

# KELLEHERS AUSTRALIA

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## In-House Memo

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### Primary Production

Given the significance of food and agriculture, primary production often enjoys particular benefits. One such is the exemption of land used for primary production from land tax. As a result, many commercial endeavours seek primary production status.

Land used for primary production may be subject to a land tax exemption depending on its location. Land used for primary production *outside* greater Melbourne is land tax exempt land<sup>1</sup>. However, land *within* greater Melbourne but wholly outside an urban zone<sup>2</sup>, or land within greater Melbourne and also in an urban zone<sup>3</sup>, may only receive the exemption status in certain circumstances as determined by the Land Tax Commissioner. An urban zone is one declared as such by the Governor in Council and published in the Government Gazette<sup>4</sup>.

#### What does primary production mean?

For the purposes of land tax, 'primary production' is defined as either<sup>5</sup>:

- Cultivation for the purpose of selling the produce of cultivation<sup>6</sup>; or
- Maintenance of animals or poultry for the purpose of selling them or their natural increase or bodily produce; or
- Keeping bees for the purpose of selling their honey; or
- Commercial fishing, including the preparation for commercial fishing or the storage or preservation of fish or fishing gear; or
- Cultivation or propagation for sale of plants, seedlings, mushrooms or orchids.

While most of these terms are sufficiently clear, the term "cultivation" has received particular judicial consideration. Principles relevant to the exemption of land used for cultivation include the following:

- 'Cultivation' is not limited to annual crops or crops with periodic production (*Safety Beach Estate Pty Ltd v Commissioner of Land Tax* (1979) 9 ATR 451);
- It is the land, not the soil alone, which is the subject of 'cultivation' (*Safety Beach Estate Pty Ltd v Commissioner of Land Tax* (1979) 9 ATR 451)
- 'Cultivation' can include activities beyond breaking up the soil and could include improvement to the water supply, fertilising, spraying plants with insecticides and fungicides and establishing windbreaks (*Safety Beach Estate Pty Ltd v Commissioner of Land Tax* (1979) 9 ATR 451);
- 'Cultivation' must be for the benefit of the plants (*Colusso v Chief Commissioner of State Revenue* (2008) 71 ATR 108);
- 'Cultivation' is limited to crops and plants sown in the soil, excluding plants for sale in pots and not in the soil of the land. (*Colusso v Chief Commissioner of State Revenue* (2008) 71 ATR 108);
- 'Cultivation' excludes the growing of grass where there was no intention to sell the grass (*Love v Commissioner of State Revenue* [2014] VCAT 476).

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<sup>1</sup> s65, *Land Tax Act 2005* (Vic).

<sup>2</sup> s66, *Land Tax Act 2005* (Vic).

<sup>3</sup> s67, *Land Tax Act 2005* (Vic); for a definition of 'urban zone' see s64(2), *Land Tax Act 2005* (Vic)

<sup>4</sup> The Governor in Council made such orders on 21 December 2006, 20 December 2007, 20 November 2008, 24 December 2009 and 22 December 2011.

<sup>5</sup> s64, *Land Tax Act 2005* (Vic); this definition focuses on horticultural, agricultural and aquacultural aspects of primary production. It does not deal with oil or gas extraction, mining or quarrying; For further definition of the term primary production; see [http://en.wikipedia.org/wiki/Primary\\_sector\\_of\\_the\\_economy](http://en.wikipedia.org/wiki/Primary_sector_of_the_economy).

<sup>6</sup> Whether the produce is in a natural, processed or converted state; s64, *Land Tax Act 2005* (Vic).

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## When is land used for primary production?

There may be difficulties in determining land use where use may vary over a period of time:

*“It may be difficult to determine at any particular point in time whether land is being used for a relevant purpose. For example, land used for primary production may only be used on a seasonal basis or may be left to lie fallow for some period of time.... In such a case, one would have to look at the activities carried out over a period of time to determine whether or not the land had ceased to be used for an exempt purpose.”<sup>7</sup>*

In determining which land use is dominant, where there is more than one use, the Court gives weight to the evaluation and comparison of the scales, extents and intensities of each competing use of the land. One method of evaluation is to compare the monetary value of particular activities. Thus, where landowners expended \$13.7 M on earthworks to develop a commercial property, while the value of the cattle herd that grazed on the land was less than \$200,000, including related plant and equipment, the farm’s primary production exemption status was disallowed (*Leda Manorstead Pty Ltd v Chief Commissioner of Taxation* [2011] NSWSCA 366).

Primary production is of particular importance to the national economy. Tax exemptions apply to primary production when it occurs in rural areas, but are restricted when they infringe upon urban zone land in greater Melbourne. Significant weight is placed on ensuring that any production which occurs on land may genuinely be classified as primary production in order to protect tax benefits for agricultural producers.

Cameron Algie  
9 July 2014

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<sup>7</sup> *VL investments Pty Ltd v Commissioner of State Revenue* [2006] VSC 215 (21 June 2006), at [27].

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