

## ***COVID-19: FIRB provides guidance on how the temporary measures will affect lease transactions***

Source: [Foreign Investment Review Board](#)

Date: 30 April 2020

Further to our [update](#) on 27 April 2020, the Foreign Investment Review Board (**FIRB**) has provided the following guidance in its [guidance note 53](#) (last updated on 24 April 2020) regarding the acquisition of an interest in Australian land by a foreign person during the COVID-19 crisis (i.e. while the *Foreign Acquisitions and Takeovers Amendment (Threshold Test) Regulations 2020* (NSW) remains in effect):

### **Land acquisitions generally**

The acquisition of an interest in Australian land (see section 12 of the *Foreign Acquisitions and Takeovers Act 1975* (Cth)(**Act**)) by a foreign person under the Act requires FIRB approval, regardless of:

- the value of the land;
- the type of land (agricultural/commercial/residential/mining or production); or
- if the land is vacant land or developed land.

However, the above distinctions still remain relevant for FIRB when considering the types of conditions that may be imposed.

### **Leases**

The acquisition of a leasehold interest in Australian land by a foreign person under the Act requires FIRB approval if the term of the lease is reasonably likely to exceed 5 years. The “term” of the lease includes any right or option to extend or renew the lease after the expiration of the initial term (if that right or option was included as part of the initial grant of the lease). See section 12(1)(c) of the Act.

### **Extending leases under existing options to renew**

It is likely that the simple extension of a lease to a foreign person under the Act under an existing option to renew would not, of itself, require FIRB approval. See section 15 of the Act.

### **Re-negotiated leases**

Section 25 of the Act provides that a foreign person under the Act is deemed to have entered into a new agreement and therefore require FIRB approval if an existing agreement (to acquire an interest in Australian land) is “materially” altered or varied.

- ***Rent adjustment – not a material alteration – FIRB approval is not required***

If an adjustment is made to lower, defer, or otherwise delay rent payments under an existing lease, particularly if it is made as a consequence of the COVID-19 pandemic and is temporary in nature, it would not, of itself, be considered to be a “material” alteration to the lease and would therefore not require FIRB approval.

- ***Where a change to the term of a lease is a material alteration – FIRB approval is required***

If a foreign person (tenant) renegotiates a lease and it does not result in a new lease being entered into but a change to the term amounts to a “material” alteration to the lease, the for-

foreign person will be deemed to have entered into a new agreement and will require FIRB approval if the term of the lease (including any extensions or renewals) is reasonably likely to exceed 5 years. In determining if this is the case, FIRB will take the remaining term of the lease into account.

- ***Where a change to the term of a lease results in a new lease – FIRB approval is required***

If the term of a lease is altered or varied so that it effectively results in the surrender of the initial lease and the grant of a new lease, the foreign person (tenant) will be regarded as having entered into a new agreement to acquire an interest in Australian land for the purposes of section 15 of the Act and FIRB approval will be required if the term of the new lease (including any extensions or renewals) is reasonably likely to exceed 5 years.

### **Agreements for lease**

Entering into an agreement for lease and entering into a lease are generally considered to be two separate actions for the purposes of the Act. Accordingly, a foreign person under the Act with an existing FIRB approval for an agreement for lease may need to apply for a separate FIRB approval for the lease (if term of the lease (including any extensions or renewals) is reasonably likely to exceed 5 years), unless the FIRB approval deals with both the agreement for lease and the lease and both are entered into during the required period specified in the FIRB approval.

### **Timing of approvals**

FIRB recognises that there will be a large number of routine lease transactions which will now require FIRB approval during the COVID-19 crisis; however, FIRB advises that it will work with applicants so that leases can be renegotiated to enable businesses to remain open.

For further information, including working examples of the above situations, see the [guidance note](#) and the [Q&A page](#) on the FIRB website.