

# LEGAL GUIDE FOR PRIMARY PRODUCERS



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# ■ THYNNE & MACARTNEY

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Thynne & Macartney's rural connections date back to its founding partners, Andrew J Thynne and Sir Edward Macartney, both having served as Secretary for Public Lands.

The guide has been prepared to assist primary producers and reflects the law as at **30 June 2007**. It is not intended to be a substitute for specific advice about a particular problem which should of course be referred to a solicitor or where appropriate, to the particular industry association.

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# Legal Guide for Primary Producers



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AgForce represents thousands of Queensland producers who recognise the value in having a strong voice.

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Call Janice today on freecall **1300 656 029** or visit **[www.agforceqld.org.au](http://www.agforceqld.org.au)**.

## Foreword

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Farming has never been easy but there was a time when the main challenges were drought, flood, fire, the myriad pests that infest every property and getting the product to market at the right time and at the right price.

In many ways, they were the good old days. Today primary producers have to be as alert to the complex and demanding legislative provisions affecting their operations as they are to the often unforgiving forces of nature and the sometimes fickle domestic and international markets.

Primary production is the second most important Queensland industry after mining. It delivers produce worth some \$11 billion annually before processing, wholesaling and retailing and one in five jobs in Queensland depends on the rural sector.

This Guide seeks to give primary producers a broad understanding of the various State and Commonwealth laws that provide, in effect, a regulatory regime for the modern farmer and grazier.

While it is a very useful tool to alert primary producers to the most significant legal issues, the Guide cannot encompass every conceivable issue and, of course, laws are always being amended.

There is certainly no substitute for good up-to-date legal advice that a solicitor can provide and the Queensland Law Society can assist primary producers to get in touch with solicitors who have expertise in this area. Feel free to visit our website – [www.qls.com.au](http://www.qls.com.au) – or call 07 3842 5842.

The Guide has been produced with the generous financial assistance of the Queensland Law Foundation and AgForce Queensland Industrial Union of Employers as a service to the public and to members of AgForce.



A handwritten signature in cursive script that reads "Megan Mahon".

**Megan Mahon**

President

Queensland Law Society

## Do you know the law as well as you know the land?

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See a solicitor first.

No matter what sort of property or business you run, there are times when you can use some good advice – professional legal advice. More than fifty percent of Queensland's solicitors live and work in major rural areas. And many large metropolitan legal firms have strong ties with rural clients, visiting rural areas on a regular basis.



Legal expertise combined with local knowledge of problems facing the rural sector is vital to primary producers.

For a referral to a solicitor with rural know-how:

- telephone Queensland Law Society on 3842 5888
- or visit our website at **[www.qls.com.au](http://www.qls.com.au)**
- or telephone your local district law association:
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  - o Caboolture Law Association
  - o Central Queensland Law Association
  - o Downs & South-West Law Association
  - o Far North Queensland Law Association
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  - o North West Law Association
  - o Redcliffe Pine Rivers District Law Association
  - o South Burnett Law Association
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# 1 Land

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## 1.1 Land tenure

There are basically two distinct types of land tenure in Queensland i.e. estate in fee simple (freehold) and State leasehold:

### (1) Freehold

Freehold land in Queensland can either be unrestricted or restricted.

Restricted freehold is former leasehold land which is subject to s174A of the *Land Act*. It cannot be held by a company or upon trust for a company without the prior consent of the Governor-in-Council. Restricted freehold is found in what is generally regarded as the prime farming and grazing areas where State Government policy dictates a limit to the areas of land to be held by foreign companies or the larger Australian companies.

Different State Governments over the years have looked at removing these restrictions from time to time but as yet, they remain in force.

### (2) State leasehold

The position in relation to State leasehold lands which covers in excess of 80 percent of Queensland is somewhat more complex.

The *Land Act* 1994 endeavours to simplify leasehold land tenures into two main categories, namely term leases and perpetual leases.

The basic distinction though under the former legislation remains (that is, between selections and pastoral holdings).

Selection tenure includes agricultural farms, perpetual lease selections, grazing homestead perpetual leases and grazing homestead freeholding leases. These tenures are found in the more closely settled areas of Queensland and in some cases, ownership is restricted. These tenures may be converted to freehold tenure.

Pastoral holdings are generally found in the more remote parts of the State or where larger areas of land are required for economic viability. The restrictions on ownership are not as onerous as those for selections, but the tenure is not as secure.

All leasehold tenures are subject to certain conditions monitored by the Department of Natural Resources and Water.

With certain exceptions, leases may be sublet, mortgaged, transferred or otherwise dealt with. Subleases and transfers though are only permitted to qualified persons as prescribed by the *Land Act* 1994.

## 1.2 Sharefarming agreements, agistment agreements and leases

Sharefarming agreements, agistment agreements, leases and subleases are contracts and it is essential that agreement be reached on the specific terms that are to apply and that the agreement be committed to writing and be signed by all parties.

Subleases of State leasehold lands require the approval of the Minister for Natural Resources and Water.

Leases over freehold land in excess of three years or containing options for extensions should be registered on title to protect the lessee.

## 1.3 Stamp duty

Stamp duty is a tax imposed by the Queensland Government on certain transactions specified in the *Duties Act*. Duty may be imposed on transactions where no documents are signed.

Interest is charged on the late lodgement of documents for stamping (generally if they are lodged more than 30 days after signing) and on the late payment of assessments (more than 30 days after assessment). Penalties are imposed on the making of false declarations. Parties may agree that any duty is payable by one of the parties to the document but the Commissioner can require any of the parties to pay the duty.

The Commissioner is empowered to 'look behind' the document and to determine its true nature. He is also entitled to treat several transactions in separate documents as one transaction if they are connected (generally resulting in more duty being payable). The Commissioner can also require valuations to be submitted if he is not satisfied that a transaction is 'at arm's length' or that the stated value of property is its full unencumbered value.

The most significant areas for primary producers are as follows:

### (1) Purchases of property

A sliding scale of duty applies to the transfer of any 'property'. Duty is based on the purchase price or on the 'full unencumbered value' if that is greater. The scale starts at one and a half percent for amounts up to \$20,000 and increases to four and a half percent for amounts over \$700,000. 'Property' is widely defined and includes land, plant, chattels, livestock and the assets of a business. However, duty is not payable on the purchase of machinery, chattels or livestock by themselves unless the purchase of a business is involved. The Commissioner considers that the purchase of such items at the same time as land amounts to the purchase of a business and will assess duty on the total price paid.

Duty will also be assessed on the amount of any liability assumed (e.g. outstanding freeholding instalments or debts owing to a bank).

Some concessions are available. That part of the purchase price (up to \$320,000) which relates to the dwelling house, residential improvements and surrounding land to be used as the purchaser's principal place of residence will be assessed at one percent (or less if it is the purchaser's first residence). Where the land has a commercial component, normal duty is charged on the commercial component. The principal place of residence concession does not usually apply to vacant residential land, however those building their first home are entitled to the concession on that part of the purchase price up to \$320,000 provided they occupy the house to be built on the land within two years of the transfer date.

Another important concession is allowed for gifts of rural property to children or grandchildren (including stepchildren, and spouses of children and grandchildren) where the duty is charged at normal rates on only the actual price paid (if any) and liabilities assumed (if any) irrespective of the value of the property.

There is a general exemption from transfer duty for transfers pursuant to the terms of a will.

## **(2) Rearrangement of partnerships**

Transfer duty also applies to rearrangements of partnerships. The same concession above applies to the gift of an interest in a family partnership from parents to children (or grandchildren etc).

## **(3) Trusts**

Transfer duty also applies in the event of a settlement of property on a trustee or upon a declaration by a trustee that he or she holds certain property on trust.

In general, transfers of property from a trustee to a beneficiary will be subject to transfer duty.

Transfer duty applies also to the transfer of units in a unit trust unless the trust is a 'public' unit trust established by a deed approved pursuant to the companies legislation.

## **(4) Motor vehicles**

Duty is assessed on the transfer of vehicles at a flat rate of two percent of the purchase price or value of the vehicle. Primary producers are entitled to an exemption for vehicles of more than six tonnes load capacity used solely for primary production.

## **(5) Companies**

Duty on the transfer of shares in private companies was abolished from 1 January 2007. However, ordinary transfer duty will apply in cases where the company is a 'land-rich company' (that is, where the company's land holdings are worth in excess of one million dollars and land comprises 60 percent or more of the company's assets) or if the company concerned is a trustee of a trust holding valuable assets and the purchaser obtains a benefit relating to the assets of the trust.

## **(6) Mortgages**

Duty is charged on mortgages at a flat rate of point four percent (reducing to point two percent from 1 January 2008 and being abolished from 1 January 2009). Exemption is available for loans used to build or acquire a principal home up to \$70,000 (or \$250,000 for a first home). If repayment is secured by a number of mortgages this duty is payable on only one of the documents.

## **(7) Leases and subleases**

Duty on leases and subleases has been abolished for leases and subleases commencing after 1 January 2006.

## **(8) Unpaid tax interest**

Unpaid tax interest is payable on late payments. The interest is accrued on a daily basis. The rate is eight percent higher than the Reserve Bank's 90-day bank bill rate.

## **(9) Objections**

A person dissatisfied with a stamp duty assessment may within 60 days (or such longer period allowed by the Commissioner) after notification of the assessment, object in writing to the Commissioner, setting out fully the grounds of the objection.

## **(10) Appeals**

A person disputing a stamp duty assessment may, if dissatisfied with the Commissioner's decision on the taxpayer's objection, appeal by filing a notice of appeal setting out the grounds with the Supreme Court within 60 days. A copy of the notice of appeal must be served on the Commissioner within seven days and the disputed assessment and late payment interest must be paid in full.

# **1.4 Development and subdivision of private land**

## **(1) Introduction**

The development and subdivision (also called reconfiguration) of land is governed by the *Integrated Planning Act 1997*. The purpose of the Act is to integrate planning law in Queensland and to provide a framework for managing growth and change into town planning schemes throughout Queensland that balance community well-being, economic development and the protection of the natural environment. Local governments are required to prepare local planning instruments (also called town plans or planning schemes) in accordance with the Act.

## (2) **Development and reconfiguration**

The Act developed one system for all development assessments by local and State Governments called the Integrated Development Assessment System ('IDAS'). The system has four stages – Application Stage, Information and Referral Stage, Notification Stage and Decision Stage. Most simple applications will only trigger the Application and Decision stages. However, complex or environmentally sensitive proposals will trigger all stages.

An IDAS development application is only required before starting work if the development is assessable. Assessable development includes reconfiguring a lot (but not amalgamating lots), building work, a material change of use of the land and operational works (e.g. excavation, filling, roadwork).

An application may be approved, approved with conditions or refused. The conditions may relate to various stages of the development, i.e. project planning, construction and/or the on-going life of the development. Failure to comply will mean that the development is unlawful.

Assessable development can be classified as either code-assessable or impact-assessable. An impact-assessable application requires public notification. Members of the public can then make submissions about the proposal. In general, reconfiguration (or subdivision) of land consistent with the planning scheme will require code assessment. Code assessment involves an application to the local government without a public notification requirement.

Both applicants and any submitters have rights of appeal to the Planning and Environment Court.

## (3) **Land Sales Act**

The *Land Sales Act* 1984 contains restrictions on the selling of land before a separate certificate of title has issued for the lot intended to be sold. The intent is to ensure that buyers are protected and do not enter into contracts and pay deposits for land where the land does not yet exist as a separate lot.

It is possible to sell land off-the-plan by:

- (a) complying with the pre-contract disclosure requirements of the Act, provided that the relevant local authority approvals have been obtained; or
- (b) seeking an exemption from the provisions of the *Land Sales Act* where it is proposed to:
  - (i) reconfigure land into five or less lots; or
  - (ii) sell six or more allotments to one purchaser.

## (4) **State leasehold land**

The reconfiguration of State leasehold land also requires the consent of the Minister.

## 1.5 Mining and petroleum activities on rural land

### (1) Mining legislation

Under the Queensland *Mineral Resources Act*, the following five types of mining authorities may affect rural land:

#### (a) Prospecting permit

The holder is entitled to enter land in Queensland to prospect for or hand-mine minerals (excluding coal) or peg a mining lease or claim on the available land.

Where the permit is for a mining district rather than a particular property, the holder requires a landholder's consent before accessing freehold or leasehold land. Where the permit is granted in respect of a particular property, the maximum term of the permit is three months and the landholder must be given notice before the holder first enters the land. A landholder is only entitled to compensation where there is specific damage or injury caused by the permit holder.

#### (b) Mining claim

The holder is entitled to carry out small-scale operations with limited use of machinery to mine certain minerals, which cannot include coal. The holder must have first held a Prospecting Permit and may access the land to mark out the proposed mining claim area. The ground marked out must generally be rectangular in shape with a maximum area of one hectare.

#### (c) Exploration permit

An Exploration Permit will either be expressly for coal, or for minerals other than coal. It allows the holder to access land to carry on prospecting operations and to apply for a mining lease or mining development licence. The initial term must not be for a period greater than five years; however, the permit can be renewed. After two years, the area of a permit for minerals other than coal must reduce by at least 50 percent, with a further 50 percent reduction each year after that. Exploration permits for coal are also subject to relinquishment requirements determined by the Minister.

The holder does not need the consent of the landholder to enter land under the authority of an Exploration Permit but must give notice before initial entry. Compensation is only available where the holder causes specific damage or injury.

#### (d) Mineral development licence

A mineral development licence entitles the holder to carry out various activities such as geophysical surveys, mining feasibility studies, environmental studies, engineering design and any other activities the Minister considers appropriate to evaluate the development potential of a particular resource. The maximum initial term of a licence is five years.

The consent of the landholder or the authority of the Governor-in-Council is necessary to allow the holder to enter occupied land. Again, compensation is only available to the landholder where there is specific damage caused by the holder.

### **(e) Mining lease**

The most common tenure for mineral production in Queensland is the mining lease, which permits the holder to enter occupied land to machine-mine specified minerals and carry out activities associated with mining or promoting mining. If a new mining township is established, mining leases or special leases may be granted.

### **(2) Restricted land**

Certain land cannot generally be included in any mining authority without the consent of the landholder. Restricted land includes land:

- (a) within 100m laterally of a permanent building used mainly as accommodation or for business purposes; or
- (b) within 50m laterally of a principal stockyard, a bore or artesian well, a dam or another artificial water storage connected to a water supply.

Unless the land in question is restricted land, a landowner cannot prevent mining or exploration on his or her land merely by withholding his or her consent.

### **(3) Petroleum legislation**

The following authorities may be granted under the Queensland *Petroleum and Gas (Production and Safety) Act*:

#### **(a) Authority to prospect**

The holder is entitled to explore for petroleum within the area of the authority. Authorities to Prospect are generally granted for an initial term of four years but may be renewed.

#### **(b) Petroleum lease**

The holder is entitled to explore for and produce all naturally occurring petroleum from the land subject to the lease. A petroleum lease cannot exceed 260 square kilometres in area.

#### **(c) Pipeline licence**

The holder is entitled to construct and operate a pipeline to convey petroleum. Where the holder does not own the land over which the pipeline is to be constructed, it must acquire an easement over the land, obtain the landholder's permission, or apply to the Department of Mines and Energy for a temporary permit (that is valid for up to nine months) to begin constructing the pipeline before it acquires the land or an easement over the land.

Petroleum companies generally prefer to obtain easements to protect their investment and can ask the State to compulsorily resume the land, or an easement over the land, required for the pipeline.

If land or an easement is compulsorily acquired by the State, the landholder is entitled to compensation determined using the 'fair value' principles of the *Acquisition of Land Act*.

#### **(4) Compensation**

Where land is affected by a mining lease or a petroleum authority (with some exceptions, including a pipeline licence), the landholder is generally entitled to compensation for the following effects caused by the authorised mining or petroleum activities:

- deprivation of possession of the surface;
- diminution in the value;
- diminution of the use made, or that may be made, of the land or improvements;
- severance of any part of the landholder's land from other parts;
- any loss arising from the carrying out of the activities under the petroleum authority; and
- other loss.

If the mining or petroleum activities include the construction and/or use of an access road on a landholder's property, the landholder is generally entitled to additional compensation for that access.

A landholder's compensation entitlements are usually the subject of a compensation agreement negotiated with the holder of the mining lease or petroleum authority. A landholder might be able to negotiate to receive non-monetary benefits as part of the compensation arrangement.

In many cases, a landholder will be able to prevent the holder of mining lease or petroleum authority commencing activities until the issue of compensation is resolved. If the parties cannot agree upon the terms of compensation, the issue can (and in some situations must) be referred to the Land Court for determination.

#### **(5) Ownership of minerals**

In limited situations, the owners of freehold land granted before 1 March 1910 retain ownership of coal under their land and are entitled to royalties when it is mined.

In almost all cases, the State now owns coal and other minerals under privately owned land.

## 1.6 Trespass on land

Trespass on land means any interference with a person's possession of land without permission. The person in possession of land does not have to own the land in order to seek an injunction to restrain a continuing trespass or prevent a threatened trespass. Damages can be awarded as monetary compensation for trespass. However, if no perceptible damage is done to land or other property the compensation is likely to be nominal.

Trespass may be committed not only by a person entering another's land but also where a person causes or allows some object to enter upon another's land. Dumping rubbish or cutting down a tree so that it falls on another's land is trespass.

Under the *Criminal Code*, it is lawful for a person in possession of land to 'use such force as is reasonably necessary in order to prevent any person from wrongfully entering upon such land' or in order to remove such person from the land provided that 'he does not do bodily harm to such person'.

It is an offence under the *Code* to set a trap intended to kill or inflict grievous harm on a trespasser to land. A landowner owes the same duty of care to a trespasser as he or she owes to someone lawfully on his or her land.

## 1.7 Rates

Rates payable to local authorities are generally based on the unimproved value of land as determined by the Valuer-General under the *Valuation of Land Act 1944* (Qld). The 'unimproved value of land' is the expected sale price of the land if it was offered for sale on reasonable terms and conditions assuming that, for the purpose of the valuation, the land is freehold and improvements to the land do not exist. Improvements may be visible (buildings and structures), invisible (weed/pest control or other treatments) or intangible (leases or licences) and will include any improvements made by previous land owner.

Where land is used exclusively in connection with a single dwelling house or for carrying on the business of primary production, any value attributable to any other potential use must be disregarded.

Land in almost all shires in Queensland is revalued annually. If a new valuation has been made, a notice must be sent to each owner (including State lessees) by the Valuer-General prior to 31 March. The Valuer-General must also place advertisements in newspapers setting out where the valuations can be inspected and the closing date for objections.

An owner has the right to object to a valuation. An objection must be in writing and must be lodged within 45 days of the new valuation being given to the owner. The Valuer-General has a discretion to extend the 45 day objection period if an owner has a legitimate reason for not lodging an objection on time provided it is lodged within one year of the valuation being advertised.

Before the Valuer-General makes a decision on an objection, the owner and the Valuer-General may have an 'off the record' conference in an attempt to resolve the objection.

If the Valuer-General disallows an objection, the owner has the right of appeal to the Land Court within 42 days, and, if still dissatisfied, then to the Land Appeal Court (on issues of fact or law) and then to the Supreme Court (on points of law only).

Once the objection and appeal processes have been completed, the local authority rates will be based on the unimproved value of the land whether it be freehold or leasehold tenure.

When preparing its annual budget, the local authority will strike a rate per dollar of the total unimproved value of all property within the particular shire concerned so that it can fulfil its expenditure requirements. The rate may vary depending on the classification of the land. The owner's general rate assessment is calculated by multiplying the unimproved value of the land by the rate per dollar struck by the local authority.

A local authority is empowered to sell lands should the owner fail to pay rates or other charges levied after three years.

## **1.8 Land tax**

Land Tax is an annual tax which is levied on the total unimproved value of freehold land in Queensland owned at midnight on 30 June immediately preceding the financial year for which the tax is levied. For more information about the process of determining the unimproved land values, see section 1.7 – Rates.

The taxable value of freehold land is, generally speaking, the average unimproved value for the current and previous two financial years less any exemption or deduction which may be applicable. Generally, this is capped at 150 percent of the value of the land for the previous financial year.

Set out below are the more significant exemptions or deductions which may be claimed:

### **(1) A statutory deduction of \$600,000 for individuals**

The total unimproved value of land owned by an individual who is ordinarily resident in Australia is reduced by the sum of \$600,000 to determine the taxable value for assessment purposes.

### **(2) A statutory deduction of \$350,000 for companies, trustees and absentees**

The total unimproved value of land owned by a company, trustee or absentee (i.e., a person who is not ordinarily resident in Australia) is reduced by the sum of \$350,000 to determine the taxable value for assessment purposes.

### (3) **Lands used for primary production**

A deduction to the taxable unimproved value of land is available to land owners that are individuals or relevant proprietary companies where the land is used for primary production. However this is not applicable to any part of the land used for other commercial or investment purposes or for land used as a hobby farm.

### (4) **Principal place of residence**

Land owned by a person and used as a principal place of residence is exempt from land tax. A company is not eligible for the principal place of residence exemption.

If a deduction is allowed for a financial year, the landowner does not need to re-apply for the deduction the following year. The deduction will continue until the use changes to one that is not exempt.

Land tax is calculated by applying the tax rate to the taxable value of the land. The amount of tax payable by a landowner is calculated on a sliding scale.

Land tax is levied by way of an assessment made by the Commissioner of Land Tax. A taxpayer may lodge an objection with the Commissioner against an assessment within 30 days of the date for payment of the assessment. However, no right of appeal exists on the grounds that the land valuation made by the Valuer-General is excessive. These enquiries are to be directed to the Department of Natural Resources and Water (see section 1.7 – Rates in regard to the objection process for unimproved land values). If the objection is allowed, the assessment is amended but if disallowed, the taxpayer has the right to lodge an appeal within a further 30 days with the Land Court.

Land tax is deemed to be a first charge on the land in priority to any other registered security. If not discharged upon a sale of the land, the purchaser will own the land subject to the charge for unpaid land tax.

## 1.9 **Foreign ownership**

### (1) ***Foreign Ownership of Land Register Act***

#### (a) **Policy**

The *Foreign Ownership of Land Register Act* 1988 (Qld) requires all foreign persons to notify the Registrar of Titles at the Department of Natural Resources and Water of their interest in land in Queensland. The notification is registered at the same time as the transfer. This information is then noted on the Foreign Ownership of Land Register.

A '**foreign person**' is defined to include:

- (i) a natural person not ordinarily resident in Australia;
- (ii) a company in which non-residents or foreign companies hold a controlling interest; and

- (iii) the trustee of a trust estate in which non-residents or foreign companies hold a substantial interest.

An '**interest in land**' includes:

- (i) freehold or leasehold land; and
- (ii) licences and permits granted under the Land Act.

#### **(b) Failure to notify**

The Act gives the Registrar broad powers to call a person, trustee or corporation to attend before him and/or submit information. This includes the production of records and the submission of information orally on oath or by statutory declaration. Failure to comply with the Registrar's requests or other provisions of the Act can lead to serious penalties.

Forfeiture of a foreign person's interest in land may occur after conviction for:

- (i) falsely declaring not to be a foreign person;
- (ii) failing to declare an existing interest; or
- (iii) becoming a foreign person and not declaring this new status.

Where the Minister considers taking action for forfeiture, the Minister may require a person within 60 days to show cause why an interest should not be forfeited. If a determination is made to forfeit the land, an appeal may be made to the Land Appeal Court to rehear the matter.

Upon dismissal of an appeal or where there is no appeal the Minister would then:

- (i) where there are registered security interests, authorise the mortgagee to arrange a sale within six months by public auction; or
- (ii) if there are no registered security interests, recommend to the Governor-in-Council that the interest be forfeited. The Minister would then sell that interest.

Where land is sold, the interest of holders of leases, easements and other interests are protected but title passes free of any outstanding mortgages.

## **(2) Foreign Acquisitions and Takeovers Act**

### **(a) Policy**

The *Foreign Acquisitions and Takeovers Act* 1975 was enacted to examine certain proposals by foreign interests to acquire assets in Australia.

The Act provides for proposals to be notified to the Foreign Investment Review Board ('**FIRB**'). Those proposals within the scope of the Act and not notified and which are subsequently found to be contrary to the national interest may be forcibly divested.

A foreign person is defined to include:

- (i) a natural person not ordinarily resident in Australia;

- (ii) a company in which non-residents or foreign companies hold a controlling interest; and
- (iii) the trustee of a trust estate in which non-residents or foreign companies hold a substantial interest.

**(b) Foreign investment review board**

The FIRB is an advisory body formed to:

- (i) examine proposals by foreign persons and to make recommendations to the Government on those proposals;
- (ii) advise the Government on foreign investment matters generally;
- (iii) foster an awareness and understanding of the Government's policy; and
- (iv) provide guidance to foreign investors.

When making recommendations, it is usual for the FIRB to liaise with the relevant Commonwealth and State departments and with the Commonwealth taxation authorities.

**(c) Proposals to be submitted**

The proposals that must be submitted to the FIRB include:

- (i) acquisitions of interests in urban real estate (other than developed non-residential real estate valued at less than \$50 million) regardless of value;
- (ii) acquisitions of individual holdings of 15 percent or more (or collective acquisitions by several foreign interests of 40 percent or more) in Australian companies, trusts or businesses (including primary production businesses) that have total assets valued at over \$50,000,000;
- (iii) all other acquisitions involving rural hobby farms and rural residential blocks, including acquisitions of land to establish new businesses;
- (iv) takeovers of certain offshore companies that have Australian subsidiaries or assets.

In addition, proposals to establish new business where the total amount of the investment is \$10,000,000 or more and direct investment by foreign governments or their agencies regardless of size must also be submitted to the FIRB.

**(d) Penalties**

The Act provides for monetary penalties or imprisonment.

In addition, orders may be made to:

- (i) restrain the exercise of any rights attaching to shares or assets;
- (ii) prohibit or defer the payment of any sums due in respect of shares or assets;
- (iii) direct the disposal of shares or assets; and
- (iv) prohibit a person from acting as a director or from being involved in management.

## 1.10 Native title/Aboriginal cultural heritage

### (a) Native title

'**Native Title**' is the recognition of the rights and interests of Aboriginal and Torres Strait Islander people in land and water.

Prior to 1992, the common law did not recognise 'native title' in Australia. However, *Mabo v Queensland (No 2)* resulted in the recognition of land rights from the time of European settlement. The High Court did not define what native title was; however, the Court said that such rights could exist where the indigenous people have maintained their traditional connection with the land and where no act has extinguished their rights over the land.

Native title allows Indigenous Australians to continue to practice their traditional laws and customs.

Native title can only exist in areas where it has not been extinguished. It is not possible for native title to take away anyone else's valid rights. Native title has been extinguished on privately owned land, residential, commercial and certain other leases and other Government areas such as schools and roads.

Native title can exist in areas such as vacant State land, forests, beaches, some types of pastoral leases, national parks and reserves. In most cases where a successful native title application is made, the land will be shared by the native title holders and other people, e.g. lessees.

Native title will not affect all primary producers. The High Court's decision in *Wik* held that native title is not necessarily extinguished by pastoral leases and native title can co-exist with the rights of some leaseholders. Certain leases (e.g. GHPLs and GHFLs) are identified as 'exclusive' leases therefore extinguishing native title. If a lease is not exclusive, then the land may be claimed in a native title application, because native title, if it existed, may not have been completely extinguished over the land.

Claimants cannot claim exclusive possession of the lease area. If native title rights and leaseholders' rights conflict, then the rights of the leaseholder prevail.

### (2) Cultural heritage

The *Aboriginal Cultural Heritage Act* ensures protection of areas and objects of significance to Aboriginal people and of areas where there is culturally, historically, or archaeologically significant evidence of occupation.

The Act establishes a duty of care for activities that may harm Aboriginal cultural heritage. This duty requires those conducting activities in areas of significance to take all reasonable and practical measures to avoid harming cultural heritage. The Department of Natural Resources and Water has published guidelines identifying reasonable and practicable measures for ensuring activities are managed to avoid or minimise harm to Aboriginal cultural heritage.

There are penalties for failing to comply with the duty of care – the maximum penalty for a corporation is \$750,000 and for an individual \$75,000. Stop work orders can also be imposed.

## 1.11 Compulsory acquisition

The Commonwealth and each State and Territory have enacted legislation specifically dealing with the acquisition of land. The legislation provides for compulsory acquisition and acquisition by negotiated agreement. Land owners who are to be dispossessed must be given notice before the acquisition and may be compensated on just terms. Both the acquisition and the amount of compensation to be paid may be subject to review.

The principal steps in a compulsory acquisition are:

- issuing a pre-acquisition notice;
- reviewing the proposal; and
- acquiring the interest in land by issuing a notice of acquisition.

The legislation sets out similar preliminary steps (the pre-acquisition notice and the review) to be followed whether the land is to be acquired by agreement or by compulsory process. The acquisition may be valid even if all the statutory requirements are not carried out.

### (1) The Commonwealth's power

The Commonwealth Government derives its powers from the Constitution, which allows the Commonwealth Parliament to pass laws about specified matters set out in the Constitution. These matters include laws about *'the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws'*.

This power allows a Commonwealth authority to compulsorily acquire land or an interest in land anywhere in Australia for public purposes.

The relevant Commonwealth law is the *Lands Acquisition Act 1989*.

### (2) Queensland's power

The State is a fully sovereign power with power to pass laws as its Parliament thinks fit, subject only to the matters of national interest ceded to the Commonwealth at Federation.

The State Parliament has put limits on the powers of State instrumentalities to take land under the *Acquisition of Land Act 1967*. A State department can take land only for the purposes described in the Schedule to this Act. Local governments and other statutory authorities can take land for those purposes or for any functions they have under their enabling legislation. The schedule has an extensive list of authorised purposes, ranging from abattoirs to wharves.

There are other State laws also authorising the taking of land. For example, the *Electricity Act* 1994 and the *Petroleum and Gas (Production and Safety) Act* 2004 allow for compulsory acquisition of land for authorised purposes under those Acts. The *Mineral Resources Act* 1989 reserves the right of the State to grant mining rights in parallel to land ownership.

### **(3) How land is taken**

#### **(a) Commonwealth**

The Commonwealth must give the landowner and other affected persons a document which states that it is considering acquiring the land for a public purpose. This document is known as a 'pre-acquisition declaration' and it must:

- name the authority that wants to acquire the land;
- describe the land in detail;
- state the public purpose for which the land is to be used; and
- explain why the land is considered suitable for the purpose.

In the absence of agreement, subject to the outcome of any review of the pre-acquisition declaration, the acquisition takes effect when a declaration by the responsible Minister is signed and published in the *Commonwealth Gazette*. It is generally also published in a local newspaper.

The landowner can claim just compensation from the Commonwealth Government as soon as the land has been acquired.

#### **(b) Queensland**

Under Queensland law, the constructing authority proposing to acquire the land must first serve a 'notice of intention to resume' on the landowner (or mortgagee, if applicable).

The notice must be in writing and should specify:

- the purpose for acquiring the land;
- the location and area of the land to be acquired;
- that the landowner may object in writing to the acquisition within 30 days from the date of the notice, setting out the grounds for the objection (which must not relate to compensation); and
- a time and place for the landowner to appear before the constructing authority to present grounds for any objection.

A copy of the notice of intention to resume is given to the Department of Natural Resources and Water, which administers the Land Title Register. It notes the title deed to the affected land with a warning that the land is subject to the proposed resumption.

Following the hearing date, and after considering any objections, a final decision is made by the constructing authority. Depending on the circumstances, the decision could be to either discontinue, amend or to proceed without change. If the objection is over-ruled, the approval of the Governor-in-Council is sought.

The Governor in Council makes a formal proclamation, which is published in the *Government Gazette*. A copy of the gazette notice will then be forwarded to all relevant parties. Ownership of the land transfers to the constructing authority at the date of the gazette notice.

#### **(4) Compensation claims**

##### **(a) Commonwealth**

The Constitution imposes a limitation on the power of the Commonwealth. Laws for compulsory acquisition of property must provide for compensation on 'just terms'. The affected landowner can negotiate fair compensation or can make a written claim. A claim for compensation from a Commonwealth authority must be made in a prescribed form. The relevant Minister can either accept or reject the amount claimed or can make a counter-offer.

If the claim is rejected, the claimant can apply to the Administrative Claims Tribunal or to the Federal Court.

The claimant and the Minister can also agree to submit to alternative dispute resolution methods such as arbitration or expert determination.

##### **(b) Queensland**

In Queensland, there is no entitlement to compensation on 'just terms'. However, the *Acquisition of Land Act* provides a general entitlement to compensation and sets out factors which must be taken into account when calculating compensation. Compensation is generally based on the market value of the land and any fixed improvements and disturbance.

The amount of compensation should be negotiated between the affected landowner and the constructing authority in the first instance. If agreement cannot be reached on an amount, the landowner can apply to have the amount of compensation assessed by the Land Court.

#### **(5) Appeals**

##### **(a) Commonwealth**

The Constitutional requirement for 'just terms' mandates that an independent and impartial tribunal assess compensation after giving a landowner a full and fair opportunity to put forward his or her case. Accordingly, either the Federal Court or the High Court may consider and overturn a decision that would result in an acquisition being made other than on just terms.

The *Lands Acquisition Act* allows both landowners and Commonwealth authorities to commence proceedings in the Federal Court to determine the relevant amount of compensation. A landowner who has rejected a final compensation offer may also apply to the Administrative Appeals Tribunal for a review of the decision to make the offer and the Tribunal may either affirm or vary the final compensation offer.

#### **(b) Queensland**

There is no appeal from the political decision to resume land. However, a landowner can ask the Supreme Court to review a decision on the basis that the rules and procedures in the *Acquisition of Land Act* have not been strictly and fairly applied.

Pending the appeal, Queensland law allows an advance on compensation to be paid to the dispossessed landowner to reduce his or her financial distress. The advance will be no more than the constructing authority's offer or estimate of the appropriate amount of compensation.

The Land Court can also hear compensation appeals. The Land Court will not review the justice of the decision to resume land, but will determine the proper amount of compensation. It has no power to hear disputes about the defects in the notice of intention to resume or the resumption procedure or any failure to consider objections fairly.

A further appeal from the Land Court's decision can be made to the Land Appeal Court against all or part of a decision of the Land Court within 42 days and a further appeal is available to the Court of Appeal on points of law only.

## 2 Water

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### 2.1 Water licences

The *Water Act* 2000 vests all rights to the use, flow and control of Queensland's water with the State Government. The Department of Natural Resources and Water ('**NRW**') manages access to water through a system of water entitlements, including water licences and water allocations.

A water licence is an entitlement to take or interfere with water. Generally, a water licence is attached to land and the water taken or interfered with may be used only on the land to which the licence is attached.

Water licences differ from water allocations in that they generally cannot be transferred from one property to another.

A water licence does not allow the physical construction of works such as dams, pumps and weirs to take or interfere with water. These works must generally be authorised by development permits issued by NRW.

#### (1) Surface water

Under the Act, a water licence is required for the taking or interfering with water in a watercourse, lake or spring for purposes such as:

- (a) irrigation;
- (b) industrial use;
- (c) stock or domestic water on lands that do not adjoin a watercourse, lake or spring; and
- (d) the storage of water in excavations that are within or connected to a watercourse.

A water licence is not required when taking water from a watercourse, lake or spring for domestic purposes and stock watering on land adjacent to a watercourse, lake or spring.

#### (2) Overland flow

Overland flow water is water that runs off the land from rainfall or is flowing over land after breaking from a watercourse, lake or spring.

The water resource plan for an area may require a landholder to obtain a licence to take overland flow water and a development permit for the physical works that take that water. Works that take overland flow water include pumps, pipes, ponded pasture infrastructure, levees or diversion banks.

In the regulated areas, NRW must be notified of works that take overland flow water, including all new works and any existing works that take water other than solely for stock or domestic purposes. Certain new works, including large infrastructure and works to take water other than for stock or domestic purposes, will require prior approval from NRW.

For example, levee banks that capture overland flow water for irrigation purposes will require approval.

### **(3) Underground water**

A water licence is required for taking or interfering with artesian water anywhere in the State. Artesian water is underground water that, once tapped by a bore, flows naturally to the surface.

A water licence is also required to take or interfere with subartesian water (underground water that has to be pumped to the surface) in certain areas. In many parts of the state, subartesian water can be taken for non-intensive stock and domestic purposes without a water licence.

## **2.2 Water allocations**

A water allocation is a tradable entitlement to a share of the available water resource. Water allocations have a title separate to land and can be traded independently. For example, a person who does not hold any land can hold a water allocation.

Water allocations are generally established through conversion of existing water entitlements when a resource operations plan for a water resource plan area is finalised.

Water allocations can be permanently traded via transferring of ownership. Water allocations can also be subject to other dealings, such as changes to the attributes of a water allocation, subdivision and amalgamation.

### **(1) Interim water allocations**

Interim water allocations are water entitlements that are supplied through water supply schemes. The intent is to convert these entitlements to water allocations on completion of a water resource plan for the area. Generally, interim water allocations are attached to land and can not be traded.

### **(2) Water allocations register**

Water allocations are registered on the water allocations register, which operates in a similar way to the land titles registry. To have effect, a dealing with a water allocation must be registered.

### **(3) Transferring water allocations**

Water allocations can be 'permanently' traded via a transfer of the allocation. If the water allocation involves supplemented water, the Purchaser must enter into a new supply contract with the resources operations licence holder before the Purchaser can become the registered owner of the water allocation. Before taking the water the subject of the allocation, the Purchaser must have all necessary approvals for the works that will be used to take the water.

#### (4) **Leasing water allocations**

Whole water allocations may be leased in the same manner as a lease of land. When a water allocation is leased, all of the benefits and responsibilities of holding the water allocation are assumed by the lessee for the period of the lease. For a lease to have effect, it must be registered on the water allocations register.

#### (5) **Other dealings**

Approval from NRW is required to subdivide, amalgamate and/or change a water allocation. If approval is granted, NRW will issue a dealing certificate, which must be registered on the water allocations register before it expires.

Applications to change, subdivide or amalgamate water allocations are often made in connection with a sale of one or more allocations. These dealings could be a requirement of either the Vendor or the Purchaser. The contract for sale of the water allocation should provide for the necessary applications to be made, specify who is to make the applications and deal with the consequences if the applications are not approved within a certain time.

##### (a) **Change to a water allocation**

A water allocation holder can apply to NRW to change certain attributes of a water allocation. The most common change involves moving the allocation to a different location.

##### (b) **Subdividing a water allocation**

A water allocation can be subdivided, so that a part of the original allocation can be sold or its attributes changed. However, a subdivision will not be allowed if it increases the holder's share of the water available under the allocation.

##### (c) **Amalgamating water allocations**

Two or more water allocations with the same attributes can be amalgamated to create one new allocation. If the attributes are not the same, the holder must apply to change one or more of their water allocations.

### 2.3 **Water infrastructure**

The *Integrated Planning Act* regulates certain works that take or interfere with water from watercourses, lakes, springs, aquifers or overland flow, including pumping equipment, diversion channels, weirs, barrages, dams and bores.

#### (1) **Watercourses, lakes and springs**

A development permit under the *Integrated Planning Act* is required for the physical construction of works, to take or interfere with water in a watercourse, such as pumps, gravity diversions, stream re-directions, weirs or dams.

## **(2) Overland flow**

Overland flow water is water that runs off the land from rainfall or is flowing over land after breaking from a watercourse, lake or spring.

The water resource plan for an area may require a landholder to notify NRW of, or obtain a development permit for, works that take actively or passively take overland flow water.

Works that actively take overland water include:

- (a) pumps, storages, sumps, drains and pipes used to take and store overland flow water;
- (b) any storage connected to another storage used to take overland flow water, and the connecting infrastructure; and
- (c) structures used to hold overland water flow for ponded pastures.

Works that passively take overland flow water include:

- (a) levees or diversion banks for directing overland flow into dams; and
- (b) levees or diversion banks to slow the movement of overland flow water.

In the regulated areas, NRW must be notified of works that take overland flow water, including all new works and any existing works that take water other than solely for stock or domestic purposes.

Certain new works, including large infrastructure and works to take water other than for stock or domestic purposes, will require prior approval from NRW. For example, levee banks that capture overland flow water for irrigation purposes will require approval.

## **(3) Underground water**

A development permit under the *Integrated Planning Act* is required for the construction of:

- (a) all artesian bores anywhere in the State, no matter what their use;
- (b) subartesian bores in declared subartesian areas, under certain wild river declarations and under certain water resource plans, used for purposes other than stock and/or domestic use; and
- (c) subartesian bores in certain declared subartesian areas and under certain water resource plans that are used for stock and/or domestic purposes.

Further, the water bore drillers' licensing arrangements of the *Water Act 2000* require drillers to comply with minimum construction standards for water bore construction. Landholders should only employ licensed bore drillers to construct a bore that meets the minimum technical standard for water bore construction. NRW maintains a public register of licensed water bore drillers.

## 3 The environment

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### 3.1 Native flora and fauna

The care and protection of native plants, animals and habitat in Queensland is regulated by the *Nature Conservation Act 1992* (Qld). The Act provides different classifications for protected plants and animals depending on the level of threat faced. The classification ranges from 'presumed extinct', 'endangered', 'vulnerable' or 'rare' to 'common'.

A person may apply to the Minister for a licence authorising them to take, use or keep protected plants or animals. Without a licence, it is an offence under the Act to take, use or keep plants or animals which are declared protected.

Areas of environmental significance in Queensland are protected under the Act. Protected areas are given a classification such as 'national park', 'conservation park', 'nature refuge', 'wilderness area' or 'co-ordinated conservation area'.

Depending on the type of classification applied, certain management principles are established. These principles must be complied with when carrying out any action within a protected area or when carrying out an action that may have an impact on a protected area.

The Environmental Protection Agency is responsible for administration of this legislation.

### 3.2 Declared plants and animals

Plants and animals may be declared 'pests' within the meaning of the *Land Protection (Pest and Stock Route Management) Act 2002* (Qld). There are three categories of pest in the Act. Depending on the category, the Act regulates whether introduction of a pest to a particular area is prohibited and whether the pest should be destroyed, reduced in number or prevented from spreading. The Act places obligations on landholders in relation to the control, sale, keeping and transport of declared pests in Queensland. Among other things, it is an offence under the Act to introduce a declared pest and to keep, feed or release a declared pest animal.

Local governments are responsible for administering the Act in relation to land within local government areas.

The *Land Act 1994* (Qld) places obligations on leaseholders when it comes to noxious plants. A noxious plant is a plant that is a declared pest under the *Land Protection (Pest and Stock Route Management) Act*. The *Land Act* provides that where a lease is infested with any noxious plants, the plants must be kept under control and the Minister may require the lessee to destroy such noxious plants within a period and require that during the remainder of the term, the holding be kept absolutely free of all noxious plants. If noxious plants are not kept under control, the Minister can order work to be done and recover the costs of that work from the lessee.

In addition, under the *Local Government Act* 1993 (Qld), the Local Government Minister has power to declare any bird, animal, insect, fungus, matter or thing to be a pest within the meaning of that Act and the local authority may then undertake destruction or prevention of the pest as it thinks necessary. Many local governments have pest management plans with stated responsibilities, objectives and strategies to deal with declared pests in their area.

### 3.3 Forests and timber control

The *Forestry Act* 1959 provides for the management of state forestry products.

The Environmental Protection Agency is responsible for establishing, monitoring and regulating the environmental standards applicable to timber harvesting on the State forest estate (State forests, timber reserves, forest entitlement areas) and other State land to which the *Forestry Act* 1959 applies.

The Department of Primary Industries and Fisheries is responsible for commercial harvesting and marketing of the State's timber resources.

It is an offence for a person to destroy a tree or take other forest products or quarry material on leasehold land without first obtaining authority to do so from the Department of Primary Industries and Fisheries.

On freehold land, trees can be managed, felled and removed for forestry purposes. Provided such activities are consistent with a native forest practice code established under the *Vegetation Management Act*, they do not require approval and are exempt from the vegetation management restrictions in the *Vegetation Management Act* and *Integrated Planning Act*. However, notice of the location of the native forest practice must be given to the Department of Natural Resources and Water before the practice starts.

### 3.4 Carbon trading

#### (1) Greenhouse gases

Gases that trap heat in the atmosphere and are responsible for causing global warming and climate change are often called greenhouse gases. Some greenhouse gases occur naturally in the atmosphere, while others result from human activities such as burning fossil fuels. The six most common greenhouse gases are:

- (a) carbon dioxide;
- (b) methane;
- (c) nitrous oxide;
- (d) hydrofluorocarbons;
- (e) perfluorocarbons; and
- (f) sulphur hexafluoride.

Although carbon dioxide is the least potent of the greenhouse gases, it is the most significant in a global warming context because it is produced in such large quantities. Terms such as 'carbon emissions' and 'carbon trading' are often used generally to refer to the six major greenhouse gases.

Each of these gases has a different capacity to heat the atmosphere. Emissions from the gases are reported under the Kyoto Protocol, an international treaty designed to reduce global greenhouse gas emissions in an attempt to stop climate change.

The Kyoto Protocol estimates a country's greenhouse gas emissions, providing for the inclusion of specific sources and sinks from the land use, land use change and forestry sector.

The Protocol has allocated individual emissions targets to the developed countries (such as Australia) that have signed the Protocol. These countries may offset their emissions by increasing the amount of greenhouse gases removed from the atmosphere by using the carbon sequestered in so-called carbon 'sinks'. At this stage, this only applies to a limited range of land use and forest-related activities. The term 'sink' is defined in the United Nations Framework Convention on Climate Change as 'any process, activity or mechanism which removes a greenhouse gas, an aerosol or a precursor of a greenhouse gas from the atmosphere' and may be used to refer to forests, plantations and other vegetation.

## **(2) Emissions trading**

Emissions are the release of a particular gas to the atmosphere as a result of a certain activity. The predominant emissions are produced through generating electricity from fossil fuels, in transport, in clearing and burning forests, and in agricultural activities.

Carbon emissions trading specifically involves carbon dioxide. It currently makes up the bulk of emissions trading. It is one of the ways countries can meet their obligations under the Kyoto Protocol to reduce carbon emissions and thereby mitigate global warming.

Emissions trading involves three key actions:

- (a) defining emissions entitlements as commodities;
- (b) assigning property rights over them; and
- (c) allowing these rights to be traded.

Trading is based on emissions permits which authorise the holder to emit a defined amount of greenhouse gas. Emissions permits can be traded from one legal entity to another at a price agreed to by the parties involved.

On 10 December 2006, the Prime Minister announced the establishment of a joint government/business Task Group on Emissions Trading. The Task Group released its report on 31 May 2007. Based on the report, the Australian Government has proposed a 'cap and trade' emissions trading scheme. This framework would involve the Government setting a limit (or 'cap') on the amount of a pollutant that can be emitted.

Companies or other groups emitting the pollutant would be given credits or allowances which represent the right to emit a specific amount. The total amount of credits could not exceed the cap, limiting total emissions to that level. Companies polluting beyond their allowances would be required to buy credits from those polluting less than their allowances, or else face heavy penalties. In effect, the buyer would be financially penalised for polluting, while the seller would be rewarded for having reduced emissions.

Agriculture, land use and waste emissions are proposed to be initially excluded from this trading scheme because of the practical difficulties of measuring emissions and monitoring compliance.

The Task Group refused to set a specific target for greenhouse reductions, although the Government has stated that it will announce an emissions reduction target in 2008 following extensive consultation to consider economic considerations.

According to the report, emission monitoring systems, an independent regulator and new laws to govern the systems could be ready in three years, with carbon trading under the proposed scheme expected to commence no later than 2012.

### **(3) Emissions trading and farming**

Agriculture accounts for about a quarter of Australia's greenhouse gas emissions. These emissions are associated with a range of activities, including livestock, fertiliser use and land clearing, while the growth of new forests counts as an offset to these emissions.

At present, it is unlikely that agricultural activities will be drawn into trading on a mandatory basis. Greenhouse gas emissions from agriculture are typically regarded as too difficult to measure on a cost-effective basis. Nevertheless, farmers will not be completely immune from greenhouse costs. The focus on stationary energy will add to fuel costs for electricity generators, affecting the retail price of electricity for grid-connected households and the cost of goods for which electricity, coal or gas is a major input.

At the same time, primary producers may find that there are commercial opportunities resulting from voluntary participation in a trading system. Allocation arrangements in a trading system may give farmers emission entitlements that are surplus to their needs, while primary producers may be able to create and sell emission and sequestration credits, leading to significant income-earning potential.

Tradeable carbon credits would offer owners an additional financial bonus to the primary purpose of planting trees. There would also be opportunities for owners of sequestered carbon rights to sell carbon credits in advance of any formalised international trading system.

In May 2007, Queensland newspapers reported that 'carbon farmers' had sold a mining company the rights to carbon dioxide stored on large stretches of their land. Instead of clearing their land, the farmers had agreed to preserve the trees on the land for 120 years to ensure that the contracted amount of carbon dioxide was absorbed.

To date, there is no formal market for carbon credits in Queensland, although a limited market has been set up in New South Wales. However, an informal market exists, with corporations seeking voluntarily to offset their carbon emissions, typically through informal exchanges such as the Australian Greenhouse Office's 'Greenhouse Friendly' programme.

A number of companies have already been established to help landowners develop carbon emission offsets through the planting of trees. Landcare Australia, for example, has established CarbonSMART, offering credits on blocks of land as small as point two of a hectare. Other commercial companies also offer carbon offset services to landowners.

Under the Kyoto Protocol, forests and other carbon sinks already in existence as at 1 January 1990 cannot be counted for the purposes of carbon emission offsets. This means that 'environmental additionality', which may be defined as an increase in carbon sequestration through eligible activities such as afforestation, reforestation, forest management, cropland management, grazing land management and revegetation carried out since 1 January 1990, is central to the sale of carbon offsets.

There is ongoing debate about recognition of pre-1990 trees, particularly where the possibility of cutting down or clearing vegetation has changed. The 'additionality' principle means that if a ban on clearing vegetation has occurred as a result of government policy, no carbon offset is available. However, the market has recognised the sale of valid permits to clear vegetation as a carbon offset. Trees not covered by vegetation laws (such as plantation forests) could possibly become carbon credits if a decision not to cut them down is made.

Research is also currently underway to look at other possible types of carbon offsets, such as sequestration of carbon in the soil or reducing emissions of nitrogen and methane through better farming practices. These are difficult areas of policy, raising measurement issues and compliance costs, and might be some time away from being commercially recognised.

### **3.5 Soil conservation**

The *Soil Conservation Act* 1986 is designed to conserve soil and to prevent soil erosion.

The Act empowers the Chief Executive Officer of the Department of Natural Resources and Water to ascertain the nature and extent of soil erosion throughout the State, to design preventative and remedial measures, to plan the use of land to give effect to those measures, to undertake experiments and to disseminate information regarding soil erosion.

Property owners may be actively involved in developing and managing conservation plans for soil conservation. The plans delineate the boundaries of the land subject to the plan and specify the particular conservation actions to be undertaken. Where the plan affects other land, the Chief Executive Officer is required to discuss the plan with the owners of that other land and seek their approval prior to approving the plan.

Alternatively, a project plan may be prepared by the Chief Executive Officer delineating the boundaries and proposals as to soil conservation and run-off water flow. The Chief Executive Officer may, in accordance with an approved project plan, give a soil conservation order to an owner requiring that person to undertake soil conservation measures specified in the order. Such an order binds the current owner of land and any subsequent owners.

### 3.6 Wild rivers

The *Wild Rivers Act* 2005 (Qld) aims to preserve river systems the State Government identifies as having all, or almost all, of their natural values intact. The Act primarily affects new activities and development proposals in declared wild river areas.

The Minister for Natural Resources and Water may declare an area to be a wild river area following a process that involves inviting community comment.

A wild river declaration may impose caps on resources (such as water and quarry materials) that can be taken in the wild river area and rules that apply new development activities (such as quarrying, agriculture and mining) in the wild river area. The declaration identifies various 'management areas' within the wild river area including:

- (1) high preservation areas (essentially, the river and its major tributaries, any special features in the wild river area and an area up to one kilometre either side of the river, its major tributaries and any special features);
- (2) preservation areas (the remainder of the wild river area);
- (3) flood plain management areas;
- (4) subartesian management areas;
- (5) designated urban areas; and
- (6) nominated waterways.

The activities which require approval following a wild river declaration include:

- agricultural activities (cultivating soil; planting, gathering or harvesting a crop; disturbing the soil to establish non-indigenous grasses, legumes or forage cultivars; or using the land for horticulture or viticulture); and
- animal husbandry activities (essentially, feeding livestock confined to a particular area, such as an area of irrigated or ponded pasture, or structure or establishing a feedlot, piggery or dairy).

Grazing and most supplementary feeding does not require approval. Further, a person who is carrying on agricultural or animal husbandry activities in an area immediately before a wild river declaration takes effect may continue to carry on the activity. Also, water entitlements and other authorities to take natural resources granted prior to the declaration are unaffected.

The Wild River Code established under the Act sets out the requirements that must be met by a proposed development (such as the establishment of agricultural or animal husbandry activities) within the declared wild river area before it will be approved.

Applications for the establishment of agricultural or animal husbandry activities or new works for such activities will not be approved if they involve any land within a high preservation area.

The clearing of vegetation in and around waterways may require approval under the *Vegetation Management Act 1999* (Qld) and/or the *Water Act 2000* (Qld).

### 3.7 Tidal rivers

The *River Improvement Trust Act 1940* is designed to improve the flow of water courses and prevent or reduce both flooding and erosion in tidal rivers. A River Trust is a body corporate established under the Act to carry out works including the following:

- (1) repair damage to river banks by flood or cyclone;
- (2) remove dead or growing timber or other vegetation or thing from the bed, banks or foreshore of any tidal waters or coastal lagoon;
- (3) to change or prevent the changing of the course of a river; and
- (4) to prevent erosion of the bed and banks and prevent flooding.

A River Trust may issue an improvement notice to a land holder within a defined river improvement area and may impose penalties if the land holder fails to comply with such notice.

A River Trust is also a constructing authority under the *Acquisition of Land Act 1967* and has the power of compulsory acquisition of land for the purpose of flood prevention.

### 3.8 Environmental organisations and environmental protection

The *Environmental Protection Act 1994* is established to protect the environment in Queensland. It provides for integrated management programs with a focus on ecologically sustainable development. The Act provides for protection by a number of mechanisms including:

- (1) requiring certain activities which may lead to contamination to be notified to the Environmental Protection Agency (e.g. spray races and dips);
- (2) requiring land which is known (or which ought to be known) to be contaminated to be notified to the Agency;
- (3) requiring all persons carrying out certain activities to hold licences for those activities (e.g. cattle feedlotting, poultry farming and pig farming);
- (4) requiring notification to be given to the Agency of events which cause (or are likely to cause) environmental harm; and
- (5) creating various offences for causing environmental harm, failing to hold appropriate approvals, failing to provide required notifications and failing to comply with conditions of approvals issued under the Act.

Environmental harm is defined very broadly under the Act. A central theme is that if a person has otherwise complied with all relevant laws and has complied with the 'general environmental duty', but nevertheless environmental harm was caused, the person would not be guilty of an offence of causing environmental harm.

Complying with the 'general environmental duty' effectively means that a person has done all which is reasonable to prevent the type of environmental harm which has occurred. The Act primarily aims to protect the environment from becoming contaminated or being damaged by the introduction of substances into the environment (e.g. chemical spills). Clearing riparian vegetation in a way which causes harm to the environment is also a breach of general environmental duty.

Environmental issues are also important considerations in land development, which is primarily governed by the *Integrated Planning Act 1971*. The local governments must take into account environmental protection issues when assessing development applications.

### 3.9 EPBC Act

#### (1) **The *Environment Protection and Biodiversity Conservation Act 1999* (Cth)**

The *Environment Protection and Biodiversity Conservation Act 1999* (the '**EPBC Act**') came into force on 16 July 2000. The Act provides protection to nationally significant aspects of the environment and was designed to streamline national environmental assessment and approval processes, protect Australian biodiversity and integrate management of important natural and cultural places.

There are seven matters of national environmental significance protected under the Act:

- (a) World Heritage properties;
- (b) National Heritage places;
- (c) wetlands;
- (d) threatened animal and plant species and ecological communities;
- (e) migratory species;
- (f) Commonwealth marine areas; and
- (g) nuclear actions (including uranium mining).

Under the EPBC Act, actions that have or are likely to have a significant impact on a matter of national environmental significance require prior approval from the Commonwealth Minister for the Environment and Water Resources. An action includes a project, development, undertaking, activity or series of activities.

## (2) Farming activities

Under the EPBC Act, farmers are entitled to continue their normal activities that were fully approved by State, Territory and local governments or otherwise lawful before the EPBC Act came into force.

However, if proposed new activities will significantly impact on a matter of national environmental significance, farmers will require prior approval before they can proceed. If they breach the Act, they will be liable for heavy penalties.

Proposed activities may include land clearing that may impact on the habitat of a listed threatened species or ecological community, discharging pollutants into an area containing habitat for a listed species or ecological community or intensifying a land use that may change the hydrological regime of an internationally protected wetland.

## (3) Assessment and approval

The EPBC Act relies on self-regulation, meaning that farmers must decide whether to refer proposed activities. If they are unsure whether or not their proposed activities will need formal assessment and approval under the EPBC Act, they can refer the activities to the Department of the Environment and Water Resources ('DEWR'). The referral process is free and involves completing and submitting a form which can be obtained from DEWR. The referral is the principal basis for the Minister's decision as to whether approval is necessary and, if so, the type of assessment to be taken, and the decision is made within 20 business days.

If the Minister decides that the proposed activities are not likely to have a significant impact, there is no further need for approval other than to comply with local and State/Territory legislative requirements. If the Minister determines that an approval is required, the proposed activities will proceed through the assessment and approval process.

## 3.10 Vegetation management

### (1) Legislation

The *Vegetation Management Act 2000* (together with the *Integrated Planning Act 1997*) controls the clearing of native vegetation on both freehold and leasehold land. Native vegetation is defined to mean native trees and native plants (other than grasses or mangroves).

Only clearing that is either exempt or undertaken pursuant to an approval is permissible.

The following two exemptions to the clearing restrictions apply to regrowth:

- (a) clearing of areas mapped as Category X on a Property Map of Assessable Vegetation ('PMAV'); and

- (b) for an area where no PMAV exists, clearing of freehold land which is mapped as non-remnant on regional ecosystem mapping or leasehold land which is mapped as non-remnant on regional ecosystem mapping and has previously been cleared after 31 December 1989.

There are other circumstances in which small areas can be cleared without a permit for safety reasons, to maintain infrastructure or to establish infrastructure (e.g. a dam, fence or a set of yards) on areas of 'not of concern' remnant vegetation and non-remnant vegetation. Such exemptions require careful consideration before any clearing is carried out.

## **(2) Approvals**

Approvals are required to carry out any clearing of native vegetation not covered by an exemption. Applications will only be accepted for clearing which falls under one of the 'ongoing purposes', which include clearing:

- (a) necessary to control non-native plants or declared pests;
- (b) to ensure public safety;
- (c) for establishing a necessary fence, firebreak, road or other built infrastructure, if there is no suitable alternative site for the fence, firebreak, road or infrastructure;
- (d) for fodder harvesting;
- (e) for thinning;
- (f) for clearing of encroachment; and
- (g) for clearing regrowth on leases issued under the *Land Act* 1994 for agriculture or grazing purposes.

While approval is generally not needed to clear leasehold land which is mapped as non-remnant on regional ecosystem mapping and which has previously been cleared after 31 December 1989, approval is required to clear regrowth on an area which was previously cleared on or before 31 December 1989.

Approval will not be granted for broad scale clearing of remnant vegetation in a grazing or farming context.

## **(3) Property maps of assessable vegetation (PMAVs)**

Because only non-remnant vegetation can potentially be the subject of broad scale clearing, the distinction between remnant and non-remnant vegetation has important consequences for the development and pasture maintenance potential of a property.

In the absence of a PMAV, vegetation that is not remnant vegetation must be determined by reference to regional ecosystem mapping maintained by the Environmental Protection Agency. It is recognised that, at the individual property scale, regional ecosystem mapping is of limited accuracy due to the mapping methodology used and scale at which it is prepared. These maps are also a poor planning tool as they are regularly updated to reflect changes in the state of vegetation.

To help overcome these limitations, a landowner can apply for a PMAV which, for the purposes of vegetation management, replaces regional ecosystem mapping to the extent it defines the boundaries of particular types of vegetation. If the areas the landowner claims are non-remnant differ to those identified as non-remnant on the current regional ecosystem mapping, the landowner will have to prove that the proposed areas are non-remnant.

On freehold land, areas of non-remnant vegetation will be classified as Category X (exempt from clearing restrictions under IPA). On leasehold land, only areas of non-remnant vegetation previously cleared after 31 December 1989 will be classified as Category X. Unless evidence is produced to demonstrate clearing after 31 December 1989, non-remnant areas on leasehold land will be mapped on a PMAV as Category 4 (which requires approval to clear). This reflects the position in respect of such vegetation before the PMAV is made.

#### **(4) Other laws**

Although clearing may be 'lawful' for the purposes of the *Vegetation Management Act* and the *Integrated Planning Act*, regard has to be had to other laws, for example:

- (a) the *Nature Conservation Act* 1992, which regulates protected plants;
- (b) the *Environmental Protection Act* 1994, which regulates environmentally relevant activities;
- (c) the *Forestry Act* 1959 regarding the ownership and taking of forest products and quarry material;
- (d) the *Soil Conservation Act* 1986;
- (e) the *Water Act* 2000 regarding the removal of vegetation from the bed and banks of a watercourse;
- (f) the *Aboriginal Cultural Heritage Act* 2003 and the *Torres Strait Islander Cultural Heritage Act* 2003;
- (g) the *Federal Environment Protection and Biodiversity Conservation Act* 1999 regarding the protection of listed threatened species and ecological communities; and
- (h) local laws, which might provide for vegetation protection orders.

## 4 The elements

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### 4.1 Fire

The *Fire and Rescue Service Act 1990* provides that the Queensland Fire and Rescue Service is empowered to protect persons, property and the environment from fire and hazardous materials emergencies and to provide for the promotion of fire prevention and control measures.

In rural areas the Service is represented by fire wardens who are appointed by the Commissioner, or where appointees are also members of the Police Service or the Public Service, by the Governor-in-Council. There are approximately 2,000 rural fire wardens in the State.

Any person wishing to burn off on his or her land must obtain a permit from the local fire warden as well as obtaining the consent of his or her neighbour.

A permit is not however required for burning of sugar cane for harvesting in accordance with established practice and on certain conditions.

A fire warden in granting a permit may impose conditions to hopefully ensure the fire does not extend beyond the required area.

The Commissioner may also prohibit the lighting of all or some fires within the whole or any part of the State. This is usually done in times of high fire danger.

A person who lights a fire in compliance with the Act does not incur liability at common law for any damage caused by that fire unless that person acts recklessly or maliciously.

### 4.2 Flood and bush fires

Financial assistance is available to primary producers for flood and bush fire relief under the Commonwealth/State Natural Disaster Relief Arrangements.

Under these arrangements the Commonwealth and State share responsibility for providing financial assistance for natural disaster relief.

For specific disasters or disasters where State expenditure exceeds the small disaster threshold (currently \$240,000 in respect of each disaster), the Commonwealth Government contributes half the costs of providing 'personal hardship and distress' relief (emergency food, clothing and accommodation etc.).

The Commonwealth Government also contributes half of the States' expenditure on 'eligible relief measures' (concessional loans, restoration of public assets, etc), where the level of that expenditure lies between two threshold amounts determined according to a formula based on total State revenue. The Commonwealth Government also reimburses 75 percent of all further expenditure beyond the higher threshold amount.

Application for assistance can be made through the Queensland Rural Adjustment Authority (QRAA) and is available in the form of concessional loans for essential family living expenses and carry on requirements, restocking to normal levels and the restoration of land, building, plant and machinery.

Eligibility for assistance is dependent upon the property concerned being declared disaster stricken by the Department of Primary Industries and Fisheries.

Assistance is not intended to compensate for losses suffered and is not available for payment of hire purchase, lease, interest or loan commitments. Assistance is not available where adequate insurance could have been arranged at reasonable cost.

The maximum amount of loan funds currently available for a single disaster is \$100,000 for carry on expenses and \$100,000 for restocking. However the maximum aggregate of all loans under natural disaster relief assistance allowable to a single producer is \$150,000.

Further information regarding eligibility criteria application procedures is available at the QRAA website at [www.qraa.qld.gov.au](http://www.qraa.qld.gov.au) or on its toll free number 1800 623 946.

### 4.3 Drought

Assistance for drought relief can be sought through the Queensland Rural Adjustment Authority Emergency Assistance Scheme criteria.

Whilst the Commonwealth Government provides assistance for truly severe droughts under the Exceptional Circumstances Scheme (i.e. where drought is a one in 20 to 25 year event), drought relief funds are mostly made available from State resources.

As well as satisfying the normal eligibility requirements, a primary producer must establish that he or she is in necessitous circumstances as a result of drought.

Drought relief funding is also dependent upon the property or the area in which the property is located being declared a disaster area and assistance is again by way of concessional loans for producers who are unable to raise money commercially.

Drought Crop Loans of up to \$40,000 may be granted at a maximum rate of \$160 per hectare planted to cover costs of seed, chemicals, fertiliser and fuel.

Drought Restocking Loans of up to \$200,000 are available for the purchase of breeding stock and \$100,000 for other stock purchases.

Drought Carry-On Loans of up to \$100,000 and Drought Recovery Loans of up to \$200,000 may be obtained to assist in covering the costs associated with carrying on or rebuilding rural activities during and after severe droughts.

Freight subsidies under the Queensland Government Drought Relief Assistance Payment Scheme through the Department of Primary Industries are also available for fodder transport, stock water cartage, livestock returning from agistment and restocking.

Applications for road or rail freight subsidies are made through local stock inspectors of the Department of Primary Industries. Further information is available at the DPI website at [www.dpi.qld.gov.au](http://www.dpi.qld.gov.au).

#### **4.4 Income tax concessions for natural disasters**

To compensate primary producers for weather and market fluctuations the *Income Tax Assessment Act* provides that a primary producer can pay tax applicable to his or her average income for the past five years.

Where taxable income exceeds average income the taxpayer is granted a rebate calculated by reference to the difference between tax on the taxable income at ordinary rates and tax on the taxable income at the average rate.

Where the average income exceeds the taxable income the taxpayer is required to pay more tax to bring the tax on the primary production income up to the level of tax at average rates.

The Act also provides for income tax concessions where a primary producer is forced to dispose of stock, crops or trees as a result of a natural disaster.

Any profits derived from a forced disposal may be spread over five consecutive years or used to reduce the cost of any replacement stock acquired in the year of the forced sale and the next four consecutive years.

## 5 Produce

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### 5.1 Reform of regulatory bodies

The *Primary Industry Bodies Reform Act 1999* (Qld) dissolved the state authorities for various primary industries. As a result, industry representation is now in the hands of various member-controlled corporations. In Queensland, the following corporations have replaced the former state authorities:

- (1) the Queensland Cane Growers Organisation;
- (2) the Queensland Dairy Farmers Organisation;
- (3) Queensland Pork Producers Incorporated; and
- (4) the Queensland Seafood Industry Association (formerly the Queensland Commercial Fishermen's Organisation).

These bodies manage much of the industry interaction with Federal, State and local governments and also promote industry activities in the community. Until 2003, it was compulsory for all relevant producers to be members of the appropriate replacement corporation. However, since 2003, membership has been voluntary,

### 5.2 Wheat and seeds

The *Wheat Marketing Amendment Bill 2007* (Cth) involves proposed amendments to the *Wheat Marketing Act 1989* (Cth). Under the amendments, the Wheat Export Authority will become the Export Wheat Commission and will have greater powers to monitor and regulate the wheat industry.

Wheat exportation in bags and containers will be deregulated from 27 August 2007 and a new Quality Assurance Scheme will be implemented from this time. The Agriculture Minister will retain the power to veto bulk exports until June 2008, after which time he will hand the power over the single desk to a grower owned body or other entity.

It is an offence under the *Wheat Marketing Act 1989* to export wheat without the written consent of the Wheat Export Authority. Penalties can reach up to \$300,000 for companies and \$60,000 for individuals who fail to obtain consent or who export outside of the terms of their consent.

The production and sale of seed in Queensland is governed by the *Agricultural Standards Act 1994* (Qld) and the *Agricultural Standards Regulations 1997* (Qld). When seed is sold in specified quantities, it must be labelled with information such as:

- (1) the percentage of pure seed;
- (2) the maximum percentage of other seed;
- (3) the germination percentage;
- (4) details of chemical treatment and if human/animal consumption is prohibited.

It may be necessary to obtain licences or approvals to use certain seeds.

It is an offence for a person to contravene a standard or to make false or misleading representations as to compliance.

Inspectors and officers may, with a warrant, enter and inspect places for evidence that an offence has been committed under the Act. They may seize any item if they suspect on reasonable grounds that the item is evidence of the offence.

Seeds packaged for sale must be fastened up and labelled in the prescribed manner. When the seeds are packaged they must be mixed so that any sample of them is a true indication of the average quality.

Every label affixed to a package of seeds or any invoice shall have effect as a written warranty by the seller that the particulars are correct and the composition corresponds with the registered composition. A buyer of seeds is not bound to accept delivery unless all of the provisions of the Act have been complied with in full.

Importers of seed should be very careful to abide by Australia's seed prohibition laws. Failing to inform a purchaser that seed contains a quantity of prohibited seed, could see an importer liable for costs associated with the removal of the prohibited weeds that result.

### **5.3 Meat**

Safe Food Production Queensland is constituted under the *Food Production (Safety) Act 2000* (Qld) and its powers to regulate the meat industry are outlined under the *Food Production Safety Regulation 2002* (Qld). It is responsible for regulating the meat industry including slaughtering, marketing and hygiene. It controls the accreditation of abattoirs, public meat markets, poultry slaughter houses and knacker yards.

The authority began a new Food Safety Scheme for Meat in 2003 which governs a variety of issues including:

- (1) the handling of animals at a place where it is to be killed for meat;
- (2) processing meat or smallgoods intended for human consumption;
- (3) processing pet meat;
- (4) handling, packaging and storing meat or a meat product;
- (5) transporting meat;
- (6) retail sales of meat, including retail premises and retail vehicle;
- (7) labelling of meat and meat products; and
- (8) the keeping of adequate records.

Safe Food Production Queensland plans to review its Food Safety Scheme and incorporate recommendations from Meat Livestock Australia to ensure its effectiveness in the future.

Prior consent of the authority must be obtained for stock to be slaughtered or for a carcass to be dressed for human consumption, unless carried out under accreditation or by the owner if the meat is not intended for sale.

A person is not permitted to sell or store any meat unless it is marked as prescribed that it comes from stock that has been slaughtered under accreditation and has been inspected and passed as fit for human consumption.

An authorised person under the *Food Production Safety Act 2000* (Qld) may enter without notice any premises or vehicle stated in accreditation. They may inspect and take samples of meat for testing. They also have the power to seize meat if they believe on reasonable grounds that it is necessary to prevent the meat from being dealt with before its wholesomeness can be tested.

Poultry may only be slaughtered and dressed for human consumption at an accredited poultry slaughterhouse unless the poultry is for self consumption and not intended for sale. Under the *Chicken Meat Industry Committee Act 1976* (Qld), a Chicken Meat Industry Committee is constituted. A person is not permitted to supply boiler chickens to a processor unless the agreement between them has been approved by the Committee. The Committee is also vested with the power to mediate disputes between growers and processors.

## 5.4 Bees and honey

The keeping of bees in Queensland is regulated by the *Apiaries Act 1982* (Qld). A person who keeps bees or carries on business as a beekeeper must be registered with their local council. Registration must be renewed annually. Among other things, the Act regulates the distance between beehives depending on the size of each hive and requires that notice must be given each time a new hive is established. The Act requires all beehives to be properly marked with proof of ownership and regulates the selling and disposing of bees and beehives. The Act limits the rights to bring bees, hives or products into Queensland.

An obligation is placed on a beekeeper who becomes aware or suspects a disease in bees, hives or bee products to give notice to the nearest local council inspector under the Act within 14 days.

Beekeepers must ensure that their honey extraction facilities and storage areas meet standards prescribed by the *Apiaries Act*. It is equally important to comply with the *Food Act 2006* (Qld) and the *Food Production (Safety) Act 2000* (Qld) to ensure that all honey meets food production standards. Strict regulations govern the procedures of handling, packaging and storing honey. Local councils are responsible for the implementation and enforcement of these requirements.

All honey containers must be properly labelled to comply with both the Department of Equity and Fair Trading requirements and the requirements of Queensland Health.

## 5.5 Milk

The dairy industry is regulated by Safe Food Production Queensland which is constituted under the *Food Production (Safety) Act 2000* (Qld).

Under the Act, Safe Food Production Queensland introduced the *Food Safety Scheme for Dairy Produce*. The scheme commenced in January 2003. The scheme provides that Queensland dairy regulations are now in line with national Food Safety Standards and sets out various requirements for farmers and processors. More than 1,100 dairy farms and 45 dairy processing premises are involved in the scheme.

The food safety criteria requires the control and prevention of:

- (1) microbiological contamination;
- (2) chemical contamination; and
- (3) physical contamination.

It is equally important to ensure effective identification and traceability.

Safe Food Production Queensland encourages all dairy producers to have a food safety plan which identifies potential hazards and monitors and controls hygienic conditions. Safe Food Production Queensland, along with the Australian and New Zealand Dairy Authorities' Committee, provides industry guidelines to help dairy producers institute food safety plans.

After the deregulation of the dairy industry in 2000, the Federal Government enacted the *Dairy Industry Adjustment Act 2000* (Cth). The Act is administered by the Dairy Adjustment Authority, whose aim is to ensure the industry remains competitive and prosperous with minimal government intervention.

The Authority supervises the implementation of the Dairy Industry Adjustment Package, comprising of four programmes for the benefit of producers registered before 17 August 2000. These are:

- (1) the Dairy Structural Adjustment Program – to assist eligible producers who may have suffered a significant loss due to deregulation;
- (2) the Dairy Exit Program – providing an optional 'one-off' payment of up to \$45,000 to eligible producers leaving the industry;
- (3) the Dairy Regional Assistance Program – to assist regional communities to adjust to deregulation; and
- (4) the Supplementary Assistance Program – to assist people severely affected by price movements following deregulation.

Another entity, the Australian Dairy Corporation is funded by industry levies and constituted under the *Dairy Produce Act 1986* (Cth). The Corporation's primary role is to promote the dairy industry both locally and overseas, with a strong focus on the exportation of Australian dairy products. This includes the purchase of dairy products from Australian producers for sale overseas.

## 5.6 Chemicals

The *Agricultural Standards Act 1994* (Qld) imposes quality and control standards on 'agricultural requirements'. Among other things, an 'agricultural requirement' is seed, fertiliser, lime or stock food. A person is not permitted to sell these goods unless they comply with prescribed standards. The Act provides that an inspector may enter any place used for the storage, preparation or sale of an agricultural requirement and may open packages, remove samples for analysis and seize and detain quantities of the product. The inspector may also require the production of financial records relating to sales and call for certain other information.

The Act requires that all people who wish to sell agricultural requirements comply with the Act. Failure to do so enables a buyer to lawfully reject delivery of such goods.

The National Registration Authority for Agricultural and Veterinary Chemicals is constituted under the *Agricultural and Veterinary Chemicals Act 1994* (Qld) and is responsible for the regulation, registration and control of agricultural and veterinary chemicals.

The 'Agvet Code' is a list of registered chemicals in Queensland. It is an offence under the *Chemical Usage (Agricultural and Veterinary) Control Act 1988* (Qld) to use a chemical that is not registered under the Agvet Code unless it is exempted from registration. It is an offence under the Act to dispose of chemicals improperly or to dispose of a chemical in a manner that could cause harm to any person, property, animal or the environment.

Standards officers are appointed to ensure that people in possession of agricultural products or stock feed do not deal with it in ways that produce chemical residue in excess of prescribed amounts. The responsible Government Minister can give notice requiring the destruction or disposal of such produce or feed.

The *Agricultural Chemicals Distribution Control Act 1966* (Qld) is administered by the Department of Primary Industries and Fisheries. The Act controls the aerial distribution of chemicals and also the ground distribution of herbicides. The Department is responsible for the granting of licences and permits for both private and commercial chemical distribution.

The Department has set up a system of dual licensing. Licences are required for pilots who undertake aerial chemical distribution and also for the businesses and contractors who carry out the business of aerial chemical distribution.

Aerial chemical distribution is regulated in southern, eastern and central regions of Queensland. A person cannot cause or permit aerial spraying to be carried out unless a licensed pilot is used and it is carried out in the course of a business or under the direction or the authority of a licensed spraying contractor. A person cannot cause or permit ground distribution to be carried out unless the operator of equipment has a commercial operator's licence or he/she is under the supervision of a person with a commercial operator's licence unless he or she is a landowner carrying out his or her own ground distribution. The maximum penalty for failing to use licensed contractors is \$1,500.

The Act empowers an inspector to enter and inspect any place where there is an aircraft or ground equipment used for distribution and take samples. Similar powers of inspection are contained in the *Health Act 1937* (Qld), which also prohibits any person under 17 years of age to take part in the distribution, mixing or loading of chemicals.

Landowners and sprayers should take reasonable steps to ensure that no harm is done to land, stock, crops and people on neighbouring properties when undertaking aerial or ground chemical distribution. Landowners and aerial sprayers may owe common law duties of care to neighbouring landowners and a claim for tortious negligence or nuisance may succeed where damage has been caused.

Aerial spray drift may also attract provisions of the *Environmental Protection Act 1994* (Qld). This Act creates a general duty not to carry out activities that are likely to cause environmental harm unless all reasonable steps are taken to prevent and minimise that harm. Aerial sprayers and landowners should institute risk management measures to prevent spray drift and associated harm to the environment.

## 5.7 Diseases

The *Stock Act 1915* (Qld) allows the Governor-in-Council to control the introduction of stock into Queensland and the movement of stock in Queensland. He may declare infected areas and order the destruction of stock. An obligation is imposed by the Act to notify an inspector of the existence or suspected existence of any disease. If chemical or antibiotic residues in the tissues of stock exceeds a prescribed amount, the stock will be deemed to have a disease.

The *Plant Protection Act 1989* (Qld) controls the introduction and movement within Queensland of plants, soil and other things in order to prevent, control and eradicate pest infestations. The Act contains offence provisions and severe penalties for non-compliance.

The Governor-in-Council may also prohibit for specified periods the growing or planting of a crop plant.

A pest may be declared a notifiable pest under the Act. When the owner of any land, or contractor engaged by the owner, discovers or becomes aware of a notifiable pest on the owner's land, they must notify an inspector within 24 hours and within seven days confirm the discovery in writing to the Director-General. The Director-General may order destruction of a crop although an owner has rights of compensation if healthy plants are destroyed.

Biosecurity Queensland came into operation in March 2007. A joint operation of the Department of Primary Industries and Fisheries, the Department of Natural Resources and Water and the Environmental Protection Agency, Biosecurity Queensland is now responsible for protecting Queensland's primary industries from diseases in both animals and plants. Biosecurity Queensland offers advice and assistance to land holders and producers with respect to pest management and disease control.

## 5.8 Genetically modified crops

All dealings with Genetically Modified Organisms ('GMOs') are regulated under the *Gene Technology Act 2000* (Cth) and Queensland's corresponding legislation, the *Gene Technology Act 2001* (Qld). These Acts establish a nationally consistent regulatory scheme for gene technology in Australia. The legislative framework appoints the Gene Technology Regulator, an office responsible for the overall administration and control of genetic modification in Australia. The regulator sets out guidelines and a code of practice for the research, production and manufacture and of organisms that have been genetically modified.

'Dealings' with GMOs are controlled by a system of licensing and registration. It is prohibited to deal with GMOs without a licence (unless the dealing is specifically exempt) and heavy penalties apply if the conditions of a licence are breached. All approved GMOs and genetically modified products in Australia are entered onto a centralised and publicly available register.

The regulator appoints inspectors who are vested with the responsibility to monitor compliance with the regulations and to handle penalties for offences. An inspector may enter any premises on which GMOs are utilised and inspect, take samples and conduct tests. People on the premises during an inspection must answer any questions and relevant documents may be seized. Monitoring Inspectors have technical expertise in areas such as agriculture, ecology and microbiology; they monitor the activities of licence holders to ensure that the legislation is complied with. Compliance Inspectors investigate licence breaches and make up the law-enforcement arm of the regulator.

Pursuant to the federal legislation, state and territory governments have the power to enact their own legislation regarding market and trade issues for genetically modified crops. While the majority have enacted such legislation, the Queensland Government has yet to do so.

Food Standards Australia New Zealand requires that all foods using gene technology be assessed and approved prior to sale. All foods and ingredients that are made up of or contain genetically modified products must meet labelling standards.

## 5.9 Statutory levy functions, MLA levies and wool tax

Most primary industries are represented to some extent by industry bodies. The role of these bodies is to advance and protect the interests of producers within an industry. To fund these activities, statutory levies are imposed. Both producers and manufacturers may be required to pay levies as a contribution to industry activities. Levies represent resource sharing within industries and fund research and development, marketing and promotion and the general support of industry programs.

The *Primary Industries (Excise) Levies Act 1999* (Cth) allows the Federal Government to introduce industry levies. The Levies Revenue Service is a national body responsible for the collection and disbursement of various industry levies.

This body collects the levy at the point of transaction and then distributes it to nominated industry groups where it is used to fund various activities.

Levies must be paid by producers when pigs, buffalo, deer, cattle, sheep, lambs and goats are slaughtered. Levies must also be paid by people who sell live cattle, sheep, lambs and goats. Levy rates are specified in the Act. Meat and Livestock Australia and Animal Health Australia are industry bodies whose activities are funded by levies. These bodies are devoted to managing the interaction between government and producers, marketing the Australian meat industry, conducting industry research and supporting producers.

The *Wool Privatisation Act 2000* (Cth) privatised the Australian wool industry and led to the establishment of a new corporate body to represent Australian wool growers. Australian Wool Innovation is owned by and works solely for the benefit of Australian woolgrowers. The Act replaced the wool tax with a wool levy that is now collected to fund industry activities. The levy has been collected since 2002 and is used to drive research and innovation for the benefit of wool growers. Under the Act, Australian Wool Innovation is required to conduct a wool levy poll every three years to determine the rate of the levy. The majority vote determines the wool levy payable within the industry.

## 5.10 Plant breeders' rights

Plant Breeders' Rights ('PBR') are a form of intellectual property established and regulated by the *Plant Breeders' Rights Act 1994* (Cth). The Act provides benefits and protection to breeders who produce new plant varieties.

To fall within the Act and apply for PBR protection, a person must be a plant breeder who has produced a new variety of plant. Protection is not afforded to people who find a naturally occurring new variety of plant. The variety must be new and must also fulfil the requirements of distinctiveness, stability and uniformity. A plant must show distinctive and unique characteristics when compared to similar plant varieties and the seed must consistently produce the same result.

When a breeder applies to Intellectual Property Australia for PBR protection, comparative growing trials are used to establish whether or not the new variety fulfils the requirements of the Act. Although a costly process, the benefits of PBR protection can be extensive. Protection provides the exclusive right to produce and reproduce the material and exclusive rights to sell and export the material.

The Act protects the rights of breeders and allows them to license the use of protected plants. The growing of a protected plant without a licence is an offence and wrongdoers may be required to pay royalties to the breeder. PBR protection lasts 25 years for trees and vines and 20 years for other plant types.

Growers are now permitted to grow a second generation crop by propagating 'farm saved seed' from a protected plant. However, this is only permissible if the grower retains the original licence from the plant breeder.

Growers must be careful to abide by the conditions of a licence as penalties can be onerous. It is also important that growers keep seed separate from the seed of other crops to ensure that protected seeds are not inadvertently propagated outside the scope of a licence.

### **5.11 Horticulture code of conduct**

After widespread concern for unfair trading practices within the horticulture industry, the federal Department of Agriculture, Fisheries and Forestry introduced a mandatory industry code known as the Horticulture Code of Conduct in May 2007.

The Code requires growers and wholesalers to enter written trade agreements to ensure that mutual duties and obligations are understood. Wholesalers are also asked to publish and make available their terms of trade.

The aim of the Code is to regulate trade between the growers and wholesalers of fruit and vegetables. The Australian Competition and Consumer Commission enforces the code and is also available to mediate disputes.

## 6 Stock and animals

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### 6.1 Travelling stock

#### (1) Waybills

The *Stock Act 1915* requires a waybill for travelling stock to be supplied to the drover or transport operator. In certain circumstances, cattle, sheep or goats can be moved to or from a neighbouring holding for ordinary stock management purposes (not collecting or returning stock that has strayed) and horses (not leaving a cattle tick area to being moved for slaughter) can be moved without a waybill.

If a waybill is required for stock leaving a private property, the occupier of the property is responsible for completing the waybill. For stock leaving a saleyard at which they were offered for sale, it is the person responsible for selling the stock. In all other cases, it is the owner of the stock or the owner's agent. The waybill must be on the prescribed form, which can be a combined waybill/national vendor declaration form.

A drover or transport operator must keep the original waybills available for inspection while travelling the stock. A duplicate of the waybill must be kept by the person responsible for completing it for two years.

#### (2) Travel permits

In addition to a waybill, some stock movements also require a travel permit to be obtained from an inspector. Travel permits are required when moving stock to and from areas affected by disease or ticks, when moving stock that are diseased or suspected of being diseased, and when moving stock to or from the Brisbane RNA Showgrounds, interstate and into quarantine facilities. Where a travel permit is required, it is an offence to travel stock by a route other than the route specified in the travel permit.

It is an offence for a person to accept delivery of stock from a drover or transport operator unless the person at the same time receives a waybill for the stock.

Waybills and travel permits must be produced to an inspector or police officer on demand.

#### (3) NLIS

The National Livestock Identification System ('**NLIS**') requires certain movements of cattle, sheep and goats (and soon pigs) moved from one property to another to be recorded.

For cattle, a national database records the Property Identification Code ('**PIC**') assigned to every NLIS identification number, which is unique to each NLIS device. All cattle that are moved must be identified by an NLIS device. The person receiving travelling cattle is responsible for ensuring the animals are transferred to their new PIC on the database within 48 hours of completion of the travel.

An NLIS device for cattle can be either an ear tag or a rumen bolus/ear tag combination. A DPI&F inspector must endorse an order for NLIS devices.

White NLIS devices are for use in cattle that are either still on their property of birth or have never left their property of birth. Orange NLIS devices are for use in cattle that have left their property of birth or have an unknown property of birth.

The NLIS for sheep relies on the NVD/Waybill system rather than a national database to record movements between PICs. All sheep moving between different PICs must have an NLIS tag applied unless they are travelling directly from the property to abattoirs in consignments of four decks or more. NLIS tags for sheep are not electronic but visually read ear tags supported a NVD/Waybill that must accompany sheep when they are moved.

The NLIS for goats is still being phased in, in Queensland. Goats born after 31 December 2006 require identification with an NLIS sheep tag before movement unless they are moving directly from the property of birth to slaughter over the hooks in full deck lots of the same class. Registered stud dairy goats identified with a tattoo may be considered to have an equivalent NLIS identification. Until 1 January 2008, goats born before 1 January 2007 are not required to be tagged.

#### **(4) National vendor declarations**

National Vendor Declarations ('NVDs') are an industry initiative and are not legally required when selling cattle (except where combined with a waybill). However, as a matter of commercial practice, purchasers of cattle usually require a NVD.

NVDs are required under the National Livestock Identification System for sheep and goats (discussed above).

It is an offence to make a false or misleading declaration on a NVD.

#### **(5) Travelling sheep brand**

It is an offence to travel sheep not legibly branded with the letter 'T' unless the sheep are legibly branded with the owner's registered paint brand and it is not intended to drive them more than 65 kilometres or they are transported by rail or vehicle. It is not necessary though to brand stud sheep travelling to a sale or show or fat lambs travelling to a saleyard or slaughter house.

#### **(6) Tail tags**

Cattle from 'T' status properties or cattle under the European Union Cattle Accreditation Scheme when consigned to saleyards must be identified with both NLIS permanent tags and tail tags. From 3 April 2007, these are the only cattle that require tail tags when sold.

Tail tags may also be used voluntarily by owners to provide additional identification in relation to HGP Free status (pink tags), or for Ausmeat accredited feedlots (purple tags).

## 6.2 Prevention of cruelty to animals

The *Animal Care and Protection Act 2001* (Qld) governs the responsibility of primary producers in this area.

All people in charge of an animal owe a duty of care to that animal. Animals must be provided with appropriate food, water and shelter and sufficient injury and disease prevention measures must be taken.

Among other things, it is an offence to do the following things to an animal:

- (1) cause pain that is unjustifiable, unnecessary and unreasonable;
- (2) abuse, terrify, torment or worry it;
- (3) overwork it;
- (4) confine or transport it without suitable shelter, food and water or in an unsuitable container; and
- (5) kill it in a way that is inhumane or causes it unreasonable pain.

However, the dehorning of cattle, the castration, spaying, ear-marking or branding of any animal, lamb-marking, mulesing, shearing or crutching of any sheep or the shoeing of any horse is not prohibited provided the operation is performed with a minimum of suffering to the animal.

Under the *Animal Care and Protection Act*, inspectors of the Royal Queensland Society for the Prevention of Cruelty to Animals have the right to enter any place whatsoever to inspect any animal and the accommodation for such animals if it is reasonably suspected that an animal is injured or in danger. Its officers also have the power to take into possession or detain any animal in respect of which an offence under the Act has been committed or if it is reasonably believed that an animal is at risk of harm.

## 6.3 Brands and earmarks

The *Brands Act 1915* governs the use and registration of brands.

It is an offence to sell any cattle of a live weight in excess of 100 kilograms unbranded. It is also an offence to sell any pig of a live weight in excess of 30 kilograms unbranded if the owner owns more than two pigs.

It is not compulsory to earmark cattle nor is it compulsory to brand horses or brand or earmark sheep and goats.

Applications to the Registrar to become an owner of a registered brand or earmark must be made in the prescribed form accompanied by the prescribed fee.

Cattle earmarks are for use only in a prescribed district. It is an offence to earmark without branding the cattle. An earmark is registered only in conjunction with a brand.

Sheep brands and earmarks are registered on a district basis and except in the case of travelling sheep may be used only within the boundaries of the district for which they are registered.

Brands and earmarks may be transferred.

Inspectors have the power to seize any horse or cattle bearing a brand which has been altered or blotched and any cattle, sheep or goats from which the ear has been cut or cropped contrary to the Act. Inspectors have wide powers to enter properties to search and inspect any stock brand mark, branding instrument or pliers and to seize and detain any stock in respect of which they suspect an offence has been committed.

It is an offence to use or possess without lawful excuse any branding instrument or pliers and to brand any stock with a brand or earmark other than your own.

The legal significance of branding is that the existence on any stock of a registered brand or registered earmark is, in the absence of evidence to the contrary, evidence that the animal is the property of the registered owner of such brand or earmark.

The owner of a registered brand and/or earmark as at 1 January each year is required to advise the Registrar of all brands and/or earmarks in use by him or her before 31 January of that year. Brands may be cancelled if an owner fails to submit a Brands Return Form for three consecutive years. Brands Return Forms are available from the DPI website at **[www.dpi.qld.gov.au](http://www.dpi.qld.gov.au)**.

## 6.4 Straying animals

A primary producer has a duty to keep his or her livestock from trespassing on another's property. The term 'livestock' includes not only cattle, horses, donkeys, sheep, goats and pigs but also includes fowls, ducks, geese and possibly tame deer. The expression does not however extend to dogs and cats.

Stock owners may be liable for any damage caused by straying stock, including not only physical damage (e.g. to crops) but also injury to other stock from infection, physical attack or misbreeding.

Several defences may be available to a primary producer whose stock stray. A primary producer will not be liable if the escape was due to the act of a third party for whom he or she is not responsible e.g. when a stranger leaves a gate open or drives the owner's cattle onto another's land, or where an 'Act of God' caused the stock to stray, e.g. a storm blowing down a gate or a flash of lightning causing cattle to stampede. Another defence is available where the damage was due to the plaintiff's own fault. However, the law does not impose an obligation on a landholder to fence his or her land to keep another person's cattle from straying onto it.

A landowner will not be liable for any damage caused to the user of an adjoining public road by the landowner's stock straying onto the road unless the owner has knowledge of a vicious or mischievous propensity in the animal to stray.

## **6.5 Impounding straying stock**

The impounding of straying stock is controlled by the various local governments throughout Queensland. As local laws vary between areas, information regarding impounding should be sought from the relevant local government.

## **6.6 Dividing fences**

### **(1) New fences**

The law in relation to the maintenance, construction and repair of dividing fences is contained in the *Dividing Fences Act* 1953 (Qld).

The general rule laid down by the *Dividing Fences Act* 1953 is that the owners of adjoining lands not divided by a sufficient fence are jointly liable in equal shares for the construction of a new dividing fence. A claim under the Act must be made by giving one month's notice in writing to the adjoining landowner. This notice must clearly state where the fence will be erected, the type of fence proposed and how the work will be organised and the cost of the fence shared. An owner cannot recover from an adjoining owner any part of the cost associated with the construction of the new fence unless the procedure stipulated by the Act is followed or the adjoining owner agrees.

If an agreement is not reached within one month after the notice is given, the matter may be mediated or decided by a magistrate or a referee in the Small Claims Tribunal. The Small Claims Tribunal can decide disputes over amounts up to \$7,500, while the Magistrates Court can hear claims for amounts up to \$50,000. The magistrate or referee can make orders about the type of fence to be constructed, who should construct it, the amount to be paid by each neighbour towards the cost of the fence, the time period within which the fence is to be built and where the fence is to be constructed.

There is no definition of a 'standard fence' in the Act. In making any order, the magistrate or referee will take into account the type of fence common to the area and the purpose for which the adjoining lands are used. If adjoining lands are used for different farming purposes, the dividing fence might need to satisfy the different fencing requirements for those purposes. Over the years, the courts have consistently held that landowners will only be entitled to recover a proportion of the cost of a new fence which is typical of the type of fence found in the locality.

If the adjoining landowner still fails to comply with a Court or Tribunal order to fence, the work can be done and the adjoining owner's share recovered from him or her.

The same procedure is followed when a neighbour wishes to demolish an old fence and replace it with a new one.

## **(2) Repairs**

In the case of an existing dividing fence which simply requires repairs, the Act provides in most cases for the repair costs to be divided equally between the adjoining owners. Again, the procedure involves the giving of a notice in writing to the adjoining owner setting out details of the repair work involved. The adjoining owner has 14 days within which to reply to the neighbour disputing the notice to repair. If the adjoining owner does nothing within one month of the notice, then the person giving the notice is entitled to repair the fence and to recover half of the repair costs. Alternatively, within that period the adjoining owner may refer the matter to the Court or Tribunal to determine.

If a dividing fence is damaged or destroyed by flood, fire, lightning, storm or any other accident, then the owner of the land on either side may immediately repair the fence without notice to the adjoining owner and is entitled to recover half of the costs.

If a neighbour damages a dividing fence because of negligence (by, e.g. allowing a tree on his or her land to fall or withdrawing support from the fence), that neighbour must repair the damage. If he or she does not, the adjoining owner may repair the fence and sue to recover the repair costs.

## **(3) General position**

The Act applies to all leases and licences issued under the *Land Act* 1994 (Qld) as if the lessees or licensees were owners of the land. There are provisions in the *Land Act* dealing with types of fences to be constructed or maintained on State leasehold tenure.

The *Dividing Fences Act* 1953 cannot be applied against the State or a person or authority having the administration, management or control of State land to compel a contribution towards the costs of construction or repair of a dividing fence between a property and unalienated State land. However, if the State land is leased, the lessee is liable to contribute to the cost of a dividing fence.

## **(4) Review of dividing fences law**

The Queensland Government is currently reviewing the law of neighbourly relations, particularly in relation to common causes of disputes between neighbours. These include the cost, location, style and height of fences, which are among the most common causes of neighbourhood complaints to local councils and government departments.

In May 2007, the Department of Justice and Attorney-General published a discussion paper and called for public submissions on the law relating to dividing fences. The closing date for submissions was 22 June 2007, which was then extended to 26 July 2007. The review is likely to foreshadow updates to current policies and practices in relation to dividing fences, as well as possible amendments to the *Dividing Fences Act* 1953.

## 6.7 Weapons licensing

The *Weapons Act* 1990 and its associated regulations control the use of firearms in Queensland. The Act categorises firearms into numerous categories. Depending on the category designated for a particular firearm, ownership and use of the firearm may be banned or alternatively a licence may be required to use it in Queensland.

Primary producers are entitled to own and use category A, B, C or D firearms provided they hold a licence for that category of firearm and provided the firearm(s) are registered with that licence.

The categories consist of:

- (1) Category A – weapons such as air rifles and single/double barrel shotguns;
- (2) Category B – break action shot guns and centrefire rifles;
- (3) Category C – semi-auto rim fire rifles with less than ten rounds and pump-action shotguns with less than five rounds; and
- (4) Category D – self-load centrefire rifles, self-loading shotguns and pump action shotguns with more than five rounds.

The employees, agents and immediate family members of a primary producer are not required to hold a licence to use such firearm provided:

- (1) the primary producer holds an appropriate licence for the firearm;
- (2) the firearm is used only on the primary producer's land; and
- (3) the firearm is used only for purposes connected with primary production and with the express consent of the primary producer.

Applications to be licensed to own and use a firearm must be made to your local police station.

## 7 Employment

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### 7.1 Business structures

The initial decision as to the appropriate legal vehicle through which a business should be conducted will be influenced by a number of factors including consideration of limited liability, minimisation of income tax and the degree of control required.

#### (1) Sole trader

To be a sole trader does not involve any significant establishment costs. If a business name is used, the name must be registered with the Office of Fair Trading.

The sole trader pays tax on the personal scale and the scope for tax planning is limited. Tax is payable on the income derived (assessable income) less deductible expenses (taxable income). So that the annual tax assessment does not have to be paid all in one go, tax is paid under the aptly named Pay-As-You-Go ('PAYG') system which involves the payment of tax each quarter.

The limitations of the sole trader in raising working capital are obvious as they have only their own assets and resources to offer as security.

If the sole trader incurs debts they will be liable to pay them and their liability is not limited to the business assets but extends to all other assets, including the family home.

Insurance may be put to good use in the sole trader situation. A sole trader may, for example, not only insure the working assets against damage, theft etc., but they may also take out insurance against public risk. In addition, life insurance can be used to widen the trader's asset base so that if, for example, they leave the family business to one child by Will they can leave the insurance policy to another child thus avoiding a sale of the business on their death.

This structure is most satisfactory for a small, low risk business where losses are expected in the early years and where because other family members have their own sources of income it is not advantageous from a taxation point of view for the other family members to share in income from the business.

#### (2) Partnership

A partnership is a straight forward trading structure for taxation purposes and is not particularly costly to establish or to maintain. Again if a business name is used, the name must be registered, unless it only contains the name of each individual partner.

A partnership is a relationship between persons carrying on a business with a common view to profit.

The *Partnership Act* 1891 sets out the requirements for a partnership. It is not a requirement that a partnership be evidenced by a formal partnership agreement, however it is commercially sensible that a comprehensive agreement be signed by all partners.

There are upper limits on the number of partners in any one partnership, depending on the nature of its business. Every partner is liable jointly with the other partners for the debts and obligations of the firm incurred while they are a partner. A partner's estate after the partner's death may be liable for partnership debts.

Queensland though has long permitted limited partnerships to exist which consist of general partners with unlimited liability and special partners whose liability is limited (e.g. investors in a partnership business). The *Partnership Act* 1891 also regulates this entity which has proved popular as an investment vehicle in the United States.

Partnerships involve a pooling of resources e.g. capital and labour. Income splitting for taxation purposes is a clear benefit and partnership losses can be offset against other income of the individual partners.

It is not necessary for all assets used in a business to be contributed to the partnership. For example, it is quite common for any grazing partnership to acquire only the plant and livestock required to carry on the income generating activity. The land upon which the business is conducted can remain in the ownership of one or more partners (usually the parents).

Unless there is evidence to the contrary, property bought with money belonging to the partnership is considered to have been bought on account of the partnership.

Where the partnership is for a fixed term a partner can only retire earlier with the consent of the other parties.

Subject to any agreement, where the partnership is not for a fixed term, any partner may end the partnership on giving notice in writing to the other partners.

Some of the benefits of a written partnership agreement include the recording of a minimum period of notice of intended retirement and provision allowing those partners who wish to continue in the partnership to do so and to pay out the retiring or deceased partner on terms over a period of time. In this way assets which may have taken years to establish can be protected.

The partnership structure is best suited for the smaller husband and wife low risk businesses where simplicity and equality of income achieve maximum effectiveness. It may also be the most desirable structure where it is anticipated that losses will be incurred by the business in early years. In these circumstances the partners will be able to offset those losses against income derived from other (non-partnership) sources. This 'distribution of losses' is not available with companies or trusts. Quarterly instalments of tax are also payable by the partners.

### (3) Company

A company is a separate legal entity and is taxed as such. The tax rate from is presently 30 percent. The establishment and administration of a company is more involved than a partnership or sole trader structure.

Companies are broadly classified in three ways according to:

- (a) the liability of its members;
- (b) whether the company is public or proprietary; and
- (c) whether the company is registered in or outside Australia.

The most common company structure is one where the liability of its members is limited to the amount (if any) remaining unpaid on the members' shares.

Companies may be public or proprietary companies. Proprietary companies cannot seek public subscription for funds as can public companies which may list their shares on the stock exchange.

The benefit of a limited liability company is often illusory in practical terms as many people dealing with companies (e.g. banks) insist upon personal guarantees from directors or major shareholders.

The *Corporations Act 2001* imposes duties on the officers of a company to act honestly, to keep proper accounts and not to use their position or information obtained for their own benefit or to the detriment of the company. There are also numerous formalities and expenses involved in relation to a company including the initial costs of registration, maintaining the various registers required, filing annual returns and the holding of annual general meetings.

Certain types of land tenure in Queensland cannot be held on behalf of or by a company, e.g. grazing homestead perpetual leases and grazing homestead freeholding leases other than under certain limited family arrangements.

When a company declares a dividend the company can attach to those dividends a 'franking credit' by paying company tax on the dividend. The shareholder receives a 'franked dividend'. This system of dividend imputation is to eliminate double taxation of company profits i.e. once in the hands of the company and again when distributed to shareholders. In the case of a franked dividend, tax is assessed on the aggregate of the dividend received and the franking credit attached to that dividend. However, a rebate is allowed to the shareholder of an amount of tax equal to the franking credit received.

It is possible to vary the share (and consequently the voting) structure of a company to suit various circumstances. Should one party wish to reserve voting control during their lifetime and then pass voting control to their spouse whilst allowing profits and distributions on liquidation to be made to other shareholders (say the children), the share structure can be altered so as to provide for separate classes of shares which carry with them different rights as to voting, dividends and distributions on liquidation.

The company structure will be the most appropriate where the business is high risk, all family members are high marginal rate tax payers, or where the company's 'profit' can be distributed to the proprietors by way of salaries, superannuation contributions or interest on loans so that there is no significant level of taxable income in the company.

The company structure is to be avoided in relation to the acquisition of appreciating capital assets and where it is envisaged that significant losses will be incurred in the early years.

#### **(4) Trusts**

Trusts are relatively easy to form and their terms (i.e. the rights and obligations of the trustee and beneficiaries) should be fully documented. Trusts are not subject to governmental controls on their formation or operation except where a company acts as trustee in which event the requirements of the *Corporations Act 2001* must be fulfilled.

The term 'discretionary trust' is used to describe a trust in which the trustee is given a discretion as to which of the possible beneficiaries (generally drawn to include a wide variety of people including family members as well as trusts, companies and charities) is to receive a distribution of income and/or capital in any year and in what proportions. This form of trust therefore offers immense flexibility.

A unit trust is one in which the trustee holds the assets in trust for the unit holders (beneficiaries) in specific proportions.

The initial costs involved in establishing a trust are similar to establishment costs of a partnership. The cost though will increase where a corporate trustee is used.

The trust deed should provide that the settlor is not and can never be a beneficiary of the trust. It is preferable that the trustee also be an entity which could not be a beneficiary under the trust. This may be achieved in the case of discretionary family trust by appointing a company as trustee where the parents are both the directors and shareholders.

The trustee is personally liable for its actions as trustee. However, provided the trustee acts within the scope of its authority the trustee will have a right of indemnity against the trust funds. If the trustee is a company the trust can be provided with most of the advantages of company status including limited liability.

The main disadvantage of a trust is that it cannot distribute losses to beneficiaries to be offset against taxable income from other sources. However, like companies, a trust may carry forward losses, although a trust does not have to meet the same qualifications as do companies to effect this.

The averaging provisions of the *Income Tax Assessment Act* allowing primary producers with fluctuating incomes to 'average out' their incomes over a number of years can be extended to apply to a beneficiary's interest.

Family members are not prohibited from obtaining loans or other payments from the trust unlike directors and shareholders of a company. Furthermore, the entitlement to trading income may be readily shared with family members while the parents are able to retain some measure of control.

## 7.2 Employer/employee relationships (including WorkChoices)

Given the changes currently occurring in this area of the law, readers are urged strongly to seek expert legal advice.

### (1) What legislation applies

As a result of substantial amendments to the *Workplace Relations Act* (Cth) in March 2006, generally referred to as 'WorkChoices', the Australian industrial relations landscape has been substantially altered. WorkChoices overrides Queensland's *Industrial Relations Act* to a substantial extent and now exclusively applies to all Queensland employers who operate as a 'constitutional corporation' (in general terms a company trading goods or services). As a result, the *Industrial Relations Act* will now only apply to rural employers who are sole operators, partnerships or are Queensland Government entities.

This fundamental change does not however affect other Queensland legislation on certain aspects of the workplace, such as the *Workplace Health and Safety Act*, *Anti-Discrimination Act* and *Workers Compensation and Rehabilitation Act*, which continue to apply to all Queensland operating employers.

### (2) Sources of the employment relationship

At the heart of every employment relationship is a contract between the employer and employee, which can be oral, written or a combination of the two. Overlaying this contractual agreement is a layer of statutory safeguards and modifications either through the *Workplace Relations Act* (Cth) or the *Industrial Relations Act* (Qld) (depending which applies), including awards.

### (3) Awards and agreements

Many employees in primary industries are governed by awards.

An award is a binding order made by an industrial tribunal, which effectively becomes a statutory instrument. An award sets out many of the rights and duties of employers and employees to whom the award relates, including hours of work, rates of pay, penalty rates, holiday pay loading, sick leave and accommodation entitlements.

There are both Federal and State awards. Prior to WorkChoices, most employees were covered by Queensland State awards. State awards are common rule awards – i.e. they apply to all employers and employees engaged in the industry to which the award relates.

For example, the *Clerical Employees Award – State* binds all persons employed as and who employ clerks in Queensland. A Federal award only applies to employers who are specifically made a respondent to or are named in the award.

Awards contain minimum employment conditions; and an employer's failure to observe these minimum wages and conditions may result in court action and penalties.

The minimum wage was the basic protection for all workers in Australia. Determination of the national minimum wage has been taken out of the hands of the Australian Industrial Relations Commission ('**AIRC**') by WorkChoices and put into the hands of the newly-created Australian Fair Pay Commission ('**AFPC**').

Collective and individual agreements (enterprise bargaining agreements) are agreements between:

- (a) a group of employees and employer (collective); or
- (b) a particular employee and a particular employer (individual),

which deal with matters relating to the employee relationship. These are special agreements that have been approved and 'certified' by a State Industrial Commission or AIRC.

Agreements could be made at a State or Federal level, depending on the nature of the award they sought to replace. There is a special legislative process to be followed to get these agreements certified. The agreements are subject to a 'Fairness Test'. The primary consideration of the Fairness Test is whether the monetary and non-monetary compensation provided in lieu of any applicable protected conditions excluded or modified by the agreement under review is fair. In most instances, fair compensation will be provided by way of an hourly rate of pay higher than in the award being replaced by the agreement.

In addition to the monetary and non-monetary compensation provided under an agreement, in applying the Fairness Test the Workplace Authority may also have regard to:

- (a) the personal circumstances of employees, including their family responsibilities; and
- (b) in exceptional circumstances, the industry, location or economic circumstances of the employer and the employment circumstances of the employees where the Workplace Authority is satisfied that it is not against public interest to do so.

The agreement is negotiated between the employer and each individual employee or group of employees or their representative (Union) before lodging same with the Workplace Authority. As long as the new Workplace Agreement offers conditions the same as or better than the Australian Fair Pay and Condition Standard ('**AFPCS**') and any other applicable laws, the Workplace Agreement is valid. New Workplace Agreements will be compared to the AFPCS and assessed by the Workplace Authority to ensure this.

Workplace Agreements previously lasted for a limited time (usually three years) and if they were not recertified, the terms of the award applied once again. It appears that Workplace Agreements negotiated under WorkChoices will now continue indefinitely.

Non-award employees will be covered by the AFPCS, may eventually be covered by a new Federal award under WorkChoices, or may enter into a new Workplace Agreement.

**(a) For a 'non-WorkChoices' employer in Queensland**

Employers and employees will continue to be subject to the existing State awards and State Industrial Relations system.

The terms of the employment contract may be governed by a common rule award. A common rule award is a statutory instrument that binds employers of all employees who do a particular work or calling. In addition to an award – or in the absence of an award – there may be an employment contract which provides for other terms of employment – or even for more generous provisions for matters covered by an award.

A special contract that may be entered into and which will override the provisions of any applicable award are Collective or individual Certified Agreements. These agreements will only have the effect of overriding an award if they are sanctioned (or certified) by either the AIRC or the Queensland Industrial Relations Commission.

Overriding all of these sources of rights in the employment relationship are the current legislative provisions in the *Industrial Relations Act 1999* (Qld) (the '**IRA**'). The IRA sets out minimum standards and an employer cannot offer less than the statutory minimum provisions for all employees in relation to annual leave; long service leave; sick leave; family leave (maternity, paternity and carers leave); termination of employment (reinstatement and redundancies); unfair contracts; apprenticeship and industrial trainings.

The IRA imposes a three-month probationary period for all new employees, although this can be waived by the parties. The probationary period may only be extended in special circumstances.

The situation is different if the employer is not subject to WorkChoices but has employees who are currently covered by a Federal award. Federal awards have been affected by WorkChoices to become transitional awards until they have been reviewed and 'simplified' by the AFPC. In those circumstances, the employer can keep those employees under the transitional award for the moment, negotiate a fresh agreement under the IRA or simply negotiate for employees to come within an existing Queensland State award.

If employees are covered by a Federal Certified Agreement; those agreements are deemed by WorkChoices to be transitional agreements with a five-year nominal expiry date which cannot be varied or extended. An employer in those circumstances will be forced to return to being subject to the Queensland industrial relations system.

**(b) For a 'WorkChoices' employer in Queensland**

Some WorkChoices changes, such as the accrual of annual leave, require employers to immediately implement new accounting methodology and perhaps backdate same.

**(i) Where employees previously covered by State Awards**

While the Australian Fair Pay Commission and Australian Industrial Relations Commission are revising and consolidating all awards under WorkChoices (the current deadline is 2009), the terms and conditions laid down by Queensland awards and agreements will continue to operate (subject to the noted modifications below) for three years (or until their current expiry date) as Notional Agreements Preserving State Awards ('**NAPSA**') and Preserved State Agreements ('**PSA**'). This means these Queensland awards are now deemed to constitute individual agreements between the employer and the employee. NAPSAs and PSAs can be replaced with Workplace Agreements under WorkChoices simply by negotiating and lodging a new agreement with the newly created Workplace Authority.

If employers and employees do not negotiate a new collective or individual Workplace Agreement under WorkChoices within the three-year interim period during which NAPSAs and PSAs continue to apply, then the most appropriate revised Federal award will apply to the employees as determined by the AFPC which is to fully review and revise all awards into one set of Federal Awards prior to 2009.

Whilst NAPSAs and PSAs are essentially the same as their pre-WorkChoices form, they are only converted to the extent that they do not include '*non-allowable matters*' or have not been overridden by the new AFPCS. Accordingly, employees under transitional NAPSAs and PSAs must continue to work the same number of ordinary hours, be paid the same amount of overtime at the same rates, and receive the same annual leave loading, etc as if they were employed under the previous applicable State award, unless an AFPCS has altered those conditions.

Matters that are '*non-allowable matters*' simply cease to be covered in transitional NAPSAs and PSAs. These matters include provisions specifying hiring policy, training policy and anything that supports or requires Union activity in the workplace. WorkChoices declares the following matters to be '*allowable matters*' in NAPSAs and PSAs – annual leave; personal/carer's leave; parental leave (including maternity and adoption leave); long service leave; notice of termination; jury service; and superannuation (until 2008).

As annual leave and personal/carer's leave are now part of the AFPCS, those matters will not form a part of future awards issuing from the AFPC. If those matters in a NAPSA or PSA are more generous than those set by the AFPCS, they will be '*preserved*' until a new award issues.

Other 'protected allowable award matters' continue to exist as long as the relevant PSA or NAPSA is not replaced by a new Workplace Agreement.

WorkChoices encourages employers to replace NAPSAs and PSAs with new Workplace Agreements within the three-year transitional period. New Workplace Agreements must meet the minimum standards set in the AFPCS but do not have to offer the same conditions as the NAPSA or PSA they replace.

**(ii) For employees under Federal Awards**

If employees are employed under a pre-Work Choices Federal award, then that award continues to apply as they are created under the *Workplace Relations Act 1996* to which WorkChoices is an amendment.

**(c) Employment contracts**

Whilst a fundamental contract underlies every employment relationship, employment contracts are especially important in relation to non-award employees or where the parties wish to agree to terms which are an improvement on those contained in the relevant award or to address and regulate matters not otherwise covered by an award.

An employment contract is made at the moment a job is offered, even if the offer is oral. A contract of employment may be written, oral or implied. Contracts generally cover issues that fall outside awards that otherwise need to be addressed such as protection of intellectual property, confidentiality, and post employment restraints of trade, provision of a vehicle and other fringe benefits; and performance-based incentives/bonuses.

A contract cannot 'disadvantage' an employee when compared with the terms and conditions set by an award or an Act (WorkChoices or the Industrial Relations Act, whichever applies). Accordingly a contract cannot create conditions that are not allowed under the law generally, e.g. a contract that offers less than the AFPCS or minimum award wage.

Litigation between employers and employees where the employment agreement is oral is a quite common event. It is advisable for all concerned that a written record is kept of the terms, conditions, wages, date of commencement and all other discussed and agreed terms.

**(4) Termination of employment**

Most contracts of employment, awards or certified workplace agreements will contain express terms covering the termination of the employment relationship – for misconduct, poor work performance or redundancy – particularly in relation to how much notice should be given (or paid in lieu of notice) or amounts for severance pay in cases of redundancy. The new AFPCS will also set out annual leave entitlements that must be paid when dismissing someone.

For non-WorkChoices employees, in addition to the terms of employment, the IRA imposes an obligation that an employee will not be terminated unfairly or harshly or for an invalid (discriminatory) reason. If a dismissed employee successfully proves that they were terminated unfairly, the Queensland Industrial Relations Commission can order an employer to pay the employee compensation of up to six months wages. If the employee proves they were terminated for an invalid reason, then in addition to paying compensation, the employer may be fined. Employees excluded from bringing an unfair dismissal claim are short-term casual employees, employees in their probationary period and employees who earn more than an amount specified in the *Industrial Relations Act*.

For employees subject to WorkChoices, an employer with fewer than 100 employees cannot be subject to any claim for unfair dismissal. Only the jurisdiction for unlawful dismissal remains available to all employees. An unlawful dismissal occurs if the dismissal breaches the termination processes or requirements set out in the relevant award or resulted from a breach of applicable legislation (such as anti-discrimination and equal opportunity laws).

Over the last decade, it has become almost standard for employers to adopt the '*three warning*' rule before dismissing a problematic employee. Most employers have worked on the basis that:

- (a) first warning – the employee is warned in writing that their behaviour or performance is unacceptable and needs to improve;
- (b) second warning – the employee is informed that their behaviour/performance has not improved since the first warning and that they have a final opportunity to make the identified changes/improvements or be dismissed;
- (c) third warning – dismissal because of failure to improve.

The '*three warning*' rule is not a formal rule but is a form of conduct which has (if performed correctly and with natural justice) been recognised as being reasonable process which can successfully rebut a claim for unfair dismissal. Although unfair dismissal provisions currently do not apply to many WorkChoices employers, it is anticipated that disgruntled employees will categorise claims against their former employers under different 'titles' such as an unreasonable breach of contract or unlawful for discrimination to achieve the same result. For that reason, it is recommended that employers continue to pay careful attention to the process of dismissing staff and that the '*three warning*' rule is a reasonable place to start.

## 7.3 Workers' compensation

### (1) General

Workers' compensation insurance is compulsory insurance to be obtained by all employers to cover their Queensland employees/workers for injuries sustained, arising out of, or in the course of their employment.

It is an offence for an employer not to take out this insurance or not to continue it while there are workers employed. If an employer does not have this insurance, then apart from any fine which may be imposed, WorkCover Queensland ("**WorkCover**") can recover from the employer any compensation WorkCover has paid out to the injured worker in the form of statutory benefits (wages, medical treatment, etc) and common law damages payments.

An employer must send a report about an injury to the WorkCover within ten days of the employer becoming aware of the injury or the worker reporting same.

Where there is a possibility of legal proceedings being instituted against an employer by his or her employee for common law damages arising out of the accident, it is prudent for the employer to advise his or her own solicitor at this time.

## (2) **Worker**

The insurance cover is for the benefit of workers. The term 'worker' is widely defined by the *Workers Compensation and Rehabilitation Act 2003* ('**Act**') as a person working under a contract of service; although the Act does regularly undergo amendment to define persons who are covered. The Act currently does allow for a policy to be obtained to cover rural fire brigade members and counter-disaster volunteers. Contractors working in their normal trade of business are not included, nor are self-employed persons (although the latter can obtain a specific WorkCover policy to cover themselves). Readers should note however that circumstances can arise where a contractor can become a worker for the purposes of the Act (i.e. a fencing contractor is asked to assist with an additional task such as shifting feed bags – if injured whilst performing the latter task rather than fencing, the contractor may be a worker for the purposes of the Act).

## (3) **Injury**

The insurance cover is in respect of injuries to workers which arise out of or in the course of their employment if the employment is a significant contributing factor. Specifically 'injury' includes:

- (a) a disease contracted in the course of employment to which the employment was a significant contributing factor (whether or not the disease is contracted at the place of employment); and
- (b) the aggravation or acceleration of any disease, personal injury or medical condition where the employment was a significant contributing factor to that aggravation or acceleration.

An 'injury' also arises out of or in the course of the worker's employment if it happens while the worker is travelling between their home and their workplace or work-related trade school or medical appointment (for an existing injury) or a second workplace; provided there is no substantial interruption or delay in the journey (commonly referred to as a journey claim).

It should be noted that 'injury' does not include a psychiatric or psychological injury resulting from reasonable management action taken in a reasonable way or action taken by WorkCover in relation to an application for workers' compensation.

## (4) **Claim**

In order to receive statutory compensation, the worker's claim for compensation must be filed with WorkCover within six months after the date on which the injury occurred. Upon acceptance, WorkCover is liable to pay compensation from the date of injury or from the date four weeks before the application was filed, whichever is the later date (except where the claim involves a workplace death).

## **(5) Compensation**

The types of compensation payable under the Act are – periodic (usually weekly) payments to compensate for loss of wages; special payments (medical and similar expenses); and lump sum payments (for specific injuries including death and as a replacement of periodic payments).

### **(a) Periodic payments**

Generally, if the worker is totally incapacitated as a result of their injury then:

- (i) for the first 26 weeks the worker is entitled to receive 85 percent of their normal weekly earnings;
- (ii) after the first 26 weeks and up to two years, the worker will receive the greater of 65 percent of their normal weekly earnings; or 60 percent of Queensland's full-time adult's ordinary time earnings (QOTE); and
- (iii) from two years to five years, the same amounts as (ii) if the worker has a work-related impairment of >15 percent or otherwise an amount equal to the single pension rate.

There is a prescribed method of calculating periodic benefits for workers only partially incapacitated from work. There are also provisions enabling a redemption payment to be made where the injured worker remains incapacitated but moves interstate.

### **(b) Special payments**

These include the cost of medical treatment and hospital expenses, funeral expenses, prosthetic expenses, travelling expenses and rehabilitation expenses.

### **(c) Lump sums**

Where the injury is fatal, the applicable lump sum is immediately paid by WorkCover.

Where the injury is not fatal, and the injury has become stable and stationary (will not medically improve to any great degree), the Act allows WorkCover or the injured worker to request an assessment of whether the worker has suffered any permanent residual work related impairment. The assessment is for each specific injury sustained from the same incident/event.

For psychiatric/psychological injuries, the injured worker must be assessed by a Medical Assessment Tribunal of three relevant specialists. The assessment of the Tribunal is final. For all other injuries, WorkCover can obtain an assessment from a relevant medical practitioner. The injured worker can refuse to accept such an assessment, however in which case the injured worker is referred to a Medical Assessment Tribunal of three relevant specialists whose decision is final.

Once the permanent impairments for all injuries sustained in the same event have been assessed, WorkCover issues a Notice of Assessment (which incorporates an offer of a lump sum payment) which adds up the non-psychiatric components of the assessment process and keeps any psychiatric component separate (i.e. a worker suffers a five percent impairment for a fractured arm, a ten percent impairment for a fractured leg, and a ten percent impairment for a chronic (psychological) adjustment disorder out of the same accident – WorkCover would issue a Notice of Assessment identifying a fifteen percent impairment for non-psychiatric injuries and a ten percent psychiatric impairment).

If the injured worker's assessed permanent impairment for psychiatric injury or combined permanent impairment for non-psychiatric injury exceeds 20 percent of the whole body, the injured worker can receive the associated lump sum payment without compromising any entitlement to seek further damages from the employer for common law damages for negligence. If the assessed impairment is less than 20 percent however (remembering that any assessment of psychiatric and non-psychiatric injuries can not be added), then the injured worker must choose between:

- (i) accepting the lump sum offer in respect of all injuries and thereby waive any entitlement to seek further damages from the employer for common law damages for negligence arising out of the relevant event; or
- (ii) deferring consideration of the lump sum offer; or
- (iii) rejecting the lump sum offer and preserve the injured worker's entitlement to seek further damages from the employer for common law damages for negligence arising out of the relevant event.

The choice of (i) or (iii) are irrevocable. Regardless of the above, the issue of the Notice of Assessment with incorporated lump sum offer terminates the injured worker's entitlements to any ongoing weekly and special benefits.

## **(6) Common law damages**

A claim for common law damages generally must be brought within three years of the day of injury at the workplace (an extension of the limitation period can be achieved in limited circumstances under the *Limitation of Actions Act* and by the operation of the pre-proceedings provisions of the Act, referred to below). Common law damages can only be pursued by an injured worker if:

- (a) he/she has a Notice of Assessment for at least one of the injuries allegedly sustained in the relevant event; and
- (b) the assessed level of work related impairment either exceeds 20 percent; or does not exceed 20 percent and the injured worker has not accepted the lump sum offer contained in the Notice of Assessment (as discussed above).

It should be noted that for any claim involving a medical condition resulting from exposure to dust or airborne particles, such as asbestos, Queensland has ceded its jurisdiction for damages to the NSW Dust and Diseases Tribunal, to which the following discourse has limited application.

An injured worker is entitled to obtain legal representation to assist in navigating the common law damages process set out below, noting however that there may be a limited or lack of entitlement to recover the associated costs of same. Employers with valid workers' compensation insurance will be represented in the common law damages process by WorkCover or lawyers retained by WorkCover at WorkCover's cost on the employer's behalf. An uninsured employer will still be represented by WorkCover or WorkCover's lawyers; however the ensuing penalties for failing to take out or maintain the relevant insurance make it prudent for such an employer to seek their own legal representation as part of this process.

In the event that the injured worker has established an entitlement to claim for common law damages, the injured worker must then navigate a pre-litigation process involving:

- (a) the lodgement of a complying Notice of Claim form setting out all relevant personal, health/medical and financial information. The Notice of Claim must also annex all relevant financial and medical records in the injured worker's possession, an offer to settle the common law damages claim, and a signed authority allowing doctors, current and past employers, insurance companies and various other entities to release their records pertaining to the injured worker;
- (b) WorkCover, with the employer's co-operation, investigating the injured worker's claim. Within six months of receiving the compliant Notice of Claim and investigating the claims, WorkCover must respond to the injured worker with a statement advising whether WorkCover accepts that the employer was negligent in the circumstances (and if so then to what extent), whether WorkCover accepts the injured worker's offer to settle, and making a counter-offer if appropriate;
- (c) in the event that WorkCover rejects the injured worker's offer at (b) or makes an unacceptable counteroffer, the injured worker and WorkCover must convene a 'without prejudice' settlement conference within three months of WorkCover providing its response at (b);
- (d) in the event that the 'without prejudice' settlement conference does not resolve the claim for common law damages, both the injured worker and WorkCover must exchange mandatory final written offers before calling the conference to a close. The mandatory final offers must be open for acceptance for a minimum of 14 days and cannot be revoked in the interim.

If the 14-day period passes, then the injured worker can then file legal proceedings which are essentially limited to a claim for the injuries described in the Notice of Assessment arising out of the specified event. The legal proceedings generally must be instituted after the above pre-proceedings stages have been completed but before expiration of the three-year limitation period.

Provided the injured worker has an entitlement to bring a common law claim and has done so within the limitation period, then he/she must prove that the injury sustained was caused by the negligence of their employer, with or without an associated breach of statutory duty or breach of contract. Depending on the quantum being sought, the proceedings may be instituted in the Queensland Magistrates, District or Supreme Courts to be heard by a magistrate/judge without a jury.

Generally there is no entitlement for a successfully claiming injured worker to recover legal costs of the pre-proceedings or litigated common law damages claim (the exceptions are an entitlement to some legal costs where the injured worker had a >20 percent work related impairment and/or the injured worker ultimately received a judgment for damages which exceeds his/her mandatory final offer at the pre-proceedings settlement conference. Conversely, if the injured worker ultimately received a judgment for damages less than WorkCover's mandatory final offer at the pre-proceedings settlement conference, WorkCover is entitled to a costs order in its favour.

Workers' compensation insurance covers the employer for the costs of a common law claim.

## 7.4 Workplace health and safety

### (1) Objective of the *Workplace Health and Safety Act 1995 (Qld)* ('WHSA')

The WHSA seeks to *'prevent a person's death, injury or illness being caused by a workplace, by a relevant workplace area, by work activities, or by plant or substances for use at a workplace'*.

### (2) Important definitions

**'Workplace'** includes any place where work is/is to be performed by a worker or a person conducting a business or undertaking. This is interpreted broadly, so it would, for example, include a ute supplied by an employer for an employee's use.

**'Employer'** includes a person who conducts a business or undertaking and engages someone else to do the work (other than by a contract for services). A person is engaged to work whether they are to be 'paid' in money or in kind (i.e. food and board) or perform the work voluntarily.

A **'Worker'** is a person who performs work (paid or voluntary) other than pursuant to a contract for services.

There are a number of important definitions and obligations that have recently come into force in relation to certain types of 'construction work' (which includes extensions, conversions, refurbishments and disassemblies). If a reader is to engage in 'construction work' on their property, ensure that consideration is also given to the definitions (and resulting obligations) of 'client' and 'principal contractor'.

### **(3) Workplace health and safety obligations**

The WHSA sets out a list of persons ('duty holders') who have obligations to ensure workplace health and safety. These include persons who conduct a business or undertaking; persons in control of workplaces (i.e. owners); owners of plant; manufacturers and suppliers of plant (including tools and machinery) and substances (including chemicals). It is important to note that the duties are not exclusory (so multiple duty holders can have multiple similar and overlapping duties at the same workplace) and cannot be delegated.

It is important to note that the definition of supplier of plant would include a farmer selling second hand machinery and equipment, and that certain particular obligations arise for such duty holders.

The WHSA provides that a duty holder must discharge their obligation to ensure workplace health and safety, with a string of severe penalties for failure to do so (fines of up to \$150,000 or three years imprisonment).

A workplace health and safety obligation can be discharged by complying with the following in order of priority:

- (a) by following a government regulation or Ministerial Notice (if directly applicable);
- (b) by adopting a Code of Practice (or a system providing the same or better level of protection than provided in a relevant Code) whilst also taking reasonable precautions and exercising proper diligence; and
- (c) if there is no regulation/Ministerial Notice or Code of Practice published to deal with a particular workplace hazard, then the duty holder must take reasonable precautions and exercise proper diligence to ensure that its obligations are discharged.

### **(4) The risk management process**

The WHSA provides that to properly manage exposure to risks a duty holder must:

- (a) identify hazards;
- (b) assess risks that may result from hazards;
- (c) decide on appropriate control measures to prevent or minimise the level of risk;
- (d) implement the appropriate control measures; and
- (e) monitor and review the effectiveness of the adopted control measures.

In order to properly manage exposure to risk, a duty holder should consider the appropriateness of the control measure to be adopted in the following order:

- (a) eliminate the hazard or prevent the risk;
- (b) if (a) is not possible, then minimise the risk by considering, in the following order:
  - (i) substituting the identified hazard with a lesser one (creating less risk);
  - (ii) isolating the hazard;
  - (iii) minimising the risk by engineering measures;

- (iv) applying administrative measures; and
- (v) using personal protective equipment.

## **(5) Defences**

The only defences to proceedings for a breach of a WHSA obligation are for the duty holder to prove:

- (a) that they specifically complied with a regulation or Ministerial Notice; or
- (b) adopted a risk management protocol consistent with or better than a published Code of Practice and took reasonable precautions and exercised proper diligence to prevent contravention of the implemented risk management process; or
- (c) the offence of breach was due to a cause over which the duty holder had no control.

## **(6) Workplace health and safety officers**

An employer must appoint a Workplace Health and Safety Officer ('WHSO') if 30 or more workers are normally employed at that workplace. A WHSO has certain workplace powers and obligations set out in the WHSA.

## **(7) Workplace health and safety inspectors ('inspectors')**

Inspectors, where they have lawfully entered a workplace, have certain powers to search, inspect, measure, test, photograph/film, copy documents, make inquiries, and require reasonable assistance. Additionally, inspectors have the power to issue Improvement or Prohibition Notices, which may suspend or prevent the duty holder from carrying out a particular task/process or using a particular piece of plant or machinery.

## **(8) Legal proceedings**

Prosecution for WHSA offences must be initiated within one year of the offence being committed or within six months of the offence coming to the Department's/inspector's knowledge.

Executive officers of a corporation must ensure that the corporation complies with the WHSA; and if a corporation commits an offence, then each of the corporation's executive officers commit the offence of failing to ensure the corporation complied with the relevant provisions. Evidence that the corporation has been convicted of an offence is also evidence that each of the executive officers committed the offence. The only defence for an executive officer is to prove that the officer exercised reasonable diligence to ensure the corporation did comply with its WHSA obligations or the executive officer was not in a position to influence the conduct of the corporation in relation to that particular offence.

## **(9) The WHSA regulations**

The Regulations also impose a multitude of obligations and duties. Of particular importance is the obligation to provide the Department with notice of a workplace incident causing serious bodily injury, workplace illness or a dangerous event within 24 hours (less if there is a death). Where there is a serious workplace injury/incident, there are additional regulations restricting 'interference' with the scene prior to police/Inspector attendance.

## **(10) Codes of practice**

There are a multitude of published Codes of Practice relevant to the rural industry, including:

- (a) Children and Young Workers Code of Practice 2006 (see below);
- (b) First Aid Advisory Standard 2004;
- (c) Forest Harvesting Code of Practice 2006;
- (d) Prevention of Workplace Harassment Code of Practice 2004;
- (e) Hazardous Substances Code of Practice 2003;
- (f) Horse Riding Schools, Trail Riding Establishments and Horse Hiring Establishments Code of Practice 2002;
- (g) Manual Tasks Code of Practice 2000;
- (h) Noise Code of Practice 2004;
- (i) Plant Code of Practice 2005;
- (j) Risk Management Code of Practice 2007 (see below);
- (k) Code of Practice Electrical Equipment – Rural Industry;
- (l) Rural Plant Industry Code of Practice 2004;
- (m) The Storage and Use of Chemicals at Rural Workplaces Code of Practice;
- (n) Sugar Industry Code of Practice 2005;
- (o) Sugar Mill Safety: a supplement to the Sugar Industry Code of Practice 2005;
- (p) Cane Rail Safety: a supplement to the Sugar Industry Code of Practice 2005;
- (q) Safe Design and Operation of Tractors Code of Practice 2005

Readers should periodically check the following web address for further publications/ amendments to the applicable Codes:

**[www.deir.qld.gov.au/publications/type/codesofpractice/index.htm#c](http://www.deir.qld.gov.au/publications/type/codesofpractice/index.htm#c)**.

## **(11) Risk Management Code of Practice 2007 ('RMC')**

The RMC, which is a particularly important Code of Practice, commenced on 15 June 2007. The RMC and its supplements give greater detail to the five-step risk management process referred to in the WHSA (see (4) above).

Whilst it is indicated that the risks with the greatest potential to cause harm and a greater likelihood of occurring should be controlled first, it is also stressed that prompt attention should be given to risks that may be easy to fix, even though they have a low risk priority. Similarly, the RMC stresses that particular attention should be given to risks that may have a very low likelihood of causing harm but may result in major consequences such as death.

The RMC draws reference to a Queensland Industrial Court decision in *Twigg v Hughes & Hesse*, which commented that the obligations imposed by the WHSA ‘*verge on the absolute*’. The RMC reinforces that the WHSA states there is an obligation to prevent injury to workers, not to take reasonable steps to prevent injury. As a result, a duty holder may need to do more than what is reasonable to avoid prosecution.

Supplement No. 2 provides a tool for assessing identified risks to determine which ones are the most serious and plan the actions needed to respond to the risk in order of priority. It is important to note however that the provided assessment tool only provides a ‘rough’ means of ranking risks. Accordingly the resulting ‘priority scores’ need to be interpreted with caution, given that they are subjective and judgmental. Further, the WHSA and RMC make it clear that the adequacy of the risk assessment method is determined by achievement of the desired outcome, namely the avoidance/minimisation of reasonably foreseeable risks.

In deciding on risk control measures, the RMC now specifies that:

*‘It is important to be able to justify why that particular control measure was chosen, rather than a higher level measure... Simply following the hierarchy of control does not necessarily mean compliance with the WHSA... Eliminating the hazard completely is the most effective control and must always be attempted first when deciding on control measures. This may mean discontinuing dangerous work practices, removing dangerous substances or introducing new equipment. Administrative controls and the use of personal protective equipment are the lowest on the list of control measures.’*

## **(12) Child and Young Workers’ Code of Practice 2006 (‘Children’s Code’)**

The Children’s Code commenced on 1 July 2006 and provides guidelines for safety at workplaces where children might be working or in attendance (which specifically includes farms/rural workplaces). Accordingly, where children are either working at or present at a rural workplace, the Children’s Code must be adopted or an alternative equivalent or greater standard needs to be implemented. Every workplace will have its own unique and additional risks which may not be specifically addressed in the Children’s Code. WHSA requires each particular and peculiar circumstance to be addressed whether specifically dealt with in a Code or not.

The Children’s Code states that a child will be at a rural workplace when he/she is:

- (a) participating in a work experience program;
- (b) attending at a parent’s rural workplace at any time e.g. during school holidays;
- (c) living on a farm;
- (d) riding in a truck, tractor or other vehicle otherwise used for work; or

(e) helping with farm work.

The Children's Code makes it clear that:

*'The reason children are in the workplace makes no difference to the fact that the workplace health and safety legislation provides for their protection from the risk of death, injury or illness... (at a workplace).'*

The Children's Code reiterates that the normally adventurous behaviour of children means that they are more likely to climb and play on machinery, hide in restricted areas, go where they are not supposed to go, play in excavations, and experiment with substances they may find.

Appendices 2 and 3 of the Children's Code specifically relate to safety for children in rural workplaces.

## 7.5 Pay-roll tax

Pay-roll tax is a State tax based on the annual pay-roll of employers. The Office of State Revenue (OSR) collects pay-roll tax in Queensland. Despite the introduction of the GST, certain employers must still pay pay-roll tax under the *Pay-roll Tax Act 1971*.

The Act applies to certain employers who pay or are liable to pay wages in Queensland (not being wages for services performed outside Queensland) and wages paid outside Queensland that relate to services performed within Queensland. Wages are widely defined to include wages, gross salary, commissions, bonuses or allowances including meal allowances but excluding allowances for travelling or accommodation paid at rates that are specified from time to time.

The present threshold amount for employers being required to pay pay-roll tax is wages paid of \$19,230 (average per week) in any week for the period commencing after 1 July 2007.

For wages paid or payable on and from 1 July 2002, the tax rate is four and three-quarter percent of wages and the Act sets out a detailed formula for the prescribed amount to be paid by the employer in respect of taxable wages.

A number of exemptions from pay-roll tax are provided for and these generally relate to religious institutions, hospitals, schools, colleges and local authorities.

Employers paying wages above the threshold amount must register and pay pay-roll tax monthly. At the end of each financial year following the lodgement of an annual return, an adjustment is made if necessary.

The Act contains complex grouping provisions which result in the grouping together of employers and their businesses for the purposes of calculating pay-roll tax. As an example, a business is unable to artificially stay below the pay-roll tax threshold by having some employees paid by a related company.

The Commissioner of Pay-roll Tax has power to exempt employers from providing monthly returns if the Commissioner is of the opinion that no tax will be payable, or if paid, would be refunded.

Objections to any decisions made by the Commissioner must be made within 60 days. The Commissioner must consider the objection and advise the objector in writing of any decision. If the objector is still dissatisfied with the outcome, he or she may appeal to the Supreme Court within 60 days of being given notice of the objection decision.

## 7.6 Fringe benefits tax

Fringe Benefits Tax ('**FBT**') is a tax payable by employers in respect of fringe benefits provided to employees or their associates. A 'fringe benefit' is described as a benefit other than salary and wages accruing to a person because of an employment relationship. FBT extends to non-salary benefits that are provided by employers to prospective or former employees in connection with their prospective or past employment. It must be self-assessed by employers annually for a standard 12-month period, i.e. 1 April to 31 March and tax is paid by quarterly instalments.

FBT is payable on the following types of benefits:

- motor vehicles;
- low interest on loans;
- car parking;
- expenses which an employer reimburses;
- some residential accommodation;
- entertainment;
- some living away from home benefits;
- board meals;
- some other benefits such as the provision of services and rights to use property.

Areas of particular interest to primary producers are below:

### (1) Motor vehicles

A motor vehicle fringe benefit arises when a car is owned or leased by an employer and made available for any private use by an employee. Unregistered vehicles used mainly for business purposes are exempt.

### (2) Remote area housing

From 1 April 2000, remote area housing benefits are exempt from FBT for all employers provided certain conditions are satisfied.

### **(3) Exemptions**

Meals provided to and consumed by an employee on a working day on the employer's premises and certain employee relocation costs borne by an employer are exempt from FBT.

A benefit is exempt from FBT if it would have given rise to a tax deduction to the employee if he/she had incurred the expense in relation to that benefit.

### **(4) Reportable fringe benefit**

While fringe benefits are income tax free in the hands of the employees, where the value of such benefits is greater than \$2,000 (excluding car parking and entertainment), it is used to calculate:

- (a) entitlement to income tested tax concessions; and
- (b) liability to income tested surcharges such as Medicare levy, superannuation contributions, Higher Education Loan Programme (HELP) repayments and child support obligations.

## 8 Federal taxes

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### 8.1 Income tax

#### (1) Outline of incentives for primary producers

A number of special tax concessions are available to primary producers. These include:

- (a) income averaging;
- (b) annual deductions over ten years for cost of connecting electricity or telephone lines;
- (c) annual deductions over three years for capital expenditure on water facilities primarily for the purpose of conserving or conveying water;
- (d) outright deduction for land care operations;
- (e) special provisions relating to double wool clips and insurance recoveries for livestock and timber losses;
- (f) special provisions relating to forced disposal or compulsory destruction of livestock; and
- (g) the right to transfer livestock and plant at tax values in partnership rearrangements.

In addition, under the Farm Management Deposits Scheme (FMDS), primary producers are entitled to claim tax deductions for FMDS deposits in the year the deposits are made. Any subsequent FMDS withdrawals are included as assessable income in the year the repayments are made.

Primary producers may qualify for the deductions allowable to taxpayers generally, including deductions for repairs and maintenance.

#### (2) Who is a primary producer?

A primary producer is essentially an individual, trust or company who or which carries on a business of primary production alone or in partnership being production resulting from:

- (a) the cultivation of land;
- (b) the maintenance of domestic (but not wild) animals or poultry for sale or for sale of their bodily produce including natural increase;
- (c) forest operations;
- (d) fishing operations.

The manufacture of dairy produce qualifies as primary production provided the manufacturer was also the producer of the raw material. To qualify for some concessions the taxpayer must be engaged in or the property in question must be used for 'agricultural or pastoral pursuits'. Wine making (as distinct from viticulture) and butter making (as distinct from dairy farming) have been held not to be agricultural or pastoral pursuits. Timber milling is not primary production even though the miller may have planted, tended and felled the miller's own trees.

The Commissioner accepts that primary production includes orchid or mushroom growing, contract broiler growing and the provision of artificial breeding services for the beef cattle industry by selling semen collected from bulls owned and maintained by the taxpayer.

A dealer in cattle is not usually a primary producer.

### **(3) What is a business of primary production?**

Entitlement to many of the incentives for primary producers is dependent on the taxpayer carrying on a business of primary production. A shareholder in a primary production company, a salaried manager of agricultural or pastoral property or the owner of such a property who has leased it will generally not qualify as a primary producer. On the other hand, the members of a partnership (or the beneficiaries entitled to the income of a trust) which carries on a primary production business could qualify. So could a city-dwelling owner of a primary production business run for him or her by a salaried manager and persons who enter into a joint venture sharefarming arrangement.

Whether or not the activities of the taxpayer amount to a business of primary production is a question of fact and degree. Some of the considerations which have been taken into account include:

- (a) whether a significant commercial purpose or character may be attributed to the primary production activities;
- (b) the size or scale of the activities;
- (c) whether the activities result in a profit and in those cases where no profit is produced whether the taxpayer has a genuine belief that eventually the activities will be profitable;
- (d) whether the activities are of the same kind or carried on in the same way as those which are characteristic of ordinary trade in the line of business in which the venture was made;
- (e) whether there is a repetition and regularity of the activities;
- (f) whether there is organisation of the activities in a businesslike manner and the use of a system;
- (g) whether the taxpayer has had prior experience in related business activities; and
- (h) whether the activities may more properly be described as the pursuit of a hobby or recreation rather than a business.

## **8.2 Capital gains tax**

Capital Gains Tax ('CGT') is generally payable when an asset acquired after 19 September 1985 is disposed of by sale or gift. CGT is also payable in certain circumstances in respect of assets acquired before 19 September 1985; e.g. where an asset has been substantially improved or there has been a change in the majority shareholding of the company that owns the asset.

## (1) Capital gain

If tax is imposed on a capital gain it is calculated allowing for:

- (a) costs incidental to its purchase and sale (including agent's fees and stamp duty); and
- (b) costs incurred in improving and maintaining the asset.

## (2) Capital loss

There will be a capital loss where the sale price exceeds the cost base. In calculating the loss, the cost base is not indexed but may be reduced to reflect certain costs associated with the asset.

Capital gains and capital losses made by the taxpayer are netted and if the result is a net capital gain it is brought into the taxpayer's assessable income for the year of income. However, if the result is a net capital loss, it cannot be used to reduce taxable income but rather is carried forward for the purpose of calculating the net capital loss or net capital gain in succeeding years.

## (3) Exemptions

CGT doesn't apply to certain assets including:

- (a) betting wins;
- (b) proceeds of superannuation and life insurance policies;
- (c) certain motor vehicles and motorcycles;
- (d) plant and equipment subject to depreciation or capital allowances;
- (e) a taxpayer's principal place of residence (not exceeding two hectares).

## (4) Relief

Where the asset is owned for at least 12 months, the capital gain may be indexed for inflation (if acquired before 21 September 1999) or discounted by 50 percent. The 50 percent discount cannot be claimed by a company.

CGT is not payable on capital gains on an individual taxpayer's main residence, including the first two hectares of adjacent land used for domestic purposes.

Further, small businesses (generally businesses with net assets of six million dollars or less or with annual turnover of less than two million dollars) are eligible for the following CGT concessions:

- (a) **15 year asset exemption** – exemption from CGT for an owner who has held a small business for 15 years and sells due to retirement (must be over 55 years old) or due to permanent incapacity;
- (b) **50 percent reduction for active assets** – a capital gain can be reduced by 50 percent for assets actively used in the small business (the 50 percent discount for assets held at for 12 months or longer may also apply for a total 75 percent discount);

- (c) **retirement exemption** – exemption for capital gains up to a lifetime limit of \$500,000 (provided that if the owner is under 55, the amount must be paid into a superannuation fund);
- (d) **rollover asset exemption** – the capital gain resulting from the sale of an active asset can be reduced by the amount spent on a nominated replacement asset.

More than one of the four concessions can be applied to minimise a taxable capital gain if the conditions for each are satisfied.

The ownership structure of a small business can affect the owner's eligibility for the small business concessions.

## 8.3 Goods and services tax ('GST')

### (1) Australian business numbers

Any entity carrying on the business of a primary producer needs to obtain an Australian Business Number ('**ABN**'). When making payments to other businesses, the supplying entity needs to quote its ABN, otherwise the paying party is obliged to withhold tax at the rate of 46.5 percent.

### (2) GST

#### (a) Who is required to pay GST?

Any entity carrying on an enterprise is required to register for GST if its annual turnover is over \$50,000. An enterprise is defined to include 'an activity in the form of a business or a concern in the nature of trade'. If the annual turnover is under the \$50,000 threshold limit, then the enterprise can register for GST but does not have to.

#### (b) Collecting GST

An enterprise is required to remit GST to the Australian Taxation Office on supplies that it makes. It is the responsibility of a supplier to collect GST from its customers by adjusting its prices and contracts accordingly.

Under the GST legislation, the supplier is required to pay the GST and not the customer. Suppliers need to adjust their prices to ensure that they have sufficient money to pay the GST which will equal  $\frac{1}{11}$  of the total sale price.

#### (c) GST rate

The current GST rate is ten percent. To determine the amount of GST in a GST inclusive price divide the price by 11 to give the amount of GST payable.

**(d) Supply**

The *New Tax System (Goods and Services Tax) Act 1999* is primarily directed towards the concept of a taxable supply. A supply is defined to be a supply of anything and encompasses all sales, transfers and some grants of interest.

**(e) Consideration**

GST is payable on the consideration provided for a supply. This could be monetary or non monetary amounts. For non monetary amounts, the consideration is deemed to be the market value of what is given in exchange. Barter arrangements are subject to GST.

**(f) Input tax credit**

Where an enterprise acquires items which are classified as taxable supplies, it is entitled to claim an input tax credit. Where the item is partly for commercial purposes and partly for private purposes, it is entitled to a partial input tax credit. Input tax credits can be offset against GST payable or claimed as a refund if the enterprise has excess input tax credits.

**(g) Tax invoices**

A tax invoice is an important document under the GST system. To claim an input tax credit an enterprise must hold a tax invoice. Suppliers are required to provide tax invoices within 21 days of request and fines can be imposed for failure to do this.

**(h) Recipient created tax invoices**

In certain circumstances where the price can not be determined at the time of sale, the recipient can issue Recipient Created Tax Invoices instead of the supplier. Recipient Created Tax Invoices are often used where the price cannot be determined until after further processing (e.g. by an abattoir or a sugar mill).

**(i) Exemptions – GST free**

There are no blanket exemptions for particular enterprises under the GST system. The only exemptions relate to particular types of transactions.

There are numerous exemptions relevant to primary producers. If an exemption is classified as GST free then an enterprise selling that item is not required to pay GST and there is no need for the price to be increased to cover GST. The enterprise is still entitled to claim input tax credits for its costs of generating that supply.

The following are a summary of GST Free Supplies:

**(i) Food**

Most foods for human consumption are classified as GST free. However, there are exceptions. Generally, live animals, unprocessed cows' milk, grains, cereal, sugarcane and plants under cultivation are not considered food and are therefore subject to GST.

**(ii) Water**

The supply of water (including water allocations ) is GST free.

**(iii) Exports**

Goods exported within 60 days of sale are generally GST free.

**(iv) Going concerns**

Sales of going concerns are GST free. In order to qualify as a going concern, the sale must meet specific criteria. These consist of:

- the contract of sale specifying that it is a 'sale of a going concern';
- all parties being registered for GST;
- the vendor carrying on the enterprise up until the date of settlement; and
- the vendor supplying all things necessary to continue the carrying on of the enterprise.

The sale of a farming business consisting of the land, stock, plant and equipment from one entity to another would generally satisfy the requirement of a going concern.

**(v) Grant of land**

Grants of land (either freehold or leasehold) by government is generally GST free.

**(vi) Farmland supplied for farming**

The supply of a freehold or leasehold interest in land is GST free if:

- the land has been used for a farming business for a period of at least five years prior to the supply; and
- the recipient intends that a farming business be carried on, on that land.

**(vii) Subdivided farmland**

A supply of subdivided farmland is GST free if:

- the land has been used for a farming business for at least five years prior to the supply; and
- the land has been supplied to an associate of the owner for less than market value.

For example, the subdivision and gift of farmland to a family member of land on which to construct a house will constitute a GST free supply.

**(3) Margin scheme**

GST on the sale of land can also be calculated under the Margin Scheme. GST is only payable on the increase in capital value of the land since the commencement of the GST or the subsequent acquisition of the property. Under a Margin Scheme sale the purchaser is not entitled to claim any input tax credit for the GST paid. The Contract of Sale should specify that the Margin Scheme is to be applied.

#### **(4) Tax periods and accounting basis**

GST needs to be accounted for on a tax period. The most common tax period is quarterly. However, an enterprise with a turnover of over \$20,000,000 is required to account on a monthly tax period. Smaller enterprises can also account on a monthly tax period if they so elect.

Enterprises with a turnover of over one million dollars are required to account for GST on an accrual basis (that is, pay GST upon issuing an invoice). Entities with annual turnovers of less than one million dollars can elect to use an accrual basis or adopt a cash basis for paying GST (that is, GST is only payable and input tax credits only claimable upon payment).

#### **(5) *Trade Practices Act***

The *Trade Practices Act* 1974 imposes heavy fines for misleading and deceptive conduct. The Australian Competition and Consumer Commission has issued guidelines for what it considers to be appropriate statements of prices. The Australian Competition and Consumer Commission considers prices should reflect the full cash price and not be quoted as '*plus GST*'.

#### **(6) Contracts**

All contracts should address GST. Supply contracts should identify whether the supply is inclusive or exclusive of GST.

Contracts for sale of farming properties and farming businesses need to address whether or not the sale is a sale of a going concern, the farmland exemption applies, a sale is under the Margin Scheme, a sale is under the normal GST rules or any combination of these arrangements applies.

## 9 Finance

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### 9.1 *Consumer Credit Code*

The *Consumer Credit Code* ('**Code**') (part of the *Consumer Credit (Queensland) Act* 1994) came into operation in Queensland on 1 November 1996. This legislation impacts significantly on those credit providers who provide consumer credit.

The Code aims to protect individual consumers and its application is limited to transactions where the amount financed is provided wholly or predominantly for personal, domestic or household purposes. The Code does not apply where financing is for the acquisition of commercial vehicles or farm machinery, or where security is taken over these items. In these cases, there is no maximum limit and all such transactions will continue to be governed by the *Credit Act* 1987.

Farm machinery is widely defined and can include fishing vessels.

Neither the Code nor the Act will apply where the consumer is a company (subject to certain exceptions) or with respect to the provision of credit by a bank or a pastoral finance company where the credit is provided by way of overdraft or by some other means other than by a credit sale contract, continuing credit contract or term loan, or is otherwise exempt from their operation.

The Code affects and seeks to control many commercial activities. Some of the important aspects are:

#### (1) **Contracts of sale**

Where credit is required in connection with a contract of sale, the supplier cannot insist on the buyer obtaining credit from a specified person.

#### (2) **Credit sale contracts and loan contracts**

The Code regulates mandatory disclosure in the contracts of the amount financed, the credit charge and a statement of the person to whom and the place at which payments are to be made. Also listed are items which must not be included in the amount financed. These include amounts payable by the debtor in respect of specific insurance payments.

#### (3) **Mortgages**

There are restrictions on the exercise of rights by a mortgagee. Proceedings may not be instituted unless the debtor is in default and the requisite notice has been served and has not been complied with within the specified period.

Third party mortgages are also prohibited. That is, a party cannot give a financier a mortgage over its property unless it is either a debtor or guarantor under a credit contract.

Both the *Credit Act* and the *Credit (Rural Finance) Act 1996* contain specific provisions for relief against repossession from farmers of farm equipment necessary for the carrying on of the farm business, provided the mortgagor can satisfy the mortgagee that it can remedy the default within 12 months. If the mortgagor can satisfy the Court that it can remedy the default, the power of the mortgagee to take possession and sell the mortgaged goods can be suspended for up to 12 months.

#### **(4) Guarantees**

Under the Code a guarantee must always be in writing or made by the acceptance of an offer in writing signed by the guarantor to enter into the contract of guarantee and the guarantor must receive a copy of the credit contract before entering into the guarantee.

If the debtor's liability under the guaranteed credit contract is increased because a term of the credit contract is changed, the guarantor does not guarantee the increased liability unless the credit provider gives the guarantor written notice of the credit contract variation and the guarantor gives written acceptance to the guarantee being extended to cover the increased liability.

A credit provider must give the guarantor a copy of the signed guarantee within 14 days after the guarantee is signed.

A lender may not bring proceedings against the guarantor unless certain procedures are followed.

#### **(5) Continuing credit contracts**

These are contracts with two characteristics:

- (a) multiple advances of credit must be contemplated; and
- (b) the amount of available credit must ordinarily increase as the amount owing is reduced.

Accordingly, overdrafts and credit card facilities will be continuing credit contracts and regulated by the Code.

Under the Code the Court has wide powers to re-open such transactions which are unjust, unconscionable, harsh or oppressive.

## **9.2 Bills of sale**

A bill of sale is a form of security taken over chattels. Chattels are defined in the *Bills of Sale and Other Instruments Act 1955* (Qld) as furniture, goods and other articles capable of complete transfer by delivery, fixtures (if separately assigned or charged), book debts and trade machinery.

The Act provides for a general system of registration of security interests on goods. This system allows lenders (including banks and finance companies) to officially record their interests on a Bills of Sale register.

The Bills of Sale register is maintained by the Office of Fair Trading in the Queensland Department of Tourism, Fair Trading and Wine Industry Development. Lenders register their security interest by lodging an application with the Office of Fair Trading using a Bills of Sale Form 1.

The effect of registration is that a lender can maintain his or her security against third parties. Registration of a bill of sale expires after five years and must be renewed to remain in force.

The system also allows people intending to buy certain chattels, such as motor vehicles, to ensure they are not buying something which may be encumbered. Prospective lenders or purchasers may search the register to find out whether there is money owing on the chattels prior to purchase, which may provide some protection against repossession.

Stock mortgages, crop liens and wool liens may also be registered under the *Bills of Sale and Other Instruments Act*.

### **9.3 Motor vehicles**

Bills of sale over motor vehicles are registered under the *Motor Vehicles and Boats Securities Act*. A purchaser may search the Register and obtain a dated certificate either containing the particulars of the security interests or a statement that there is no such registration.

A motor vehicle is defined under the *Motor Vehicles and Boats Securities Act* as 'a land vehicle that moves on wheels and is propelled by a motor that is part of the vehicle'. This definition also includes non-motorised caravans and trailers designed to be attached to, or drawn by, a vehicle but specifically excludes farm machinery.

It is advisable to obtain a certificate from the Register prior to entering into any arrangement to purchase a vehicle.

### **9.4 Repossession**

Hire purchase agreements are deemed to be the sale of goods by instalments and are classified as 'credit contracts' under the Code, if the charge that is or may be made for hiring the goods, together with any other amount payable under the contract, exceeds the cash price of the goods.

As discussed earlier, farmers may be given relief against repossession of certain goods.

### **9.5 Mortgages of land**

#### **(1) Introduction**

A registered owner may mortgage his or her property as security for a loan. As mortgagor, he or she remains the registered owner of the land but holds it subject to the rights created in favour of the lender, or mortgagee. Most Queensland mortgages are registered.

A registered mortgage must comply with certain requirements. It must be on a prescribed form, describe the lot, the owner's interest in the land being mortgaged and the debt secured by the mortgage, and must be validly signed and witnessed by both the mortgagor and mortgagee. It must then be lodged with the Titles Office to become a registered mortgage.

## (2) Sale under a mortgage of land

Under the *Property Law Act 1974* (Qld), a mortgagee has a power of sale if a mortgagor defaults on repayment of the loan. The mortgagee must first serve notice on the mortgagor requiring the mortgagor to remedy the default and the default must continue for a period of 30 days from the service of the notice.

Different notice requirements apply if leasehold land is involved. Advertisements must also be placed in the Government Gazette and in a newspaper circulating in the locality.

As mentioned above, the Code also requires the financier to serve notice on the mortgagor similar to that under the *Property Law Act* for loans regulated by the Code. Under the Code, the default must continue for at least 30 days before the financier can exercise its power of sale.

**Note:** Nothing prevents the financier from commencing the sale process before the end of the notice period, provided the property is not actually transferred to a purchaser before the end of the notice period.

A sale by mortgagee is usually by public auction.

The proceeds of sale are to be applied in a specific order, namely: the sale expenses, the moneys due under the mortgage and then any subsequent mortgagees in order of priority and any surplus is paid to the mortgagor.

## (3) Foreclosure

While this remedy is available to a mortgagee, it is infrequently used. The effect of foreclosure is to make the mortgagee the owner of the property. Foreclosure is usually only considered appropriate where the value of the property is less than the amount owing and it is considered that with time the value of the property will increase.

## 9.6 Bankruptcy

Bankruptcy describes the circumstances where an individual or joint debtors are unable to pay their debts when they fall due and are in time relieved of their obligations. While a creditor may institute bankruptcy proceedings, an individual may also voluntarily submit to bankruptcy.

Upon bankruptcy, the bankrupt's 'divisible property' vests in a trustee in bankruptcy and the bankrupt is obliged to co-operate with the trustee regarding his/her property and creditors. However, not all of a bankrupt's property is subject to administration by the trustee.

For example, such items as clothing, tools of trade, household articles, some insurance policies, compensation for personal injury and property held in trust for another may not form part of the bankrupt's estate. A bankrupt can be discharged automatically after three years or after a shorter period if certain criteria are met.

An alternative to bankruptcy to consider in respect of financial problems may be a 'Part IX' Debt Agreement or a 'Part X' Personal Insolvency Agreement ('PIA').

Under a Debt Agreement, the debtor, by way of the Official Receiver, puts forward a written proposal for dealing with his/her debts. If that written proposal is accepted by a majority in value of the creditors, the debtor can then satisfy his debts as set out in the Debt Agreement. For a PIA, the debtor must appoint a trustee to act on their behalf, to control their assets and to put forward a proposal to the debtor's creditors. If the creditors accept that proposal, a PIA is formed and the debtor must satisfy his/her debts as set out in the PIA.

If the debtor enters into and complies with either a Debt Agreement or a PIA, creditors who were bound by those instruments cannot make further claims. Usually, if a Debt Agreement or PIA is not agreed to by the creditors or is not complied with by the debtor, the debtor must present his/her own petition in bankruptcy.

Bankruptcy, Debt Agreements and PIAs should only be considered after consultation with an insolvency expert.

## **9.7 Small claims tribunal**

The Small Claims Tribunal provides a quick and cheap procedure for the hearing of minor consumer disputes between a consumer and a trader for goods or services for less than \$7,500 and disputes with residential landlords.

Lawyers cannot appear before the Tribunal and there is no appeal procedure from the decision of the Tribunal except in rare circumstances.

## **9.8 Minor debts**

In addition to the Small Claims Tribunal, the Magistrates Court also has jurisdiction to deal with debt recovery actions for less than \$7,500. However, unlike the Tribunal, all documentation provided to the Court must adhere to the Court Rules. Also, lawyers can appear on behalf of one or both parties, but generally parties will appear unrepresented for minor debts.

## 10 Succession and family law

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### 10.1 Succession law

#### (1) Introduction

The law concerned with the distribution of property on death and the administration of a deceased person's estate is referred to as Succession Law. The relevant legislation is the *Succession Act* 1981.

#### (2) The importance of a will

A Will has been defined as a revocable disposition of property of the testator intended to take effect on death. A Will is the only method by which a person has control over the distribution of a lifetime's accumulation of property after death and the administration of the deceased's estate.

#### (3) Functions of a will

The basic functions of a Will can be summarised as follows:

- (a) to nominate executors and trustees;
- (b) to provide for the maintenance and care of the testator's family including the appointment of a guardian of any infant children; and
- (c) to dispose of property in the way in which the testator wishes.

#### (4) Will making

##### (a) Who may make a will

A person may make a Will if that person is over 18, or under 18 but married or a member of the Defence Forces.

The main requirement for the making of a valid Will is that the testator possesses the requisite testamentary capacity. In very general terms, the law requires the testator to be of sound mind, memory and understanding at the time of the making of the Will.

In limited cases, the Supreme Court may authorise that a Will be made for a person without testamentary capacity if special circumstances exist.

##### (b) Requirements of a valid will

There are certain formal requirements for a valid Will. These may be summarised as follows:

- (i) the Will must be in writing;
- (ii) it must be signed (although an illiterate person can validly execute a Will by their 'mark', such as an 'X', provided it is intended as execution of the Will);
- (iii) the signature must appear at the foot or end of the Will; and

- (iv) the Will must be signed or acknowledged in the presence of two witnesses, who must both be present when the testator and each other signs.

Attesting witnesses and interpreters and the alternate beneficiaries who would receive the gift if it fails are disqualified from receiving a benefit under any Will which they witness unless all the remaining beneficiaries provide written consent to the distribution.

### **(c) Alterations and revocations of wills**

#### **(i) Alteration**

There is a general presumption that any alteration to a Will is made after its execution. It follows that no change made after execution will be valid or have any effect unless the change is executed in the same way as that required for the execution of a Will.

The normal method by which Wills are altered or revoked is by the execution of a new Will or by the making of a subsequent Codicil. A Codicil is a document to be read in conjunction with the original Will which in some way alters the Will or republishes it after a change in the testator's circumstances. To be valid, a Codicil must satisfy all the requirements of a valid Will and should make some reference to the original Will.

#### **(ii) Revocation**

Marriage revokes all provisions of a Will except for dispositions of property to a spouse, and the testator and spouse are still married at the date of death. A new Will should be made after marriage unless the earlier one contains a statement that it was made in contemplation of the marriage.

Divorce revokes the parts of a Will which relate specifically to the former spouse.

A Will may also be revoked by another Will or Codicil.

Finally, a Will may be revoked by destruction. Two elements must be present: first, there must be a sufficient act of destruction, and secondly, the necessary intention to revoke the Will must be present at the time of destruction.

### **(5) Property that may be disposed of by a will**

A person may by Will dispose of any property to which the person is entitled at the time of his or her death, except property over which the person is trustee.

Basically, there are two types of property that may be disposed of by a Will:

- (a) Realty – land and buildings; and
- (b) Personality – goods and chattels but also intangible assets such as shares, money deposits and interests in life assurance policies.

A testator should ensure that the whole of the testator's property is effectively disposed of by a Will.

## (6) Intestacy

A person dies intestate if that person either does not leave a Will, or leaves a Will that does not effectively dispose of the whole of his or her property. Any property not disposed of is distributed according to the intestacy rules. Those rules are based on proximity of kinship; that is, the estate is distributed first to the closest relatives of the deceased – the spouse and children – and if none survive, then down the line to the intestate's next closest relatives.

## (7) Family provision

If a person dies without making proper provision from their estate for the maintenance and support of the deceased person's spouse, child or other dependant, then the Court may in its discretion order that provision be made out of the deceased person's estate for that spouse or child. In effect, the Court re-writes the Will.

## (8) Estate administration

Executorship of a person's estate is an important obligation; one should take great care in choosing an executor. An executor is charged with the responsibility of winding up and finalising the affairs of a person accumulated over a lifetime.

The executor's duties can be summarised as follows:

- (a) to take possession of the estate of the deceased;
- (b) to pay the debts of the deceased;
- (c) to distribute the residue of the estate after payment of debts and expenses of administration to those beneficially entitled under the Will or the intestacy rules.

Although the appointment of a professional trustee company or the Public Trustee should result in a properly administered estate, the administration could be a lengthy process and these bodies may charge a commission for administrative duties. This results in additional expense for the estate which may be avoided by the appointment as executors of specific persons known to the testator.

## 10.2 Family law

### (1) Divorce

Family Law in Australia is based on a '*no fault*' principle which means that a Court is not interested in blaming either party. A divorce can be applied for either individually or jointly. The only ground for divorce is that a marriage has broken down irretrievably, as evidenced by the parties living separately and apart for a period of 12 months. The separation need not be by agreement, although one party must have communicated to the other that the marriage has ended.

It is possible to be separated and continue to live under the same roof, although the Court will require independent evidence to verify that the parties have, indeed, been living separately under the one roof.

Where there are children under the age of 18 years, a Court will not grant a divorce unless it is satisfied that proper arrangements have been made for the care of the children.

## (2) **Property settlement in marriage**

One of the most difficult tasks following separation is to divide up assets and debts. This is particularly difficult if there is one major asset such as the family home or farm. The *Family Law Act* gives Courts a wide discretion to make orders altering property interests between married couples.

The Court has a duty, as far as is practicable, to finalise financial relations between parties and to achieve a '*clean break*', enabling both parties to get on with their lives financially independent of each other.

The Court adopts a four-step process in determining property settlements:

- (a) The first step is to identify and value all of the assets and liabilities of the parties no matter how held (individually, jointly or in a trust or company structure).
- (b) The second step is to look back over the marriage and since separation and evaluate the financial and non-financial contributions of both parties to the asset pool and also to consider any contribution of either party in the role of homemaker and parent. For example, if one party brought into the marriage their interest in the family farm, this should be taken into account as a contribution on that party's behalf.
- (c) The third step is to consider if the contribution-based assessment at step two should be adjusted because of '*future needs*' factors. These factors include the age and state of health of the parties; whether either party has a responsibility to care for a child under the age of 18 years; any child support paid; the responsibility of either party to support any other person; the duration of the marriage and the extent to which it has affected the earning capacity of either party, and any other circumstances which the Court considers should be taken into account.
- (d) The fourth step is to consider whether, overall, the property settlement proposed is '*just and equitable*' and whether any adjustment should be made to the conclusion reached at step three.

If parties can reach a negotiated agreement on the division of matrimonial property, then consent orders or a binding financial agreement can be entered giving effect to the agreement.

### (3) **Property settlements in *de facto* relationships**

The law governing property settlements for separating *de facto* couples (which includes same sex couples) is set out in the *Property Law Act*. To apply, the couple must have:

- (a) lived in a *de facto* relationship for at least two years; or
- (b) have a child of the relationship who is under the age of 18 years; or

it would be unjust not to recognise the financial or non-financial contribution of a *de facto* spouse, even though the relationship was for less than two years and there is no child of the relationship.

In Queensland, either *de facto* partner may apply to a State Court for an order adjusting interests in property. An application must be made within two years of the *de facto* relationship ending. The State Court (Supreme, District or Magistrates) considers the same four steps to work out the appropriate property division as the Family Court does for a separating married couple (set out above). One difference, however, is that in a *de facto* relationship, superannuation is not regarded as property, but as a financial resource, and as a result, superannuation cannot be transferred from one partner to the other.

### (4) **Binding financial agreements**

The law now allows couples to enter into binding and enforceable financial agreements before, during and at the end of a relationship. While these agreements are commonly called '*pre-nuptial agreements*', they can apply not only to marriages but to *de facto* relationships as well. The contents of the agreement must follow the particular provisions of the relevant legislation (the *Family Law Act* for married couples, and the *Property Law Act* for *de facto* couples) and will not be binding unless the provisions are followed.

An agreement made at the beginning of a relationship can deal with how, in the event of a breakdown of the relationship, any of the property or financial resources of either or both of the parties is to be dealt with. Advantages of making an agreement include:

- protecting assets brought into a relationship, such as a farm or family business; and
- providing certainty and preventing costly litigation in the event of the relationship breaking down.

### (5) **Children**

When relationships end, one of the first questions often asked is '*Who gets the children?*'

It does not matter whether parents are married or in a *de facto* relationship, all children are covered by the *Family Law Act*.

Major changes to the law in 2006 included promoting the rights of children to have a meaningful relationship with, and know, both of their parents, as well as encouraging parents to continue to share responsibility for their children should the parents separate. Emphasis is also placed upon resolving parenting arrangements outside of the Court.

Family relationship centres have been set up and family dispute resolution practitioners appointed to assist parents to develop parenting plans to deal with parenting issues and disputes. The key changes to the law are to:

- introduce a presumption of equal shared parental responsibility;
- require the Courts to consider whether children spending equal time with both parents is reasonably practical and in the best interests of the children;
- make the right of children to know both their parents and to be protected from harm the primary factors in determining the best interests of the children; and
- better recognise the interests of children spending time with grandparents and other relatives significant in their lives.

The primary considerations are the benefit to the child of having a meaningful relationship with both parents and the need to protect the child from physical or psychological harm. The additional considerations include:

- any views expressed by the child;
- the extent to which parents have fulfilled their responsibilities as parents;
- the willingness of each parent to facilitate and encourage a close relationship between the child and the other parent;
- the right of a child to enjoy his or her Aboriginal or Torres Strait Islander culture (if applicable); and
- the practical difficulty and expense of a child spending time with both parents.

The best interests of a child remain the paramount consideration when a Court makes parenting orders.

## **(6) Child support**

The Child Support Agency (attached to the Australian Taxation Office) has powers to assess and collect child support. The Child Support Agency has power to make an administrative assessment of child support by reference to the taxable income of each of the parents. All child support assessments use a basic formula which takes into account each parent's income, the number of children and their living arrangements.

From 1 July 2008, the Child Support Agency will adopt a new formula for calculating child support. The Agency will base its assessment on Australian research showing the real costs of raising children depending on the level of the parents' income and children's ages. It will treat both parents' incomes equally by allocating the same notional self-support amount to both parents, take both parents' incomes into account in deciding the costs of children and apportioning the resulting costs between parents according to their share of combined income. It will also take into account the fact that older children cost more than younger children to maintain. It also seeks to treat children from first and subsequent families more equally by using the actual costs of the children from a second family, rather than a flat amount, in working out child support payable by the first family.

Another change from 1 July 2008 is that during the first three years after separation, parents will be able to have additional income earned from a second job and overtime excluded from their child support calculations, if they started earning this extra income after separation.

Parents can also continue to enter private agreements on the amount of child support to be paid and these agreements can be registered with the Child Support Agency.

## (7) Relocation

Another question often asked is '*Can I move interstate or overseas with my children?*'

If there is a Court order that relates to where the children will live and the time the children are to spend with the other parent, it is an offence to move without the consent of the other parent. If there is no agreement, then the party wishing to move the children would need to make an application to the Court for permission to move the children. The Court will evaluate the competing proposals, including how the children's relationship with the parents will be affected, and decide if it is in the best interests of the children to stay or to move away from one parent.

## 10.3 Enduring powers of attorney

The *Powers of Attorney Act* 1998 reformed the law in relation to the appointment of persons to manage financial and personal affairs and to deal with health matters. Among other things, this legislation:

- (1) improved the form of enduring financial power of attorney previously available;
- (2) introduced an enduring power of attorney for health and personal matters; and
- (3) created an 'advance health directive', enabling a person to give directions for his or her future health care and treatment if that person becomes unable to do so.

A health attorney is able to make decisions in relation to health care (e.g. consent to surgery) or personal matters (e.g. where a person should reside) when a person is unable to make those decisions themselves. Everyone, regardless of age or present state of health, should consider taking advantage of the provisions of the *Powers of Attorney Act*.

## 11 Vehicles

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### 11.1 Transport operations

Certain aspects of the various Transport Operations Acts and Regulations are of interest to primary producers. A summary of some of the more relevant provisions is set out below:

The *Transport Operations (Road Use Management) Act 1995* ('**TORUM**') covers traffic offences.

The provisions for driving whilst under the influence of alcohol or a drug, dangerous driving, and driving without due care and attention or without reasonable consideration for other road users apply equally to the riding of horses. Offences are also prescribed for organising, promoting or taking part in an unauthorised or unlicensed race involving vehicles or animals on a road.

In respect of road accidents, the driver or rider of any vehicle or animal involved in an accident resulting in injury, death, or damage to any property (including any animal) must:

- (1) stop and remain at the scene;
- (2) render assistance to the injured person;
- (3) make reasonable endeavours to obtain medical and other aid; and
- (4) report the accident to the police as soon as possible.

A person may leave the scene of the accident solely for the purpose of obtaining medical or other aid for an injured person.

TORUM also:

- (1) entitles local governments to make local laws with respect to vehicles or animals on a footpath or water channel across a road and the seizure, removal and disposal of an infringing vehicle or animal; and
- (2) creates obligations on any person who deposits any matter or substance likely to cause injury or danger to any person or vehicle on any road or damages a road by use or passage.

The *Transport Operations (Road Use Management – Vehicle Standards and Safety) Regulation 1999* provides that a person cannot drive or park a vehicle on a road if the vehicle is not equipment as required by the Vehicle Standards, not constructed and loaded to comply with the Vehicle Standards, is not in a safe condition, or is otherwise defective.

These regulations also govern certificates required for sale of a vehicle.

## 11.2 Concessional registration

*Transport Operations (Road Use Management – Vehicle Standards and Safety) Regulation 1999* contains provisions dealing with concession registration.

Seasonal registration, that is registration for only three or six months, is allowed for:

- (1) trailers over four and a half tonnes; or
- (2) vehicles, being prime movers or trucks of or over six tonnes GVM,

which are either owned by a primary producer and used only in the owner's business as a primary producer or only used to transport primary produce from a farm or fishing waters to where the primary produce is processed, stored or loaded onto a train, vessel or another vehicle. At the expiration of the period, the registration of the vehicle may be either renewed for a period of three or six months, or deferred for a period not exceeding one year and then renewed.

Concessional registration fees may be granted to a primary producer for primary production vehicles which are specified in the Regulations. Classification in most cases depends upon the number of axles of the vehicle. Further concessional registration fees may be granted to the registered operator of other prescribed vehicles, e.g. for vehicles with distance and road use limits which are owned by a primary producer and only used in the owner's business as a primary producer. Again, the concessions depend upon the weight of the vehicle concerned.

The concession holder must notify the Chief Executive in writing before the vehicle is used for a purpose other than for which the concession was granted or within 14 days after a material change in circumstances or the sale or transfer of the vehicle. At that point, the Chief Executive may reassess the fee for the balance of the vehicle's current registration.

The Schedules to the Regulations set out the concessional registration fees. Schedule 3A specifies vehicles for particular concessional registration fees, which includes vehicles used on a road only in a number of remote councils and shires including Aurukun, Doomadgee, Kowanyama, Pormpuraaw and Yarrabah Shire Councils. These concessions also apply to vehicles:

- (1) whose registered operator is the sole or joint operator of an agricultural property and the vehicle is used on a road solely to cross roads within the property or which travel solely between two agricultural properties directly across the road from each other where the road is traversed for a distance of no more than two kilometres; or
- (2) used solely for fencing of a primary producer's property.

A certificate of inspection under the *Transport Operations (Road Use Management – Vehicle Standards and Safety) Regulation 1999* is current for a primary production vehicle for which concessional registration has been granted for two years after its issue.

### 11.3 Unregistered vehicles

Under the *Transport Operations (Road Use Management – Vehicle Registration) Regulation* 1999, a person must not use or permit to be used on a road an unregistered vehicle unless:

- (1) the vehicle, with a registration application and current insurance certificate, is being towed to or has a permit to be driven to an inspection station for registration;
- (2) the vehicle is being used with an unregistered vehicle permit; or
- (3) the vehicle has a special authorisation or permit under the Regulations.

Where a primary producer owns any motor vehicle which is not at any time used on a public road, it is not necessary to register that vehicle. However, adequate insurance cover may still be prudent.

The *Motor Accident Insurance Act* 1994 ('**MAIA**') defines an '*uninsured motor vehicle*' as a motor vehicle for which there is no CTP insurance policy in force. As a CTP insurance policy is part of a vehicle's registration fee (subject to the special authorities referred to below), an unregistered vehicle is an '*uninsured motor vehicle*' for the purposes of the MAIA.

The MAIA applies to cover all personal injuries caused by, through or in connection with a motor vehicle if such injury is the result of:

- (1) the driving of a motor vehicle;
- (2) a collision or action taken to avoid a motor vehicle collision;
- (3) a motor vehicle running out of control; and/or
- (4) a defect in the motor vehicle causing loss of control whilst being driven,

and caused wholly or partly by a wrongful act or omission in respect of the motor vehicle by a person other than the injured person. The MAIA however does not apply in those circumstances if:

- (1) the accident involved an uninsured motor vehicle but did not occur on a road or in a public place;
- (2) the accident was caused by, through or in connection with a tractor, backhoe, bulldozer, end loader, forklift, industrial crane or hoist, other mobile machinery, agricultural implement or a prescribed class of motor vehicle unless the accident happened on a road.

The MAIA otherwise makes it an offence for a person to drive an uninsured motor vehicle on a road or in a public place. Should an accident involving an uninsured vehicle occur on a road, then the Nominal Defendant will defend any resulting injury claim but may recover, as a debt, from the owner or driver of the uninsured vehicle (or both), any costs including damages paid by the Nominal Defendant as a result of a claim for personal injury.

A person selling or disposing of an unregistered or written-off vehicle which has an identifying chassis or VIN number must ensure lodgement of an approved form notifying of the disposal.

## 11.4 Temporary occupation and use of land for carrying out road works

The Chief Executive has the power to temporarily occupy and use land and do anything that is necessary or convenient to carry out road works (see *Transport Infrastructure Act*).

The person who is proposing to occupy or use the land is required to give at least three days written notice to the owner or occupier of the land or obtain the owner's or occupier's written approval to the occupation or use.

The notice must set out the works to be carried out, the use proposed to be made of the land, details of the things proposed to be done on the land and the approximate time the occupation and use is expected to continue.

If urgent remedial works are required, written notice is not required to be served but the person proposing to occupy or use the land must, if practicable, notify the owner or occupier of the land orally.

Subject to certain time restrictions, the owner of the land may claim compensation for physical damage caused by the entry, occupation or use or for taking or consumption of materials.

## 11.5 Removal of animals from roads

Under the *Land Protection (Pest and Stock Route Management) Act 2002*, it is an offence to allow stock to stray onto the stock route network and straying stock may be seized. Further provisions relate to the release or sale of seized stray stock.

The *Transport Operations (Road Use Management) Act 1995* grants a local government chief executive officer the power to deal with any animal left unattended on a road or in circumstances where its presence is hazardous. The animal may be removed and detained. The CEO will then issue a notice to the owner (if they can be ascertained) notifying of the animal's removal and where it is being kept. If the owner does not claim the animal within one month, the animal may be auctioned and the proceeds distributed in accordance with the Act.

## 11.6 Loading

The loading of vehicles and trailers must comply with relevant applicable requirements. All loads must meet performance standards such that risks to other road users are minimised, the loading does not reduce the vehicle's stability and the load is restrained to prevent it falling off the vehicle or dislodging when the vehicle is moving.

The *Transport Operations (Road Use Management – Mass, Dimensions and Loading) Regulation 2005* provides a number of restrictions in relation to matters such as ground clearance, dimensions, mass, etc. In relation to trailers, there are particular requirements regarding trailers for the carriage of animals, which requires that:

- (1) a trailer built to carry cattle, horses, pigs or sheep on two or more partly or completely overlapping decks must not have more than 12.5 metres of its length available to carry animals; and
- (2) in a B-double built to carry animals, the two semi-trailers must not have more than 18.8 metres of their combined length available to carry animals.

Under the Grain Harvest Management Scheme, the practical difficulty of filled loading onto vehicles bulk commodities to within accurate weight tolerances is addressed. The Scheme balances the need to protect road infrastructure through regulation against efficient grain harvesting practices. Participation in the Scheme is open to farmers and anyone making approved harvest deliveries.

## 11.7 Transportation of livestock

The rules and regulations relating to the transportation of livestock are contained in a policy and coding manual prepared by Queensland Transport.

The *Animal Care and Protection Act 2001* provides for the making of codes of practice about animal welfare, including the transportation of livestock and other animals (s13). As an overarching obligation, the Act prohibits animal cruelty (up to 1,000 penalty units or two years imprisonment) including where:

- (1) an animal is confined or transported without appropriate preparation (including appropriate food, rest, shelter or water);
- (2) an animal is unfit for such confinement or transport;
- (3) an animal is confined or transported in an unsuitable container or vehicle; or
- (4) the person otherwise acts in a way that is inappropriate for the animal's welfare in relation to confinement and transportation, including unjustifiably, unnecessarily or unreasonably overcrowding or overloading animals.

Under of the *Stock Act 1915*, where there is an identified disease, the Minister may prohibit or restrict the movement of infected stock, or otherwise prescribe the manner in which such infected or suspected stock is to be transported. Additionally, the Minister may require any stock within an infected area to be removed or otherwise control the movement of any stock or fodder within an infected area.

Some stock movements require a travel permit under the *Stock Act 1915*. These circumstances include movement of stock into or out of an infected area or area subject to a notification, the movement of stock to a quarantine facility prior to export, a cross-border or territory movement which requires a travel permit, movement of suspected stock or movement into, out of or within a prescribed area.

The *Transport Infrastructure (State-Controlled Roads) Regulation 2006* allows the Chief Executive to prohibit taking animals onto a State controlled road or motorway, except in a vehicle or pursuant to a stock route travel or agistment permit.

## 11.8 Diesel fuel rebate

### (1) Federal fuel tax credits and grants

Fuel tax credits provide a credit for fuel tax (excise duty) that is included in the price of fuel to entities using that fuel in their businesses and to householders using fuel for domestic electricity generation.

The *Fuel Tax Act* 2006 created a fuel tax credit scheme which commenced on 1 July 2006 and substantially replaced the previous Energy Grants Credits Scheme ('EGCS'), with the EGCS to be phased out by 1 July 2012.

Fuel tax credits from 1 July 2006 exist for diesel vehicles used in agricultural and fishing businesses of greater than four and a half tonnes Gross Vehicle Mass ('GVM') travelling on a public road (and diesel vehicles acquired before 1 July 2006 equalling four and a half tonne GVM); and for off-road activities that were previously covered under the EGCS. The current rates of tax credit vary depending on category of 'eligible use' and type of 'eligible fuel'; and the current rates are available at [www.ato.gov.au/fuelschemes](http://www.ato.gov.au/fuelschemes).

Businesses with outstanding entitlements for diesel credits under the EGCS from an earlier period can still claim under the transitional provisions.

Alternative fuels will not be eligible for fuel tax credits under the Act until 1 July 2011. However alternative fuels such as biodiesel, ethanol, LPG and CNG will continue to be eligible for an EGCS fuel grant before 1 July 2010. The amount of the EGCS fuel grant will reduce to nil in five equal annual steps commencing 1 July 2006 and concluding on 1 July 2010.

All businesses need to be registered for both GST and for fuel tax credits before they can claim under the Act. The fuel tax credit period is the same as the business' GST tax period.

From 1 July 2008 with petrol as well as diesel being eligible for a full fuel tax credit when used in previously eligible EGCS activities; and petrol and diesel will be eligible for 50 percent fuel tax credit when used in activities, machinery or equipment not previously eligible under EGCS. A full fuel tax credit will apply from 1 July 2012.

In order to claim fuel tax credits on a Business Activity Statement, the entitlement must be calculated by assessing the eligible litres and converting this into a dollar value. There are different fuel tax credits for different eligible activities, so a business needs to calculate the quantity of fuel used for each eligible activity for each type of eligible fuel where the rates are different.

A primary producer can claim an EGCS grant for eligible fuel purchased for use in an eligible agricultural activity including cultivating crops, rearing livestock, viticulture, horticulture, pasturage or apiculture, transporting livestock other than on a public road, hunting and trapping and removing waste from an agricultural activity.

If carried out on an agriculture property, additional activities including drilling bores, building or maintaining fire breaks, pumping and supplying water, fencing, frost abatement, controlling weeds, pests or disease, building or maintaining improvements, constructing earthworks, milking, shearing, breeding working animals or bailing hay are also 'eligible activities'. Ineligible activities include distributing, manufacturing or marketing produce and transporting livestock on public roads (although this may be 'eligible' under the road transport activity).

Similarly there are eligibility guidelines for EGCS credits for commercial fishing and forestry.

So long as the primary producer has purchased eligible fuel and used it in an eligible activity, the remaining requirements are that:

- (a) the vehicle be used for travelling on a public road;
- (b) the eligible fuel must be used in registered vehicles weighing over 20 tonnes GVM operating in all areas; or
- (c) in registered vehicles weighing between four and a half and 20 tonnes GVM when operating outside of or across defined metropolitan boundaries.

Claims for an EGCS fuel grant for alternative fuels and a fuel tax credit for other fuels need to be lodged in separate forms.

Under the EGCS, a fuel grant claim can be lodged when the eligible fuel is purchased and can be claimed for fuel purchased up to three years before the day of receipt of the claim. If the fuel is not used for an eligible activity then the ATO must be advised within 90 days.

Special rules also apply where alternative fuels are blended (the ATO provides formulas for combined fuel tax credits and EGCS entitlements).

As EGCS claims are self-assessed, sufficient records to substantiate claims must be retained for up to eight years in case of ATO audit. False, erroneous or unsubstantiated claims may render the fuel tax credit claimant liable for a penalty. General interest charges may also apply to over-claimed fuel tax credit amounts. EGCS fuel grants and fuel tax credits are both assessable income for income tax purposes.

The ATO has released several rulings relating to EGCS fuel grants, and primary producers should remain vigilant regarding the effects of these and future rulings.

An EGCS fuel grant may not be available if the primary producer takes any action where approval is required under the *Environment Protection and Biodiversity Conservation Act 1999* and such approval has not been obtained.

## (2) State fuel subsidy

Under the *Fuel Subsidy Act 1997*, it is made clear that only one subsidy is payable whether under this Act or a corresponding law of another State. Of relevance to primary producers, subsidies are payable to licensed bulk end users. Bulk end users purchase fuel at the unsubsidised price and claim the subsidy directly from the Office of State Revenue for the fuel used either by way of provisional subsidy payments or accrued subsidy payments in arrears. Licensed bulk end users must keep specified records in relation to the subsidy scheme.

Where a primary producer purchases diesel fuel in a retail quantity from a licensed retailer for an off-road purpose; the producer must advise the retailer of this and the quantity that is to be used for off-road purposes; as there is an obligation to repay the amount of any subsidy for fuel used for that purpose.

The *Petroleum Products Subsidy Act 1965* previously subsidised the distribution of certain petroleum products in certain country areas. As part of the national fuel tax rebates scheme, this Act ceased to operate as of 1 July 2007. Transitional provisions apply until expiry of the Act on 1 July 2009.

## 12 Defective machinery

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### 12.1 Introduction

Recourse for defective or deficient machinery or services may potentially be available due to either:

- (1) the terms of the sale contract; or
- (2) the machinery or services failing to comply with pre-purchase representations by the seller or others.

From a purchaser's point of view, a remedy for defective machinery or services is more likely to be available if the purchase is made on the basis of clear written specification of:

- (1) the purpose for which the machinery or services are required;
- (2) the quality and performance capabilities the machinery or services will have;
- (3) the availability of facilities for repair and spare parts;
- (4) any other matters of importance to the purchaser.

Ideally such specifications should be incorporated into written contractual terms. It may be possible to rely upon written or spoken pre-purchase communications or upon spoken contractual terms to obtain recourse for defective or deficient machinery but this introduces significant uncertainty.

The following information is provided on the assumption that the machinery or services were purchased for a business purpose and from a corporate seller, which would usually be the case for a primary producer. The position may be different for household purchases, or purchases from a non-corporate seller.

### 12.2 Contractual remedies

The starting point for obtaining recourse for defective or deficient machinery or services is the terms of the contract under which they were purchased. If the machinery or services are not in accordance with the contract, the seller must generally remedy the defect or deficiency (or pay the cost of doing so). The seller may also be liable to pay for other losses arising.

A sales/service contract may contain explicit terms concerning quality and performance. However, many sales/service contracts contain no such terms, or contain terms limiting or excluding liability for lack of quality or performance. A purchaser's contractual remedies are then limited to such warranties as are imposed into the contract by statute.

### 12.3 Statutorily implied contractual remedies – purchases for less than \$40,000

Where the purchase price for machinery and services is less than a statutory limit (presently \$40,000 exclusive of GST), statute (*Trade Practices Act 1974* ("TPA")) compulsorily imposes into the sale contract various useful warranties, regardless of the agreed contractual terms. However, sellers of machinery and services can limit their liability under such warranties to the cost of repair or replacement of machinery or the cost of supplying the services again. In particular:

#### (1) Fitness for purpose (TPA s71(2))

Where machinery is supplied and the purchaser makes known to the seller any particular purpose for which it is being acquired, there will generally be an implied condition that the machinery is reasonably fit for that purpose. Similarly, services (except insurance and transport services) and materials supplied in connection with those services must generally be fit for the stated purpose.

#### (2) Merchantable quality (TPA s71(1))

Machinery or services supplied must be of merchantable quality except as to defects specifically drawn to the purchaser's attention or where the purchaser examines the goods and should have seen such defects.

#### (3) Sale by description (TPA s70)

Where machinery is purchased by description, the machinery must conform to the description.

#### (4) Reasonable care and skill (TPA s74)

There is an implied condition that services (except insurance and transport services) must be supplied with reasonable care and skill.

### 12.4 Statutorily implied contractual remedies – purchases for more than \$40,000

Above the relevant statutory limit (presently \$40,000 exclusive of GST) there is no compulsory statutory protection of purchasers of machinery or services. Non compulsory warranties (similar to as above) are statutorily implied into contracts for the purchase of machinery but such warranties can be, and usually are, excluded by specific terms of the sale contract (see *Sale of Goods Act* ss16-18).

There are no implied warranties in relation to the provision of services for a sale price above \$40,000 ex GST.

Consequently, the terms of the sales contract are crucial when purchasing machinery or services for more than \$40,000.

## 12.5 Misleading and deceptive conduct

If a company, in trade or commerce, engages in conduct that is misleading and deceptive or likely to mislead or deceive, anyone who suffers loss and damage in reliance upon that conduct may be able to claim their loss and damage from the company (*Trade Practices Act 1974* s52).

This can provide a purchaser with a remedy if the seller or other party has, prior to purchase, made statements about the standard, characteristics, reliability, through-put, etc of machinery or services, even where the misleading and deceptive conduct was unintentional.



