

Government's new critical infrastructure list raises more questions than it answers for investors

Written by The Conversation

The government's latest move to tighten the regulations for overseas investors may provide some clarity on what's off limits for some projects but it doesn't resolve the ongoing debate on what type of approach the government will take to foreign investment.

[Treasurer Scott Morrison announced](#) the Critical Infrastructure Centre (CIC) will manage a list of assets that will automatically be referred to its scrutiny, if there's interest from foreign investors. According [to media reports](#) an initial list has already been approved by cabinet. The CIC will expand this list in consultation with all levels of governments, owners and operators.

The government needed to clarify what counts as critical infrastructure after the unpredictable decision-making in [the 2016 Ausgrid bid](#) . The current legislation on critical infrastructure in Australia is very wide and not geared towards encouraging foreign investment.

This latest move is also particularly important if the government plans to go ahead its [Developing Northern Australia initiative](#) . This project would require a huge amount of highly diversified infrastructure investment in areas such as transport, water, social services and others which potentially all fall under the current critical infrastructure definition.

As much of this investment will have to come from both overseas and local investors, there is a need to create clarity so the required foreign investors can plan their bidding on a long term basis.

At the same time, there are specific security aspects that need to be addressed in terms of protecting power, ports and water sectors from terrorism and sabotage. Of course, this protection should be in place irrespective of who owns the relevant assets.

Involvement of the CIC certainly adds an additional layer of bureaucracy to the approval process for foreign investment in Australia. The Foreign Investment Review Board (FIRB) located within Treasury was meant to mobilise sufficient expertise to decide on these matters by co-opting board members and staff from the Department of Defence and security services. The

decision to establish the CIC within the Attorney General's department seems to reflect the views of the proponents of stronger scrutiny from outside Treasury.

However, the establishment of the CIC does not resolve the policy debate that needs to be had about foreign investment and that will determine whether Australia will take a more restrictive security approach or a more commercially oriented approach. For example, Australia has [National Guidelines for Protecting Australian Critical Infrastructure from Terrorism](#) that are similar to the ones of the United States Department of Home Security. These guidelines cover banking and finance, transport, energy, water, health, food and grocery, communications as well as manufacturing and supply chains. Potentially, these guidelines could draw many regular commercial activities within the realm of critical infrastructure.

The [European Union's guidelines on critical assets](#) have a much narrower focus on energy and transport, and in line with the three sectors mentioned by the treasurer, electricity, water and ports.

There are different assessments of what constitutes critical infrastructure, from a security and a commercial perspective. From a security perspective, assets like ports can be seen as a risk in terms of national security and sovereignty but from a commercial perspective these assets are part of a global network of infrastructure. The question is, to what extent are these two aspects compatible.

In 2015, the Attorney-General, in commenting on critical infrastructure resilience strategies in Australia, defined it in terms of four outcomes: a strong and effective business-government partnership; enhanced risk management of the operating environment; effective understanding and management of strategic issues; and a mature understanding and application of organisational resilience. These outcomes can't necessarily be enforced by the foreign investment approval process, that is, in the pre-investment phase of foreign investment. Rather they need to rely on processes that cover domestic and foreign owned assets alike on a long-term basis.

The resulting new procedures with the CIC are likely to follow existing practice. CIC will support the existing framework, the Foreign Investment Review Board, in its assessment and management of investment applications, providing advice to the Treasurer on a case by case basis.

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This process will maintain the treasurer's discretion in deciding about investments deemed to affect national interest. Presumably, the Foreign Investment Review Board will refer applications to CIC if the intended investments fall within the broad definition of critical infrastructure.

The practical outcomes for investors depend on how this framework will be handled. If CIC is subordinate to FIRB, it would not be involved in applications that do not come before FIRB because of threshold limits or because of exemptions granted in free trade agreements.

If CIC can act on its own, it would depend on how wide or narrow a definition of critical infrastructure is used, whether specific infrastructure projects will have to be submitted for approval.

The new Critical Infrastructure Centre can play an important role in creating security and predictability for overseas investors. At the same time, it could create considerable obstacles if the approval process becomes politicised. The devil is both in the policy and the detail.

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