



AGRICULTURAL LAND AND AGRIBUSINESS

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This guidance document incorporates content from the pre-1 January 2021 FIRB website and Guidance Notes 17, 18, 21 and 34, as well as new content indicated by the sidebar. Please note, this is a temporary provision to assist reader's transition to these new guidance documents and may be removed in due course.

- Foreign persons generally require foreign investment approval before acquiring an interest in agricultural land where the cumulative value of their agricultural land holdings exceeds (or would exceed with the proposed investment) \$15 million.
 - Private investors from certain free trade agreement partners enjoy a higher monetary threshold.
 - Foreign government investors require approval for all acquisitions of agricultural land, regardless of their cumulative holdings or the consideration of the proposed investment.
- Even if a proposed investment in agricultural land does not require approval under any of the thresholds above, it will still require foreign investment approval if the land is 'national security land', regardless of its value or the nature of the investor.
- Generally, approval will not be granted for an acquisition of agricultural land, or an interest in a land entity that holds agricultural land, if Australian investors were not offered an equal opportunity to invest in that land/entity through an open and transparent sale process.
- Approval for an acquisition of agricultural land to be used for a non-agricultural purpose (for example, redevelopment into a residential development) will generally be subject to development conditions, as assessed on a case-by-case basis.
- All acquisitions (and sales) of agricultural land by foreign persons, regardless of whether they required prior approval, must be registered on the [Register of Foreign Ownership of Agricultural Land](#). Foreign persons must also separately notify the Government once they have acquired an interest in agricultural land that was the subject of a foreign investment approval.
- Foreign persons must also register certain interests they acquire in water entitlements and water rights on the [Register of Foreign Ownership of Water Entitlements](#).
- Special rules apply for investments into an agribusiness, compared to investments in other Australian businesses. Foreign persons generally require foreign investment approval before acquiring a direct interest in an agribusiness, where the cumulative value of their interest in that business exceeds (or would exceed with the proposed investment) \$61 million.
 - Private investors from certain free trade agreement partners are exempt from the special agribusiness rules. Investors from these countries can treat agribusinesses in the same manner as other Australian entities and businesses.

- Foreign government investors require approval for all direct interest investments in an agribusiness, regardless of their cumulative interests or the consideration of the proposed investment.
- Even if a proposed investment in an agribusiness does not require approval under any of the thresholds above, it will still require foreign investment approval if the business is a ‘national security business’, regardless of its value or the nature of the investor.
- Foreign persons must notify the Government once they have acquired an interest in an agribusiness that was the subject of a foreign investment approval.
- Foreign persons must also keep records relating to certain actions concerning their foreign investment for up to five years.

Looking for more?

A: Definition of agricultural land	3
B: Meaning of primary production business	5
C: Concept of ‘could reasonably be used for’	6
D: When does a proposed investment in agricultural land require approval?	7
E: Monetary thresholds for agricultural land investments	8
F: Australian opportunities requirement: an open and transparent sale process	9
G: Exemption certificates for agricultural land.....	13
H: Definition of an agribusiness.....	15
I: When does an investment in an agribusiness require approval?	17
J: Monetary thresholds for agribusiness investments	18
Further information	19

A: DEFINITION OF AGRICULTURAL LAND

Agricultural land is defined in section 4 of the *Foreign Acquisitions and Takeovers Act 1975* (the **Act**) as 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, for fish farming or oyster beds in estuaries and bays, the estuaries and bays would not be considered agricultural land.

Land includes a building or a part of a building. However, a building or a part of a building 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.

Agricultural land can sometimes also host buildings or structures associated with another type of land. For example, agricultural land may host a residential dwelling (e.g. the farmer's residence), or wind turbines as part of a wind farm. Further information on how the land is treated in these situations can be found in the *Key Concepts* and *Commercial Land* Guidance Notes, respectively.

Specific exclusions

Section 44 of the *Foreign Acquisitions and Takeovers Regulation 2015* (the **Regulation**) excludes land that is not being used wholly or predominantly for a primary production business, and meets one or more of the following conditions, from being agricultural land:

Land zoning:

- Land where zoning requires government approval for a primary production business.
 - However, 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 where 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 where 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; or
- 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).

Mining operations:

- Land used wholly or predominantly for: a mining operation; to locate infrastructure relating to a mining operation; or to store waste from a mining operation.
- Land where an approval (that is not a mining or production tenement) from a government authority 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.
- Land that was acquired solely, or is used wholly or predominantly, to meet a condition of a government authority approval relating to another piece of land involving: a mining operation; infrastructure relating to a mining operation; or waste from a mining operation.

Wind and solar power stations:

- Land used wholly or predominantly for a wind or solar power station located on the land (whether on or beneath the surface),
- Land where an approval from a government authority is in force allowing: a wind or solar power station to be established or operated on the land (whether on or beneath the surface).
- Land that was acquired solely, or is used wholly or predominantly, to meet a condition of a government authority approval relating to another piece of land involving a wind or solar power station.

Environment:

- 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.

Other:

- 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.

B: MEANING OF 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*.

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

- cultivating or propagating plants, fungi or their products or parts (including seeds, spores, bulbs and similar things), in any physical environment; or
- maintaining animals for the purpose of selling them or their bodily produce (including natural increase); or
- manufacturing dairy produce from raw material that the person produced; or
- conducting operations relating directly to taking or catching fish, turtles, dugong, bêche-de-mer, crustaceans or aquatic molluscs; or
- conducting operations relating directly to taking or culturing pearls or pearl shell; or
- planting or tending trees in a plantation or forest that are intended to be felled; or
- felling trees in a plantation or forest; or
- transporting trees, or parts of trees, that the person felled in a plantation or forest to the place:
 - where they are first to be milled or processed; or
 - 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/or
- the person plans, organises and carries on the activity in a business-like manner with the purpose of making a profit.

A person is 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 Taxation 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 *IT 225: Primary production – agistment income*.

C: 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 could again 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. 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. 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.

D: WHEN DOES A PROPOSED INVESTMENT IN AGRICULTURAL LAND REQUIRE APPROVAL?

See also the *Overview, Key Concepts, National Security and Fees* Guidance Notes.

Under Australia's foreign investment framework, foreign persons must notify the Treasurer before taking a notifiable action or a notifiable national security action. Some notifiable actions are also significant actions. A foreign person must not take a notifiable and significant action, or a notifiable national security action, until they have received foreign investment approval for that proposed action.

- Where a foreign person acquires an interest in agricultural land,¹ this will be a notifiable and significant action if the [monetary threshold](#) is met.
- Where a foreign person acquires an interest in agricultural land,² this will be a notifiable national security action if the land is national security land.

A foreign person seeking to acquire an interest in agricultural land that meets one of these conditions must apply for foreign investment approval before taking the action.³ Applications are submitted electronically on the [Foreign Investment Review Board \(FIRB\) website](#), and are supported by further guidance (see, for example, the FIRB application checklist). A fee is payable for all foreign investment applications.

If the proposed investment is a notifiable and significant action, it will be screened for foreign investment approval under the national interest test. If the proposed investment is a notifiable national security action, and is not also a significant action, it will be screened under the narrower

1 There are a number of ways in which a foreign person may acquire an interest in agricultural land (see, for example, section 12 of the Act). Acquisitions of Australian land are considered on a title-by-title basis.

2 There are a number of ways in which a foreign person may acquire an interest in agricultural land (see, for example, section 12 of the Act). Acquisitions of Australian land are considered on a title-by-title basis.

3 Foreign persons who want to minimise the risk of an asset they are interested in purchasing being sold to someone else before they receive foreign investment approval can enter into a contract as long as the contract is conditional on receiving foreign investment approval.

national security test. Regardless of which test the investment is screened under, the foreign person must not take the action until they have received foreign investment approval.

Significant penalties (including infringement notices, civil and criminal penalties) may apply for breaches of the foreign investment law.

Exemptions from requiring approval

Part 3 of the Regulation provides a number of exemptions, where an acquisition of agricultural land may not be considered a notifiable action, a significant action, and/or a notifiable national security action, and may thus not need to be notified to the Treasurer. See the *Key Concepts* Guidance Note.

A foreign person is also not obliged to notify the Treasurer that they are proposing to take a significant action unless the action is also a notifiable action or notifiable national security action. However, under the Act the Treasurer has the power to make a range of orders in relation to a significant action that a person is proposing to take or has already taken (even if they do not inform the Treasurer about it).

Section 40 of the Regulation also allows private investors from Chile, New Zealand, Thailand, and the United States to treat agricultural land in a different manner in certain situations.⁴ These are:

- When working out if a target entity is a land entity (see the *Business* Guidance Note) – for the purpose of determining if the investment involves an acquisition of land – these investors may disregard any interests in land held by the entity that are used wholly and exclusively for a primary production business.
- When acquiring an interest in mixed use land (see the *Key Concepts* Guidance Note) that is both agricultural land and another type of Australian land (such as commercial land or residential land), the monetary threshold will not be considered met, for these investors, if only the agricultural land threshold is met. That is, the monetary threshold for the other type of land must be met in order for the acquisition of that land to be a notifiable and/or significant action.

Certain foreign investments that are not notifiable actions or notifiable national security actions may be reviewable national security actions. Where a reviewable national security action is not notified to the Treasurer (including as a result of one of these exemptions), the action may be called-in for review if the Treasurer considers that the action may pose a national security concern. Foreign persons can choose to extinguish the Treasurer's call-in power by voluntarily notifying of reviewable national security actions. Guidance on investment areas that may raise national security concerns, and where investors are therefore encouraged to voluntarily notify, are outlined in the *National Security* Guidance Note.

E: MONETARY THRESHOLDS FOR AGRICULTURAL LAND INVESTMENTS

The monetary thresholds for agricultural land are based on the consideration for the investment, and not the value of the land itself (with the exception of currently held land for the purpose of the cumulative threshold). The relevant thresholds depend on the nationality of the foreign

⁴ To be eligible for these exemptions, the immediate acquirer must be an entity formed in one of these countries. An investor acquiring through a subsidiary incorporated in another jurisdiction will not be eligible.

person and whether or not the foreign person is a foreign government investor. Special rules also apply for owners and operators of wind and solar farms.

- For foreign government investors, a \$0 threshold applies.
- For private investors (except those from Chile, New Zealand, Thailand and the United States), a cumulative \$15 million threshold applies.
 - In working out if this cumulative threshold is met; sum up the consideration for the current proposed investment, along with the total value of all interests currently held in Australian agricultural land by both the foreign person and their associates (using a reasonable assessment of the current market value of those interests).
- For private investors from Thailand who propose to acquire land which is being used wholly and exclusively for a primary production business⁵, the monetary threshold is \$50 million (not cumulative).⁶
- For private investors from Chile, New Zealand and the United States the monetary threshold is \$1,216 million (not cumulative).⁷
- For owners and operators of wind and solar farms purchasing agricultural land on which there is a developed wind or solar power station (that is, mixed use agricultural and commercial land), and the acquisition is for the sole purpose of operating a wind or solar power station on the land, the relevant monetary threshold is the relevant commercial land threshold. See the *Commercial Land* Guidance Note.
- For all investments in national security land, the monetary threshold is \$0, regardless of the investor.

F: AUSTRALIAN OPPORTUNITIES REQUIREMENT: AN OPEN AND TRANSPARENT SALE PROCESS

See also the *Key Concepts, Commercial Land and Business* Guidance Notes.

As part of the national interest test, where a foreign person proposes to acquire an interest in agricultural land that will be used for a primary production business or residential development, or an interest in a land entity that holds agricultural land that will be used for a primary production business or residential development, the decision-maker will consider whether there was an equal opportunity for Australians to invest in that land/entity.

⁵ Note the narrower definition of agricultural land applying to Thai investors.

⁶ To be eligible for this threshold, the immediate acquirer must be an entity formed in Thailand. An investor acquiring through a subsidiary incorporated in another jurisdiction will be subject to the relevant thresholds of the subsidiary's jurisdiction.

⁷ To be eligible for this threshold, the immediate acquirer must be an entity formed in one of these countries. An investor acquiring through a subsidiary incorporated in another jurisdiction will be subject to the relevant thresholds of the subsidiary's jurisdiction.

Generally, approval will not be granted for an acquisition of freehold interests (or leasehold interests with freehold characteristics⁸) in agricultural land, or an interest in a land entity that holds agricultural land, that was not offered for sale through an open and transparent sale process.

What constitutes an open and transparent sale process

Whether a sale process is open and transparent depends on the particular circumstances of the sale. Some factors that will be considered in determining whether a sale process was open and transparent include:

- the timetable and scale of the sale process; and
- the number of interested parties, participation in the process by Australian parties, and whether there was an opportunity for Australian parties to bid for the land/entity.

To provide certainty for investors and vendors, a sale process with the following characteristics would be unlikely to pose national interest concerns:

- 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, or listed on the ASX);
- 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.

Other sale processes may be sufficient if the investor can demonstrate that the land/entity sale has been open to an equivalent level of participation by Australian parties as the process outlined above.

Example 1

Michele is a foreign person and wishes to acquire Joe's farm to continue to run the primary production business. 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 on the basis of an open and transparent sale process.

⁸ 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 (e.g. perpetual or pastoral leases).

Example 2

Susan has been directly approached by a foreign investor seeking to buy her farm to run a primary production business. Susan's farm is not currently on the market, however, it was advertised five months ago and taken off the market after 90 days as it was not sold.

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 is likely to satisfy the requirement for an open and transparent sale process as the property was advertised in the last six months.

Example 3

EnergyDevelopment Co, a foreign person, is seeking to acquire a large parcel of agricultural land for the purposes of constructing a wind farm. The vendor approached a number of parties to seek bids for the land, and EnergyDevelopment Co was the successful bidder.

EnergyDevelopment Co's proposal would not be subject to the open and transparent sale process requirement as they will not use the land for a primary production business or residential development. However, EnergyDevelopment Co should still submit details of the sale process along with their application to demonstrate how the land was offered for sale.

Example 4

Lumber Co, a foreign person, is seeking to take out a 25 year lease over agricultural land for the purposes of operating a primary production (forestry) business. The freehold ownership of the land will not change, and the lease involves an annual lease payment which provides a return on the land to the current owner.

As the leasehold arrangement is not one with freehold characteristics, there is no requirement for the 25 year lease of the property to be advertised widely

Exemptions from the open and transparent sale requirement

There are a number of situations where the Treasurer may consider waiving the open and transparent sale requirement. These include:

- Investments 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 (see the *Key Concepts* Guidance Note).
 - This could include: proposals that give effect to internal reorganisations; acquisitions of increased interests in a target entity where the applicant already holds a 50 per cent (or more) interest; or proposals to introduce new minority interests where the target is already foreign-controlled.

- Investments that still allow Australians to participate in a significant way.
 - This could include: where the applicant is majority Australian controlled;⁹ proposals where Australians will still retain a reasonable degree of control in the target land/entity post-investment; or proposals where Australians will still have the opportunity for significant participation in the use of the land post-investment (for example, proposals involving a sale and long term¹⁰ leaseback arrangement with an Australian farmer).
- Acquisitions of agricultural land for redevelopment into a retirement village, aged care facility, or certain forms of student accommodation (see the *Commercial Land* Guidance Note).
 - While retirement villages, aged care facilities, and certain forms of student accommodation are types of residential land (despite being subject to the commercial land monetary thresholds), and would thus normally be subject to the open and transparent sale requirement, an exemption may be granted for these forms of development on the basis of their commercial-like operations.
- Acquisitions of agricultural land for the primary purpose of providing a 'buffer zone' from a nearby mining operation.
 - Some mining activities can cause significant disturbance to nearby properties (for example, in the form of noise or dust pollution). Where agricultural land is acquired for the primary purpose of providing nearby properties a buffer from this disturbance (even where a primary production business may still operate on the land to the extent possible), an exemption may be granted on the basis that the land use is primarily related to mining activities.
- Investments that are genuinely immaterial to broader ownership considerations.
 - This could include: land swaps; land boundary adjustments; or where Australian entities are a small and incidental part of a larger offshore transaction (and any land holding by those entities is also a small and incidental element of the transaction).

Nothing in these general requirements and exceptions removes the Treasurer's ability to exercise discretion and weigh up all the national interest circumstances presented by a proposal. The Treasurer may consider extenuating circumstances or compassionate grounds.

Even where a transaction may be exempt from the open and transparent sale process requirement, the circumstances of the sale are still relevant. For example, private approaches by a vendor to parties, including Australian parties, are preferable to deals negotiated with one party only. The Treasurer may still take the overall circumstances of the sale into account as part of examining whether a proposal is contrary to the national interest.

9 Control may include relevant ownership and/or beneficial interests. It would generally be expected that Australians control 50 per cent or more of the applicant, or retain 33 per cent or more control of the target.

10 Evidence of a lease agreement with an Australian farming entity must be provided. Account will be taken of factors such as the term of the lease (would generally be expected to be at least 10 years (including any extensions or renewals)) and whether the lessee is provided a pre-emptive right to purchase.

Providing evidence of the open and transparent sale process

The investor is responsible for demonstrating how they became aware that the land/entity was advertised for sale and whether the acquisition was subject to an open and transparent sale process. Investors should include all relevant details about the sale process, whether or not the investor considers the case to meet the Australian opportunity requirement or fit within one of the exceptions. The investor may need to arrange for the vendor to provide details, either via the investor or directly to the Government.

G: EXEMPTION CERTIFICATES FOR AGRICULTURAL LAND

See also the *National Security and Exemption Certificates* Guidance Notes.

Foreign persons (including foreign government investors) seeking to make multiple acquisitions of agricultural land can apply for a *Land Exemption Certificate* under section 58 of the Act. An exemption certificate grants up-front approval for a program of acquisitions, without the need to seek separate individual approval (in the form of a no objection notification) for each investment.

When may an exemption certificate be appropriate?

An exemption certificate is a mechanism available to reduce the regulatory burden of foreign investment screening that would otherwise apply to each acquisition covered by a certificate. It can significantly streamline the approval process for those foreign persons seeking to make a number of investments.

Exemption certificates for agricultural land would generally be considered appropriate where:

- the total proposed value of acquisitions over a three year period does not exceed \$100 million (or if acquiring for use for an activity other than agriculture, \$30 million). This includes acquisitions made individually or under an exemption certificate;
- the maximum value of individual transactions (that is, the value of the property, not individual titles) does not exceed \$10 million; and
- the regions or localities where the agricultural land in which interests are to be acquired are clearly defined.

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:

- 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; and
- the total value of recent FIRB approvals, either individually or via an exemption certificate.

Exemption certificates are generally issued for 12 months for first time exemption certificate holders. Longer durations are considered a case-by-case basis for investors that have a demonstrated compliance history with such certificates.

Exemption certificates are intended for foreign persons who intend to make a high volume of acquisitions (this generally would not include individuals). As such, an exemption 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.

Australian opportunities requirement – an open and transparent sale process

Should a foreign person seek to use an exemption certificate to acquire a freehold interest (or leasehold interest with freehold characteristics¹¹) in agricultural land that will be used for a primary production business or residential development, or an interest in a land entity that holds agricultural land that will be used for a primary production business or residential development, that land/entity will need to have been offered for sale through an **open and transparent sale process**. Conditions will generally be imposed on exemption certificates to ensure this requirement is met (including reporting on the sale process for each of the acquisitions).

Applications for a *Land Exemption Certificate* should include all relevant details around the proposed sale processes for the program of acquisitions, and whether or not the investor considers the acquisitions will meet the open and transparent sale process requirement. Investors can request for the open and transparent sale process conditions not to be imposed on their exemption certificate, or for certain acquisitions under the certificate to be excluded from the requirement, if they meet one of the general exceptions from the open and transparent sale process.

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

Investors should consider whether it is best for transactions with complex sale processes to be handled as separate applications, rather than as part of an exemption certificate.

Example 5

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.

11 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 (for example, perpetual or pastoral leases).

Example 6

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 one 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.

Nationalsecurity land

Where a program of land acquisitions may include land that is ‘national security land’ or may otherwise give rise to national security concerns, foreign persons can also apply for a *National Security Exemption Certificate* under sections 43BA and 43BB of the Regulation.

These exemption certificates can cover acquisitions of land that are otherwise notifiable national security actions and reviewable national security actions. In deciding to grant one of these exemption certificates, the Treasurer would need to be satisfied that the taking of the action or kinds of actions by the foreign person would not be contrary to Australia’s national security.

A foreign person may apply for multiple exemption certificates (e.g. under sections 58 of the Act and 43BA of the Regulation) in a single application to ensure that they obtain cover across all of their proposed investments.

H: DEFINITION OF AN AGRIBUSINESS

Section 12 of the Regulation defines an Australian entity or Australian business to be an agribusiness when the following two circumstances are met:

- 1) The Australian entity or Australian business uses assets in carrying on a business wholly or partly, in any of the following classes of the [Australian and New Zealand Standard Industrial Classification \(ANZSIC\) codes](#):
 - Any class of Division A (generally includes those activities engaged in growing crops, raising animals, growing and harvesting timber, and harvesting fish and other animals from farms or their natural habitats);
 - 1111 Meat processing;
 - 1112 Poultry Processing;
 - 1120 Seafood Processing;
 - 1131 Milk and Cream processing;
 - 1133 Cheese and Other Dairy Product Manufacturing;
 - 1140 Fruit and Vegetable Processing;
 - 1150 Oil and Fat Manufacturing;

- 1161 Grain Mill Product Manufacturing; and/or
 - 1181 Sugar Manufacturing; and
- 2) Either:
- for an Australian entity:
 - : the value of the assets of the entity (and its subsidiaries), used in carrying on a business listed in (1), exceeds 25 per cent of the total asset value of the entity; or
 - : the earnings before interest and tax derived by the entity (and its subsidiaries), in carrying on a business listed in (1), in the most recent financial year for which there are audited accounts, exceeds 25 per cent of the total earnings for the entity; or
 - for an Australian business; the value of the assets of the business, used in carrying on a business listed in (1), exceeds 25 per cent of the value of the total assets of the business.

For the avoidance of doubt, any agricultural land or water interest assets held by the entity or business, should be taken into account in these calculations.

Where there are mixed earnings or mixed-use assets that are used partly in a relevant ANZSIC class, these may be apportioned on the basis of information available to the foreign person (including information that they may have access to on a confidential basis).

Example 7

Agversity is a diversified Australian business and the parent entity of the business. The business has operations in both dairy product manufacturing and transport logistics. A German corporation is proposing to acquire 15 per cent of the securities of Agversity (which is an Australian entity) for \$70 million.

Agversity's most recent audited financial statements show that in the last financial year: 10 per cent of the value of its total assets were used in its dairy manufacturing operations; and its dairy manufacturing operations accounted for more than 40 per cent of its total earnings before interest and tax.

As the proportion of Agversity's total earnings before interest and tax derived from its dairy manufacturing business exceeds 25 per cent, Agversity is considered to be an agribusiness.

Example 8

Holt's Meats is a meat processing abattoir that does not hold any agricultural land. Despite this, more than 25 per cent of its assets by value are used in the carrying on of a meat processing business. It is thus considered an agribusiness.

If Jon Co, a private investor from Italy, acquired a 10 per cent interest in Holt's Meats for \$61 million, it would be acquiring a direct interest in an agribusiness, and would need to seek foreign investment approval for this before making the investment.

I: WHEN DOES AN INVESTMENT IN AN AGRIBUSINESS REQUIRE APPROVAL?

See also the *Overview, Key Concepts, Business, National Security and Fees* Guidance Notes.

Under Australia's foreign investment framework, a foreign person must notify the Treasurer before taking a notifiable action or a notifiable national security action. Some notifiable actions are also significant actions. A foreign person must not take a notifiable and significant action, or a notifiable national security action, until they have received foreign investment approval for that proposed action.

- Where a foreign person acquires an interest in an agribusiness, this will be a notifiable and significant action if the investor is acquiring a direct interest in the business and the **monetary threshold** is met.
- Where a foreign person acquires an interest in an agribusiness, this will be a notifiable national security action if the investor is acquiring a direct interest in the business, or starting such a business, and the business is a national security business.

A foreign person seeking to acquire an interest in an agribusiness that meets one of these conditions must apply for foreign investment approval before taking the action.¹² Applications are submitted electronically on the [Foreign Investment Review Board \(FIRB\) website](#), and are supported by further guidance (see, for example, the FIRB application checklist). A fee is payable for all foreign investment applications.

If the proposed investment is a notifiable and significant action, it will be screened for foreign investment approval under the national interest test. If the proposed investment is a notifiable national security action, and is not also a significant action, it will be screened under the narrower national security test. Regardless of which test the investment is screened under, the foreign person must not take the action until they have received foreign investment approval.

Significant penalties (including infringement notices, civil and criminal penalties) may apply for breaches of the foreign investment law.

Some investments may involve multiple actions

Investors should be aware that some agribusinesses may also be considered agricultural land entities, and foreign investment approval may be required for more than one action.

Section 13 of the Regulation defines an agricultural land entity as an Australian entity that hold interests in agricultural land, where the value of those interests exceed 50 per cent of the value of the entity's total assets (see the *Business* Guidance Note). Where that entity also carries on a business in a **relevant ANZSIC class**, the entity may also be an agribusiness.

Investments in an agribusiness and/or agricultural land entity may involve multiple notifiable or significant actions including: acquiring an interest in agricultural land; acquiring a direct interest in an agribusiness; and/or acquiring a substantial interest in an entity. This will largely depend on the agricultural land holdings of the target entity, the interest being acquired, and whether the relevant monetary thresholds are met.

¹² Foreign persons who want to minimise the risk of an asset they are interested in purchasing being sold to someone else before they receive foreign investment approval can enter into a contract as long as the contract is conditional on receiving foreign investment approval.

Example 9

Happy Grow Apples is a large Australian entity that operates multiple apple orchards around Australia and sells its fresh apples to supermarkets. The value of Happy Grow's agricultural land holdings comprise more than 50 per cent of its total assets (which are valued at \$300 million).

Happy Grow Apples meets the definition of both an agricultural land entity and an agribusiness.

If Jon Co, a private investor from Italy, acquires a 30 per cent interest in Happy Grow Apples for \$100 million, it would be acquiring: a direct interest in an agribusiness; a substantial interest in an entity; and an interest in Australian agricultural land. Jon Co would need to apply for, and receive foreign investment approval, for all three actions before making the investment.

Exemptions from requiring approval

Part 3 of the Regulation provides a number of exemptions, where an investment in an agribusiness may not be considered a notifiable action, a significant action, and/or a notifiable national security action, and may thus not need to be notified to the Treasurer. See the *Key Concepts Guidance Note*.

However, certain foreign investments that are not notifiable actions or notifiable national security actions (including as a result of one of these exemptions) may be reviewable national security actions. Where a reviewable national security action is not notified to the Treasurer, the action may be called-in for review if the Treasurer considers that the action may pose a national security concern. Foreign persons can choose to extinguish the Treasurer's call-in power by voluntarily notifying of reviewable national security actions. Guidance on investment areas that may raise national security concerns, and where investors are therefore encouraged to voluntarily notify, are outlined in the *National Security Guidance Note*.

J: MONETARY THRESHOLDS FOR AGRIBUSINESS INVESTMENTS

The monetary threshold for an investment into an agribusinesses depends on whether or not the foreign person is a foreign government investor.

- For foreign government investors, a \$0 threshold applies.
- For private investors (except those from Chile, New Zealand and the United States, who are exempt from agribusiness investments¹³), a cumulative \$61 million threshold applies.
 - In working out if this cumulative threshold is met, sum up:
 - : the consideration for the current proposed investment;
 - : the value of any other interests currently held in the agribusiness by the foreign person and their associates (using a reasonable assessment of the current market value of those interests); and
 - : the value of any other interests previously acquired from the agribusiness (for example, this may include machinery or equipment), and still held, by the foreign

13 To be eligible for this exemption, the immediate acquirer must be an entity formed in one of these countries. An investor acquiring through a subsidiary incorporated in another jurisdiction will not be eligible.

person and their associates (using a reasonable assessment of the current market value of those interests).

- For all investments in national security land, the monetary threshold is \$0, regardless of the investor.

FURTHER INFORMATION

Further information is available on the [FIRB website](#) or by contacting 1800 050 377 from Australia or +61 2 6216 1111 from overseas.

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.