PROPERTY COUNCIL of Australia

Australia's property industry
Creating for Generations

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John Breusch
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By email: FIRBStakeholders@treasury.gov.au

Dear John

2022 Foreign Investment Reforms - Discussion Paper

The Property Council welcomes the opportunity to comment on Treasury's 2022 Foreign Investment Reforms discussion paper (the discussion paper).

We welcome the Government's ongoing commitment to improving the foreign investment review framework through this consultation and broader package of reforms to be pursued in the second half of 2022, as well as proposing the initial set of regulatory changes announced in February 2022.

Australia has historically punched above our weight in attracting global investment and skilled workers to our shores due to our strong economic fundamentals and the transparency and stability of our governance and legal frameworks.

However, as noted in previous Property Council submissions to Treasury regarding Australia's foreign investment review framework, in recent years, Australia's increasingly complex and costly regulatory and tax regime for foreign investment in real estate has begun to impact our global reputation and competitiveness. This perception of complexity and risk has been exacerbated through the COVID period with the introduction of the FIRB 'national security test', delays and uncertainty on FIRB approval timeframes which impact market liquidity, and the closing of domestic and international borders.

In assessing the current state of play with the FIRB framework, we can summarise the industry's concerns into three main themes:

- **FIRB regime assumes passive investors/commercial landlords have full access rights to premises that they are leasing to tenants** – this can lead to land acquisitions such as data centres or health care being deemed as 'sensitive land' or 'national security land' acquisitions, thereby triggering lower monetary thresholds and more complicated approval processes, with conditions being imposed around restricting access which result in unnecessary compliance. In simple terms, while a landlord might own the 'box', it is the tenant who owns and controls the contents. The regulatory burden on investors could be significantly reduced if the landlord/operator (passive/active) distinction was reflected in the FIRB regime. It would also mean FIRB would not need to impose conditions relating to limiting access rights for building owners or their representatives given this is already set out in the terms of leases with tenants.
- **FIRB's distinction between 'residential land' and 'commercial land' does not appropriately reflect newer forms of investments in long-term rental accommodation** (e.g. Build-to-Rent, co-living, disability care, social and affordable housing) or investments in mixed use precincts. This can lead to uncertainty around which monetary threshold to apply, and in some cases, higher residential application fees being applied which deters greater investment in specialised housing that could boost housing supply and provide community benefits.
- **Uncertainty and inconsistency around approval timelines have significant commercial and economic consequences for participants and liquidity in the market.** The timing for execution and settlement of transactions are driven by a myriad of factors, including financial year and reporting obligations as well as financing and liquidity requirements. Contracts also often have sunset dates and if the deal is not completed by a fixed date, pricing can be reopened for negotiation. While we understand FIRB's median approval times are stabilising, our members continue to have transactions where approval is taking 6 months or more. The lack of certainty on FIRB approval timeframes from transaction to transaction can have drastic consequences on the commerciality of the deal, and adversely affect investor confidence when investing in Australia. This appears to be exacerbated by a lack of continuity in dealing with experienced case managers, which often leads to repeat questions or non-commercial questions being asked of applicants.

Reforms in the focus areas set out in the discussion paper will go a long way to properly targeting those transactions that should require FIRB approval, improving the experiences of participants that do require FIRB approval especially for less-sensitive transactions, allow FIRB to prioritise their time and resources on more sensitive transactions, and improve certainty around FIRB approval times for all market participants.

Our submission focuses on most of the key areas identified in the discussion paper, namely areas to reduce regulatory burden, increasing the take-up and effectiveness of exemption certificates, compliance and enforcement of the framework and the overall operation of the foreign investment framework.

The Property Council raised many of the issues covered in this submission in previous foreign investment-related consultations with the Government. In our view these issues remain outstanding and resolving them would contribute significantly to improving Australia's foreign investment review framework.

If you would like to discuss any aspect of this submission further, please contact Kosta Sinelnikov on 0422 168 720 and ksinelnikov@propertycouncil.com.au, or myself on 0400 356 140 and bngo@propertycouncil.com.au.

Yours sincerely

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Submission:

2022 Foreign Investment Reforms - Discussion Paper

March 2022

PROPERTY COUNCIL of Australia

Table of Contents

1. About the Property Council

The Property Council of Australia champions the industry that makes up 13 percent of our nation's GDP and generates over 1.4 million jobs, making this sector a bigger employer than mining and manufacturing combined. Property investment affects 16 million Australians through their retirement savings and is a massive driver of foreign direct investment into our nation.

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.

2. Executive summary

The property industry acknowledges and supports the vital role Australia's foreign investment framework plays in ensuring investment into Australia is in the national interest. We also welcome the Government's ongoing commitment to improving the foreign investment review framework and striking the right balance between facilitating investment and protecting the national interest.

The practical experiences of industry participants indicate that there continue to be significant variations in the time it can take for transactions to receive FIRB approval, with some transactions taking six months or more for approval. This adds uncertainty and cost into ordinary commercial transactions and can be detrimental to Australia's reputation as a welcoming place for international capital and businesses.

Some of these challenges have arisen due to a misalignment between the traditional view of the real estate sector (bifurcating property assets into a simple residential and commercial dichotomy) and the changing nature of how global investors view passive-style investment opportunities across the long-term rental housing spectrum, such as build-to-rent, co-living, social and affordable housing and disability care.

There is also a lack of appreciation of the role of the landlord and property management practices where building owners (or their representatives) do not have broad and free access to the tenanted areas of the buildings that they own. 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. This has inadvertently resulted in determinations that certain land acquisitions should be classified as sensitive land or national security land, thereby triggering lower monetary thresholds and more complicated approval processes, with conditions being imposed around restricting access which result in unnecessary compliance.

At the same time investors are facing process-related challenges which stem from uncertainty and inconsistency around approval timelines and a lack of continuity in dealing with the same case managers, which often leads to the same questions being asked of investors that frequently go through the application process.

Reforms in the focus areas set out in the discussion paper will go a long way to reducing the breadth of transactions that require FIRB approval and improving the experiences of participants that do require FIRB approval – this will reduce unnecessary friction for less-sensitive transactions, allow FIRB to prioritise their time and resources on more sensitive transactions, and improve certainty around FIRB approval times for all market participants.

Our submission focuses on some of the key areas identified in the discussion paper, namely:

1. **Areas to reduce regulatory burden**, which include a further expansion of the moneylending exemption for residential property and an exemption for the amalgamation or subdivision of wholly owned land, better treatment of passive-style investments like institutional investment in large-scale residential property, interfunding activities and investments of widely held investments in residential property, and further improvements to reduce the regulatory burden or clarify provision for property investment.

2. **Improvements to exemption certificates** through an expansion of the parameters under which exemption certificates can be exercised and the introduction of an investor-specific exemption certificate.

3. **Compliance and enforcement** to ensure that these activities are properly targeted and proportionate to the circumstances, and that investors are given the flexibility to abide by their compliance obligations without undue administrative burden.

4. **Recommendations to improve the overall operation of the foreign investment framework** by improving the investor experience (including through more targeted and appropriate conditions and a lowering of fees), ensuring applications are processed in a more timely manner and other administrative improvements that would help to enhance the FIRB regime.

3. Areas to reduce regulatory burden

We agree with Finding 6 from the final evaluation report that is it important to continue exploring options to further refine the foreign investment framework to better facilitate foreign investment while safeguarding the national interest and national security.

Below we provide two recent case studies of how the FIRB approval process and requirements are having commercial impacts on transactions that involve foreign investors:

Case study 1: A large commercial office transaction was completed in two tranches – a 50% interest initially and subsequently a 25% interest. FIRB approval for the initial 50% interest was received in approximately four weeks. However, despite the underlying fund and investor base remaining unchanged for both transactions, the application to acquire the further 25% interest took far longer than four weeks, due to the fact that a new case officer was assigned.

Case study 2: A global investor with substantial holdings in Australia from recent transactions sought to buy a commercial real estate asset which is not considered a sensitive asset. A FIRB application was submitted, with four extension requests being made by FIRB, and the process taking more than four months to date. The legislative interpretation being used by the case officer is inconsistent with past practice and experience of the applicant. Approval delays are having a significant commercial impact on the viability of the transaction because of deal sunset dates and financial year end impacts.

Undertaking the various reforms set out across the focus areas identified in the discussion paper should seek to alleviate these negative commercial impacts.

In this section of our submission, we have focused on additional 'less-sensitive' transactions that could be exempted from the regime, ways to improve the treatment of passive-style investments and superannuation funds and clarification that would assist better delineating between commercial land, sensitive land and national security land investments.

Types of less-sensitive transactions that could be exempted

As noted in the discussion paper, one way to reduce the regulatory burden is to exempt 'less-sensitive' transactions from requiring FIRB approval which will remove unnecessary barriers to investment and at the same time free up FIRB time and resources for more sensitive transactions.

Consultation question 1.1 seeks feedback on the types of less-sensitive transactions that could be exempted from foreign investment screening without compromising the national interest, and how this would best be achieved. Accordingly, we have set out below several recommendations on transactions that should not be subject to FIRB approval as they are less-sensitive in nature. The list includes the example highlighted in the discussion paper as a suggested change to reduce regulatory burden by exempting subdivisions and amalgamations of land.

These examples present clear cases of the FIRB review framework imposing unnecessary red tape for foreign investors that are not aligned with the policy intent of the framework and don't present any risks to national security or the national interest.

Transaction type	**Description and impact**	**Recommendation**
Moneylending for residential developments of 10 or more dwellings	Section 27 of the Regulation exempts certain interests relating to moneylending agreements entirely from the operation of the Act. However, in the case of interests in residential land, the current moneylending exemption is very narrow as it only applies if the lender is an ADI or otherwise licensed as a financial institution (with certain caveats and restrictions, such as meeting the widely held test or listed test). Broadening of the moneylending exemption for non-stock and mutual entities has been flagged under the proposed regulatory reforms of February 2022, but we believe more can be done to broaden out the exemption with respect to institutional debt investment in residential property. It is our understanding that the relatively narrow approach for residential interests is intended to capture those providing home loans to purchasers of residential dwellings, and not intended to broadly capture lending to residential developers. If the moneylending exemption does not apply for residential development, this would inhibit the ability of large financial institutions that don't meet the widely held or listed tests (or other exemption categories) from lending to residential developments, thereby impacting on the supply of housing in Australia. This is because of the	Make clear in the Guidance Notes (or clarify the law or regulations to state) that the moneylending exemption for commercial property applies to residential developments of 10 or more residential dwellings.

	significant impact of application fees on financial returns and the timing impact. Given the lower thresholds and higher relative fees for residential property, foreign debt funding is often not financially feasible. Furthermore, speed to market for debt transactions is critical so the time delay for FIRB will render many offshore debt proposals uncompetitive.	
	Box 1: Case study of impact of FIRB fees on feasibility of moneylending If a foreign lender provides a $20m bridging loan for a residential site, and the moneylending exemption does not apply, the FIRB application fee is $241,300 (based on the $20m interest in residential land). If this is a 12-month loan at an 8% interest rate, the return without FIRB fees is $1.6m or 8%. With FIRB fees it falls to $1.36m or 6.8%; a reduction of 15%, which can render the deal unfeasible.	
	In our view, and consistent with our understanding of the policy intent, the moneylending exemption should be consistent with the definition of 'commercial land' which includes land on which 10 or more residential dwellings can be built. That is, lending for the purposes of any residential development should be considered 'commercial' for the purposes of the moneylending exemption, which will mean these transactions are not required to seek FIRB approval and could therefore be more financially viable.	
Amalgamation or subdivision of wholly owned land	An exemption from FIRB approval for subdivisions and amalgamations of land where investors already hold an interest in the land that is being subdivided or amalgamated, and their overall interest would not change, is in our view an entirely sensible and necessary change. Exempting these legal changes – which in essence have not changed the underlying ownership of the asset – would help improve the FIRB regime and free up FIRB's time and resources to focus on other more sensitive transactions.	Exempt from FIRB approval subdivisions and amalgamations of land where investors already hold an interest in the land that is being subdivided or amalgamated, and their overall interest would not change.

Improving the treatment of passive-style investments and superannuation funds

We welcome the proposed Tranche 1 amendment to increase the control threshold for foreign persons who acquire an interest in an unlisted Australian land entity from 5 per cent to 10 per cent (which aligns the control thresholds for listed and unlisted Australian land entities) and commend the Government for taking industry's previous feedback on this issue into account.

Consultation question 1.2 seeks further feedback on how Treasury can improve the treatment of passive-style investments and superannuation funds under the framework and better accommodate how entities in the financial sector operate and manage their affairs.

Accordingly, we have set out below three recommendations; firstly on encouraging more institutional investment in residential property, secondly on improving the treatment of fund investment in residential property, and thirdly providing an exemption for interfunding activities (an issue noted in the discussion paper).

Issue	**Description and impact**	**Recommendation**
Institutional investment in residential property	Specific types of property assets which are comprised of established dwellings, namely social and affordable housing, specialist disability accommodation (both through the National Disability Insurance Scheme or otherwise), and Build-to-Rent housing, have been seeing strong institutional investor demand from domestic and foreign institutional investors. This flow of capital and liquidity into the market can unlock more opportunities for local developers to start new projects, thereby boosting the supply of built-for-purpose housing stock and employment in the construction sector without pricing out Australian residents from the broader housing market. FIRB rules have very specific requirements for residential dwellings whereby foreign investors are only able to purchase 'new' residential dwellings rather than existing dwellings. There are specific exemptions to this policy that allow foreign entities to acquire existing 'commercial residential' dwellings, with reference to the 'commercial residential' definition under the GST rules as well as	Make clear in the Guidance Notes (or clarify the law or regulations to state) that, similar to the approach currently applied to other forms of 'commercial' accommodation premises: - the definition of commercial land includes all forms of long-term rental accommodation, including affordable housing, purpose-built disability

	other types of existing dwellings such as retirement villages and certain student accommodation that do not fall under the 'commercial residential' GST definition. According to the explanatory material of the *Foreign Acquisitions and Takeovers Amendment (Exemptions and Other Measures) Regulations 2017*, this change was made "to align the treatment of these assets with like accommodation premises that are developed commercial land." In addition, the FIRB definition of 'commercial land' specifically includes land on which 10 or more residential dwellings can be built, or land which is considered 'commercial residential' premises. In our view, investments in other types of long-term rental accommodation, including affordable housing, purpose-built disability accommodation, and Build-to-Rent developments, should all fall within the 'commercial' parameters of the FIRB regime – either because they consist of 10 or more dwellings, or because they are akin to the type of accommodation premises that are already considered developed commercial land. This will mean there are no restrictions on foreign investors acquiring 'existing' residential investments that fall within these parameters, and the commercial property fee thresholds should apply.	accommodation, and Build-to-Rent developments - the foreign investor limitations on purchasing 'new' dwellings do not apply to institutional investment in long-term rental accommodation, including affordable housing, purpose-built disability accommodation, and Build-to-Rent developments - commercial property fees should apply for these types of investments.
Fund investments in residential property	Passive institutional investment in property is usually done through some form of managed funds, such as Managed Investment Trusts. These funds are becoming increasingly important for some types of large-scale residential assets such as social/affordable housing, specialist disability accommodation and Build-to-Rent. This form of passive investment should be treated in the same manner as passive investments in funds that manage commercial property assets. In essence, these funds are widely held across a number of investors, and the foreign investors that put capital into these funds are wholesale/institutional investors that don't acquire any control over the underlying assets of the fund.	Treat fund investments in residential property under similar conditions (including thresholds, fees, etc.) as commercial property provided these investments are managed through MITs, CCIVs or similar structures.

	We believe that amendments could be made to allow for institutional investment in existing residential assets under similar conditions as commercial property, provided these investments are managed through Managed Investment Trusts (MITs) or similar wholesale investment fund structures (e.g. the recently legislated Corporate Collective Investment Vehicle (CCIV) regime, which is set to start 1 July 2022).	
Interfunding activities between funds with same responsible entity	We are supportive of providing an exemption for 'interfunding' activities, where a fund invests in a separate fund and both funds are controlled by the same responsible entity. This is another example where, given that there is no change in the underlying ownership of interest, this should not be treated the same as a transaction where buyers and sellers are distinct entities with different owners. As a typical commercial operation, requirements to seek FIRB approval would only take up time, increase costs and use up government resources for no tangible benefit.	Exempt interfunding activities where there is no change in underlying ownership from FIRB approval.

Clearly delineating between commercial land, sensitive land and national security land

The following section of the submission outlines issues of clarification for the application of legislative or regulatory provisions that should be resolved to ensure commercial land acquisitions are subject to the appropriate monetary threshold and are not inadvertently caught by the lower thresholds for sensitive land and national security land.

Issue	Description and impact	Recommendation
Clarifying scope of national security business/land, including treatment of data centres	National security land investments are subject to a $0 monetary threshold. In the explanatory material of the 2021 national security regulations, some clarity was provided regarding the treatment of land that contains data centres to determine whether it falls within the national security land/business definitions. While this is a positive step in providing some clarity around the issue of investments in data centres, we believe that the mere ownership of land that contains a data centre should not be deemed national security sensitive. The ownership of commercial property does not give landlords broad and free access to tenanted areas of the property that they own. Given the potentially sensitive nature of the data that may be housed by commercial data centre operators, rights of access are much more tightly controlled than in normal buildings or commercial premises. Even in the case of emergency, landlords may not be allowed access unless they are appropriately escorted by tenants. This clarification of scope would align Australia's regime with others around the world in data centre property not having requirements to go through investment screening processes. Therefore, we would recommend that the definition of national security land/business excludes land (and ownership of that land) on which data centres are located.	Clarify the definition of national security land/business to exclude the ownership of land on which data centres are located.

Clarifying scope of 'sensitive land' definition for land with telecommunications or public infrastructure	Commercial real estate investments that are considered 'sensitive land' are subject to the FIRB regime at a lower monetary threshold compared to other non-sensitive real estate investments. The definition of 'sensitive' land and the conditions set out in paragraphs (viii) and (x) of section 52(6) of the *Foreign Acquisitions and Takeovers Regulations 2015* are triggered by the mere fact of having telecommunications or public infrastructure located on the land, regardless of ownership or control of the infrastructure. We understand the Government's broader focus on critical infrastructure with respect to national security concerns. However, there is a separate 'critical infrastructure' regime that has been established to directly manage and mitigate these risks. Meanwhile, the broad scope of the sensitive land definition increases the scope of commercial real estate investments that are captured by the FIRB regime, creating investor uncertainty and potentially deterring or delaying investment in assets that are mere conduits for housing telecommunications or public infrastructure (e.g. an office building with a mobile tower on the roof). We believe that amendments should be made to the previously mentioned sections (section 52(6)(viii) and (x)) of the regulations. As critical infrastructure concerns are best placed to be dealt with through the critical infrastructure regime, the definition of sensitive land should be streamlined to only apply where there is an acquisition of the ***ownership*** of telecommunications or other public infrastructure on the land in question.	Amend the definition of sensitive land to no longer apply where the relevant infrastructure is not owned by the landowner.
'Sensitive land' definition for land where certain materials are stored or contained	Section 52(6)(c)(iv) of the FIRB regulations deals with land subject to authorisations under Commonwealth or state/territory law regarding certain materials stored or produced on that land. It is not clear what types of scenarios this part of the regulations refers to.	Further clarity is provided regarding section 52(6)(c)(iv) of the FATR and the types of authorisations, laws and

	We recommend that guidance (including examples) is provided as to what legislative authorisations, laws and materials this section is intended to address.	materials that are referred to that section.
Broad scope of leasehold interest	There appears to be contradictory guidance on how leasehold interests are treated under the FIRB provisions. It is unclear whether these interests are only the tenanted premises or to the whole of the building in which the lease/tenancy is contained. Guidance Note 4 provides an example (Example 6) of referring to the whole of the building in the context of sensitive land because of the telecommunications infrastructure located on the building. This could be inferred to result in the whole of the building being the relevant interest. However, Guidance Note 8 refers to the leased premises only in the context of national security land: *However, with respect to acquisitions of land under a lease, the interest in land will be determined by what is being acquired on that title. Where an investor acquires a leasehold interest over part of the title (e.g. one floor in a commercial office building), their approval covers that leasehold interest only – not approval to acquire the entire building. Similarly, where an agency in the national intelligence community has an interest in a portion of land under one title, it is only that portion of land that is national security land. If an investor acquires an interest in land that only represents a portion of the title, and that portion is not national security land, it will not require mandatory notification.* We believe that the second interpretation should apply to both national security land and sensitive land whereby the relevant leasehold interest should only be the leased/tenanted area for all types of land (whether national security land, sensitive land or otherwise) and not apply to the building or whole property on which that tenanted area is located.	Clarify that a leasehold interest is the leased/tenanted area and not the building or whole property on which that tenanted area is located for both national security land and sensitive land.

4. Exemption certificates

We support the Government's response to Finding 5 from the evaluation final report to immediately seek further public and investor views on ways exemption certificates can be improved. As highlighted in the discussion paper, exemption certificates provide efficiency benefits to both investors and the Government. We believe there is untapped potential to reduce friction points for foreign investment by improving the exemption certificate approval process and broadening its criteria.

In response to question 3.1 and the issue of exemption certificates, we believe that currently an appropriate balance isn't being struck between facilitating investment and protecting the national interest. While we have had some positive feedback from members regarding greater take-up of exemption certificates over the past year, we note that there are challenges with current exemption certificates parameters which are discussed below.

Question 3.2 seeks feedback on other types of exemption mechanisms that could be valuable for investors. We would strongly support the creation of an investor-specific exemption mechanism and believe that this opportunity to streamline low-sensitivity investments for frequent investors should be considered by Government.

Issue	**Description and impact**	**Recommendation**
Land exemption certificates	Our members have noted that there are challenges with current exemption certificate parameters for Australian land certificates, in particular: - the $100m limit on exemption certificates - the need to have very specific investment criteria that covers the program of investments under the exemption certificate - the limited time in which the exemption certificate can be used to execute transactions - the exclusion for "sensitive land".	Broaden the exemption certificate criteria to ensure it operates effectively for real estate and managed fund investments including: - removing the $100m limit, - faster approval times,

	These narrow parameters have resulted in the take-up of exemption certificates being limited. Furthermore, exemption certificates may take up to six months or more to approve, which can then delay investment decisions or mean it is more commercially efficient to seek approvals one by one (thereby tying up more time and resources of both FIRB and the investor).	- longer period for executing acquisitions/transactions, and - applicability for sensitive land.
Fund exemption certificates	Exemption certificates granted for a program of investing into wholesale funds or MITs have been beneficial to the property industry as these are typically granted for larger amounts of equity and over a 3-year period. However, there seems to be a lack of understanding about the workings of the funds industry when certain conditions or strictures are set with an exemption certificate of this type. For example, applicants are required to list every fund they may consider investing in upfront, which makes it more difficult to invest in newly established funds which may not have existed when the exemption certificate application was made, requiring a new FIRB application or a variation to the existing exemption certificate. This again can increase the cost and reduces the likelihood of investors taking up exemption certificates or investing in these new funds altogether, thereby restricting the pool of capital available for them to make investments. We recommend that exemption certificates for investments into wholesale funds provide the flexibility to invest in new funds which have similar structure and features (e.g. that the fund is widely held, invests in similar real estate sectors) to those listed in the original application. Information required to prove this could be included as part of the conditions given with approval.	Provide greater investor flexibility in exemption certificates for fund investments to include new funds which have similar features to those listed in the original application.
Investor-specific exemption mechanism	Exemption certificates are currently granted based on particular asset classes (e.g. land/property investments, businesses or similar entities). However, an investor with a broad mandate that includes several asset classes – for example, operating businesses, infrastructure, and real estate – would need to apply for several exemption certificates to cover their investment mandate.	Introduce an investor-specific exemption for low-risk institutional investors who are appropriately regulated and have

	An investor-specific exemption could be granted on a case-by-case basis to each 'approved' investor once the Treasurer (on the advice of FIRB) is satisfied that the entity/organisation does not pose a national security risk. In relation to any exemption, the following factors could be used to assess whether granting an investor-specific exemption would be appropriate: - if the entity is subject to a comprehensive and robust regulatory regime governing their funds management and investment activity, which would include in Australia by the Australian Securities and Investments Commission and in their home jurisdiction by equivalent regulators such as the Securities and Exchange Commission or the Financial Conduct Authority; and - acts as a fiduciary that has a broad and wide client base and has statutory and common law duties to act in the best interests of their underlying clients - the primary objective is to secure better financial futures for their clients and the people they serve, rather than to pursue political or strategic objectives through their investments; and - has a proven track record in investing in Australian assets. This investor-specific exemption would need to be practicable for the exempted entity, acknowledging that such investors would be practically restricted in the number of transactions that are completed each year and the number of assets or interests that are held in each underlying fund or portfolio. It is also important to note that whilst these professional investors will often have a clear set of investment criteria, they may not know the exact investments or the sub-sectors that they wish to invest into. Alternatively, streamlined approval should be given to these institutional foreign investors whenever an individual application is made, as part of the Government's measures to streamline less sensitive investments and similar to the proposed streamlining of investments made by some investment funds that are currently defined as 'Foreign Government Investors'.	a track record of investment in Australia. Alternatively, a more streamlined approval process should be provided to frequent investors noting that these investors typically have a lower risk/sensitivity profile (see recommendations in section 6 of this submission regarding case officer assignment and unique investor IDs for examples of streamlining applications for these investors).

5. Compliance and enforcement

Compliance and enforcement are systemically important features of a robust investment review framework that give confidence to those investors that try to act responsibly. However, it is important to ensure that compliance and enforcement powers are targeted at where they are needed most and that investors aren't burdened with undue compliance requirements.

Section 4 of the discussion paper considers opportunities to refine and improve FIRB's compliance and enforcement measures. Below are provided some general comments, examples and recommendations towards improving how FIRB conducts its compliance and enforcement activities. The examples and recommendations focus on questions 4.2 and 4.3 from the discussion paper.

The potential penalties for contraventions of the foreign investment screening rules can be disproportionate particularly when considering the extensive reporting obligations that investors are under. However, we note that this disproportionality is being balanced out with the current approach of education and outreach in the first instance when a contravention has occurred.

We believe that enforcement action should not be taken where there has been an unintended breach and an investor has sought to rectify that breach as soon as possible after having become aware of the issue. This is consistent with what we understand to be the general approach taken by Treasury to date, and we welcome that approach continuing.

Issue	**Description and impact**	**Recommendation**
Notification obligations	Sections 98C, 98D and 98E of the *Foreign Acquisition and Takeovers Act*, operating alongside reporting conditions imposed on no objection notifications and exemption certificates, often create confusion for property investors. For example, these sections are not relevant to many investors due to section 41B of the *Foreign Acquisitions and Takeovers Regulation* (for acquisitions of interest in either residential or commercial land) which provides an exemption from these notification requirements.	Ensure that the compliance and enforcement framework is being properly applied/targeted in line with FIRB legislative and regulatory provisions.

	However, we have seen instances of investors receiving notices of potential non-compliance for reporting obligations that are exempt under regulation 41B of the FATR and that were never imposed in a no objection notification.	
Online reporting mechanism	The current online reporting mechanism can be too repetitive and does not allow for appropriate tailoring of information specific to each transaction. Investors should be given the option of submitting information on a tailored basis for specific transactions (e.g. free text fields rather than specific questions). Where large volumes of reporting are required to be submitted, investors should be provided with the ability to do so more easily and Treasury should be able to accept more streamlined reporting/information.	Provide greater flexibility in online reporting tools to ease the administrative burden for investors that are trying to comply with their reporting obligations.

6. Overall operation of the foreign investment framework

Question 5.1 of the discussion paper seeks industry's views on further foreign investment reform options to improve the overall design and operation of Australia's foreign investment framework.

We have identified several issues and opportunities to enhance the Government's approach to the processing of applications and the overall operation of the framework to provide improved certainty for investors and more appropriately utilise time and resources of FIRB and referral agencies.

Reasonableness of FIRB conditions attached to approvals

Issue	Description and impact	Recommendation
Conditions are not appropriate or targeted	As noted above, landlords generally have no access to the tenanted areas of their buildings. However, we have heard repeated instances of conditions being imposed on landowning entities or entities further up the chain of ownership that explicitly prevent directors of foreign entities that hold passive interests in pooled property funds from accessing the buildings acquired by those funds, or accessing specific data by those directors or their representatives. These are just a couple of examples of conditions that do not reflect the standard practices of institutional investors ownership, leasing and management of commercial property. The implication that an international investment trust or its associates have any interest in the daily operations of a tenant who may or may not be a government agency or data centre operator highlights a fundamental misunderstanding of a landlord's commercial practices. Such conditions can cause confusion for decision-makers and key investor stakeholders and create a significant compliance burden for the investor as well as the tenant or investee business.	FIRB approvals should not impose conditions that do not reflect commercial practices and are best dealt with through commercial lease terms. The guiding principles on setting conditions should include reasonableness as an additional factor for considerations.

	One way of addressing this issue may be achieved by amending the guiding principles on developing conditions (i.e. Guidance Note 11) to include reasonableness as an additional consideration.	
Conditions duplicate existing legal requirements	We have also heard of repeated instances where conditions are imposed on FIRB applicants which replicate obligations that already exist under law (specifically obligations arising from tax law). This results in more onerous obligations of the same legal requirement given the consequences for breach of conditions and the trigger for a breach is a very low threshold (e.g. not notifying FIRB within 30 days of certain actions being taken). This experience aligns with the views of the Productivity Commission,[1] which found that too many conditions were imposed through the foreign investment screening process. It stated that: *Conditions that duplicate existing legal requirements on businesses operating in Australia add to the regulatory burden without delivering additional benefits.* Increased penalties for not complying with FIRB conditions can result in duplicate penalties being triggered for a single compliance failure. For example, the foreign investor may face penalties under both tax law *and* the FIRB framework for failing to lodge tax returns or other information within the timeframes specified by the ATO. We would echo the view of the Productivity Commission and recommend that FIRB carefully considers that the conditions imposed upon approval are appropriate and reasonable for each case and applicant, and that these conditions don't duplicate obligations that already exist for applicants under existing law or regulation. One way of addressing this issue may be achieved by amending the guiding principles on developing conditions (i.e. Guidance Note 11) to include non-duplication as an additional consideration.	Government should ensure that conditions imposed do not duplicate existing legal obligations by amending the guiding principles to include non-duplication as a factor.

[1] *Foreign Investment in Australia – Commission Research Paper*, June 2020, Productivity Commission

Competitiveness of FIRB application fees

<table>
<tr><th>Issue</th><th>Description and impact</th><th>Recommendation</th></tr>
<tr>
<td>Fees are out of step with other comparable jurisdictions</td>
<td>While we understand the Government's position that the cost of administering the framework should be borne by foreign investors, the impact of changes to the FIRB application fee structure has been significant for foreign investors in the property sector. We believe that high fees do act as an additional deterrent to marginal investments that would otherwise flow into Australia if fees were lowered to levels that are comparable with other jurisdictions.

Commercial real estate fees

Firstly, our global investor members have noted for some time that FIRB application fees are not globally competitive compared to similar regimes. While the Government has repeatedly insisted the fees are 'consistent' with other nations (although the maximum fee levied through FIRB is higher than for both the US and New Zealand - see below table), this overly simplistic statement ignores the fact that Australia's FIRB screening regime is significantly broader than other regimes in the scope of transactions that are captured.
<table>
<tr><th></th><th>Australia</th><th>US</th><th>New Zealand</th></tr>
<tr><td>Maximum investment application fee</td><td>A$503,000</td><td>US$300,000
(~A$410,000)</td><td>NZ$54,000
(~A$52,000)</td></tr>
<tr><td>OECD FDI Regulatory Restrictiveness Index (higher number = more restrictive)</td><td>0.15</td><td>0.09</td><td>0.23</td></tr>
</table>
</td>
<td>Government should reduce FIRB application fees to remain competitive and in the context of the other large transaction costs incurred by foreign investors.

Fees for applicants that are seeking pre-approval should be adjusted (e.g. a portion of the fee is levied upfront, and the rest levied once the deal closes and FIRB approval is given) because of the greater completion risk.</td>
</tr>
</table>

	This also comes on top of the other transaction costs foreign investors are likely to face (e.g. stamp duty along with hefty foreign investor surcharges on the stamp duty). We recommend that fees levied on commercial property transactions (particularly for non-sensitive assets or investments) are reduced to bring us in line with other markets and attract more inbound investment. Fee increases for those investors seeking pre-approval can also be especially problematic. Prior to the fee calculations being adjusted as part of the 2021 reforms, investors were more comfortable in seeking FIRB pre-approval and paying requisite fees at the commencement of a due diligence process given the transaction cost "at-risk" should the deal not complete was not as significant. However, transactions at the larger end of the scale now entail much higher application fees, which deters investors from seeking pre-approval or engaging in competitive bidding processes where speed of execution is a critical factor. The ability of potential buyers to be involved in competitive bidding processes has an impact on market liquidity. High upfront transaction costs (which are not borne by all potential bidders) reduce the liquidity available in a given market to the detriment of sellers, be they foreign or domestic entities. This issue could be addressed in part by adjusting the application fees that are paid for pre-approvals by only levying a portion of the fee upfront and the rest once the deal is completed.	
Disparity in fees for institutional investment in commercial and residential property	Fees for institutional investment into residential property present a separate problem. Institutional real estate investors make decisions based on, among other things, an assessment of the cost and expected return of particular investments. Australia's alternative residential sector (which includes assets such as specialist disability and affordable housing, and other sectors identified in the previous section of this submission) is becoming an increasingly important part of the housing supply and mix but is currently unfeasible	Clarify that institutional investors investing into long-term rental accommodation, including affordable housing, purpose-built disability accommodation, and Build-to-Rent developments, will be subject to the commercial

	as an investment option for some investors because of the higher cost involved compared with the commercial property sector. In some instances, these alternative residential assets may not meet the commercial land or commercial residential definitions and be defined as residential land (e.g. a specialist disability accommodation site on which less than ten dwellings can be built – see Box 2). As a result, the applicable fee for foreign investment in a wholesale fund that is acquiring these assets is significantly more than for a fund that invests in commercial assets.	property fee scale (consistent with recommendation above in section 3 of the submission).
	Box 2: Case study of FIRB fees for investment in specialist disability accommodation If an institutional investor is investing $50m into a fund that invests into specialist disability accommodation, the FIRB application fee is $503,000. By comparison, an investment for a similar value commercial property fund would equate to a FIRB application fee of $6,350. This amounts to just over 1% of the cost of a residential land application.	
	This deters greater investment in specialised housing that boosts housing supply and provides community benefits, including to disadvantaged parts of the community. Given the higher FIRB fees for residential have historically been directed towards individual home buyers, there seems to be a mismatch that institutional investors face when comparing opportunities in the residential and commercial property sectors. We believe that to not deter foreign investment from supporting specialist residential sectors and put a handbrake on housing supply in Australia, fees for this type of residential investment should be aligned with fees applicable to commercial property.	

Better streamlining and triaging of applications for frequent or high value investors

Issue	Description and impact	Recommendation
Streamlining applications by assigning case officers to frequent or high value investors	Frequent investors are generally assigned whichever case officer is available to handle their application. If the case officer hasn't dealt with that applicant in the past, it will take time for them to understand who the applicant is, what other investments they have made in the past, who their investors are, etc. Regulators such as the ATO provide case officers or relationship managers for taxpayers of a certain size. A similar approach could be adopted for investors that have invested significant volumes in Australia over the past, say, 3 years. Assigning specific case officers to frequent and high value investors would cut down the time required for a case officer to become familiar with the investor, their circumstances, their investment strategy, and other specific details of the applicant. This would make the approval process and the overall management of cases by FIRB and referral agencies more efficient.	Assign specific case officers to frequent and high value investors.
Streamlining applications through unique investor identification numbers	Some investors are concerned and frustrated with having to provide the same investor information or answer the same questions time after time on applications. This issue could be resolved with the use of unique investor identification numbers. The current update to the FIRB application portal could allow frequent investors to log in under their unique identification number and have easy access to their old case files and the ability to pre-populate information when preparing new applications.	Issue unique investor identification numbers and include the ability to access old case files and pre-populate forms based on previously submitted information.

Improving advice, guidance and agency referrals

Issue	Description and impact	Recommendation
Lack of additional avenues for advice and guidance	We acknowledge that FIRB's guidance material has recently been updated and simplified to cover the extensive reach of the foreign investment review system. However, the broad and high-level nature of the guidance means that the examples provided can be fairly simple and do not address the more challenging 'grey' areas. For example, there is still some uncertainty remaining with how the new national security definitions apply to certain businesses or land, and FIRB's guidance to voluntarily lodge an application if investors are not sure is at times not practical where there are commercial imperatives driving particular timelines or decisions, and given the significant fees involved. There is also no avenue currently for a seller of assets to seek 'pre-approval' or guidance on whether the assets they are proposing to put on the market would require FIRB approval. One potential improvement that we urge Treasury to consider is the creation of an ATO ruling-style system. Potential sellers or buyers could seek FIRB's confirmation that, given their unique set of circumstances, formal approval to transact is or is not required. This system or stream would sit alongside the normal FIRB application process but be able to provide certainty that is more timely and less costly than the usual FIRB application process.	Establish an ATO ruling-style process to provide timely advice or confirmation to investors about whether FIRB approval is required.
Limited transparency and timeliness of FIRB and referral agencies	Based on our members' experiences, applicants are occasionally not given clear or timely information on how their application is progressing. Communication typically occurs late in the process with inevitable extensions of the review process implemented by FIRB.	Triaging of applications and appropriate resourcing of FIRB and referral agencies to enable swift processing of applications.

	This leads to uncertainty on transaction settlement times and last-minute changes have significant impact on financing arrangements, legal documentation, and other commercial aspects of transactions. The investor experience from application to application can vary greatly depending on the relevant case officer as to how communicative they are and how much they are willing to share. Members note that questions are often received from consult agencies which are either not relevant to the acquisition, misunderstand the acquisition or are otherwise addressed in the application itself. Some advisers are unable to liaise directly with consult agencies, which contributes to the slowness of the process. We believe that there are several opportunities to improve the investor/applicant experience with FIRB to improve the transparency and timeliness of the application process. Firstly, FIRB should continue the approach of triaging of applications early on in the process (as was done when temporary FIRB measures were in place) to determine what may be sensitive and require consult agency involvement, and therefore require more time and resources. The use of the ATO for more standard transactions would allow FIRB/Treasury to dedicate experienced case officers to applications that are more complex. Secondly, it would be helpful if staff across FIRB/Treasury and consult agencies have a sound understanding of different markets and sectors – for example, how the real estate market works and how investment funds (e.g. Managed Investment Trusts) operate. Building skills, knowledge and experience across the case teams on an ongoing basis should be given priority. Lastly, the involvement of consult agencies typically adds time and difficulty to the application process. Applicants should be provided with clarity on whether an application will require FIRB consultation with other agencies, and the extent to which this would affect the approval timeframe.	Providing ongoing training and education to case officers about different markets and industry sectors. Implementing a 'clock'-style system to streamline approvals where consult agencies are involved, allowing for regular updates on the progress of applications, and opportunities provided to applicants to deal directly with consult agencies to reduce miscommunications or delays with information transfers.

	To improve the timeliness of processing these cases, a 'clock'-style system should be implemented where consult agencies have a fixed time to process the application or otherwise it is deemed to be approved. This system would also help FIRB to more actively manage consult agencies rather than simply passing on questions and responses between them and applicants.	