



## Family Farm Transactions: Primary Production Business Exemptions

This Commissioner's practice outlines:

- the factors the Commissioner will consider when determining whether farming property is used in a business of primary production and
- how the Commissioner will exercise discretion to determine if a transferor used farming property in the business of primary production immediately before the property is transferred.

Read this practice together with the ['Exempt Family Farm Transactions – Transfer Duty'](#) fact sheet.

### Background

The *Duties Act 2008* (Duties Act) exempts duty on certain transfers of farming property between family members.

Farming property includes:<sup>1</sup>

- land used solely or dominantly for primary production purposes and
- other dutiable property used solely or dominantly in connection with a primary production business.

Primary production means:<sup>2</sup>

- growing or rearing of plants, their parts or their produce for sale.
- breeding, rearing or maintaining animals or their offspring for food or to produce or collect their skins, shells or bodily produce for sale.
- breeding, rearing or maintaining of produce animals or their progeny for stud purposes or for food, or to produce or collect their skins, shells or bodily produce for sale.
- breeding or rearing of horses or their progeny for sale.
- any other activity that is prescribed as primary production.

It does not matter if what is sold, or to be sold, is in a natural, processed or converted state.<sup>3</sup>

For the family farm exemption to apply, each transferor must have been using the farming property in the business of primary production:

- immediately before the transaction took place<sup>4</sup> or

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<sup>1</sup> Duties Act s99.

<sup>2</sup> Duties Act s101A(1).

<sup>3</sup> Duties Act s 101A(2).

<sup>4</sup> Duties Act s 102(2)(a).

- at another time before the transaction if a family member of the transferor used the farming property in the business of primary production immediately before the transaction took place.<sup>5</sup>

The transferor, or the family member of the transferor, may use the property in the business of primary production personally, with others or through a related entity.<sup>6</sup>

A family member of a transferor means a natural person who holds a qualifying relationship with the transferor.<sup>7</sup> A related entity of a family member is limited to certain trusts and corporations.<sup>8</sup>

Each transferee must intend to continue using the farming property in the business of primary production.<sup>9</sup>

## Commissioner's Practice

### *Dominant use of the land*

1. A transaction may be exempt from duty if the farming property is used for multiple purposes, including if the land is partly unused, as long as the property is used dominantly in the business of primary production.<sup>10</sup>
2. Land is used dominantly for primary production if the main, chief or paramount use of the land is primary production.<sup>11</sup>
3. To determine if the land is used dominantly for primary production, the Commissioner will consider:<sup>12</sup>
  - 3.1 the area of any land being transferred
  - 3.2 the area, scale and extent of activities performed on the land
  - 3.3 the actual extent of the primary production activities compared to the potential extent or the carrying capacity of the land
  - 3.4 the income and expenditure attributed to each purpose of the property and the profit made from each purpose<sup>13</sup>
  - 3.5 time spent, labour and resources used for each purpose and
  - 3.6 the usage of fixtures and chattels located on the land.

See the ['Family Farm Exemptions' fact sheet](#) for examples of when land is considered to be used dominantly for primary production activities.

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<sup>5</sup> Duties Act s 102(4).

<sup>6</sup> Duties Act s 102(3).

<sup>7</sup> Qualifying relationships are listed in Duties Act s 100.

<sup>8</sup> Duties Act s 102A(2) and (4).

<sup>9</sup> Duties Act s102(2)(b)

<sup>10</sup> If part of the property is used for primary production and the remaining part of the property is used for processing, sale or other activities, the remaining part is considered not used for primary production.

<sup>11</sup> *Leda Manorstead v Chief Commissioner* [2010] NSWSC 867, paragraph 69.

<sup>12</sup> *Leda Manorstead v Chief Commissioner* [2010] NSWSC 867; *Hope v Bathurst City Council (No 2)* (1983) 52 LGRA 79; *Thomason v Chief Executive, Department of Lands* (1994-1995) 15 QLCR 286.

<sup>13</sup> This factor relates to the level of investment a person has in an activity compared to that of primary production activities. It takes into account the income generated and expenses incurred by each activity.

4. If the land being transferred is composed of several parcels, only the parcels solely or dominantly used in the business of primary production may be exempt.<sup>14</sup>
5. Other dutiable property used solely or dominantly in connection with the business of primary production, such as business licences required for certain farming activities, may also be exempt as farming property.<sup>15</sup>

### ***Establishing primary production activities as a business***

6. For the family farm exemption to apply, a primary production business must be conducted as a commercial undertaking for the purpose of making a profit on a continuous or repetitive basis.<sup>16</sup> Hobby or self-sustaining farms are generally not considered a primary production business because they are not operated on a commercial basis.
7. When determining whether the primary production activities are carried out as a business, the Commissioner will consider whether they conform to established commercial principles for the operation of that type of business<sup>17</sup> including:
  - 7.1 whether they have a significant commercial purpose or character
  - 7.2 whether the activities indicate more than just a mere intention to engage in business
  - 7.3 whether they are directed towards making a profit and have a prospect of making a profit (whether or not a profit is actually being made)
  - 7.4 whether they are planned, organised and carried on in a businesslike manner, rather than being carried on for recreation, hobby, sporting or similar activities and
  - 7.5 whether they have the same or similar characteristics as, and are carried out in the same or similar manner to, the ordinary trade in that line of business.
8. While each case will depend on its own facts, no one indicator is decisive and there is often significant overlap between the indicators.<sup>18</sup> The Commissioner will weigh up all the relevant indicators and make allowances for events such as droughts, fires and other uncontrollable events that may affect the performance of primary production activities.
9. The onus is on the transferor to prove the land is solely or dominantly farmed in the business of primary production. When the land is transferred, the transferor may be required to provide the following types of evidence to assist in determining that the activities are being run as a business:
  - 9.1 completed tax returns for the current and previous years showing the transferor as a primary producer
  - 9.2 financial statements for the current and previous years
  - 9.3 business plans, work journals, invoices, receipts or other evidence of the activities concerning the business
  - 9.4 stock details such as purchase and sales receipts
  - 9.5 asset registers

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<sup>14</sup> Duties Act s 102(1).

<sup>15</sup> Duties Act s 99.

<sup>16</sup> *Hope v Council of the City of Bathurst* 91980) HCA16; *Commissioner of Taxation (Cth) v Murry* [1998] HCA 42.

<sup>17</sup> *Ferguson v FCT* [1979] FCA 29; *Shanahan v Commissioners of Land Tax (NSW)* 96 ATC 4320.

<sup>18</sup> *Evans v FCT* [1989] 20 ATR 922.

- 9.6 maps and photos of the specified land used
  - 9.7 leases, licences or other agreements with third parties and
  - 9.8 other operational records (such as breeding records, input and production costs, seasonal and other conditions affecting production) and
- if the business is a start-up:
- 9.9 documents showing research conducted to prepare land for primary production activity, such as expert reports and soil testing results
  - 9.10 the date the property started being prepared for use as primarily for primary production
  - 9.11 the type of primary production activity for which the property is being prepared
  - 9.12 details of the preparatory activities being conducted and
  - 9.13 information regarding the persons carrying out the preparatory activities.

### **Business indicators**

#### *Significant commercial purpose or character*

- 10. To determine whether the land used for primary production has significant commercial purpose or character, the Commissioner will consider:
  - 10.1 the physical size and scale of activities performed on the land
  - 10.2 the repetition and regularity of activities performed on the land
  - 10.3 the extent of activities performed on the land
  - 10.4 the past and future commercial viability of the business (that is, prospects for income, expenses, profit and commercial use of the land)
  - 10.5 the financial and non-financial resources invested into activities performed on the land, including the amount of capital invested
  - 10.6 the amount of due diligence and planning carried out before conducting activities to ensure commercial viability and
  - 10.7 whether activities are sufficiently organised.<sup>19</sup>
- 11. If the size and scale of the activities are small but:
  - 11.1 consistently result in more produce than is required for personal use and
  - 11.2 there is an intent or reasonable expectation of making a profit,

it may be considered that a business is carried on despite the scale of the activities.<sup>20</sup>

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<sup>19</sup> *Maraya Holdings Pty Ltd v Chief Commissioner of State Revenue* [2013] NSWSC 23; *Maraya Holdings Pty Ltd v Chief Commissioner of State Revenue* [2013] NSWCA 408.

<sup>20</sup> *Thomas v FCT* [1972] 3 ATR 165.

### *Example 1: Commercial character*

Naida kept 15 chickens on two hectares of land to provide home grown eggs. She sells the excess eggs to relatives and friends for a modest profit.

Naida is not carrying on a business of primary production. Although she had repetition and regularity in her operations, she did not try to sell in a commercial market and did not seek the best price for her eggs. The size of Naida's brood was small when compared to the carrying capacity of the land, which is 1000 hens per hectare. She also had not conducted any research into the egg industry or looked at the full costs of production and distribution in determining the commercial viability of her enterprise.

### *Intention to farm*

12. An intention to carry on a primary production business must be reflected by the activity, and the extent of activity.<sup>21</sup> The Commissioner will consider:
  - 12.1 whether activities are preparatory or preliminary to the ultimate activities
  - 12.2 whether there is an intention to make a profit
  - 12.3 the size and scale of the activities and
  - 12.4 whether the activity is better described as a hobby or the pursuit of a recreational or sporting activity.

### *Example 2: Business intent*

A land owner entered into an arrangement with the owner of a nearby cattle station to buy a few dozen cattle at the beginning of every season, let them graze on his land then sell them back to the cattle station owner at a profit.

The primary reason for this arrangement is fire hazard reduction. The cattle help keep the grass fields short and the small profit generated from feeding the cattle helps with other maintenance costs of the land.

The primary intention is not to operate a primary production business and the land is not farming property.

13. Generally, pilot or experimental activities do not amount to a business unless it is demonstrated they have a sufficient commercial character to be regarded as a business in their own right.<sup>22</sup>
14. Preparatory activities such as feasibility studies, infrastructure and machinery scoping, carried out with a view to conduct primary production, will only be taken to be primary production business if:
  - 14.1 the evidence demonstrates something more than research or improving unsuitable land to bring it to a condition where it may be used for a primary production business<sup>23</sup> and
  - 14.2 there is sufficient evidence that preparatory activities include the development of a product for sale. This includes planting seeds intended to produce crops, tending to fruit or nut trees or placing cattle on a cattle farm.<sup>24</sup>

<sup>21</sup> *Inglis v FCT* (1979) 10 ATR 493.

<sup>22</sup> *Softwood Pulp and Paper Ltd v FCT* (1976) 7 ATR 101; *Goodman Fielder Wattie Ltd v FCT* (1991) 22 ATR 26.

<sup>23</sup> *Thomas v FCT* [1972] 3 ATR 165; *Southern Estates Pty Ltd v FCT* (1967) 117 CLR 481.

<sup>24</sup> *Safety Beach Estate Pty Ltd v Commissioner of Land Tax* 79 ATC 4032; *Thomas v Federal Commissioner of Taxation* (1972) 3 ATR 165.

### *Example 3: Preparatory work*

Mark bought eight hectares of land on which he built a home. He realised that the land was fertile and capable of producing fruit. Mark spent a year seeking advice from local farmers, collected technical literature on citrus farming and obtained soil and water analyses of the land. He drafted a business plan and a budget of capital and recurrent costs. After clearing the land, he planted 700 mandarin trees, 700 orange trees and 700 lemon trees, but did not expect to make a profit for eight years. He also installed an irrigation system.

Mark is running a business of primary production as there was a clear intention to make a profit based on reasonable grounds and backed up by appropriate research and advice.

If Mark had not done the above research and analysis, had only planted a small number of trees to test which would grow best and was still investigating the likelihood of potential buyers, this would suggest that the activities were only of a 'preliminary or preparatory' nature and did not amount to the carrying on of a primary production business.

### *Example 4: Preparatory work*

Lindsay bought 700 hectares of run-down rural land and intended to start a cattle farming business. Over five years, she spent several thousand dollars on farm machinery to clear the land, build roads and mend fences. She also bought and erected some farm buildings. She did not derive income from the property until the property was stocked with 100 cattle.

For the first five years, Lindsay was not carrying on a business of primary production as her activities would be regarded as preparatory to the commencement of business. While Lindsay had a clear purpose to engage in cattle farming, she recognised that certain activities needed to be done to the land before she was able to buy the cattle and put them on the land.

### *Profit-making purpose*

15. The transferor must engage in primary production activities on a continuous and repetitive basis with a genuine intention to make a profit.<sup>25</sup> A simple intention to cover expenses is insufficient. If a profit is not currently being made, evidence must demonstrate there is a prospect of making a profit.<sup>26</sup>
16. To determine whether there is a prospect or intention to make a profit, the Commissioner will consider:
  - 16.1 profits and losses from previous years and an expectation of profits or losses in future years
  - 16.2 the level of profit earned and the degree to which the profit contributes to the transferor's income
  - 16.3 activity of a sufficient degree<sup>27</sup> to show the potential for profit, with consideration of the minimum activities necessary to achieve a sustainable turnover and
  - 16.4 for a newly established business, the intention to and potential for making a profit in future years. The Commissioner will also consider positive efforts made by the transferor to improve profitability.<sup>28</sup>

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<sup>25</sup> *Ashleigh Developments Pty Ltd v Chief Commissioner of State Revenue* [2011] NSWADT 250.

<sup>26</sup> It is not necessary for the primary production activities to make a profit every year; *Ferguson v FCT* [1979] FCA 29.

<sup>27</sup> *Inglis v. FC of T* 80 ATC 4001 at 4004-4005; (1979) 10 ATR 493 at 496-497.

<sup>28</sup> *Thomas v FCT* [1972] 3 ATR 165.

### *Example 5: Start-up business*

Fiona has land capable of producing fruit. She seeks advice from local farmers, collects technical literature on fruit farming and conducts soil and water tests to confirm land fertility and suitability. She prepares a business plan with a budget of capital and recurrent costs.

Fiona spends significant time cultivating trees and implementing the strategies suggested by industry experts. She hires workers to cultivate and pick fruit and enters into an arrangement with local markets and wholesalers. Fiona intends to operate the business for an indefinite period with the intent to make profit.

Although Fiona has not performed repetitive activities, she is using the farming property in a business of primary production.

### *Activities organised in a business-like manner*

17. A business is typically carried on in a systematic and organised manner conforming to ordinary commercial principles. The Commissioner will consider the circumstances surrounding the activity,<sup>29</sup> including:
  - 17.1 the length of time the business has been conducted with respect to regular business records of sales and expenses, and activities such as repeated and invoiced stock purchases
  - 17.2 adequate record-keeping which monitors cash-flow, stock and production<sup>30</sup> and
  - 17.3 activities such as:
    - 17.3.1 registering a business name and obtaining an Australian Business Number
    - 17.3.2 preparing cost and income forecasts for the purpose of developing a business plan or obtaining a business loan
    - 17.3.3 conducting technical or market research and/or employing experts to provide advice and
    - 17.3.4 planning, organising and recording information through business records, strategic and operational plans, account books and separate business bank accounts.

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

18. Activities are more likely to be a business when they are carried on in a manner similar to how participants in the same industry carry on their activities.<sup>31</sup> The Commissioner may compare the following characteristics:
  - 18.1 amounts invested in particular capital items
  - 18.2 types of expenses incurred
  - 18.3 types of customers to whom the product is sold
  - 18.4 marketing employed
  - 18.5 volume of sales and profit margin
  - 18.6 resources (including time, labour and expenditure) put into activities
  - 18.7 relevant knowledge and experience of the person conducting activities
  - 18.8 how activities are conducted or operated and
  - 18.9 holding of relevant licences, qualifications or memberships to industry associations.

<sup>29</sup> *Newton v Pyke* (1908) 25 TLR 127.

<sup>30</sup> *FCT v JR Walker* (1985) 16 ATR 331.

<sup>31</sup> *IR Commissioners v Livingston* (1926) 11 TC 538.

### *Example 6: Similar characteristics to other businesses*

Jeff and Marie returned from Japan where they had noticed the price of apples. They spent time researching, talking to experts and collecting technical literature, and determined their land was suitable for growing apples. They established relationships with international wholesalers who indicated that if their apples were of superior quality, they would have a ready market and would be able to make a substantial profit from selling them.

Jeff and Marie selected varieties for the Japanese market based on their research and planted one hundred trees. Marie devised a unique irrigation system which they installed. They carefully sprayed and pruned the trees and protected the growing fruit from the elements. They distinguished their product by individually wrapping their fruit and putting 'quality one' labels on them. They made losses for four years, however, were confident that they would make a profit.

Jeff and Marie used their property in the business of primary production. While their activities were not carried on in a similar manner to that of the ordinary trade of apple growing, they had a clear commercial purpose, clear intention to make a profit, conducted research into their activities and the market, the activities were repeated and they were able to show that they were innovating new methods of servicing specialty markets.

### *Business or hobby*

19. A business is distinguished from a hobby or mere recreational activity, regardless of if the transferor carries on activities in an organised, systematic and repetitive manner.
20. Generally, primary production activities will be a hobby if the activities are not carried on in the same manner as a business activity. For instance:
  - 20.1 there is little to no intention of making a profit and no system or plan in place to show how a profit can be made
  - 20.2 there is no repetition or regularity of sales
  - 20.3 the activity has a small scale and
  - 20.4 produce is mainly sold to friends and relatives rather than to the public at large.

### *Example 7: Hobby*

Steven believes in clean eating and lives on a semi-rural lot on the outskirts of the metropolitan region where he grows organic fruit and vegetables. Sixty per cent of the produce is for his own personal use. He gives away 30 per cent of his harvest to family and friends and sells the remainder at his local farmers' market on Sundays.

He also works as a landscaper, which accounts for approximately 70 per cent of his income.

Steven's primary production activity is a hobby or recreational activity and would not qualify for the family farm exemption.

### ***Farming immediately before the transaction***

21. The phrase 'immediately before' is not defined in the Duties Act and must be read according to its ordinary meaning as 'an event happening without any lapse of time or delay, ahead of a transaction'.<sup>32</sup>
22. For there to be no lapse of time or delay, the transferor or family member or their related entities must be using the property in the business of primary production leading up to and when the transaction occurs.

<sup>32</sup> Macquarie Dictionary.

23. If the property is only used for primary production for a short period before the transaction, the activities carried out on the property may not indicate the property is used in the *business* of primary production.
24. For the Commissioner to accept that a family member of the transferor or their related entity was using the property in the business of primary production immediately before the property is transferred, and that the transferor had previously used the property in that way, the Commissioner will consider:
  - 24.1 the reasons why the transferor ceased farming the property, such as
    - 24.1.1 age or ill health preventing the transferor from continuing to physically farm the property
    - 24.1.2 providing opportunities to the next generation to farm the property with the intent of succession planning and
    - 24.1.3 events that prevent the business of farming from occurring such as bankruptcy, fire or drought
  - 24.2 the person or related entity farming the property immediately before the transaction and their relationship to the transferor
  - 24.3 the dates when the transferor and their family members or related entities farmed the property
  - 24.4 if any person, other than a family member, farmed the property since the transferor ceased farming
  - 24.5 the reasons for and length of any breaks in continuity of any primary production business operating on the farming property
  - 24.6 aside from the transferor, if any other person financially or non-financially benefitted from the business run on the property and
  - 24.7 the size, scale, intensity and regularity of the farming business the transferor operated on the property.

*Example 8: Succession planning*

Sandip and Sanitha each owned a half share in farming property and together ran a primary production business. Sandip physically farmed the property while Sanitha managed the books for the business. In line with succession planning, they decided to transfer their property to their son.

A family farm exemption would apply to the transfer of the property because, immediately before the transaction, the property was used in the business of primary production by:

- one transferor who was physically farming the property and
- the other transferor who carried out activities to run the primary production business and was jointly entitled to its profits.

*Example 9: Succession planning*

Dan ran a primary production business on farming property he owned. He gave his nephew, Luke, the opportunity to learn the business with the aim of one day passing the property and business to him. Luke took possession of the property and business, and Dan stepped away from being involved. After some time, Dan transferred the property to Luke.

A family farm exemption would apply to the transfer of the property because, immediately before the transaction, the property was used in the business of primary production by:

- the transferor because he had previously done so and
- the transferor's family member.

#### *Example 10: Illness*

Chin used his farming property in the business of primary production. Chin ceased farming on 1 June 2015 as he became ill and was no longer able to continue physically farming the land. His daughter farmed the property with her friend until 3 November 2020 when Chin transferred the property to her.

A family farm exemption would apply to the transfer of the property because, immediately before the transaction, the property was used in the business of primary production by:

- the transferor because he had previously done so and
- the transferor's family member (with others).

#### *Example 11: Farmed by a related entity*

Jane owns farming property which she farmed until 1 June 2015. After that date, Jane's son, Mike, farmed the property through a corporation. The shareholders of the corporation are Mike, his wife and his two children.

The corporation farming the property is a related entity of a family member of the transferor because every shareholder of the corporation is a family member of Jane.

Jane transfers the property to Mike on 1 December 2020.

A family farm exemption would apply to the transfer of the property because, immediately before the transaction, the property was used in the business of primary production by:

- the transferor because she had previously done so and
- the transferor's family member through a related entity.

#### *Example 12: Farmed by a related entity*

Antonio owned farming property and his family partnership runs the primary production business. The partners of the family partnership included Antonio, his son Giorgio and his daughter-in-law Barbara. When Antonio retired from the partnership, Giorgio and Barbara continued to farm the property through their company by leasing the property from Antonio, who then transferred the property to Giorgio.

A family farm exemption would apply to the transfer of the property because, immediately before the transaction, the property was used in the business of primary production by:

- the transferor (with others) because he had previously done so and
- a family member through a related entity.

#### *Example 13: Farmed by an unrelated entity*

Stefan owned farming property and ran a primary production business personally. Stefan then leased the farming property to a partnership in which neither he nor his family members were partners. When the lease expired, he transferred the farming property to his daughter.

A family farm exemption would not apply to the transfer of the property because, immediately before the transaction, the property was being used in the business of primary production by entities other than the transferor, his family member or his family member's related entity.

*Example 14: Farmed by a related entity*

Hayley owned farming property and ran a primary production business. After she retired, the business ceased to operate.

After some time, Hayley's son, Olly, started his own farming business on the property through the Olly Family Trust. The beneficiaries of the trust were Hayley, Olly and Olly's wife. Olly farmed the property through the trust which was an entity related to him before Hayley transferred the property to him.

A family farm exemption would apply to the transfer of the property because, immediately before the transaction, the property was used in the business of primary production by:

- the transferor because she had previously done so and
- the transferor's family member through a related entity.

*Example 15: No primary production business before the transfer*

Anika owned farming property and ran a primary production business personally. When she retired, her daughter started developing her own grain and cattle business on the property.

At the time Anika transferred the property, the business only had three cattle and the grains were not yet ready for harvest. The business was not yet generating any profit, and lacked adequate planning, organisation and commercial purpose.

A family farm exemption would not apply to the transfer of the property because the transferor did not farm the property in the business of primary production immediately before the transaction.

*Example 16: No primary production business before the transfer*

Joe owned farming property and ran a primary production business. Joe agreed to lease the property to his neighbour for a 10 year period so they could expand their cattle business into his land.

When the lease expired, his neighbour removed the cattle from the land. Joe purchased cattle to place on the land and immediately transferred the property to his daughter.

A family farming exemption would not apply as the intent, size and character of the transferor's activities did not amount to operating a primary production business immediately before the transfer of the property.

*Example 17: Change in nature of primary production business*

Sebastian owned farming property on which he personally ran a grain business. When he retired, his son started developing and operating his own vegetable growing business on the property. After some time, Sebastian transferred the property to his son.

A family farm exemption would apply to the transfer of the property because, immediately before the transaction, the property was used in the business of primary production by:

- the transferor because he had previously done so and
- the transferor's family member.

Changes to the nature of the primary production activities operating on the land does not affect the fact a primary production business was being carried out.

*Example 18 - No farming conducted by transferor*

Suke purchased a farming property with a house so he could enjoy a rural lifestyle. As a side income stream, Suke leased a large portion of the property to unrelated persons for agistment and to grow crops.

Some time later, Suke allowed his son to start his own cattle business on the land. After a few years of losses, the business started to generate a profit in line with forecasts and business planning, and he transferred the property to his son.

A family farm exemption would not apply to the transfer of the property because the transferor did not use the property in the business of primary production at any time.

**Date of effect**

This Commissioner’s practice takes effect from 8 December 2022.

Chris McMahon  
COMMISSIONER OF STATE REVENUE

8 December 2022

**Document history**

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