



On 29 March 2020, the Treasurer announced that due to the impacts of the coronavirus outbreak, all monetary thresholds will be temporarily reduced to \$0, and that the FIRB will work with applicants to extend the timeframes for decision making to up to six months. Further information on these temporary changes can be found in 'Guidance Note 53: Temporary measures in response to the coronavirus', available on the FIRB website at [www.firb.gov.au](http://www.firb.gov.au).

All other guidance material, including this note on agricultural land, should be read in light of those temporary changes. Within this note, the temporary changes may have particular impact on matters related to, but not exclusively including:

- the monetary thresholds for determining if the threshold test is met; and
- the imposition of conditions for the development of land.

Where there is any inconsistency between this note and Guidance Note 53, the information in Guidance Note 53 takes precedence.

## AGRICULTURAL LAND INVESTMENTS

Last updated: 24 April 2020

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.

---

<sup>1</sup> An exception applies for interests arising from security interests (see section 6 of the Register of Foreign Ownership of Agricultural Land Rule 2015).

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.
- 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.
- For *non-foreign government investors from Chile, New Zealand and the United States*, a threshold of \$1,192 million applies.
- For *Thai investors* who propose to acquire agricultural land which is being used wholly and exclusively for a primary production business, a threshold of \$50 million applies.

## AUSTRALIAN OPPORTUNITY - AN OPEN AND TRANSPARENT SALE PROCESS

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, the decision-maker will consider whether there was an opportunity for Australian investors to acquire the given parcel of agricultural land or agricultural land entity, and have regard to the openness and transparency of the sale process.

Generally, approval will not be granted for the acquisition of freehold interests (and leasehold interests with freehold characteristics<sup>2</sup>) in agricultural land that was not offered for sale through an **open and transparent sale process**.

---

<sup>2</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

This requirement only applies to agricultural land that is intended to be used for a primary production business or residential development.

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 applicants 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);
- 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 applicant can demonstrate the land has been open to an equivalent level of participation by Australian parties as the sale process outlined above.

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

---

acquire a freehold interest at the end of the lease; and where the lessor is a State/Territory government (eg. perpetual or pastoral leases).

include proposals involving a sale and long term<sup>3</sup> leaseback arrangement to an Australian investor.

Nothing in these general requirements and exceptions removes the decision-maker's ability to exercise discretion and weigh up all the national interest circumstances presented by a proposal. The decision-maker may consider extenuating circumstances or compassionate grounds. Examples of extenuating circumstances generally not subject to this national interest consideration include where the proposal is genuinely immaterial to broader ownership considerations – for example 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).

The applicant 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. Applications should include all relevant details about the sale process, whether or not an applicant considers the case to meet the Australian opportunity requirement or fit within one of the exceptions. The applicant may need to arrange for the vendor to provide details, either via the applicant or directly to the Treasury.

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

#### **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.

#### **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

---

<sup>3</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.

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

HousingDevelopment Co, a foreign person, wishes to acquire a parcel of agricultural land, for the purposes of undertaking a residential development.

HousingDevelopment Co will generally only receive approval for the purchase if the land has been subject to an open and transparent sale process.

### Example 4

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 primary production/residential development. However, EnergyDevelopment Co should submit details of the sale process along with their application to demonstrate how the land was offered for sale.

### Example 5

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.

#### 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 review 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 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; and
- 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](#) or by contacting +61 2 6263 3795.

---

**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.