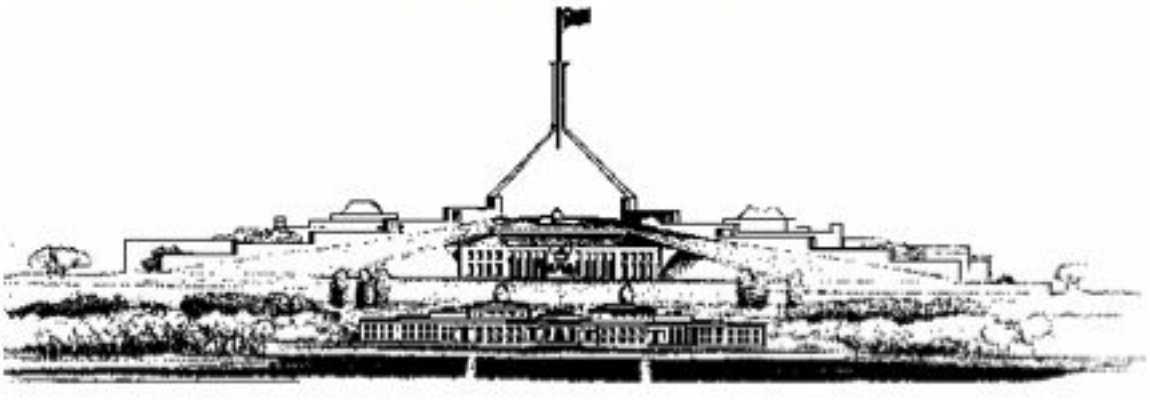
COMMONWEALTH OF AUSTRALIA

PARLIAMENTARY DEBATES



THE SENATE

ADJOURNMENT

China

SPEECH

Wednesday, 10 June 2020

BY AUTHORITY OF THE SENATE

SPEECH

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Questioner		**Responder**	
Speaker	Fierravanti-Wells, Sen Concetta	**Question No.**	

Senator FIERRAVANTI-WELLS (New South Wales) (20:26): My warnings about the skulduggery of the communist regime in China go back to early 2018. Since the Wuhan coronavirus I have intensified my criticisms and advocated that it can no longer be business as usual with the CCP. I have pushed for a major overhaul of critical infrastructure and foreign investment framework, including expanding the parameters of national interest, to ensure we better protect our national sovereignty. I have called for practical ways to protect our sovereignty, including breaking the lease on the Port of Darwin. I shall have more to say about this in due course.

In foreshadowing reform, including a national interest test, the Treasurer outlined the nearly $4 trillion of foreign investment into Australia, of which more than 20 per cent comes from the US, more than 10 per cent from each of the UK and Japan and a little over five per cent from China. Australians welcome foreign investment from like-minded democratic countries. What concerns them is investment by non-democratic totalitarian regimes or their state owned entities whose corporate frameworks do not accord with ours.

Last week's announcement has been forced on the government as a consequence of the growing distrust of the communist regime in China and its activities in Australia. I have no doubt diplomatic assurances have been given to Chinese authorities that my views and those of other colleagues in more recent times are simply those of mere backbenchers, but I say to those authorities that my concerns are shared by the silent majority in Australia. This is what democracy is about, and backbenchers love to be underestimated!

For years, we have been prepared to turn a blind eye to CCP skulduggery because the rivers of gold were flowing. Principles and values based dealings gave way to appeasement. Our export figures tell the story. During the Howard years exports to China rose from about five per cent to 13 per cent, under Labor they shot up to 30 per cent and under the Abbott, Turnbull and Morrison governments they have risen to about 33 per cent. In 2013 a Treasury paper sounded warnings about Chinese state owned enterprises. Notwithstanding their growth in Australia, in June 2015 the China–Australia Free Trade Agreement was signed.

In a 2017 paper entitled 'Mapping the legal landscape: Chinese state-owned companies in Australia', Professor Roman Tomasic and senior lecturer Ping Xiong, both from the University of South Australia, explored the legal contours of Chinese controlled investment in Australia. Their paper stated that in 2003 China established the State-owned Asset Supervision and Administration Commission which oversees state shares in major SOEs. That same paper noted that, by 2016, there were 66 major Chinese SOEs with a presence in Australia across most industry sectors. Of these, 39 were centrally controlled, with 130 Australian subsidiaries. The other 27 were provincially controlled, with 84 Australian subsidiaries.

For Chinese companies, corporate governance is limited. Rather, they are subject to corporate social responsibility norms underpinned by article 19 of China's company law, which states: 'In companies, Communist Party organisations shall, in accordance with the provisions of the constitution of the Communist Party of China, be set up to carry out activities of the party. Companies shall provide the necessary conditions for the party organisation to carry out their activities.' This puts the CCP front and centre of SOEs, irrespective of whether they operate inside or outside China.

In considering real reform to foreign investment, there are complex but important challenges. I will briefly touch on some pertinent issues. The Foreign Acquisitions and Takeovers Act 1975, FATA, regulates foreign acquisitions of Australian businesses and other assets, such as residential land, including for significant actions and notifiable actions where the acquisition is by a foreign person. FATA does not mention the Foreign Investment Review Board. The Treasurer determines FIRB's role and functions, thereby affording him the flexibility to augment its role in any reform. It provides advice, with final decisions made by the Treasurer. 'National interest' has never been defined in FATA. It's up to the government of the day to decide on a case-by-case basis and, in turn, strengthen as required.

Sensitive business areas include media, telecommunications, transport, military goods or services, encryption and security technologies, communication systems, uranium, mining, nuclear facilities and bulk data storage. The definition of 'sensitive business' may overlap with but does not match the definition of 'critical infrastructure' in the Security of Critical Infrastructure Act 2018. 'Critical infrastructure' is not used in FATA. Clearly, though, a business that provides critical infrastructure would, in policy terms, be considered a sensitive business.

So how, then, do we effect real reform in this complex area? Firstly, there needs to be consistency of definitions between these two important acts. 'Sensitive business' should include critical infrastructure and new provisions relating to the acquisition of critical infrastructure. Further, the definition of 'notifiable action' under FATA should also include an investment of any value in critical infrastructure. Regrettably, critical infrastructure is restricted to ports and utility assets—gas, water and electricity. It is imperative that the areas of coverage under both acts be expanded to more sectors, including banking, finance, food, grocery and agricultural activities, health and medical, transport, data communications, IT and airports.

Secondly, whilst the Treasurer has broad discretionary powers in determining the national interest, this could be augmented by adding to the definition of 'notifiable action' to ensure more relevant matters come to the Treasurer's attention. Thirdly, clarification is needed as to whether Australians with dual citizenship could be considered a foreign person for the purposes of FATA. FATA defines 'foreign person' as one not ordinarily resident in Australia, leaving open the possibility of an Australian citizen being a foreign person for the purposes of FATA. However, under the Australian Citizenship Act 2007, a person is 'ordinarily resident in a country' if that person's home is in that country or that country has the person's permanent abode, even if the person is temporarily absent from that country. This leaves open the possibility that a dual Australian citizen may not be a foreign person under FATA through his or her citizenship alone; it is their residence that is significant. This is important because interactions by foreign interests with Australian entities which may have foreign connections or foreign directors or Australian entities controlled by dual citizenship nationals can potentially give rise to national interest considerations. FATA applies to all corporations whether or not formed or carrying on business in Australia. Hence, for directors of companies who hold dual citizenship we will also need to look at the provisions of the Corporations Act, including disclosure of their director's material personal interests. It may be that citizenship or connection with another country is a material personal interest which the director needs to disclose in relation to his or her company entering into a contract to provide critical infrastructure.

Lastly, and probably most significantly, is the issue of Australian businesses carried on by, or land acquired from, government—be that Commonwealth, state/territory or local government—not being subject to foreign acquisition procedures under FATA, except if proposed to sell to a foreign government investor and if the subject of the sale was public infrastructure. A foreign government investor includes foreign governments, state owned corporations and corporations in which a foreign government or separate government entity, alone or together with one or more associates, holds a substantial interest. Public infrastructure includes ports, airports, public transport infrastructure, gas, electricity, water and sewage plants. This is infrastructure relevant to national security, and invokes the defence power under the Constitution.

The exemption afforded to acquisition of land or business from governments is very troubling, given the nature of the pronouncements by Premier Daniel Andrews in Victoria and his Belt and Road Initiative plans with the Communist regime in China. This is a critical point that must be considered. The Commonwealth can regulate activities of governments only if there is a constitutional head of power that allows it to do so. In broadening the national security test, consideration of the removal of the exemption relating to governments will be a critical test of the government's political fortitude in effecting real change.

In conclusion, I am heartened that the leviathan ship of state is slowly altering course for a more secure Australia. Whether the political fortitude is enduring remains to be seen.