

CHANGES TO TREATMENT OF WIND AND SOLAR POWER STATIONS UNDER THE FOREIGN ACQUISITIONS AND TAKEOVERS REGULATION 2015

CLASSIFICATION OF LAND

The below table summarises how land will be classified going forward, in light of the changes to the FIRB Regulations.

Land use	Classification	Threshold
Treatment of undeveloped wind and solar farms – where there is no substantive permanent building on the land that can be lawfully occupied by persons, goods or livestock:		
1. The land is currently being used 'predominantly' for a primary production business. ¹	The land will be classified as agricultural land . ² The land will also be vacant commercial land if the land is not "wholly and exclusively" used for a primary production business. Importantly, land can be both vacant commercial land and agricultural land. In that case, the lower threshold will apply.	Vacant commercial land - \$0 Agricultural land - \$15 million (calculated on a cumulative basis with the value of any other interests in agricultural land held by the acquirer and its associates)
2. If paragraph 1 above does not apply, an approval has been granted, or an application has been made to a government authority for an approval (including accreditation), to establish or operate a wind or solar power station to be located on the land (whether on or beneath the surface). ³	The land will be classified as vacant commercial land . ⁴	\$0 Note that the zero dollar monetary threshold will apply even if the relevant application is yet to be finally determined and has not been withdrawn or otherwise disposed of. ⁵
Treatment of developed wind and solar farms – where an accredited (or any component of an accredited) wind or solar power station located on the surface of the land:		
3. The land is currently being used 'predominantly' for a primary production business.	The land will be classified as agricultural land if, at the time of a relevant transaction, it satisfies the test that the land is being used 'predominantly' for primary production. FIRB guidance suggests that the assessment of 'predominance' can be made based on the proportion of relevant land that is used for a primary production business. However, a careful analysis would need to be undertaken in light of relevant facts. Notwithstanding, in the majority of cases involving the acquisition of an accredited power station, we would expect that even where land might be categorized as agricultural because a predominant use remains primary production, the land will be treated as development commercial land (with a higher threshold) by virtue of an exception that applies where an owner or operator (or an associate of an owner or operator) acquires an interest in the land for the sole purpose of operating a wind or solar power station.	Agricultural land - \$15 million (calculated on a cumulative basis with the value of any other interests in agricultural land held by the acquirer and its associates) Developed commercial land – see item 4.
4. The land is not currently being used 'predominantly' for a primary production business.	The land will be classified as developed commercial land .	\$57 million unless the interest in land being acquired does not give the acquirer a right to occupy the land or be involved in the central management and control of the entity that holds the land, in which case the higher \$261 million monetary threshold will apply. ⁶

1. Primary production business has the meaning given to that term in section 995-1 of the *Income Tax Assessment Act 1997*(Cth).

2. FIRB Regulations, section 52(4)(1).

3. FIRB Regulations, sections 44(4)(v) and 44(7B).

4. Only above ground infrastructure will qualify to make land non-vacant. Land with only below-ground infrastructure will be considered vacant land.

5. FIRB Regulations, section 44(4).

6. FIRB Regulations, section 52(6)(b) and Guidance Note 14.