



Productivity Commission
Melbourne

Dear Sir or Madam

Subject: Regulation of Australian Agriculture

This submission is a response to the Productivity Commission issues paper for the enquiry into the regulation of Australian agriculture. The Australian Centre for Agriculture and Law is a specialised research centre focused on the legal governance of agriculture and rural communities. We have conducted a number of studies addressing the effectiveness, efficiency and fairness of rural regulation, and the purpose of this submission is to bring these to your attention. We have provided links to these source documents in a confidential attachment because many are subject to publishers' copyright or other restrictions against general dissemination.

Over and above the content of this research, we have several key issues that we wish to highlight.

Concerns about the terms of reference

"Regulatory efficiency" is about achieving a desired goal with the minimum possible use of resources. All regulatory instruments have a cost. The function for regulation is to constrain people from doing things that they wish to do, imposing a private cost in the public interest. Parliament has the legitimate role of weighing up the need for regulatory constraints and determining that it is in the public interest to impose these, taking into account broad concerns about the public interest.

The terms of reference and the discussion document do not require consideration of public or private benefits from regulation. In effect this assumes that there is no benefit from regulation, only cost. The analysis also ignores the broader considerations that might influence parliament to impose constraints, discounting the relevance of the many public interest considerations that might cause parliament to use regulation.

A particular concern is that the discussion of native title issues does not recognise the importance of the public benefits being sought and the causes of any identified failure to achieve these. Addressing very complex and complicated native title issues through a narrow efficiency lens is (at the very least) a contestable approach. The Productivity Commission should particularly highlight the limitations of a narrow evaluation approach to regulatory performance in this regard.

Many rural regulations do provide private (as well as public) benefit. Some examples may suffice to make this point.

1. Regulatory control of agricultural invasive species may impose a cost or constraint on some landholders, but it reduces economic losses and costs to other landholders as well as producing public good benefits.
2. The control of unauthorised water extraction or contamination is essential to the integrity of the market for private rights.



3. Australia's valued reputation for safe agricultural products depends partly upon having an effective and credible regulatory system.
4. There can be systemic benefits to Australia from regulations even when it is hard to measure these. Australia has entered into international agreements for biodiversity protection, species trade, biosecurity, and the like because Parliament has identified a benefit which outweighs the likely costs of regulations.
5. Regulation is often used to protect the collective social capital, by helping to create a more just and humane society. Social capital has direct and indirect effects which include creating trustful conditions that enable efficient contracts.
6. It can also be argued (as has been done by Michael Porter and others) that regulation can cause industries to adapt to competitive pressures, making them more internationally competitive. For rural industries, demonstrating sound ethical and ecological performance would seem to be strategically relevant.

This suggests the need to evaluate regulation in the light of its goals, and whether they are achieved, and why, and the benefits that are produced. The terms of reference and the discussion document do not require consideration of intended or achieved public or private benefits from regulation. In effect this assumes that there is no benefit, only cost. Australia does not have a coherent approach to identifying and valuing regulatory benefits – this deficiency is not unique to Australia. Analysis based on cost alone is a dubious a basis for policy reform. In addition, to evaluate regulation on the basis of economic cost alone is also contestable given the many other variables (such as collective social capital) that are relevant to these issues.

Effectiveness is an important consideration that is not highlighted by the terms of reference. Some rural regulatory goals (for example the control of invasive species) are often not achieved (thus the instruments are inefficient), arguably partly due to poor implementation, perhaps because those being regulated lack the capacity to do what is needed, or because the responsible agencies are unable to do what is required. Outcome effectiveness is an important aspect of determining whether resources are used efficiently, and consider whether the causes of ineffectiveness are due to regulation or due to other systemic factors.

Unbundling cost

Because regulation must be administered (and sometimes enforced) there is a transaction cost involved. This is distinct from the cost of intended constraints on the preferred activities of some citizens that is discussed above. Many transaction costs are incidental and may make little contribution to achieving the regulatory purpose. Transaction costs can result in the waste of resources or frustrations, diverting effort away from productive uses but without necessarily advancing the parliamentary purpose. An argument for streamlining bureaucratic arrangements is quite distinct from an argument for deregulation.

For example, imposing administrative requirements on a large number of farmers in order to manage the activities of only a few is *prima facie* inefficient. Native vegetation control is an area of regulation that often involves cumbersome administration, where attention to reducing the avoidable bureaucracy could result in more efficient laws without undermining the purpose of those laws. Disciplined systems analysis to reduce transaction costs and frustrations, and greater use of administrative technologies, may be a way of addressing these types of issue.



We have addressed some approaches to streamlining in the report *Harmonising Australia's Environmental Laws: Scoping of Harmonisation of Environmental Regulation and Regulatory Practice across Jurisdictions in Australia*.

Land use conflict and regulation

The Terms of Reference specifically discuss regulatory arrangements for land use planning, noting that poorly implemented regulation may impose a burden on landholders. Regulatory reform to better manage land use conflict (particularly between agriculture and extractive operations) has not been successful. For example, the implementation in New South Wales of initiatives such as the Mining and Petroleum Gateway Panel, which does not provide a mechanism for public consultation, appears to have not had a beneficial effect on conflict in agricultural communities. We believe that this is partly because there is no capacity to consider local perspectives on the agricultural potential of a particular landscape. Because the Panel lacks the authority to refuse a development, landholders have expressed that the Gateway Panel process provides little security to their interests. The paper *Agricultural Land Use Conflict in the Context of Climate Change: An Australian Case Study* deals with these issues.

General failings

Our research indicates that there are failures of effectiveness, efficiency and fairness in regulation, but that improvement will require reform to the systems through which regulation is created, implemented and improved. Principles for better rural regulatory review and design are canvassed in *Developing a Good Regulatory Practice Model for Environmental Regulations Impacting on Farmers Australian Farm Institute and Land and Water Australia 2007*. This report makes a number of strategic recommendations for improved rural regulation. We also refer you to the paper *Leading reform of Natural Resource Management Law: Core Principles*. That paper sets out a framework for the design of better rural regulation. These documents take a broader perspective on regulatory efficiency than the terms of reference of the enquiry. We suggest that the enquiry should consider the systemic causes of regulatory failings.

Embracing regulatory innovation

The world of governance is rapidly changing. In particular there is a shift occurring from the traditionally government centred model of regulation to an increasingly collaborative or contested approach. Elements include the increasing presence of industry codes and standards, non-government organisation codes and standards, environmental and social branding, and market based environmental and social instruments.

As government funds decline, and as non-government governance instruments and programs become more powerful, there is an inevitable shift in the role of government. There are opportunities to harness non-government regulation but these are hampered by the lack of a coherent policy and legal framework. We discuss this, and some options for a more deeply collaborative approach in *Martin & Noble (2015) Hybrid governance and 'wicked' natural resource risks in Environmental jurisprudence – improving governance effectiveness*.

An under-recognised aspect of transaction efficiency is the implications of the increasing variety of market-based instruments deployed in the rural context. Whilst these are ostensibly not regulatory, they are



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typically supported by statutory arrangements. The increase in these instruments has complicated rural property

rights, and poses new policy risks that should be considered. We have discussed these matters in *Environmental property rights in Australia: constructing a new Tower of Babel*.

We would be happy to provide more details, should the Commission request this.

Yours Truly

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