GUIDANCE NOTE 53

TEMPORARY MEASURES IN RESPONSE TO THE CORONAVIRUS

Last updated: 4 September 2020

On 29 March 2020, the Treasurer announced that due to the impacts of the coronavirus outbreak, all monetary screening thresholds will be temporarily reduced to $0.

The *Foreign Acquisitions and Takeovers Amendment (Threshold Test) Regulations 2020* gave effect to this temporary change. These Regulations amended the *Foreign Acquisitions and Takeovers Regulation 2015* (the Regulation) to prescribe nil monetary value thresholds for particular significant actions and notifiable actions. This means that a greater number of investments by foreign persons in Australia are required to be notified to the Treasurer for review to ensure they are not contrary to the national interest.

This Guidance Note supplements the Q&A and sets out examples of how the temporary changes could apply for different acquisitions. The Guidance Note is not exhaustive and does not cover all types of actions that may be subject to foreign investment screening. Where there is an inconsistency between this Guidance Note and the other Guidance Notes, the information in this Guidance Note takes precedence at this time.

APPLICATION REVIEW PROCESS

To ensure sufficient time for screening applications, the FIRB will work with existing and new applicants to extend statutory timeframes for reviewing applications from 30 days to up to six months. In doing so, the Government will continue to prioritise urgent applications for investments that protect and support Australian businesses and Australian jobs.

Administrative measures are being introduced to ensure the great majority of applications are processed much faster. To deal with the expected substantial increase in applications, Treasury and the ATO are triaging cases using a risk-based approach and have brought on additional staff to manage the workload. This will help manage both urgent cases that support Australian businesses and routine applications. The Government is committed to meeting commercial deadlines wherever possible during these times of economic crisis.

Priority will be given to processing applications for investments that protect and support Australian businesses and Australian jobs. In particular, the potential impact on the community and employment will be considered when screening applications. Equally, more routine transactions, such as the entering into a new lease agreement for developed commercial land will be appropriately prioritised given the potential link to protecting and supporting Australian businesses and Australian jobs.

Applicants are encouraged to provide relevant information in their cover letter which specifically addresses their claim for prioritisation.

Timing of application

Applicants are encouraged to contact the FIRB early in the process of developing an application.

While it is ultimately up to the applicants about how early in the transaction process they should submit their application to the FIRB, in general, the earlier the application is submitted (along with payment of the correct fee), the earlier the screening process will commence. Once a no-objection notification is given to a foreign person, the person generally has 12 months to take the action.

Factors that may delay the application process include where applicants pay the incorrect fee or do not include sufficient information about the proposed action in their application.

The statutory timeframe for making a decision will not start until the correct fee has been paid. Applicants should accurately describe their proposed action in their application or notice to determine the expected fee at the time of lodgement.

Applicants should ensure their application includes sufficient information about details of their proposed action to avoid unnecessary delay in the review process. For a list of documents and information required when submitting an application, please consult the Application Checklist.

FEES

Fees will be payable for all investment that is now required to be screened (other than where the fee payable is prescribed as nil).

However, as announced on the FIRB website on 23 March 2020, the Treasurer will consider refunding a fee paid where the measures being implemented globally, and in Australia by governments, businesses and individuals in relation to the coronavirus pandemic have resulted in delays to, or deferrals of, investment decisions that are currently the subject of a foreign investment application, and the applicant wishes to withdraw that application. This is a temporary exception to the advice provided in Guidance Note 29 and Guidance Note 30 concerning fee refunds in the event of a withdrawal. Applicants should clearly state the reasons for their remittance request at the time of withdrawal. With reference to the national interest, the FIRB will retain its discretion not to refund fees where the decision to withdraw is not clearly linked to the above factors.

Fees for non-vacant commercial land

A lower fee applies for acquisitions of interests in non-vacant commercial land with consideration of $55 million or less by foreign government investors. These acquisitions are subject to a $2,100 fee. Refer to section 17 of the *Foreign Acquisitions and Takeovers Fees Imposition Regulation 2015* (the Fees Regulation).

Prior to the $0 screening threshold changes, only foreign government investors were screened for low-value non-vacant commercial land. However, as acquisitions for non-vacant commercial land are now subject to a $0 threshold, a differentiated fee outcome for this type of acquisition between $10 million and $55 million exists. Namely, foreign government investors will be required to pay a fee of $2,100, while foreign non-government investors will be required to pay a fee of $26,700.

To put foreign non-government investors in line with the concessional fee treatment of foreign government investors, fee waivers will be considered and processed on a per-application basis, so that foreign non-government investors will ultimately pay the same fee as foreign government investors for acquisitions of interests in non-vacant commercial land of up to $55 million.

We recommend that applicants for non-vacant commercial land acquisitions between $10 million and $55 million pay the concessional $2000 fee upfront (using the invoice details received when application is lodged) and apply for a partial fee waiver. Applicants can request the concessional fee either in the cover letter for their application or by replying to the auto-generated email from FIRB Applications (received when application is lodged). Applicants seeking a partial fee waiver need to be aware that the 30 day statutory timeframe does not commence until the correct fee is paid and a decision has been taken on the request.

The effect of this Guidance Note is as follows:

Foreign non-government investors proposing to acquire non-vacant commercial land where the consideration is…	**Payable fee at time of application**	**Effect of Guidance Note 53**
$10 million or less	$2,100	Unaffected
Above $10 million and not more than $55 million	$26,700	Fee waivers will be considered and processed on a per-application so that the foreign non-government investor will ultimately pay the same fee as foreign government investors.
Above $55 million and not more than $1 billion	$26,700	Unaffected
Above $1 billion	$107,100	Unaffected

If an interest is being acquired in a land entity which holds non-vacant commercial land, the standard fee for an interest in an Australian entity action will continue to apply (if applicable).

The lower fee rule under section 17 of the Fees Regulation will continue to be unavailable for internal reorganisations.

For more information on fees for non-vacant commercial land, refer to Guidance Note 30.

CONDITIONS

The Government and the FIRB acknowledge the uncertainty surrounding the duration of economic impacts of the pandemic, even after the health impacts have receded.

The Treasurer and his delegates will continue to review foreign investment proposals against the national interest on a case-by-case basis. Where appropriate, conditions will be applied proportionately to address identified risks on a non-discriminatory basis.

Conditions imposed on investment that is now required to be screened under the temporary changes will remain for as long as required to protect the national interest, and as such, may remain in place including after the expiry of the temporary measures.

The Government's administrative approach to enforcing conditions and/or imposing penalties will recognise the unique and sensitive nature of the crisis.

PRE-EXISTING AGREEMENTS

The changes to the monetary thresholds apply to actions taken after the announcement at 10:30pm AEDT on 29 March 2020 ('the announcement'). However, the changes do not apply to an action taken under an agreement which was entered into by the parties before the announcement, regardless of whether there are unmet conditions or not (and disregarding the application of subsection 15(5) of the *Foreign Acquisitions and Takeovers Act 1975* (the FATA)).

It is possible for an agreement to be reached prior to the formation of a contract, though the question ultimately depends on the facts of each case. In determining whether an agreement has been reached before the announcement, the agreement will need to be one where the negotiations have been completed and the parties have arrived at a mutual understanding of all the essential elements of their bargain. Therefore, the concept of an agreement does not cover any preliminary stage in negotiations or other circumstances short of a mutual understanding of all the essential elements of a bargain. As such, entry into a 'heads of agreement', 'letter of intent' or an 'agreement in principle' would normally not constitute an agreement for these purposes, though it is ultimately a question of fact.

PRE-EXISTING OPTIONS

If foreign persons are simply exercising pre-existing options under an agreement entered into prior to 10:30pm AEDT 29 March 2020, it is likely that this would not of itself give rise to any new significant and/or notifiable action. Section 15 of the FATA establishes the rule that, if a person has an option to acquire an interest in a security, asset, trust or land, then they are taken to have acquired the interest at the time they acquire the option (whether or not they subsequently exercise that option).

EXISTING NO-OBJECTION NOTIFICATIONS

Where a foreign person, prior to 10:30pm AEDT 29 March 2020, has received a no-objection notification with respect to a notifiable and/or significant action, they do not have to apply to FIRB again when taking the proposed action or executing the agreement with respect to that action, as long as the action is taken within the timeframe specified in the no-objection notification.

However, to the extent that the foreign person seeks to take an action that is not covered under the no-objection notification, and the action is notifiable by virtue of the new $0 screening threshold, the foreign person would need to provide notice of that action to FIRB.

EXISTING EXEMPTION CERTIFICATES

Exemption certificates granted prior to 10:30pm AEDT 29 March 2020 are still valid providing the conditions (if any) specified in the certificate continue to be met. The temporary changes do not revoke or amend any certificate. Foreign persons are still able to apply for an exemption certificate, which will be granted if the proposed actions by the foreign person are not contrary to the national interest.

Certain exemption certificates granted prior to 10:30pm AEDT 29 March 2020 contain conditions which exclude the acquisition of particular interests which were specified in subsection 52(6) of the Regulation (for instance, interests in certain sensitive types of land). Section 52(6) and associated provisions have now been repealed. However, transitional measures have been implemented so that subsection 52(6) (and associated provisions)

continue to apply in relation to an exemption certificate granted prior to 10:30pm AEDT 29 March 2020 as if the repeal had not happened. This means that acquisitions of those relevant interests will continue to not be covered by the exemption certificate and separate notification may be required.

As a result of the temporary changes, certain acquisitions may now potentially give rise to significant and/or notifiable actions where this would not have previously been the case. Such acquisitions may be covered by exemption certificates that are already held by a foreign investor and, where this occurs, those acquisitions will be taken into account in determining whether the exemption certificate holder has exceeded the financial limit specified in their exemption certificate.

Example 1

Jack Pty Ltd was issued an exemption certificate on 3 February 2020 which allows it to acquire up to $400 million in assets of Australian businesses and securities in entities over the next 12 months. As there is now a nil threshold value for all acquisitions of interests in assets of Australian businesses and interests in securities in entities, all acquisitions (which meet the terms of the exemption certificate) will be taken into account in determining whether Jack Pty Ltd has exceeded the $400 million financial limit in its exemption certificate.

EXEMPTION CERTIFICATES ISSUED AFTER 29 MARCH 2020

New exemption certificates (ECs) issued after 29 March 2020 are likely to include conditions which prevent the exemption certificate holder from being able to acquire interests in sensitive developed commercial land under the certificate. Therefore, acquisitions of those relevant interests may require separate notification to FIRB (similar to the position with respect to exemption certificates granted before 29 March 2020).

STREAMLINED EXEMPTION CERTIFICATES

In addition to applying for a new standard EC, during the period that the temporary changes are in place, investors can apply for three new types of streamlined EC:

1. Low-risk business ECs, for investors (including private equity and venture capital fund managers) acquiring small entities in non-sensitive sectors that fall below the old monetary thresholds.

2. Low-risk commercial land ECs, for investors acquiring small interests in developed commercial land, or businesses required to renew a number of commercial leases; and

3. Restoration variations to existing ECs, that will amend the financial limit of existing business and land ECs to ensure that foreign investors can use existing certificates to pursue their original, approved, investment strategies.

For further information and eligibility criteria, please see Table A below.

Standard ECs can take time to assess because of the need to ensure that sensitive businesses or land will not be acquired under the EC without sufficient scrutiny. Treasury expects to be able to assess the new streamlined ECs relatively quickly as fixed eligibility criteria reduces the risk that national interest concerns may arise with respect to the businesses or assets being acquired.

Any national interest issues identified as part of the streamlined assessment could result in delays. In these cases, applicants would have the choice to continue with the EC application (and have it assessed as a standard EC), or withdraw the application and receive a refund of the fee.

Where an applicant has previously submitted a standard EC application which is still being processed, they may request for that application to be processed as a streamlined EC provided the original application satisfies the criteria for any of the streamlined ECs. Such requests will be considered on a case by case basis.

Fees for low-risk streamlined exemption certificates

Consistent with the fee waiver approach for acquisitions of interests in non-vacant commercial land of up to $55 million, for low-risk developed commercial land streamlined ECs fee waivers will be considered and processed on a per-application basis so that the fee for these ECs is $10,600.

We recommend that applicants for the new streamlined EC pay the concessional $10,600 fee upfront (using the invoice details received when application is lodged) and apply for a partial fee waiver. Applicants can request the concessional fee either in the cover letter for their application or by replying to the auto-generated email from FIRB Applications (received when application is lodged). Applicants seeking a partial fee waiver need to be aware that the 30 day statutory timeframe does not commence until the correct fee is paid and a decision has been taken on the request.

For the low-risk business streamlined EC and the low-risk commercial land streamlined ECs, the standard rule applies whereby a fee waiver applies if a person applies for a second EC separately but within 14 days of making the first application (see, for instance, Guidance Note 26 – Exemption certificates (business)).

Where an existing applicant for a standard EC successfully applies for their application to be processed as a streamlined low-risk commercial land EC, a fee waiver will be considered and processed on a per-application basis so that the fee for these ECs is $10,600.

Table A - Streamlined exemption certificates (EC) eligibility criteria

EC type	Low-risk business EC	Low-risk developed commercial land EC	Restoration variation to existing EC
Description and use	• Available to investors acquiring interests in small entities in non-sensitive sectors that fall below old monetary screening thresholds. • Includes recapitalisations and 'top-ups' of already owned (or majority controlled) businesses.	• Available to investors acquiring interests in low-value non-sensitive developed commercial land (or land entities holding such land) or businesses required to renew leases.	• Available to investors with an existing business or land EC to 'restore' the value of the EC given the total consideration may now be used up more quickly counting $0 transactions. • Only applies to acquisitions of types covered already (e.g. types of business/locality limits continue to apply).
Eligibility criteria	• Only for private investors (or investment funds with passive FGIs) that have	• Only for private investors (or investment funds with passive FGIs) that have	• Must hold existing business or land EC. • Consideration limit likely to be reached in less than

	invested in Australia previously*. • Available for investment in non-sensitive sectors only. Investments in sensitive technology, defence, health, critical minerals and critical infrastructure and service providers that have access to critical infrastructure or sensitive data are excluded.	invested in Australia previously*. • Investments in sensitive land (e.g. land leased to Government, land that has bulk data storage or telecommunications facilities or public infrastructure on the land) are excluded.	3 months or has already been reached. • FGIs not eligible.
Limitations	• Individual transactions - $100 million for new investments; $200 million for top-up investments (already control target). • Total consideration limited to $500 million. • EC duration to end of temporary COVID-19 measures.	• Individual transactions – $50 million monetary cap. • Total consideration limited to $200 million. • EC duration to end of temporary COVID-19 measures.	• No change to individual transaction consideration limit. • Additional total consideration limited to $200 million.
Standard conditions	• Standard conditions (scope, permitted purpose, reporting and tax).	• Standard conditions (scope, permitted purpose, reporting and tax). • Sensitive land excluded, except if renewing an existing lease.	• Same as existing EC – scope, permitted purpose, reporting and tax conditions do not change.
Fees (2020-21)	• $36,900	• $36,900#	• $10,600

* If an investment fund, it is the fund manager (general partner) that is relevant for determining whether the applicant has previously invested in Australia, not the fund being used to make the investment.

An '*investment fund with passive FGIs (foreign government investors)*' is a fund in which the general partner of the fund is a private investor and no FGI participating in the fund (e.g. as a limited partner) is able to control or influence the investment and/or operational decisions of the fund, the general partner, or any of the fund's underlying assets. Whether this is the case in a particular application will be determined on the basis of evidence provided during the application process. Each applicant must be able to submit sufficient evidence to demonstrate the complete passivity of any FGI participating in the fund. Passivity may depend on the specific structure of the investment fund. Where the structure of the fund is unclear or any doubt around whether the underlying investors are entirely passive, the application would be carefully considered and processed through the normal arrangements (rather than through the streamlined EC approach).

Consistent with the fee waiver approach for acquisitions of interests in non-vacant commercial land of up to $55 million, fee waivers will be considered and processed on a per-application basis so that the fee for a low-risk commercial land streamlined EC is $10,600.

EXEMPTIONS

Exemptions are detailed in Part 3 of the Regulation. All existing exemptions are still in place and are unaffected by the temporary changes, except for the exemption under subsection 38(5) of the Regulation (relating to acquisition of interests in residential land used for residential care, retirement villages and certain forms of student accommodation), which has now been repealed.

Acquisitions of interests in residential land used for residential care, retirement villages and certain student accommodation

Prior to the $0 screening threshold changes, foreign persons (except foreign government investors) acquiring an interest in an aged care facility, a retirement village and certain student

accommodation were subject to the applicable developed commercial land screening thresholds ($60 million or $275 million). Refer to former subsection 38(5) of the Regulation.

Subsection 38(5) of the Regulation has now been repealed. This means that all foreign persons proposing to acquire such interests are taken to be acquiring residential land (subject to a $0 screening threshold) and must notify the Government to get prior approval, unless the proposal is exempt under subsection 38(6) of the Regulation.

Please use the Australian Taxation Office's foreign investment application form.

For information on the fee applicable, refer to Guidance Note 29.

OFFSHORE ACQUISITIONS

For all foreign persons, acquiring an interest in a foreign corporation is a significant action where the conditions under section 40 of the FATA are met, including the applicable monetary thresholds. Given that all monetary screening thresholds have been temporarily reduced to $0, more low-value offshore transactions are likely to be significant actions under the FATA.

Where parties notify such actions, and where such notifications require urgent handling in order to facilitate a broader offshore transaction, parties should advise the FIRB accordingly. The FIRB is committed to meeting urgent commercial deadlines wherever possible during these times of economic crisis – including in relation to offshore acquisitions.

The $0 screening threshold change has implications for the exemption for foreign government investors acquiring interests in Australian entities as a result of acquiring an interest in securities in a foreign entity – as described by s56(4) of the regulations. As such, any acquisition by a foreign government investor of an interest in securities in a foreign entity which results in them acquiring more than 20 per cent of an Australian entity is now significant, regardless of the value of the Australian entity. If the action is significant (even where it is not submitted to the FIRB for approval), the Treasurer may use powers to impose conditions if the action is considered contrary to the national interest. Where the action is submitted to the FIRB for approval and relates to a non-sensitive Australian entity, FIRB will apply its triaging processes to expedite the application.

LAND ACQUISITIONS

Starting from 10:30pm AEDT 29 March 2020, acquisitions of interests in Australian land by all foreign persons are notifiable and significant actions, regardless of value, type of the land (agricultural, commercial, residential, or mining or production tenement), or whether the land is a vacant land or developed land. These distinctions, however, remain relevant when considering the types of conditions that may be imposed to protect the national interest.

ACQUISITIONS OF CAR PARK INTERESTS IN CONJUNCTION WITH RESIDENTIAL LAND

Some acquisitions of residential land may include developed commercial land such as a car parking space/s, bike locker or storage space which is incidental to the residential dwelling. Such land will not be treated as a separate acquisition of developed commercial land when being purchased by a foreign person where the incidental developed commercial land:

- is being acquired under the same Contract for Sale; and

- makes up a small portion of the total area of land to be acquired.

Proposed acquisitions of interests in car parks, storage spaces or bike lockers that are not being acquired in conjunction with a residential land acquisition under the one contract will be considered to be commercial land with $0 threshold and foreign investment approval will be required prior to acquiring the interest.

LEASES

Acquisitions by foreign persons of leasehold interests in Australian land require foreign investment approval where the term of the lease, or the likely term, is to be more than 5 years. Refer to section 12(1)(c) of the FATA.

The term of the lease would include any right or option to renew the lease after the expiration of the initial term (where that right or option was included as part of the initial grant of the lease). For example, a lease with an initial term of four years with an option to renew for a further two years would require approval. Refer to section 15(1)(b) of the FATA.

In general, foreign persons entering into a lease agreement after 10:30pm AEDT 29 March 2020 (and where the lease tenure is in excess of 5 years) will be subject to a $0 monetary screening threshold, and therefore will need to notify the FIRB.

Where landlords are simply extending leases under existing options to renew, it is likely that this would not, of itself, give rise to any new significant and/or notifiable action under the FATA. Section 15 of the FATA establishes the rule that, if a person has an option to acquire an interest in land, then they are taken to have acquired the interest in land at the time they acquire the option (whether or not they subsequently exercise that option).

The FIRB recognises this means a large number of routine lease transactions will now require approval. Treasury and the ATO will work with applicants to ensure processes are timely and sufficiently certain so that leases can be renegotiated to enable businesses to remain open, including through high-level triaging and applying a risk-based methodology to expedite the processing of non-sensitive applications.

Renewal of leases for non-sensitive developed commercial land

For the renewal or material variation of existing non-sensitive leasehold interests in developed commercial land, where the same acquirer held a substantially similar interest under a lease immediately before 10.30pm on 29 March 2020, the thresholds in Table B below apply from 4 September 2020.

For renewals or material variations of leasehold interests in sensitive developed commercial land, or where there is a change in the lessee, the $0 monetary screening threshold applies.

Recognising this change applies from 4 September, please note the following transitional arrangements:

- Where a foreign person has previously submitted an application that is still being processed, and based on Table B the applicant's proposed action is no longer a significant and notifiable action, the applicant may withdraw the application and request a fee refund.

- Where a foreign person has previously submitted an application that is still being processed, and that application includes some proposed actions which based on Table B are no longer significant and notifiable actions, the applicant should contact their case officer to discuss amendments to the scope of the application.
- Where a foreign person has previously obtained a no objection notification – with or without conditions – in relation to an action but is yet to take the action, and based on Table B the action is no longer a significant and notifiable action, the no objection notification no longer applies and the applicant may take the action without foreign investment approval.
- Where a foreign person has previously obtained a no objection notification that includes conditions, and has already taken the action that is the subject of the no objection notification, but based on Table B the same action would no longer be a significant and notifiable action, the conditions will continue to apply. Should a foreign person wish to seek a variation of those conditions, further guidance is available in GN40.
- Where a foreign person has previously obtained an exemption certificate, and under that exemption certificate has already taken actions that were significant and notifiable actions at the time they were taken, but which based on Table B would no longer be so, those actions will still contribute to the financial limit of the exemption certificate and any conditions attached to those actions under the exemption certificate will continue to apply. Should a foreign person wish to seek a variation of those conditions, further guidance is available in GN40. However, such actions taken from 4 September would not contribute to the financial limit and would not be subject to the exemption certificate conditions.

Table B: Thresholds for the renewal or variation of leases for non-sensitive[2] developed commercial land

For this kind of land	Threshold – more than:
Land that is being acquired by a foreign person who is an agreement country or region investor[1]	$1,192 million
Land that is being acquired by any foreign person other than an agreement country or region investor, or a foreign government investor	$275 million
Land that is being acquired by a foreign government investor	$0

[1] Foreign persons that are agreement country or region investors are those from: the United States of America, New Zealand, Chile, Japan, the Republic of Korea, China, Singapore, Peru, a country (other than Australia) for which the Comprehensive and Progressive Agreement for Trans Pacific Partnership, done at Santiago on 8 March 2018, is in force (CPTPP) (as at 1 January 2020, the CPTPP is in force for: Canada, Japan, Mexico, New Zealand, Singapore and Vietnam), and the region of Hong Kong, China.

[2] Sensitive land is land which, one of more of the following applies at the time the interest in the land is acquired:

(1) the land will be leased to the Commonwealth, a State, a Territory, or a body of these governments, except specific corporate Commonwealth entities (within the meaning of the *Public Governance, Performance and Accountability Act 2013*) other than the Australian Nuclear Science and Technology Organisation, Comcare, the Commonwealth Superannuation Corporation, the Commonwealth Scientific and Industrial Research Organisation and the Reserve Bank of Australia;
(2) the land will be fitted out for a sensitive business or a business of providing storage of bulk data;
(3) the land will be fitted out specifically to store, handle or dispose of biological agents on the List of Security-sensitive Biological Agents (within the meaning of the *National Health Security Act 2007*);
(4) an authorisation under a law of the Commonwealth, a State or a Territory will allow materials that are regulated under that law to be produced or stored on the land;
(5) a mining operation will operate on the land;
(6) a stored communication (as defined in section 5 of the *Telecommunications (Interception and Access) Act 1979*) will be stored on the land;

(7) the failure of part of a network unit (as defined in Part 2 of the *Telecommunications Act 1997*) on the land will affect the provision of telephony or internet services on other land;
(8) servers critical to an authorised deposit taking institution (being a body corporate authorised under section 9(3) of the *Banking Act 1959* to carry on a banking business) or a stock exchange in Australia will be located on the land;
(9) public infrastructure will be located on the land.

Re-negotiated leases

Rental amounts

Where an adjustment is made to lower, defer, or otherwise delay rental payments under an existing lease, particularly where such adjustment is made in relation to the coronavirus crisis and is temporary in nature, then it would not of itself be considered a 'material' variation to the lease agreement for the purposes of section 25 of the FATA (and therefore not give rise to a new significant or notifiable action occurring).

Example 2

Subeta Pty Ltd (Subeta), is a foreign person and operates a business selling clothes at a shop located in a shopping centre in Canberra. Subeta entered into a 6 year lease in 2017 to lease the shop premises from the shopping centre owner. Subeta temporarily closes its shop for a 4 month period during the coronavirus crises and has agreed with the shopping centre owner to vary the lease agreement to provide for a 50 per cent reduction in rental payments over the next 12 month period. This rental reduction will not be regarded as a 'material' variation for the purposes of the FATA and so Subeta will not be required to give notice of any new action under the FATA.

Where a change to the term of a lease is a material alteration

Where a foreign person lessee renegotiates a lease and this does not result in a new lease being entered into, however, a change to the term amounts to a material variation to the lease agreement, that person will be regarded as having entered into an agreement for the purposes of section 25(1) of the FATA. In these circumstances, the lessee will need to consider whether, the term of the new agreement will mean that the lease is reasonably likely (including any extensions or renewals), to exceed 5 years. FIRB considers that the remaining term of the lease will be taken into account in these circumstances.

Example 3

Jenny Sub plc is a foreign person who entered into a 4 year lease in 2019 to operate an electronics retail shop (assume the land falls within one of the circumstances described in Section 52(4)(c) of the *Foreign Acquisitions and Takeovers Regulation 2015* – meaning it cannot be affected by the restoration of monetary thresholds that came into effect on 4 September 2020). In 2020, Jenny Sub plc negotiates with the landlord for a 25 per cent reduction in rent over the next 6 months due to the coronavirus crises and for the lease to be extended by a further 3 years. The terms of the lease means that the alteration of the period specified in the lease is a material variation to the lease and so a new agreement is taken to have been entered into. The new agreement covers the remaining period of the lease (i.e. 3 years plus the additional 3 years). As the new agreement is reasonably likely to exceed 5 years, Jenny Sub plc will be taking a significant and notifiable action under the FATA and will require FIRB approval.

Where a change to the term of a lease results in a new lease

Where the term of a lease is varied and this amounts to the surrender of the initial lease and the grant of a new lease, a foreign investor 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 FATA. In those circumstances, it will be necessary to consider whether the term of the new agreement will mean that the new lease (including any extension or renewal) is reasonably likely, at the time the interest under the lease is acquired, to exceed 5 years.

Example 4

Chris Corporation Pty Ltd (ChrisCorp) is a private foreign person which rents a commercial warehouse in Noosa, Queensland, where it manufactures motorcycles (assume the land falls within one of the circumstances described in Section 52(4)(c) of the *Foreign Acquisitions and Takeovers Regulation 2015* – meaning it cannot be affected by the restoration of monetary thresholds that came into effect on 4 September 2020). It had entered into a 4 year lease with the landlord and that lease was due to shortly expire. ChrisCorp experienced a downturn in its business as a result of the coronavirus and negotiated with the landlord for its lease to be extended by an additional 5 years (with a further 5 year option) and for a 6 month rental holiday to be provided. The initial lease did not provide for any extension or renewal of the term of the lease. Based on the wording of the initial lease and the surrounding circumstances, the extension of initial lease will result in the grant of a new lease and ChrisCorp will be regarded as having entered into a new agreement to acquire an interest in Australian land for the purposes of s 15 of the FATA. As the term of the new lease (together with any extension or renewal) is reasonably likely at the time the interest is acquired to exceed 5 years, ChrisCorp will be taking a significant and notifiable action under the FATA and will require FIRB approval.

Agreement for lease

In law, an 'agreement for lease' (AFL) creates an interest in land that is different to the interest created by a lease. Therefore, entering into an AFL and entering into a lease are generally considered as two separate actions for the purposes of the FATA. As such, if a foreign person entered into an AFL prior to 29 March 2020, and at that time was not required to notify, this action generally has no bearing on the question of whether the same person is required to notify entering into the actual lease after 29 March 2020. If the term of the lease is reasonably likely to exceed five years, the person is required to notify the FIRB prior to entering into the lease.

In certain circumstances, an AFL and subsequent lease may be considered as one agreement. This ultimately depends on the facts of each case. For instance, an AFL and subsequent lease are more likely to be considered as one agreement where, following entry into the AFL, no further document has to be executed to provide for the grant of the lease.

Example 5

Copley Freight Pty Ltd is a foreign person and entered into an agreement for lease in January 2019 in relation to developed commercial land. A pre-existing warehouse on the land was to be repurposed into a freight distribution facility before Copley Freight Pty Ltd entered into a lease with the landlord. The lease conditions were also still to be settled and the previous tenant was still occupying the premises when the agreement for lease was entered into. Copley Freight proposes to enter into a lease with the landlord in July 2020 for a period of 4 years with two options to renew for a further 4 years each. As the lease will be reasonably likely to be for a period of more than 5 years, Copley Freight Pty Ltd will be taking a significant and notifiable

action of acquiring an interest in Australian land when it enters into the lease and will need to seek prior approval from FIRB.

ESTABLISHING NEW ENTITIES

The mere establishment of companies by foreign persons (i.e. an Australian subsidiary company) in anticipation of, and solely for the purposes of executing transactions in the future (where those transactions would be subject to foreign investment approval or would be subject to an exemption under the FATA), will generally not be considered to meet the tests outlined in sections 40(4)(a)(i) or 47(4)(a) of the FATA, and are therefore not required to be notified at the time at which such entities are created. However, where the later substantive transaction is proposed to occur (i.e. the newly established company is involved in activities such as entering into leases or acquiring securities in entities that it was set up to acquire), that later transaction may be subject to prior approval.

FIRB considers that the mere establishment of Australian unit trusts by foreign persons will also generally not be required to be notified on the basis of it being a notifiable action under sections 40(4)(c)(i) or 47(4)(b) of the FATA at the time at which such entities are created. However, where a later substantive transaction involving the trust is proposed to occur (i.e. the trustee of the newly established trust is involved in activities such as entering into leases or acquiring securities in entities that it was set up to acquire), that later transaction may be subject to prior foreign investment approval.

STARTING AN AUSTRALIAN BUSINESS

Only foreign government investors require FIRB approval for starting a new Australian business. This rule is unaffected by the $0 screening threshold changes.

Generally, the establishment of companies by foreign non-government investors (i.e. an Australian subsidiary company) for the purpose of carrying on an Australian business does not require FIRB approval. However, where a later substantive transaction is proposed to occur (i.e. the newly established company is involved in activities such as entering into leases or acquiring securities in entities that it was set up to acquire), that transaction may be subject to prior approval.

SCHEMES OF ARRANGEMENT

In relation to a scheme of arrangement under Part 5.1 of the Corporations Act, once a bidder and target have entered a scheme implementation agreement, that agreement is generally considered to cover the scheme process through to implementation. This means that if a foreign person entered into a scheme implementation agreement with an Australian target prior to the announcement, and obtained a no-objection notification for that action, separate foreign investment approval is not required if the agreement between the bidder and the target's shareholders occurs after the announcement but within the time limit that the no-objection notification specified for the action to be taken. Additionally, if a foreign person entered a scheme implementation agreement with an Australian target prior to the announcement, and was not required to obtain foreign investment approval for that action, foreign investment approval is not required if the agreement between the bidder and the target's shareholders occurs after the announcement.

FURTHER INFORMATION

Further information is available on the FIRB website or by contacting +61 2 6263 3795.

Important notice: This Guidance Note provides a summary of the relevant law. As this Note tries to avoid legal language wherever possible it may include some generalisations about the law. Some provisions of the law referred to have exceptions or important qualifications, not all of which may be described here. The Commonwealth does not guarantee the accuracy, currency or completeness of any information contained in this document and will not accept responsibility for any loss caused by reliance on it. Your particular circumstances must be taken into account when determining how the law applies to you. This Guidance Note is therefore not a substitute for obtaining your own legal advice.