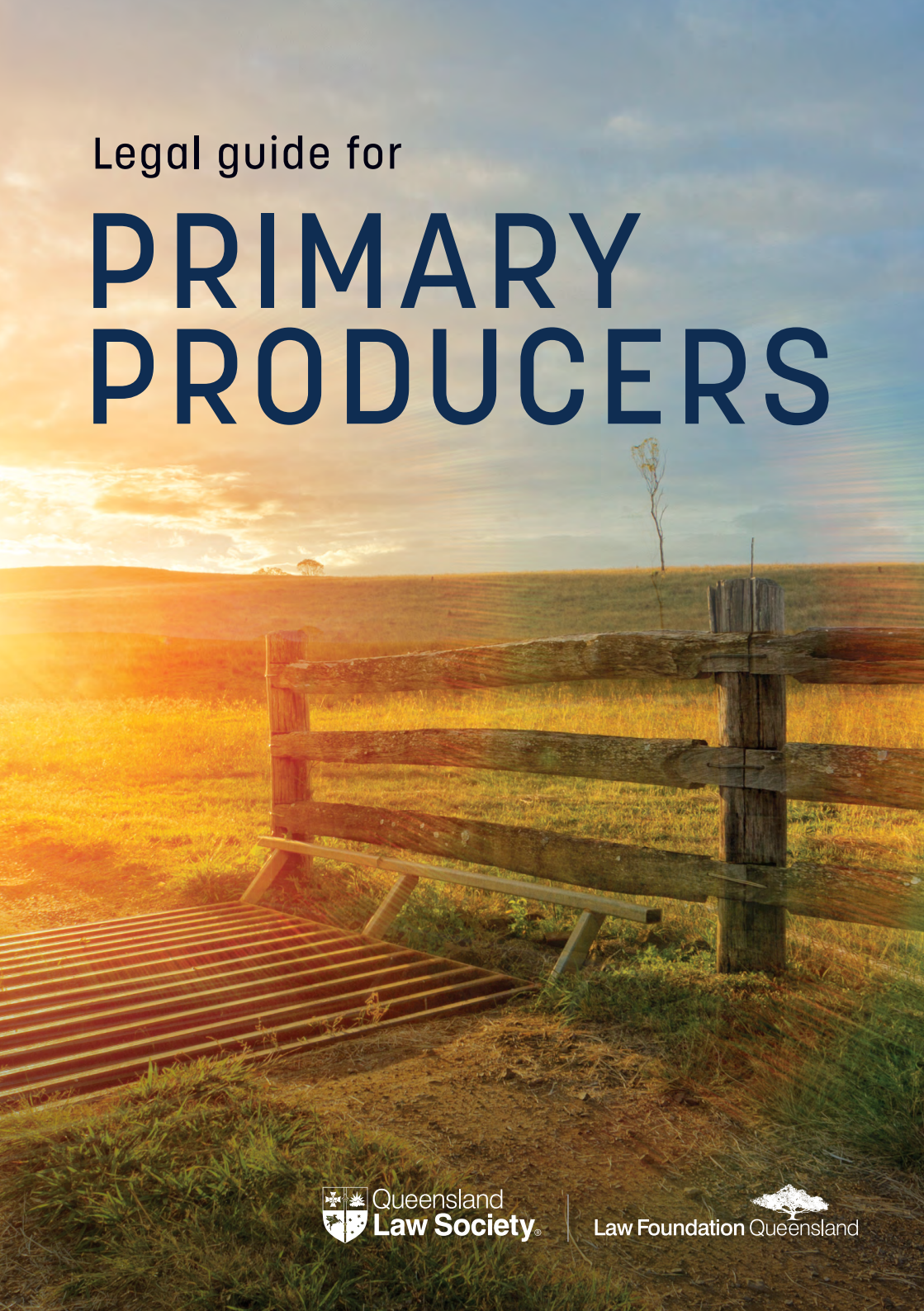


Legal guide for

# PRIMARY PRODUCERS





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# Thynne Macartney

This is the fifth version of the Legal Guide for Primary Producers that Thynne & Macartney's Agribusiness Group has authored following previous editions which were published in 1990, 2001, 2007 and 2012.

Thynne & Macartney was established in 1893 by Mr AJ Thynne and Sir Edward Macartney who were, in different ways, involved in the early development of agriculture in Queensland. Since then, Thynne & Macartney has grown to become one of the leading agribusiness practices in Australia with a range of clients who include public, private and off-shore investors, predominantly in the beef, wool growing and broad acre farming sectors. The firm is particularly proud of its long history in representing successive generations of rural families.

This publication has been prepared as a general guide for primary producers and covers a range of topics which are tailored for the agricultural sector. This version of the guide reflects the law as at 30 April 2019, but it is not intended to be a substitute for specific legal advice that might be required for a particular problem, which should always be referred to a solicitor in the first instance.

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# Legal guide for primary producers

According to the ATO, a primary producer is an individual, partnership, trust or company operating a primary production business if they undertake:

- plant or animal cultivation (or both)
- fishing or pearling (or both)
- tree farming or felling (or both).

The real picture is a bit more complex, and the work of primary producers is one of the foundations of our country's economic success, and our culture. It is not for nothing that during elections and photo opportunities politicians cannot get an Akubra on fast enough; identifying themselves with the Australian values and ideals that are wound up in the work of our primary producers is something they all aspire to do.

Part of the reason for that is economic; according to the Australian Bureau of Statistics, in 2017-18 the gross value of crops in our country was 29.3 billion dollars, and the value of livestock 29.6 billion.

Forestry exports contribute \$3 billion to Australia's economy; its manufacturing, sales and service income make up around \$24 billion per year. Throw in the fact that the value of Australia's fisheries and aquaculture production is forecast to rise by 4% to \$3.3 billion by 2019-20, and we are talking a serious contribution to our economy.

Not all of the benefit is economic, however, and those photos of pollies in Akubras and Driza-bones don't just appear in the financial papers. They love to tap into the sheer Australiana that accompanies a life on the land or sea.

That is understandable too, in that much of our national identity is built on the history of the people who work the land

and the ocean, who in our nostalgic views ride boundless cattle stations and farms, wield mighty axes or battle the high seas. All those pursuits rely on helping your neighbour, building trust through a handshake and facing adversity with quiet confidence. We all see something of that inside us, and we feel proud of it.

Times have moved on and technology has changed the way we do things, but not the spirit, and it is to our nation's great benefit. That we still have the world's best produce, much sought after both here and abroad, is a source of national pride.

It is also something worth protecting and that means dealing with the regulatory regimes that cover primary production, and the legal issues that are more often a part of that world.

This guide will help you navigate those regimes and keep abreast of recent changes which may affect the way you work. Naturally, if you need a deeper level of advice QLS member solicitors stand ready to help. I thank Law Foundation—Queensland for producing the book and the invaluable help of Thynne and Macartney in its production, and wish our primary producers all the best in their endeavours.



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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 primary features of these two types of land tenures can be summarised as follows:

### a. Freehold

Until 1 July 2014, freehold land in Queensland was either unrestricted or restricted.

Restricted freehold was former leasehold land which was subject to the now repealed section 174 of the *Land Act 1994* (Qld), meaning that it could not be held by a company or upon trust for a company without the prior consent of the Governor-in-Council being obtained. Sometimes you still see the reference to section 174 of the *Land Act* noted on titles to freehold land, but that notation can be completely disregarded as it is no longer of any effect.

The abolition of restricted freehold land has certainly helped to simplify Queensland land tenures and land ownership.

### b. State Leasehold

The position in relation to State leasehold land which covers approximately two-thirds of the Queensland land mass is more complex.

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

The basic historical distinction though under previous 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 while there were previously ownership restrictions, they no longer apply. These tenures can be converted to freehold tenure upon payment being made to the Queensland Government of an amount of money which is prescribed by the Regulation to the *Land Act*.

A similar right exists under the *Land Act* for the lessor of a term lease to convert that type of tenure to freehold as well, but the impact of native title which is discussed later in this chapter often makes the process much more difficult, time consuming and expensive. Very few term leases in Queensland have been converted to freehold tenure as a consequence.

Pastoral holdings are generally found in the more remote parts of the State or where larger areas of land are required for economic viability. Again, there are no restrictions on ownership, but the tenure is not considered to be as secure as either perpetual lease or freehold tenure.

All leasehold tenures are subject to a fairly standard and uniform set of conditions monitored by the Department of Natural Resources, Mines and Energy.

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 approximately 50% of Queensland’s land mass. As a consequence of amendments to the *Land Act* that were enacted by the Queensland Government in 2014, most term leases issued for grazing or agricultural purposes over land that is in excess of 100 hectares in area were converted to “rolling term leases”. This type of lease can be extended by the lessee once at any time during the term of the lease for the same number of years that the lease was originally issued for. The introduction of “rolling term leases” has added a layer of security for the holders of this type of lease.

With certain limited exceptions, leases can be sublet, mortgaged, transferred or otherwise dealt with. Subleases and transfers though are only permitted with the prior consent of the Minister for Natural Resources, Mines and Energy.

## **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, Mines and Energy.

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 with agistment agreements (for a term of two years or for a shorter term that subsequently runs for more than two years) to register what is known as a “security interest” in respect of the livestock 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 *Planning Act 2016* (Qld). The Act provides a framework for managing land use planning 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 which essentially 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 application for development approval 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 on-going 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* (Qld) 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:

- i. by complying with the pre-contract disclosure requirements of the Act, provided that the relevant local authority approvals have been obtained; or
- ii. under 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 does not support 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* 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). 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* (Qld), 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.

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, deemed to be 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. 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, but a trust will be in circumstances where the property is used as the home of all of the beneficiaries of the trust.

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, Mines and Energy (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 any improvements situated on that land as well as licences, permits and miners homesteads granted under the *Land Act 1994* (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 (currently up to a maximum penalty of \$109,000).

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 substantial 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:

- advise the Commonwealth Treasurer and Government on Australia's foreign investment policy and its administration;
- 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 by a foreign person 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 range between \$1,154 million for US, NZ and Chilean investors in agricultural land or businesses and \$nil for investors from a number of other countries depending upon the type of the proposed acquisition.

A relatively new requirement for approval to be given to a foreign person seeking to acquire Australian agricultural land is that the land must have been subject to an “open and transparent sale process”. This will necessitate the land being marketed / advertised in channels that Australian bidders could reasonably access for a minimum period of 30 days within a six month period immediately prior to the date on which the sale agreement is signed.

Acquisitions excluded from the Act include:

- land acquired from government;
- certain investments in financial sector companies;
- acquisitions gained by will or devolution of law; and
- acquisitions in listed or unlisted land entities below a certain threshold.

#### **iv. Penalties**

The Act provides for monetary penalties or imprisonment, or both.

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.

#### **c. Capital Gains Withholding Regime**

The capital gains withholding regime applies to the sale, transfer or other disposal of the following assets:

- taxable Australian real property with a market value of \$750,000 or more (which also includes, for example, mining, quarrying and prospecting rights as well as leases over real property);
- indirect Australian real property interests in Australian entities; and
- options or rights to acquire this type of property or interest.

Where there is a disposal of Australian real property with a market value of \$750,000 or more, the purchaser is required to withhold 12.5% of the purchase price and pay it to the Australian Taxation Office (ATO) unless the vendor provides the purchaser with an ATO-issued clearance certificate.

A clearance certificate is valid for 12 months from the date it is issued and can be used by a vendor for multiple disposals of real property or indirect Australian real property interests or rights which take place within that period.

The current capital gains withholding regime applies to vendors disposing of taxable property under contracts entered into after 1 July 2017 and was designed to ensure that foreign residents do not dispose of Australian real property interests without paying the appropriate taxes to the ATO.

## 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, roads and railway lines.

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

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.

Native Title can be extinguished by the native title holders (or the native title claimants in a claim that is yet to be determined) agreeing to surrender their native title interests to the State.

## **b. Cultural Heritage**

The *Aboriginal Cultural Heritage Act 2003* (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, Mines and Energy 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 \$1,178,000 and for an individual \$117,800. 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 1984* (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* (Cth).

## **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* (Qld). 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 aviation to wharves.

There are other State laws also authorising the taking of land. For example, the *Electricity Act 1994* (Qld) and the *Petroleum and Gas (Production and Safety) Act 2004* (Qld) allow for compulsory acquisition of land for authorised purposes under those Acts. The *Mineral Resources Act 1989* (Qld) 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 description 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, Mines and Energy, 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 to resume the land 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 for a formal determination of the compensation.

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 would usually be the subject of a negotiation 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 against compensation to be paid to the dispossessed landowner to reduce his or her financial distress until the compensation is finally determined. 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* (Qld) (**MR Act**) 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, Uranium and Geothermal Energy

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 *MR Act* 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 when the State when title to the land was first granted.

##### ii. Minerals and Coal Seam Gas

The MR Act 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* (Qld);
- B. section 32 of the *Crown Lands Alienation Act 1868* (Qld); or
- C. section 21 of the *Mineral Lands Act 1872* (Qld).

The term “minerals” is defined in the MR Act 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 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* (Qld) (**PG Act**) 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.

### iv. **Uranium**

Section 35 of the *Atomic Energy Act 1953* (Cth) provides that the Commonwealth has ownership of uranium and other radioactive substances.

### v. **Geothermal Energy**

The *Geothermal Energy Act 2010* (Qld) provides that all geothermal energy on or below the surface of land is, and always has been, the property of the State.

The term “geothermal energy” is defined as heat energy derived from the earth’s natural, subsurface heat.

## 2.2 **Resource Authorities**

### a. **Mining Exploration Authorities**

Under the MR Act, the following four types of exploration resource authorities can affect rural land and most parts of Queensland are covered by at least one of these authorities:

#### i. **Prospecting Permit**

The holder is entitled to enter land to prospect for or hand-mine minerals (excluding coal) or peg a mining lease or claim on the available land. The holder may enter and leave the land using a reasonable type of transport and may enter or leave land that the permit states is access land.

Where the permit is for a mining district rather than a particular property, the holder requires a landholder’s consent before accessing the land.

Where the permit is granted in respect of a particular property, the maximum term of the permit is three months, the landholder must be given at least five business days' notice before the holder first enters the land and the permit holder requires a landholder's consent before accessing the land for hand mining. 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 may prospect for or hand mine any mineral to which the mining claim applies. The holder may, for the purpose of prospecting or mining, enter the area of the mining claim, use such machinery or mechanical devices as authorised under the MR Act and erect and maintain a temporary camp.

The area of mining claim must generally be rectangular in shape with a maximum area of one hectare. The Minister may grant a mining claim for a maximum area of 20 hectares for a mining claim that applies to gemstones or other precious stones.

**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 three years, the area of a permit must reduce by at least 40%, with a further 50% reduction by the end of five years. Exploration permits for coal are also subject to relinquishment requirements determined by the Minister.

**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 authority 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 Authorities**

The following resource authorities that authorise exploration may be granted under the PG Act:

### **i. Authority to Prospect**

The holder is entitled to explore for or test 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 can be granted for a maximum term of twelve years and may be renewed.

### **ii. Petroleum Lease**

The holder is entitled to explore for and test for all naturally occurring petroleum from the land subject to the lease.

A petroleum lease also authorises production.

## **c. Coal and Minerals Production Authorities**

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 conduct larger scale mining operations including 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.

## **d. Petroleum Production Authorities**

The holder of a petroleum lease granted under the PG Act is entitled to produce all naturally occurring petroleum from the land subject to the lease.

## **e. Related Infrastructure**

The development of resource projects 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 sale.

### **i. Water monitoring authority**

The holder of an Authority to Prospect or a Petroleum Lease under the PG Act can apply for a water monitoring authority to enable it to access land outside of the area of the Authority to Prospect or a 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 a 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 of a petroleum survey licence 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, constructing any structures nor can it dispose of or store poisonous, toxic or hazardous substances on the land.

**iii. Petroleum pipeline licence**

To construct a petroleum pipeline outside the area of a petroleum lease, the holder needs a petroleum pipeline licence.

**iv. Petroleum facility licence**

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

## **2.3 Protected Land**

**a. Areas of Regional Interest**

The *Regional Planning Interests Act 2014* (Qld) (**RPI Act**) regulates impacts from resource and other regulated activities on identified areas of regional interest.

The RPI Act protects the following areas of regional interest:

- i. priority agricultural areas – areas of highly productive agriculture production that are identified in a regional plan or prescribed by the regulations;
- ii. priority living areas – areas shown on a map in a regional plan as a priority living area that include the existing settled area of a city, town or other community and other areas necessary or desirable for the future growth of the existing settled area and as a buffer between the existing or a future settled area and resource activities;
- iii. strategic cropping areas – areas of strategic cropping land or potential strategic cropping land as shown on the electronic trigger map for strategic cropping land in Queensland; and
- iv. strategic environmental areas – areas shown on a map in a regional plan or prescribed under a regulation.

Subject to certain exemptions, the RPI Act requires those proposing to carry out resource activities in areas of regional interest to first obtain a regional impact development approval (**RIDA**).

The RPI also affects landholders as a RIDA is also required for certain non-resource “regulated” activities, such as broadacre cropping or water storage (dams) in strategic environmental areas.

To obtain a RIDA, an application must be made to the Chief Executive of the Queensland Department of State Development, Manufacturing, Infrastructure and Planning. Applications for resource activities in strategic cropping areas are referred to the Department of Natural Resources, Mines and Energy for advice. Applications for resource activities in priority agricultural areas are referred to the Department of Agriculture and Fisheries for advice.

All resource activities proposed in strategic cropping areas or priority agricultural areas must obtain a regional interests development approval, unless they are exempt.

There are three exemptions in the RPI Act which may apply to resource activities in strategic cropping areas or priority agricultural areas:

- activities carried out with the agreement of the land owner that are not likely to have a significant impact on the priority agricultural area or strategic cropping area and not likely to have an impact on land owned by a person other than the land owner;
- a resource activity carried out for less than one year; and
- a pre-existing resource activity.

#### **b. Restricted Land**

Restricted land for a production authority or exploration authority includes land:

- i. within 200 metres laterally of a permanent building used as a residence or for business purposes; or
- ii. within 50 metres laterally of a principal stockyard, a bore or artesian well, a dam or another water storage facility.

Generally, a resource authority holder must not enter restricted land to carry out surface activity (or an activity below the surface in a way that is likely to cause an impact on the surface), unless each owner and occupier of the restricted land has given written consent. Consent may be given on conditions, but consent cannot be withdrawn during the period stated in the consent.

In the case of production authorities, what is considered restricted land is determined when the resource company applies for the production authority. Any improvements a landholder makes to the land after that date do not attract the restricted land protections. In the case of exploration authorities, landholders can continue to make improvements and, if these cause the underlying land to meet the definition of restricted land, that land will attract the restricted land protections.

Generally, restricted land cannot be included in a mining lease or mining claim without the consent of the landholder.

## **2.4 Land Access for Resource Authorities other than Mining Leases and Mining Claims**

### **a. Preliminary Activities**

A resource authority 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 business or land use activities of the landholder. The resource authority holder is however generally required to give an entry notice at least ten business days before entering



private land and is liable for any “compensatable effects” actually caused (discussed below under the heading *Compensation*).

## b. **Advanced Activities**

Generally, if a resource authority 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;
- a deferral agreement that defers the negotiation of such an agreement to a later time; or
- an opt-out agreement under which the landholder agrees to ‘opt-out’ of entering into a conduct and compensation agreement or a deferral agreement

There are exceptions for entry necessary to preserve life or property or because of an emergency. The resource authority holder can also enter private land to conduct advanced activities in cases where the resource authority holder and landholder cannot agree to the terms of a conduct and compensation agreement and the matter is referred to the Land Court for determination or where the parties have agreed to commence an arbitration process.

A resource authority holder can issue a negotiation notice compelling a landholder 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 (20 business days commencing on the day the negotiation notice is given), either the resource company or the landholder can call for the parties to participate in a non-binding alternative dispute resolution (**ADR**) process (for example, a case appraisal, conciliation, mediation or negotiation). Although the costs of the ADR process must usually be paid by the resource authority holder, a party who does not attend can be ordered to pay the other party’s costs.

If, at the end of the minimum negotiation period or following an ADR process, the parties have not negotiated a Conduct and Compensation Agreement, either the resource authority holder or the landholder can call for the parties to participate in arbitration. Arbitration is legally binding resolution that is private as distinct from a Land Court determination that would be published. If the parties have not participated in an ADR process, the resource authority holder is liable to pay the arbitrator’s costs. If the parties have participated in an ADR process, the arbitrator’s costs are shared unless the parties agree otherwise or the arbitrator decides otherwise.

Before an ADR election notice or arbitration notice is given by the resource authority holder or the landholder, an additional optional step in the negotiation process is available. Either the resource authority holder or the landholder can issue a conference election notice to initiate a conference supervised by the Department of Natural Resources, Mines and Energy. A supervised conference will cease if an ADR election notice or arbitration election notice is given.

As a “last resort”, either the resource authority holder or landholder can apply to the Land Court for resolution of the Conduct and Compensation Agreement process if ADR has failed to result in the parties reaching agreement and the parties do not agree to go to arbitration.

Resource authority holders regularly propose a “Standard Conduct and Compensation Agreement” or “Standard Deferral Agreement” in the forms originally published by the Queensland Government in 2010 and last updated in May 2018. 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 or during subsequent steps in the process and should instead seek legal advice at the earliest opportunity.

Resource authority holders are obliged to pay the landholders’ “negotiation and preparation costs” (defined to mean accounting costs, legal costs, valuation costs and the costs of an agronomist) necessarily and reasonably incurred in entering or seeking to enter into a conduct and compensation agreement or deferral agreement.

### **c. Compensation**

Where land is in the authorised area of a resource authority (other than a mining lease or mining claim) or access land for such a resource authority, the landholder/s (including the owner and any person who has been given a right to occupy the land) is generally entitled to compensation for the following “compensatable effects” caused by authorised activities carried out on 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 resource authority on the land; and
- consequential loss incurred by the landholder arising out of a matter listed above.

#### **d. Conduct Rules**

The Land Access Code published by the Queensland Government in November 2010 and later updated in September 2016 prescribes certain mandatory conditions concerning the conduct of authorised resource activities on private land and also provides non-binding “best practice guidelines for communication between the holders of resource authorities and owners and occupiers of private land”.

The holders of exploration permits and mineral development licences issued under the MR Act, petroleum authorities issued under the PG Act, petroleum tenures issued under the *Petroleum Act 1923* (Qld), geothermal authorities issued under the *Geothermal Energy Act 2010* (Qld) and greenhouse gas storage authorities issued under the *Greenhouse Gas Storage Act 2009* (Qld) must comply with the applicable mandatory provisions of the Land Access Code.

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 resource authority holder’s use of access tracks, construction of fences, grids and gates, use of waters, control of pollutants and prevention of the spread of pests.

Again, landholders should always seek independent legal advice before signing a conduct and compensation agreement as they are entitled to recover their reasonable legal costs from the resource authority holder.

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

### **2.5 Land Access for Mining Leases and Mining Claims**

#### **a. Grant of Resource Authority**

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.

If agreement cannot be reached, either party may apply to the Land Court to determine compensation. The Land Court can only award monetary compensation, not in-kind compensation or conditions about conduct or access. The Land Court will determine compensation based on the criteria in the MR Act, which are outlined below.

## b. Compensation

Where the surface area of land is the subject or an application for a mining lease or mining claim (or any surface access to the mining lease/claim land), the land owner is generally entitled to compensation for the following as they relate to the owner's land:

- deprivation of possession of its surface;
- diminution of the value of the land or any improvements;
- 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 surface rights of access; and
- any loss or expense arising as a consequence of the grant or renewal of the mining lease/claim.

In addition, 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 or renewal of the mining lease or mining claim.

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 or any improvements;
- 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 .

## 2.6 Land Access for Petroleum Pipelines

Where a pipeline licence holder does not own the land over which the petroleum pipeline is to be constructed, it must acquire an easement over the land, obtain the land owner's permission, or apply to the Department of Natural Resources, Mines and Energy for a "Part 5 permission", which gives the Queensland Government the right to resume the land.

Pipeline licence holders generally prefer to acquire the underlying land or an easement, rather than relying solely on the land owner's permission, to protect their investment.

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 1967* (Qld) 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.

## **2.7 Unexpected Consequences**

### **a. Contractual Rights**

At the time a landholder and a resource authority 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 authority 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.

### **c. Statutory Rights for Detrimental Impacts on Underground Water Supplies**

Resource authority holders have a statutory obligation under the *Water Act 2000* (Qld) 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.

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, resource authority 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.

#### d. **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 resource authority holder's negligence (provided that loss is not too remote). Such claims might be possible in the context of accidents that have caused 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 resource authority 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, Mines and Energy (**Department**) 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. In some water plan areas such as Barron, Condamine and Balonne, Cooper Creek, Great Artesian Basin, Gulf and

Wet Tropics, a water licence can be permanently relocated to a different parcel of land, provided the relocation falls within the water plan rules.

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 purposes on land that does not adjoin a watercourse, lake or spring; and
- iv. the storage or impounding of water behind a weir or storage structure or 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. Works that take water solely for stock or domestic purposes are accepted development works provided they comply with the relevant code. The Department must be notified of any accepted development works within 60 days of their completion. Certain new works, including large infrastructure and works to take water other than for stock or domestic purposes, are assessable development and require prior approval from the Department. For example, levee banks that capture overland flow water for irrigation purposes 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.

A water licence does not authorise the construction of works such as water bores or wells. The requirements for water infrastructure are addressed in chapter .

### **3.2 Water Allocations**

A water allocation is an entitlement to a share of an available water resource that is detached from land. 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.

There are two categories of water allocations:

- supplemented allocations – where the water is obtained from a Resource Operations Licence holder (for example SunWater or SEQ Water) that is licenced to operate the relevant water supply infrastructure; and
- unsupplemented allocations – where the water taken is not dependent on water infrastructure.

Surface water allocations can be permanently traded via transferring of ownership and some water management plans now also permit the permanent transfer of underground water allocations. 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. Transfers of supplemented water allocations must be accompanied by a notice to the registrar of water allocations of the existence of a supply contract. For the transfer of an unsupplemented water allocations, notice of the proposed transfer must



be given to the Department which will then issue a dealing certificate which must be lodged with the transfer.

The entitlement to receive water from a supplemented water allocation can also be “temporarily traded” by way of a seasonal assignment for a water year to another person or place. A seasonal assignment of a supplemented allocation can be for all or part of the allocation, must comply with certain rules and requires the consent of the Resource Operations Licence holder. A seasonal assignment of an unsupplemented water allocation requires the consent of the Department which will only be granted if it is permitted by the water plan.

**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 is required to subdivide, amalgamate and/or change a supplemented or an unsupplemented 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 *Planning Act 2016* (Qld) 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 *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 like-for-like replacement of a pump, 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

Works that actively take overland flow 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.

The water resource plan for an area or the *Water Regulation 2016* (Qld) may require a landholder to notify the Department of works that take overland flow water, including all new works and any existing works.

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

### c. **Underground water**

A development permit under the *Planning Act 2016* (Qld) is required for the construction of:

- i. all artesian bores, no matter what their use;
- ii. subartesian bores in declared subartesian areas 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' licensing arrangements of the *Water Act 2000* require drillers to comply with minimum construction standards for water bore construction. Landholders should only employ licensed bore drillers to construct a bore that meets the minimum technical standard for water bore construction. The Department maintains a public register of licensed 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. Among other things, the Act:

- i. requires certain activities which may lead to contamination to be notified to the Department of Environmental and Science (for example, livestock spray races and dips);
- ii. requires land that is known (or ought to be known) to be contaminated to be notified to the Department of Environmental and Science;
- iii. requires all persons carrying out certain "environmentally relevant" activities to hold environmental authorities for those activities (for example, cattle feedlotting, poultry farming, pig farming and meat processing);
- iv. requires notification to be given to the Department of Environmental and Science of events that cause or threaten serious or material environmental harm;
- v. allows the Department of Environmental and Science to issue an environmental protection order to a person undertaking environmentally relevant activities and related persons of any companies undertaking those activities to require compliance with environmental obligations; and

- vi. creates 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 or environmental protection orders.

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 (for example, 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 development, which is primarily governed by the *Planning Act 2016* (Qld). That Act aims to achieve ecological sustainability by managing the processes of land use planning and development assessment.

**b. *Environment Protection and Biodiversity Conservation Act***

The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) protects 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 (including the Brigalow ecological community defined by reference to sixteen regional ecosystems listed as ‘endangered’ under the *Queensland Vegetation Management Act 1999*);
- migratory species;
- Commonwealth marine areas;
- Great Barrier Reef Marine Park;
- nuclear actions (including uranium mining); and
- a water resource in relation to coal seam gas development or large coal mining development.

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 Minister for the Environment. 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 could 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. Coal seam gas and large mining developments**

The EPBC Act was amended in 2013 to provide for additional environmental impact assessment processes for actions involving coal seam gas (CSG) or large coal mining developments that will or are likely to have a significant impact on a water resource.

A proponent of a CSG or large coal mining development that is likely to have a significant impact on a water resource (either in its own right or as a result of the cumulative impacts of multiple projects) must refer the project to the Minister for approval.

A water resource means surface water, ground water, a watercourse, lake or wetlands, aquifers (whether or not it currently has water in it) and includes all aspects of the water resource (including water, organisms and other components and ecosystems that contribute to the physical state and environmental value of the water resource).

The EPBC Act does not define what constitutes a significant impact but does inclusively reference impacts of associated salt production and/or salinity. The Department has released 'Significant Impact Guidelines' that set out criteria for assessing whether an impact is likely to be significant.

**iii. Assessment and approval**

The EPBC Act relies on self-regulation, meaning that a project proponent must decide whether to refer proposed activities. If a project proponent is unsure whether the proposed activities require formal assessment and approval under the EPBC Act, they can refer the activities to the Department of Environment. The referral process is free and results in a decision as to whether approval is necessary and, if so, the type of assessment to be undertaken. 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 EPBC Act approval. If the Minister determines that an approval is required, the proposed activities will proceed through the assessment and approval process.

## 4.2 Vegetation Management

### a. Vegetation Management Act

The *Vegetation Management Act 1999* (Qld) and the *Planning Act 2016* (Qld) regulate the clearing of native trees and native plants (other than grasses or mangroves) on both freehold and leasehold land.

Only clearing that is exempt, compliant with an accepted development vegetation clearing code or undertaken pursuant to a development approval is permissible.

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

#### i. Exempt clearing

Of primary importance to rural landholders is the exemption that allows areas of regrowth mapped as category X on the Regulated Vegetation Management Map to be cleared without restrictions under the *Vegetation Management Act* (although, as is the case with all clearing, it may be subject to other laws such as the “protected plants” regime under the *Nature Conservation Act 1992* (Qld) and/or the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

Other exemptions apply in particular circumstances for maintaining existing and establishing new infrastructure, establishing a necessary fence, road or track, fire management and avoiding risk to people or infrastructure.

#### ii. Accepted development

Accepted development vegetation clearing codes allow clearing for purposes including necessary infrastructure such as yards and water facilities, weed control, managing encroachment, fodder harvesting in Western Queensland and improving the operational efficiency of existing agriculture.

For example, under the accepted development vegetation clearing code for managing category C regrowth vegetation, clearing is permissible for a range of specific purposes, although some such as managing encroachment, thinning and fodder harvesting are limited to particular regional ecosystems.

Separate codes for particular clearing purposes apply to category B (remnant) areas.

Before clearing under an accepted development code, landholders are not required to obtain a permit but must submit a clearing notification form, identifying the area to be cleared with GPS co-ordinates, to the

Department of Natural Resources, Mines and Energy. When clearing, the rules in the relevant code must be followed.

### iii. Approvals

Approvals are required to carry out any clearing of native vegetation not covered by an exemption or an accepted development code. Applications will only be accepted for clearing for a “relevant purpose”, including clearing:

- A. necessary to control non-native plants or declared pests;
- B. to ensure public safety;
- C. for relevant infrastructure where the clearing cannot reasonably be avoided or minimised;
- D. for fodder harvesting;
- E. for managing thickened vegetation; or
- F. for clearing of encroachment.

Since 8 March 2018, landholders have no longer been able to apply to clear remnant vegetation or regulated regrowth vegetation for the development of high value agriculture or irrigated high value agriculture. Approval will not be granted for broadscale clearing of remnant vegetation in a grazing or farming context.

### iv. Property Maps of Assessable Vegetation (PMAVs)

To overcome some of the limitations of the Regulated Vegetation Management Map, which is subject to continual revision as vegetation grows and laws change and can also be inaccurate and imprecise, a landowner can apply for a PMAV that either redefines or “locks in” the boundaries of vegetation category areas. Once a PMAV is made, the regulated vegetation management map is updated to reflect the PMAV and the boundaries of vegetation category areas shown on the PMAV prevail over the regulated vegetation management map to the extent of any inconsistency.

Landholders who have not done so already should seek to lock in category X (exempt) areas on their properties under a PMAV.

Successive governments have been inclined to honour the effect of existing PMAV’s when tightening vegetation clearing restrictions. For example, in 2018 areas of regrowth that had previously been cleared between 31 December 1989 (or earlier on freehold land) and 2003 were reclassified from Category X to Category C (“high value regrowth”) unless they had previously been “locked in” by a PMAV. Under the new laws, vegetation previously cleared since 2003 will be progressively reclassified as Category C 15 years after last being cleared unless cleared in the interim or “locked in” under a PMAV.

If a landowner wishes to have an area not already category X reclassified as category X under a PMAV, the landowner will have to prove that the vegetation falls outside the definitions of the other vegetation categories and the area is otherwise eligible to be classified as category X (for example, if the vegetation falls outside the definitions of the other vegetation categories only because it has previously been cleared for particular purposes or because of burning, flooding or natural causes, it cannot be made a category X area).

## b. Other Laws

Even where clearing is “lawful” for the purposes of the *Vegetation Management Act 1999* (Qld) and the *Planning Act 2016* (Qld), regard must be had to other laws, for example:

- i. the *Nature Conservation Act 1992* (Qld), which regulates protected plants;
- ii. the *Environmental Protection Act 1994* (Cth), which regulates environmentally relevant activities;
- iii. the *Forestry Act 1959* (Qld) regarding the ownership and taking of forest products and quarry material;
- iv. the *Soil Conservation Act 1986* (Qld);
- v. the *Water Act 2000* (Qld) regarding the removal of vegetation from the bed and banks of a watercourse;
- vi. the *Aboriginal Cultural Heritage Act 2003* (Qld) and the *Torres Strait Islander Cultural Heritage Act 2003* (Qld);
- vii. the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) regarding the protection of listed threatened species and ecological communities; and
- viii. local laws, which might provide for vegetation protection orders.

## 4.3 Nature Conservation Act

The care and protection of native plants, animals and habitat in Queensland are further regulated by the *Nature Conservation Act 1992* (Qld), administered by the Department of Environment and Science.

### a. Protected plants and animals

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”, “near threatened” to “least concern”.

There are currently 955 species (224 animals and 731 plants) listed as threatened (extinct in the wild, endangered or vulnerable) in Queensland. Of these species, about 400 are listed as threatened nationally under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).



A person may apply to the Minister for a licence authorising the taking, using or keeping of protected plants or animals. Without a licence, it is an offence under the Act to take, use or keep protected plants or animals.

Under Queensland's "protected plants" regime, the Department of Environment and Science maintains records of historical and reported sightings of protected plant species and the areas within a two-kilometre buffer around these sightings become "high risk areas" (blue dots) on Flora Survey Trigger Maps.

The protected plants regime under the *Nature Conservation Act* is separate to the more commonly understood tree clearing laws in the *Vegetation Management Act*. Category X areas exempt from clearing restrictions under the *Vegetation Management Act* are not exempt from regulation under the *Nature Conservation Act*.

The *Nature Conservation Act* has more limited exemptions, of which those relevant to agriculture include:

- i. clearing in compliance with a self-assessable vegetation clearing code for thinning, managing weeds or managing encroachment;
- ii. clearing for routine maintenance of existing infrastructure (such as roads, fences, stockyards, water facilities and buildings), maintenance in the course of plantation management or maintenance in the course of cropping on land that was previously lawfully cleared;
- iii. establishing or maintaining a firebreak or fire management line within certain parameters; and
- iv. clearing to reduce or avoid an imminent risk of serious injury or death to a person or damage to buildings or property.

Where no exemption applies, before clearing in an area covered by a blue dot, landholders are required to engage a suitably qualified person to prepare flora survey report (estimates of the cost of the survey are in the order of \$10,000), provide the report to the Department at least one week before clearing and complete the clearing within 12 months after the survey. If the flora survey identifies any endangered, vulnerable or near threatened (**EVNT**) plants, a landholder must not clear within 100 metres of the plants or apply for a clearing permit, which will be assessed against the Department's guidelines. The Department can impose a condition on a clearing permit that requires the offset (protection on another area) of any EVNT plants to be cleared.

These are not new laws, but the "trigger maps" are regularly updated with new "blue dots".

## b. Protected areas and habitat conservation

The *Nature Conservation Act* protects areas of environmental significance in Queensland. Protected areas are given a classification such as “national park”, “conservation park”, “nature refuge” 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.

In addition, regulations under the *Nature Conservation Act* can identify an area as critical habitat (being habitat that is essential for the conservation of a viable population of protected wildlife or community of native wildlife) or an area of major interest. It is an offence to take or interfere with native wildlife in a critical habitat or area of major interest, even if the wildlife itself does not fall within the classes of protected wildlife, unless permitted by the regulation or conservation plan or a licence, permit or other authority.

## 4.4 Forestry

The *Forestry Act 1959* (Qld) provides for the management, commercial harvesting and marketing of state forestry products and quarry material.

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 and Fisheries.

On freehold land, trees can be managed, felled and removed for forestry purposes. Provided such activities are consistent with the ‘Managing a native forest practice’ accepted development vegetation clearing code under the *Vegetation Management Act 1999* (Qld), they do not require approval under that Act. However, as with clearing under all accepted development codes, notice of the proposed native forest practice must be given to the Department of Natural Resources, Mines and Energy before the practice starts.

## 4.5 Carbon trading

### a. Emissions

Gases that trap heat in the atmosphere and are thought to be responsible for 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 large quantities. Terms such as “carbon emissions” are often used generally to refer to emissions of 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 1997 (**Kyoto Protocol**), an international treaty that imposed on signatory nations emissions targets that end in 2020 and the subsequent Paris Agreement on Climate Change 2015 (**Paris Accord**) under which more of the world's developed and developing countries voluntarily committed to their own domestic emission reduction targets. On ratifying the Paris Accord, Australia indicated it would reduce emissions to 26-28 per cent on 2005 levels by 2030.

Countries may offset their emissions reported under the Kyoto Protocol and Paris Accord by increasing the amount of greenhouse gases removed from the atmosphere by using recognised forms of carbon sequestration.

## **b. Trading schemes**

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 require emitters of greenhouse gases to purchase carbon credits to offset their emissions. However, the Federal Government has established the Emissions Reduction Fund, a voluntary scheme that aims to provide incentives for the adoption of new practices and technologies that reduce emissions together with a national registry of emissions units, predominantly “Australian carbon credit units” (ACCUs) that can be traded. To date, the largest purchaser of ACCUs has been the Federal Government, which uses the ACCUs purchased to offset the country's reportable emissions under the Kyoto Protocol and Paris Accord.

## **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.

Pending any move to require agricultural producers to account for their direct emissions, increasing numbers of primary producers have taken advantage of commercial opportunities resulting from voluntary participation in carbon markets, including the Federal Government's Emissions Reduction Fund.

#### **d. Emissions Reduction Fund**

The Emissions Reduction Fund (**ERF**) facilitates the accreditation of 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.

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).

Both Kyoto ACCUs and non-Kyoto ACCUs can be sold to the Federal Government or to emitters seeking to meet voluntary commitments (for example, by companies wishing to offer products and services that are “carbon neutral”).

#### **e. Generating and selling Australian Carbon Credit Units**

ACCUs can be generated by adopting approved emission abatement activities that store carbon or reduce greenhouse gas emissions.

A proponent of a project to generate ACCUs must register under the Emissions Reduction Fund (which requires the proponent to meet a “fit and proper” test designed to minimise fraud and dishonesty in the system).

To be approved, each project must satisfy the “regulatory additionality” requirement. That is, it must not be required by a Commonwealth, State or Territory law. It must also satisfy the “newness requirement” which means that the project must not have begun to be implemented before it has been registered.

Also, the project must be covered by an approved method (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.

There are a number of methods landholders and primary producers can implement to generate tradeable ACCUs including:

- i. forest regeneration – the regeneration of native forests that have been suppressed by livestock or clearing;
- ii. avoided deforestation – the preservation of native forest previously approved for clearing (therefore avoiding the emissions that would have resulted from clearing);

- iii. savanna burning – fire management in the early dry season in northern savannas aimed at reducing the incidence and extent of larger, higher intensity late dry season fires;
- iv. feeding nitrates to beef cattle – replacing urea lick blocks with nitrate lick blocks for pasture-fed beef cattle;
- v. beef cattle herd management – reducing the emissions intensity of beef cattle production by reducing cattle emissions per kilogram of liveweight produced; and
- vi. soil carbon – storing carbon on grazing land by introducing activities that either increase inputs of carbon to the soil, reduce losses of carbon from the soil or both.

After applying to become an ERF participant and registering a project with the ERF, a project proponent can sell ACCUs (with a delivery schedule into the future) by registering for and bidding successfully at an auction run by the Clean Energy Regulator (**CER**), resulting in a binding carbon abatement contract with the Australian Government. Alternatively, a project proponent might find another buyer of ACCUs in the market, including emitters looking to meet voluntary emissions targets or “aggregators” looking to on-sell ACCUs to the Government or other buyers at a later date.

ERF participants are required to report on their projects at regular intervals and, for most projects, a minimum of three scheduled audits across a seven-year period is required.

If an ERF participants contracts to sell ACCUs generated from a project (for example under a carbon abatement contract with the CER), the participant must ensure that the promised number of ACCUs have been created, assessed and credited to its Australian National Registry of Emissions Units account by the scheduled delivery date or dates.

#### **f. Risks of carbon trading**

Participating in the ERF and entering into a contract with the CER are not without risk. Some issues that project proponents should consider before deciding on whether to participate in the ERF include:

- i. whether to engage a “carbon expert” and on what terms—care should be exercised when entering into any “services agreements” with companies professing expertise in carbon projects to ensure landholders are adequately protected and are not liable for any unexpected costs, particularly if the project does not proceed;
- ii. whether the intending participants have the legal right to carry out a project—for example, for the holder of certain leasehold tenures in Queensland to have the right to carry out the project activities in the project area and the exclusive right to be issued ACCUs, the landholder may be required to address native title issues, which is potentially a major hurdle;
- iii. whether any mortgagee of the underlying land will consent to the effective encumbrances on title associated with the project;

- iv. the duration of the forward contract (for example, with the CER) for delivery ACCUs, which are typically for a period of up to 10 years;
- v. the permanence obligations associated with some projects that require the carbon stored by a sequestration project to be maintained for the nominated period (either 25 or 100 years), regardless of whether the project is still generating saleable ACCUs in this extended period or there is any market for those ACCUs—if a project proponent withdraws from a project during the permanence period it may become subject to a “relinquishment requirement” requiring it to return a specified number of ACCUs to the CER;
- vi. complications upon a future sale of the underlying land—contracts with the CER require the consent of the CER before a project proponent’s obligations can be transferred to a new landowner, potentially delaying or hindering the sale of your property even where the buyer is accepting of the ongoing nature of the project;
- vii. whether the project will generate the number of ACCUs the participant contracts to sell by the required date or dates—in contracts with the CER a participant can negotiate a revised delivery schedule (the total number of ACCUs to be delivered under the contract will not be revised and the final delivery date will not be postponed past the contract period) or you can purchase additional ACCUs on the secondary market but in the worst case scenario could be liable to pay damages to the CER.

#### 4.6 Soil Conservation

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

The Act empowers the Chief Executive Officer of the Department of Natural Resources, Mines and Energy 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.

## 4.7 River Improvement Trusts

The *River Improvement Trust Act 1940* (Qld) aims to provide for the management of river catchment areas to improve water quality and river system function. A River Trust is a body corporate established under the Act to carry out works including works to:

- a. repair damage to river banks or catchment areas caused by flood or cyclone or prevent the future occurrence of such damage;
- b. remove dead or growing timber or other vegetation or thing from the bed, banks or foreshore of any tidal waters, coastal lagoon, bed or banks of a river or nearby lands;
- c. change or prevent the changing of the course of a river;
- d. prevent erosion of the bed or banks of a river or land in the river's catchment; and
- e. prevent or mitigate flooding.

A River Trust may issue an improvement notice to a land holder within a defined river improvement area. If the landholder fails to comply with a notice, penalties may apply, and the River Trust may complete the work at the landholder's expense.

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

## 4.8 Biosecurity

The *Biosecurity Act 2014* (Qld) came into effect on 1 July 2016. It is designed to provide an effective framework to minimise biosecurity risks and facilitate a timely response to a biosecurity risk. It also manages biosecurity risks associated with emerging, endemic and exotic pests and diseases that impact on plant and animal industries such as agriculture, aquaculture, horticulture, fisheries and forestry industries.

### a. General biosecurity obligation

Under the Act, individuals and organisations now have a “general biosecurity obligation” to take all reasonable and practical measures to prevent and manage “biosecurity risks” under their control and about which they know or should reasonably be expected to know.

A biosecurity risk exists when you deal with any pest, disease or contaminant, or with something that could carry one of these (for example, animals, plants, soil, and equipment).

If your activities pose a biosecurity risk, you need to:

- i. take all reasonable and practical steps to prevent or minimise each biosecurity risk;
- ii. minimise the likelihood of the risk causing a biosecurity event and limit the consequences of such an event; and

- iii. prevent or minimise the adverse effects the risk could have and refrain from doing anything that might exacerbate the adverse effects.

You are not expected to know about all biosecurity risks, but you are expected to be aware of the biosecurity risks associated with your day-to-day work and hobbies. For example, livestock owners are expected to stay informed about, and manage appropriately, pests and diseases that could be carried by their animals as well as weeds and pest animals that could be on their property.

All individuals and organisations have a “general biosecurity obligation”. So, for example, tenants of leased properties should be aware of any biosecurity risks associated with their activities and take steps to appropriately manage pests and diseases (even though they do not own the land). Landlords also have a “general biosecurity obligation” and therefore have certain responsibilities despite having handed over possession of their property.

## **b. Registration requirements**

Under the Act, anyone who keeps more than a certain number of designated animals (for example, one or more head of cattle, sheep, goats, pigs etc, 100 or more chickens or one or more beehives) is a “registrable biosecurity entity” and must register with Biosecurity Queensland.

Registered biosecurity entities (RBE) are allocated a property identification code (PIC).

If you had been allocated a PIC before 1 July 2016, you will have automatically become an RBE and your registration will be valid until 1 July 2019.

PICs are not “owned” by the landowner and are instead allocated to land on which animals are kept. As a result, more than one RBE can be registered to a property. If you do not own the property where your animals are kept, you still need to register as an RBE through Biosecurity Queensland.

It is your responsibility to keep your registration details up to date and you must notify Biosecurity Queensland if there are changes to your contact information or property details (e.g. land parcels removed, changes to the types of animals kept) or you acquire additional property on which animals will be kept.

## **c. Prohibited and restricted matters**

The concepts of “prohibited matter” and “restricted matter” replace the declared pest classes under the previous legislation.

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 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.



“Prohibited matter” is a disease, exotic fish, insect pest, pest animal or a weed that is not found in Queensland but if it was to enter Queensland it would seriously impact our health, way of life, the economy or the environment. If a person become aware of the presence of a prohibited matter, he or she must report it to Biosecurity Queensland within 24 hours.

“Restricted matter” is an animal disease, noxious fish, insect, pest animal or weed found in Queensland that is listed in Schedule 2 of the Act. There are seven categories of restricted matter. Actions specific to each category are required to be taken to limit the impact of the restricted matter by reducing, controlling or containing it. For example, categories 1 (which includes Johne’s disease and Hendra virus) and 2 must be reported within 24 hours.

Again, you are not expected to know all types of prohibited and restricted matters however you are expected to know about prohibited and restricted matters you could potentially come across as part of your business. For example, graziers are expected to know about serious diseases of livestock including foot-and-mouth, anthrax and Johne’s disease and citrus farmers are expected to know about citrus canker.

#### **d. Cattle tick management**

Since 1 July 2016 Queensland has been divided into two cattle tick zones, the cattle tick infested zone and the cattle tick free zone.

Owners of properties that are infested with cattle tick in the free zone have an obligation to notify of the presence of cattle tick or tick fever and will be subject to movement requirements and be required to undertake a cattle tick eradication program.

In most cases, a biosecurity certificate issued by an accredited certifier must be obtained before high-risk livestock (e.g., cattle) are moved from an infested zone to a free zone.

#### **e. Biosecurity orders**

The *Biosecurity Act* allows Biosecurity Queensland to make a Biosecurity Emergency Order if an urgent response to a biosecurity event is necessary to:

- i. isolate an area relevant to the emergency;
- ii. stop the spread of any biosecurity matter associated with the biosecurity event; or
- iii. eradicate the biosecurity matter.

A ‘biosecurity event’ is something that has happened that has had, is having or may have a significant adverse effect on Queensland’s biosecurity. For example, a horse has died, and it has been confirmed that the death was caused by the Hendra virus infection, which could have a significant adverse effect on human health.

A biosecurity emergency order cannot last more than 21 days and will only be used in the case of a serious biosecurity emergency.

In less serious circumstances, an authorised officer has the power to issue a biosecurity order when someone has not met a statutory biosecurity obligation. They must be given in writing and may include a requirement to take an action to discharge a biosecurity obligation and compliance plan.

**f. Other laws**

The *Land Act 1994* (Qld) also places obligations on leaseholders when it comes to declared pests, a plant or animal that is invasive biosecurity matter, controlled biosecurity matter or regulated biosecurity matter under the *Biosecurity Act*.

The duty of care condition of all leases, licences and permits issued under the *Land Act* for agricultural, grazing or pastoral purposes includes an obligation to take all reasonable steps to manage any declared pest.

The *Land Act* specifically provides that where a lease is infested with any noxious plants (being plants that are a declared pest), the plants must be kept under control. 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.

**g. Market requirements**

**i. Livestock Production Assurance**

From 1 October 2017, biosecurity has been an element of the voluntary on-farm assurance program, Livestock Production Assurance (**LPA**) administered by AUS-MEAT on behalf of the red meat industry. The majority of meat processors require livestock to be sourced from LPA-accredited producers.

As part of the biosecurity requirements of LPA, a documented Farm Biosecurity Plan is required for each PIC. The plan must address how the producer will:

- A. manage and record the introduction and movement of livestock in a way that minimises the risk of introducing and/or spreading infectious diseases;
- B. where reasonable and practicable, control people, equipment and vehicles entering the property, minimising the potential for property contamination and, if possible, keep a record of such movements; and
- C. prevent and control animal diseases on-farm by regularly monitoring and managing livestock.

**ii. J-BAS and Dairy Score**

J-BAS is a voluntary risk-profiling system underlying the new deregulated approach to managing Johne's disease in beef cattle. A similar 'Dairy Score' system applies to dairy cattle. The self-assessed scores range from 0 (representing 'unmanaged risk') to 8 ('high assurance') and allow producers to communicate with buyers about the risk of Johne's disease and meet market requirements for trade (for example, the movement of cattle into the Northern Territory or Western Australia).

Once transitional arrangements end, a score of 2 or higher will require having a property biosecurity plan, like the one required under the Livestock Production Assurance program, in place.

Veterinary oversight of a property biosecurity plan (requiring signed confirmation from a vet that he or she has discussed biosecurity risks associated with the property and ways of managing those risks with the person completing the plan) and triennial testing is required for scores 7 and 8.

## 5. The Elements

### 5.1 Fire Safety

The *Fire and Emergency Services Act 1990* (Qld) establishes a framework for the management of the Queensland Fire and Emergency Service which is empowered to both prevent and respond to fires and other emergency incidents. The Act also regulates the activities of the volunteer organization, The State Emergency Service.

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 neighbours.

A permit is not however required for burning of sugar cane for harvesting in accordance with established practice and on certain conditions, except where the cane farm adjoins non-cane land in which case a permit will be required from the local warden.

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

The Commissioner can 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 and complies strictly with the conditions of the Permit 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 and Industry Development Authority (QRIDA).

Natural Disaster Assistance loans of up to \$250,000 may be obtained to assist in the re-establishment of a primary production enterprise located in a declared disaster area to cover costs such as:

- repairing or replacing damaged buildings, plant or equipment;
- purchasing livestock to replace those lost in the 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 establishment or maintenance fees, no early payout fee, a maximum term of ten 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 application procedures is available at the QRIDA website at [www.qrida.qld.gov.au](http://www.qrida.qld.gov.au) or on its toll free number 1800 623 946.

## **b. Other Drought Relief Assistance**

For property owners within State drought-declared areas by the Queensland Government, assistance may be available principally in the form of freight subsidies under the Queensland Government Drought Relief Assistance Scheme administered by the Department of Agriculture and Fisheries. The same assistance is also available to property owners who are not within a State drought-declared area but have a current Individually Droughted Property (IDP) declaration.

These subsidies may be made available for fodder transport, stock water cartage, livestock returning from agistment, restocking transport costs as well as the Emergency Water Infrastructure Rebate.

Applications for road or rail freight subsidies are made through local stock inspectors of the Department of Agriculture and Fisheries. Further information is available at the DAF website at [www.daf.qld.gov.au](http://www.daf.qld.gov.au) or on its general enquiries number 13 25 23.

## **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 an offset 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 (known as “Canegrowers”);
- b. the Queensland Dairyfarmers Organisation;
- c. Pork Queensland Incorporated; and
- d. the Queensland Seafood Industry Association.

Membership of these bodies is voluntary.

These organisations, with AgForce Queensland Farmers Limited and the Queensland Farmers’ Federation, manage much of the industry interaction with Federal, State and local governments and also promote industry activities in the community.

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

### 6.2 Meat

Safe Food 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 2014* (Qld).

With the Department of Agriculture and Fisheries, Queensland Health and Meat & Livestock Australia, it is responsible for regulating the meat processing industry including slaughtering, labelling and hygiene. It controls the accreditation of abattoirs, public meat markets, poultry slaughter houses and knacker yards for use.

The Authority administers the Food Safety Scheme for Meat which governs:

- a. the handling of animals before slaughter;
- b. processing meat or smallgoods intended for human consumption;
- c. processing pet meat;
- d. handling, packaging and storing meat or a meat product;
- e. cold storing, transporting and delivering meat;
- f. retail sales of meat by butchers and supermarkets;

- g. labelling of meat and meat products; and
- h. wild game harvesting of kangaroos and pigs and delivery to meat processors.

After slaughter and before a carcass is dressed for human consumption:

- a. Safe Food Queensland must have issued an accreditation to the operator;
- b. the meat must be marked in the prescribed manner; and
- c. the meat must be inspected in accordance with prescribed regulations as fit for consumption.

These requirements do not apply to the slaughter or processing of livestock for private consumption and 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 as required.

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 it can be tested or verified under the *Food Production Safety Regulation 2002* (Qld).

### 6.3 Grain Trading

Grain Trade Australia is a voluntary membership industry body which standardises trade rules and grain contracts across Australia.

The *GTA Grain Trading Standards* establish a series of terms and conditions which are almost universally adopted by the industry in the trading of grain and include:

- a. commodity specific quality and quantity verification processes;
- b. dispute resolution mechanisms;
- c. shipping and transport risk provisions; and
- d. payment and currency mechanisms.

The *Australian Grain Industry Code of Practice* and *Australian Grain Transport Code of Practice* are maintained and implemented by Grain Trade Australia.

### 6.4 Horticulture

The Produce and Grocery Ombudsman was established by the federal Department of Agriculture to 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.

The Australian Competition and Consumer Commission (“**ACCC**”) administers the Horticulture Code of Conduct under the *Competition and Consumer Act 2010* (Cth). The Code is designed to regulate trade between the growers and wholesalers of fruit and vegetables and avoid conflicts of interest. Compliance with the Code is mandatory and it requires growers and wholesalers to enter into written trade

agreements to ensure that each others duties and obligations are understood. Wholesalers are also asked to publish and make available their terms of trade to growers. The Code establishes the Horticulture Mediation Adviser which is available to determine disputes arising between the grower and agent or merchant. Non-compliance with the Code can result in legal proceedings brought before the ACCC.

## 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 (Queensland) Act 2016* (Qld). These Acts establish a regulatory scheme for the use of gene technology in Australia. The legislative framework appoints the Gene Technology Regulator, an office responsible for the overall administration and control of genetic modification in Australia. The regulator sets out guidelines and a code of practice for the research, production and manufacture and of organisms that have been genetically modified.

“Dealings” with GMOs are controlled by a system of licensing and registration. It is prohibited to import, grow, deal with or sell 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 responsible for monitoring compliance with the regulations and to impose penalties for offences. An inspector may enter any premises on which GMOs are grown or stored and inspect, take samples and conduct tests. People on the premises during an inspection must answer any questions and relevant documents may be seized.

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 Queensland which is constituted under the *Food Production (Safety) Act 2000* (Qld) and the *Food Production Safety Regulation 2014* (Qld).

Safe Food Queensland maintains the *Food Safety Scheme for Dairy Produce* which brings Queensland dairy regulations in line with the *National Standards for Primary Production and Processing of Dairy Products and Specific Cheeses* and sets out various requirements for farmers and processors.

The food safety criteria and accreditation process require the control and prevention of:

- a. microbiological contamination;
- b. chemical contamination; and
- c. physical contamination;

of milk and dairy products. An accreditation issued by Safe Food Queensland must be held before producing, storing, transporting, handling or processing milk or dairy products.

The Australian and New Zealand Dairy Authorities' Committee also provides industry guidelines to help dairy producers institute food safety plans.

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 organisation's primary role is to promote the dairy industry both locally and overseas, with a focus on the exportation of dairy products to foreign markets.

## 6.7 Bees and Honey

The keeping of bees in Queensland is regulated by the *Biosecurity Act 2014* (Qld). A person who keeps bees or carries on business as a beekeeper must be registered with the Department of Agriculture and Fisheries.

The Act requires all bees to be kept in hives which are 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.

If a beekeeper becomes aware of or suspects a disease in bees, hives or bee products, the beekeeper is required 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 which 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.

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 Hemp

The cultivation and production of industrial cannabis for hemp and seed is regulated by the *Drugs Misuse Act 1986* (Qld), the *Drugs Misuse Regulation 1987* (Qld) and the *Narcotic Drugs Act 1967* (Cth).

The federal Office of Drug Control issues licences to growers to permit dealing with industrial cannabis and seed handlers, traders and processors are required to comply with requirements of the *Drugs Misuse Regulation 1987* in storing, transporting and processing seed and material derives from industrial cannabis.

The cultivation and production of cannabis for medical or other purposes in Queensland are prohibited by the *Criminal Code* (Qld).

## 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 obtain PBR protection under the Act, a person must be an eligible plant breeder who has produced a new variety of plant, which is unique enough to qualify for protection.



In assessing uniqueness, the new plant must be recognised as a new and distinct variety which can be reproduced in a stable and uniform manner after propagation.

Once protected by the Act, the breeder holds the exclusive right to produce, reproduce, sell or export the plant, subject to some limited exceptions. PBR protection lasts 25 years for trees and grapevines and 20 years for other plant types.

## 6.10 Chemicals

The Australian Pesticides and Veterinary Medicines Authority (“**APVMA**”) controls the regulation and sale of agricultural and veterinary chemicals in Australia. Queensland prescribes to the framework set by APVMA under the *Agricultural and Veterinary Chemicals (Queensland) Act 1994* (Qld) and the *Chemical Usage (Agricultural and Veterinary) Control Act 1988* (Qld).

The APVMA administers the “Agvet Code” which authorises the manufacture, storage and use of chemicals for agricultural and veterinary purposes. Under the Code, a number of offences are set out for the use or disposal of chemicals in a manner which could cause harm to a person, property, animal or the environment.

The *Agricultural Chemicals Distribution Control Act 1966* (Qld) is administered by the Department of Agriculture and Fisheries to control the aerial and ground spraying of chemicals, herbicides and insecticides. The Department is responsible for the grant of licences and permits for both private and commercial chemical distribution and use. Under the Act and regime implemented by the Department and Biosecurity Australia, a person cannot cause or permit aerial spraying to be carried out unless it is performed by a licensed pilot or under the direction of a licensed spraying contractor. The Act empowers inspectors to enter any place where there is an aircraft or ground equipment used for spraying and take samples of chemicals and fuels.

Landowners and sprayers should take reasonable steps to ensure that no harm is done to land, livestock, 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 by spray drift or watercourse contamination.

Aerial spray drift may also trigger penalties under 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.

The *Biological Control Act 1987* (Qld) regulates the use and control of biological organisms such as introduced animal viruses and target microbes. The Act establishes the Queensland Biological Control Authority to oversee and authorise the release of biological agents for specific scientific purposes.

## 6.11 Produce Levies

Agricultural industry bodies are designed to advance and protect the interests of primary producers in their industry sectors. To fund these activities, statutory levies are collected at transaction points to fund research and development, marketing, promotion and education programs for the collective benefit of the industry.

The *Primary Industries (Excise) Levies Act 1999* (Cth) enables the Federal Department of Agriculture to collect and distribute various industry levies amongst nominated industry groups where the revenue is used to fund prescribed activities.

Levies must be paid by producers when:

- a. goats, pigs, emus, ostriches, buffalo, deer, cattle, sheep, lambs and goats are slaughtered;
- b. cattle, sheep, lambs, goats, certain grains and honey are sold;
- c. buffalo, cattle, goat, lambs and sheep are live exported;
- d. horticulture products are harvested and sold;
- e. wool is clipped;
- f. milk is delivered to a manufacturer;
- g. forest products are felled;
- h. poultry products are produced; and
- i. grapes are sold or made into wine;

at rates set by the Minister for Agriculture and specified under the *Primary Industries Levies and Charges Collection Act 1991*.

Meat and Livestock Australia and Animal Health Australia are industry bodies funded by levies. These bodies are devoted to managing the interaction between government and producers, marketing the Australian red meat industry domestically and abroad, conducting industry research and supporting producers.

Australian Wool Innovation Limited is funded by a wool levy to drive research and innovation for the benefit of wool growers.

Other bodies including Dairy Australia, The Grains Research and Development Corporation, Plant Health Australia and Wine Australia are established to grow specific industries and market produce.

## 7. Stock and Animals

### 7.1 Travelling Stock

#### a. Movement Record

The *Biosecurity Act 2014* (Qld) requires that a movement record be created by the person responsible for an animal before that animal departs from the place at which it is located and identifiable, usually under the National Livestock Identification System. Previously these documents were referred to as “waybills”.

The form of a movement record is not prescribed, though it needs to include:

- i. location details of the points of origin and destination of the animal;
- ii. dates of movement;
- iii. a description of the animal, including breed, species, distinguishing marks or features;
- iv. the name and address of the person to receive the animal;
- v. the name and signature of the person completing the record; and
- vi. the Property Identification Code unless microchips are affixed to the animal.

Movement records must be kept by the person creating the record for a period of 2 years and be produced to an inspector upon demand.

For cattle and sheep, the industry designed National Vendor Declarations will suffice as movement records.

A movement record is not required to be created for the movement of livestock between neighbouring places within 20 kilometres and for ordinary stock management purposes.

#### b. NLIS

The National Livestock Identification System (**NLIS**) establishes a centralised database to record the locations of cattle, sheep and goats throughout Australia by tracking microchips which are affixed to live animals.

All cattle, sheep and goats are ear or rumen tagged after birth with a radio frequency identification device. The device is then associated with a Property Identification Code (**PIC**) for the landholding on which animal is located at any point in time. The ear or rumen tag is designed to remain with the animal throughout its life and every time an animal is moved from one place to another, the movement between PICs must be registered within 48 hours on the NLIS by an on-line notification to the NLIS.

**c. PigPass**

The PigPass system records movements between properties with different Property Identification Codes (**PICs**). All pigs moving between properties with different PICs are required to be identification tagged and/or tattoo branded and the movement recorded in the on-line PigPass Portal within 48 hours of arrival of the pigs at their destination.

**d. Stock Route Permits**

Stock Route Travel Permits are required for moving or grazing livestock on the stock route network and Stock Route Grazing Permits are issued for the short term grazing of livestock on specific sections of the stock route network, in certain circumstances.

Both types of permits are issued by the local government which is responsible for the stock routes within its geographical area.

**e. Travelling Sheep Brand**

Sheep which are to be driven on a stock route or by road for more than 65 kilometres must be branded with either the owner's paint brand or with the letter "T".

**f. Tail Tags**

Cattle from "T" status properties under the Extended Residue Program or cattle under the European Union Cattle Accreditation Scheme when consigned to saleyards must be identified with both NLIS permanent tags and identification tail tags.

**g. Cattle ticks**

Queensland is divided into a tick free zone and tick infested zone. All producers are required to monitor and report the presence of cattle ticks and tick fever in the tick free zone and if identified, undertake an eradication program.

The movement of livestock from the tick infested zone to the tick free zone requires livestock to be free from ticks and accompanied by a biosecurity certificate issued by an accredited certifier.

## **7.2 Brands and Marks**

The *Brands Act 1915* (Qld) governs the use and registration of brands and marks for livestock.

Brands and earmarks are registered on the Queensland Brands Database to assist with the identification of livestock and proof of origin of livestock cattle, sheep, horses, goats and pigs. The legal significance of branding is that the existence of a registered brand or registered earmark on an animal is, in the absence of evidence to the contrary, evidence that the animal is the property of the registered owner of the brand or earmark.

It is an offence to sell unbranded cattle of a live weight in excess of 100 kilograms or an unbranded pig of a live weight in excess of 30 kilograms.

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

Applications to the Registrar of Brands 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 and 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. 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 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.

## **7.3 Straying Animals**

### **a. Straying Livestock**

A primary producer has a duty to keep its livestock from trespassing on another's property. Such "livestock" includes not only cattle, horses, donkeys, sheep, goats and pigs but also fowls, ducks, geese, llamas, ostriches, emus, bison, crocodiles and deer (though not domesticated dogs and cats).

Stock owners may be liable for damage caused by straying livestock, including physical harm, injury to other stock from infection or mis-mating. However, liability will not arise if livestock escape due to the act of a third party for whom the stock owner was not responsible, such as when a stranger leaves a gate open or where an "Act of God" caused the livestock to stray. Another defence is available where the damage was due to the neighbour's own fault.

In Queensland, a landowner will not be liable for any damage caused to the user of a public road by the landowner's stock straying onto the road unless the owner permits the livestock to be present on the road or knows that the animal is vicious, has a propensity to stray and does not attempt to remedy the straying.

## **b. Impounding Straying Stock**

The impounding of straying livestock 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, ear-marking 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 Licensing

The *Weapons Act 1990* (Qld) and the *Weapons Regulation 2016* (Qld) 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, D or H 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;
- d. Category D self-load centrefire rifles, self-loading shotguns and pump action shotguns with more than five rounds;
- e. Category H – handguns.

The employees, agents and immediate family members of a primary producer are not required to hold a licence to use firearms, other than Category H, 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 a local police station.

# 8. Business Structures

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

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

The *Partnership Act 1891* (Qld) 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* (Qld) 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 from 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* (Cth) imposes duties on the officers of a company to act honestly, to keep proper accounts and not to use their position or information obtained for their own benefit or to the detriment of the company. There are also numerous formalities and expenses involved in relation to a company including the initial costs of registration, maintaining the various registers required, filing annual returns and the holding of annual general meetings.

Certain types of land tenure in Queensland cannot be held on behalf of or by a company; 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 whilst allowing profits and distributions on liquidation to be made to other shareholders (say the children), the share structure can be altered so as to provide for separate classes of shares which carry with them different rights as to voting, dividends and distributions on liquidation.

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

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

#### 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* (Cth) 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 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.

# 9. Human Resources

## 9.1 Employer / Employee Relationships

By a combination of the federal *Fair Work Act 2009* (Cth) 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 employment contracts.

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

#### i. National Employment Standards

The National Employment Standards (**NES**) are ten minimum entitlements for essentially all employees concerning maximum weekly hours, requests for flexible working arrangements, various sorts of leave and holidays, notice of termination and redundancy. The NES apply compulsorily and have 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 the Fair Work Commission. 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 the Fair Work Commission, 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 non-government 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* and the *Wine Industry Award*.

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 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 employment 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 employment 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 age, sex, gender identity, sexuality, impairment, race, religion, trade union activity, relationship status, pregnancy, 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 on-line.

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 extraordinarily 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**

Generally, an employer has a duty to pay wages or a 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 (based on the employee's ordinary hours of work for part-time employees);
- ten days of paid sick and carer's leave per year for full-time employees or a pro rata of 10 days per year depending on hours of work for part-time employees;
- two days of unpaid personal/carer's leave per year for all employees;
- two days of compassionate and bereavement leave per occasion (paid for full-time and part-time employees and unpaid for casual employees);
- five days unpaid family and domestic violence leave per year;
- long service leave of 8.6666 weeks (based on the number of ordinary hours work and subject to certain conditions for casual and regular part-time employees) after ten years of continuous service (with a pro rata entitlement if employment is terminated in certain circumstances after seven years of continuous service);
- 52 weeks of unpaid parental/adoption leave.

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 upon the termination of employment of many employees.

The laws concerning unlawful termination and unfair dismissal override any provisions appearing in any private employment contract. The law in this area is complex and a detailed consideration is beyond the scope of this publication. The following is 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:

<b>Period of continuous service</b>	<b>Minimum notice period</b>
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 a longer notice period.

Employees who have contracts of a fixed duration or contracts for completion of a particular task and 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.

Unlawful termination of employment can expose an employer to, in some cases, civil penalties.

**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; for example, where it could be shown that the employee was actually dishonest or fraudulent in the recruitment process; and
- grave breach of confidentiality (if pertinent to the position).

#### iv. Unfair dismissal

Unfair dismissal of employment may result in the employer having to reinstate the employee or pay compensation, sometimes of up to six months' pay.

Generally, employees only have access to unfair dismissal protections if:

- they have completed the minimum period of employment (six months or 12 months if the employer is a small business, being one employing fewer than 15 employees) and;
- they are a full-time employee, a part-time employee or a casual employee who worked on a regular and systematic basis, and
- either they:
  - earn less than the relevant earnings threshold (which is indexed to inflation but is presently about \$145,400 per annum), or
  - they are covered by an award or enterprise agreement.

Casual employees who worked on an irregular basis 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 the Fair Work Commission 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;
  - the employee was given appropriate training;
  - the employee was given warnings 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 were addressed.

If the employer is a small business employer (that is, one employing fewer than 15 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 upon 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 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*”, claims for back pay or similar, claims for superannuation entitlements and problems associated with underpayment of WorkCover insurance premiums.

Employers who maintain or are considering entering into independent contractor relationships should obtain specific legal advice.

## 9.2 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 in, or arising out of, 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 also 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* (Qld) (**Act**) as a person working under a contract of service, although the Act is regularly amended to define which persons are covered. 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 whilst 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 unless they provide and use mechanical power farm machinery in the sharefarming operation or are 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, a worker’s expectation or perception of reasonable management action 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 generally be filed with WorkCover within six months after the date on which the injury occurred. The six month time limit can be extended to three years in certain circumstances where there is a reasonable cause for not making the claim earlier. 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 include the following.

**i. Weekly compensation for lost wages**

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, 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 and rehabilitation expenses, funeral expenses and travel and other allowances.

**iii. Lump sums**

Where the injury is fatal, the applicable lump sum is 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 the degree of impairment from psychiatric and non-psychiatric injuries cannot be combined), 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 B 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 1974* (Qld) 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 i or makes an unacceptable counter-offer, the injured worker and WorkCover must convene a "without prejudice" settlement conference within three months of WorkCover providing its response at i;
- 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.

### 9.3 Workplace Health and Safety

Queensland's laws in relation to workplace health and safety are consistent with the national framework for uniform work health and safety laws.

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

The *Work Health and Safety Act 2011* (Qld) (**WHSA**) and accompanying *Work Health and Safety Regulation 2011* (Qld) (**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 on 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 its 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.

The definition of supplier of plant would include a farmer selling second hand machinery and equipment and 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 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 requires officers 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 appropriate resources and processes to eliminate or minimise hazards and risks are available and used; 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;
- ii. the degree of harm that might result from the hazard or the risk;
- 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;
- iv. the availability and suitability of ways to eliminate or minimise the risk;
- 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.

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.

At step 3, 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 actions;  
Use suitable personal protective equipment.

#### e. Consultation

In addition to consulting other duty holders, the WSHA 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 & 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 to 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 \$130,550 for individuals or \$500,000 for companies for the lowest category offences and fines of up to \$783,300 and/or five years imprisonment for individuals or \$3,916,500 for companies for the most serious offences.

**i. Legal proceedings**

Prosecution for WHSA offences must generally 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 rural industries, including:

- i. Children and Young Workers Code of Practice 2006 (see below)
- ii. Confined Spaces Code of Practice 2011
- iii. First Aid in the Workplace Code of Practice 2014
- iv. Forest Harvesting Code of Practice 2007
- v. Hazardous Manual Tasks Code of Practice 2011
- vi. Horse Riding Schools, Trail Riding Establishments and Horse Hiring Establishments Code of Practice 2002
- vii. How to Manage and Control Asbestos in the Workplace Code of Practice 2011
- viii. How to Manage Work Health and Safety Risks Code of Practice 2011 (see below)
- ix. How to Safely Remove Asbestos Code of Practice 2011
- x. Labelling of Workplace Hazardous Chemicals Code of Practice 2011
- xi. Managing Noise and Preventing Hearing Loss at Work Code of Practice 2011
- xii. Managing Risks of Hazardous Chemicals in the Workplace Code of Practice 2013
- xiii. Managing Risks of Plant in the Workplace Code of Practice 2013
- xiv. Managing the Risk of Falls at Workplaces Code of Practice 2018
- xv. Managing the Work Environment and Facilities Code of Practice 2011
- xvi. Manual Tasks Involving the Handling of People Code of Practice 2001
- xvii. Mobile Crane Code of Practice 2006
- xviii. Preparation of Safety Data Sheets for Hazardous Chemicals Code of Practice 2011
- xix. Rural Plant Code of Practice 2004 (see below)
- xx. Safe Design and Operation of Tractors Code of Practice 2005
- xxi. Safe Design of Structures Code of Practice 2013
- 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 Code of Practice 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 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. Resources for agricultural industries**

Workplace Health and Safety Queensland maintains resources to assist rural industry employers and workers understand their health and safety duties in the workplace on its website <https://www.worksafe.qld.gov.au/agriculture> and publishes regular eSAFE Rural newsletters.

## 10. Business Taxes and Duties

### 10.1 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 ten years for cost of connecting electricity or telephone lines;
- iii. outright deductions for capital expenditure on fencing, fodder storage facilities and water facilities primarily for the purpose of conserving or conveying water;
- iv. outright deduction for landcare operations and shelterbelts;
- v. annual deductions for the depreciation of horticultural plants (including vineyards);
- vi. special provisions relating to double wool clips and insurance recoveries for livestock and timber losses;
- vii. special provisions relating to forced disposal or compulsory destruction of livestock; and
- viii. 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 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 animals or poultry for sale or for sale of their bodily produce including natural increase;
- iii. forest operations;
- iv. fishing and aquaculture 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 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 livestock 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 the 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 generated 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.

**10.2 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**

There will be a capital gain on the disposal of an asset where the disposal price exceeds the cost base of that asset.

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 transfer duty); and
- ii. costs incurred in improving and maintaining the asset.

**b. Capital Loss**

There will be a capital loss where the sale price is less than 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. personal use items acquired for less than \$10,000 and collectables acquired for less than \$500;
- vi. 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% for individuals or trusts or 33.33% for compliant superannuation funds. These discounts 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 at 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.

### 10.3 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 47%.

#### 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 \$75,000. 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 \$75,000 threshold limit, then the enterprise can register for GST but does not have to do so.

##### 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* (Cth) 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 28 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:

**A. Food**

Most fresh 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.

**B. Water**

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

**C. Exports**

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

#### **D. 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.

#### **E. Grant of Land**

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

#### **F. 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 that land.

#### **G. 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 or annually if they have a turnover of less than \$75,000 (or \$150,000 for not-for-profit organizations).

Enterprises with a turnover of over \$10 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 than \$10 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.

### **10.4 Payroll Tax**

Payroll tax is a Queensland tax based on the annual payroll of employers and collected by the Office of State Revenue under the *Payroll Tax Act 1971* (Qld).

The Act applies to certain employers who pay or are liable to pay wages for services performed within Queensland. Wages are widely defined to include wages, gross salaries, commissions, bonuses or allowances at rates that are specified from time to time.

The present threshold amount for employers being required to report payroll tax is if:

- a. wages of \$1.1 million are paid per annum; or
- b. wages of \$21,153 are paid in a week.

Payroll tax rate is currently payable at 4.75% of the gross value of taxable wages and the Act sets out a detailed formula for the calculation of the prescribed amount to be paid by the employer. Payroll tax must be reported and paid monthly and at the end of each financial year following the lodgement of an annual return, an adjustment is made if necessary.

A number of exemptions from payroll tax exist and these generally relate to religious institutions, hospitals, schools, colleges and local authorities.

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 or engaged on a contract or fixed period basis.

The Commissioner of the Office of State Revenue 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.

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

Areas of particular interest to primary producers include:

### 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. Technology Items**

GPS navigation tools, laptops, tablets, mobile phones and software provided to employees for primary use in a business are exempt from FBT.

**d. Station Accommodation**

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.

**e. Reportable Fringe Benefit**

Subject to some exceptions, fringe benefits are income tax free in the hands of the employees but where the value of such benefits is greater than \$2,000, it is used to calculate the employee's:

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

## **10.6 Duty**

Transfer duty is a tax imposed by the Queensland Government on certain transactions specified in the *Duties Act 2001* (Qld) and the *Duties Regulation 2013* (Qld). Duty is generally calculated on the consideration paid under a written instrument though it may be imposed on transactions where no documents are signed.

Interest is charged on the late lodgement of documents for an assessment of duty (generally if they are lodged more than 30 days after the liability to pay duty arises) and on the late payment of assessments (more than 30 days after an assessment is made). Penalties are imposed on the making of false declarations.

Duty is required under the legislation to be paid by the parties to a transaction, though the parties usually agree that any duty is payable by one of them.

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

The most significant triggers of duty 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 for the business.

As a general rule, duty will also be assessed on the amount of any liability assumed (such as a debt owing to a bank).

**b. Rearrangement of Partnerships**

Transfer duty also applies to rearrangements of partnerships based on the unencumbered market value of the partnership share which is being rearranged (i.e. ignoring the liabilities of the partnership).

**c. Trusts**

Transfer duty also applies in the event of a settlement of dutiable 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 duty. Duty is also imposed on 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 and public companies has been abolished.

However:

- i. Landholder duty will apply to acquisitions of a “significant interest” in a company where the company’s land holdings are worth \$2 million or more; and
- ii. Corporate trustee duty will apply to acquisitions of shares in a company where the company is a trustee of a trust holding valuable assets and the purchaser obtains a benefit relating to the assets of the trust.

Landholder duty and Corporate trustee duty are levied at the same rate as Transfer duty.

**f. Mortgages, Leases and Subleases**

Duty on mortgages, leases and subleases has been abolished.

## **g. Concessions**

A number of concessions are available to reduce the amount of transfer duty imposed on a transaction including:

### **i. First home transfer duty concession**

This concession is available to first home buyers who purchase a home valued at less than \$550,000 and live in the home within 1 year. If the value of the home is less than \$500,000, no duty is payable on the transaction and the concession reduces as the value of the home reaches \$550,000.

### **ii. Home transfer duty concession**

This concession reduces the rate of transfer duty payable on the acquisition of a principal place of residence to 1% for the first \$350,000 of value of the home and then applies the usual transfer duty rates for the balance of the value. For the concession to apply, the home must become lived in by the purchaser within 1 year.

### **iii. Primary production concession**

A concession is available for the transfer of an interest in primary production land and/or primary production assets between relatives.

For the concession to apply, the transferor must carry on a primary production business on the land before the transfer and the transferee must carry on a primary production business on the land after the transfer.

### **iv. Superannuation fund concession**

A concession is available for the transfer of dutiable property between compliant superannuation funds to merge or split those funds or on the resettlement of a compliant superannuation fund.

## **h. Exemptions**

Generally, transfer duty is not payable on:

- i. the transfer of property from a deceased person's estate to a beneficiary under a will or the rules of intestacy;
- ii. the operation of the rules of survivorship on the death of a joint tenant;
- iii. the transfer of an equal interest in a principal place of residence between spouses;
- iv. the change of a tenancy arrangement from joint tenants to tenants in common and vice versa;
- v. a dutiable transaction arising from a court order or financial agreement made under the *Family Law Act 1975* (Cth) between spouses or the *Property Law Act 1974* (Qld) between defacto partners.

### **i. 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.

**j. 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.

**k. Appeals**

A person dissatisfied with the Commissioner's decision on an objection can appeal to the Supreme Court or Queensland Civil Appeals Tribunal within 60 days.

## 11. Finance

### 11.1 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, known as the mortgagee. Most mortgages are registered on the title to the land.

A registered mortgage must comply with certain requirements. It must be in 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 offered for sale by public auction or a contract of sale entered into before the expiry of the 28 day notice period.

A sale by a 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 very rarely 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.

## 11.2 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 [www.ppsr.gov.au](http://www.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 \$5,000 and the property 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 and different approach on the law of personal property securities to that which 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 upon whether the transaction took a particular form. The following examples demonstrate the former law:

- Party A seeks credit from Party B to purchase a motor cycle. Party B agrees to provide credit to Party A on the basis that Party A grants Party B a mortgage over the motor cycle (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 motor cycle. If Party A defaults in making repayments to Party B, Party B can retake possession and sell the motor cycle as it holds the legal title to the motor cycle. 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 motor cycles and Party B is a manufacturer of motor cycles. Party B agrees to provide a motor cycle to Party A on credit terms under a supply agreement on the basis that legal title in the motor cycle is retained by Party B (known as a “retention of title arrangement”). Party A is merely given possession of the motor cycle 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 motor cycle as it holds the legal title to the motor cycle. 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 can 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 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. Whilst 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 two years where the lessor or bailor is “regularly engaged in the business” of leasing or bailing goods.

There are specific rules for leases of serial numbered goods (such as motor vehicles, aircraft and watercraft) and these changed most recently on 1 October 2015. As a result, leases and documents of serial numbered goods entered into:

- on or after 20 May 2017 are PPS Leases if they have a fixed term of two or more years;
- on or after 1 October 2015 but before 20 May 2017 are PPS Leases if they have a fixed term of between 90 days and 1 year;
- before 1 October 2015 are PPS Leases if they have a fixed term of 90 days or more.

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.

### 11.3 Consumer Credit and Farming Equipment Finance

#### a. Consumer Credit

Since 1 July 2010, the *National Credit Code (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 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**

Whilst 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 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.

**11.4 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 \$7,500 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 and discrimination claims.

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 both parties 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.

### **11.5 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.

## 12. Succession

### 12.1 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* (Qld).

#### 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;
- to dispose of property in the way in which the testator wishes; and

- to transfer control of certain business or investment structures, such as companies and trusts, 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 does not have a Will or their circumstances have 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 Supreme Court has the power to declare that a document or part of a document that was intended to be the testator’s last Will but fails to meet the formal requirements is 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 not be used if the testator does not want the beneficiaries to know what changes were made to the Will.

#### B. Revocation

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

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

Divorce, the termination of a civil partnership or the end of a de facto relationship revokes the parts of a Will which relate specifically to the former spouse, civil partner or de facto partner.

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 a person's death on his or her personal financial affairs and business financial affairs is:

- Any assets in the person's name are dealt with by the terms of the person's Will.
- Any assets in a company of which the deceased is a shareholder or director, remain in the company and the person's death does not affect those assets. Shares in the company will be dealt with by the Will. The deceased will cease to be a director of the company. If the company owes the deceased money, the loan is an asset of the estate and will be dealt with in accordance with the deceased's Will.
- Any assets in a trust of which the deceased is a trustee or beneficiary will remain in the trust and the death does not affect those assets. Depending on the trust terms, the deceased may have the power to put in place a successor/s as trustee. The deceased will cease to be a beneficiary of the trust but if the trust owes the deceased money, that loan is an asset of the estate and will be dealt with in accordance with

the deceased's Will.

- Any assets in a partnership remain in the partnership. The deceased is able to gift his or her interest in the partnership only, not the specific assets of the partnership. The deceased's interest in the partnership and any loan account in the partnership (where the partnership owes the deceased money) is dealt with by the Will.
- Any loan account in a trust, company or partnership whereby the deceased owes money to any of those entities will be a debt of the 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. A testator should deal with such assets in his or her 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 a person's 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 dependents or your estate and in whatever proportions the trustee determines. Dependents mean the deceased's spouse, child or someone who is financially dependent on the deceased. There may be tax consequences on the payment of death benefits so a testator should obtain appropriate advice.

## 12.2 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.

A partial intestacy results where a person leaves a will that effectively disposes of only part 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 a civil partner or de facto partner), children (including step children) and if none survive, then down the line to the intestate's next closest relatives commencing with their parents.

In some instances, it may be necessary to apply to the Supreme Court for

a grant of letters of administration to appoint administrators to deal with the person's estate. Administrators have the same rights, obligations and duties as executors.

#### **b. Executor's Role in Estate Administration**

Executors of a person's estate have an important obligation and it is therefore important that a person takes great care in choosing his or her executor(s). 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.

The executor should be a person who is trusted by the testator and familiar with the testator's affairs. It is often preferable to appoint more than one executor, either jointly or successively to administer the estate and this can include a professional advisor such as the person's lawyer or accountant. Any professional advisor who is appointed as an executor is likely to charge his or her normal professional fees to complete the duties of an executor, provided the testator has authorised the payment of these fees in the Will. Individual executors may seek executor's commission for work carried out as an executor however there is no absolute entitlement to be awarded executor's commission. Any amount of executor's commission must be either set by the will, agreed to by the residuary beneficiaries or ordered by the court.

#### **c. Grant of Probate**

A Grant of Probate is obtained by making an application to the Supreme Court. It affirms the authority of those named in the Will to administer the estate by formally recognising the deceased's last valid Will. 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 generally 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 mentioned in the Will, a beneficiary named in any earlier Will, a spouse parent or child of the testator, any person who would be entitled to a share of the deceased's estate if the deceased had died intestate; a parent or guardian of any minor mentioned in the Will and a

creditor or other person who may have a claim against the estate has the legal right to be given a copy of any Will of the deceased.

**e. Family Provision**

If a person dies without making adequate provision from his or her estate for the proper maintenance and support of the deceased person's spouse, civil partner, de facto partner, child, step 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 person. In effect, the Court re-writes 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, however the Court can grant an extension of time to file an application in certain circumstances. If notice is given but court proceedings are not commenced within the nine months the estate can be distributed, however where negotiations are continuing, in some circumstances the executor may not be able to rely on the protection that the estate was property distributed. A settlement of a claim can be negotiated at any time.

Family provision claims delay the estate administration because once negotiations and court proceedings have commenced, distribution cannot occur until the claim is dealt with. This delay and the nature of a family provision claim can cause angst among family members and often result in substantial legal costs for the estate.

## **12.3 Planning for Incapacity**

**a. How incapacity will impact**

If a person becomes incapable of managing his or her financial affairs, the likely impacts on the person's personal and business affairs will be as follows:

- An attorney appointed under a valid enduring power of attorney will be authorised to control the person's financial affairs. Alternatively, where there is no attorney appointed, it will be necessary to make an application to QCAT for the appointment of an administrator. There is the possibility, particularly where an application is contested, that the Public Trustee could be appointed to act in this role.
- A director of a company will no longer be eligible to hold this position. If an alternate director has been appointed, that appointment is also no longer valid.
- A shareholder of a company will be unable to vote at member meetings, however a validly appointed attorney could vote on the shareholder's behalf.
- A partner in a partnership will be affected as determined by the partnership agreement – most agreements provide for cessation as a partner in the event of incapacity. If there is no agreement, the partner's validly appointed attorney could act.

## **b. Enduring Power of Attorney**

An enduring power of attorney is a document by which a person appoints one or more attorneys to look after his or her financial and/or personal and health affairs in the event that the person loses the capacity to make decisions, for example, through illness, accident or disability.

It is also possible for attorneys to have the power to make financial decisions for a person while the person still has capacity. This is common for spouses and can also be useful where someone works remotely or travels frequently and needs financial matters attended to in the person's absence.

An enduring power of attorney can appoint certain attorneys to make decisions about financial matters and different attorneys to make decisions about health and personal matters.

Not having an enduring power of attorney can have serious consequences if something happens to a person unexpectedly. If a person does not have an enduring power of attorney and he or she loses capacity, it may be necessary to make an application to the Queensland Civil and Administrative Tribunal for the appointment of an administrator to manage the person's financial affairs and a guardian to look after his or her personal and health affairs.

## **c. Advanced Health Directive**

An "advance health directive" enables a person to give directions for his or her future health care and medical treatment if that person becomes unable to do so, for example through loss of capacity to make decisions. The directives are about ensuring quality of life and that medical practitioners and attorneys act in accordance with the directions given in this document. This document entitles a person to elect not to receive certain treatments in circumstances where the person is unlikely to recover from an illness or injury which results in little to no quality of life.

## **d. Binding Death Benefit Nominations**

Superannuation does not automatically form part of a person's estate when he or she passes away. Rather, the trustee of the superannuation fund has the discretion as to how a person's superannuation entitlement is to be distributed to certain classes of dependants such as a persons surviving spouse, partner, children, financial dependents or to the person's estate.

For most superannuation funds, a person can choose who receives their superannuation when they pass away, by making what is known as a binding death benefit nomination. This nomination, if validly made, will bind the trustee to distribute superannuation benefits in a particular way. However, many retail superannuation funds place a time limit on the validity of binding death benefit nominations, which revert to a non-binding nomination after a certain period of time (commonly three years).

Depending on the persons individual circumstances, it may be appropriate to put in place a binding death benefit nomination so that a person's superannuation will not form part of their estate.



# 13. Relationships and Families

## 13.1 Relationships

### a. Marriage and Divorce

The *Marriage Act 1961* (Cth) provides that “marriage” means the union of two people to the exclusion of all others, voluntarily entered into for life.

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 communicate to the other that the marriage has ended.

It is possible to be separated but continue to live under the same roof. 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, 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* (Cth) 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. Civil Partnerships**

The *Civil Partnerships Act 2011* (Qld) is Queensland legislation which allows couples who are in a de facto relationship to register their relationship. This is done by applying to the Registrar of Births, Deaths and Marriages for the relationship to be registered as a Civil Partnership.

Any adult who is not married or already in a registered relationship can register their relationship under this Queensland legislation. The pre-requisites are that the couple is not in a prohibited relationship (i.e. a relationship 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 can be registered. During this time, one or both applicants may withdraw the application.

The parties to a registered relationship may also participate in an official ceremony. Two persons who have given notice of their intention to enter a Civil Partnership may make a declaration of their intention before an authorised notary and at least one other adult witness.

A registered relationship is terminated by the death or marriage of a party to the relationship. It also may be terminated by either or both parties making application in the approved form to the Registrar of Births, Deaths and Marriages.

An application for termination made by one party only 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, the provisions of the *Family Law Act 1975* (Cth) relating to de facto property settlement apply immediately, irrespective of the length of the relationship.

## **13.2 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 agreement must comply with strict requirements set out in the *Family Law Act 1975* (Cth) and will not be binding unless those requirements are met. These include obtaining independent legal advice as to the effect of the agreement on a person's 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 should you separate and preventing costly litigation in the event of the relationship breaking down.

### 13.3 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 are also taken into account as are 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 2 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 3.

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 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 *Civil Partnerships Act 2011* (Qld); 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 or there would be serious injustice to the party applying if a property adjustment order was not made.

## 13.4 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 1975* (Cth).

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 upon 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; and
- 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);
- the practical difficulty and expense of a child spending time with both parents; and
- 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 Services and Assessment**

Child Support is part of the Commonwealth Department of Human Services (along with Medicare and Centrelink). Child Support has powers to assess and collect child support for children of separated parents. Child Support has power to make an administrative assessment of child support by reference to the taxable income of each of the parents, to ensure that both parents financially provide for their children in accordance with their financial capacity. Child Support has access to Australian Taxation Office records.

All child support assessments are calculated using a 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**

A question often asked by separated parents is "Can I move interstate or overseas with my children?"

If there is a court order that relates to where the children live and the time the children are to spend with the other parent, that order is breached when one parent relocates without the consent of the other parent. The relocation must be of a distance that would affect the staying parent's ability to spend time with the children as set out in the Order.

The provisions of the *Family Law Act* confirm that each parent has parental responsibility for their children regardless of separation. Court orders usually provide that parents have to confer about major decisions affecting children such as moving interstate or overseas. If there is no agreement, then the party wishing to move the children needs to apply to the court for permission to relocate with 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 relocate away from one parent.

### 13.5 Spouse Maintenance

The *Family Law Act 1975* (Cth) provides that spouses have a responsibility to maintain each other, if one spouse is able to do so and the other spouse is unable to support herself or himself whether due to caring responsibilities for a child of the marriage under the age of 18 years, his or her age or physical or mental incapacity for appropriate employment, or for any other adequate reason. The *Family Law Act* also empowers the court to make similar maintenance orders for de facto couples.

Spouse maintenance is often paid by the ‘breadwinner’ spouse to a non-working spouse until a property settlement is negotiated or ordered. The reasons that make a person eligible for spouse maintenance are also often relied upon to increase that person’s share of the assets available for division in the property settlement.

### 13.6 Protection Orders & Family Violence

When domestic violence occurs involving parties in an intimate relationship (married persons, de facto couples, parents of a child, engaged couples, or boyfriends and girlfriends) or household or family members, the party experiencing domestic or family violence can apply to a Magistrate for a domestic violence protection order (DVO). Violent behaviours include physical or sexual abuse, emotional or psychological abuse, economic abuse and behaviour that is controlling, threatening, intimidatory and harassing.

Conditions can be added to the DVO, such as making it illegal for the violent person to come within a certain distance of where the applying person lives or works. Applications can be made by the person experiencing domestic violence or a lawyer or other person authorised to act for him or her or by the police.

Orders are generally made for a period of five years (unless the Court is satisfied a shorter order should be made) and may be extended where necessary.

A person does not have a criminal offence recorded against them when a DVO is made against them. However, if the DVO is breached, the person can be charged with the criminal offence of breaching a DVO. This criminal offence has a penalty of up to three years in jail.

## 14. Vehicles and Machinery

### 14.1 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* (Qld) (**TORUM**) covers traffic offences.

The provisions for driving whilst under the influence of alcohol or a drug, dangerous driving, and driving without due care and attention or without reasonable consideration for other road users apply equally to the riding of horses. Offences are also prescribed for organising, promoting or taking part in an unauthorised or unlicensed race involving vehicles or animals on a road.

In respect of road accidents, the driver or rider of any vehicle or animal involved in an accident resulting in injury or death, or where damage to other property (including any animal) is likely to exceed \$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 the driving, leading or wheeling of vehicles or animals on a footpath, shared path or water channel, the driving or leading of animals to cross 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 2010* (Qld) 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 (detailed in Schedule 1 of these regulations), 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.

### 14.2 Concessional Registration

*Transport Operations (Road Use Management Vehicle Registration) Regulation 2010* (Qld) (**Vehicle Registration Regulations**) contains provisions dealing with concession registrations for primary producers.



“Primary producer” is defined in the Vehicle Registration Regulations as a person engaged mainly in the production of primary produce. “Primary produce” is defined as raw material for clothing or food derived from agriculture, dairying, fishing, the raising of livestock or viticulture.

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

- a. trailers with an aggregate trailer mass (ATM) over 4.5 tonnes; or
- b. vehicles, being prime movers or trucks of at least six tonnes gross vehicle mass (GVM),

(defined in the Vehicle Registration Regulations as Prescribed Vehicles), 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. A primary production vehicle is a vehicle that is owned by a person who is primary producer, used only for carrying on the person’s business as a primary producer and is a Prescribed Vehicle. A primary producer who is granted concessional registration for a primary production vehicle must not use the vehicle, or permit the vehicle to be used, for a purpose other than:

- a. for carrying on the producer’s business as a primary producer; or
- b. as permitted under section 100G.

Section 100G of the Vehicle Registration Regulations provide that a primary producer who is granted concessional registration for a primary production vehicle may use the vehicle, or permit the vehicle to be used, to transport fodder:

- a. for another primary producer who has been granted disaster relief financial assistance provided the fodder is transported within 1 year after the day the other primary producer is granted the disaster relief financial assistance; or
- b. for another primary producer (provided it is not done for reward or under a commercial arrangement):
  - i. who is the registered operator of a vehicle that has its garage address in a drought-declared area or at a drought-declared property; or
  - ii. who is the registered operator of a vehicle that had its garage address in a drought-declared area or drought-declared property provided the fodder is transported within 1 year after the area stopped being a drought-declared area or a drought-declared property.

Co-operative associations may also apply concessional registration fees provided the Prescribed Vehicle is registered in the name of the co-operative and is only used to carry produce owned by a member of the co-operative between the point of primary production and the first point of processing (e.g. a mill) or other transport (e.g. a railway).

Further concessional registration fees may be granted to the registered operator of other prescribed vehicles, e.g. for vehicles with distance and road use limits which are owned by a primary producer and only used in the owner's business as a primary producer. Again, the concessions depend upon the weight of the vehicle concerned.

The concession holder must notify the Chief Executive in writing before the vehicle is used for a purpose other than for which the concession was granted or within 14 days after a material change in circumstances or the sale or transfer of the vehicle. At that point, the Chief Executive may reassess the fee for the balance of the vehicle's current registration.

The Schedules to the Vehicle Registration 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.

### 14.3 Unregistered Vehicles

Under the Vehicle Registration Regulations, 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 authorization or permit under the Vehicle Registration 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* (Qld) (**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 whilst being driven,

and caused wholly or partly by a wrongful act or omission in respect of the motor vehicle by a person other than the injured person. The MAIA however does not apply if:

- a. the accident involved an uninsured motor vehicle unless the accident happened on a road or in a public place; or
- 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 machine (for which registration is required under the Vehicle Registration Regulations) 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.

#### **14.4 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* (Qld)].

The person who is proposing to occupy or use the land is required to give at least seven 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.

## 14.5 Removal of Animals from Roads

Under the *Stock Route Management Act 2002* (Qld), it is an offence to allow stock to stray onto the stock route network and straying stock may be seized. If stock is seized, the chief executive officer of the Department of [insert] must issue a notice to the owner of the seized stock (if they can be ascertained) notifying them of the stock's removal and that the stock must be claimed within three days. If the stock is not claimed, the chief executive may sell or dispose of them.

The *Transport Operations (Road Use Management) Act 1995* (Qld) 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.

## 14.6 Loading

### a. Light vehicles (GVM or ATM of more than under 4.5 tonnes)

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, the load is restrained to prevent it falling off the vehicle or dislodging when the vehicle is moving and the load does not overhang dangerously, exceed mass limits or cover lights, indicators, reflectors or the number plate. The person in control of the vehicle is responsible for ensuring the loading requirement or trailer is compliant.

### b. Heavy vehicles (GVM or ATM of more than 4.5 tonnes)

On 10 February 2014, the Heavy Vehicle National Law, covering all "heavy vehicles" over 4.5 tonnes, commenced in Queensland, New South Wales, Victoria, Tasmania, South Australia and the Australian Capital Territory. The law covers matters relating to vehicle standards, mass dimensions and loadings, fatigue management, the Intelligent Access Program.

Heavy vehicles include road trains, semi-trailers, livestock and other agricultural vehicles.

There are also particular requirements regarding trailers for the carriage of animals, which require that:

- i. 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
- ii. 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 and National Heavy Vehicle Regulator have 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.

## 14.7 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* (Qld) 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 2,000 penalty units, being \$261,100 for individuals, or three 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 *Biosecurity Act 2014* (Qld), 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.

Queensland is divided into two cattle tick zones, the cattle tick infested zone and the cattle tick free zone. All high and low-risk livestock must be free of cattle ticks before entering the free zone. When moving livestock between zones there are risk minimisation requirements that must be met. These requirements are set out in the Queensland biosecurity manual.

The *Transport Infrastructure (State-Controlled Roads) Regulation 2017* 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.

## 14.8 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 GVM travelling on a public road 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 on the ATO’s website.

The scheme also covers duty paid alternative fuels such as biodiesel, ethanol, liquefied petroleum gas (LPG) and compressed natural gas (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.

## 14.9 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 upon written or spoken pre-purchase communications or upon spoken contractual terms to obtain recourse for defective or deficient machinery but this introduces significant uncertainty.

The following information is provided on the assumption that the machinery or services were purchased for a business purpose and from a corporate seller, which would usually be the case for a primary producer. The position may be different for household purchases, or purchases from a non-corporate seller.

### 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* (Qld) ss16-18).

There are no implied warranties in relation to the provision of services for a sale price above \$40,000 excluding 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.

#### 14.10 Drones

Drones are used by primary producers to check fence lines and stock movements, monitor crop growth and water levels and take photographs and videos of inaccessible parts of land. Increasingly, drones are also being used by activist groups to take photographs and videos of farming operations on privately owned land.

There are no State or Federal laws that govern how photographs or videos obtained, without permission, by a drone can be used. However, the Civil Aviation Safety Authority (CASA) has published safety rules that must be followed by certain people when flying drones.

CASA's safety rules must be complied with by people who fly drones for recreational purposes. The safety rules were created to protect people and property from physical harm. Some of the safety rules include (but are not limited to) as follows:

- i. drones must not be flown higher than 120m or over an area where an emergency event has occurred or is occurring (such as a car crash or bushfire);
- ii. drones must not be flown within 30 meters of people;
- iii. drones over 100 grams must be kept at least 5.5km away from controlled airports; and
- iv. drones must only be flown during the day and not at night and kept in sight at all times.

If a person flying a drone for recreational purposes does not follow the above rules, a land owner can report a safety breach to CASA. CASA will investigate a safety breach if it receives sufficient evidence. CASA may accept evidence such as photographs or a recording of the drone being used incorrectly and the name of the person flying the drone. CASA does not investigate privacy related concerns arising from drone use.

Depending on the size of a drone and where it is to be flown, persons who seek to fly for commercial purposes may need to hold a licence and be certified by CASA.

CASA will shortly introduce registration and accreditation requirements that will impact on persons flying drones for recreational and commercial purposes and persons under the age of 16 years will be restricted from flying drones without the supervision of someone over the age of 18 years.

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