

Australian Critical Infrastructure Centre

On 23 January 2017 the Australian Government launched the Critical Infrastructure Centre in response to the complex and evolving national security risks to critical infrastructure. The establishment of the Centre forms part of the Government's Critical Infrastructure Resilience Strategy. One of the initial tasks of the Centre will be to develop a Critical Infrastructure Register (to capture and track who owns critical assets). These developments are expected to have implications for inbound foreign investment in the infrastructure sector.

What is the Centre?

The Critical Infrastructure Centre (**Centre**) was established on 23 January 2017 and is based within the Australian Government's Attorney-General's Department. It is expected to comprise staff with expertise from various other Australian Government agencies. The establishment of the Centre forms part of the Government's Critical Infrastructure Resilience Strategy (**Strategy**). A disruption to critical infrastructure could have a range of serious implications for business, governments and the community. The Strategy, which comprises a policy statement and a plan for practical implementation, aims to ensure the continued operation of critical infrastructure in the face of all hazards.

What is critical infrastructure?

The scope of "critical infrastructure" is not certain. The recently released consultation paper (discussed below) provides that Australian state and territory governments share the following definition of critical infrastructure:

'those physical facilities, supply chains, information technologies and communication networks which, if destroyed, degraded or rendered unavailable for an extended period, would significantly impact the social or economic wellbeing of the nation or affect Australia's ability to conduct national defence and ensure national security'.

The Centre's page on the Attorney-General's Department website indicates that critical infrastructure "provides services that are essential for everyday life such as energy, food, water, transport, communications, health and banking and finance".

While the definition is not yet clear, the concept may be construed more widely than the types of infrastructure prescribed under the current foreign investment legislative regime, which in general terms includes:

public infrastructure (which includes airports or airport sites; ports; infrastructure for public transport; or infrastructure used to provide the following services to the public generation, transmission, distribution or supply of electricity, the supply of gas, the storage, treatment or

Key issues

- The Critical Infrastructure Centre was established on 23 January 2017, bringing together expertise to a single location to better manage national security risks to Australia's critical infrastructure.
- A Critical Infrastructure Register is being developed.
- The Foreign Investment Review Board is expected to be supported closely by the expertise of the Centre in relation to foreign investment proposals which concern critical infrastructure.
- The establishment of the Centre and Register may allow foreign investors to be better informed when considering whether to bid for an asset and determine if a proposal will raise national interest concerns.

distribution of water or the treatment of sewage);

- certain existing or proposed roads, railways or inter-modal transfer facilities; and
- the infrastructure (or part of the infrastructure) of a telecommunications network or a nuclear facility.

Key functions

The key functions of the Centre include:

- identifying key assets within the high risk infrastructure sectors;
- developing a register of critical infrastructure assets, which captures and tracks information about who owns and operates critical assets (**Register**) – in this regard it is proposed that the Register will initially deal with key critical assets in high risk sectors (such as water, ports and electricity);
- undertaking strategic risk assessments of Australia's most critical assets to determine the national security risks from foreign involvement;
- developing national security risk assessments in response to requests from stakeholders, such as the Foreign Investment Review Board (**FIRB**);
- developing risk management strategies based on determined risk profiles;
- supporting national security compliance activities; and
- detecting and monitoring new, unknown, existing and potential national security risks, issues and opportunities.

The Centre is expected to perform its key functions in close consultation with state and territory governments,

regulators and private owners and operators.

Public consultation and timing

While the Centre's initial focus will be on the most critical assets in the electricity, water and ports sectors, the Government indicated that it proposed to consult with states, territories, industry and investors to consider what other assets require attention.

On 21 February 2017, the Centre released a discussion paper outlining the complex and evolving national security risks of sabotage, espionage and coercion to our critical infrastructure. The paper seeks views on how the Centre can work together with state and territory governments and industry to best manage these risks. Timing for the establishment of the Register has not yet been announced, however, the consultation paper indicates that acquirers of critical infrastructure assets would be given 30 days to register their interests, with a 6 month transition period proposed to allow existing owners to register their interests. An indication of timing for the establishment of the Register and more detail on the registration requirements is expected sometime after the close of submissions on the current consultation paper, which is scheduled for 21 March 2017.

Impact on foreign investment

The introduction of the new foreign investment regime in December 2015 saw a strengthening of the rules relating to acquisitions of and investments in government-owned critical infrastructure assets (or entities which hold them). For

example, prior to the new law, acquisitions of interests in Australian land (including sites such as ports, airports or other infrastructure) from Australian Commonwealth, state, territory and local governments were exempt from notification, which is no longer the case. Additionally, the new law introduced a concept of "lower threshold commercial land" which lowered the monetary threshold (from A\$252 million to A\$55 million) for acquisitions by privately-owned foreign investors of certain non-vacant commercial land which is leased to government or used for specified purposes, including (among others) public infrastructure, communications networks or servers critical to authorised deposit-taking institutions.

The introduction of the more stringent requirements relating to critical infrastructure followed closely after the controversy which flowed from the grant of a 99-year lease of the Darwin Port by the Northern Territory Government to China's Landbridge Group in October 2015. The grant of the lease (absent of review by FIRB, which was not required by the rules at the time), gave rise to criticism from a number of stakeholders, in particular the United States. Australian security experts also raised concerns that the deal was rushed and did not obtain the proper scrutiny it deserved.

The development of the Strategy and the formation of the Centre is consistent with and adds to the strengthening of foreign investment rules in this area and is aimed at ensuring that future proposals involving Australia's critical infrastructure assets are considered in a more cohesive and comprehensive manner.

While FIRB and the Australian Treasurer will continue to remain responsible for assessing and determining foreign investment applications on a case by case basis under the existing foreign investment framework, FIRB is expected to consult with the Centre on applications which are notified under the existing law and which concern critical infrastructure assets and have regard to the Register. Accordingly, the establishment of the Centre and the Register will be used to strengthen, streamline and assist in the consideration of such applications, rather than representing a shift of existing Government policy with respect to foreign investment in the infrastructure sector.

In particular, the Centre and Register (once established) are expected to ensure that critical infrastructure assets are registered and identified in advance. Accordingly, the more proactive and comprehensive assessment promised by the Centre should help avoid the type of situation faced in the A\$12 billion Ausgrid sales process, where Cheung Kong Infrastructure and China State Grid were ultimately rejected as suitable bidders at the last minute by the Australian Treasurer on national security grounds, despite having been progressed by the New South Wales Government to the final stages of the sales process.

However, at this early stage there remains a level of uncertainty regarding how the Register will operate. For instance it is not yet clear precisely what information will be recorded on the Register, whether the Register will be made public and who will have access to the Register.

Commentary indicates that the Register is unlikely to be made public.

This reflects the approach taken in relation to the recently established Agricultural Land Register (and Water Entitlements Register), although in the case of the Agricultural Land Register, legislation requires publication of periodic aggregate statistics and reports on the level of foreign ownership of agricultural land.

The arguments around restricting access to the Register reflect concerns that the kind of information that may be recorded on the Register (which include details of individual registrants) could, if disclosed publicly, lead to privacy and/or national security issues.

While it may be clear in some cases (having regard to the nature of the asset) that an asset would be considered critical and is likely to be on the Register, other cases may not be clearly defined. Assuming the Register will not be public, a question arises as to how at what stage in a sale process bidders might be made aware (either by vendors or, potentially, by the Centre or FIRB) that the target asset is on the Register.

Further clarity on these issues is expected at the end of March, following consideration of submissions on the current consultation paper.

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