

Australia's Critical Infrastructure Consultation  
Critical Infrastructure Centre  
Attorney-General's Department  
3-5 National Circuit  
Barton ACT 2600  
Via email: [cicentre@ag.gov.au](mailto:cicentre@ag.gov.au)

21 March 2017

Dear Sir or Madam,

**Strengthening the National Security of Australia's Critical Infrastructure  
Discussion Paper**

I have pleasure in enclosing a submission in response to the Discussion Paper on Strengthening the National Security of Australia's Critical Infrastructure.

The submission has been prepared by the Foreign Investment Committee, Business Law Section of the Law Council of Australia.

If you have any questions in relation to the submission, in the first instance please contact the Committee Chair, Malcolm Brennan, on 02-6217 6054 or via email: [malcolm.brennan@au.kwm.com](mailto:malcolm.brennan@au.kwm.com)

Yours faithfully,



**Teresa Dyson, Chair**  
Business Law Section

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**FOREIGN INVESTMENT COMMITTEE OF THE BUSINESS LAW SECTION  
OF THE LAW COUNCIL OF AUSTRALIA**

**SUBMISSION ON STRENGTHENING THE NATIONAL SECURITY OF AUSTRALIA'S CRITICAL  
INFRASTRUCTURE DISCUSSION PAPER**

This is a submission prepared by the Foreign Investment Committee of the Business Law Section of the Law Council of Australia ("**Committee**"), in response to the Discussion Paper on Strengthening the National Security of Australia's Critical Infrastructure ("**Discussion Paper**") ("**Submission**").

We understand the need to address national security concerns and support the Commonwealth Government's efforts in making Australia safe.

We welcome the Government's objective of providing greater certainty and clarity to investors and industry on the types of assets that will attract national security scrutiny. We understand that the Commonwealth Government intends to do so through the recently established Critical Infrastructure Centre that will develop coordinated, whole-of-government national security risk assessments and advice to support government decision-making on investment transactions.

A more coordinated approach is particularly welcomed given the uncertainties created last year in the investment environment by the commentary relating to Landbridge's investment in the Port of Darwin and reported national security concerns regarding Ausgrid resulting in rejection of the bids by State Grid and Cheung Kong Infrastructure. We urge the Government to provide greater clarity and upfront guidance to foreign investors as to which assets are so sensitive that the Government may not permit foreign investors to acquire them or require Australian participation, before investors commence to spend significant amounts of time and costs preparing for a bid.

It is important that the Commonwealth Government strike an appropriate balance between security concerns with legitimate investment activities without deterring bona fide foreign investment. There is a significant need for investment in Australia's infrastructure sector. Foreign investors for a long time have contributed material capital to the building and enhancement of infrastructure in this country. It could even be argued that foreign investment is necessary to secure the country's critical infrastructure, given the level of capital required for infrastructure upgrades which are now very topical.

In addition to certainty and transparency, principles of fairness and due process should not be compromised unnecessarily. Foreign investors should not be discriminated against unfairly based solely on prejudice and without credible evidence that their foreign ownership has contributed to national security concerns. To the extent possible, the same safeguards provided to Australian businesses in the context of a national security concern should be afforded to foreign businesses.

Below are our comments and recommendations on some of the issues raised in the Discussion Paper.

**1 Critical Infrastructure Centre ("Centre")**

1.1 We understand that no change is intended to the foreign investment process. The Treasurer will retain his ultimate decision making powers as to whether a foreign investment proposal is contrary to Australia's national interest. In this context, the Centre is intended to support the Treasurer where national security is in issue.

We make a few points.

***National interest test is broader than national security***

1.2 Firstly, it needs to be emphasised that, the foreign investment regime in Australia should not become like the US Committee on Foreign Investment in the United States ("**CFIUS**") regime or the Canadian national security review regime.

1.3 Unlike the US and Canada national security reviews, the foreign investment test in Australia is whether the proposed action is contrary to national interest. The test is broader than just national security. We believe that this test is appropriate for Australia's foreign investment

regime because it allows the Treasurer to take into account broader factors such as the economic benefits arising from foreign investment and the impact on the investor, their customers and the market as well as community concerns. The test is flexible and serves Australia well. Ultimately, the Treasurer needs to consider all relevant factors and find an appropriate balance.

- 1.4 Consistent with the broader national interest test, the Centre should have a balanced representation from the economic agencies and the intelligence agencies. In particular, the Centre should have representation from the Treasury generally as well as the Treasury's Foreign Investment Division supporting the Foreign Investment Review Board ("FIRB").
- 1.5 Even though CFIUS's focus is national security, the benefits of having a broader view of foreign investment is acknowledged in the composition of the CFIUS members. CFIUS is chaired by the US Secretary of the Treasury and comprises 9 permanent members of various departments and offices.<sup>1</sup>

### ***More guidance around the national security factors and conditions***

- 1.6 Secondly, in the context of critical infrastructure, we consider it desirable and helpful to foreign investors that the Government provide more guidance around:
  - (a) the specific assets that would attract national security scrutiny (see also paragraphs 2.2 and 2.3 of the Discussion Paper) and those that require Australian participation;
  - (b) the national security factors that the Treasurer would take into account.

This is consistent with the approach taken in the US and Canada where illustrative lists of national security factors are made known to the public. However, again, national security should not be the only factor considered in a national interest test; and

- (c) the conditions that could mitigate national security concerns.

For example the so-called "Treasurer's preferences" applied in the Transgrid transaction and other State government privatisations. It would be more efficient if the Government can provide some guidance on the requirements on ownership, strategic or board control, or operational control that it would be looking for. This can be reported on an aggregated basis in FIRB's annual reports.

- 1.7 It is important that clearer guidance on the matters above is given early before the investor goes into an acquisition process and spends significant amount of time and costs preparing for a bid. In particular, if there are certain assets that are off limits to foreign investors, they should be made known. Also, the investor should be advised upfront of the conditions that the Government is expecting. Some of these conditions may not be commercially feasible and may cause the investor to not proceed with a bid if they are insisted upon.
- 1.8 The application fee imposed during the 2015 legislative reform has generally caused investors to delay making an application to FIRB until much later in a sale process. For transactions involving critical infrastructure, it would be helpful if the Government is able to give clear guidance on the matters above without the investor having to make a formal application. It would also be helpful if the Centre and FIRB could give the owners of critical infrastructure

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<sup>1</sup> CFIUS members comprise the heads of Department of the Treasury (Chair), Department of Justice, Department of Homeland Security, Department of Commerce, Department of Defense, Department of State, Department of Energy, Office of the U.S. Trade Representative and Office of Science & Technology Policy. The Office of Management & Budget, Council of Economic Advisors, National Security Council, National Economic Council, Homeland Security Council are observers and participate in CFIUS activities. The Director of National Intelligence and the Secretary of Labor are non-voting, ex-officio members of CFIUS with roles as defined by statute and regulation.

sufficient guidance on the parameters within which they may conduct a sale of their assets, during their regular engagement with the owners.

## 2 Critical Infrastructure Asset Register

### *Guidance on the sensitive assets*

- 2.1 We understand that the Critical Infrastructure Asset Register will not be made public. However, description of categories of sensitive assets will be provided.
- 2.2 We welcome the Government's proposal to give guidance to foreign bidders upfront whether there are certain assets that will not be approved for foreign investment. This will help minimise the waste of time and resources in pursuing a proposal which will ultimately not be approved. We recommend that the Government clarify whether approval will definitely not be given in respect of the categories of sensitive assets described, or whether the Treasurer will still retain his discretion to assess proposals on a case-by-case basis if appropriate mitigation measures are offered, including Australian participation. Any such description should be sufficiently specific and clear to give meaningful guidance to foreign investors.
- 2.3 Where critical infrastructure is already in private hands, if there is any restriction on foreign investment, in particular foreign government related investment then this should be stated clearly.

### *Registration requirements and time period*

- 2.4 The Discussion Paper also asks whether a 30 day period or a 6 months transition period is appropriate for owners to register their interest in a critical infrastructure asset.
- 2.5 It is not possible to meaningfully comment on the adequacy of the time periods proposed unless we know what assets are captured and what information needs to be collected. If the definitions of critical infrastructure and the information required to be registered are very complicated, longer time periods could well be required.
- 2.6 The experience with the implementation of the Register of Foreign Ownership of Agricultural Land is helpful as a reference point. There have been many teething issues with that Register. Based on that experience, longer time periods will be required.

## 3 Attorney-General's 'last resort' power

- 3.1 We understand the Government is considering whether to introduce similar powers as the Attorney-General's ("**AG**") directions powers under the Telecommunications Sector Security Reform ("**TSSR**") in the context of critical infrastructure as a last resort (the "**last resort power**").
- 3.2 The Telecommunications and Other Legislation Amendment Bill implementing the TSSR package has been introduced into the Senate but has not been passed yet.
- 3.3 We note that the TSSR package (particularly the AG's directions power) was highly controversial and underwent two rounds of public consultation over the last two years or so. As a result of extensive consultation with the telecommunications industry, certain safeguards were proposed for the AG's directions powers, including:
  - (a) the requirements for:
    - (i) an adverse security assessment from ASIO;
    - (ii) the AG to be satisfied that the activity is prejudicial to security;
    - (iii) the AG to be satisfied that all reasonable steps have been taken to negotiate a security outcome in good faith;

- (b) consultation with the affected company;
  - (c) consideration of factors such as the impact of a direction on the company, their customers and the market in addition to security considerations; and
  - (d) the ability to have the AG's directions reviewed under the Administrative Decisions (Judicial Review) Act 1977 ("**ADJR Act**").
- 3.4 We query whether the last resort power is really necessary in the context of critical infrastructure in the ports, electricity and water sectors as regulation of these assets are usually state-based. The danger with such a broad power is that it creates regulatory uncertainty and undue complexity which is not conducive for any business, whether or not they are foreign. It will be difficult to define the exact scope of this power and what critical infrastructure assets are subject to this power.
- 3.5 If a last resort power is considered necessary, it should apply to all critical infrastructure businesses, and not just foreign businesses.
- 3.6 In addition, the last resort power should have safeguards around it, to ensure that it is not exercised beyond what is necessary to protect national security. In this regard, we understand that the safeguards above are considered appropriate in the context of the telecommunications sector. Any such safeguards should be extended to all critical infrastructure businesses subject to the last resort power, whether or not they are foreign.
- 3.7 Principles of fairness and due process should not be compromised unnecessarily. Foreign investors should not be discriminated against unfairly based solely on prejudice and without credible evidence that their foreign ownership has contributed to the national security concerns.

### ***The Treasurer's power***

- 3.8 Leaving aside regulation which applies across the board within the Australian borders, foreign investors are often subject to additional national security measures at the border, as conditions of the Treasurer's approval of their proposed acquisition or new business under the *Foreign Acquisitions and Takeovers Act 1975* ("**FATA**").
- 3.9 Some of these conditions attempt to give the Government broad powers similar to the AG's TSSR directions power on an ongoing basis, but without necessarily including the safeguards that the Australian community deemed necessary to include in the TSSR package.
- 3.10 In our experience, extensive consultation with foreign investors is undertaken before the Treasurer exercises discretion to impose national security conditions under the FATA. However, beyond the consultation process in an application, it is often unclear to foreign investors what is the process that the Government undertakes to determine what national security conditions (if at all) are necessary.
- 3.11 We believe that it would instil further confidence in Australia's foreign investment regime if the Government would explicitly commit to certain basic safeguards for the foreign investors. At a minimum, consistent with the scope of authority given to the Treasurer under the FATA, the Treasurer should make clear and reiterate that his power to impose conditions would only be used based on credible evidence to the extent necessary to ensure that the proposal is not contrary to national interest.
- 3.12 The Government could also outline in a Guidance Note the process that it takes as part of its national interest assessment where national security is relevant to the exercise of the Treasurer's powers. For example, if an adverse security assessment from ASIO or the Centre will be obtained before the Treasurer would consider imposing conditions relating to national security, this should be made clear to investors.

3.13 In addition, foreign investors should be given a meaningful opportunity to respond to national security concerns. Without understanding the nature of the concerns, it is impossible for foreign investors to work with the Government to find ways to resolve them.

3.14 Of course, full details of the concerns are not always possible given that disclosure of classified information may compromise the country's national security. Where foreign investors are asked to take on faith that the Government has genuine national security concerns without knowing the specifics, it becomes critical that foreign investors have confidence that Australia's foreign investment is fair and non-discriminatory, and that the exercise of the Treasurer's powers is proportionate to the national security concerns.

3.15 In this regard, the same classified information disclosure issue is acknowledged by the US Government. However, the US Government considers that there are sufficient safeguards in the CFIUS rules that ensure that actions taken by the President or CFIUS are taken only to address legitimate national security concerns. The following is particularly instructive:

“CFIUS is authorized to enter into or impose, and enforce, agreements or conditions to mitigate any national security risk posed by the covered transaction. Section 721 and Executive Order 11858, however, contain important conditions on CFIUS's exercise of this authority. First, before CFIUS may pursue a risk mitigation agreement or condition, *the agreement or condition must be justified by a written analysis that identifies the national security risk posed by the covered transaction and sets forth the risk mitigation measures that the CFIUS member(s) preparing the analysis believe(s) are reasonably necessary to address the risk.* CFIUS must agree that risk mitigation is appropriate and must approve the proposed mitigation measures. Second, CFIUS may pursue a risk mitigation measure intended to address a particular risk *only if provisions of law other than section 721 do not adequately address the risk.*”<sup>2</sup>  
[emphasis added]

3.16 We believe that by being transparent and open about the process and holding itself to a high standard, the Government could instil confidence in Australia's foreign investment regime so that there is acceptance of the credibility of the decisions made by the decision makers (be it an approval or a rejection).

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<sup>2</sup> Office of Investment Security; Guidance Concerning the National Security Review Conducted by the Committee on Foreign Investment in the United States.