Growing the Business of Farming | NSW Farmers ASSOCIATION

Submission to the Productivity Commission

Annual Review of Regulatory Burdens on Business – Primay Sector

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EXECUTIVE SUMMARY

Regulatory review is and should be an ongoing concern for regulatory bodies. While there have been a number of reforms over the years that have reduced regulation in the agricultural industry there has also been an increase in the level of social and environmental regulation introduced. The NSW Farmers' Association (the 'Association') will continue to monitor ongoing regulatory reviews for while there appears to be a willingness to reduce regulation, this intent will have to be demonstrated by outcomes of reduced business costs and complexity.

Despite the economic reform of many markets there has been a general increase in the level of social regulation faced by farmers. New areas of legislation such as environmental, food safety, animal welfare, and occupational health and safety have added additional costs and complexities on the farm business.

The Association has identified a number of key regulatory areas that are of concern to farmers in NSW. Duplication and overlap of regulation create additional confusion and costs for farm businesses. It is sometimes the case that a farmer has to deal with a number of different government departments at both a state, federal and local level on the same issue. The regulatory development process must be structured to ensure that consultation with other jurisdictions and other regulations occurs to prevent overlap or duplication of regulations.

Policies and regulations developed at a federal or state level don't necessarily deliver the desired outcomes due to implementation and administration interpretation in different jurisdictions. Inevitably operational differences occur between federal, state and local governments. Differences even occur within governments between departments. This inconsistency creates confusion, complexity and added costs to businesses. Development of regulations under a national authority or a central authority would reduce the level of inconsistency in application and development of regulations.

The Association is concerned that regulation in some areas has become very prescriptive with a focus on enforcement rather than achieving the underlying objective of the regulation. Regulations need to be aimed at being outcome focused to achieve determined goals allowing for a degree of flexibility to achieve those goals.

The prescriptive nature of some regulation, together with the introduction of more social and environmental outcomes, imposes excess paperwork on farm businesses. It is recognised that accountability and transparency is necessary to ensure a level of compliance. However unnecessary paperwork, duplication of paperwork or paperwork that does not necessarily provide additional assurance to the farm business adds costs to business without reflective benefits. Paperwork and reporting requirements should be minimized whenever possible.

The Association recognises that many rules and regulations are necessary for the effective operation of business. The task for government is to ensure that regulations foster effective operation and do not compromise the competitiveness of Australian businesses.

RECOMMENDATIONS

Recommendation 1

That the regulatory development process be structured to ensure that consultation with other jurisdictions and other regulations occurs to prevent overlap or duplication of regulations

Recommendation 2

Regulations need to be developed under a national authority. In cases where this is not possible it is urged that a central authority is adopted within a particular jurisdiction.

Recommendation 3

Regulations need to be aimed at being outcome focused to achieve determined goals allowing for a degree of flexibility to achieve those goals.

Recommendation 4

Regulatory recoding requirements should be made available electronically. Regulatory authorities should streamline regulatory processes and where possible make use of existing information to prevent duplication.

Recommendation 5

In the development of regulations the additional costs on individuals for the public benefit be recognised and where possible measures be adopted to alleviate the cost on the individual.

Recommendation 6

That Transport, Storage and Use (including minor use) of Agricultural Chemicals is adopted under a National Authority, such as the APVMA or similar.

Recommendation 7

That a Nationally coordinated and regulated End Point Royalties collection system be considered.

Recommendation 8

Undertake fundamental reform of native vegetation and biodiversity legislation as it applies to farm land. The reform outcomes should look to deliver a partnership model rather than a punitive model.

Recommendation 9

That the general duties under the OHS act be amended to provide a uniform duty across all Australian jurisdictions.

Recommendation 10

That statutory approved guidance material be made available which can act as a defence further provides confidence within the OHS system by providing the incentive of compliance.

Recommendation 11

That the ability to opt out of a statutory scheme through the use of competitive commercial insurance agencies be examined.

Recommendation 12

That the Schedule 1 Deemed employment of workers of the *Workplace Injury Management and Workers Compensation Act 1998* (NSW) be removed.

Recommendation 13

That journey and recess claims be removed as compensable claims from the *Workers Compensation Act 1987* (NSW).

Recommendation 14

That s.9A of the *Workers Compensation Act 1987* (NSW) be amended to provide clarity that employment is not a substantial contributing factor injuries arising at work due to the undertaking of voluntary recreational activities.

Recommendation 15

That various State and Federal industrial relations systems are merged into a national unitary system.

INTRODUCTION

The NSW Farmers' Association (the 'Association') welcomes the opportunity to provide a submission to the Productivity Commission's Annual Review of Regulatory Burdens on Business. Regulatory burden or red tape is a major issue for the Association as it has a direct impact on our members and their competitiveness with other farmers in Australia and international markets.

The Association is Australia's largest State farmer organisation representing the interests of farmers across a range of commodities including broad acre meat, wool and grain producers, to more specialised producers in the horticulture, egg, pork, dairy and oyster industries. As small business operators they are exposed to a range of regulatory mechanisms. In addition as landholders they must also comply with numerous environmental requirements, and as food producers there are a number of food safety standards that they must meet. Many of the benefits of these regulations extend beyond the farmer to the general public, however their costs are imposed directly on the farmer.

As a state based organization the Association is primarily concerned with the regulatory burden on farmers in NSW and therefore this submission includes reference to a number of state based pieces of legislation. Cognisant that the Productivity Commission is a national body, it is understood that its charter "extends to the public and private sectors and focuses on areas of Commonwealth as well as State and Territory responsibility…". The Association believes that both state and Federal legislation need to be considered within the context of this review to fully comprehend the true regulatory burden imposed on business.

While there is often a negative interpretation given to regulatory burden, the Association recognises that many rules and regulations are necessary for the effective operation of business. The task for government is to ensure that regulations foster effective operation and do not compromise the competitiveness of Australian businesses.

This submission is divided into three parts. The opening section describes some of the broad issues surrounding regulatory burden and gives some background on regulatory burden in NSW. The second section contains information on the regulatory burden imposed on farmers in NSW. The final section provides some particular case study examples of regulatory burden that apply to farming in NSW.

The Association has identified four main areas of regulatory burden that are relevant to farmers in NSW. These include:

- overlap or duplication with other regulation, especially across jurisdictions
- inconsistency of regulations across jurisdictions
- Undue prescription and complexity, and
- excessive paperwork

The Association hopes that the Commission will regonise these areas and consider the recommendations put forward in this submission.

REGULATORY BURDEN

There is a clear economic case for government intervention in markets where some form of market failure has taken place. Instances of market failure arise through the existence of public or merit goods, a monopoly market position, and externalities. In such cases it can be justified that such intervention is in the public interest. The intention of government regulation and intervention in the market should be to correct the inefficiencies and develop a Pareto optimum allocation of resources.

Reviews of Regulations

There have been a number of reforms over the years that have reduced regulation in the agricultural industry. Reforms such as the deregulation of electricity, ports, airlines, gas and telecommunication markets have arguably increased competition and driven market efficiencies. Agricultural industries have not been isolated from reform with industries such as dairy, domestic grain and wool all undergoing deregulation. While these economic reforms inevitably leave some participants in a weaker position the understood intention is to improve the efficiencies of the market and competitiveness on the domestic and international markets.

In October 2006 the NSW Independent Pricing and Regulatory Tribunal completed an investigation into the burden of regulation in NSW and the means of improving regulatory efficiency. The Tribunal outlined a number of regulatory areas that were evident in NSW. A number of recommendations were made including to improve the consultative approach, improving the quality of analysis, ensuring appropriate review of regulation, and facilitate more efficient cross jurisdictional regulation. The Government has provided an initial response addressing many of the broader recommendations through the establishment of the Better Regulation Office and the development of a new guide to Best Practice Regulation. The Association will follow the response to the review closely.

Reviews and reforms have led both Federal and State governments to establish regulatory oversight bodies. On 9 November 2006, the NSW Government announced the establishment of the Better Regulation Office. Under the Better Regulation Office the NSW Government has committed to ensuring that all regulation is developed in a manner consistent with the following best practice principles:

- the need for government action should be established;
- the objective of action should be made clear;
- the costs and benefits of a range of options should be considered, including non-regulatory options;
- government action should be effective and proportional;
- the simplification, repeal, reform, or consolidation of existing regulation should be considered;
- business and community consultation should inform regulatory decisions; and
- regulation should be periodically reviewed and, if necessary, reformed to ensure its continued efficiency and effectiveness.

As yet there has been no time in which to assess the new Office and its performance based on the outlined principles. Indeed the Office is so new that a recent Scorecard by the Business Council of Australia was unable to assess the State's performance against all of the identified benchmarks. The Association will continue to monitor the operation of the Better Regulation

Office for while there appears to be a willingness to reduce regulation, this intent will have to be demonstrated by outcomes of reduced business costs and complexity.

Regulatory burden in NSW

Despite the economic reform of many markets there has been a general increase in the level of social regulation faced by farmers. New areas of legislation such as environmental, food safety, animal welfare, and occupational health and safety have added additional costs and complexities on the farm business. The qualitative aspect of these regulations has meant an increased workload on the farm business with additional reporting and auditing processes required of the farmer to ensure they conform with designated standards or guidelines.

The net effect of regulatory reviews and the introduction of new legislation have led to an overall increase in regulatory burden. In 2003 there were 1,800 Commonwealth Acts of Parliament in place, 170 of which had been passed in the previous year[1]. The Institute of Public Affairs recently reported that the six state governments passed 6,786 pages of new primary law in 2006. This is almost double the 3,463 pages passed in 1986.[2]

In a submission to the Federal Government's Taskforce on Reducing Regulatory Burdens on Business, the Business Council of Australia noted that in 2005 NSW has about 1,300 Acts and 650 principal statutory instruments, with a further 5500 local government planning instruments. It would appear that governments benchmark their activity on the number of pages of legislation that they introduce.

In 2003 the NSW State Chamber of Commerce launched the "Red Tape Register" to quantify the cost of red tape and compliance for businesses in NSW. In a recent submission[3] to the NSW Independent Pricing and Regulatory Tribunal Review of Red Tape in NSW, the State Chamber of Commerce provided information collected from the Register indicating that the level of regulatory burden had remained unchanged for the 3 years to 2005. The State Chamber reported that the average business was devoting around 200 hours a year to filling out paperwork required by Government departments to comply with industrial relations and taxation laws.

All these regulations have a compounding effect on the costs of running a business and "measures of the total cost of regulations in an economy like Australia's is likely to amount to around the 8 to 9 percent of GDP seen in similar economies"[4]. In 2005 the Australian Chamber of Commerce and Industry estimated that regulation costs the Australian economy were approximately $86.0 billion[5] per year.

In addition to complying with existing regulations there is an additional cost to farm businesses of updating procedures and understanding regulations each time a regulation is removed or changed. The survey conducted by the Australian Business Ltd State Chamber[3] illustrated that 60 percent of businesses spent up to 15 hours in 2003/04 researching how new laws would affect the business.

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[1] Business Council of Australia (2005) *Business Regulation Action Plan FOR FUTURE PROSPERITY*, Available from http://www.bca.com.au/Content.aspx?ContentID=97546 [Accessed 4 June 2007]
[2] Business Council of Australia (2007) *A Scorecard of State Red Tape Reform*, Available from http://www.bca.com.au/Content.aspx?ContentID=101066 [Accessed 28 May 2007]
[3] Australian Business Limited/State Chamber (2006) *NSW Regulation Review to the Independent Pricing and Regulatory Tribunal of New South Wales*, Available from http://www.nswbusinesschamber.com.au/reference/influence_government/Red_Tape_Submission_(Feb_06_Final).pdf [Accessed 22 May 2007]
[4] Moran A (2005) *Impact and Outcome of Regulation on the Economy*, Institute of Public Affairs Ltd, Melbourne
[5] Australian Chamber of Commerce and Industry (2005) *Holding Back The Red Tape Avalanche, A Regulatory Reform Agenda For Australia*, Position Paper, Available from http://www.acci.asn.au/text_files/Discussion%20Papers/Regulation%20Policy%20Framework%20Electronic%20Copy.pdf [Accessed 31 May 2007]

REGULATORY BURDEN ON FARMING BUSINESSES IN NSW

Farmers acknowledge that regulations have benefits as well as costs, and that they are weighed against each other when considering the merit of a particular approach. When legislation is constructed appropriately it can have positive effects on business. The Horticulture Code of Conduct is an example of such legislation, which was recently launched by the Department of Agriculture, Fisheries and Forestry. The Code aims to provide growers with transparent terms of trade in their dealings with wholesalers at the fresh fruit and vegetable markets. Legislation, however, does not always support farmers' business interests and it is in these circumstances that we ask the Government to make reforms.

A Parliamentary Audit by the Association of Laws and Regulations in November 2002 revealed that farmers are being regulated out of business by a mountain of bureaucratic red tape. Farmers in NSW must comply with at least 56 different agricultural and environmental laws and regulations that have been introduced over the years.

On 28 February 2007 the ABC Program, Landline stated that farmers spend 400 hours a year on average doing paperwork to prove they are complying with regulation. Not only are farmers losing productivity by compliance, but they are incurring monetary costs in addition. For example, the Australian Bureau of Agricultural and Resource Economics has produced a report, stating it cost each farmer between $36,000 and $1.3 million to comply with native vegetation regulations[6].

The Association has identified a number of key areas of regulatory burden imposed on farmers in NSW. These include:

- overlap or duplication with other regulations, especially across jurisdictions
- inconsistency of regulations across jurisdictions
- Undue prescription and complexity, and
- excessive paperwork

Overlap or duplication with other regulation, especially across jurisdictions

Policies and regulations developed at a federal or state level of government generally have good intentions for business in Australia, however farmers find that they don't necessarily deliver the desired outcomes due to administration inefficiencies between government and the general public.

Quite often regulations and policies are developed by the federal government and then it is the responsibility of the state governments to implement them. State Governments often spread their responsibility across a number of departments, which creates problems for the end user due to a lack of communication and conflict between departments or authorities administering the regulation. This leads to duplication and/or overlap of regulation and staff which, in addition to the taxpayer cost, leaves farmers confused about whom to approach. This creates excess paper work and consequently a loss of productivity to their business.

[6] Davidson, A. et al (2006) *Native Vegetation, Management of broadacre farms in new south whales: impacts on productivity and returns*, Available from www.abareconomics.com/publications_html/crops/crops_06?er06_native_veg.pdf [Accessed on 4 June 2007]

Native Vegetation & Biodiversity Regulations
The main statutory planning legislation, the *Environmental Planning and Assessment Act 1979* is administered by local government and the NSW Department of Planning. The *Native Vegetation Act 2003* is administered by Catchment Management Authorities, with NSW Department of Natural Resources responsible for compliance. The *Threatened Species Conservation Act* and the *Protection of the Environment Operations Act* are administered by different arms of the Department of Environment and Climate Change.

Agricultural Chemical Legislations
The agricultural chemicals legislation is suffering replication of regulation at State and Federal levels as well as economic inefficiencies. Currently in NSW, agricultural chemicals are looked after by three different Government department agencies, which include: Work Cover NSW, the Department of Primary Industries and Fisheries, and the Department of Environment and Climate Change. There are three main areas that these State Departments are accountable for, including: transport, storage, and use. There is significant overlap between the operation of these items of legislation and a general failure to clarify the jurisdiction and accountabilities of the responsible authorities

Recommendation 1

That the regulatory development process be structured to ensure that consultation with other jurisdictions and other regulations occurs to prevent overlap or duplication of regulations.

Inconsistency of regulations across jurisdictions

Furthermore there are variations and inconsistencies in regulatory requirements between the different states, adding to the costs and complexities of doing business. The lack of a national coordinated approach means that states often act independently in developing regulations. As such it is quite common that a regulation that applies in NSW is quite inconsistent with a regulation in another state. With transport and trade occurring regularly between states, farmers are often confronted with different rules which complicate trade and discriminate between farmers in the different jurisdictions.

It is often the case that the Federal Government agrees on principles, but then state governments' develop inefficient, inconsistent regulatory approaches, adding to the costs of running business. There is a need for a more consistent, national approach across a whole raft of areas that impact on primary producers.

Oversize vehicle permits
Conditional registration is provided by the NSW Roads and Traffic Authority for general use of headers and plough implements. These conditional registrations are subject to the machinery meeting the specified dimensions set by the Roads and traffic Authority. The dimensions set in NSW happen to be less than those of other states. This gives rise to the situation where a farmer transporting a header from Queensland to NSW during harvest becomes illegal once he crosses the border.

National Livestock Identification System
The sheep industry is suffering inconsistency of the National Livestock Identification System (NLIS) between States, despite a national body making recommendations for a national scheme. Differing technologies and logo requirements in various states are an example of state inconsistency. Both Victoria and Queensland use similar logos to buy and sell sheep, however NSW chose not to adopt the same logo. These types of inconsistencies result in confusion, loss of market access and higher overheads.

Recommendation 2

Regulations need to be developed under a national authority. In cases where this is not possible it is urged that a central authority is adopted within a particular jurisdiction.

Prescriptive Nature of Regulation

Farmers are concerned that regulation in some areas has become very prescriptive with a focus on enforcement rather than achieving the underlying objective of the regulation. The Association is aware of situations where farmers have been fined for minor infringements where the actual safety or operation of the vehicle is not compromised. Regulations need to be outcomes focused.

Vehicle Dimensions

A truck with a stock crate has been operated and registered for a number of years. To secure the stock crate to the body of the truck cleats are used which overhang the body of the truck by five centimeters. The Association was made aware that when the farmer took the truck to be registered they were informed that the truck was overwidth and that the crate had to be modified to fit within the prescribed dimensions. While leaving the crate in its current state would not compromise the safety of the vehicle with a minor overhang, requiring that the crate be modified would compromise the structural integrity of the crate.

Recommendation 3

Regulations need to be aimed at being outcome focused to achieve determined goals allowing for a degree of flexibility to achieve those goals.

Excess Paperwork

All of the above faults contribute to an excess amount of paperwork. Duplication and overlap of regulation requires excess paper work both within and between jurisdictions. The prescriptive nature of some regulation imposes excess paperwork to properly address all minor infringements.

Recommendation 4

Regulatory recoding requirements should be made available electronically. Regulatory authorities should streamline regulatory processes and where possible make use of existing information to prevent duplication.

IDENTIFIED REGULATORY BURDENS

Through feedback provided by members and advisory committees the Association has collated a number of case studies where particular regulatory burdens have been identified. These case studies include:

It is important to note that the attached case studies are by no means an exhaustive list of the issues facing farmers in NSW.

National Pollutant Inventory

The National Pollutant Inventory (NPI) is a publicly accessible database containing information on the types and amounts of pollutants being emitted to the Australian environment.

Issue
Farmers in intensive industries are required to report nitrogen and phosphorus pollution (excrement etc.) to the National Pollutant Inventory (NPI). Complying with this regulation is burdensome to the producer for two reasons. Firstly because the measurement requirements are time consuming and secondly if the pollutant reporting thresholds are exceeded by the farmer, their contact details become publicly accessible.

Time consuming
The reporting form currently requires expertise to complete and is not user friendly due to literature and computer competency factors. There are few incentives for intensive farmers to pursue accuracy in the reports, which raises questions about the scientific credibility of the data. The value of the data is also questioned as the nitrogen and phosphorus emissions exclude extensively run livestock.

Exposure of contact details
If nitrogen and phosphorus pollution exceeds the threshold imposed by the NPI, farmers contact details are posted on the publicly accessible database. The exposure of these details leaves farmers vulnerable to harassment by extremist groups.

Proposed Reforms
Farmers don't have an issue providing emissions and contact details to the NPI, however seek that their contact details are not accessible on public website and that unnecessary time constraints are not imposed to complete the reports.

In order to reduce the time constraint which this regulation imposes on farmers, it is proposed that the responsibility for measuring and reporting the emissions is given to the relevant industry bodies. It is believed that this will also provide more accurate results, eliminating miscalculations by the farmer.

Industry bodies should be able to provide accurate emission figures based on general industry production figures (average slaughter numbers, average livestock numbers, known average emissions, effluent figures etc).

By shifting the responsibility to the industry body, the time constraints placed on the farmer are removed and the risk of public exposure is also eliminated.

Recommendation 5

In the development of regulations the additional costs on individuals for the public benefit be recognised and where possible measures be adopted to alleviate the cost on the individual.

Agricultural Chemicals legislation

Issue

The agricultural chemicals legislation is suffering replication of regulation at State and Federal levels and economic inefficiencies of same. There are over sixty acts and regulations covering this area. The 'Control of Use' legislation as governed by the *NSW Pesticides Act* is under resourced by the NSW State Government. The revenue which previously came from registrations of chemicals is now collected by the Australian Pesticides & Veterinary Authority (APVMA) at national level. As a result the State doesn't have the resources to ensure compliance.

Currently in NSW, Agricultural Chemicals are looked after by three different Government department agencies, which include

- Work Cover NSW (*Occupational Health and Safety Act 2000*; *Occupational Health and Safety (Hazardous substances) regulation 1996; Road and Rail Transport Dangerous Goods Act 1997*).
- The Department of Primary Industries and Fisheries (*Stock Foods Act 1940; Stock Chemical Residues Act 1975; Noxious Weeds Act 1995*), and
- The Department of Environment and Climate Change (*NSW Pesticides Act 1999; Protection of the Environment Operations Act 1997*;

This means that administration of each is fragmented with no central authority over each of the three critical controls.

The second issue of major concern relates to inconsistencies between States in their approaches to administering various controls on the transport, use and storage of agricultural chemicals. Two prime examples are:

1. Drift of agricultural chemicals – drift of herbicides onto non-target crops has allegedly caused significant damage to farm and non-farm businesses along the border between Victoria and NSW. The NSW Department of Conservation has chosen not to enforce chemical control areas whereas the Victorian Government has decided to enforce these areas. This has been a problem for business owners on either side of the Murray River and the inconsistency demonstrates wider problems in other areas of the State.
2. Minor use and off-label use of agricultural chemicals – States other than NSW allow users to utilize chemicals in ways which are 'off-label' on the understanding that the user bears all the risk and a zero residue level is in force if produce is tested. In contrast, NSW users have to fund research and trial data and apply for minor use permits at a cost under the APVMA permits scheme. It is questionable whether this State based control of off-label use is addressing the risks to export markets and domestic consumer confidence.

Recommendation 6

That Transport, Storage and Use (including minor use) of Agricultural Chemicals is adopted under a National Authority, such as the APVMA or similar.

Plant Breeders Rights Act.

Plant Breeder's Rights (PBR's) are exclusive commercial rights to a registered variety. The rights are a form of intellectual property, like patents and copyright, and are administered under the federal *Plant Breeder's Rights Act 1994* (the Act).

Background
The increasing privatization of plant breeding services in Australia has resulted in an increase in importance of property right protection for many suppliers of varieties. There is also recognition by State and Federal Governments in Australia that plant varieties are a private good and, providing there is no market failure, the private sector should have the investment responsibility for plant breeding. The most common method of generating revenue for investment is End Point Royalties (EPR).

EPRs are royalties paid on every tonne of product produced (usually grain) by growers. EPRs are established by contracts and often create the commercial environment in which breeders and growers operate. They are a popular method of collecting payment for PBR protected materials as they allow the grower and breeder to share the risks associated with producing a harvest.

The majority of growers feel that EPRs are necessary because of the withdrawal of government investment in plant breeding, and the need to increase productivity gains through improved varieties.

Issue
The introduction of EPRs under the Plant Breeders Rights Act has created confusion and increased compliance burden to farmers as the various plant breeding companies have inconsistent contract and collection mechanisms.

Growers are also concerned that EPRs are not getting back to breeders, or that EPRs represent a form of 'double-dipping' because they are paying for the seed and then a royalty when the grain is delivered – on top of statutory research levies through the Grains Research & Development Corporation (GRDC).

Proposed Reform
Growers feel that it is important that the industry looks for ways to improve how EPRs are managed. In particular the Association believes that investigation into a nationally coordinated and regulated EPR collection system involving all parties in the supply chain should be undertaken.

There is precedence for such activity overseas. In the UK the British Society of Plant Breeders (BSPB) and in Canada, the Canadian Plant Technology Association (CPTA) undertake the collection of PBR royalties and enforcement activities on behalf of their members.

Recommendation 7

That a Nationally coordinated and regulated End Point Royalties collection system be considered.

Native Vegetation and Biodiversity

Issue 1. *Duplication of regulations or activities of other regulators*
In NSW, actual land use conflict is mirrored by conflict between the authorities administering the various items of environmental legislation and the legislation itself.

The main statutory planning legislation, the *Environmental Planning and Assessment Act 1979* is administered by local government and the Department of Planning. The *Native Vegetation Act 2003* is administered by Catchment Management Authorities (CMAs), with Department of Natural Resources (DNR) responsible for compliance. The *Threatened Species Conservation Act* and the *Protection of the Environment Operations Act* are administered by different arms of The Department of Environment and Climate Change (DECC).

There is significant overlap between the operation of these items of legislation and a general failure to clarify the jurisdiction and accountabilities of the responsible authorities. Also missing, are practical mechanisms for resolving land use disputes in an equitable and timely manner. To generalise, property developers and big industry (eg mining) typically have the skills and resources to get the best results from this flawed system; farmers and small residential land holders do not, and consequently suffer the most.

Statutory Planning and Natural Resource Planning
Currently, CMAs are responsible for Catchment Action Plans and for approving Property Vegetation Plans under the *Native Vegetation Act 2003*. As indicated above, local governments have power, however, to create instruments including Tree Preservations Orders, and wildlife corridors that require a separate consent process and potentially nullify exemptions provided under the Native Vegetation Act. The present draft LEP will aggravate this issue by encouraging local governments to create instruments that override the Native Vegetation Act. A different approach is needed that aligns local government with the collaborative landscape planning initiatives driven by farmers and supported by CMAs.

Issue 2. *Threatened Species Legislation*
In NSW, threatened species legislation provides a mechanism for identifying and listing threatened ecological communities and species. All new development (eg urban, mining, agricultural) must be assessed to determine its impacts on these species. Before native vegetation can be cleared it must be demonstrated that it does not comprise a threatened species or habitat for threatened species, or (and this is only permissible in certain circumstances) that an adequate offset has been provided.

In addition to these threatened species controls, NSW has introduced blanket controls on clearing of all native vegetation in land zoned rural. Some development is possible but only in exchange for offsetting large areas of private property for conservation purposes. Effectively, the public reserve system in the process of being extended to include key areas of private rural land.

On one hand farming is being driven out of the best farming regions by urbanisation and increasing land prices. On the other hand, biodiversity conservation is preventing development of new farming land. As stated above, land is the primary means of production for agriculture. Loss of access to arable land due to urban encroachment and biodiversity controls is creating a supply crisis which impacts disproportionately on small players; in other words, those farmers who have less capacity to offset land to meet biodiversity criteria or to compete in the market for already cleared land. This is a major economic and social issue for NSW agriculture.

Issue 3. *Impact of Excessive Land Use Planning Legislation*

Farmers are increasingly affected by legislation which impacts upon the daily operations of their business and the land use planning area is no exception. Of particular concern, in this regard, is the imposition of legislation which seeks to restrict or prohibit what was previously considered routine agricultural development activity and the imposition of native vegetation type provisions.

Examples of such provisions with respect to the former were found in the draft Standardised LEP where development consent requirements were suggested for the following:

- diversification between intensive and extensive agricultural operations,
- routine irrigation development activity,
- the erection of buildings or fences within certain distances of water bodies or
- the undertaking of private sheep sales on farm

The draft also suggested a range of native vegetation type provisions such as riparian corridors and tree preservation orders, and the need to preserve 'scenic amenity' values at the cost of farmers. These impositions are not only covered by other legislation but would have resulted in increased administration costs for farmers, uncertainty from the conflict and overlap between statutory planning and natural resource management as well as the reduction in the productive and market value of agricultural land.

Councils have the ability to impose native vegetation provisions within their LEP which are in excess of the Native Vegetation Act. This is a significant concern with many examples particularly coastal areas throughout the state. The Eurobodalla Shire is a good example where the Council has determined that *any activity* that results in the "destruction or removal of any native plant other than a noxious weed" requires development consent. This includes: the use of herbicides for pasture and regrowth management; clearing for fenceline maintenance; clearing willows from farm dams; removing fallen timber, *etc*. Council advises landholders to put their request in writing for a specific issue. However an inspection from Council to determine a case is $370. In addition, each application costs $75 for submission, and most submissions can only be done by a consultant. This cost, as well as the timeframe for assessment, is clearly ludicrous for these types of activities.

Proposed Reform

Professor Paul Martin from The University of New England has written a report titled "Concepts for Private Sector Funded Conservation Using Tax Effective Instruments". The Association would refer the Productivity Commission to Attachment 3 in the report, which includes two case studies**,** representing two types of farmer based conservation organizations[7]. An industry based environmental program and a regional voluntary conservation program. Both organizations have the characteristics required to form the platform for a Regional On-farm Conservation Program.

Recommendation 8

Undertake fundamental reform of native vegetation and biodiversity legislation as it applies to farm land. The reform outcomes should look to deliver a partnership model rather than a punitive model.

[7] Martin, P. (2007) *Concepts for private sector funded conservation using tax effective instruments*, The University of New England, Armidale.

Occupational Health and Safety Legislation

Issue

The lack of consistency between States' OHS jurisdictions is well noted as a source of regulatory inefficiency.[8] These inefficiencies affect agricultural businesses both directly when operating or trading interstate; and indirectly through the transfer of additional costs to farmers by providers of goods and services to agriculture. The refusal of the NSW Government to prioritise harmonisation of its OHS legislation with that of other States threatens the process of providing greater regulatory efficiency in OHS across Australia.[9]

The *Occupational Health & Safety Act 2000* (NSW) use of an absolute duty of care within its general duty of care combined with inadequate defences available to employers makes it virtually impossible for these duty holders to escape conviction. This holds true even when employers have taken comprehensive measures to ensure the safety of their workers[10] or when the risk is caused by a willfully disobedient employee.[11]

This resort to an "absolute duty of care", damages confidence in the law and gives rise to *"unsustainable legal liabilities"* to employers.[12] As such they act as a disincentive for efforts towards compliance. Further, the regulatory efficacy of OHS duties containing a fault element has been upheld in the Maxwell Review of Victorian OHS law.[13] This position further has support in the comparative incidence rates of State jurisdictions.

This comparison as illustrated in Fig 1 shows that State jurisdictions containing an absolute duty of care (NSW and QLD) do not have superior performance against other States with regards to the incidence of workplace injury.

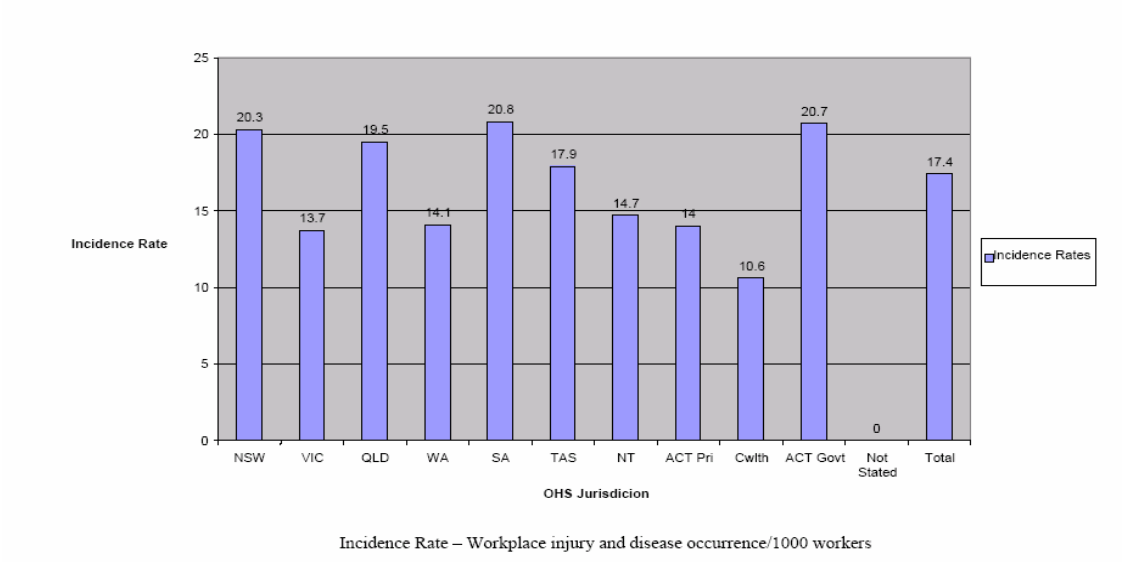
The regulatory requirement under Chapter 2 of the *Occupational Health and Safety Regulation 2001* (NSW) for a risk assessment to be performed on all hazards identified provides an onerous regulatory burden upon all farming businesses. Such a burden is avoidable by using the approach proposed by recognising specified controls within regulatory guidance as defence against charges for OHS breaches.

An example of how the application of NSW OHS law has a specific unnecessary regulatory burden on farming enterprises may be found in *WorkCover Authority of New South Wales (Inspector Simpson) v Raynjune Pty Limited* at [168][14]. In this case Staunton J held that a farming employee was not under supervision by the farm manager. This is despite both individuals being involved in the same harvesting operation and in the same field at the time of an incident. Her Honour found in this was on the basis that both individuals were operating separate items of machinery at the point in time. Such case law points to a requirement to hire supervisory personnel who are not engaged in production activities. This is not only expensive,

[8] Regulation Taskforce 2006, *Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business*, Report to the Prime Minister and the Treasurer, Canberra, January. p.39
[9] Council of Australian Governments, Communique of Meeting 13 April 2007, p.2
[10] *Inspector Templeton v Pavese Citrus Pty Ltd* [2004] NSWIRComm 322 (Unreported, Staff J, 29/10/2004)
[11] *WorkCover Authority of New South Wales (Inspector Childs) v Kirk Group Holdings Pty Limited and Anor* [2004] NSWIRComm 207 (Unreported, Walton J, revised - 19/01/2005)
[12] Australian Chamber of Commerce and Industry, "Modern Workplace: Safer Workplace – An Australian Industry Blueprint for Improving OHS 2005-2015" (ACCI, Blueprint), p.55
[13] Maxwell, C. *Occupational Health and Safety Act Review* (1994), p.357-358
[14] NSWIRComm 46 (Unreported, Staunton J, 8/3/2007)

but has unrealistic implications for agricultural work performed over large pastoral or cropping holdings.

Fig 1 Incidence Rates by Jurisdiction 2001, 2002 & 2003[15]



Incidence Rate – Workplace injury and disease occurrence/1000 workers

Proposed reforms:
The replacement of the absolute duties of care with duties limited to that which is *"reasonably practicable"* would bring NSW OHS law in line with most Australian jurisdictions and repair confidence of the law within the rural sector.

The provision of statutory approved guidance material which act as a defence further provides confidence within the OHS system by providing the incentive of compliance. Such an approach has further reduced the costs of compliance with OHS law by removing the requirement of employers who chose to rely upon such guidance to undertake a risk assessment upon all hazards identified.

Victoria in its recent Regulatory Impact Statement on proposed reforms to its OHS Regulation estimated that the removal of the prescribed risk assessment requirement to result in savings of about $52.3 million dollars to business over ten years.[16]

Recommendation 9

That the general duties under the OHS act be amended to provide a uniform duty across all Australian jurisdictions.

Recommendation 10

That statutory approved guidance material be made available which can act as a defence further provides confidence within the OHS system by providing the incentive of compliance.

[15] National Occupational Health and Safety Commission, The National Workers' Compensation Statistics Database: NOSI2, < http://nosi2.nohsc.gov.au/default.taf>, at 14 June 2005
[16] WorkSafe Victoria (2007) Regulatory impact statement: proposed Occupational Health and Safety Regulations 2007; and proposed Equipment (Public Safety) Regulations 2007

Workers Compensation Legislation

Issue

Recent changes requiring that workers only need to be insured in their "state of connection" (excluding the NT) and other collaborative efforts between State and Territory jurisdictions has improved the regulatory efficiency across states. Competitive pressure between the States has also seen an improvement in the efficiencies of differing State workers compensation schemes with resulting reductions in premiums. In particular the Association welcomes reforms to the scheme that realise the limited capacity of small employers to manage claims given the low propensity of a claim occurring.

Comparatively high premiums for the Agricultural Industry

The National Farmers Federation reports the NSW Workers Compensation Scheme as having the highest premium rates for the agricultural industry in Australia. Currently the average mixed farming enterprise in NSW pays around 7.8 % of payroll for their workers compensation premium. This compares with about 3-3.5% in Queensland and 4.5-5 % in Victoria.

Deeming of workers

The NSW system through Schedule 1 of *Workplace Injury Management and Workers Compensation Act 1998* (NSW) automatically deems certain unincorporated contractors performing rural work as employees for the purposes of determining the workers compensation premium of employers who are principal contractors. This regardless of how the common law treats these contractors; and includes large well established areas of contracting services such as fencing and tree clearing.

Such deeming provisions impose unnecessary cost upon farming business; restrict the capacity of independent contractors to engage in their trade; and become complex and confusing when the contractor is employing other workers. Further, due to the lack of awareness raising by the regulator, these provisions are generally not known in the general farming community until the incidence of a "wage audit" to verify the wages declared by employers for the purposes of calculating premiums.

Employment substantial contributing factor

While s.9A of the *Workers Compensation Act 1987* (NSW) does not permit compensation unless the employment was a substantial contributing factor to the injury it appears that many injuries are in fact being paid when the genuine undertaking of production tasks is not a factor.

An example of this is the awarding of $174,000 to a shearer who obtained an eye injury whilst recreational fishing on a property when that day was declared "wet" in accordance with the *Pastoral Industry Award* (Cth). Whilst the injury occurred at the property it could hardly be associated with undertaking the work of shearing. The incidence then cost the shearer's employer an experience adjustment of $220,000.[17] Costs such as these are both worn by individual farming businesses employing workers or are passed onto the agricultural industry in the form of higher costs of goods and services.

Proposed Reforms

Workers Compensation systems should have the aim of returning workers who are genuinely injured at work back to productive capacity and compensating them for the time taken in rehabilitation and for any permanent impairments.

[17] '$220,000 WorkCover Debt', *The Land* (North Richmond), 3 March 2005, 25.

The NSW Government should continue to examine how savings should be put into place to enable reductions in premiums that will reduce the competitive disadvantage of the NSW agricultural industry against that of other states. The ability of opting out of the statutory scheme and using commercial insurance agencies should be seriously examined.

The statutory deeming of workers under the NSW system should be ceased. This system is arbitrary, costly and uncompetitive. WorkCover NSW has put in place systems that enable principal contractors and sub-contractors better mechanisms to determine if at common law the relationship entered into is one of contract for services or an employment contract. This includes a new system of binding rulings. These systems are a fairer mechanism of alleviating uncertainty over the nature of these arrangements.

Genuine tests of the relationship to the undertaking of genuine work should be integral to maintaining a workers compensation system. Such a test should not include recreational injuries sustained at work or commuting injuries as having a direct causal relationship with work. Such a test should be included within the legislation.

Recommendation 11

That the ability to opt out of a statutory scheme through the use of competitive commercial insurance agencies be examined.

Recommendation 12

That the Schedule 1 Deemed employment of workers of the *Workplace Injury Management and Workers Compensation Act 1998* (NSW) be removed.

Recommendation 13

That journey and recess claims be removed as compensable claims from the *Workers Compensation Act 1987* (NSW).

Recommendation 14

That s.9A of the *Workers Compensation Act 1987* (NSW) be amended to provide clarity that employment is not a substantial contributing factor injuries arising at work due to the undertaking of voluntary recreational activities.

Federal Legislation – WorkChoices

Background
The Federal Government's new WorkChoices legislation is aimed at reforming the various State and Federal industrial relations systems in Australia towards a national unitary system by utilising the Federal Government's corporations' power within the Constitution. Therefore in order to come under the new system employing entities must be classified as a constitutional corporation.

In the transitional period since WorkChoices commenced there are essentially four award systems running concurrently:

1. Preserved Award – these awards apply to incorporated businesses that were legally bound by a Federal Award prior to the commencement of WorkChoices. Rates of pay and conditions are varied from time to time by the newly established Australian Fair Pay Commission (AFPC).
2. Transitional Award – these awards apply to unincorporated businesses that were legally bound by a Federal Award prior to the commencement of WorkChoices. Rates of pay and conditions are varied following a National Wage Case by the Australian Industrial Relations Commission (AIRC) and application by the union to individually update the award with the principles adopted. These awards will continue to apply until 27 March 2011. During the five-year transitional period employers can either choose to incorporate and then be bound by the Preserved Award and have access to the WorkChoices system, or at the completion of the transitional period revert to an appropriate State Award.
3. A Notional Agreement Preserving State Award (NAPSA) - applies to all incorporated businesses previously employing under a State Award prior to the commencement of WorkChoices. Rates of pay and conditions are varied from time to time by the AFPC. NAPSAs will continue to apply until 27 March 2009, at which point employees will revert to an appropriate Federal Award.
4. State Award – apply to unincorporated businesses that were previously employing under these awards prior to the commencement of WorkChoices. The new reforms have no effect on any such employer. Rates of pay and conditions will continue to be varied following a State Wage Case by the Industrial Relations Commission of NSW (NSWIRC) and application by the union to individually update the award with the principles adopted.

Issue
The transitional award system was put in place to satisfy unincorporated businesses under the Federal Award. Despite the complexity of transitional systems, the Association supports their intention; however wishes that comity could be applied to wages in comparable awards.

Farmers are subject to a changing political climate often creating changes in policy, which may result in complying with new or differing legislations and regulations. This can impact on farmers in both a negative and positive way. Farmers in NSW are concerned about the effects of any changes to industrial relations legislation.

<u>Incorporation</u>
It is estimated that approximately 90% of farming businesses are either sole traders or partnerships and unincorporated. The main reason for this is a result of taxation issues including: accessing Farm Management Deposits (not accessible to incorporated farming businesses) and stamp duty on transfer of asset ownership.

Farmers who are not incorporated cannot access the benefits of WorkChoices, unless they still have access to the Federal Award Transitional system until 27 March 2011.

If a farming business is unincorporated then the farmer needs to consider whether they should incorporate to access WorkChoices. The most significant question is whether a restructure can be undertaken to access WorkChoices that does not necessarily impede the existing tax and other benefits of not being incorporated.

State Responses to WorkChoices

Utilising loopholes in the WorkChoices legislation, the NSW Government has enacted legislation which applies to incorporated businesses employing children under the age of 18 under workplace agreements and also provides a remedy for unfair dismissal where it would otherwise be removed by WorkChoices. It essentially means that any agreement must be vetted against an applicable State award so that there are "No Net Detriments" to the employee. This is an unnecessary burden upon employers because they must consider State Awards when implementing agreements even when a Federal Award is appropriate. Employees under the age of 18 entering into a workplace agreement already need a parent or guardian to sign, therefore raising the question as to whether this is in the public's best interest.

Another loophole that has been explored by the union movement in NSW is the creation of safety-based awards applying to an industry with provisions for union consultation, policy development and safety training. This has been achieved in the transport industry by the TWU. There is a concern that a similar tactic could be used to implement a "safety card" across agriculture and to regulate safety in the wool industry. This award-based regulation operates side-by-side with existing NSW OHS laws and the operation of WorkCover and is an unnecessary burden.

Proposed Reforms

The Association supports legislation that encourages reform of various State and Federal industrial relations systems towards a national unitary system. We also support negotiation at the enterprise level (including access to individual workplace agreements) with limited interference by third-parties, removal of unfair dismissal laws for small business, legislated minimum standard conditions of employment and limitations on additional provisions in awards and agreements.

The Association seeks that

- taxation impediments to incorporate businesses are softened.
- Comity be applied to wages in comparable awards
- Federal WorkChoices Legislation Act override State Government legislation dealing with child employment and State Awards based on safety-related matters. This could be achieved by removing exclusions in the overriding principles of the Federal WorkChoices Act or by enacted legislation which deals with such matters.

Recommendation 15

That various State and Federal industrial relations systems are merged into a national unitary system.

Volumetric Loading/ Livestock Loading

Issue
In November 2003 the Australian Transport Minister approved the model *Road Transport Reform (Compliance and Enforcement) Bill.* The Bill set up model provisions for the establishment of a nationally consistent and more effective and equitable scheme for encouraging compliance with the requirements of the road transport law and for the enforcement of those requirements.

However the implementation of the requirements under the Bill fell under state government jurisdictions and legislation. In NSW the *Road Transport (General) Act 2005* and the chain of responsibility provisions contained within were passed by NSW parliament in April 2005. These regulations are very prescriptive and not consistent with systems in neighbouring states.

Background
The *Road Transport (General) Act 2005* contains the 'chain of responsibility' provisions which make all parties in the transport chain responsible for mass and loading breaches. The Act also contains much stricter enforcement guidelines with low tolerance levels.

Unfortunately measuring actual gross truck weights on farm is very difficult, impractical and cost prohibitive as trucks are loaded in the paddock and portable scales are extremely expensive. Victoria currently has a livestock loading scheme that is focused on vehicle compliance and animal welfare conditions. The mass requirements are dictated by tare weights and stocking density.

Queensland has a Grain Harvest Management Scheme and a Livestock Loading Scheme. The Livestock loading scheme is similar to Victoria with mass limits defined by tare weights and stocking densities. The Grain Harvest Management Scheme permits those drivers registered in the scheme a degree of flexibility in truck masses.

NSW has strict specified maximum gross and axle mass limits, regardless of goods carried and stocking densities.

The flexibility afforded in Queensland and Victoria allow farmers to load vehicles and gain higher economic efficiencies. However in NSW strict requirements force farmers to under load and therefore restrict them from gaining access to the same efficiencies afforded in Queensland and Victoria.

Proposed Reforms
- The introduction of a livestock loading scheme using a regulatory formula based on vehicle dimensions such as deck area; tare weight; and livestock loading densities.
- A GHMS for grain producers to better enable compliance with road transport legislation, and the opportunity for NSW farmers to compete on a level playing field with other States.

Recommendation 2

Regulations need to be developed under a national authority. Implementation of regulations by different jurisdictions must be done consistently.

Recommendation 3

Regulations need to be aimed at being outcome focused to achieve determined goals, allowing for a degree of flexibility to achieve those goals. All jurisdictions should be encouraged to follow these principles.