INFRASTRUCTURE REFORMS IN 2016 – PULLING IN THE SAME DIRECTION?

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By: Clive Cachia

Looking to kick-start lacklustre economic growth, Australian Governments routinely consider infrastructure funding and reform to be a headline-grabbing opportunity to demonstrate their pro-active "nation-building" credentials.

This is a common theme around the world (expect to see a renewed emphasis on infrastructure funding and development in the U.S. election once primary season is out of the way) but is especially relevant to Australia. The heightened level of foreign investment interest in privatised Australian infrastructure assets, vast land mass and strong projected population growth in already congested cities, have served to prompt Australian Governments at all levels to consider ways to best promote this source of economic growth.

This has been especially evident in 2016. Let's take a quick look at some of the more interesting and noteworthy developments so far this year and consider whether they are all pulling in the same direction.

RELEASE OF AUSTRALIAN INFRASTRUCTURE PLAN

In February, Infrastructure Australia (the Federal Government's infrastructure policy advisory body) released its first 15-year Infrastructure Plan and a re-constituted Infrastructure Priority List with over 90 potential infrastructure solutions to help implement the Plan. The Plan sets out 78 recommendations with a particular emphasis on:

- the need for further privatisations and deregulation to generate sufficient returns on investment for capital providers
- formulation of a *National Freight and Supply Chain Strategy* to map nationally significant supply chains and their access to supporting infrastructure and promote reforms to enable the efficient movement of freight
- promoting the "user-pays" principle for infrastructure funding with any required subsidies being delivered through the tax and welfare systems
- increased financing of public infrastructure by taking advantage of low interest rates and relatively low levels of public debt (as a percentage of GDP)
- exploring the use of "value capture" (i.e. the levying of commercial and residential land surrounding new infrastructure projects so that private owner windfall gains are shared with the public)
- minimising the application of caps, curfews and other restrictions on the use of existing infrastructure and avoiding such caps, curfews and other restrictions in new infrastructure

- requiring each project to adhere to *National Governance Principles* outlining best practice planning and project decision making throughout the lifecycle of project funding, consultation, development, construction and operation
- consolidating multiple infrastructure funds into a single Australian Government Infrastructure Fund with a focus on national, rather than parochial, interests
- making Federal Government financing of projects conditional on the States and Territories implementing the reforms in the Plan.

FIRB REVIEW OF CRITICAL STATE-OWNED ASSET SALES

Fresh from a significant re-write of Australia's foreign investment laws in December 2015 (see here), further changes were made in March. The Foreign Investment Review Board (FIRB) was granted the authority to review and assess proposals by private foreign investors to acquire, directly or indirectly, Australian "critical state-owned infrastructure assets". This was in response to the political fall-out of the Northern Territory Government's decision to offer a 99-year lease of the Port of Darwin to a Chinese private investor without Federal Government approval.

Previously, FIRB was only required to assess proposals of sales of such assets to foreign government investors.

Such "critical state-owned infrastructure assets" include:

- public infrastructure such as an airport, a port, or electricity, gas, water and sewerage systems
- existing and proposed roads, railways and inter-modal facilities that are significant or controlled by the Government
- telecommunications infrastructure
- nuclear facilities.

Private foreign investors will now be required to apply for a "no objections" notification from the Australian Treasurer prior to acquiring an interest in such infrastructure. The fees for such an application have recently been significantly increased. However, it is the added time, scrutiny and uncertainty which may prove even more costly for these foreign investors.

RECENT REJECTION

Whilst not relating to state-owned or infrastructure assets, the recent rejection by the Treasurer of a Chinese-led consortium's proposal to acquire the agricultural estate of S Kidman & Co raises concerns about the precise scope of the "national interest" test which is used to assess foreign investment proposals in Australian infrastructure.

The primary stated concerns were:

- the sheer geographic size of the asset (approximately 1.3% of the Australian land mass and 2.5% of its arable land)
- the contention that it was difficult for any single Australian bidder to acquire the entire operation because the estate was offered for sale as a single aggregated asset.

Interestingly, the Treasurer made his decision after consultation with the FIRB but also after relying on an independent private-sector review of the sale process.

The "national interest" test is not prescribed or defined under Australia's foreign investment laws in order to maintain maximum flexibility to judge each proposal on its merits. This is a good thing. However, the above concerns are not expressly foreshadowed in FIRB guidance notes and policies and represent significant uncertainty as to how such concerns will apply to future foreign investment proposals across all industries.

TAX HURDLES FOR FIRB APPROVAL

In March, the Federal Government also imposed a number of tax-related conditions which must be met before foreign investment proposals would be approved by the FIRB. See our earlier detailed article here.

In summary, these conditions include requirements that foreign investors and their associates:

- comply with Australian tax laws and pay any outstanding tax
- provide documents and information requested by the Australian Taxation Office (ATO)
- notify the ATO of any transactions where transfer pricing or anti-avoidance tax rules may apply
- provide an annual report to the FIRB on compliance with these tax conditions.

Where a significant tax risk is identified in a particular case, further conditions may be imposed including an obligation to engage in good faith with the ATO to resolve any tax issues arising from the transaction and provide periodic information to the ATO including a forecast of tax payable.

These new conditions have also been imposed under the banner of protecting the "national interest".

BUDGET 2016

In May, the Federal Government released Budget 2016 and allocated AUD50 billion for major infrastructure projects to 2020. Current and new projects include the Melbourne to Brisbane Inland Rail, the Western Sydney Airport and various freight rail and road upgrades in Victoria, Western Australia and Queensland.

Specifically, the Federal Government has:

- committed AUD3.3 billion of funds to four State and Territory Governments under the "Asset Recycling Initiative" – a program to promote privatisations – and designed to unlock additional State and Territory Government funding including the Sydney and Melbourne metro projects
- established a AUD2 billion Water Infrastructure Loan Facility to State and Territory Governments to stimulate investment in dams and water pipelines across Australia
- legislated for the AUD5 billion Northern Australia Infrastructure Facility (to commence 1 July 2016) designed to encourage and complement private sector investment through concessional financings.

Whilst Federal Government funds have been committed, there remains a reluctance by some State Governments to participate – most notably, the political unwillingness to privatise state assets under the "Asset Recycling Initiative" and, despite being included in the Infrastructure Priority List, ongoing opposition to the East West Link in Melbourne by the Victorian Government.

FOREIGN INVESTMENT AND INFRASTRUCTURE WORKING TOGETHER

The Australian Infrastructure Plan and Budget 2016 include welcomed initiatives to promote public and private investments in Australian infrastructure. However, there is a risk that recent changes to foreign investment laws and their application to infrastructure projects may compromise the ability of foreign capital investment to be part of the plan to fully develop such initiatives. Another risk to such investment is the unfortunate political and infrastructure policy differences between certain Australian Governments. These risks will need to be acknowledged and managed by all Governments, investors in and owners and operators of infrastructure assets to ensure they are all pulling in the same direction.

KEY CONTACTS

CLIVE CACHIA
PARTNER

SYDNEY
+61.2.9513.2515
CLIVE.CACHIA@KLGATES.COM