4 Approach to benchmarking food safety regulation

Key points

- The Commission's approach to this benchmarking study has been informed by the rationale for the broader benchmarking program as well as the lessons from the Commission's previous studies of regulation benchmarking and international studies.
- There are many challenges in undertaking a regulation benchmarking study. The Commission has been mindful of these challenges and has sought to mitigate the risks posed by them through its design of the study. Where it has not been possible to satisfactorily mitigate the risks, appropriate caveats and qualifications have been made in the report.
- Stakeholders raised a number of concerns regarding specific food safety regulations, including:
  - the requirements for Victorian and Queensland food businesses to have food safety supervisors
  - Queensland's notification requirements for the suspected intentional contamination of food
  - requirements for food safety plans
  - the lack of consistency in primary production and processing regulation across jurisdictions.
- Stakeholders also raised concerns about the way food safety regulation is administered and enforced, including:
  - uncertainty for businesses in how they are to demonstrate compliance with outcomes-based regulations
  - the uncertainty caused by differing interpretations of regulatory requirements — both across jurisdictions and within jurisdictions
  - regulatory overlap and duplication — both between government regulators and between regulators and private sector requirements (the latter being beyond the scope of this study)
  - delays and costs in getting maximum residue levels approved.

This chapter outlines the Commission's approach to this benchmarking study from both a theoretical and an applied perspective ('benchmarking' is defined in box 4.1). First, the chapter draws together the rationale for the broader

benchmarking program and the lessons from international studies, along with a discussion of the challenges of benchmarking and the selection of benchmarking indicators, to form the basis of the Commission's approach to this study. Then, the chapter outlines how submissions and consultation with stakeholders informed the Commission's choice of the areas of food safety regulation to benchmark.

Box 4.1 **What is benchmarking?**

Benchmarking is the process of comparing an area of interest using one or more indicators resulting in a point of reference against which that area of interest can be compared, assessed, measured or judged. Benchmarking depends upon having a standardised method for collecting and reporting the data or information underpinning the indicators on which the comparisons will be based.

Benchmarking helps an organisation understand its performance (or, in the context of this study, the regulatory regime it administers) relative to either its peers or against some standard (such as a best-practice standard). Organisations make such comparisons in order to diagnose problems in their performance, identify their strengths and weaknesses (relative to their peers) and/or to determine best practice. The organisations (or regulatory regimes) being compared usually share some features — for example, they may regulate the same markets or regulate similar aspects of business activity.

In general, benchmarking is best used as a tool to inform decision making rather than to simply establish some hierarchy of performance amongst a peer group. In using benchmarking to inform decision making, the benchmarking outcomes need to be considered in light of the circumstances of the organisations being compared. For example, it would reasonably be expected that in order for a regulator in a larger state (such as Western Australia) to achieve the same level of regulatory coverage as a smaller state (such as Tasmania), the larger state regulator will need to have a greater number of regional offices, or have their staff spending more time travelling. If both states recover the full cost of regulation from business, then the geography of the larger states will contribute to a potentially higher cost of regulation for businesses in those states.

Sources: OECD (2006); Vlăsceanu, Grünberg and Pârlea (2004).

4.1 Why benchmark business regulation?

The Regulation Taskforce (2006) provided the impetus for a program of benchmarking business regulation when it concluded that benchmarking across jurisdictions would assist in improving regulatory regimes. This view was endorsed by the Australian Bankers' Association in their submission to the Commission's 2008 benchmarking study (ABA 2008) wherein it noted that benchmarking could

lead to a number of benefits, including: improving the efficiency and effectiveness of regulation; ensuring the consistency of regulation across jurisdictions; improving the transparency of decision making and accountability of regulators; and ensuring regulation delivers ‘net benefits’.

The use of benchmarking to identify improvements in regulatory regimes has precedent in international studies. In fact, the OECD (2007b) has observed that many international studies focused on benchmarking of regulatory regimes shared common objectives, including to:

- create sustained pressure for improvement in the public sector
- expose areas where improvement is needed and reveal underlying problems of an organisation (or group of organisations)
- identify superior processes which can be adopted and provide insights as to what constitutes best practice
- focus on the links between processes and performance
- assess performance objectively
- test whether the implementation of improvement plans and strategies resulting from benchmarking have been successful.

The majority of these objectives are also of relevance to this study.

The simple public reporting of benchmarking indicators on regulatory burdens, even without any accompanying analysis, can also be beneficial. Benchmarking can promote ‘yardstick’ competition across jurisdictions (or levels of government) and, through this competition, foster ongoing improvement in the regulatory environments of those jurisdictions. This increased transparency and accountability also places incentives on policy makers to improve their regulatory regimes and, in turn, to reduce unnecessary burdens on business. To the extent that gaps between current and better practices can be identified and made transparent, benchmarking can promote the accountability of regulators for moving to the better regulatory practices (PC 2009).

The benchmarking of regulatory burdens over time may assist in identifying the jurisdictions that have been the most successful in reducing the burdens on business. Benchmarking could also strengthen the accountability of regulators to business and the community by requiring them to demonstrate the benefits of regulation where those benefits are said to more than offset the costs of the regulation (PC 2007b).

Finally, benchmarking provides a useful tool for identifying unnecessary regulatory burdens through the comparison of the costs imposed by different regulations and regulatory approaches aimed at achieving the same outcomes.

4.2 Insights from international benchmarking studies

Outside of Australia and New Zealand there are a number of examples of benchmarking studies in which attempts have been made to compare regulatory regimes at a point in time or regulatory burdens over time (box 4.2). These international studies provide valuable insights that have been applied in this study, including:

- planning the study so that it is not heavily reliant on representative data from business
- establishing comparable measures of regulatory burden through an analysis of the actual requirements on business and, where appropriate, using simplifying assumptions (such as assumed time frames for certain business processes)
- using the smart principles for promoting regulatory compliance (box 4.3) as the basis for some of the indicators used to compare regulators and their administration and enforcement of food safety regulation (see chapters 7 and 8)
- narrowing the scope of the study, wherever possible, to specific aspects of regulation (or business activity)
- linking the benchmarking indicators to specific regulatory requirements.

Collectively, the international studies suggest a range of alternative measures for quantifying regulatory burdens. The studies also suggest that reliance on a single measure (such as a count of regulatory requirements) or on a single aspect of the regulatory burden (such as the administrative burden) may result in a failure to identify the major source(s) of regulatory burden on businesses.

Box 4.2 International studies of regulatory burden

Comparisons across countries

The World Bank's *'Doing Business'* report presents a range of quantitative indicators on business regulations and the protection of property rights across 181 countries. This annual exercise can be used to compare aspects of regulatory regimes across countries. For example, in *Doing Business 2009*, Australia was ranked ninth in terms of ease of doing business and third in terms of ease of starting a business.

The OECD's report*, Cutting Red Tape: Comparing Administrative Burdens across Countries,* considers the administrative burdens faced by transport businesses in 11 countries undertaking two activities: 'hiring a worker' and 'operating a vehicle'. This report produced a number of insights into how the regulatory regimes could be simplified or made more efficient.

Comparisons within countries (or jurisdictions)

Most benchmarking studies of a country or jurisdiction are undertaken as part of a broader government program of 'red tape reduction'. The studies are typically undertaken to establish a baseline regulatory burden and then to track progress against a stated goal of reducing that regulatory burden. As a result, these studies are typically making comparisons over time, rather than a comparison at a point in time (which is the primary purpose of the Commission's benchmarking program).

Many countries have adopted the Standard Cost Model to measure and track the administrative burdens on business due to regulation. In the course of its *Administrative Burden Measurement Exercise,* the Health and Safety Executive (UK) found that while administrative burdens can be large when measured in aggregate across the economy, the actual cost to individual businesses was quite small.

The Canadian province of *British Columbia* took a unique approach to measuring regulatory burdens by using a count of regulatory requirements to quantify the burden. A regulatory requirement was defined as 'a compulsion, obligation, demand or prohibition placed on an individual, entity or activity by or under the authority of a provincial Act, regulation or related policy'. This approach has the advantage of being readily measured and providing a consistent basis for measurement over time, but the disadvantage of giving equal weight to each requirement, regardless of its nature.

Other studies

Reducing the risk of policy failure: challenges for regulatory compliance (Parker) considers the emerging issues for regulatory compliance and the possible explanations for differing compliance levels. A number of 'smart principles' for promoting regulatory compliance can be gleaned from the report (box 4.3).

Sources: HSE (2009); Jones et al (2005); Ministry of Small Business and Revenue — Government of British Columbia (2008); OECD (2007a); Parker (2000); World Bank (2008).

Box 4.3 'Smart' principles for promoting regulatory compliance

- Maximise the potential for voluntary compliance:
  - avoid unnecessarily complex regulation
  - ensure regulation is effectively communicated
  - minimise the costs of compliance (in terms of time, money and effort)
  - ensure regulation fits well with existing market incentives and is supported by cultural norms and civic institutions
  - consider providing rewards and incentives for high/voluntary compliance, for example, by reducing the burden of routine inspections and granting penalty discounts when minor lapses occur
  - nurture compliance capacity in business, for example, by providing technical advice to help businesses, especially small- and medium-sized enterprises, to comply with regulation.
- Maintain an ongoing dialogue between government and the business community, to ensure that regulators have a good understanding of the types of businesses they are targeting.
- Adequately resource regulatory agencies.
- Use risk analysis to identify targets of possible low compliance.
- Develop a range of enforcement instruments so regulators can respond to different types of non-compliance.
- Monitor compliance trends in order to gauge the effectiveness and efficiency of enforcement activities.

Source: Based on Parker (2000).

4.3 Challenges in benchmarking

Selecting benchmarking indicators

Benchmarking indicators are the specific pieces of data and information (processed data) on which the comparisons of regulatory burdens are based. These indicators can either be quantitative (statistical or empirical) or qualitative (descriptive). Not all indicators used in the study are direct indicators of the regulatory burden and, in some instances, indirect indicators are used where they provide guidance on the likely nature of the burden on business attributable to an aspect of the regulatory regime.

While quantitative indicators provide a direct basis for the benchmarking comparisons, there is normally only a narrow range of indicators suitable for direct quantitative measurement. Also, the range of such indicators is further limited by the need to ensure comparability of the results. In contrast, while qualitative indicators are usually less precise and require close attention to ensure consistent application and analysis, they can capture more broadly-based sources of costs, such as the costs imposed by the approach of regulators to the administration and enforcement of regulation. Accordingly, a mix of quantitative and qualitative indicators is required in order to provide a reasonable balance of precision and coverage in the study.

In selecting the indicators used in this study, the Commission was mindful of the following principles:

- *relevance* — the indicators should illuminate an important aspect of the burden of regulation on business and also be relevant to the possible policy responses for reducing unnecessary burdens
- *ease of interpretation* — wherever possible, the indicators should be easy to interpret and it should be apparent what they are being used to measure
- *ease of data collection* — the data required for an indicator should be obtainable at a reasonable cost or already be available. Where gaps or limitations in the data exist, they should not materially undermine the usefulness of the indicator(s) reliant on that data
- *timeliness* — the indicators should be based on a reference period as close to the present as possible
- *comparability* — the indicators should facilitate meaningful comparisons between jurisdictions
- *robustness* — the indicators should be conducive to producing comparable benchmarking results over time.

The indicators used in this study have to be tailored to the specific aspects of the regulatory burden being benchmarked. Further, the indicators have been developed in light of the feedback received from stakeholders through their submissions and the Commission's consultation process.

Sourcing the data

In the context of food safety regulation, the Blair Review (1998) noted the difficulty in quantifying the cost of business regulation aside from the fees and charges specified by the regulations or regulators. Other studies examining regulatory

compliance costs (such as PC 2004, PC 2008c, Allen Consulting Group 2007, KPMG 2007 and VCEC 2007[1]) have also experienced difficulty in quantifying the compliance costs incurred by business. Some of the reasons for the difficulties experienced in these studies include:

- businesses often do not have the systems to collect the relevant data at the required level of disaggregation in order to inform estimates of compliance costs for individual regulatory requirements
  - even when businesses have such systems, difficulties arise in attributing costs to particular regulations
- even where compliance costs can be reliably estimated, non-complying businesses do not incur those costs
- difficulty in identifying the population of businesses that are affected by the regulation(s) in question, and identifying a representative sample of businesses within that population to survey
- variability of business characteristics affects estimates of compliance costs. For example, a business with high staff turnover is likely to face higher staff training costs than a business with lower turnover
- given a business' concern for its reputation can cause it to act in a manner at least consistent with, if not beyond, the minimum requirements of food safety regulation,[2] it can be difficult to determine the incremental cost to business of the regulation.

In addition to these challenges, the Commission was also mindful that this study should minimise the burden on those businesses and regulators supplying data — especially given the considerable resources they have expended in the supply of information to a number of other studies into food safety in recent times. In order to minimise the burden on businesses and regulators, the Commission sought to source the data used in this study from publicly-available sources wherever possible. For those instances where public data were not available, and direct indicators of the burden on business were required, the Commission worked with organisations that had expressed an interest in providing to the benchmarking study, or had recently collected such data. The Commission also sought information from governments on their administration and enforcement practices through a survey of local councils

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[1] In response to these challenges, the VCEC (2007) derived its aggregate costs of regulation to the economy from a combination of information from regulators, a limited survey of businesses (29 respondents) and findings from previous studies (such as Allen Consulting Group 2002).

[2] For example, Jin and Leslie (2004) found that chain restaurants in Los Angeles have stronger incentives to maintain hygiene than independent restaurants, because a failure by one damages the reputation of the chain (cited in VCEC 2007).

and national, state and territory regulators. Appendix B contains further details of the Commission's approach to collecting data.

This approach reflects the lessons from the 'cost of business registrations' report (PC 2008c), namely:

- using a wide round of stakeholder consultation to help ensure surveys and other information gathering activities are well constructed and appropriately targeted
- that data should be sought from the source best placed to provide it. For example, businesses complying with particular requirements would be best placed to know the costs of complying with those requirements. Similarly, regulators should have the best knowledge of the regulations they enforce and administer, and how they undertake their responsibilities
- the importance of working closely with those supplying data in order to achieve an acceptable response rate and quality of data.

Controlling for the objectives of the regulation

All of the regulations covered in this study include food safety among their objectives. However, certain regulations also include other objectives, such as the 'industry development' objectives contained in some of the primary production acts. As a result, it can be difficult in some instances to determine whether it is a 'food safety requirement' that is being considered when comparing certain regulations and the burden they impose on business. Some of this difficulty can be overcome by focusing the benchmarking on individual requirements within the regulations that are obviously related to food safety considerations. However, there are some cases where a requirement might be serving more than one objective. In such cases, close liaison with regulators and those supplying the data has ensured that appropriate caveats have been included in the report in order to put the benchmarking outcomes in the proper context.

Controlling for business specific factors

Factors unique to a given business can affect that business' estimate of the burden imposed by a given regulatory requirement (PC 2008c). As part of the data quality assurance processes used in this study, any anomalies in business data were investigated and, where applicable, caveats noted in the report. Appendix B contains further details of the Commission's data quality assurance processes.

Interpreting the benchmarking results

Even though the Commission has been careful to design its data requirements and benchmarking indicators to minimise the limitations of previous benchmarking studies, not all of the challenges referred to above can be completely overcome. This results in data sets that are subject to caveats and qualifications. Further, the indicators initially selected may not illustrate the regulatory burden as well as was first thought. The 'Cutting Red Tape' report (OECD 2007a) provides an example of the difficulties that can be experienced in this regard — out of an original 17 indicators, only eight were deemed appropriate for comparative analysis.

The interpretation of the benchmarking results can become awkward in light of any caveats and qualifications on the benchmarking data. This in turn presents another challenge for the use of the benchmarking results for policy purposes.

The Commission has sought to minimise the significance of these challenges, by:

- basing its data specifications and approach to data collection on a thorough understanding of the underlying regulatory requirements
- consulting with regulators to clarify any aspects of the regulations and requirements on business that may affect the data collected
- not reporting data or using indicators where their comparability has been substantially compromised
- providing suitably detailed caveats to the benchmarking indicators where appropriate.

Realising the potential benefits from benchmarking

The benefits potentially available from benchmarking the burdens arising from food safety regulation will depend, in part, on the extent to which the jurisdictions investigate, and act upon, the differences identified in the study and share relevant information that may contribute to more effective and less burdensome regulatory regimes.

4.4 Process for selecting areas of food safety regulation to benchmark

It is not feasible to benchmark all aspects of a given area of regulation, such as food safety regulation. Rather, as foreshadowed in the Issues Paper for this study (PC 2009), the Commission developed criteria (box 4.4) to be applied to the

concerns raised by stakeholders (section 4.5) in order to select the regulations and administration and enforcement practices to be benchmarked (section 4.6).

Box 4.4 **Criteria for selecting areas of food safety regulation to benchmark**

1. There are differences in either the regulation itself or in the administration/ enforcement of that regulation.
2. The benchmarking analysis of the regulation or its enforcement/administration is likely to inform either current or proposed reforms.
3. There appears to be a difference among jurisdictions in the cost the regulation or its enforcement/administration imposes on business.
4. Where there are differences in the costs imposed by regulations, those differences do not appear to be matched by a difference in the effectiveness of those regulations.
5. It appears feasible to construct indicators which will enable informative benchmarking across jurisdictions, wherever possible based on existing data.

4.5 Regulatory concerns raised in submissions and during consultation

Through submissions and stakeholder consultations, the Commission was made aware of various areas of food safety regulation where differences existed among Australian jurisdictions (and between Australia and New Zealand) and which imposed significant burdens on businesses. A number of participants pointed out that the burden of food safety regulation varies with the nature of the business — even for common regulatory requirements. For example, the cost of cleaning an older restaurant in order to comply with hygiene requirements is likely to be higher than for cleaning a newer restaurant.

The concerns raised by participants in relation to the burdens imposed by food safety regulation can be classified into three groups:

1. the requirements under principal Food Acts (including the regulations and food standards issued under these acts), as well as the administration and enforcement of those acts (and regulations and standards)
2. the requirements under the acts (and regulations) for primary production and processing activities, as well as the administration and enforcement of those acts (and regulations)

3. the requirements contained in 'other food safety regulation', as well as the administration and enforcement of those acts and regulations.

The principal Food Acts and delegated regulations

Regulatory requirements

Two specific concerns were repeatedly raised with the Commission as being burdensome or a significant point of difference in the regulatory burden across jurisdictions:

1. the requirement in Victoria and Queensland for a business to employ a food safety supervisor (FSS)
2. the requirement for most Victorian food businesses to have a Food Safety Plan (FSP).[3]

The concerns with the FSS requirements of Victoria and Queensland centred on the costs of training these staff. In the case of Queensland, these training costs are said to be compounded by the uncertainty over how local councils interpret and apply the requirement for the FSS to be 'reasonably available'. On the other hand, many of the concerns raised regarding Victoria's regime of 'FSPs for all' were based on the opinion that the FSPs had not produced any material improvement in Victoria's food safety outcomes, or at least not to an extent that justified the costs.[4] In comparing the requirements of an FSS and an FSP, a number of participants considered the FSPs to be more a burdensome requirement than the requirement for an FSS.

Most Australian jurisdictions are currently in the process of implementing Standard 3.2.1 (Food Safety Programs) of the Australia New Zealand Food Standards Code (ANZFS Code) for specific sectors. However, despite this requirement being in the implementation phase, a number of matters were brought to the Commission's attention, including:

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[3] The Food Amendment (Regulation Reform) Bill 2009 (which was passed on 28 July 2009) reduced the number of Victorian businesses required to prepare FSPs. For example, most low risk businesses (such as such those dealing with pre-packaged food that requires temperature control) will no longer require an FSP.

[4] These comments did not reflect the current reforms to FSP requirements being implemented in Victoria — these reforms are aimed at reducing the regulatory burden and are discussed further detail in chapter 6.

- differences in how the FSPs will be audited — including differences in who may complete the audits (local councils, state/territory-level regulator and/or third party auditors, depending on the jurisdiction) and the cost of the audits
- the cost of preparing the plans
- the differing timelines and approaches of the jurisdictions for their implementation of the requirements.

The divergence of the Food Acts of the Australian jurisdictions from the Model Food Act is a notable difference in regulatory regimes. The notification requirement for the suspected intentional contamination of food within Queensland's Food Act was raised regularly as being both unique among Australian jurisdictions and also a possible source of significant cost to Queensland food businesses.

Some of the differences that were raised less frequently than those issues above include:

- differences in treatment of dietary substances by Australia and New Zealand — for example, due to the differences in regulations, some products cannot legally be produced in Australia but can be produced in New Zealand
- differences across the jurisdictions in their interpretation of the Standard 1.5.1 (Novel Foods) of the ANZFS Code
- the burden on businesses arising from food labelling requirements (subs. 6 and 7)
- having to provide the same or similar information to a number of regulators and/or government departments in the event of a food recall (sub. 10).

Administration and enforcement

The administration and enforcement practices of New Zealand's national regulator (the New Zealand Food Safety Authority (NZFSA)), Australian state and territory regulators and local councils (Australia) and territorial authorities (New Zealand) were raised as concerns by many participants. The concerns raised include:

- the differing inspection and audit regimes of local councils/territorial authorities, including those within the same jurisdiction (subs. 7 and 10)
- the overlap and duplication of inspection requirements (sub. 10) — for example, butchers being inspected by the local council and then being audited (or inspected) on food safety matters by other regulators
- inconsistent or invalid interpretation of regulatory requirements by regulators and their inspectors (subs. 3 and 10)

- the consequences for a breach of the regulatory requirements — a number of participants offered the opinion that the New South Wales approach of 'name and shame' was unduly burdensome.

A number of participants considered there to be material differences in the requirements to be met by new food businesses before they can commence operations. In addition to this concern, the duplication of requirements for a new food business was a concern raised by Woolworths:

> … some Local Councils in Tasmania count each department within a supermarket (eg butcher, bakery, deli) as separate food businesses requiring separate registration and are invoiced separately. (sub. 10, p. 5)

Clubs Australia considered:

> The greatest compliance burdens for clubs are the inspection and administration fees charged by local councils. These fees vary considerably and councils determine the fees depending on different features of the food businesses in their area. (sub. 5, p.3)

Fees were also a concern raised by a number of other participants, many of whom noted that this was a greater issue in those states providing discretion to local councils regarding the fees they charge. Further, where the ability of a council to charge a fee was dependent upon that council undertaking some action, for example a routine inspection, some participants suggested there has been increase in those 'fee justifying' activities thereby compounding the cost of the fee.

A number of participants offered possible causes for these differences in administration and enforcement practices, including:

- the difficulties experienced by the regulators (including local councils and territorial authorities) in attracting and retaining staff
- the differing geographies of the jurisdictions. For example, the size of Western Australia may warrant a more decentralised approach compared to that taken in a more compact jurisdiction, such as Tasmania or the ACT.

Primary production and processing activities

Regulatory requirements

Participants raised concerns about the nature of regulatory requirements for primary production activities in general. For example, some small businesses cited a lack a clarity regarding which of their current (and potential) business activities fall within the ambit of the primary production regulator and which fall within that of the local

council or Department of Health (or equivalent). A lack of consistency in the legislation and standards for food safety in primary production and processing activities was another area of concern for stakeholders. The concern was expressed in relation to both those industries where Food Standards Australia New Zealand (FSANZ) has established a standard within the ANZFS Code (such as seafood) and those industries where such a standard is yet to be established (such as poultry and eggs). For example, some of the concerns raised in regard to egg production, included:

- the thresholds of production at which regulation comes into effect
- differing requirements for the pasteurisation of egg pulp
- differing requirements for the stamping and/or labelling of eggs.

The preparation of FSPs (where they are required) was also an area of particular concern for participants. A perceived lack of clarity in the requirements prompted some business participants to engage a consultant to prepare their FSPs in order to gain some assurance that they were compliant with the requirements. Other business participants indicated that their concern was not so much with the clarity of the requirements, but rather the burden of the number of programs (both government and private sector) they need to comply with and the different ways in which compliance must be demonstrated.

Administration and enforcement

One of the most common concerns raised by participants in relation to the regulation of primary production and processing activities was the overall cost of demonstrating compliance with the regulatory requirements. While these concerns were, in part, related to the direct costs of audits/inspections and licensing requirements (including fees and charges), a number of participants also identified inconsistencies across jurisdictions. For example, some jurisdictions do not charge any audit/inspection fees, while those jurisdictions that do charge fees, do so on a range of bases (including cost recovery). In respect to New South Wales, the NSW Food Authority noted:

> The current structure of licence fees reflects the arrangements of earlier commodity-based primary production regulators. Inconsistent licence fees between industries represent an inequitable sharing of the cost of food regulation. As a result, the fees charged for regulatory activities do not maximise equity or efficiency. (sub. 4, p. 6)

A number of New Zealand participants felt that New Zealand businesses are held to higher scrutiny than their Australian counterparts. They attributed this to the fact that the majority of New Zealand's primary produce is exported and, as a result, the

NZFSA's regulatory oversight is simultaneously directed at compliance with domestic food safety requirements along with ensuring compliance with overseas standards/requirements and preserving 'brand New Zealand'. To further illustrate the extent of this issue, some New Zealand producers said they had difficulty establishing which of the regulator's requirements were directed at 'domestic compliance' and which are directed at 'export compliance' — this was particularly an issue for those producers for whom it was cost effective to distinguish between products destined for domestic consumption and those produced for overseas markets, and having those products regulated accordingly.

Other food safety regulation: imports, exports and chemical residues

The regulation of imported food, food for export and agricultural and veterinary chemicals,[5] which lie outside of the core food and primary production regulation, were often also cited as posing concerns to businesses.

Imported food

The most common concern raised by participants was that imported food and domestically provided food are not subject to the same regulations and/or the same level of regulatory scrutiny.[6] For example, it was contended that not all food entering Australia or New Zealand was tested for compliance with all the standards that domestic producers must meet (that is, some regulations are not applied). Also, where such testing is undertaken by the Australian Quarantine and Inspection Service (AQIS) and NZFSA, it is not to the same extent that domestically produced food is tested (that is, differing levels of regulatory scrutiny are applied). Some participants were also concerned about the level of fees charged in relation to the regulation of imported food and the length of time taken for clearance.

Although there is widespread concern with 'control of imports', some of the regulatory burdens attributed to food safety may in fact relate to other regulatory concerns:

> … legitimate quarantine/biosecurity restrictions … are often misinterpreted as food safety restrictions. (NZFSA, sub. 2, p. 11)

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5 Although Maximum Residue Limits (MRLs) are listed in the ANZFS Code, they have been included in this category given they are one aspect of the concerns raised in respect to agricultural and veterinary chemicals.

6 Appendix C (section C.1) provides further detail on the regulation of imported food in Australia and New Zealand — including changes coming into effect in New Zealand during 2008-09.

Food for export

Both Australian and New Zealand participants raised concerns over the duplication and overlap of export regulations with other food safety regulation applying to primary production and processing activities. More specifically, these concerns included:

- the time and costs associated with multiple audits/inspections — some being for 'domestic compliance' and some being for 'export compliance' (this was particularly a concern in Australia)
- the burdens associated with complying with the two sets of regulations — domestic and export — especially given the differences between the two.

On the other hand, some producers in New Zealand questioned why the more demanding requirements of export countries were imposed on all domestic production, thereby imposing higher costs than necessary for some primary food producers.

Many viewed the regulations applying to exported food to be more complex and onerous than those applying to domestic primary production and processing activities. However, as noted by the Northern Territory Horticultural Association, some of the factors contributing to the complexity of export regulations is due to foreign, rather than domestic, governments:

> Variation in national standards, for example between Australian requirements and Eurogap [a commercial standard applied by many European importers] requirements, add[s] an additional layer of difficulty to the challenging process of exporting fruit and vegetables. (sub. 9, p. 2)

More generally, concerns were also raised about the high level of fees charged by AQIS and the NZFSA and the level of expertise of the 'enforcement officers'. For example, officers undertaking duties in relation to industries with which they were neither familiar nor trained.

Agricultural and veterinary chemicals — Maximum residue limits

Both the Australian Hydroponic & Greenhouse Association and the Northern Territory Horticultural Association raised concerns in relation to the regulation of agricultural and veterinary chemicals:

> Currently permits issued by the [Australian Pesticides and Veterinary Medicines Authority (APVMA)] for a new use have an [Maximum Residue Limit (MRL)] set following a rigorous process. The approved use is subsequently gazetted. The MRL then has to be adopted into the FSANZ Food Standard Code for the MRL to be officially recognized. This also involves a rigorous process independent of that

> conducted by the APVMA, which can delay the adoption of an MRL for up to 18 months. This makes many permits unavailable to growers, sometimes for the entire approval period of the permit. (sub. 13, p.1)
>
> The chemical permit application process is also unwieldy… for example, growers of Asian vegetables which are not commonly listed for chemical use must apply separately for each chemical and each crop. (sub. 9, p. 2)

A number of participants raised additional concerns about the opportunity costs to both chemical producers and primary producers due to chemicals not being produced on account of the extended approval times and associated compliance costs.

Choice, on the other hand, raised concerns about how MRLs are enforced once they have been established:

> There is no consistent enforcement program across the states and territories that assesses the level of compliance with the MRLs in both imported and locally produced foods. The level of monitoring varies from state to state.
>
> Australia also imports produce, some of which comes from countries with a less stringent approach to agricultural chemicals. Some produce may be contaminated by pesticides that aren't permitted here or contain pesticide residues at levels that exceed the Australian MRL …
>
> The Australian Quarantine and Inspection Service is responsible for ensuring that imports comply with the Food Standards Code but their testing regime means only a small minority of fruit and vegetable imports are tested for pesticide residues. (sub. 7, p. 7)

Costs from commercial requirements

Various businesses complained about the costs they face on account of commercial requirements (box 4.5). Their concerns lay not only with the costs of these commercial requirements, but also with the costs arising due to the overlap with, and duplication of, commercial requirements with government food safety regulation.

Box 4.5 Participants' comments on the costs imposed by commercial requirements with respect to food safety and food quality

NSW Food Authority:

> In its dealings with food businesses, the Authority often receives questions in relation to food industry quality assurance audits and why the results of the audits conducted by government regulators cannot be used by customers such as major food retailers in relation to a supplier's food safety performance.
>
> It is clear that a large proportion of the audit burden for the food industry is not related to legislated requirements (Acts and Regulations), but rather to industry-imposed quality assurance programs which have a different scope than food safety compliance audits. The quality assurance programs tend to focus more on individual customer and consumer requirements, with varying levels of attention placed on regulatory food safety requirements. This often leads to audit duplication because major food retailers and other entities do not wish to share audit data with potential market competitors. (sub. 4, p. 1–2)

Northern Territory Horticultural Association:

> Quality assurance systems are becoming increasingly complicated and costly. Previously Freshcare accreditation [a private sector quality assurance program] would allow a grower to sell produce to most retailers and wholesalers. However, Freshcare is currently being superseded by much more stringent systems including HACCP (Hazard Analysis and Critical Control Points) and WQA (Woolworths Quality Assurance). This means that growers are not only investing increasing amounts of time and money into attaining the current standard but they often have to undertake several quality assurance programs in order to provide produce to several different suppliers each with their own unique quality assurance program. (sub. 9, p.1)

Biocontrol Solutions:

> … we are continually seeing the "Goal Posts" moved as our two major supermarkets jostle to see who can have the most prescriptive set of requirements for their suppliers. A grower supplying both chains is required to have separate Q/A manuals and undergo separate audits to achieve the same result (time consuming, costly and unnecessary). (sub. 14)

New Zealand Food Safety Authority:

> Where food safety requirements are included in private sector standards, they may not be proportionate to any food safety risk the product may actually pose, or may not be equivalent to requirements set under regulatory standards. The lack of equivalence between government and private food safety standards can present a burdensome array of duplicative verification checks by multiple agents. (sub. 2, p. 8)

Some participants considered that while aspects of the commercial requirements are directed at food safety concerns, their overriding focus was 'food quality'. Even so, the Food Regulation Implementation Sub Committee (ISC) cautioned:

> Consideration should also be given to:
>
> Compliance costs associated with meeting standards/legislative requirements, with recognition of costs associated with meeting existing industry and commercial

> arrangements, including information already collected as a cost of doing business. Examples are … the requirements imposed by the major supermarkets. Caution must be exercised when examining the matter of compliance cost with a clear distinction being made between what are private benefits and what are public benefits. (sub 12, p. 5)

ISC's caution is well founded as separating the burdens posed from such commercial arrangements from those of a regulatory nature can be problematic, especially where the commercial arrangements are based on some aspect of the regulatory requirements. For example:

> Freshzest subsequently received a residue violation from Woolworths because [Woolworth's] random testing had detected a residue of the [pesticide] of 0.8 ppm. This use had not been adopted into the Food Standard Codes by FSANZ and as such there was no legal residue limit. Freshzest produce was suspended from trade for a period of time costing them several tens of thousands of dollars. (sub. 14, p.2)

The burdens arising from commercial requirements lie beyond the scope of this study as they are not the result of government regulation. However, there is an acknowledgement of the issues on the part of governments and government forums (such as ISC) and indications of a preparedness to engage in dialogue regarding the interplay between commercial requirements and government regulation.

4.6 Areas of food safety regulation selected for benchmarking

In applying the criteria (box 4.4) to the concerns outlined in section 4.5, it became clear that only one of those concerns did not satisfy the criteria, namely the registration requirements for new businesses under the Food Acts (sub. 10) — the Commission's earlier benchmarking report (PC 2008c) examined these costs and found the cost for the registration of a food business were generally $600 or less. Further, for the 'typical food business', there was found to be no significant differences in registration costs across Australian jurisdictions.

Accordingly, this report does not benchmark the costs arising for new businesses from the 'registration' requirements contained in the Food Acts. However, this report does consider the costs of registration for businesses required to do so under primary production and processing regulations (which were not covered in the Commission's earlier report).

As the costs of registration for new businesses were not significant, the burdens arising from the duplication of these requirements (raised by Woolworths in sub. 10) have not been explored in this report. Rather, the broader issue of

duplicated regulatory oversight, and indicators of the overall burdens this duplication creates, have been addressed in chapter 8.

A number of the concerns raised by participants form the basis of chapters within the report. For example, the concerns raised regarding the take up of the Model Food Act provisions are explored in chapter 5. Other concerns addressed directly within chapters include: food recalls (chapter 5); food safety supervisors (chapter 6); food safety plans (chapter 6); fees charged under the Food Act (chapters 7 and 8); enforcement of regulation under the Food Acts and primary production and processing acts (chapters 7 and 8); fees charged under the primary production and processing acts (chapters 9–12);[7] inconsistency and lack of clarity in primary production and processing regulations (chapters 9–12); agricultural and veterinary chemicals (Maximum Residue Limits) (chapter 13); imported and exported food (chapter 14).

Some of the other concerns regarding food safety regulation, such as the regulators' interpretations of Standard 1.5.1 (Novel Foods), are not addressed directly in the report but the issues they raise are considered in a broader context. In the case of the interpretation of Standard 1.5.1, the key issues relate to the consistency of regulatory interpretations and, in turn, the measures regulators have in place to promote such consistency. These issues are considered in chapters 7 and 8. Similarly, the issues underpinning the concerns regarding labelling and dietary substances are examined in chapter 8, and, to a lesser extent, in chapters 9 and 10 for those instances where such requirements apply to primary production and processing activities.

[7] Chapter 8 also contains details of the aggregate fees charged by regulators and the bases on which those fees are determined.