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The Great Game Rebooted or the Long March to Acceptance? The Legal and Policy Impediments to Chinese Investment in Australian Corporations and Business Opportunities

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The Great Game Rebooted or the Long March to Acceptance? The Legal and Policy Impediments to Chinese Investment in Australian Corporations and Business Opportunities

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The rise of state capitalism poses profound questions for Australia. Long a beneficiary of China's hunger for security of supply in natural resources, the country now finds itself increasingly as an investment target and source of business opportunities in sectors as diverse as telecommunications, natural resources and agriculture. As a consequence, elements of Australia's legal and policy framework are coming under pressure. In particular, the operation of the Foreign Investment Review Board, created as a consequence of the *Foreign Acquisition and Takeovers Act* (1975), has now become a source of domestic political contestation. This paper explores the implications through the lens of the *Australia in the Asian Century* White Paper consultation process. It argues that ongoing ambiguity has the potential to undermine the cogency and coherence of the underpinning legal and policy framework. If unresolved it risks Australia becoming bypassed by the emergence of a new Southern Silk Road that positions China, in particular, at the centre of an integrated trading hub dominated by state capitalism.

A Introduction

On occasion bank analyst research reports capture the zeitgeist. In 1993, Jim O'Neil of Goldman Sachs coined the 'BRIC' acronym to highlight the growing importance of the mid-tier economies of Brazil, Russia, India and China. Subsequently refined projections–based on GDP growth, per capita income and currency flows–implied that further integration provided the building blocks of a global economic re-alignment.[1] The acronym has since passed into the lexicon. In 2011, HSBC–a bank that likes to advertise its acumen in knowing when emerging markets have emerged–chose an even more arresting metaphor. We are, it is claimed, witnessing the re-emergence of the Southern Silk Road.[2] This view also positions China as the pivotal hub in a global trading operation. As with the BRIC projections a decade earlier, the transformative implications are forecast to be far-reaching. The timescale, however, has shortened from the realm of futurology. The global bank predicts a ten-fold increase in trade and capital flows between emerging markets over the next forty years. The creation of a 'new global south,' it argues, 'is set to revolutionize the global economy.'[3] As could be expected, HSBC has been careful to stress the benefits. Left unstated are the ideational and structural strains on regional and indeed global frameworks.[4]

These frameworks were forged through the outworking of the last great power play on the Silk Road, the fabled route linking China to the West. The implosion of empire–imperialist and communist alike–reconfigures the global battle for influence. The 'Great Game,' once fought

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[1] The origins date back to a research report in 2001; see also Dominic Wilson and Roopa Purushothaman, 'Dreaming With BRICS: The Path to 2050' (Global Economics Paper No 99, Goldman Sachs, 1 October 2003).

[2] Stephen King, 'The Southern Silk Road: Turbocharging South-South Economic Growth' (HSBC Global Research, 6 June 2011).

[3] Ibid.

[4] A further influential banking commentator, Gerard Lyons of Standard Chartered, claimed the challenge could be summed up in three words, 'Owned by China,' see Tom Bawden and Kevin Shalvey, 'The Era of 'Owned by China', *The Guardian* (online), 12 January 2011 <http://www.guardian.co.uk/business/2011/jan/12/era-of-owned-by-china>.

between Britain and Russia for dominance of the Far East and Asian sub-continent, now lies within contemporary China's military and economic sphere of influence.[5] In the early twentieth century China was a mere pawn. Its subsequent transformation to global manufacturing powerhouse has made the Middle Kingdom a regionally and globally significant, if still partially unknown, actor. Nowhere is the potential conflict more pronounced than in its deployment of state capital across both developed and emerging markets, including the epicentre of the Great Game itself: Afghanistan.[6] While the visibility of China's reach has increased, its strategic purpose remains exceptionally contested. Uncertainty is magnified by a combination of the financial resources at China's disposal, its preference of guaranteeing security of supply over reliance on spot-market transactions, and the difficulties for outsiders to divine the interaction between corporate and political power.[7] The rise of China, therefore, poses a series of uncomfortable *ex ante* and *ex post* questions and concerns, most notably for recipient nations, including Australia.

Given the extent to which Australia's economic wellbeing is tied to China's future growth, determining how to manage this process has significant pressing corporate, legal and policy implications. It has now become subject to intense domestic political contestation, as a consequence of finely balanced parliamentary arithmetic and a questioning of whether the resources boom has peaked.[8] The paper explores the legal and policy impact of Chinese investment in Australia, a debate that has been characterized by former Prime Minister John Howard as 'juvenile.'[9] It does so in the context of the *Australia in the Asian Century* consultation process,[10] arguably the single most important strategic assessment of how to manage Australia's

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[5] Peter Hopkirk, *The Great Game: On Secret Service in High Asia* (John Murray Publishers, 1990). For application of the strategic implications to Australia, see Hugh White, 'Power Play: Australia's Future Between Washington and Beijing' (2012) 39 *Quarterly Essay* 1; see also Paul Kelly, 'China Divides Labor Across Its Generations', *The Weekend Australian* (Sydney), 11-12 August 2012, 13-14 (arguing that 'Australia is now plunging into an intense intellectual dispute, guaranteed to spill into Labor and Coalition politics, about how to manage its greatest external policy challenge for half a century – the rising competition between China and the United States': at 13).

[6] Alexander Benard, 'China Means Business', *Australian Financial Review* (Melbourne), 10 August 2010, 1, 10-11 (noting Chinese investment in oilfields and copper mining in Afghanistan: at 1).

[7] Fred Hochberg, 'State Capitalists Map Out a Wild West', *Financial Times* (online), 11 July 2012 <http://www.ft.com/intl/cms/s/0/4744aba0-ca9d-11e1-89be-00144feabdc0.html#axzz235xzFXR6>. The author, president and chairman of the Export-Import Bank of the United States, notes that while the export credit agency provided '$33 billion in financing but five times more was spent worldwide in unregulated export financing…to gain access to natural resources they don't have, to promote investments in their own countries or to create a more favourable environment for businesses they view as national champions.' For impact on Australia, see Andrew Burrell, 'US Flexes its Muscles on Investment', *The Australian* (Sydney), 16 August 2012, 1 (noting that the Export-Import Bank would make available a record $5 billion to facilitate inward investment).

[8] This is manifest in the political row over the decision by BHP Billiton to scale back its Olympic Dam project in South Australia. The decision based on escalating costs and depressed prices, prompted a political fire-fight, with the opposition leader claiming, erroneously, that the decision was explicitly linked to federal tax policy, see Jacob Greber, 'Ferguson Sparks Labor Row Over Mining', *Australian Financial Review* (Sydney), 24 August 2012, 7 (quoting the resources minister as saying that the 'resources boom is over'). Business leaders have criticised the current state of political debate on how to capture the benefits of inward investment. Mike Smith, the chief executive of ANZ, for example, has pointed out, 'it is the duty of politicians to forge public opinion, to inform the public about what is good for the country, rather than pandering to it in a populist manner,' quoted in Enda Curran and Michael Sainsbury, 'Don't Mix Politics and Deals: FIRB in Warning to State-Owned Investors', *The Australian* (Sydney), 7 August 2012, 1.

[9] James Massola, 'Howard Calls for More Chinese Investment', *Australian Financial Review* (Sydney), 28 August 2012, 1.

[10] Ken Henry et al, 'Australia in the Asian Century Issues Paper' (White Paper, Department of the Prime Minister and Cabinet, December 2011); for latest thinking on the initiative, see Ken Henry, 'Keynote Address' (Speech delivered to the 2012 Biennial Conference of the Asian Studies Conference of Australia, University of Western Sydney, 13 July 2012) 3 ('[A] notable feature of this White Paper is that it will be, first and foremost, a domestic policy document. While it is being developed against the backdrop of what is happening in our region, its focus is

shifting geo-political and economic relations in a generation. It provides a sounding board to evaluate the *Foreign Acquisitions and Takeovers Act* (1975) and associated policy apparatus. If, as the chair of the *Australia in the Asian Taskforce*, Ken Henry, has argued, the rise of China forces a new mindset in government, business and society, it is critical to ascertain whether the existing policy frameworks remains fit for purpose.[11]

The paper is structured as follows. Section B outlines the *Australia in the Asian Century* policy process. It sets out the corporate and policy risks associated with mismanaging the opportunities of greater engagement with the region, with particular reference to foreign direct investment. Section C maps the changing global contours of Chinese foreign investment. It provides a granular analysis of how China has expanded its range of investment choices. It outlines the risks posed to Australia of being bypassed in the construction of the new Southern Silk Road. Section D details the existing domestic framework governing the regulation of state capitalism. Section E ascertains the extent to which uncertainty over its application reflects an inherent conflict involved with integrating China into the national, regional and global economy, misunderstandings, or political gamesmanship. This is achieved through the detailed examination of a controversial application of the national interest test involving state capital: the blocking of Huawei Technologies capacity to tender for the National Broadband Network.[12] Section F discusses the operational remit and activity of the Foreign Investment Review Board (FIRB). It then considers how prevailing political imperatives interact with that FIRB activity, and how enhanced accountability and reduced political contestation might be integrated into the policy framework. Section G concludes.

B Australia and the Asian Century

The consultation process on *Australia in the Asian Century* highlights the critical importance of integrating micro-level decisions at firm level with macro-level governmental capabilities.[13] The stated aim of integration is the capacity to leverage our created and natural endowments. Inward investment from entities directly or indirectly financed through pools of state capital at the micro firm level profoundly challenge the efficacy of the macro legal, policy and regulatory frameworks.[14] The situation is further complicated when the firm in question has no formal links with a foreign government.[15] At stake is not only the authority and competence of government. Of equal importance is what constitutes the national interest in stewarding natural endowments, such as resources, and created ones, such as the establishment of the National Broadband Network. In a succession of recent speeches, the chair of the White Paper Taskforce, Ken Henry, argues that how we manage shifting economic paradigms has immediate and long-term

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on guiding Australia's evolution — exploring what Australians can do, indeed must do, to enhance their prosperity and broader wellbeing in this Asian Century').

[11] Ken Henry, 'Keynote Address' (Speech delivered to the Business Symposium of the Australian Conference of Economists, Victoria University, Melbourne, 12 July 2012).

[12] In its submission to the White Paper, the firm noted pointedly that Australia had imposed unnecessary restrictions on foreign investment, see Huawei Technologies, Submission No 180 to the Department of Prime Minister and Cabinet, *Australia in the Asian Century White Paper*, 5 March 2012, 8 ('[Australia] must be willing to set trade, security, foreign investment, visa and economic policy frameworks that encourage Asian investment and drive the Australian economy. In many of these areas Australia is already falling behind other countries who have been able to advance policy development enabling a fair and transparent framework for business opportunities').

[13] Henry (2011), above n 10.

[14] Ibid 12 (noting that 'China's FDI in Australia has grown from $0.55 billion at the end of 2006, to $12.82 billion and was the ninth largest source at the end of 2010').

[15] Briefing, 'Who's Afraid of Huawei?', *The Economist* (London), 4 August 2012; see also Holman Jenkins, 'What To Do About Huawei, *Wall Street Journal* (New York), 11 July 2012, A11; for Australian context, see Geoff Kitney, 'Huawei Pleads For a Fair Go', *Australian Financial Review* (Melbourne), 17 August 2012, 1, 6.

practical implications: 'Our abundant natural resource endowments are not inexhaustible, even though earlier generations of Australians–and the present one, largely–have acted as if they were. And what has been constructed in strong capabilities, through policy reforms over many years, can quickly be undone–more or less at the stroke of a legislator's pen.'[16] The consultation process is, therefore, predicated on explaining to a domestic audience the nature of the profound shifts taking place around us.

The fact that China, Australia's largest trading partner, is in competition for influence within and beyond the region with our single most important strategic military partner, the United States, complicates the terrain and the calculation of how best to manage it. It necessitates the deployment of astute navigational strategies to traverse unpredictable crosscurrents. The framing proposed in the White Paper consultation unmistakably suggests that Australia's future is best served by deeper integration. This in turn inevitably necessitates further reliance on a broader range of foreign investment.[17] Conversely, there is cognisance that integration poses profound and unresolved questions for a society that remains largely unaware or sceptical for cultural as well as narrow partisan and deeper ideological reasons about the sweeping changes transforming the regional and global economy. Indeed, it is a point made with clarity by Huawei Technologies in its submission to the review.[18]

Recent political intervention has done much to further muddy rather than clarify matters.[19] In a recent speech in Beijing, Tony Abbott, the leader of the opposition, maintained that the prevalence of state-owned enterprise investment complicates the decision-making process in determining whether foreign investment threatens the national interest.[20] The policy reflection

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[16] Henry, above n 11.

[17] Henry, above n 10 ('We need to think about how we remove the remaining barriers to trade, investment and cross-border innovation, how we move towards harmonized regulation, and allow firms across the region to form productive supply chains': at 15).

[18] See Huawei Technologies, above n 12, 12 ('At present there appears a reluctance to accept this change is happening at the pace it is, and that old strategies in international relationships and partnerships can remain unaltered. Huawei, as a totally involved corporate player in all major economies in the Asian region, considers it important Australia awake now, prepare its strategies and build its knowledge of the region, so it can be fully integrated in the booming Asian region and share in the opportunities that will come from a respectful, peaceful and cooperative region').

[19] The ambiguity has been a consistent theme throughout the White Paper consultation process, see Business Council of Australia, 'Assessing Australia's Trade and Investment with Asia,' Submission No 2 to the Department of Prime Minister and Cabinet, *Australia and the Asian Century White Paper*, 10 April 2012, 4 (noting 'in recent years, we have, for example, appeared to be inconsistent in our approach to new flows of foreign direct investment from Asia.' The submission further notes that while major natural resource suppliers are 'seeking alternative suppliers' the growth of indigenous large corporations capable of satisfying local needs threaten competitiveness: at 18); Colonial First State, 'The Rise of the Ferro Dollar', Submission No. 234 to the Department of Prime Minister and Cabinet, *Australia and the Asian Century White Paper*, 15 March 2012 (arguing that 'raising the capacity of the non-mining economy is essential and the only agent in the economy capable of doing this effectively is the government': at 1); see also Rio Tinto, Submission No. 216 to Department of Prime Minister and Cabinet, *Australia and the Asian Century White Paper*, 2 March 2012 (noting the reliance on foreign capital to raise $1.8 trillion of commodities-related investment and warning that 'If Australia is unable to meet new demand, it encourages our trading partners to develop new supply relationships to ensure secure supplies of the resources on which they depend. It leaves the upside of any growth in demand to be claimed by new suppliers in other resource-rich countries around the world' at 4. To achieve this goal, Rio Tinto argues that it is essential to raise the investment threshold: 'This includes reducing the regulatory burden on business, improving labour market flexibility, and extending to all countries the FIRB thresholds currently applied to US investors: at 5). This has gained some political traction from the former prime minister, John Howard, see Massalo, above n 9.

[20] Tony Abbott, 'Address to AustCham' (Speech delivered at Australian Chamber, Beijing, 24 July 2012) 2, 'It would rarely be in Australia's national interest to allow a foreign government or its agencies to control an Australian business. That is because we don't support the nationalization of business by the Australian government, let alone by a foreign one').

demonstrates the chasm between aspiration and reality, principle and pragmatism. The following week, back on Australian soil, he narrowed the critique to the politically charged question of foreign ownership of land and agribusiness. The Coalition released its own white paper, which advocates placing additional restrictions on farm sales. It calls for the creation of a national register to track foreign ownership and suggests that accountability and public confidence could only be assured by having representatives of the agricultural sector on the Foreign Investment Review Board (FIRB).[21] Rural-based opposition senators have gone further. They have called for a more substantive definition of the national interest test. Whether expanding the pool of experts within the FIRB or codifying the parameters of what constitutes the national interest provides greater accountability and clarity, thereby building public confidence, is however, far from clear. The FIRB performs an advisory function.[22] As will be explored more fully below, ultimate decision-making on foreign investment relies on the sole discretion of the Treasurer, who is not required to act on or publish the advice from FIRB.[23] The essential point to bear in mind at this stage is that the contours of the debate on foreign investment, particularly from China, obfuscates as much as it illuminates. Mutually traded accusations of protectionism and xenophobia, political impotence and incompetence, and the elevation of posture over principle, conspire to cloud rational discourse.[24]

Whether the investment strategies pursued by China reflects rational diversification or is an instrument of political power within a New Mercantilist paradigm remains exceptionally and increasingly contested.[25] Moreover, the increasing size and visibility of Chinese investment along with its geographic concentration and aggressive search for security of raw resources supply, from sub-Saharan Africa to Latin America to here in Australia, stands in marked contrast to the barriers Beijing has imposed on entry to its own market.[26] Introducing artificial barriers to entry is not, however, an option for countries like Australia, which are signatories to the OECD

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[21] Warren Truss (Chair of Working Group), 'The Coalition's Policy Discussion Paper on Foreign Investment in Australian Agricultural Land and Agribusiness' (Discussion Paper, Liberal and National parties, August 2012) 3 (The 'creeping cumulative acquisition of agricultural land, for example, may be inconsistent with both the national interest and the interests of local communities, even though foreign acquisitions of discrete land holdings will generally not of themselves be a matter of concern for the FIRB'); see also Tony Abbott, 'Foreign Investment in Australian Agricultural Land', *The Daily Telegraph* (online), 6 August 2012 <http://www.tonyabbott.com.au/News/tabid/94/articleType/ArticleView/articleId/8832/Foreign-Investment-in-Australian-Agricultural-Land.aspx>.

[22] *Foreign Acquisition and Takeovers Act 1975* (Cth); see also Curran and Sainsbury, above n 8 (quoting the new FIRB chairman, Brian Wilson, who has stressed the flexibility of a principles-based approach. 'Australian businesses, however they are owned should be run on a purely commercial basis and not as an extension of the policy, political or economic agenda of a foreign government)'.

[23] The rejection of an attempt by the Singapore Exchange to take over its Australian counterpart was notable in that the Treasurer justified the decision 'on unambiguous and unanimous advice from FIRB that the proposed transaction was contrary to the national interest,' see Department of Treasury (Cth), 'Foreign Investment Decision' (Press Release, 8 April 2011).

[24] See Fleur Anderson, 'Senators Push For Tougher FIRB Rules', *The Australian Financial Review* (Melbourne), 10 August 2012, 4; see also Penny Wong, 'Investing in Our Future' (Speech delivered at the Australia-Israel Chamber of Commerce, Melbourne, 8 August 2012) 4 ('The historically bipartisan approach to open and free trade – including foreign investment – is breaking down as false parochialism begins to dictate economic policy is some quarters').

[25] Will Hutton, *The Writing on the Wall: China and the West in the Twenty-First Century* (Hachette Digital, 2008); Martin Jacques, *When China Rules the World: The Rise of the Middle Kingdom and the End of the Western World* (Allen Lane, 2009); Stefan Halper, *Beijing Consensus: How China's Authoritarian Model Will Dominate the Twenty-First Century* (Basic Books, 2010); for critique, see Peter Nolan, *Is China Buying the World?* (Polity Press, 2012) 3-11.

[26] While this has raised hackles in policy as well as political circles it is important to note that China is not a member of the OECD, it is not constrained by the obligation not to erect artificial barriers to entry, see Justin O'Brien, 'Mapping the Trajectory of Regulatory Debate: Securing the National Interest or Justifying Protectionism?' in Renee Fry, Warwick McKibbin and Justin O'Brien (eds), *Sovereign Wealth: The Role of State Capital in the New Financial Order* (Imperial College Press, 2011) 155-170.

liberalisation agenda.[27] Managing community expectations about how to manage the chasm between legal obligation and inchoate rage at how the regulatory environment is played is, therefore, necessary if extremely problematic.[28] One interesting attempt to manage Chinese investment is to make demonstrable improvements to the way in which businesses are run. In 2007 the highly influential Vice Chancellor of the Delaware Court of Chancery, Leo Strine gave a remarkable speech.[29] For Strine, shifting global dynamics necessitated a critical re-think about the purpose of the corporation and the market in which it is nested. In a controversial passage, Strine warned that corporations and markets needed to take societal obligations seriously because of a New Mercantilism, dominated by China, which 'sink even deeper beneath the normative floor that the West sets for the ethically and socially responsible conduct of corporate affairs.'[30] Such a rethink is beyond the scope of this article, which concentrates on the extent to which the existing domestic policy frameworks are flexible and robust enough to deal with the effects of domestic political priorities interacting with structural changes in international economic power. What is clear, however, is that the rhetoric and substance of corporate social responsibility is advancing within China at a faster rate than in the United States in both corporate and regulatory arenas.[31] This makes fealty to these concepts an exceptionally difficult basis on which to justify exclusion. As will be explored more fully below, it is, however, precisely on this basis that the Australian federal government has partially sought to limit foreign direct investment from state-owned enterprises.[32]

Complex mapping of the rise of China investment overseas reveals five interlinking dynamics and associated risks. First, it highlights the growing sophistication of the Chinese economy and the major institutional actors within it, including, crucially, private firms ostensibly far-removed from the machinations of the Chinese government. Second, while the domestic market continues to dominate growth strategies, overseas acquisitions for the manufacturing, telecommunications and financial services sectors facilitate technological innovation.[33] This drives increases in the product value chain but also enhances fears of intellectual capital theft in the manufacturing sector and accusations that investments may influence lending strategies in the banking sector. Third, the creation of national champions, capable of competing in international markets as global brands in their own right, reinforces the centrality of China in the

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[27] See Adrian Blundell-Wignall and Gert Wehinger, 'Open Capital Markets and Sovereign Wealth Funds' in Fry, McKibbin and O'Brien, ibid 105-146 at 114 ('Foreign investors are to be treated not less favourably in like situations' in order to remain in compliance with the OECD Code of Liberalisation of Capital Movements (1961) and OECD Declaration on International Investment and Multinational Enterprises (1976, updated 2000)).

[28] See comments by Mike Smith, chair of ANZ, quoted in Curran and Sainsbury, above n 8.

[29] Leo Strine, 'Towards Common Sense and Common Ground: Reflections on the Shared Interests of Managers and Labor in a More Rational System of Corporate Governance' (Speech delivered at William Mitchell College of Law, St Paul, United States of America, 10 March 2007) <http://www.dorsey.com/files/upload/MinnesotaSpeech.pdf>.

[30] Ibid at 17.

[31] See China Securities Regulatory Commission, 'The First Integrity Rules for Capital Market Regulation to Take Effect in September' (Press Release, Shanghai, 31 July 2012) noting that 'integrity is the foundation yet the same time a bottleneck for the development of capital market. Loss of integrity will undermine the market confidence and damage the interests of market players, especially that of small and medium investors.' For application of corporate social responsibility as core to corporate purpose, see SASAC, *Guidelines to the State-owned Enterprises Directly under the Central Government on Fulfilling Corporate Social Responsibilities* (2008), SASC <http://www.sasac.gov.cn/n2963340/n2964712/4891623.html>.

[32] See Section D below.

[33] King & Wood Mallesons, Submission No 193 to the Department of Prime Minister and Cabinet, *Australia and the Asian Century White Paper*, 4 March 2012, (noting that 'Australian businesses and the Australian Government must increasingly recognize that the new wave of Chinese expansion represents a business model that shifts away from dependence on rapid low-cost production to one that is focused on innovation, high value-add, enhanced management and stronger corporate governance. The new generation of Chinese companies will increasingly make overseas acquisitions that enhance their technological assets, marketing reach and managerial expertise': at 19).

global supply chain. Fourth, diversification of surplus capital investment strategies reduces reliance on low yield assets such as US Treasuries but also leads to accusations that China is attempting to 'own the world'.[34] Fifth – and most problematically for recipient countries – there remains opacity as to whether these investments reflect solely commercial imperatives or are also imbued with politically oriented goals. Disentangling the strength of competing trade and investment and strategic dynamics is one of the most pressing political economy questions of our time. Before evaluating how the Australian legal and policy framework has attempted to untie this Gordian knot, it is necessary to explore with more granularity the changing global nature of Chinese investment and its relationship with Australia.

C Enter the Dragon

In 2011, as the *Australia in the Asian Century White Paper Issues* Framework was being finalized, China's overseas investment expenditure had increased to over $US375 billion.[35] For a country such as Australia which historically has been, and, indeed still is, so dependent on foreign capital, this investment pool has offered and continues to offer significant future opportunities.[36] Information provided by the Foreign Investment Review Board reveals that while real estate transactions have skewed the overall number of successful approvals, more than AUD $10 billion needed to feed the resources pipeline has come from China.[37] The global demand for resources has been central to Australia's relative insulation from the effects of the global financial crisis. The country has significant reserves of alumina, zircon and tantalum as well as liquid natural gas, nickel and iron ore. Much of it lies in Western Australia. The state is the world's leading producer of bauxite, rutile and zircon. Western Australia has the largest known reserves of nickel and the second largest supply of iron ore, gold, bauxite and diamonds.

Chinese concerns have become some of the most significant competitors to the dominant ostensibly domestic holdings–BHP Billiton and Rio Tinto, which are dual-listed on the London market, and the increasingly important Fortescue Metals Group. As a consequence, Australia has been the single largest beneficiary of Chinese overseas direct investment to date. There have been, however, warnings that a lack of clarity on investment protocols could prove problematic.[38] These problems are intensified by the emergence of new commodities markets, a point made repeatedly in submissions to the Australia in the Asian Century White Paper consultation.[39] Continued success necessitates awareness of the increasing range of options facing China as it integrates into global markets and its corporations extend beyond low-level extraction.[40] As Ian Smith, the chief executive of explosives manufacturer Orica put it in a recent conference in Perth, 'we really have to get the settings right because Africa is coming. The

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[34] See Benard, above n 6; see also Nolan, above n 25.

[35] KPMG and the University of Sydney China Studies Centre, *The Growing Tide: China Outbound Direct Investment in Australia* (November 2011), 3 <http://epublishbyus.com/ebook/ebook?id=10023001#/6>.

[36] KPMG and the University of Sydney China Studies Centre, *Demystifying Chinese Investment: China's Outbound Direct Investment in Australia* (August 2012), 5 <http://sydney.edu.au/china_studies_centre/images/content/Research/demystifying-chinese-investment-2012.pdf> (From September 2006 to June 2012, China invested $US45.1 billion in Australian businesses through 116 completed deals).

[37] See Foreign Investment Review Board, *Annual Report 2010-2011* (Canberra, 2012), 31 (noting that 5,033 applications have been approved).

[38] Peter Drysdale, 'Australia: Time to Adapt' (2012) 4 *East Asian Forum Quarterly* 31 ('The retreat of Chinese overseas direct investment from Australia is likely to gather pace unless Australia's drift on foreign investment policy receives an urgent makeover').

[39] See submissions by Business Council of Australia, Rio Tinto, and Colonial First State, cited above n 19.

[40] King & Wood Mallesons, above n 33, 19.

second half of the 21st century, they will be a major supplier of commodities.'[41] It is clear that the major beneficiary in this process will be China.[42]

An excellent recent series of reports jointly authored by KPMG and the University of Sydney China Studies Centre provides much needed additional data to help evaluate the changing nature of Chinese investment.[43] While China's state-driven investment program is relatively young, it is possible to draw some high-level conclusions about its changing contours, each of which has profound implications for the Australian policy framework. First, not only is the *size* increasing, so too is the rate of increase. Research houses have calculated that this trend will continue until at least 2020.[44] Second, China has invested in a variety of *sectors*. Security of natural resources supply, while important, is not the only factor fuelling growth. Globally, in 2010 mining investment constituted US$29.6 billion of China's total investment portfolio, while wholesale and retailing had reached $US39.6 billion, leasing and business amounted to $US69.7 billion, and finance investments were worth $US 49.2 billion.[45] Third, China has expanded the *range* of markets, including countries with higher risk profiles than many Western firms are willing to countenance. The scale of investment changes geo-political realities. In 2011, Chinese banks provided more loans to the developing world than the World Bank. In some countries this numerical superiority was substantial. For example, China's US$75.8 million in loans to the Republic of Congo dwarfed that provided by the World Bank US$25.5 million. In Ghana, China provided $9.87bn in loans compared to just $313 million from the World Bank.[46]

Fourth, China is increasing the *type* of deals in which it is entering. Several high profile transactions in 2012 demonstrate concerted attempts to 'move up the value chain' in a range of sectors, including aviation (e.g. Superior Aviation Beijing's US$1.8 billion bid for Hawker Beechcraft), and agribusiness (e.g. Bright Food Group's successful acquisition of British cereal firm Weetabix).[47] These investments, which combine lower Chinese labour costs and higher Western technical expertise perform a feedback loop. They provide an opportunity to import innovative production processes into the domestic economy, which in turn allows for international competitiveness. It is indicative that these arrangements constituted almost half of total deal value in 2011.[48] The primary vehicle for achieving this goal is through the development of major conglomerates, primarily state-owned enterprises (SOEs).

These firms are increasingly listed internationally, primarily through Hong Kong (the so-called "Red Chip" growth stocks). In 2001, 12 Chinese companies were listed in Fortune's Global 500. In 2011, 61 Chinese companies (all but 4 were state-owned) were on this list, ranking China as

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[41] Ayesha de Kretser and Luke Forrestal, *The Australian Financial Review* (Melbourne), 24 August 2012, 15 (quoting speech made at the Financial Review and Macquarie Future Forum, Perth, 23 August 2012).
[42] See King, above n 2.
[43] See above n 35 and n 36.
[44] Thilo Hanemann and Daniel H. Rosen, 'China Invests in Europe: Patterns, Impacts and Policy Implications', (Rhodium Group, June 2012) 5; KPMG and the University of Sydney China Studies Centre, above n 35, 3.
[45] KPMG and the University of Sydney China Studies Centre, above n 35, 4, 5.
[46]Steven Duke, 'China Lending More Than World Bank', *BBC News* (online), 9 December 2011 <http://www.bbc.co.uk/news/business-16092634>.
[47] Tom Orlik, 'China's Expanding Outbound Investment Appetite,' *Wall Street Journal* (online), 17 July 2012 <http://online.wsj.com/article/SB10001424052702303933704577532333649620086.html>; see also ACapital, *How fast is China Globalizing: Tracking Chinese Outbound Investments - Full year 2011*, 3 (2012) ACapital Corporate Website <http://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0CEcQFjAB&url=http%3A%2F%2Fwww.bencham.org%2FBinaryLoader.axd%3FOwnerID%3D8083209d-663f-4084-bacb-40711b2039c9%26OwnerType%3D0%26PropertyName%3DEmbeddedFile_d3430e3f-7ad3-4e61-859c-63291eda65b2%26FileName%3DACapital%2BDragonIndex%2BFullYear%2B2011.pdf%26Attachment%3DTrue&ei=fbcxUMvOOZCfiQfi9YCABQ&usg=AFQjCNFn88nMaCbHMJTPEMgKVDkfwFGgKw>.
[48]ACapital, ibid.

the third most concentrated domicile, behind the US and Japan.[49] For the firm and its ultimate owners, the Chinese government as well as individual and institutional shareholders, substantive, credible and demonstrable commitment to minimum standards of corporate social responsibility provides critical domestic and external signalling. In January 2008, the State-owned Assets Supervision and Administration Commission (SASAC), which monitors the activity of major SEOs, issued corporate social responsibility guidelines. The Guidelines 'give impetus to state-owned enterprises … to earnestly fulfil corporate social responsibilities, so as to realize coordinated and sustainable development of enterprises, society and environment in all respects.'[50] Although non-binding, the guidelines state unambiguously that 'fulfilling CSR is an overall social requirement.' Given the reality of authoritarian politics on the mainland and the need to manage an economy comprising one quarter of humanity, the exhortation is not an altogether symbolic gesture.[51] Such an approach leads to a questioning of western commitment to the values espoused by Chancellor Strine highlighted above[52] as well as the formulations advanced by the Australian federal government in the calibration of principles governing investment from state controlled entities.

There is also evidence that China is moving to impose more stringent obligatory rules on outbound investments.[53] For example, in 2012, the SASAC issued a directive requiring centrally controlled SOEs planning to invest overseas in areas outside of their core business to lodge details of their investment and financing sources with SASAC, obtain approval before actual investments are made, and ensure they are registered with SASAC before making major investments in core businesses.[54] This reflects a confluence of tactical and strategic commercial and political imperatives. Designed, ultimately, to safeguard the stability of the country, an unmistakable by-product is more effective compliance and risk management systems, ostensibly the *sine quo non* of commercial acumen and purpose.

Finally, along with traditional partnerships, China is using a variety of additional *investment vehicles* to pursue its investment strategy. Above the paper has discussed the growing importance of privately-owned companies, and the increasing size of China's SEOs. In addition, China has built the size and complexity of its sovereign wealth funds. It now has 4 of the world's 11 largest funds by size.[55] Recent acquisitions, such as a major stake in Thames Water in London, demonstrate a desire to reduce dependency on US Treasury bonds. Of even greater significance is its expansion of stakes in private equity operations, most notably the recent planned

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[49] Maija Palmer and Kathrin Hille, 'Lenovo Close to Passing HP in PCs', *Financial Times* (online), 16 August 2012 <http://www.ft.com/intl/cms/s/0/48b2481e-e78d-11e1-8686-00144feab49a.html#axzz23eqdNuH5> (noting that the Chinese manufacturer now has 14.9% of global market share, 0.6% behind Hewlett-Packard, generating sales of $8bn and quarterly profits of $141m); see also Lex, 'Sanity Versus Vanity,' *Financial Times* (online), 16 August 2012 <http://www.ft.com/intl/cms/s/3/27bf5d34-e7a3-11e1-86bf-00144feab49a.html#axzz23eqdNuH5> (noting that Lenovo's strategy, based on acquisition of NEC in Japan and Medion in Germany have helped solidify market share in developed countries and that operating costs for the conglomerate are a quarter those of HP) .

[50] SASAC, above n 31.

[51] Ibid.

[52] See above n 29-30 and accompanying text.

[53] See US Chamber of Commerce, *Corporate Responsibility and Sustainable Economic Development in China: Implications for Business* (March 2012), US Chamber of Commerce 13. <http://www.uschamber.com/sites/default/files/international/files/17296_China%20Corp%20Social%20Responsibility_Opt.pdf> (noting that improvements in CSR allow for differentiation and moves to escalate the value proposition at home and abroad as well as reducing domestic contestation) accessed 16 August 2012; see, more generally, Organisation for Economic Co-operation and Development (OECD), 'China: Encouraging Responsible Business Conduct' (OECD, 2008) 65-142.

[54] KPMG and the University of Sydney China Studies Centre, above n 36, 15.

[55] See Sovereign Wealth Fund Institute, *Global Rankings*, (July 2012) Sovereign Wealth Fund Institute <http://www.swfinstitute.org/fund-rankings/>.

acquisition of General Motors Pension Plan assets currently under management of Performance Equity.[56] The acquisition, conducted through the State Administration of Foreign Exchange (SAFE), has been valued at $1.5-$2billion. It is reported by the *Financial Times* to be 'secretive even by private equity standards,' in part because private equity has emerged as an issue in the upcoming presidential election. What is also clear, however, is that these concerns are not enough to invalidate an opportunity to gain access to a private equity pipeline that gives the China Investment Corporation access to trade sales. Here is Australia, while direct stock purchases by Chinese entities are limited as a consequence of legislative and the operation of the Takeovers Code, there is no such overt prohibition in US-domiciled private equity transactions.

Taken together, this sketching of changing deal flows demonstrates the growing sophistication in both the substance and management of China's trading relationship with the outside world as mediated by its corporations and funds managers. Unless the process is managed effectively, therefore, Australia could see its competitive advantage whittled away, not only in the resources space, a declining component of the total, but also in telecommunications, where the investment in the National Broadband Network offers a critical opportunity to build productive industries. What is unresolved is whether we have the knowledge or the will to take advantage of this shift. Before exploring the consequences through a specific detailed evaluation of Huawei's experience with the foreign investment regime, it is necessary to set out its general parameters.

D The Operation of the Australian Framework

The variable quality of corporate governance reporting and ownership purpose necessitates warranted reflection on whether providing access to domestic resources or markets serves or hinders the national interest. Equally, if decisions are made to restrict investment do policymakers risk slipping into irrelevance if other alternative markets, with guaranteed security of supply emerge? The question of the exploitation of natural endowments–ownership rights over extraction or cultivation–is critical to recipient countries in both the developed and developing world. Absent a cohesive and coherent approach, resource-led states, such as Australia, risk failing to maximize or squandering the proceeds of what until now has been an unprecedented resources boom. None of this is to suggest that it is unreasonable to impose restrictions on parts of the critical infrastructure because of strategic and/or cultural factors. Indeed it is commonplace.[57] These can include restrictions in dual-use technologies or protection of core communication portals, such as media markets, from undue foreign influence. The restrictions can be complete, partial or entail a review process, which, in turn, may or may not privilege investments (depending on the salience of wider security concerns).[58] The policy problem centres on a lack of agreement on what 'critical' means and the parameters that governments can use to define 'national security' interests.[59] The consequence can be a perceived lack of transparency in the investment review processes, which may allow the evaluation pathways to become susceptible to political and economic populism and convince trading partners to seek alternatives.

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[56] Stanley Pignall and Dan McCrum, 'China to Buy US Assets Via GM Pension', *Financial Times* (online), 18 July 2012 <http://www.ft.com/intl/cms/s/0/82cd520a-d0f9-11e1-8957-00144feabdc0.html#axzz23eqdNuH5>.

[57] See United States Government Accountability Office (GAO), 'Foreign Investment: Laws and Policies Regulating Foreign Investment in 10 Countries' (GAO, February 2008); OECD, 'Protection of 'Critical Infrastructure' and the Role of Investment Policies Relating to National Security' (OECD, May 2008), 6.

[58] See generally, O'Brien above n 26; Wignall-Blundell and Gehringer, above n 27.

[59] OECD, 'Transparency and Predictability for Investment Policies Addressing National Security Concerns: A Survey of Practices' (OECD, 2008).

While the investments to date in Australia have generally been structured as joint ventures, the number of hostile bids for medium sized Australian operations has increased.[60] There are, of course, clear commercial grounds for adopting such an approach. From the Chinese corporate perspective, as noted above, the synergies produce economies of scale, reduce dependency on the major Australian exporters, and minimise the risk of reliance on volatile spot markets. Conversely, the facilitation of inward capital flows may also depress prices in cases where the same entity extracts and uses the resources. The fear expressed in Canberra focuses on the fact that this linkage could disproportionately benefit the customers of Australian resources, namely the Chinese. The policy implications sharpened in 2008 because of a strategic raid by Chinalco and its (junior) American partner, Alcoa, on the Rio Tinto share register in London; itself the target of BHP Billiton's audacious attempt to consummate the largest takeover in history. Legal advice to Chinalco held that neither Australian law nor policy invalidated the $12 billion raid.[61] As a consequence, there was no requirement to notify or seek prior federal approval. Two weeks after the raid, the Australian federal government attempted to reconcile competing objectives by refining the principles used to evaluate potentially controversial commercial deals.[62] The effect, however, was to introduce continuing uncertainty in the marketplace.

Under Australian law, foreign investment is evaluated under the *Foreign Acquisitions and Takeovers Act* (1975). The Act delegates the advisory analytic function to the Foreign Investment Review Board (FIRB), and as detailed in Section F, more than 90% of total applications are effectively decided by FIRB under delegated authorisation. However, ultimate decision-making authority remains with the Treasurer. Unfortunately, the principles did little to provide clarity. The first principle covers the investor's independence from the relevant government (to monitor for actual foreign government control). It remains unclear what degree of independence is deemed appropriate. Moreover, it is uncertain whether this provision could be enforced against a publicly listed entity in which a state or regional government held a formal but minority interest or even more problematically if the entity was privately owned.[63] Second, the Board is required to review the investor's litigation record and 'common standards of business behaviour' (i.e. the extent to which the investor has clearly expressed commercial objectives and the quality of its corporate governance). It is equally uncertain whether this principle would apply to a newly listed corporation or one with no previous litigation history. Of equal significance the stated commitment in China to principles of corporate social responsibility as a mechanism of ensuring social order, as well as commitment to introduce an integrity regime governing the operation of the securities market, present, on paper at least, credible attempts to institutionalise ethical restraint that match or indeed exceed western commitments.

The third principle examines the impact of the investment on competition (to be determined in consultation with the Australian Consumer and Competition Commission). Such an approach

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[60] See Gillian Tan, Deal Book Australia: Chinese Investment in Australia is Complicated', *Wall Street Journal* (online), 18 July 2012 <http://blogs.wsj.com/dealjournalaustralia/2012/07/24/chinese-investment-in-australia-is-complicated/> (noting the creation of Yancoal Australia in July 2012, formed through a contested merger with Gloucester Coal, had become the largest Chinese-controlled listed corporation in Australia); for a full list of approved Chinese investors, see KPMG and the University of Sydney China Studies Centre, above n 36. In 2009 two high profile deals were explicitly rejected. The first involved China Minmetals Non-Ferrous Metals planned acquisition of Oz minerals on the grounds that the latter's mining rights included military-zoned land. The second involved a further attempt by Non-Ferous to acquire Lynas, which was not proceeded on as a consequence of policy advice that no acquisitions in excess of 50% were likely to be accepted. For background, see Greg Golding and Rachel Bassil, 'Australian Regulation of Investments By Sovereign Wealth Funds and State-Owned Enterprises' in Fry, McKibbin and O'Brien above n 26, 171-188.

[61] O'Brien, above n 26, 164; see also Golding and Bassil, above n 26.

[62] Department of Treasury (Cth), 'Government Improves Transparency of Foreign Investment Screening Process' (Press Release, 17 February 2008).

[63] It is precisely for this reason that the Huawei Technologies attempt to be involved with the NBN has proved so problematic.

may have value in the case of a major acquisition, which impacts on market pricing. It is questionable what influence the transfer of a mid-tier company could have on competition policy, making the provision largely irrelevant unless invoked for short-term political reasons. Fourth, the FIRB is mandated to evaluate the impact of the proposed investment on government revenue or other policies, including tax and environmental protection. It is hard to see how this could be utilised only against state-owned investment vehicles without compromising equity of treatment principles. Fifth, the FIRB is mandated to evaluate national security considerations, which includes undefined 'strategic interests'. Sixth, the board will determine the impact on the operation and direction of Australian business, 'as well as its contribution to the Australian economy and broader community', which includes taking into consideration 'the interests of employees, creditors and other stakeholders.'

The Federal Treasurer, Wayne Swan, sought to display his pro-inward investment credentials and displace concern by suggesting his office is swamped by Chinese proposals. He has publicly stated that the government had approved a Chinese investment once every nine days since coming to office. He also intimated, however, that Chinese investment proved exceptionally complex; it required a more detailed examination, which in turn allowed for an expansion of the timeframe for approval beyond thirty days.[64] The proposals have generated considerable ire in Western Australia, where those involved in facilitating inward investment complain that it is important to 'differentiate between stock market and real miners'. They also suggest that linking the national interest to the need to separate supply and demand misunderstands the dynamics of the mining industry. This is precisely the message the Federal Treasurer promulgated at the time of release of the revised principles.

> The key is that investments are consistent with Australia's aim of maintaining a market-based system in which companies are responsive to shareholders and in which investment and sales decisions are driven by market forces rather than external strategic or political considerations… Our predisposition is to more carefully consider proposals by consumers to control existing producing firms. We usually welcome and encourage some participation by the buyer… but we need to ensure that investment is consistent with Australia's aim of ensuring that decisions continue to be driven by commercial considerations and that Australia remains a reliable supplier in the future to all current and potential trading partners.[65]

The rationale for such an interventionist approach was explicitly justified by reference to the international debate on the regulation of sovereign wealth funds. The empirical basis for such an assertion is hard to justify.[66] Not surprisingly it is a theme also developed by Chinese and Chinese-linked mining concerns. Interviews conducted by one of the researchers for this paper in Beijing in 2008 made it clear that both parties are puzzled and annoyed at what they perceive to be an admixture of discriminatory practices, bad faith and policy incoherence.[67] One of the most significant investments in Western Australia, for example, has come from a subsidiary of CITIC

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[64] Under Australian law, foreign investors can withdraw an application if it has not been accepted within the timeframe, thereby guaranteeing confidentiality. In one recent case involving Sinosteel, a Chinese-based corporation, the government refused the request for withdrawal and allowed the proposed investment to be gazetted. According to a senior representative of the Chinese firm involved, this decision was contrary to its wishes and demonstrated 'discriminatory practice' (Justin O'Brien, Interview with Wang Gongcheng, CP Mining Management Pty Ltd (Beijing 5 September 2008)). The government eventually approved an application limiting the investment to 49.99%, on the grounds that a controlling interest would be contrary to competition policy.

[65] See Wayne Swan, 'Australia, China and This Asian Century' (Speech delivered at Australia-China Business Council, Melbourne, 4 July 2008).

[66] See Drysdale, above n 38; see also Geoffrey Garrett, 'Chinese Investment Elephant is Well and Truly in the Room', *The Weekend Australian* (Sydney), 18-19 August 2012, 16 (noting three major flaws in what he terms the 'anti-China campaign:' there is no global restraint on mercantile behaviour; reciprocity undermines OECD commitments; and even if state-owned enterprises were an instrument of state power, the investment helps Australia by providing a source of royalties).

[67] See O'Brien, above n 26.

Pacific, a listed Hong Kong corporation, in which the Chinese government retains a thirty per cent passive stake. The director of CITIC Pacific's Australian operation, Wang Gongcheng, was scathing about what he sees as the apparent lack of knowledge in Canberra of either Chinese realities or the economics of iron ore extraction.[68] Now that concern has turned to other sectors, most notably telecommunications, where the difficulty in navigating the interaction between law and policy in relation to Huawei Technologies attempt to tender for the construction of the National Broadband Network has done much to sour relations.

E Coldplay: No Paradise in Australia for Huawei

It will no doubt be surprising to the former Liberal Foreign Minister, Alexander Downer, and former Victorian Labor Premier, John Brumby, that they sit on the advisory board of a corporate entity apparently judged to be a national security risk.[69] John Lord, a former commander for the Royal Australian Navy who retired at the rank of Rear Admiral, will be equally perplexed that representing the local operations of Huawei Technologies, the Chinese telecommunications conglomerate, has proven so controversial. All three have fallen foul of concern about the provenance of the parent firm, which emerged from the Chinese military-industrial complex to become one of the most significant global players in mobile and core broadband network provision.[70] Huawei's strategy of hard and soft investment in Australia now lies in tatters. The appointment of a local board in June 2011 was an experiment that has neither provided access nor convinced Canberra of a commitment to best-practice corporate governance or social responsibility. The deployment of cutting-edge mobile technology and strategic alignments with both Optus and Vodafone and university partnerships,[71] combined with the soft promotion of rock concerts by Coldplay, has not made the firm any more acceptable than hosting conferences on digital inclusion addressed by the very Government minister responsible for rolling out the National Broadband Network.[72]

The firm was told privately that 'there is no role for Huawei in the National Broadband Network'. As a result, Australia is by no means the 'Paradise' of opportunity that the band warbles in its latest single. The play has become cold. The Prime Minister, Julia Gillard, effectively confirmed that national security concerns precluded Huawei from tendering: 'You would expect that as a government we would make all of the prudent decisions to make sure that the infrastructure project does what we want it to do and we've taken one of those decisions.'[73] There are a number of ironies at work. As a critical platform provider Huawei is well aware of the power of the networked society to effect change. The confluence of technology and social media practice is transforming politics across the globe, including in China itself. The unresolved question is whether Huawei, with its genesis within the People Liberation Army, is a commercial

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[68] Justin O'Brien, Interview with Wang Gongcheng, CP Mining Management Pty Ltd (Beijing, 5 September 2008).
[69] For details on board composition, see corporate website: Huawei Technologies, *Local Board Members* (19 August 2012) <http://www.huawei.com/au/about-huawei/corporate-info/local-board-directors/index.htm>.
[70] For background on Huawei's transformation, see *The Economist*, above n 15.
[71] See Huawei corporate website: Huawei Technologies, *University Partnerships* (19 August 2012) <http://www.huawei.com/au/about-huawei/corporate-citizenship/university-partnerships/index.htm>.
[72] See Huawei corporate website: Huawei Technologies, *Connecting Communities: The Impact of Broadband on Communities in the UK and its Implications for Australia* (February 2011) <http://www.huawei.com/au/about-huawei/newsroom/reports-and-submissions/index.htm>.
[73] AAP, 'Huawei's NBN Exclusion Prudent', *Australian Financial Review* (online), 26 March 2012 <http://afr.com/p/national/huawei_nbn_exclusion_prudent_pm_FbKOKk2uPLKcRvlGHXFf6I>.

entity or corporate sleeper for Chinese political and military interests.[74]

A report commissioned by Huawei and presented at a national conference organized by the firm in Canberra last August emphasised the critical importance of the internet in generating accountable governance. Dr Tim Williams, a former advisor to David Milliband in the United Kingdom, authored the 'Connecting Communities' report.[75] It featured a chapter on 'E-Democracy: The Revolution Will Be Webcast, Tweeted and YouTubed.' It noted 'the very creative and powerful challenges to governments and bureaucracies' from the capacity of social media networks. These, it argued, boost participation, increase transparency and accountability and force responsiveness. Huawei Australia endorsed the findings arguing that it made a 'neat fit' with its corporate responsibility to enrich communities through communication. 'We hope that this White Paper promotes and inspires engagement and discourse between Australian businesses, industry groups, Government and, of course, communities themselves,' wrote its Director of Government and Public Affairs, Jeremy Mitchell, in the foreword.[76]

The capacity of high-speed internet access to address a democratic deficit was reinforced by Senator Stephen Conroy. He used the Huawei event to outline the ambition for the NBN. It could, he argued act as a mechanism to fuse 'community, inclusion and opportunity.' None of these appears to apply to Huawei Australia. It may have provided a platform to bolster the political justification for the infrastructure but it need not tender to build it. As the Attorney General department put it, 'as a strategic and significant government investment, we have a responsibility to do our utmost to protect its integrity and that of the information carried on it.'[77]

If Huawei and its locally appointed advisory board feel they have been played, they have grounds for doing so. The implications of the decision for foreign direct investment from Chinese-controlled entities could also be far-reaching. It is far from clear just what a major Chinese entity like Huawei could do to pass the national interest threshold.[78] As Greg Golding, a senior partner at King & Wood Mallesons, has noted, there is a touch of xenophobia in the debate over foreign direct investment from Chinese-controlled entities and no evidence that these firms pursue anything other than commercial interests.[79] Indeed, the Huawei Australia strategy demonstrates an aspiration to meet corporate governance principles. There can be no doubting the integrity or gravitas of those selected to join the board and in Alexander Downer's case surely a granular, if dated, understanding of specific Australian Security Intelligence Organisation concern in relation

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[74] The claims have been shrugged off in an interview conducted by one of the researchers in Hong Kong in May 2012 with Scott Skykes, global head of public affairs at Huawei, who pointed to the retrenchment of the Huawei chairman from the PLA; see more generally, Kenneth Lieberthal and Peter Singer, 'Cyber-Security and US-China Relations' (Brookings Institution, Washington, D.C., February 2012) 3 ('Despite China's own blanket denials of culpability in such actions, the perception is growing at both the popular and elite level in America that the cyber threat from China, while multifaceted, has a large government-directed component.' Without adducing evidence, the report notes, 'in sum, distrust of each other's actions in the cyber realm is growing between the U.S. and China, and such distrust easily spills over into broader assessments of the other country's long term intentions:' at 6).
[75] Huawei Technologies, above n 72.
[76] Ibid, i.
[77] Geoffrey Barker, 'China's Huawei Banned From NBN', *Australian Financial Review* (online) 24 March 2012 <http://www.afr.com/p/technology/china_giant_banned_from_nbn_9U9zi1oc3FXBF3BZdRD9mJ>.
[78] See Foreign Investment Review Board, above n 37, 31 (noting that 5,033 applications were approved. Although many of these applications relate to real estate acquisitions almost $10 billion was linked to investments in mineral exploration and development).
[79] Greg Golding, *State Capital, Sovereign Wealth Funds and the Future Fund* (26 March 2012) Centre for Law Markets and Regulation Portal, <http://www.clmr.unsw.edu.au/article/accountability/accountability-systems/state-capital-sovereign-wealth-funds-and-future-fund-iii>; see also Golding and Bassil, in Fry, McKibbin and O'Brien above n 26, 186 (noting that a recipient government's policy towards foreign investment should be transparent, proportionate, non-discriminatory and accountable' and strongly implying that Australia's is not).

to Huawei's operational model and the threats it may or may have posed to national security. Assuming these were not flagged or ignored, the Huawei experiment brings a degree of external oversight unseen in Chinese operations to date. Equally, there is recognition and an expansive definition of corporate responsibility within the Huawei governance model. The firm's endorsed white paper, for example, calls for government commitment to open source principles and sharing data. It recommends online concession passes for seniors and the drafting of a statutory duty for the communications regulator to promote social inclusion.

The challenge for Huawei and for China's outward facing corporations is to demonstrate that stated commitment to the highest standards is warranted both in board governance and ensuring the integrity of risk management systems. Much has been written about how Australia can use the birth of the 'Asian Century' to inculcate higher standards of corporate governance and effective regulation within the country and across the region. As noted above, it is, of course, appropriate to have restrictions if there is evidence to support them or if risk cannot be dealt with the through the imposition of security clearance procedures as the Singtel/Optus tie up demonstrates. The purchase of Optus by Singtel, which is partially controlled by sovereign wealth funds from Singapore, was approved only after inclusion of specific undertakings to ensure ongoing security protocols were in place. Placing barriers to entry in the government space for the building of a network when Huawei operates extensively in the corporate sphere here in Australia seems more than a little political. It mirrors the overtly partisan nature of the debate in the United States, which is mired in assertion rather than evidence and procedures for determining investment occluded rather than transparent.[80] A further effect is to undermine the work done by the Foreign Investment Review Board to clarify the determinants of inward investment.

F Australia's Foreign Investment Policy, FIRB, Transparency and Accountability

The national security priorities and political context that influenced the Commonwealth Government's decision on Huawei Technologies inevitably permeate the decision-making environment regarding the FIRB and Australia's Foreign Investment Policy ('the Policy') more generally, but that does not mean that they are completely dominant. It is important to note that only a very small number of cases generate controversy and this is clear in the data contained in the FIRB's Annual Reports. For example, as the 2010-2011 Annual Report states, the proposed $8.4 billion takeover by the Singapore Stock Exchange of the Australian Securities Exchange was the first business proposal that the Treasurer found to be contrary to the public interest since April 2001, when the proposed takeover of Woodside Petroleum Limited by Shell Australia Investments was rejected.[81] The FIRB Annual Report also provides a snapshot of the number of approvals sought for inward foreign investment, their scale and the sectors that they target. In 2010-2011, 10,865 applications for foreign investment approval were considered and of these 10,293 were approved 43 rejected, 390 withdrawn and 139 were deemed exempt. It is noticeable that real estate comprised the vast bulk of activity with 9,771 of the approvals and 42 of the 43 rejections.[82]

However, although real estate provides the overwhelming majority from a purely numerical view, the value by industry sector offers a different perspective. For example, 9,771 approvals in the real estate sector amount to proposed investment of $41.51 billion (23% of the total); 117 approvals in services project proposed investment of $47.50 billion (27% of the total); 222 approvals in mineral exploration and development are expected to generate $54.90 billion (31%

[80] See Benard, above n 6.
[81] FIRB, above n 37, xv.
[82] Ibid, 10, 19.

of the total of proposed investment); and 17 approvals in agriculture, forestry and fishing $1.38 billion (0.79% of the total).[83] As discussed earlier in the paper it is has been the latter two sectors which have generated the most controversy in recent times, especially when the source of the possible inward investment has been China. One might be forgiven for thinking that China is dominating inward foreign investment and *buying up the farm* as it were, but again the FIRB data presents a different empirical reality. It is true that on a raw approvals total numbers basis out of a total of 10,565 approvals in 2010-2011 China accounts for 5,033 and is easily the biggest source country, followed by the UK (1,004 approvals) and Malaysia (896 approvals). Also, in terms of proposed investment in the minerals, exploration and development sector, China is the largest source country, (just), with $9.758 billion, closely followed by Canada ($9.317 billion) and India ($8.829 billion). However, on total projected proposed investment China ranks 3rd with $14.976 billion, just ahead of Canada ($14.894 billion), but behind the US ($27.590 billion) and the UK ($15.383 billion). Also, in that China total of $14.976 billion only the relatively small amount of $4 million is Chinese projected investment in agriculture, forestry and fishing.[84]

So, the popular perception that China is dominating the purchase of Australian assets is misplaced. This is not the first occasion in recent memory that the *spectre* of a powerful Asian country buying Australian assets has perhaps been overblown. The new FIRB Chair, Brian Wilson (appointed 16 April 2012), noted in a recent interview that: 'The Foreign Acquisitions and Takeovers Act was put in place in 1975, when there was a huge backlash against Australia being sold off to the Japanese.'[85] So, it seems that an element of jingoism may indeed lie at the heart of Australia's inward investment policy and it is possibly sobering, (and refreshing?), to note that in 2010-2011 Japan was only 9th in terms of inward foreign investment into Australia. This testifies to the universal truth that trading patterns, levels and partners will fluctuate over time and given these shifts in trade relationships, it is important that all Australia's trading partners perceive the nation's trade policy levers to be operated in an even-handed manner.[86] As discussed above, if this even-handedness is perceived not to be present then substantial problems can mount quite quickly.

If we look for a moment at Australia's Foreign Investment Policy, the Commonwealth Government through the Treasurer publicly states its position. It notes that Australia is 'a capital hungry country' and so it reviews 'foreign investment proposals against the national interest on a case by case basis,' setting out its approach in terms of: who needs to apply; when they should apply; what the Government is looking for; how long before a decision is made; national interest considerations; and foreign governments and their related entities.[87] On the face of it, this all seems very straightforward and candid, but the devil is in the detail especially as seen in the earlier discussion above in terms of transparency and accountability regarding a number of cases.

This ambiguity has been acknowledged by the new FIRB chair, whose predecessor, John Phillips a former Deputy Governor of the Reserve Bank of Australia held the position for 15 years). Mr

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[83] Ibid, 23.
[84] Ibid, 31.
[85] Glenda Korporaal, 'New FIRB Boss Keen to Lift Lid on Agency', *The Australian* (online), 12 May 2012 <http://www.theaustralian.com.au/business/financial-services/new-firb-boss-keen-to-lift-lid-on-agency/story-fn91wd6x-1226353377917>.
[86] See also Massalo, above n 9 (quoting John Howard 'When it comes to foreign investment, can I say this, I'm very much in favour of having Chinese investment, just as much as I was in favour of having Japanese investment. Japanese companies of the 1970s and '80s weren't state-owned but they were certainly state-told on many occasions').
[87] Treasurer, *Australia's Foreign Investment Policy* (January 2012) <http://www.firb.gov.au/content/_downloads/AFIP_Aug2012.pdf>.

Wilson admitted that in the past the FIRB had been called: 'shadowy or mysterious or opaque.' As discussed earlier some critics still hold this view, but it is rejected by Mr Wilson who argues that through increased briefing sessions, guidance notes and availability for consultation, the FIRB is more forthcoming and transparent which generates higher accountability.[88] This emphasis on education, liaison with other agencies and publicity is integral to the FIRB's compliance work. Indeed much of the product of the FIRB is handled almost exclusively through the conventional civil bureaucracy, specifically the Foreign Investment and Trade Policy Division of the Treasury (the Division), which provides secretariat services through approximately twenty staff to the FIRB. Via an ongoing authorisation from the Treasurer (effectively a delegation), the Division evaluates proposals and makes decisions on those that are Policy conforming and/or do not have special sensitivity. In 2010-2011, more than 94% of proposals were decided under this delegated authority.[89] Nevertheless, the bottom line is that the FIRB remains an advisory body and not a policymaking entity. It is the Government of the day which decides and expresses the Policy and which provides guidance on national interest in relation to foreign acquisitions through that Policy. So, as the analysis throughout this paper stresses, inward foreign investment and politics, and on occasion, populism, are inextricably entwined.

G Conclusion

What seem to be the possible stress points in the operating environment of the Policy and the FIRB and what might they indicate more broadly about the calibration of inward foreign investment to Australia? First, some issues reflect the political dimension more starkly than others, for example, thresholds. Privately-owned foreign investors should notify the Government before acquiring an interest of 15% or more in a business valued at $244 million or above. However, for privately-owned US investors that threshold is $1,062 million (except in prescribed sensitive sectors where the $244 million limit still applies). Is this discrepancy fair given Australia's overall trade portfolio and trading patterns? Is this why the US still remains the largest inward investor into Australia? Is it a reflection of the Australia: US strategic alliance, in particular the presumed military shield that the US offers to Australia under the ANZUS Alliance? The answers to these questions (in order) are probably: yes; possibly; and almost definitely. Will these settings change as we progress through *The Asian Century*? Perhaps, but that is extremely hard to predict. Will they be affected significantly by the ongoing global tension between the US and China and how will the repercussions of that tension impact upon Australia's strategic priorities? These are issues which will help to shape Australia's future.

A second less obvious stress point is how political tensions of this nature impact upon the FIRB's ongoing approval processes. For example in 2010-2011, 390 applications were withdrawn by the applicants and of these 67% involved real estate proposals, so 33% of withdrawals were non-real estate proposals. The FIRB does not publish a breakdown of withdrawals by sector, but in 2010-2011 real estate proposals comprised 97% of the total approvals and all other sectors the remaining 3%.[90] There may be simple and non-controversial factors to explain this ratio of 3% (approvals): 33% (withdrawals) in the non-real estate sectors, or there may be more subterranean influences at work. This might be an issue on which the FIRB could continue its recent drive for increased engagement, transparency and accountability by releasing more data to identify whether there are specific sectors which seem more prone to withdrawn applications than others. This might help clear confusion and/or suspicion about what factors may be at work. It is important to acknowledge that it is not known how many

[88] Korporaal, above n 85.
[89] FIRB, above n 37, 6.
[90] Ibid 19, 23

intended deals do not even make it to an initial request for approval and thereby impact upon the data publicly released by the FIRB, never mind a subsequent withdrawn status due to the influence of similar factors. The absence of full disclosure, allied with the pragmatic realities of prevailing standards of commercial confidentiality, may render it impossible to verify the circumstances of proposed individual deals and thereby ascertain whether skewed and unfair evaluation processes are at work. This ambiguity helps to create the regulatory space in which prejudice, resentment and other negative variables may flourish, impacting negatively upon Australia's national self-interest.

Possibly related to this second point is the clear recognition that some sectors generate more *political heat* than others in terms of inward foreign investment and what are the sources of that investment. For example, technology infrastructures, as discussed in Section E, which looked at the blocking by the Commonwealth Government of Huawei Technologies from becoming integrally involved in the National Broadband Network, a decision based on grounds of national security, presumably involving strenuous advice from the intelligence and defence agencies. Another example is agriculture - Section B discussed some of the more populist moves recently by the Federal Opposition to seek to prioritise the agriculture sector more highly in the FIRB infrastructure. Also, in January 2012 the Commonwealth Government released a Policy Statement on Investment in Agriculture which provided Guidance on assessing foreign investment applications in the agricultural sector.[91] This high-profile response from both sides of politics is regarding a sector which in 2010-2011 had 17 approvals for a total proposed investment value of $1.38 billion (less than 1% of the annual total).[92]

The *elephant in the room* for the entire topic of managing foreign inward capital investment to Australia is what to do about state pools of investment capital, especially if they are sourced from China which is now almost certainly Australia's most important trading partner. As discussed earlier China is not a member of the OECD and not a signatory to the OECD Code of Liberalisation of Capital Movements (1961). China has barriers to inward investment that Australia does not. China is by western standards an authoritarian one party state, that some in the Australian Parliament and elsewhere (from all sides of politics), view as having a shameful human rights record, but which nevertheless is the most dynamic economy in the world. Within ten years if current trends are maintained China will assume the mantle of the world's largest contributor to global GDP through its amalgam of central economic planning and its embryonic *China Model* of capitalism.

Under Australia's Foreign Investment Review Framework all foreign governments and their related entities should notify the Commonwealth Government and gain approval before making a direct investment in Australia regardless of the value of that investment.[93] Can Australia's current policy settings be maintained in their current form given developments in global capital markets since the Global Financial Crisis? For example, in a recent visit to Australia, Mr Vikram Pandit, CEO of Citigroup, (the world's fourth biggest bank by revenue and ninth largest by market value), stated that sovereign wealth funds were likely to play a much larger role in the future in the provision of global capital.[94] Given this harsh contemporary financial reality, Australia's inherent strategic thirst for capital and its key trade relationships, can Australia

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[91] Wayne Swan, *Policy Statement on Investment in Agriculture* (January 2012) <http://www.firb.gov.au/content/_downloads/Agriculture_policy.pdf>.

[92] FIRB, above n 37, 23.

[93] Wayne Swan, *Australia's Foreign Investment Policy* (January 2012, 2) <http://www.firb.gov.au/content/_downloads/AFIP_Aug2012.pdf>.

[94] John Kehoe, 'Bond Market Growth a Must', *The Australian Financial Review* (Sydney), 24 August 2012, 27.

maintain its segregation of approval processes of state and non-state sources of inward investment capital, and its seeming distaste for the former as we move through The Asian Century?