

Australia's Treasurer foreshadows increased scrutiny around State and Territory asset sales processes

Against the backdrop of significant reforms to Australia's foreign investment regime which came into effect on 1 December 2015, the Treasurer has issued a press release which foreshadows further changes to the regime, aimed at increasing scrutiny around State and Territory asset sales processes.

What are the proposed changes?

A press release was issued by the Treasurer, the Honourable Scott Morrison MP, on Friday 18 March 2016.

It foreshadows that the sale of critical infrastructure assets by State and Territory Governments to private foreign investors will be formally subject to review by the Foreign Investment Review Board (**FIRB**) from 31 March 2016 – increasing scrutiny around these asset sales processes to address potential "national security risks".

Critical infrastructure assets are expected to include:

- public infrastructure (eg airports or airport sites, ports, infrastructure for public transport, electricity, gas, water and sewerage systems);
- existing and proposed roads, railways and inter-modal transfer facilities that are part of the National Land Transport Network or are designated by a State or Territory Government as

significant or controlled by the Government; and

- telecommunications infrastructure and nuclear facilities.

This is particularly topical at the moment given the recent sale of Port of Darwin (in relation to which national security and defence concerns were raised by a number of interested parties) and the upcoming sales processes for Port of Melbourne, Ports of Fremantle, Utah Point in Western Australia and the sale of AusGrid in New South Wales.

Details as to how this increased scrutiny will be achieved in the context of Australia's current foreign investment regime have not yet been released, but it is expected that the new measures will be implemented via regulatory amendments, which can be quickly adopted.

What is the position under the current foreign investment regime?

Under Australia's current foreign investment regime, private foreign investors are not required to notify and obtain prior approval for

Key issues

- From 31 March 2016 it is expected that private foreign investors bidding for infrastructure projects will be subject to the same level of foreign investment scrutiny as their government-owned counterparts.
- Private foreign investors looking to participate in State and Territory asset sales processes may need to make their bid subject to foreign investment approval.
- Critical infrastructure assets under the new rules are expected to include public infrastructure, existing and proposed roads, railways and certain inter-modal transfer facilities, telecommunications infrastructure and nuclear facilities.

acquisitions of securities, assets and land unless the value of the relevant securities, assets or land in which an interest is being acquired exceeds

prescribed thresholds (which vary depending on the type of interest being acquired and home country of the investor).

That said, the existing rules provide an exemption to notification where the acquisition is of an interest in assets or Australian land (but not securities) from the Commonwealth or an Australian State, Territory or local government. This exemption applies only to privately owned investors and is expressed not to apply to foreign government investors.

The existing rules are described in detail in Clifford Chance briefing note at http://www.cliffordchance.com/briefings/2015/12/foreign_investmentregulationinaustralia.html.

What does this mean for private foreign investors?

The Treasurer's recent announcement envisages that the exemption to the requirement to obtain foreign investment approval for private acquisitions of Government owned assets and land will soon cease to be available in its current form.

From 31 March 2016 it is expected that private foreign investors bidding for infrastructure assets will be subject to the same level of foreign investment scrutiny as their government-owned counterparts.

Bids for Government-owned infrastructure assets by private foreign investors will soon need to be made subject to foreign investment approval (if otherwise required by the rules). This is expected to level the playing field among bidders and remove any procedural advantage which private investors formerly enjoyed by virtue of the exemption

from the foreign investment approval process.

We anticipate that details regarding the proposed changes will be released this week, particularly given the Treasurer's proposed 31 March 2016 commencement date.

A more detailed overview of these changes and their potential impact on private foreign investors will be available in a Clifford Chance briefing note shortly.

Contact us

In the meantime if you would like further information or guidance in relation to this briefing note, please do not hesitate to contact any member of our team (overleaf).

Contacts

Sydney

Richard Graham

Partner

T: +61 2 8922 8017

E: richard.graham@cliffordchance.com

Dave Poddar

Partner

T: +61 2 8922 8033

E: dave.poddar@cliffordchance.com

Lance Sacks

Partner

T: +61 2 8922 8005

E: lance.sacks@cliffordchance.com

Joni Henry

Counsel

T: +61 2 8922 8090

E: joni.henry@cliffordchance.com

Amelia Horvath

Counsel

T: +61 2 8922 8023

E: amelia.horvath@cliffordchance.com

Nadia Kalic

Counsel

T: +61 2 8922 8095

E: nadia.kalic@cliffordchance.com

Perth

Jon Carson

Partner

T: +61 8 9262 5510

E: jon.carson@cliffordchance.com

Justin Harris

Partner

T: +61 8 9262 5503

E: justin.harris@cliffordchance.com

Paul Lingard

Partner

T: +61 8 9262 5575

E: paul.lingard@cliffordchance.com

Tracey Renshaw

Partner

T: +61 8 9262 5505

E: tracey.renshaw@cliffordchance.com

Paul Vinci

Partner

T: +61 8 9262 5504

E: paul.vinci@cliffordchance.com

Kate Naude

Senior Associate

T: +61 8 9262 5573

E: kate.naude@cliffordchance.com

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www.cliffordchance.com

Clifford Chance, Level 16, No. 1 O'Connell Street,
Sydney, NSW 2000, Australia

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