Productivity Commission

second annual
review of

Regulatory Burdens on Business

- manufacturing and distributive trades

Australian Dairy Industry submission

Australian Dairy Products Federation
Australian Dairy Farmers Ltd
Dairy Australia

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Introduction

The Presiding Commissioner
Productivity Commission
Review of Regulatory Burdens
- manufacturing & distributive trades
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As an integrated primary, manufacturing, retail and export industry, Australian Dairy welcomes this important opportunity to raise and discuss regulatory issues.

Dairy product manufacturing begins at farm locations. Dairy farm operators are responsible for ensuring that milk intended for sale complies with regulations and meets an approved food safety program. The programs include requirements for control and prevention of microbiological contamination, management of potential chemical and physical contamination, and identification and traceability.

Dairy farms are licensed by State food regulators as food premises, in contrast to beef cattle and sheep farms. State authorities set licence conditions requiring dairy farmers to produce safe and suitable food under approved food safety programs that must be audited at least annually. See for example, the Dairy Food Safety Victoria (DFSV) and Tasmanian Dairy Industry Authority websites.

As well as first-stage processing, some dairy enterprises manufacture products, particularly local cheeses. Most milk is transferred by carriers to licensed factories, ie. milk processors and product manufacturing companies. All operators in the chain are similarly licensed. The national Dairy Primary Production and Processing Standard covering all sectors will apply fully from October 2008 for preparation of dairy food intended for local or export markets. Over 50% of milk is exported as products.

Since industry deregulation in 2000 there has been substantial rationalisation in dairying and milk product processing sectors, and notably, 'a higher level of specialist production of dairy products such as cheeses, produced through groupings of farmers at the local level'.[1] [numbers refer to endnotes]

There is now no legislative control, Federal or State, over prices companies pay dairy enterprises for their milk. Nor are there market protections. The Australian industry is one of the world's few dairy industries operating a free, open market.

Appropriate regulatory frameworks are important to Dairy as a world food industry, but food preparation rules and many other regulations do increase costs, affect competitiveness, and influence innovation and investment decisions.

Part 1 of this submission outlines the Industry as context to discussion of regulatory issues. Part 2 provides an overview of concerns across sectors. Part 3 identifies, and discusses in some detail, two areas of Industry issue with regulatory systems.

The Australian Dairy Industry looks forward to close consideration of issues raised against policy statements and good regulatory practice tests.

Australian Dairy Industry submission 2008 – contact

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Summary

PART 1 outlines the Australian Dairy Industry and key trends as context for discussion of regulations. *pages 5 to 6*

- The medium-term outlook for the Dairy Industry is quite positive but turns on being more competitive in all markets. Australian exporters will particularly need to continue to compete on price, quality and delivery, against rising competition.

- The Dairy Industry, like other Australian food industries, cannot carry any more regulatory costs or disincentives to innovation than absolutely essential.

- The Dairy Industry supports the intent and wording of COAG's principles for minimum effective regulation and reduction of regulatory impacts. The Industry expects these principles will be applied in these reviews by the Productivity Commission, and in ongoing actions by both Federal and State regulators.

PART 2 is an overview of regulation regimes of concern to the Industry. A proportion of the material in Part 2 is of general issue and is intended to add to cases presented by other manufacturing industries. These industries are subject to multiple complex and expanding regulation regimes. Simple recommendations for changes to particular rules are difficult to frame. *pages 7 to 14*

It is anticipated that the Commission, through its own research and application of points of principle to concerns raised by industries, will identify cases for closer review and regulatory reduction. Particular matters of concern to Dairy include:

- **Cost of regulation of chemicals and their usage.** Authorities should develop minimum effective regulation based on science and reflecting risk assessment. Increasing requirements for control and training, even where chemical use has been satisfactory over decades, are direct costs that should be carefully examined.

- **Regulation by national systems with blanket rules.** While rural industries often seek uniformity across jurisdictions in principle, having 'one system' can also raise productivity issues where practices in sizeable parts of industries differ for efficiency, commercial and environmental reasons. Examples discussed include the Animal Welfare Strategy Livestock Transport Standard, and QA programs.

- **Cumulative weight of a multitude of regulations** affecting rural operations. Many points have been raised by State organisations. A particular issue for Dairy is conditions on Federal programs that limit support for New Zealanders who have purchased and operate near 500 enterprises in Victoria and are paying taxes.

- **The trend to regulated programs requiring actions to 'save' energy, water, or waste**, instead of Australian governments using marketplace mechanisms. In particular, the Environment and Resource Management Efficiency Program in Victoria, and the stringency and reporting requirements of the NEPM (National Environment Protection Measure) for Used Packaging Materials.

- **Increasing costs of reporting to authorities** for a range of national and state programs including the National Pollutant Inventory and Greenhouse regimes.

- **Greenhouse reporting and emissions trading** as a large, emerging regulatory arena. The Dairy industry is expecting Australian governments to show their commitment to principles of 'minimum effective regulation' and 'good regulatory practice' in developing these potentially high-impact regulatory regimes.

- **Food health debate, policy and standard making is increasingly complex.** The Dairy Industry is concerned to be fully involved and have influence equal to other parties under present and future systems. Current issue areas for Dairy include: Revision of Government mandated Population Dietary guidance, Nutrition and health claims, Mandatory Fortification, and Regulation of Novel Foods.

- **Continuing need to streamline food regulation regimes** by reducing overlap, inefficiencies and costs. Dairy Industry frustrations about workings of the Australian food product regulation system are similar to those expressed by other industries, and include multiple rules, transparency, and need for consultation at policy stages and during implementation, as well as in standard development.

- **Dairy is experiencing significant difficulties with alignment, integration and duplication of food hygiene standards**, particularly the Australian Dairy Primary Production and Processing standard, and parallel export rules [Part 3.1]. A more general but equally important issue is development of Guidelines that extend beyond actions needed for basic compliance with standards [Part 3.2].

PART 3 discusses two areas of Industry issue with regulatory systems.

3.1. Need for efficient food safety standards and systems *pages 15-20*

The Dairy Industry has worked with FSANZ, consumers and regulators to achieve a national Dairy Primary Production and Processing Standard based on Codex food regulation principles. The PPPS was gazetted in 2006 to operate from October 2008. It is being applied in State systems and will align food safety requirements for dairy businesses across Australia and for all products, whether for domestic or world markets – with benefits in national productivity, cost control and competitiveness. *Associated regulatory issues in 2008, and looking forward, include*:

- That policy objectives behind the national Food Standards System will not be attained because regulations are duplicated and guidelines are over-prescriptive. The Dairy Industry has strong working partnerships with State regulators that would be extended by effective implementation of the Dairy PPP Standard as one Australian system (instead of six State codes and Export Milk Orders). Achieving a single national system would be a turning point in regulatory efficiency and an advance for the nation, the industry, Ministerial Councils and regulators – *a prime instance of COAG principles being followed through to action on the ground*.

- COAG and ANZFRMC policies for risk-based minimum effective regulation must be applied to achieve useful Compliance Guidelines to go with PPP Standards. FSANZ should take the lead in drafting guides to fulfil these policies. Industries should not face money and time costs of having to 'start again' in negotiating PPPS Guidelines.

- The operational impacts of export orders and AQIS systems are a long debated regulatory burden. Having achieved the Dairy PPP Standard through FSANZ, the Dairy Industry now reasonably anticipates removal of detailed Export Orders and streamlined process for export certification and trade based on Australia's system.

3.2 Costs of regulatory creep in guidance and processes *pages 21-23*

- Regulatory creep is an escalating problem. Implied directions or confusion can pressure businesses into over-compliance. The extra costs are regulatory burden. Costs can also creep in during system development. Regulators and committees need to be vigilant in drafting standards, guidelines, notices etc.

- Agricultural industries reasonably expect agencies to develop basic Compliance Guidelines that support outcomes-based Standards. 'Best practice guides', if any, need to kept apart from Standards. This expectation accords with COAG Principles.

- Regulatory systems that are set to serve some markets, can mean over-compliance costs for other markets. Particular Dairy Industry concerns are discussed in 3.2.

1. Dairy Industry trends – as regulation context

The Dairy Industry is concerned that regulatory structures be critically examined in light of current and likely future circumstances. It is vital to take into account economic, market, competition, consumer and social trends.

The record shows a need to monitor and anticipate issues, as achieving effective changes to regulatory regimes to maintain competitiveness can take many years.

The Australian Dairy Industry is a mature, modern industry, and a world leader in milk product preparation. It is currently the third most important rural industry at the farmgate – valued at $3.2 billion in 2006-07 – and the fifth most important in agricultural exports – manufactured products valued at $2.5 billion.[2]

Australian milk production increased from 8.2 million litres in 1994-95 to a peak of 11.27m litres in 2001-02, then settled to a drought affected 9.6m litres in 2006-07. Over half of Australia's annual production is now exported to over 100 countries. In 2006, world trade of dairy products was dominated by NZ at 32%, the EU 30%, then Australia 12%, Argentina 6%, the Ukraine 3% [DA and ABS data].

Some 65% of dairy production is concentrated in Victoria, with a further 12% in NSW. As southern Australia edges out of drought and world dairy prices improve, cost effects of regulations may seem less pressing than other issues. However, the medium-term outlook says Australian dairy must be more competitive in all markets.

Although Australia's trade has doubled since 1990, the export flow faces challenges.

- Australia is one of the world's few dairy industries operating a free, open market.
- World market prices (ie. export returns) determine the farmgate price paid for milk for every Australian dairy farmer.
- As Australian production grows, more needs to be exported with viable returns.

In 2006-07, milk was utilised as: cheeses (35%), drinking milk (23%), skim milk powder and butter (23%), whole milk powder (11%). Within Australia, supermarket sales of dairy products continue to increase in volume and value.

ABARE projections for dairy trade identify improving conditions, then easing of world prices. ABARE has regularly stated that 'a major challenge facing the Australian dairy industry is to maintain its competitiveness in export markets'. ABARE's outlook for dairy industry markets out to 2012 includes the following:[3]

- World prices for manufactured dairy products are expected to remain high in 2008, after rising sharply late in 2006 driven by constraints on supply growth from the three major exporters, the European Union (EU), New Zealand (NZ) and Australia – at a time of rising global requirement.
- Over five years to 2012, demand for dairy products is expected to remain strong associated with firm economic growth for major importers. From 2009, however, production growth in major exporting countries is forecast to exceed growth in demand and to put *downward pressure on prices*, perhaps by 10%.
- Further expansion of dairy industries in developing countries, such as China, India and Argentina, will likely mean their own production accounts for an increasing proportion of their rising domestic consumption – reducing import demand in those countries and adding to world supplies.

Competition is rising from potential new and sizeable exporters, including countries in South America with lower cost structures than Australia.[4] Competition also continues from OECD countries where dairying and export is subsidised by governments. These factors interact in global marketplaces and determine pricing.

Australian dairy exporters must continue to compete on price, quality and delivery and even then, world prices will determine Australian dairy business income. While much effort is expended by Australia in WTO forums and on Free Trade Agreements aiming to reduce distortions in world trade and market pricing, history shows that major change cannot be relied upon, and that cost control to increase profitable competitiveness in current and new markets will be vital.[5]

Within Australia, ongoing regulatory costs add to rising issues that impact on international competitiveness and profitability. These include workforce difficulties, and charges for water formerly seen as a free natural resource. The Industry notes the Primary Industries Ministerial Forum has confirmed (Feb 2008) that 'continued productivity growth is of fundamental importance to the agriculture and food sectors'. The Ministers committed to reconsider influences that are key to agricultural industry productivity. 'The Regulatory Framework' is top of the list.[6]

1.2 Industry expectations of Productivity Commission reviews

The Dairy Industry, like other sectors, can carry no more regulatory costs than essential – and this should be Australia's national objective. Costs of regulatory activity are difficult to quantify, but it is clear these are real and impact on competitiveness. Multiple studies have identified that 'red tape' impacts on businesses through higher running costs, by limiting choices and by lessening scope and motivation for innovation, invention and investment. Together these reduce productivity and competitiveness, especially where firms must compete with others operating in less costly environments. Impacts vary among firms in an industry.[7]

The challenge for governments and industries facing productivity pressures is to reduce costs and restrictions of regulation, *and to secure the public benefits expected from regulatory systems.* This was recognised, again, by the Council of Australian Governments (COAG) in 2006.[8] The requirement on proponents to show clear public benefits of business regulation has been reiterated by COAG in recent statements, particularly the April 2007 COAG *National Reform Agenda* Communiqué including a Regulatory Reform Plan and Principles of Good Regulatory process.[9]

COAG pledges have been reinforced by the incoming Federal Government. The Prime Minister has stated his commitment to 'systematically … reducing the level of over-regulation of the … business community' [*Kevin Rudd, Press Club Apr 2007*]. The December 2007 and March 2008 COAG meetings, confirmed deregulation as a priority – with (another) Business and Competition Working Group now established.

The Dairy Industry supports the intent and wording of COAG's principles and expects they will be applied in these Productivity Commission reviews – as well as in ongoing actions by both Federal and State regulators.

The Industry also supports COAG objectives to accelerate the regulation reduction agenda, to decrease the regulatory burden on business, and to deliver significant improvements in competition, productivity and international competitiveness. However, achieving results will require much more than 'talk'. Principles need to translate, within a reasonable time frame, to clear action on the ground.

The Commission should look for successful models during its reviews, such as the Dairy Industry's practical, risk-based partnerships with State regulators [Part 3].

2. Overview of regulations of Dairy concern

The Australian Dairy Industry has a history of working with Federal and State regulatory agencies. As relayed in submissions to various inquiries,[10] the Industry supports regulation regimes that are underpinned by:

- Minimum effective standards and regulations based on science and appropriate risk assessment.
- Consideration of the food chain in its entirety for food safety purposes.
- A science based assessment of risk at critical points and development of appropriate strategies to manage that risk to protect public health and safety with minimum effective regulation.
- An emphasis on preventative rather than reactive measures.
- Recognition of the shared responsibility for food safety between all parts of the food supply chain.

Similar principles should also apply in development of regulations for control of environment-affecting practices, chemicals, biosecurity or trade.

Dairy has a tested food safety model integrated along its supply chain, and believes this could be utilised in some other food industries. As a general principle, industries should be regulated according to their risks, record and circumstances.

> As a mature industry with sophisticated systems to meet food safety regulatory requirements, [the Dairy Industry] would be concerned if it is required to operate within a system designed to regulate the 'lowest common denominator' eg. food industries that have yet to develop to the extent to which the dairy industry operates. *DA to Bethwaite inquiry, March 2007*

2.1 Dairying business operation in national systems

Dairying is a rural based industry, long-established mainly across southern Australia. With statutory restructuring and deregulation of milk pricing on 1 July 2000, the number of farms has contracted (from 13,156 in 1999-00 to 8,055 in 2006-07), even as annual milk production has near doubled.[11]

Dairying has become much more complex. Operators must now balance a range of business, customer and stakeholders interests, many of which are prescribed or guided by multiple sets of regulation.

The industry's *Dairying for Tomorrow* tool, sets out regulatory requirements and compliance and good practice models for ten regulated areas: effluent, irrigation, nutrients, soils, chemicals, farm wastes, pests and weeds, biodiversity, and air and energy. These a major part, but not all, of new rule systems.

Further areas of regulation include animal care, quality assurance and licensing, plus general business decisions such as employment, transport and trading.

The range of regulations and regulatory issues is expanding each year. These affect the dairy chain – starting from the on-farm manufacturing stages.

Particular dairy enterprise issues with a national perspective, include:

Chemicals and fertilisers. It is recognised that the Commission has released a draft report on Chemicals and Plastics Regulation, and that there are a number of other exercises afoot, including the COAG reviews of Hazardous Materials. There are many stakeholders in the chemicals sector and considerable money involved. At times, the needs of smaller business users are overlooked.

Dairy enterprises, as with other manufacturers, use a range of chemicals for multiple and important purposes. DA made a submission to the COAG Review of Hazardous Chemicals (March 2007) emphasising that multiple chemicals are used along the dairy supply chain. Dairy quality assurance and food safety programs all control access, storage and use of these chemicals.

► Minimum effective regulations based on science and reflecting risk assessment are reasonably expected for chemicals, as in other areas. The Dairy Industry's established chemical control systems need to be recognised in all reviews.

► Escalating requirements for control and training, even where chemical use has been satisfactory over decades, are direct costs that should be carefully examined.

Fertiliser is a major input and cost for dairying establishments. State laws require that surface and ground water not be polluted by run-off nutrients during normal operations or rain periods, and dairies have made changes to operations.

Possible restrictions on use of types of fertilisers is an emerging issue in States and potentially nationally. There must be a scientific basis for restricting fertiliser options and this must be objectively examined with commercial effects costed.

National record and practice schemes. Aspects of dairying are increasingly regulated by national systems, a number with links to international regimes. While rural industries seek uniformity across jurisdictions in principle, regulations that require 'one system' can raise issues where practices in sectors or areas differ for efficient production, commercial and environmental reasons. For instance:

- The Dairy Industry, among others, is working with DAFF and Animal Health Australia on the *Australian Animal Welfare Strategy* (AAWS). There are real concerns the AAWS will take years to achieve implementable outcomes. Based on strong inputs to its 2007 review the Commission seems to agree.[12] The Livestock Transport Standard affects producers and meat processors (20% of cattle originate from Dairy). This is the first of a set of rebuilt rules planned under the AAWS. Dairy and other industries are concerned by emergence of Guidelines with clearly higher compliance levels than needed.

- The Dairy Industry took a lead in developing and implementing on-farm QA covering farming and manufacturing practices, and linking these with QA requirements on dairy processing companies.[13] Farm food safety programs are mandatory for dairy licensing. All cover key QA elements *tailored for dairying.* Over the last decade, the beef cattle sector has set up accreditation schemes. There is an issue now of duplication and a form of regulation creep because 'voluntary' systems are becoming mandatory for enterprises operating (for efficiency reasons) under different production and commercial models.

A number of such regulation regimes, national schemes and instruments show signs of 'regulatory creep' leading into potentially higher than needed compliance costs. This is considered as a key issue in Part 3 of this submission.

Doing business: In various submissions, the Victorian Farmers Federation (VFF) has emphasised the cumulative weight of the multitude of ongoing regulations affecting rural operations. NSW, Queensland and other State associations have similarly raised this regulatory and capacity problem. A 2007 VFF red tape list included (as well as land use, primary production and State rules not listed here):[14]

- 70+ regulatory authorities, 23,000 pages of legislation, 8,000 pages of regulations, and cost of complying with all the audits
- Taxation – an area of huge regulatory complexity … adding hours each month to the administrative burden of running a rural business' (eg. rising administrative costs for bookkeepers, and pressures such as needing to learn and use MYOB)
- Centrelink processes, then more steps for State programs; Visa rules
- Chemical control beset by over-regulation
- Farm machinery compliance, Standards Australia, and insurance.

There is also a growing issue with confusion on arrangements and entitlements for businesspeople from NZ who have purchased dairies and have operated them over years. Near 500 NZ citizens have acquired dairies in Victoria and are contributing to the dairy supply chain from on-farm manufacturing stages. However, issues continue around conditions on Federal programs limiting support through Centre-link to Australian citizens rather than to taxpayers.

2.2 Manufacturing on-farm and company processing

Productivity and innovation advances are crucial to all industries, and in Dairy this is mainly to be achieved through manufacturing developments.

> **While dairy farmers can improve farm efficiency, the most impact on farm profitability is manufacturing efficiency and value adding** – this ensures that Australia continues to produce a wide range of high quality and innovative dairy products. In turn, this promotes higher consumption of dairy and improves the use of and demand for milk. *DA website 2.2008*

Food safety regulation impacts on the whole supply chain, including on-farm manufacturing operations through licence requirements for QA programs plus any additional company specifications. Processing companies are also closely regulated under State and export food hygiene rules that are based on international codes.

Achieving and maintaining efficient food safety standards and systems is a key objective for Dairy Industry operations and competitiveness.

► The Dairy Industry is experiencing difficulty with alignment, harmonisation and duplication of food hygiene standards, specifically the Australian Standard for Dairy Production and Processing, and parallel export regulations [refer Part 3.1].

► Development of PPPS Guidelines for basic compliance with standards is also a key issue [Part 3.2].

The Dairy Industry took a lead in working with Food Standards Australia New Zealand (FSANZ) soon after it was given responsibility 'to extend its evidence-based standard setting process to the primary sectors' by developing Primary Production and Processing Standards (PPPS). After two years of work, the Dairy PPPS was gazetted on 5 Oct 2006. It is now in the Food Standards Code chp 4**.**

Dairy businesses are all required to comply with the Australian PPP Standard developed through the FSANZ risk assessment and management process, by October 2008. The Dairy PPPS is based on both international codes and the State and Industry regulated food safety systems that are achieving highly safe food.

However, a parallel set of regulations operates for export product under Federal AQIS legislation and control. AQIS regulates requirements for all processing stages plus the inspection and distribution of dairy products intended for export.

It is a Dairy objective to achieve implementation of Australia's Dairy PPP Standard as the basis for all dairy product preparation in Australia – and to reduce export regulatory burden, so enhancing competitiveness and returns. Securing market access is vital but so is addressing export rules and processes that duplicate State-based hygiene and QA programs [Part 3.1].

An associated issue area is the need for FSANZ, working with industry, to ensure development of a Compliance Guideline to support users in applying the Dairy PPPS. For a mature industry with well-tested and effective processes, it is a real concern that a FSANZ draft Guideline (written for use by regulator officers), has taken an year to evolve [Part 3.2]. Industry perspectives include:

> Now there are issues with the Guidelines – stalled for the moment – incredibly prescriptive drafts. Guidelines need to be based on risk assessment (including long-time performance).
>
> … appears to have trawled through all sorts of guidelines and added these together. Also a feeling that 'we did it for seafood so doing this way for dairy' (but seafood started from few rules).
>
> Interpretative guides need to simply answer the question – 'What do I need to do to comply'.

Dairy processors have also raised issues with types of environmental rules now emerging, as their effects have become apparent in practice. Environmental regulations are becoming increasingly complex with wider and deeper impacts on dairy processing operations.

Pollution control regulations are long-established. Most factories that generate 'externalities', understand these rules and address them in QA programs. In addition, industries such as Dairy, are responding to rising stakeholder interest in environmental management. For instance, dairy industry manufacturers have recently announced and commenced a set of sustainability initiatives.[15]

> Australia's dairy industry has launched a new Council to influence and promote sustainability initiatives, with a focus on manufacturing. The Dairy Manufacturers Sustainability Council will address sustainability issues … through leadership, education and research, with a focus on communicating sustainability initiatives and influencing stakeholders to … improve industry's environmental performance.
>
> The Council aims to set environmental sustainability standards across the dairy industry with the support of its members. *Sustainability Victoria, Business news 2006*

That an Industry commits to sustainability initiatives does not clash with Industry expectations that regulations be scrutinised for excessive costs and for negative impacts on innovation and investment.

Careful dissection of practices, costs and returns is crucial to red tape reduction. It would be rare that all of the extra costs to businesses arising from regulation regimes are only a result of the policy goals of the regulation. Whatever the policy purpose, a proportion of additional costs could arise from poor regulation design or inefficient regulator implementation. This could especially apply where the regulation is 'high-profile', 'sensitive' or developed in rush.

Australia's productivity and competitiveness goals mean all regulatory costs need to be examined including nationwide inefficiencies arising from, for example, many agencies setting aspects of Environmental, Water and Local Government rules. All Governments need to ensure agencies co-ordinate to achieve 'minimum effective regulation'. Regulation making also needs to be separate to fee setting processes.

An area of particular concern is the trend for Australian Governments to introduce regulated programs to *require* actions that 'save' energy, or water, or trade waste, rather than using marketplace mechanisms. For example:

- The Environment and Resource Management Efficiency Program in Victoria, under the *Environment Protection (Amendment) Act* 2006 and *Environment Protection (Environment and Resource Efficiency Plans) Regulations* 2007, is requiring third-party energy audits and replacement of equipment with theoretically 'more energy efficient' models but on non-commercial pay-back.

Before the ERME Program in Victoria	**Cost effect of ERME Program, Vic**
Commercial plant operations within Environmental Protection laws & policies	31 pages of new EP(EREP) Regulation 39 pages of new ERE Planning Guidelines to manage, understand, monitor.
Plant maintenance and continuous improvement planned by the company	Third-party energy audit required at costs to company. eg. $25K - $30K per site for the audit. Internal costs to evaluate the audits and prepare action plans these can double the audit cost.
Equipment replacement based on 12-18 month ROI (calculated on energy savings & other returns eg. higher capacity, safety).	Regulatory audit uses 3-year ROI rather than company hurdle rate. Program forces equipment replacement.

- The stringency and reporting requirements of the National Environment Protection Measure (NEPM) for Used Packaging Materials rules plus the variability of legislation across States and Territories in which the brand owner's products are sold. As explained by one Dairy Industry company -

  [A company] can be a volunteer signatory to the National Packaging Covenant NPC - this means that [company] is not subject to regulatory action (and penalties) under State legislation that implements the National Environment Protection (Used Packaging Materials) Measure (NEPM). The NEPM is enshrined in legislation administered in each state, however if you are a signatory to the Covenant you are exempt from it.

  It should be noted that the NEPM legislation is seen to be more stringent as it requires brand owners to physically take back and reuse or recycle post-consumer waste packaging materials from their products and keep records of the tonnes of packaging associated with the brand owner's products that have been diverted from landfill.

  These obligations have to be met in accordance with the specific (and potentially varying) requirements in the legislation of each State and Territory in which the brand owner's products are sold.

  Under the National Packaging Covenant [a company] must: submit a 5 year action plan [including for key actions and processes to be undertaken to establish comprehensive and robust baseline data], then report annually on implementation of the action plan [placed on a website for public review], and report annually on packaging quantities used.

- Economic and practical issues with Zero-Waste regulatory approaches to Trade Waste. DA provided input to Victoria's Trade Waste Review during 2006. The next stage statement had not been released at Feb 2008.

Increasing costs of reporting to a range of authorities, for national and state programs – including National Pollutant Inventory, Greenhouse Gas regimes, National Packaging Covenant, and Victorian 'waterMAP' (requires all industrial and non-residential users of over 10 megalitres of potable water per year to develop a water management plan to use water more efficiently.)

Greenhouse reporting and emissions trading is a whole new regulatory area requiring close attention by governments, industries and businesses.

An Emissions Trading Scheme is seen as a key part of 'an effective framework for meeting the climate change challenge', [www.greenhouse.gov.au]. There are multiple exercises now underway, run by different agencies, around the structuring of a scheme with a target start of 2010. This is a costly process for all involved/affected.

ADF submissions in the last few months include:

- On the *National Greenhouse and Energy Reporting System discussion paper*, to the Greenhouse and Energy Reporting Taskforce, Australian Greenhouse Office, Department of the Environment and Water Resources (16 Nov 2007).

- On the *Abatement Incentives prior to the commencement of the Australian Emissions Trading Scheme discussion paper*, to the Climate Change Group Department of the Prime Minister and Cabinet (23 Nov 2007)

Reporting and trading systems will be high-impact regulation. Australian Dairy Farmers Ltd (ADF) is developing a formal position on climate change, based on acceptance that scientific evidence justifies action. The ADF has advised government agencies of serious concerns about the pace of developing a trading scheme and about elements of potential structures. There is also concern about promotion of unrealistic expectations regarding money that farmers, for instance, could make from emissions trading.[16] The ADF is strengthening its inputs for submission to the Garnaut review. Key points include:

- The dairy industry does not oppose the possible introduction of a national Emissions Trading Scheme (ETS). The industry supports the concept of developing least-cost abatement actions for man-made greenhouse gases.

- Implementation of an ETS will have consequences for Dairy through impacts on direct input costs (energy, electricity etc) and manufacturing and farm infrastructure. The structure of an ETS could significantly increase operating costs, levels of volatility in the business environment facing firms and the complexity of business decision making.

- Dairy's support for any ETS depends on Dairy (and agriculture in general) remaining an uncovered sector under an ETS until the system has evolved to have much greater certainty and stability within its operations, until there is much greater consensus on accuracy and validity of measuring greenhouse emissions, and until there are management options available to reduce gas emissions that are recognised as tradeable offsets, apart from reducing stock numbers or nitrogen fertiliser use.

- It is vital an ETS does not detrimentally affect international competitiveness of Australian dairy foods, or distort markets for key inputs such as land, and Dairy businesses should be appropriately compensated for disproportionate loss of asset values arising from implementation of an ETS.

The Dairy industry agrees with assessments in the Commission's 2007 report on Regulatory Burdens on Business that careful regulatory design of all reporting and emissions trading rules is essential. Dairy is expecting Australian governments to show their commitment to principles of 'minimum effective regulation' and 'good regulatory practice' in developing these new regulatory regimes.

2.3 Dairy food products – preparation, sale, export

Another expansive set of regulations define or determine the features of foods prepared and sold worldwide, ie. food product rules and standards, codes, protocols, guides, instructions and processes.

Internationally, a number of organisations provide direction to food trade and rules. The Codex Alimentarius Commission (Codex) is the major influence on Australian *food safety* and *food product* regulation. Under the FAO and WHO Food Standards Program, Codex develops and promulgates standards and associated materials with the aims of 'protecting health of the consumers, ensuring fair trade practices in the food trade, and promoting coordination of all food standards work undertaken by international governmental and non-governmental entities'.

Codex functions through multiple committees. This presents cost and logistics challenges to Australian regulators and industries. However, Codex and Codex Australia (in DAFF) appear well-organised and there are now paths for industries to provide input to Federal Departments in advance of Codex committee meetings.

Concerns raised about international processes include slowness, trade power and country protection tactics in technical committees (including from Australia), plus the ongoing struggle between OIE (animals) and Codex (food) organisations.

However, Australia and its industries need to give priority to streamlining Australia's food regulation regimes, to understanding sources of influence and to working on inefficiencies and costs.

Dairy Industry concerns about workings of the Australian food product rule system (mainly chapter 2 of the Joint ANZ Food Standards Code) are similar to those expressed by other industries and food businesses. These include that there is considerable activity at the detail level, but it is difficult to access policymaking.

> A lot of time is spent responding to many FSANZ actions regarding food products and milk products, including nutrition matters, food additives – so many food notifications each week.
>
> How does policy process work? Does FSANZ develop proposals to go to Ministerial Council, or do Ministers and their advisers provide direction? How can an industry influence early guidance?

The COAG Food Regulation Agreement 2002 established a new system under a Ministerial Council (ANZFRMC) and Food Standards Australia New Zealand. FSANZ manages the Food Standards Code 2002, and sets food product standards for the two countries with the goal of *A safe food supply and well-informed consumers*.

This system was to implement actions agreed from the 1998 Blair food regulation review.[17] While there were advances, by 2006, real problems were apparent. The Corish Report, for instance, challenged seemingly sacrosanct food rules, pointing to costs and streamlining sought by the 1998 review that simply had not occurred.

> Capacity of businesses to innovate is being affected by uncertainty from current regulatory processes, the length and transparency of FSANZ processes, and overlap between various regulations. Further reform of the food regulation system is needed… to secure a framework that encourages the development of an internationally competitive food sector. *Corish report 2006* [18]

The Federal Government commissioned the Bethwaite Review early in 2007 to examine food regulation governance including ways to streamline and to address outstanding items from 1998. It was to report to COAG but this did not occur. The Bethwaite Review has faded from Departmental websites, perhaps a testimony to vexed issues with content, process and power structures of food regulation.

At its 26 March 2008 meeting, COAG appeared to add 'food regulation' to the 'hot spots' list, with an expected outcome stated as 'harmonisation' (one of the goals of the major new national food regulation system that commenced in 2002. The Productivity Commission should not defer all consideration of food regulation to COAG – this is a critical arena that needs Productivity Commission input.

In September 2006, the Victorian Treasurer announced a full review by VCEC of food regulation, as that State's first hot-spot red tape reduction target. VCEC was able to achieve a thorough review and a strong, useful report – *Food Regulation in Victoria* – after many submissions and consultation rounds.[19] VCEC identified a set of issues with food product regulation processes that concern Dairy (and other food industries), and that should be of equal concern to governments.

The Dairy Industry generally supports VCEC recommendations on national and state food product policy and regulation process. These include:

- national public health issues such as obesity, type 2 diabetes and heart disease should be addressed at a national level, transparently, by COAG
- use national food standards to achieve public health objectives only where clearly demonstrated as the most cost-effective means of achieving government objectives [for example, in assessing fortification need and options]
- ANZFRMC and FSANZ should adhere to COAG Principles and Guidelines for National Standard Setting and Regulatory Action in developing national standards [ANZFRMC should also adhere to its own policy guidance such as science bases]
- need for independent national review of the policy framework underpinning labelling provisions of the Food Standards Code
- need for further improve the governance arrangements for the ANZFRMC including the transparency and timeliness of decision making, particularly to stimulate food industry innovation [rigid rules deter new product development]
- improve management of misleading and deceptive conduct relating to food by co-ordinating with the Australian Competition and Consumer Commission.

The Dairy Industry is concerned to be fully involved and have influence equal to other parties in food health debates and in standard making. Current issue areas for Dairy include: Revision of Government mandated Population Dietary guidance; Nutrition and health claims; Mandatory Fortification, and Novel Foods.

While FSANZ processes are stated, information pipelines into ANZFRMC shaping of policy guidance are less than clear. Currently, briefings for the Food Regulation Standing Committee (of Department Heads) and for Ministers seem to build on 'tailored consultation' with limited groups by DOHA sections.[20]

Dairy will likely not be alone in expressing concern to the Productivity Commission about this regulatory conundrum. The transparency of ANZFRMC policy, processes and decision-making was a theme in submissions to VCEC over 2005-2007. VCEC also identified and discussed problems with consultation and decision processes. [21]

Trade and Biosecurity regulations

In overseas trade, issues arise with various types of rules and interpretations. Many need to be addressed by technical officers at working levels, but even these can be influenced by world trade politics and the variable use – by many countries - of 'tools' such as biosecurity regulations.

The Dairy Industry will be making a full submission to the recently announced Biosecurity and Quarantine review raising a series of broad and particular issues.

3. Two key regulatory issue areas

These two areas are of particular concern to the Dairy Industry now and looking forward. Issues in these areas link to regulatory policy and theory, to productivity, and to costs and competitiveness. The Dairy Industry generally argues for minimum effective regulation, that is, regulation should be in proportion to assessed risk, to achievable outcomes, and to industry or enterprise performance.

3.1 Efficient food safety standards and systems

Over the last decade, the Industry, in partnership with State regulators, developed food safety systems based on Codex food regulation principles. From 2004 the industry has worked with FSANZ, consumers and regulators to achieve a national Dairy Primary Production and Processing Standard (PPPS) covering dairy production and almost all processing.

The PPPS was gazetted in 2006 to operate from October 2008. Under the Food Standards System agreed in 2002, this Standard will be adopted by all jurisdictions. It will align food safety requirements for dairy businesses across Australia, whether products are destined for domestic or world markets – with potential benefits in national productivity, cost control and competitiveness.

Regulatory issues in 2008 and looking forward, include:

- **That national Food Standards System objectives will not be achieved because regulations are duplicated and guidelines are over-prescriptive.** Full implementation of the Dairy PPP Standard, the first PPPS for a mature industry, as one Australian system (instead of six State codes and Export Milk Orders) should be a turning point in regulatory efficiency and an advance for the nation, for the industry, for Ministerial Councils and for regulators.
- **COAG and ANZFRMC policies for risk based minimum effective regulation must extend to achieving useful Compliance Guidelines** for PPP standards. FSANZ should lead in drafting guidelines to fulfil these policies. Procedures for audit and verification also need to reflect performance. Industries should not face money and time costs of having to 'start again' in negotiating PPPS Guidelines.
- **The operational impacts of export orders and AQIS systems are a long debated regulatory burden.** The *Export Assurance* Report 2000 identified that duplication was costing industries and Australia, and recommended a single system for processing regulation for all markets. Having achieved the Dairy PPPS through FSANZ, the Dairy Industry now reasonably anticipates removal of detailed Export Orders and streamlined systems for export certification and trade.

In 2002, FSANZ was given authority by the Ministerial Council (ANZFRMC) 'to extend its evidence-based standard-setting process to the primary sector' though making food hygiene standards. The ANZFRMC issued policy guidance, particularly:

- Overarching Policy Guideline on Primary Production and Processing Standards (2006)
- A Protocol and a Model for development of PPP Standards (2002)

Alongside the objective of providing safe food controls for the purpose of protecting public health and safety, the Overarching Policy Guideline emphasises *minimum effective regulation*, *reducing the regulatory burden on the food sector*, and facilitating the harmonisation of Australia's domestic and export food standards and their harmonisation with international standards.

The Guideline also refers to the FSANZ Act provisions for FSANZ have regard to:

- Need for standards to be based on risk analysis using best available scientific evidence
- The promotion of international consistency in setting food standards
- The promotion of an internationally competitive and sustainable food industry, and the promotion of fair-trading in food.

It then sets out Higher Order Principles, and Policy Guidance on expected PPP Standard outcomes, and how FSANZ and each Standards Development Committee (SDC) should progress, including consultation. Expected procedure is also detailed in the Protocol and Model with steps to an agreed and approved standard. Higher Order principles for a Primary Production and Processing Standard include to:

- be consistent with internationally recognised Codex standards, save where, after consideration of a risk assessment, it is clear the relevant standard does not sufficiently protect public health and safety in Australia
- address, where this is appropriate, food safety across the entire food chain
- facilitate trade, and be not more trade restrictive and comply with Australia's obligations under WTO agreements
- ensure that the regulatory framework promotes consumer confidence
- ensure the cost of the overall system should be commensurate with assessed level of risks and benefits
- provide a regulatory framework that applies only to extent justified by market failure
- provide for collaborative action among enforcement agencies to optimise the use of resources and effectiveness.

A challenge faces FSANZ and industries that need to develop (or change) processing standards – and there is real potential for more red tape.

Work began on the Dairy PPP in 2004 on instigation of Dairy Australia. An Initial Assessment was followed by an issues paper for consultation comment by March 2005. FSANZ stated that the PPP for Dairy would '*aim to be consistent with international Codex guidelines and build upon the very good food safety management systems already in place in the Australian dairy industry*'.[22] The Draft Assessment Report of March 2006 included 'scientific assessment of the food safety risks'.

Achieving efficiencies for industries and regulators was part of the policy rationale behind developing national PPP Standards based on international Codex standards, for Australian food intended for all markets.[23] This was reinforced by FSANZ in its 2006 Draft Assessment Report during the Dairy PPPS process. FSANZ said:

> **The dairy industry in Australia is a highly regulated sector and practices a high level of food safety management.** Currently, these arrangements are implemented through six different sets of State based regulatory requirements as well as industry codes of practice and guidelines.
>
> Additionally, those dairy businesses wishing to export must comply with the requirements of the AQIS *Export Control (Milk and Milk Product) Orders* 2005.
>
> Industry and Government has recognised a benefit in the development of a single set of national requirements within a single standard. The objective of a [PPPS] for Milk is to provide nationally consistent regulatory requirements that protect public health and safety and are cost effective.

The Final Assessment Report of August 2006 led into ANZFRMC approval and gazettal of the Dairy PPP Standard to commence two years later on 5 October 2008. This FSANZ Standard 4.2.4 covers heat-treated milk and all steps to retail.[24] The ANZFRMC Protocol Step 10 indicates that quick uniform adoption was an aim but in reality timescales are longer and include a number of implementation steps. Even the Standard for 'food service for sensitive populations' (the highest risk area in FSANZ studies in 2002), has taken years to achieve. It was finally gazetted in 2006 with such businesses needing approved food safety programs by Oct 2008.

If lifting Australian food safety level were the vital issue then timescales would have to be shorter. The time to achieve operational rules indicates that national regulation and efficiency benefits must be a prime driver for governments committing regulators and industries to the cost of preparing FSANZ standards.

The Dairy PPP Standard is structured to achieve Outcomes. It allows for innovation and a degree of operational variation among plants. The PPPS builds on Australia's highly safe dairy food preparation which is based on modern State regulation.

> The approach taken by DFSV is far more open and flexible that the prescriptive approach used historically in Victoria, in other States, and as set out in the Export Orders administered by the Australian Quarantine and Inspection Service (AQIS), and in a number of our overseas dairy trading partner countries. It allows for innovation and acceptance of new processes and technologies, while the integrity of the Food Safety System is not compromised and the targeted outcomes are still achieved. In general [companies] see Dairy Food Safety Victoria (DFSV) as very progressive in its management of food safety risk. *Analysis for VCEC 2006* [25]

In its 2007 Food Regulation Review Report, VCEC reinforces that the risk-based approaches used by the Victoria's Statutory Authorities provide the most efficient and effective food regulatory mechanisms.

Risk assessment is now fundamental and this should be fitted to sectors and performance. Rulemaking today should aim to achieve necessary outcomes through minimum effective regulation based on risk assessment, science and performance. The first step of good regulatory practice is to *Establish a Case for Action*. If a case for regulating cannot be made there should be no further action.

Risk profiling should be an vital tool for determining if food safety regulation is warranted. In 2002 FSANZ commissioned two major studies to identify food risk profiles; an examination of the epidemiology of reported foodborne illness, plus a key factor analysis (type of food operation, probability and frequency of illness, by quantity of food consumed, and severity of illness).[26]

The profiling exercise found five food sectors were of highest risk. Economic evaluation showed a significant benefit-cost for mandating food safety programs for businesses in 1, 2, 3, 5 (not 4 because of low illness costs/meal).

1. food service for sensitive populations (highest risk)
2. producers, harvesters, processors, vendors of raw ready to eat seafood
3. catering operations serving food to the general population
4. eating establishments, and
5. producers of manufactured and fermented meats.

A more specific ANZFA report divided food businesses into three risks: high, medium, low.[27] In 2001 (prior to further QA advances in processing) medium risk establishments included abattoirs, poultry processing, dairy factories, take-away, and fast food chains. Highest risk were airline caterers, hospital caterers, and nursing homes.

Building on this, for the Dairy PPPS development, FSANZ used a combination of 'risk profiling, quantitative /qualitative risk assessments and scientific evaluations' to 'identify and assess food safety hazards in order to develop efficient and cost-effective risk management measures'.[28] An extract of the FSANZ report follows.

FSANZ Dairy PPPS, 2006 Draft Assessment Report (DAR)

The Risk Profile determined that the **current management practices in place within the Australian dairy industry support the production of dairy products with a high standard of public health and safety.** The key findings include:

• Consumption of dairy products is rarely linked to food-borne illness in Australia.

• A wide range of microbiological hazards may be associated with raw milk and dairy products, but these do not represent a problem under current management practices which:

- control animal health;

- ensure adherence to good milking practices;

- require effective heat treatment e.g. pasteurisation; and

- have controls to prevent post-pasteurisation contamination in the dairy processing environment.

• There are minimal public health and safety concerns regarding the use or presence of chemicals in dairy products due to the extensive regulatory and non-regulatory measures in place along the dairy industry primary production chain.

• Extensive monitoring of chemical residues in milk over many years has demonstrated a high level of compliance with the regulations.

Risk management. The outcomes of the Risk Profile demonstrate that the existing regulatory arrangements and industry initiatives that have been implemented are effective in protecting the public health and safety of consumers. … Proposal P296 has sought to develop a single national standard for milk production and processing based on the measures that are common across the State-based requirements and that support the high level of food safety evident in this industry.

The Dairy PPP Standard demonstrably aligns with the FSANZ description of 'a single set of outcome-based national requirements that support the safe production of dairy products'. The gazetted Dairy PPPS is compact and covers Dairy primary production (Div 2), Dairy collection and transport (Div 3) and Dairy processing (Div 4). It is structured to achieve regulatory options for risk management as decided during assessment and consultation. It is a national standard that :

- requires primary production businesses and dairy transport businesses to have documented food safety programs including some specific controls to address food safety, and
- requires processing business to have a documented food safety program (food safety program or Codex HACCP system).[29]

The substantial FSANZ assessment behind this Dairy Standard should also underlie the development of PPPS Guidelines, plus critical review of the purpose and effects of Australia's duplicate set of regulations for export.

Industry participants are concerned by drafts of an interpretative guide circulated by FSANZ in 2007 and 2008. In particular, the drafts relating to two pages of the Dairy PPPS are some 45 pages long, elements are detailed and prescriptive, and points go beyond basic actions considered necessary to comply with the PPPS. Additional guides are intended for transport and processing, maybe 150 pages in all.

While FSANZ stresses that Guides are intended for regulators auditing compliance and will not be a legal requirements on businesses. However, extracts from FSANZ documents show that when businesses seek explanations from regulators 'on compliance with the Standard or Code', agencies will be expected to refer to the 'Guides'. In a short time, prescriptions in the Guides will become regulation.

The serious issue of Guides introducing 'regulatory creep' and increasing costs through over-compliance is discussed in Part 3.2, with the conclusion that *Australian industries should require Compliance Guidelines for users with all outcomes-based Standards*. Government policy statements, including the COAG principles from 1997 to 2007 support this expectation.[30]

To achieve efficient, productive Australian food safety systems, regulators and industries also need to proactively address duplication in export rules.

The safety of Australian milk and milk products destined for local or export markets is well-established. The veracity of the State-based, Codex-linked, industry-applied systems that underpin these safety outcomes has been confirmed through FSANZ processes. FSANZ – an independent expert body – concluded in its Final Report on the Dairy PPP Standard for the Ministerial Council in August 2006, that:

> **The Australian dairy industry produces dairy products of a high level of safety.** This has been supported by industry initiatives and a State-based regulatory system that has implemented comprehensive regulatory requirements from on-farm through to processing and distribution.[31]

The second set of regulations impacting on most dairy processing in Australia are the Commonwealth *Export Control Act* 1982, the *Export Control (Prescribed Goods - General) Order* 2005, the *Export Control (Milk and Milk Products) Orders* 2005 [the Milk Orders], plus associated instruments at multiple levels. The Orders set administrative arrangements for export but also prescribe operational requirements.

The Milk Orders introduce another set of food standards developed by a single Australian regulator, not through FSANZ. These 'export standards' (as named in the Orders),[32] do reference the Food Standards Code on products and Australian testing standards, but also duplicate substantial aspects of processing hygiene systems regulated under the Australian Dairy PPPS. Although AQIS has indicated it will incorporate the PPPS, this is unlikely to lead to regulatory streamlining.

The existence of parallel, duplicative food hygiene regulation in Australia has long been contentious, particularly as (i) major food industries with value-adding stages in Australia depend equally on domestic and export markets, and (ii) competitiveness in price (necessarily reflecting cost structures), quality and delivery are increasingly vital in all markets.

An independent panel review of the *Export Control Act* 1982 (Cth) during 1999 under the National Competition Policy, examined the Federal export regulation and its effects on competition and export by Australian food industries. The review found the Act provided 'recognisable economic benefit', but policies and procedures could lead to major competitive distortions with associated inefficiencies and trading disadvantages. The Panel assessed that distortion could be reduced by 'changing the emphasis of some functions' and by addressing a set of problems, including dual systems (domestic and export) for managing food safety, and complexity and cost incurred in meeting export systems.

The *Export Assurance* report, said that 'Australian exports of food and agricultural products have been disadvantaged by working under a combination of two systems – domestic and export – and legislation that is unnecessarily prescriptive'. It developed a Vision for more streamlined, efficient, trade-effective food processing regulation.[33]

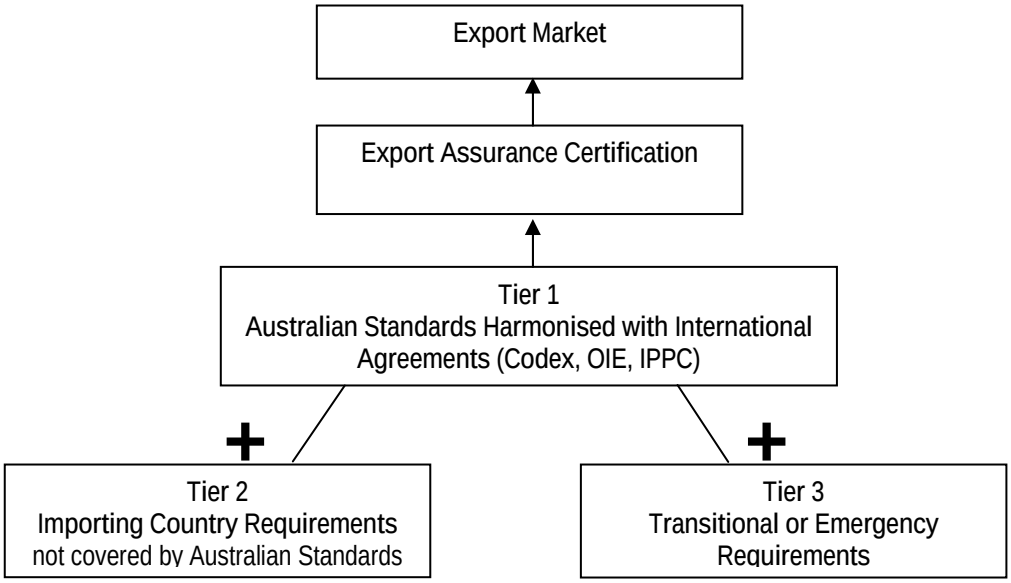
> **The … vision is for exports based on Australian standards,** enabled by a true partnership between government and industry, with single-body certification by government, where this is required by importing countries. … The Committee believes the vision could not be attained without a fundamental change in the manner by which Australian food and agricultural products are currently regulated.
>
> [The vision involves] adoption of Australian standards, rather than the most stringent foreign requirements, as the baseline for all export destinations [and] freedom for individual producers to invest to meet additional standards that may be required by individual governments …
> *Export Assurance Report, pp x, 96, 98*

This Export Assurance model was agreed by the Federal Government in 2003.[34]

There is a consensus that processing sectors of industries such as dairy and meat have advanced strongly in quality assurance and plant and product performance over 10-15 years (much due to companies taking responsibility for QA and outputs). **Many consider regulatory systems have not progressed commensurately, and there has been limited advance toward Australian Standard export.**

A key recommendation of the *Export Assurance* model is that food manufacturing plants in Australia should all operate under Australian Standards (these harmonised with international agreements, Codex, OIE), implemented at State to local levels. This would be 'Tier 1', ie. ongoing Australian manufacturing production of many types of food consistently safe for human consumption in Australia and if exported.

Export Assurance report 2000 - Features of the Three-Tier Model



Where an importing country specifies additional or different requirements not covered by Australian food safety standards, these 'Tier 2' criteria would be need to be met and verified with government certification if required by those countries.[35]

While reviews of AQIS Export Orders during 2005 added an 'outcome' orientation and incorporated Food Product standards, two food hygiene systems still clearly operate. The dairy industry had notably achieved some convergence of 'domestic' and 'export' through logic, performance and practical of audit co-operation. VCEC, in its Sept 2007 Food Regulation report observes positively on sensible delegations between AQIS and State authorities on Dairy audit. Yet, there are signals in 2007-08 that these MOUs are breaking down for a range of reasons.

A number of pointers indicate the need and opportunity for fundamental review again of duplication of Australian standards and 'export standards'. These include (i) the Dairy Industry securing a formal Primary Production and Processing Standard following independent FSANZ assessment of the safeness of food outcomes from State-based dairy hygiene regulation, and (ii) Federal and State Governments commitments from 2006 to seriously cut regulatory load.

- **Blocks of rules now need to be critically examined, including those as long-standing as Export Orders.** The Australian Dairy Industry's ongoing record of producing highly safe food makes scrutiny of regulation duplication and roles of regulators, vital for policy, productivity and competitiveness reasons. Restructuring to remove the Milk Orders would be a prime 'deregulation action'.

- The Dairy Industry can provide further thinking on such an advances, if sought.

3.2 Costs of regulatory creep in guidance and processes

All Australian governments face a challenge to reduce regulation costs and impacts on innovation and competition, and to ensure promised public benefits are secured – otherwise regulatory 'returns' are negative.

As part of this, industries and businesses reasonably expect capable, considered performance from departments and regulators. Policymakers and regulators themselves need to be vigilant to ensure regulatory systems are not more than minimum effective regulation and that ongoing benefits are exceeding costs.

This section considers issues with regulatory structures, process and application, and suggests reasonable Industry expectations. Particular concerns include that:

▷ Regulatory creep is an escalating problem. Implied directions or expectations, or confusion, can pressure businesses into over-compliance. The extra costs are a direct regulatory burden.

▷ Costs can also creep in during system development. Regulators and committees need to be vigilant in drafting standards, guidelines, notices etc.

▷ Agricultural industries reasonably expect agencies will develop basic Compliance Guidelines to support use of outcomes-based Standards. 'Best practice guides' if any, need to kept apart from Standards. This accords with COAG Principles.

▷ As the number of industry schemes increases, industry entities should also be expected to assess options and consult in accord with 'good regulatory practice'.

▷ Regulatory systems set to service some markets, can mean over-compliance costs for other markets. For instance, the Dairy Industry is concerned by degree of influence of EU trade prescriptions on Australian dairy export rules. Strong trade-commercial-technical negotiations are needed, not expansion of costly rules.

'Regulatory creep' is a reality – 'the hidden menace of the red tape burden'[36] - and adds to costs, mainly by engendering unnecessary compliance actions.

Over-compliance under pressure or by expectation, or direction, is a key effect of regulatory creep, and the associated extra costs are a measure of the burden.

Causes and effects of regulatory creep show themselves in a number of ways. The Productivity Commission 2007 Issues Paper sought inputs on 'extra costs arising from apparently poor regulation design, including excessive coverage (regulatory creep - regulations covering more than was intended or is warranted)'. Further indicators include:[37]

- Unclear rules, where confusion about standards, guidance and regulation leaves people not knowing what is expected of them, and what constitutes compliance with the law. The pressure is to over-comply at extra cost.
- Regulation developed or embellished by non-statutory means, including industry systems, co-regulation, science and enforcement processes that extend through pathways often lacking government justification and impact analysis beyond baseline requirements to unnecessary compliance burdens.
- Guidance - its status, how it is developed and used to influence enforcement activity and compliance, with potential unnecessary burdens at extra cost.
- Quasi-regulation giving much discretion to regulators and, because of its convenience and lack of scrutiny, sometimes used as 'backdoor regulation'.

- Quasi-regulation such as Guidelines, being pitched at so-called 'best practice' levels (a commercial decision) rather than minimum effective regulation.
- Industry self-regulation gaining imprimatur of government agencies and being lifted into legislation.

In 2006, noting over 6,750 Australian Standards already in place, the Productivity Commission said Standards Australia and standard-makers generally should : [38]

- ensure better justification processes before new standards are developed, and
- systematically consider costs and benefits before developing or revising a standard, and publish reasons for such decisions.

The Commission reinforced that 'all government bodies should rigorously analyse impacts before making a standard mandatory by regulation, and ensure it is the minimum necessary to achieve the policy objective'. Similar issues arise with guides.

Policies for minimum effective regulation need to extend to all types of regulatory actions and instruments. When 'outcomes-based regulation' ('what') is developed to give business flexibility in achieving outcomes, there appears to be an urge among many parties to shift old prescriptions about 'how' into Guidelines.

Two types of Guides are emerging in regulatory procedure: *Compliance Guidelines* and *Good Practice Guidelines*. Confusion among these has been identified as a major source of regulatory creep, unnecessary compliance burden on businesses, and cost to economies.

> The way in which guidance is developed and used can play a significant part in encouraging regulatory creep. It is important here to draw a distinction between best practice guidance and guidance that is intended to help those being regulated comply with their obligations. Best practice guidance … must be clearly labelled as such.
>
> Often the Government, regulators and industry will prepare guidance notes that encompass both advice on complying with regulatory requirements and best practice advice. It may be more helpful for businesses to have both sets of guidance in one volume, but it can also lead to confusion over what constitutes best practice and what is required by law.
>
> Guidance can also have the force of law as the courts may take into consideration the extent to which guidance has been followed. *UK Better Regulation Task Force 2004* [39]

Agricultural industry participants are concerned to ensure that Guidelines associated with Orders or Standards are just 'Compliance Guidelines'.

Each Standard sets down Outcome requirements, and Compliance Guidelines need to state basic ways of complying with the standard, ideally using science/research.

Importantly, this accords with policy objectives of specifying 'what' businesses are to do, and then allowing businesses latitude to work flexibly, creatively and responsibility in producing results. Compliance Guidelines should provide firm, but not fixed, points on 'how' to achieve the outcomes set down in standards.

Perceived legal status of guidelines also contributes to unnecessary compliance. Views that a guide must be complied with can arise from language (eg. 'should')[40] and from regulator or industry practices.

If Guidelines set measures above basic requirements, the guidance is not 'minimum effective regulation'.[41] This is especially so when Guidelines have direct regulatory effect by being printed alongside a Standard that is a statutory instrument or has authority by reference through a statute, regulations or notice.

Industries under productivity and competitiveness pressures need to work on all fronts to achieve Compliance Guidelines and to exclude 'best practice' from regulation regimes. It is reasonable for agricultural industries to expect that Compliance Guidelines will be developed for users of all Standards, and that good practice guides, if any, will be kept aside from Standards. This expectation is well-supported by COAG Principles.

> Legislation should entail the minimum necessary amount of regulation to achieve the objectives. Only those parts of a product standard originally developed for voluntary compliance … which are necessary to satisfy regulatory objectives should be referenced in mandatory regulatory instruments adopted by government. *COAG Principles 1997-2008* [42]

A number of issues identified in discussion within the Industry early 2008, show signs of regulatory creep (and raise questions about Impact Assessment).

- *The Livestock Transport Standard* under development as a forerunner of a series of Animal Welfare Standards and Guidelines through Animal Health Australia, is sensitive area. This makes it even more vital that drafts issued by the responsible body, AHA, align with policy and industry expectations in development of both the Standard and Compliance Guidelines.

- *Development of Guidelines for the new Dairy PPP Standard*, where some points in a draft extend beyond basic actions needed to comply [see 3.1].

- *A meat industry scheme, Livestock Production Assurance (LPA) and its blanket extension to dairy cattle although farm models are very different.* While LPA and the core document (National Vendor Declarations – NVD) began as voluntary systems, its ties with the statute-backed National Livestock Identification System (NLIS), plus local rules for NVD in various saleyards, make NVD and LPA Level 1 'mandatory'. LPA is a regulation regime. A key question about schemes such as LPA, is whether industry entities should be expected to assess options in accord with good regulatory practice?

- *Regulatory systems set to service some markets can mean over-compliance costs for other markets.* The Australian national/state dairy food safety system is based on international standards, and it routinely produces highly safe products for all markets. So additional requirements by importing countries are essentially 'commercial' or 'trade' specifications (even if described as for food safety or to converge with their local systems).

  If blanket changes are made to export rule systems by Australian regulators in response to trade demands of one importing area (say the EU), the extra requirements will add 'over-compliance' costs to Australia's highly safe food products being prepared for other markets, domestic and export. This would be a form of regulatory creep and also raises questions about need for and depth of regulatory impact assessment. Debate about options, which should include negotiations with countries, would be crucial before imposing costs.

The Dairy Industry can also provide further thinking on this issue area, if sought.

Endnotes and references

[1] Victoria Department of Treasury and Finance website on National Competition Policy legislation review. www.dtf.vic.gov.au/ [2.2008]

[2] Current and historical industry statistics plus some trend discussion sourced from: Dairy Australia – *Australian Dairy Industry In Focus 2007*, and the Dairy Australia website. www.dairyaustralia.com.au/

[3] ABARE. Dairy outlook to 2011-12 australian commodities > vol. 14 no. 1 > march quarter 2007. Also: ABARE australian commodities > vol. 14 no. 4 > December quarter 2007 (focussed on 2007-2008).

[4] "In recent years South American milk production has grown steadily and outstripped local consumption. Dairy products from the region have greatly increased their presence in world markets … Competition from the three major export industries [Argentina, Uruguay, Brazil] is likely to increase in the short to medium term. As cost effective, pasture-based producers they are well placed to challenge in international markets." ABARE Conference 2006. Phillips C, Dairy Challenges in an Evolving Export market Competition from South America.

[5] 'Australia is highly restricted in its access to world processed food markets by the impact of rigid import controls, tariffs and other trade barriers including export subsidies provided by foreign countries for their own exports. High input costs also reduce Australia's competitiveness. Australia needs to give priority to diversification of export markets, particularly in the emerging markets in Africa, Asia, the Americas and the Middle East … Australia also needs to increase productivity, improve cost efficiency and undertake market research and promotion in order to be more competitive in the long run.' Kidane (2006) Export Impediments and Opportunities for Australian Processed Food Industry, *Journal of Asia-Pacific Business* 7(3). Also various Australian Farm Institute publications.

[6] Primary Industries Ministerial Forum in Cairns, Friday, February 29 2008. www.daff.gov.au/__data/assets/word_doc/0004/576643/communiquefeb.doc

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[10] The Dairy Industry's approach to supply chain management, DA website 2.2008; DA submission to VCEC Inquiry into Food Regulation in Victoria , DA submission to Bethwaite Review March 2007. DA submission to COAG review of Hazardous Materials, 3.2007.

[11] Dairy Australia – Australian Dairy Industry In Focus 2007.

[12] Productivity Commission (2007) *Annual Review - Primary Sector*, Report.

[13] DA, On Farm Quality Assurance, website 2.2008.

[14] VFF (2007) submission to PC review of Regulatory Burdens on Business.

[15] Australian Dairy Manufacturing Industry/ DA (2006) *State of the Environment Report*

[16] Burgess A (2008) Climate change, emissions: education before action, *The Australian Dairyfarmer* Jan-Feb.

[17] The Food Regulation Review Committee (Blair) Review report, *Food: A growth business*, 1998, was a major driver for the new system to 2002. The review recommended a well-integrated, streamlined and cost-effective co-regulatory system to protect public health and safety across the whole food supply chain, plus clear, simple, practical and, as far as possible, nationally uniform systems and legislation.

[18] Corish report (2006) *Creating our Future: agriculture and food policy for the next generation*. Report by the Agriculture and Food Policy Reference Group to the Minister for Agriculture, Fisheries and Forestry, February.

[19] VCEC, *Simplifying the Menu: Food Regulation in Victoria*, report, September 2007, and Government Response Feb 2008.

[20] The COAG Food regulation agreement included a requirement for a Food Regulation Consultative Council if agreed by the parties. This did not occur. Rather, in April 2003, the Ministerial Council endorsed a mechanism to enable stakeholders to have input to development of policy on the regulation of food through flexible set according to the sensitivity or complexity of a particular issue. This Consultative Mechanism was reviewed after 12 months, and during 2005 adjustments were made to the consultation process. A second Forum was held in April 2006. Sources – various web pages, including archives.

[21] VCEC, *Simplifying the Menu: Food Regulation in Victoria*, report, September 2007. Particularly Chapter 7.

[22] FSANZ *Food Standards News* 53 - April 2005. A SDC for dairy - comprising industry, government and consumer representatives was established 'to provide advice to FSANZ during the process'.

[23] As recommended by the 1998 Blair Report and a 'senior officials working group'.

[24] The FSANZ SDC is working on the raw milk components to complete the PPP Standards for Dairy Products.

[25] Dench Mcclean Carlson (2006) *A Case Study on The Dairy Industry*. VCEC website.

[26] *Food Safety Management Systems, Costs, Benefits and Alternatives*, Allen Consulting Group, 2002; *National Risk Validation Project*, Food Science Australia and Minter-Ellison Consulting 2002. See also: *Food Safety Management in Australia - Risk Profiling and Food Safety Programs*, Food Regulation Standing Committee, Consultation Paper March 2003. A repeat of the baseline 'cost of foodborne illness' assessment is said to be scheduled for 2008.

[27] ANZFA (2001) *Food Safety: The priority classification system for food* businesses (A risk-based system designed to classify food businesses into priority ratings based on the risk they present to public health and safety).

[28] FSANZ (2006) Draft Assessment Report Proposal P296 Primary Production And Processing Standard For Dairy.

[29] FSANZ (2006) *Final Assessment Report Proposal P296 Primary Production And Processing Standard For Dairy.*

[30] *Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standard-Setting Bodies*. Endorsed by COAG 1995, amended by COAG 1997 and 2004, current 2008.

[31] FSANZ (2006) *Final Assessment Report Proposal P296 Primary Production and Processing Standard For Dairy*. FSANZ, is 'a statutory authority under Commonwealth law and an independent, expert body'.

[32] *Export Control (Milk and Milk Products) Orders* 2005, 34 Export standards for milk and milk products. 34.1 [reads] The occupier must ensure that the applicable requirements of the following Schedules are met: (a) Schedule 3 (Structural requirements); (b) Schedule 4 (Operational hygiene); (c) Schedule 5 (Preparation and transport); (d) Schedule 6 (Product standards); (e) Schedule 7 (Trade description); (f) Schedule 8 (Identification, tracing systems, integrity and transfer).

[33] *Export Assurance* (2000), NCP Review of Export Control Act 1982, Panel Frawley, Makin, Neiper, Wilson.

[34] *The Government Response to the National Competition Policy Review of the Export Control Act 1982*, with elaborations prepared by AQIS, Feb 2003. www.daff.gov.au [10.07]

[35] A Tier 3 was specified for emergency or country 'commercial' requirements needing government backing eg. Halal.

[36] In a turning-point review by the UK Better Regulation Task Force. BRTF (2004) *Avoiding Regulatory Creep*. www.brc.gov.uk/

[37] BRTF report above, plus Office of Best Practice Regulation (OBPR) (2006) *Best Practice Regulation Handbook*, Appendices B-9.

[38] Productivity Commission (2006) *Standard Setting and Laboratory Accreditation*, Report.

[39] BRTF (2004) *Avoiding Regulatory Creep* report, p17. UK Better Regulation Task Force. www.brc.gov.uk/ . Many different terms / instruments (quasi-regulation) were identified as 'guidance': Guidelines, Advice, Voluntary Codes of Practice, Approved Codes of Practice, Best practice guidance, Good practice guidance, Guidance on complying with regulatory requirements, Criteria, Guidance Notes, Approved Documents.

[40] BRTF (2004): The language used in guidance can also add to the confusion. Frequent use of the word 'should' tends to make those using guidance feel that they have no choice but to follow it to the letter.

[41] Good or Best Practice Guidelines seek more than basic compliance conduct and will almost certainly engender higher costs. While said to be voluntary, the absence of basic compliance guides, plus agency actions to include so-called 'best practice' within regulatory instruments (Standards, Orders, Notices…) develops an expectation which could extend into regulator practice, tribunals and law courts.

[42] Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standard-Setting Bodies, endorsed by COAG 1995, amended by COAG 1997 and 2004, current 2008.