AUSTRALIAN PROPERTY INSTITUTE INC.

SUBMISSION TO THE

PRODUCTIVITY COMMISSION

ON

ISSUES PAPER: REGULATION OF AUSTRALIAN AGRICULTURE

AUSTRALIAN PROPERTY INSTITUTE
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1. PREFACE

1.1. This submission to the Productivity Commission (PC) on the Issues Paper entitled *Regulation of Agricultural Land*[1] has been prepared by the Australian Property Institute (API) as part of ongoing research efforts and dissemination of factual and dispassionate information about the worth of property rights in Australia, compensation assessments for such rights and the management of such rights.

1.2. In addition, API records its appreciation for the invaluable and numerous discussions that occurred during the preparation of the submission with members of the Submission Committee. This submission however does not necessarily represent the views of any of the individual members of the Submission Committee, sitting strictly extra-curially.

[1] Productivity Commission (PC) (2015) *Regulation of Agricultural Land*, Issues Paper (Melbourne: December).

2. INTRODUCTION

2.1. This submission responds to the PC's Issues Paper entitled *Regulation Australian Agriculture* especially the followings sections: ***Land Tenure and use**, specifically Land use planning (pp.9-10), Pastoral leases (p.10), Native title (p.11)*, ***Environmental protection*** (pp.11-12), ***Water*** (p.14), and ***Investment*** (pp.21-22). The API welcomes the opportunity to respond to the Inquiry and in particular the provision of a submission by the API to the PC.

2.2. A key question of this inquiry is stated in the Issues Paper as "whether a regulation, and the way it is implemented, imposes an unnecessary regulatory burden"[2] on "the competitiveness and productivity of Australian agriculture."[3] That key question for the inquiry is supported by API, and in particular it is noted with approval that the inquiry will also consider a broad range of matters pertaining to the impairment of the endeavours of farm businesses. It is further noted in the *Terms of Reference*[4] that in undertaking the inquiry , the PC has also been specifically required *inter alia* to:

- *Indicate priority areas for removing or reducing unnecessary regulatory burdens on farm businesses*
- *Identify where there is greatest scope to pursue regulatory objectives in more efficient ways*
- *Identify unnecessary restrictions on competition*
- *Assess whether the current level at which matters are regulated is appropriate and if better coordination across governments would reduce unnecessary overlap .*[5]

2.3. It is also noted in the Issues Paper that the many of the "regulatory concerns raised in the white papers on agricultural competitiveness and developing northern Australia"[6] are subsequently discussed in the Issues Paper, to which the API will respond to in Section 3 of this submission.

2.4. Furthermore, of particular interest to the API are those specific matters listed in 2.1 above and more generally in 2.2 above which will be addressed in Section 3 of this submission. In addition, API notes the PC is seeking data and information *inter alia* on:

- *Inconsistent and/or overlapping regulations between jurisdictions or levels of government*
- *Regulation that has a particular effect on certain types of farm businesses, or on businesses in certain locations*
- *Areas of regulation that are the highest priority for reform, and which level of government should be responsible for the regulatory arrangements.*[7]

[2] PC, 5 para. 3 "Unpacking the costs of regulation and 'unnecessary burdens'.
[3] PC, 1 para. 2 "About this inquiry."
[4] PC, 2, para.2 "More detail on what the Commission has been asked to do."
[5] PC, 2, para.2.
[6] PC, 2 para.3.
[7] PC, 5, Box 'Information request.'

2.5 API notes there is a compelling need to accommodate an increasingly scarce (and valuable) complex of competing agricultural property rights. The growing evident inability of spatial planning to understand the non-urban environment and also the interface between the non-urban environment and peri-urban areas has led to a need for a deeper grasp of the interaction between agricultural property rights and the economics of agricultural endeavours.

Agricultural property rights comprise an untidy and complex mixture of natural resources encompassing surface and subsurface mineral deposits, aquifers, ambient and impounded surface waters, intensive agribusinesses, rangelands and horticultural activities, amongst others. The API welcomes the opportunity to comment on some of these aspects in the following submission.

2.6 Should any further information be required by the Commission in respect of either the introductory comments above or the foreshadowed responses in Section 3 of this submission, Mr. Stephen Child, Member Services Manager API NSW can be contacted.

3. COMMENTS AND RECOMMENDATIONS

3.1 The following comments and recommendations respond sequentially to the Issues Paper in the order raised in that document.

3.2 **CONSIDERING THE COLLECTIVE BURDEN OF REGULATION**

- *Are there systemic problems with government regulatory processes and institutions which create unnecessary regulatory burdens on farm businesses?*

- *What reform options might improve these processes and institutions?*

Response:

API considers there are too many layers in the process of obtaining consent to a particular agricultural endeavour (proposed or renewed) to be conducted on a specific parcel of land. In NSW for example, development consent may have to be obtained from a local consent authority (Council) pursuant to the *Environmental Planning and Assessment Act 1979* (NSW) for an activity such as the planting of a vineyard in a specific local government area. However, development consent for the planting of a vineyard in other local government areas may not be necessary under the provisions of another Council's planning scheme (known as a Local Environmental Plan or LEP).

For example in the Hastings Valley in the mid-North Coast of NSW, pursuant to the *Port Macquarie-Hastings LEP 2011* (NSW) vineyards are only permissible with development consent on land situated within the standard zone *RU1 Primary*

Production, **as such an activity is defined as *intensive plant agriculture*[8]. In the Manning Valley to the south, vineyards are similarly defined as *intensive plant agriculture* within the zone *RU1 Primary Production* pursuant to the *Greater Taree Local Environmental Plan 2010*[9]. Paradoxically, vineyards as defined within the Manning Valley are permissible without development consent. Such inconsistencies between local government areas are not uncommon, however both the Hastings and Manning Valleys have a long history of viticulture which confounds any attempt to understand the differing approach to the planting of vineyards.**

Nevertheless, concurrent approval may also have to be obtained pursuant to the *Water Management Act 2000* (NSW) for water impoundment, access to stream flows of water, or construction of a bore for irrigation purposes. The approval authority for such a specific purpose water access licence is not the local Council but the Department of Primary Industries - Water.

Approval may also have to sought for activities to be undertaken involving removal of native vegetation pursuant to the *Native Vegetation Act 2003* (NSW) to permit an agricultural endeavour such as a vineyard. A consent for such vegetation clearing (where required) is to be sought from the Office of Environment and Heritage, not the local Council.

Whilst the above three examples do not include all the approvals necessarily to be obtained to allow a vineyard to be planted and subsequently managed, the examples do emphasise the complexity of regulatory processes which place a significant burden on a relatively prosaic agricultural endeavour such as the planting of a vineyard. This complexity can clearly inhibit smaller farm businesses from undertaking such activities given the obvious external resources required such as finance, specialist skills such as legal, land use planning or hydrological advice amongst other matters, and timeliness all of which can deter innovation or viability. In addition, where such an agricultural activity is proposed in a peri-urban area or in an established agricultural area adjoining urban areas, the range of issues can be significantly greater reflecting the increasing interactive difficulties occurring between urban and non-urban uses generally throughout Australia. In addition agricultural activity is increasingly impacted upon by Indigenous and non Indigenous heritage legislation which requires quite separate applications pertaining to this area.

To improve this situation, API considers there is a need for greater interaction and coincidence between government regulatory processes, and better transparency of regulatory processes to obviate complexity and resultant confusion.

[8] *Port Macquarie-Hastings Local Environmental Plan 2011*, Definitions- *Intensive Plant Agriculture (d) viticulture.*

3.3 **LAND TENURE**

- *How could development assessment and approval processes be improved?*
- *Do different development assessment and approval processes result in unnecessary regulatory burdens?*
- *Are there inconsistencies between land use regulations and other regulations? What is the evidence for this?*

Response:

As stated above API considers there are too many layers in the process of gaining development consent to particular agricultural endeavours and it is clear that even between local government areas there are differing regulatory burdens. The example provided above of the planting of a vineyard in the Hastings Valley and the Manning Valley starkly underscores the differing burdens placed upon farm businesses.

In the API submission of February 2015 to the Commission's Issues Paper : *Business Set- up Transfer and Closure* it was stated that:

There is a concerning disconnect between the general approval given by consent authorities (e.g. Councils) under the Environmental Planning and Assessment Act 1979 (NSW)[10]

It is also important to note an earlier joint submission to the Commission by API and SIBA in July 2010 in response to the Issues Paper: *Performance Benchmarking of Australian Business Regulation Planning, Zoning and Development Assessments,* stated that not only between local government areas was there a lack of co-ordination but also between state and territory jurisdictions. It was stated in that joint submission:

> ***…. there are jurisdictional aspects arising from the Australian Constitution which have acted to inhibit any significant move away from an obviously outdated focus on exclusory zoning. The six Australian states were, until 1901, separate British colonies and they retained individual responsibility at Federation for land management within each state as this task is not a power specifically vested in the Commonwealth of Australia under the Constitution. Management of the water of rivers is also vested firmly in the states. There has been an almost covert reluctance to harmonise the planning and zoning systems nationally, arguably reflecting the jealously preserved powers of the states at Federation. It is this dysfunctional situation that clearly requires reform to enhance overall efficiency and effectiveness of the states and territories' planning and zoning systems for the national benefit.[11]***

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[9] *Greater Taree Local Environmental Plan 2010,* Definitions- *Intensive Plant Agriculture (d) viticulture (d).*

[10] API (Australian Property Institute) (2015) *Submission to the Productivity Commission on Business Set-up Transfer and Closure. (*Sydney: February), 4.

[11] API and SIBA (Spatial Business Industries Association) (2010) *Joint Submission to the Productivity Commission on Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments.* (Sydney: July), 5-6.

Hence, API notes that the Commission in its draft May 2015 report *Business Set-up Transfer and Closure*, stated:

> ***While some state have undertaken reforms to parts of their zoning and development assessment processes in recent years, it appears that there remain substantial impediments to business entry…..***
>
> ***State and local governments should continue to improve their processes, in line with the leading practices previously identified by the Commission, in order to meet regulatory objectives in a way that minimises the burdens and barriers imposed on business.[12]***

Hence it remains a concern to API there remains systemic problems in government regulatory processes and institutions between the three levels of Australian government and within those jurisdictions.

3.4 **PASTORAL ACTIVITIES**

- *Do the benefits of regulations that restrict land use to agriculture activities outweigh the costs?*
- *Is there scope for zones to allow a broader range of complementary land uses, while still preserving agricultural interests and recognising essential land management or conservation purposes?*
- *Is diversification of agricultural activity unnecessarily restricted by conditions in pastoral leases?*
- *Is pastoral leasehold an effective way of facilitating efficient land use? What other approaches could be used?*
- *What implications (if any) does the security of tenure of pastoral leases have for lending or investment?*
- *What are the highest priority reforms for improving pastoral lease arrangements*?

Response:

API considers that there is a need to achieve greater facilitation of access to jurisdictional and inter jurisdictional information that impacts upon the use of land for agricultural activities. As stated earlier there are clear inconsistencies between and within jurisdictions, and the assessment and approval processes remain complicated, unco-ordinated and sometimes illogical.

As regard pastoral leases, API and SIBA responded jointly in June 2014 to the NSW Trade and Investment document *Crown Lands Legislation White Paper*[13]which canvassed *inter alia* the issue of pastoral leases. It was stated by API and SIBA:

[12] Productivity Commission (2015) *Draft report: Business Set-up Transfer and Closure* (Canberra: May), 76.
[13] Department of Trade & Investment, Regional Infrastructure and Services (NSW Trade & Investment) (2014), *Crown Lands Legislation White Paper (White Paper),* (Sydney).

…… that where additional activities are proposed, it should be recognised that such activities may be required to comply with the Environmental Planning and Assessment Act 1979 (NSW), in particular where development consent is required notwithstanding that the activity may be considered 'low impact'. It is noted that some Local Environmental Plans include a surprisingly broad range of agricultural activities which as a class of land use are subject to development consent.

API and SIBA note that additional activities proposed on Crown land by tenure-holders sometimes occur as part of the process of aggregation of tenures. It is considered that such aggregation should be carefully considered to ensure that aggregation of tenures does not have undesirable consequences for the community, especially in rural and regional areas.[14]

3.5 **NATIVE TITLE**

- *How well are native title processes managed?*
- *How do native title processes affect decisions relating to current or future land use?*
- *What scope exists to reduce any unnecessary burden imposed by native title processes and how should regulation be reformed to give this effect?*

Response:

Underpinning any response to native title processes, API notes that in a submission in July 2010 to the Business Tax Division of the Commonwealth Treasury in response to the consultation paper entitled *Native Title, Indigenous Economic Development and Tax* it was stated :

> ***……that native title does not accord with traditional anglo-Australian concepts of property. It is pointed out the High Court decided in Mabo v.Queensland (No.2) (1992) 175 CLR 1 that rights to land held by Indigenous people had survived British colonisation, and that these rights (native title) had to be considered in existing Australian laws. It is accepted that native title is a unique legal right which does not fully accord with Australian property law principles, and sits separate from anglo-Australian common law rather having its roots in traditional Indigenous law and customs.***[15]

Further in relation to dealing with the impact of any burdens imposed upon non Indigenous parties by native title processes API in the above 2010 submission stated:

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[14] API and SIBA (2014) *Joint Submission to NSW Trade and Investment on Crown Lands Legislation White Paper* (Sydney: 10 June), 6.

[15] API (2010) *Submission to Business Tax Division the Treasury on Consultation Paper: Native Title, Indigenous Economic Development and Tax* (Sydney: July), 6.

> ***…. To achieve this end, a method of incorporating Indigenous pre-existing interests into the Australian legal system is the future act procedures set in the Native Title Act 1993 (Cth). Where a future act is determined to affect native title, the Act provides for monetary and non-monetary compensation to be paid to the native title holders, such payments occurring through a specified negotiation process under the Act, or by the relevant Court. The native title holders can request non-monetary or monetary payment, or a combination of both as compensation. The Act also establishes that future acts affecting native title can be validated if the parties execute an agreement termed an Indigenous Land Use Agreement (ILUA), or if procedural requirements under the Act are complied with as regards notification, consultation or negotiation. Future acts generally are categorised as either extinguishing acts, or acts to which the non-extinguishment principle is applicable. Extinguishing acts are such that native title rights and interests are permanently extinguished and cannot revive at some future time even if the act has subsequently ceased. The issue of a freehold title by the Crown is an example of a permanent extinguishment of native title.***
>
> ***Alternatively, when a non-extinguishing act occurs on Crown land, the rights and interests held by native title holders can revive once the act ceases to occur. During the time when the non-extinguishing acts is occurring, the native title is said to be suspended for that period. The conduct of mining on Crown land is an example of an act that does not extinguish native title.***[16]

Given that native title was first recognised in Australia in 1992 in the *Mabo* decision, the incorporation of this previously unknown form of land title has necessitated complex processes which are recognised as necessary. Where current or future agricultural endeavours encounter native title, such endeavours may be classed as extinguishing acts under the *Native Title Act* 1993 (Cth). Unless excluded by the provisions *s.47*, *s.47A* or *s.47B Native Title Act* 1993 (Cth) such encounters with native title continue to initiate four interrelated obligations which must be discharged, namely:

1. **There must be negotiations.**[17]
2. **Negotiations have to relate to the future Act.**
3. **Negotiations to be conducted in good faith.**
4. **Negotiations have to occur within six months of commencement.**

Given that the processes are necessarily complex and are dealing with an intensive legislative interplay, API is unable to offer any commentary as regard how such reform could occur to reduce the obvious time burden.

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[16] API (2010) *Submission to Business Tax Division the Treasury on Consultation Paper: Native Title, Indigenous Economic Development and Tax* (Sydney: July), 6-7.

[17] As provided for in *s.24M D(6B) Native Title Act 1993* (Cth).

3.6 **ENVIRONMENTAL PROTECTION**

- *What excessive and unnecessary costs do environmental protection regulations impose on farm businesses?*
- *Do environmental protection regulations particularly affect certain businesses or businesses in certain locations?*
- *Can the burden imposed by environmental protection regulations be reduced by changing the regulations or the way they are administered?*
- *Are there more effective approaches to environmental protection adopted overseas, or in other parts of Australia, that should be considered?*

Response:

As stated earlier in this submission the gaining of development approval for even prosaic agricultural endeavours is mired in inter jurisdictional and internal jurisdictional complexity and sometimes contradictory processes. The issue of environmental protection which is covered by both Commonwealth and State and Territory legislation adds additional complexity to this already significant burden upon farm businesses. API considers that a useful "one stop one shop" approach is desirable.

3.7 **WATER**

- *Are there aspects of the water market that are imposing an unnecessary regulatory burden on farm businesses? If so, what are they?*
- *What aspects of water regulation are having a material effect on the competitiveness of farm businesses and the productivity of Australian agriculture?*

Response:

As regard the water market and the issue of water property rights, API stated in December 2014 in a submission to the Competition Policy Review Secretariat of the Commonwealth Treasury (the Harper Review) that:

> ***…. the absence of inter-jurisdictional harmonisation of water legislation between the States is the major hindrance in achieving a truly competitive water market. Whereas real property and strata titling is harmonised between the six States permitting ready comparisons between property market irrespective of state location, this is not the case for the water market.***
>
> ***Indeed, a right to water is so very different to a land property right, and hence the risk associated with providing debt or equity funds against a right to water is an endeavour which is regarded as a high risk by banks and financial institutions. The commutation of rights to water can be declared by the relevant State minister with the holder of the right to water receiving arguably dubious compensation for this valuable and often scare natural resource. Water in all the State jurisdictions is described as private personal property, no***

different to that attached to a motor vehicle or a piece of furniture. Whilst private personal property clearly can have substantial value, it nevertheless cannot support a secure charge such as a first mortgage over real property, which can be readily foreclosed in the case a breach between the mortgagee or and mortgagor. Interest rates charged for first mortgages over real property are substantially less that the interest rates charged when the asset is personal private property.[18]

The arguments raised by the API in the abovementioned submission to the Harper Review remain current in the absence of harmonisation and the dysfunctional nature of state water markets. Such aspects clearly have a material effect on the competitiveness of agricultural endeavours and obviously the productivity of such endeavours.

3.7 **INVESTMENT**

- *Are there regulatory impediments to domestic or foreign investment in agriculture?*
- *What are the costs and benefits of the foreign investment framework for agriculture?*
- *Are foreign investment review processes timely, efficient and transparent?*
- *What are the likely implications for the agriculture sector from the recent reduction in screening thresholds, creation of a national foreign investment register, and the introduction of application fees for proposals of foreign acquisition of agricultural land?*

Response:

API and SIBA provided a joint submission to the Land Register Consultations Working Group of the Foreign Investment and Trade Policy Division., of the Commonwealth Treasury on 1 February 2013 in response to the consultation paper: *Establishing a National Foreign Ownership Register for Agricultural Land.* The complexities in establishing such a register centred on definitions of "agricultural land" and "foreign ownership" coupled with the necessary triggers for inclusion on the register such as value. API and SIBA considered that there were serious issues with the creation of such a register and stated:

… triggers for inclusion of land holdings in the proposed register will need to be carefully conceived to ensure transparency and efficiency. For any register of land transfers or lease holdings to be meaningful it will have to be as current as possible. It is recognised there is always a lag in the publication of sales and leasehold data, and this will of necessity impact upon the currency of the data available.[19]

[18] API (2014) Submission to Competition Policy Review Secretariat in response to draft report.(Sydney: December),2.

[19] API and SIBA (2013) *Joint Submission to Land Register Consultations Working Group, Foreign Investment and Trade Policy Division, The Treasury* (Canberra and Deakin: February), 12.

1. APPENDIX 1

AUSTRALIAN PROPERTY INSTITUTE INC.

The Australian Property Institute, (formerly known as the Australian Institute of Valuers and Land Economists), has enjoyed a proud and long history. Originally formed in South Australia over 87 years ago in 1926, the Institute today represents the interests of nearly 8,000 property experts throughout Australia.

The API, the nation's peak professional property organisation and learned society, has been pivotal in providing factual, independent and dispassionate advice on a broad range of property issues addressed by the Commonwealth and State/Territory governments and their agencies since the Institute was formed.

In addition, the Institute's advice has increasingly been sought by international bodies such as the United Nations, the Food and Agriculture Organisation (FAO), the European Commission (EU) and the World Bank, evidencing a level of expertise within the API and its membership, which is recognised regionally and globally.

As a professional organisation the primary role of the Australian Property Institute is to set and maintain the highest standards of professional practice, education, ethics and discipline for its members.

API members are engaged in all facets of the property industry including valuation, property development and management, property financing and trusts, property investment analysis, professional property consultancy, plant and machinery valuation, town planning consultancy, property law, research and education.

Membership of the Australian Property Institute has become synonymous with traits and qualities such as professional integrity and client service, industry experience, specialist expertise, together with tertiary level education and lifelong continuing professional development.

2. APPENDIX 2

SUBMISSION COMMITTEE

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