



FACT CHECK

Scott Morrison says the government had no authority to reject or approve the leasing of the Port of Darwin to a Chinese company. Is that correct?

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The claim

Prime Minister Scott Morrison says the federal government in 2015 did not have any authority to reject or approve any aspect of the Northern Territory government's deal to sell the lease over the Port of Darwin to Chinese interests.

The \$506 million transaction vested a 99-year lease to Landbridge, the Australian subsidiary of a privately-owned Chinese company which is reported to have [links to the People's Liberation Army of China](#).

It was controversial at the time and remains so, particularly in light of China's increasingly assertive economic and militaristic strategic stance in the region.

Yet more than six years after it was finalised, questions remain about why the Coalition government in 2015 did nothing to intervene. Asked recently about the Darwin port transaction, [Mr Morrison claimed](#):

"There was no authority for the federal government to reject, approve anything in relation to the leasing of that asset."

At the same press conference, he said: "[T]he Australian government did not authorise it, did not approve it, did not have the power to approve it."

So was there really nothing the federal government could have done?

RMIT ABC Fact Check investigates.

The verdict

Mr Morrison's claim is not the full story.

The Foreign Investment Review Board determined in 2015 that it had no authority to examine the Darwin port deal — because it fell under exemption provisions of the Foreign Acquisitions and Takeovers Act 1975 at that time.

However, there was ample opportunity for the Department of Defence and security agencies to raise concerns.

One expert told Fact Check that if defence and other agencies had expressed serious concerns about a potential risk to national security parliament could have passed legislation specifically dealing with that issue.

Such a move would have required the government to have a "valid reason" for seeking to override the deal — a reason that would stand up if challenged in the High Court of Australia.

In addition to legislative authority, experts say the Commonwealth has always had very broad powers, particularly the informal power to exert political pressure.

Yet the federal government in 2015 did not, apparently, exert any political pressure over the Northern Territory to try to sway its decision.

The 2015 lease deal

In October 2015, the Northern Territory government, led by the Country Liberal Party, sold [a 99-year lease](#) over land and operations of the Port of Darwin for \$506 million to [Landbridge Group](#), the Australian subsidiary of a Shandong-based energy and infrastructure group owned by [Chinese billionaire Ye Cheng](#).

The deal [immediately attracted controversy](#), given concerns about Darwin's geographically strategic position close to Asia, and the proximity of the port environs to defence activities by Australia's Navy and its US allies.

The sale [blindsided](#) Australia's key ally, the United States, which regularly [rotates marines](#) through Darwin for joint military exercises.

Then president Barack Obama raised his concerns directly with then prime minister Malcolm Turnbull [during an APEC meeting](#) in November 2015, and asked for the US to be given a "heads-up" in future.

Assessing the claim

There is some ambiguity to Mr Morrison's claim. He spoke of the federal government lacking "authority" to reject or approve the lease deal.

In a narrow sense, that could be taken as referring to an explicit law capable of authorising the transaction.

In a broad sense, it could be taken as referring to the government's ability — or power — to find a way to

stop the deal proceeding.

While the word "authority" could suggest the narrow reading, later in the same media conference Mr Morrison also used the word "power".

"As I said, the Australian government did not authorise it, did not approve it, did not have the power to approve it."

Mr Morrison also said the absence of an authority to approve or reject the deal was "the problem that I had to fix, and I fixed it, and we put legislation in place to make sure that we kept a hawk eye on what was going on in that ... port".

That raises questions about whether the federal government, knowing the deal was being negotiated, could have fixed the problem before it was finalised in October 2015.

As well, Mr Morrison's comment about lacking the "power to approve" the deal steps around the question of whether the government had the power to reject.

The Foreign Investment Review Board process

Most acquisitions or investments in Australia by foreign individuals or entities must be vetted by the [Foreign Investment Review Board](#), which advises the Treasurer if the deal may be 'contrary to the national interest'.

Reviews are done on a case-by-case basis, and the process is not transparent. The final decision is up to the Treasurer.

The treasurer at the time of the Port of Darwin lease was Mr Morrison, who assumed the portfolio in September 2015.

[Treasury told a Senate committee review](#) that it began examining the proposed sale of the lease in December 2014, mindful that Darwin port was "critical infrastructure".

Treasury's January 2016 submission to the committee said it was aware early in the process that the lease of the Port of Darwin to private foreign investors could be exempt from the Foreign Acquisitions and Takeovers Act 1975, depending on how the Northern Territory Government chose to structure the lease. That was because interests acquired directly from Australian governments generally did not require FIRB approval.

The NT government decided to structure the deal in two parts: the lease of the port, land and infrastructure; and the sale of a company that operated the port.

Once this structure became apparent, FIRB did not complete its examination of the deal and did not provide formal advice to Mr Morrison.

Treasury told the committee that the way the deal was structured guarded it from FIRB scrutiny because both the lease and the sale came under exemption provisions.

The lease of the land fell under a specific exemption in what was then section 12A(7) of the Foreign Acquisitions and Takeovers Act 1975.

That provision prevented FIRB from reviewing deals involving the acquisition of an interest in urban land by foreign entities if the asset was sold by the Commonwealth, a state or territory.

The second part, the sale of the port operator, fell under regulations accompanying the Foreign Acquisitions and Takeover Act 1975 that deemed that if the value of a company was less than \$252 million, no FIRB review was required.

The NT government in September 2015 told FIRB the port operator's assets were less than \$252 million, so it did not meet the value threshold for FIRB scrutiny.

What about defence and national security concerns?

FIRB does not work in isolation: it can and does refer foreign investment proposals to certain other Commonwealth agencies and departments to hear their concerns or objections.

In the case of the Port of Darwin lease, FIRB's then chairman Brian Wilson [told the same Senate committee](#) that FIRB, Treasury, the Defence department, security agencies, the Attorney-General's department and the Northern Territory government had consulted about the port's privatisation for more than a year.

Mr Wilson said that in the first half of 2015 he repeatedly sought responses from defence and security agencies to ascertain if they had any objections or concerns.

Twice, he fielded responses indicating no concerns about potential risks to national security, so he asked for the agencies to review it a third time "at the highest possible level".

The defence department [told the Senate committee](#) it was asked to assess the Landbridge proposal in July 2015 and concluded it had no security concerns about Landbridge being the proposed acquirer, nor did it have concerns about either the defence department's future access or use of the Darwin facility because the lease only affected the port's commercial areas.

In its submission, Defence said that even if FIRB had proceeded with a full review, which it didn't, defence still would not have had any concerns.

When the deal was formally announced in October 2015, defence conducted yet another review at the request of defence secretary Dennis Richardson. Again, it found no concerns.

Mr Richardson [told The Australian](#) in November 2015 that the defence department had examined the matter "thoroughly" and it was "amateur hour" to suggest the Chinese would use the lease as a cover to spy on naval vessels.

"The notion that the Chinese can establish a base there simply does not stand up to hard-headed scrutiny ... These issues, when you examine them, melt like butter sitting on a car bonnet on a hot day."

It should be noted that at least one minister in the federal government warmly welcomed the Landbridge deal when it was announced. On October 13, 2015, the minister for trade and investment, [Andrew Robb, said](#) it was "a powerful sign of the enhanced commercial relationship between Australia and China flowing from the China-Australia free trade agreement."

"Landbridge's commitment to the growth of the Port of Darwin will be a huge spur to the development of Australia's north, serving as a catalyst for the entry of major investment right across the port's upstream supply chain in agriculture, resources & energy and economic infrastructure," Mr Robb said.

Four months after the Landbridge deal, Mr Robb resigned as minister. He quit parliament at the July 2016 election, and almost immediately [accepted a job as an adviser to Langbridge](#).

That role ended in late 2018. He has since been [sharply critical](#) of his former Coalition colleagues and Australia's security agencies, arguing they had fostered "toxic" anti-China sentiment.

Since then

In the intervening years, the government has [amended the regulations](#) governing FIRB decisions to ensure sales of assets by states and territories are no longer entirely exempted from scrutiny.

And parliament has [passed new laws](#) allowing the Commonwealth to intervene in transactions involving infrastructure assets where national security is an issue.

In May 2021, Cabinet's national security committee [sought](#) another review into the implications of the port lease on defence interests and national security. The outcome was [leaked to The Australian](#) in December 2021.

Once again, the review concluded there were no concerns, and no formal recommendation was made for the government to intervene.

What about the Defence Act?

In his November 2015 interview in The Australian, Mr Richardson said Australian authorities could take back control of the port in any time of crisis using the Defence Act.

He told the newspaper: "We have the power of the Defence Act. We can declare a contingency and the lessee can be directed to do what we require."

Mr Richardson told the Senate committee in December 2015 that the defence department signed a deed of licence relating to the port with the NT government in May 2015.

"It goes to the point of access," he told the committee. "It specifically recognises contingencies and defence's rights in the event of contingencies. It specifically recognised defence emergencies under the Defence Act."

He told the committee that shortly before the Landbridge deal was announced publicly, the National

Security Committee of Cabinet was briefed and "[s]pecific attention was drawn to the fact that even if departments and agencies had objected there was nothing the Commonwealth would have been able to do about it because of the [1975] Foreign Acquisitions and Takeovers Act".

More recently, Mr Turnbull took a different view. In a series of tweets he said the Commonwealth "certainly could have stopped the sale in practical terms—if Defence and ASIO had taken a different view, it wouldn't have happened."

What the experts say

Barrister [Lachlan Molesworth](#) is a director of [Foreign Investment Advisory Australia](#), a specialist consultancy providing advice on transactions that may need FIRB scrutiny.

He worked in Treasury from June 2015 until March 2018, and was the legal adviser to the treasurer with specific focus on foreign investment, taxation and financial services.

To be clear, Mr Molesworth may have provided Mr Morrison with advice on this matter.

Mr Molesworth says Mr Morrison is correct in saying there was "no authority for the federal government".

He says that at the time Landbridge bought the lease, the Commonwealth could not intervene using any FIRB review or veto power due to the exemptions that applied at that time under the Foreign Acquisitions and Takeovers Act 1975.

As well, no applicable power was enlivened to block the transaction on national security grounds. In theory, he said, parliament could pass a law based on defence concerns that could have prevented the transaction occurring. But he said any such law would need "a valid defence basis, otherwise the High Court could find it unconstitutional and invalid".

"That's a long way of saying, if the defence/military found a valid reason that the Port of Darwin [deal] was contrary to our defence interests, then parliament could make a law preventing such a transaction occurring or giving a power to the Commonwealth government to be able to take action."

"But this would require that valid defence reason to be found," he said.

He notes laws are now in place to permit the Commonwealth to intervene on the basis of national security concerns. They are the Security of Critical Infrastructure Act 2018 and amendments made to the Foreign Acquisitions and Takeovers Act 1975.

"These new laws basically means the Treasurer and Minister for Home Affairs can now block anything that involves infrastructure or can give rise to a 'national security concern'," he said.

But Mr Molesworth says the suggestion by former defence secretary Dennis Richardson at the Senate committee—that "even if departments and agencies had objected there was nothing the Commonwealth would have been able to do"—was technically incorrect as parliament could have made legislative changes if it had parliamentary support and a proper constitutional basis.

[Stephen Kirchner of the United States Studies Centre](#) says Mr Morrison's claim is "technically correct and technically incorrect".

He alludes to the government's significant political power in noting "it may not have been necessary for the Commonwealth to involve statutory authorities to get the Northern Territory government to make a different decision".

"A strong objection from the feds would probably have sufficed, but that was not forthcoming at the time," Dr Kirchner says.

"Most people agree the process could have been better, regardless of the outcome, hence, the subsequent legislative changes," he says.

"In particular, there was inadequate consultation with the US, but again, that may not have changed the decisions made at the time."

He noted that while recent legislative changes unambiguously bring such transactions within the Commonwealth's purview, the federal government has not opted to unravel the deal.

[Peter Jennings, the executive director of the Australian Strategic Policy Institute](#), has been a vocal critic of the port deal.

From 2009 until 2012, he was deputy secretary in charge of strategy in the defence department, a role that required him to consider defence's potential concerns in relation to many foreign investment applications put before FIRB.

He told Fact Check the sale of the port lease was a "monumental stuff-up, a huge failure" and reflected a "[dreadful policy error](#)" on the part of the Turnbull government, which had just sworn in a suite of new ministers.

"No politician from either side of politics will defend it now," he said.

"Yet neither side of politics is prepared to review the lease of the port so that we can do something about it."

Mr Jennings suggested no one in government seemed to have properly focused on, or fully grasped, the implications of handing the port to a Chinese entity.

He says that, even if the sale took some federal ministers by surprise, 'If it had been handled intelligently, they would have said, 'Hang on, let's pause and we will have a look at this".

At that point, he says, the federal government could have exerted significant political pressure on the

Northern Territory.

That same point was made by [Allan Behm of the Australia Institute](#). He says Mr Morrison's claim is false and amounts to "language chopping and logic chopping".

In Mr Behm's view, the word "authority" is interchangeable with "power", and the federal government could have leaned heavily on the Northern Territory to halt the deal.

"The Commonwealth government enjoys enormous economic, political and legal powers with respect to almost everything. If it wishes to intervene in a matter, it will always find a way to do so."

"This was a failure of process, so you can see why he [Mr Morrison] wants to hide behind this technicality."

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