Agricultural Competitiveness White Paper Submission - IP527
King & Wood Mallesons
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Dear Taskforce members

**Agricultural Competitiveness Submission**

We refer to the Agricultural Competitiveness Issues Paper calling for contributions to the Government's White Paper on the competitiveness of the Agricultural sector.

We welcome the opportunity to make a submission. The questions set out in the issues paper are of great importance to the future development and functioning of our Agricultural sector. This submission does not seek to address all the issues. Instead we have addressed a selection of the questions and sought to provide some specific legal perspectives.

**Overview**

As legal advisors in the agriculture industry we have noted the recurring theme of calls for better regulation to more effectively meet the needs of businesses and the broader community. This is highlighted in the annual "Directions Report" produced by King & Wood Mallesons, which reports on the current issues and challenges facing Australian directors and boards.

Our Directions 2014 Report, which reflects the results of a survey of directors undertaken by King & Wood Mallesons in December 2013, outlined that although 2013 was a relatively quiet year in terms of new reform and regulatory change in Australia, Australian directors remain concerned about the purpose and effectiveness of regulation, with survey respondents once again ranking "ineffective regulation / excessive red tape" as the top challenge for directors in 2014. We see this concern not only amongst directors, but across the Agricultural industry more broadly.

Agriculture is a pivotal industry for Australia. With the emergence of the economic importance of Asia in the 21st century, Australia's Agriculture industry has an opportunity to capitalise on the prospects for further growth that this will create. To do this, it is critical to ensure that we have in place a regulatory regime that will help Australia's farming and other agribusinesses to improve their overall productivity and efficiency, in order to maximise their competitiveness on an international stage.

As such, and in line with the impetus of the Issues Paper, decisions regarding reform to the regulation should take into account the need to establish consistent, clear and effective regulatory regimes that do not deliver excessive amounts of "red" or "green" tape that will unnecessarily impede businesses, or stifle the innovation and productivity gains that Australian farmers and agribusinesses have proven so capable of achieving.

In this respect, in formulating the policy settings for the Agricultural Competitiveness White Paper, the Government should have regard to the conclusions from the independent review of the Federal Government's regulatory impact analysis process in 2012, and in particular the findings that:

- the problems to be addressed were not clearly identified, and therefore regulatory responses were not appropriately targeted;
- consultation was below best practice standard;
- insufficient information was provided in order to form proper judgements about the effects of proposed regulation; and
- consultation was sometimes little more than conveying what was already decided and the RIA Process did not actually result in quality analysis of options and impacts.[1]

Finally, it is acknowledged that the Agriculture industry remains a critical part of many communities, and still holds an important place in Australia's national identity. As a result, policy decisions about the industry often generate passionate and intense community responses from all sides. Whilst vigorous debate is to be welcomed, there is an overarching need for governments of all levels to carefully manage concerns in many contentious areas such as foreign investment, corporate farming, genetically modified crops, livestock policies, the environment and food labelling.

In summary, the key points made by the submission below are as follows:

**Enhancing access to finance:**

- The additional sector specific requirements imposed by ASIC on Agricultural registered managed investment schemes, and the impact of those requirements on market perception and interest in the sector, should be reviewed (see section 1.1).
- The Government should consider additional tax concessions, or amending existing tax concessions as a means of attracting private capital into farm investment and encouraging farming as a viable commercial vocation (see section 1.2).
- The Government should amend the Corporations Law to better support sale and leaseback arrangements and remove the uncertainty created by the Willmott Forests decision (see section 1.3).
- Restrictions on corporate ownership of some state Agricultural land should be removed and impediments to the transfer of state Agricultural land should be made less discretionary (see section 1.4).
- The Government should consider the role of special purpose vehicles to provide seasonal and equipment financing to farmers (see section 1.5).
- Procedures should be put in place to ensure that foreign investment is not unduly impacted by proposed changes to the foreign investment thresholds and register (see section 1.6).

[1] David Borthwick AO PSM and Robert Milliner, 'Independent Review of the Australian Government's Regulatory Impact Analysis Process', 20 April 2012, p37.

**Reducing ineffective regulation:**

- Concessions should be introduced for normal land management activities, including where they have been assessed under State laws (see section 2.1).
- Water approvals and licences should be streamlined (see section 2.2).
- Consistent laws in respect of food regulation should be implemented nationally (see section 2.3).
- Reform is needed in respect of Agricultural chemicals and veterinary medicines regulation (see section 2.4).
- There is scope to streamline the regulatory requirements in respect of the Carbon Farming Initiative (see section 2.5).
- The Agricultural sector should be excluded from the new restrictions on international technology transfer (see section 2.6).

# 1 Enhancing access to finance

- *How do we better attract private capital into farm investment?*

## 1.1 ASIC requirements

***The additional sector specific requirements imposed by ASIC on Agricultural registered managed investment schemes, and the impact of those requirements on market perception and interest in the sector, should be reviewed***

ASIC has issued a regulatory guide (RG 232) in relation to agribusiness registered managed investment schemes, which contains benchmarks and disclosure principles for scheme operators. These requirements are imposed in addition to the general requirements of the Corporations Act that apply generally to registered managed investment schemes (which are sector and asset class neutral). The requirements operate on an "if not, why not" basis – that is, if the scheme does not comply, the operator must explain why not and describe how the underlying concerns relating to the requirements are addressed. The additional requirements are a response to several high-profile failures in the sector, as well as concerns that ASIC has identified as peculiar to these schemes.

Agribusiness is one of a limited number of investments for which ASIC has created these additional requirements, the others being debentures and unsecured notes, mortgage schemes, and over-the-counter contracts for difference. Several of ASIC's concerns in relation to agribusiness schemes have legitimacy. However, by categorising agribusiness schemes with high risk financial products and imposing additional benchmarks and disclosure requirements, it is possible that in focussing regulatory attention on these schemes, ASIC has created a perception that they inherently carry higher risk than other investments, potentially impacting investor and promoter appetite.

As the Corporations Act is sector neutral in this area, the role of ASIC in imposing additional sector specific requirements, and the impact of those requirements on market perception and interest in the sector, should be examined.

## 1.2 Tax concessions

***The Government should consider additional tax concessions, or amending existing tax concessions as a means of attracting private capital into farm investment and encouraging farming as a viable commercial vocation.***

We submit that consideration should be given to the following tax reforms in the Agricultural sector:

a) Adoption of tax concessions on disposal of productive farm land (e.g. capital gains tax ("**CGT**") concessions to encourage capital investment) – this would include measures to attract both foreign and local Australian investment. More specifically:

   (i) In relation to foreign investment, a concessional rate of MIT withholding tax could be introduced for productive farm land MITs. This approach has previously been adopted in the context of "clean building" MITs to attract investment in a more targeted manner (where a further concessionary MIT withholding tax rate of 10% applies instead of the general rate of 15%). This should attract foreign investment in productive farm land.

   (ii) In relation to attracting local investment, certain CGT concessions could be adopted to encourage capital investment. This could include enabling farming companies to access the CGT discount of 50% where the productive farm land has been held for more than 12 months (which is currently unavailable to entities other than individuals or trusts).

b) Stamp duty concessions (e.g. to facilitate expansion and consolidation of farming land) – this could include a concessional rate of duty on the purchase of adjacent productive farm land (e.g. adjacent to an existing farm).

c) Concessions for farming workers (e.g. to encourage farming as viable vocation) – this could include expanding the existing FBT concessions which are available to non-profit organisations to employers who operate productive farm land. The FBT concessions which could be specifically applied include:

   (i) FBT exemption - subject to capping;

   (ii) FBT rebate;

   (iii) certain other benefits (e.g. exemption for employees' live-in accommodation, residential fuel, meals or other food and drink); and

   (iv) remote area concessions.

d) Continued (or expanded) access by primary producers to tax concessions that are not available to other businesses – for example, many farming businesses have realised tax losses in the current environment. In order to encourage private investment and the restructuring of inefficient farming operations, the concessional loss rules which apply to designated infrastructure projects could be applied to farming businesses. For example, companies and trusts that carry on part or all of an Agricultural business on productive farm land could, subject to certain conditions:

(i) uplift their tax losses (e.g. by the long-term bond rate (LTBR)); and

(ii) use those losses without applying the company continuity of ownership and same business tests or the equivalent trust loss rules.

Further, consideration should be given to amending the non-commercial loss rules in Division 35 of the *Income Tax Assessment Act 1997* to enable farming losses to be offset against other income in appropriate circumstances where the non-commercial loss rules would otherwise apply to deny the application of the loss against that other income (e.g. farmer needs to supplement his or her income due to the underperformance of their farming business). Under the current rules, if any taxpayer is in business as an individual, either alone or in a partnership, and their business makes a loss, the non-commercial loss rules can apply to prevent that loss being offset against their income from other sources, such as supplementary wages.

e) Concessions that alleviate the cost of key business inputs (e.g. of a similar kind to the existing fuel tax credits on fuel used in the course of conducting the farming business) should also be considered.

- *What examples are there of innovative financing models that could be used across the industry?*
- *What would encourage uptake of new financing models?*
- *What alternative business structures could be developed for farming that also retain ownership with farm families?*

## 1.3 Sale and leaseback arrangements

***The Government should encourage sale and leaseback arrangements and remove the uncertainty created by the Willmott Forests decision***

*Benefits of sale and leaseback arrangements*

In recent times there has been a trend towards farm operators entering into sale and leaseback arrangements. These arrangements enable farm operators to realise value from their land holdings, whilst still retaining the farming business carried out on the land.

Sale and leaseback arrangements are effected by the farm operator selling the land to an investor, on the basis that the land is leased back to the farm operator for an agreed period. The arrangement provides the farm operator with a capital injection and enables the farm operator to use this money to secure the future viability of the farming business. It can also enable the farm operator to reduce the amount of debt financing needed in order operate the farm.

The Government should encourage these types of arrangements as an alternative ownership structure and should ensure that they continue to be seen as a viable funding option. In order to do this, the Government should consider the Willmott Forests decision described below, and the steps necessary to reduce the uncertainty that this decision creates.

*Willmott Forests decision*

The court decision in *Willmott Growers Group Inc v Willmott Forests Limited (Receivers and Managers appointed) (in liquidation)* [2013] HCA 51 ("**Willmot Forests**") has demonstrated an additional and largely unexpected risk for farm operators and their financiers in entering into sale and leaseback arrangements.

Willmott Forests Limited ("**WFL**") is the responsible entity and/or manager of a collection of managed investment schemes ("**MIS**"). This case concerned forestry operations conducted on land owned by WFL, where WFL leased that land to investors in the MIS ("**Growers**") and the Growers had the right to grow and harvest trees on that land.

WFL went into voluntary administration and receivers were appointed in September 2010, and liquidators were appointed in March 2011. In conjunction with the receivers, WFL's liquidators sought to sell WFL's assets on terms which included that the land had to be transferred free from the encumbrances arising out of the MIS (including the Growers' leases). The liquidators sought directions, under s 511 of the Corporations Act 2001 (Cth) ("**Corporations Act**") including directions approving the disclaimer of the Growers' leases pursuant to s 568(1) of the Corporations Act with the effect of extinguishing the Growers' leasehold interests.

The majority of the High Court held that the liquidator of a landlord company has the power to disclaim a lease and that the effect of that disclaimer was to terminate:

- the company's liability to provide the tenant with quiet enjoyment of the leased property (and not derogate from the grant of a right of exclusive possession) and the tenant's right to quiet enjoyment (and non-derogation from the grant); and

- the tenant's estates or interests in the land.

Prior to the Willmot Forests litigation, Australian real estate market participants generally assumed that the provisions in the Corporations Act that permitted liquidators to disclaim property of the company in liquidation could not permit liquidators of landlords to disclaim a lease granted by the landlord.

*Effect of Willmott Forests decision on agribusiness*

Farm operators that have entered into sale and leaseback arrangements will continue to invest significant capital in developing the land. In addition, the farm operator may also have paid a premium for the grant of the lease.

The practical effect of the Willmott Forests decision is that the farm operator may lose this capital, which is tied up in their leasehold interest, and become an unsecured creditor in the event of insolvency of the land owner.

The decision is likely to make it more difficult for participants in the agribusiness sector to obtain financing where they do not hold a freehold interest in the farmed land. This is because the financiers will view a lease as significantly less secure than a freehold interest.

*Steps that the Government can take to resolve this issue*

The issue could be resolved by amending the Corporations Act provisions to make clear that a lease can only be disclaimed by a liquidator of the tenant company not by the liquidator of the landlord.

Alternatively, it could be clarified that disclaimer of a lease by landlord does not affect the proprietary interest of a tenant in the land. That is, the landlord might be released from onerous contractual liabilities in the lease, but the tenant company would continue to be entitled to occupy the tenancy under the terms of the lease.

## 1.4 Transfer of Agricultural land

***Restrictions on corporate ownership of some state Agricultural land should be removed and impediments to the transfer of state Agricultural land should be made less discretionary***

The ability to transfer land pursuant to a predictable and reliable process is a key requirement for the efficient use of Agricultural land. This would facilitate the further development of successful operations as well as allowing operators to acquire holdings or structure their holdings in a manner that best suits their activities and financial structure.

Dealings in Crown or State land in many States is subject to Ministerial consent. This consent, on its face, appears a reasonable position given the State has some interest in ensuring that any party obtaining an interest in State land has the ability to meet its obligations in respect of that land. However, in some States this Ministerial consent requirement has become an opportunity for departmental officers to refuse to recommend that the Minister approves the transfer unless the transferee agrees to new terms and conditions of tenure which are not negotiable.

This increasing use of the discretion has the result that a purchaser of Crown or State lands does not have any forseeability in respect of what conditions of tenure might apply if they seek to obtain a transfer of an existing interest in land. Additional conditions of tenure often have material costs and risks associated with them including:

- obligations to obtain public liability insurance;
- granting indemnities to the State that do not ever terminate; and
- imposing obligations on the landowner that are greater than what is required by Statute.

Further to this, some States actively seek to prohibit ownership of lands by corporate entities. For example the Queensland *Land Act 1994* (Qld) contains restrictions on corporations owning perpetual leases for grazing or Agricultural purposes. In addition, a broad range of Queensland land is subject to notations under section 174 of the *Land Act 1994* (Qld) (and its predecessors) which prohibit corporate ownership of freehold land without the Governor in Council's approval.

We support any initiatives to remove these restrictions and improve the certainty as to how discretion can be used where consents for the transfer of an interest in land are required. Such moves improve the ability of transferees to obtain necessary finance as sovereign risk is greatly reduced with a predictable and reliable system of tenure management.

## 1.5 Special Purpose Vehicles

***The Government should consider the role of special purpose vehicles to provide seasonal and equipment financing to farmers***

One alternative to consider is establishing a special purpose funding vehicle ('**SPVs**') to make Agricultural loans to individual borrowers or, as described further below, to existing farming co-operatives.

The loans to individual borrowers would provide for interest to be paid once or twice a year (when the farm earns income), and could otherwise capitalise. Loans could also include a "toggle" – that is, the individual borrower has the right to elect to capitalise a portion of the interest, subject to meeting specified conditions.

The funding vehicle would be funded using the proceeds of debt (and possibly equity). The debt needs to be structured in a way such that it matches the profile of the loans to individual borrowers.

These sorts of structures have, in the past, involved banks providing the debt funding to the SPV. If there was a desire to have alternative suppliers of debt provide the funding (eg fixed income investors or superannuation funds) there may be a need for:

- some form of government guarantee of the senior debt or a portion of it; or
- government provision of equity or junior debt.

In either case, the government body would earn a market related fee for its guarantee, or a market related return for its investment in equity or junior debt.

A variant of the above would be to use a statutory corporation in place of the SPV, along the lines of the Clean Energy Finance Corporation.

In particular, we understand from our clients that individual farmers are facing difficulties sourcing seasonal financing (for the cost of inputs such as seed, fertiliser and pesticides) at competitive rates, as banks are not as active in these areas in recent years. As such, individual farmers often need to source vendor financing for this at higher rates. This is important as the cost of funding, and the risk of not obtaining such funding, causes individual farmers to have less certainty surrounding their ability to generate income and service their long term debt.

The SPV described above could be a provider of seasonal and equipment financing. Furthermore, the credit assessment and administration of the loans could be devolved by providing the funding through existing co-operative channels ("**Co-Ops**"). The SPV could lend to the Co-Ops who, in turn, would lend to their members. The Co-Ops could secure their loans by the product they purchase from members, setting off the purchase price against the product. A further benefit of this approach is that much of the machinery for implementing this suggested proposal exists today.

Similarly, the SPV could be a provider of equipment financing to the Co-Ops and individual farmers.

- *How can foreign investment best contribute to the financing and productivity growth of Australian agriculture?*

## 1.6 Foreign investment regime

***Procedures should be put in place to ensure that foreign investment is not unduly impacted by proposed changes to the foreign investment thresholds and register***

We understand that the Government intends to reduce the threshold for the scrutiny by the Treasurer (through the Foreign Investment Review Board ("**FIRB**")) of foreign investment in the Agriculture sector and to establish a register for foreign ownership of rural land. This policy is reflective of current political and public sensitivity to investment in the sector. However, the introduction of these measures needs to be handled carefully in order to ensure that foreign investment continues to be attracted to the sector.

In this regard, we note that the Government's Foreign Investment Policy states that "foreign investment plays an important role in maximising food production and supporting Australia's position as a major net exporter of Agricultural produce, by financing investment, and delivering productivity gains and technological innovations."

To ensure that foreign inflows into the Agricultural sector are not unduly impacted by the proposed changes to the foreign investment thresholds and introduction of a new register, it is submitted that:

- the approach to greater scrutiny by FIRB be clear and well defined;
- that whilst there will be greater scrutiny, the current approach to the welcoming of foreign investment continue;
- that with the additional scrutiny, the Foreign Investment and Trade Policy Division of the Treasury be adequately resourced to cope with the additional flow of applications the reduced thresholds will bring;
- consideration be given to the use of a bulk or pre-approval process to assist with processing proposals with high volumes;
- the approach to attaching conditions to statements of no objections for the future use of rural land also be consistent and well defined;
- the register of foreign ownership of land be clear as to its scope and in particular use definitions that are consistent with the foreign investment regime;
- the proposed use of the register by Government be published; and
- access to the register by non-government related third parties be prohibited or at least restricted to high level information only.

# 2 Reducing ineffective regulations

- *What opportunities are there to reduce ineffective or inefficient regulation?*

## 2.1 Concessions for land management activities

***Concessions should be introduced for normal land management activities including where they have been assessed under State laws***

Both new development and routine land management activities can be subject to duplicated environmental assessment and permitting requirements under State and Federal laws. Other industries involved in routine land management activities such as the forestry industry have been given the benefit of exemptions under the *Environment Protection and Biodiversity Conservation Act 1999* (Cwth) ("**EPBC Act**"), (eg. the exemptions that apply to certain RFA forestry operations).

Land management activities, such as yearly burning for fuel reduction purposes, are activities which can potentially have annual assessment and approval requirements. Compliance represents a significant burden for landowners who must decide, often without legal or expert advice, each time whether any land management or development might attract requirements for approval.

Cases such as the *Minister for The Environment and Heritage v Greentree (No 2)* [2004] FCA 741 and *Spencer v Commonwealth of Australia* (2010) 241 CLR 118 demonstrate both the significant consequences of breaching State or Federal environmental laws as well as the difficulties landowners can face, with the resources available to them, in determining and obtaining required approvals.

Agricultural land requires long term management and certainty for it to be utilised most efficiently. Other industries facing similar burdens have received support from the Commonwealth through the inclusion of approval exemptions, where the relevant activity has been adequately assessed. We think that consideration should be given to providing landowners with long term protections in respect of their normal land management activities as well as considering how State and Federal approval requirements can be:

- drafted in a manner that is easy to understand. In some legislation, where guidelines for assessment have been complied with, a person who takes an action which may eventually be found to be unlawful, has a defence in respect of any unlawful activity;
- streamlined so that not only can duplication of Federal and State approval requirements be removed, but also remove the need to re-apply for approvals once an activity has been assessed.

## 2.2 Water regulation

***Water approvals and licences should be streamlined***

Obtaining water rights and the ability to use them is a complicated process across most States. The process often requires the landholder to not only obtain the water rights but also other approvals to actually construct a bore or other extraction equipment in order to take the water they already have rights to take. In addition, landowners are often then further restricted in how they can use the

water, in particular the ability to trade or supply water as part of their normal farm management activities.

This has not always been the case. Historically the right to interfere with underground water was an incident of the ownership of land, only limited by the extent that the landowner's action infringed on the ability of any other landowner to also take water from their land. Similar principles have also historically applied to the taking and use of riparian water.

However, since water reforms commenced in the late 1990s and early 2000s, water laws have proliferated. A complex intertwining set of legislation, policy, approval conditions and statutory instruments has been implemented, which are difficult for experienced legal advisors to piece together let alone farmers. This is in addition to the significant restrictions which are often placed on water rights which limit the land on which it can be used, the authorised purpose of use and when and how the water can be traded with or supplied to others (if at all).

For example, in order to determine whether they can obtain access to water for their activities in some areas of NSW, irrigators need to consider:

- the Water Act 2007 (Cwth);
- the Murray Darling Basin Plan and impacts on water rights granted under State laws;
- the Water Act 1912 (NSW) if any bores are to be used to extract water;
- the Water Management Act 2000 (NSW) ("**WMA**") which regulates water access licences, water supply works approvals, combined and other water approvals;
- applicable Water Sharing Plans which further regulate some groundwater areas under the WMA;
- whether any of the embargoes on groundwater resources apply;
- State policies regarding groundwater transfers and stacked water sources; and
- development and environmental laws for any infrastructure required to extract and transport the water to the area of use.

This represents a significant burden for any landowner seeking to understand what rights they have and how they may utilise water rights, or seek to increase their rights as part of developing the land.

Competitiveness would be improved if landowners were, within reasonable limits, able to manage the use of water they have rights to in the most efficient manner. This might include the ability to freely trade or supply water that isn't needed in one year. In our view, at the very least, the regulation of water laws across Australia needs to be significantly simplified.

In Western Australia, water reform is currently being considered by the State Government. To contribute to competitiveness, without compromising the objective of preserving and appropriately managing water resources, we suggest:

- improving transparency so that information about available water and the conditions on which it is available is freely available;

- ensuring that regional water allocation plans replace State based regulation instead of adding to it; and
- amending the trading mechanisms to make them both simpler and more certain so that those seeking to trade water can be assured of an outcome not subject to government discretion (both as to allowing the transfer and amending conditions and rights to water in the process).

## 2.3 Food regulation

***Consistent laws in respect of food regulation should be implemented nationally***

The responsibility for the regulation of food standards in Australia is multi-jurisdictional. Whilst State and governments have primary carriage of the implementation and enforcement of most food standards, the regulation of food imported to and exported from Australia is the responsibility of the Federal Government.

At a policy level, the Intergovernmental Food Regulation Agreement ("**IFRA**"), which was signed by all members of the Council of Australian Governments ("**COAG**") in 2000[2], records the agreement of each of the Commonwealth and each state and territory government that there is a need to maintain a co-operative national system of food regulation that includes (amongst others) the following objectives:

- reducing the regulatory burden on the food sector;
- providing cost effective compliance and enforcement arrangements for industry, government and consumers;
- providing a consistent regulatory approach across Australia through nationally agreed policy, standards and enforcement procedures.[3]

Part IV of the IFRA provides each signatory is obliged to use its "best endeavours to ensure that their respective Parliaments retain in force" a Model Food Law (as set out in the Annexes to the IFRA), which is designed to provide for the effective and consistent administration and enforcement of the *Australia New Zealand Food Standards Code* as defined in the *Australia New Zealand Food Authority Act 1991*(Cth) ("**Food Standards Code**"). The Model Food Law is split into two separate Annexes, A (the substantive provisions) and B (regarding administration and enforcement).

Article 11 of the IFRA requires that each State and Territory is required to make its best endeavours to enact legislation that includes provisions that are on the same as the terms as Annex A of the Model Food Bill, however:

- where a State or Territory has separate legislation governing safe primary food production, the legislation may omit certain wording from the provisions; and
- the legislation "*may contain whichever provisions it chooses to include from those contained in Annex B*".

[2] As amended with effect from 3 July 2008
[3] See Recital A of the *Food Regulation Agreement* (2008)

As has been noted, the lack of any requirement for consistency in the administration and enforcement provisions means that each State and Territory can opt for entirely different regulatory and compliance regimes, in respect of the substantive provisions.[4] For example Victoria has elected not to adopt the infringement notice provisions set out in sections 116-124 of the Model Food Law, meaning regulators in Victoria are not able to issue "on the spot" fines that regulators in other jurisdictions are able to.

In addition to the divergence in compliance regimes, the divergence in the interpretation of the Food Standards themselves as between state-based regulators meant that COAG was required to establish a centralised Code Interpretation Service ("**CIS**") to provide advice on the Food Standards Code to ensure a nationally consistent approach to the way in which food standards are interpreted and enforced by jurisdictions.[5] However, access to the CIS is costly (as it relies on external legal advice), so a complex enquiry could cost an applicant up to $23,105.[6] Whilst it is likely that as the body of interpretative analysis produced by CIS expands, the level regulatory clarity will improve, any business currently seeking confirmation of the application of a Food Standards is in a disadvantageous position.

There is little doubt that the jurisdictional inconsistency in interpretation and enforcement of the Food Standards Code is an unnecessarily inefficient regulatory structure, which is inconsistent with the principles espoused in the IFRA. There is evidently more that can (and should) be done to improve the certainty of the obligations for businesses subject to the Food Standards Code.

There have been a number of reports calling for a review of the provisions of Annex B of the Model Food Law, in order to assess the extent to which it is necessary to permit deviation between jurisdictions, with the aim of treating more aspects of Annex B as compulsory under the Model Food Law.[7] Although such a review would require approval of COAG, the Commonwealth Government's support for improving the level of consistency in enforcement of the Model Food Law is an essential in order for this to be achieved on a national basis.

In addition to enhancements to the Model Food Law, consideration should be given to improving the levels of coordination, cooperation and information sharing between state and local government authorities with responsibility for enforcement of the Food Standards Code across Australia. Even allowing for regional differences (including matters such as climate variances) greater coordination and understanding of the regulatory approach taken will help to improve consistency and deliver greater certainty for businesses operating in multiple regions of Australia.

## 2.4 Agricultural Chemicals and Veterinary Medicines

***We support the latest proposed reforms to the Agricultural and Veterinary Chemicals Legislation to (among other things) remove the mandatory review regime. There is also scope for further reform to remove inter-jurisdictional inconsistency in the regulation of Agricultural chemicals and veterinary medicines.***

[4] As noted by the Productivity Commission: *Impacts of COAG Reforms: Research Report Business Regulation and VET* (Volume 2 – Business Regulation) April 2012, Ch 12, pp 254-255 (Box 12.2).

[5] A key driver for the establishment of this CIS was the decision of the NSW Supreme Court in *Authorised Officer Christine Tumney (NSW Food Authority)* v *Nutricia Australia Pty Ltd* [2008] NSWSC 1382, which highlighted the inconsistencies and drafting deficiencies involved in interpretation of the Food Standards Code.

[6] See https://apps.foodstandards.gov.au/cis/SitePages/Help.aspx

[7] See most recently Gibbs C (et all) "*Review of Selected Regulatory Burdens on Agriculture and Forestry Businesses*" ABARES, Canberra (November 2013), ch 20 (p 97-98)

The regulation of Agricultural chemicals and veterinary medicines is subject to a multi-jurisdictional approach, via the *National Registration Scheme* for Agricultural and Veterinary Chemicals. Under this Scheme, responsibility for various aspects of regulation is shared between the Commonwealth and the states and territories.

In particular, the initial assessment and registration of chemicals and medicines used in agriculture, as well as the control of manufacturing and supply activities and compliance up to the point of retail sale, is undertaken by the Australian Pesticides and Veterinary Medicines Authority ("**APVMA**"). After the point of retail sale, the control of the use (including disposal) of all chemicals and medicines is the responsibility of regulatory bodies appointed by the individual states and territories.

Whilst there have been significant reforms to the laws regarding the registration and on-farm use of Agricultural and veterinary chemicals, not all of these have resulted in an improvement in the regulatory burden on farming practices.

In particular, in June 2013 the *Agricultural and Veterinary Chemicals Legislation Amendment Act 2013* was passed by the parliament. The stated aims of this legislation were to reform the approval, registration and review of relevant chemicals "*to improve the effectiveness of the regulatory system and reduce inefficiency at the APVMA, while making processes more predictable, clearer and less unwieldy for industry*."[8] A key outcome of this legislation was the introduction of a mandatory scheme for the re-registration of Agricultural and veterinary chemicals every 7–15 years.

This mandatory scheme is an additional regulatory process that compels reviews in circumstances where the APVMA already had the flexibility to review registrations in the event that new research or evidence identified any concerns about the use or safety of a particular chemical or medicine. This mandatory scheme effectively results in a duplication of regulatory capabilities, and the introduction of regulatory burdens in the case of chemicals and medicines for which no issue has been identified.

To this end, reforms proposed in the *Agricultural and Veterinary Chemicals Legislation (Removing Re-approval and Re-registration) Amendment Bill* that was introduced by the Government on 19 March 2014 are supported. If enacted, the provisions removing the end dates for approvals and last renewal dates for registrations so that approvals will no longer end after a particular period (along perpetual renewal) will address the potential regulatory issues created by the 2013 amendment legislation by effectively removing the mandatory scheme (in addition to other regulatory reforms).

In addition, it is noted that the Government has also flagged further reforms to the arrangements for "minor use" of chemicals and medicines. Under the current system, there is considerable inconsistency in the regulation as to what constitutes legal "off-label use" as between the control-of-use legislation in each State and territory. For example, whilst it is mandatory to obtain a permit from the APVMA to use chemical in an off-label manner in most states,[9] under the *Agricultural and Veterinary Chemicals (Control of Use) Act 1992* in Victoria it is legal to use chemicals other than 'restricted use' chemicals in an off label application, provided that:

- the maximum label rate is not exceeded
- the label frequency of application is not exceeded

[8] Department of Agriculture "*Proposed Agricultural and Veterinary Chemicals Legislation Amendments - Consultation paper*" (December 2013).

[9] The process and requirements for minor use permits is set out on the APVMA's website at the following link: http://www.apvma.gov.au/permits/agricultural/index.php#_Minor_Use_Permits

- any specific label statements prohibiting the use are complied with (e.g. DO NOT statements).[10]

Inconsistencies of this kind can lead to farmers in some states benefiting from more flexible access to a wider range of chemicals and uses, as a result of more flexible regulatory arrangements, while others are impeded by more restrictive regimes. Understandably, there are a number of regulatory issues that arise from the use of off-label chemicals, and there may well be compelling ecological or environmental reasons for variance between regions in Australia. However, there is clear scope to review the degree of differentiation in the control-of-use laws for each state and territory, in order to avoid unnecessarily inconsistent regulatory regimes that may lead to inefficiencies or distortive market outcomes.

## 2.5 Carbon Farming Initiative requirements

***There is scope for regulatory reform to streamline the requirements for applications under the Carbon Farming Initiative***

It is understood that the Coalition Government's Direct Action Plan will retain the existing Carbon Farming Initiative ("**CFI**").[11] The CFI is essentially a voluntary carbon offsets scheme that allows farmers and land managers to earn carbon credits by storing carbon in vegetation and soils or by reducing greenhouse gas emissions (such a nitrous oxide and methane) on the land.

Retention of the CFI under the Coalition's Direct Action plan is likely to offer farming and forestry businesses the opportunity to continue to assess potential projects for application to the CFI. However, in its current form, there are a number of regulatory aspects of the CFI that should be reviewed for the purposes of considering whether the regulatory requirements are appropriate to encourage CFI projects and investment.

In particular, the regulatory and application process for eligibility for a CFI project is lengthy and cumbersome. Essentially, for a project activity to be eligible under the CFI, it must:

- fall within the scope of the CFI, which covers projects in the agriculture and land use sectors (including Agricultural emissions avoidance projects, introduced animal emissions avoidance projects, and sequestration offsets projects) as well as projects to reduce emissions from legacy landfill waste;

- be covered by an approved CFI methodology for measuring the activity must be used. The methodologies contain detailed rules for implementing and monitoring specific carbon farming activities and generating carbon credits; and

- be of a kind that is on the positive list of abatement activities that are eligible to earn carbon credits under the CFI; and not be on the negative list, which identifies activities that are excluded from the CFI (ostensibly where there is a risk that the activity will have an adverse

[10] See the DEPI website: http://www.depi.vic.gov.au/agriculture-and-food/farm-management/chemical-use/agricultural-chemical-use/off-label-use/off-label-chemical-use-in-victoria

[11] As outlined in the Department of Environment "*Emissions Reduction Fund Green Paper*" (2013) Chapter 5.

impact on matters such as the availability of water, the conservation of biodiversity, the local community, or land access for Agricultural production).[12]

Based on the limited uptake of CFI projects so far, it is recommended that the Government investigate ways of streamlining the administrative process for the approval of CFI methodologies, and also the review of activities that are included under the existing "list" structure.

Under the current process, the time required in order to determine eligibility for a proposed CFI activity is extensive, with the determination requiring assessment by the Department of Environment and the Domestic Offsets Integrity Committee ("**DOIC**"), before a public consultation phase for a period of 40 days, followed by further assessment and finally consideration by the Minister.[13] This process, which is capable of taking over two years to complete, requiring applicants to incur significant direct costs and delays before a project can be established. In many cases, farming or forestry businesses would not be able to countenance such costs and delays, even if a viable project has been proposed.

In addition, the regulatory process established under the "list" structure of the CFI Regulations creates additional regulatory impediments. For projects not currently listed on the "positive list", a proposal must be made to the Minister for the Environment for a recommendation to add to the positive list regulations. The Minister in turn must seek the advice of the DOIC, which must formulate its advice to the Minister in collaboration with the Department for the Environment, which involves the Department first collating relevant information and preparing advice for DOIC.

At the same time, the CFI negative list includes a number of natural resource management provisions (for example, the restrictions require water access property rights or regulatory approval from the National Water Commission in respect of specified tree planting)[14] that arguably involve duplication of other existing regulatory arrangements.

Whilst there are understandable policy imperatives in ensuring the ongoing integrity of the CFI, consideration should be given to whether the current regulatory arrangements for new projects are adequate to incentivise agriculture and forestry businesses to consider developing projects for approval under the CFI program.

- *Which regulations are disproportionate to the risks they are supposed to address?*

## 2.6 International technology transfer

***The Agricultural sector should be excluded from restrictions on international technology transfer***

The Issues Paper places significant emphasis on the potential for Australia to improve global food security by exporting our technology and know-how. Sharing knowledge and expertise with overseas organisations is also critical to R&D collaboration, an exercise which would enable parties

[12] The CFI requirements are found under the *Carbon Credits (Carbon Farming Initiative) Regulations 2011*

[13] A summary of the process is provided in the Guidelines: http://www.climatechange.gov.au/sites/climatechange/files/files/reducing-carbon/guidelines-for-submitting-methodologies-pdf.pdf

[14] See *Carbon Credits (Carbon Farming Initiative) Regulations 2011*, regulation 3.37

to utilise their complementary strengths and unlock unparalleled opportunities. Indeed, the recent 2012 joint Australia-Chinese governmental study "Feeding the Future" highlighted the strengths of both China and Australia's Agricultural technology and the ability to leverage them across an enormous population base in China, and a substantial Agricultural sector in Australia.

Unfortunately, with Parliament passing the Defence Trade Controls Act 2012 ("**DTAC Act**"), there is now a new barrier which hampers overseas collaboration, and jeopardises Australia's opportunities for exporting Agricultural technology.

The DTAC Act introduces restrictions on the supply and publication of technology or software contained in the Defence and Strategic Goods List ("**DSGL**"), a 361 page document that contains restrictions on munitions and "dual use goods" (ie, technologies largely used for "good purposes" but which also have "dangerous applications", eg, technologies across material sciences, chemicals, microorganisms, and engineering). Under the regime, a person who publishes or supplies a technology listed on the DSGL to a place outside of Australia will be committing a criminal offence (even if for the purposes of research or commercialisation), unless they have obtained a permit from the Defence Department. These offences will apply equally to the industry, university and research sectors, once they come into full effect on 16 May 2015.

We understand that the Steering Group under the DTAC Act considers that there is a low incidence of information publication which would constitute an offence under the proposed regime. However, given the complexities and uncertainties of the regime and based on feedback from research organisations, we are concerned that the regime will impose an onerous compliance burden on individuals or organisations that wish to export Agricultural technology, or collaborate with overseas organisations on Agricultural R&D. It is concerning that in disrupting and even potentially criminalising common activities undertaken in the course of R&D, the DTAC Act could have far-reaching consequences for Australian research which is aimed at improving and fostering innovation in agriculture.

In light of this, we support the Steering Group's proposal to consider a risk based approach in which certain low risk industries are excluded from the regime, whereas high risk industries would be targeted directly and given greater information and support to aid compliance. Given that there is likely to be a negligible risk that most materials and/or technologies used to improve the effectiveness and sustainability of farming practices can be used in conventional, chemical, biological, nuclear and weapons of mass destruction, we recommend that the Agricultural industry be one of those industries excluded from the regime.

* * * * * * *

We are making these submissions on behalf of our firm, and the views expressed are our own and not those of any of our clients.

We would welcome the opportunity to discuss these submissions with the members of the Taskforce. Please contact:

- Scott Bouvier [redacted]; or
- Meredith Paynter [redacted]

if there are any queries arising from this submission.

Yours faithfully

[Sgd] King & Wood Mallesons

**Contributors**

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