15 June 2007

Sue Holmes
Assistant Commissioner
Regulatory Burdens – Primary Sector
Productivity Commission
PO Box 80
BELCONNEN ACT 2616

Re:- Review of Regulatory Burdens on Business – Primary Sector

April 2007

Dear Assistant Commissioner Holmes

Woolworths Limited welcomes the opportunity to comment on the Productivity Commission Annual Review of Regulatory Burdens on Business – Primary Sector. As discussed, below is a slightly edited version of the submission made to the Bethwaite Review into Reducing The Food Regulation Burden On Business. Please extract any relevant information for use in this review as needed, however it is a more far reaching document than just the Primary Sector.

Woolworths appreciates this opportunity and asks that we remain on the distribution list so that comment may be made on the Draft Report when available and as applicable. I have attached with this report a Submission Cover Sheet to be used for contact purposes.

Please contact me should you require any further information.

Yours sincerely

WOOLWORTHS LIMITED

ALAN FAGERLAND

National Compliance Manager

Retail Support

Introduction

Woolworths Ltd ("Woolworths") employs approximately 145,000 staff across Australia in 753 Supermarkets; 138 Big W general merchandise stores; 1023 Liquor Stores (including stores attached to Supermarkets); 380 consumer electronics stores; 495 Petrol Sites and 260 Hotels.

In its Supermarkets, Woolworths operates butchers and bakeries, and is the largest retailer of private and generic label food, grocery and liquor products.

Woolworths acknowledges that whilst elements of the Australian regulatory system have improved as a result of the Blair review, the lack of legislative consistency and administrative co-ordination between the State and Local Government jurisdictions continues to impose significant and unnecessary burdens on industry with little or no consumer benefit. The problems are largely caused by:

- duplication of legislative coverage - through Federal (*Trade Practices Act*) State and Territory (*Food Acts* and State and Territory general consumer protection legislation);
- duplication of enforcement - resulting in inconsistency in interpretation within and between State and Local Government jurisdictions; and
- inconsistency in laws between the States - for example, notification of intentional contamination under Queensland's *Food Act* and Western Australia's failure to date to adopt the *Model Food Act* (with the *Health Act* and *Food Hygiene Regulations* remaining in force). It also appears as though Western Australia continues to operate under the *Weights and Measures Act* (the Western Australian *Trade Measurement Act* adopts the Uniform *Trade Measurement Legislation* and whilst it has passed through Legislative Council, and has received royal assent, the operative provisions are not yet in force).

The scope of this submission is limited to issues which are clear examples of the problem which have a significant impact on Woolworths business. In preparing this submission, Woolworths does not express a view on what the law should be, other than that it should be uniform so that all Australian consumers have uniform rights.

1. **Consistent Legislation**

The Blair review recommended that all domestic Food Laws in Australia be developed nationally and enacted and enforced uniformly. This has not occurred and there is still significant inconsistency and duplication between the law of the Commonwealth and the States and Territories.

For example:

- Although the *Model Food Act* has been adopted in most States and Territories, food safety legislation and responsibility for enforcement differs significantly from State to State.

    - In Victoria, all food business are required to develop and maintain food safety programs, including programs for low risk businesses, such as petrol stations that have a milk fridge and liquor stores that conduct wine tastings.

    - The New South Wales Food Authority runs a centralised food business notification scheme. The notification process can then determine whether there is a need for third party auditing, approved food safety programs, approved templates or just an annual inspection. It is understood that the New South Wales Government have proposed an amendment to the *Food Act* which will require mandatory inspections by Local Government at food premises, however Local Councils may choose several categories to comply with the proposed legislation or may choose to absolve this responsibility back to the New South Wales Food Authority. Currently, Local Government are responsible for annual store inspections under the *Food Act* and the New South Wales Food Authority remains responsible for meat unit audits under the *Food Regulation*, Part 3 Food Safety Schemes.

    - In Queensland, there is no clear distinction between responsibilities for Local Government EHO's and the Department of Health Population Centre EHO's, who both inspect supermarkets according to the *Food Act*. There is also a duplication of effort by SafeFood Queensland who use contract auditors to audit meat and delicatessen departments under the *Food Production (Safety) Regulation*. The use of contract auditors involves an inordinate amount of time to perform the audit, thereby increasing revenue because of an hourly charge. Also, both Local Government and Safe Food Queensland perform pre-opening inspections of supermarkets for registration/accreditation purposes.

    - In South Australia, Local Government EHO's and PIRSA both inspect supermarkets on a fee for service basis. PIRSA inspect meat and delicatessen departments and EHO's inspect the entire store once or twice annually. In 2 years of inspecting premises, PIRSA have not identified any significant problems.

- Northern Territory Health perform annual inspections in Supermarkets efficiently and as needed. There is no duplication of effort in this state.
- Western Australian Local Councils EHO's perform annual inspections and some Councils charge for the service whilst others do not. Additional inspections performed are in Supermarkets as a result of customer complaints.
- Registration/audit fees between each jurisdiction vary considerably.

- Some State legislation, such as the South Australian *Prices Regulations* which prohibits the return of unsold bread, and the "intentional contamination" provisions of the Queensland *Food Act* exist only in one State. Other examples include *Container Deposit Legislation* in South Australia and *Quarantine Regulations* in Tasmania preventing the sale of imported salmon and other imported fish products (for example, pickled herrings) in that State.

- Western Australia has not yet adopted the *Model Food Act*. At the time of writing this submission, Western Australia continues to operate under the *Weights and Measures Act*. The *Trade Measurement Act* adopts the Uniform *Trade Measurement Legislation* and whilst it has passed through Legislative Council, and has received Royal Assent, the operative provisions are not yet in force.

- Civil Liability Reforms following the Ipp Report have not been implemented uniformly. The *Trade Practices Amendment (Personal Injuries and Death) Act* provides that sections 52 (misleading conduct) and 53 (misrepresentation) are no longer available as causes of action in personal injury claims based on a failure to warn. However, equivalent reform has not been made to all State *Fair Trading* legislation and so causes of action remain available in Western Australia, Northern Territory, the Australian Capital Territory and South Australia.

- Similarly, the *Fair Trading Acts* in New South Wales and the Northern Territory have equivalent provisions to Part V Division 2A of the *Trade Practices Act*, whereas other States do not. The result is that a consumer who is injured in New South Wales or the Northern Territory can recover significantly more compensation because of higher caps on damages in these States.

- Part 2 Division 3A of the New South Wales *Fair Trading Act* empowers the New South Wales Department of Fair Trading to require the production of evidence substantiating claims. Similar provision exist in Victoria, the Australian Capital

Territory, Queensland, South Australia and the Northern Territory, but not in the *Trade Practices Act*, nor in Tasmania or Western Australia.

- The recent tort reform process in Australia has extinguished the right to aggravated and exemplary damages in common law personal injury claims in some states but not others (Tasmania, Western Australia, the Australian Capital Territory and Victoria). Damages for loss of earning capacity are capped at 3 times weekly earnings in all States and Territories except South Australia. However, under the *Trade Practices Act*, damages are capped at 2 times weekly earnings. Significant differences also exist between the average weekly earnings for each State and Territory, resulting in different damages awards depending on the place of injury.

Woolworths customers are entitled to expect an identical set of legislative standards and consistency in regulatory administration and enforcement across all the States and Territories of Australia. What level of protection the law affords should not depend upon the State in which a consumer resides.

Woolworths is not proposing a lower level of regulation. As a national business, State boundaries are irrelevant to Woolworths' operations and in most cases, Woolworths' own systems for managing food safety adopt the most stringent State regulations, and then for consistently implement this requirement throughout all supermarkets. It is important that *Food* and *Fair Trading* Laws be enacted in a uniform manner and without additional, individual State requirements.

The following problems flow from a lack of legislative and regulatory consistency:

- Inefficiencies resulting in unnecessarily higher cost to food manufacturers, processors, distributors and retailers.

- Food safety standards in different jurisdiction must mean one of two things. If higher standards are necessary to ensure public health and safety, then this means that consumers in jurisdictions with lower safety standards are not being adequately protected. If the less stringent standards suffice, then accordingly it must mean that additional regulation represents an unreasonable and unnecessary impost on industry. Both scenarios are undesirable from a public policy viewpoint.

- Compliance difficulties - for example, the Western Australian *Weights and Measures Act* (which is still in force, as the operative provisions of the *Trade Measurement Act* are not yet in force) prohibits the sale of in-store baked muffins and cakes over a certain size without a reference to weight on the packaging. As a practical matter, Woolworths cannot separate the Western Australian business in

respect of the packaging of muffins and cakes, meaning that muffins and cakes must be sold nationally by weight. However, this increases the risk of a short measure offence. When these items are sold singly, customers generally are not concerned about the weight of a muffin or cake, they purchase it to suit their needs.

2. **Consistent Implementation**

In Woolworths' experience, even where legislation is uniform or close to uniform, regulatory implementation and interpretation differ significantly. This raises identical issues to those identified in the section headed "consistent legislation", namely:

- cost to industry;
- either differing levels of food safety depending on location, or unreasonable and unnecessary regulation on business; and
- difficulties with compliance.

All levels of government (Federal, State and Local) are responsible for the enforcement of Food Laws to a greater or lesser extent. At the Federal level, AQIS is responsible for imported food. Depending on the particular jurisdiction and type of business conducted, a number of State Departments/Agencies are involved. For example, in Victoria, the Food Safety Unit, PrimeSafe, and the Dairy Food Safety Victoria each have responsibility for the administration of Food Law. In Queensland, Queensland Health and SafeFood Queensland have responsibility for the administration of Food Law. In New South Wales, State Government agencies have been amalgamated into the New South Wales Food Authorities. Local Council EHO's also have a role. All up, hundreds of agencies are responsible for the enforcement/administration of Food Laws.

The ACCC and State and Territory Consumer Affairs Departments administer consumer protection/trade measurement legislation which has a significant impact on all food business.

Examples of inconsistent implementation that Woolworths has encountered include:

- The *Uniform Trade Measurement* legislation provides that "meat" must be sold by weight. Woolworths has received different advice from jurisdictions regarding the interpretation of the word "meat". For example, Woolworths has been advised by the Queensland Office of Fair Trading that "meat " means red meat only. However, the Victorian and Tasmanian Consumer Affairs Departments have advised Woolworths that it applies to all animal flesh other than seafood. The New South Wales Department of Fair Trading takes a more stringent interpretation still, excluding crustaceans, but not other types of seafood. In respect of value added

products, there is no consensus regarding when a product is so significantly altered, that it ceases being meat.

- Although *Trade Measurement* legislation is largely uniform, South Australia and the Australian Capital Territory inspect all scales annually despite Woolworths having a contract with Wedderburn who perform full services on all scales annually. These inspections are nothing more than revenue raising exercises. On average in South Australia the charge is $550 per store.

- The enforcement of the new Country of Origin Labelling requirements for unpackaged products. Some jurisdictions have openly stated that they will not enforce the Standard. Non-enforcement creates difficulties for Woolworths because considerable time, effort and costs have been incurred in all Supermarkets to ensure national standards compliance however, other smaller fresh food businesses or independently owned supermarkets often do not comply, which gives these business an unfair competitive advantage.

- Pre-packaged pet food is sold in supermarkets without risk of contamination, however PrimeSafe in Victoria requires segregation and signage for the sale of pet food. PrimeSafe also requires separate storage areas for pet food which must be appropriately identified with signage. No other Australian jurisdiction has similar requirements.

- In Victoria, PrimeSafe does not permit retailers to display whole or gutted fish on ice for customer inspection and self service. Whilst PrimeSafe does not regulate supermarkets, they provide this interpretation to the *Food Standards Code* to Council EHO's for enforcement. Apart from one or two Council EHO's in New South Wales, no other Australian jurisdiction has the same interpretation for the sale of seafood.

- There appears to be a general lack of knowledge or understanding amongst Local Councils EHO's when using guideline documents. Safe Food Australia offers a Guide to Food Safety Standards, which is often quoted by EHO's as enforceable requirements rather than a guide to the Food Standards Code.

- There are inconsistent approaches to registration requirements and food safety audits (such as the frequency and duration). Whilst this is partly due to different legislative frameworks, it can also be due to inconsistent interpretation and implementation. For example, some Local Councils in Tasmania count each department within a supermarket (eg, butcher, bakery, deli) as separate food businesses requiring separate registration and are invoiced separately. Audits are

most frequent in jurisdictions that have implemented fee-for-service premises inspection or audit arrangements, for example EHO's & PIRSA Auditors in South Australia, New South Wales Food Authority for Meat Department Audits and SafeFood Queensland for Meat and Deli Department audits. Safe Food Queensland use contract auditors and there are numerous occasions when Major Non-Conformances (NCR's) are raised and in some instances for seemingly trivial matters. The raising of Major NCR's is justification for a return visit to the store to verify corrective action has been taken and to close out the NCR. Fees are charged at the applicable rate for this return service.

- Under the *Model Food Act*, Woolworths is responsible for all food sold even where it has no practical control over the manufacture, processing, packaging and distribution. A good example is Nutrition Information Panels. Some Local Councils undertake routine sampling and testing. If a problem is identified, retailers may be called upon to ensure the problem is corrected. This is, strictly, the responsibility of the manufacturer and communication should be between the Council EHO and the manufacturer, rather than the retailer.

- Differences in interpretation of the *Food Standards Code* can and do occur within jurisdictions, for example:

    - Local Council EHO's in Tasmania demanding bin liners for the bulk dumpster bins located outside of the store.

    - Standard 3.2.2 Div 3 Clause 8(2) of the *Food Standards Code* requires that self-service ready to eat food be "supervised". Local Council EHO's in Tasmania interpret this as requiring a full time supervisor for the self serve displays, eg loose nut and loose bread roll displays.

    - Local Council in Queensland not issuing an Opening Certificate for a new store because an EHO is not satisfied that the cleaning system complies with the Australian Standard and considers it irrelevant that the product has been approved as compliant and is approved for use in Woolworths Supermarkets by every other Council in the Nation.

    - Specific Signage required for Hand Wash Basins by some Councils in New South Wales.

    - No clear understanding for Microbiological limits for Listeria monocytogenes (Lm) in ready to eat food sold over the counter. In some states Lm is a reportable organism of public health concern while in

others it is not. Also some Council EHO's take a zero tolerance approach whilst others accept up to 100 cfu's per gram.

There is duplication of food regulation contraventions at both a State and Federal level and this extends to intra-State regulation (for example, dealing with false and misleading representations in connection with the supply of a food product). Notwithstanding that Woolworths is a retailer and effectively has no control over the claims made in labelling by the manufacturer it is exposed to liability. For example, sections 13(3) and (4) of the New South Wales *Food Act* (and provisions in other State Food Legislation) make it a serious offence to sell food which has been falsely described (and similar provisions exist in other States). Very limited defences are available - in particular, a defence of mistaken and reasonable belief and a warranty defence which were available under Act's predecessor are no longer available. Similar offences also exist under the *Trade Practices Act* (section 75AZC - including that the goods have a particular composition and in relation to the Country of Origin of a product) and equivalent offences in the State *Fair Trading Acts.* The result is that alleged breaches of the labelling of national brands are frequently brought to the attention of Woolworths by regulators and Woolworths is exposed to direct liability despite the fact that the appropriate approach is for regulators to take action with the manufacturer.

For example, Councils in Victoria and in Western Australia will test food for conformity with the Nutritional Information Panel (NIP). NIP is not a Food Safety concern, however this is still tested. The *Food Standards Code* offers no tolerance for Nutritional Information and, as a practical matter, in a manufacturing environment it is not feasible to guarantee an absolute quantity in every product. As well, NIP quantities are not always tested and instead are determined by calculation based on the knowledge of individual components or ingredients (which is permitted under the *Food Standards Code*).

In addition, all tests require a degree of interpretation, for example, fat analysis. There is no prescribed method of analysis and different methods - for example, soxhlet and acid hydrolysis - yield different results. No clear guidelines exist which allow for consideration for a degree of tolerance (for seasonal variation) as exists for offences such as short measure under *Trade Measurement* legislation.

3. **Improved Governance**

Woolworths considers that there is an urgent need for improvement in these main areas:

- Product recall;
- Co-ordination between and within jurisdictions;
- Stakeholder consultation/communication;
- Overlapping roles of FSANZ and the Ministerial Council; and

- Food safety plans/audits.

Product Recall

Depending upon the nature of the product concerned, a product recall must be notified to a number of regulators at the State and Federal level, for example the ACCC and FSANZ and the State Offices of Fair Trading and State Departments of Health. There seems to be no logical reason for the multiplicity of recall notification requirements which the law technically requires.

There is no guidance given in any government document about what level of risk requires a recall. For example, concerns in the past have been expressed about the long terms risks of the presence of some chemicals in food. Where guidelines as to maximum limits exist, they can be applied. However, on one view, any level has the potential to cause injury and some would advocate for a recall although the reasonable man might dismiss the risk as far-fetched.

Although not strictly a "recall" issue, Queensland also has separate provisions relating to notification of food tampering incidents in the *Food Act* which are not replicated in other state laws. This requirement does not exist for other products - including pharmaceuticals where there has been tampering incidents in Australia in the past.

In practice, the Queensland provisions means that two bodies are involved in relation to such incidents - the Police and Queensland Health. Other State laws make it an offence to contaminate goods (for example section 93IB of the New South Wales *Crimes Act* Contaminating Goods with Intent to Cause Public Alarm or Economic Loss). In New South Wales, it is an offence to conceal a serious indictable offence. The Police will need to be involved in intentional contamination issues, and it makes sense that any reporting requirements be included in State *Crimes Acts.*

Co-ordination

Woolworths acknowledges that in some areas co-ordination between the States and Territories is good. For example, in respect of recalls the practice is that a manufacturer only need to notify the ACCC, FSANZ and the manufacturer's "home state". Nevertheless, a legal obligation to notify the States also exists in the *Fair Trading Act*. However, on many important issues, including food poisoning outbreaks, there is a lack of co-ordination between the jurisdictions.

A recent example is the investigation into Salmonella Saintpaul on rockmelons. Whilst investigations were initiated by the New South Wales Food Authority, it required considerable effort to work with all jurisdictions along the East Coast of Australia who required essentially the same information. This information would have been more easily provided once to a

central Commonwealth authority (for example, Department of Health and Ageing). In addition, several Councils in Victoria took rockmelon samples for testing. There was no coordinated approach between jurisdictions (Queensland, New South Wales, the Australian Capital Territory, Victoria and Tasmania) nor Local Government investigations. The entire exercise was very much an ad hoc and disjointed process without any conclusive results.

A co-ordinated approach for investigation into food poisoning outbreaks is essential and specifically this responsibility should not be left solely to ad hoc investigations and samplings by local government EHO's.

Stakeholder Consultation/Communication

Whilst FSANZ is obliged to undertake stakeholder consultation, there is room for significant improvement. Submissions are seemingly ignored, and inadequate consultation often occurs when last minute changes are made to FSANZ's recommendations. Two recent examples illustrate this point:

- Country of Origin Labelling for unpackaged food - the changes to Country of Origin regulations for unpackaged food arising out of P292 required labels to be in 9mm font size, which is both impractical and unnecessary, from a consumer perspective and is an extremely costly imposition on Supermarkets. In Woolworths case, two tickets were required for each display of affected goods. In its submission to government , Woolworths objected to the requirement for 9mm font on this basis. It appears as though this submission was ignored. Subsequently, retailers were required to make their own application to amend the *Food Standards Code* to change the font size to one which is more practical. On 7 December 2006 an amendment to the *Food Standards Code* was gazetted to change the font size to 5mm. This entire exercise incurred great costs and should not have been necessary if the review and submission process was managed efficiently and correctly through FSANZ and the Ministerial Council in the first instance. Woolworths estimates that the costs incurred by it as a result of this incident are in excess of $1 million (with implementation $882,400, Consultancies and Market Research $120,000 and numerous meetings involving up to 30 staff and senior management).

- The addition of artificial chemicals to mass consumption products (for example folate and iodine to bread). The addition of these chemicals to bread effectively means no freedom of choice for consumers, some of whom are opposed to fortification of foods with vitamins and minerals. The addition of folate was initially proposed to be added to bread making flour during the milling process, however, because of the lack of controls at milling operations it was decided that

the requirement was to be applied to the final product (bread) thus shifting the responsibility on retailers.

There was a distinct lack of consultation when the decision was made to shift way from flour to bread (one hastily convened teleconference) and no RIS conducted to measure the impact of changing away from the milling operations to Retail Bakery operations.

State and Territory *Food Acts* dictate that the retailer is responsible to ensure that all food sold complies with the *Food Standards Code*, and even though there cannot be any guarantee of maintaining the correct levels of folate in every loaf of bread, nevertheless this expectation remains.

The Ministerial Council has requested a further review of FSANZ's recommendation.

There is also a need for improved consumer education carried out at Government and industry levels. For example, most consumers do not understand the difference between a "best before" and a "use by" date. Woolworths suggests that this is a task that should properly be undertaken at the national level (for example, FSANZ).

Roles of FSANZ/Ministerial Council

Both FSANZ and the Ministerial Council are involved in the standards setting process, often leading to waste and inefficiency.

Under the *Food Standards Australia New Zealand Act* 1991, FSANZ is responsible for the assessment of applications and proposals to amend the *Food Standards Code*. Generally, this involves two rounds of public consultation, and the preparation of applications and submissions is a time consuming and costly exercise for industry (and Government). At the conclusion of this process FSANZ either rejects the application/proposal, or makes a recommendation to the Ministerial Council to approve the amendment. The Ministerial Council can the either approve the amendment (after which it will be Gazetted), or request a further review by FSANZ. After this review has been conducted, the Ministerial Council may request a second review, and after this second review is completed, the Ministerial Council may amend or reject FSANZ's recommendation.

In this way, the process of standards setting is politicised. It is only at the very end of the standards setting process that an applicant knows whether their application will be rejected on political grounds. This creates waste (in terms of the costs associated with preparing applications/submissions) and uncertainty (in that an applicant cannot know whether their application will be accepted even if the application is supported by science).

Food Safety Plans/Audits

In this regard , the food regulatory system in Victoria is one of the better systems and is acknowledged by Woolworths as meeting most of industry's needs. Woolworths has opted to use third party auditing of food safety programs, which provides the most suitable outcome for our Supermarket business. Third party auditing provides consistency of interpretation of the *Food Act* and Regulations because the same auditors review all Supermarkets and Petrol Sites within the State of Victoria.

Woolworths is a responsible retailer and ensures compliance with regulations and whilst it is not necessary in most States, Woolworths has introduced and complies with food safety programs in accordance with the *Food Standards Code* Standard 3.2.1 (Food Safety Programs). These programs are audited by trained internal food safety auditors and in addition in Victoria all stores are audited by third party food safety auditors.

This ensures a consistent approach to food safety throughout all Woolworths Supermarkets and is a self imposed requirement.

Woolworths refers to the discussion in this submission regarding the inconsistent approaches to food safety regulation between the States, and Woolworths questions the need for such inconsistent and duplicitous regulation. Accordingly, for national businesses, Woolworths also proposes the implementation of a single food safely plan covering the whole of its food retailing activities, together with a single audit program**.**

Conclusion

It is Woolworths submission that there exists significant legislative inconsistencies, inconsistencies in the implementation of Food Laws, and that there exists opportunities for improvements in the governance of Australia's food regulatory system.

Consumers are entitled to expect an identical set of legislative standards and consistency in regulatory administration and enforcement across all the States and Territories of Australia. What level of protection the law affords should not depend upon the State in which a consumer resides. Under the present system it cannot be said that Australian consumers have uniform rights. At the same time, businesses who operate across State borders are burdened with the costs associated with a lack of uniformity. This situation needs to be urgently resolved.