Dissenting Report by Senators Joyce, Ludlam and Xenophon

Introduction

1.1 We acknowledge the comments of our Coalition colleagues; however, both the Chair and Coalition Senators Reports do not seem to fully recognise the challenges currently facing Australia with regards to investment by foreign entities, and the long term issues that this Parliament could face, long after we have vacated our seats.

1.2 Australia is not alone in its review of foreign investments by state-owned entities (SOEs) and sovereign wealth funds (SWFs).

According to a report by Will Devlin and Bill Brummitt, referred to in a report completed by Mr Mark Thirlwell from the Lowy Institute for International Policy:

> "… the German government is reportedly considering legislating to block state-controlled foreign investments; the European Commission is inquiring into whether state-controlled investment funds from Russia, China and the Middle East threaten Europe's single market; and the United States has revised legislation governing its Committee on Foreign Investment in the United States."[1]

1.3 Certainly while generally foreign investment can have positive economic effects, with it can come political consequences, impacts on corporate governance and risks to competition, and each of these factors need to be strictly considered by the Foreign Investment Review Board before approval for investment is granted. This Dissenting Report will seek to explain our concerns on each of these matters.

Foreign investment trends

1.4 Globalisation and the opening of trade doors by nations previously removed from international commerce has seen a significant increase in investment by foreign entities through sovereign funds and also through acquisition of majority shares in Australian companies.

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[1] Mr Mark Thirlwell, *Australia's Open Investment Future*, December 2008, pg 9

"Australia has managed to attract extra foreign capital stock over the past 25 years – increasing from about $25 billion in 1980-81 to $347 billion in 2006-07 (or from about 18 percent of GDP to about 33 percent)."[2]

In a December 2008 report titled *Is the Foreign Investment Review Board acting fairly?*, Mr Mark Thirlwell, Program Director, International Economy, Lowy Institute for International Policy, stated:

"Over the past two financial years, Australia has approved some A$10 billion in proposed Chinese investment, and earlier this year forecasts for 2007-08 suggested a figure for proposed investment in excess of A$30 billion. In this sense the China relationship is following the pattern of Australia's highly successful economic relationship with Japan, dating back to the 1970's, which saw major Japanese investment follow trade in the resources sector."[3]

1.5 The comparison between China's and Japan's investments in Australia was discussed at length during the Senate Committee hearings, however it must be noted that at the commencement of Japanese investment, they were under joint venture agreements; investment was completed by corporate interest, not government interest; and, Japan is a democracy, with an open and transparent court system.

Indeed, as Mr Mark Thirwell stated:

"Traditionally Australia's most important trading partners have also been our key security partner (the UK and then the US) – or at least an ally of our key security partner (Japan), all of them democracies. Now for the first time our largest trading partner is authoritarian, a quasi-mercantilist, and a strategic competitor of our major ally."[4]

1.6 However, the dynamics of the global environment have changed.

"In a July 2008 speech to the Australia China Business council, the Commonwealth Treasurer Wayne Swan said that 'Australia is an open, liberal nation that makes its living through trade with the rest of the world ... It follows that we have an open and welcoming approach to foreign investment."

"Complementing these espoused principles is the notion that Australian foreign direct investment policy does not discriminate between investors. Recently, the Prime Minister, Kevin Rudd, said Australian foreign investment regulation is non-discriminatory'. We have had a foreign investment from Japan and Korea and the US and Great Britain for decades on a large scale."[5]

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[2] Institute of Public Affairs, *Submission 32*, pg 7
[3] Mr Mark Thirlwell, *Australia's Open Investment Future*, December 2008, pg 15
[4] Mr Mark Thirlwell, *Australia's Open Investment Future*, December 2008, pg 9
[5] Institute of Public Affairs, *Submission 32*, pg 9

As at 31 December 2008, the United States and the United Kingdom were the largest foreign investors in Australia, 24.8 percent and 24.3 percent respectively. Japan, Hong Kong and Singapore were ranked 3rd, 4th and 5th, and China was ranked 15th, with just 0.5 percent, lower than, for example, Belgium or the British Virgin Islands.

In its submission to the Committee, the Lowy Institute for International Policy wrote:

> "The twenty largest SWFs are all based either in major resource-exporting countries (including Australia and its growing Future Fund) or in East Asian economies with large stocks of foreign exchange reserves. The IMG estimates that SWFs could grow to control about US $12 trillion by 2012, four times as much (nominally) as they control now."[6]

1.7 Under the *Foreign Acquisitions and Takeovers Act 1975*, a pre-screening process exists for major investment applications, "defined as any purchase by a foreign entity, and any associates, of more than 15 percent of an Australian company, or by several foreign entities of more than 40 percent in aggregate"[7].

> "Investors are obligated to notify government of their proposal, prior to commencement, if it exceeds a set of monetary thresholds, and there are additional restrictions on sensitive industries such as airports, banking, media, residential real estate, telecommunications and transport (civil aviation and shipping)."[8]

Foreign investment proposals are assessed in accordance with a 'national interest test', having regard to the "widely held community concerns of Australians,"[9] and "the Treasurer can reserve the right to impose conditions on a major foreign investment proposal in order for it to be approved"[10].

1.8 During the Senate Committee hearings, Mr Patrick Colmer, General Manager, Foreign Investment and Trade Policy Division, Treasury, was asked when a foreign investment could be considered "bad" for Australia.

> Mr Colmer — That is a question which I think varies over time. If you look back at the cases that we have rejected, you can see that we have not rejected outright very many at all. In fact our best information is that 16 cases have been rejected since 1990. That is out of something in the order of, on average, about 500 business cases a year. We have had a different pattern in real estate but I have not actually been talking about that. The predominant reason for rejecting those cases has been to do with various forms of criminality on the part of the proposer. There is also the Shell-Woodside case where the decision was taken back in 2001 that Shell was

[6] Lowy Institute for International Policy, *Submission 56*, pg 4
[7] Institute of Public Affairs, *Submission 32*, pg 11
[8] Institute of Public Affairs, *Submission 32*, pg 11
[9] Institute of Public Affairs, *Submission 32*, pg 11
[10] Institute of Public Affairs, *Submission 32*, pg 11

> not going to develop that resource; and the decision was taken at the time that the national interest was best served by developing that resource much more quickly than Shell was expected to do it.[11]

China's rise

1.9 Since the 1980s, when the People's Republic of China opened its economy to the rest of the world, it has grown to become an economic super power.

> "China is not only, by far, the largest emerging market, it has also been the fastest growing major economy for the last three decades with many, including Treasurer Swan, believing that this growth will continue. Last year, China accounted for a larger share of total world growth than the United States."[12]

> "Prior to 1991, Chinese foreign investment was negligible. Since 2000 though and the launch of the 'Going Out' foreign investment strategy, the Chinese state has provided significant support for Chinese firms to invest overseas to gain access to sources of supply, new markets and greater organisational capabilities. China's 150 state-owned 'central enterprises', that together control three-quarters of the listed companies in China, have been at the forefront of this strategy."[13]

1.10 For example, in its submission to the inquiry, Chinalco, the Aluminium Corporation of China, detailed its current and future foreign ventures in Australia and around the world:

> “Chinalco has 34 directly owned or controlled subsidiaries ... Chinalco is also exploring business opportunities in various countries including Russia, Vietnam, Mongolia, Guinea, Indonesia and India.”[14]

1.11 China's investment in Australia in particular is growing rapidly.

> "In 2006, the stock of Chinese investment in Australia was about $3.5 billion, while last financial year investment applications rose to $10 billion and this year may hit $30 billion. The Treasurer noted that since coming to power in late November 2007, he had approved a Chinese investment application on average once every nine days."[15]

1.12 Given China's position of strength as an emerging economic super power, and the vulnerability that Australia could one day find itself in at the bargaining table, it must be acknowledged that the safest and most prudent position to take is one where that position of strength cannot be exerted on Australia in years to come.

[11] Mr Patrick Colmer, *Proof Committee Hansard*, pg 6
[12] Lowy Institute for International Policy, *Submission 56*, pg 5
[13] Lowy Institute for International Policy, *Submission 56*, pg 5
[14] Chinalco, *Submission 23,* pg 3 and 4
[15] Lowy Institute for International Policy, *Submission 56*, pg 7

This would mean precluding state-owned enterprises from the capacity to invest, in a substantial form, in the assets in Australia, especially in our long-term key strategic assets such as mineral deposits.

1.13 Indeed, foreign direct investment in the mining sector in particular has rising strongly since 2001.[16] According to Concept Economics,

> "… the mining sector is the industry with the greatest amount of investment by foreigners. The ABS estimated that the level of direct foreign investment in mining was $77 billion in 2006. The manufacturing sector has the next highest level of foreign investment with $59 billion followed by the wholesale/retail trade and finance and insurance industries which have about $50 billion each."[17]

Concept Economics goes on to state in its submission that foreign investment in Australia's mining sector is crucial.

> "The ability of Australia to attract foreign investment to its mining sector has positioned Australia to take advantage of current world prices for minerals commodities. Foreign investment was, and remains, crucial to discovering and assessing Australia's mineral reserves."[18]

1.14 Indeed, a number of submissions argued that foreign investment by state-owned enterprises is just another form of foreign investment and therefore should not be limited.

The Institute of Public Affairs wrote in its submission to the Committee:

> "In Australia an SOE only enjoys the same commercial environment as any other investor. And the Australian government maintains the right to appropriately regulate where they may be a perceived risk from an external SOE investor … Given appropriate corporate governance standards, large controlling shareholders need not pose any investment threat or any other type of threat to Australia."[19]

1.15 However, the Institute of Public Affairs also quoted Western Australian Premier, Colin Barnett, who stated in late September 2008, that

> “Australia could be overwhelmed by the weight of Chinese investment ... I believe Australia as a whole needs to agree on the rules of the game with this Chinese demand I think we do need to make sure we do keep it manageable, that we don’t lose control of our own economic development, in other words.”[20]

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[16] Concept Economics, *Submission 6*, pg 16
[17] Concept Economics, *Submission 6*, pg 16
[18] Concept Economics, *Submission 6*, pg 19
[19] Institute of Public Affairs, *Submission 32*, pg 2
[20] Institute of Public Affairs, *Submission 32*, pg 13

1.16 Furthermore, it can be argued that the potential consequences of a dispute involving a foreign investment by a state-owned enterprise can have far reaching effects, as can be seen by the current case involving Rio Tinto executive, Stern Hu.

Potential political consequences of foreign investment – 'The elephant in the room!'

1.17 Government involvement in commercial agreements creates an entirely different proposition to corporate ownership. Ultimately, the ‘elephant in a room’ which must be acknowledged is: 'Do we know the outcome when a dispute arises with an entity that is majority-owned by another nation?'

For example, when there is a dispute between two corporate entities, the matter is taken to court which makes a ruling that is abided by by both parties. However, when a dispute about a corporate matter involves another nations’ government, matters such as bilateral trade agreements, seats at the United Nations and diplomatic relations come into play.

1.18 Australia’s current Foreign Investment Review Board guidelines do not take into account these complexities and are ineffectual against the new possible maladies that are brought about by a foreign government's sovereign ownership within Australia.

Indeed, although one of the principles the Foreign Investment Review Board considers in its assessment of investment proposals is whether operations are independent from the relevant foreign government, this has clearly not been invoked in practice.

In fact, during the Senate Estimates hearings on 04 June 2009, it was admitted by Treasury's Mr Patrick Colmer, that it is virtually impossible for a state-owned entity to be completely independent from its government owners.

> Mr Colmer—The reality is that any government-owned entity will not be totally independent from the government. The questions that we look at are: what is the governance of the entity, how does it operate, and can we see that it is operating independently and without direct and continuing government control, because any government entity will have a relationship with its government.
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> ...
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> I guess the easiest way to answer your question is that bearing in mind that government entities are related to governments, we have not to date taken the view that any particular company has such overriding government control that it has been a problem.[21]

[21] Mr Patrick Colmer, *Proof Committee Hansard (04 June 2009)*, pg 12

1.19 Journalist, Greg Sheridan, gave an example in *The Australian* newspaper on 26 February 2009 of how foreign investment can impact political relationships.

> "The Chinese run a very sophisticated and integrated government. As with any huge system, not everything runs like clockwork, but it is nonsense to think the different arms of policy are not ruled by the central government. In one famous example, China's State Administration of Foreign Exchange bought Costa Rican government bonds in exchange for Costa Rica cutting diplomatic ties with Taiwan and establishing them with Beijing."[22]

1.20 Currently, there is no recognised or formal process to compel or require a state-owned entity to modify their operations to comply with Australia's standards; and there is a real risk that any request for operational modifications will refused.

Furthermore, if Australia is, as some submissions have claimed, so reliant on foreign investment for our own economic growth, will this result in the Foreign Investment Review Board caving in to demands, at the expense of Australia's national interest, for the sake of a contract?

National Interest Test

1.21 According to Treasury, Australia's Foreign Investment Policy states:

> "The Government's approach to foreign investment policy is to encourage foreign investment consistent with community interests."[23]

It goes on to state that:

> "The Government determines what is 'contrary to the national interest' by having regard to the widely held community concerns of Australians."[24]

1.22 However a 2008 poll conducted by the Lowy Institute found that while "62 percent of Australians agree that China's growth has been good for Australia … [there was] growing unease about the strategic consequences of China's rise. 60 percent agreed that China's aim is to dominate Asia and 52 percent agreed that Australia should join with other countries to limit China's influence."[25]

1.23 In February 2008, the Treasurer released a set of six principles that are considered by the Foreign Investment Review Board in determining, on a case by case basis, whether particular investments by foreign governments and their agencies are consistent with Australia's 'national interest'.

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[22] Greg Sheridan, *The Australian, 26 February 2009*
[23] Treasury, *Australia's Foreign Investment Policy*, March 2009
[24] Treasury, *Australia's Foreign Investment Policy*, March 2009
[25] Mr Mark Thirlwell, *Australia's Open Investment Future*, December 2008, pg 15

- An investor's operations are independent from the relevant foreign government;
- An investor is subject to and adheres to the law and observes common standards of business behaviour;
- An investment may hinder competition or lead to undue concentration or control in the industry or sectors concerned;
- An investment may impact on Australian Government revenue or other policies;
- An investment may impact on Australia's national security; and,
- An investment may impact on the operations and directions of an Australian business, as well as its contribution to the Australian economy and broader community.[26]

However, these guidelines leave a lot to be desired and need to be stricter and more explanation given to each criterion to ensure that the correct assessment is made in Australia's national interest.

1.24 Further, it should be a matter of consideration that the decision by the Foreign Investment Review Board to allow investment by a foreign state-owned entity is not at the expense of Australia’s position on human rights and our call for human rights laws to be abided internationally.

1.25 In a similar way, private entities from foreign nations who participate in or support activities that go against broadly held Australian values should be barred from investing in Australian assets.

For example, if a foreign company that, as part of its other investments, supports the development of land mines, and seeks to invest in major supermarket chains, Coles or Woolworths, surely the Foreign Investment Review Board should decide that it is in not in Australia's interests to approve their investment proposal.

Human Rights

1.26 Treasury's policy documents states:

> "The Government's approach to foreign investment policy is to encourage foreign investment consistent with community interests."[27]

However, there is currently no consideration given by the Foreign Investment Review Board to the human rights record of the nation which is seeking to invest.

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[26] Treasury, *Australia's Foreign Investment Policy*, March 2009
[27] Treasury, *Australia's Foreign Investment Policy*, March 2009

1.27 For the purposes of assessing adherence to human rights standards, Principle 2 of the Foreign Investment Review Board's guidelines ("that the investor is subject to and adheres to the law and observes common standards of business behaviour") would seem the obvious benchmark.

However, it became evident during the Senate Committee hearings that the checks and balances implied in this principle is insufficient to block investments by institutions operating in partnership with some of the world's worst human rights abusers.

For example, the Foreign Investment Review Board is currently considering a $505 million deal that will deliver the state-owned 'China Non Ferrous Mining Metal Group Co. Ltd' (CNMMC) a 51.6 percent stake in Australian company, Lynas Corporation, which owns the Mt Weld Rare Earths mine near Laverton in Western Australia, thought to contain one of the worlds’ largest supplies of high-grade rare earths.

However, CNMMC operates the largest nickel mine in Burma in active partnership with the Burmese military regime and is seeking further acquisitions in Burma.

CNMMC also has extensive mining operations in countries including North Korea, Iran, Zambia, Mongolia and Thailand. Many of these projects are carried out in joint partnership with the authorities of these nations.

A question on this issue was put to General Manager, Foreign Investment and Trade Policy Division, Treasury, Mr Patrick Colmer, during a Senate Committee hearing:

> Mr Colmer—The position, as I understand it from the basis of the information that we have, is that the Chinese company is operating in Burma. That in itself does not tell us anything except that it is operating in Burma. The fact that a company may be operating in Burma-I believe we have an embassy in Burma.
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> Senator LUDLAM—Yes we do.
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> Mr Colmer— It does not seem, of itself, to be a relevant consideration. If there is information about its operations in Burma or anywhere else that are relevant to the way that it operates in Australia, then that would be something that we may be interested in.

If by 'common standards of business behaviour', the Foreign Investment Review Board is willing to approve investment by a company which collaborates with a ruthless and corrupt dictatorship, it is fair to argue that the guidelines are due for an overhaul.

1.28 China’s approach to human rights is a stark contradiction to Australia’s stance and as such should be a factor of consideration when assessing whether to allow the government of China, through its state-owned entities and sovereign wealth funds to benefit from Australia's successful industries and economy.

1.29 In his submission to the Committee, businessman and human rights activist, Ian Melrose, refers to China's Human Rights record. He says:

> "This is not a Government we should allow to own Australian strategic mining resources which will be for their benefit, not ours."[28]

Further, he argues that "politicians and businessmen who say you should not mix human rights with trade are cowards and opportunists."[29]

1.30 According to Amnesty International –

- China executes more people each year than the rest of the world put together;
- Internet censorship remains pervasive in China with few signs that the authorities are prepared to relax policies of surveillance and control;
- Critics of the government and members of banned religions can be sent to a labour camp for up to 4 years, without charge or trial;
- Torture is widespread in the criminal justice system - common methods include electric shocks, beating and sleep deprivation;
- Nearly 20 years after the military crackdown on demonstrators in Tiananmen Square, dozens of people arrested then still remain in prison;
- People who make a stand on human rights are harassed and arrested, often relating to vague charges like 'state secrets'. They include lawyers, journalists, HIV activists and trade unionists;
- Trade unions are illegal; and,
- Unofficial religious groups - such as the Falun Gong spiritual movement - are banned as 'subversive' and individual practitioners detained.[30]

1.31 Despite this, Prime Minister, Kevin Rudd, and Treasurer, Wayne Swan, and have openly stated they welcome investment from Chinese SOEs and SWFs.

> "In a July 2008 speech to the Australia China Business council, the Commonwealth Treasurer Wayne Swan said that 'Australia is an open, liberal nation that makes its living through trade with the rest of the world ... It follows that we have an open and welcoming approach to foreign investment."
>
> "Complementing these espoused principles is the notion that Australian foreign direct investment policy does not discriminate between investors. Recently, the Prime Minister, Kevin Rudd, said Australian foreign investment regulation is non-discriminatory'. We have had a foreign

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[28] Mr Ian Melrose, *Submission 8*, pg 3
[29] Michelle Grattan, The Age, *TV ads oppose Chines firm's bid for Rio Tinto*, 1 June 2009
[30] Amnesty International, *China's human rights record* http://www.amnesty.org.uk/content.asp?CategoryID=11204

> investment from Japan and Korea and the US and Great Britain for decades on a large scale."[31]

1.32 Further to the Foreign Investment Review Board's guidelines, investment by a state-owned enterprise from a country with a poor human rights record should be specifically restricted, and the Foreign Investment Review Board's guidelines for investment should be amended accordingly.

Corporate governance dangers

1.33 Another issue of concern with regard to foreign investment by state-owned entities and sovereign wealth funds is the threat it poses to corporate governance. According to Associate Professor Frank Zumbo from the University of New South Wales:

> "Sovereign wealth funds and state-owned companies are generally operated by their respective Governments in a secretive manner that prevents scrutiny of their size, source and management of funds and state-owned companies. Secrecy also generally surrounds the investment and other objectives of the funds or the state-owned companies."[32]

> "Indeed, allowing sovereign wealth funds and state-owned companies to take controlling or influential positions in Australian target companies means that the future direction of the Australian target companies in those strategic industries will be determined by persons or entities whose agendas and objectives are not publicly known and whose agendas and objectives may be inconsistent or even detrimental to the other shareholders, as well as to suppliers and customers of the Australian target company."[33]

1.34 This possibility must be a factor during consideration by the Foreign Investment Review Board, to ensure that a majority of a sector or industry is particularly targeted, and some form of monitoring must be in place to ensure that creeping acquisitions are not taking place.

Risks to Competition

1.35 Increases in foreign investment also place pressure on Australia's ability to compete internationally.

1.36 Associate Professor Frank Zumbo says that to allow SWFs and SOEs to take controlling positions in Australian companies enables them to set market prices which may subsequently price Australian products/services out of the international market.

> "Dangerously for competition this influence could lead to the Australian target company implementing discriminatory pricing practices that (i) benefit state-owned companies that are customers of the Australian target

[31] Institute of Public Affairs, *Submission 32,* pg 9
[32] Associate Professor Frank Zumbo, *Submission 38*, pg 2
[33] Associate Professor Frank Zumbo, *Submission 38*, pg 2

> company, or (ii) benefit customers from the country sponsoring the sovereign wealth fund or which controls the state-owned companies."[34]

1.37 Associate Professor Frank Zumbo also argues that competition can be "dampened" should a state owned company acquire a controlling or influential position in an Australian target company as part of a strategy to vertically integrate.

> "If a state-owned company is a steel producer the state-owned company may take a controlling or influential position in Australian target companies that mine the raw materials needed for steel production. In doing so, the state-owned company would considerably strengthen its position to raise steel prices as it has locked up Australian suppliers of the raw materials to the detriment of other competing steel producers who may no longer be able to obtain competitively priced raw material supplies from the Australian target company."[35]

1.38 The Foreign Investment Review Board, through its six core principles, looks at whether an investment may impact on the operations and directions of an Australian business, as well as its contribution to the Australian economy and broader community.

Further to the current CNMMC investment proposal being considered, the Vice Chairman of the Autonomous region of Inner Mongolia, Zhao Shuanglian, told a media conference on Wednesday 2nd September that local rare earths production at high quality ore mines would be recommended to limit exports to prop up prices.[36]

Anti-competitive price fixing obviously does not adhere to Australia’s common standards of business behaviour and handing a Chinese state-owned enterprise one of the worlds’ largest supplies of high-grade rare earths mines shores up its potential to successfully set prices in the future whether it chooses to advertise the fact or not.

And, as a state-owned enterprise, it is almost a given that CNMMC will be influenced by the behaviour of China’s wider mining and pricing strategies which will seriously impact Australia's competitive advantage.

1.39 Furthermore, arbitrary lines in the sand on shared ownership for state owned enterprises ignore the influence that a large shareholder can have without having a majority share.

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[34] Associate Professor Frank Zumbo, *Submission 38*, pg 3
[35] Associate Professor Frank Zumbo, *Submission 38*, pg 3
[36] Australian Associated Press Financial Newswire, *Lynas under pressure after Chinese Comments*, 3 September 2009

If Chinalco, for example, had been successful in its bid to own 18 percent of Rio Tinto's shares in February 2009, while it may not have been the majority shareholder, it would have been the biggest shareholder by significant margin.

Such shareholding would have a huge influence on the final spectrum of appointed directors, as the controller of the largest block of shares would have the largest say of all shareholders as to who was ultimately elected to the board.

1.40 Again, this reiterates that the Foreign Investment Review Board must have in place measures to ensure that one particular nation is not able to buy into Australia's strategic assets, and certainly not to gain majority control of a sector, to ensure that the market remains in Australia's best interests.

A case of reciprocity

1.41 One of the best ways to put perspective on the issue of investment by state-owned enterprises is to look at it through the eyes of reciprocity;

For example, would the Chinese government allow an Australian government-owned entity to hold more than a 50 percent share in its coal mines?

If the answer is 'No', then surely one must ask why Australia should open its doors to foreign investment by a country who would deny it entry.

1.42 Evidence from Mr Patrick Colmer, Executive Member of the Foreign Investment Review Board, during the Senate Committee hearings included that two of the most restrictive countries with Foreign Investment policy, that being India and China, are the fastest growing economies in the world.

Conversely, the most open economies were Iceland and Ireland, both economies having now collapsed.

> Senator JOYCE—Are there boards equivalent to the Foreign Investment Review Board in other countries, such as India, China or the United States?
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> Mr Colmer—Yes and no. The United States has a system called the Committee on Foreign Investment in the United States, generally referred to as CFIUS, and that is similar to the foreign investment process that we run. I would say, though, that our system is much more interventionist than the United States system, and in the OECD in this area we are ranked 35 out of 41, as being the 35th least restrictive—get your head around that! It is difficult; I don't know which way to count on that—
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> Senator JOYCE—Who is the most restrictive?
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> Mr Colmer—The most restrictive is either China, India or Russia, but I am not sure which one.
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> Senator JOYCE—China, India or Russia—they are all up the top there somewhere?

> Mr Colmer—They are down at 41. We are at the bottom.
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> Senator JOYCE—I know, but the most restrictive on investment are China, India and Russia?
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> Mr Colmer—Yes, I think that is right, from memory. And the least restrictive are typically the European countries. I think maybe Iceland might be No. 1, but I have not looked at the ranking for a while. The UK is up in the top five.
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> Senator JOYCE—The problem at the moment, of course, is that Iceland is broke, Ireland is broke and Britain is making its very best attempt at going broke. Would these be good indicators of how you should operate?
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> Mr Colmer—I am not sure whether or not you can relate their economic situation totally to their investment regime. I think there are probably a wide range of other factors that are in play.
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> Senator HURLEY—You are just relying on the last 18 months out of many decades of prosperity.
>
> Senator JOYCE—What are the great sensitivities of Russia? In what section of its economy has it got immense sensitivity about where people invest?
>
> Mr Colmer—I am not terribly familiar with the Russian investment system, except that I do know that it is one of the more restrictive ones. We are probably better compared to places like Canada, New Zealand and the US, who all have—in a very general sense—a similar system to ours. There are quite different arrangements at the detailed level, but they are generally similar types of systems.[37]

1.43 Given that, for example, China may restrict Australian funds or entities from investing within its borders, it is fair to argue that Australia should not be so open to allowing China's government to invest in our assets and should place restrictions on China until it reciprocates the investment opportunities.

Conclusion

1.44 While Australia's economy certainly benefits from foreign investment, it is crucial that it is not at the expense of our ability to be competitive in the international marketplace and that it doesn't enable another nation to have indirect control over Australia's independence, governance, ethics and values.

Australia's integrity must never be compromised by a commercial imperative.

1.45 The Foreign Investment Review Board must, as part of its considerations for any investment proposal by a foreign entitiy, particularly a sovereign wealth fund or state-owned entity, acknowledge the possible consequences that go far beyond a simple monetary investment.

[37] Mr Patrick Colmer, *Proof Committee Hansard*, pg 10

1.46 Similarly, the Foreign Investment Review Board must monitor in particular a countries interest in specific sectors, to ensure creeping acquisitions are not taking place which would negatively impact on Australia's economy and Australian companies and jobs.

Recommendation 1

A foreign government shall not use any corporate vehicle which they control to be allowed to purchase any strategic assets within Australia.

Further, for a non-state-owned entity, a related entity test will be applied so that different corporate entities with the same ultimate majority controlling influence represented by equity, debt or other mechanisms will be deemed as the one entity for assessment as to whether it will result in more than 10 percent of control of any strategic asset market in Australia.

Recommendation 2

The Foreign Investment Board will be required to, as a point of consideration in its decision, assess whether Australia has reciprocal rights of investment in the proposer's country.

Recommendation 3

The Government must look to enact effective laws to prevent creeping acquisitions of Australian businesses and assets owned by state-owned entities.

Recommendation 4

The Foreign Investment Review Board needs to provide clear criteria of what the 'national interest' test is and that abbreviated versions of FIRB advice to the Minister be tabled in both houses of Parliament.

Further, that the Government defines what it means by 'community interest' and 'common standards of business behaviour' and subject major investment proposals to rigorous public scrutiny to ensure that they meet genuine common standards of business behaviour.

Recommendation 5

That the human rights records of the country of state-owned entity seeking to invest in Australia be a key factor during consideration by the Foreign Investment Review Board. Similarly, that all foreign non-state-owned entities be subject to consideration of their other investment activities and whether these conflict with Australia's ethical positions.

SENATOR BARNABY JOYCE

SENATOR SCOTT LUDLAM

SENATOR NICK XENOPHON