introduced into the NSW Parliament. On 4 June 2015, the *Electricity Network Assets (Authorised Transactions) Act 2015* was passed by the NSW Parliament, clearing the way for the state government to begin the process of leasing 49 per cent of NSW's electricity network.⁷

3.8 On 25 June 2015, the NSW Treasurer, the Hon. Gladys Berejiklian MP, announced the opening of the expression of interest (EOI) process for the 99 year lease of Transgrid to private investors.⁸ On 25 November 2015, approximately five months after the commencement of the EOI process, the NSW Government announced that an Australia-led consortium, NSW Electricity Networks, had made the successful bid for the Transgrid lease. After a consultation and assessment process, which involved FIRB; the Australian Taxation Office (ATO); and the Australian Competition and Consumer Commission (ACCC), NSW Electricity Networks agreed

3 The NSW Treasury, *Electricity Network Transactions*, http://www.treasury.nsw.gov.au/electricity_network_transactions (accessed 29 February 2016).

4 The NSW Treasury, *About Transgrid*, http://www.austlii.edu.au/au/legis/nsw/consol_act/enata2015566/ (accessed 29 February 2016).

5 The NSW Treasury, *Electricity Network Transactions*, http://www.treasury.nsw.gov.au/electricity_network_transactions (accessed 29 February 2016).

6 The NSW Treasury, *Electricity Network Transactions*.

7 See the *Electricity Network Assets (Authorised Transactions) Act 2015*, http://www.austlii.edu.au/au/legis/nsw/consol_act/enata2015566/ (accessed 29 February 2016).

8 The Hon. Gladys Berejiklian MP, Treasurer of NSW, 'Major Milestone in Poles and Wires Lease', *Media Release*, 25 June 2015, http://www.treasury.nsw.gov.au/_data/assets/pdf_file/0008/126467/20150625_Gladys_Berejiklian_-_Major_milestone_in_poles_and_wires_lease.pdf (accessed 29 February 2016).

to pay the NSW Government a total of \$10.258 billion for the right to lease the entirety of Transgrid for 99 years.⁹

3.9 As a precondition of the award of the lease, NSW Electricity Networks agreed to sign an *Electricity Price Guarantee*, an undertaking that committed the consortium to ensuring that network charges will be lower at the end of the financial year 2018–2019 than they were on 30 June 2014.¹⁰

3.10 NSW Electricity Networks is a consortium made up of five private investors, including two Australian companies, which together have a 35.03 per cent stake in Transgrid. The five members of the consortium are:

- Caisse de dépôt et placement du Québec (CDPQ), a Canadian pension fund with a total stake of 24.99 per cent.
- Hastings, as the manager of Utilities Trust of Australia, which owns a 20.02 per cent stake in Transgrid.
- Tawreed Investments Limited, the global direct infrastructure vehicle of the Abu Dhabi Investment Authority, with a total stake of 19.99 per cent.
- Wren House Infrastructure, a wholly-owned subsidiary of the Kuwait Investment Authority, which also has a 19.99 per cent stake in the Transgrid lease.
- Spark Infrastructure, an Australian infrastructure manager and an ASX-listed owner of energy infrastructure, which has a total stake in Transgrid of 15.01 per cent.¹¹

3.11 As a consequence of the Transgrid lease, the NSW Government announced that it would be eligible for approximately \$1 billion in additional Commonwealth infrastructure funding, on the basis of the National Partnership Agreement on Asset Recycling.¹²

9 The Hon. Mike Baird MP, Premier of NSW, and the Hon. Gladys Berejiklian MP, Treasurer of NSW, 'NSW Achieves Outstanding Result in \$10.258 billion Transgrid lease', *Media Release*, 25 November 2015, http://www.treasury.nsw.gov.au/_data/assets/pdf_file/0013/127030/25-11-15_NSW_achieves_outstanding_result_in_TransGrid_lease.pdf (accessed 29 February 2016).

10 For an overview of the legislated requirements of the *Electricity Price Guarantee*, see Section 8 of the *Electricity Network Assets (Authorised Transactions) Act 2015*, http://www.austlii.edu.au/au/legis/nsw/consol_act/enata2015566/s8.html (accessed 29 February 2016).

11 'NSW Achieves Outstanding Result in \$10.258 billion Transgrid lease', *Media release*, 25 November 2015, http://www.treasury.nsw.gov.au/_data/assets/pdf_file/0013/127030/25-11-15_NSW_achieves_outstanding_result_in_TransGrid_lease.pdf (accessed 29 February 2016).

12 The NSW Treasury, *Electricity Network Transactions*, http://www.treasury.nsw.gov.au/electricity_network_transactions (accessed 29 February 2016).

3.12 According to the NSW Government, the EOI process for the eventual lease of Ausgrid, the second largest provider in the NSW electricity network, was launched 24 November 2015.¹³ The EOI phase for the lease of Endeavour Energy, the final component of the state's electricity assets to be leased, is also currently underway. At the time of writing, the NSW Government had made no announcement in relation to indicative bids for either company.

Critical infrastructure

3.13 Critical infrastructure assets do not feature as a separate component of Australia's national interest test for foreign investment, as is the case in the US. However, the Government has in place a strategy aimed at ensuring that the nation's critical infrastructure assets can be operated under all conditions. This overarching policy position is outlined in the Government's *Critical Infrastructure Resilience Strategy: Plan* (the Strategy).¹⁴

3.14 The Strategy is administered by the Attorney General's Department, which is also the lead Commonwealth agency on matters relating to critical infrastructure resilience policy. The Strategy provides a definition of critical infrastructure that is shared by the Commonwealth, state and territory governments:

Those physical networks, supply chains, information technologies and communication networks which, if destroyed, degraded or rendered unavailable for an extended period, would significantly impact the social or economic wellbeing of the nation or affect Australia's ability to conduct national defence and ensure national security.¹⁵

3.15 For the purpose of defining the destruction or disruption of critical infrastructure assets, the Strategy uses the phrase 'significantly impact' to mean an event or incident that threatens public safety and confidence; threatens national economic security; harms Australia's international competitiveness; or otherwise impedes the continuity of government and its services.¹⁶ To prevent these effects from degrading or undermining Australia's national interest, the Strategy seeks to ensure that the nation's critical infrastructure assets can continue to operate effectively in the face of all threats and risks.¹⁷

3.16 In order to achieve its aim of ensuring that critical infrastructure assets can operate 'in the face of all hazards', the Government has adopted an approach that seeks

13 The NSW Treasury, *About Ausgrid*, http://www.treasury.nsw.gov.au/electricity_network_transactions/about_ausgrid (accessed 29 February 2016).

14 Australian Government, *Critical Infrastructure Resilience Strategy: Plan*, <http://www.tisn.gov.au/Documents/CriticalInfrastructureResilienceStrategyPlan.PDF> (accessed 21 March 2016).

15 Australian Government, *Critical Infrastructure Resilience Strategy: Plan*, p. 1.

16 Australian Government, *Critical Infrastructure Resilience Strategy: Plan*, p. 1.

17 Australian Government, *Critical Infrastructure Resilience Strategy: Plan*, p. 1.

to produce a non-regulatory business-government partnership.¹⁸ This approach is founded on two principal policy objectives:

- That critical infrastructure owners and operators can effectively manage reasonably foreseeable risks to the continuity of their operations, through a mature, risk-based approach;
- That critical infrastructure owners and operators can be effective at managing unforeseen risks to the continuity of their operations through an organisational resilience approach.¹⁹

3.17 On the basis of its partnership approach to managing threats and risks to Australia's critical infrastructure, the Government seeks to achieve a number of key outcomes including:

- a strong and effective business-government partnership;
- enhanced risk management of the operating environment;
- effective understanding and management of strategic issues; and
- a mature understanding and application of organisational resilience.

3.18 The Government's partnership approach to securing Australia's critical infrastructure rests on effective engagement with both industry and other levels of government. In order to engage and coordinate effectively with industry participants, in 2003, the Australian Government established the Trusted Information Sharing Network (TISN). This network allows critical infrastructure owners and operators across seven sector groups to share information and cooperate within a secure environment, in order to address a range of security and business continuity challenges.²⁰ The seven groups within TISN comprise the following sectoral participants: banking and finance, communications, energy, food and grocery, health, transport and water services.²¹

3.19 Additionally, the Government's Critical Infrastructure Advisory Council (CIAC) provides both coordination and strategic guidance for the members of TISN, and comprises the chairpersons from the seven sectoral groups; senior Australian Government representatives from the relevant agencies; and senior state and territory government representatives.²²

3.20 In addition to participating in TISN, state and territory governments also have defined roles and responsibilities in relation to the resilience of critical infrastructure.

18 Australian Government, *Critical Infrastructure Resilience Strategy: Plan*, p. 1 <http://www.tisn.gov.au/Documents/CriticalInfrastructureResilienceStrategyPlan.PDF> (accessed 21 March 2016).

19 Australian Government, *Critical Infrastructure Resilience Strategy: Plan*, p. 1.

20 Australian Government, *Critical Infrastructure Resilience Strategy: Plan*, p. 2.

21 Australian Government, *Critical Infrastructure Resilience Strategy: Plan*, p. 2.

22 Australian Government, *Critical Infrastructure Resilience Strategy: Plan*, p. 2.

Given Australia's federal system of government, state and territory governments are responsible for managing all threats to life and property that might occur within their jurisdictions. They are also responsible for providing a range of basic services, such as healthcare and the supply of water, which form part of Australia's critical infrastructure assets. As the Strategy makes clear:

All Australian state and territory governments have their own critical infrastructure programs according to the operating environment and arrangements for each jurisdiction. The Strategy aims to complement these programs and support their objectives wherever possible...It is essential that critical infrastructure owners and operators know and understand the jurisdictional response arrangements and have good working relationships with the appropriate state and territory agencies.²³

3.21 While Australia's foreign investment review process does not formally define critical infrastructure assets, or incorporate a codified definition of critical infrastructure in the national interest test, the government maintains a strategic approach to the protection of critical infrastructure from a range of threats and risks.

Concerns regarding the current framework in relation to critical infrastructure

3.22 The Australian Strategic Policy Institute (ASPI) raised a number of concerns regarding the adequacy of critical infrastructure protection under Australia's foreign investment review process. At the heart of its concerns was the need for a comprehensive, high-level review process which is consistent, transparent and robust.

State Owned Enterprises

3.23 Drawing on the Transgrid matter, ASPI highlighted that one of the unsuccessful bidders for the lease was State Grid, a Chinese State Owned Enterprise (SOE).²⁴ According to ASPI, the close links between Chinese SOEs and the ruling Communist Party of China (CPC) has the effect of making these entities into little more than instruments of the CPC, even though they operate in the global free market.²⁵ ASPI raised particular concerns that the close and ambiguous relationship between the CPC and SOEs does not appear to be sufficiently or effectively captured in FIRB's review and assessment processes.²⁶

3.24 ASPI held the view that, in light of the close links between SOEs, including major corporations like State Grid, and the CPC, Chinese SOEs should not be

23 Australian Government, *Critical Infrastructure Resilience Strategy: Plan*, p. 2 <http://www.tisn.gov.au/Documents/CriticalInfrastructureResilienceStrategyPlan.PDF> (accessed 21 March 2016).

24 Australian Strategic Policy Institute, *Supplementary Submission 4.1*, p. 1.

25 Australian Strategic Policy Institute, *Supplementary Submission 4.1*, p. 1.

26 Australian Strategic Policy Institute, *Supplementary Submission 4.1*, p. 1.

considered as appropriate bidders for Australian critical infrastructure assets.²⁷ ASPI further argued that:

These considerations...should lead to a judgement that Chinese SOEs ought not be considered as appropriate partners in NSW's 'poles and wires' infrastructure. No Australian company would ever be allowed by Chinese authorities to tender for parts of their electricity distribution and transmission network. Indeed, State Grid was kept as an SOE at a time when Beijing privatised many businesses precisely because power infrastructure was seen to be critical to Chinese security and must be kept in Government hands.²⁸

3.25 ASPI maintained that Australia's electricity networks are potentially vulnerable to a variety of different forms of cyber intrusion and attack, and that some networks, such as the Transgrid distribution network, are unusually significant in virtue of their strategic importance.

3.26 According to ASPI, the number and scale of recent attacks, principally in the cyber sphere, against critical infrastructure targets has increased significantly.²⁹ ASPI observed that the US has seen a number of successful cyber-attacks on major electricity networks over the last few years. It argued that such attacks have the potential to cause significant damage to vital elements of critical infrastructure and national security.³⁰

3.27 ASPI pointed out that NSW's electricity distribution system is a significant part of Australia's critical infrastructure because major parts of the Commonwealth Government, including the defence and intelligence communities, rely on the electricity supply from that network.³¹ ASPI continued:

The Committee should note that the NSW 'poles and wires' network is as vulnerable to cyber attack as the US electricity distribution network or the networks of other countries. Moreover there is increasing interest on the part of malicious cyber actors to explore how to damage the critical infrastructure of potential opponents. Australia cannot isolate itself from these international developments...NSW's electrical transmission and distribution system is an element of critical infrastructure on which significant parts of the Federal Government, Defence and Intelligence community relies. We cannot afford to be casual about the security of this critical infrastructure.³²

3.28 ASPI criticised the view that the vulnerability of critical infrastructure to hacking means that it is unimportant who owns these assets. ASPI maintained that

27 Australian Strategic Policy Institute, *Supplementary Submission 4.1*, p. 4.

28 Australian Strategic Policy Institute, *Supplementary Submission 4.1*, p. 4.

29 Australian Strategic Policy Institute, *Supplementary Submission 4.1*, p. 2.

30 Australian Strategic Policy Institute, *Supplementary Submission 4.1*, p. 2.

31 Australian Strategic Policy Institute, *Supplementary Submission 4.1*, p. 2.

32 Australian Strategic Policy Institute, *Supplementary Submission 4.1*, pp. 3-4.

physical access to control systems is still a significant advantage in an attempt to sabotage a critical infrastructure asset, such as an electricity transmission network, and that control systems remain more vulnerable to 'locally-launched' attacks than they are to intrusion attempts from remote systems.³³ ASPI maintained that arguments to the contrary are a 'cyber red herring':

It has been claimed that, if Australian infrastructure is vulnerable to Chinese cyber hacking, then the ownership and control of our infrastructure should make no difference. This is a council of despair, and hardly a basis on which to make sensible decisions about controlling our critical infrastructure. It remains the case that physical access is by far the easiest way to tamper with control systems, as, while effective, remote access can take a great deal of time and requires a high degree of technical ability. Sensible strategies to manage security around physical and cyber access to control systems of critical infrastructure will go a very long way to protecting Australian interests.³⁴

3.29 ASPI welcomed the fact that the NSW Government, after consulting with FIRB and other Commonwealth agencies, did not award the 99 year of Transgrid to bids from consortia that included Chinese State-owned Enterprises (SOEs). However, ASPI also questioned the extent to which this decision was based on security considerations.³⁵ ASPI concluded that the decision does not constitute evidence that the foreign investment review process adequately considers, in every case, the national security implications of foreign investment, especially in respect of critical infrastructure assets.³⁶

Ad hoc and opaque process

3.30 Mr Peter Jennings, Executive Director of ASPI, argued that FIRB does not have in place a robust framework for the assessment of the national security implications of some forms of foreign investment. This is particularly significant because the review process is conducted on a case-by-case basis. While providing for flexibility, under such a system, it is unlikely that sufficiently clear, consistent and rigorous procedures for assessment are currently being followed. Mr Jennings suggested that:

A robust framework would start with a series of fairly defined procedures that could be applied in any test of foreign direct investment. As I say, a robust test is one that could be replicated over any foreign investment application. What I find disturbing is that there seems to be almost a, sort of, bespoke process of interaction that takes place between agencies that is reinvented every single time one of these proposals comes forward.³⁷

33 Australian Strategic Policy Institute, *Supplementary Submission 4.1*, p. 5.

34 Australian Strategic Policy Institute, *Supplementary Submission 4.1*, p. 5.

35 Australian Strategic Policy Institute, *Supplementary Submission 4.1*, p. 4.

36 Australian Strategic Policy Institute, *Supplementary Submission 4.1*, p. 4.

37 Mr Peter Jennings, Australian Strategic Policy Institute, *Committee Hansard*, 10 March 2016, p. 15.

3.31 Mr Jennings further maintained that the current assessment process needs to be supplemented by the establishment of an additional committee at the deputy secretary level. This would provide the additional, senior-level scrutiny that would help to produce a more thorough assessment framework.³⁸ It would also help to ensure that those agencies that are most central to the assessment process, such as the Department of Defence (Defence) and Treasury, are required to undertake a formal assessment process that is decisively above the desk officer level:

It [the review process] can be very informal or could be nothing more than a phone call between desk-level officials where one says, 'We don't have problem,' and that seems to be the end of the discussion. Our submission to the committee suggested that, at the very least, there ought to be a deputy secretary level committee, which would create some structures and processes that would require agencies to go through somewhat more formal evaluations.³⁹

3.32 ASPI suggested that the current FIRB process remains largely opaque. In particular, it criticised the Treasury's view that the current assessment process is necessary to create community confidence in the foreign investment review framework. ASPI argued that 'it is difficult to see how such an opaque and impenetrable process can create any basis for public confidence in FIRB decisions.'⁴⁰

Support for the current framework in relation to critical infrastructure

3.33 According to the Attorney General's Department (AGD), foreign investment plays a significant role in maintaining the resilience of Australia's critical infrastructure assets.⁴¹ AGD further observed that, in a relatively small number of cases, foreign investment in critical infrastructure can pose a number of potential risks to Australia's national security, which require appropriate consideration and management.⁴²

Whole-of-government assessment process

3.34 AGD maintained that well established mechanisms already exist within the Commonwealth Government to facilitate the effective cooperation of agencies in assessing the risks posed by some types of foreign investment.⁴³ Ms Katherine Jones, Deputy Secretary for National Security and Emergency Management, observed that

38 Mr Peter Jennings, Australian Strategic Policy Institute, *Committee Hansard*, 10 March 2016, p. 15.

39 Mr Peter Jennings, Australian Strategic Policy Institute, *Committee Hansard*, 10 March 2016, p. 15.

40 Australian Strategic Policy Institute, *Supplementary Submission 4.1*, p. 6.

41 Ms Katherine Jones, Attorney General's Department, *Committee Hansard*, 10 March 2016, p. 32.

42 Ms Katherine Jones, Attorney General's Department, *Committee Hansard*, 10 March 2016, p. 32.

43 Ms Katherine Jones, Attorney General's Department, *Committee Hansard*, 10 March 2016, p. 34.

the AGD engages on a regular basis with agencies that have an interest in foreign investment in critical infrastructure sectors:

...we do have well established mechanisms for working across the Commonwealth government, and we engage very regularly with a whole range of agencies that may have interest generally in foreign investment in critical infrastructure but specifically in relation to particular elements of our critical infrastructure sectors.⁴⁴

3.35 Ms Jones informed the committee that in 2014–2015, the AGD was involved in the assessment of 54 cases that were referred to it by FIRB. The assessment process involved liaising with other Commonwealth Government agencies, including Defence and the Australian Security and Intelligence Organisation (ASIO).⁴⁵

3.36 Ms Jones suggested that one of ASPI's criticisms of the review process – that it lacks a senior officials' committee, ideally at the deputy secretary level – had been addressed. She explained that a committee at the deputy secretary level already meets on a regular basis, and that it discusses issues that arise from foreign investment in critical infrastructure.⁴⁶ Over the past six months, the volume of work addressed by the committee had increased substantially.⁴⁷ Ms Jones also pointed out that the committee's work is informed by contributions from a large number of agencies, including the Departments of Foreign Affairs and Trade (DFAT); Prime Minister and Cabinet (DPMC); Agriculture and Water Resources (DAWS); Infrastructure and Regional Development (DIRD); Defence; AGD; and ASIO.⁴⁸

3.37 In terms of the AGD's contribution to the investment review process, the department assesses proposals on the basis of their potential effects on the continuity of the services provided by the critical infrastructure asset in question.⁴⁹ In carrying out its assessment, the department also liaises with national security agencies and the relevant line agencies, in order to provide a comprehensive evidence base for the department's final assessment of the potential risks and benefits of the proposed investment.⁵⁰

44 Ms Katherine Jones, Attorney General's Department, *Committee Hansard*, 10 March 2016, p. 34.

45 Ms Katherine Jones, Attorney General's Department, *Committee Hansard*, 10 March 2016, p. 35.

46 Ms Katherine Jones, Attorney General's Department, *Committee Hansard*, 10 March 2016, p. 35.

47 Ms Katherine Jones, Attorney General's Department, *Committee Hansard*, 10 March 2016, p. 35.

48 Ms Katherine Jones, Attorney General's Department, *Committee Hansard*, 10 March 2016, p. 35.

49 Ms Katherine Jones, Attorney General's Department, *Committee Hansard*, 10 March 2016, p. 33.

50 Ms Katherine Jones, Attorney General's Department, *Committee Hansard*, 10 March 2016, p. 33.

3.38 According to the AGD, the department's assessment process involves a consideration of the applicant; the nature of the investment proposal; the criticality and potential vulnerabilities of the infrastructure being acquired; and the general characteristics of the critical infrastructure sector in which the investment is to occur.⁵¹

3.39 In addition to the contributions of other Commonwealth agencies to the assessment of proposals, the Australian Government, represented by the AGD, engages with a number of key international partners on questions of critical infrastructure security and resilience.⁵² In particular, the Australian Government actively participates in a well-established forum on critical infrastructure security with its 'five eyes' partners.⁵³ Known as the 'Critical Five', the forum consists of senior representatives from the 'five eyes' intelligence alliance, comprising the US, Britain, Australia, Canada and New Zealand. The focus of the forum is on improving information sharing and cooperation on a range of common threats to critical infrastructure.⁵⁴ Ms Jones observed that:

Australia plays a leading role in this forum and has specifically led initiatives to deliver enhanced information-sharing on foreign investment in critical infrastructure, including best practice approaches for managing national security risks over the past three years.⁵⁵

3.40 DFAT also explained its role in the foreign investment review process to the committee. According to Mr Justin Brown, Acting Deputy Secretary, DFAT provides a range of information, analyses and assessments to assist in the Government's decision-making process. DFAT provides FIRB with any information that might be valuable in the assessment process. As Mr Brown explained:

We also provide any other information we think might be valuable for the government to take into account. Quite often that will include what we might describe as 'broader foreign and trade policy considerations'. I mentioned earlier that we have free trade obligations with a large number of countries now. We would typically provide advice on any legal obligations or compliance issues as part of these agreements. We would also look at the broader trade and investment relationship with those countries – whether there are any other issues that might impact on the government's decision. We tend to cast the net very wide. We typically consult with our diplomatic

51 Ms Katherine Jones, Attorney General's Department, *Committee Hansard*, 10 March 2016, p. 33.

52 Ms Katherine Jones, Attorney General's Department, *Committee Hansard*, 10 March 2016, p. 33.

53 Ms Katherine Jones, Attorney General's Department, *Committee Hansard*, 10 March 2016, p. 33.

54 Ms Katherine Jones, Attorney General's Department, *Committee Hansard*, 10 March 2016, p. 33.

55 Ms Katherine Jones, Attorney General's Department, *Committee Hansard*, 10 March 2016, p. 33.

networks in a pretty broad way to try to ensure that all of our assets and the intelligence from within our system are brought to bear and that we provide the most comprehensive input we can into the whole-of-government process.⁵⁶

3.41 In its submission, the Treasury reiterated the point that one of the fundamental aims of the FIRB assessment process, in addition to facilitating foreign investment in Australia, is to ensure that the Treasurer receives comprehensive, thorough and rigorous whole-of-government advice on any potential national interest concerns that arise from a proposed foreign investment.⁵⁷ Treasury also pointed out that FIRB is always involved, early and directly, in the consideration of any investment proposals that are assessed to be either significant or complex.⁵⁸

3.42 According to the Treasury, the review process is fundamentally based on a thorough consultation process, one that not only involves a large number of Commonwealth agencies, but also takes in early and comprehensive consultation with state and territory governments:

Treasury consults with Australian, state and territory government departments, national security agencies and authorities with responsibilities relevant to the proposal. Advice and comments provided by such agencies are important in assessing the implications of proposals and, in particular, in determining whether they potentially raise any national interest issues. For example, advice from the relevant national security agencies is relied upon for assessments as to whether an investment raises national security concerns.⁵⁹

3.43 In its submission, the Treasury noted that the assessment and consultation process in relation to the Transgrid lease lasted for more than 12 months, with FIRB engaging with both the NSW Government and a number of Commonwealth agencies in order to ensure that all national interest considerations were addressed.⁶⁰

3.44 In particular, FIRB's assessment and consultation process led to the implementation of a range of safeguards as a condition of the lease. These reflect the fact that the Transgrid electricity transmission system is a vital piece of Australia's critical infrastructure.⁶¹ The Treasury pointed out that these safeguards are more stringent than any conditions hitherto imposed on comparable critical infrastructure acquisitions.⁶² The safeguards are designed to make sure that:

56 Mr Justin Brown, Department of Foreign Affairs and Trade, *Committee Hansard*, 10 March 2016, p. 40.

57 The Treasury, *Submission 14*, p. 11.

58 The Treasury, *Submission 14*, p. 10.

59 The Treasury, *Submission 14*, p. 10.

60 The Treasury, *Submission 14*, p. 16.

61 The Treasury, *Submission 14*, p. 17.

62 The Treasury, *Submission 14*, p. 17.

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- the operation and control of Transgrid's transmission system and telecommunications business are undertaken solely from within Australia. Maintenance is also to be undertaken in Australia unless it is not possible to do this on reasonable commercial terms;
 - electricity supply data and personal information are accessible from and held solely within Australia;
 - individual foreign members of the consortium maintain their interests in Transgrid at no more than 50 per cent;
 - 50 per cent of Transgrid's board comprise Australian citizens and residents;
 - Transgrid has an independent chairperson and an independent director on the board who are Australian citizens and residents, one of whom is required for all board quorums;
 - senior personnel in critical positions hold appropriate security clearances; and
 - annual reporting takes place:
 - to the NSW Government, certifying compliance with NSW's critical infrastructure licence conditions; and
 - to FIRB, certifying compliance with all of the safeguards.⁶³

Flexible and comprehensive approach

3.45 In his evidence to the committee, Mr Brian Wilson, Chairman of FIRB, observed that the foreign investment review process, especially in respect of the national interest test, benefits significantly from its broad and unlegislated character. Mr Wilson made the point that the uncodified nature of the national interest test, which takes in questions of national security in addition to other considerations, provides a flexible and comprehensive method by which to judge the risks and benefits of foreign investment:

I think that it would be difficult to suggest there is a material component of national interest that is not picked up in the five subcomponents that we define – impact on the economy and the community, national security, competition, other laws and regulations and the nature and character [of the investor and the proposed investment]...I think that it would be dangerous to somehow provide a numerical weighting or a 20-page checklist. I think what that would do would, on the one hand, potentially deny transactions that are not contrary to Australia's national interest, or that could be mitigated through appropriate conditions coming in.⁶⁴

63 The Treasury, *Submission 14*, pp. 17–18.

64 Mr Brian Wilson, Foreign Investment Review Board, *Committee Hansard*, 10 March 2016, p. 56.

3.46 Mr Wilson observed that the current assessment framework possesses both the flexibility and the comprehensiveness to ensure that Australia's national interest is protected, while also ensuring that proposals for foreign investment are not unnecessarily stymied as a result of a review framework that is overly restrictive.⁶⁵ In addition, Mr Wilson suggested that a fully codified review framework, in which a set of criteria is mandated and published, could have the paradoxical effect of allowing a potential investor to structure a proposal to take advantage of any loopholes in the assessment criteria. This could make possible investments that would otherwise be contrary to Australia's national interest.⁶⁶

3.47 Mr Wilson also pointed out that the consultative character of the foreign investment review framework, in which the Treasury, on behalf of FIRB, engages with a range of agencies to inform the Government's decision making process, means that the framework ultimately rests on taking advice from the appropriate agencies. This is the fundamental basis of FIRB's overview of the risks and benefits posed by a proposal for foreign investment:

I would not expect that someone from Defence, ultimately, would second-guess me on matters of corporate structure. I would not expect that someone from the Attorney-General's Department, ultimately, would second-guess the ATO or revenue division of Treasury on matters of tax. All we can do is ask, and if we are not satisfied with the results, continue to ask. But at the end of the day, I do not think it would sensibly be open to me or any board member—having asked and continued to ask—if the department of Defence, in consultation with the Navy and with the security agencies, is saying, 'We are comfortable. We have looked at this. We have looked at this up, down and sideways on each time you have asked, and we are still comfortable,' to then say, 'Well, notwithstanding your views, I am not.' It cannot happen.⁶⁷

3.48 Mr Wilson highlighted that the effectiveness of the investment review process is based on accessing a wide range of advice from those agencies best placed to assess the implications of a proposal for foreign investment.⁶⁸ FIRB is responsible for producing advice to the Treasurer on the basis of the cumulative 'weight' of the assessments that it receives from the relevant agencies.

State Owned Enterprises

3.49 In its evidence, the Australian National University's East Asian Bureau of Economic Research (EABER) argued that some of the concerns about Chinese

65 Mr Brian Wilson, Foreign Investment Review Board, *Committee Hansard*, 10 March 2016, p. 56.

66 Mr Brian Wilson, Foreign Investment Review Board, *Committee Hansard*, 10 March 2016, p. 56.

67 Mr Brian Wilson, Foreign Investment Review Board, *Committee Hansard*, 10 March 2016, p. 58.

68 Mr Brian Wilson, Foreign Investment Review Board, *Committee Hansard*, 10 March 2016, p. 58.

investment, especially by SOEs or by companies that have a close relationship to the CPC, are based on misconceptions about the nature and intentions of the Chinese State and Chinese companies.⁶⁹ EABER maintained that, because China is a one-party state, it is almost true by definition that every Chinese corporate entity will have some degree of involvement with the State.⁷⁰ EABER further observed that:

Yet such concerns about private Chinese investment are overstated. Because a single party governs China, almost by definition virtually every Chinese private company and every Chinese businessperson has some degree of commercial or personal association with the Chinese party-state. The vast majority of business-state linkages are borne of commercial practicality and have no bearing on strategic intent.

3.50 EABER made the point that if these connections were enough to automatically disqualify Chinese investment on national security grounds, then Australia should not accept any Chinese investment. Such a position would not only devastate the Australian economy but would also undermine national security through reduced military spending capabilities.⁷¹

3.51 Further, EABER informed the committee that recent research on the operations and intentions of Chinese SOEs suggested that central government control is often minimal, and that there is no conclusive evidence that SOEs feature as a major component of a wider and aggressive Chinese strategic posture. EABER pointed out that:

Concerns regarding FDI from Chinese SOEs are also overblown. A significant body of academic research has concluded that SOEs are generally commercially motivated entities and that profitability and national economic development are the key determinants of SOE investment decisions.⁷²

3.52 However, EABER made the point that public debate in Australia fails to distinguish between different types of SOEs and that most Chinese SOEs are neither large nor strategically important to Beijing. Furthermore, as over half of SOE assets are controlled by local governments at the county level and below; 87 per cent of state assets are held in corporatised structures; and almost half of SOE capital is from non-state sources, arguments about any kind of centrally planned grand strategy for Chinese SOE investment abroad are difficult to sustain.⁷³

3.53 Notwithstanding the debate regarding foreign investment by SOEs and the national security implications, the point remains that investment in Australia by Chinese SOEs, in particular, is a contentious issue amongst many Australians. Herein lies one of the primary concerns regarding the current foreign investment review

69 East Asian Bureau of Economic Research, *Submission 20*, p. 6.

70 East Asian Bureau of Economic Research, *Submission 20*, p. 6.

71 East Asian Bureau of Economic Research, *Submission 20*, p. 6.

72 East Asian Bureau of Economic Research, *Submission 20*, p. 6.

73 East Asian Bureau of Economic Research, *Submission 20*, p. 6.

process. It is important that the Government take action to maintain public confidence in the Australian foreign investment review framework.