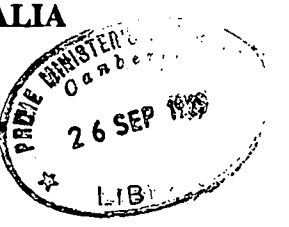
COMMONWEALTH OF AUSTRALIA



SPEECH

BY

The Rt Hon. J. G. GORTON, M.P.

ON

OVERSEAS INVESTMENT IN AUSTRALIA

(Ministerial Statement)

[*From the 'Parliamentary Debates', 16 September* 1969]

Mr GORTON (Higgins—Prime Minister) — by leave — The importance to Australia of a strong and continuing inflow of overseas capital has never been questioned by my Government. During the years after the end of World War II, the accumulated total of private overseas investment in Australia has been about $7,000m. Without that investment, it would have been impossible for us to develop as quickly as history demands we must. Our immigration programme would have been restricted. Import replacement and a growing independence of many overseas commodities would have been curtailed. And we would not have grown the industrial muscles which we need.

This overseas flow of investment has developed resources which were previously not utilised. It has contributed to the sustained growth in our export income, and it has raised the general level of efficiency and therefore of real incomes in many sectors of the economy. It confers great benefits on us and it is essential that it should continue. It is, however, also true that overseas capital does not come to Australia merely because of a wish to confer these advantages on us. Basically it comes here because we are a politically stable country, because there are great opportunities for new development here, and because there are good opportunities for profit, and for growth as the nation grows.

Naturally, at a time when great new possibilities are opening up in this country we wish to see Australians get as good an opportunity as possible, within the limits of their resources and capacities for saving, for participation in these developments and growth and profits. This is not an attitude that can or should be carried to the point of discouraging people from abroad who are willing to bring here their money and their energies and their know-how. But it is an attitude on the part of the Australian community which overseas interests have to recognise. To a very large extent they already recognise and are prepared to accept it. And many of them indeed, in increasing numbers, have seen that it is an attitude which is basically helpful to them and can be turned, in a co-operative spirit, to their and our good account.

As we see it, the central aim of policy must be to provide, on terms which are fair as between overseas investors and the Australian people, the conditions under which investment will be attracted here. Those conditions should be such that overseas enterprises can operate securely and effectively, making the greatest contribution they can to our development at a fair return to themselves. And above all, conditions under which they can work in harmony, on even terms, and so far as practicable on a joint basis and in close collaboration with Australian enterprises. We do not believe that we can or should seek to legislate, in such a complex field.

But we reiterate our wishes and have little doubt that overseas companies of repute will note and respond to those wishes.

Mr Uren—They have not in 20 years.

Mr GORTON—Yes. They are doing it more and more.

GUIDELINES

The Government has, as its general objective, the encouragement of Australian participation in and partnership with, overseas enterprises. And in speaking of partnership I place emphasis upon the offer of equity participation to Australians by overseas ventures. As encouragement towards this end we have recently completed a review of the restraints imposed on overseas companies seeking to raise fixed interest borrowings in Australia—or the borrowing guidelines as they have come to be known. These guidelines apply only to proposed fixed interest borrowings, not to the raising of share capital in Australia for the purpose of financing operations by enterprises incorporated here.

At present overseas interests proposing any form of borrowing within Australia are requested to consult the Reserve Bank and Australian lending institutions are requested to satisfy themselves that overseas interests—or companies in which more than 25% of the shares are held by overseas interests—have received approvals from the Reserve Bank covering any proposed borrowings. This will continue. Generally speaking companies will be allowed reasonable access to Australian borrowings for financing normal requirements of working capital, bridging finance, and continuing carry-on requirements. Further, in accordance with the Government's general policy of ensuring that every effort is made to increase exports of Australian goods, ready approval will be given to borrowings for the specific purpose of financing export transactions.

In calculating the new local borrowings that will be approved to finance fixed assets in future, the base will be the local borrowings approved as acceptable as at 30th June 1969 under the existing guidelines. Companies that are now regarded as having been established in Australia for a period of 4 years or longer will be allowed to borrow up to 10% of any increase subsequent to June 1969 in the total of shareholders' funds, other funds from overseas sources, and local borrowings excluding those to finance increases in working capital or to finance exports. For the sake of brevity I will refer to those amounts as the increase in funds employed.

Companies wholly overseas-owned and established in Australia for periods of less than 4 years will be allowed local borrowings of up to 2½% of the increase in funds employed for each year that they have been established. Such companies will henceforth have a new base and a new percentage applied each year until they have been established here 4 years. From that time onwards they will be allowed local borrowings of up to 10% of subsequent increases in funds employed. For companies in which Australians have a share of the equity, additional borrowings to those set out above will be allowed. The extent of the additional borrowings will be determined by the share of the total equity in the company held by Australians.

To meet requirements of funds additional to the proceeds of new share issues and the local borrowings in accordance with the preceding paragraphs, a company will be allowed to raise in Australia a proportion of its total new borrowings which will accord with the proportion of shares in the company held by Australians. Australian equity will be weighted on a four for three basis so that the proportion for a company with 30% Australian equity will be 40%. If for special reasons overseas loan funds to match local borrowings cannot be arranged, access to local borrowings will nevertheless be increased to take account of the extent of the Australian equity.

In the application of this aspect of the guidelines, the Reserve Bank will take into account, for purposes of calculating the extent of Australian equity, offers to Australians of new or increased equity (other than through convertible notes) which have not been taken up but which are considered to have been genuine and reasonable offers of local equity participation in the company. If new or increased Australian equity is offered bona fide through the issue of convertible notes, the Reserve Bank will take into account in calculating the extent of Australian equity one-half the future increase in Australian equity that would result if the notes were converted.

It should be mentioned here that approval will not normally be granted for borrowings that would facilitate the remittance of funds abroad. Consistently, moreover, with the longstanding exchange control policy of requiring overseas interests taking over enterprises in Australia to bring in cash to the full extent of the purchase price, approval will not normally be given to borrowings intended to finance a takeover. Overseas interests seeking exchange control for a takeover are reminded that on completion, the changed ownership of the enterprise taken over will necessitate discussions with the Reserve Bank of the extent of local borrowings by the enterprise as a whole.

CONVERTIBLE NOTES

I move on to discuss convertible notes. During the developmental stages of many major projects there are either no earnings, or no surplus earnings available for distribution to shareholders. This, of course, discourages would-be investors who need a return on their capital at once and limits the amount of share capital which those promoting the venture can raise. Therefore the alternative of fixed interest borrowings, with a guarantee of income, has had more attraction to many lenders as well as to those seeking to borrow. For the borrower believes that by offering immediate return on the investment as income he will increase the likelihood of borrowing successfully. He also knows that the interest he must pay on fixed interest borrowings is cumulatively deductible for income tax purposes, thus substantially reducing the effective cost of his borrowings.

As a step towards attaining our goal of increasing Australian equity participation in Australian development, we sought means of diverting these fixed interest borrowings into borrowings with a chance of equity participation. It was for this reason that the Treasurer (Mr McMahon) announced in his Budget Speech our proposal to amend the Income Tax Law in order to restore deductibility of interest for income tax purposes on convertible company securities. Before 1960 interest on all convertible securities was deductible; but it became evident that convertible notes were being widely substituted for equity issues and that, in the majority of cases, the plain purpose of this substitution was tax avoidance. So to protect the revenue, deduction of interest on all convertible securities was disallowed.

We do not intend to go back to a pre-1960 situation. We shall minimise the scope for tax avoidance and will lay down conditions to which convertible securities must conform if they are to qualify for deductibility of interest. These conditions are:

1. The lender or noteholder, and not the issuing company, has the option to convert;
2. The noteholder's right to exercise the option is not deferred longer than 24 months after the date of issue of the security;
3. The convertible note has a currency of not less than 7 nor more than 10 years but the company may make the terminal date for the exercise of the option as much as, but not more than, 12 months earlier than the maturity date of the note;
4. The terms and conditions of the issue are fixed and not subject to any variation throughout the period of their currency; and
5. The conversion price for shares is not less than 90% of their market price when the convertible securities are issued, or par, whichever is greater.

We believe that these conditions will have a twofold advantage. They will give companies adequate scope for using convertible securities to their best advantage in business financing and they will offer to Australian investors a new opportunity to participate in the equities of overseas-initiated ventures in Australia, especially those in the extractive industries. If such ventures issue convertible notes to finance development or expansion, Australians who take up these securities will have an assured rate of income during the developmental period of the project with the option to acquire equity, and thus share in the growth of the business. The opportunity that convertible notes opens up for wider participation by Australians in the ownership of such overseas-initiated ventures has been a major consideration in the decision we have taken to restore tax deductibility of interest on such convertible notes.

In so seeking to widen opportunities for Australian participation in ownership we have sought to ensure that the opportunities would be real and not merely nominal and

that they will not be too long delayed. We think that the option to convert to shares should remain open long enough for the company to have established itself and for its shares to have value enough for note-holders to take them rather than opt for repayment of their loan in cash. It is in order to provide adequate time for development and profitability that we propose that convertible notes should have a currency of at least 7 years and that the option to convert should not terminate earlier than 12 months before the maturity date of the note. We also believe that 10 years will for all practical purposes be long enough for convertible notes to remain outstanding. Certainly, if the development or expansion of an overseas-initiated venture is to lead to an issue of equity to Australians, it is reasonable to expect this to be resolved within a period not longer than 10 years. Convertible issues proposed to be issued by companies in which more than 25% of the shares are held by overseas interests will be subject to examination by the Reserve Bank to determine that the terms of issue are reasonable and genuine.

COMPANY TAKEOVERS

The question of Australian participation in Australian development is not confined to expressing a strong Government desire for joint ventures, or to encouraging the offer of equity to Australian shareholders through borrowing guidelines. The question of protection of Australian companies against overseas takeovers also arises. The Government has given special consideration to this question of takeovers in general, whether such takeovers are by overseas or by other Australian companies.

We have been especially concerned to prevent the use of takeover methods which are unfair to a company's shareholders as a body. I refer to such practices as the large-scale purchase of shares through nominees, to first come first served offers and similar manoeuvres. These problems were reported on by the Company Law Advisory Committee and in March of this year the Standing Committee of Attorneys-General agreed to adopt the report in principle.

As the Attorney-General informed the House on 20th May the Commonwealth Government has considered that report and has decided to amend the companies Ordinances of the Australian Capital Territory and Northern Territory to give effect to the Advisory Committee's recommendations, namely:

Disclosure

A person having a beneficial interest of 10% or more in the voting capital of a company listed on an Australian stock exchange will be required to give notice of that interest to the company. The company will be required to enter this information in a special register which will be available for public inspection. The new provisions are to apply to, but without discrimination against, persons resident, or companies incorporated, outside the jurisdiction, as well as to persons or corporations within the jurisdiction of this Government. The proposed provisions are generally in line with the existing law in the United Kingdom and the United States but, in view of enforcement difficulties, are to be accompanied by certain sanctions not provided in those countries. A registered holder who is aware that he holds on behalf of a non-resident will be required to furnish to that person information as to the requirements of the legislation.

THE TAKEOVER CODE

A. The code will be made applicable to offers by natural persons.

B. An invitation to make an offer—as, for example, in first come first served invitations will be treated as if it were an offer.

C. The criterion for application of the code will be 15% of the voting power, instead of one-third as at present.

D. An offerer who increases the price offered in respect of some shareholders will be obliged to pay the increased price to those who have already accepted.

E. Provision will be made to prevent a bid for less than the provided limit of 15% of shares being used to acquire shares in excess of that limit.

F. It will be an offence for a person to make a takeover offer, or to give notice of intention to do so without having any reasonable or probable grounds of expectation of being able to provide the consideration for the offer or proposed offer.

G. All aspects of a takeover will be governed by the law of the State or Territory in which the offeree company was incorporated.

It will be noted that the report does not recommend the prohibition of first come first served offers as such but the Eggleston Committee reported that these changes will ensure that this kind of offer will not escape the control applicable to other kinds of takeover offers.

There were additional proposals from the Associated Stock Exchanges and although these were not covered by the Committee because it considered they were outside its terms of reference, they will be incorporated in the companies ordinances of the Australian Capital Territory and the Northern Territory.

1. One of the amendments will provide that any amendment to the articles of association restricting voting rights shall require the affirmative vote of not less than 51% in value of the shareholders of the class of shares affected. A similar requirement already exists in the listing requirements of the Australian Associated Stock Exchanges. The present position under the uniform Companies Act is that any amendment of the articles of association of a company requires a special resolution, which in turn, requires a three-fourth's majority of members of the company voting in person or by proxy.

   The proposed provision will be in the nature of an additional requirement, which will recognise the significance of a restriction on voting rights. Shareholders who do not vote affirmatively for a restriction—including those who do not vote at all—will, in effect, be treated as opposed to the restriction.
2. The other additional amendment relates to the notice of intention that must be given before a takeover is made. The present position is that this notice must be given not earlier than 28 days, and not later than 14 days, before the offer is made. The amendment will require the notice to be given not earlier than 42 days and not later than 28 days. The additional notice provided for by the amendment will allow an offeree corporation a better opportunity of considering the terms of the offer and of taking steps, if it so desires, to amend its articles of association to restrict voting rights attached to shares held by overseas interests.

I turn now to takeovers which, irrespective of the method used, may be judged contrary to the national interest. In the past the Government has acted to preserve Australian ownership and control of enterprises which for special reasons of national interest or importance could not be permitted to pass into foreign hands.

For many years we have opposed the entry of overseas banks into the local industry. And in the areas of television and radio broadcasting the acquisition of control by foreign interests has been excluded by statute. Further statutory control is not at present contemplated and we do not believe that it is possible now to define further classes or fields of enterprise which we believe should not, in the national interest, pass to overseas ownership.

However whilst our general experience over the years has shown that almost all overseas investment in Australia accords with our country's interests it has also shown that there remains a need for the Government to be ready to guard against the transfer from Australian control of established companies in particular areas of activity. For example some few years ago there were thought to be attempts by overseas investors to take over an important and long-established Australian mining company, while more recently it was believed that there was an attempt to take over one of the principal Australian life assurance organisations, which would have carried with it the right to determine the investment policy of assets totalling some $700m of Australians' savings.

Although we expect the need to arise only on rare occasions as a Government we reserve the right to do all in our power to prevent particular takeovers when, in the circumstances of the case, we would consider it to be bad in the national interest. The strengthening of the takeover code through amendment of the Uniform Companies Act should ensure not only that takeover proposals proceed in a fair and open

manner, but also that the Government will have more time to intervene, or express a Government view, if it considers the national interest calls for it.

To sum up, Mr Speaker, we seek to encourage the flow of overseas capital into this country. We seek to make it crystal clear that we look with favour on joint enterprise and on the offer of Australian equity in new ventures—and that we will be disturbed where the opportunity for Australian participation is not given. We seek to encourage the growth of Australian equity by offering more access to the fixed interest borrowing as Australian equity in a company increases. We seek to protect companies against unfair methods of takeover and to reserve to ourselves the right to intervene in such takeovers when we consider it is in the national interest, and we seek the acceptance of the basic principles of a code of good corporate behaviour.

Such a code was adopted by the Canadian Government three years ago. Speaking of overseas companies, and paraphrasing the language to our own environment, I think there are three essentials for which we look as a nation:

1. A high degree of Australian autonomy, with Australian citizens participating on the boards of directors and in the management of companies;
2. The objective of a financial structure which provides opportunity for equity participation by Australians;
3. A sensitivity to the reasonable national aspirations of Australia which whilst somewhat indefinable in detail are known quite well by all those in this House and by anybody who is at all sensitive to these aspirations, and who as a company has intentions of investing in this nation.

By the means outlined in this speech we believe that we will, without interfering with the flow of capital we need so badly, offer considerable encouragement to greater Australian equity participation and that, Sir, is the objective of this Government and, I believe, of most of the citizens of this country.

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