

Chapter 5

Committee view and recommendations

5.1 The Port of Darwin lease process brought to light serious concerns regarding the foreign investment review framework and the process that underpins it. These concerns resurfaced in relation to the Transgrid and S. Kidman and Co. matters.

5.2 The committee recognises the validity in retaining the broad and unlegislated character in respect of the national interest test. Yet such flexibility must be balanced by a clear, consistent and rigorous procedure for assessment that is publicly accountable. In short, flexibility should not come at the expense of both consistency and transparency. While the committee appreciates FIRB's concerns that a fully codified review framework could be counterproductive and overly restrictive, there is considerable scope for greater clarity regarding the process and its outcomes.

5.3 During the course of the inquiry, the committee heard from a wide range of stakeholders who engage with the foreign investment review process. Their concerns, which are shared by the committee, focus on the lack of transparency in relation to the process and its outcomes. The concerns regarding the foreign investment review process in relation to various investment decisions, including the Port of Darwin, Transgrid and S. Kidman and Co. matters, went to:

- the lack of consistency, procedural rigour and a clear assessment review process;¹
- an overall lack of transparency and clarity regarding the steps in the process as well as the overall outcome, which creates an impression that decision making is subjective, lacking adequate focus on security or other key considerations, and is open to interpretation;²
- the limited publicly available information regarding the reasoning for decisions given to investors and the Australian public, beyond what the Treasurer chooses to publicise;³ and
- thresholds in relation to agricultural land and agribusinesses, which lack consistency due to varying FTA obligations⁴ and a conscious decision of the Abbott-Turnbull Government to impose differential thresholds.

5.4 The overall outcome of these elements is a process that may serve as a disincentive to foreign investors and continue to undermine public confidence in foreign investment in Australia.

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

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

3 Agricultural Management Company, *Submission 25*, p. 3.

4 East Asian Bureau of Economic Research, *Submission 20*, p. 11.

Consistency and transparency

5.5 The committee welcomes the Treasurer's recent announcement regarding an agreement with the states and territories to subject critical infrastructure assets to FIRB review. The need for such reform was overdue. The committee recognises that these proposed changes were largely triggered by ongoing public concerns regarding the review process, particularly in relation to the Port of Darwin lease, as well as declining public confidence in foreign investment decisions.

5.6 Indeed, the Port of Darwin lease remains a matter of contention and public debate. Questions remain unanswered regarding the review process and the terms of the lease. As a case in point, it is not clear to the committee why \$506 million was received for the lease while \$390 million was referred to in the lease documentation. While the committee has put this question to the Northern Territory Government, it is yet to receive a response. Furthermore, it is not clear to the committee how the Australian Defence Force will retain access to the port beyond the maximum 25 year period specified in the Deed of License.⁵ Since the Port of Darwin was leased to Landbridge for a period of 99 years, this is a significant disparity.

5.7 Although the committee recognises the importance of confidentiality in the foreign investment review process, especially in relation to information that is 'commercial-in-confidence' or security classified, the evidence provided during the inquiry suggests that the assessment process is seen by many stakeholders as predominantly ad hoc, with little indication of how important criteria, such as the national interest test, are interpreted by the Treasurer, FIRB and other government agencies. In particular, a number of witnesses, such as ASPI, AMC and Mr Troy Setter, observed that one of the chief weaknesses of the current assessment process – from both national security and economic development perspectives – is the fact that stakeholders have little information about either the criteria that will be applied or the weighting that is given to them.⁶ At the heart of such criticism is the lack of consistency and transparency in the processes that underpin the foreign investment review framework.

5.8 To this end, the committee recommends that Treasury, in consultation with other departments and in cooperation with FIRB, identify and make public some of the elements or key features of the assessment process, in order to introduce greater transparency and openness into Australia's foreign investment review framework.

5.9 The committee takes the view that providing more public information about the assessment process will go some way to explaining to potential investors and the Australian people the government's rationale for a differentiated system of investment thresholds, including differences that are a direct result of Australia's FTA obligations.

5 Department of Defence, Overview of the Deed of Licence for use of the Darwin Port, Document tabled by the Department of Defence on 3 February 2016, p. 1.

6 Mr Peter Jennings, Australian Strategic Policy Institute, *Committee Hansard*, 10 March 2016, p. 15; Agricultural Management Company, *Submission 25*, p. 3; Mr Troy Setter, Consolidated Pastoral Company, *Committee Hansard*, 10 March 2016, p. 20.

Recommendation 1

5.10 The committee recommends that Treasury publish guidance about the foreign investment review assessment process including information on the steps and features of the process.

Public information and public confidence

5.11 A primary aim of the foreign investment review framework is to assure the Australian public that foreign investment is not only subject to ongoing and effective monitoring but that it will also produce significant national benefits. To this end, the Australian public needs to be assured that Australia's national interests are protected.

5.12 While much of the focus in relation to the review process has centred on the tension between economic interests and security concerns and the respective views in support of liberalisation, on the one hand, or greater controls, on the other, it is government which must weigh up the various considerations and make a determination in accordance with public preference. Yet in order to make such a determination, government must keep the public informed about both the process and the rationale for its decisions.

5.13 The point was made in evidence that, as Australia's foreign investment review framework is based on a negative test, as opposed to New Zealand's approach of outlining the national benefits of foreign investment, it is more difficult to ensure that the review process is communicated to the Australian public in a transparent and open manner.

5.14 The committee takes the view that much of the public concern regarding foreign investment in Australia would be alleviated if there was some transparency in relation to the decision making process. However, little has been done to instil public confidence in the process. This has made the task of ascertaining public preference, which should be central to determining whether Australia's national interest are being met, difficult if not impossible. For these reasons, the committee recognises the need to build public confidence in the foreign investment process and recommends that the Treasurer provide public information on foreign investment decisions regardless of whether they are positive or negative.

5.15 The committee recognises that FIRB's New Zealand counterpart, the Overseas Investment Office, publishes both positive decisions and negative decisions regarding foreign investment. While allowing for the review of proposed foreign investment, the New Zealand system sets out legislated criteria for determinations and, by providing its reasoning for approvals or rejections, helps to instil public confidence in the process. The committee recommends that a similar process be introduced in Australia.

5.16 To this end, the committee recommends that the Treasury publish information regarding both positive and negative decisions regarding foreign investment review decisions. Drawing on the New Zealand example, the Treasury should publish a clear and comprehensive explanation of the national interest rationale behind the Treasurer's decision not to object to a foreign investment proposal; to block a proposed investment; or to allow an investment to go ahead provided that certain specified conditions are met. If conditions are attached to a proposal, then the

published decision should outline the nature of these conditions and how they will benefit the national interest.

5.17 The committee takes the view that consistent and comprehensive communication is the key to ensuring that the Australian people are fully informed of the national benefits of foreign investment. This will go some way to allaying public concerns and misconceptions about foreign investment, and will thereby provide the government with a mechanism to gauge public perceptions of foreign investment in Australia.

Recommendation 2

5.18 The committee recommends that the Treasury publish the Treasurer's rationale behind both positive and negative decisions regarding foreign investment, in order to inform the public and to instil public and investor confidence in the review process.

Agricultural Land Register

5.19 The committee notes recent media reporting which suggests that the Agricultural Land Register, which was introduced to provide data on all purchases, sales and transfers of Australian agricultural land by foreign persons, might not be made publically available.⁷ The committee understands that the ATO has declared that it cannot publish detailed breakdowns of foreign interests in agricultural land if doing so would identify a tax payer or make their details public.⁸

5.20 However, the committee notes that the Government committed itself to the creation of the Agricultural Land Register in order to introduce a greater degree of transparency and scrutiny into Australia's foreign investment review framework in relation to agricultural land.⁹ While the committee recognises that there are privacy limitations on the type of information that the ATO can publish, greater scrutiny and transparency in relation to the foreign investment review framework can only be achieved if the Agricultural Land Register is made public. Furthermore, the usefulness of the Agricultural Land Register to increasing public confidence in the foreign investment review process is dependent on as much information as possible being made available to the Australian public and to foreign investors.

7 Lucy Barbour, 'Foreign-owned land register will not be made public despite transparency pledge', *ABC News*, 30 March 2016, <http://www.abc.net.au/news/2016-03-30/register-of-foreign-owned-farm-land-will-not-be-made-public/7284104> (accessed 30 March 2016).

8 Lucy Barbour, 'Foreign-owned land register will not be made public despite transparency pledge', *ABC News*, 30 March 2016, <http://www.abc.net.au/news/2016-03-30/register-of-foreign-owned-farm-land-will-not-be-made-public/7284104> (accessed 30 March 2016).

9 The Hon. Barnaby Joyce MP, Deputy Prime Minister and Minister for Agriculture and Water Resources, and the Hon. Scott Morrison, Treasurer of the Commonwealth of Australia, 'Foreign-owned agricultural land holdings to be registered by 29 February', *Media Release*, 22 February 2016, <http://minister.agriculture.gov.au/joyce/Pages/Media-Releases/foreign-owned-agricultural-land-holdings-to-be-register-by-29-February.aspx> (accessed 30 March 2016).

Recommendation 3

5.21 **The committee recommends that the Australian Government establish a publicly available Agricultural Land Register for all foreign-owned agricultural land to increase public confidence in Australia's foreign investment review framework and its effectiveness in safeguarding Australia's long term economic and security interests.**

Proposed lease of Ausgrid

5.22 Given recent developments in the Ausgrid lease process, especially in relation to the regulation of the tariffs that energy distribution networks are entitled to charge, a number of significant additional issues have arisen in relation to the NSW Government's proposed lease of Ausgrid.¹⁰ In particular, the committee understands that uncertainty over the regulatory environment might lead to potential bidders lowering their offers for the 99-year lease of 50.4 per cent of Ausgrid.¹¹

5.23 In order to undertake an examination of the foreign investment review framework in relation to the proposed lease of Ausgrid, the committee recommends that the Senate extend the inquiry reporting date.

Recommendation 4

5.24 **The committee recommends that the Senate extend the inquiry reporting date to 28 April 2016.**

Senator Chris Ketter

Chair

10 Angela Macdonald-Smith, 'NSW opposition urges Ausgrid sale delay', *Sydney Morning Herald*, 5 April 2016, <http://www.smh.com.au/business/energy/nsw-opposition-urges-ausgrid-sale-delay-20160404-gnyg17.html> (accessed 6 April 2016).

11 Angela Macdonald-Smith, 'NSW opposition urges Ausgrid sale delay', *Sydney Morning Herald*, 5 April 2016.

