

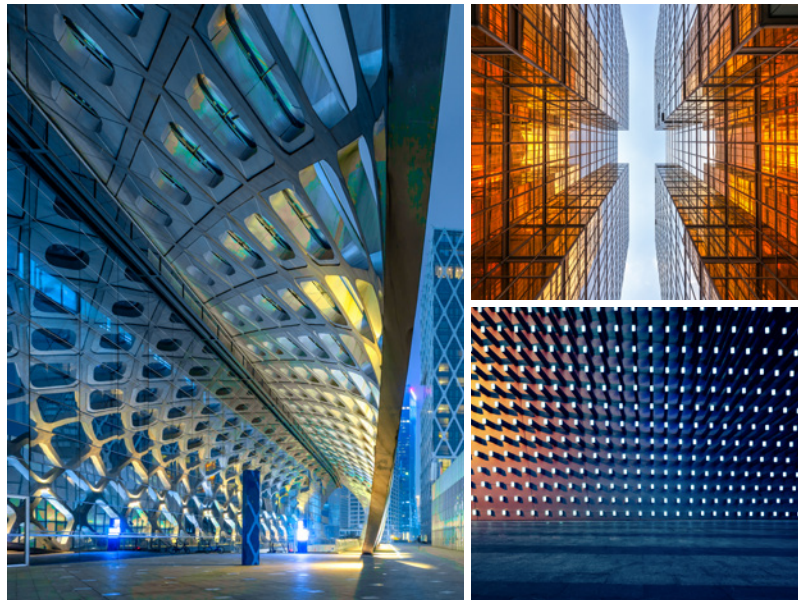


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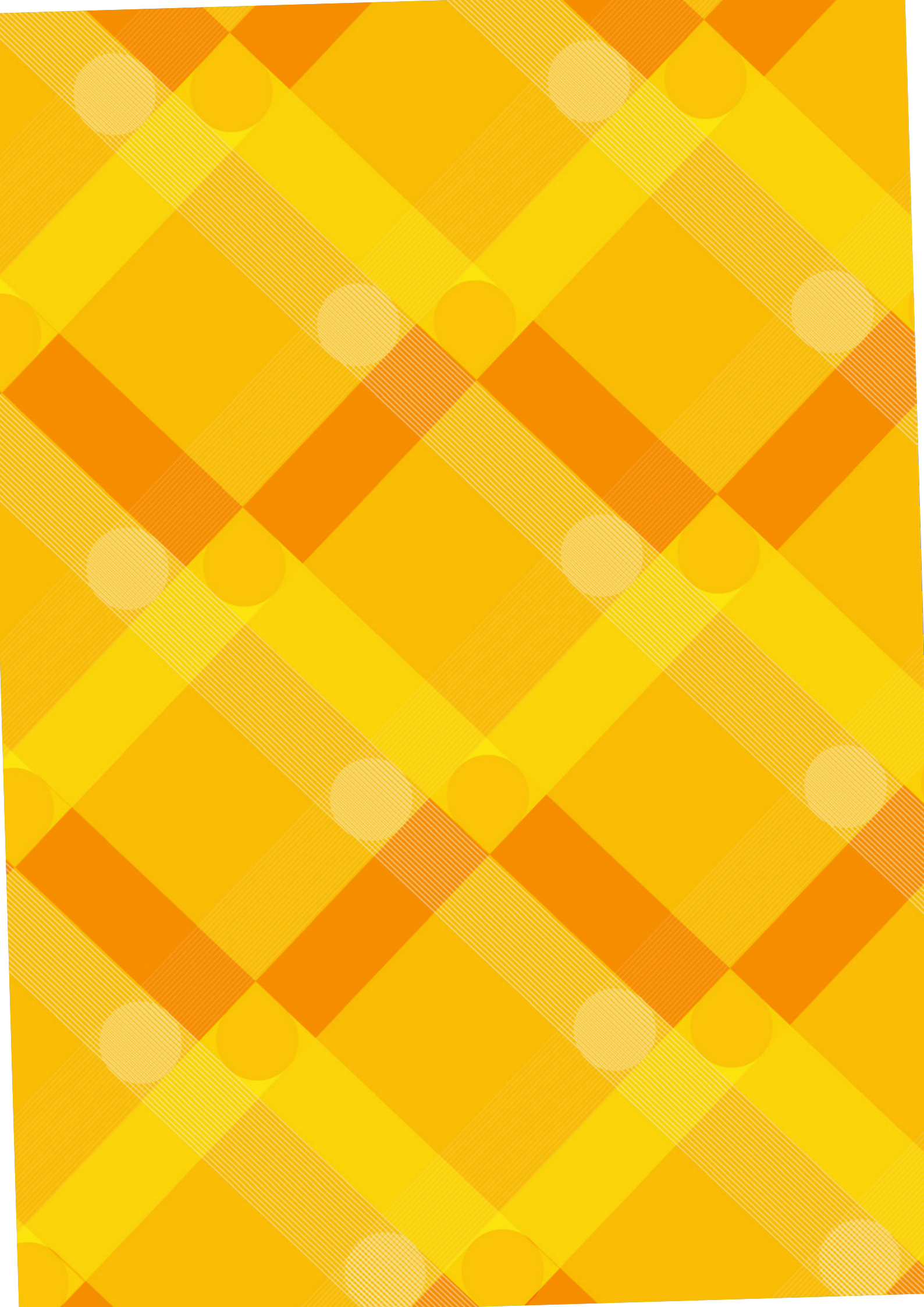
AUSTRALIAN FOREIGN INVESTMENT REVIEW

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ISSUE JULY 2021



Welcome

We are delighted to welcome you to the next edition of the Australian Foreign Investment Review. There have been a large number of developments in the past 12 months or so to Australia's foreign investment regime and COVID-19 has created some unique challenges which resulted in significant temporary changes to our foreign investment regime.

In this edition, we examine foreign investment into Australia over the past 12-18 months and how this has been impacted by COVID-19 and the new foreign investment regime which commenced on 1 January 2021.

Firstly, Matthew FitzGerald and Spandan Das examine FIRB's annual report for the 12 months ended 30 June 2020 highlighting key themes and messages in relation to foreign investment in Australia in this period.

Secondly, Malika Chandrasegaran and Illana Gottlieb consider how the new legislative framework for foreign investment into Australia may be impacted by an increasing focus on compliance by FIRB.

Thirdly, Melissa Swain-Tonkin and Phillip Smith discuss a welcome development for streamlined FIRB approval for funds with foreign government investors.

Finally, Matthew FitzGerald and Crusoe Flynn-Pittar examine the new approach to the statutory decision period and how this is impacting upon FIRB application processes.

We trust you will enjoy this edition of the Australian Foreign Investment Review.



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About Herbert Smith Freehills

Herbert Smith Freehills has one of Asia Pacific's leading M&A legal practices, as well as the expertise and track record to help make any international investment in Australian assets a smooth and efficient process.

Our foreign investment experience includes navigating some of Australia's largest deals through the foreign investment review process.

We combine our transactional expertise with industry sector experience. We are acknowledged leaders in a number of global sectors including energy, mining and infrastructure, and technology, media and telecommunications.

FIRB's annual review: some insights and observations from the last 12 months

The Foreign Investment Review Board (**FIRB**) Annual Report for the year ended 30 June 2020 (**Report**) was recently released. We discuss some key takeaways from the Report.



This article was written by¹

Matthew FitzGerald,
Partner, Brisbane

Overview

FIRB released its annual report for the year ended 30 June 2020 (**Report**) providing data on the foreign investments applications considered by FIRB between 1 July 2019 and 30 June 2020. The full Report is accessible [here](#).

In summary, in respect of the 2019-20 period, the Report shows:

- a 15.4% decrease in the value of approved foreign investment proposals;
- the United States remaining the largest source of approved foreign investment by value into Australia, followed by Japan;
- the services sector and commercial real estate sector as the top two sectors by value attracting foreign investment;
- a decrease in the number and value of foreign investment approvals subject to conditions; and
- three rejections of foreign investment proposals, two in the mineral exploration and development sector and the other related to a proposed acquisition of an Australian dairy and beverages company.

In response to the COVID-19 pandemic, the temporary changes to Australia's foreign investment review framework were introduced on 29 March 2020. Most notably, the monetary screening thresholds

triggering the requirement for FIRB approval under the *Foreign Acquisitions and Takeovers Act 1975 (FATA)* were temporarily lowered to \$0.

Other significant reforms to FATA also commenced on 1 January 2021.

We discuss these findings further below.

Value and type of approvals generally

There were 8,221 foreign investment approvals in 2019-20, representing approximately \$195.5 billion of proposed foreign direct investment into Australia. This represents a decline in value of 15.4% from the \$231.0 billion of approvals in 2018-19, and an increase of 19.9% from the \$163.1 billion of approvals in 2017-18.

There was a significant decline in foreign direct investment in certain sectors, including approvals in the following sectors:

- manufacturing, electricity and gas sector declining to \$33.0 billion in 2019-20, a 10% decrease from the \$36.7 billion of approvals in 2018-19;
- mineral exploration and development sector totalling 108 in number with a total value of \$11.2 billion (down from 121 approvals totalling \$16.9 billion in 2018-19); and

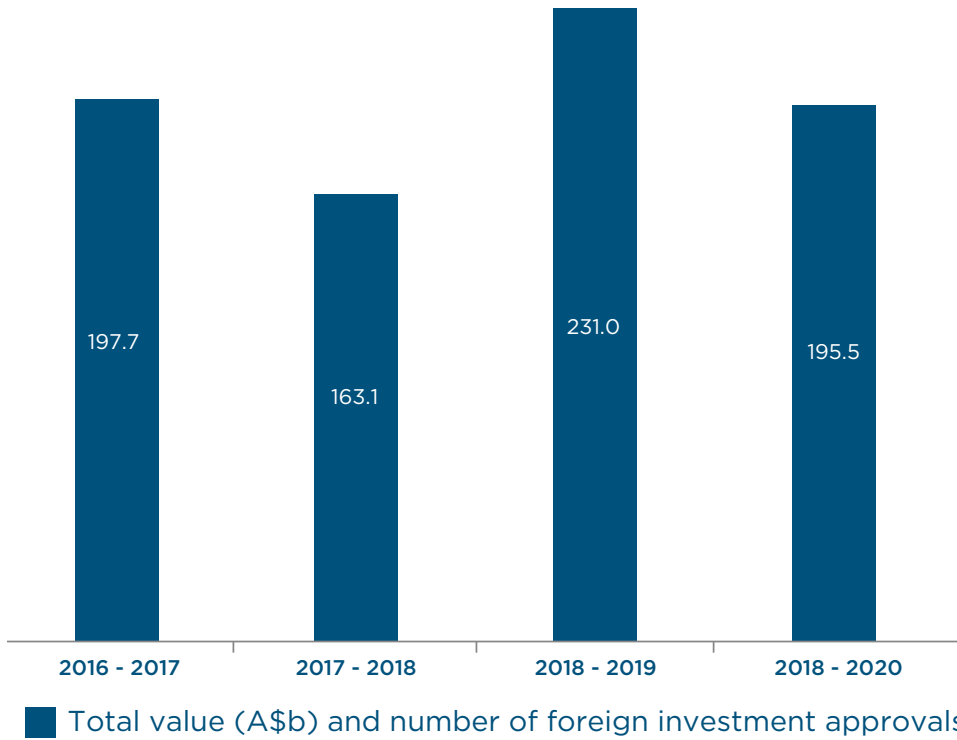
- services sector declining to \$73.6 billion in 2019-20, a 3% decrease from the \$76.0 billion of approvals in 2018-19.

Foreign investment approvals in certain sectors, however, increased from their 2018-19 levels, with approvals in the following sectors:

- finance and insurance sector increasing to \$13.6 billion in 2019-20, an increase of \$7.3 billion; and
- agriculture, forestry and fishing sector increasing to \$8.3 billion in 2019-20, an increase of \$1.0 billion.

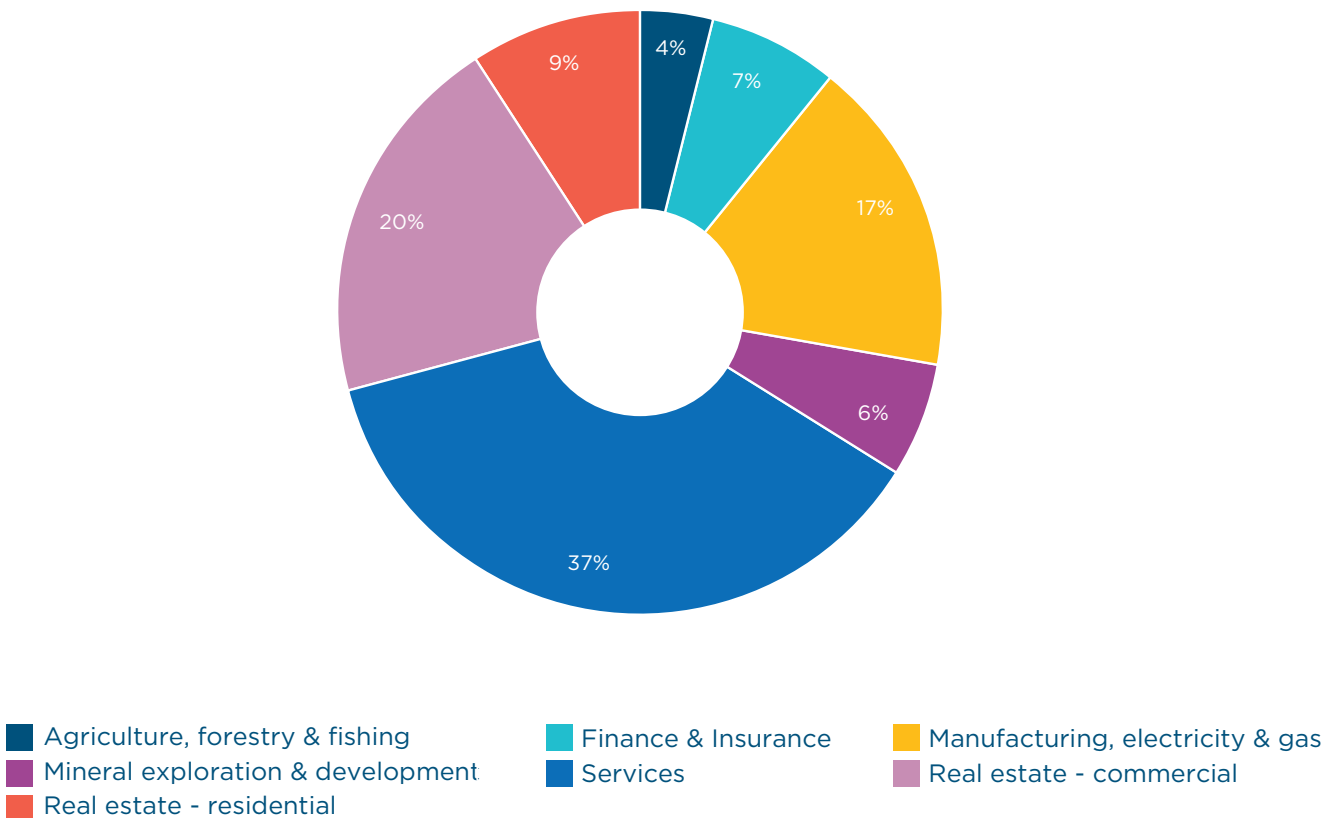
1. This article was also written by Spandan Das (Vacation Clerk, Brisbane).

Total value (A\$b) and number of foreign investment approvals



Source: FIRB Annual Reports 2016-2017, 2017-2018, 2018-2019, 2019-2020.

Shared total value of approvals by sector



Source: FIRB Annual Report 2019-2020.



Sources of Foreign Investment

The United States and Japan were the top two sources of proposed foreign direct investment into Australia by value.

United States' approvals in 2019-20 was \$49.2 billion, a 15.5% decrease from the \$58.2 billion in approvals granted in 2018-19. The United States had notable increases in proposed investment in the finance and insurance sector (increase in approvals value from \$791.8 million in 2018-19 to \$2.5 billion in 2019-20) and the mineral exploration and development sector (increase in approvals value from \$2.9 billion in 2018-19 to \$4.7 billion in 2019-20). However, this increase was offset by significant decreases in proposed investment by US investors in the real estate and services sector.

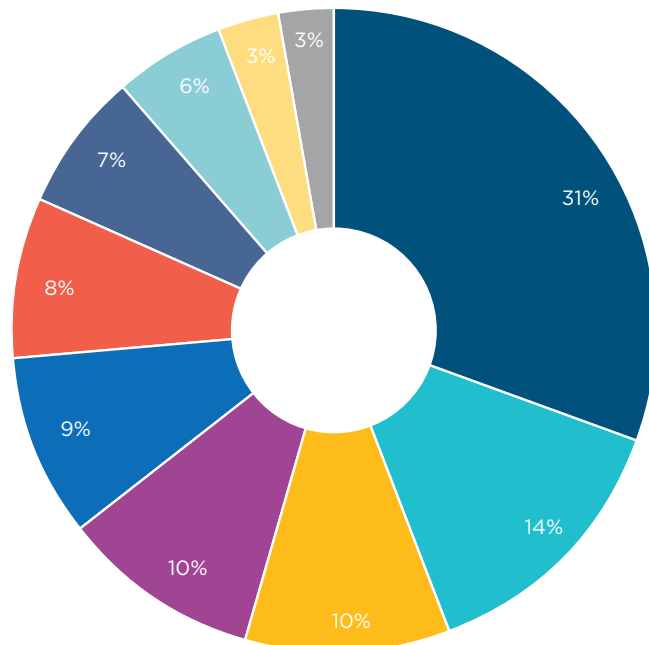
Proposed approved investment from Japan increased by \$7.0 billion to \$22.1 billion in 2019-20, elevating Japan to the second largest source country by value. The growth in the value of approvals for Japanese investors was predominantly driven by the manufacturing, electricity and gas sector

(which increased in value from \$2.5 billion in 2018-19 to \$17.5 billion in 2019-20). This increase was despite falls in proposed Japanese investment in the finance and insurance, mineral exploration and development, and real estate sectors.

With respect to China, the value of proposed investment in 2019-20 (\$12.8 billion) remained relatively steady as compared to 2018-19 (\$13.1 billion). China dropped from the fifth top source country in 2018-19 to sixth in 2019-20. This was largely attributable to a significant decrease in the value of approvals from China in the services sector and the mineral exploration and development sector.

The top five investor countries, following Japan, was rounded out by Singapore (\$16.2 billion), Canada (\$16.0 billion) and the United Kingdom (\$14.9 billion). Interestingly, the United Kingdom figure represents a significant increase from \$6.1 billion in 2018-19 to \$14.9 billion in 2019-20 (largely attributable to a \$7.1 billion increase in approvals for United Kingdom investments into the services sector).

Sources of foreign investment by country



■ United States
 ■ Japan
 ■ Singapore
 ■ Canada
 ■ United Kingdom
 ■ China
 ■ Hong Kong
 ■ France
 ■ United Arab Emirates
 ■ Germany

Source: FIRB Annual Report 2019-2020.

Rejections and conditional approvals

Three foreign investment applications were rejected in 2019-20 compared to one rejection in 2018-19. A review of publically available information suggests that these rejections were all related to proposed Chinese investments into Australia; two in the mineral exploration and development sector, and the other in relation to the proposed acquisition of an Australian dairy and beverages company.

No exemption certificate applications were declined in 2019-20, nor were any exemption certificates revoked.

FIRB imposed conditions on approximately 45% of the total number of applications and over 71% of the total value of approvals, representing a 11% decrease of the total number of applications and a 25% decrease of the total value from 2018-19 levels.

In 2019-20, the median processing time for foreign investment applications was 48 days (up from 41 days in 2018-19), an increase likely contributed to by the introduction of the zero dollar threshold on 29 March 2020 as well as greater scrutiny being applied by FIRB on FIRB applications more generally.

Impact of COVID-19

In response to the impacts of COVID-19 on the global economy and business landscape, the Treasurer implemented temporary changes to Australia's foreign investment review framework on 29 March 2020.

These temporary changes reduced the monetary screening thresholds which trigger FIRB approval under the FATA to \$0. In effect, this required all foreign investments (other than those exempt under FATA), regardless of the value or the nature of the investor to seek FIRB approval. This was a major shift to the existing FIRB regime, which normally applies monetary screening thresholds (up to \$1,192 million) and other tests to determine whether a particular investment by a foreign person requires FIRB approval.

The Federal Government reasoned the measures as an avenue to protect 'national interest' by preventing foreign investment into distressed assets in critical sectors, without any governmental oversight. The underlying rationale of the changes was to implement monetary screening for transactions of normally viable businesses, distressed by the pandemic, which would otherwise fall below the screening thresholds.

The temporary changes were removed on 1 January 2021 at which time the usual monetary screening thresholds were reinstated.

Stepped up focus on compliance and enforcement

Compliance and enforcement continues to be a clear focus of both the Treasury and the Australian Tax Office (ATO) in recent years, and was also noted as a key agenda item in 2019-20. The compliance approach of the Treasury and the ATO adopts a risk-based approach, which encompasses education and a compliance assurance program.

In line with the significant announced regulatory changes for Australia's foreign investment regime (see below), the Treasury developed an education campaign for foreign investors and their advisers to ensure compliance with the changes from 1 January 2021.

To address compliance issues in relation to foreign investments, the Treasury has developed a compliance assurance program which empowers the Treasury to conduct compliance audits and reviews. In 2019-20, four audits were completed, with one audit revealing an instance of partial-compliance amongst investors. The Report also highlights that the Treasury received 24 reports of potential non-compliance.

Recent regulatory developments

Significant amendments to Australia's foreign investment regime commenced on 1 January 2021.

The amendments to the FATA provide FIRB with enhanced powers to scrutinise foreign investments that may impact Australia's national security.

Under the new "national security test":

- proposed investments concerning a "national security business" or "national security land" are subject to mandatory notification to FIRB;
- investments not notified to FIRB may be "called in" for review by the Treasurer on national security grounds; and
- in exceptional circumstances, the Treasurer may exercise "last resort" powers to impose conditions, vary existing conditions, or require divestment of approved investments where national security risks emerge.

For our detailed analysis of the recent FIRB reforms please refer to our separate [article](#) ("Major Foreign Investment Reforms In Australia – What You Need To Know").

Conclusion and key takeaways for investors

The Report provides useful insights into recent foreign investment trends within Australia. Key takeaways for foreign investors who require FIRB approval are:

- engage with FIRB early, particularly where the proposed acquisition is of a sensitive asset or critical infrastructure;
- whether a foreign investment will protect and support Australian businesses and jobs will be a key consideration for FIRB in assessing an application;
- be aware of the Treasurer's "call in" and "last resort" powers that came into effect on 1 January 2021; and
- put systems in place to ensure ongoing compliance with conditions imposed by FIRB.

Given the significant reforms to the FIRB regime on 1 January 2021, it will be interesting to review the data in FIRB's next annual report.

More information

For more information or assistance with your foreign investment queries, please contact Matthew FitzGerald at matthew.fitzgerald@hsf.com

FIRB – a strong compliance focus and practical tips for investors



This article was written by

Malika Chandrasegaran,
Partner, Sydney

Ilana Gottlieb,
Solicitor, Sydney

A shift in philosophy

On 1 January 2021 the Federal Government introduced a suite of changes to the *Foreign Acquisitions and Takeovers Act 1975* (the **Act**). These changes included reforms to the enforcement mechanisms of the Foreign Investment Review Board (**FIRB**), signalling a shift in philosophy regarding the powers of FIRB and its role as an Australian regulator.

FIRB's new enforcement mechanisms were framed by the Government as a centrepiece to what was described as the "most significant reform" to the Act in nearly 50 years. The Government has stressed that ensuring compliance with the foreign investment framework is crucial to the credibility and effective functioning of the regime. The reforms bring FIRB more in-step with the ACCC and ASIC who historically had greater compliance powers.

We recap below the key changes and also set out some practical tips for foreign investors to ensure compliance with the complex foreign investment regime.

What are the new compliance mechanisms?

The revised Act grants FIRB a significant range of new compliance mechanisms, including the ability to:

- issue infringement notices for all breaches relating to foreign investments;
- utilise monitoring and investigative powers, including access to premises with consent or by warrant;
- accept enforceable undertakings relating to compliance;
- give directions to prevent or address breaches of compliance conditions;
- revoke decisions to approve applications where false or misleading information was given by the applicant; and
- require applicants to notify FIRB where they take the actions specified under a no objection notification or exemption certificates.

Additionally, civil and criminal penalties for breach of the Act have been increased to "ensure appropriate deterrence is achieved".

What can foreign investors do?

The foreign investment regime can be complex and we have set out below some tips for foreign investors who are seeking to navigate foreign investment in Australia under the new regime.

Audit recently completed transactions and make retrospective applications if required

Given recent changes in the regime, and also in light of the zero dollar thresholds that applied in 2020, we recommend that foreign investors conduct audits of recently completed transactions to evaluate whether an action required notification and approval from FIRB. We can also assist with this process.

If it is discovered that a previous transaction required FIRB approval, we recommend that a "retrospective application" be made. In our experience, FIRB has been willing to provide retrospective approval in situations where there has been a genuine oversight, the acquisition is non-sensitive and does not raise any national interest concerns and where an investor has proactively identified a breach.

For example, we have seen this come up in the context of large global transactions with a small Australian component (where due to the investor technically being classified as a foreign government investor or other circumstances, the action required notification under the Australian foreign investment regime). In granting retrospective approval, FIRB will typically impose conditions requiring an investor to implement processes to ensure compliance with the Act.



Implement general protocols for compliance

For foreign investors who make regular investments in Australia, it may be useful to put in place protocols that can guide those within the organisations who are assessing and negotiating opportunities that relate to foreign investment in Australia.

While these protocols will be specific to the context of each investor, in our experience, the following can assist in seeking to ensure compliance:

- nominate individuals who will be responsible for general FIRB compliance: these individuals may be required to assess whether a proposed action is significant and/or notifiable (or liaise with external advisers to make this assessment), field questions from other employees in relation to FIRB and be responsible for maintaining a database of FIRB conditions and ensuring compliance by the organisation with those conditions (see further below);
- have a standard set of questions to pose to individuals internally assessing acquisition or investment opportunities that have a connection to Australia (or to pose to a third party who is bring the opportunity to the investor);

- specify timelines for action: as many foreign investors would be aware, liaising with FIRB can take a few months and it is best to plan for this early in the piece. We recommend making an assessment very early in the process of considering a transaction to seek to ensure that any approval can be obtained within the broader transaction timetable.

Create a database of conditions

Investors may have multiple actions that are subject to FIRB conditions and multiple individuals whose work relates to these conditions. We therefore recommend that investors who make regular investments in Australia create a central database of FIRB conditions that have been imposed on that investor, that can be easily sent to or accessed by relevant individuals in the organisation. The database may specify the following:

- the particulars of each condition, including what actions the conditions apply to and relevant details on timing;
- processes and steps for compliance with each set of conditions; and
- individuals to contact in relation to the conditions.

Educate and train

It is important that senior management and legal personnel have an understanding of the Australian foreign investment regime and requirements for compliance. Our team can assist in delivering training sessions on the general application of and recent changes to the foreign investment regime.

Where to from here?

Given the Government's focus on national security and regulating foreign investment to ensure it is not contrary to the national interest, Australia's foreign investment regime (like many other foreign investment regimes) is not likely to become any less complex and there will be a continued focus on ensuring compliance. Indeed, it is likely that more transactions will come within the ambit of the regime, for example with the new proposed changes to broaden the scope of critical infrastructure.

Accordingly, it will remain important to seek advice early on proposed investments that touch Australia and to put in place processes to ensure compliance. Of course, please do contact us if we can assist in any way.

FIRB – approval streamlined for funds with foreign government investors



This article was written by¹

Melissa Swain-Tonkin,
Partner, Brisbane

Phillip Smith,
Senior Associate, Brisbane

In brief

- Foreign Investment Review Board (FIRB) monetary screening thresholds have been relaxed for investment funds that are more than 40% owned by passive, foreign government investors (FGIs).
- Eligible funds will now face the same monetary screening thresholds as 'foreign persons' – not the \$0 thresholds applicable to FGIs.
- The reforms make it **less likely** that private equity firms, pension funds and other mutual funds with FGIs will require FIRB approval before undertaking non-sensitive and lower value acquisitions of Australian assets.

The beginning of 2021 saw the commencement of sweeping reforms to Australia's foreign investment framework. Six months into the new regime, we are taking a closer look at the practical implications of the reforms for foreign investors in Australia. In this article, we examine how the reforms have streamlined FIRB approval for overseas funds whose members include substantial FGIs with no control over individual investment decisions.

Eligible funds no longer 'FGI'

Corporations, trustees of unit trust or general partners of an unincorporated limited partnership that operate a scheme and meet the following conditions **will not** be FGIs under the FIRB regime:

- foreign governments or FGIs collectively own a 40% or more interest in the relevant entity (but no more than 20% from any single foreign government);
- members of the scheme make contributions in return for acquiring rights to benefits produced by the scheme;
- contributions to the scheme are pooled to produce financial benefits or rights or interests in property for the members; and
- no individual member is able to influence any individual investment decisions or the management of any individual investments of the scheme.

Significantly, this means that funds which satisfy this exemption **will not face the \$0 monetary screening thresholds** applicable to FGIs, which effectively made FIRB approval mandatory for all acquisitions.

The explanatory statement notes the criteria for relief is aimed at 'reflecting the broad range of structures, contributions, and

investments that are possible for an investment fund.' In practice, a wide range of foreign funds will benefit, including:

- private equity funds;
- venture capital funds;
- managed investment companies listed on foreign stock exchanges;
- hedge funds; and
- mutual funds.

A large number of these funds were previously classified as FGIs because their investors included FGIs. That said, given that 'FGIs' include foreign governments, agencies, public pension funds, sovereign wealth funds and public university endowments), it can still be relatively easy to trigger the 20% from any one government threshold. In addition, entities directly controlled by foreign governments, such as sovereign wealth funds, and state-owned enterprises, will continue to be treated as FGIs.

How 'passive' do a fund's FGIs have to be?

Generally, investment funds can still benefit from the reforms whilst allowing FGIs to participate in their broad investment strategy and management. The key is that FGIs are

1. This article was also written by John Slater (Solicitor, Brisbane).

not able to influence *individual* investment decisions. To be sure, the line between influencing a scheme's overall strategy and individual investment decisions may be finely balanced and will depend on all the relevant circumstances at hand. The explanatory statement usefully provides the following guidance on how an FGI's involvement can impact a fund's classification when seeking FIRB approval:

- the FGI **must not**:
 - individually be able to authorise the purchase or sale of particular shares or property; or
 - be able to require the fund to exercise voting rights in respect of an individual investment in a particular way.
- the FGI **may**:
 - have representatives on advisory committees, which are not considered to be able to influence individual investment decisions solely by virtue of this role; or
 - require the fund to divest from a particular sector, or to only make investments that meet ethical investing criteria (provided the other criteria are met) because such influence is not influencing individual investment decisions.

Will funds that qualify still require FIRB approval to transact in Australia?

Possibly – depending on the size and nature of the proposed acquisition. Funds which satisfy the exemption will generally still be

classified as 'foreign persons' under the FIRB regime. In this instance, FIRB's standard monetary screening thresholds will apply.

It should also be noted that acquisitions may still be 'significant actions' or 'reviewable national security actions'. In the latter case, the Treasurer may still exercise the 'call in' power to review such transactions, which may result in the imposition of conditions, prohibition of the acquisition or even ultimately requiring divestment of the relevant asset.

Like all foreign persons, eligible funds will still face \$0 monetary screening thresholds for acquisitions in national security land, residential land, vacant commercial land, national security businesses and Australian media businesses.

What about funds that don't qualify?

Investment funds that continue to be classified as FGIs may still apply for an exemption certificate to avoid having to seek upfront FIRB approval for each of their individual acquisitions. That said, exemption certificates are unlikely to be available for acquisitions that are high-value or sensitive in nature.

FIRB's Guidance Note advises that applications for exemption certificates are considered on a case-by-case basis and may be granted where:

- the proposed acquisitions are capable of being assessed against the national interest test at the time of application

(which will likely necessitate a higher level of certainty about the nature of the acquisitions); and/or

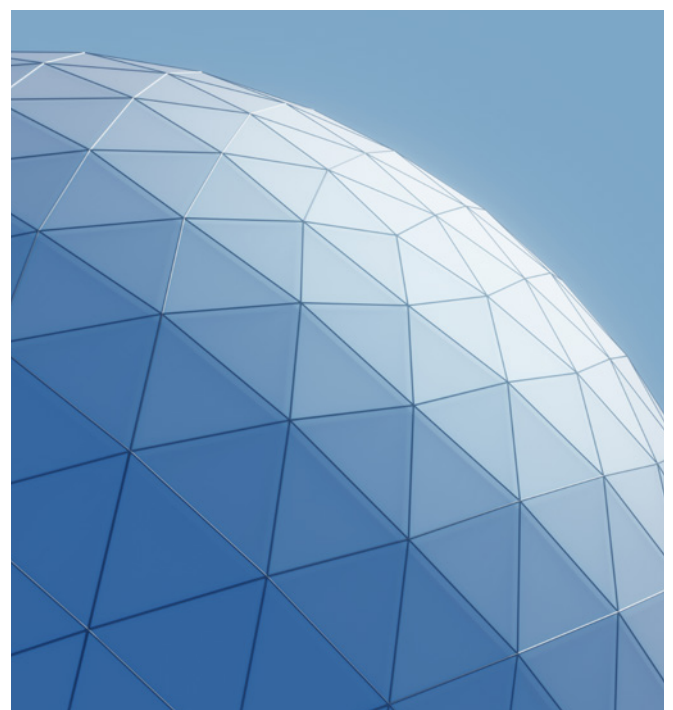
- the investor and investment is assessed to be sufficiently low risk; and/or
- the proposed target company, business, industry, sub-sector or sector typically does not raise national interest issues.

Eligible funds will also have the benefit of the 'de minimis' exemption for offshore transactions as this exemption has now started to operate as normal following the removal of general \$0 thresholds.

Bright future for foreign investment in Australia

Elevated scrutiny of national security considerations in foreign investment is a key focus of Australia's new foreign investment regime. However, the measures discussed in this article are one important way that the recent reforms have made it easier for institutional investors to transact in Australia.

The FIRB approval process now draws a pragmatic distinction between acquisitions by state-controlled entities and foreign governments passively acquiring a stake in Australian assets through independent investment funds. This has better attuned Australia's foreign investment regime to the significant role that pension funds and other government-related investors now play in international capital markets. In our view, it is a sensible reform that enhances Australia's desirability as a destination for foreign investment by investment funds.



FIRB's statutory decision period



This article was written by

Matthew FitzGerald,
Partner, Brisbane

Crusoe Flynn-Pittar,
Solicitor, Brisbane

Overview

The FIRB regime has been significantly overhauled by the reforms taking effect from 1 January 2021 (for an overview of the main changes, see our [separate article \("major foreign investment reforms in Australia - what you need to know"\)](#)). One aspect of these reforms has been the addition of a power for the Treasurer to unilaterally extend the statutory decision period. Although the addition of this power removes some of the control that FIRB applicants previously enjoyed, we envisage that it is unlikely to have a material impact on FIRB processing times in practice.

Application process and extending the statutory timeline

When a FIRB application is lodged, the FIRB applicant is issued with payment details for the relevant FIRB application fee. Once the FIRB application fee is paid, FIRB will then have to consider the relevant FIRB application within the statutory decision period of 30 days unless extended (the **Statutory Period**). Importantly, the clock will only start on the Statutory Period once the FIRB application fee has been paid. As a result, FIRB applicants must ensure that they pay the FIRB application fee as promptly as possible, particularly where the relevant FIRB approval is required within a tight timeframe.

Extending the Statutory Period prior to the reform

Prior to the recent FIRB reforms taking effect, the ability to extend the Statutory Period rested with the FIRB applicant. In these circumstances, FIRB could only extend the Statutory Period by seeking to do so through a request from the FIRB applicant. In practice, however, if FIRB was not going to reach a decision in time they would contact the FIRB applicant and ask that the applicant seek an extension of the Statutory Period. Although this was technically a 'request', if the applicant did not seek the extension they would run the risk of FIRB making an interim order which would prohibit the relevant action from being taken and make the application public, whilst the application was further considered by FIRB. As a result, in practice, FIRB's request to a FIRB applicant to seek an extension was almost always agreed to by the FIRB applicant.

Impact of COVID-19 on the FIRB decision timelines

During the COVID-19 period, there were stricter rules introduced by the Federal Government on foreign direct investment which meant that a nil monetary threshold applied for assessing whether FIRB approval was required. The Statutory Period was also increased from 30 days to up to 6 months.

During this time, FIRB was prioritising urgent FIRB applications which could demonstrate a benefit to the Australian economy or which would have significant solvency consequences if FIRB approval was not obtained in a timely manner. These factors combined to create the potential for significant delays in FIRB applications which did not fall into these categories. This created particular angst for those foreign investors that were accustomed to receiving a prompt decision from FIRB (although this was not an issue unique to Australia and was a common issue experienced in other jurisdictions when considering foreign direct investment).

Treasurer's new unilateral power to extend FIRB application timeline

The new suite of reforms to the FIRB regime include the addition of a right for the Treasurer to unilaterally extend the Statutory Period for a further period of up to 90 days by notice to the FIRB applicant. The notice must include reasons for the decision to extend but the Treasurer is not required to hear from the FIRB applicant before making the decision.

This change gives the Treasurer a broad right to extend the period which, previously, could only be exercised on request of the

FIRB applicant. However, it is our expectation that this new right is unlikely to have a material impact on FIRB application processing times in practice. This is because the Australian Government welcomes foreign direct investment and in order to facilitate such investment, FIRB needs to efficiently and effectively screen FIRB applications in a timely manner. This means that FIRB will need to continue to work diligently to assess FIRB applications within the Statutory Period without routinely seeking extensions.

Areas of current focus

Consistent with the emphasis on national security underlined in the recent FIRB reforms (see our [separate article \("major foreign investment reforms in Australia – what you need to know"\)](#)), FIRB has shown an increased focus on national security in assessing FIRB applications. In particular, FIRB has continued its focus on the control and location of data associated with the target business and whether there will be an 'offshoring' of data as a result of the proposed transaction. This can manifest itself in detailed lines of inquiry from FIRB on these issues and ultimately a request for conditions to be placed around the location, storage and control of data as a condition to the proposed FIRB approval.

As part of FIRB's consideration of all FIRB applications, it will consult with the other interested government agencies and will act as the conduit for any queries the other agencies may have in respect of the application. Prompt responses to these queries will be pivotal to ensuring a timely decision is reached by FIRB. The two most common consult partners of FIRB are the

Australian Taxation Office (**ATO**) and the Australian Competition and Consumer Commission (**ACCC**).

If the proposed acquisition involves a tax-efficient leveraged acquisition structure, the FIRB applicant can also expect significant focus from the ATO as part of the FIRB review process. This will likely involve significant tax specific inquiries and the imposition of standard tax conditions as part the FIRB approval provided. Similarly, if the proposed acquisition has the potential to give rise to any competition law issues, the ACCC will likely undertake a detailed analysis of the proposed acquisition as one of FIRB's consult partners. Any such investigation by the ACCC will likely give rise to a delay to the 30 day decision timeline if there are substantive competition issues identified by the ACCC.

Optimising approval timelines

With the thresholds having been reinstated, we are once again experiencing more streamlined approval timelines, with most applications receiving a decision within 30 to 60 days – particularly for routine FIRB applications. In achieving this timeframe, submitting a comprehensive and well-structured FIRB application and promptly responding to any queries from FIRB is critical.

Commercial deadlines

In circumstances where there is a bona fide commercial deadline for a proposed transaction which has been communicated to FIRB, this timeline may be further compressed. To that end, we have seen FIRB applications processed in as little as

2-3 weeks where there was a commercial deadline and if the commercial deadline was not met there would be significant adverse consequences to the business (eg insolvency or the loss of a significant commercial opportunity).

Proactive engagement with FIRB on proposed conditions

It is also important for FIRB applicants to engage with FIRB early in relation to any potential conditions that may be attached to a FIRB approval. This may include the FIRB applicant indicating upfront what conditions, if any, that it would be willing to accept, in order to assist with a streamlined decision. One method of achieving this would be to include the proposed wording that the FIRB applicant is seeking to be included in the no objection letter including the associated conditions that the FIRB applicant is willing to accept (eg FIRB's standard tax conditions).

Conversely, where a FIRB applicant is not upfront about certain aspects of the proposed transaction or ownership structure sitting behind the relevant acquisition vehicle (eg due to confidentiality concerns regarding investors involved in the acquisition), a more protracted timeline may eventuate as FIRB and its consult partners seek to understand the underlying transaction and ownership structure. FIRB applicants should accordingly seek to be as fulsome as possible in their FIRB applications, particularly in circumstances where there is a pressing commercial deadline driving the timeline for a FIRB decision.





For a full list of our global offices visit [HERBERTSMITHFREEHILLS.COM](https://www.herbertsmithfreehills.com)
