

Change to rules for private foreign investment in government-owned critical infrastructure assets

As envisaged by the Australian Treasurer last month, the *Foreign Acquisitions and Takeovers Regulation 2015 (Cth) (Regulations)* have been amended to ensure that private foreign investors bidding for government-owned infrastructure projects will be subject to the same level of foreign investment scrutiny as their government-owned counterparts.

Acquisitions of Australian land and assets from the government

Broadly speaking, under Australia's foreign investment regime, privately-owned foreign investors are not required to notify and obtain prior approval for 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, in some cases, on the home country of the investor).

That said, the 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.

Prior to 31 March 2016, this exemption applied generally to all privately owned investors, but was expressed not to apply to foreign government investors, who were required to undergo formal review by the Foreign Investment Review Board

(FIRB) prior to making such acquisitions.

What has changed?

From 31 March 2016, the general exemption to the requirement to notify acquisitions of Australian land and assets directly from the Government was removed for privately owned investors seeking to acquire critical infrastructure assets. The change was implemented under the *Acquisitions and Takeovers Amendment (Government Infrastructure) Regulation 2016 (Cth)*, which amends the Regulations.

This means that private investors acquiring Australian land which comprises or includes critical infrastructure assets or an Australian business holding an interest in such assets from the Commonwealth or an Australian State, Territory or local government will now need to notify FIRB and obtain foreign investment approval.

Critical infrastructure assets include:

- public infrastructure (e.g. airports or airport sites, ports,

Key issues

- Private foreign investors bidding for Government-owned critical infrastructure assets are now subject to the same level of foreign investment scrutiny as foreign government investors and may therefore need to make their bids subject to foreign investment approval.
- Under the new rules, critical infrastructure assets include public infrastructure (including airports, ports and certain utilities), existing and proposed roads, railways and certain inter-modal transfer facilities, telecommunications infrastructure and nuclear facilities.
- The new rules take effect from **31 March 2016**.

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;

- telecommunications infrastructure; and
- nuclear facilities.

What does this mean for private foreign investors?

This amendment to the rules means that private foreign investors bidding for Government-owned infrastructure assets will be subject to the same level of foreign investment scrutiny as foreign government investors bidding on the same assets.

Therefore bids by private investors for such assets will now 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.

Contact us

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).

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