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Regulation of Australian Agriculture  
Productivity Commission  
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Dear Commissioners

### **Introduction**

The Pastoralists and Graziers Association of WA (Inc) (PGA) is a non-profit industry organisation established in 1907, which represents primary producers in both the pastoral and agricultural regions in Western Australia.

The PGA represents Western Australian meat, wool and grain producers who believe in the benefits of competition and the reduction of government regulation within their industry.

The PGA appreciates the opportunity to provide its views and comment on the Productivity Commission Issues Paper on the Regulation of Australian Agriculture.

The PGA believes that the fundamental mechanism that underpins expanding agricultural production is demand, followed by the ability to supply this demand at a profit.

Australia's relatively small domestic market means that 60 per cent (in volume) of total agricultural production is exported (The Prime Minister's Science, Engineering and Innovation Council 2010).

Western Australia is particularly export exposed.  
About 80% of WA wheat is exported - predominantly to Asia and the Middle East - generating \$2 billion in annual export earnings for the state.

It is therefore imperative that government regulation is cost effective and must not act as an impediment to market access by increasing compliance costs that would reduce the competitive position of Western Australian farmers by comparison with their global counterparts.

### **Land Use Planning**

The current building standards within the Building Code of Australia (BCA) require onerous fire safety requirements for farm buildings that will have an impact on the cost of construction.

This is particularly apparent in areas where deficient water infrastructure prevents economically viable BCA compliance options.

These requirements would mean that large farm sheds would have to comply with the sort of fire safety measures usually found in city warehouses.

These are usually a ring main to supply fire-fighting water fed from a tank, pressurized by a diesel-powered pump,

Considering that some, if not most farm water supplies are from roof top collection, the appropriateness of these standards should be reconsidered from the point of view of a risk profile that considers use, exposure and location.

### **Pastoral Leases**

Diversification of pastoral leases in Western Australia is unnecessarily restricted by the terms and conditions of permitted activities.

Although widely referred to as diversification permits, in reality they are not. According to the WA Department of Lands (source - [www.lands.wa.gov.au/Pastoral-Leases/Permits-to-Diversify/Pages/default.aspx](http://www.lands.wa.gov.au/Pastoral-Leases/Permits-to-Diversify/Pages/default.aspx)), permits are divided into pastoral use and non-pastoral use.

These uses are;

- ✓ Sowing of non-indigenous pastures;
- ✓ Agricultural uses of land under a lease, but only if the proposed use is reasonably related to the pastoral use of the land;
- ✓ Non-pastoral use of enclosed and improved land;

and may include a permit for the sale of any produce of the pasture or activity permitted.

- ✓ Keeping or selling prohibited stock. Prohibited stock are defined as being those animals not authorized. Authorized stock is sheep, goats, horses and cattle, and stock kept for domestic or household purposes (presumably pigs or poultry, etc).
- ✓ Low-key pastoral-based tourism, but only if it is satisfied that the activities will be purely supplementary to pastoral activities on the land;

Permits to clear land can also be issued, but if it involves clearing a portion of land of greater than one hectare, another clearing permit is required from the Department of Environment and Conservation.

Further, these permits are not transferable upon sale of the lease, and have to be renewed by the subsequent owner. If these permits are not recognized as a tradeable private property right, the true value of these activities as an asset may never be fully realized.

At a recent conference on Rangelands Sustainable Economic Development in WA, the WA Minister for Regional Development; Lands referred to the diversification permit process as horrendous.

In the PGA's view, not only is the process horrendous, but the language is ponderous. Only a true bureaucrat could describe prohibited as the opposite of authorized.

Further, it has been the PGA's recent experience during the 2015 pastoral lease renewal process that the biggest implication on the security of tenure of these leases, are the actions of government itself.

During this process, the state government attempted to significantly alter the terms of the lease despite a previous Minister of Lands having essentially made an "Offer and Acceptance Contract" to lessees.

Legal counsel the PGA received at the time from a solicitor experienced in tenure renewals said the pastoral leases renewal process was treated fundamentally differently to the renewal of mining and exploration tenements.

Typically, the mining and oil and gas industries receive automatic approval to renew their leases and licences.

### **Environmental Protection**

In February 2014, the PGA commented on the *EPBC Act* nomination to list as a key threatening process, the proliferation, placement and management of artificial watering points in the arid and semi-arid Australian rangelands.

It is difficult to envisage any future development of the beef industry in Northern Australia without artificial watering points.

Paper exercises such as this only undermine confidence in the future of the northern beef industry.

Further, the PGA notes that whilst this consultation document sought to hold responsible artificial watering points as a key threatening process, at the same time the Commonwealth Department of the Prime Minister and Cabinet formed a North Australia Taskforce to deliver on the Abbott Government's election commitment of a White Paper on Developing Northern Australia. This had the result that whilst one arm of government was looking to develop the north of Australia, another arm was seeking to list a key component of the pastoral industry as a threatening process.

If efficiency and effectiveness of regulation is ever to be achieved, government departments need to talk to each other.

The WA *Environmental Protection Act 1986* Part 5 Division 2 Clearing of Native Vegetation contains legislated environmental regulation (in addition to its associated regulation *Environmental Protection (Clearing of Native Vegetation) Regulations 2004*) that impinges on farming operations and activities. For example;

- ✓ Native vegetation includes dead vegetation.
- ✓ Involvement in a contravention includes aiding, abetting, and counselling.

The associated regulations additionally protect native vegetation in;

- ✓ Protected wetlands as defined in the *Environmental Protection (South West Agriculture Zone Wetlands) Policy 1988*.

This policy does state that if the agreement of the owner cannot be obtained it is not to record the wetland. However, this policy is a gazetted instrument and could be changed without legislation.

Further protection is accorded to;

- ✓ A wetland under the Ramsar Convention.

- ✓ A wetland in the Directory of Important Wetlands in Australia.
- ✓ A threatened ecological community, as determined by the Minister and referred to in a list maintained by the administration of the *Conservation and Land Management Act 1984*.
- ✓ Environmentally sensitive areas, as declared by the Minister to be an area of the State, or an area of the State of a specified area or class, as specified in a notice, amongst others as well.

Some landowners and landholders may be unaware of some or all of these restrictions and could unwittingly break the law.

Although there is an office of Appeals Convenor, the Act says that it shall act according to equity, good conscience and the substantial merits of the case, without regard to technicalities or legal forms, shall not be bound by any rules of evidence and may conduct its inquiries in whatever manner it considers appropriate.

Further, an appeals committee shall not in reporting to the Minister under subsection (3) make any recommendation that conflicts with any approved policy or with any standard prescribed by or under this Act.

In other words, the Appeals Convenor appears to be restrained from considering the common law legal merits of an appeal.

In the PGA's view, the Act and its regulations are pernicious.

### **Access to Agricultural Technologies**

According to the Agricultural Biotechnology Council of Australia, it costs US\$136 million to bring a new GM crop to market, most of which goes on gathering the data required by the regulatory system.

Considering that the World Health Organization says that “no effects on human health have been shown as a result of the consumption of such (GM) foods”, and the European Commission has said “that biotechnology is no more risky than conventional plant breeding technologies”, the Commonwealth Government should actively reduce the costs of regulating GM crops to remove disincentives to innovation in plant breeding.

Under the *GM Crops Free Areas Act 2003* there has been a freeze on the commercial cultivation of GM crops in Western Australia.

Under this legislation, the Western Australian Minister for Agriculture and Food has powers to grant exemption orders to allow commercial cultivation of specified GM crops in specified areas of Western Australia.

In 2009, commercial plantings of GM cotton were allowed in the Ord River Irrigation Area, and in 2010, commercial plantings of GM canola were permitted throughout Western Australia.

However, the Minister may, by order published in the Government Gazette, revoke the exemption.

The original purpose of the *GM Crop Free Areas Act* was to protect the State's markets and its good reputation before adequate segregation and identity preservation systems were put in place.

Planting of GM canola in WA has increased each year since 2010. The state's leading grain logistics company CBH has no difficulties segregating GM and non-GM canola at its receival points, silos, train sets, grain centres and port terminals.

GM crops and non-GM crops are being grown alongside one another all over the world.

In 2014, the Supreme Court of Western Australia (*MARSH v BAXTER* [2014] WASC 187) found that there was no evidence of any physical dangers, toxicity or risks of harm to persons, animals or property by reason of contact with GM canola.

Consequently, this Act serves to threaten access to GM technologies that allow farmers to grow the crops most suited to their farm cropping system.

### **Access to Agricultural and Veterinary Chemicals**

In August 2014, the PGA commented on draft policy options to reduce national security risks posed by 84 chemicals that can be used to make toxic weapons. These options were released by the Commonwealth Department of the Attorney General.

In the options paper, end users were the largest single grouping of businesses or organizations using or handling these toxic chemicals, and farmers represented over half the total end users.

In fact, the usage figure for farmers was likely to be greater because the Industrial Chemicals subset contained many compounds commonly used for fumigating grain.

There are also reasonable differences of opinion as to the lethality of toxic chemicals.

The US Government's Agency for Toxic Substances and Disease Registry (ATSDR) lists arsenic, lead and mercury as its top three toxic substances. The ATSDR has assisted with responding to terrorism incidents, including the 2001 anthrax attacks, so its listing can be considered to have some authority.

None of these elemental metals was listed as part of the 84 chemicals, although some of their compounds were.

In fact the Consultation RIS confused toxicity with lethality.

Lethality or deadliness is how capable something is of causing death. Most often it is used when referring to chemical weapons, biological weapons, or their chemical components. The use of this term denotes the ability of these weapons to kill, but there is also the possibility that they may not kill.

Clearly, end users such as farmers would be significantly affected by any expansion or extension of the existing National Code of Practice because of this quasi-regulatory process.

## Water

The current water legislation in Western Australia is the *Rights in Water and Irrigation Act 1914* (RiWA). At present a new Act, the Water Resources Management Bill is being formulated.

The PGA has concerns about the removal of exemptions and license provisions. The RiWA Act currently exempts stock and domestic water and garden bores from licensing, and this exemption for stock and domestic water needs to be maintained in the new legislation to ensure that primary producers retain access to water to run their businesses without additional cost or regulation. Such a change would fail any no disadvantage test.

Access to domestic water is enshrined in Australian common law and the UN recognises this access as a basic human right.

Other exemptions in the RiWA Act that affect primary producers are the rights to use;

- ✓ spring water rising on their property,
- ✓ water in wetlands wholly on their property,
- ✓ water in drains, overland flows or stormwater runoff.

These exemptions need to remain in the new legislation and the ability of statutory water allocations contained in consumptive pools should not override these exemptions.

Riparian water rights, that is the right to take water from rivers and streams to which the property owner has direct access need to remain in the new legislation. The amount of water available under this provision is decreasing because the right is lost when subdivision occurs on properties with river and stream access.

Licensing regimes in Western Australia do not follow the provisions of the National Water Initiative as no perpetual licenses have been issued in this state.

This water allocation is a property right and the fact that there is no continuity of access affects the owner's ability to forward plan or borrow funds for expansion.

PGA believes that environmental water provision should be included in the consumptive pool arrangements so that reductions in water allocations affect all water users.

Open water trading provisions need to be included in the new legislation to ensure that if water allocations are reduced due to lower water availability then all water users have the ability to buy extra water to carry out their activities. This provision is available to Eastern States producers.

Another concern is the ability to remove rights to water by regulation, which can be introduced easily, the alterations being tabled in parliament for two weeks and if no objection is received, the regulations come into force.

By contrast, if the alterations are contained in the Bill then the provisions will need to be debated by politicians.

## **Transport**

In Western Australia, roads are owned by Main Roads WA or local government authorities.

Main Roads WA receives federal funding to maintain those state highways that are part of the National Highways system.

In the agricultural areas of Western Australia movement of livestock, grain harvests, fertilizer and agricultural lime sands starts and finishes on local roads.

Local government authorities are not always adequately resourced to operate these roads, and preservation of the road to avoid maintenance expenditure is often a priority over their use for economic activities.

Consequently, the operation of high capacity vehicles is sometimes restricted.

## **Animal Welfare**

The PGA notes that animal welfare in Western Australian agriculture is most often associated with the export of livestock to overseas destinations.

The system that controls the export of livestock is a multi-faceted licensing system.

It includes holding a valid licence granted by the Secretary of the administering department, in this case the Commonwealth Department of Agriculture.

The Secretary cannot grant a licence unless he or she is satisfied that the applicant 'is competent to hold the licence and is (and is likely to continue to be) able to comply with licence conditions'. The Secretary can announce any licensing conditions he or she considers appropriate, provided that they are not inconsistent with the regulations. The exporter must comply with any conditions imposed on the licence. An export licence holder who intentionally or recklessly contravenes a licence condition commits an offence. The Secretary may also decide to cancel, suspend or not renew the licence in the event of non-compliance with conditions.

A licence holder must apply for a permit to ship a particular consignment of animals. The Secretary may grant a permit to export after he or she has considered the applicant's compliance with licence conditions. An exporter must submit a Notice of Intention to export (NOI) and a Consignment Risk Management Program (CRMP) to the Secretary. The NOI must detail the type of animals to be exported, from where the animals will be sourced and where they will be kept while waiting for permission to leave for loading. The dates of transport, departure and arrival must also be included.

The animals must then be inspected by a veterinarian and a health certificate must be issued to the effect that an authorised officer has inspected the animals portside and is satisfied that they meet the standards of the importing country. If the health certificate is not issued, the animals cannot be exported. After the health certificate is issued, the exporter must apply for permission to

leave for loading. Permission will be granted if the animals remain fit to travel. Once these conditions have been met, the Secretary may grant an export permit.

At any point, the would-be exporter could fail to meet any one of these conditions.

In addition, it is a licence condition that the holder of a livestock export licence may only export livestock in accordance with the Australian Standard for Export of Livestock (ASEL).

ASEL provide animal welfare standards that must be met at each stage of the live-export process. They are prescribed by the government. These standards expressly incorporate the Australian Position Statement on Live Export and state based animal welfare legislation. Therefore, an exporter must comply with the ASEL if they are to retain their licence.

ASEL apply to the sourcing and on-farm preparation of livestock, the land transport of livestock, the management of livestock in registered premises, vessel preparation and loading, and the onboard management of livestock.

It is important to note that ASEL are not guidelines. They are given the force of law by being proclaimed as Orders (regulation) under the *Australian Meat and Livestock Industry (Export Licensing) Regulations 1998* and the *Export Control (Animals) Order 2004*.

Further, in Western Australia, the welfare of animals is regulated by the *Animal Welfare Act 2002*.

Although the animal welfare act is administered by the state Department of Food and Agriculture (DAFWA), it gives power to appoint as general inspectors those members of the staff of the RSPCA nominated by the RSPCA. These general inspectors have considerable powers including search, entry, inquiry, and seizure.

This Act is being slowly extended through the conversion of the Model Codes of Practice for the Welfare of Animals into Animal Welfare Standards and Guidelines as regulation.

With certain exceptions, state government legislation prevails up to the limits of low water along the coast.

In addition, the Australian Maritime Safety Authority regulates livestock export at sea, as they have the delegated authority under the *Navigation Act 1912*.

This permits them to make orders for the carriage of livestock on all ships on which it is intended to take on, that are taking on, or have on board livestock at any port in Australia or that are carrying livestock to sea from any port in Australia.

It should be noted that these orders do not apply to a ship arriving at a port in Australia carrying livestock loaded at a port outside Australia for discharge at a port in Australia, etc, and this situation reflects that Australian jurisdiction over ships can only apply when they are within the limits of Australian territory.



The current legislative situation is a mosaic of state and commonwealth law. It is a complex (and comprehensive) legal framework.

The policies, principles, rules and guidelines surrounding livestock export and animal welfare are complicated, intricate and involved.

Government should acknowledge that livestock export is trade in a perishable food commodity.

It must be made simpler by removing jurisdictional overlap and simplifying the number of approval mechanisms.

With respect to the Exporter Supply Chain Assurance System (ESCAS), the PGA makes the following general comments;

- ✓ It is important to note that any attempts of the Government to control activities that occur beyond its jurisdiction are necessarily limited under international law, under which 'the traditional grounds for jurisdiction have been territory and nationality'.
- ✓ In the context of live export, jurisdictional constraints are also presented, in that the ownership of the livestock often transfers to the importer on loading or, at the latest, on arrival at the port of destination.
- ✓ The limits of jurisdiction have an obvious and significant impact on the extent to which Australian law can reach the live export trade and, as a result, the ESCAS system can only at best achieve indirect control of actions within importing countries through the export licensing system.
- ✓ Given these jurisdictional limits, neither the Australian Government nor its Department of Agriculture and Water has the legal authority to conduct compliance inspections of export supply chains, including slaughter facilities, in export destination countries.
- ✓ The ESCAS system was developed by the Department of Agriculture and although based on the recommendations contained in the Industry Government Working Group reports of 2011 there is an absence of detail in the *Export Control (Animals) Order 2004*.
- ✓ Beyond the listing of the broad issues that should be addressed in ESCAS, no further details with regard to the requirements are provided in the *Export Control (Animals) Order 2004*.
- ✓ The more detailed requirements and guidance on the auditing process with regard to animal welfare matters were developed by the Department of Agriculture and provided by way of checklists.
- ✓ Consequently, livestock exporters are often confronted with requests for differing levels of detail that vary from official to official and consignment to consignment.
- ✓ It is difficult therefore, for livestock exporters to establish standard operating procedures with any kind of confidence that they will be treated in a uniform fashion by those public officials entrusted to process them.

As the Department has no power to inspect, it must rely on notifications of potential cases of non-compliance from the exporters and from third parties.

Consequently, this has promoted a situation where animal rights groups conduct surveillance of the 'in-country' activities of live exporters in the hopes of recording a breach. As public opponents of the live export trade, the ESCAS system actively encourages these animal rights groups to prosecute their activist agendas.

## **Biosecurity**

The PGA observes that the fountainhead of legislative sovereignty for Australia's export regulation is the *Export Control Act 1982*.

It is generally accepted that this Act was a response to the 1981 'meat substitution scandal' and some of its subsequent regulations and orders have similar origins.

As such, there appears to have been an element of extemporized reactions that may have resulted in inconsistencies in application, complex systems that incur costs in meeting them, and has resulted in a culture of government control over the export community.

As an example of the complexity of export regulation, the PGA points to the system of registered establishments, licences and permits.

To most casual observers, a registration, and a licence and a permit mean the same thing.

To the department it appears that a registration means an exporter can think about exporting, a licence means the government might let them export, and a permit means that the government says they can actually export.

In particular, the PGA makes comment on the certification of organic produce.

Third party organizations are accredited by the department to certify produce with organic, biodynamic, biological or ecological trade descriptions in compliance with the National Standard for Organic and Biodynamic Produce.

The current 'organic' standard has a zero percent tolerance for genetically modified organisms, when the US standard is 5% and the EU standard is 0.9%.

It actually appears that this standard is designed to prevent export of these products, and is in fact a mechanism to exert control over domestic markets.

## **Competition Regulation**

The PGA notes that markets can be tough, unpleasant and difficult places in which to operate.

Competition should be judged on the bases of efficiencies and capacity, and a failure to compete should not be protected by legislation.

There is a difference between the use of market power, and its misuse.

Legislative protection should only be invoked when companies (or individuals) are using their market power to engage in malicious activities that are anti-competitive.

The PGA notes that voluntary prescribed industry codes are effectively mandatory when authorized.

The PGA is of the belief that regulations that allow small businesses to collectively bargain with a large business are rarely taken up by those small businesses, who are often the first to complain about anti-competitive practices by large business.

### **Other Issues – sheep NLIS**

As far back as 2007, the Productivity Commission identified industry dispute over the need for the NLIS system in its current form.

In 2012, the PIMC Working Group on NLIS (Sheep and Goats) produced a report concluding that there are no insurmountable barriers to commencing the phased implementation of an electronic NLIS (Sheep & Goats) system. For this to occur the report said there will need to be a substantial investment of resources and funding.

How there can be no insurmountable barriers when there will need to be a substantial investment of resources and funding is an oxymoron.

Further, ABARES subsequently produced a recent consultation regulation impact statement for consideration by SCoPI. According to this statement, full electronic ID could cost the sheep and goat industry \$44 million per year.

Compliance by edict shifts the costs of these schemes to farmers.

### **Conclusion**

According to the Institute for Public Affairs (Innovation strangled by red tape), Australia ranked 124th of 144 countries on the burden of government regulation in the most recent World Economic Forum Global Competitiveness Report.

Much of this regulatory activity appears to be connected to the “precautionary principle”.

At its simplest, this principle reverses the onus of proof such that a proponent has to prove its actions will do no harm, despite there being no evidence to the contrary.

Regulation is singularly unable to predict the future and it can prevent new thinking and new ideas.

Furthermore, many agencies under the guise of cost recovery can charge levies on firms to cover the costs of devising, imposing and enforcing regulations. This makes regulation a self-perpetuating mechanism with no effective braking device.

Yours faithfully

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*The PGA wishes to acknowledge the assistance of PGA Executive Committee member Mrs Sue Walker who wrote the appreciation on Water in this submission.*