
‘Marketed widely’ – understanding policy changes to foreign investment in Australian agricultural land

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In brief

On 1 February 2018, the Australian Treasurer announced important updates that will impact how foreign investors can acquire agricultural land (whether freehold or leasehold with a term over five years) in Australia, where approvals from the Foreign Investment Review Board (FIRB) are required. This LegalTalk Alert provides a summary of the Treasurer’s announcement and the subsequent guidance note provided by FIRB, with a takeaway of the key elements of the change, impacts and interpretation of the need for land to be ‘marketed widely’. The new rules will have the greatest impact on the ability to consummate a deal off market with a foreign investor, one which has traditionally been favoured by farmers and investors alike.

In detail

On 1 February 2018, the Australian Treasurer [announced important changes](#) that will affect how foreign investors can acquire agricultural land in Australia where Foreign Investment Review Board (FIRB) approval is required for the acquisition.

The key element of the change will require a foreign investor to demonstrate to FIRB, as part of the application process, that the property proposed to be acquired has been marketed widely, allowing Australians an equal opportunity to participate in the sale process.

Following the Treasurer’s announcement, FIRB has [issued a guidance note](#) in relation to the changes. Key takeaways from the guidance note include:

The property must be ‘**marketed widely**’ which means:

- public marketing/advertising was undertaken for the sale of the property, using channels that Australian bidders could reasonably access (for example, advertised on a widely used real estate listing site, or in a large regional/national newspaper);
- the property was marketed/advertised for at least 30 days; and
- there was equal opportunity for bids or offers to be made for the property while still available for sale.

The guidance note also lists some exceptions to the new ‘marketed widely’ requirement, including where the applicant:

- is acquiring a property via a private sale that was marketed/advertised in the above manner in the last six months but did not sell or where the sale fell through; or
- has a substantial Australian ownership share (i.e. 50 per cent or more), as this constitutes an opportunity for Australian bidders, despite a foreign ownership share; or
- is required to make the acquisition to comply with state or commonwealth law e.g. mining buffer zones.

The changes apply immediately, including to applications currently being considered by FIRB, as well as those to be submitted in the future.

Implications of the policy change

In light of this announcement, it is worth recapping the high level rules around foreign investment in agricultural land, including:

- FIRB approval will generally be required for proposed investments in agricultural land by foreign persons (excluding foreign government investors) where the cumulative value of a foreign person’s agricultural land holdings exceeds AUD15 million. Exceptions apply to investors from Australia’s trade agreement partners (Chile, New Zealand, Thailand and the United States), which have higher thresholds. All acquisitions of agricultural land by foreign government investors require approval.
- Separate to the FIRB approval process, all acquisitions of interests in agricultural land by foreign persons, regardless of whether they require FIRB approval and regardless of value, must be notified to the Australian Taxation Office Register of Foreign Ownership.

The theme of the 1 February policy change, that Australians be given the opportunity to participate in the sale process of agricultural land where foreign persons are the ultimate acquirer, is not entirely new. FIRB has been raising this issue in its assessment of foreign investment applications in relation to agricultural land in a number of applications PwC has been involved with in recent times.

Clearly, pressure has been applied through public channels by local interests in relation to the threat, whether real or perceived, of valuable Australian agricultural assets favouring foreign buyers in off market transactions.

There are many legitimate reasons why a vendor would choose not to opt for a public sale process of an asset, including for political, reputational, commercial, privacy and timing reasons. Clearly, such a vendor could still choose not to market their property ‘widely’ however, their potential source of buyers would therefore exclude foreign persons if FIRB approval is required, thereby arguably limiting the ability for a true market value being achieved for the asset.

Similarly, there may be good reasons why a foreign buyer may not wish to participate in a public sale process. Take for example an existing foreign agricultural land owner who wishes to acquire a neighbouring property to expand operations. The ability to privately approach the neighbouring owner and consummate a deal off market will be compromised where FIRB approval is required.

The takeaway

Vendors, foreign buyers and their respective advisers will need to factor in these new FIRB rules when planning for the sale and purchase of agricultural land in Australia. Our experience shows that there is significant, growing appetite for Australian agricultural land assets and we await to see how this latest policy change may impact the market for agricultural land.

Let's talk

For a deeper discussion of how these issues might affect your business, please contact:

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