legal guide for

primary producers

public information

Queensland Law Society

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■ THYNNE & MACARTNEY
MEMBER OF THE KENNEDY STRANG LEGAL GROUP

Thynne & Macartney is very pleased to have been asked to author this updated resource for Queensland farmers and graziers, the firm's Agribusiness team having prepared previous editions in 1990, 2001 and 2007.

Established in 1893, Thynne & Macartney has one of Australia's leading practices in agribusiness and acts for a broad range of rural clients including some of Australia's largest public and private grazing enterprises.

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 firm is particularly proud of its relationships with successive generations of rural families.

The guide has been prepared to assist primary producers and generally reflects the law as at 30 June 2012. 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.

Bill Loughnan
Chair of Partners

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Legal guide for primary producers

Agriculture is the bedrock on which our state was founded while more recently our resource-rich state has seen mining activity develop into one of the core elements of Queensland's economy. A careful balance needs to be struck between the two.

Although we have been suffering from the effects of a high Australian dollar, reducing demands for our exports overall, we have benefited from two La Nina seasons that have provided us with better production rates than those in the northern hemisphere (currently suffering drought conditions) with resulting improved prices for these commodities.

As a primary producer, you are an important contributor to an industry which will be worth $15.12 billion in 2012-13, according to government forecasts. Despite some lag in economic recovery from the global financial crisis for OECD countries, this year's total value of Queensland's primary industry commodities is expected to be 9% higher than the average for the last five years.

For those working with the mining industry, in late 2012 the State Government reported continuing strong private capital investment in the sector. Queensland also has steady export results, with farm export earnings in 2012-13 expected to be around 24% higher than the five-year average to 2010-11.

This *Legal guide for primary producers* provides valuable legal information across a number of production sectors about the legal issues specific to regional and rural communities. It is an important publication that supports the legal rights and duties of those essential to our economy and identity as Queenslanders – the enterprises and people who work with, and make the most of, the land.

As laws change constantly it is important that you obtain legal advice on your specific issues from a solicitor.

If you are picking this up as a hard copy, you can access online versions on the following websites: Law Foundation – Queensland (qlf.com.au) and Queensland Law Society (qls.com.au). On the Society's site you can also find the right solicitor for you based on their area of law and location.

I thank Law Foundation – Queensland for producing this practical guide and Thynne Macartney for its valuable help in its preparation.

Annette Bradfield

President – Queensland Law Society

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1. Land

1.1 Land Tenure

There are basically two distinct types of land tenure in Queensland: estates in fee simple (freehold) and State leasehold. The principal distinctions between these two types of land tenures can be summarised as follows:

a. Freehold

Freehold land in Queensland can either be unrestricted or restricted.

Restricted freehold is former leasehold land which is subject to section 174 of the *Land Act 1994*. 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 and State Government policy limits the area of this type of land that can be held by foreign companies or by 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.

b. State leasehold

The position in relation to State leasehold land which covers in excess of 70% of the Queensland land mass is 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 to natural persons. These tenures may be converted to freehold tenure upon payment being made to the Queensland Government of the unimproved value of the land.

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 Mines.

While some leasehold tenures are perpetual and therefore do not expire, the majority are granted for a fixed term of years and are described as “term leases”. They account for about 50% of Queensland’s land mass.

Landholders can apply to renew a term lease after 80% of the current term has elapsed (or in special circumstances). The laws concerning renewals

of term leases were changed as a result of the Rural Leasehold Land Strategy, which was labelled the "Delbessie Agreement" by the former Queensland Government and signed at "Delbessie Station", Hughenden, on 2 December 2007. Under the Strategy, the standard term of a renewed rural lease continues to be 30 years or less. However, a lease may be issued for up to 40 years if the Minister for Natural Resources and Mines believes the land is in good condition or 50 years if the Minister considers the land is in good condition and, if appropriate, the landholder has entered into a conservation agreement and an Indigenous access and use agreement. Renewed leases may be offered subject to a reservation that part of the leased land is a future conservation area. Landholders are obliged to manage future conservation areas with particular care. When the term of the renewed lease expires, a further lease will not be offered for the conservation area.

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* with the prior consent of the Minister for Natural Resources and Mines.

1.2 Leases, Subleases and Agistment Arrangements

Leases, subleases and agistment agreements are all 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 Mines.

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

With the introduction of the *Personal Property Securities Act* (Cth) in 2012, it is important for stock owners to have particular wording included in longer term agistment agreements (over 12 months) so that they can register what is known as a "security interest" in respect of the livestock they are agisting on someone else's property on a public register. The failure to do so may result in the property owners' financier claiming title to the livestock in certain circumstances.

1.3 Sharefarming Arrangements

Sharefarming agreements give rise to contractual rights and obligations which are binding on both the landowner and the sharefarmer, and for the sake of certainty, it is important that these rights and obligations be contained in a written agreement signed by the parties.

The profit-sharing entitlements of the parties vary under these types of arrangements, but they are generally consistent within a particular geographical locality. Unlike leases and subleases of land, sharefarming agreements cannot be registered on the title to a property, so care needs to be taken in the drafting

of a sharefarming agreement in order to ensure that the agreed arrangements survive a change in ownership or transfer of the property.

Further, in certain circumstances it will be necessary for sharefarmers who keep equipment on a landowner's property to register their ownership of that equipment on the Personal Property Securities Register in order to avoid losing title to the equipment if the landowner becomes insolvent, enters into liquidation or unlawfully sells the equipment to someone else.

1.4 Development and Reconfiguration

a. Introduction

The development and subdivision (reconfiguration) of land is governed by the *Sustainable Planning Act 2009*. The Act provides a framework for managing planning instruments and development throughout Queensland that aims to achieve ecological sustainability. Local governments are required to prepare local planning instruments (also called town plans or planning schemes) in accordance with the Act.

b. Development and reconfiguration

The Act provides for a system of development assessment called the Integrated Development Assessment System (IDAS). The system has five stages: the application stage, information and referral stage, notification stage, decision stage and compliance stage. Simple applications will only trigger the application, decision and compliance 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 such as project planning, construction or the ongoing life of the development. Failure to comply will mean that the development is unlawful.

Assessable development can be 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.

c. ***Land Sales Act***

The *Land Sales Act 1984* contains restrictions on the selling of land before a separate certificate of title exists 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:

i. complying with the pre-contract disclosure requirements of the Act, provided that the relevant local authority approvals have been obtained; or

ii. seeking an exemption from the provisions of the *Land Sales Act* where it is proposed to:

   A. reconfigure land into five or less lots; or

   B. sell six or more lots to one purchaser.

d. **State leasehold land**

The reconfiguration of State leasehold land also requires the consent of the Minister. The Queensland Government's current policy discourages the subdivision of rural leasehold land except to facilitate surrender, area build-up or the rearrangement of adjoining lots.

1.5 Dividing Fences

a. **New fences**

The law in relation to the maintenance, construction and repair of dividing fences is contained in the *Neighbourhood Disputes Resolution Act 2011* (Qld).

The general rule laid down by the *Neighbourhood Disputes Resolution Act 2011* 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 on the common boundary of adjoining properties. 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 a description of the land on which the fencing work is proposed to be carried out, the line on which it is proposed to construct or replace the fence, the type of fencing work proposed to be carried out and the estimated cost of the fencing work to be carried out including the cost of labour and materials. The notice must also be accompanied by a copy of at least one written quotation stating the estimated cost of the fencing work to be carried out. 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 referred by either landowner to the Queensland Civil and Administrative Tribunal (QCAT) if the total cost of the fencing proposed to be carried out is less than $25,000 or the Magistrates Court if the cost is greater. Orders can be made about the kind of fence to be constructed,

the line on which it is to be constructed, the amount to be paid by each neighbour towards the cost of the fence and the time by which the fencing work is to be carried out.

There is no definition of a "standard fence" in the Act. Any order 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 agricultural 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 an 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 landholder wishes to demolish an old fence and replace it with a new one.

b. Repairs

Unlike the position under the now repealed *Dividing Fences Act 1953*, the procedure involved in compelling an adjoining landowner to contribute to the cost of repairing an existing boundary fence mirrors that which applies to the construction of a new or replacement boundary fence.

c. Leasehold land tenures

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 also provisions in the *Land Act* dealing with specific types of fences to be constructed or maintained on State leasehold tenure.

d. State land, roads and stock routes

Neither the Queensland Government nor any authority having the administration, management or control of unallocated State land, roads or stock routes can be required to contribute towards the costs of construction or repair of a dividing fence under the Act.

However, if State land is leased to a third party, the lessee is liable to contribute to the cost of a dividing fence.

e. Other general principles

The Act does not affect the common law under which a dividing fence separating adjoining land is, to the extent the dividing fence is on the common boundary, equally owned by the adjoining landholders.

If a dividing fence is damaged or destroyed by the negligence of an owner of land or by someone who has entered the owner's land with the express consent of the owner, then that owner must restore the dividing fence to a reasonable standard at its sole cost and expense.

Any agreement reached by adjoining landowners which results in a fence being constructed or repaired on a line that is other than on the common

boundary between adjoining lands does not affect the title to, or possession of, any part of the land.

In circumstances where urgent fencing work is required to be carried out to a dividing fence between adjoining parcels of land and it is impractical to give a contribution notice to the adjoining owner, the Act does contain a dispensation from the giving of the usual contribution notice.

If it is necessary to apply for an order compelling the adjoining owner to contribute to the cost of constructing, replacing or repairing a dividing fence between adjoining properties, neither party to the proceedings can be legally represented at a hearing in QCAT (although may be in a hearing in the Magistrates Court). However, a party may be represented by a real estate agent.

1.6 Trespass

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 grievous 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 site value of the land for non-rural land and the unimproved value of land for rural land as determined by the Valuer-General under the *Land Valuation Act 2010* (Qld).

The "site 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. The site value excludes the value of improvements such as buildings and structures but includes the values of improvements such as clearing, levelling, drainage and other works to prepare the land for development.

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, structures and fences), invisible (weed / pest control or other treatments) or intangible (leases or licences) and will include any improvements made by previous owners.

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 re-valued 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 60 days of the new valuation being given to the owner. The Valuer-General has a discretion to extend the 60-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. The objection must be “properly made” which includes being on the prescribed form, including the prescribed fee, setting out the grounds for the objection, providing supporting evidence and stating the new valuation being sought.

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 60 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 for rural land and the site value for non-rural 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 or site 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 or site 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 taxable 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 taxable land values, see chapter 1.7 *Rates*.

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

a. A statutory deduction of $600,000 for individuals

The total taxable 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.

b. A statutory deduction of $350,000 for companies, trustees and absentees

The total taxable value of land owned by a company, trustee or absentee (that is, 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.

c. Lands used for primary production

A deduction to the 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.

d. 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 60 days of the date of receipt 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 Mines (see chapter 1.7 *Rates* in regard

to the objection process for unimproved or site 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 60 days with the Supreme Court or QCAT.

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

a. *Foreign Ownership of Land Register Act*

i. 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 Mines of their interest in land in Queensland. The notification is registered at the same time as the foreign person acquires its interest in the land. This information is then noted on the publicly available Foreign Ownership of Land Register.

A "foreign person" is defined as:

- a natural person who is not a citizen and not ordinarily resident in Australia;
- a foreign company; or
- a company in which non-residents or foreign companies hold a controlling interest.

A trustee of a foreign trust estate which meets certain income and capital tests set out in the Act must also register its interest in land.

An "interest in land" includes freehold or leasehold land and licences and permits granted under the *Land Act 1994* (Qld) or *Harbours Act 1955* (Qld).

ii. 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:

- falsely declaring not to be a foreign person;
- failing to declare an existing interest; or
- 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:

- where there are registered security interests, authorise the mortgagee to arrange a sale within six months by public auction; or
- 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.

b. *Foreign Acquisitions and Takeovers Act*

i. Policy

The *Foreign Acquisitions and Takeovers Act 1975* (Cth) regulates the acquisition of Australian assets by foreign persons.

The Act provides that certain proposals to acquire Australian assets must be submitted to and approved by the Foreign Investment Review Board (FIRB). FIRB may make an order prohibiting the proposed acquisition where the acquisition is determined to be contrary to the national interest. Proposals are considered on a case by case basis by having regard to community concerns rather than "hard and fast" rules.

Those proposals within the scope of the Act which are not notified to FIRB and are subsequently found to be contrary to the national interest may be forcibly divested.

A foreign person is defined to include:

- a natural person not ordinarily resident in Australia;
- a company in which non-residents or foreign companies hold a controlling interest; and
- the trustee of a trust estate in which non-residents or foreign companies hold a substantial interest.

ii. Foreign Investment Review Board

FIRB is an advisory body formed to:

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

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

iii. Proposals to be submitted

The proposals that must be submitted to FIRB include the acquisition of residential land, vacant non-residential land and shares or units in Australian urban land (that is, non-rural) corporations or trusts. Acquisitions of rural hobby farms and rural residential blocks are considered to be residential land for the purposes of the Act and must be submitted to FIRB for approval.

All other proposals must be submitted to FIRB where the target is valued at or above the applicable monetary thresholds. The applicable thresholds start at $244 million for US investors and $5 million for non-US investors depending upon the type of the proposed acquisition.

Acquisitions excluded from the Act include:

- any new business proposals by foreign persons (other than foreign governments); and
- acquisition of an ownership interest in an Australia business by an individual foreign person which is less than 15% or an ownership interest in an Australia business by several foreign persons which collectively is less than 40%.

iv. Penalties

The Act provides for monetary penalties or imprisonment.

In addition, orders may be made to:

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

1.10 Native Title and 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 is; 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, for example, lessees.

Native title will not affect all primary producers. The High Court's decision in *Wik Peoples v The State of Queensland* 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 (for example, grazing homestead perpetual leases and grazing homestead freeholding leases) 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.

b. Cultural heritage

The *Aboriginal Cultural Heritage Act* (Qld) protects areas and objects of significance to Aboriginal people and areas where there is culturally, historically, or archaeologically significant evidence of occupation. An area can have cultural heritage significance even if it contains no markings or other physical evidence indicating Aboriginal occupation or significance.

The Act establishes a duty of care for activities that may harm Aboriginal cultural heritage. This duty requires those conducting activities to take all reasonable and practical measures to avoid harming cultural heritage. The Department of Natural Resources and Mines 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 $1,000,000 and for an individual $100,000. Stop work orders can also be imposed.

The Australian Government, at the request of an Aboriginal or Torres Strait Islander person, can make declarations to protect significant Aboriginal areas and objects from threats of injury or desecration under the *Aboriginal and Torres Strait Islander Heritage Protection Act* (Cth) if it appears that state laws have not provided effective protection.

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.

a. 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*.

b. 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.

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.

c. How land is taken

i. 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.

ii. 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 Mines, which administers the Land Title Register. It notes the title 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.

d. Compensation claims

i. 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.

ii. 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.

e. Appeals

i. 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.

ii. 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 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. Mining and Gas

2.1 Ownership of Resources

a. Ownership of gold

Historically gold has been considered "the prerogative of the sovereign" and any gold found either on or below the surface of land was deemed to be the property of the Crown.

The *Mineral Resource Act 1989* (MRA) reflects this position and provides that gold on or below the surface of the land is the property of the State.

b. Ownership of coal, minerals, petroleum and uranium

The position at common law is that a landholder has ownership of minerals and other resources found on or below the surface of land unless the State reserved the right of ownership of these resources when the title to the land was granted or statute provides otherwise.

i. Coal

The *MRA* provides that coal on or below the surface of the land is the property of the State **except** where the land was granted in fee simple before 1 March 1910 and the grant didn't contain a reservation of property in the coal to the State.

It is rare to discover that the title to coal was not reserved by the State when title to the land was first granted.

ii. Minerals and coal seam gas

The MRA provides that all **minerals** on or below the surface of the land are the property of the Crown except **minerals** on or below the surface of land granted in fee simple under:

A. section 22 of the *Alienation of Crown Lands Act 1860*;

B. section 32 of the *Crown Lands Alienation Act 1868*; or

C. section 21 of the *Mineral Lands Act 1872*.

The term "minerals" is defined in the MRA widely to include a substance normally occurring naturally as part of the earth's crust, dissolved or suspended in water on or within the earth's crust or that may be extracted from a substance of the earth's crust and includes copper, lead, silver, zinc, bauxite, phosphate rock, magnesite, clay, foundry sand, coal seam gas, limestone, marble, products of underground gasification processes, peat, salt, oil shale, silica and block-mined rock for building or monumental purposes.

However certain materials which could be considered minerals under the definition (such as soil, sand, gravel, rock, living matter and steam or water) are excluded from the definition of "minerals" as ownership of these items are dealt with under laws which generally also reserve ownership in them to the State.

In order to ascertain whether or not the landholder has title to minerals on or below the surface of the land it is necessary to ascertain when title to the land was first granted and again it is rare to discover that the landholder has a right of ownership of the minerals.

iii. Petroleum

The *Petroleum and Gas (Production and Safety) Act 2004* provides that all petroleum on or in a natural underground reservoir is, and always has been, the property of the State.

The term "petroleum" is defined to include a substance consisting of hydrocarbons that occur naturally in the earth's crust or a gas that occurs naturally in the earth's crust and includes oil shale petroleum, methane, natural gas and coal seam gas.

Interestingly, coal seam gas is also defined to be a "mineral" under the MRA.

iv. Uranium

Section 35 of the *Atomic Energy Act* provides that the Commonwealth has ownership of uranium and other radioactive substances.

2.2 Protected Land

a. Strategic cropping land

New laws to protect strategic cropping land (SCL) generally apply to developments proposed since 30 January 2012 and potentially restrict not only mining and related infrastructure development but most types of development that could lead to the permanent alienation or diminished productivity of SCL.

Whether land is SCL is assessed using criteria concerning slope, rockiness, gilgai micro-relief, soil depth, soil wetness, soil pH, salinity and soil water storage. Trigger maps showing areas where SCL might exist can be obtained from the website of the Department of Natural Resources and Mines. Even if land is mapped as potential SCL on the trigger maps, the SCL protections will only apply if the relevant development proponent accepts the accuracy of the trigger maps or the department decides based on an on-ground assessment that the land is in fact SCL.

Development on SCL may still be approved depending on whether it is within either a “protection area” or “management area”, and depending on the nature and duration of the impacts of the development.

Most exploration activities (both mining and gas), underground pipelines and the development of coal seam gas wells can proceed on SCL subject to compliance with a “standard conditions code” on the basis that they will have only a temporary impact and pose a relatively low risk of adversely impacting on SCL.

Other projects and developments on SCL land that is either in a “protection area” or in a “management area” and has a history of cropping must be assessed. In “management areas” conditions will be imposed on projects likely to have impacts on SCL to avoid or minimise those impacts. In a “protection area”, projects that are assessed to have permanent impacts on SCL (which include activities that would prevent the land from being cropped for at least 50 years, open-cut mines and hazardous mine waste storages such as tailings dams) will be permitted only in exceptional circumstances.

There are two protection areas in Queensland: one in central Queensland taking in the areas around and between Emerald and Rolleston and the other in southern Queensland covering the areas around Chinchilla, Kingaroy, Dalby, Toowoomba, Warwick, Boonah and Stanthorpe.

The Queensland Government is currently reviewing the SCL laws in response to criticism that developments on protected land that are complimentary to agriculture, such as piggeries and poultry farms, have been unnecessarily restricted while similar developments such as feedlots are already exempt from the SCL laws.

b. Restricted land for mining tenements

Restricted land includes land:

i. within 100 metres laterally of a permanent building used mainly as accommodation or for business purposes; or

ii. within 50 metres laterally of a principal stockyard, a bore or artesian well, a dam or another artificial water storage connected to a water supply.

Generally, restricted land cannot be included in any mining lease, mining claim or mineral development licence without the consent of the landholder. Also, an exploration permit for coal or minerals does not authorise entry onto restricted land without the landholder’s consent.

Unless the land in question is restricted land, a landowner cannot prevent the grant of a mining lease, lease, mining claim or mineral development licence and cannot prevent exploration under an exploration permit for coal or minerals merely by withholding consent.

2.3 Exploration

a. Mining exploration tenements

Under the Queensland *Mineral Resources Act*, the following five types of exploration tenements can affect rural land and in fact cover most parts of Queensland:

i. 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.

ii. 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.

iii. Exploration permit

An Exploration Permit will either be expressly for coal, or for minerals other than coal. Exploration permits generally allow holders to access the land to determine the existence and quality in or under land by methods which include prospecting, geophysical surveys, drilling, and sampling and testing materials to determine mineral bearing capacity or properties of mineralisation. 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%, with a further 50% 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.

iv. 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. Certain mineral development licences will permit the tenement holder to extract significant volumes (possibly hundreds of thousands of tonnes) of the targeted resource to determine its quality and marketability in a practice that is known as "bulk sampling". The maximum initial term of a licence is five years.

b. Petroleum exploration tenements

The following tenements that authorise exploration may be granted under the Queensland *Petroleum and Gas (Production and Safety) Act*:

i. Authority to prospect

The holder is entitled to explore for petroleum within the area of the authority, evaluate the feasibility of petroleum production, and evaluate or test natural underground reservoirs for petroleum storage. Authorities to Prospect are generally granted for an initial term of four years but may be renewed.

ii. Petroleum lease

The holder is entitled to explore for all naturally occurring petroleum from the land subject to the lease. A petroleum lease cannot exceed 260 square kilometres in area. A petroleum lease also authorises production (discussed in chapter 2.4 *Production*).

c. Land access for exploration activities

An exploration tenement holder is not required to reach agreement with an affected landholder before carrying out "preliminary" exploration activities on private land. "Preliminary" activities are those authorised activities that will have no impact or only a minor impact on the land or business activities of the landholder. The tenement holder is however generally required to give an entry notice at least 10 business days before entering private land and is liable for any "compensatable effect" actually caused (discussed below under the heading Compensation).

Generally, if an exploration tenement holder wishes to conduct "advanced" activities (being activities other than "preliminary" activities), it must first approach the landholder to attempt to negotiate a conduct and compensation agreement for the proposed activities (or a Deferral Agreement that defers the negotiation of such an agreement to a later time). There are exceptions for entry necessary to preserve life or property or because of an emergency.

Tenement holders can issue negotiation notices compelling landholders to use all reasonable endeavours to negotiate a conduct and compensation agreement (or a deferral agreement). A negotiation notice must be accompanied by, among

other things, a copy of the Land Access Code (discussed below under the heading Conduct Rules) and details of the proposed activities, including when and where the activities are proposed to be carried out.

If an agreement is not reached within the minimum negotiation period (usually 20 business days), either the resource company or the landholder can call for a government-supervised conference or an alternative dispute resolution process (ADR). Although the costs of the conference or ADR must be paid by the party who calls for it, a party who does not attend can be ordered to pay the other party's costs.

Tenement holders regularly propose a "Standard Conduct and Compensation Agreement" or "Standard Deferral Agreement" in the forms published by the Queensland Government in 2010. The "standard" agreements do not adequately protect landholders' rights. Despite the statutory negotiation process, landholders should not feel pressured to sign an agreement before the minimum negotiation period expires and should instead seek legal advice at the earliest opportunity.

Tenement holders are generally obliged to pay the reasonable costs of landholders' legal advice.

d. Compensation

Where land is affected by one of the most common mining or petroleum tenements, the landholder (including the owner and any registered lessee) is generally entitled to compensation for the following "compensatable effects" caused by authorised exploration activities as they relate to the landholder's land:

- deprivation of possession of its surface;
- diminution of its value;
- diminution of the use made, or that may be made, of the land or improvements;
- severance of any part of the land from other parts or other land of the landholder;
- any cost, damage or loss arising from the carrying out of activities under the tenement on the land; and
- in certain circumstances, other costs and damages including accounting, legal and valuation costs.

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

e. Conduct rules

The Land Access Code published by the Queensland Government in November 2010 prescribes certain mandatory conditions concerning the conduct of authorised resource activities on private land and also states non-binding "guidelines for communication between the holders of authorities and owners and occupiers of private land".

The holder of each exploration permit and mineral development licence issued under the *Mineral Resources Act* and each petroleum authority holder must comply with the applicable mandatory provisions of the Land Access Code. In addition, a person who carries out an authorised activity for a mining tenement or petroleum authority must carry out the activity in a way that does not unreasonably interfere with anyone else carrying out a lawful activity.

It is common and beneficial for landholders to seek to supplement the Land Access Code by negotiating additional requirements as part of a conduct and compensation agreement. For instance, those additional requirements might address the landholder's property-specific concerns and the general inadequacy of the Land Access Code in respect of the tenement holder's use of access tracks, construction of fences, grids and gates, use of waters and control of pollutants.

Again, landholders should always seek independent legal advice before signing a conduct and compensation agreement and will usually be able to recover their reasonable legal costs from the tenement holder.

The mandatory provisions of the Land Access Code prevail over any inconsistent provision of a conduct and compensation agreement.

2.4 Production

a. Coal and minerals

The most common tenure for coal and mineral production in Queensland is the mining lease, which generally authorises the holder to enter occupied land to machine-mine specified minerals and carry out activities associated with mining or promoting mining. A mining lease might in addition or instead authorise infrastructure that supports mining such as access roads and powerline and water pipeline corridors.

b. Petroleum

The holder of a petroleum lease granted under the Queensland *Petroleum and Gas (Production and Safety) Act* is entitled to produce all naturally occurring petroleum from the land subject to the lease. A petroleum lease cannot exceed 260 square kilometres in area.

c. Land access procedures for production activities

i. Coal and minerals

A mining claim or mining lease cannot be granted or renewed unless compensation has been determined (by agreement or by determination of the Land Court) between the applicant and each person who is the owner of land the subject of the application and of any surface access to that land and the conditions of the agreement or determination have been or are being complied with by the applicant.

At any time before a compensation agreement is made, either the applicant or the landholder can apply to the mining registrar to have the Land Court

determine the amount of compensation and the terms, conditions and times of payment of that compensation.

If the parties have not reached a compensation agreement or the question of the amount of compensation has not been referred to the Land Court for determination, the mining registrar must refer the question of compensation to the Land Court for determination:

- for new mining claims or mining leases, if no objection is lodged, three months after the last date an objection to the application could be lodged or three months after the date the Land Court instructs the mining registrar to grant the mining claim or recommends the grant of the mining lease; or
- for renewals of mining claims or mining leases, three months after the current term of the claim or lease is due to expire.

ii. Petroleum

Activities connected with petroleum production will generally fall within the definition of "advanced" activities under the *Petroleum and Gas (Production and Safety) Act* and therefore the negotiation regime in respect of "advanced" activities for exploration (discussed above in chapter 2.3 Exploration) will also apply in the context of production.

That is, if a petroleum tenement holder wishes to conduct "advanced" activities, it must first approach the landholder to attempt to negotiate a conduct and compensation agreement for the proposed activities (or a deferral agreement).

Tenement holders can issue negotiation notices compelling landholders to use all reasonable endeavours to negotiate a conduct and compensation agreement (or a deferral agreement). A negotiation notice must be accompanied by, among other things, a copy of the Land Access Code (discussed above under the heading Conduct Rules) and details of the proposed activities, including when and where the activities are proposed to be carried out.

If an agreement is not reached within the minimum negotiation period (usually 20 business days), either the resource company or the landholder can call for a government-supervised conference or an alternative dispute resolution process (ADR). Although the costs of the conference or ADR must be paid by the party who calls for it, a party who does not attend can be ordered to pay the other party's costs.

Tenement holders regularly propose a "Standard Conduct and Compensation Agreement" or "Standard Deferral Agreement" in the forms published by the Queensland Government in 2010. The "standard" agreements do not adequately protect landholder's rights. Despite the statutory negotiation process, landholders should not feel pressured to sign an agreement before the minimum negotiation period expires and should instead seek legal advice at the earliest opportunity.

Tenement holders are generally obliged to pay the reasonable costs of landholders' legal advice.

d. Compensation

Where land is affected by one of the most common mining or petroleum tenements, the landholder (including the owner and any registered lessee) is generally entitled to compensation for the following “compensatable effects” as they relate to the landholder’s land:

- deprivation of possession of its surface;
- diminution of its value;
- diminution of the use made, or that may be made, of the land or improvements;
- severance of any part of the land from other parts or other land of the landholder;
- any cost, damage or loss arising from the carrying out of activities under the tenement on the land; and
- in certain circumstances, other costs and damages including accounting, legal and valuation costs.

If production activities include the construction or use of an access road on a landholder’s property, the landholder is generally entitled to additional compensation for that access.

In addition, for the grant of a mining lease or a mining claim a landholder is entitled to a statutory premium (which, when added to any premium for the status and use currently being made of the land, is equal to at least 10% of the amount otherwise payable) to reflect the compulsory nature of grant of the tenement.

An owner of land the subject of a mining lease where no part of the surface area of that land is included in the lease (that is, a lease for underground mining) is entitled to compensation for:

- diminution of the value of the land of the owner or any improvements thereon;
- diminution of the use made or which may be made of the land of the owner or any improvements thereon;
- all loss or expense that arises;

as a consequence of the grant or renewal of the mining lease.

2.5 Related Infrastructure

The development of mines and gas fields will often require the support of related infrastructure such as railways to transport the mined materials or pipelines to transport gas to facilities for further processing or export.

a. Petroleum legislation

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

i. Water monitoring authority

   The holder of an Authority to Prospect or a Petroleum Lease under the *Petroleum and Gas (Production and Safety) Act* can apply for a water monitoring authority to enable it to access land outside of the area of the Authority to Prospect or Petroleum Lease and monitor water resources to ensure that it complies with its obligation to "make good" any damage which might occur as a result of work carried out under the Authority to Prospect or Petroleum Lease (that is, to examine water bores or springs which could be affected by drilling or production work).

ii. Petroleum survey licence

   The holder is entitled to access private land to investigate, survey and identify a route for a pipeline or the location of a petroleum facility subject to providing notice to the landholder.

   The holder cannot carry out "invasive" activities such as excavating or clearing land, or constructing any structures, nor can it dispose of or store poisonous, toxic or hazardous substances on the land.

iii. Petroleum pipeline licence

   The holder is entitled to construct and operate a pipeline to convey petroleum from the areas of a Petroleum Lease where the licence area is outside of the area covered by a Petroleum Lease.

iv. Petroleum facility licence

   The holder is entitled to construct and operate a petroleum facility such as a storage depot, meter station, processing plant, refinery, LNG separation plant or significant transport facility on an area outside of the area covered by a Petroleum Lease.

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

b. Compensation

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* (see chapter 1.11 *Compulsory Acquisition*).

Where an easement is negotiated between a resource company and the landholder, compensation will usually be assessed in accordance with the "fair value" principles of the *Acquisition of Land Act* given that the resource company might otherwise be able to convince the Queensland Government to compulsorily acquire the easement in which case these principles would apply.

Where land is affected by a petroleum pipeline licence or petroleum facility licence and it is not the subject of an easement and activities are carried out which involve invasive disturbance to the land, the landholder is generally entitled to compensation for the following effects caused by the authorised activities:

- deprivation of possession of its surface;
- diminution of its value;
- diminution of the use made, or that may be made, of the land or improvements;
- severance of any part of the land from other parts or other land of the landholder;
- any cost, damage or loss arising from the carrying out of activities under the tenement on the land; and
- in certain circumstances, other costs and damages including accounting, legal and valuation costs.

A landholder's compensation entitlements are usually the subject of a compensation agreement negotiated with the holder of the petroleum pipeline licence or petroleum facility licence. 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 petroleum pipeline licence or petroleum facility licence 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.

2.6 Unexpected Consequences

a. Contractual rights

At the time a landholder and a resource tenement holder enter into an agreement under which compensation is paid, the resource company's activities will usually not have commenced. As a result, the effects of those activities need to be estimated to a large extent to inform negotiations about the landholder's compensation entitlements.

Many compensation agreements proposed by resource tenement holders will provide for the landholder to give up all rights to further compensation in exchange for payment of the agreed amount for the project's expected effects (assuming everything will occur as planned).

Landholders should be wary of that approach. Unexpected consequences of the project not taken into account when assessing the original compensation could include contamination caused by an overflow or leak, death or injury to a person or livestock caused by an accident, contamination or diminution of underground water supplies or simply a greater impact on the landholder's business caused by an intensification of the project over time.

A landholder should consider whether it is appropriate to incorporate into the agreement a mechanism to allow the landholder to make further claims for compensation if the project has unexpected consequences.

One way landholders can be protected against unexpected consequences is through the inclusion of a robust indemnity (that is, a promise to protect from loss) from the resource company in a compensation agreement.

It is also important for landholders to be careful when entering into agreements with resource companies to avoid inadvertently surrendering common law and statutory rights that would otherwise provide some protection against unexpected consequences.

b. Statutory rights for material changes in circumstances

Unless a compensation agreement prevents such a claim, in many circumstances a landholder will be able to apply to the Land Court for a review of the original compensation if there has been a material change in circumstances since original compensation was agreed upon or determined by the Land Court.

i. Statutory rights for detrimental impacts on underground water supplies

Petroleum tenement holders have a statutory obligation under the *Water Act* in certain circumstances to enter into make good agreements with bore owners who can no longer obtain a reasonable supply of water from the bore due to the decline or likely decline in the water level caused by the tenure holder's extraction.

Mining tenement holders who obtain water licences for dewatering of mines are also generally required, as a condition of the water licences, to make good bores that are unduly affected by their dewatering operations.

In each case, there are substantial limitations on the effectiveness of the make good regimes regulated by the Queensland Government. For example, they are generally triggered only once drawdown of a particular magnitude is detected or modelled, they generally apply only to the effects of drawdown and not the contamination of aquifers, tenement holders are not currently required to provide security for the future performance of make-good obligations, the obligations might not apply to all bores used by a landholder, and the regime is dependent upon the Queensland Government's willingness and effectiveness in maintaining and enforcing it over time.

As a result, landholders should consider negotiating more robust commitments from resource companies as part of agreements concerning compensation.

ii. Common law rights

Unless a landholder has surrendered such rights by agreement, the landholder will be able to make claims for further compensation under long-established general legal principles for certain unexpected consequences of a resource project in certain circumstances.

For example, if a landholder can prove that the resource tenure holder owed a duty of care in carrying out a particular activity and breached that duty of care, the landholder will generally be able to bring a claim for the loss caused by the tenement holder's negligence (provided that loss is not too remote). Such claims might be possible in the context of accidents that have cause death or injury to people or livestock or damage to property or leaks or spills that arise from inadequacies in the design or operation of infrastructure and cause contamination to land, waterways or aquifers.

Leaks, spills and other environmental impacts of resource projects might also give rise to a claim for nuisance if a tenement holder's activities substantially and unreasonably interfere with a landholder rights to use of the landholder's property.

3. Water

3.1 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 Mines 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 the department.

a. 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:

i. irrigation;

ii. industrial use;

iii. stock or domestic water on lands that do not adjoin a watercourse, lake or spring; and
iv. 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.

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

c. 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.

3.2 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, leases and amalgamation.

a. **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 cannot be traded.

b. **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.

c. **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.

d. **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.

e. **Other dealings**

Approval from the Department of Natural Resources and Mines is required to subdivide, amalgamate and / or change a water allocation. Applications must be consistent with the Resource Operations Plan (if any). If approval is granted, the department will issue a dealing certificate, which must be registered on the water allocations register before it expires. If the water allocation involves supplemented water, the owner must apply to amend its supply contract with the resource operations licence holder before the owner can register the subdivision, amalgamation and / or change.

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.

i. Change to a water allocation

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

ii. 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.

iii. 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.

3.3 Water Infrastructure

The *Sustainable 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.

a. Watercourses, lakes and springs

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

Certain works do not require a development permit and instead can be self-assessed under the relevant code, including the construction of a pump, spear, well, gallery or gravity diversion to take water for stock or domestic purposes from a watercourse, lake or spring by the owner of the adjoining land.

b. 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 the Department of Natural Resources and Mines of, or obtain a development permit for, works that take actively or passively take overland flow water.

Works that actively take overland water include:

i. pumps, storages, sumps, drains and pipes used to take and store overland flow water;

ii. any storage connected to another storage used to take overland flow water, and the connecting infrastructure; and

iii. structures used to hold overland water flow for ponded pastures.

Works that passively take overland flow water include:

i. levees or diversion banks for directing overland flow into dams; and

ii. levees or diversion banks to slow the movement of overland flow water.

In the regulated areas, the department 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 the department. For example, levee banks that capture overland flow water for irrigation purposes will require approval.

c. Underground water

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

i. all artesian bores, no matter what their use;

ii. 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

iii. 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' licencing arrangements of the *Water Act 2000* require drillers to comply with minimum construction standards for water bore construction. Landholders should only employ licenced bore drillers to construct a bore that meets the minimum technical standard for water bore construction. The department maintains a public register of licenced water bore drillers.

4. The Environment

4.1 Environmental Protection

a. *Environmental Protection Act*

The *Environmental Protection Act 1994* (Qld) 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:

i. requiring certain activities which may lead to contamination to be notified to the Environmental Protection Agency (e.g. spray races and dips);

ii. requiring land which is known (or which ought to be known) to be contaminated to be notified to the agency;

iii. requiring all persons carrying out certain activities to hold environmental authorities for those activities (e.g. cattle feedlotting, poultry farming and pig farming);

iv. requiring notification to be given to the agency of events which cause (or are likely to cause) environmental harm; and

v. 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 *Sustainable Planning Act 2009*. The Act aims to achieve ecological sustainability by managing the process of developments and managing the effects of development on the environment.

b. *Environment Protection and Biodiversity Conservation Act*

The *Environment Protection and Biodiversity Conservation Act 1999* (the EPBC 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.

The Act applies to several matters of national environmental significance, including:

- World Heritage properties;
- National Heritage places;
- wetlands;
- threatened animal and plant species and ecological communities;
- migratory species;
- Commonwealth marine areas;
- Great Barrier Reef Marine Park; and
- 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 Australian Government Minister for Sustainability, Environment, Water, Population and Communities. An action includes a project, development, undertaking, activity or series of activities.

i. 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.

ii. 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 Sustainability, Environment, Water, Population and Communities (SEWPC). The referral process is free and involves completing and submitting a form which can be obtained from SEWPC. 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.

iii. Reform

The Australian Government has responded to an independent review of the EPBC Act and has proposed national reforms for Australia's national environmental law. The Council of Australian Governments set two clear deadlines for the implementation of the reforms – by December 2012 environmental standards were to be developed for assessment and approval by the States and Territories by March 2013.

Some of the key elements of the reform package are:

- a new strategic approach to protecting Australia's environment;
- a more streamlined assessment process;
- new national standards for accrediting environmental assessment and approval processes;
- a new biodiversity policy;
- improving the listing of species for protection;
- identifying and protecting ecosystems of national significance;

- better regulating international trade in wildlife;
- providing more public information;
- more cooperative approach to developing environmental standards;
- better processes for heritage listing; and
- a draft environmental offsets policy.

c. 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 “extinct in the wild”, “endangered”, “vulnerable” or “rare” or “near threatened” 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 Department of Environment and Heritage Protection is responsible for administration of this legislation.

4.2 Vegetation Management

a. Permitted clearing

The *Vegetation Management Act 2000* (together with the *Sustainable Planning Act 2009*) 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 certain regrowth:

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

ii. for an area where no PMAV exists, clearing of land which is mapped as “white” on a current published “regrowth vegetation map” (that is, not regulated regrowth).

In addition, the "regrowth vegetation maps" show the areas of regulated regrowth that can be cleared if the clearing complies with the regrowth vegetation code. Regulated regrowth is generally regrowth of forest quality (a minimum of 11% foliage projective cover), that has not been re-cleared since 31 December 1989 and that is either an "endangered", "of concern" or "least concern" regional ecosystem.

Under the regrowth vegetation code, "of concern" and "least concern" regional ecosystems on freehold land and "least concern" regional ecosystems on leasehold land can be cleared in most circumstances. However, the rules in the code must be followed. Before clearing under the code, landholders are not required to obtain a permit but must submit a clearing notification form, identifying the area to be cleared with GPS coordinates, to the Department of Environment and Heritage Protection.

There are other circumstances in which small areas can be cleared without a permit – for safety reasons, to maintain infrastructure or to establish infrastructure (for example, a dam, fence or a set of yards) on areas of "not of concern" remnant vegetation and non-remnant vegetation.

The legality of all proposed clearing should be considered carefully before any work is carried out.

b. Approvals

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

i. necessary to control non-native plants or declared pests;

ii. to ensure public safety;

iii. for establishing a necessary fence, firebreak, road or other built infrastructure, and the clearing for the relevant infrastructure cannot reasonably be avoided or minimised;

iv. for fodder harvesting;

v. for thinning; or

vi. for clearing of encroachment.

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

c. Property maps of assessable vegetation (PMAVs)

Because only certain non-remnant vegetation can potentially be the subject of broadscale clearing, the distinction between remnant and non-remnant vegetation as well as between regulated and non-regulated regrowth 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 Department of Environment and Heritage Protection. 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.

Areas of non-remnant vegetation that are not regulated regrowth can be classified as Category X (that is, exempt from clearing restrictions under the *Vegetation Management Act* regime). If the areas the landowner claims are Category X differ to those identified as non-remnant and not regulated regrowth on the current regional ecosystem and regrowth vegetation mapping, the landowner will have to prove that the proposed areas are Category X.

d. Other laws

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

i. the *Nature Conservation Act 1992*, which regulates protected plants;

ii. the *Environmental Protection Act 1994*, which regulates environmentally relevant activities;

iii. the *Forestry Act 1959* regarding the ownership and taking of forest products and quarry material;

iv. the *Soil Conservation Act 1986*;

v. the *Water Act 2000* regarding the removal of vegetation from the bed and banks of a watercourse;

vi. the *Aboriginal Cultural Heritage Act* 2003 and the *Torres Strait Islander Cultural Heritage Act 2003*;

vii. the Federal *Environment Protection and Biodiversity Conservation Act 1999* regarding the protection of listed threatened species and ecological communities; and

viii. local laws, which might provide for vegetation protection orders.

4.3 Forestry

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 Agriculture, Fisheries and Forestry 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 Agriculture, Fisheries and Forestry.

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 1999*, they do not require approval and are exempt from the vegetation management restrictions in the *Vegetation Management Act 1999* and *Sustainable Planning Act 2009*. However, notice of the location of the native forest practice must be given to the Department of Natural Resources and Mines before the practice starts.

4.4 Emissions

a. 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, clearing and burning forests, and agricultural activities. The six most common greenhouse gases are:

i. carbon dioxide;

ii. methane;

iii. nitrous oxide;

iv. hydrofluorocarbons;

v. perfluorocarbons; and

vi. 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 of 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.

b. Emissions trading

Emissions trading schemes throughout the world generally involve three key actions:

i. defining "carbon credits" (which can be used to offset actual emissions to meet emissions targets) as commodities;

ii. assigning property rights over them; and

iii. allowing these rights to be traded from one legal entity to another at a price agreed to by the parties involved.

For the time being, Australia does not have a carbon trading scheme in the true sense. Instead, under Australia's carbon price mechanism (CPM), which commenced in July 2012, there is a fixed carbon price of $23 per tonne of carbon dioxide equivalents, rising at 2.5% per year until 30 June 2015.

As a result, entities liable under the scheme (around 500 of the country's most prolific emitters of greenhouse gasses in certain industries) are effectively taxed on their direct emissions, except those that are offset using carbon credits. Direct emissions associated with agriculture, fisheries and forestry are excluded from coverage under the scheme.

From July 2015, when Australia's "cap and trade" scheme commences, the Government will allocate and auction a fixed number of carbon permits and the carbon price will be set by the market, with some measures put in place to prevent extreme price fluctuations.

c. Emissions in agriculture

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.

Greenhouse gas emissions from agriculture are typically regarded as too difficult to measure on a cost-effective basis. Nevertheless, even if direct emissions from agriculture remain excluded from Australia's carbon price mechanism, primary producers are not immune from greenhouse costs. The application of the scheme to energy generators and other industries will add to input costs.

At the same time, certain primary producers may find that there are commercial opportunities resulting from voluntary participation in the carbon markets.

d. Carbon Farming Initiative

The Carbon Farming Initiative (CFI) was established under the *Carbon Credits (Carbon Farming Initiative) Act 2011*. It complements the carbon pricing mechanism (CPM) by facilitating the accreditation of Australian carbon credit units (ACCUs).

Each ACCU represents one tonne of carbon dioxide equivalents (a standardised measure of greenhouse gases, including methane and nitrous oxide). ACCUs can be "banked" for future use or traded and used by others seeking to offset their emissions.

There are two types of ACCUs: Kyoto ACCUs and non-Kyoto ACCUs. Kyoto ACCUs can be generated from activities that are recognised by current international carbon accounting rules (including the Kyoto Protocol) and that therefore count towards Australia's national emissions target. Those activities include reforestation, avoided deforestation, and reducing emissions from livestock, manure and fertiliser. Kyoto ACCUs can be used to meet obligations under the CPM or compatible international schemes or to meet voluntary commitments (for example, by companies wishing to offer products and services that are "carbon neutral").

Non-Kyoto ACCUs are those generated from activities that are not recognised by current international carbon accounting rules (such as soil carbon, feral animal management, improved forest management and non-forest revegetation). Non-Kyoto ACCUs cannot be used to meet obligations under the CPM but can be sold to the Commonwealth Government from July 2013 under a tender process or sold for use in voluntary schemes.

e. Generating Australian Carbon Credit Units

ACCUs can be generated by adopting approved emission abatement activities that store carbon or reduce greenhouse gas emissions (from sources that are not covered by the CPM).

A proponent of a project to generate ACCUs must become a recognised offsets entity (after meeting a "fit and proper" test designed to minimise fraud and dishonesty in the system).

To be approved, each project must satisfy the "additionality" test. That is, it must not be required by an Australia law and must go beyond common practice. A list of activities which go beyond common practice in particular industries (knows as the "positive list") is maintained by the Commonwealth Government.

These include various kinds of permanent plantings, human-induced regeneration, restoration of wetlands, application of biochar to soil, capture and combustion, or reduction, of methane from animals, capture and combustion of methane from specified landfill waste, and certain projects under the Commonwealth Government's "Greenhouse Friendly" program. Project proponents can apply to have an activity considered for inclusion on the "positive list".

Further, the proposed activity must not be on the “negative list” of activities, which are excluded from the CFI scheme. Included on the “negative list” are projects which were mandated by Australian laws until 24 March 2011, establishment of forests under forestry managed investment schemes, planting of weed species, re-establishment of vegetation on land which was subject to clearing of native forest in specified situations, and planting of trees in an area which receives more than 600mm long-term average annual rainfall (subject to particular exceptions).

Finally, the project must be covered by an approved methodology (effectively a set of rules and instructions for generating ACCUs for each recognised abatement activity that is published by the Commonwealth Government), and must be carried out in accordance with that methodology.

Currently, the only methodologies that have been approved concern the capture and combustion of landfill gas, the destruction of methane generated from manure in piggeries, environmental plantings and savanna burning. There are therefore currently limited opportunities for most primary producers to participate in the CFI although additional methodologies continue to be researched and might be approved in the future.

4.5 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 Mines 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.

4.6 Wild Rivers

The *Wild Rivers Act 2005* (Qld) was introduced by the former Queensland Government to preserve river systems identified 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.

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 to new development activities (such as quarrying, agriculture and mining) in the wild river area. Each declaration can identify various "management areas" within the wild river area including:

- 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);
- preservation areas (the remainder of the wild river area);
- flood plain management areas;
- subartesian management areas;
- designated urban areas; and
- 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).

In June 2012, the current Queensland Government began the development of the Cape York Peninsula Bioregion Management Plan to replace wild river declarations on Cape York Peninsula. In addition, the Government has announced that it is developing alternative strategies to protect Queensland's western rivers while allowing sustainable development to proceed.

4.7 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:

a. repair damage to river banks by flood or cyclone;
b. remove dead or growing timber or other vegetation or thing from the bed, banks or foreshore of any tidal waters or coastal lagoon;
c. to change or prevent the changing of the course of a river; and
d. 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.

4.8 Noxious Plants and Declared 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, unless the person has a declared pest permit.

Local governments are responsible for administering the Act in relation to land within local government areas and must have a pest management plan for declared pests in its area.

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.

The Land Protection (Pest and Stock Route Management) Amendment Bill 2012 has recently been introduced and proposes to amend the *Land Protection (Pest*

and Stock Route Management) Act 2002 to allow landholders, including state landholders, to control flying foxes by destroying animals or their roosts that are found on the landholders' land. To permit this, the Bill also proposes to remove the provision in the *Nature Conservation Act 1992* prohibiting the disturbance or destruction of flying fox roosts.

5. The Elements

5.1 Fire Safety

The *Fire and Rescue Service Act 1990* provides that the Queensland Fire and Rescue Service (which is a division of the Queensland Government Department of Community Safety) 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 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.

5.2 Natural Disaster Relief

a. Natural disaster assistance funding

Financial assistance may be available to primary producers where a natural disaster such as a drought, flood, bushfire or cyclone has caused damage or distress to a primary production operation.

A geographic region must be classified as affected by an "eligible natural disaster" in order for the funding to be available and responsibility for the funding is shared between the Commonwealth and State Governments and in Queensland is administered by the Queensland Rural Adjustment Authority (QRAA).

Natural Disaster Assistance loans of up to $250,000 may be obtained to assist in the reestablishment of a primary production enterprise to cover costs such as:

- repairing or replacing damaged buildings, plant or equipment;
- purchasing livestock to replace those which may have perished in the natural disaster event;
- to meet day-to-day expenses such as rents or rates or to meet essential property operational needs such as replanting, restoring or re-establishing affected areas.

The loans feature a concessional interest rate, no account keeping or establishment fees, a maximum term of seven years and the possibility of a two-year "interest only" period.

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.

Further information regarding eligibility criteria and application procedures is available at the QRAA website at qraa.qld.gov.au or on its toll-free number 1800 623 946.

b. Other drought relief assistance

In areas which are declared as "drought zones" by the State Government, assistance may be available in the form of freight subsidies under the Queensland Government Drought Relief Assistance Payment Scheme administered by the Department of Agriculture, Fisheries and Forestry.

These subsidies may be made available for fodder transport, stock water cartage, livestock returning from agistment and restocking transport costs.

Applications for road or rail freight subsidies are made through local stock inspectors of the Department of Agriculture, Fisheries and Forestry (DAFF). Further information is available at the DAFF website at daff.qld.gov.au.

c. 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.

6. Produce

6.1 Regulatory Bodies

The former *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:

a. the Queensland Cane Growers Organisation;
b. the Queensland Dairy Farmers Organisation;
c. Queensland Pork Producers Incorporated; and
d. 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.

There are various Codes of Practice that have been developed by the relevant industry bodies to advise their members on approaches that are aimed at preventing or minimising environmental harm that may result from industry practice.

6.2 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 in partnership with the Department of Agriculture, Fisheries and Forestry and Queensland Health 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:

a. the handling of animals at a place where they are to be killed for meat;
b. processing meat or smallgoods intended for human consumption;
c. processing pet meat;
d. handling, packaging and storing meat or a meat product;
e. transporting meat;

f. retail sales of meat, including retail premises and retail vehicle;
g. labelling of meat and meat products; and
h. the keeping of adequate records.

Safe Food Production Queensland has reviewed its Food Safety Scheme and incorporated 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.

6.3 Grains

The *Wheat Export Marketing Act 2008* (Cth) regulates and monitors the export of bulk wheat. The wheat export accreditation scheme is administered by Wheat Exports Australia and companies must meet strict eligibility requirements. This body has the power to obtain information from accredited wheat exporters and direct audits.

It is an offence under the *Wheat Export Marketing Act 2008* to export wheat unless the exporter is an accredited wheat exporter.

Accreditation is not required for individual producers exporting wheat produced by that individual producer or if the wheat exported is exported in a bag or container of less than 50 tonnes.

Penalties can reach up to $330,000 for companies and $66,000 for individuals for any exportation without accreditation.

The *Wheat Export Marketing Act 2008* also required the Productivity Commission to conduct a review of export wheat marketing arrangements. The results of that review form the basis of the Wheat Export Marketing Amendment Bill 2012. The aim of the Bill is to effect the full deregulation of the bulk wheat export market.

6.4 Horticulture

In response to a 1999 committee report concerning fairness in the retail sector, the federal Department of Agriculture, Fisheries and Forestry (DAFF) established the Produce and Grocery Ombudsman. The ombudsman may resolve disputes amongst industry participants (but not consumers) in relation to the supply of produce to both markets and retailers. The ombudsman operates under the industry-established voluntary Produce and Grocery Industry Code of Conduct.

After widespread concern for unfair trading practices within the horticulture industry, DAFF introduced a mandatory industry code known as the Horticulture Code of Conduct in May 2007 under the former *Trade Practices Act 1974*, now the *Competition and Consumer Act 2010*.

The Horticulture Code of Conduct 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 Horticulture Code of Conduct is to regulate trade between the growers and wholesalers of fruit and vegetables. The Australian Competition and Consumer Commission (ACCC) enforces the code and the ACCC and the Horticulture Mediation Adviser are available to mediate disputes (in relation to fruit and vegetables) where there is a written agreement between the grower and agent or merchant. The ACCC can institute legal proceedings for breaches under the code or Act.

For disputes that arise in circumstances where there is not a written agreement, or the dispute is in relation to produce that is not fruit and vegetables, the Produce and Grocery Ombudsman may be able to assist.

6.5 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 licencing 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.

6.6 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 1100 dairy farms and 45 dairy processing premises are involved in the scheme.

The food safety criteria requires the control and prevention of:

a. microbiological contamination;
b. chemical contamination; and
c. 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, which consists of four programs for the benefit of producers registered before 17 August 2000. These are:

a. the Dairy Structural Adjustment Program – to assist eligible producers who may have suffered a significant loss due to deregulation;
b. the Dairy Exit Program – providing an optional “one-off” payment of up to $45,000 to eligible producers leaving the industry;
c. the Dairy Regional Assistance Program – to assist regional communities to adjust to deregulation; and
d. the Supplementary Assistance Program – to assist people severely affected by price movements following deregulation.

Another entity, Dairy Australia (formerly the Australian Dairy Corporation), is funded by industry levies and Government support 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.

6.7 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 the Department of Agriculture, Fisheries and Forestry. 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 the Food Standards Australia New Zealand requirements and the requirements of Queensland Health.

6.8 Seeds

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:

a. the percentage of pure seed;
b. the maximum percentage of other seed;
c. the germination percentage;
d. 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 and quarantine 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.

6.9 Plant Breeders' Rights

Plant Breeders' Rights (PBR) are a form of intellectual property administered by the *Plant Breeders' Rights Act 1994* (Cth) (Act). 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 an eligible plant breeder (or their successor in title) who has produced a new variety of plant, which qualifies for protection. Namely, the plant must be a new and distinct variety, which must also fulfil requirements of stability and uniformity. In summary, that means the applicant must demonstrate the plant has distinctive and unique characteristics when compared to existing plant varieties, those characteristics remain sufficiently uniform when it is propagated and they remain unchanged after repeated propogation.

When a breeder applies 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. For example, PBR protection provides the breeder with the exclusive right to exclude others from producing, reproducing, selling or exporting, or propagating material of the new variety, subject to some limited exceptions. In effect, it gives the PBR owner a limited monopoly over the new variety while the protection lasts, which that person can either exploit themselves or license others to do so.

Once registered, PBR protection lasts 25 years for trees and grapevines and 20 years for other plant types. PBR is a form of property which can also be assigned, sold and transferred to others. If PBR rights are infringed, the owner can bring a claim and the available remedies include an injunction, damages or an account of profits. The Act also includes criminal penalties for infringement in exceptional circumstances.

Breeders should seek advice and consider applying for provisional protection before marketing any new variety to avoid the possibility of prejudicing a successful application for PBR protection.

Growers handling plant varieties subject to PBR protection must be careful to abide by the conditions of their 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.

6.10 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 Agriculture, Fisheries and Forestry. 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 regulated by Biosecurity Australia. 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 licenced pilot is used and it is carried out in the course of a business or under the direction or the authority of a licenced 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 licenced contractors is $2200. 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.

6.11 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. Failure to do so may result in a maximum penalty of $11,000.

Biosecurity Queensland came into operation in March 2007 and is now within the Department of Agriculture, Fisheries and Forestry. Biosecurity Queensland is 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.

6.12 Biosecurity

Biosecurity in Australia is regulated by the *Quarantine Act 1908* (Cth). The Act is administered by DAFF Biosecurity within the Australian Government Department of Agriculture, Fisheries and Forestries. DAFF Biosecurity is responsible for minimising the risk of biological threats from exotic pests and diseases. It manages quarantine controls at Australia's borders and administers import and export inspection and certification systems. DAFF Biosecurity also works closely with other Government agencies, such as Australian Customs and Border Protection Service and Food Standards Australia and New Zealand, to assist in identifying and managing post-border threats.

Biosecurity plays an important part in both exportation and importation of goods from and to Australia, both of which have extensive licencing and compliance requirements.

a. Exportation

Exportation of goods requires a current licence under the relevant legislation. For example, licencing requirements for the exportation of livestock and meat products is set out in the *Australian Meat and Livestock Industry Act 1997*. Exporting these goods without a current licence can result in up to five years' imprisonment. Vessels used in the exportation of livestock must meet biosecurity standards, both national and international. Licencing for horticultural products is administered by the industry body Horticulture Australia Limited under the *Horticulture Marketing and Research and Development Services Act 2000*.

Under the *Export Control Act 1982*, exporters of “prescribed goods” from Australia are required to provide notice to the Australian Quarantine and Inspection Service (AQIS) of the intention to export those goods and to nominate the place where the goods can be inspected. There is a maximum penalty of 12 months’ imprisonment for non-compliance. Prescribed goods include live animals, animal reproductive matter, meat products (including game), milk and milk products, eggs and egg products, plants and plant products, fish and fish products. There are a number of regulations applying to each type of prescribed goods, which set out whether the exporter is required to have a licence, permission, consent or approval.

b. Importation

The AQIS Import Conditions Database (ICON) sets out certain quarantine conditions for importation of some products. An import permit will usually be required for the importation of plant and animal products, and products may not be released without the permit.

Importers of goods into Australia are required to give notice of the intention to import to Customs officers. If the notice is not given prior to importation, the notice must be made within 35 days of the landing of the goods. A failure to do so may result in a maximum penalty of two years’ imprisonment under the *Quarantine Act 1908*. The *Imported Food Control Act 1992* imposes a penalty of 10 years’ imprisonment for knowingly importing food that does not meet the applicable standards or poses a risk to human health. The applicable standards are those standards either included in or adopted by the Australia New Zealand Food Standards Code. There is a similar penalty for dealing with food imported into Australia that does not meet the applicable labelling standards.

c. Proposed changes

In September 2008, the “One Biosecurity – A Working Partnership” report was released, making a number of recommendations for the improvement and streamlining of Australia’s biosecurity legislation. The report noted that biosecurity risks, trade interests and treaty obligations as well as the increased international movement of people and goods have changed significantly since the *Quarantine Act* was first drafted. Consultation on the proposed new biosecurity legislation has closed and the draft legislation was scheduled to be introduced to Parliament by the end of 2012.

It is expected that the draft legislation will place greater emphasis on a risk-based approach of quarantine management through use of modern scientific and intellectual evidence, good governance and procedural fairness. Key changes under the proposed legislation include:

- incorporating the risk analysis process into the Act to ensure decisions are open and accountable (the process is currently operated under regulations);

- the Director of Biosecurity will have the ability to prohibit goods being brought not only into Australia but also into Australian Territory (12 nautical miles from Australia);
- notice of imported goods will need to be made prior to goods being brought in or within 24 hours of landing (the current legislation allows up to 35 days after landing); and
- new powers will be given to biosecurity officers to monitor compliance with requirements for first point of entry.

6.13 Produce Taxes and Levies

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 Services Privatisation Act 2000* (Cth) privatised the Australian wool industry and lead 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.

7. Stock and Animals

7.1 Travelling Stock

a. 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 be 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.

b. Travel permits

In additional 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.

c. NLIS

The National Livestock Identification System (NLIS) requires certain movements of cattle, sheep, pigs and goats 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 Department of Agriculture, Fisheries and Forestry 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 and goats relies on the NVD / Waybill system rather than a national database to record movements between properties with different PICs. All sheep and goats moving between properties with different PICs must have an NLIS tag applied. NLIS tags for sheep and goats are not electronic but visually read ear tags supported by a NVD / Waybill that must accompany the livestock when they are moved.

An exception to the tagging requirement exists for stud dairy goats which have been tattooed in that NLIS tags are not required to be applied unless these goats are being moved outside the stud system or to an abbatoir.

For pigs, the NLIS works in conjunction with the national PigPass system and the Waybill system to record movements between properties with different PICs. All pigs moving between properties with different PICs are required to be NLIS tagged and pigs over 30kg in weight are required to be slap branded with a tattoo brand in addition to the NLIS tag (unless the owner owns two or fewer pigs, in which case just the NLIS tag will suffice). NLIS tags for pigs are not electronic but visually-read ear tags supported by a PigPass or Waybill that must accompany the livestock when they are moved.

d. 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.

e. 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.

f. 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).

7.2 Brands

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 Department of Agriculture, Fisheries and Forestry's website at daff.qld.gov.au.

7.3 Straying Animals

a. Straying stock

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 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.

b. 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.

7.4 Animal Welfare

The *Animal Care and Protection Act 2001* (Qld) imposes responsibilities on all people in charge of animals, including primary producers.

All people in charge of an animal owe a duty of care to that animal. Animals must be provided with appropriate food, water, living conditions and treatment of injury and disease. Provision must also be made in an appropriate way for an animal's need to display normal patterns of behaviour.

Among other things, it is an offence to:

a. cause an animal pain that is unjustifiable, unnecessary or unreasonable;

b. abuse, terrify, torment or worry an animal;

c. overwork an animal;

d. confine or transport an animal without suitable shelter, food and water, in an inappropriate way, in an unsuitable container or when the animal is unfit for confinement or transport;

e. kill an animal in a way that is inhumane, causes it not to die quickly or causes it unreasonable pain;
f. unjustifiably, unnecessarily or unreasonably injure, wound, overcrowd or overload an animal; or
g. unlawfully abandon or release an animal or release an animal from the custody of the person in charge of it.

An individual can be fined up to $100,000 and/or imprisoned for up to two years for an animal cruelty offence.

However, certain recognised farming management practices are not prohibited provided they are carried out in accordance with the relevant code of practice. There are specific codes for, among other sectors, cattle generally, cattle at feedlots, cattle at saleyards, sheep, poultry, pigs and goats and codes for the transport and slaughter of animals.

For example, the code of practice for cattle defines acceptable management practices for dehorning, castration, spaying, earmarking and branding. The code of practice for sheep also details practices for lamb-marking, shearing, crutching and mulesing. In recent years, there have been calls from both animal rights campaigners and certain groups within the wool industry for a ban on mulesing in order to avert threatened boycotts of Australian wool by foreign retailers.

Under the *Animal Care and Protection Act*, inspectors of the Royal Queensland Society for the Prevention of Cruelty to Animals or departmental inspectors appointed by the Department of Agriculture, Fisheries and Forestry have the right to enter any place if authorised by a warrant or if it is reasonably suspected that an animal is injured or under an imminent risk of death or injury (including as a result of an animal welfare offence). Inspectors also have the power to seize any animal that the inspector reasonably believes is the subject of an animal welfare offence or is under an imminent risk of death or injury.

7.5 Weapons Licencing

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:

a. Category A – weapons such as air rifles and single/double barrel shotguns;
b. Category B – break action shot guns and centrefire rifles;
c. Category C – semi-auto rim fire rifles with less than ten rounds and pump-action shotguns with less than five rounds; and
d. 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:

a. the primary producer holds an appropriate licence for the firearm;
b. the person using the firearm is eligible to obtain a licence to use the firearm;
c. the firearm is used only on the primary producer's land; and
d. 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.

8. Business Structures and Employment

8.1 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.

a. Sole trader

Commencing to trade as 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 and the like, but 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.

b. Partnership

A partnership is a straightforward 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 (for example, 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 such as 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 small, 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.

c. Company

A company is a separate legal entity and is taxed as such. The tax rate is presently 30%. 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:

i. the liability of its members;

ii. whether the company is public or proprietary; and

iii. 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 (such as 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 to not 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; for example, 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 (which would otherwise be taxed 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 while 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.

d. Trusts

Trusts are relatively easy to form and their terms (including 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 unitholders (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 a 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 in most circumstances.

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.

8.2 Employer/Employee Relationships

By a combination of the Federal *Fair Work Act* and Queensland's referral of its industrial relations powers to the Federal Government, the relationships between essentially all non-government Queensland employers and their employees have since 1 January 2012 been covered by the Federal Fair Work scheme.

a. Sources governing the employment relationship

Employment relationships under the Fair Work scheme are governed by four main sources, in the following rank order:

- the National Employment Standards (NES) and the *Fair Work Act* and *Regulations*, which contain the NES;
- enterprise agreements;
- awards; and
- private contracts.

The NES and *Fair Work Act*, and all enterprise agreements and awards are readily available online.

i. National Employment Standards

The National Employment Standards (NES) are a section of the *Fair Work Act* and provide 10 minimum standards in employment essentially concerning maximum weekly hours, requests for flexible working arrangements, various sorts of leave and holidays, notice of termination and redundancy. The NES covers essentially all employees. The NES applies compulsorily and has priority over all of the following sources of employment terms.

ii. Enterprise agreements

Under the *Fair Work Act*, employers, employees and (sometimes) unions can negotiate and agree upon various forms of "enterprise agreement". Enterprise agreements must be approved by and registered with Fair Work Australia. An enterprise agreement is like a privately negotiated

and registered award between particular employers, employees and (sometimes) unions. There are also some other similar legacy agreements in place, arising from former workplace relations schemes. Enterprise agreements can modify the award terms that would otherwise apply to an employer/employee relationship. However, in order to be approved by Fair Work Australia, enterprise agreements must be "better off overall" for relevant employees. This means that while an enterprise agreement can be used to tailor employment terms to better suit a particular enterprise, it cannot be detrimental to employees, taken overall.

The expense of drafting, negotiating and obtaining approval for an enterprise agreement means that they are generally used only by medium-to-large employers.

An enterprise agreement cannot contradict the NES but will override an award or a private employment contract that would otherwise apply.

iii. Awards

Awards are effectively statutory instruments providing minimum employment terms and conditions to particular categories of employer and employee. Since 1 January 2010, the vast majority of Australian employees are covered by a relatively small number of Federal "Modern Awards". In addition to various industry-specific awards there is an award applicable to all other "miscellaneous" employees, except those employees who have not, traditionally, been covered by awards (such as management employees and professionals).

Awards with potential relevance for primary producers include the Air Pilots Award, the Horticulture Award, the Pastoral Award, the Silviculture Award, the Sugar Industry Award, the Timber Industry Award, the Wine Industry Award, and various others.

Awards are overridden by the NES and any applicable enterprise agreement but override any private contract. The vast majority of employees outside of management and the professions are covered by awards, which provide most of the conditions of employment for those employees.

iv. Private contracts

All employees have a contract of employment, although the vast majority of employees are award-covered and have no formal contract but only a verbal agreement or a simple letter setting out a few basic terms specific to the employee. Non-award employees (typically management and professionals) have or should have a formal private contract as the major source of their terms and conditions.

The NES and any applicable enterprise agreement or award will override the terms of any private contract and consequently the contracts of award/enterprise agreement employees can only be supplementary in nature.

b. Hiring employees

Hiring choices can expose an employer to claims and penalties if an employer selects employees on a basis prohibited by relevant anti-discrimination legislation. While a detailed consideration of anti-discrimination legislation is beyond the scope of this publication, broadly discrimination is prohibited on various grounds including perhaps most relevantly age, gender, impairment, race, religion, relationship status, parental status and family responsibilities.

After a decision has been made to hire a particular employee, the critical terms of employment should be put in writing.

All employees must, when hired, be given a "Fair Work Information Statement" which sets out some basic employee rights. The content of the Fair Work Information Statement changes from time to time but can be found online.

Employees should be informed in writing of

- whether they are to be full-time, part-time or casual;
- the date employment commences;
- the hours of work;
- remuneration;
- the length of notice that will be required to terminate the employment. This is particularly important as the NES and awards generally only state the *minimum* length of notice required and the *actual* length of notice required may be longer. In the absence of any specific agreement, long-term employees may be entitled to unduly long periods of notice.

Where a long period of notice for termination is offered (for example, four weeks), it is usually advisable to include a probationary period of up to six months during which the employment may be terminated on one week's notice.

For employees who have a managerial role or a role where they will have access to valuable or confidential information, contractual terms concerning intellectual property rights and confidential information are advisable. There are numerous other terms of employment which can be incorporated into sophisticated contracts of employment, but a discussion of this topic in full is beyond the scope of this publication.

c. During employment

i. Duties

An employer has a duty to pay wages and salary and the employee has a duty to render service. These obligations are dependent on one another.

Employers and employees have a mutual duty of trust and confidence towards each other. The employer owes a duty of care to employees to take reasonable care to protect the employee against foreseeable injury arising out of the employment.

Employees have an obligation to obey lawful and reasonable orders of the employer, and to take reasonable care in their work. Employees have a duty not to solicit customers for their own benefit, not to poach other employees, to keep employer confidences and not comment adversely to other parties about the employer, to account for the employer's property and to answer the employer's questions. Many of these duties apply only during the employment and for this reason specific contractual terms expanding the employee's obligations after employment has ceased can be very important for employees who have access to employer confidences.

ii. Amendment

Any amendments to the employment arrangements for a particular employee should be recorded in writing.

iii. Leave

All employees are entitled to minimum annual and other forms of leave as set out in the NES. At present a very brief and simplified summary is that most permanent full-time employees will be entitled, at minimum, to:

- four weeks' annual leave per year;
- 10 days of paid personal/carer's (for example, sick) leave per year;
- two days of unpaid personal/carer's leave per year;
- two days of compassionate (bereavement) leave per occasion;
- long service leave of 8.6666 weeks after 10 years of full-time service (with a pro-rata entitlement if employment is terminated in certain circumstances after seven years of full-time service);
- 52 weeks of unpaid parental/adoption leave.

Part-time employees' leave entitlements are generally pro rata, and casual employees' entitlements are highly limited. Careful records of leave should be kept. Significant claims for supposedly accumulated annual leave can arise on the departure of long-term employees who work in isolation and control and record their own leave (such as station managers) and it will be the responsibility of the employer to produce records showing that leave was actually taken.

iv. Records

Employers are required to maintain various records, including:

- employer and employee names;
- whether the employment is full-time or part-time;
- whether the employment is permanent, temporary or casual;
- the commencement date of employment;
- remuneration rates;
- gross and net amounts paid and any deductions from pay;
- records of hours worked by the employee, where pay is by reference to hours worked;

- payments of incentives, bonuses, loadings, penalty rates, allowances and monetary entitlements;
- overtime hours worked and when the employee started and ceased working overtime;
- agreements to average an employee's hours of work, make individual flexibility arrangements and guarantees of annual earnings;
- entitlements to leave, and leave taken, and as to the cashing out of accrued leave
- superannuation paid; and
- as to transfers of business.

There are civil penalties for failing to keep these records or for keeping them inaccurately.

d. Termination of employment

Australian law contains considerable restrictions on the termination of employment of many employees.

Unlawful termination of employment that contravenes relevant requirements can expose an employer to, in some cases, civil penalties. *Unfair* termination of employment may result in the employer having to reinstate the employee or pay compensation, generally of up to six months' pay. The laws concerning unlawful and unfair dismissal override any provisions appearing in any private contract. The law in this area is complex and a detailed consideration is beyond the scope of this publication. The following is only a quick overview.

i. Notice

Subject to certain exceptions (see below) employees must be given their correct period of notice of termination (or pay in lieu thereof). Notice must be at least the minimum required under the NES, in accordance with the following table:

Period of continuous service	Period of notice
Not more than one year	One week
More than one year but not more than three years	Two weeks
More than three years but not more than five years	Three weeks
More than five years	Four weeks

The above period must be increased by one week if the employee is over 45 years old and has completed at least two years of continuous service.

Note the above are *minimum* periods and that a particular award or enterprise agreement or private contract may require longer notice.

Employees who have contracts of a fixed duration or contracts for completion of a particular task or casual employees are not generally entitled to notice of termination. Employees who have been summarily dismissed are not entitled to notice.

ii. Unlawful termination

In some instances, a termination of employment may be not merely unfair but unlawful. This would typically be because the termination is for reasons of discrimination (similar to considerations on hiring employees) or where termination is victimisation as a consequence of temporary illness, participation in industrial activity or membership of the union, exercising workplace rights such as querying wages or other working conditions, lodging complaints, and similar activities. Additionally, a termination will not be lawful unless the correct period of notice is given.

iii. Summary termination

Generally it is acceptable to terminate an employee without notice, and without consideration of whether the termination is fair, if the employee has engaged in very serious misconduct. Generally summary dismissal tends to be hard to justify and in all but the most blatant cases, taking legal advice prior to effecting a summary dismissal is wise. The following are examples of conduct that may justify summary termination:

- wilful or deliberate behaviour by an employee that is inconsistent with the continuation of the contract of employment. Typically this must be persistent and blatant;
- conduct that causes serious and imminent risk to the health or safety or the reputation, viability or profitability of the employer's business.
- the employee, in the course of the employee's employment, engaging in criminal conduct:
- the employee being intoxicated at work;
- the employee refusing to carry out a lawful and reasonable instruction that is consistent with the employee's contract of employment. Typically this would need to be blatant and persistent.
- gross neglect of duty or incompetence. Only exceptional circumstances of incompetence would justify summary dismissal e.g. where it could be shown that the employee was actually dishonest or fraudulent in the recruitment process.
- grave breach of confidentiality (if pertinent to the position)

iv. Unfair termination

Generally employees only have access to unfair dismissal protections if:

- they have completed the minimum period of employment (six months) and;
- they are not a casual employee, and
- either they:
  - earn less than the relevant earnings threshold (which is indexed to inflation but is presently about $118,300 per annum), or
  - they are covered by an award or enterprise agreement.

Casual employees generally cannot make a claim for unfair dismissal.

A dismissal may be unfair if it is “harsh, unjust or unreasonable in the circumstances”. This is not a concept that is clearly defined. However, generally Fair Work Australia will tend to consider such matters as:

- whether there was a valid reason for the dismissal;
- whether the employee was notified of that reason;
- where an employee is terminated as a consequence of poor performance or conduct, and if so whether
  - the expectations of the position were made clear to the employee;
  - appropriate training was given;
  - whether there were warnings given that termination would result if matters did not improve;
  - the employee was given an opportunity to respond to the employer’s concerns;
  - and other similar matters.

If the employer is a small business employer (that is, one employing less than 15 full-time equivalent employees), then it is strongly advised that the employer dismiss the employee in a manner consistent with the Small Business Fair Dismissal Code (available on-line). Generally where a small business employer dismisses consistent with that code, an unfair dismissal claim should not succeed.

v. Redundancy

Redundancy is termination of employment where the employer no longer wishes to employ anyone in the role formerly occupied by an employee. Generally redundancies occur in the context of an employer that is “downsizing”.

Where a redundancy is genuine, the employee cannot subsequently make a claim for unfair dismissal. However, an employer will commonly be required to pay additional amounts (known as severance) to a redundant employee, depending on the employee’s length of service. There are various exceptions in this respect and there are technical requirements for effecting genuine redundancies, the full details of which are beyond the scope of this publication.

Details of when redundancy is payable, and how much is payable, can be found in awards and the NES.

e. Independent contractors

Use of “independent contractors”, being workers who provide services to a business, but who are not employees of the business, is common in various industries throughout Australia including primary production. There are certain advantages to obtaining labour via an independent contractor model, as opposed to an employment model. In particular, genuine independent contractors are not entitled to the benefit of awards and the NES. Contracting can also be an attractive model to workers as a consequence of potential taxation and other benefits.

However, establishing a genuine independent contractor relationship requires substantially more than naming the relationship as such. The test as to whether a relationship is one of employment or one of independent contract is an area of the law involving significant uncertainty. However, broadly, a genuine independent contractor must be a person who is in business for themselves, typically involving a degree of business risk and reward, and business independence.

It is probably fair to say that there are a significant number of workers who are described and paid as independent contractors who are in fact treated as (and would be regarded by a court or the FWA as) employees. This potentially exposes employers to civil penalties for "sham-contracting" and to claims for back pay or similar.

Employers who maintain or are considering entering into independent contractor relationships would be well advised to take specific legal advice.

8.3 Workers' Compensation

a. 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 together with a penalty.

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

Where there is a possibility of the employer being sued by his or her employee due to an accident, it is prudent for the employer to advise his or her own solicitor immediately.

b. Worker

The insurance cover is for the benefit of workers. The term "worker" is widely defined by the *Workers Compensation and Rehabilitation Act 2003* as a person working under a contract of service; although the Act does regularly undergo amendment to define which persons 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 or business are not included, nor are self-employed persons (although the latter can obtain a specific WorkCover policy to cover themselves). However, circumstances can arise where a contractor can become a worker for the purposes of the Act. For example, a fencing contractor asked to assist with

an additional task such as shifting feed bags, if injured while performing the latter task rather than fencing, may be a worker for the purposes of the Act.

A person who works a farm as a sharefarmer is a worker as long as they do not provide or use farm machinery in the sharefarming operation, and they are not entitled to more than one third of the proceeds of the sharefarming operation.

c. 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:

i. 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

ii. 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.

d. 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).

e. 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).

i. Periodic payments

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

- for the first 26 weeks the worker is entitled to receive 85% of their normal weekly earnings;
- after the first 26 weeks and up to two years, the worker will receive 75% of their normal weekly earnings or 70% of Queensland's full-time adult's ordinary time earnings (QOTE), whichever is the greater; and

- from two years to five years, the same amounts as after the first 26 weeks if the worker has a work-related impairment of >15% 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.

ii. Special payments

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

iii. 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, 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. For example, if a worker suffers a 5% impairment for a fractured arm, a 10% impairment for a fractured leg, and a 10% impairment for a chronic (psychological) adjustment disorder out of the same accident, WorkCover would issue a Notice of Assessment identifying a 15% impairment for non-psychiatric injuries and a 10% psychiatric impairment.

If the injured worker's assessed permanent impairment for psychiatric injury or combined permanent impairment for non-psychiatric injury exceeds 20% 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% however

(remembering that any assessment of psychiatric and non-psychiatric injuries can not be added), then the injured worker must choose between:

A. 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

B. deferring consideration of the lump sum offer; or

C. rejecting the lump sum offer and preserve the injured worker's entitlement to seek common law damages against the employer for negligence arising out of the relevant event.

The choice of A or C 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.

f. 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:

i. he/she has a Notice of Assessment for at least one of the injuries allegedly sustained in the relevant event; and

ii. the assessed level of work-related impairment either exceeds 20%; or does not exceed 20% 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:

i. 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;

ii. 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;

iii. in the event that WorkCover rejects the injured worker's offer at ii 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 ii;

iv. in the event that the "without prejudice" settlement conference does not resolve the claim for common law damages, the injured worker, WorkCover and any third-party contributors 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, 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. Provided there is a complying notice of claim, as set out in (i), legal proceedings may be filed outside the usual three-year limitation period, but must be served on the employer within 60 days after the day of the conference. Provided the injured worker has an entitlement to bring a common law claim and has done so within the period stipulated, 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 successful worker to recover legal costs of the pre-proceedings or litigated common law damages claim unless the injured worker ultimately received a judgment for damages which exceeds his / her mandatory final offer from the pre-proceedings settlement conference (the exception is that there is entitlement to some legal costs

where the injured worker had a >20% work-related impairment). If the injured worker's claim is dismissed by the court, or the worker ultimately receives a judgment for damages less than WorkCover's mandatory final offer from 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.

8.4 Workplace Health and Safety

On 1 January 2012, Queensland implemented new laws in relation to occupational health and safety in accordance with nationally uniform work health and safety laws.

a. Objective of the *Work Health and Safety Act 2011* (Qld)

The *Work Health and Safety Act 2011* (WHSA) and accompanying *Work Health and Safety Regulation* seeks to provide a framework to protect the health, safety and welfare of all workers at work and of all other people who might be affected by the work. It also outlines health and safety duties and rights in the workplace.

The guiding principle of the WHSA is that all people are given the highest level of health and safety protection from hazards arising from work, so far as is reasonably practicable (that is, what could reasonably be done at the particular time to ensure health and safety measures are in place).

b. Important definitions

"Workplace" is any place where work is carried out for a business or undertaking and includes any place where a worker goes, or is likely to be, while at work. A **"place"** includes a vehicle, vessel, aircraft or other mobile structure and also any installation or any waters.

"Person conducting a business or undertaking" includes a person conducting a business or undertaking alone or with others, whether or not for profit or gain. They can be a sole trader (for example, a self-employed person), a partnership, company, unincorporated association or public authority (including a local council, although it does not include an elected member of a local council acting in that capacity). A volunteer association (where none of the volunteers employs any person to carry out work for the volunteer association) is not considered to conduct a business or undertaking for the purposes of the WHSA.

"Worker" is any person who carries out work in any capacity for a person conducting a business or undertaking and includes employees, contractors, subcontractors, labour hire workers, outworkers, apprentices and trainees, work experience students, volunteers and individuals who perform work for their own business.

c. Workplace health and safety obligations

The WHSA sets out a wide list of persons ("duty holders") who have obligations to ensure workplace health and safety of workers and other people who may be at risk from work carried out by the business. These include persons who conduct a business or undertaking (whether as employers, self-employed persons or otherwise); persons in control of workplaces or of fixtures, fittings or plant included in a workplace; owners of plant; designers, manufacturers and suppliers of plant (including tools and machinery) and substances (including chemicals); and workers.

It is important to note that the definition of supplier of plant would include a farmer selling second-hand machinery and equipment, and that similar obligations would therefore apply to such persons.

The duties are not exclusory so a person may have more than one duty and more than one person may have the same duty, which may result in similar and overlapping duties at the same workplace.

The duties also cannot be transferred to another person and duty holders are also required to consult and co-ordinate activities with other duty holders in relation to the same matter (for example, where multiple contractors might be involved in an operation).

The *Work Health and Safety Regulation* outlines how a duty under the WHSA must be performed and prescribes procedural or administrative matters to support the WHSA (for example, licences for specific activities or the keeping of records).

Officers of a person conducting a business or undertaking (for example, directors or secretaries of a corporation, partners in a partnership, officer holders in an unincorporated association and possibly even senior management) also have a duty to exercise due diligence to ensure the person conducting a business or undertaking complies with any duty or obligation under the WHSA. As such, there is a positive duty on officers to ensure due diligence has been conducted and officers are required to enquire about and monitor their organisation's safety obligations and performance. In this respect. Due diligence would include taking reasonable steps to:

i. acquire and keep up-to-date knowledge of work health and safety matters; and
ii. gain an understanding of the nature of the business and operations and the hazards and risks associated with the operations; and
iii. ensure the business has, and uses, appropriate resources and processes to eliminate or minimise hazards and risks; and
iv. ensure the business has processes for receiving and considering information about incidents, hazards and risks and responding to them in a timely manner; and
v. ensure the business has, and implements, processes for complying with its relevant duties and obligations.

d. Management of risks

In managing risks to health and safety, a duty holder must identify reasonably foreseeable hazards that could give rise to risks to health and safety and eliminate such risks so far as is reasonably practicable or, if that is not possible, minimise the risks so far as is reasonably practicable.

What is "reasonably practicable" in ensuring health and safety means that which is, or was at a particular time, reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters including:

i. the likelihood of the hazard or the risk concerned occurring; and

ii. the degree of harm that might result from the hazard or the risk; and

iii. what the person concerned knows, or ought reasonably to know, about the hazard or the risk and ways of eliminating or minimising the risk; and

iv. the availability and suitability of ways to eliminate or minimise the risk; and

v. after assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.

If it is not reasonably practicable to eliminate a risk, a duty holder must implement risk control measures that most effectively eliminate the hazard or minimise the risk. This may involve a single control measure or a combination of different controls that together provide the highest level of protection that is reasonably practicable. The ways of controlling risks are ranked from the highest level of protection and reliability (level 1) to the lowest (level 3) and must be considered in order.

Level 1 Eliminate the hazard.

Level 2 Substitute the hazard with something safer;
Isolate the hazard from people;
Reduce the risk through engineering controls.

Level 3 Reduce exposure to the hazard using administrative measures (procedures); Use suitable personal protective equipment.

In order to properly manage exposure to risks, the following risk management process should be undertaken:

1. Identify hazards (that is, what could cause harm);
2. Assess risks that may result from hazards (that is, the nature and seriousness of the harm and the likelihood of it happening);
3. Eliminate the risk or, if not reasonably practicable, implement appropriate control measures to prevent or minimise the level of risk; and
4. Monitor and review the effectiveness of the adopted control measures to ensure they work as planned.

e. Consultation

In addition to consulting other duty holders, the WHSA requires persons conducting a business or undertaking to consult with workers, or a health and safety representative representing workers, about a variety of matters including when identifying hazards and assessing risks arising from work, proposing changes that may affect the health and safety of workers, carrying out certain activities prescribed by the WSHA, making decisions about eliminating or minimising risks, providing health and safety information and training, resolving health and safety issues and monitoring the health and safety of workers or workplace conditions.

f. Incidents

A person conducting a business or undertaking is required to notify Workplace Health and Safety Queensland as soon as they become aware of a death, serious injury or illness requiring immediate medical treatment or of any dangerous incident that exposes a person to a serious health or safety risk. Certain infections and infectious diseases also need to be reported.

Legal advice should be sought if a workplace incident occurs so that all obligations are complied with and so that your rights are protected, particularly if an investigation is undertaken as prosecutions may be considered.

g. Workplace health and safety inspectors

Inspectors from Workplace Health and Safety Queensland will generally investigate any workplace incidents or suspected contraventions of the WHSA. Inspectors, where they have lawfully entered a workplace, have certain powers to search, inspect, measure, test, photograph, film, copy documents, make inquiries and require a person to answer questions or provide information or reasonable assistance to the inspector. Importantly, the WHSA removes the right against self-incrimination, however a person can claim privilege before any answers or information is given to an inspector and legal advice should be sought in this regard.

Inspectors also have the power to issue improvement or prohibition notices, which may suspend or prevent the duty holder from carrying out a particular task or process or using a particular piece of plant or machinery until the matters identified have been remedied.

h. Offences and penalties

The WHSA provides that a duty holder or officer must discharge their obligation to ensure workplace health and safety and comply with their obligations under the WHSA, with a number of offences and severe penalties for failure to do so. Maximum penalties range from fines of up to $100,000 for individuals or $500,000 for companies for the lowest category offences and fines of up to $600,000 and/or five years' imprisonment for individuals or $3 million for companies for the most serious offences.

i. Legal proceedings

Prosecution for WHSA offences must be initiated within the latter of two years of the offence coming to the department's notice or within one year after a coronial inquest or report. The limitation period can however be extended for category 1 offences (the most serious offences) in special circumstances.

j. Codes of practice

The WSHA provides for codes of practice to be made and these are designed to provide a practical guide to achieving the standards of health and safety required under the WHSA.

In most cases, following an approved code would achieve compliance with the health and safety duties under the WHSA in relation to the subject matter of the code. However, codes only deal with particular issues and do not cover all hazards or risks that may arise. The health and safety duties under the WHSA require duty holders to consider all risks associated with their work, not only those for which regulations and codes exist.

Codes of practice are not mandatory so a duty holder may choose to use some other way of achieving compliance, although any other method adopted must provide an equivalent or higher standard of work health and safety than suggested by the code.

There are currently a number of published codes of practice relevant to the rural industry, including:

i. Children and Young Workers Code of Practice 2006 (*see page 84*)

ii. Confined Spaces Code of Practice 2011

iii. First Aid Code of Practice 2004

iv. Forest Harvesting Code of Practice 2007

v. Hazardous Chemicals Code of Practice 2003

vi. Hazardous Manual Tasks Code of Practice 2011

vii. Horse Riding Schools, Trail Riding Establishments and Horse Hiring Establishments Code of Practice 2002

viii. How to Manage and Control Asbestos in the Workplace Code of Practice 2011

ix. How to Manage Work Health and Safety Risks Code of Practice 2011 (*see page 83*)

x. How to Safely Remove Asbestos Code of Practice 2011

xi. Labelling of Workplace Hazardous Chemicals Code of Practice 2011

xii. Managing Noise and Preventing Hearing Loss at Work Code of Practice 2011

xiii. Managing the Risk of Falls at Workplaces Code of Practice 2011

xiv. Managing the Work Environment and Facilities Code of Practice 2011

xv. Manual Tasks Involving the Handling of People Code of Practice 2001

xvi. Mobile Crane Code of Practice 2006

xvii. Plant Code of Practice 2005

xviii. Preparation of Safety Data Sheets for Hazardous Chemicals Code of Practice 2011

xix. Prevention of Workplace Harassment Code of Practice 2004

xx. Rural Plant Code of Practice 2004 (*see below*)

xxi. Safe Design and Operation of Tractors Code of Practice 2005

xxii. Sugar Industry Code of Practice 2005

xxiii. Sugar Mill Safety – Supplement to the Sugar Industry Code of Practice 2005

xxiv. Cane Rail Safety – A supplement to the Sugar Industry Code of Practice 2005

xxv. Work Health and Safety Consultation, Co-operation and Co-ordination 2011

The codes of practice are continually reviewed and amended and new codes developed. Readers should therefore check the website of Workplace Health and Safety Queensland for the current list of approved codes to ensure compliance with the WHSA is maintained.

How to Manage Work Health and Safety Risks Code of Practice 2011

This code replaces the Risk Management Code of Practice 2007. It outlines the process of managing risk which should be followed when considering what is reasonably practicable in particular situations so that a duty holder can meet its duty of care under the WHSA.

The code includes a step-by-step risk management process which is designed to allow you to think about what could go wrong at your workplace, what the consequences could be and what you should do to eliminate or minimise the health and safety risks which might exist. It discusses how to identify hazards, how to assess risks (using a risk assessment), how to control risks, how to review controls and the records which should be kept.

Rural Plant Code of Practice 2004

This code provides guidance in relation to the management and control of rural plant. Rural plant is essentially anything located at or used for the performance of work at a rural workplace and includes machinery, vehicles, structures (such as a silo), equipment, tools or apparatuses.

The code covers the identification and management of risks from rural plant and the risk controls, preventative measures, consultation and training which should be considered. The code also discusses risks from specific plant including tractors, front-end loader attachments, all-terrain vehicles, electrical risks, confined spaces and working at heights.

Children and Young Workers Code of Practice 2006

This code provides guidelines for safety at workplaces where children might be working or in attendance (which specifically includes rural workplaces/ farms). Accordingly, where children are either working at, or present at, a rural workplace, the code must be adopted or an alternative equivalent or greater standard needs to be implemented. The code includes specific reference to the safety of children in rural workplaces.

The 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)."

A child will be considered to be at rural workplace when they are working or attending at a workplace, including when they are living on a farm, working on a casual basis after school or during school holidays, participating in a work experience program, riding in machinery or vehicles used for work, helping with farm work or in a business or shop, or simply entering a backyard shed or work area.

The code identifies hazards which are likely to represent a particular risk to young workers compared to older, more experienced workers. It also reiterates that the normally adventurous behaviour of children means 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.

k. Guide for Queensland's Rural Industry

Workplace Health and Safety Queensland has also published a new guide (*Work Health and Safety Laws: Guide for Queensland's Rural Industry*) to help rural industry employers and workers understand their health and safety duties in the workplace. The guide was developed in response to what was perceived to be a disproportionate number of workplace deaths and injuries in the rural sector.

The guide can be downloaded from Workplace Health and Safety Queensland's website or a copy can be requested from the department's infoline on 1300 369 915.

9. Business Taxes and Duties

9.1 Income Tax

a. Outline of incentives for primary producers

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

i. income averaging;

ii. annual deductions over 10 years for cost of connecting electricity or telephone lines;

iii. annual deductions over three years for capital expenditure on water facilities primarily for the purpose of conserving or conveying water;

iv. outright deduction for landcare operations;

v. special provisions relating to double wool clips and insurance recoveries for livestock and timber losses;

vi. special provisions relating to forced disposal or compulsory destruction of livestock; and

vii. 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 withdrawals are made.

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

b. 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:

i. the cultivation of land;

ii. the maintenance of domestic (but not wild) animals or poultry for sale or for sale of their bodily produce including natural increase;

iii. forest operations;

iv. 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 viniculture) 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 of Taxation 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.

c. 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, in certain circumstances, 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.

The nature, extent, and manner of producing primary production must amount to the carrying on of a business. Whether or not the activities of the taxpayer amount to a business of primary production is a question of fact and degree. Relevant considerations include:

i. whether a significant commercial purpose or character may be attributed to the primary production activities;

ii. the size or scale of the activities;

iii. 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;

iv. 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;

v. whether there is a repetition and regularity of the activities;

vi. whether there is organisation of the activities in a businesslike manner and the use of a system;

vii. whether the taxpayer has had prior experience in related business activities; and

viii. whether the activities may more properly be described as the pursuit of a hobby or recreation rather than a business.

d. Offsetting primary production losses against other income

The non-commercial business loss (NCL) measures can prevent the offset of losses made from particular business activities against a taxpayer's other income in a particular tax year. Such losses are instead deferred to be offset against profits from the same business or a similar business activity in future tax years.

The NCL measures generally prevent the offset of losses from a business against other income unless the taxpayer's taxable income (plus reportable fringe benefits, reportable superannuation contributions and total net investment losses) is less than $250,000 and the business:

i. produces assessable income of at least $20,000;

ii. has produced a profit in three of the past five years (including the current year);

iii. uses real property or an interest in real property worth at least $500,000 on a continuing basis; or

iv. uses other assets worth at least $100,000 on a continuing basis.

However, the NCL measures do not apply to losses from a primary production business if the taxpayer's assessable income from sources not related to that primary production business is less than $40,000 in a tax year (excluding any net capital gain). In those circumstances, the taxpayer can offset the loss against other income in the same tax year.

9.2 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; for example, where an asset has been substantially improved or there has been a change in the majority shareholding of the company that owns the asset.

a. Capital gain

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

i. costs incidental to its purchase and sale (including agent's fees and stamp duty); and

ii. costs incurred in improving and maintaining the asset.

b. 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.

c. Exemptions

CGT doesn't apply to certain assets including:

i. betting wins;

ii. proceeds of superannuation and life insurance policies;

iii. certain motor vehicles and motorcycles;

iv. plant and equipment subject to depreciation or capital allowances;

v. a taxpayer's principal place of residence (not exceeding two hectares).

d. 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%. The 50% 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 $6 million or less or with annual turnover of less than $2 million) are eligible for the following CGT concessions:

i. **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;

ii. **50% reduction for active assets –** a capital gain can be reduced by 50% for assets actively used in the small business (the 50% discount for assets held for 12 months or longer may also apply for a total 75% discount);

iii. **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);

iv. **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.

9.3 Goods and Services Tax

a. 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%.

b. GST

i. 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.

ii. 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 one-eleventh of the total sale price.

iii. GST rate

The current GST rate is 10%. To determine the amount of GST in a GST inclusive price divide the price by 11 to give the amount of GST payable.

iv. Supply

The *New Tax System (Goods & 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.

v. 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.

vi. 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.

vii. 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 so.

viii. 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).

ix. 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:

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.

Water

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

Exports

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

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.

Grant of land

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

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.

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.

x. 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 must specify that the Margin Scheme is to be applied.

xi. 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 $1 million are required to account for GST on an accrual basis (that is, pay GST upon issuing an invoice). Entities with annual turnovers of less the $1 million 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).

xii. Consumer protection

The *Competition and Consumer Act 2010* 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”.

xiii. 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.

9.4 Payroll Tax

Pay-roll tax is a State tax based on the annual payroll of employers. The Office of State Revenue (OSR) collects payroll tax in Queensland. Despite the introduction of the GST, certain employers must still pay payroll tax under the *Payroll 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 payroll tax is wages paid of $1 million per annum. However, an employer must register for payroll tax if the employer (or the employer group) pays more than $19,230 in a week, even if the employer believes that overall the employer will not pay over $1 million that year.

For wages paid or payable on and from 1 July 2002, the tax rate is 4.75% 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 payroll 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 payroll 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 payroll tax. As an example, a business is unable to artificially stay below the payroll tax threshold by having some employees paid by a related company.

The Commissioner of Payroll 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.

9.5 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 (being 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:

a. 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.

b. Remote area housing

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

c. 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.

d. 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 $2000 (excluding car parking and entertainment), it is used to calculate:

i. entitlement to income-tested tax concessions; and

ii. liability to income-tested surcharges such as Medicare levy, superannuation contributions, Higher Education Loan Program (HELP) repayments and child-support obligations.

9.6 Duties

Stamp duty is a tax imposed by the Queensland Government on certain transactions specified in the *Duties Act 2001*. 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:

a. 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 1.5% for amounts between $5,000 and $75,000 and increases to 5.75% for amounts over $1,000,000.

"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 $350,000) which relates to a dwelling house, residential improvements and surrounding land to be used as the purchaser's home will be assessed at 1% (or less if it is the purchaser's first home). Where the land has a commercial component, duty at the usual rates is charged on the commercial component.

The home concession does not apply to vacant residential land, however those building their first home are entitled to a duty concession provided they occupy the house to be built on the land within two years of the transfer date. The concession reduces as the land value increases and ceases at $399,999.99.

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.

b. 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).

c. 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.

d. Motor vehicles

Duty is assessed on the transfer of vehicles at a flat rate of 2% to 4% of the purchase price or value of the vehicle; the higher the number of cylinders the higher the rate. Primary producers are entitled to an exemption for vehicles of more than six tonnes load capacity used solely for primary production.

e. Companies

Duty on the transfer of shares in private companies was abolished from 1 January 2007. However, ordinary transfer duty will apply to acquisitions giving control of 50% or more of the shares in cases where the company is a "land-rich company" (that is, where the company's land holdings are worth $2 million or more) 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.

f. Mortgages

Duty on mortgages has been abolished.

g. Leases and subleases

Duty on leases and subleases has been abolished.

h. Unpaid tax interest

Unpaid tax interest is payable on late payments. The interest is accrued on a daily basis. The rate is 8% higher than the Reserve Bank's 90-day bank bill rate.

i. **Objections**

A person dissatisfied with a 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.

j. **Appeals**

A person disputing a stamp duty assessment may, apply to the commissioner for review fo the original assessment within 28 days. If dissatisfied with the commissioner's decision the taxpayer can 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.

10. Finance

10.1 Mortgages of Land

a. **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 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, 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.

b. **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 a newspaper circulating in the locality for a minimum of 28 days before any sale by the mortgagee.

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.

c. 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.

10.2 Personal Property Securities

a. Background

"Personal property" is all forms of property other than land, water rights and certain rights or entitlements created by statute. Examples include tangible property (such as motor vehicles, livestock and crops) and intangible property (such as shares, bank accounts and the right to receive payment from a debtor).

Personal property has long been offered as security for obtaining credit for both personal and commercial purposes. Under the former law, over 70 pieces of Commonwealth and State legislation regulated the giving of personal property as security and over 40 public registers recorded these securities. Since 30 January 2012, the *Personal Property Securities Act 2009* (Cth) (PPSA) has replaced the multitude of laws with one Act which uniformly applies to granting security in personal property in Australia (subject to limited exceptions).

Most registrations on former registers such as the Register of Encumbered Vehicles (known as REVS) and the Register of Company Charges have been migrated onto the new Personal Property Securities Register (PPS Register).

b. PPS Register

The PPS Register is an electronic register which can be accessed and searched at ppsr.gov.au. Any person can search the PPS Register by using the serial number of certain types of property (such as a motor vehicle's vehicle identification number (VIN)) or by the details of the party who grants the security interest (such as an individual's name and date of birth or a company's ACN) (known as the "grantor").

As a general rule, if a person is acquiring personal property, then the person acquiring the personal property should undertake a search of the PPS Register to ascertain whether the personal property is the subject of a security interest and obtain a release of any security interest to ensure that the acquirer takes the personal property free from any security interest.

In certain circumstances, the PPSA provides that an acquirer takes property free from any security interest. For example, an acquirer does not require a release where:

- the value of the personal property is less than $5000 and the property is used predominantly for personal, domestic or household purposes; or
- the personal property is sold or leased in the course of the seller's or lessor's business of selling or leasing personal property of that kind.

c. The new approach of the PPSA – substance over form

In addition to creating a single register, the PPSA has also unified and rationalised the laws that relate to granting a security interest in personal property. The PPSA has a new approach on the law of personal property securities rather than the approach that existed under the former law.

Under the former law, the types of transactions that were considered to involve the granting of security and which were required to be registered on a public register depended on whether the transaction took a particular form. The following examples demonstrate the former law:

- Party A seeks credit from Party B to purchase a motorcycle. Party B agrees to provide credit to Party A on the basis that Party A grants Party B a mortgage over the motorcycle (formerly known as a bill of sale). The mortgage provides that Party B holds the legal title in the motor cycle and Party A is merely given possession of the motorcycle. If Party A defaults in making repayments to Party B, Party B can retake possession and sell the motorcycle as it holds the legal title to the motorcycle. Under the former law, the mortgage was a recognised form of security and was registered on the former Bills of Sale Register.
- Party A is a retailer of motorcycles and Party B is a manufacturer of motorcycles. Party B agrees to provide a motorcycle to Party A on credit terms under a supply agreement on the basis that legal title in the motorcycle is retained by Party B (known as a "retention of title arrangement"). Party A is merely given possession of the motorcycle for the purposes of selling. If Party A defaults in paying Party B as provided for under the supply agreement, Party B can retake possession and sell the motorcycle as it holds the legal title to the motorcycle. However, under the former law the retention of title arrangement was not a recognised form of security. The retention of title was therefore not recorded on any public register.

Both of the above examples involved Party B holding the legal title as security for payment of monies owed to Party B by Party A. The legislature considered that the emphasis of the former law on the form of the transaction caused difficulties for parties dealing with Party A, potential financiers of Party A and also creditors of Party A.

In contrast to the former law, the PPSA looks to the substance of the transaction. Both the mortgage and the retention of title arrangement, in substance, secure payment to Party B. As such, both transactions should be registered on the PPS Register.

d. Benefits of registration

A transaction which creates a security interest is not invalid if it is not registered on the PPS Register. A secured party may still enforce its security in the usual manner under normal circumstances.

However, if a secured party fails to register its interest on the PPS Register and the grantor goes bankrupt, insolvent or enters a form of external administration, the security interest is forfeited to the grantor, that is, it is made ineffective.

This is particularly important to secured parties that hold the legal title of personal property as a security interest (such as under a retention of title arrangement) as this means that the secured party will lose its ownership of the personal property if it fails to register.

As a general rule, the priority between secured parties is a determined by a "first in time" approach. However, certain secured interests are given a "super priority". One such example of a security interest given a "super priority" is a security interest created by a retention of title arrangement.

e. Extended application of PPSA – the PPS lease

One aim of the PPSA is to create a consistent regime that determines the priority between interested parties. While it is clear that such interested parties include financiers and parties who have taken security over personal property, other parties may also have an interest in the personal property in the possession of a grantor.

Take for example an owner of a horse who leases a horse to a trainer. In practice, the trainer may lease some horses and the trainer may hold legal title to other horses. To an external party, the trainer has exclusive possession and control of all horses. As such, the trainer appears to hold legal title to all horses and on this basis a financier may take an "all assets" security over the trainer. If the trainer was wound up and the financier took control of the trainer's assets, the horse owner and the financier would have competing claims to the leased horses.

For this reason, the PPSA deems certain transactions to be a security interest regardless of whether the transaction in substance, secures payment or performance of the obligation by a party. One such deemed transaction is the PPS lease. Broadly speaking, a "PPS lease" is a lease or bailment of personal property for a term of more than one year (or 90 days for serial-numbered goods) where the lessor or bailor is "regularly engaged in the business" of leasing or bailing goods.

The example of the horse trainer is a clear example of a PPS lease. Another example which may be considered to be a PPS lease is an agistment agreement whereby an owner of livestock depastures its livestock on another person's land. It is recommended that any agreement whereby possession of personal property is given to another party be reviewed by a solicitor to determine whether registration on the PPS Register is required.

f. Transitional period

g. Where a security (such as a retention of title):

- was created prior to 30 January 2012; and
- was not required to be registered under the former laws; and
- is required to be registered under the PPSA,

then a two-year transitional period exists from 30 January 2012 which temporarily protects the interest of the secured party.

Any person who may be a secured party with a registrable interest should seek legal advice as early as possible.

10.3 Consumer Credit and Farming Equipment Finance

a. Consumer credit

Since 1 January 2010, the National Credit Code (part of the *National Consumer Credit Protection Act 2009* (Cth)) has provided national regulation of the provision of "consumer credit". The primary purpose of the code is to provide consumers with a level of consumer protection.

The code applies to the provision of credit to individual persons (as well as residential body corporates) where the credit is provided wholly or predominantly for:

i. personal, domestic or household purposes; or

ii. to purchase, renovate or improve residential property for investment purposes or to refinance credit provided for these purposes.

As such, the code regulates credit transactions such as personal loans, credit card facilities, hire-purchase agreements for domestic appliances and finance for the acquisition of residential property.

The code does not apply where finance is obtained for the acquisition of commercial vehicles or farm machinery. However, in these cases, consumer protections may be available to primary producers under the *Credit (Rural Finance) Act 1996* (Qld) (see 10.3(b) Rural finance, below). Further, the code does not apply where the finance is obtained in the name of a company.

The code sets out the disclosure obligations of the credit provider, minimum rights of consumer and available dispute resolution processes. Some of the major examples of the consumer protections provided by the code in practice are:

i. Freedom of choice

   A supplier of goods or services cannot insist on the buyer obtaining credit from a specific credit provider.

ii. Minimum information required to be included in credit contract

   The code requires mandatory disclosure of items such as fees and charges, the total amount of interest payable under the loan contract, default interest rates and enforcement expenses. If a credit provider advertises an interest rate then it must also advertise a comparison rate to enable consumers to compare the costs of obtaining the advertised credit.

iii. Mortgages

   The code prohibits credit providers from taking mortgages over all the assets of the consumer. A mortgage must specifically state the assets which are mortgaged.

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

iv. Guarantees

Any guarantee given in respect of a code-regulated credit contract is limited to the amount set out in the credit contract. If the amount of credit is subsequently increased, the guarantor does not guarantee the increased liability unless the guarantor accepts the increase in writing.

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

b. Farming equipment finance

While the code does not regulate commercial finance that arises in the agricultural context, some consumer protections have been extended to individual persons who obtain credit for "farming equipment" under the *Credit (Rural Finance) Act 1996* (Qld).

Farming equipment is defined broadly as equipment of a type whose usual use is to carry out a farming business. Examples include harvesters, milking machines, ploughs and tractors.

The *Credit (Rural Finance) Act* provides protection to farmers against the enforcement of mortgages over farming equipment. If the credit provider has provided a default notice to the owner of the farming equipment but has not yet obtained possession of the equipment, the owner may apply to a court seeking an order to prevent the credit provider obtaining possession of the equipment for up to 12 months provided the owner demonstrates that the equipment is being used or is intended to be used in the owner's farming business.

The *Credit (Rural Finance) Act* also provides farmers with certain rights and protections where farming equipment is leased under a hire-purchase agreement.

10.4 Minor Civil Disputes

a. Queensland Civil and Administrative Tribunal

Until 2010, there were two specialised forums for creditors/consumers to pursue minor debt claims and disputes up to $7500 value – The Small Claims Tribunal and the Magistrates Court exercising its minor debt jurisdiction.

Since 2010, the Queensland Civil and Administrative Tribunal (QCAT) has taken over as the "super tribunal" or "one-stop shop" for all of the above matters. QCAT now determines the following matters as "minor civil disputes":

- debt disputes up to $25,000;
- consumer and trader disputes up to $25,000;
- property damage disputes up to $25,000;
- residential landlord/tenancy disputes;
- dividing fences disputes (now under the *Neighbourhood Disputes Resolution Act 2011* (Qld), which replaced the *Dividing Fences Act 1953* (Qld)).

As noted above, QCAT's monetary jurisdiction for determining a "minor civil dispute" is $25,000. QCAT has separate jurisdiction beyond this amount for other matters including, for example, retail shop lease disputes.

QCAT's objectives are to deal with matters in a way that is "accessible, fair, just, economical, informal and quick". In doing so, QCAT adopts more flexible processes (compared to the Court Rules) and the parties are presumed to not require legal representation and to bear their own costs (subject to some exceptions).

In most cases, a determination by QCAT can be enforced in the same way as a judgment in the court.

b. Queensland courts

The creation of QCAT does not affect the jurisdictions of the Magistrates Court (and other Queensland courts) to determine disputes. However, simplified procedures are no longer available in the Magistrates Court in determining "minor debt" claims.

If a party prefers to use the formal court system to litigate a dispute, then they will be entitled to legal representation. The successful party will also usually be entitled to seek a costs order against the other side.

c. Time limits

Limitation periods apply to claims brought in QCAT and in the court. A person with a claim should act swiftly to avoid the claim becoming statute barred.

10.5 Insolvency

Bankruptcy (or "personal insolvency") describes the circumstances where an individual is unable to pay his/her debts when they fall due. The *Bankruptcy Act 1966* (Cth) then provides a structured process for creditors to be addressed and for the bankrupt to be relieved of his/her obligations after a defined period.

Bankruptcy proceedings can be implemented by a creditor (by way of filing a creditor's petition) or an individual can voluntarily submit to bankruptcy (by way of filing a debtor's petition).

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.

Not all creditors are bound by the bankruptcy process. Unsecured creditors (including the ATO) are usually all bound, however the rights of secured creditors (for example, mortgagees) to enforce their security are not ordinarily affected.

A bankrupt can be discharged automatically after three years (assuming the bankrupt has met his/her statutory obligations) or after a shorter period if certain criteria are met.

An alternative to bankruptcy 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 (according to specific voting requirements), 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 agrees to present his/her own petition in bankruptcy.

Bankruptcy, debt agreements and PIAs should only be considered after consultation with an insolvency expert.

The law and processes relating to corporate insolvency have some similarities with bankruptcy. However, there are important differences. Specialist insolvency advice should be sought if you have any concern regarding a corporate insolvency.

11. Succession

11.1 Succession Planning

a. 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*.

b. 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 (in their personal name) after death and the administration of the deceased's estate.

c. Functions of a Will

The basic functions of a Will can be summarised as follows:

- to nominate executors and trustees;
- to provide for the maintenance and care of the testator's family including the appointment of a guardian of any infant children; and
- to dispose of property in the way in which the testator wishes.

d. Will making

i. 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.

The Supreme Court has power to make a Will for a person without testamentary capacity and the Court would normally do so if the person did not have a Will or their circumstances had changed since the making of their Will (for example, the person who was to benefit from the existing Will is separated from the person or had done serious harm to the person).

ii. How a Will must be executed

There are certain formal requirements for a valid Will. These may be summarised as follows:

A. the Will must be in writing;

B. it must be signed by the testator (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); and

C. the signature of the testator must be made or acknowledged by the testator in the presence of two or more witnesses, all present at the same time.

The court has the power to declare that Wills that fail to meet the requirements are still valid.

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 persons who would benefit directly from the disqualification consent in writing to the distribution.

iii. Alterations and revocations of Wills

A. 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, or is authorised by an order of the court.

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.

A codicil should be avoided to effect a change if you do not want the beneficiaries to know how you changed your Will.

B. Revocation

Marriage revokes all provisions of a Will except for dispositions to a spouse and the appointment of the spouse as executor or guardian, and the testator and spouse are still married at the date of the testator's death.

A Will made in contemplation of marriage, whether or not that contemplation is stated in the Will, is not revoked by the solemnisation of the marriage contemplated.

Divorce revokes the parts of a Will which relate specifically to the former spouse.

A Will may also be revoked by another Will or a document declaring the intention to revoke the Will or any part of it.

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 of the testator to revoke the Will must be present at the time of destruction.

e. Effect of death on assets

The impact of your death on your personal financial affairs and business financial affairs is:

- Any assets in your personal name are dealt with by the terms of your Will
- Any assets in a company of which you are a shareholder or director remain in the company and your death does not affect the assets. Your shares in the company will be dealt with by your Will. You will cease to be a director of the company. If the company owes you money you will have a loan account with the company. That loan account is an asset of your estate and dealt with by your Will.
- Any assets in a trust of which you are a trustee or beneficiary will remain in the trust and your death does not affect the assets. Depending on the trust terms, you may have the ability to put in place your successor/s as trustee. You cease to be a beneficiary of the trust but if the trust owes you money (that is, you have a loan account with the trust), that loan account is an asset of your estate. Repayment of that loan account could cause financial hardship to the trust.
- Any assets in a partnership remain in the partnership. You are able to gift your interest in the partnership and not the specific assets of the partnership. Your interest in the partnership and any loan account in the partnership (where the partnership owes you money) are dealt with by your Will.
- Any loan account in a trust, company or partnership whereby you owe money to any of those entities will be a debt of your estate and will be repayable in priority to distributions to beneficiaries.

- Assets held as joint tenants with another or others will automatically pass to the survivor or survivors irrespective of the terms of the Will of the joint tenant who dies. Land can be held as joint tenants, bank accounts in more than one name are treated as if held as joint tenants (unless there is evidence to the contrary), shares in joint names are treated as if held as joint tenants. However co-ownership of a car, boat, plane, furniture etc does not mean ownership automatically passes to the survivor. It is important to deal with such assets in your Will.
- Superannuation is money in a trust whether it is a self-managed superannuation fund or an industry fund. The death benefits payable as a result of your death are paid either in accordance with a valid binding death benefit nomination (if one is in place) or as decided by the trustee of the fund. The trustee can only direct payment to dependants or your estate and in whatever proportions the trustee determines. Dependants mean "spouse, child or someone who is financially dependent on you". There may be tax consequences to payment of death benefits so getting advice is recommended.

11.2 Estate Administration

a. 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 (including de facto spouse) and children – and if none survive, then down the line to the intestate's next closest relatives commencing with their parents.

b. Executor's role in 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:

- to take possession of the estate of the deceased;
- to pay the debts of the deceased;
- 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. A trustee company will charge a commission for administrative duties.

This results in additional expense for the estate which may be avoided by the appointment of specific persons known to the testator as executors. Individual executors may seek executor's commission for acting as an executor but the amount of the commission can be set by the will, agreed to by the residuary beneficiaries or ordered by the court if application is made to the court.

c. Grant of probate

A grant of probate is obtained by making an application to the Supreme Court. It is likened to a court order that says this person has died, this is the last will of that person, it is valid and the person or persons to whom the grant is given are the only persons entitled to deal with the deceased's assets.

The nature and/or value of assets will govern whether a grant of probate will be required. It is possible to administer some estates informally (that is, without a grant of probate) by providing indemnities if required by any financial institution holding the deceased's funds or, if the estate comprises little else but real estate (and there is a Will) by lodging the Will with the Titles Office with transmission documents.

d. Entitlement to a copy of the Will

Any person who is a beneficiary in any Will of the deceased person, or, if the deceased died without a Will, any person entitled to the deceased's estate on intestacy has the legal right to be given a copy of any Will of the deceased.

e. 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 financial dependant, then the court may, in its discretion, order that further and/or better provision be made out of the deceased person's estate for that spouse or child. In effect, the court rewrites the Will.

Notice of intention to make a claim for further or better provision must be given to the executor within six months of the date of death. Court proceedings for the claim must be commenced within nine months of the date of death. If notice is given but court proceedings are not commenced within the nine months' the estate can be distributed. A settlement of a claim can be negotiated at any time.

Family provision claims delay the estate administration because distribution cannot occur until the claim is dealt with, cause angst among family members, and can incur substantial legal costs.

11.3 Planning for Incapacity

a. How incapacity will impact

If you became incapable of managing your financial affairs, this will impact on your personal financial affairs and your business affairs as follows:

- You need an attorney appointed under a valid enduring power of attorney otherwise an application to QCAT for the appointment of an administrator will be necessary. There is the possibility that the Public Trustee could be appointed to act as administrator.

- If you are a sole trader your attorney appointed under a valid enduring power of attorney could act in your place;
- If you are a director of a company, you can no longer be a director. If you have appointed an alternate director that appointment is no longer valid.
- If you are a shareholder of a company, you will be unable to vote at member meetings but your attorney could vote on your behalf.
- If you are a partner in a partnership, the impact will depend on what is in the partnership agreement – most agreements provide for cessation as a partner in the event of incapacity. If there is no agreement then your attorney could act.

b. Enduring power of attorney

In case you are not always able to make decisions when you need to, you should have an enduring power of attorney.

Being too ill to make decisions about your medical treatment or attend to your financial affairs, or suffering an injury or disability (such as a stroke) could prevent you from making your wishes known to others. Alternatively you may be going on holidays and need financial matters attended to in your absence.

An enduring power of attorney can appoint another or others (individually, jointly, by majority or successively) to make decisions for you about financial matters and/or health and personal matters.

An enduring power of attorney is like insurance – just in case you need it.

c. Advanced health directive

An “advance health directive” enables a person to give directions for his or her future health care and treatment if that person becomes unable to do so. The directives are about ensuring quality of life. If there is no quality of life and you are unlikely to recover from illness or injury, certain nominated treatment can be withheld.

12. Relationships and Families

12.1 Relationships

a. Marriage and divorce

Divorce in Australia is based on a “no fault” principle which means that a court is not interested in blaming either party when a marriage ends. 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, welfare and development of the children.

b. De facto relationships

Section 4AA of the *Family Law Act 1975* provides that two people are in a de facto relationship if they are not legally married to each other, not related by family and having regard to all of the circumstances of their relationship, they have a relationship as a couple living together on a genuine domestic basis.

The circumstances which can be taken into account in determining whether a de facto relationship exists may include the following:

- the duration of the relationship;
- the nature and extent of common residence;
- whether a sexual relationship exists;
- the degree of financial dependence or interdependence, and any arrangements for financial support;
- the ownership, use and acquisition of property;
- the degree of mutual commitment to a shared life;
- whether the relationship is or was registered under a prescribed law of a State or Territory, for example in Queensland under the *Relationships Act 2011*;
- the care and support of children;
- the reputation and public aspects of the relationship.

It is not necessary for all of the above circumstances to apply to a relationship for it to be considered a de facto relationship. For example, a couple could be spending long periods of time apart in two different countries due to work commitments but still be considered to be in a de facto relationship if some of the other factors exist, such as commitment to a shared life, financial interdependence and the reputation and public aspects of the relationship.

c. Registered relationships

The *Relationships Act 2011* is Queensland legislation which allows couples who are in a de facto relationship to register their relationship. This can be done by applying to the Registrar of Births Deaths and Marriages for the relationship to be registered.

Any adult who is not married or already in a registered relationship can register their relationship under the Queensland legislation. The prerequisites are that the couple is not in a prohibited relationship (that is, between a sibling, parent or lineal descendant) and one of the parties must live in Queensland.

Once an application is made to the registrar, there is a 10-day cooling-off period before the relationship is registered. During this time one or both applicants may withdraw the application.

A registered relationship is terminated by the death or marriage of a party to the relationship, or by registering a termination.

If either or both parties want to terminate the registered relationship, an application in the approved form must be made to the Registrar of Births Deaths and Marriages. If a single application is made it must be served on the other party to the relationship.

The termination of the relationship cannot be registered until 90 days after the date the application was made. During this time one or both parties may withdraw the termination application.

Registering a de facto relationship creates a legal record of the existence of the relationship. This means that there is no need to prove the existence of the relationship in other proceedings such as for property settlement. By registering the relationship it means that the provisions of the *Family Law Act 1975* relating to de facto property settlement apply immediately irrespective of the length of the relationship.

12.2 Binding Financial Agreements

The law 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 comply with certain strict requirements set out in the *Family Law Act 1975* and will not be binding unless those requirements are followed. These include obtaining independent legal advice as to the effect of the agreement on your rights and the advantages and disadvantages of entering into the agreement at that time.

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 you own at the commencement of a relationship, for example, assets which have been passed down through generations, such as a farm or family business; and
- providing certainty as to how your property will be dealt with should you separate and preventing costly litigation in the event of the relationship breaking down.

12.3 Property Settlements

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 1975* gives courts a wide discretion to make orders altering property interests between married and de facto 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:

- 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).
- The second step is to look back over the relationship from the date of marriage, or commencement of cohabitation for de facto couples and evaluate the financial and non-financial contributions of both parties to the asset pool. Post-separation contributions will also be taken into account as well as any contribution of either party in the role of homemaker and parent. For example, if one party brought into the marriage or de facto relationship their interest in the family farm, this should be taken into account as a contribution on that party's behalf.
- 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.
- 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.

Either party to a marriage can apply to a court for a property settlement order at any time after separation. Once a married couple have divorced, there is a time limit of 12 months from the date of the divorce order within which court proceedings for property settlement must be commenced.

For de facto couples there is a time limit of two years from the date of separation within which proceedings for property adjustment must be commenced.

Since 1 July 2009 the provisions of the *Family Law Act* have applied to de facto couples who separated after that date. One of the following circumstances must also exist for the Act to apply:

- the parties lived in a de facto relationship for a period or a total of the periods of at least two years; or
- the relationship was registered under a prescribed law of a State or Territory (for example, the *Relationships Act 2011* in Queensland); or
- there is a child of the relationship who is under the age of 18 years; or
- a party has made substantial financial contributions to the acquisition, conservation or improvement of any property of the parties or either of them and there would be serious injustice to the party applying if a property adjustment order was not made.

12.4 Children

a. Parenting arrangements

When relationships end, one of the first questions often asked is “Who looks after the children?”

It does not matter whether parents are married or in a de facto relationship, all arrangements for children are covered by the *Family Law Act*.

Major changes to the law were made in 2006 that 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 on resolving parenting arrangements outside of the court through counselling and mediation.

Family relationship centres are available and family dispute resolution practitioners appointed to assist parents to develop parenting plans to deal with parenting issues and disputes without having to resort to going to court.

The important areas of the law to be aware of are:

- There is a presumption of equal shared parental responsibility which means parents participate equally in making major long-term decisions about the upbringing of their children (there are exceptions where there is family violence or abuse).
- The courts are required to consider whether children spending equal time with both parents is reasonably practical and in the best interests of the children.
- If equal time is not practical or in the children’s best interests, the courts must then consider whether children spending substantial and significant time including weekends, weekdays and special occasions with both parents is reasonably practical and in the best interests of the children.
- The right of children to know both their parents and to be protected from harm are primary factors in determining the best interests of the children.
- The interests of children spending time with grandparents and other relatives significant in their lives is recognised.

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 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.
- any other relevant matter

The best interests of a child remain the paramount consideration when a court makes a parenting order dealing with the child’s living arrangements.

b. 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.

Since 1 July 2008, the Child Support Agency has applied a new formula for calculating child support. The agency bases 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 treats both parents' incomes equally by allocating the same notional self-support amount to both parents, takes 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 also takes 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.

During the first three years after separation, parents are also 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 into private agreements on the amount of child support to be paid and these agreements can be registered with the Child Support Agency. There are two kinds of private child support agreements:

i. limited agreements meaning they end after three years, or either parent can terminate them;

ii. binding agreements meaning they can only be terminated by further written agreements or court orders.

c. 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. Even if there is no court order,the provisions of the *Family Law Act* require consultation between parents about a major decision affecting the children such as moving interstate or overseas.

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.

13. Vehicles and Machinery

13.1 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 while 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 unlicenced 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 or death, or where damage to other property (including any animal) exceeds $2500 must:

a. stop and remain at the scene;
b. render assistance to the injured person;
c. make reasonable endeavours to obtain medical and other aid; and
d. 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:

a. 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
b. 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 equipped 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.

13.2 Concessional Registration

Transport Operations (Road Use Management – Vehicle Registration) Regulation 2010 contains provisions dealing with concession registration.

Seasonal registration, that is registration for only three or six months, is allowed for:

a. trailers over 4.5 tonnes; or

b. 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 on 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 on 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 that 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 5 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:

a. 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

b. 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 2010* is current for a primary production vehicle for which concessional registration has been granted for two years after its issue.

13.3 Unregistered Vehicles

Under the *Transport Operations (Road Use Management – Vehicle Registration) Regulation 2010*, a person must not use or permit to be used on a road an unregistered vehicle unless:

a. 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;

b. the vehicle is being used with an unregistered vehicle permit; or

c. 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:

a. the driving of a motor vehicle;

b. a collision or action taken to avoid a motor vehicle collision;

c. a motor vehicle running out of control; and/or

d. a defect in the motor vehicle causing loss of control while 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:

a. the accident involved an uninsured motor vehicle but did not occur on a road or in a public place;

b. 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 a written-off vehicle (or part of a vehicle that has an identifying chassis or VIN number) must ensure lodgment of an approved form notifying of the disposal.

13.4 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 1994*).

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.

13.5 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 chief executive officer 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.

13.6 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 person in control of the vehicle is responsible for ensuring the loading requirement or trailer is compliant. 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.

For example, a vehicle built to carry cattle, horses, pigs or sheep cannot be higher than 4.6 metres. There are also particular requirements regarding trailers for the carriage of animals, which require that:

a. 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
b. 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.

The Department of Transport and Main Roads has developed numerous guidelines and policies to facilitate the movement of large loads in a safe and efficient manner. The guidelines provide an exemption from regulations although permits may be required in certain situations.

Also, the Grain Harvest Management Scheme (managed by AgForce Queensland) addresses the practical difficulty of loading bulk commodities onto vehicles to accurate weight tolerances. 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.

13.7 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 (with a maximum fine up to 1000 penalty units, being $100,000 for individuals or $500,000 for companies, or two years' imprisonment) including where:

a. an animal is confined or transported without appropriate preparation (including appropriate food, rest, shelter or water);
b. an animal is unfit for such confinement or transport;
c. an animal is confined or transported in an unsuitable container or vehicle; or
d. 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 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.

13.8 Diesel Fuel Rebates

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.

Fuel tax credits exist for agricultural and fishing businesses using diesel vehicles of greater than 4.5 tonnes Gross Vehicle Mass (GVM) travelling on a public road (and diesel vehicles acquired before 01/07/06 equalling 4.5 tonne GVM); and for off-road activities. 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 ato.gov.au/fuelschemes.

The scheme also covers duty-paid alternative fuels such as biodiesel, ethanol, LPG and CNG. Biodiesel is covered if it is a blend of 20% or less with diesel, and ethanol is covered if it is a blend of 10% or less with petrol.

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.

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 credits 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. Ineligible activities include distributing, manufacturing or marketing produce and transporting livestock on public roads (although this may be "eligible" under the road transport activity).

The fuel tax credits applicable for road transport activity are reduced by a road user charge.

Similarly there are eligibility guidelines for credits for commercial fishing and forestry.

Records sufficient to substantiate claims must be retained for up to five years in case of a tax audit. False, erroneous or unsubstantiated claims may render the fuel tax credit claimant liable for a penalty. Fuel tax credits are both assessable income for income tax purposes.

13.9 Defective Machinery

a. Introduction

Recourse for defective or deficient machinery or services may potentially be available due to either:

i. the terms of the sale contract; or

ii. 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:

i. the purpose for which the machinery or services are required;

ii. the quality and performance capabilities the machinery or services will have;

iii. the availability of facilities for repair and spare parts;

iv. any other matters of importance to the purchaser.

Ideally such specifications should be incorporated into written contractual terms. It may be possible to rely on written or spoken pre-purchase communications or on 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.

b. 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 guarantees as are imposed into the contract by statute.

c. **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), the Australian Consumer Law (ACL) (part of the *Competition and Consumer Act 2010*) compulsorily imposes into the sale contract various useful guarantees, regardless of the agreed contractual terms. However, sellers of machinery and services can limit their liability under such guarantees to the cost of repair or replacement of machinery or the cost of supplying the services again. In particular:

i. Fitness for purpose (ACL s55)

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.

ii. Acceptable Quality (ACL s54)

Machinery or services supplied must be of acceptable 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.

iii. Sale by Description (ACL s56)

Where machinery is purchased by description, the machinery must conform to the description.

iv. Reasonable care and skill (ACL s60)

There is an implied guarantee that services supplied (except insurance and transport services) must be supplied with reasonable care and skill.

d. **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.

e. 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 (ACL s18).

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.

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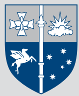

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