



## AGRICULTURAL LAND INVESTMENTS

Proposed investments in agricultural land by foreign persons (excluding foreign government investors) generally require approval where the cumulative value of a foreign person's agricultural land holdings exceeds \$15 million, with exceptions applying to investors from Australia's trade agreement partners (as specified below). All acquisitions of agricultural land by foreign government investors require approval.

All acquisitions of interests in agricultural land by foreign persons regardless of whether they require approval and regardless of value must be notified to the Australian Taxation Office Register of Foreign Ownership<sup>1</sup>.

This Guidance Note provides information for foreign investors proposing to invest in Australian agricultural land, including when an acquisition of agricultural land is a notifiable action, approval processes and compliance.

## SIGNIFICANT AND NOTIFIABLE ACTIONS

The acquisition of an interest in Australian agricultural land by a foreign person is a significant and notifiable action if the threshold test is met in relation to the land. The threshold test is met if the total value of all interests in agricultural land held by the foreign person (and their associates) and the consideration for the acquisition of the interest in the agricultural land is more than \$15 million. A foreign person who proposes to enter an agreement to take a notifiable action must notify the Treasurer before entering the agreement.

An investment in agricultural land that is a notifiable action will also be a significant action. This means the Treasurer may:

- decide not to object to the action and give the person a no objection notification not imposing conditions;
- decide not to object to the action provided that one or more conditions are complied with that ensure the action would not be contrary to the national interest and give the person a no objection notification imposing conditions; or
- decide that the action would be contrary to the national interest and make an order prohibiting the proposed significant action.

If a significant action has already been taken which is contrary to the national interest, the Treasurer may make an order, known as a disposal order, which is directed at unwinding the action. Alternatively, the Treasurer may impose conditions.

## THRESHOLDS FOR AGRICULTURAL LAND INVESTMENTS

The applicable threshold value depends on the nationality of the foreign person and whether or not the foreign person is a foreign government investor.

- For *foreign government investors*, a \$0 (nil) threshold applies.

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<sup>1</sup> An exception applies for interests arising from security interests (see section 6 of the Register of Foreign Ownership of Water or Agricultural Land Rules 2017).

- For non-foreign government investors (except those from Chile, New Zealand, Thailand and the United States), a cumulative \$15 million threshold applies.
  - To meet the cumulative threshold, the total value of all interests in agricultural land in Australia held by the foreign person (and their associates) and the consideration for the acquisition of the interest in the agricultural land together must exceed \$15 million.

## AUSTRALIAN OPPORTUNITY – AN OPEN AND TRANSPARENT SALE PROCESS

As part of the national interest test, the decision maker will consider whether there was an opportunity for Australians to acquire a given parcel of agricultural land. The decision maker will have regard to the openness and transparency of the sale process.

Generally, approval will not be granted for any acquisition of agricultural land that was not offered for sale publicly and ‘marketed widely’<sup>2</sup> for a minimum of 30 days. The purpose of this requirement is to ensure Australians have had sufficient opportunity to bid in any sale process of agricultural land.

An open and transparent sale process means:

- public marketing/advertising was undertaken for the sale of the property, using channels that Australian bidders could reasonably access (e.g. advertised on a widely used real estate listing site or large regional/national newspaper);
- the property was marketed/advertised for at least 30 days; and
- there was equal opportunity for bids or offers to be made for the property while still available for sale.

The responsibility is on the applicant to demonstrate how they became aware that the property was advertised for sale and whether the acquisition was subject to an open and transparent sale process. Applicants may be requested to provide evidence of the sale process.

Exceptions to this requirement include acquisitions where the applicant:

- has a substantial Australian ownership share (i.e. 50 per cent or more), as this constitutes an opportunity for Australian bidders, despite a foreign ownership share; or
- is undertaking an internal reorganisation; or
- is acquiring a property via a private sale that was marketed widely<sup>3</sup> in the last six months but did not sell or where the sale fell through; or
- is required to make the acquisition to comply with State or Commonwealth law e.g. mining buffer zones; or
- is acquiring an interest in an ASX listed company, as Australians are already afforded the opportunity to buy an interest in the entity by acquiring shares; or

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<sup>2</sup> Marketed widely means that the property must be listed/advertised on widely used real estate listing websites or in regional/national media.

<sup>3</sup> As per footnote 2.

- is increasing their interest in an agricultural land entity where they already hold more than a 50 per cent interest provided that there is no change in the underlying agricultural land holdings of the entity; or
- is acquiring a leasehold interest with a duration between 5<sup>4</sup> and 10 years (with the duration taken to include any options to renew); or
- is acquiring a leasehold interest for a wind or solar farm development.

Nothing in these general requirements and exceptions removes the decision-maker's ability to consider extenuating circumstances, although this will be narrowly applied.

### Example 1

Michele is a foreign person and wishes to acquire Joe's farm. She first saw Joe's farm advertised in a local newspaper and spoke to the realtor who has had the property listed for the last two months.

Michele confirms with the realtor that the property has been advertised through multiple channels for a period of at least 30 days, including online, through rural real estate brokers, and via advertisements in local and national media. If Michele applies to the Foreign Investment Review Board to acquire Joe's farm, the sale process is unlikely to raise national interest issues.

### Example 2

Susan has been directly approached by a foreign investor seeking to buy her farm. Susan's farm is not on the market for sale, however, it was advertised for sale five months ago but was taken off the market as it was not sold (either no offers were received or the offers received were not accepted).

The foreign investor, Green Forestry Co, approached Susan because they have significant holdings of land near Susan's farm for their forestry business and now have the capital available to expand their business.

Green Forestry Co applies to the Foreign Investment Review Board to acquire the property. This acquisition would satisfy the requirement for an open sale process as the property was advertised in the last 6 months.

### Example 3

Therese wishes to buy a large parcel of agricultural land that is currently used for crop farming and includes an incidental established residential dwelling. Therese saw the property advertised in an Australian national newspaper and viewed further information about the property on a real estate agent's website. Numerous parties, both foreign and Australian, were given the opportunity to bid or make offers for the property. If Therese lodges a Foreign Investment Review Board application for the acquisition, it is unlikely that national interest issues will be raised regarding the opportunity for Australians to purchase the land.

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<sup>4</sup> Leases with duration of five years or under are exempt from screening under the *Foreign Acquisitions and Takeovers Act 1975*.

## Development conditions - residential development

Standard development conditions will apply to **all** agricultural land acquisitions that are for residential development. That is, the acquisition would be conditional on development commencing within a five year period.

## Exemptions for certain investors

The thresholds for agricultural land and the agricultural land significant and notifiable action framework do **not** apply to non-foreign government investors from Chile, New Zealand, Thailand and the United States.

- In such cases, the framework applying to other types of Australian land such as commercial land and residential land still applies where the land in which the interest to be acquired is both agricultural land and another type of Australian land.
- When working out if a target entity is a land entity, investors from these countries may disregard interests in land that are used wholly and exclusively for a primary production business. If the action is another type of significant action or notifiable action under Australia's Foreign Investment Framework this will still apply (for example, acquiring a substantial interest in an Australian entity above the applicable threshold).
- For *Thai investors* who propose to acquire land which is being used wholly and exclusively for a primary production business, it is a notifiable and significant action if the land is valued at more than \$50 million.

## Exemptions for owners or operators of wind or solar power stations

The thresholds for agricultural land do **not** apply to certain acquisitions of agricultural land by owners or operators of wind or solar power stations. A "wind or solar power station" is defined in section 5 of the [Foreign Acquisitions and Takeovers Regulation 2015](#) to mean a wind power station or solar electricity generation system that is an accredited power station as defined in the *Renewable Energy (Electricity) Act 2000*.

Owners and operators of solar and wind power stations that acquire an interest in agricultural land that contains a wind or solar power station, and their acquisition is for the sole purpose of operating the wind or solar power station on the land can disregard the fact that the land is agricultural land for the purpose of the Act.

In such circumstances even if the land still meets the usual test for agricultural land it is treated as if it is not agricultural land for the purposes of screening and specified thresholds for the other type of land will apply. For example, if it is considered non-vacant commercial land then the applicable threshold for such land will apply. See Guidance Note 14 for more information. For more information on wind or solar power stations, see Guidance Note 50.

## DEFINITION OF AGRICULTURAL LAND

Agricultural land is land in Australia that is used, or that could reasonably be used, for a primary production business. This includes land which is partially used for a primary production business, or land where only part of the land could reasonably be used for a primary production business.

Agricultural land also includes land which may, from time to time, be covered by water (for example, a farm dam or stream). However, agricultural land does not include land where the only primary production business that the land is or could reasonably be used for is a primary

production business relating to submerged plants and animals. For example, fish farming or oyster beds in estuaries and bays, the estuaries and bays would not be agricultural land.

Land includes a building or a part of a building. However, a building or a part of buildings that does not have any direct connection with land that is used or that could reasonably be used for a primary production business is not included within the meaning of agricultural land. For example, an administrative office for a primary production business that is on a strata title in an office block in a city centre is not included within the definition of agricultural land.

### Primary production business

The definition of a primary production business is the same as the definition in subsection 995-1(1) of the *Income Tax Assessment Act 1997* (ITAA 1997). The definition includes cultivating or propagating plants; maintaining animals for the purpose of selling them or their bodily produce; conducting operations relating directly to taking or catching fish and certain other marine animals; planting or tending trees in a plantation or forest that are intended to be felled; or felling trees in a plantation or forest.

A person carries on a primary production business if the person *carries on a business* of:

- (a) cultivating or propagating plants, fungi or their products or parts (including seeds, spores, bulbs and similar things), in any physical environment;
- (b) maintaining animals for the purpose of selling them or their bodily produce (including natural increase);
- (c) manufacturing dairy produce from raw material that you produced;
- (d) conducting operations relating directly to taking or catching fish, turtles, dugong, bêche-de-mer, crustaceans or aquatic molluscs;
- (e) conducting operations relating directly to taking or culturing pearls or pearl shell;
- (f) planting or tending trees in a plantation or forest that are intended to be felled;
- (g) felling trees in a plantation or forest; or
- (h) transporting trees, or parts of trees, that you felled in a plantation or forest to the place:
  - i. where they are first to be milled or processed; or
  - ii. from which they are to be transported to the place where they are first to be milled or processed.

Various indicators should be considered to decide if an activity is a business of primary production, including whether:

- the activity has a significant commercial purpose or character;
- the person is doing the activity to make a profit and have a prospect of profit from the activity;
- there is repetition and regularity of the activity;
- the person carries out the activity in a similar manner to that of the ordinary trade in that line of business; and
- the person plans, organises and carries on the activity in a business-like manner with the purpose of making a profit.

You are not carrying on a business if the activity is better described as a hobby, a form of recreation, or a sporting activity.

For more information see Tax ruling [TR 97/11: Income tax: am I carrying on a business of primary production](#).

For information on the implications of agistment, see Taxation Ruling No. [IT 225: Primary production – agistment income](#).

### Concept of ‘could reasonably be used for’

Whether land could reasonably be used for a primary production business depends on the facts and circumstances of the land. Factors that may provide a reasonable indicator that the land could (or could not) reasonably be used, either alone or together with other factors, may include the following:

- *The primary uses allowed on the land under its zoning:* These are likely to provide a reasonable indicator of whether the land could reasonably be used for a primary production business. For example, if zoning allowed for primary production activities to be undertaken without the further approval of the local regulatory body, this would likely indicate that the land could reasonably be used for a primary production business. However, land within a rural residential zone, where zoning requirements either explicitly do not allow for primary production activities, or would only be approved in special circumstances, is not land that could reasonably be used for a primary production business.
- *Land use history:* If the land has been used in a primary production business in recent years, this is likely to indicate that the land again could reasonably be used for a primary production business, unless there has been one or more significant changes in the land in the meantime (for example, significant permanent environmental degradation, water depletion or pollution, or removal or loss of the earlier primary production business infrastructure). However, even though the land has not been used in a primary production business in recent years does not necessarily mean that it could not reasonably be used for a primary production business in the future. Examples of this could include if the land is not being used in a primary production business due to:
  - an extended extreme climatic event, such as a long term drought;
  - a recent natural disaster, such as bushfire or floods; or
  - other activities, such as mineral exploration and development on the land after which expected, or legally required, land remediation works would mean that the land in whole or part again could reasonably be used for a primary production business.
- *Land characteristics* (for example, climate, crop yield, land size, remoteness, soil quality, stock holding capacity, topography, vegetation and water availability): Land must be of sufficient size to allow for the operation of a stand-alone primary production business in some or all cases within the site, with land of one hectare or less not considered agricultural land. Remoteness of the land from goods transport and other infrastructure, as well as key agricultural service providers, may mean that land could not reasonably be used for a primary production business, until such infrastructure and/or services became available to the locality.
- *Lease or licence conditions or limitations:* Where there is a right to occupy agricultural land under a lease or licence whose term (including any extension or renewal) is reasonably likely to exceed five years, there may be land use conditions or restrictions attaching to the lease or licence.

- Where these explicitly allow for primary production activities to be undertaken, the land could reasonably be used for a primary production business, irrespective of the lessee or licence holder's intention during the lease or licence term.
- Where these do not permit use for a primary production business by the lessee or licence holder, this in isolation should not be taken as meaning the land could not reasonably be used for a primary production business. Other factors, such as those outlined above, and the rationale for such a restriction on the lease or licence would be relevant to an assessment. For example, if a lessor has retained adjacent land on which they are operating a primary production business and has restricted the uses of the lessee so that they can incorporate the land back into their operations should they decide to do so at the end of the lease term (after the land has been left fallow to raise productivity), then the land could reasonably be used for a primary production business.

It is also not generally expected that dwellings within city limits would be considered to be on land that could reasonably be used for a primary production business, although it may be feasible or legal for small scale intensive primary production activities, or administrative activities related to a primary production business to occur on such land in some cases (where the land in question is larger than one hectare – see Exclusions below). However, such land is agricultural land if non-ancillary activities of a primary production business are carried out on the land. For example, market gardens or propagating plants as part of a plant nursery.

## Exclusions

The *Foreign Acquisitions and Takeovers Regulation 2015* (Regulation) at section 44 explicitly excludes land that is not being used wholly or predominantly for a primary production business and meets one or more of the following conditions.

- Land whose zoning requires government approval for primary production businesses;
  - If zoning allows the land to be used for one kind of primary production without approval, it is deemed agricultural land irrespective of whether approval is required for another kind of primary production business the prospective investor intends to use the land for.
- Land whose zoning allows use for a primary production business and an application has been made to, and is awaiting a final determination from, a relevant government authority for:
  - the land to be rezoned as land whose zoning does not allow use for a primary production business; or
  - approval for a mine, oil or gas well, quarry, or other similar operation under a mining or production tenement, (a mining operation) to be established on the land; or
  - approval to locate infrastructure relating to a mining operation on the land (such as infrastructure for processing the material extracted by the operation and accommodation for miners); or
  - approval for waste from a mining operation to be stored on the land.
  - an approval (including accreditation) for establishing or operating a wind or solar power station to be located on the land (whether on or beneath the surface);

- Land used wholly and predominantly for a mining operation, to locate infrastructure relating to a mining operation, or to store waste from a mining operation;
- An approval of a government authority (that is not a mining or production tenement) is in force allowing a mining operation to be established or operated on the land, infrastructure relating to a mining operation to be located on the land; or waste from a mining operation to be stored on the land;
  - The land was acquired solely, or is used wholly or predominantly to meet a condition of such an approval than relates to other land.
- Land used for wind or solar power station/s, including when an approval is in place to allow the wind or solar farm to be established or operated on the land, or the land was acquired solely for the purpose of meeting a requirement of government approval for the solar or wind farm.
  - In the situations listed above, the land is to be treated as either vacant or non-vacant commercial land. If a wind or solar power station is located on the surface of the land the land will be considered non-vacant. See Guidance Notes 14 and 50 for more information.
- Land used, under a law of the Commonwealth, a State or a Territory or a legally binding agreement, wholly or predominantly for the purposes of the protection or conservation of the environment;
- Land used wholly or predominantly for the purposes of a wildlife sanctuary or for rehabilitating animals;
- Land located within an area that has been approved by a government authority as an industrial estate;
- The area of the land is one hectare or less;
- The use of the land has been approved by a government authority for providing facilities for tourism, outdoor education or outdoor recreation to the public.

The Regulation also excludes land where the only primary production business that the land is or could reasonably be used for is conducting operations relating directly to taking or catching fish or culturing pearls or other aquatic life, including plant and animal products.

## **EXEMPTION CERTIFICATES FOR AGRICULTURAL LAND**

Foreign persons (including foreign government investors) are able to apply for an exemption certificate to cover a program of acquisitions of interests in agricultural land.

Exemption certificates for agricultural land would generally be considered where:

- the total proposed value of acquisitions over a three year period does not exceed \$100 million;
- the regions or localities where the agricultural land in which interests are to be acquired are defined clearly.

Exemption certificates would generally be granted subject to a condition that limits the maximum value for a single transaction (i.e. value of the property, not the value of individual titles) to \$10 million and a periodic reporting condition on acquisitions made during the period.

The above limits are to be used as a guide only. The actual limit granted may be lower than these limits depending on factors, including but not limited to:

- the location restrictions on the exemption certificate;
- the track record of the acquiring party;
- the future usage of the land including any capital investment plans;
- The total value of recent FIRB approvals, either individually or via an exemption certificate.

Standard development conditions will be applied to all agricultural land exemption certificates that are for residential development. That is, the exemption certificate would be conditional on development commencing within a five year period.

Foreign persons acquiring interests that require notification for the Register of Foreign Ownership administered by the Australian Taxation Office should comply separately with their notification requirements under the *Register of Foreign Ownership of Water or Agricultural Land Act 2015*, for any applicable acquisitions and disposals made while an exemption certificate is in place.

For more information on the guidelines for exemption certificates, see Guidance Note 21.

## FEES

The fee is payable at the time of application. Processing commences when the correct fee is paid.

For more information on the fees applying to foreign investment applications, see Guidance Note 30.

## PENALTIES

Strict penalties (including civil and criminal penalties) may apply for breaches of Australia's foreign investment rules.

## FURTHER INFORMATION

Further information is available on the FIRB website at [www.firb.gov.au](http://www.firb.gov.au) or by contacting +61 2 6263 3795.

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**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.