

16 September 2020

Department of Home Affairs  
By email: [ci.reforms@homeaffairs.gov.au](mailto:ci.reforms@homeaffairs.gov.au)

Dear Sir/Madam,

### **Protecting Critical Infrastructure and Systems of National Significance**

The Property Council welcomes the opportunity to provide comments to the Department of Home Affairs on the *Protecting Critical Infrastructure and Systems of National Significance* Consultation Paper (**the consultation paper**), released in August 2020.

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.

On behalf of our members, we provide the research and thought leadership to help decision-makers create vibrant communities, great cities and strong economies. We support smarter planning, better infrastructure, sustainability, and globally competitive investment and tax settings which underpin the contribution our members make to the economic prosperity and social well-being of Australians.

Our members consist of domestic owners and managers of property as well as offshore investors that put substantial amounts of capital to work across different sub-sectors and geographies. As per the consultation paper, certain real estate assets that they own and manage are likely to be affected by enhanced regulations and security obligations.

### **Sensible and proportionate regulations for critical infrastructure**

We appreciate the Government's concerns regarding the nation's critical infrastructure and the risks that unforeseen disruption to these sectors can have on essential services.

However, we have some concerns that the changes proposed in the consultation paper to expand the sectors covered by an enhanced regulatory framework may have downstream impacts on the property sector.

Of prime concern is the potential impact on data centres as a distinct real estate asset class, as data and the cloud make up one of the focus areas for the enhanced regulatory framework.

Data centres are growing in prominence around the globe, so we are likely to see further growth in these types of assets in Australia over coming years. Demand for the sector is being driven by more people working from home with an increase in demand for cloud storage. Sydney alone saw total data capacity rise by 76% from Q1 2019 to Q1 2020.<sup>1</sup>

However, there is also a potential second-order effect on foreign investment – a necessary ingredient to a thriving economy – because of the references made in draft foreign investment regulations to the *Security of Critical Infrastructure Act 2018*. In having to assess and respond to two sets of interrelated reforms, this creates complexity and uncertainty for offshore investors looking for investment opportunities here.

### **Mitigating concerns through principled regulation**

We believe that any new regulatory framework covering critical assets (like data centres) should be based on a number of straight-forward principles that would mitigate industry and investor concerns.

Firstly, the enhanced framework should not duplicate existing regulatory frameworks. For example, certain foreign investments need to gain approval from FIRB (the Foreign Investment Review Board). FIRB may also impose conditions on the relevant entity after giving approval. If such conditions, whether in form or substance, replicate the obligations and requirements of the relevant entity under the enhanced regulatory framework (in circumstances where the entity or the owner of the entity is subject to both FIRB and critical infrastructure legislation/regulations), then only one set of regulations should apply. Thus, we support the approach proposed in the consultation paper of working with affected entities and not duplicating existing regulatory frameworks.

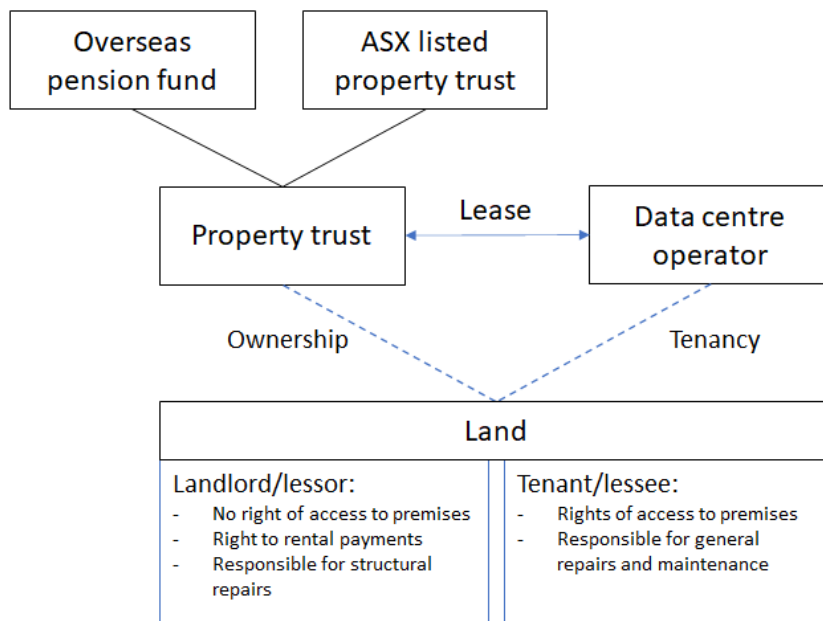
Secondly, the enhanced regulatory framework should only impose obligations and restrictions that are proportionate to the concern and risk. For example, governments often have concerns around property access. However, as explained below, these concerns may already be mitigated in other ways, whether through commercial agreements or other legal arrangements. We believe that the enhanced regulatory framework should only set out obligations that are in proportion to specific risks or concerns to ensure that affected entities, owners or operators are not burdened by excessive regulation and red-tape.

Lastly, it is important to understand the relationship between commercial landlords and tenants, and the enhanced regulatory framework should draw the distinction between owners of property assets as opposed to the operators of facilities on the property. 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).

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<sup>1</sup> *Asia Pacific Data Centre Trends, H1 2020, CBRE Research*

Commercial property ownership and lease example

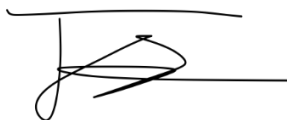


It is helpful to highlight the rights and responsibilities of both a landlord and tenant under a standard commercial tenancy agreement. Landlords will generally have no rights of access to premises once the lease period begins, and only in extreme circumstances (e.g. premise abandonment or tenant bankruptcy)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

The enhanced regulatory framework should take into account these types of arrangements and commercial realities when it comes to setting out specific obligations for critical infrastructure entities. We would be happy to provide further input to the Government as the consultation and design process for the framework continues.

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



Torie Brown  
**Acting Executive Director, Capital Markets**