



## Primary Production Business Exemptions

This Commissioner's practice provides guidance on when land will be exempt from land tax because it is used for a primary production business.

### Background

Part 3 Division 3 of the *Land Tax Assessment Act 2002* (LTA Act) provides an exemption from land tax for land used by certain people for a primary production business.

### *When land is used for primary production*

Section 30A(1) of the LTA Act provides that land is used for primary production if used for any of the following:

- (a) the growing or rearing of plants (including trees, fungi or any crop) for the purpose of selling them, parts of them or their produce
- (b) the breeding, rearing or maintenance of living creatures for any of the following purposes (*produce animals*) –
  - (i) selling them, or their progeny, for food
  - (ii) the production or collection of their skins, shells or bodily produce
  - (iii) selling parts of them or their skins, shells or bodily produce
- (c) the breeding, rearing or maintenance of produce animals for the purpose of selling them or their progeny –
  - (i) for stud purposes or
  - (ii) to be used for a purpose set out in paragraph (b)(i), (ii) or (iii)
- (d) the breeding or rearing of horses for the purpose of selling them or their progeny
- (e) any other thing prescribed for the purposes of this subsection.

Land is also used for primary production if it is used for rearing living creatures for a third party for the purpose of producing or collecting their skins, shells or bodily produce, or selling parts of the creatures, or their skins, shells or bodily produce. An exemption in these circumstances is limited to where a written agreement<sup>1</sup> is made between the owner of the animals (the secondary producer) and the person who may lawfully use the land for the purposes of rearing living creatures.

Secondary production involves the processing or converting of anything for the purpose of selling it.<sup>2</sup> An exemption is not available for land used for secondary production.

<sup>1</sup> Regulation 13A of the *Land Tax Assessment Regulations 2003*.

<sup>2</sup> LTA Act s 30A(2).

### ***When land is used for a primary production business<sup>3</sup>***

Land is used for a primary production business when it is used for primary production and the use of the land:

- has a significant and substantial commercial purpose or character and
- is directed at making a profit and has a prospect of making a profit (whether or not a profit is actually being made) and
- is planned, organised and carried on in a businesslike manner, rather than being carried on for recreation, hobby, sporting or similar activities and
- has the same or similar characteristics as, and is carried out in the same or similar manner to, the ordinary trade in that line of business taking into account scale, size and permanency; and repetition and regularity.

### ***Rural land***

*Rural land* refers to all land in the State that is not *non-rural land*.

Land is exempt in an assessment year if, at midnight on 30 June in the previous financial year, the land is rural land used solely for a primary production business.<sup>4</sup>

### ***Non-rural land***

*Non-rural land* is all land in the State within the *metropolitan region*<sup>5</sup> or outside the metropolitan region and zoned other than for rural purposes under a local planning scheme or an improvement scheme.

Land is exempt for an assessment year if, at midnight on 30 June in the previous financial year, the land is non-rural land used solely for a primary production business by an owner of the land and/or by a person related to a family owner.<sup>6</sup>

### ***Family owner and person related to family owner***

For the purpose of determining who is a family owner or a person related to a family owner, an individual that is a shareholder, beneficiary or unit holder must be nominated in writing by the family corporation, trustee of the family trust or unit trust scheme (as relevant).<sup>7</sup> This nomination, which must be made by the owner, determines how the family relationships will be tested.

The Commissioner may make the nomination if an owner of the land does not make a nomination within a reasonable period of time after being requested.<sup>8</sup>

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<sup>3</sup> LTA Act s 30B.

<sup>4</sup> LTA Act s 30C.

<sup>5</sup> As defined in the Glossary to the LTA Act, *metropolitan region* is the region described in Schedule 3 to the *Planning and Development Act 2005*.

<sup>6</sup> LTA Act s 30D.

<sup>7</sup> LTA Act s 30G(b)(i).

<sup>8</sup> LTA Act s 30G(b)(ii).

A *family owner*:

- is an individual<sup>9</sup> or
- is a corporation where every shareholder is either the nominated shareholder or a family member of the nominated shareholder or
- holds the land as trustee of a discretionary trust or other trust (except unit trust schemes) under which every *beneficiary* is either the nominated beneficiary or a family member of the nominated beneficiary<sup>10</sup> or
- holds the land as trustee of a unit trust scheme under which every unit is held by either the nominated unit holder or a family member of the unit holder.

A *family member*<sup>11</sup> of a person is a:

- child or remoter lineal descendant of the person or
- parent or remoter lineal ancestor of the person or
- brother or sister, or a child or remoter lineal descendant of the brother or sister of the person
- aunt or uncle of the person or
- spouse or former spouse of the person,<sup>12</sup> or the spouse of a child, parent, brother, sister, aunt or uncle of the person
- a brother or sister of the person's spouse or
- the spouse of a brother or sister of the person's spouse.

A *beneficiary* is a person who is a beneficiary under a trust (other than a unit trust scheme) (whether the beneficiary has a current or future entitlement or is a potential beneficiary under a discretionary trust).

A person using the land is related to a family owner if:

- the family owner is an individual – the person is a family member of the family owner or an entity in which<sup>13</sup> every person who holds an interest is either the family owner or a family member of the family owner.<sup>14</sup>
- the family owner is a corporation – the person is the nominated shareholder ('the shareholder') or a family member of the shareholder, or an entity in which every person who holds an interest is either the shareholder or a family member of the shareholder.<sup>15</sup>
- the family owner is a trustee of a family trust – the person is the nominated beneficiary of the trust ('the beneficiary') or a family member of the beneficiary, or an entity in which every person who holds an interest is either the beneficiary or a family member of the

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<sup>9</sup> The *Interpretation Act 1984* provides that an individual refers to a natural person.

<sup>10</sup> Referred to as a family trust.

<sup>11</sup> Section 29 of the LTA Act provides that *family member* has the meaning given in the *Duties Act 2008* s 100.

<sup>12</sup> Spouse includes a de facto partner of at least 2 years.

<sup>13</sup> Partnership, corporation, trustee of a family trust or trustee of a unit trust scheme.

<sup>14</sup> LTA Act s 30I.

<sup>15</sup> LTA Act s 30J.

beneficiary.<sup>16</sup> All beneficiaries of the trust must be individuals who are the nominated beneficiary or a family member of that nominated beneficiary.<sup>17</sup>

- the family owner is a trustee of a unit scheme – the person is the nominated unit holder ('the unit holder') or a family member of the unit holder, or an entity in which every person who holds an interest is either the unit holder or a family member of the unit holder.<sup>18</sup>

### Commissioner's Practice

1. The owner of the land must provide sufficient evidence to show the land qualifies for an exemption, even if another person uses the land. The owner must obtain and provide detailed information about the use of the land, including non-primary production use.
2. The Commissioner will consider all of the criteria to determine whether the use of the land indicates that a primary production business is being carried out. Where necessary, the Commissioner may engage the services of experts to assist in this determination.
3. To determine whether land is used for primary production, the Commissioner will consider the present, actual and physical use of the land for a purpose to derive relevant benefit.<sup>19</sup> There must be recurring physical activity present on the land and the use of the land must be bona fide and genuine. There must be some degree of substance or intensity attached to it.<sup>20</sup>
4. Primary production is considered to end and secondary production begins when another process to transform the primary product into a derivative product commences.<sup>21</sup>

### **Land used for a primary production business**

5. The conduct of a business involves a commercial enterprise in the nature of a going concern, consisting of activities engaged in for the purpose of profit on a continuous or repetitive basis.<sup>22</sup> It should conform to established commercial principles for the operation of that type of business.<sup>23</sup>
6. The land must be used solely for primary production business and cannot be used for another purpose, including secondary production and other non-primary production uses such as holiday accommodation. However, the land may be used for infrastructure associated with the primary production business, such as dams, packaging or machinery sheds, and loading ramps.

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<sup>16</sup> LTA s 30K.

<sup>17</sup> Trusts containing beneficiaries that are not natural persons have until 30 June 2020 to make the necessary amendments to make trusts compliant in order to receive an exemption for the 2019-20 assessment year.

<sup>18</sup> LTA s 30.

<sup>19</sup> *Chief Commissioner of State Revenue v Metricon Qld Pty Ltd* [2017] NSWCA 11

<sup>20</sup> *Carjugular Industries Pty Ltd v Commissioner of Land Tax* (1983) 9 QLCR 151

<sup>21</sup> *Caruana v Chief Commissioner of State Revenue* [2011] NSWADT 183 at [44]

<sup>22</sup> *Hope v Council of the City of Bathurst* 91980) HCA16; *Commissioner of Taxation (Cwth) v Murry* [1998] HCA 42

<sup>23</sup> *Ferguson v FCT* [1979] FCA 29; *Shanahan v Commissioners of Land Tax (NSW)* 96 ATC 4320

### *Significant and substantial commercial purpose or character*

7. Relevant factors in determining whether land used for primary production is used for a significant commercial purpose or character include:
  - 7.1 physical size and scale of the activity
  - 7.2 repetition and regularity of the activity
  - 7.3 intensity of the activity
  - 7.4 characteristics of the activity compared to businesses in the same type of production
  - 7.5 history and future prospects for income, expenses and profit
  - 7.6 current and expected commercial viability
  - 7.7 size of profits comparative to the value of land
  - 7.8 amount of capital employed
  - 7.9 resources (including time, labour and expenditure) put into the activity
  - 7.10 due diligence undertaken by the person conducting the activity to ensure commercial viability and
  - 7.11 organisation of the activity, whether conducted in businesslike manner.<sup>24</sup>

### *Directed at making a profit and has a prospect of making a profit*

8. Use of the land must be directed at making a profit on a continuous and repetitive basis and must have a prospect of doing so, even if a profit is not currently made.
  - 8.1 An intention to simply cover expenses is not sufficient.
  - 8.2 Non-cash costs such as depreciation should be accounted for in determining profit, as should holding costs such as local government rates. Consideration should also be given to labour, other resources provided free of charge, and the value of any benefits obtained in lieu of monetary consideration, such as an employee who is remunerated by way of free or reduced rent.
  - 8.3 It is not necessary for the primary production activities to make a profit in every year to be classed as a primary production business. Actual profits or losses from previous years and expectations of profit or loss in future years are important indicators and will be considered.
  - 8.4 A one-off profit for a particular period may not be sufficient to qualify for exemption. The profit result in preceding periods and the potential for profit in subsequent years are relevant in determining the primary producer's intention.

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<sup>24</sup> *Maraya Holdings v Chief Commissioner of State Revenue* [2013] NSWSC 23 and *Maraya Holdings v Chief Commissioner of State Revenue* [2013] NSWCA 408

*Use of land is planned, organised and carried on in a businesslike manner*

9. A primary production business is characteristically carried on in a systematic, organised and repetitious manner conforming to ordinary commercial principles that amount to carrying on a business. The Commissioner may compare the planning, organisation and recordkeeping of the activity with other businesses carrying out the same type of primary production.
10. Documentary evidence which may demonstrate a business is conducted include:
  - 10.1 evidence from the Australian Taxation Office that a person has received tax concessions or deductions as a primary producer
  - 10.2 financial statements for the business
  - 10.3 business plans, work journals or other evidence of the activities concerning the business
  - 10.4 stock details (e.g. movement records, purchase and sales receipts)
  - 10.5 asset registers, including fixed assets
  - 10.6 maps, photos and other evidence of the specified land used
  - 10.7 leases, licences or other agreements with third parties and
  - 10.8 other records (e.g. breeding records, input and production costs, seasonal and other conditions impacting production).
11. A business in a start-up period must demonstrate more than the improvement of land to bring it to a condition where it might be used for a primary production business for which it is not yet suitable.<sup>25</sup>
12. Regardless of whether an activity is carried on in an organised or systematic manner, the pursuit of a hobby is not carrying on a business. Generally an activity is carried on as a hobby or for recreation or sport if:
  - 12.1 it is evident the person conducting the activity does not intend to make a profit; there is no system or plan in place to show how a profit can be made
  - 12.2 losses are incurred because the activity is motivated by personal pleasure
  - 12.3 the transaction is isolated and there is no repetition or regularity of sales
  - 12.4 the activity is not carried on in the same manner as a business activity
  - 12.5 there is little evidence of any system or organisation about the activity
  - 12.6 the activity is carried on a small scale or
  - 12.7 there is an intention by the person conducting the activity to carry on a hobby, a recreation or sport rather than a business.

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<sup>25</sup> *Thomas v FCT* [1972] 3 ATR 165; *Southern Estates Pty Ltd v FCT* (1967) 117 CLR 481

### *Similar characteristics and manner to other businesses*

13. The use of the land must have the same or similar characteristics as, and be carried out in the same or similar manner to, the ordinary trade in that line of business taking into account scale, size, permanency and repetition and regularity.
14. To determine this, the Commissioner may compare the following factors and characteristics:
  - 14.1 amount of capital invested
  - 14.2 sort of expenses incurred
  - 14.3 types of customers to whom the product is sold
  - 14.4 type of marketing
  - 14.5 size of profits and profit margin
  - 14.6 resources (including time, labour and expenditure) put into the activity
  - 14.7 relevant knowledge and experience of the person conducting the activity
  - 14.8 organisation of the activity and
  - 14.9 method of operation of the activity.
15. The larger the scale of the activity, the more likely it will be that a primary production business is being carried on. If the scale of the activity is small but results in more produce than is required for personal use and there is an intent or reasonable expectation of making a profit, a business may be considered to be carried on despite the scale.
16. When assessing volume of sales, allowance will be made for whether the business is in the early stages of activity, as well as whether sales were affected by droughts, fires and other uncontrollable events.
17. If at least the minimum activities necessary to maintain a commercial quantity and quality of product for sale have not been maintained, the Commissioner may consider the person has ceased to carry on a primary production business.
18. The Commissioner will not consider activities conducted on land of a token or trivial nature without evidence of sales, natural increase of stock or a business plan to be the conduct of a business.

### ***Owner-user (Non-rural land only)***

19. The user of the land is taken to be the person entitled to the income from the primary production activities conducted on the land. The land must be used solely by the owner, a person related to the owner or a family owner of the land, or a combination of both.
20. If non-rural land is jointly owned by two or more family owners, the land will only qualify for exemption where any of the owners or a related person is using the land for a primary production business.
21. If non-rural land is jointly owned by unrelated persons, the exemption will only apply if all of the owners and no other persons are using the land for a primary production business.

### *Examples*

1. John, David and Joan are not related. They own the land but only Joan uses the land for a primary production business. The land is not exempt because it is not being used by all the owners.
2. John, David and Joan are not related. They own the land and all use the land for a primary production business. The land is exempt because it is being used by all of the owners.
3. John and JP Pty Ltd are the owners of the land. John and his son Paul are the only shareholders in JP Pty Ltd. All owners qualify as a family owner of the land and all owners are related to each other. Paul is the user of the land. The land is exempt because it is used by Paul solely for a primary production business and he is related to the owners of the land.
4. John, John's wife Jane and their friend David own the land. David's son Allan is using the land for a primary production business. The land is not exempt even though the person using the land is related to one owner as not all of the owners are related to each other.

### ***Partial exemptions***

22. If a portion of the land is being used solely for a primary production business and all other criteria for the exemption have been met, a partial exemption may be granted for that portion of land.<sup>26</sup>

#### *Example 5*

Two-thirds of a parcel of land is being used solely for a primary production business and one-third is being used for a trucking business. The two-thirds being used for the primary production business will be exempt from land tax.

23. If land is used for both primary production and secondary production, a partial exemption may be allowed on that portion of the land used solely for the primary production business.

#### *Example 6*

Two-thirds of a parcel of land is being used to grow oranges and one-third is used to process the oranges into juice. The two-thirds being used for the primary production business will be exempt from land tax.

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<sup>26</sup> See Commissioner's Practice LT 23 'Taxable Value of Partially Exempt Land' for an explanation of how the taxable value of partially exempt land will be determined.



## Date of Effect

This Commissioner's practice takes effect from 1 July 2019.

Nicki Godecke  
COMMISSIONER OF STATE REVENUE

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## Commissioner's Practice History

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		From	To
LT 17.0	22 May 2015	1 July 2014	30 June 2019
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