Getting a new real estate deal done (despite COVID-19)

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As Australia continues to navigate the incredible scenarios that COVID-19 is forcing us all to face – we thought it useful to flag some insights and learnings from some of our recent deals that have successfully moved ahead despite the practical and regulatory speedbumps that COVID-19 has introduced:	
Interim management	The combination of the regulatory overlay of the national code for commercial leasing and the extended FIRB assessment period means interim management provisions are absolutely key. The seller will have legal obligations to negotiate rent relief – but the buyer needs to ensure there are appropriate limits on what can be agreed without approval. We recommend this item be locked down at the term sheet stage – it can become a sticking point during negotiations otherwise.
Rent deferrals and arrears cascades	The national code for commercial leasing is increasing the prevalence of rent 'deferrals' with long repayment tails (i.e. 2 years / remainder of lease term – depending on jurisdiction). Though those deferred amounts are not "arrears" in the traditional sense, parties need to decide how to treat them contractually. i.e. will the buyer take on the benefit (but collection risk) of deferred rent payments in its assessment of value; or will the seller effectively retain the benefit and pursue separately (or via the buyer) when they become due?
Lease extensions (WALE and development)	An additional factor introduced by the national code for commercial leasing is the requirement (in some jurisdictions) for lease extensions to be offered in conjunction with rent abatements or deferrals. In most cases the increased WALE will be welcomed by landlords – but this could be an unwelcome surprise if you are looking to take advantage of a shorter term development opportunity. Something to diligence – and to include in the interim management controls.
Debt facilities (credit approval lag)	Not unexpectedly given the market, we are seeing lag time on getting credit approval for debt facilities. Early engagement is accordingly key – both for buyers engaging with their financiers and for sellers to test with buyers (and bidders) the status of their funding.
FIRB timeframes	With the extension of the statutory timeframe for FIRB responses out to 6 months, this longer timeframe needs to be built into your transaction timeline (though in practice we are expecting timeframes for FIRB approval may end up being similar to where many deals have been ending up - pre-COVID - after FIRB-requested extensions). Sellers are continuing to press buyers to lodge FIRB during the exclusivity phase (i.e. pre contract) to try and minimise the impact of FIRB on the deal timelines.
FIRB thresholds	It is unsurprising that the $0 threshold means there are an increased number of smaller transactions that now need to go through the FIRB process – but parties should be aware that the $0 threshold pops up in some unexpected places. For example, a lease to a foreign corporation for a term longer than 5 years will now trigger FIRB requirements – so, if your deal is conditional on a new lease being put in place with a key foreign tenant, that lease may need to be reworked (to a shorter term arrangement) or the overall transaction may be delayed.
Mundane practicalities (electronic signing)	Though flexibility has been introduced for document formality requirements during the COVID-19 period, be aware that the implementation is not consistent across jurisdictions – and some documents may still need to be signed in 'wet ink'. Something to test early and build into your steps plans so you can efficiently get to exchange and to close.

Contact one of our experts, Chris Pitson, to discuss getting a new deal done despite COVID-19.