

Submission to the Senate Economics Committee

Regarding

Foreign Investment by State-Owned Entities

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1. This submission deals with the concept of the National Interest, which is an important organising principle in Australian domestic and foreign policy. The Committee is likely to hear arguments for and against the proposition that ownership of Australian assets by sovereign wealth funds and state-owned companies is in the national interest. While few would dispute the proposition that a given policy should be in the national interest, there is less agreement about how to conceptualise the national interest. It is hoped that this submission will be of assistance to the Committee.

2. The concept of ‘national interest’ can be traced to the sixteenth and seventeenth centuries when some modern nation-states began to crystallise. With the development of nationalist sentiments, older terms such as the ‘will of the prince’ and ‘raison d’état’ lost their ability to mobilise the public and were replaced by references to ‘national interests’ and ‘vital interests’, as well as catchphrases such as ‘national honour’, ‘public interest’, and ‘general will.’¹ Thus, one of the main reasons for the use of the term is to mobilize the public behind a policy or to quell public resistance to a policy.

3. The ‘national interest’ is invoked regularly in Australia. In 1997, for example, the Australian government released Australia’s first White Paper on foreign and trade policy. Entitled *In the National Interest*, the White Paper gave prominence to the term while explaining that the ‘national interest’ was permanent, or at least very durable, and ‘does not change with a change in government.’ It defined the national interest as military security and economic development:

¹ C. Beard, *The Idea of National Interest*, MacMillan, New York, 1934.

Preparing for the future is not a matter of grand constructs. It is about the hard-headed pursuit of the interests which lie at the core of foreign and trade policy: the security of the Australian nation and the jobs and standard of living of the Australian people. In all that it does in the field of foreign and trade policy, the Government will apply this basic test of the national interest.²

4. Despite the certainty with which this assertion is made, there are difficulties involved in defining the national interest as ‘the security of the Australian nation.’ For example, the normal meaning of security — to be untroubled by danger or apprehension — has been reframed in narrowly military terms: security is defined as military security, and insecurity refers to a military threat. But Australians face all kinds of threats, and most of them are not military in nature. For instance, long-term environmental security on the driest continent on earth may be worsened by economic policies that — in the short term — increase the ‘jobs and standard of living of the Australian people.’

5. Of course, it is reasonable to argue that all Australians have a shared interest in not being invaded and conquered, but it is not so straightforward to cite the ‘national interest’ as a justification in other areas of public life, such as ‘the jobs and standard of living of the Australian people.’ For example, economic growth may be stimulated by policies that make it easier to dismiss one’s employees because it may increase their insecurity, make them more obedient, and induce them to work harder. Such policies may benefit those with greater wealth and power, but not everyone stands to gain from them. They may therefore not be in the national interest because the economy does not exist independently of the people who comprise it.

6. Australian policy, although filled with certainty, is bereft of clarity. A case in point is the Department of Foreign Affairs and Trade’s submission to a Senate inquiry³ relating to the Broadcasting Services Amendment Bill 1999. The bill established a scheme for the regulation of international broadcasting services transmitted from

² DFAT, *In the National Interest - White Paper on Foreign and Trade Policy*, Canberra, 1997.

³ Senate Committee on Foreign Affairs, Defence and Trade, *Inquiry into the Powers conferred on the Minister for Foreign Affairs by the Broadcasting Services Amendment Bill (No. 4)*, 1999.

Australia. The bill proposed that in certain circumstances, certain broadcasts could be contrary to the national interest. Under such circumstances, the foreign minister would have the power to direct the Australian Broadcasting Authority to refuse to allocate the licence, to warn a licensee, or to suspend or cancel a licence. In other words, the foreign minister would be required to determine whether a broadcast service was likely to be contrary to the national interest.

7. Once again, there was no attempt to specify just what that national interest might be. Despite the authority with which the concept was wielded in public, the Department of Foreign Affairs and Trade (DFAT) submission conceded that it could not explain more about the national interest, and that it 'will be a matter for the minister to form a view on in light of the nature of the proposed service and all the relevant circumstances prevailing at the time.'⁴

8. The submission went on to note that it was not possible to define precisely what sorts of broadcasts would be contrary to the national interest. It did, however, provide the examples of:

hostile broadcasts promoting communal violence or terrorism in a foreign State, or inciting or encouraging armed hostilities or the violent overthrow of an established government, ... broadcasts which demean persons or groups on the basis of ethnicity, nationality, race, gender, sexual preference, religion, or mental or physical disability.

9. The DFAT submission then stated that the Bill did not require the Minister to give reasons for his decision. Indeed, the Explanatory Memorandum to the Bill noted that the 'nature of these decisions is such that exposure of the reasons for the decisions could itself be contrary to Australia's national interest.'⁵ It would require no more than a statement of the obvious to explain to the public the reasons for the Minister's decisions.

⁴ DFAT, *Submission to Senate FADT Inquiry – Broadcasting Services Amendment Bill*, 1999.

⁵ Broadcasting Services Amendment Bill, 1999.

But DFAT had direct input into the drafting of the Explanatory Memorandum, which in turn provided a revealing insight into DFAT's dismissive attitude to the views of ordinary Australians.

10. The arbitrary and unaccountable nature of this state of affairs is clear. As the Seven Network's submission to the same inquiry put it, 'depending on the political environment in the region, what may be considered to be in the national interest may change from day to day, depending on the issues of the moment and the presiding powers in other countries.'⁶

11. In 1996, the Australian government's reforms to the treaty-making process imposed a requirement that all treaties tabled in Parliament be accompanied by a National Interest Analysis (NIA). Once again, there was no attempt to explain what the national interest might be. Its 'Guidelines for National Interest Analyses' advised the Treaties Secretariat to:

Address the advantages and disadvantages to Australia of taking the proposed treaty action. Include significant, quantifiable and foreseeable economic and/or environmental effects.⁷

12. Thus, the concept of 'national interest' is highly subjective. Its most prolific users prefer to apply a negative test — 'such and such is not in the national interest' — when required to make a decision based on it. Furthermore, according to the (admittedly peculiar) DFAT viewpoint, the reasons for making a decision based on the national interest should be left unexamined, as any examination is itself detrimental to the national interest.

13. The situation in this regard was unchanged when the government issued a new White Paper in 2003, *Advancing the National Interest*, which also reiterated the primacy

⁶ Seven Network, *Submission to the Senate Inquiry into the Broadcasting Services Amendment Bill*, 1999.

⁷ DFAT Treaties Secretariat, *Negotiation, Conclusion and Implementation of International Treaties and Arrangements – Annex II, provided to DFAT officers as part of the National Interest Analysis*, 2000.

of the concept. A Senate Committee that looked into this White Paper expressed its concern that:

despite the prominent rhetorical and conceptual role assigned to ‘national interest’, the White Paper’s authors clearly felt under no obligation to acknowledge, let alone try and wrestle with, the complexities and problems that are intrinsic to the definition and application of the term. This is a significant shortcoming.⁸

14. In 2007, then-Foreign Minister Alexander Downer invoked a rarely used ‘national interest’ exemption clause to fast-track ratification of the Timor Sea Treaty through the Australian parliament. The Joint Standing Committee on Treaties was summarily informed that Mr Downer wanted it to rubber-stamp the Treaty on Certain Maritime Arrangements in the Timor Sea (CMATS). I co-wrote a submission at the time dissenting from this view. In my view, the then-Foreign Minister was railroading through the Parliament a treaty that resulted in the expropriation of resources from Asia’s poorest country under the pretext of the ‘national interest.’

15. As the Committee is aware, the Foreign Acquisitions and Takeovers Act (1975) allows the Treasurer to stop a foreign takeover of an Australian business if that takeover is ‘contrary to the national interest’. According to the legislation,

Where the Treasurer is satisfied that:

- a person proposes to enter into an arrangement with an Australian business...
- that would have the result that the business would be controlled by foreign persons ... and
- that result would be contrary to the national interest,

⁸ Senate Foreign Affairs, Defence and Trade References Committee 2003, *The (not quite) White Paper*, Parliament House, Canberra, p 9.

the Treasurer may make an order prohibiting the entering into of the proposed arrangement.

16. There is no attempt to specify just what the national interest might be. Accordingly, it would appear that the Treasurer has an almost indiscriminate power to block a foreign takeover but with an important qualifier – he or she cannot admit publicly that this power is almost indiscriminate. A veneer of neutrality, judiciousness and fairness must be preserved if the power is to work credibly.

17. In my view, how the ‘national interest’ is defined (in economic terms) relates to the way the Australian state and economy actually function. One of the most important functions of the state is to regulate domestic and external affairs in the overall interests of the economy, with special consideration for its dominant sectors. The most powerful groups in the economy may have different opinions on several issues, but they all agree on the importance of a stable investment climate for business operations (both overseas and domestically), and on the need for good access to human and material resources. The state is required to ensure this outcome. Governments come and go but the state persists. The senior public servants who direct the long-term interests of the Australian state must, given the reality of the system, present governments with ‘the systemic facts of the state’s situation and interests within a much longer time frame than the electoral cycle.’⁹

18. These long-term systemic imperatives do not change radically, regardless of which government is in power. This is hardly surprising in a capitalist democracy because the highest priority is the maintenance of investment stability. Unless this priority is attended to, no other priorities can be addressed. While Labor or Liberal-National governments may act in somewhat different ways, with varying nuances, they remain committed to the same systemic interest – that of Australian capitalism. Corporate managers do not usually focus on this systemic interest. They typically focus on specific details such as profits and market share in their corporations. However, the upper echelons of the state executive, which is largely composed of people with similar lifestyles, aspirations, and associations,

⁹ P. Gowan, *The Global Gamble*, Verso, London, 1999, p 65.

does focus on investment stability and on an environment conducive to the enduring interests of Australian capitalism. The state executive shapes, and is shaped by, the enduring framework of the private economy, where more immediate and focused corporate planning occurs.

19. Thus, the 'national interest' as conceptualised in economic terms is, given the reality of a capitalist democracy, best understood as the maintenance of the system and its associated need for investment stability. A foreign state that attempted to acquire an Australian asset through sovereign wealth funds or state-owned companies would be acting contrary to Australia's 'national interest' if it interfered with these considerations.

20. I am able to appear before the Committee if required.