



4 September 2020

## **SUBMISSION IN RESPONSE TO FOREIGN INVESTMENT REFORM EXPOSURE DRAFT**

Infrastructure Partnerships Australia welcomes the opportunity to provide this submission in response to the Federal Treasury's Exposure Draft Legislation enacting changes to the *Foreign Acquisitions and Takeovers Act 1975*, and the Draft Regulation (Definition of National Security Business) enacting changes to the *Foreign Acquisitions and Takeovers Regulation 2015*.

Infrastructure Partnerships Australia is the nation's infrastructure think tank, providing independent policy research focused on excellence in social and economic infrastructure.

### **The rationale for reform is clear, but investor confidence is more important than ever**

The infrastructure sector understands and supports the Federal Government's intention to protect Australia's national interest through reforms to the foreign investment framework. Infrastructure Partnerships Australia appreciates that the Federal Government has sought to provide timely and comprehensive information to reassure investors of the scope and intention of the proposed reforms.

However, it is important to consider the context of these reforms. The Federal Government, along with all state and territory governments, have highlighted the importance of infrastructure in supporting Australia's economic recovery from COVID-19. Private investment in infrastructure, alongside public stimulus, will be critical to supporting the economy through this period, and boosting the Australia's productive capacity over the longer term.

In this context, it is important to ensure these reforms do not unduly impact the confidence of foreign capital providers to make timely and efficient investments in Australian infrastructure wherever possible. Capital is globally mobile, so a failure to maintain investor confidence could see the attractiveness of Australian infrastructure decline or costs of capital increase at a time when the Australian economy can least afford it.

With this in mind, the infrastructure sector could benefit from further clarity around some points in the Draft Legislation and Regulation.

### **Further clarity is needed around a number of issues**

#### *The definition of "critical infrastructure"*

The definition of a 'national security business' in the draft Regulation provides a clear link to the definition of 'critical infrastructure' as laid out in the *Security of Critical Infrastructure Act 2018* (SOCI).

As Treasury is aware, this definition is currently under review through a separate *Protecting Critical Infrastructure and Systems of National Significance Consultation Paper*, being led by the Federal Department of Home Affairs. As this Consultation Paper clarifies, SOCI places regulatory obligations on the electricity, gas, water and ports sectors. However, the Consultation Paper also flags the need to broaden the definition of 'critical infrastructure' to include other sectors including data, communications, energy, education, health, transport and water.

Running these reform processes concurrently introduces additional uncertainty. Even if it can be assumed that the proposed reforms will seek to broaden the definition of "critical infrastructure", and thus "national



security business” to include all forms of economic infrastructure and many forms of social infrastructure, the interconnected nature of infrastructure assets presents additional definitional challenges. It is unclear if the proposed reforms would extend the definitions to include not only transport, energy or water assets, but also, for instance, the data collected from those assets, or the infrastructure used to store that data.

Given the interconnected nature of the two reform processes, the Federal Government – across Treasury and the Department of Home Affairs – should seek to provide greater transparency around precisely what asset types may be captured through the proposed reforms. Infrastructure owners, operators and investors need time to consider the impacts of these proposed reforms and, noting the changes are scheduled to come into effect from 1 January 2021, it is essential that greater clarity is provided as soon as possible.

### *Different types of investments*

The infrastructure sector would also benefit from further clarity around how different types of investment applications will be assessed. While the definition of “direct interest” is established in the *Foreign Acquisitions and Takeovers Regulation 2015*, we respectfully request greater clarity on how the expanded foreign investment framework will deal with and distinguish amongst other scenarios, debt for equity conversions, certain security arrangements, capital raisings, share buy-backs and capital reductions/returns.

### *Streamlining of low-risk investments*

The assurances provided by the Federal Government that low-risk investments will be streamlined is welcome, and the Explanatory Memorandum provides some guidance on the voluntary notification process and investor exemption certificates.

However, the scope of transactions eligible for exemption certificates and assessment timeframes is unclear, particularly in relation to the grandfathering of existing exemption certificates for established foreign investors in the Australian market. There have been certain indications or speculation that “pre-approval” and/or fast track arrangements may be available (separate from exemption certificates) for certain approved foreign investors, and further details as proposed would be much appreciated.

Infrastructure Partnerships Australia understands that further clarity regarding this issue will be provided through the second Draft Regulation, and we look forward to engaging with Treasury in relation to this.

### *Exchange of information with foreign governments*

Infrastructure Partnerships Australia understands that, in addition to the sharing of information within certain Australian Government Agencies and Departments, certain “protected information” may be shared with Foreign Governments in limited circumstances, which include three separate tests:

- the protected information can only be shared when it relates to National Security
- the sharing must not be contrary to the National Interest, and
- there must be an “information sharing” agreement between Australia and the foreign government.

Further clarity around these arrangements would be useful, particularly in relation to which foreign governments Australia has or is expected to enter a relevant Information Sharing Agreement, what categories of information are expected to be shared and what controls will be put in place to ensure that existing privacy restrictions will be preserved.

### *Register of foreign owned assets*

The draft Legislation imposes an obligation on foreign persons or investors to notify the Registrar of certain prescribed events relating to registrable land, water interests or the acquisition of an interest in an Australian entity or business and interests acquired under the National Security Test. These prescribed events are described in certain detail in the draft Legislation, however further specific details on the extent of information required would be useful, as well as confirmation that the Registrar will be the Commissioner of Taxation, reporting to the Australian Treasurer.

### **The principles of transparency, consistency and efficiency should be prioritised**

Above all, Infrastructure Partnerships Australia calls for the implementation of the foreign investment reforms to establish a framework that is as transparent, consistent, and efficient as can reasonably be expected. Due to the breadth of the proposed reforms, these principles will be critical to ensure lower-risk investments into Australia are not inadvertently deterred alongside those that pose significant national security risks.

On a whole, investors require as much clarity and transparency upfront as possible concerning which investments will be captured, how long assessments will take, and the extent to which the Treasurer's wide-ranging powers are likely to be deployed across the range of potential future investments.

Thank you for your consideration of this submission. We look forward to continuing to engage with the Federal Treasury on the important issues raised in this submission, and more broadly, to progress positive change in Australia's infrastructure sector.

Should you require further information, please contact Jon Frazer, Director of Policy and Research on (02) 9152 6017 or [jon.frazer@infrastructure.org.au](mailto:jon.frazer@infrastructure.org.au).

Yours sincerely,



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