



EXEMPTION CERTIFICATES

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This guidance document incorporates content from the pre-1 January 2021 FIRB website and Guidance Notes 8, 9, 21, 26 and 49, as well as new content indicated by a 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.

- This Guidance Note provides a general overview on exemption certificates under the foreign investment review framework. For further information on a particular type of exemption certificate, depending on the kinds of proposed investments to be covered under the certificate, see the:
 - *Agriculture* Guidance Note
 - *Commercial Land* Guidance Note
 - *Residential Land* Guidance Note
 - *Mining* Guidance Note
 - *Business* Guidance Note
 - *National Security* Guidance Note
- Exemption certificates are intended to reduce regulatory burden for foreign persons (including foreign government investors) by enabling them to obtain up-front approval for a program of lower-risk investments over a period of time, rather than having to apply for a no objection notification for each proposed investment.
- Applications for exemption certificates will be considered on a case-by-case basis against the national interest test or national security test, as the case requires.
- A person may apply for multiple exemption certificates for different types of interests (for example, land interests and securities interests) in a single application. An application for an exemption certificate will not be considered until the relevant application fee has been paid in full. For further information on fees, see the *Fees* Guidance Note.
- 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 (or national security, as the case requires). A variation may be made on application in writing from the recipient of the exemption certificate or on the Treasurer's own initiative. For further information on variations, see the *Key Concepts* Guidance Note.
- A foreign person who has had an application for an exemption certificate declined or narrowed to exclude certain interests can still seek a no objection notification for individual acquisition(s).

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A: WHEN MAY AN EXEMPTION CERTIFICATE BE APPLICABLE?

An exemption certificate is a mechanism available to minimise regulatory burden by enabling foreign investors to obtain approval for a program of investments instead of a separate approval for each investment. It is intended for foreign persons with a high volume of investments. Generally, a certificate will not 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 total and individual value of interests that can be acquired as well as the period during which acquisitions can be made. Exemption certificates are generally issued for 12 months for first time exemption certificate holders. Longer durations are considered on a case-by-case basis for investors that have a demonstrated compliance history with such certificates.

Effect of an exemption certificate

An exemption certificate is a certificate given by the Treasurer (or delegated decision-maker) that specifies an interest or an interest of a kind that, if acquired by a foreign person, does not give rise to a significant action, notifiable action, notifiable national security action, or reviewable national security action. The certificate may also specify conditions that are required to be complied with.

The Treasurer is not able to 'call-in' an investment for which an exemption certificate exists. To extinguish the Treasurer's power to 'call-in' a particular investment under an exemption certificate, the investor will be required to have satisfied the relevant reporting requirements such that it is clear the acquisition is permissible under the exemption certificate.

As with no objection notifications, the Treasurer's last resort power will be available for actions for which an exemption certificate has been given. For further information on the Treasurer's 'call-in' power and last resort power, see the *National Security* Guidance Note.

B: TYPES OF EXEMPTION CERTIFICATES

A person may apply for multiple types of exemption certificates for different types of interests in a single application (e.g. businesses/entities exemption certificate, land exemption certificate and notifiable national securities exemption certificate) – in effect enabling an investor to obtain an exemption across all of its proposed actions. Below is a list of exemption certificates a person may apply for under the foreign investment review framework.

Business and entities

A foreign person may apply for an exemption certificate under section 42 of the *Foreign Acquisitions and Takeovers Regulation 2015* (the **Regulation**) if they are proposing to acquire one or more kinds of interests in the assets of an Australian business or the securities of an entity.

For further information, see the *Business* Guidance Note.

Certain interests in exploration tenements, and interests in mining, production or exploration entities

A foreign person may apply for an exemption certificate under section 43 of the Regulation if they are proposing to acquire interests in exploration tenements, and/or interests in mining, production or exploration entities.

For further information, see the *Mining* Guidance Note.

Land

A foreign person may apply for an exemption certificate under section 58 of the Act for a program of acquisitions of one or more kinds of interests in Australian land (for example, a combination of agricultural land and developed commercial land).

For further information, see the following guidance notes:

- *Agriculture* Guidance Note
- *Commercial Land* Guidance Note
- *Residential Land* Guidance Note
- *Mining* Guidance Note

Residential land

There are five types of exemption certificates which cover certain kinds of residential land. Applicants may apply for one or more types of exemption certificates, where applicable.

- A foreign person (for example, a temporary resident) may apply for an exemption certificate under section 59 of the Act to acquire an established dwelling.
- A foreign person may apply for an exemption certificate under section 43B of the Regulation to acquire residential land other than an established dwelling (for example, vacant land or near-new dwelling).
- A property developer may apply for an exemption certificate under section 57 of the Act to sell new dwellings in a development to a foreign person.
- A property developer may apply for an exemption certificate under section 43A of the Regulation to sell near-new dwellings in a development to a foreign person.
- A foreign person may apply for an exemption certificate under section 58 of the Act for a program of acquisitions of residential land (e.g. a combination of established dwellings, vacant land, new dwellings, and/or near-new dwellings).

For further information, see the *Residential Land* Guidance Note.

National security actions

A foreign person may apply for an exemption certificate under section 43BA of the Regulation in relation to actions that would otherwise be notifiable national security actions. A foreign person may apply for an exemption certificate under section 43BB of the Regulation in relation to actions that would otherwise be reviewable national security actions.

For further information, see the *National Security* Guidance Note.

Example 1

FarmCo, a foreign person, is seeking to acquire a number of agricultural land parcels over the next 12 months for the purpose of running a primary production business with a total consideration of \$40 million. FarmCo may apply for a land exemption certificate under section 58 of the Act.

If there were already existing Australian businesses operating on the land, FarmCo may also be acquiring interests in a business or assets of a business. In such circumstances, FarmCo may apply for a land exemption certificate under section 58 of the Act and a business exemption certificate under section 42 of the Regulation.

Example 2

MobileCo is a foreign person who wants to make a \$100 million program of acquisitions of Australian land (in particular, vacant commercial land) for development. As Australian land may also be national security land, MobileCo applies for a land exemption certificate under section 58 of the Act and a national security exemption certificate under section 43BA of the Regulation.

Example 3

CentralCo, a foreign person, seeks to undertake a program of acquisitions of securities in entities in Australia. Some of the target entities may also be land entities under section 13 of the Regulation. As such, CentralCo submits an application for a land exemption certificate under section 58 of the Act and a business/entities exemption certificate under section 42 of the Regulation.

C: HOW WILL APPLICATIONS BE ASSESSED?

Business, entities or land exemption certificates

Applications for business, entities or land exemption certificates will be considered on a case-by-case basis to ensure they are not contrary to the national interest (except for national security exemption certificates under sections 43BA and 43BB of the Regulation, which will be considered on the basis that they are not contrary to national security – see below).

The national interest test takes into account factors such as the character of the investor and the nature of its Australian business, the purpose and scope of proposed acquisitions, acquisitions history, potential benefits of the proposed investment, and compliance standing (for example, meeting reporting requirements and any existing conditions) as well as any national security risks. For more information on the assessment of the national interest, see *Australia's Foreign Investment Policy* on the FIRB website.

The Treasurer may grant exemption certificates that exempt one or more acquisitions covered by the certificate from being notifiable actions or significant actions where the proposed acquisitions are:

- capable of being assessed against the national interest test at the time of application (that is, this will likely necessitate a higher level of certainty about the nature of the acquisition/s); and/or
- the investor and investment is assessed to be sufficiently low risk; and/or

- the proposed target company, business, industry, sub-sector or sector typically does not raise national interest issues.

If an applicant, or any related person or entity, has previously held an exemption certificate, their compliance history with respect to the conditions of that exemption certificate will be taken into account when assessing the applicant's suitability to hold a subsequent exemption certificate.

For exemption certificates relating to interests in agricultural land, compliance with obligations relating to the [Register of Foreign Ownership of Agricultural Land](#) 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.

Other examples of situations where the granting of an exemption certificate may be considered contrary to the national interest by the Treasurer include where:

- The program of proposed acquisitions is not well defined by an applicant and the scope is very broad.
- National interest factors cannot be adequately assessed at the time of the application.
- The program of investment is not considered to be sufficiently 'low risk' or 'low sensitivity'.
- The potential tax risks cannot be adequately assessed at the time of the application.

National security exemption certificates

Applications for exemption certificates with respect to notifiable national security actions will be considered on a case-by-case basis to ensure they are not contrary to national security. An action that is covered by the certificate would not be a notifiable national security action and therefore would not be subject to the notification requirements that attach to notifiable national security actions (if the action is also a significant or notifiable action, the obligations that attach to those actions would remain unless an exemption applies).

Similarly, applications for exemption certificates with respect to reviewable national security actions will be considered on a case-by-case basis to ensure they are not contrary to national security. An action that is covered by the certificate will no longer constitute a reviewable national security action and therefore not be subject to the 'call-in' power.

The Treasurer may grant exemption certificates that exempt one or more acquisitions covered by the certificate from being notifiable national security actions or reviewable national security actions where the proposed acquisitions are:

- capable of being assessed against the national security test at the time of application (that is, this will likely necessitate a higher level of certainty about the nature of the acquisition/s); and/or
- the investor and investment is assessed to be sufficiently low risk; and/or
- the proposed target company, business, industry, sub-sector or sector typically does not raise national security issues.

Given the sensitivity of national security related exemption certificates, investors are encouraged to contact the Treasury early in the process of preparing an application.

D: WHAT INFORMATION NEEDS TO BE PROVIDED?

Applicants should refer to the *FIRB application checklist* to ensure that they provide the required information, noting that additional information may also be requested during the assessment stage.

The proposed acquisitions must be of a kind that the Treasurer can be satisfied are not contrary to the national interest (or national security, as applicable) at the time of granting the certificate. As such, when granting an exemption certificate, the Treasurer must be satisfied that the proposed investments to be covered by the certificate are not individually or collectively contrary to the national interest (or national security, as applicable).

As such, applications for exemption certificates need to contain sufficient detail about proposed acquisitions to allow the national interest test or national security test to be applied. While in certain cases an applicant may not know the target entity or entities for the investment, applications will need to provide sufficient detail about potential target entities or assets by identifying target industries, and the nature of the businesses and assets that the foreign person proposes to invest in. The provision of additional information that is not well targeted may hinder the efficient processing of applications.

E: TIMEFRAME AND PROCESS

Exemption certificate applications are typically more complex than applications for individual transactions, and therefore may take longer to process than standard applications.

The applicant can assist the Treasury to efficiently assess the application by completing all fields in the online application with specific attention to detail which will assist government agencies to identify the likely targets for investment. The more specific the application is about likely targets and the scale and nature of the proposed acquisitions, the more straightforward the assessment process will be.

F: CONDITIONS AND COMPLIANCE

An exemption certificate will generally be given subject to conditions. Conditions contained in an exemption certificate will apply in the same way as if a target was being acquired individually and subject to a no objection notification with conditions.

Each exemption certificate will set clear parameters for proposed acquisitions that can be made under it. This will generally involve a limit on total consideration value and the kinds of interests that can be acquired (for example, one or more of assets or securities). Acquisitions relating to a particular kind of interest or specific targets may be subject to specific limits. This may mean a certificate is granted on a narrower basis than what was initially applied for.

Where the exemption certificate relates to acquisitions of vacant land, standard development conditions may apply (e.g. the exemption certificate is conditional on development commencing within a five year period). For further detail, see the *Commercial Land* Guidance Note.

Where the exemption certificate relates to acquisitions of vacant commercial land or agricultural land, the Australian opportunity requirement may apply (that is, the exemption certificate is

conditional on the land being sold through an open and transparent sale process). For further detail, see the *Agriculture and Commercial Land* Guidance Notes.

Acquisitions that are not within the scope of an exemption certificate are not covered by the exemption certificate – and, if a notifiable action or a notifiable national security action, must be separately notified and assessed. Failure to do so may constitute an offence or other breach of the Act and result in penalties. Non-compliance with the Act or the conditions of an exemption certificate may also lead to revocation of an existing exemption certificate.

G: REPORTING AND COMPLIANCE

Foreign persons granted an exemption certificate may be required to report periodically (for example, quarterly) on the acquisitions made during the period specified under their certificate, as per any specific reporting conditions. 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. For more information, see the [Compliance and Reporting](#) page on the FIRB website.

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.