



**Parliamentary Joint Committee on Intelligence and Security —  
Review of the Security of Critical Infrastructure Bill 2017**  
Submission from the South Australian Government  
January 2018

## Purpose

This submission is provided by the Government of South Australia to contribute to consideration of the *Security of Critical Infrastructure Bill 2017* (the Bill), and the supporting explanatory memorandum (EM), and raise concerns about the potential significant implications of the Bill for owners and operators of critical infrastructure, including the state.

## Introduction

South Australia remains committed to supporting appropriate measures to safeguard Australia against the national security risks of sabotage, espionage and coercion. We recognise that this Bill is just one tool in a suite of measures that collectively protect our nation, and support what we believe is the intent of the Bill - to mitigate the potential for a malicious foreign actor to gain access to and control of Australia's critical infrastructure through direct ownership and third party contractual arrangements.

There are existing frameworks for identifying critical infrastructure and managing relationships with owners and operators functioning nationally and within each state and territory. The National Critical Infrastructure Resilience Strategy framework considers critical infrastructure from a holistic perspective and incorporates security, business continuity, resilience and mitigation. It is noted that this Bill focuses on a specific subset of critical infrastructure assets to address specific risks to national security associated with foreign ownership and control.

Recognising the public value of the Bill, South Australia has participated as much as possible in the consultation, despite the significant constraints imposed by process and compressed timeframes. It is pleasing that some feedback from jurisdictions and industry has been incorporated into the Bill, including strengthening the consultation requirements with states.

However, some changes made, notably to the EM, prior to the Bill's introduction in December have introduced ambiguity and new concerns. These are discussed in more detail in the following pages, but relate to: inconsistencies between the Bill and EM; definitions which do not align with established industry practice; onerous reporting requirements, and; potentially significant financial implications of directions through last resort directions power (if issued) for owners and operators. These matters will impact how the Bill is operationalised and increase potential for the Bill to be challenged, leading to significant time and financial waste, due to ambiguity. There remains the fundamental concern about the ability for the Commonwealth to direct the state and state instrumentalities. In a broader sense, the clarity of this Bill is further reduced as it focusses only on risks associated with foreign ownership and control, with little regard for how it interacts operationally with well-practiced and existing critical infrastructure arrangements at both a national and state level.

## **The South Australian Context**

South Australia has networks of critical infrastructure associated with telecommunications, electricity, water, gas and ports which service 1.6 million people and provide significant employment and industry development opportunities to our state. The infrastructure is a combination of privately and government-owned and operated.

The South Australian Government has built strong relationships and established processes with operators of identified state critical infrastructure, particularly in relation to physical security of the infrastructure. As expected, some of these are also identified by the Critical Infrastructure Centre (CIC) as critical infrastructure assets of national interest within their context and would fall within scope of the Bill.

## **South Australian response to the Bill**

The following sections outline the specific concerns relating to the Bill and EM that are raised by South Australia for the consideration of the Parliamentary Joint Committee on Intelligence and Security.

### **Scope of the Bill**

While there is a broad understanding of and support for what the Bill is seeking to achieve, there is a degree of confusion within our state regarding the precise scope of the Bill and how it will work in practice. Much of the uncertainty about the scope of the Bill arises from definitional issues, which are discussed in more detail below.

South Australia is also concerned about potential broader application in the future, particularly given the ability of the Minister to privately declare new critical infrastructure assets (making the critical infrastructure asset subject to the legislation and triggering the associated obligations) and given the potential scope of the directions the Minister may seek to issue pursuant to the 'last resort directions power'.

### **Ability to direct the state and state instrumentalities**

It is acknowledged that, in the broad application of this legislation, there may be times where it is appropriate for the Commonwealth to issue a direction to owners/operators of critical infrastructure in the interests of national security. However, a primary concern, previously raised in a letter from the South Australian Premier to the Attorney-General, relating to the power for the Commonwealth to direct the state and state instrumentalities regarding state-owned asset operations remains.

It is recognised that safeguards are built into the Bill and the increased articulation of consultation requirements has strengthened these. However, the concern fundamentally remains, particularly considering the ability for the Commonwealth to privately declare assets as critical infrastructure assets without prior consultation with the state and the potential implications of directions, if made, on owners.

## Ambiguity of definitions

A key concern relates to inconsistencies between the Bill and the EM, particularly relating to the fundamental definitions of “critical infrastructure asset” and “direct interest holder”. While their definition appears relatively clear in the Bill, they are clouded by examples and descriptions in the EM. This ambiguity raises a real concern as to how this Bill may be applied and, given the importance of these concepts to the overall scheme of the Bill, is likely to make the Bill challenging to operationalise.

### Critical Infrastructure Assets

‘Critical infrastructure’ as a term and concept is well established in the Australian, state and territory governments. However, the Bill introduces a new term of ‘critical infrastructure asset’.

The concept ‘critical infrastructure’ would not be appropriate for this Bill, given the Bill is only intended to apply to a subset of critical infrastructure and address specific concerns associated with foreign ownership and control. However, the introduction of the new term ‘critical infrastructure asset’ within the already well established critical infrastructure sector creates potential confusion

In addition to the name of the defined terms, South Australia has particular concerns about how each category of critical infrastructure asset is defined, and specifically how they relate to the physical assets and systems as well as the operating entity. Rather than provide assistance about how the definition of each category of critical infrastructure is intended to operate, the EM only serves to confound the issue by indicating (contrary to the express definitions in the Bill) that a utility or other entity may itself be, or form part of, a critical infrastructure asset. An example of this is provided in the Attachment.

The definition of each critical infrastructure asset is crucial given the associated implications this has for reporting entities for and operators of assets (particularly relating to the extent of their reporting obligations and the costs they may incur in complying with directions or implementing mitigations in relation to assets). The uncertainty about this key concept also adds weight to concerns regarding the related concept of ‘direct interest holder,’ as it could significantly change who is identified as a direct interest holder for the purpose of this Bill.

### Direct interest holder

The explanation of the definition of ‘direct interest holder’ in the EM, including the examples therein, is not consistent with the definition in clause 8 of the Bill.

The EM suggests an entity is a ‘direct interest holder’ in relation to a critical infrastructure asset where the entity merely has an interest in another entity which has an interest in an asset (e.g. it suggests a shareholder of a company that owns an asset is itself a direct interest holder in the asset). More detailed examples of this are provided in the Attachment. While the state acknowledges that information about these broader entities

may be required to be included in a report in accordance with paragraph 6(1)(h) of the Bill, it does not appear that these broader entities themselves meet the requirements of a direct interest holder in relation to an asset.

In addition, the EM suggests an entity (including a Minister of Governor) may be a 'direct interest holder' in relation to a critical infrastructure asset where they merely have the capacity to appoint a person to the board of another entity which has an interest in an asset. An example of this is provided in the Attachment. Again, it does not appear the entity with the power of appointment meets the requirements of a direct interest holder in relation to an asset.

Based on the EM, South Australia holds a real concern that the Commonwealth's interpretation of 'direct interest holder', particularly relating to Ministers and Governors, may be broader than intended. Moreover, the EM and the various examples contained within it appear to be inconsistent with the text of the Bill. Consequently, instead of the EM providing clarity, it has led to uncertainty about the intention of the Bill and, as a result, who is and is not a direct interest holder, with the various obligations that entails. Further, if by virtue of the examples given in the EM, the concept of a direct interest holder is given a broader interpretation than the text of the Bill would otherwise indicate, it will undoubtedly lead to duplication in reporting obligations.

## Operationalisation

There is significant uncertainty regarding the implications of operationalising this Bill, including the related costs and obligations. This can, in part, be attributed to the limited consultation with stakeholders; more fundamentally, it is a consequence of the uncertainty surrounding key concepts in the Bill and the nature of directions that may be sought to be imposed on entities. Further, the risk assessment process that will be used to operationalise the Bill remains unclear.

In addition, there is a broad concern about how the Bill interacts, at an operational level, with the already well-established practices across the scope of critical infrastructure security, mitigation and resilience. It must also be noted that this Bill will impose an additional layer of reporting requirements that could lead to duplication and confusion of existing processes between jurisdictions and owners and operators.

While section 33 of the EM indicates the CIC has '*worked with industry and government to strike an appropriate regulatory balance*' and the register '*will impose a minimal compliance burden on industry*', without a clear understanding of who the reporting obligations are imposed upon, and precisely what the reporting obligations are, it is not possible to support this assertion. This is compounded by the ongoing nature of the reporting obligations, particularly considering ownership and control of assets and the entities that own and control those assets can change.

In addition to the costs associated with the reporting obligations, there could well be significant costs incurred by entities in complying with a direction issued pursuant to the Bill. The Bill does not provide adequate safeguards in relation to the nature of the directions that may be given, particularly where they have significant cost (financial and reputational) implications for entities.

For example, there may be a significant financial burden on an entity if the Commonwealth were to determine that a particular existing contractor is unsuitable and, as a result issue, a direction that the entity cease using that contractor. Complying with any such direction could be expected to have significant cost implications for the entity, particularly given there is no commitment to appropriate compensation from the Commonwealth.

## Consultation process

The compressed timeframes for consultation means that the Bill has not been sufficiently fleshed out with stakeholders. This has resulted in a lack of clarity about definitions and scope. Additionally, the responsibilities of and implications for stakeholders are not well understood. There is potential for unintended consequences to arise out of this lack of clarity.

## Summary

South Australia supports the intent of the Bill as a mechanism to mitigate against the risks associated with foreign ownership and control.

While there is broad concern about how this Bill interacts with well-established practices across the scope of critical infrastructure security, business continuity, mitigation and resilience, key concerns relating to this Bill and supporting EM include:

- the ability of the Commonwealth to direct the state and state instrumentalities
- inconsistencies between the Bill and the EM, resulting in confusion
- lack of clarity regarding fundamental concepts and definitions, and the associated obligations arising from them
- implications of the reporting obligations imposed by the Bill and the implications of complying with directions that may be issued under the Bill.

If these concerns are not addressed prior to the commencement of the Bill, South Australia is concerned that it will be challenging to operationalise the Bill, particularly given the lack of understanding about the associated processes and requirements. It is unfortunate that the limited consultation has impeded the ability to develop a shared understanding of these matters and to properly consider all implications.

South Australia reaffirms its commitment to appropriate measures to protect Australia's national security.

## **Attachment - Examples of inconsistency between Bill and EM**

### **Critical infrastructure asset**

Page 44 of the EM appears to treat the water utility as being the critical infrastructure asset. However, the Bill itself (consistent with established practice in the critical infrastructure sector) treats the physical infrastructure as the asset, not the water utility that operates that physical infrastructure. The EM appears to be inconsistent with the text of the Bill and is likely to lead to uncertainty about the Bill's effect and operation. As can be seen from the balance of this example and the further discussion below, this has flow on implications for who is a direct interest holder in relation to the critical infrastructure asset concerned and who, therefore, has reporting obligations in respect of that asset.

### **Direct interest holder**

Page 26 of the EM suggests Company X is a direct interest holder in Company A (which owns a critical electricity asset) on the basis of Company X's shareholding in Company A. Similarly, the example on page 44 suggests the New South Wales Government is a direct interest holder on the basis of its shareholding in Critical Water Corporation, which operates a critical water asset under a license. In both examples, the entity that the EM suggests is a 'direct interest holder' does not have any interest in the asset itself; it merely holds shares in another entity that does have an interest in the asset. The examples appear to ignore the requirement in both paragraphs of the definition of 'direct interest holder' that a person have an interest in the asset itself. This same issue arises in a number of other examples contained in the EM including, without limitation, the second example on page 40.

Paragraph 156 on page 26 of the EM suggests a Minister or Governor could be a 'direct interest holder' by virtue of their authority to appoint members to a board of an organisation that has an interest in a critical infrastructure asset. In the example given, the Minister and Governor do not have an interest in the asset itself; they merely have the ability to affect the makeup of the entity that does have an interest in the asset. The Minister or Governor in the example given does not appear to have an interest in an asset in these circumstances such as would make them a direct interest holder. South Australia understands it is not the intention for a Minister or Governor to be a direct interest holder in such circumstances and that the insertion of sub-clause 6(3) and the associated amendments to the EM were intended to clarify that a Minister or Governor is not a direct interest holder. However, these changes could have the opposite effect, in that they suggest a Minister or Governor is a direct interest holder in such circumstances, and that while they are then exempted from the reporting requirements they remain subject to the other aspects of the Bill.