

# Agribusiness

*Contributing editors*

Carol VandenHoek and Wendy Baker QC



2018

GETTING THE  
DEAL THROUGH 

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DEAL THROUGH

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*Contributing editors*

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**Miller Thomson LLP**

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## CONTENTS

<b>Introduction</b>	<b>5</b>	<b>Malaysia</b>	<b>57</b>
Carol VandenHoek and Wendy Baker QC Miller Thomson LLP		Azman bin Othman Luk, Pauline Khor, Amelia Koo and Moy Pui Yee Rahmat Lim & Partners	
<b>Argentina</b>	<b>6</b>	<b>Mexico</b>	<b>65</b>
John O'Farrell and Gonzalo Ballester JP O'Farrell Abogados SA		Alejandro Zeind and Antonio Zeind Zeind & Zeind	
<b>Australia</b>	<b>14</b>	<b>Netherlands</b>	<b>72</b>
Carolyn Chudleigh, Kendra McKay and Stephanie Lambert HFW Australia		Jan van de Ven ABLD	
<b>Brazil</b>	<b>23</b>	<b>Romania</b>	<b>76</b>
André Ricardo Passos de Souza and Ralph Melles Sticca Passos e Sticca Advogados Associados		Otilia Petrescu and Silviu Stratulat Stratulat Albulescu Attorneys at Law	
<b>Canada</b>	<b>28</b>	<b>Ukraine</b>	<b>82</b>
Carol VandenHoek and Wendy Baker QC Miller Thomson LLP		Nazar Chernyavsky and Andrew Zablotskyi Sayenko Kharenko	
<b>Chile</b>	<b>37</b>	<b>United Kingdom</b>	<b>89</b>
Matías Araya, Sebastián Norris and Milenita Vega Araya & Cía		Nicolas Carbonnelle, Sally Shorthose and Joanna Ketteley Bird & Bird	
<b>China</b>	<b>44</b>	<b>United States</b>	<b>95</b>
Jan Holthuis, Li Jiao and Shu Liu Buren		Arleen A Nand DLA Piper LLP	
<b>India</b>	<b>51</b>		
Krishan G Singhanian, S N Verma, Ashwin Vasista and Nikita Shankar Singhanian & Co			

# Australia

Carolyn Chudleigh, Kendra McKay and Stephanie Lambert

HFW Australia

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## Overview

### 1 Describe the agriculture and food supply chain in your jurisdiction.

Australia is a very large and environmentally diverse nation continent, and agribusinesses and rural industries cover around 60 per cent of Australia's land mass. There is a mix of dryland farming and irrigation. Australia produces more food than it consumes, therefore, the export market is very important to Australia's economy. It is also a large employer of people covering a wide variety of skills from horticulture to engineering, bioscience research to manual labour and management to finance.

Agricultural produce for consumption locally and for export includes:

- crops;
- horticulture;
- animal products (beef, pork, poultry, lamb and dairy);
- viticulture;
- cotton;
- aquaculture; and
- wool.

Australian food quality is considered internationally to be very high. Maintaining this high quality is a main driver for the Australian federal government departments that regulate rural industries and of significant interest to the federal government's agency for scientific research being the Commonwealth Scientific and Industrial Research Organisation (CSIRO). Transporting the food produce around the country and to the export ports in a timely, safe and cost-effective manner continues to be the main challenge because of the distances involved.

### 2 What is the regulatory environment for primary agriculture and primary food processors in your jurisdiction?

Australia has a federal government, the Commonwealth, responsible for lawmaking and governance at the national level. There are also state and territory governments (New South Wales (NSW), Victoria, Queensland, Western Australia, South Australia, Tasmania, and the Northern Territory and the Australian Capital Territory) responsible for lawmaking in their states or territories. The third tier of government are the local councils that are responsible for managing regions and cities.

The regulatory environment for primary agriculture and primary food processors in Australia is complex because of the three tiers of government. That said there is currently a political push to simplify and nationalise the laws and regulations governing agribusinesses and rural industries.

The federal government's Department of Agriculture and Water Resources is responsible for administering the laws relating to primary agriculture and primary food processing. There are more than 24 individual pieces of legislation covering a wide range of issues.

The federal government then establishes authorities and other statutory and non-statutory bodies to operate under specific laws. The state and territory governments follow the same model of governance and management. Depending on the production or business type, these laws may require approvals, registrations, licences and permits in order to conduct agribusiness.

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### 3 What are the main non-governmental organisations and non-profit organisations in the agribusiness sector in your jurisdiction?

There are a large number of associations and industry organisations in the agribusiness sector in Australia. The Australian Trade and Investment Committee, among others, makes publicly available industry directories. The AG Institute also maintains a national member directory and a national consultants register. Some of Australia's agribusiness associations include:

- Agribusiness Australia;
- Australian Dairy Farmers Federation (ADFF);
- Australian Egg Corporation (AECL);
- Australian Forest Growers (AFG);
- Australian Institute of Food Science and Technology (AIFST);
- Australian Institute of Horticulture (AIH);
- Australian Meat Industry Council;
- Australian Water Association (AWA);
- Australian Women in Agriculture (AWIA);
- Cattle Council of Australia;
- GrainGrowers;
- National Farmers' Federation; and
- WoolProducers Australia.

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## Land acquisition and use

### 4 Identify and summarise the legislation addressing agricultural property transactions in your jurisdiction. Outline how farmland is typically held.

There is no single specific piece of legislation addressing agricultural property transactions in Australia. The acquisition and disposal of rural land holdings follows the same conveyancing procedures as the buying and selling of houses, commercial buildings, shopping centres and other real estate assets. This includes general conveyancing laws regarding vendor disclosure and purchaser due diligence, and also includes land title transfer laws and regulations. What is specific to agricultural property transactions is the complexity or unusual nature of the subject matter of the transaction.

Whether the asset being offered for sale is a small rural holding or a large-scale agricultural enterprise, obligations placed on the seller regarding disclosure and prudent behaviour on the part of the buyer regarding due diligence, can result in a complex terms sheet for a commercial deal and a complicated set of transaction documents for lawyers to prepare and negotiate.

Converting a commercial terms sheet into a legally enforceable, robust and clearly drafted transaction document is not always easy, especially with the increasing number of matters that have an impact on the conveyance of rural land.

Matters to consider regarding agricultural property transactions include:

- due diligence and disclosure obligations;
- land tenure, access and easements;
- dividing fences;
- water rights, including water access licences, dam licences and bore licences;
- stock and crops;
- plant and machinery including depreciation;

- third-party rights, including agistment agreements and share-farming;
- forward supply contracts;
- management obligations during the transaction term;
- warranties regarding environmental issues, including disclosure of conservation agreements or notices regarding acid soils and contamination risks;
- work health and safety issues and employment law; and
- the certainty of commercial terms regarding the consideration to be paid by the purchaser to the vendor.

### Farmland ownership

The real estate for a family-run rural enterprise is usually held either in the personal names of the farmers or graziers, or in a private 'proprietary limited' company or a private discretionary trust. Appropriate tax and accounting advice should be obtained to work out the best land-ownership structure for the business undertaking. It is then common for the farmer or grazier to set up an operating entity (again, a private proprietary limited company or a private discretionary trust) that will carry on the agribusiness from the real estate. This structure results in a property entity and an operating entity. There are tax, accounting and risk mitigation reasons for separating the two entities. These entities will usually have an agreement between them regarding the use of the land and the allocation of risk, responsibilities and profits. Succession planning is also an influencing factor in these structures.

For larger corporate investments in rural enterprises, the corporate entity in which the farmland will be held is, again, usually driven by tax and accounting considerations.

### Land tenure

The usual land tenure concepts in Australia are freehold and leasehold.

Land title creation and ownership is managed by each state and territory under the applicable laws for that state or territory.

Larger rural properties often have a mix of leasehold and freehold land tenures across their land holdings.

Leasehold land holdings are usually Crown or government leasehold grants, as opposed to private leasehold agreements with private landowners. In Australia, the tenant-farming model from private landowners is uncommon. Farmland is usually purchased in freehold by the farmer or grazier or, where freehold is not available, leased from the Crown or government.

The Torrens title system of land title creation and registration exists in all states and territories in Australia. Freehold and private leasehold land interests are created and managed under this system. Its main function is to create indefeasibility of title upon registration of the interest in land, under the relevant state or territory property laws.

Leasehold land interests in Crown or government-owned land are governed by the relevant state, territory or Crown land laws.

Freehold landownership of farming land or land for agribusinesses is common and well understood. It is the same as freehold landownership for houses and commercial buildings. The difference is the zoning laws applicable for that parcel of land. The zoning laws, either state or territory based, or based at the local council level, specify the permitted land use of that parcel of land and whether approvals are needed to change or modify that use or carry out development consistent with the permitted use.

Leasehold landownership of farming land or land for agribusinesses is also common and well understood. However, the types of leases are many and varied. For example, in some states there are:

- perpetual leases – these are granted in perpetuity of an annual rent with rights to convert to freehold at certain points in time;
- pastoral leases – a particular type of leasehold tenure that allow Crown land to be used for grazing stock;
- Crown roads and enclosure permits – the right to exclusively use tracks of land that were previously stock routes or Crown roads; and
- Western Lands Leases or leases with environmental restrictions – the primary purpose of these leases is to ensure appropriate land administration and land management, as the land is usually in a very fragile and sparsely populated area.

Interestingly, by world standards, the land under the NSW Western Lands Leases is regulated by one of the oldest pieces of resource

management legislation, having been created in 1901 and specifically requiring resource management of the land.

### Native title

Native title in Australia must also be considered when reviewing agricultural property ownership and use.

Native title is the recognition of the rights and interests of and Torres Strait Islander people in matters of land and water in Australia.

Prior to 1992, Australian common law did not recognise native title in Australia. However, the *Mabo* case (*Mabo and Ors v Queensland (No. 2)*) resulted in the recognition of land rights from the time of European settlement. It is interesting to note that the High Court of Australia did not define what native title was: it 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 practise their traditional laws and customs, however, it can only exist in areas where it has not been extinguished previously. It is not possible for native title to take away anyone else's valid rights, so native title has been extinguished on privately owed land (including residential and commercial land), certain other landholdings and leases, and other government areas, such as schools and roads.

Native title can exist in areas such as vacant state land, forests, beaches, some types of pastoral leases, national parks and reserves.

In most cases where a successful native title application is made, the land that is the subject of the application will be shared by the holders of the native title and other occupiers. Native title will not necessarily have an impact on all primary producers and rural land holdings. The High Court's decision in the *Wik* case (*The Wik Peoples v State of Queensland and Ors*) held that native title is not necessarily extinguished by pastoral leases and can coexist with the rights of some leaseholders. Certain leases may be 'exclusive' leases and would therefore extinguish native title. If a lease is not exclusive, then the land may be claimed in a native title application. However, native title claimants cannot claim exclusive possession of the lease area. If native title rights and leaseholders' rights conflict, then the rights of the leaseholder prevail. In conveyancing, it is always prudent in due diligence to check the native title register of the National Native Title Tribunal to ascertain whether there are any claims in connection with the subject land.

### Share-farming

For agricultural land uses, there are often share-farming agreements, agistment agreements, private or personal lease or occupancy arrangements, and licences to consider. Many share-farming or private lease agreements are oral and are deemed to be periodic tenancies. It is therefore preferable for such agreements to be in writing between the parties to give certainty as to the intended terms.

If a purchaser is made aware of a share-farming arrangement or agricultural tenancy that is not in writing, the purchaser should require the arrangement or tenancy to be put in writing, preferably before entering into the transaction document (with appropriate assignment clauses) or, in any case, before completion.

Agricultural tenancies can be used for:

- grazing;
- dairying;
- pig farming;
- poultry farming;
- viticulture;
- orcharding;
- beekeeping;
- horticulture;
- growing of vegetables or other crops of any kind;
- forestry; or
- any combination of these activities.

Agricultural tenancies can involve:

- a written lease or licence;
- a tenancy at will (a verbal or 'handshake' agreement);
- a share-farming agreement; or
- any other arrangement by which a person who is not the owner of the farm has the right to occupy or use it.

The basis of a share-farming agreement is that the owner will supply the land and assets, but probably not the machinery. The share-farmer provides the labour, expertise, fertiliser if necessary, the machinery and the marketing for the sale of the produce if necessary. The appeal in this type of agreement is that the owner of the land benefits from receiving income for no physical work. If the season or prices are bad, the share-farmer as well as the owner will suffer a reduction in income.

Generally, the term of a share-farming agreement is at least 12 months and often longer, but it is possible to have a shorter term agreement (eg, lucerne hay baling season).

#### **Access rights, easements and other interests in land**

A search of the land title (whether freehold or leasehold) will show other registered interests in the land, including easements, rights of way and restrictions on use.

Another issue to address when acting for either a vendor or a purchaser is what access is available to the property and whether it is a legal access or access that is personal and can be terminated and to what point. Sometimes, what vendors who have owned property for a very long period of time, perhaps for generations, believe to be a legal access to a property is in fact access across a stock route or through a neighbour's land parcel, and found not to be legal access at all.

The lack of legal access can cause problems and it is not unusual to discover that the farming lands are physically landlocked once such access is removed. That is often because the legal access – usually from an inconveniently placed public road on the 'other side' of the property – has not been used for a long time so has been fenced closed or used for other purposes. It is extremely important that legal practitioners ascertain that the access to the property is a legal access by way of a formed or public road.

Checking the currency of any registered easements or rights of way or a carriageway is also important as many are often found to be redundant and can be removed from title.

The actual area of the property being purchased should also be clarified and this may require a formal survey to be undertaken. This is important when the purchase price is being negotiated (or at least calculated in the first instance) on a dollars-per-acre or dollars-per-hectare basis for certain arable land or at different rates for different land uses across large holdings.

#### **5 Outline any rules related to use of farmland for non-agricultural uses.**

The states and territories and local councils have planning laws that regulated the permitted use of land. Land is classified and zoned to allow a particular use without requiring development consent and to also allow other uses, such as non-agricultural uses, provided development consent is first obtained. For example, land that is zoned for rural use may also permit bed-and-breakfast accommodation and tourism for farm-stay businesses, provided development consent is obtained first.

#### **6 How is lending secured by farmland addressed in your jurisdiction? Do special rules apply for farm lending?**

Loans made to an agribusiness or rural landholder is usually secured by way of a mortgage over the real estate and a general security agreement or charge over the corporate entity owning the real estate or the agribusiness operations. Other securities such as corporate or personal guarantees and other collateral securities may also be required depending on the level of the debt and the total leverage against the equity or value of the assets. Farm and agribusiness loans are usually credit-assessed as any other type of commercial loan. However, due to the seasonal nature of income from farming enterprises, the repayment terms are often tailored to suit the particular rural enterprise.

#### **7 Are there provisions relating to creditors' rights on default by farmers that apply in your jurisdiction?**

Usually, the terms of the relevant loan agreement or finance contract will identify what actions of the borrower constitute a default and will specify the rights of the creditor upon such default.

Farm debt mediation schemes have been in place in Australia for nearly 20 years. They are mandatory legislative schemes in NSW and Victoria, and voluntary schemes in Queensland and Western Australia.

Farm debt mediation is a method of alternative dispute resolution that is intended to facilitate discussions between banks and their farming customers so that the lender and borrower can better negotiate their financial position. Any enforcement action taken by a creditor against a farmer that fails to comply with the relevant farm debt mediation legislation is void. There is currently discussion at the national level between the National Farmers' Federation, the Rural Financial Counselling Service and the Australian Bankers' Association, to consider whether a consistent national scheme should be implemented.

The Financial Ombudsman Service Australia (FOS) is another mechanism available to small business owners and borrowers for accessible financial dispute resolution to resolve complaints with financial services providers (that are members of FOS).

However, there are time limits and monetary limits that apply to all claims lodged with the FOS. Currently the FOS ombudsmen accepts claims up to A\$500,000 (a single dispute can also contain more than one claim). However, the monetary limit on awards the ombudsmen can per claim made on or after 1 January 2015 is A\$309,000 (this excludes compensation for costs and interest payments) and A\$3,000 (per claim) for consequential financial loss or damage.

In response to the Ramsay Review, the 2017 Federal Budget has introduced measures that will have a significant impact on the existing dispute resolution schemes in Australia. From 1 July 2018, a single, industry-funded external dispute resolution body for all financial disputes (including superannuation disputes) will be established, known as Australian Financial Complaints Authority supervised by ASIC. The new authority will consolidate the FOS, the Credit and Investments Ombudsman and the Superannuation Complaints Tribunal into a single industry ombudsman scheme to reduce gaps, confusion and duplication in the three schemes. The new authority will have a monetary limit of A\$1 million and a compensation cap of no less than A\$500,000 for non-superannuation related financial disputes.

#### **8 Describe any rules relating to public control of farm property in your jurisdiction. What legislation governs them?**

##### **Rezoning**

The state and territory governments and local councils can rezone farming land and therefore change the permissible use of such land. This rezoning does not extinguish or invalidate any immediately prior valid use (which usually survive under existing use rights). In most instances, this is a value-add proposition for the farmer as land that is zoned for rural uses is usually considered to be lower in value than, for example, light industrial zoned land or residential zoned land. Rezoning controls are under the relevant state and territory-planning laws.

##### **Compulsory acquisition and resumption**

Each level of government in Australia (federal, state or territory and local government) has the power to compulsorily acquire land from private landowners. This includes farmland. Compulsory acquisition is also known as 'resumption'.

This usually occurs in order to build new or expand existing roadways or public transport routes, and to build railway corridors, airports and other transport infrastructure. It can also occur to protect the community – for example, through resuming land that is heavily contaminated – or to preserve parks and open spaces, or create electricity corridors for power-lines.

If farmland, or any part of it, is resumed, there is compensation payable based on a valuation formula.

Resumption is an absolute right of the government.

##### **Mining, minerals and petroleum rights**

Mineral and petroleum rights in Australia are generally reserved in favour of the Crown. This is the case despite a landholding being freehold in nature. That is, the freehold owner of the land does not own any minerals or resources under the surface of the land. The rights to minerals in the ground arise from the laws in each state and territory and the original Crown grants of the landholding. These laws set out the processes and rights for the Crown to grant to private entities the right to explore for the resource (exploration permits, licences or leases), the right to carry out works to determine the likely existence of minerals or resources and then, ultimately, the payment of royalties and compensation to the landowners and occupiers of the surface land if the right to mine is granted.

There are significant tracts of farmland that are subject to exploration rights. This does not mean there are minerals or resources under the farmland, but if there are, it may be that the farmland has been acquired for mining purposes.

This can be highly controversial and is similar to compulsory acquisition or resumption.

**Native vegetation and clearing**

The state and territory governments developed and endorsed Australia’s Native Vegetation Framework in 2012. Under this framework, there are five goals to guide government, the community and the private sector in vegetation management around Australia. These are:

- to increase the extent and connectivity of native vegetation;
- improve the condition and function of native vegetation;
- maximise benefits of ecosystem service markets;
- value and manage native vegetation; and
- advance the engagement of indigenous peoples in the management of native vegetation.

The Environment Protection and Biodiversity Conservation Act 1999 (Cth) (EPBC Act) is the government’s primary legislation controlling environmental protection and biodiversity conservation matters. This Act does not directly regulate native vegetation or greenhouse gas abatement (which is done at the state or territory level), but does cover vegetation clearing resulting from agricultural production, where such clearing is the result of an intensification of land use and is likely to have a significant impact on protection or conservation matters.

In such instances, licences or permits to carry out clearing of native vegetation will be required and fines will be levied against those persons carrying out illegal clearance.

**9 Are there any restrictions on foreign ownership of farm property in your jurisdiction? What legislation governs them?**

The Foreign Acquisitions and Takeovers Act 1975 (Cth) (amended by the Foreign Acquisitions and Takeovers Legislation Amendment Act 2015) provides that proposed investments in agricultural land generally require approval where the cumulative value of a foreign person’s agricultural land holdings exceeds the threshold. The laws introduced in 2015 provide for a new monetary threshold for agribusinesses of A\$55 million and agricultural land of A\$15 million.

There are application fees applicable (up to A\$101,500).

Foreign government investors require approval regardless of the value. However, there are some exceptions applying to investors from Australia’s trade agreement partners (Chile, New Zealand, Singapore, Thailand and the United States).

Despite the threshold values, the Australian Taxation Office’s Register of Foreign Ownership must be notified of all acquisitions of interests in Australian agricultural land by foreign persons. The decision of whether to grant an approval (which is technically a ‘decision not to object’ rather than an actual approval) is based on a number of factors, including whether the acquisition would be contrary to the national interest.

Furthermore, the Register of Foreign Ownership of Agricultural Land Amendment (Water) Act 2016, amends the Register of Foreign Ownership of Agricultural Land Act 2015, to establish a Register of Foreign Ownership of Water Entitlements (Water Register) to be administered by the Commissioner of Taxation; and provides for the collection of information and publication of statistics about foreign holdings of registrable water entitlements and long-term contractual water rights. This allows for increased transparency on the levels of foreign ownership in water entitlements.

**Government programmes**

**10 Does the government provide agriculture support programmes to producers, processors or agriculture-related businesses and organisations? Outline the programmes and how they are generally accessed.**

Government-provided support programmes available to agricultural producers, processors and agribusinesses include:

- rural financial counselling service;
- drought-related concessional loans and farm finance concessional loans;

- farm household allowance, farm management deposits, taxation measures and exemptions;
- drought communities programmes;
- farm risk programmes;
- pest and weed management control advice; and
- social support.

The state and territory governments have additional programmes to assist farmers during drought and hardship. The Australian Taxation Office also provides a supporting advice hotline. These support programmes are well advertised and are accessed directly via the programme coordinators and hotline numbers with suitably trained persons placed in rural areas to assist.

**11 Are there any programmes addressing assistance or government incentives for investment by foreign ownership in agribusiness?**

Once approved by the Australian Foreign Investment Review Board, foreign owners of Australian agribusinesses are generally treated the same as local or domestic investors and are generally entitled to access the same support programmes within the industry.

The Australian Trade and Investment Commission, which was created by the federal government, is the entity charged with providing coordinated government assistance to attract foreign investment into Australia. Investment into Australian agribusinesses is high on the agenda. Services are provided to international investors free of charge and are confidential.

**Food safety, certification programmes, animal safety and disease**

**12 Outline the applicable legislation for primary processors of live animals. Is any distinction made between meat for domestic consumption and meat for export?**

The objective of the Agriculture Ministers’ Forum (AGMIN), which represents various agencies within the Commonwealth and state and territorial governments, is to develop and promote sustainable, innovative and profitable agricultural industries. AGMIN also produces codes of practice and industry standards that cover items such as poultry processing, game meat for human consumption, welfare of animals, beef cattle feedlots, and many others.

While each state and territory has animal welfare and processing standards and guidelines, there is a current push to create a nationally consistent set of standards and guidelines. The states and territories have the primary responsibility for animal welfare and the federal government is responsible for international trade agreements to ensure exporters maintain international export standards.

The guidelines related to these matters are:

- the Australian Animal Welfare Standards and Guides (Model Codes of Practice);
- the Australian Standards for the Export of Livestock; and
- the regulations relating to live animal export trade.

The Department of Agriculture and Water Resources works closely with the Department of Industry, Innovation and Science, which has a focus on food processing and manufacturing.

Legislation governing the meat and livestock industries in Australia include:

- the Australian Meat and Livestock Industry Act 1997 (Cth);
- Export Control Amendment (Quotas) Act 2015; and
- the Dairy Produce Act 1986 (Cth).

There is no distinction made between meat for domestic consumption and meat for export. However, there is a very small number of authorised halal and kosher abattoirs with special permission to conduct religious-based processing.

**13 Describe the food safety regime in your jurisdiction, including applicable legislation and regulations.**

There are a number of important documents that form the integral parts of the joint food regulation system. Food safety in Australia is governed by the Food Standards Australia New Zealand Act 1991 and is regulated at the national level. There is a binational arrangement

between Australia's federal government, states and territories and New Zealand. This intergovernmental agreement and treaty establishes a food regulation system and sets standards under the Australia New Zealand Food Standards Code. Chapter 3 of this Code deals with food safety. There are five standards relevant to food safety:

- interpretation and application;
- food safety programmes;
- food safety practices;
- food premises and equipment; and
- food safety programmes regarding service to vulnerable persons.

#### **14 What enforcement can take place in relation to food supply chain safety? What penalties may apply?**

Each state and territory has a food safety agency that works to ensure food is safely produced, manufactured and sold at each step in the supply chain. There are state and territory government laws and regulations that administer and enforce food legislation and all aspects of the Australia New Zealand Food Standards Code.

Regular audits and inspections are made at properties. Depending on the severity of the breach or non-compliance, enforcement can vary from:

- a warning letter;
- improvement notice;
- penalty notice;
- product seizure;
- registration suspension;
- prosecution; or
- registration cancellation.

#### **15 Describe any certification programmes and rules for genetically modified foods, organic foods or other differentiated products.**

Genetically modified (GM) foods are regulated under the Australia New Zealand Food Standards Code. There are two provisions: mandatory pre-market approval, including a food safety assessment, and mandatory labelling requirements on the product. There is a list of approved GM foods. In Australia, the Office of the Gene Technology Regulator oversees the release of GM organisms to the market under the Gene Technology Act 2000 (Cth).

There are six organic approved certifying organisations in Australia that are recognised by the Department of Agriculture and Water Resources. These are:

- Aus-Qual;
- Australian Certified Organic;
- Bio-Dynamic Research Institute (BDRI);
- National Security Association Of Australia Certified Organic;
- Organic Food Chain; and
- Safe Food Production Queensland.

There is also a National Standard for Organic and Bio-Dynamic Produce, issued under the Australia New Zealand Food Standards Code.

#### **16 What are the food labelling requirements, including the applicable legislation, enforcement and penalties?**

Food labelling laws are very strict in Australia, although labelling is not about safety but rather about consumer's choice. The Australia New Zealand Food Standards Code sets the standards for what information must be contained on food labels including matters such as:

- use-by or best-before dates;
- country of origin;
- health claims;
- ingredient list and percentage labelling;
- food additives; and
- nutrition information.

GM foods that contain novel DNA must be labelled with the words 'genetically modified'.

Penalties for breach of food labelling laws include fines, closure of the business and, in extreme cases, jail sentences for fraud.

The relevant legislation regarding the different requirements of food labelling is part of the Australian Consumer Law under the Competition and Consumer Act 2010 (Cth).

#### **17 Outline any applicable legislation regarding health of food animals, including transportation and disease outbreak and management.**

Each state or territory government has plans and processes in place for coordinating responses to pest or disease outbreaks. The system, however, is a nationally agreed system coordinated by the federal government with authorities including Plant Health Australia, Animal Health Australia, Wildlife Health Australia and the CSIRO's Australian Animal Health Laboratory.

The Australian Animal Welfare Standards and Guidelines for the Land Transport of Livestock are managed by Animal Health Australia. These standards cover the transport of food animals by road and rail.

Australia is free of many of the world's most aggressive animal diseases, such as avian influenza H<sub>5</sub>N<sub>1</sub> and foot-and-mouth disease. Australia's biosecurity laws are very strict and biosecurity practices (such as disinfecting, boundary fences, management of stray animals and clean machinery) are promoted. There is a list of pests and diseases that must be reported and processes to manage national pest and disease outbreaks. The Department of Agriculture and Water Resources manages these.

#### **18 What are the restrictions on the movement of animals within your country?**

There are interstate quarantine requirements when crossing state or territory borders in Australia. Each state or territory has its own quarantine laws. Regarding food animals, it is the biosecurity laws that are relevant.

In addition, the Australian Animal Welfare Standards and Guidelines for the Land Transport of Livestock will apply to the cross-border movement of food animals within Australia. This protects the welfare of the animal with regard to travelling time, time without water, temperature and transport conditions, and the general safety and well-being of the animals.

#### **19 Describe any restrictions on import of food animals.**

The Department of Agriculture and Water Resources regulates the import of food animals into Australia. Quarantine and biosecurity are very serious matters in Australia. Not all live animals may be imported into the country, as the disease or pest risk is very high. This includes animals that are pets. The basic rule is 'no live food animal imports are allowed into Australia'.

#### **20 What are the regulations related to livestock slaughtering?**

The Australian Standard for the Hygienic Production and Transportation of Meat and Meat Products for Human Consumption is the relevant standard approved by the federal government. There is also a model Code of Practice for the Welfare of Animals Livestock at Slaughtering Establishments.

There are state and territory laws regarding the prevention of cruelty to animals that also apply. Planning and environmental laws also apply to the operation of the abattoir itself.

#### **21 Outline the regulatory regime relating to pest control and pesticides, and other management regimes in relation to disease and pests in plants and animals.**

The Department of Agriculture and Water Resources manages the laws regarding biosecurity concerns in Australia, including under the Biosecurity Act 2015 (Cth). These laws relate to pests, diseases and weeds in animals, aquatic animals, plants, bees, birds and locusts.

Australia has a very rigorous and effective declaration process when goods are imported into Australia. There are obligations to report biosecurity concerns and specially trained investigators will review all biosecurity concerns. There will not be a prosecution if the breach was unintentional. If the breach is intentional, fines and penalties, and possibly jail, will likely follow for the convicted offender.

Biosecurity is also an issue within Australia itself and not just applicable to imports. Weed seeds, diseases and pests can be unintentionally transported between farming operations or agribusinesses, thereby increasing the risk of a pest or disease spreading. There is, therefore, an educational push, driven by all levels of government, to make biosecurity the responsibility of all persons within the agriculture industry.

**Business organisation**

**22 How are agricultural operations typically organised in your jurisdiction?**

The real estate for a family-run rural enterprise is usually held either in the personal names of the farmers or graziers, in a private proprietary limited company or in a private discretionary trust. Appropriate tax and accounting advice should be obtained to work out the best land-ownership structure for the business undertaking. It is common for the farmer or grazier to set up an operating entity (again, being a private proprietary limited company or a private discretionary trust) that will carry on the agribusiness from the real estate. This structure results in a ‘property entity’ and an ‘operating entity’. There are tax, accounting and risk mitigation reasons for separating the two entities. These entities will usually have an agreement between them regarding the use of the land and the allocation of risk, responsibilities and profits. Succession planning is also an influencing factor in these structures.

For larger corporate investments in rural enterprises, the structure of the corporate entity in which the farmland will be held is again usually driven by tax and accounting considerations. Capital raisings may also influence structure by the use of collective investment vehicles such as managed investment schemes or other arrangements where funds are pooled and co-invested.

There are no set rules regarding the structure for agricultural operations. The structures utilised follow well-known structures that can include (a combination of) the following:

- companies, mostly private proprietary limited;
- unit trusts and family discretionary trusts;
- management investment schemes, both registered and unregistered;
- partnerships;
- unincorporated joint ventures; and
- contractual relationships.

Owing to the distances between some farming operations and the actual or perceived importance and benefits of collective bargaining powers, cooperatives have been very important within the agricultural sector in Australia for many decades. Cooperatives are democratically-run business structures governed by specific state or territory legislation, and continue to play an important role for a range of commodities including dairy, rice, cotton, sugar and grains.

**23 Outline any restrictions on foreign ownership of agricultural operations or businesses other than farming operations.**

See question 9.

There are also strict rules and thresholds regarding foreign persons and foreign governments acquiring interests in Australian businesses other than farming operations. The federal government reviews all foreign investment proposals above the specific thresholds to ensure such proposals are not contrary to Australia’s national interest.

**Agricultural workers, immigration, and health and safety**

**24 Describe any specific rules or laws governing the rights of workers or employees for agricultural operations.**

The Fair Work Act 2009 (Cth) commenced on 1 July 2009 and sets out Australia’s national workplace relations system. This Act governs national employment standards, awards, enterprise agreements and unfair dismissal laws. It is overseen by the Fair Work Ombudsman, the workplace relations tribunal, an independent body with powers in connection with:

- minimum wages and employment conditions;
- enterprise bargaining;
- industrial action and dispute resolution; and
- terminations and dismissals.

Unions and employer associations also exist within the agriculture sector in Australia. These organisations provide support and advice to employers and employees regarding rights in the workplace.

New employment awards have been developed to cover employers of particular industries within the agriculture sector in Australia. The Pastoral Award 2010 covers employment within livestock and broadacre (large-scale) cropping farms. The Horticulture Award 2010 covers

the horticulture industry. There are other awards regarding nurseries, cotton gins, wool storage and testing, wine and sugar. These awards cover overtime rates, penalty rates, leave entitlements, and other workplace obligations and rights.

**25 How is farmworker immigration regulated in your jurisdiction?**

Workers from overseas play an important part in Australia’s rural industries, filling labour shortages during peak times such as harvest, picking, shearing, seeding and spraying. Skilled workers, working holidaymaker programmes, regional sponsored migration schemes and other visa types are available. The Australian Department of Immigration and Border Protection processes visa applications.

**26 Outline the health and safety regulations relating to farmworkers in your jurisdiction.**

State and territory work health and safety laws govern the rights and safety of workers and employees for agricultural operations. The Australian Work Health and Safety Strategy 2012–2022 identifies Australia’s agriculture industry as a priority industry for review, assessment and action. Safe Work Australia, an entity that operates under the federal government’s governance and accountability frameworks, is focusing on reducing injury fatalities within Australia’s rural industry sector – often caused by equipment misuse and chemical misuse.

**International trade**

**27 How are the export and import of agricultural products (animal and non-animal) regulated in your jurisdiction?**

**Export**

Approximately 60 per cent of Australia’s agricultural products are exported. The Department of Agriculture and Water Resources manages the following export legislation which includes:

- Export Control Act 1982 (Cth);
- Australian Meat and Live-stock Industry Act 1997 (Cth);
- Export Control Amendments (Quotas) Act 2015;
- Australian Grape and Wine Authority Act 2013 (Cth);
- Dairy Produce Act 1986 (Cth);
- Export Charges (Collection) Act 2015 (Cth) and associated export charges legislation, Export Inspection legislation;
- Horticulture Marketing and Research and Development Services Act 2002 (Cth) (as amended by Horticulture Marketing and Research and Development Services (Amendment) Act 2002); and
- various other acts of parliament regarding the exportation of meat.

Under the Legislation Act 2003 (Cth), these pieces of export legislation will cease on 1 April 2020, so the federal government is looking to reform the current export legislation to make it simpler for exporters and farmers to understand the laws and apply the regulations and rules.

- The laws prescribe the requirements for exporters to be:
- export-registered and therefore be open for inspection of facilities;
  - to have fit and proper persons managing the processes;
  - compliant with standards; and
  - compliant with the importing country’s requirements; and
  - rigid documentation processes

There are specific rules for live export, dairy, eggs and egg products, fish and fish products, organic and bio-dynamic goods, plants and plant products, wood packaging and meat.

**Import**

The Department of Agriculture and Water Resources works in close alignment with shipping and cargo importing industries to ensure harmful pests and diseases are not brought into Australia. As an island continent, Australia has benefited from strict import and quarantine laws. There are biosecurity requirements placed on importers, including special rules regarding cargo items that are classified as high risk of carrying pests.

Importers require approved documentation, approved packing material, possible treatments whether offshore or onshore before being cleared, and then clearance and inspection of the goods at a biosecurity or quarantine inspection point. Goods arriving from high-risk

countries or those that will be unpacked in rural areas go through higher inspection thresholds.

### 28 May tariffs, quotas or similar measures be put in place?

Under World Trade Organization rules, Australia has commitments on tariffs, export subsidies, quotas and domestic support for agricultural products.

The Department of Agriculture and Water Resources manages agricultural quotas for Europe and the UK for high-quality beef, sheep-meat and goatmeat and dairy products, the United States for beef and dairy, and Japan for bovine offal, pork, poultry, preserved meats, honey, apple juice and orange juice.

### 29 What treaties apply to the import and export of agricultural products in your jurisdiction?

Australia is a member of 10 free-trade agreements (FTAs), with:

- China;
- New Zealand;
- Singapore;
- the US;
- Thailand;
- Chile;
- Malaysia;
- South Korea;
- Japan; and
- the Association of Southeast Asian Nations (ASEAN), as a group:
  - Brunei;
  - Myanmar;
  - Malaysia;
  - Philippines;
  - Singapore;
  - Vietnam;
  - Thailand;
  - Laos;
  - Cambodia; and
  - Indonesia;
  - (together with New Zealand).

There are another 10 FTAs, and other similar economic co-operation agreements, currently being negotiated.

These agreements are legally binding and oblige the parties to liberalise access to each other's markets for agricultural products, goods and services generally, and also for foreign investment. There is an acknowledge that FTAs may not be entirely consistent in their degree of liberalisation, and to that end the Australian government seeks to actively review, monitor and implement global best practice. Specifically regarding the FTAs between New Zealand (such as the Australia-New Zealand Closer Economic Relations Trade Agreement) and ASEAN as a group, to which New Zealand is also a party, the purposes of these FTAs do differ so the parties to those FTAs continue to monitor their implementation.

WIPO is the World Intellectual Property Organisation. Australia is an active member. The UN is the agency responsible for WIPO and its administration and policy development. Australia's FTAs usually seek to include obligations and commitments regarding intellectual property following international best practice and to keep up to date with global developments in the protection and enforcement of intellectual property rights.

## Intellectual property

### 30 How are plant breeders' property rights protected in your jurisdiction?

Plant breeders' rights are legally enforceable intellectual property rights over new plant varieties that are registered by breeders under the Plant Breeders' Rights Act 1994 (Cth). This legislation applies across Australia. The owner of a variety of plant that is protected by plant breeders' rights is afforded a level of commercial control over that plant variety, including certain rights (which may be exclusive) that may be licensed or assigned to other persons for use.

Plant breeders' rights are very common for fruits (apples, citrus and berries) and grains, and are particularly common for ornamental or unique items (including flowers, grass and nursery items). In

Australia, the ornamental sector currently accounts for 50 per cent of all new applications for plant breeders' rights.

The objective of plant breeders' rights in Australia is to support and promote the development of new varieties of plants. The ability to export these varieties is also a main focus. However, plant breeders' rights only apply to propagating materials so, where a grower of a particular plant is not aware that the particular plant is a protected variety and does not propagate material for sale, the holder of the plant breeders' right for that plant will not necessarily receive protection.

Accordingly, it is important for plant breeders' rights to have a growers' agreement in place to ensure that a person growing the protected variety does not sell that variety without consent.

### 31 How is farmers' access to crop varieties and plant technologies addressed in your jurisdiction?

The federal government and state and territory governments have supporting research and development authorities (such as the Grains Research and Development Corporation) charged with providing guidelines and assistance to farmers regarding crop varieties and plant technologies best suited to their situation.

### 32 What other intellectual property considerations apply to agribusiness in your jurisdiction?

The main forms of relevant intellectual property in Australia are plant breeders' rights, patents, trademarks and copyrights.

#### Patents

Under the Patents Act 1990 (Cth), patents for inventions can be granted for a period of 20 years conferring an exclusive right to benefit from the invention during that time. The invention must be novel, inventive and useful. Patents are applied for on a per-country basis, but there are certain international treaties that assist with international patent applications.

Patents in the agricultural sector can be used to protect inventions such as:

- methods of genetic modification of crops;
- technologies used in abattoirs and meat processing plants;
- the development of new vaccines for livestock (eg, to prevent outbreaks of foot-and-mouth disease, the Hendra virus, and bovine and ovine Johne's diseases);
- water irrigation technology; and
- new processes for the conversion of biological materials into sustainable fluids.

There are other types of patents, including innovation patents: these exist for only eight years and have a lower inventive threshold than full patents, which is an innovative step rather than an inventive step. An innovation patent can be used to protect processes that use plants or animals, but cannot protect plants or animals themselves. For example, such a patent could include seeds from plants, derivatives from plants, plant materials used in industrial processes and plant varieties, genes or chromosomes.

GM crops involve the alteration of genetic material of an organism. They are the products of human intervention through the insertion of foreign material to change the genetic makeup of the original crop. This means GM crops are engineered and are, therefore, controversial because of ethical concerns about manipulation of genetic material.

#### Trademarks

The Trade Marks Act 1995 (Cth) protects trademarks in Australia including names, logos, packaging types, shapes, sounds, scents and colours. Trademark registration will protect brand identity.

#### Copyright

The Copyright Act 1968 (Cth) protects copyright in Australia, but the protection arises automatically without the need to register the copyright interest. Copyright protects the expression of ideas in a particular material format, but does not protect the idea itself.

**Environmental issues****33 Describe the regulatory agencies that have a role in managing the environmental impact of agricultural production in your jurisdiction.**

Each state and territory has a department or departments charged with regulating the environmental impact of agricultural land uses under the laws of that state or territory. These agencies include the following.

**New South Wales**

- Department of Primary Industries;
- Department of Planning and Environment; and
- Department of Industry.

**Victoria**

Department of Environment, Land, Water and Planning.

**Queensland**

- Department of Natural Resources and Mines;
- Department of Agriculture and Fisheries;
- Department of Energy and Water Supply; and
- Department of Environment and Heritage Protection.

**South Australia**

- Department of Environment, Water and Natural Resources; and
- Department of Primary Industries and Regions.

**Western Australia**

- Department of Water and Environmental Regulation;
- Department of Agriculture and Food;
- Department of Primary Industries and Regional Development; and
- Department of Planning, Lands and Heritage and Environment Protection Authority.

**Tasmania**

Department of Primary Industries, Parks, Water and Environment

**Australian Capital Territory**

Environmental Protection Authority.

**Northern Territory**

Department of Environment and Natural Resources.

Each state or territory government department may then create an agency or authority charged with the regulatory authority to manage, approve and control land uses, environment risks, pests and diseases, biosecurity, and generally seek to improve economic and social outcomes for rural industries and agribusinesses.

In addition, the federal government departments – the Department of Agriculture and Water Resources; Department of Environment and Energy; and Department of Infrastructure and Regional Development – manage Crown (ie, government-owned) land and also prescribe laws for the management of environmental impacts arising out of agricultural enterprises.

The Constitution of Australia says that Commonwealth laws are to be followed if the laws of a state ever conflict with the laws of the Commonwealth. The Australian federal judiciary may also step in with powers to review decisions by state judiciaries.

**34 Describe how water and air pollution is regulated in relation to primary agriculture in your jurisdiction.**

Australia has a long history of water regulation. Water rights were connected to land rights and were transferred with landownership. However, over the past 20 to 30 years, water laws have been modernised to reflect the importance of water usage's impact on the environment. This includes water availability to maintain healthy agricultural land uses and soil nutrient quality.

**35 Describe how liquid and other waste is regulated in relation to primary agriculture in your jurisdiction.**

Liquid waste can be produced, including as a by-product, by all sectors of society. It includes sewage and wastewater from food, and agricultural processing and manufacturing. Liquid waste may contain organic substances and nutrients that are valuable in the agricultural processing chain, but it may also be hazardous because of chemicals or pathogens within the liquid waste.

Usually, liquid waste disposal requires approval from the relevant state or territory environmental protection authority. Licences may be required and limits on volume may be imposed. Significant fines may be charged for failure to comply with the regulations. There are liquid waste treatment facilities in Australia and this cost is usually borne by the manufacturer or producer, which in turn, increases the cost of the good to the end consumer.

Other waste from primary agriculture may include:

- oil, tyres and rubber (from farm equipment and machinery);
- chemicals (from dips and drenches, fertilisers and sprays);
- veterinary chemicals, scrap metal and burn damage; and
- other hazardous waste (paint, sealants, adhesives).

The management of such waste – in particular, the generation, handling, storage, treatment and disposal of such waste – has in recent times focused on sustainable processing and development, including the adoption of cleaner production principles where possible. Each state or territory government has a service supporting and encouraging good farm management practices for cleaner and safer land use practices. Regarding the land size of Australia and the huge distances between properties and rural communities, education for on-farm



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management practices regarding waste minimisation, waste storage and ultimately waste removal and disposal, is increasingly important as it may not be cost-effective to transport waste to the nearest facility, which could be hundreds of kilometres away.

There are significant penalties for illegally dumping waste on private or public land or into water without a licence, permit or approval from the relevant authority. Australian agricultural production relies heavily on water supplies so if the environment is harmed, the flow-on effect and impact on the waterways can be devastating.

## Getting the Deal Through

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