



# YOUNG AUSTRALIANS in INTERNATIONAL AFFAIRS

## RECONSIDERING FOREIGN INVESTMENT: FRAMEWORK AND PRINCIPLES

POLICY BRIEF - HAIYUE MA

# EXECUTIVE SUMMARY

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Foreign investment is an integral factor of Australia's sustained economic growth; as of 2019, foreign economies had a total of \$3.8 trillion invested in Australia. [1] The extent to which the advent of protectionist policies abroad has influenced Australia is subject to debate; at the same time, recent concerns about the administration of Australia's foreign investment review framework have illuminated structural flaws which impede efficiency, contradict principles of good governance, [2] and undermine public and investor faith. This is an especially pertinent issue within the context of escalating tensions between global actors, in which Australia finds itself in an increasingly awkward position. As such, a critical re-examination of Australia's foreign investment framework is warranted.

# BACKGROUND

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Australia's foreign investment framework is comprised of sets of regulations under the Foreign Acquisitions and Takeovers Act 1975 (FATA) [3] and the Australian government's Foreign Investment Policy (the Policy). [4] The Foreign Investment Review Board (FIRB) serves as a non-statutory body to advise the Treasurer and the Australian Government regarding investment applications and proposals. Some key considerations include, but are not limited to: whether applications are in accordance with regulations under Australia's foreign investment framework, and whether proposals conflict with Australia's national interests. [5] The final decision is made by the Treasurer, who may allow applications to proceed subject to conditions designed to safeguard these national interests. [6]

Driven by the gained momentum of trade protectionism [7] and escalated tensions between key global actors over the past decade, public rhetoric surrounding foreign investment in Australia has adopted a strikingly sceptical tone, especially when such investments potentially pertain to the protection of Australian industries and national security.

## **CASE STUDY: LEASE OF THE PORT OF DARWIN**

This is demonstrated by the contentious lease of Port of Darwin in October 2015. "Binding contracts" were entered with Landbridge Group, a subsidiary of Shandong Landbridge Group. [8] Since then, the Northern Territory Government has refused to release the final proponents' offers, citing commercial-in-confidence reasons. The lack of transparency and accountability on behalf of the Australian government throughout the procedure incensed national security anxieties, and moreover, cast serious public doubt onto the competence of Australia's foreign investment framework.

Whilst much of public cynicism surrounding this deal was "alarmist nonsense" (Defence Secretary Richardson, 2015), [9] the fact that the deal was exempted from regular procedure reveals "loopholes" (Jennings, 2015) in legislation. Thus, the polarising potential of foreign investment in Australia and the contested nature of Australia's foreign investment review process necessitate a holistic reassessment of current norms and procedures.

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# THE PROBLEM

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## 1) Lack of transparency and accountability

The main source of public information about the foreign investment review process is material published on FIRB's website, including its annual reports. However, the annual reports provide minimal information on processes that govern decision-making within the foreign investment review framework. By withholding this information, decisions made under this framework cannot be held accountable. In relation to the lease of Darwin port, a 2016 Senate committee revealed that while the FIRB had been contacted to review the deal, no formal investigation followed because at the time there was an exemption from scrutiny as it involved a private company and a state or territory government. The head of FIRB admitted the entire process had undermined public confidence, failed to show a balance between economic gain and national security concerns and was finalised on an "ad-hoc" basis. [10] Furthermore, a party whose interests are adversely affected by a foreign investment decision has no capacity to seek administrative review.

For a decision to be reviewable by the Administrative Appeals Tribunal, it must have been made under an act, regulation, or legislative instrument that expressly provides a review right. No such right is provided by the FATA or its regulations. This blocking of review decisions from administrative oversight arguably contradicts and invalidates the purpose of the existing entitlement to make Freedom of Information requests of the FIRB.

## **2) Arbitrary definitions of national interest**

There is no legislative definition of national interest under the existing foreign investment review framework. In any case where national interest is potentially concerned, the Treasurer is conferred the authority to rule whether a particular investment will be contrary to said national interest. As a result of the arbitrary definitions of national interest, public opinion may be easily influenced and agitated by reactionary agendas, which in turn undermine the integrity of review decisions. For example, in 2013 Treasurer Hockey cited hostile public opinion as one of the grounds for rejecting Archer Daniels Midland's acquisition of GrainCorp. [11] Whilst Hockey is reasonably justified in that projects which "undermine" public support for foreign investment was not in Australia's national interest, more clarity and rationale surrounding the applications of national interest could have potentially appeased reactionary public opinion in the first place.

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# POLICY RECOMMENDATIONS

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## 1 Transparency

To publish summaries of the rationale behind recommendations made by FIRB on additional databases, or as an additional section in FIRB's annual report.

This would ensure greater procedural transparency within the FIRB's operations, in accordance with Organisation for Economic Co-operation and Development's (OECD) principles of good governance which advocates the notion of regulatory transparency (OECD 2012b, Recommendation 2).

There is an element of discretion that is necessary within any Government procedures. At the same time, transparency is a necessary element to establishing an environment that is conducive to the receipt of foreign investment. [12] Moreover, by communicating accurate and clear information, the effectiveness of the foreign investment review process can be assessed against its stated objectives.

## **2** **Accountability**

Administrative review provides the capacity to seek reasons for a particular decision. The prospect of administrative review may make the review process of both decisions by the Treasurer and the recommendations of the FIRB more regular and rigorous.

## **3** **National Interest**

To provide the public and foreign investors with broad principles of national interest to ensure that decisions made on the basis of national interest adhere to said principles. National interest and security considerations in relation to projects involving State Owned Enterprises (SOEs) should outline what constitutes "political or strategic objectives that may be contrary to Australia's national interest" (the Policy). It may be contended that the lack of a strict definition for national interest within the Australian framework enables a degree of flexibility in reviewing proposals, flexibility and transparency should not be mutually exclusive. The proposed alterations to the status quo may attain greater clarity and establish confidence in the public and foreign investors without undermining the adaptability of the framework.

# CONCLUSION

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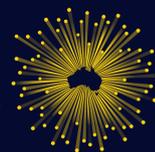
The final decision on whether to block a foreign investment application ought to remain with elected representatives. It will be greatly beneficial however to find a way to strengthen the framework's commitment to transparency and accountability. Additionally, there may be benefits from introducing a measure of administrative review. A reassessment of Australia's foreign investment review framework should take place in conjunction with broader re-evaluations pertaining to the changing political landscape, as well as Australia's shifting role within the international community.

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