Investment structures: A guide to investing in Australia's food and agribusiness sector

KPMG

KING&WOOD MALLESONS
金杜律师事务所

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The opportunities for investment in the Australian food and agricultural sector are ripe for the picking, with the sector currently experiencing a level of investor interest, and government focus and support, not seen for decades, and supply / demand dynamics in relation to many agricultural commodities facilitating robust returns.

It is generally recognised that the world's population, particularly its middle class, is growing at a rapid rate, and so too is demand for high quality, safe and sustainably produced food and agricultural products. The Australian food and agricultural sector, from farm gate producers to food processors, are well placed to meet this demand, with a well-earned reputation for, and the capacity to produce and export, a wide variety of quality products, including grain, meat, livestock, wool, wine and dairy products, and to provide a wide range of support services.

Whilst Australia's primary production sector is still largely populated by domestic companies, co-operatives and other family-based businesses, the number of regional and multinational businesses and investors becoming involved in Australian food and agribusiness is steadily increasing.

Increasingly, successful investing requires a two way partnership, often born from sourcing needs and trading relationships, to deliver much needed capital to Australian industry for capacity and productivity enhancements and innovation, to facilitate access to new markets, and to provide foreign investors with food security and supply solutions, access to management skills, know-how and innovative technology, and/or opportunities to earn solid returns.

Foreign investors can deploy capital in Australia's food and agricultural sector in a variety of ways. This guide is intended to provide some food for thought when it comes to considering options to structure an investment, by identifying the structures typically used in Australia's food and agricultural sector, and discussing the relative pros and cons of such structures, and issues that investors and businesses may face in using these structures.

But investing in Australian food and agriculture is not risk-free, and it is essential to obtain quality, insightful advice to appropriately identify and manage relevant issues, and to mitigate the risks and challenges that any investment may produce.

As leading professional service firms with particular specialist expertise in the food and agriculture sector, King & Wood Mallesons and KPMG are very well placed to assist investors in making decisions about their investments in the sector, by leveraging in-depth local knowledge and experience, both in Australia and abroad.

We hope this guide enables you to better understand some of the key legal and tax related issues which are relevant to structuring an investment in Australia's food and agricultural sector, and would welcome the opportunity discuss it with you.

Increasingly, successful investing requires a two way partnership... to deliver much needed capital to Australian industry... and to provide foreign investors with food security and supply solutions...

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Australia – unparalleled agribusiness and food investment opportunities

Australia offers unparalleled opportunities for international investors in the agribusiness and food sector. Our island continent is known for its clean and green production and its robust biosecurity regulations.

For over fifty years, Australia has been at the forefront of developments in agricultural productivity. Living in one of the world's driest regions, Australians have had to learn how to adapt their production systems to get the most out of our land. Innovation through technology has been key and our agricultural industry today uses advanced and cutting-edge farming techniques and technologies. Australian agribusiness business expenditure for R&D exceeds $710 billion annually and the relative impact of Australian scientific publications in this field is 40 per cent higher than the global average.

Australia offers potential investors high-quality raw inputs and an internationally recognised reputation as a producer of safe, high-quality food. Australia also provides access to and understanding of the fastest growing consumer markets in the world, those of our near neighbours in Asia.

Australian governments are driving reforms to boost competitiveness, remove unnecessary regulation, and stimulate investment in infrastructure. With rising incomes and increased population growth in Asia, there is a growing demand for agricultural output which Australia is uniquely positioned to deliver. This position is strengthened by the recently concluded Free Trade Agreements with Korea, Japan and China, providing Australia a historic trifecta of agreements with export markets accounting for more than 55 per cent of our total goods and services exports.

Australia is 'open for business' and we welcome foreign investment that drives growth and development. This guide outlines various options available to investors for structuring investments in Australia's food and agribusiness sector.

Bruce Gosper
CEO
Austrade

Australian Government
Australian Trade Commission

Australia UNLIMITED

The Australian Trade Commission (Austrade) contributes to Australia's economic prosperity by helping Australian businesses, education institutions, tourism operators, governments and citizens as they develop international markets, win productive foreign direct investment, promote international education, strengthen Australia's tourism industry and seek consular and passport services.

Introduction

Australia, as one of the world's leading agricultural producers, offers excellent opportunities for investors in the food and agribusiness sector.

Australia has an international reputation for producing safe, healthy and high quality food, has a diverse and secure supply of raw ingredients, and is located close to fast-growing Asian markets.

However, significant changes are occurring.

Australia's food and agribusiness sector is impacted by a range of global factors which are threatening to disrupt traditional demand and supply for food-agri products, creating both opportunities and challenges for a sector that will need to adapt and transform quickly.

Purpose of this guide

The purpose of this guide is to outline the various options available to investors for structuring investments in Australia's food and agribusiness sector.

There are many reports on the WHAT (such as, what are the issues and opportunities?) and the WHY (such as, why is investment needed?). This guide is about the HOW: how does an investor structure an entry to the Australian food and agribusiness sector?

It has been developed to answer questions that are commonly asked by investors when it comes to taking the next step in developing an investment strategy.

This guide provides a brief overview of the most common investment structures in Australian food and agribusiness. It considers the relevant legal and tax aspects of these structures in the context of desired investor objectives and sector norms, supplemented by analysis and case studies, so that investors who may be new to Australia, can progress their investment considerations with this baseline information.

A key theme of this guide is that any investment structure must ensure:

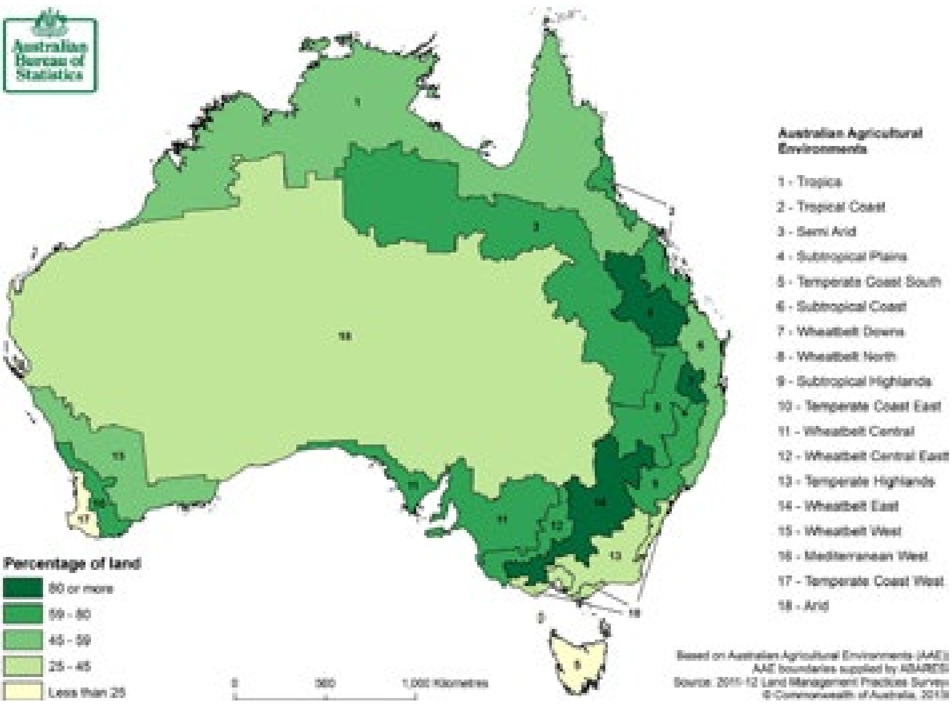
- there is an alignment of interests between investors and managers/operators; and
- the structure is "fit for purpose", in the sense that the structure meets the commercial objectives of the investor.

For example, the lack of scale of some potential opportunities in Australia's food and agribusiness sector can be a critical factor. Some investment structures, such as hybrid company/trust or hybrid co-operative/trust structures lend themselves more to ease of aggregation, as opposed to partnerships and unincorporated joint ventures.

Of course, this guide is not an exhaustive analysis and will not answer all questions, especially in relation to bespoke corporate financial strategies for aggregations, capital market listings, and fund raisings for which investors should obtained detailed professional advice and should not rely on this guide in substitution for that advice.

If you would like more information on anything within this guide, or would like to discuss a potential investment, please contact King & Wood Mallesons and KPMG.

Land used for agricultural production (2011-12)



Australia Bureau of Statistics, "Land Use on Farms", Agricultural Resource Management Practices, Australia, 2011-12 (27 June 2013).

Drivers for investing in Australia's food and agribusiness sector

Demand for food and other agricultural products is expected to grow substantially, and Australia is ideally placed to capitalise on these trends, due to its:

- proximity to growth markets in Asia;
- reputation for producing high quality and safe food and other agricultural products;
- robust biosecurity system; and
- skilled workforce.

Another positive factor for the food and agribusiness sector is Australia's recent entry into a number of free trade agreements (**FTA**) with countries such as China, Japan and South Korea. These FTAs not only provide improved access to some of the world's most important markets, they also create excellent opportunities for exports from Australia.

Around 60% of Australia's agribusiness output is exported and with the trifecta of FTAs with China, Japan and South Korea, and import tariffs on many of Australia's food-agri products scheduled to be significantly reduced over the next decade, there is an opportunity to rapidly increase the scale of exports and improve profitability by creating global and regionally focused integrated food production and distribution.

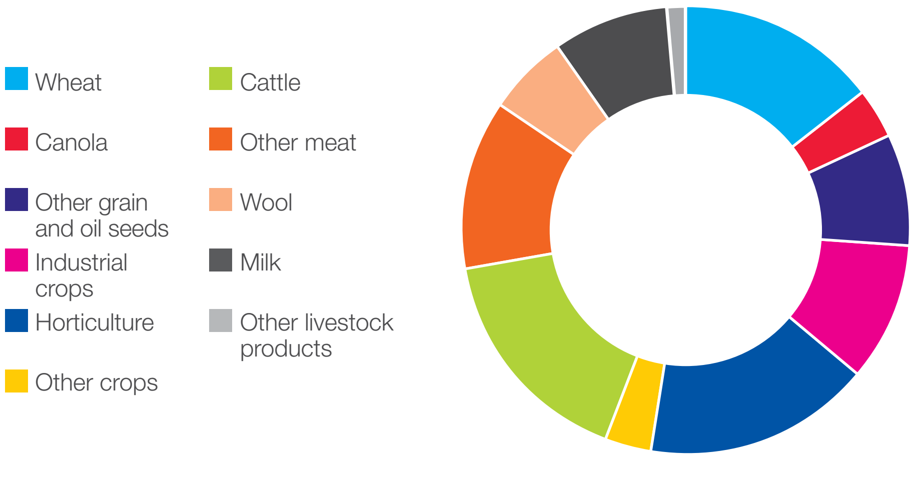
By 2020, the Australian Farm Institute estimates that Asia will be importing an additional 5.2 million tonnes of dairy products, 1.9 million tonnes of beef and 1.1 million tonnes of chicken from other countries. To supply this increased demand would require a 50% increase in Australia's current dairy production, an 86% increase in beef production and a 140% increase in chicken meat production.[1]

Asian markets will transform the existing ideas of scale of many Australian producers and processors. To achieve scale and meet demand, there is a pressing need for more investment and development of Australian agribusiness to build capacity, to improve technology, to conduct more research on Asian consumer tastes, to manage land assets better and to increase yields.

In this environment, opportunities abound for investors. Australian agribusiness will offer attractive investment opportunities for astute investors, and along the way these investments could transform its structure and further enhance its performance.

Globally, factors such as availability and utilisation of arable land and water, urbanisation, income growth in developing economies, population growth and changes in dietary patterns in developing countries are reshaping the traditional ways that societies (and therefore their governments) and investors are looking at global food supply.

Share of gross value of Australia's agricultural production, by industry (2012-13)



Emily M Gray, Max Oss-Emer and Yu Sheng, "Australian agricultural productivity growth: Past reforms and future opportunities", Australian Bureau of Agricultural and Resource Economics and Sciences Research Report No 14.2 (February 2014), 6.

1 Glenn Dalton and Mick Keogh, 'The Implications for Australian agriculture of changing demand for animal protein in Asia' (Research report, Australian Farm Institute, October 2007).

Criteria to assess possible investment structures

When considering an investment structure to be used for an investment in Australia's food and agribusiness sector, there are a number of factors that will influence the choice of investment structure for a potential investment.

Table 1 on page 9 of this guide sets out the key factors typically used by investors to assess potential investment structures:

- establishment;
- funding;
- control / management;
- returns to investors;
- ability to exit;
- governance / risk; and
- tax considerations.

Table 2 on pages 10 and 11 of this guide sets out whether each investment structure described in this guide satisfies those factors using a traffic light system where:

- **green** means the investment structure substantially, and usually, satisfies the factor;
- **orange** means the investment structure sometimes satisfies the factor (for example, because it depends on (i) what has been agreed by the parties to the investment, (ii) the identity of the parties to the investment and/or (iii) the nature, size and/or complexity of the investment); and
- **red** means the investment structure does not usually satisfy the factor.

In assessing the suitability of a particular investment structure, an investor should bear in mind that tax is often an influential factor. It is necessary to consider the tax implications and residency of each investor, the tax rate and treatment of the vehicle chosen to undertake the activity, and any planned future changes in ownership in the context of the nature of the commercial activity being conducted. The choice of structure may also impact the opportunity to effectively utilise tax concessions. This guide highlights key tax factors to consider as part of the structuring process.

Table 1: Factors that influence investment structures

Key factors	
Establishment	**How the structure is created**
Simple to establish	Can the structure be created relatively easily?
Separate legal entity	Does the structure have an identity / capacity which is distinct to that of the investors?
Does not need to be registered with a government agency	Does the establishment of the structure involve a filing or registration with an Australian Government agency (such as ASIC or the Australian Taxation Office)?
Low establishment costs	Are the costs related to establishment of the structure relatively low?
Taxation	Does the structure suit the tax circumstances of each investor and the expected tax profile of the activity?
Funding	**How a structure may raise capital**
Ability for structure to issue equity	Is raising capital through issue of equity securities (such as ordinary shares) possible?
Ability for structure to issue hybrid capital	Is raising capital through issue of hybrid securities (such as preference shares or convertible notes) possible?
Ability for structure to raise debt	Is raising capital through debt possible?
Control / management	**How much management or operational control investors have**
Investors have day-to-day control	Do investors have day-to-day control over the business and affairs of the structure?
No need for directors / trustee	Is a board of directors or a trustee responsible for the day-to-day management of the business and affairs of the structure?
Business decisions require investor approval	Do investors have the right to vote on (or otherwise approve) key decisions relating to the business and affairs of the structure?
No restrictions on investments	Do rules or documentation typically restrict or define the investments it may make?
Returns to investors	**How returns to investors are made**
Ability to distribute income	Can income/profits be distributed to investors?
Ability to distribute capital	Can capital be distributed to investors (regardless of income/profits)?
Flow through income	Is there a degree of flexibility to flow through taxable income to investors?
Franking credits available	Are franking credits available for the investors on payment of dividends?
Ability to exit	**How investors may sell interests and how new investors may acquire interests**
Selling to existing investors	Can investors sell their interests to other existing investors?
Selling to new investors	Can investors sell their interests to new investors?
Acquisition of interests by new investors	Can outside investors acquire newly created or newly issued interests in the entity?
Trade sale	Can the structure be sold to a third party purchaser?
IPO	Can the structure be listed on a securities exchange (such as ASX)?
Ability for asset or equity sale	Does the structure allow for the sale of either equity in, or assets of, the vehicle which may give rise to differing taxation outcomes?
Perpetual existence	Does the structure have an indefinite lifespan?
Governance / risk	**Regulatory and legal requirements that are imposed on the structure**
No / minimal regulatory oversight	Is the structure free of DIRECT regulation by an Australian Government agency (such as ASIC)?
Limited liability	Is investors' liability limited to a fixed amount (such as paid up capital)?
No / minimal reporting requirements	Do investors have a statutory right to receive financial reports?
Low ongoing costs	Are the costs related to the continued operations of the structure relatively low?
No / minimal compliance requirements	Is the structure subject to regulatory reporting requirements (such as under the Corporations Act or the Australian Taxation Office)?
No / minimal tax reporting requirements	Does the structure need to make income tax payments and lodge tax returns?
Other tax considerations	
Applicable tax rate	What is the applicable income tax rate under the investment structure and who is the taxpayer?
Access to CGT discount	Is a discounted CGT tax rate for individuals and qualifying superannuation funds available?
Flow through of tax losses	Can tax losses flow through to the investors?
Ability to carry forward tax losses	Have the relevant loss testing rules been satisfied in order to utilise carried forward tax losses?
Access to R&D tax incentives	Does the structure meet the requirements for claiming the R&D tax incentive?

Table 2: Investment structures

	Company	Unit trust	Incorporated joint venture	Unincorporated joint venture
Establishment				
Simple to establish				
Separate legal entity				
Does not need to be registered with a government agency				
Low establishment costs				
Funding				
Ability for structure to issue equity				
Ability for structure to issue hybrid capital				
Ability for structure to raise debt				
Control / management				
Investors have day-to-day control				
No need for directors / trustee				
Business decisions require investor approval	As provided in Constitution	As provided in Trust Deed	As provided in Shareholders' Agreement	As provided in Joint Venture Agreement
No restrictions on investments		As provided in Trust Deed	As provided in Shareholders' Agreement	As provided in Joint Venture Agreement
Return to investors				
Ability to distribute income				Directly received by participant
Ability to distribute capital				
Flow through of income for tax purposes				
Franking credits available		Certain elections can be made		
Ability to Exit				
Selling to existing investors		As provided in Trust Deed	As provided in Shareholders Agreement	As provided in Joint Venture Agreement
Selling to new investors		As provided in Trust Deed	As provided in Shareholders Agreement	As provided in Joint Venture Agreement
Acquisition of interests by new investors		As provided in Trust Deed	As provided in Shareholders Agreement	As provided in Joint Venture Agreement
Trade sale		As provided in Trust Deed	As provided in Shareholders Agreement	As provided in Joint Venture Agreement
IPO		Would need to be a MIS	Would need to restructure to comply with the Listing Rules	
Ability for asset or equity sale (tax consideration)				
Perpetual existence				
Governance / risk				
No / minimal regulatory oversight				
Limited liability				
No / minimal reporting requirements	Depends on the company type, size and circumstances		Depends on company type, size and circumstances	
Low ongoing costs				
No / minimal compliance requirements				
No / minimal tax reporting				
Other tax considerations				
Applicable tax rate	30%	0% – 45%* (presently entitled beneficiary's tax rate)	30%	0% – 45%* (taxed at participant's tax rate)
Access to CGT discount				
Flow through of tax losses				
Ability to carry forward tax losses	Subject to loss continuity tests	Subject to complex rules	Subject to loss continuity tests	Losses flow through
Access to R&D tax incentives		If a public trading trust		

* The rate does not include the Temporary Budget Repair Levy or the Medicare Levy. The Temporary Budget Repair Levy is payable at 2% for taxable incomes over $180,000 and is applicable to both resident and non-resident individuals from 1 July 2014 (applies to the 2014-15, 2015-16 and 2016-17 income years).

Partnership	Sale and lease back arrangement	Share farming arrangement	MIS	Co-operative
As provided in Partnership Agreement		As provided in contract between the parties		
As provided in Partnership Agreement	N/A	N/A	As provided in Constitution	As provided in Constitution
				Depends on type
	N/A	N/A		
	N/A	N/A		Special tax rules apply
As provided in Partnership Agreement	As provided in lease terms	As provided in contract between the parties		As provided in Constitution
As provided in Partnership Agreement	As provided in lease terms	As provided in contract between the parties		As provided in Constitution
As provided in Partnership Agreement	As provided in lease terms	As provided in contract between the parties		As provided in Constitution
	As provided in lease terms	As provided in contract between the parties		
	N/A	N/A		
Partnership may cease upon death of a partner	N/A			
	N/A	N/A		
0% – 45%* (taxed at participant's tax rate)	0% – 45% (depending on entities entering into the arrangement)	0% – 45% (depending on entities entering into the arrangement)	0% – 45% (depends on structure of MIS)	30%
	N/A	N/A		
	Depends on the parties	Depends on the parties	Depends on structure	
Losses flow through	Depends on the parties	Depends on the parties	Depends on structure	Subject to loss continuity tests
	N/A	N/A	If a public trading trust	

Structuring options for investors

Company

Overview and key features

A company is an incorporated entity that is owned by its members (usually shareholders), capable of holding assets in its own name and is liable for its own debts, liabilities and other obligations. Companies are subject to the Corporations Act, and to the oversight of the Australian Securities & Investments Commission (**ASIC**).

A company is managed by its board of directors subject to certain matters being reserved to shareholders for decision making. Directors are generally responsible for managing the company's day-to-day business and affairs in accordance with legal duties and obligations, such as the duty to act with care and diligence in the best interests of the company.

The rights of shareholders in a company are governed by the Corporations Act as well as that company's constitution (if any), although some of these rights may be modified by agreement between the company and its shareholders.

In most circumstances, a proprietary company (as opposed to a public company) would be the preferred incorporated vehicle used by investors for investments in the food and agribusiness sector in Australia.

Public companies tend to have a broad shareholder base, and are subject to stricter disclosure and reporting requirements. In order to be listed on ASX, a company must be a public company.

A proprietary company:
- must have at least one shareholder but no more than 50 non-employee shareholders;
- must have at least one director who is ordinarily resident in Australia;[2]
- may have a company secretary;
- will be classified as 'large' or 'small' with consequences for financial reporting obligations; and
- can generally not engage in public fundraising activities in Australia that would require the lodgement of a prospectus or other disclosure document (except for an offer of shares to existing shareholders or employees).

A shareholder generates a return from their shareholding in two potential ways:
- the company may distribute income or capital; or
- the shares may increase in value allowing the investor to record a capital gain from any sale of its shareholding.

Companies trade with limited liability, meaning that shareholders are not responsible for the debts, liabilities or other obligations of the company. There are however limited and exceptional circumstances where shareholders or directors can be held responsible for the debts, liabilities or other obligations incurred by the company.

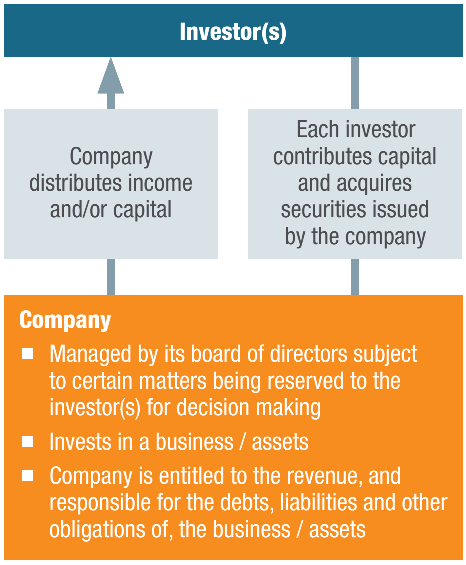
There are relatively few food and agribusiness companies "listed" on ASX. Some examples include Elders Limited, AACo, Select Harvests Limited, Bellamy's Australia Limited, Webster Limited, Tandou Limited and Tassal Group Limited.

CASE STUDY:

Hassad

The Qatari sovereign wealth fund Qatar Investment Authority established its agricultural operations in Australia through a proprietary company, Hassad Australia Pty Limited (**Hassad**). Hassad has built a major agriculture and livestock enterprise in Australia, owning 14 properties covering 290,000 hectares of pastoral and cropping lands from Western Australia to Queensland, New South Wales and Victoria.

Company



Reasons to use this structure?

Companies are the most common investment structure used in Australia by investors. The popularity of this investment structure is driven by the following features:
- limited liability;
- the ability for income and capital to be distributed to shareholders;
- flexibility in exiting the investment;
- ease of establishment and flexibility for structuring purposes; and
- taxation as a company at the 30% income tax rate.

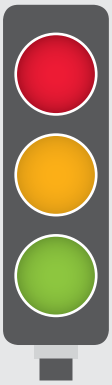
Tax implications

Most companies are subject to a flat income tax rate of 30% which is significantly lower than the highest marginal tax rate for individuals.[3] All companies operate under a full self-assessment system and follow a regulated timetable for tax instalment payments and lodgement of income tax returns.

2 A company director does not need to be an Australian citizen to qualify as an "Australian resident". Whether the individual is to be regarded as an Australian resident is a question of fact and a number of criteria must be considered and satisfied.

3 On 22 June 2015, the Tax Laws Amendment (Small Business Measures No.1) Bill 2015 received Royal Assent which reduced the company tax rate to 28.5% for small businesses (with a turnover of less than $2 million) for income years starting on or after 1 July 2015.

Key features of companies



- Separate legal entity which is liable for its own debts, liabilities and other obligations – shareholders enjoy limited liability to such debts, liabilities and other obligations
- Can raise funding by issuing equity or hybrid capital or obtaining debt financing
- Can distribute income or capital to shareholders
- Flexibility in exiting the investment

- Day-to-day business and affairs managed by the directors

- Residency requirements for directors

There is a distinction between private and public companies for income tax purposes. Broadly, private companies may be subject to certain rules such as limiting deductions in respect of certain loans and excessive payments to shareholders/associates.

As companies have the choice to finance their business in the form of either debt (i.e. borrowing money) or equity (issuing shares), any financial instrument is governed by the debt/equity definitions and rules in the income tax legislation, which may have different characterisation for legal and accounting purposes. The debt/equity classification is relevant for determining whether interest payments are deductible or frankable and has further international tax law implications such as withholding tax obligations, foreign tax offsets/credits and thin capitalisation.

When a company pays Australian company tax on its profits, it generates franking credits which may be passed onto its shareholders by paying a dividend. Franked dividends paid to non-residents are exempt from dividend withholding tax.

As a general rule, non-resident investors are liable for Australian tax on all Australian source income. In the case of dividends, interest and royalties, there is a requirement to withhold tax paid to non-residents. The tax rates of withholding tax may vary depending on whether there is an applicable double tax agreement (**DTA**) between Australia and the investor's domicile.

CASE STUDY:

AACo

Australian Agricultural Company Limited (**AACo**) is a publicly listed company that was founded in 1824, beginning operations as a cattle producer. It is now a fully integrated branded beef company, owning and operating grazing properties, feedlots, and an abattoir south of Darwin, across seven million hectares in Queensland and the Northern Territory.

A company has the ability to carry forward tax losses and capital losses indefinitely which can be offset against future company income subject to satisfying loss recoupment tests. The loss recoupment tests are complex and should be examined in detail where there is a change in ownership of a company. There are also concessional tracing provisions for public companies which may simplify the application of certain loss recoupment tests.

The company structure allows access to tax concessions, exemptions and flow-through preferences. These include foreign branch exemption, foreign dividend exemption and CGT exemptions. Importantly, the research and development (**R&D**) tax concession is only available to companies and leverages the use of companies (see pages 30 and 31 of this guide for more information).

2015-16 federal budget tax and other benefits for agribusiness

Since announcing incentives to encourage investment and growth in the food and agribusiness sector as part of the 2015-16 Federal Budget, the Australian Government has passed legislation to give effect to these initiatives:

- **Drought preparedness framework – accelerated tax write-offs**
  - **Fences and water facilities – immediate tax write-off**
    A deduction with no cap will be available to primary producers on fencing and water facilities (e.g. dams, tanks, bores, irrigation channels, pumps, water towers and windmills) for income years commencing from 12 May 2015 to 30 June 2017. These items are normally written off over 30 years for fences and three years for water facilities.
  - **Fodder storage assets – three year tax write-off**
    Capital expenditure by primary producers on assets such as silos and tanks used to store grain and other animal feed will enjoy an accelerated three year write-off from 12 May 2015. These assets are normally written off over periods up to 50 years.
- **$20,000 small business tax break available to small agribusinesses**
  For small agribusinesses (i.e. turnover less than $2 million), an immediate write-off for each capital asset costing less than $20,000 applies to assets acquired and installed from 12 May 2015 to 30 June 2017. Such assets (e.g. farm machinery and vehicles) are normally written off for tax purposes over several years.
- **Infrastructure – grant funding**
  The Government has identified 'Food and Agribusiness' as one of the five key 'Growth Sectors' in respect of grant funding aimed at infrastructure and regional development. For example, Northern Australia has received grant funding totalling $101.3 million over four years to improve cattle supply chains, particularly road improvements.

Unit Trust

Overview and key features

Under a unit trust structure, assets are held and managed by a trustee for the benefit of the holders (known as beneficiaries) of fixed interests (known as units) in the trust property.

The trustee is appointed in accordance with the trust deed and must act in accordance with the trust deed and their applicable fiduciary duties owed to the unitholders. The trustee can be a natural person but is usually a company, and will typically be paid a fee for managing the trust assets. Where the trust is managed by a professional asset manager, the manager may be remunerated based on investment performance and other factors including assets under management.

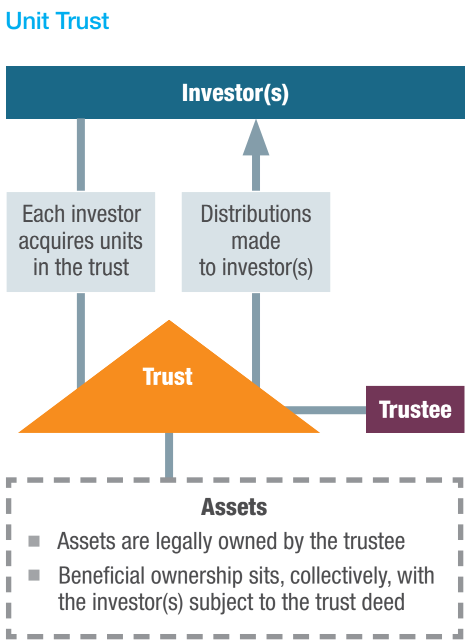
Agricultural asset management in the sector is increasingly common in Australia, with numerous managers raising and investing funds in the sector.

Despite the trustee having legal ownership of the assets, the assets do not belong to the trustee – beneficial ownership of trust assets sits, collectively, with the beneficiaries.

The process of establishing a trust involves the contribution of assets or funds, but it does not result in the creation of a separate legal entity.

A trust can be simple to establish and there are generally minimal reporting requirements. The terms of a trust are set out in the trust deed, which governs how the trust is managed and provides for the obligations of the trustee.

Beneficiaries' interests are expressed in units which have rights attached to them under the trust deed regarding income, distribution and redemptions.



CASE STUDY:

Warakirri

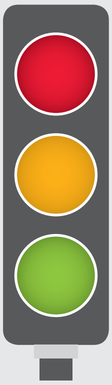
A pioneer in Australian institutional agricultural investment management, Warakirri Asset Management Pty Ltd (**Warakirri**) was established just over 20 years ago to provide investment vehicles which would meet particular needs of wholesale investors and offer specialist direct investment opportunities within the Australian food and agribusiness sector.

Warakirri currently manages two agricultural funds for institutional investors: the Warakirri Agriculture Trust and the Warakirri Dairy Industry Trust.

The Warakirri Agriculture Trust, established in 1996, has approximately 75,000 hectares of broad acre cropping farms in Victoria, New South Wales, southern Queensland and Western Australia, and is one of the top 10 grain producers in the country.

The Warakirri Dairy Industry Trust, established in 2006, is one of the top five milk producers in Australia, has approximately 4,700 hectares across 11 dairy farms in Victoria and south-east South Australia, and runs some 7,500 milking cows and 3,000 heifers.

Key features of unit trusts



- Minimal reporting requirements
- Can raise debt
- Flow through tax characteristics

- Not a separate legal entity
- Managed by the trustee, not the beneficiaries

- Could qualify as a managed investment scheme and thereby attract ASIC regulation[4]
- Cannot raise equity capital

Reasons to use this structure?

Unit trusts can have potential tax benefits, and for this reason are often used to hold the real property assets of an agricultural enterprise while a company is used to hold other assets and operate the agribusiness.

Unit trusts are relatively easy to establish, can be tailored to the investor's needs and typically have few reporting requirements. A trust can borrow funds, but cannot raise equity capital.

A unit trust can enable a 'fund' type structure allowing for open ended subscriptions which accommodates a large number of investors. For example, Rural Funds Group is a leading agricultural trust which listed in 2014 and now comprises a diverse portfolio of agricultural assets.

Tax implications

The beneficiaries of a trust are taxed on the equivalent proportion of taxable income that equates to their share of the trust's distributable income to which they are presently entitled.

Individual beneficiaries of a trust can access the CGT discount which is a major advantage over a company when looking to invest in capital assets. However, losses incurred by a trust are trapped in the trust and not distributed to beneficiaries.

Whilst a trustee may hold shares as part of the trust property, there are integrity measures which limit the circumstances in which a beneficiary can receive franking credits when a dividend passes through a trust.

Public trusts can be listed on ASX and certain types of trusts (corporate unit trusts and public trading trusts) are treated as companies for the purposes of Australian income tax law.

Commonly used for property and infrastructure investments, certain distributions made by a unit trust such as accelerated tax depreciation may represent tax deferred distributions. Tax deferred distributions are generally non-taxable when received by investors and instead, are treated as a return of capital such that the investor's cost base of their units for CGT purposes is reduced by the amount of the tax deferred distribution.

Unlike partnerships, trust losses are trapped in the trust and cannot be distributed to beneficiaries.

An advantage of a unit trust is that the investor's interest is easily identifiable and can be easily transferred. The redemption of units is straightforward and facilitates ease of return of capital and the requirements of company laws and other regulations for companies are not applicable.

Management investment trusts

It is important to be aware that some non-trading trusts may be covered by the statutory definition of a managed investment trust (**MIT**) and can have tax advantages for investing in certain infrastructure and property.

For income tax purposes, a reduced withholding tax rate of 15% applies on certain distributions made by the trustees of qualifying MITs to foreign resident beneficiaries.

4 Refer to page 25 of this guide.

Joint Venture

Overview and key features

A venture or project can be carried on by individuals or companies as a joint venture (**JV**). A JV creates a common enterprise for parties to assist each other with a common goal. JVs can be incorporated (where the joint venturers are shareholders in a special purpose company) or unincorporated (where the joint venturers' relationship is a contractual arrangement).

An incorporated JV exists where the JV parties hold the shares and directorships of the JV in equal (or other) proportions. Incorporated JVs tend to be governed by a Shareholders' Agreement in addition to the company's constitution. Incorporated JVs operate and are governed in a similar manner to companies (described on page 12 of this guide).

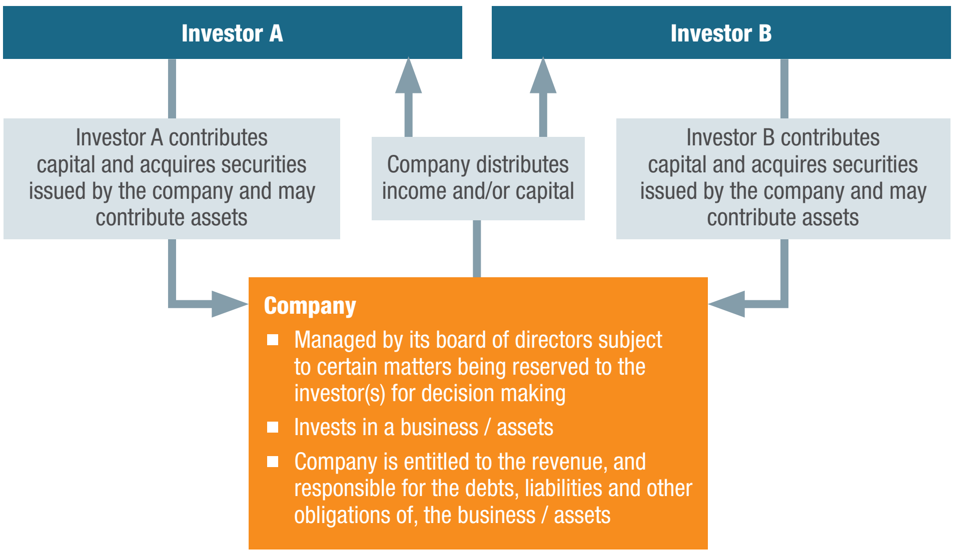
The main advantage of an incorporated JV is the limited liability which it confers on its venturers as shareholders. Transfer of interests (i.e. entities entering or exiting the JV) is also facilitated by this structure and the body of law governing companies is available to assist in regulating or interpreting the activities of the JV shareholders.

A disadvantage of an incorporated JV is that any tax losses incurred by the JV will be trapped in the company. The tax losses cannot be transferred out on the basis that the incorporated JV is not 100% held by one venturer.

Unincorporated JVs are not separate legal entities. An unincorporated JV is typically an unincorporated contractual association between two or more persons. As an unincorporated JV is not a legal entity it will not be able to hold assets in its own right. However, to facilitate dealing with third parties, a separate entity may be incorporated to serve as manager of the JV. The manager would as the agent of the JV in relation to the business, hold assets on behalf of the JV, employ employees and carry out work in accordance with the joint ventures' wishes. Typically, the manager will break even, with no profit or loss as the activities are carried on in the JV.

Unincorporated JVs are governed by the terms of the formal agreement between the joint venturers (**Joint Venture Agreement**) and by common law. This agreement also governs the relationship and duties between the parties, often detailing how the parties may exit or terminate the JV and how new participants may join the JV. Such a JV is likely to be appropriate where the members associate for a particular project.

Incorporated JV



CASE STUDY:

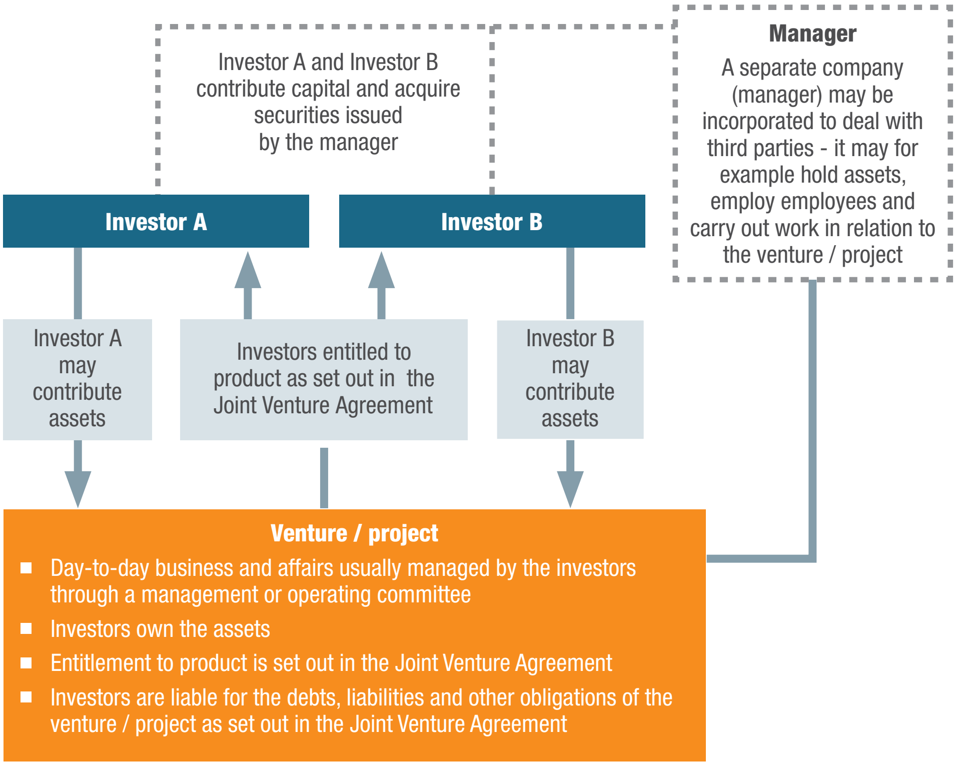
Cubbie Station

Cubbie Station, spanning a massive 93,000 hectares in south west Queensland, is the largest irrigated property in the southern hemisphere. It is also Australia's biggest cotton grower, producing 10% of the country's cotton crop.

Cubbie is the largest holder of water rights in Australia, with rights to flows along the Culgoa River, part of the Murray-Darling Basin catchment.

In 2013 Cubbie was bought by CS Agriculture, a JV between the Chinese-led consortium Shandong RuYi, and fifth generation Australian wool trader, the Lempriere Group, which purchased 20%. Cubbie Station is now managed by the Lempriere Group on behalf of CS Agriculture.

Unincorporated JV



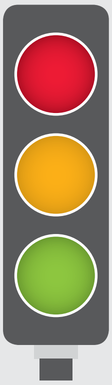
Key features of incorporated JVs

- Separate legal entity which is liable for its own debts, liabilities and other obligations – JV participants enjoy limited liability to such debts, liabilities and other obligations
- Can raise funding by issuing equity or hybrid capital or obtaining debt financing
- Can distribute income or capital to the JV participants
- Flexibility in exiting the investment

- Day-to-day business and affairs managed by the directors of the special purpose company

- Residency requirements for directors
- Tax losses trapped in the special purpose company

Key features of unincorporated JVs



- No government agency regulation
- JV participants may obtain debt financing
- Tax flow through and tax independence for each JV participant

- Day-to-day business and affairs usually managed by the JV participants through a management or operating committee
- Not a separate legal entity – the JV participants are liable for the debts, liabilities and other obligations of the venture / project as set out in the Joint Venture Agreement. However, an incorporated manager may be used to limit the liability of the JV participants in some respects.

- Cannot issue equity or hybrid capital

Reasons to use this structure?

A JV allows an investment to be de-risked by bringing together multiple parties who deliver individual benefits to the JV, including:

- access to new markets and distribution networks;
- operational and management skills;
- technology and know-how; and
- access to greater resources, including specialist employees and finance.

For example, Freedom Foods has announced a JV with the Perich Group and New Hope Dairy to buy dairy farms. The Perich Group provides operational and management skills, and New Hope Dairy brings its know-how about the Chinese consumer and distribution capability in China.

Tax implications

The tax treatment of a JV will depend on whether it is unincorporated or incorporated, as the tax treatments are quite different.

An incorporated JV is treated as a company for tax purposes. Tax is paid at the company level and a tax return is required. Tax losses remain trapped in the JV.	An unincorporated JV is not a legal entity and will not hold assets in its own right. Taxable income and losses will be passed through to the joint venturers. A separate tax return is not required.

An incorporated JV is a separate legal entity and is effectively treated the same as a company for Australian tax purposes (see pages 12 and 13 of this guide). Unincorporated JVs are distinguished from partnerships so they may not require the application of the Partnership Acts of the various States and Territories. This may enable the participants not to be exposed to joint and several liabilities. A partnership, for income tax purposes, involves the joint derivation of income. By contrast, an unincorporated JV involves the joint derivation of a product or output (rather than sale proceeds or profits) of the business activity which is then shared amongst the participants. The participants may then, separately, derive income from this product or output for their own tax purposes, independent of the unincorporated JV. Each joint venturer may adopt differing tax treatments for income and expenses of their part of the joint venture. Further, tax gains and losses will be passed through to the joint venturers.

As JVs may provide greater flexibility from an income tax perspective than partnerships, it is vital that the commercial relationship and actions between participants in fact constitute a JV. This may be supported by the Joint Venture Agreement which usually contains an express statement that the parties have not formed a partnership for general law or tax purposes.

Partnership

Overview and key features

A partnership involves two or more individuals or companies carrying on business in common as partners with a view to profit. Subject to certain exceptions, there cannot be more than 20 partners.

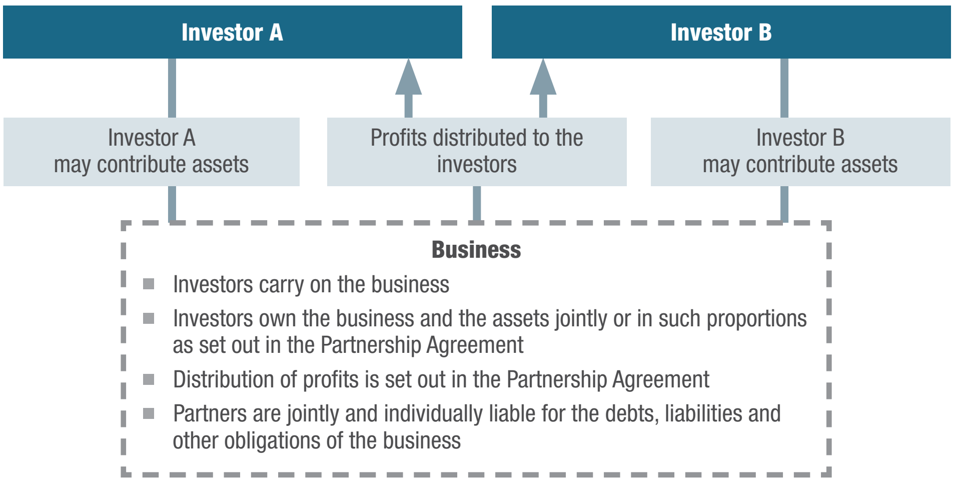
Partnerships are governed by state-based legislation, the terms of the partnership deed or agreement (**Partnership Agreement**) and the common law.

A partnership is not a separate legal entity from the partners themselves and, as such, the assets of the partnership are owned by the partners jointly or in such proportions as set out in the Partnership Agreement. The Partnership Agreement also determines the distribution of partnership profits, as well as the rights and obligations of each partner. The Partnership Agreement may also determine how a partner may join or exit the partnership. Once agreed it may be necessary to seek the consent of other partners in order to amend the terms of the Partnership Agreement.

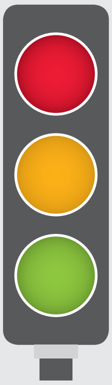
The partners are jointly and individually liable for the debts, liabilities and other obligations of the business. In some States, there is legislation permitting limited partnerships which are partnerships consisting of at least one general partner and at least one limited partner. Limited partners contribute to the capital of the partnership and share in its profits but do not take part in its management. They cannot bind the firm and their liability to contribute to the debts, liabilities or other obligations of the partnership is limited to their capital contributions. The obligations of general partners are similar to those in an ordinary partnership and their liability remains unlimited.

A partner in a business shares control over that business with the other partners as set out in the Partnership Agreement. The fact that partners are jointly and severally liable for the debts, liabilities and other obligations of the partnership means that should the business fail it may fall to the partners to discharge the business' creditors.

Partnership



Key features of partnerships



- No government agency regulation
- Partners may obtain debt financing
- Flow through of income / tax losses
- Partnerships are able to keep their financial performance confidential (although the partners themselves may be required to disclose financial information)

- Day-to-day business and affairs managed by the partners
- Limit of 20 partners (subject to certain exceptions)

- Cannot issue equity or hybrid capital
- Not a separate legal entity – partners are individually and jointly liable for the partnership's debts, liabilities and other obligations (except for limited partners where a limited partnership is used)

Reasons to use this structure?

The use of partnerships to conduct an agricultural business enterprise (other than closely–held family farming enterprises) is not very common as investors typically prefer to use a company or JV structure to obtain the benefit of limited liability.

Partnerships are not required to file any financial information concerning the partnership on any public register. Accordingly, partnerships are able to keep their financial performance confidential (although the partners themselves may be required to file financial information).

Tax implications

Various State and Territory Partnership Acts define a partnership as being the relationship that exists between persons carrying on business in common with a view to profit. For income tax purposes, a partnership includes an association of persons (other than a company or limited partnership) in receipt of income jointly.

Whilst a partnership is required to furnish a tax return, the partnership itself is not liable to pay tax. Instead, the net taxable income or allowable loss is calculated and allocated to the partners and the partners include these amounts in their individual tax return. Partnerships have the advantage of being able to pass on losses to individual partners that can be offset against other income. This may be an important consideration for new businesses which may incur losses in the early years of operation.

A Partnership Agreement sets out how the partnership capital is treated and accounted for throughout the partnership. In this regard, a partnership structure offers limited distribution flexibility as any income derived is split according to the Partnership Agreement. Further, a partnership structure results in the lack of access to deductions for superannuation contributions.

An important advantage of partnerships over companies is the treatment of partnership assets for CGT purposes. Partners directly own interests in the partnership assets. Therefore, upon disposal of a partnership asset, the partners benefit directly from any available tax exemptions and concessions including the 50% CGT discount. However, unless stipulated in the Partnership Agreement, a change in the membership of partners will usually affect the continuity of business as when a new partner is added or an existing partner retires, the current partnership ceases and a new one is created.

Sale and Lease Back

Overview and key features

Leasing is a commonly used and understood structure in Australian agribusiness. A sale and lease back arrangement involves an investor acquiring a business (including land assets) on the basis that the land is leased back to the farm operator for an agreed time period (say between 10 and 15 years) and for a set annual fee.

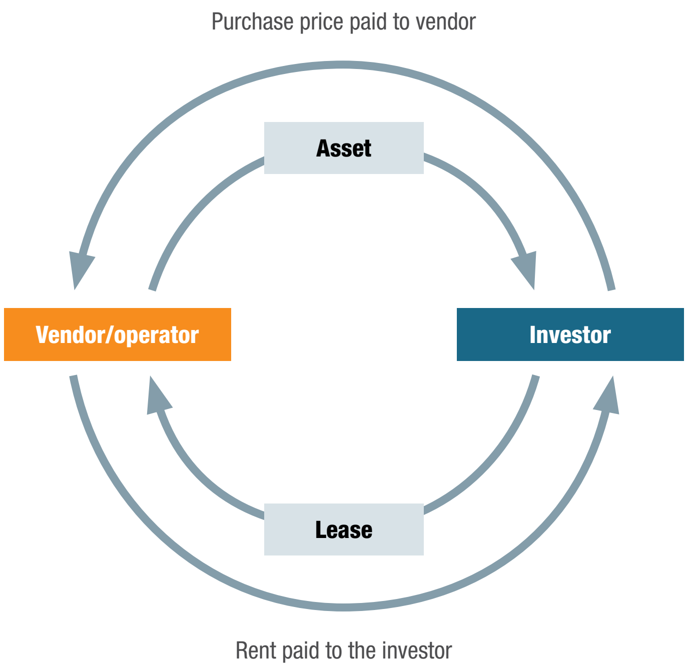
The farm operator continues to operate the farm business during the lease and retains management and decision-making control of the business. The farm operator bears all of the operational costs of the business but receives all of the proceeds of the business.

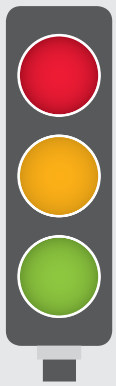
Once the investor has acquired the land, the ongoing relationship between the investor and the farm operator will be governed by the terms of the lease.

The interests of the investor and the farm operator may not be perfectly aligned and so it is important that the lease includes appropriate provisions to ensure that the land is properly maintained by the farm operator. For example, the lease may contain specific obligations or restrictions relating to the farm practices that the farm operator may utilise (e.g. the use of fertiliser, the number of stock that can be run on the land, control of noxious weeds).

Seasonal, production and commodity risks are all borne by the farm operator. The investor's economic exposure to the business for the term of the lease is limited to the rental income received from the farm operator.

Sale and Lease Back





Key features of sale and lease back arrangements
• Sale of property (and potentially other assets) by farm operator to investor • Property immediately leased back by investor to farm operator • Seasonal, production and commodity risks are born by the farm operator – the investor does not suffer any loss in bust years • Farm operator avoids capital maintenance costs • The investor receives the benefit of any improvements made to the property • Investor receives rental income and the farm operator receives the profits (and incurs the losses) from the farm business
• Farm operator retains management and decision-making control of the business • The investor and farm operator's interests in maintaining the land may not be perfectly aligned and so the lease should contain detailed maintenance obligations and restrictions on how the land can be used
• Investor does not receive any benefit in boom years

Reasons to use this structure?

In this structure the risks associated with variations in rainfall, price volatility in the commodities market and risk associated with the labour market are all borne by the farm operator. The investor receives the same rental income in boom and bust years. This may be appropriate where the investor wishes to gain exposure to the food and agribusiness sector but does not have the necessary expertise to operate the business, or where the investor seeks to minimise operations and production risk.

Sale and lease back arrangements are a common and a well understood structure in the Australian food and agribusiness sector. Recent examples include:

- Adveq Almond Trust, a consortium of foreign investors, purchased almond orchards representing approximately 50% of Australia's almond production area from Singapore based Olam International for $200 million, with a minimum 18 year lease back to Olam;
- TPG (owner of Inghams Enterprises) sold an extensive portfolio of chicken production facilities for $550 million through sale and lease back arrangements with a number of buyers; and
- Hong Kong listed CK Life Science purchased three vineyards from the McWilliam family under a sale and lease back arrangement for $15.7 million.

CASE STUDY:

Westchester

For the past 25 years leading United States global agricultural asset manager, Westchester, has acquired, managed and marketed agricultural real estate assets around the world. With more than US$3 billion currently in assets under management, this institutional investor has a portfolio which includes over 650,000 acres of high-quality diverse farmland properties in Australia and the United States.

Australian assets include 'Cobran', a large-scale, irrigated row crop property near the township of Hay, New South Wales, acquired in late 2012, which has become a high-performing prime asset in both income and capital appreciation.

Westchester has used sale and lease back as part of its business model.

Tax implications

The key tax implications are that:

- the lessee is entitled to deduct lease payments from assessable income provided there is a genuine lease for tax purposes;
- the lessor should include rent received as assessable income; and
- the lessor will be able to claim a deduction for depreciation of the property or assets.

If the sale and lease back arrangement gives the lessee the right of repurchase at the end of the lease term, the lease back may be considered a sale and a loan and the lessee and lessor may be regarded as a notional buyer and seller respectively. In this case, the lessee may claim depreciation and interest deductions similar to a hire purchase arrangement.

Share Farming Arrangement

Overview and key features

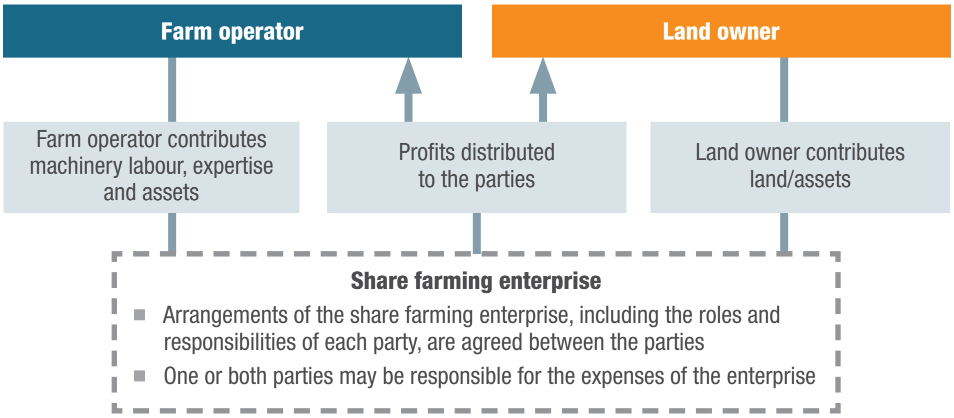
Share farming, or share cropping, is an arrangement where a land owner and farm operator share the expenses and proceeds of the crop.

The arrangement will vary depending on the income split agreed between the farm operator and the land owner. For example, in a 50:50 crop proceeds split, the farm operator may contribute machinery, labour and expertise and the land owner may contribute the land while the costs of producing the crops might be shared equally. In the case of a higher income split in favour of the share farmer, for example 70:30, the land owner may not contribute any additional expenses beyond the land to the production of the crops. The income which the land owner receives will depend in part on the production skills of the farm operator. The arrangement also requires a good working relationship between the land owner and share farmer. For this reason, it is important that the share farmer and the land owner have similar farming philosophies.

The share farming arrangement should be documented and should clearly set out the roles and responsibilities of each party. The agreed income split will likely influence the other terms of the share farming arrangement.

In another scenario, the farmer may provide everything other than funding for the crop and operational expenses. A multitude of variations to the structure are available depending on the capabilities and risk appetite of each party.

Share Farming Arrangement



Key features of share farming arrangements

- Farm operator and land owner agree to share the proceeds of the crop in agreed proportions
- Land owner receives a proportion of the benefit from boom years
- Land owner receives the benefit of any improvements made to the property

- The land owner and farm operator's interests in maintaining the land may not be perfectly aligned and so the share farming agreement should contain detailed maintenance obligations and restrictions on how the land can be used

- Depending on the agreed income split, the land owner may have to contribute working capital to the business
- The land owner will suffer a proportion of any losses in bust years
- Seasonal, production and commodity risks are borne by both the land owner and the operator
- The land owner does not receive any rental payments, its return on investment is reliant on the skill of the farm operator in managing the business

Reasons to use this structure?

Share farming arrangements provide a means for an investor (as land owner) to participate in the risks and rewards of the food and agribusiness sector even if they do not necessarily have the expertise or desire to be involved in the day-to-day operations of the business.

A share farming arrangement may provide the land owner with a higher return on capital compared to the sale and lease back structure because in this structure the land owner receives a share of the proceeds of the crop, and so will benefit from any boom years.

On the flipside, the land owner does not receive the steady rental income which is a feature of the sale and lease back structure. Instead, its return on capital is dependent on the expertise of the farm operator in managing the business. The land owner and farm operator will both bear the risks associated with variations in rainfall, price volatility in the commodities market and risk associated with the labour market. Although this structure has the potential for higher returns for a land owner, the arrangement involves a higher degree of risk compared to the sale and lease back structure and the land owner's income may be unpredictable and unstable.

Tax implications

The tax implications of share farming will depend on the level of involvement that the land owner has in the business, which will be determined by the profit split. If a land owner is involved in the business of cultivating the land, through a direct or immediate involvement in these activities, then this is considered 'primary production'. A land owner merely paying expenses relating to the ownership of the land is not sufficient to constitute an involvement in the business of primary production of the land.

The income derived from the share farming arrangement will be income derived from the carrying on of a business of primary production. If the landowner is not involved in the business activities, then the income derived from the arrangement is income received from the property.

Other structures in the food and agribusiness sector

Co-Operatives

Co-operatives are member owned and operated business organisations which allow the members to collaborate for their mutual benefit. Depending on the agreed approach within the co-operative, they can work together on a number of different fronts including buying, transport, storage, acquiring or leasing assets, employment arrangements, marketing or sharing market information.

Co-operatives exhibit many of the same features as a company, including in respect of governance and limited liability, but operate in accordance with co-operative principles. Primary amongst these principles is democratic member control, which manifests itself in a “one member, one vote” rule, regardless of how many shares a member may hold.

CASE STUDY:

CBH Group

Australia’s largest co-operative and largest exporter of grain, the CBH Group is a world leader in grain storage and handling technology. The Group’s operations stretch across the value chain from grain storage to handling, transport, marketing and processes.

Owned and controlled by Western Australian grain growers, with assets of more than $2 billion, CBH accumulates and markets more than 50% of all grain produced in the state. Seven different grain types are exported to more than 30 countries and a state-of-the-art rail fleet is dedicated to transferring grain to four strategically located port terminals.

The Group also owns a 50% stake in Interflour, an incorporated JV which operates seven flour mills internationally, as well as a grain port terminal in Vietnam and 50% of Australian Bulk Stevedoring.

Like a company, a co-operative is a separate legal entity and the members, directors, managers and employees are generally not liable for debts, liabilities or other obligations of the co-operative. Similarly, the day-to-day business of a co-operative is managed by its directors whose obligations are akin to those of a company.

Members of a co-operative can benefit from economies of scale through the combined purchasing, distribution or marketing power or influence of the group. They share in the group’s investment and operational risks and losses, as well as its benefits.

Because shares in a co-operative can only be held by active members, equity fundraising is a challenge for co-operatives.

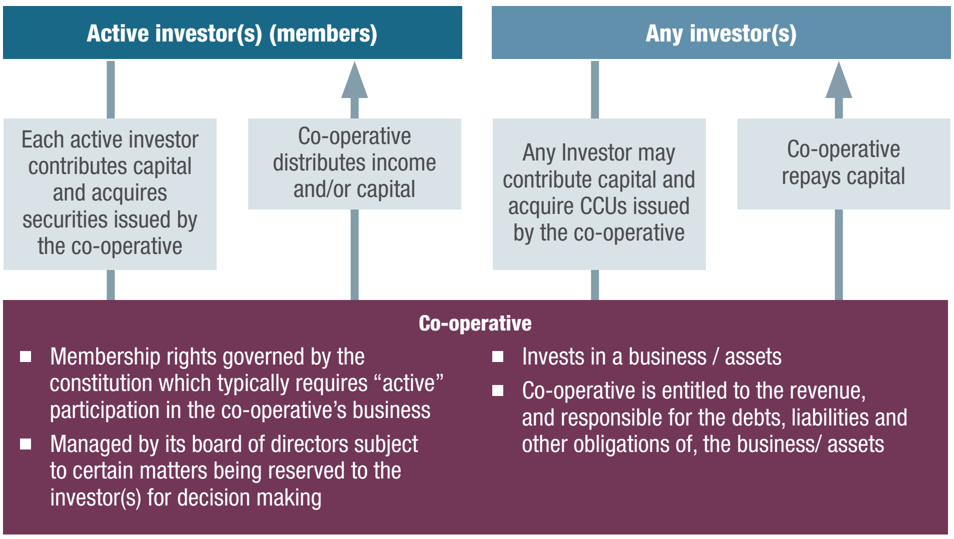
Co-operatives are generally able to raise capital by issuing “co-operative capital units” (**CCUs**). These are interests in the capital of the co-operative (but not the share capital) and may be issued to non-members as well as members. The rights attaching to a CCU depend on its terms of issue which govern how the capital is to be repaid, the nature of any interests in profits and surplus assets, to what extent there is interest payable on the capital and the priority of any payments in relation to shares in the co-operative.

Due to the fact that surplus funds are either distributed to members or used for the benefit of the co-operative, there are limited ways for returns to be generated for an external investor. For members of the co-operative the return on investment is often the avenues for production or distribution offered by membership, or perhaps rebates on costs incurred.

Some of Australia’s leading agribusinesses are co-operatives, and some have introduced, or are preparing to implement, new hybrid structures which retain member control but access equity capital from non-member investors. For example:

- Murray Goulburn Co-operative Co. Ltd, a leading dairy co-operative, is proposing to create a listed unit trust and issue units to non-voting unit holders in order to fund its growth strategy, invest in new technology and reduce debt;
- SunRice has recognised the limitations in its capital structure to fund growth and expand globally and is therefore preparing to list on ASX to improve liquidity for investors and improve its ability to access and raise equity capital which will be structured through a unit trust; and
- Fonterra created a unit trust listed on ASX and NZX (Fonterra Shareholders Fund) to create a liquid market in its stock.

Co-operative



Managed Investment Schemes

A managed investment scheme (**MIS**) is a common trust structure which allows investors to pool funds for a common purpose in order to make a profit.

MISs are governed by the Corporations Act, where a MIS is broadly defined as a scheme that has the following characteristics:

- people contribute money to acquire rights to benefits produced by the scheme;
- money is pooled or used in a common enterprise to produce benefits for members of the scheme; and
- the members do not have day-to-day control over the operation of the scheme.

The most common form of MIS is a unit trust.

A key feature of a MIS is that the investors (that is, the contributors to the investment fund) have no day-to-day control of the scheme. The trustee of the MIS, called the responsible entity (**RE**), must be a public company and is required to hold an Australian financial services licence (**AFSL**) and is regulated by ASIC.

MISs may be open-ended or closed-ended. Open-ended MISs continuously accept new contributions (and create and issue new interests) and offer continuous withdrawal (redemption) facilities. As such, in open-ended MISs the number of interests on issue and the identity of the members is constantly subject to change as new investors may join the scheme and existing members may leave. Closed-ended MISs do not offer continuous issue and redemption of interests.

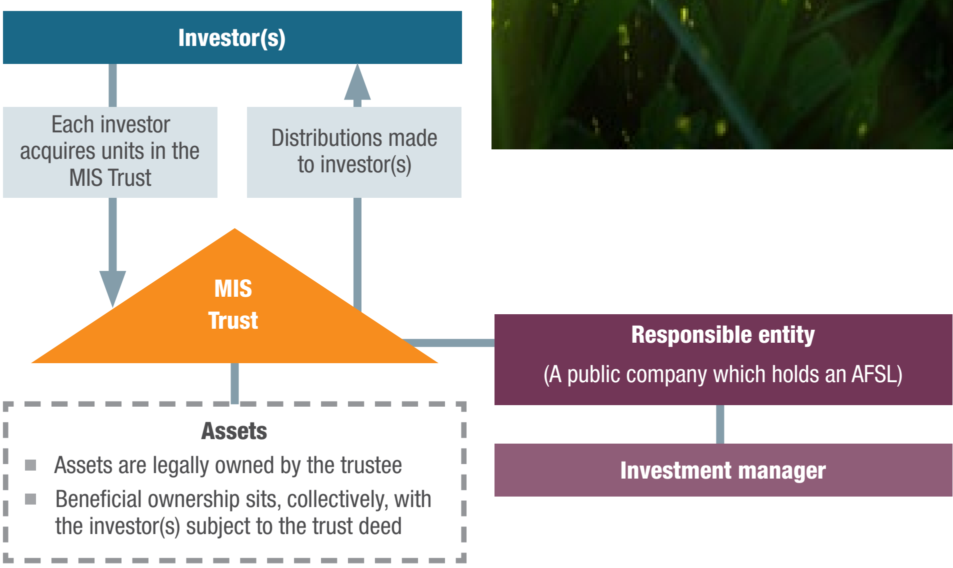
In relation to open-ended MISs, a large number of redemption requests may result in the RE being required to sell assets of the MIS in order to meet those redemptions.

The rules by which the RE is required to operate the MIS are set out in its constitution. For example, its constitution must provide for:

- the consideration required to acquire an interest in the MIS;
- the powers of the RE in relation to making investments, and borrowing money or otherwise raising funds, and dealing with the scheme's property, and
- how members may withdraw from the scheme.

If the MIS has more than 20 members, or is promoted by a person who is in the business of promoting managed investment schemes, the MIS must be registered with ASIC.

Managed Investment Scheme



Foreign investment rules

Overview of the Foreign Acquisitions and Takeovers Act 1975

The Australian Government regulates acquisitions of certain interests in Australian real estate and in Australian businesses, including the food and agribusiness sector.

Under the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (**FATA**), the Australian Treasurer is entitled to review a proposal by a foreign person to acquire interests in Australian land or businesses to consider whether it may be contrary to Australia's "national interest". The Treasurer is assisted by the Foreign Investment Review Board (**FIRB**) which examines the proposals and makes recommendations to the Treasurer as to whether or not approval should be given, and whether any conditions should apply.

In terms of investments in the food and agribusiness sectors, all direct investments by foreign government investors[5] must be notified for prior approval regardless of the value of the investment.

For non-government investors, approval is only required where the investment is above certain monetary thresholds (see page 27 of this guide).

Foreign investment proposals are reviewed against Australia's "national interest" on a case-by-case basis. The "national interest" is not defined by legislation, although some guidance on the concept, and its application to agricultural investments, is provided in the FIRB's policy document "Australia's Foreign Investment Policy". For proposed investments in agriculture, the government typically considers the effect of the proposal on:

- the quality and availability of Australia's agricultural resources, including water and land access and use;
- agricultural production and productivity;
- Australia's capacity to remain a reliable supplier of agricultural production, both to the Australian community and to trading partners
- biodiversity; and
- employment and prosperity in Australia's local and regional communities.

Investments in Australian agribusiness cannot be structured so as to avoid a requirement to notify FIRB – obtaining approval is a vital step in the process of investing in Australian land and agribusiness.

The Australian Government has a long and consistent record of welcoming foreign investment, with the vast majority of proposals being approved. Since foreign investment became regulated several decades ago, only a handful of non-real estate proposals have been blocked on "national interest" grounds.

5 Including government agencies and entities controlled by government agencies.

Thresholds for notifications for agricultural investments

For non-government investors,[6] the relevant monetary thresholds for investments in Australian agriculture as at the date of this guide are set out in the table on page 27 of this guide.

Please note that the particular thresholds which apply under the FTAs for the particular countries included in the table only apply to investments which come directly from those countries. The use of an acquisition vehicle incorporated or formed outside these countries, including a company incorporated in Australia, removes the FTA benefit and the lower notification threshold (i.e. the threshold identified in the left hand column) will apply.

6 All foreign government investors must apply for FIRB approval.

	Investors other than those listed in the columns to the right	Chilean, New Zealand and United States investors	Japanese and Korean investors	Singaporean and Thai investors	Chinese investors
Any interest in Australian rural land[7,8]	$15 million (cumulative)	$1,094 million* (non-cumulative)	$15 million (cumulative)	$50 million (non-cumulative)	$15 million (cumulative)
From 1 December 2015, an interest in a direct Australian agribusiness[9]	$55 million*	$1,094 million*	$55 million*	$55 million*	$55 million*+
A 15%[10] or greater interest in:[11] ▪ an Australian business; or ▪ an offshore company that holds Australian assets or conducts a business in Australia, and the Australian assets or businesses of the target company are valued above the threshold	$252 million*	$1,094 million*	$1,094 million*	$252 million*	$1,094 million*+

* Indexed annually on 1 January. + These thresholds only come into effect when the China -Australia FTA has been ratified

Application fees and foreign ownership register

From 1 December 2015, a new fee regime applies to the review of applications for investments by foreign persons in the agribusiness sector:

- $5,000 for rural land acquisitions of less than $1 million;
- $10,000 for acquisitions of rural land up to $1 million, rising in $10,000 increments for each million dollars of acquisition – rural land fees will be capped to a maximum of $100,000 (e.g. a $10 million farm will attract a $100,000 fee);
- $25,000 for "annual programmes" and agribusiness acquisitions of less than $1 billion; and
- $100,000 for agribusiness acquisitions of $1 billion or more.

From 1 July 2015 all new foreign investments in agricultural land must be recorded in a foreign agricultural land ownership register, maintained by the ATO.

All existing holdings in agricultural land must be registered with the ATO by 31 December 2015 and any new interests must be registered within 20 days.

Proposed legislative changes

The Australian Government is currently proposing to make legislative changes to the FATA and associated regulations. The majority of the changes will codify a number of foreign investment rules that are currently a matter of Australian Government policy.

In addition to the agricultural land and agribusiness changes referred to above, one of the main changes contemplated is to modify the concept of "substantial interest", which is currently defined as a 15% interest but is expected to increase to a 20% interest.

This will have an impact on a number of notification requirements which are triggered by the acquisition of a "substantial interest". For example, only acquisitions of a "substantial interest" in Australian businesses are notifiable, a "substantial interest" in a rural (or agricultural) land corporation is considered to be an indirect interest in rural land and therefore notifiable, and the test for foreign government investor includes where a foreign government entity/agency holds a "substantial interest".

7 "Rural land" is land used wholly and exclusively for carrying on a business of primary production. A new definition of "agricultural land" will be introduced with effect from 1 December 2015 which will replace "rural land" and include land used, or that could reasonably be used, for a primary production business.
8 Where the monetary figure is cumulative, this means that any acquisition that, together with existing investments, gives an aggregate interest in excess of the monetary figure requires notification. If the monetary figure is non-cumulative, the value of the acquisition itself must be in excess of the monetary figure in order to be notifiable.
9 Agribusinesses under the new legislation will include primary production businesses and certain downstream manufacturing businesses (including meat, poultry, seafood, dairy, fruit and vegetable processing and sugar, grain and oil/fat manufacturing) beyond the farm gate. To be an agribusiness the value of the assets of the business used in carrying on an agribusiness is to be at least 25%. The monetary threshold will be referrable to the value of the agribusiness.
10 It is expected that this threshold will increase to 20% with effect from 1 December 2015.
11 Monetary threshold referable to the value of the whole business in which the investment is being made.

Other tax considerations

Foreign investor's tax consideration

When considering a suitable structure to be used for an investment in Australia's food and agribusiness sector, foreign investors will need to consider various foreign tax implications by reference to their own particular tax profile and circumstances. This is to ensure that the foreign investors understand the taxation implications in both Australia and other relevant jurisdictions. Some of these foreign tax considerations include the following:

- Double tax agreements (**DTA**) – the withholding tax rate for interest, unfranked dividends and royalties paid overseas may be reduced under the relevant DTAs. Withholding tax rates imposed for unfranked dividends and royalties is 30% and interest is 10% in the absence of concessional treatment under DTAs.
- Tax residency – the status of tax residency impacts taxing rights as foreign investors are subject to Australian income tax on income derived from all their Australian sources. Also, tax residency impacts whether exemptions may be available for foreign investors. For example, a foreign resident may disregard a capital gain or capital loss from a CGT event where the CGT asset is not 'taxable Australian property'.
- Source of funding and capital – as discussed further below, regard should be given to the source of funding and capital as this may restrict allowable debt deductions for Australian income tax purposes and also influence future returns of capital.
- Foreign holding structures – the tax structure of investments and the role of the Australian investment should be considered within the group structure of the foreign investor. This is in light of the OECD's action plan for Base Erosion and Profit Shifting (**BEPS**) which seeks to address the discrepancy between the current international tax rules and refers to tax planning strategies which exploit gaps in tax rules to artificially shift profits to low or no-tax locations. Ultimately, foreign investors should ensure that their investment structure is supported by commercial arm's length principles and substance.

Land tax

Land tax is a tax imposed by each State or Territory (except the Northern Territory). It is charged on the taxable value of property owned that is not a principal place of residence or other class of exempt land.

An exemption is available for land for which the dominant use is primary production purposes. The definition of "primary production" and the breadth of the exemption differs significantly between jurisdictions but some examples of primary production include:

- maintaining animals for the purpose of selling them, their natural increase or their bodily produce;
- cultivating crops for the purpose of selling the produce;
- growing flowers, orchids or mushrooms for the purpose of sale; and
- commercial fishing and commercial farming of fish and other seafood.

If the landowner does not fall under an exempt category, they will be liable to pay land tax at rates of up to 3.7%. Each State and Territory, except the Northern Territory, applies a different rate of land tax to the value of property above a certain land tax threshold.

Stamp duty

Stamp duty is a tax imposed by each Australian State or Territory. Stamp duty is payable upon the sale or transfer of dutiable property (including land), dutiable transactions, and certain other dealings. By way of example, dutiable transactions may include an agreement for the transfer of land, a lease in which a premium is paid, declarations of trust or a vesting of land by statute.

Stamp duty is imposed at rates up to 7% of the greater of the GST inclusive consideration and the unencumbered market value of the transaction.

Stamp duty is also payable on certain acquisitions of interests in companies or trusts with interests in land (held directly or indirectly). This is referred to as "landholder duty" and is imposed at rates of up to 5.75% of the unencumbered market value of the land held by the entity, and in some states, goods.

The purchaser or transferee is usually liable to pay stamp duty. The liability for stamp duty arises immediately when a transfer of dutiable property occurs or when a document is executed. Stamp duty must be paid within a prescribed time before interest and penalties are imposed. This generally varies from 30 days to 3 months after the transfer of property, depending on the state in which the liability arises.

Examples of how income tax and stamp duty applies to investments in different types of structures

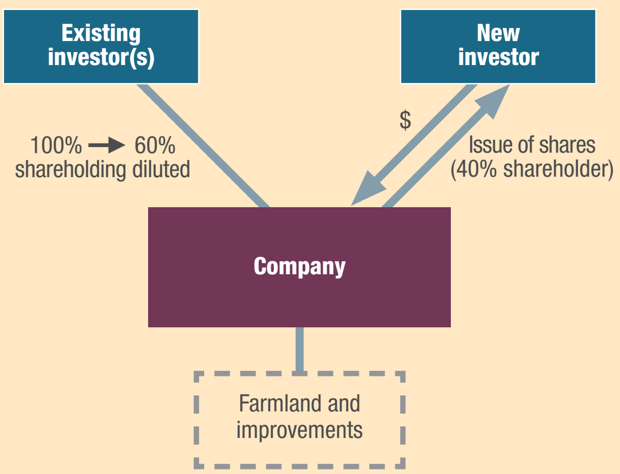
The two examples below provide a simple illustration where the choice of the investment structure could potentially result in different duty and income tax implications.

Example 1

Existing Investors originally hold 100% of the ordinary shares in an Australian resident company (**Company**). The Company holds farmland and improvements in Queensland, Australia. Existing Investors then issue 40% of the ordinary shares in Company to the New Investor for consideration ($) to obtain additional equity funding to expand the farm. Prima facie, the New Investor should not be subject to landholder duty on the indirect acquisition of the farmland and improvements which would normally apply at a rate of 5.75% of the unencumbered market value of the land and certain improvements. This is because the shareholding issued to New Investor is less than 50%.

For income tax purposes, this transaction does not give rise to a capital gains tax event. This is because the transaction is not treated as a disposal of assets by either Existing Investors or the Company for capital gains tax purposes.

The choice of structure can result in different taxation and duty implications. Generally no landholder duty should be payable by the new investor:

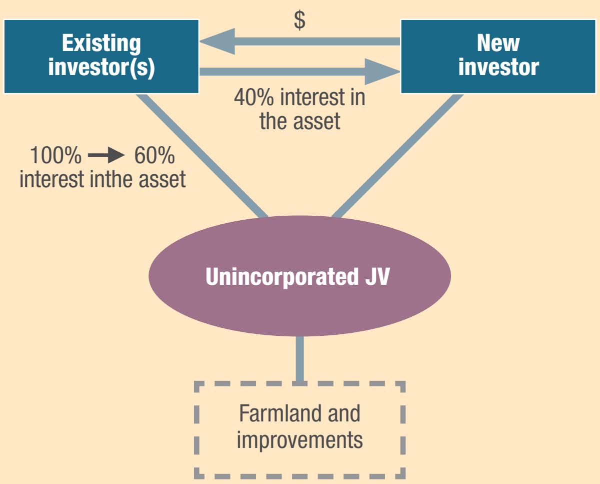


Example 2

Existing Investors originally hold a 100% interest in farmland and improvements in Queensland, Australia. The Existing Investors transfer a 40% interest in the land and improvements, to the New Investor for consideration ($). Generally, stamp duty is payable by the New Investor on acquisition of an interest in the farmland and improvements at a rate of 5.75% on 40% of the unencumbered value of the land and improvements.

The transfer of a 40% interest in the land and improvements, and any other assets, will trigger a capital gains tax event. Broadly, the Existing Investors will be taxed to the extent that the consideration received from New Investor for the 40% interest is greater than their cost base for 40% of the asset in the assets of they hold in the unincorporated JV.

Stamp duty is generally payable to the New Investor on acquisition of an interest in the land and improvements and a capital gains tax disposal arises for the Existing Investors:



R&D Tax Incentive scheme

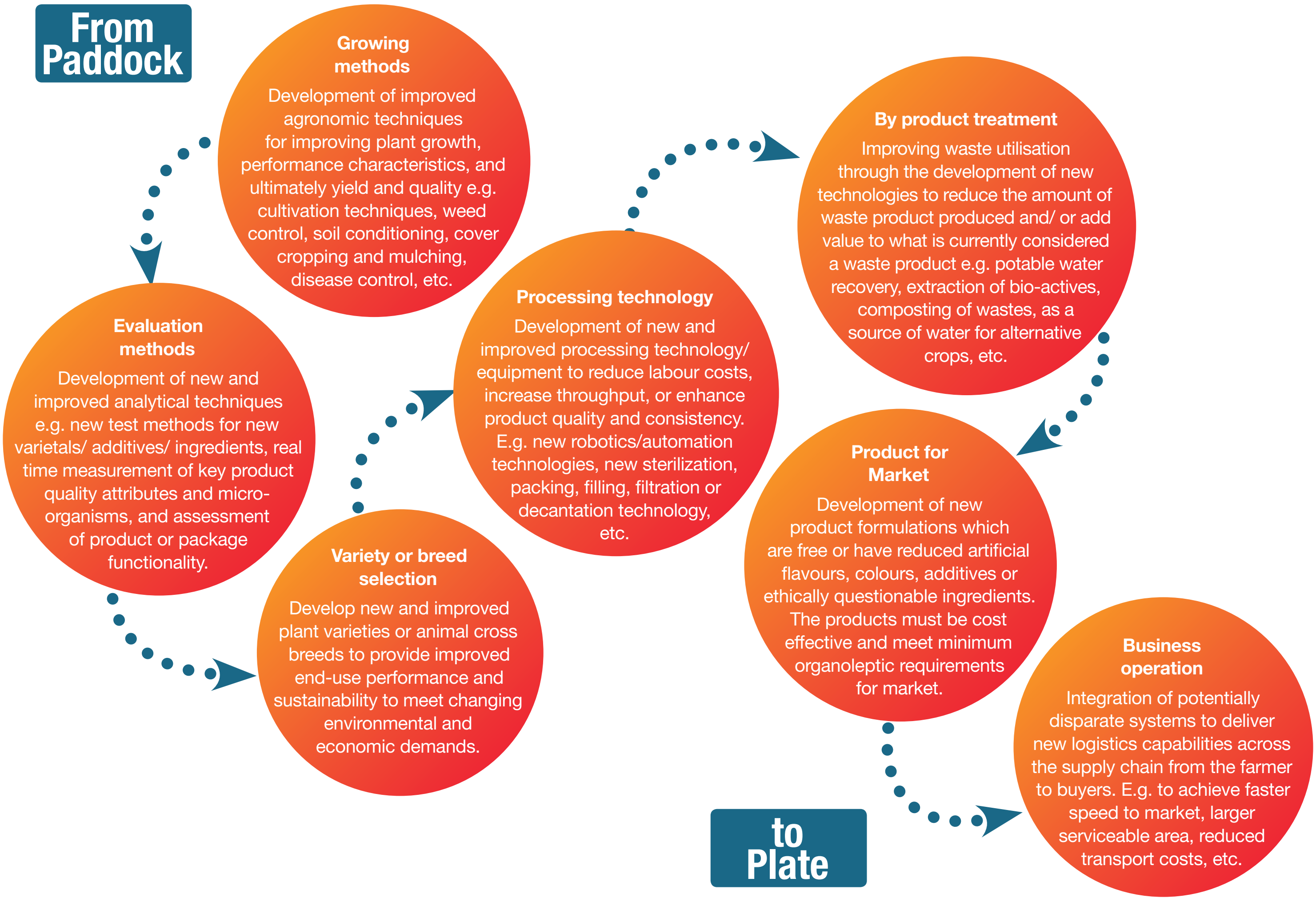
The Research and Development Tax Incentive scheme (**R&D Tax Scheme**) is the principal Australian Government incentive scheme to encourage companies to develop technology in Australia. It is broad-based, available to all industry sectors with each company controlling the direction of its R&D. The scheme extends beyond traditional laboratory experimentation and is accessible by companies developing innovative solutions to overcome technically challenging problems. A range of grants targeting advanced manufacturing, innovation, regional development and job creation are also available.

Although Australia has had a tax incentive regime for qualifying R&D activities since 1985, awareness and participation in these regimes by agribusiness has been small relative to other industries. For the 2012-13 income year, the Agriculture, Forestry and Fishing industry represented only 3.8% of all R&D Tax Incentive registrants, after Services (50%), Manufacturing (35%) and Mining (7%).[12]

Registrants within the food and agribusiness sector range from start-ups to multi-nationals. Within this sector, the nature of the R&D activities performed is often multi-disciplinary and typically includes a wide spectrum of integrated scientific investigations and engineering processes. Focus areas include dairy processing, breeding, animal feedlots, meat processing, grain research, aquaculture, agrochemicals, viticulture and value add chain product development. Environmental protection and sustainability is also high on the agenda to ensure that no irreversible damage ensues from agricultural-related activities.

12 Department of Industry, *Innovation Australia Annual Report 2013-14* (2014) 24

Example of R&D activities within the food and agribusiness sector



Overview of the R&D Tax Scheme	
Refundable tax offset	**Eligibility criteria**
Target audience	Australian incorporated companies, or foreign owned entities that carry on business through a permanent Australian establishment, with grouped turnover under $20 million.
	Benefits
Small companies	A tax offset of 45% (equivalent to a 150% deduction for comparison purposes). This equates to 15% net benefit per eligible dollar, and 45% cash refund if the company is in tax losses. From 1 July 2014, a threshold of $100 million applies to R&D expenditure claimed under the scheme.
Non-refundable tax offset	**Eligibility criteria**
Target audience	Australian incorporated companies, or foreign owned entities that carry on business through a permanent Australian establishment, with grouped turnover above $20 million.
	Benefits
Large companies	A tax offset of 40% (equivalent to a 133% deduction for comparison purposes). This equates to 10% net benefit per eligible dollar. Indefinite carry forward of the offset if it exceeds tax payable (no cash refund), subject to tax loss carry forward rules. From 1 July 2014, a threshold of $100 million applies to R&D expenditure claimed under the scheme.

Thin capitalisation

When considering cross-border investments and funding arrangements, regard should be given to the thin capitalisation rules. Broadly, the thin capitalisation rules operate to limit allowable interest deductions by a specified statutory ratio or formula. This limit is imposed to counter the strategy of using debt over equity funding so as to obtain the more favourable tax treatment of debt.

The thin capitalisation provisions can be triggered when non-residents hold controlling interests in Australian entities.

Generally, the thin capitalisation rules effectively apply a 60/40 debt to equity ratio in order to claim interest deductions.

Glossary

Term	Meaning
$	Australian dollars
AFSL	Australian financial services licence
ASIC	Australian Securities & Investments Commission
ASX	Australian Securities Exchange, the primary securities exchange in Australia
Austrade	Australian Trade Commission
CCU	Co-operative capital units
CGT	Capital gains tax
Corporations Act	*Corporations Act 2001* (Cth)
DTA	Double tax agreement
FATA	*Foreign Acquisitions and Takeovers Act 1975* (Cth)
FIRB	Foreign Investment Review Board
FTA	Free trade agreement
GST	Goods and services tax
IPO	Initial public offering
JV	Joint venture
MIS	Managed investment scheme
MIT	Managed investment trust
N/A	Not applicable
OECD	Organisation for Economic Co-operation and Development
R&D	Research and development
R&D Tax Scheme	R&D tax incentive scheme
RE	Responsible entity
US$	United States dollars

Working with KPMG and King & Wood Mallesons

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The KPMG difference

Today's agribusiness sector is seeing exciting growth opportunities, but companies must pursue them against a backdrop of seasonal variability, unstable fuel prices, rising logistics costs and a fluctuating dollar.

As agribusiness players grapple with these issues and develop strategies for profitable growth — including the establishment of new export markets, or responding to local opportunities for joint ventures and alliances — they face a number of operational risks and complex business challenges.

In responding to these challenges, companies are increasingly seeking independent professional advice to help enhance decision making. We know that the most reliable and relevant advice comes from advisers with a solid base of industry experience. It is why so many agribusinesses have chosen KPMG as their preferred financial and business adviser.

About KPMG

KPMG is a global network of professional firms providing audit, tax and advisory services. They operate in 155 countries worldwide. In Australia, KPMG has over 5,000 people and 380 partners, with offices around the country. KPMG's Agribusiness group offers audit, tax and advisory services geared to the unique needs of the agribusiness sector. KPMG's agribusiness clients draw on our deep industry experience and extensive technical resources to support their internal capabilities and to obtain a fresh, independent perspective on important strategic and operational issues.

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Working as a team, we offer a broad range of audit, tax and advisory services to Asian companies seeking to invest and grow in the Australian agribusiness market, as well as Australian companies seeking investment or building trading operations in Asia.

We make it our business to be at the leading edge of thinking and innovation in the agribusiness sector, through research publications, industry representative body participation and Federal and State government policy roundtable input.

We are delighted to co-author this report with King & Wood Mallesons and hope that it contributes productively to the evolution of investment and growth in Australian agri. We are looking forward to discussing any tax or regulator aspects of this report further and our contact details are provided below.

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The King & Wood Mallesons difference

Agribusiness in Australia is a highly regulated, technology intensive and commercial sector subject to significant change. Therefore, participants in the agribusiness sector need legal advisers with deep agribusiness experience.

From acquisitions to commercial transactions, from seeking funds to food security issues, from the environment to new technology, investors in Australian agribusiness can rely on King & Wood Mallesons for commercial and innovative legal solutions, tailored to their strategic priorities and approach to doing business.

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As a full service firm, we have experience across all aspects of the agribusiness sector including: mergers & acquisitions including private equity and joint ventures, commercial agreements, investment structures, foreign investment approval, property ownership issues, infrastructure access, finance and commodities trading, intellectual property, competition and tax.

The insight, industry knowledge and experience in our team, coupled with the strength of our relationships with regulators, means that we can help investors adapt to and comply with market changes which ensures that investors will receive the best support across all aspects of the agribusiness sector.

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