HERBERT SMITH FREEHILLS

AUSTRALIAN FOREIGN INVESTMENT REVIEW

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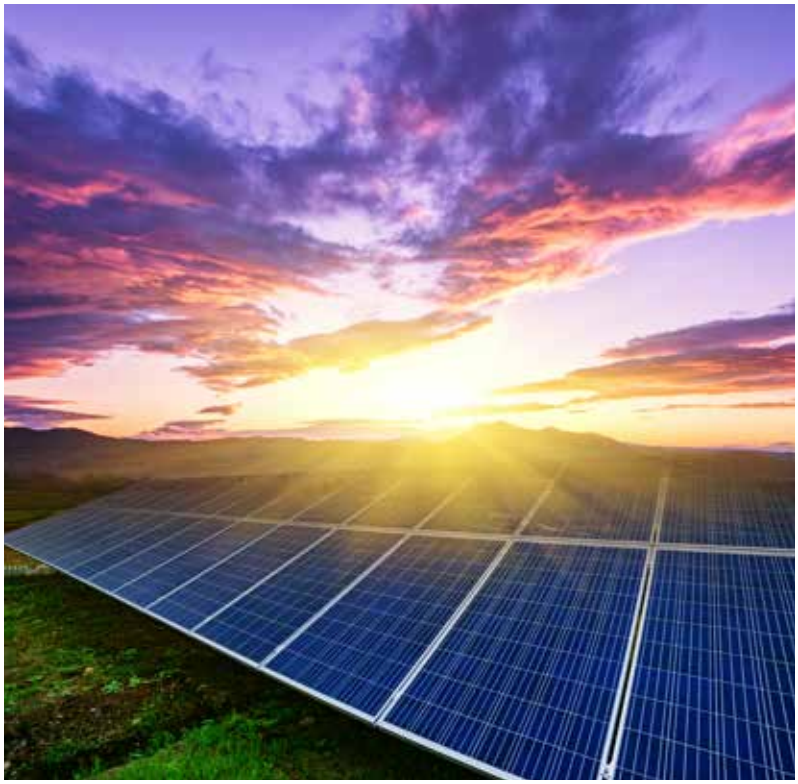

ISSUE 9 DECEMBER 2017

Welcome

In this edition of the *Australian Foreign Investment Review*, we focus on the practicalities of dealing with FIRB and highlight the areas of increasing sensitivity and focus for FIRB.

Firstly, Adam Strauss and Malika Chandrasegaran reflect on Herbert Smith Freehills' recent engagement session with FIRB, outlining tips and tricks for applications in order to ensure timely decisions.

David Ryan and Robert Nicholson detail the tighter governmental controls over critical infrastructure as a result of new legislation, and the proposed creation of a register to track the ownership of critical infrastructure assets.

Damien Hazard then hones in on the recently clarified disclosure requirements for private equity fund managers, which change what is required for previously confidential limited partner and fund structure information.

Nick Baker and Madeleine Miller put the spotlight on renewables projects, and seek to bring clarity to how these projects are treated following the legislative amendments introduced on 1 July 2017.

Finally, Matthew FitzGerald and Lucinda Grant outline FIRB's increasing engagement and consultation with other government departments and regulators when reviewing FIRB applications, and the impact this has in practice for applicants.

Please enjoy the ninth edition of Herbert Smith Freehills' *Australian Foreign Investment Review*.

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About Herbert Smith Freehills

Herbert Smith Freehills has one of Asia-Pacific's leading M&A legal practices, as well as the expertise and track record to help make any international investment in Australian assets a smooth and efficient process.

Our foreign investment experience includes navigating some of Australia's largest deals through the foreign investment review process.

We combine our transactional expertise with industry sector experience. We are acknowledged leaders in a number of global sectors including energy, mining and infrastructure, and technology, media and telecommunications.

'THEY HAVE MORE DEPTH ON THE BENCH BY QUITE A MARGIN; THERE ARE SEVERAL LAWYERS THERE I COULD GIVE A COMPLEX M&A MATTER TO'
(AUSTRALIA) – CHAMBERS ASIA PACIFIC 2017

Our discussions with FIRB: insights into current priorities and tips for applications

From top

Adam Strauss, Partner

Malika Chandrasegaran, Senior Associate

Herbert Smith Freehills was recently invited by FIRB to provide feedback on the application process and to discuss some of FIRB's current priorities and tips for applications to assist in ensuring timely decisions.

These discussions form part of FIRB's broader engagement with the business community and stakeholders, and reflect its genuine interest in improving the efficiency of the application process.

We share some insights from these discussions below.

Enhancing compliance activities

The Treasury is enhancing its compliance arrangements for foreign investment.

FIRB has indicated that it is establishing a rolling annual program whereby FIRB will audit an applicant's compliance with approval conditions attached to FIRB approvals. The approvals to be audited will comprise both randomly selected approvals as well as approvals with conditions where the consequence of breach of the conditions would be significant. We understand that the audit will not be made public.

Review of online application form, business application checklist and guidance notes

FIRB wishes to refine the foreign investment review process and is currently in the process of updating its online application form, business application checklist and guidance notes to take into account feedback from stakeholders.

Early engagement and sale processes

FIRB encourages early engagement from vendors of significant/sensitive businesses and agricultural assets in relation to the sale process undertaken in relation to the asset, in particular whether it was open to a broad range of potential local and international acquirers.

Other tips for applications

FIRB encourages applicants to front-end applications with all relevant information to assist in ensuring a timely decision. This includes:

- setting out all relevant information listed in the business applications checklist;
- detailing the applicant's commercial rationale for the transaction and intentions for the business (rather than using a more formulaic response);
- setting out details regarding how the transaction will be financed, including any related party financing;
- if the application relates to agricultural land, including a map and details of the land; and
- clearly outlining commercial deadlines early on in the process, and detailing the costs and consequences of the deadline not being met.

This article was written by Adam Strauss, Partner, Sydney and Malika Chandrasegaran, Senior Associate, Sydney.

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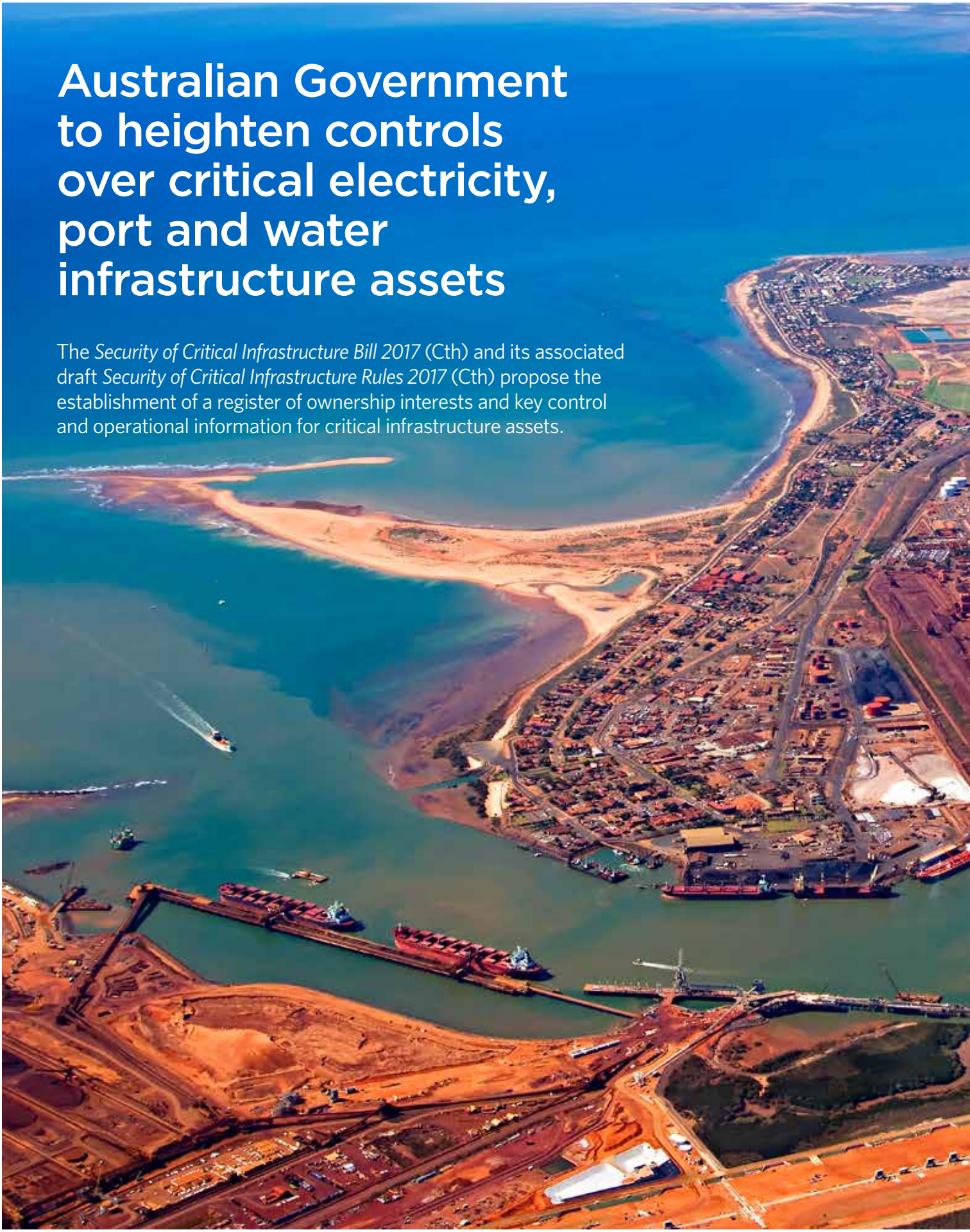
Australian Government to heighten controls over critical electricity, port and water infrastructure assets

The *Security of Critical Infrastructure Bill 2017* (Cth) and its associated draft *Security of Critical Infrastructure Rules 2017* (Cth) propose the establishment of a register of ownership interests and key control and operational information for critical infrastructure assets.



From left
David Ryan, Partner
Robert Nicholson, Partner

The Act and Rules (once enacted) will also allow the Government to identify threats of sabotage, espionage and coercion and require owners and operators to develop mitigation measures to address those threats.

The draft legislation comes after the Federal Government established the Critical Infrastructure Centre in January 2017. The Bill is still a draft and stakeholders were able to provide feedback on the Bill until 10 November 2017.

The Register will be used by the Foreign Investment Review Board to assess national security risks in assessing applications for foreign ownership of critical infrastructure assets.

The Bill and draft Rules are accompanied by an 83-page Explanatory Document issued by the Government and Critical Infrastructure Centre.

What are critical infrastructure assets?

The Act will apply to "critical infrastructure assets" in the electricity, ports and water sectors. According to the Explanatory Document, these sectors have been identified because *"their existing regulatory regimes do not directly manage security risks of sabotage, espionage and coercion"*.

Critical infrastructure assets comprise:

- **Critical electricity assets** – all electricity network assets or systems used for the transmission or distribution of electricity. It will currently capture 9 electricity transmission assets, 16 electricity distribution assets and 6 interconnectors. It will also include electricity generators that are *"critical to ensuring the security or reliability of an electricity network in a State or Territory"*. This is defined as any generator providing system restart ("black start") ancillary services and synchronous generators with installed capacities of more than: in NSW – 1,400MW, in Victoria – 1,200MW, in Queensland – 1,300MW, in WA – 600MW, in SA – 600MW, in Tasmania – 700MW and in the NT – 300MW.
- **Critical ports** – specific Australian ports gazetted as "security regulated ports" under the Maritime Transport and Offshore Facilities Security Act 2003 (Cth) (**MTOFSA**). The Rules specifically refers to 20 ports.
- **Critical water assets** – water utilities servicing at least 100,000 water and/or sewerage connections and holding a licence agreement with a State or Territory, which if disrupted would significantly impact the operations of large population hubs, economic interests and Government operations. At this stage it is not clear whether this would include desalination plant and significant wholesale water infrastructure.

> "The Act will apply to "critical infrastructure assets" in the electricity, ports and water sectors."

- **Any other assets declared to be critical infrastructure assets, and assets prescribed by the Rules** - the Bill notes that there will only be a limited number of assets within this category. Sectors that may potentially be covered by this category could include natural gas pipelines and coal delivery systems such as railroads (as key components of the fuel delivery systems for critical electricity assets). Assets may not be declared under this category unless the Minister has consulted with the relevant Minister of the State or Territory in which the asset is located.

Most of the assets affected by the Minister's declaration rights will have their "critical infrastructure" status made public. However, the Minister may privately declare an asset to be a critical infrastructure asset

where the Minister assesses there to be a risk to national security if it were publically known that the asset is critical infrastructure.

The Bill is estimated to apply to approximately 100 assets in the electricity, ports and water sectors.

The telecommunications sector is also referred to in the Explanatory Document but is not mentioned in the Bill and Rules. Telecommunications are separately managed under the recent *Telecommunications and Other Legislation Amendment Act 2017*, which amends the *Telecommunications Act 1997*.

Some specifics

Direct interest holders

A direct interest holder is any person:

- holding a direct or indirect ownership interest of greater than 10% in a critical infrastructure asset (leasehold interests are expressly captured); or
- otherwise in a position to directly or indirectly influence or control the critical infrastructure asset.

Direct interest holders are required to report their interest and control information including information about the control the entity has over decisions relating to the running of the asset, (e.g. voting and veto rights and the ability to appoint persons to the board) and information about any person they have appointed to the body that governs the asset and the access they have to operating systems. The Bill contains specific provisions regarding the interests of superannuation funds and the treatment of trustees. It also includes provisions dealing with the compliance obligations of partnerships.

Responsible entities

A responsible entity is the person with operational control of the relevant critical infrastructure asset. The Bill specifies that the responsible person:

- for critical electricity and water assets, is the person holding the licence, approval or authorisation to operate the asset or provide the service delivered by the asset;[1] and
- for a critical port, is the "port operator" under the MTOFSA. The Explanatory Document also appears to indicate that this may include the operators of distinct facilities within individual ports.[2]

The Register

The Register is intended to provide a deeper understanding of who owns, controls and has access to critical infrastructure assets. It requires interest and control information and operational information to be provided to the Government as follows:

- direct interest holders in critical infrastructure assets will be required to provide interest and control information; and
- responsible entities will be required to provide operational information, including information in relation to system access and the offshoring or outsourcing of controls and key operational aspects.

Direct interest holders and responsible entities will have six months to report, and are then obliged to notify the Government within 30 days of any change in this information or the occurrence of a "notifiable event". The Centre also has the power to require a reporting entity or operator to provide any other information considered relevant to its functions.

The Register will not be made public.

The last resort power

The Act will include a power for the Minister to require direct interest holders and responsible entities to do, or refrain from doing, anything that the Minister considers to be a risk to security. This direction right will only apply if other mechanisms such as State or Territory powers are considered not likely to be effective. The Centre must consult with the parties concerned before this power is exercised.

Compliance

The Bill provides for civil penalty provisions and the use of civil penalty orders or injunctions and enforceable undertakings. Certain provisions may attract criminal penalties.

The Explanatory Document includes the Government's assessment of the likely annual compliance costs associated with the Act.

Reporting

The Bill includes an obligation on "reporting parties" to report annually on their compliance with the Act. Reporting parties are the "responsible entity" (operator) for the asset and any direct interest holders.

Separately, the Minister is required to report annually to the Federal Parliament on the use of the Minister's various powers under the Act. This is intended to ensure the appropriate use of those powers, and enhance oversight and accountability.

Relationship to foreign ownership

The Explanatory Document very clearly states that the Bill is *"designed to strengthen the Government's capacity to manage the national security risks of espionage, sabotage and coercion arising from foreign investment in Australia's critical infrastructure"*.

The linkage to foreign ownership in the Explanatory Document is interesting, as the Bill and Rules are of general application and barely mention foreign ownership (other than allowing access to the Register for the purposes of the FIRB process). The wording of the Explanatory Document is not likely to be helpful to already damaged foreign perceptions of Australia's foreign investment regime in the wake of the Ausgrid decision.

The resilience of a critical infrastructure asset is not necessarily determined by foreign ownership or control of that asset. Emergency powers already exist under most State and Territory legislation for the Government to assume control of infrastructure assets in emergency situations. It is also interesting that the scope of the critical risk and resilience assessment does not at this stage include resilience of critical infrastructure assets in the face of other challenges such as natural disasters or climate change.

We noted in our article[3] in February that the proposals differ from the equivalent critical infrastructure policies administered

1. This is interesting in the case of some electricity generators as some States and Territories do not currently require a generation licence (e.g. NSW). The potential knock-on impacts on State and Territory licensing arrangements should be considered.
2. In any event, port operators may need to ensure they have access to required information from port tenants under their relevant sublease arrangements.
3. Article available at https://www.herbertsmithfreehills.com/latest-thinking/new-critical-infrastructure-centre-to-advise-firb-what-is-it-and-will-it-help

by the United States Department of Homeland Security. The US policies apply to 16 different industry sectors and are focussed on a broader range of events or circumstances that may affect the resilience and reliability of critical infrastructure. The US policies are not specifically linked to foreign ownership of the relevant critical infrastructure.

While obviously a relevant consideration to national security, the direct linkage to foreign ownership appears unnecessary. For example, why would a foreign party want to expend significant amounts of money to acquire an asset just to have the opportunity to then cripple it? Opportunities for cyber-terrorism and sabotage do not require ownership of the target assets. Further, domestic ownership of a critical asset does not make the relevant asset more resilient to external attack. On the other hand, the government does appear to be focussed on the access to data which ownership or control of some assets might provide.

However, the information in the Register regarding the sensitivities associated with critical infrastructure will be a valuable tool for the Foreign Investment Review Board in assessing foreign ownership applications. As seen in FIRB's rejection of the foreign ownership of the Ausgrid electricity distribution network, a late appreciation of these sensitivities caused significant disruption to the New South Wales privatisation process and also caused significant concern from foreign investors in Australian infrastructure assets. Pre-emptory understanding of risk issues should help streamline the FIRB process.

What it means for you

For investors:

- a need for direct control investors to disclose interest and control information within 6 months of the Act becoming effective;
- a need to develop compliance and reporting systems regarding interest and control information and changes to that information; and
- the FIRB application process should become more streamlined and certain, as potential national security risks for critical infrastructure assets will have been previously identified. However, FIRB approval conditions may now include additional risk mitigation measures.

For businesses/operators:

- a need for responsible entities to disclose operational information within 6 months of the Act becoming effective;
- a need to develop compliance and reporting systems regarding operational information and changes to that information;
- potential controls on offshoring and outsourcing of business operational control and access; and
- potential obligations to develop mitigation measures if the Critical Infrastructure Centre identifies any national security risks.

Please contact us if you require further information about the Bill and Rules and their impact on you and your business.

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FIRB's focus on private equity funds and investor information: clarity on increased disclosure of LP details

Damien Hazard, Partner

Shockwaves were felt through the world of fund managers this October when FIRB case officers reached out to a number of fund managers and law firms to inform them of the latest decision by FIRB regarding the level of investor disclosure it expects to receive from fund managers in their FIRB applications going forward.

Until recently it has been fairly common for domestic and international fund managers to seek to resist attempts by FIRB to gather confidential information about their investor base, fund structure and complex management arrangements. Both individual sponsors and industry bodies have consistently sought to persuade FIRB that private equity fund managers should not need to provide such detailed information, given the passive nature of their investor base.

Such disclosure practices have often been tolerated to date, with FIRB case officers making case-by-case exemptions to the typical information requests based on their assessment of whether the transaction was a low sensitivity transaction or whether the fund manager was a low-risk investor.

FIRB has now officially decided, however, that such case-by-case exemptions will not be granted going forward. Instead FIRB has indicated that private equity fund managers will always be required, consistent with the business applications checklist on FIRB's website, to disclose full details of:

1. all foreign investors who hold a 5% or more ultimate ownership interest in the relevant fund. Regardless of any confidentiality restrictions in the fund documents, the fund manager will be required to disclose the identity of those investors, together with details of their country of origin and the percentage interest they hold in the fund;
2. all foreign government investors who, in aggregate with other foreign government investors from the same country, hold an ultimate ownership interest of 5% or more in the relevant fund. This type of information request can require disclosure of the identity of fund investors who hold less than a 5% ownership interest. For example, if five different foreign government investors from a single country hold 5%, FIRB requires disclosure of the identity of each of the five foreign government investors who make up the 5%; and
3. any other matters that FIRB considers necessary for it to assess the ownership and control of the fund manager and the relevant fund (or funds) proposing to invest in an Australian business, entity or asset. In our experience, FIRB often requests details on the beneficial ownership, place of incorporation and board composition of the fund manager, and a description of the investment decision making process in place for the fund entities and the fund manager.

This decision has been endorsed by both the FIRB board and the Treasurer, so it is difficult to foresee any deviation from this decision in the near future.

What does this mean for fund managers?

For most fund managers this FIRB decision means that more time needs to be devoted to the FIRB application upfront in order to:

1. collate all the relevant fund ownership and control information; and
2. if necessary under its fund documents, seek its investors' consent to the disclosure of their identities and participation in the fund to FIRB.

Depending on current settings in their fund documents, fund managers may also need to consider whether to amend the confidentiality provisions in their fund documents so as to permit the disclosure of LP data to FIRB in circumstances where a FIRB application needs to be lodged in respect of a fund investment.

This article was written by Damien Hazard, Partner, Sydney.

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FIRB's approach to renewable projects after the 1 July amendments and future developments

From left
Nick Baker, Partner
Madeleine Miller, Solicitor

There have been a number of developments and indications of policy guidance or change to the approach FIRB may take when considering investments in renewable projects over the last six months including:

- the Australian Government's announcement as part of the 2017-18 Budget of changes to the foreign investment framework, several of which were designed to streamline and simplify the operation of the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (the **Act**) and its regulations; and
- as we noted in our **article**[4] earlier this month, the Government has published an exposure draft of *The Security of Critical Infrastructure Bill 2017* (Cth) (the **Bill**) and its associated draft *Security of Critical Infrastructure Rules 2017* (Cth) (the **Rules**) which propose the establishment of a register of ownership interests and key control and operational information for critical infrastructure assets (**Register**).

The Government announced that amendments to the Act taking effect on 1 July would clarify the treatment of developed solar and wind farms as commercial non-vacant land rather than vacant land and agricultural land, and thereby reduce unnecessary red-tape. Although this announcement was welcomed by those who have dealt with the Act's ambiguous treatment of land used for solar or wind farms, the amendments introduced by the *Foreign Acquisitions and Takeovers Amendment (Exemptions and Other Measures) Regulations 2017* (Cth) do not provide the clarity that was promised.

The intention of the new Register under the Bill and Rules is for it to be used by FIRB to assess national security risks in assessing applications for foreign ownership of critical infrastructure assets. Critical infrastructure assets are stated to be within the "electricity, ports and water sectors" but the Bill does not specifically address renewable projects such as solar and wind farms.

July 1 amendments - what are the changes?

Treatment of solar and wind farms prior to 1 July 2017

Prior to the 1 July 2017 amendments, there were no explicit references to solar or wind farms in the Act or its regulations. Land used for solar or wind farms could be treated as vacant commercial land ($0 notification threshold), non-vacant commercial land ($55 million (for sensitive land) or $252 million (for non-sensitive land) notification threshold) or agricultural land ($15 million cumulative notification threshold), depending on the nature of the underlying land and the nature of structures on the land.

> "The amendments introduced by the *Foreign Acquisitions and Takeovers Amendment (Exemptions and Other Measures) Regulations 2017* (Cth) do not provide the clarity that was promised."

Previously, the Act provided that land is vacant unless a substantive permanent building that could be lawfully occupied by persons, goods or livestock is located on the land. Solar and wind farms rarely contain such structures, so that even land containing a developed solar or wind farm would generally not fall within the concept of non-vacant commercial land under the Act.

Further, the previous definition of agricultural land provided that land used, or that could reasonably be used, for a primary

4. Article available at https://www.herbertsmithfreehills.com/latest-thinking/australian-government-to-heighten-controls-over-critical-electricity-port-and-water

production business was agricultural land with no exceptions for solar or wind farms. Most solar or wind farms are built on paddocks or grazing lands, which often could still reasonably be used for primary production even with a developed solar or wind farm located on the land. As a result, a conservative analysis of the application of the Act to solar or wind farms would determine that the land used for the solar or wind farm was agricultural land, to which the $15 million cumulative notification threshold (and higher application fee) applies. As a result there was a high likelihood that acquisitions of land in connection with solar or wind farms would require notification to the Foreign Investment Review Board (**FIRB**).

Treatment of solar and wind farms following amendments to the Act from 1 July 2017

The amendments to the legislation introduced on 1 July expressly contemplate the treatment of land used for solar and wind farms. However, this land is still treated as vacant commercial land, non-vacant commercial land or agricultural land, or a combination of these classifications.

Developed solar and wind farms

The amendments provide, through a change to the definition of "vacant", that land is not vacant if an accredited wind or solar power station is located on the surface of the land. This does clarify that developed, accredited solar and wind power stations are to be treated as non-vacant commercial land, to which the higher screening threshold of $55 million or $252 million will apply. However, Guidance Note 50 provides that if the land is being predominantly used for a primary production business it is also considered agricultural land, to which the $15 million cumulative threshold applies.

Different treatment applies for owners and operators of existing wind or solar farms in Australia. For this category of foreign investor, an acquisition of land containing a wind or solar power station is not considered agricultural land for the monetary notification threshold purpose, irrespective of its predominant use, where the land is acquired for the sole purpose of operating a wind or solar power station.

Undeveloped solar and wind farms

Less clarity has been provided as to how greenfield solar and wind projects are intended to be treated under the Act. The amendments provide that land which is not being used wholly or predominantly at the time of acquisition for a primary production business will not be categorised as agricultural land where that land meets one of the following conditions:

- an application has been made to a government authority for an approval (including accreditation) for establishing or operating a wind or solar power station to be located on the land;
- the land is used wholly or predominantly for a wind or solar power station located on the land;
- an approval of a government authority (including accreditation) is in force allowing a wind or solar power station to be established or operated on the land; or
- the land was acquired solely, or is used wholly or predominantly, to meet a condition of such an approval that relates to other land.

> "Developed, accredited solar and wind power stations are to be treated as non-vacant commercial land."

Whether the land should also be treated as vacant commercial land is not entirely clear from the language in the Act. Guidance Note 50 indicates that this is intended to be the case. The result of this change to the definition of agricultural land means that all greenfield solar and wind projects with approvals in place or applied for will be considered vacant commercial land (to which a $0 notification threshold value

applies) unless the land is being used wholly and exclusively for primary production at the time of the acquisition.

Do the 1 July amendments help?

In terms of clarifying the intended treatment of solar and wind farms under the Act and its regulations, the 1 July changes are not of much assistance. The changes require a close reading of the Act, its regulations and Guidance Note 50 and complicate, rather than simplify, how these projects are to be treated. Even upon close reading of the legislation, it is not always apparent how the land should be classified and which threshold should apply.

It appears that the intention is for dual classifications of land to often apply to land used for solar and wind farms, and for the lower threshold (and no doubt the higher fee) to apply in each case. This will result in foreign investors looking to how it can be ensured that the use of the land triggers the higher threshold. Foreign investors that are not already owners and operators of renewable power stations looking to acquire a developed solar or wind farm will need to ensure that the land is not being used predominantly for primary production in order for the land to be considered non-vacant commercial land and for the higher $55 million or $252 million threshold to apply. Conversely, foreign investors acquiring land with approvals in place (or applied for) for a solar or wind farm will need to ensure that the land at the time of the acquisition is being used wholly and exclusively for primary production in order for the land not to be considered vacant commercial land if they want to avoid the $0 notification threshold.

Although these changes benefit foreign investors purchasing developed solar and wind farms with the likelihood of a higher threshold applying, they complicate the treatment of undeveloped solar and wind farms and increase the likelihood that foreign investors will be required to notify FIRB prior to acquiring these types of assets.

Future developments: The Security of Critical Infrastructure Bill

Are solar and wind farms critical infrastructure?

The current text of the Bill and the Rules stipulate that an asset is a critical electricity asset if it is:

- a network, system, or interconnector for the transmission or distribution of electricity; or
- an electricity generation station that is critical to ensuring the security and reliability of electricity networks or electricity systems in a State or Territory.

The Rules further elaborate that for an electricity generation station to be critical to ensuring the security and reliability of electricity networks or electricity systems in a particular State or Territory, the station must:

- be contracted to provide a system restart ("black start") ancillary service in the State or Territory; or
- be a synchronous electricity generator, in the State or Territory, that has an installed capacity of at least: NSW – 1,400MW, in Victoria – 1,200MW, in Queensland – 1,300MW, in WA – 600MW, in SA – 600MW, in Tasmania – 700MW and in the NT – 300MW.

Based on the current wording of the Bill, the Rules and guidance from the Critical Infrastructure Centre, we would not expect solar and wind farms to be considered critical electricity assets where from a technical perspective the respective solar or wind farm:

- does not meet the installed capacity threshold of the State or Territory in which it is located;
- is not technically capable of providing a system restart ancillary service; or
- is categorised as a non-synchronous intermittent generator (which to date has generally been the case), participating in the National Electricity Market and registered as a semi-scheduled generator.

What this means for you

For foreign investors considering an acquisition of an interest in Australian land for a solar or wind farm, you will need to understand, in order to determine whether notification to FIRB will be required:

- whether you are already an owner or operator of an existing solar or wind farm in Australia;
- whether the solar or wind farm to be acquired is already developed;
- whether approvals are in place or have been applied for;
- whether the land is being used wholly and exclusively or predominantly for primary production;
- the cumulative value of any interests in Australian agricultural land you may already hold; and
- the value of the interest in land to be acquired.

Please contact us if you require further information.

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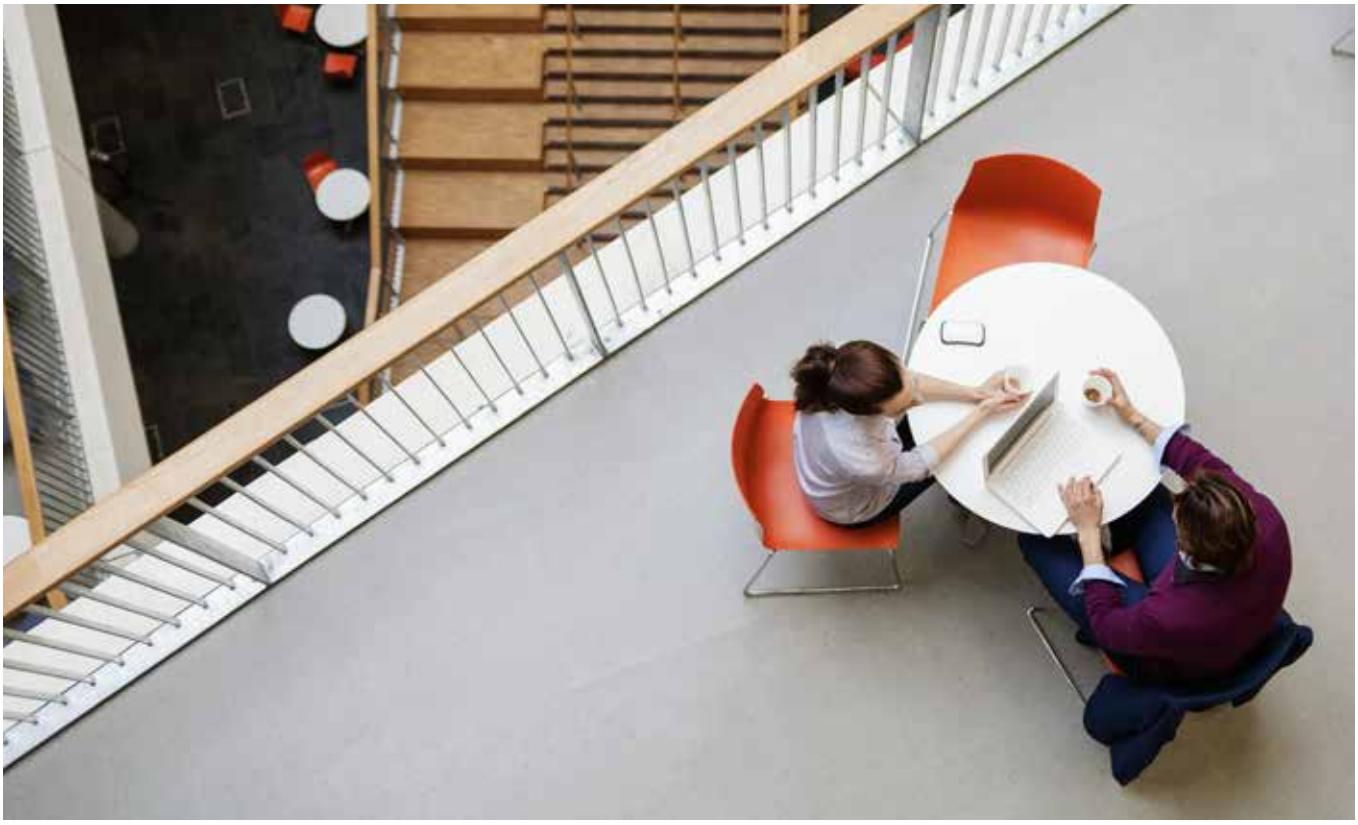
FIRB: a call to consult

In considering an application, FIRB is increasingly engaging in consultation with government departments and regulators to streamline its review of foreign investment in Australia and determine whether proposed transactions are in the national interest.

Now, more than ever, this consultation is becoming a key part of the FIRB approval process, and operates to illustrate FIRB's focus areas when making a recommendation to the Treasurer. Applicants can benefit from understanding these areas and the bodies that govern them so that any points of concern are addressed at the front-end in the application, ensuring a more efficient and integrated assessment.

From top
Matthew FitzGerald, Partner
Lucinda Grant, Graduate

CONSULT PARTNERS	INTERACTION WITH FIRB
Australian Taxation Office (ATO)	Tax-related conditions are now commonplace in FIRB approvals, with applicants and their associates required to "comply with Australia's taxation laws" in relation to the proposed transaction and any acquisitions or operations in connection with it. Where tax risks are identified, conditions can vary broadly and include, for example, the party having to report its tax compliance to FIRB annually, seek a pre-transaction ruling, or address any anti-avoidance or transfer pricing measures. Conditions precedent in transaction documents are also now seeking to pre-agree that FIRB's standard tax conditions are effectively pre-agreed as acceptable by a prospective buyer. This means that foreign buyers who are not familiar with the standard FIRB tax conditions will need to ensure these are acceptable prior to signing transaction documents with any such FIRB conditions precedent. Applicants are advised to seek tax advice early and anticipate an increased focus on tax compliance going forward.
Australian Competition and Consumer Commission (ACCC)	As Australia's competition regulator, the ACCC is relied upon to advise FIRB on a proposed transaction's impact on competition in Australia from a national interest perspective. Generally speaking, FIRB will defer providing its decision on a proposed foreign investment until the ACCC has made its determination on an applicant that presents competition issues.
Australian Prudential Regulation Authority (APRA)	APRA's focus on the prudential management of financial institutions is relied upon by FIRB. When it comes to foreign investment in Australian financial organisations, investors are often required to apply and be approved by APRA. As with the ACCC, FIRB will reserve its determination on the proposal until it has ascertained APRA's position on an applicant that requires APRA and FIRB approvals.
Critical Infrastructure Centre (CIC)	The Australian Government launched the Critical Infrastructure Centre in January this year in an effort to better manage national security risks relating to Australian critical infrastructure. Where there is foreign investment in critical infrastructure, FIRB will consult with, and rely on, the CIC to assess relevant applications. This is considered in detail in David Ryan and Robert Nicholson's article on page 4.



Area of Focus: Data security

FIRB is tightening its control over the security of sensitive information and assets dealt with in proposed transactions. For example, sale documents which contain confidential data, joint venture arrangements involving the sharing of data, and the mechanisms of storing that data post-completion, are increasingly attracting FIRB attention and consideration.

Area of Focus: Corporate governance

The composition of the board of directors of a prospective purchaser is monitored and may be influenced by FIRB. Where foreign investment is proposed regarding, for example, sensitive sectors or critical infrastructure, conditions may be imposed to require the prospective purchaser's chairperson to be an independent Australian citizen resident in Australia, or foreign ownership to be limited to a specific percentage.

Key takeaways:

- Herbert Smith Freehills has noted a particular emphasis in recent practice on the standardisation of ATO conditions, very strong tax scrutiny on tax structuring, and increased data sharing concerns.
- Moving forward, more reliance will be placed on the CIC and its staff who have expertise across numerous Australian Government departments to holistically assess the national interest of investments in critical infrastructure assets.
- The growing interdependency of government agencies in the FIRB approval process, backed by legislature[5] which now permits the sharing of information between such agencies, marks a move towards decreasing information requests issued to investors and increasing efficiency.
- It is essential that applicants seek advice and analyse risk early in relation to FIRB's areas of focus, generate a plan to manage that risk, and address it in their application so as to avoid protracted consultation and delayed timelines.

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5. Part 7 *Foreign Acquisitions and Takeovers Act*

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Asia Pacific M&A

Recent awards include:

Lawyers Weekly Australian Law Awards 2017
Energy and Resources Team of the Year
Dealmaker of the Year (Rebecca Maslen-Stannage)

Chambers Asia-Pacific Awards 2017
Asia Pacific Firm of the Year

Australasian Law Awards 2017
Law Firm of the Year (>500 employees)

Australasian Law Awards 2017
Australian Deal of the Year (Acquisition of Asciano by Brookfield and Qube)

Australasian Law Awards 2017
M&A Deal of the Year (Acquisition of Asciano by Brookfield and Qube)

FT Asia-Pacific Innovative Lawyers Awards 2017
Most Innovative Law Firm in New Business & Delivery Models
(ALT in Shanghai and Melbourne)

Beaton Research + Consulting/Financial Review Client Choice Awards 2013- 15
Best Professional Services Firm (revenue over $200M)
Best Law Firm (revenue over $200M)

Lawyers Weekly 2015 Australasian Lawyer Awards
Australian Deal Team of the Year (Herbert Smith Freehills, M&A team)
Australian Dealmaker of the Year (Philippa Stone)

IJ Global Awards 2014
Asia-Pacific Upstream Deal of the Year – Donggi Senoro
Asia-Pacific Solar Deal of the Year – Moree
Asia-Pacific Wind Deal of the Year – Burgo
Asia-Pacific Metals & Mining Deal of the Year – Roy Hill
Asia-Pacific PPP Deal of the Year – Transmission Gully

Thomson Reuters Project Finance International (PFI) Awards
Asia-Pacific Deal of the Year – Advising on the A$7.8 billion of US and Australian dollar debt financing of the Roy Hill iron ore project in Western Australia – 2014
Asia-Pacific Renewables Deal of the Year – Energy Development Corporations' US$315 million financing of the 150 MW Burgos Wind Farm Project

ALB Indonesia Law Awards 2014
M&A Deal of the Year (XL Axiata's acquisition of Axis Telekom)
Indonesia Deal of the Year (XL Axiata's acquisition of Axis Telekom)
Shipping Law Firm of the Year (our first ever shipping award)

Chambers Asia-Pacific Awards 2015
Australia Law Firm of the Year

Trade Finance Deals of the Year 2014
Asia Pacific Deal of the Year – Burgos Wind Farm

Thomson Reuters Deal League Tables
Highest volume of deals announced by number, Australia and New Zealand, 2013–2016
Highest value of deals announced , Australia and New Zealand, 2013–2015

IFLR Middle East Awards 2014
Equity Deal of the Year (Emirates REIT IPO)

Asian-Mena Counsel Firms of the Year 2015
India Corporate and M&A Firm of the Year

Asian-Mena Counsel Firms of the Year 2014
China Corporate M&A Firm of the Year
Malaysia Corporate M&A Firm of the Year
Deal of the Year – CNPC's acquisition of gas field interests in Mozambique

China Business Law Awards 2014
China Deal of the Year – CNOOC's takeover of Nexen

"I'M EXTREMELY SATISFIED. THEY WERE VERY SUPPORTIVE AND DEVOTED TO THE TRANSACTIONS."
(ASIA-PACIFIC) – CHAMBERS ASIA PACIFIC 2017

"THEIR SERVICE IS OUTSTANDING AND THEY ARE FOCUSED ON ALIGNING THEIR WORK PRIORITIES TO THE THINGS THAT WILL ACHIEVE OUR BUSINESS AND STRATEGIC GOALS."
(AUSTRALIA) – CHAMBERS ASIA PACIFIC 2016

"I'D HIGHLIGHT THEM AS A STAND-OUT FIRM."
(ASIA-PACIFIC) – CHAMBERS ASIA PACIFIC 2017

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Herbert Smith Freehills Germany LLP

HONG KONG
Herbert Smith Freehills

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Hiswara Bunjamin and Tandjung
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Herbert Smith Freehills Paris LLP

PERTH
Herbert Smith Freehills

RIYADH
The Law Office of Nasser Al-Hamdan
Herbert Smith Freehills LLP associated firm

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