

Australian Dairy Industry

comments

Productivity Commission

draft report

Regulatory Burdens on Business

- manufacturing and distributive trades

Australian Dairy Farmers Ltd

Australian Dairy Products Federation

Dairy Australia

**The Presiding Commissioner
Productivity Commission**
Review of Regulatory Burdens,
manufacturing & distributive trades

The Australian Dairy Industry, an integrated primary, manufacturing, retail and export chain, welcomes the opportunity to raise issues about regulation with the Productivity Commission. These should be proactive exercises in the context of ongoing Australian Government and COAG commitments to address regulatory costs and reduce red tape.

Balanced, effective and cost-efficient regulatory frameworks and practices are vital to Dairy as a world food industry. In its March 2008 submission, the Dairy Industry identified a range of regulatory problems. Some of these, such as environmental regulation, were recognised to be likely outside the scope of this Productivity Commission (PC) review, but were important to record as regulatory effects are cumulative.

However, as the PC draft report [DR] points out, “the Australian Government’s role in relation to environmental matters has grown since the mid-1970s” reflecting widening of issues and the emergence of intergovernmental agreements and programs. [DR p117]

Similarly, while the regulation of food products, preparation and sale is mainly a State function, national regulations operate and are expanding. The Australian Government has a key steering role in the development of food standards through the Department of Health and Ageing (DOHA), and Food Standards Australia New Zealand (FSANZ) would be best described as a national statutory authority.

Further, the Department of Agriculture, Forestry and Fisheries (DAFF) is a rulemaker, and through the Australian Quarantine and Inspection Service (AQIS), is a direct regulator of the operations of hundreds of food processing plants in Australia that serve export and domestic markets. These DAFF and AQIS regulatory activities, including their interfaces with state agencies, should be wholly within the scope of this PC review.

The Dairy Industry raised, and discussed in some depth, three main issue areas. While linked, these have distinct policy, regulation, and regulator dimensions.

1. **Food health debate and policymaking leading to rules for food products.** The Dairy Industry is concerned to be fully involved and have influence equal to others under present and future policymaking systems.
 - key policy groups: ANZ Food Regulation Ministerial Council (ANZFRMC), Federal and State Departments, Food Regulation Standing Committee (FRSC), Implementation Sub-Committee (ISC), National Health & Medical Research Council (NHMRC), perhaps FSANZ.
2. **Standards-making procedures for food products and for food processing.** Dairy is concerned with regulation design, costs and inefficiencies in implementation.
 - key regulators: FSANZ, State food authorities, DOHA, DAFF Codex section, AQIS.
3. **Food hygiene regulation and how this is applied in manufacturing and production.** Dairy has significant difficulties with duplication of hygiene standards, specifically the Australian Dairy Primary Production and Processing Standard which will be operative nationally in 2008, and separate, extensive export manufacturing rules.
 - key regulators: Australian Quarantine and Inspection Service (AQIS), Dairy Food Safety Victoria, NSW Food Authority, Safe Food Queensland, and the corresponding agencies in other States and Territories.

The Dairy Industry supports a number of the recommendations in the PC draft report. However, Dairy also has concerns with elements of the draft -

- particularly the lack of attention to food hygiene regulation as a key issue area.

Inconsistency in application of rules across jurisdictions is an issue in Australia but not the only or even the major regulatory inefficiency. Arguments about across-state competitive advantages are inwardly focussed – Australia must remove inefficiencies to compete globally. Manufacturers that only sell in Australia are still in competition with the world. *Harmonising poor, prescriptive, duplicative regulation will not reduce costs and impacts.*

The terms of reference suggest room for stronger investigations by the Productivity Commission – including examining detail of regulatory regimes that have persistent problems even after reviews and reform attempts. It is important that these PC Reviews of Regulatory Burdens have useful, visible outcomes.

Substantial change in regulatory attitude, practices and detail are needed if Australia is to maintain economic progress through higher productivity and continuing competitiveness. This will require genuine review of regulatory regimes to ascertain whether policy intentions can be achieved through simpler regulation structures, fewer prescriptive rules, and less day-to-day intervention through instructions and practices.

Arguably, such reviews should not be carried out by regulators alone. Urging 'good regulatory practice' will not work in areas with command and control cultures. The Australian Government imperative to secure real reform is demonstrated in appointment of the Minister for Finance and Deregulation. The PC should not rely on past reviews or on regulators alone. Issues with agency self-review were made clear by the 2005 Taskforce.

Their mixed record of achievement can on occasion be explained by the origins and make-up of their secretariats. The biggest problems typically arise where an appointed review is fitted up with a secretariat drawn from the department responsible for the policy area under review. The dominance of the department's own interests and views can be hard to shake unless the reviewer is already expert in the area being reviewed and has a diligent hands-on approach. *Banks, 2007*¹

Specific comments are provided on the draft report under Dairy's main issue areas.

1. Food health debate and policy making

The Food Regulation Ministerial Council (ANZFRMC) "was established, responsible for developing food policy and Food Standards Australia New Zealand (FSANZ) was established with the responsibility for developing food standards" [DR].

A key problem for the Dairy Industry is how the policy making function of the ANZFRMC, is influenced by policy groups, regulators, businesses and other stakeholders. How can industries such Dairy ensure involvement in this process, *and why does this question still arise?* Examples of policy areas of importance to Dairy include: Revision of Government mandated population dietary guidance, nutrition and health claims, mandatory food fortification, and regulation of novel foods. Dairy Industry concerns include that:

- Policy level discussion of such topics, involving departments and regulators through committees, results in policy guidance to be translated through FSANZ processes into standards. These are the first stages of potentially major reforms impacting on industries and consumers. Open consultation is vital before policy is 'set'.
- ANZFRMC committee processes appear to be managed through DOHA. Openness to input at formative stages is still unclear – although policy development is occurring and some groups are clearly involved. The DOHA Food Regulation Secretariat

¹ Banks, Great Expectations: Management (and other) Lessons from the Regulation Taskforce, speech May 2007.

website shows the last Food Policy Consultation Forum Report is dated April 2006. A further meeting is planned for 7th August, 2008.

In its submission, Dairy generally agreed with the strong recommendations from VCEC in 2007 on need for improvement of ANZFRMC governance and information flow.

On the PC Draft Report, the Dairy Industry -

- ▶ **agrees with and supports PC Draft Responses 3.3, 3.4 and 3.5 but proposes these responses be adjusted to specifically include working of Committees.** The responsibility to apply COAG Good Regulatory Practice Principles in collecting evidence, consultation, in conducting analysis and advising the Council rests as much with the Heads of Departments advising members of ANZFRMC (Heads meet as FISC) and with heads of regulators and enforcement agencies (ISC) as it does with Ministers.
- ▶ **agrees with asking about the Bethwaite review but considers there is no basis for the PC deferring to that exercise** [draft response 3.1]. It has been frozen since mid 2007 and was deleted from the DOHA website early 2008. Submissions to the PC, and to VCEC in 2007 demonstrate industry frustration with further delay in the all governments, especially the Federal government, coming to grips with food regulation.
- ▶ **reinforces that issues are deeper than improving national consistency and COAG harmonisation, and recommends the PC with its knowledge** from submissions and research of the extent of food regulation issues (including food hygiene regulation, below), *specify a framework for genuine review of the width of food regulation issues that could be progressed under PC auspices in 2009.*

2. Food Standards – for products and processing

The Food Standards Code is in four chapters as noted in Box 3.1 on draft report p33.

chapter 1 – standards applying to all foods in regard to ingredients, additives, as labelling

chapter 2 – standards applying to particular types of foods (eg. dairy, meat and oils)

chapter 3 – food hygiene

chapter 4 – standards dealing with primary production in Australia.

The PC review has focussed on issues around chapter 1 and 2 standards and associated procedure, as seen in the PC's introduction to Box 3.1 –

The Code sets out the compositional requirements for food and mandates compliance with the use of ingredients, additives, food colouring, processing aids and residues. It also sets out standards for advertising, marketing and product labelling. *DR p33*

Other indicators of the Productivity Commission's concentration on these parts of the Code and implementation issues include:

- Table 1 pXXV – under design of regulation the PC indicates food labelling and an RIS problem. Dairy and others raised issues such as prescriptiveness in chapter 3 and 4 standards and guidelines but these are not pursued by the PC.
- Almost all examples discussed through the PC's chp 3 relate to food as products.

The PC focuses on 'inconsistency' of elements of implementation of food standards across States [DR 3.1], and 'Delays and difficulties in implementing and amending food standards [3.2], and looks at aspects of 'problems with the regulation-making process' [3.4].

Implementation is key in rule systems but reviews should not jump past issues with regulation design, content and workability. These crucially precede and influence adoption, and the impact of the rules on industries and businesses. The DR records examples of poor regulatory practice (fortification of bread, country of origin labelling) that had been reported to the 2007 VCEC review (and referenced by Dairy in relation to policy and regulatory process at the top level).

Problems with rule design, content and workability arise in all types of food regulation. The standards making process across all of Food Code chapter s1 to 4 is similar in principle, although the resultant standards are different in effect. Food Safety/ Hygiene standards (Code chp 3) and Primary Production and Processing (PPP) Standards (Code chp 4) regulate how plants and production sites operate – how the factories work.

Chp 3 and 4 standards plus inspection procedures, and the way the rules are applied daily, have major effects on the productivity and competitiveness of Australian food manufacturing facilities and systems. Achieving efficiencies for industries and regulators was part of the policy rationale behind developing national PPP Standards based on international Codex regimes, for Australian food intended for all markets [refer Dairy submission]. It is vital to Australia that this policy aim is secured.

The Dairy Industry submission raised the following issues with Chp3 and 4 Standards:

- ▶ **COAG and ANZFRMC policies for risk-based, minimum effective regulation, must be applied to ensure useful *Compliance Guidelines* for PPP standards.**

Dairy argues that FSANZ should take the lead in drafting guidelines that fulfil 'risk-based, 'minimum effective regulation' policies. Industries should not face money and time costs of having to 'start again' in negotiating PPPS Guidelines once a PPP Standard is ready. *It is understood FSANZ may be moving to develop PPP Standards, Guidelines and Implementation programs concurrently for future PPPS – but it is important this baseline good regulatory practice issue be discussed in the PC report.*

Dairy argues that industries under productivity and competitiveness pressures (and their regulators) need to work to develop basic Compliance Guidelines associated with Standards. The regulatory system needs to identify that these are base Guidelines only – not prescriptions or requirements. Guides should not stand in the way of innovation.

Applying views on 'best practice' is a commercial decision not for regulation regimes. Guidelines are often referred to in Standards or other instruments and are regulatory. It is reasonable under COAG principles for industries to expect Compliance Guidelines only to be formalised. *The PC is asked to comment on this issue area.*

The Dairy Industry considers that the Dairy PPPS Guideline development process has been unreasonably long and the resultant Guideline is unduly prescriptive. While the Guide is said to be for use of State regulator officers there is a significant risk that prescriptions it contains will become embedded – at productivity and innovation cost to industry and economy. (The draft report notes similar concerns about prescriptiveness in relation to Egg Production Guidelines). Australia needs to recognise that 'outcomes' are the vital performance measure – more so than ways of getting there.

- ▶ **National Food Standards System objectives are at risk of not being achieved because regulations are duplicated and guidelines are over-prescriptive.**

Dairy believes full implementation of the Dairy PPP Standard, the first PPPS for a mature industry, if achieved as one Australian system (instead of six State codes and Export Milk Orders) could be a turning point in regulatory efficiency and an advance for the nation, for the industry, for Ministerial Councils and for regulators. However, there appear limited avenues for industries and government to ensure such a turning point is actually reached. In particular, ensuring the removal of duplicative regulations as new systems are advanced [refer 3 below].

The Dairy Industry is concerned by the PC's apparent reluctance to investigate these issues. The PC notes comments about prescriptiveness in recent food regulation but does not pursue or discuss these, nor the processes leading to food code standards and guidelines. PPPS are mentioned only in short note on p50 [below].

Yet the Commission's Issues Papers expressly 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)'. As identified in the Dairy submission such poor design features also include:²

- Unclear rules: confusion about standards and guidance leaves people not knowing what constitutes compliance; the pressure is to over-comply at extra cost.
- Guidance - its status, how it is developed and used to influence enforcement activity and compliance, with potential unnecessary burdens and 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.

3. Hygiene regulation and its application in manufacturing plants

The Australian government has long been a regulator of food manufacturing and of aspects of food production, under the *Export Control Act 1982* - even though 'the Australian Government has no direct constitutional power to regulate food produced in Australia' [DR p29]. A large part, say half, of food produced in Australia is exported –so a significant proportion of processing plants operate for local and export markets.

DAFF, through AQIS, has extensive food regulation regimes, primarily for hygiene, that AQIS calls the 'export standards' -- as distinct from the national FSANZ Standards and including the Dairy Primary Production and Processing Standards.

In the case of Dairy the hierarchy of AQIS regulations and instructions is:

Export Control Act 1982

Export Control (Orders) Regulations 1982

- Export Control (Prescribed Goods - General) Order 2005
- Export Control (Milk and Milk Products) Orders 2005 (The Milk Orders)
 - Dairy Export Programme Operational Manual (DEPOM)
 - Approved Arrangements Guidelines, Checklist, Audit
 - Importing Country Requirements.

The extent of Australian Government regulation of food manufacturing is indicated by the range of Orders developed and managed by AQIS: at July 2008 - Eggs and Egg Products; Fish and Fish Products; Game, Poultry and Rabbit Meat; Meat and Meat Products; Organic Produce Certification; Plants and Plant Products.

The second indicator, depth of regulatory detail and supervision, varies to some degree.

In the case of Dairy, the Milk Orders are an ongoing, duplicate set of food standards managed by a single Australian regulator, not through FSANZ – although AQIS is involved in FSANZ. These 'export standards' (as called in the Orders), are quite detailed within the Schedules. Then there is the DEPOM Manual and Approved Arrangements.

² Main source: PC Office of Best Practice Regulation (OBPR) (2006) *Best Practice Regulation Handbook*, Appendices.

The Milk Orders 2005: 34. *Export standards for milk and milk products* [reads] 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).

The Milk Orders do reference the Food Standards Code on product features and on Australian testing standards, but the Orders set their own requirements for substantial dimensions of food processing hygiene regulated under the Australian Dairy PPPS.

The Dairy submission provided reasons and references as to why proactive effort will be needed to remove this major area of regulatory overlap – with this action being primarily in the hands of the Federal Government.

- A few key pages of the Dairy submission are attached for quick reference.

Dairy is concerned and disappointed the PC appears not to have investigated these key elements of its submission and the issues reaching back to the major review report in 2000. The PC just notes that AQIS “is currently incorporating the PPPS for dairy products into the [Milk orders] to harmonise domestic and export requirements for dairy products”.

The Industry asks that the PC investigate the structures and issues further. Although AQIS has indicated it will incorporate the Dairy PPPS into the Milk Orders, this will not itself lead to regulatory streamlining. *Dairy reiterates and expands on key points:*

- ▶ The regulatory issues are wider than using the Dairy PPPS as part of the Milk Orders.
- ▶ The key is that Australia has developed a national Dairy PPP Standard. This Australian standard is based on the strong track record of the Australian Dairy Industry across States under the regulation and auditing regimes of State authorities for manufacturing plants and farms [refer FSANZ statements extracted below, also detail in the Dairy submission].
- ▶ With full implementation of the Dairy PPPS on 5 October 2008, the Dairy PPPS should be the single and only Australian standard for dairy product manufacturing for domestic and export (the model recommended by the *Export Assurance* Report 2000 – below).
- ▶ The application of the Dairy PPPS for all dairy products for all destinations, should continue to be managed by State regulatory authorities and their associated inspection and audit arrangements using a mix of professional third-party and authority auditors.
 - These State-based arrangements are proven and the basis of the FSANZ risk profile assessment of “the high level of food safety evident in this industry”.
- ▶ Any additional country or certification requirements needed by AQIS to verify a product meets commercial, not safety, requirements of an importing country should be secured through AQIS interface with this Dairy PPPS operating system. These rules could be included in the Prescribed Goods Orders, with Milk Orders and DEPOM detail no longer required. AQIS would commission spot audits of application of the Dairy PPPS and AQIS requirements, but AQIS personnel should not need to be routinely on-site or inspecting.
- ▶ AQIS would continue and develop its key role as export certifier, facilitating interfaces with importing countries, rather than as operator of a parallel regulation system.

At July 2008, the Dairy Industry has requested that AQIS ‘hold’ on endeavouring to integrate the Dairy PPPS into the Milk Orders because of the potential for this to create a more complex set of regulations and for AQIS auditing to confound national efforts to achieve a single Dairy PPP Standard implemented by professional State agencies.

This is an active regulatory issue for PC attention, with key points of principle at stake.

Extracts from Dairy Industry submission March 2008 (for quick reference)

From Dairy submission, March 2008 pp 17-18

[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'.³ 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).

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.

³ FSANZ (2006) Draft Assessment Report Proposal P296 Primary Production and Processing Standard For Dairy.

From Dairy submission March 2008, pp 19-20

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.⁴

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 2003.⁵

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).

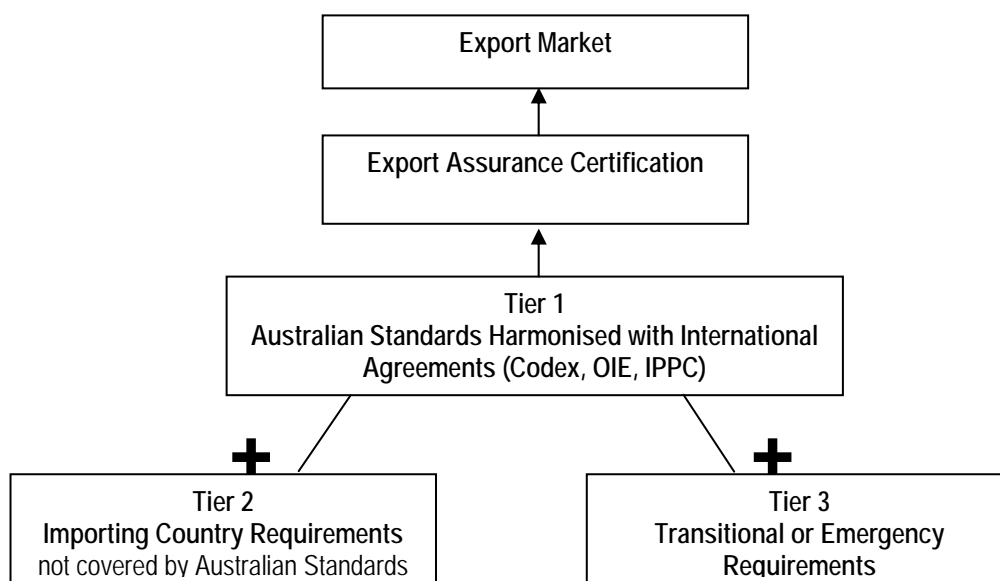
Many consider regulatory systems have not progressed commensurately and there has been limited advance toward Australian Standard export.

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.

⁴ *Export Assurance* (2000), NCP Review of Export Control Act 1982, Panel Frawley, Makin, Neiper, Wilson.

⁵ *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]

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.⁶

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 the 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'.

⁶ A Tier 3 was specified for emergency or country 'commercial' requirements needing government backing eg. Halal.