

Additional comments by Nick Xenophon, Independent Senator for South Australia

‘Time to fix a broken national interest test’

1. I commend the work of the committee and the consummate professionalism of the Secretariat in the preparation of this report. This inquiry has provided a timely opportunity to review Australia’s foreign investment framework in the context of the Port of Darwin lease and the proposed sale of the S Kidman and Co property to overseas interests. The proposed lease of TransGrid also puts our foreign investment framework into a sharper focus.
2. At the outset I state that I am not against foreign investment. A small open economy such as Australia’s needs foreign investment to develop and grow. However, the investment framework must be one that is unambiguously in the national interest, and that involves a robust and transparent framework that is currently lacking.
3. The 99 year lease – a de facto sale – of the Port of Darwin lacked transparency and accountability on so many levels. There does not appear to be a satisfactory response from the Northern Territory government as to whether in fact the successful bidder was the recommendation of the quasi-independent bid committee. There is also a lack of clarity and transparency over the headline lease amount. The Port Lease agreement tabled during the inquiry revealed the lease premium was \$391 million, whereas the Northern Territory government has stated the lease is worth \$506 million.
4. The fact that the Port of Darwin lease was not the subject of an appropriate and thorough national security and defence assessment shows a clear failure at a number of levels to properly consider the ramifications of that deal. Evidence provided to the committee indicates it is unclear whether the Australian Defence Force will be able to access the facilities beyond the maximum 25 years provided for in the lease. That this uncertainty (in relation to future ongoing access to the port) was not clarified at the time of negotiations with the successful bidder is simply unsatisfactory on the part of Defence and arguably our intelligence services.
5. The Port of Darwin lease process, and indeed the TransGrid transaction, is indicative of a loophole in the current legislation that exempts state and territory owned assets from being considered under the foreign investment review framework. I welcome the Government’s announcement that it will move to close that loophole in the *Foreign Acquisitions and Takeovers Act 1975*.
6. However, the Port of Darwin lease process also showed a lack of appropriate consideration being given to national security considerations. It would be inconceivable that some of our neighbours would allow a key strategic port to be foreign owned given the potential strategic implications of this. This is not a criticism of the successful bidder of the Port of Darwin, who I found quite open with their evidence to the committee, but a criticism of our own government for its failure to have a cohesive and coherent foreign investment framework.
7. When I introduced legislation in 2010 in relation to lowering the threshold for the Foreign Investment Review Board examination of proposed purchases of agricultural land to \$5 million from \$231 million I made reference to the New Zealand approach to foreign investment in agricultural land and assets which I maintain is much more robust, transparent and accountable than our approach.

8. The New Zealand legislation, the Overseas Investment Act 2005, sets out a number of criteria that must be considered. These criteria are set out below:

16 Criteria for consent for overseas investments in sensitive land

- (1) The criteria for an overseas investment in sensitive land are all of the following:
- (a) the relevant overseas person has, or (if that person is not an individual) the individuals with control of the relevant overseas person collectively have, business experience and acumen relevant to that overseas investment;
 - (b) the relevant overseas person has demonstrated financial commitment to the overseas investment;
 - (c) the relevant overseas person is, or (if that person is not an individual) all the individuals with control of the relevant overseas person are, of good character;
 - (d) the relevant overseas person is not, or (if that person is not an individual) each individual with control of the relevant overseas person is not, an individual of a kind referred to in section 15 or 16 of the Immigration Act 2009 (which sections list certain persons not eligible for visas or entry permission under that Act);
 - (e) either subparagraph (i) is met or subparagraph (ii) and (if applicable) subparagraph (iii) are met:
 - (i) the relevant overseas person is, or (if that person is not an individual) all the individuals with control of the relevant overseas person are, New Zealand citizens, ordinarily resident in New Zealand, or intending to reside in New Zealand indefinitely;
 - (ii) the overseas investment will, or is likely to, benefit New Zealand (or any part of it or group of New Zealanders), as determined by the relevant Ministers under section 17;
 - (iii) if the relevant land includes non-urban land that, in area (either alone or together with any associated land) exceeds 5 hectares, the relevant Ministers determine that that benefit will be, or is likely to be, substantial and identifiable;
 - (f) if the relevant land is or includes farm land, either that farm land or the securities to which the overseas investment relates have been offered for acquisition on the open market to persons who are not overseas persons in accordance with the procedure set out in regulations (unless the overseas investment is exempt from this criterion under section 20).
- (2) See section 19 in relation to subsection (1)(c) and (d).

17 Factors for assessing benefit of overseas investments in sensitive land

- (1) If section 16(1)(e)(ii) applies, the relevant Ministers—
- (a) must consider all the factors in subsection (2) to determine which factor or factors (or parts of them) are relevant to the overseas investment; and
 - (b) must determine whether the criteria in section 16(1)(e)(ii) and (iii) are met after having regard to those relevant factors; and
 - (c) may, in doing so, determine the relative importance to be given to each relevant factor (or part).
- (2) The factors are the following:
- (a) whether the overseas investment will, or is likely to, result in—
 - (i) the creation of new job opportunities in New Zealand or the retention of existing jobs in New Zealand that would or might otherwise be lost; or
 - (ii) the introduction into New Zealand of new technology or business skills; or
 - (iii) increased export receipts for New Zealand exporters; or
 - (iv) added market competition, greater efficiency or productivity, or enhanced domestic services, in New Zealand; or
 - (v) the introduction into New Zealand of additional investment for development purposes; or

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- (vi) increased processing in New Zealand of New Zealand's primary products:
 - (b) whether there are or will be adequate mechanisms in place for protecting or enhancing existing areas of significant indigenous vegetation and significant habitats of indigenous fauna, for example, any 1 or more of the following:
 - (i) conditions as to pest control, fencing, fire control, erosion control, or riparian planting:
 - (ii) covenants over the land:
 - (c) whether there are or will be adequate mechanisms in place for—
 - (i) protecting or enhancing existing areas of significant habitats of trout, salmon, wildlife protected under section 3 of the Wildlife Act 1953, and game as defined in sections 2(1) of that Act (for example, any 1 or more of the mechanisms referred to in paragraph (b)(i) and (ii)); and
 - (ii) providing, protecting, or improving walking access to those habitats by the public or any section of the public:
 - (d) whether there are or will be adequate mechanisms in place for protecting or enhancing historic heritage within the relevant land, for example, any 1 or more of the following:
 - (i) conditions for conservation (including maintenance and restoration) and access:
 - (ii) agreement to support registration of any historic place, historic area, wahi tapu, or wahi tapu area under the Historic Places Act 1993:
 - (iii) agreement to execute a heritage covenant:
 - (iv) compliance with existing covenants:
 - (e) whether there are or will be adequate mechanisms in place for providing, protecting, or improving walking access over the relevant land or a relevant part of that land by the public or any section of the public:
 - (f) if the relevant land is or includes foreshore, seabed, or a bed of a river or lake, whether that foreshore, seabed, riverbed, or lakebed has been offered to the Crown in accordance with regulations:
 - (g) any other factors set out in regulations.

9. Australia's current foreign investment framework is too vague and obtuse to inspire confidence either in Australians, or indeed foreign investors. Having defined criteria for foreign investment for a national interest test (which should not necessarily be exclusive) would give confidence to all parties involved by providing greater certainty and clarity.
10. Since the inquiry commenced, there was much controversy over the proposed sale of Van Diemen's Land, Australia's biggest dairy, to an overseas based company. This is despite the fact that a consortium led by well-known Australian business woman Jan Cameron was prepared to match the offer of the overseas company. Attached are copies of correspondence I sent to the Treasurer in respect of the transaction. The transaction to the overseas based company was subsequently approved, as it appears there is no requirement for any credible locally based bid to be taken into account. That clearly is anomalous if the whole basis of a foreign investment framework is to encourage investment from overseas where there isn't access to locally based capital.
11. Finally, whilst this inquiry could not look at this specific issue, it would be relevant to examine whether there are impediments to local investment in prime agricultural land in that there may be tax advantages available to overseas based companies not available to local companies. This is something that has been raised by the Senator the Hon Bill Heffernan and others. Australian investors and Australian investment vehicles (including superannuation funds) should not be at a comparative disadvantage to overseas based companies.

Recommendation 1

That Australia adopt a national interest test modelled on New Zealand laws that set out national interest criteria, including the economic effects of foreign versus local investment for a particular project, and a robust consideration of defence and national security issues for strategically sensitive assets including ports, water and electricity utilities.

Recommendation 2

The *Foreign Acquisitions and Takeovers Act 1975* should be amended to require any credible locally based bid for an asset to be taken into account before approving any foreign based bid.

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