

30 November 2020

Department of Home Affairs

By email: ci.reforms@homeaffairs.gov.au

Dear Sir/Madam,

**Protecting Critical Infrastructure and Systems of National Significance – Exposure Draft
Bill**

The Property Council welcomes the opportunity to provide comments in response to the exposure draft of the *Security Legislation Amendment (Critical Infrastructure) Bill 2020 (the bill)* and accompanying draft explanatory document.

The Property Council of Australia champions the industry that employs 1.4 million Australians and shapes the future of our communities and cities. Property Council members invest in, design, build and manage places that matter to Australians: our homes, retirement villages, shopping centres, office buildings, industrial areas, education, research and health precincts, tourism and hospitality venues and more.

Proposal could inadvertently capture vanilla commercial real estate transactions

We understand the bill is seeking to protect Australia's critical infrastructure and mitigate the risks that unforeseen disruption to these sectors can have on essential services.

However, as currently drafted, the bill goes well beyond this intent and could capture ordinary commercial real estate assets and owners. In particular, we are concerned that:

- the definition of 'critical infrastructure asset' could inadvertently capture land on which a data centre is located; and
- entities that own the land on which a data centre is located, and receive rental income from the data centre operator, will be caught within the enhanced regulatory framework either as owners of critical infrastructure assets or as 'responsible entities'.

This unintended outcome appears to arise because the bill doesn't make a clear distinction between the land on which a data centre is located and the servers or infrastructure owned by a data storage operator.

This ignores the more common commercial arrangement whereby the ownership of the land rests with a commercial property landlord, which leases the land and facilities to a third-party data storage operator.

In our view, the owner of land that houses a data centre is not a data storage or processing provider. The service that the owner of the land provides is use of the premises and facilities by an operator in return for rental income, and *not* the service of data storage or processing.

If the bill is left unamended, the new regime could extend to assets and entities that present no concern from a critical infrastructure and national security perspective. This would lead to an unnecessary regulatory and compliance burden on landowners and overlap or confusion regarding who bears responsibility for complying with the Positive Security Obligation and other aspects of the enhanced critical infrastructure security framework.

There is also a potential second-order effect on foreign investment – a vital element to sustaining a thriving economy in Australia – because of the references made in draft foreign investment regulations to the *Security of Critical Infrastructure Act 2018* (SOCI Act). The uncertainty around real estate assets (including but not limited to data centres) being captured by the enhanced critical infrastructure security framework and the foreign investment national security framework would present significant challenges to foreign investors and domestic vendors of those assets.

Not only would two sets of overlapping security regulations need to be complied with by entities that do not present security concerns, but significant fees (as a result of the proposed new FIRB regime that is due to start on 1 January 2021) would be levied on these entities in the process.

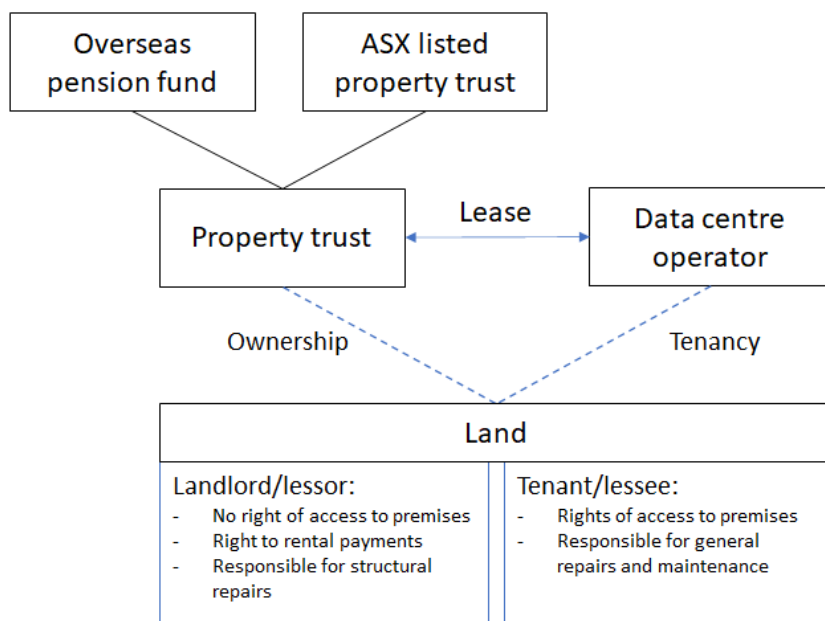
In having to assess and respond to both the critical infrastructure reforms and FIRB national security reforms, this creates undue complexity, uncertainty and costs for offshore investors looking for investment opportunities here and makes Australia less competitive globally in the competition for investment.

Differentiating between commercial property landlords and tenants

As we had noted in our submission to the *Protecting Critical Infrastructure and Systems of National Significance Consultation Paper*, it is important to understand the relationship and distinction between the owner of the land on which a data centre is located and the operator of the data centre. That relationship is, at its core, one of a commercial landlord on one side, and a tenant on the other.

Below is a diagram which sets out a typical arrangement between a property trust as the landowner and a tenant (in this case a data centre operator).

Commercial property ownership and lease example



It is helpful to highlight the rights and responsibilities of both a landlord and tenant under a standard commercial tenancy agreement. Landlords will generally have no rights of access to premises once the lease period begins, and only in extreme circumstances (e.g. premise abandonment or tenant bankruptcy) would a landlord be permitted unsupervised access to a leased property.

Most large-scale commercial property assets in Australia are typically owned through some form of trust structure, including through real estate investment trusts (REITs). These trust structures are set up to enable the investment of institutional capital into real estate from a range of domestic and overseas sources, including domestic superfunds, overseas pension funds and sovereign wealth funds, and insurance companies. These trusts will pool investments together and then be managed by professional fund managers that buy and manage the assets on behalf of the investors.

The investors, while the ultimate owners of the commercial property assets, have no day-to-day management or operational control over the assets. This is an important point as it illustrates that the ultimate owner of commercial property on which data centres or other types of buildings/facilities are located is several steps removed from the data or information that is maintained within the commercial property, and any security concerns should not arise merely as a result of the ultimate owners being foreign entities.

The enhanced framework should take into account these types of arrangements and commercial realities when it comes to setting out specific obligations for critical infrastructure entities.

Critical infrastructure asset definition

As per the explanatory document, an asset is a 'critical data storage or processing asset' if it is owned or operated by an entity that is a data storage or processing provider; and:

- a. it is used wholly or primarily in connection with a data storage or processing service that is provided on a commercial basis to an end-user that is:
 - i. the Commonwealth, a State or a Territory; or
 - ii. a body corporate established by a law of the Commonwealth, a State or a Territory; or
- b. it is used wholly or primarily in connection with a data storage or processing service that is provided on a commercial basis to an end-user that is:
 - i. the responsible entity for a critical infrastructure asset; and
 - ii. relates to business critical data; and
- c. the provider knows that the 'critical data storage or processing asset' is used as described in paragraphs a. and b.

There is a risk that this definition will also capture the land or property on which a data centre is located because of the way the draft bill and explanatory document are worded, which creates needless uncertainty for the property industry.

We believe that this is an unintended consequence and we propose below a solution that would mitigate this problem and any uncertainty caused.

Responsible entity framework

Keeping in line with our views regarding the critical infrastructure asset definition above, the owner of the land or property on which a data centre is located should be excluded from being defined as the 'responsible entity' of a critical data storage or processing asset (s12L(4) of the exposure draft bill).

Our understanding of the policy intent of the bill is that operators and direct suppliers of data storage and processing services are deemed 'responsible entities'. To avoid any uncertainty that landowners are inadvertently captured in the 'responsible entity' definition, we also propose a solution by making a small amendment to the relevant section in the bill.

Proposed solution

To fix these potential problems and provide certainty to industry, the bill and explanatory document should draw the distinction between owners of property assets as opposed to the operators of facilities on the property. It should also be made clear that land on which data centres are located would not be captured under the definitions of critical infrastructure assets, and entities that own that land would thus be outside of the scope of the enhanced regulatory framework.

To that end, the draft provisions set out as section 12F of the SOCI Act defining 'critical data storage or processing asset' should include the following as part of the definition:

(d) does not include the land on which the data storage or processing asset is located unless the other provisions of this definition are met.

To avoid any uncertainty that landowners are inadvertently captured in the 'responsible entity' definition, we also propose the following – or words to this effect – be added to s12L(4) of the bill:

(c) does not include the owner of the land on which the data storage or processing asset is located unless the other provisions of this definition are met.

The draft explanatory document provides the example of accounting services that may result in the storage of client data (section 85). Further examples, particularly with respect to land and landowners not being within the scope of the enhanced critical infrastructure security framework, should be provided to lend greater certainty to industry.

Suggested wording of a real estate example is provided below:

The definition [of a 'critical data storage or processing asset'] does not include assets that merely house data storage facilities and infrastructure that is operated by a data storage and processing provider unless those assets are also owned by the data storage and processing provider. The land on which data storage infrastructure is located would not, in and of itself, meet the definition of a 'critical data storage or processing asset'.

If you would like to discuss any aspect of this submission further, please contact Kosta Sinelnikov on [REDACTED] and [REDACTED], or myself on [REDACTED] and [REDACTED].

Yours sincerely



Belinda Ngo
Executive Director, Capital Markets