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The Hon Peter Dutton MP
Minister for Home Affairs
Parliament House
Canberra ACT 2600

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Dear Mr Dutton,

Security Legislation Amendment (Critical Infrastructure) Bill 2020 – Exposure Draft

Thank you for the opportunity to be part of the discussion on the Security Legislation Amendment (Critical Infrastructure) Bill 2020 (Bill).

I am a PhD candidate at the ANU College of Law. My thesis analyses investment by Chinese corporations into Australian critical infrastructure in order to provide recommendations on how the federal legislature can best secure Australia's national security through the regulation of the investment. The thesis analyses, among other legislation, the *Security of Critical Infrastructure Act 2018* (Cth) (SOCI Act).

I will address two issues raised in the Exposure Draft Bill: 1). the basis of the Minister's decision in the proposed Part 3A of the SOCI Act; 2). the right of entities to seek administrative review of the Minister for Home Affairs' decision.

1 *The Basis of the Minister's Decision under the Proposed Part 3A*

A key question arising from the Bill is whether the Minister's decision to authorise the Secretary of Home Affairs to issue directions and intervention requests would be predicated primarily upon an adverse security assessment by the Australian Security Intelligence Organisation (ASIO).

In its current form, s 33(4)(a) of the SOCI Act requires the Minister to be guided by the adverse security assessment in determining whether to direct responsible entities to do or refrain from doing certain actions. In making the decision, s 35(a) of the legislation requires the Minister to give greatest weight to the security assessment. The proposed Bill does not specifically provide for such safeguards, however. Under the proposed amendment, the Minister's discretion carries the most weight in the granting of ministerial authorisation. Without requiring the Minister to be guided by an adverse security assessment, the deliberation process will become

opaque. In the absence of a duty to prioritise the assessment, there is no certainty that national security considerations are at the centre of the deliberation process. To address these concerns, it is recommended that safeguards similar to those in s 33(4)(a) and (5) of the SOCI be built into the proposed ministerial authorisation, particularly in relation to issuing action directions and intervention requests.

2. *The right to seek judicial and administrative reviews of the Minister's decision in Part 3A.* In the proposed amendment, there is no provision for entities to review the Minister's decision in Part 3A. The Government gives three main reasons. First, the exercise of the right to seek review could cause delay or seriously inhibit the application of Part 3A. This problem could be resolved by establishing a tribunal specifically dealing with disputes arising from the SOCI Act, instead of burdening the Federal Court and Administrative Appeal Tribunal (AAT). This tribunal could be less formal than the AAT to ensure quick resolution of disputes. The Government's second reason is that the deliberation process involves classified information and covert investigation procedure. One solution to this potential problem is to confine the review to matters of procedural fairness, including the proposed adverse security assessment issued by ASIO.

The Government's third reason is that owners and operators of Australian critical infrastructure may be worried that their confidential commercial information will be divulged to the public. To resolve this issue for the benefit of both the Australian Government and the entities, it is recommended that any disputes arising from the SOCI Act be adjudicated on a closed-door basis. Alternatively, the adjudication process be opened to the public but subject to strict restrictions on access to information in confidence. Implementing a review framework is necessary to ensure that the application of the SOCI Act is fair and transparent, not only for owners and operators of Australian critical infrastructure, but also the Australian public.

Yours sincerely,
Joseph Lee