



## EXEMPTION CERTIFICATES FOR A PROGRAM OF ACQUISITIONS OF INTERESTS IN KINDS OF LAND

Under the foreign investment framework it is a requirement that each proposed acquisition of an interest in land by a foreign person be separately notified, unless otherwise exempt. However, a longstanding feature of the framework is that foreign persons making multiple acquisitions can apply for an up-front approval for a program of land acquisitions without the need to seek separate approvals.

Section 58 of the *Foreign Acquisitions and Takeovers Act 1975* allows a foreign person to apply for an exemption certificate in relation to acquisitions of one or more kinds of interests in Australian land, and the Treasurer to grant such a certificate, if satisfied that the acquisitions of the kinds of interests by the foreign person is not contrary to the national interest.

This Guidance Note sets out the factors that will typically be considered for each kind of land when assessing an application for an exemption certificate and the types of conditions that an exemption certificate will generally specify.

### GENERAL GUIDELINES

#### When may an exemption certificate be applicable?

The certificate is a mechanism available to minimise the regulatory burden of foreign investment screening that would otherwise apply to each acquisition covered by a certificate. It is intended for foreign persons with a high volume of acquisitions of interests in land (this generally would not include individuals). A certificate will not usually be granted where the number of likely acquisitions is small and it would be reasonable for the foreign person to notify the acquisitions separately.

A certificate will generally specify the maximum value of interests that can be acquired and also the period during which acquisitions can be made. While certificates have previously been for a default 12 months, certificates may now be issued for shorter or longer periods depending on the circumstances.

#### How will applications be considered?

Applications will be considered on a case-by-case basis to ensure they are not contrary to the national interest. This will take into account factors such as the identity of the applicant and the nature of its Australian business, the purpose and scope of proposed acquisitions, acquisitions history, and compliance standing (for example, meeting reporting requirements and any existing conditions).

If an applicant, or any related person or entity, has held an exemption certificate previously and has not complied with its conditions, or has not met conditions attached to individual acquisitions, this compliance history will be taken into account when assessing the applicant's suitability to hold an exemption certificate. For exemption certificates relating to interests in agricultural land, compliance with the Agricultural Land Register administered by the Australian Taxation Office (ATO) may be taken into account. Non-compliance with conditions of a certificate or more generally, may also lead to revocation of a certificate by the Treasurer.

A foreign person who has had an application for a certificate declined, may still apply for individual acquisitions.

### Conditions

An exemption certificate may be given subject to conditions. Standard development conditions will apply 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.

### Reporting

Foreign persons granted an exemption certificate must report periodically (for example, quarterly), on the acquisitions made during the period under their certificate, as per their specific reporting condition. The frequency of reporting will depend on factors such as the period the certificate is in force and the nature of the acquisitions covered by the certificate. As part of this reporting, a certificate holder will also need to confirm that all foreign persons covered by the certificate are meeting all ongoing conditions attached to the certificate and earlier individual approvals and certificates.

### Australian opportunity – an open and transparent sale process

Should a foreign person seek to use an exemption certificate to acquire freehold interests (or leasehold interests with freehold characteristics<sup>1</sup>) in agricultural and/or vacant commercial land proposed to be used for a primary production business or residential development, that land must have been offered for sale under an open and transparent sale process.

Conditions will be imposed on exemption certificates to ensure this requirement is met. That is, unless an applicant is acquiring land that has been subject to an open and transparent sale process, an exemption certificate cannot be used for that particular acquisition. The applicant will be required to report on the sale process for each of its acquisitions under the exemption certificate.

The conditions imposed on relevant exemption certificates would ensure that it only covers acquisitions of interests in Australian agricultural or vacant commercial land where:

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

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<sup>1</sup> Leasehold interests with freehold characteristics could include where: there are no significant/market-based periodic payments (the consideration is primarily upfront with a nominal annual lease payment); the term of the lease is indefinite or the lease would be renewed automatically or at the election of the tenant at no extra charge; there is an option to acquire a freehold interest at the end of the lease; and where the lessor is a State/Territory government (eg. perpetual or pastoral leases).

There are two general exceptions to the open and transparent sale requirement:

- Proposals where the target entity is already a foreign person, or the target land is already held by a foreign person, and there is no change in control.
  - ~ This includes proposals that give effect to internal reorganisations, acquisitions of increased interests in entities where the applicant already holds a 50 per cent interest and proposals to introduce new minority interests where the target is already foreign-controlled.
- Acquisitions that allow Australian investors to participate in a significant way.
  - ~ This includes where an applicant is majority Australian controlled (through control, ownership and/or beneficial interest), or where Australians or Australian entities have the opportunity for significant participation in the business. Openness to significant Australian investment through ASX listing may be relevant to demonstrating Australian participation.
  - ~ This also includes where there is significant ongoing participation by Australian entities in the operation of a primary production business on the land. This could include proposals involving a sale and long term<sup>2</sup> leaseback arrangement to an Australian investor.

Generally, these exceptions can be used to make the case for the open and transparent sale process conditions not to be applied (for example, if the entity is majority Australian-owned), or for certain acquisitions under the exemption certificate to be excluded from the requirement if they meet a particular exception. Because exemption certificates are for prospective purchases, applicants should consider whether it is best for transactions with complex sale process considerations to be handled as separate applications.

Applications for land exemption certificates should include all relevant details around the proposed sale process for the program of acquisitions, whether or not an applicant considers the acquisitions will meet the open and transparent sale process requirement or fit within one of the exceptions. As the exemption certificate will contain conditions, the applicant should detail which of the specific exceptions are relevant to be included in the exemption certificate.

Irrespective of these considerations, the decision maker may still take the circumstances of the sales processes for proposed acquisitions into account in determining whether the granting of an exemption certificate is contrary to the national interest.

#### **Example 1**

ResiDevelopment Co is a foreign person applying for a land exemption certificate for a number of commercial land parcel acquisitions. The interests will be freehold interests and will be used for the purposes of residential development.

Any exemption certificate granted to ResiDevelopment Co would include a condition that ensures that land proposed to be acquired under the exemption certificate for the purposes of

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<sup>2</sup> Evidence of a lease agreement with an Australian farming entity must be provided. Account would be taken of factors such as the term of the lease and whether the lessee is provided a pre-emptive right to purchase.

residential development (or a primary production business) couldn't be acquired using the exemption certificate unless the land has been subject to an open and transparent sale process.

### Example 2

ShopCo is a foreign person applying for an exemption certificate for a program of land acquisitions to facilitate the development of a number of shopping centres.

Any exemption certificate granted to ShopCo wouldn't include an open and transparent sale process condition, provided the land would not be used for a primary production business or residential development.

### Example 3

AutoCo is a foreign person that has received a land exemption certificate with conditions to ensure that they can only acquire land proposed to be used for a primary production business or residential development that has been subject to an open and transparent sale process.

AutoCo acquires land that has been publicly advertised on a widely used real estate listing website for a period of 60 days immediately prior to the date of the agreement whereby AutoCo acquires the land. As this acquisition would meet the open and transparent sale process conditions of their exemption certificate, AutoCo could use the exemption certificate to make the acquisition.

### Example 4

MooCo is an ASX listed foreign person with 70% Australian ownership. MooCo applies for an exemption certificate for a program of land acquisitions of up to a value of \$50m over 1 year to acquire land for its pastoral business.

As MooCo is majority Australian owned, any exemption certificate granted to MooCo for acquisitions of land for its pastoral business would not include an open and transparent sale process condition.

## 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. the value of the property, not the value of individual titles) to \$10 million.

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 apply 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 Agricultural Land Register administered by the ATO 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.

## **MINING AND PRODUCTION TENEMENTS**

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

Exemption certificates for mining or production tenements would generally be granted subject to conditions that:

- specify the geographic region of the tenement; and
- specify the type of minerals that can be exploited under the tenement.

### **Foreign government investors**

Foreign government investors may apply for an exemption certificate to cover exploration, or mining or production tenements. However, exemption certificates will generally not be granted to foreign government investors that cover a mixture of these tenements over substantially the same area and target resource.

- If a foreign government investor is granted an exploration tenement exemption certificate and would also like a mining or production tenement exemption certificate to cover later potential related mining or production tenements, the inclusion of such tenements in the certificate would generally be considered contrary to the national interest.
- The related mining or production tenements would normally be expected to be covered by a later exemption certificate application or notice, once the exploration activities have been substantially progressed.

## **COMMERCIAL LAND**

Foreign persons are able to apply for an exemption certificate to cover a program of acquisitions of interests in commercial land.

Conditions contained in exemption certificates for interests in commercial land will apply in the same way as if the land was being acquired individually. For example, if vacant commercial land is covered in the exemption certificate, the certificate would be conditional on development commencing within the standard five years.

Exemption certificates for commercial land will generally not cover low threshold commercial land. For more information, see Guidance Note 14.

## RESIDENTIAL LAND

Eligibility requirements for residential land differ by the type of residential land. For more information, see Guidance Note 1. Exemption certificates for a program of acquisitions of interests in residential land will have regard to the eligibility requirements in relation to the type of residential land to be included in the certificate. Conditions imposed on exemption certificates will generally include the standard conditions that would have applied to an individual approval of an acquisition.

## FOREIGN GOVERNMENT INVESTORS

Foreign government investors may seek approval to get an exemption certificate for a program of acquisitions of interests in Australian land. These will be considered on a case-by-case basis.

## EXEMPTION CERTIFICATES FOR DIFFERENT KINDS OF INTERESTS IN LAND

Foreign persons can apply for an exemption certificate for different types of land in the same certificate. This will be considered on a case-by-case basis and consistent with guidance included above.

## INFORMATION THAT NEEDS TO BE SUPPLIED IN THE APPLICATION

Applications are considered on a case-by-case basis and should include the information outlined below. Additional information may also be requested during the assessment.

- Information on who will be making the acquisitions, including ultimate ownership, whether the investor is a foreign government investor, and details of business activities in Australia.
- If there will be more than one entity, information on each entity.
- If the applicant wishes to include a yet to be established entity, details of intended ownership, entity type and where this will be established;
- Details of the proposed program of acquisitions including the kind of land. For each kind of land specify the:
  - ~ Nature of the interests to be acquired (for example, legal interests in property, securities in an Australian land entity or a mix of these);
  - ~ Proposed location of acquisitions (e.g. State or Territory, central business district metropolitan or rural, region or local government area);
  - ~ Budget for acquisitions with [indicative] breakdowns as categorised above;
  - ~ Intentions in relation to the interests to be acquired;
  - ~ Acknowledgement that if a standard condition would apply to an individual acquisition, the applicant will comply with such a condition if imposed by any certificate granted; and
  - ~ Confirmation of good compliance standing for foreign investment purposes (that is, that the applicants and any other entities with common ultimate ownership, are meeting all conditions that are applicable for earlier acquisitions or certificates).

## 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](#).

If an application for an exemption certificate for a program of land acquisitions was not granted by the Treasurer, fees to the value of the original application will be waived for any subsequent applications for an interest in land. If the entity that paid the fee is a holding entity or subsidiary, the fee may be credited towards separate notices of other entities within the same group, with the written consent of an authorised officer of the entity that initially applied for the certificate that was not given.

## PENALTIES

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

## VARIATIONS AND REVOCATIONS

The Treasurer may vary or revoke an exemption certificate given to a person if the Treasurer is satisfied that the variation or revocation is not contrary to the national interest.

A variation may be made on application in writing or by the Treasurer's own initiative.

## 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.