

Changes to rules affecting foreign investment in Australian agriculture

Following from its commitment to strengthen the foreign investment framework, in July 2015, the Australian Government released the first exposure drafts of new legislation to replace the existing foreign investment regime.

The proposed new law, which the Government envisages will be in force by 1 December 2015, contains a wide range of changes, including a number which are focused particularly on the agricultural sector. This briefing provides an overview of the key proposals relating specifically to this sector.

Changes affecting agricultural sector – key dates

March 2015: Policy requirement introduced to require acquirers to notify rural land acquisitions where the cumulative value of their holdings exceeds A\$15 million

May 2015: Government announces reform package

June 2015: Agricultural land register is established and open for registrations. Policy intention published requiring registration of interests in agricultural land

July 2015: Government releases exposure draft bills to replace existing regime

1 December 2015: Expected commencement date of new law, to include:

- cumulative A\$15 million agricultural land notification threshold
- A\$55m agribusiness notification threshold
- mandatory registration of interests in agricultural land, administered by the Australian Tax Office
- various other changes, including introduction of significant application fees.

Overview of the reforms

On 2 May 2015, the Australian Government announced a package of reforms aimed at strengthening and modernising Australia's existing foreign investment framework. In July 2015, the first exposure drafts of proposed new laws to replace the existing regime (contained in the *Foreign Acquisitions and Takeovers Legislation Amendment Bill 2015*, the draft *Foreign*

Acquisitions and Takeovers Regulations 2015 and the *Register of Foreign Ownership of Agricultural Land Bill 2015*) were released¹. The first exposure drafts² contain a wide number of proposed changes, including:

- introduction of concepts of "agricultural land" and "agribusiness" and restrictions on foreign persons buying such land and businesses;
- raising the "substantial interest" notification threshold from 15% to 20%;
- extending the scope of the law to apply to foreign government investors (who are currently subject to additional requirements under the Government's investment policy but not the current law);
- introduction of substantial application fees for processing applications;
- stricter penalties, compliance and enforcement provisions; and
- increased scrutiny around foreign investment in the agricultural sector.

Key proposals impacting the agricultural sector

The key proposals in the new draft legislation affecting the agricultural sector are set out below.

Current law and policy

Since March 2015, Australia's foreign investment policy (the **Policy**) has imposed a policy requirement on foreign persons to notify the Government and get prior approval for an acquisition of an interest in *rural land* where the cumulative value of rural land that the foreign person (and and its associates) already holds exceeds, or immediately following the proposed acquisition is likely to exceed, A\$15 million³.

Under current legislation and Policy, *rural land* is land used *wholly and exclusively* for carrying on a business of primary production.

To be a business of primary production, the business must be substantial and have a commercial purpose or character.⁴

The current law contains no concept of *agricultural land*.

Proposed new law

The new law is expected to introduce a new concept of *agricultural land* (distinct from the concept of *rural land* used under the current law).

From 1 December 2015, there is proposed to be a legal requirement (not simply a requirement under Policy) for all foreign persons to notify acquisitions of interests in agricultural land where the cumulative value of agricultural land that the foreign person (and and its associates) already holds exceeds, or immediately following the proposed acquisition is likely to exceed, A\$15 million.⁵

Agricultural land is proposed to be defined as land *that is used, or that could reasonably be used*, for a primary production business. Accordingly, the concept is much wider than the concept of *rural land*.

Whether or not land *could reasonably be used* for a primary production business will depend on the facts and circumstances of the land, however, agricultural land is expected to include 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.⁶

Agricultural land registration requirement

Current law and policy

There is currently no legal requirement to register interests in agricultural land.

However, the Policy provides that the Government has announced an intention that:

- from 1 July 2015, foreign persons holding interests in agricultural land must register those interests with the Australian Taxation Office (**ATO**) (regardless of value of that land); and
- all existing holdings of agricultural land must be registered by 31 December 2015 and any new interests be registered within 30 days.

The ATO has also indicated that foreign persons should also notify when they no longer have an interest in agricultural land⁷.

The definition of *agricultural land* in the current Policy means land in Australia that is used, or *that could reasonably be used*, for a primary production business and accordingly reflects the proposed legal definition to be introduced as part of the new package of legislation.

The register of agricultural land ownership (the **Register**) has already been established in anticipation of the change in law. Since 1 July 2015 registrations have been open for lodgement online via the ATO website.⁸

Proposed new law

The new law is expected to give legislative effect to Register and registration requirements in the Policy.

Foreign persons who acquire or change their interests in agricultural land will be required by law to report those interests or changes to the ATO, generally within 30 days.

Interests held between 1 July 2015 and 30 November 2015 are not required to be reported to the ATO until on or after 1 December 2015. However, foreign persons are able to notify the ATO from 1 July onwards and it is anticipated that this will be taken as having complied with the requirement to give notice on and from 1 December.

The draft legislation envisages the register will have two parts:

- the *basic part*, containing all information notified on or after 1 July 2015; and
- the *statistical part*, containing statistics derived from information in the basic part of the Register.

The Commissioner of Taxation will be required to periodically publish the statistical part of the Register on a website. The Government expects the first publication to be in the first half of 2016.

New agribusiness notification threshold

Current law and policy

The current law contains no provision which distinguishes agribusiness from other corporate or business acquisitions.

Proposed new law

The new law is expected to impose a new requirement on foreign persons to notify and get prior approval from the Government for all investments in *agribusiness* valued above a A\$55m threshold.

In terms of what will constitute *agribusiness*, the regulations are expected to prescribe an agribusiness to be a business that is carried on, wholly or partly, in any of certain classes of the Australian and New Zealand Standard Industrial Classification Codes as in force from time to time, published by the Australian Bureau of Statistics (**ABS**), and which is published on the ABS website.⁹

This will capture certain downstream activities with links to primary production.

It is expected that a business or company will be classified as an agribusiness if at least 25% of its assets or 25% of its (and its subsidiaries') profits are involved in or derived from agribusiness.

Filing fees

Although it will affect sectors other than agriculture, another other significant change which operators in this sector should be aware of is the proposed introduction of significant filing fees for lodgement of foreign investment notifications which are expected to apply on and from 1 December 2015. Fees will vary, depending on the nature of the transaction and applications will not be considered unless and until the requisite fee has been paid. Fees applicable to the agriculture sector are anticipated to be in the following range:

Type of acquisition	Expected filing fee
Agricultural land valued at or under A\$1 million	A\$5,000
Agricultural land valued at over A\$1 million	A\$10,000 incremental fee per A\$1 million in value, capped at A\$100,000
Investments in agribusiness	A\$25,000 or A\$100,000 if the proposed investment is greater than A\$1 billion

What the changes mean for investors

Going forward, all foreign investors will be required to comply with the new regime (only parts of which are discussed in this briefing note). However, the new notification thresholds for agricultural land and agribusinesses are perhaps more likely to impact privately owned foreign investors, in view that foreign government investors and their related entities are already subject to the more stringent notification requirements imposed by the current Policy and includes notification of all acquisitions of land (including agricultural land) and all direct investments (including investments in agribusiness).

That said, in the lead up to the proposed change in law on 1 December 2015, a key issue for all foreign investors in this sector (including foreign government investors) will be the identification of any existing agricultural land and registering that land on the new Register.

Foreign investors may also be incentivised to lodge any proposed foreign investment applications prior to 1 December 2015 to avoid the imposition of substantial filing fees.

¹The imposition of application fees is proposed under the *Foreign Acquisitions and Takeovers Fees Imposition Bill 2015*, which the Government has indicated to be a standard tax imposition bill. The closing date for submissions on the first exposure drafts closed on 17 July 2015.

²This briefing is current as at the time of writing and is based on the first exposure drafts of new legislation containing the anticipated changes and publicly available information. The legislation ultimately enacted and policy requirements imposed by the Government may vary (perhaps substantially) from the exposure drafts.

³Consistent with Australia's free trade agreement commitments, the threshold will apply to all privately-owned investors except those from the United States, New Zealand, Chile, Singapore and Thailand. Privately-owned investors from these countries are subject to the following (non-cumulative) investment thresholds:

- Singaporean and Thai investors require prior approval if acquiring a substantial interest in a primary production business valued above \$50 million; and
- United States, New Zealand and Chilean investors require prior approval if acquiring a substantial interest in a primary production business valued above \$1,094 million.

Foreign investment approval is not needed for acquisitions of interests (including in rural land) (i) by will or devolution by operation of law, (ii) from the Government (Commonwealth, State or Territory, or local; or (iii) solely to hold as security, or by way of enforcement of a security, for the purposes of a money lending agreement

⁴The definition of a primary production business is taken from the *Income Tax Assessment Act 1997* and is not anticipated to be changed by the new laws discussed in this briefing. It refers to production resulting from the cultivation of land; animal husbandry/farming; horticulture;

fishing; forestry; viticulture or dairy farming. Primary production for the purpose of the rural land definition does not include hobby farms, 'rural residential' blocks or land used for stock agistment or mining

⁵This requirement will extend to notification of acquisitions of interests in corporations or trusts where agricultural land comprises over half of their total assets, to the intent that acquisitions of interests in such entities will be treated like direct acquisitions of agricultural land. The exceptions to notification for free trade countries are still expected to apply. Refer to footnote 3.

⁶The explanatory memorandum to the first exposure draft of the *Foreign Acquisitions and Takeovers Legislation Amendment Bill 2015* contains guidance on the factors to consider.

⁷This requirement is contained in the ATO website (see footnote **Error! Bookmark not defined.**) but is not specifically set out in the current Policy.

⁸See: www.ato.gov.au/general/Foreign-investment-in-Australia/agricultural-land-register/

⁹Specifically, it is anticipated that the following classes will be prescribed: all classes in Division A (agriculture, forestry and fishing) and any of the classes in Subdivision 11 of Division C (food product manufacturing), other than class 1113 (cured meat and smallgoods manufacturing); class 1132 (ice cream and manufacturing); class 1162 (cereal, pasta and baking mix manufacturing); a class in group 117 (bakery product manufacturing); class 1182 (confectionary manufacturing) and a class in group 119 (other food product manufacturing).

Contacts

Sydney

Mark Pistilli

T: +61 2 8922 8001

E: mark.pistilli@cliffordchance.com

Richard Graham

T: +61 2 8922 8017

E: richard.graham@cliffordchance.com

Dave Poddar

T: +61 2 8922 8033

E: dave.poddar@cliffordchance.com

Lance Sacks

T: +61 2 8922 8005

E: lance.sacks@cliffordchance.com

Danny Simmons

T: +61 2 8922 8007

E: danny.simmons@cliffordchance.com

Amelia Horvath

T: +61 2 8922 8023

E: amelia.horvath@cliffordchance.com

Perth

Paul Vinci

T: +61 8 9262 5504

E: paul.vinci@cliffordchance.com

Jon Carson

T: +61 8 9262 5510

E: jon.carson@cliffordchance.com

Justin Harris

T: +61 8 9262 5581

E: justin.harris@cliffordchance.com

Paul Lingard

T: +61 8 9262 5575

E: paul.lingard@cliffordchance.com

Tracey Renshaw

T: +61 8 9262 5505

E: tracey.renshaw@cliffordchance.com

China

Terence Foo

T: +86 106535 2299

E: terence.foo@cliffordchance.com

Richard Blewett

T: +86 106535 2261

E: richard.blewett@cliffordchance.com

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www.cliffordchance.com

Clifford Chance, Level 16, No. 1 O'Connell Street,
Sydney, NSW 2000, Australia

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