Productivity Commission

Inquiry into Regulation of Australian Agriculture

2016

NSW Farmers' Association
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NSW Farmers' Association Background
The NSW Farmers' Association (the Association) is Australia's largest State farmer organisation representing the interests of its farmer members – ranging from broad acre, Livestock, wool and grain producers, to more specialised producers in the horticulture, dairy, egg, poultry, pork, oyster and goat industries.

Key Points

Land Use

Planning

Key measures NSW Farmers recommend for implementation within the planning system to better connect these issues include:

- The assessment of on-farm developments at a regional or district level using triple bottom line considerations.
- A regional planning focus that draws on strategic plans that integrate the necessary trade offs to ensure a genuine triple bottom line approach to planning, recognising the value of agriculture socially, environmentally and economically to the community.
- The creation of certainty to farming businesses through the creation of a legislated right to farm and the prohibition of the application of environmental zones over farm land.
- The use of regional planning policies to identify areas of NSW that contain highly productive and sensitive natural resources that are inappropriate for development for extractive industries and other areas where such development may be appropriate depending on further assessment.

Pastoral Leases

- That conversion from pastoral leases to freehold title should occur without restrictions or impediments.

Native title

- Government funding for landholder representation is important to ensuring that the system of native title is able to operate fairly with reduced burden for farmers.

Environmental Protection

Native Vegetation

- The implementation of the 43 recommendations made by the NSW Government's Independent Review of Biodiversity Legislation Review Panel will ensure best practice land and biodiversity management, while improving flexibility for farming businesses and regional communities.

Use of Agricultural Chemicals

- That the present retraining requirements associated with the *Pesticide Regulation* should be removed and replaced with alternate low cost pathways to demonstrating commitment to good agricultural practice developed.
- That any training provision placed within a pesticide control order for on-farm use of chemicals be consistent with the requirement of the *Pesticide Regulation*.

- That agricultural and veterinary chemicals approved by the Australian Pesticides and Veterinary Medicines Authority be exempted from the requirement for labelling obligations under the Global Harmonised System of Classification.
- That farmers be exempted from the requirement to hold safety data sheets (SDS) for chemicals that are approved by the Australian Pesticides and Veterinary Medicines Authority.

Access to Technologies

Genetic Modified Crops

- Existing regulation of access to genetically modified crops by the Office of the Gene Technology Regulator is appropriate to ensuring there is no known detrimental implications for consumers of normal dietary proportions that are grown or fed with GM produce.

Agricultural Chemicals

- Australia should seek to further align regulatory effort to risk as part of further reforms to Australia's National Registration Scheme for agricultural chemicals.
- Regulatory incentives should be integrated within the National Registration Scheme as part of an effort to ensure that minor use patterns for agricultural chemicals are commercialised in Australia.

Transport

- Further reform is required in the National Heavy Vehicle Law and by state jurisdictions to better align regulatory requirements for road access to actual risk.
- The introduction of the proposed Oversized Overmass Vehicle Escort Scheme may have the perverse outcome of increasing red tape on the movement of farm machinery.
- The present chain of responsibility obligation creates an excessive regulatory obligation for farmers due to issues of market power and uncertainty as to what actions will discharge the obligation.
- An increased emphasis on gazetting road access for the movement of agricultural combinations will lead to reducing red tape for the movement of agricultural machinery created by the existing permit system.

Animal Welfare

- Existing Prevention of Cruelty to Animals legislation provide adequate regulatory standards for animal welfare legislation and provide the opportunity for the market to drive alternate animal welfare outcomes price signals.

Biosecurity

- The new biosecurity frameworks implemented by the Australian and NSW Governments appropriately align regulatory effort to the risks posed by biosecurity matter. These frameworks are important to maintaining and improving the capacity of Australia's agricultural production.

Competition Regulation

- Effective regulation of anti-competitive behaviour in markets upstream and downstream is important to developing the market signal to the farm gate to increase production and optimise agriculture's contribution to the Australian economy.
- Mandatory codes of conduct are effective regulatory tools in response to specific competition issues impacting agriculture. However efforts are required improve the ability of these codes to ensure the benefits of the competitive process flow to the farm gate. The submission provides commentary on the existing Bulk Wheat Port Access Code of Conduct and the Horticulture Code of Conduct.
- The Australian Government should implement the proposal put forward by the Harper review to incorporate an effects test within the prohibition of misuse of market power within the *Competition and Consumer Act 2010*.
- The appointment of an Agricultural Commissioner and the establishment of an Agricultural Unit within the Australian Competition and Consumer Commission (ACCC) will improve the ability of the ACCC to understand and protect competitive processes within the agricultural value chain.

Investment

- The register of foreign investment in agricultural land, water and supply chains provides a low cost method of understanding foreign investment in Australian agriculture to inform existing and future policy surrounding this type of investment.

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Introduction

NSW Farmers is Australia's largest state farming organisation representing the interests of the majority of commercial farm operations throughout the farming community in NSW. Through its commercial, policy and apolitical lobbying activities it provides a powerful and positive link between farmers, the Government and the general public.

The state of NSW is responsible for the production of almost a quarter of Australia's gross value of agricultural production and twenty percent of Australia's agricultural exports. Further the value of agriculture is vital to the regional economies with almost one in thirteen employees in NSW regions directly employed in agriculture, fishing or forestry.

As small business operators, farmers 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.

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.

In this light, NSW Farmers supports the statement within the issues paper that the test of good regulation is its capacity to meet its 'economic, social and/or environmental objectives, and is designed and implemented efficiently and effectively'.

This submission has identified areas where we believe that current regulation is failing to meet these objectives in an efficient manner. This impedes the ability of farmers across NSW to contribute to the growth of agriculture as a driver of the Australian economy. Specifically this is with regard to regulation covering:

- Land tenure and land use planning.
- Native vegetation.
- The registration and use of chemicals in agriculture.
- Heavy vehicle regulation and road access.

NSW Farmers has also identified the importance of competition regulation to ensuring markets are able to properly function. Options for improving the design of this regulation have been identified, including the adoption of the Harper Review's recommendation for the incorporation of an effects test within the misuse of market power prohibition within the *Competition and Consumer Act 2010*. Likewise we support the current approaches to state and federal biosecurity regulation.

With regard to animal welfare, NSW Farmers supports existing provisions prohibiting cruelty to animals in both state legislation and through the ESCAS. We however believe that to the extent that the public demands alternate animal husbandry practices, market-based drivers form best mechanism to provide signals for adoption by producers.

1. Land tenure and use

1.1 Land Use planning

Despite there being an increasing level of land use competition and conflict occurring in relation to regional planning issues, recent policy reform has not specifically examined opportunities that will benefit the regions, as opposed to metropolitan NSW.

There are also a number of policy reform initiatives taking place which are tangential to regional planning issues and so we believe that it is an opportune time to examine how these laws operate together and in the context of land use planning in NSW. The NSW Department of Primary Industries' Strategic Plan of 2015 to 2019 aims to increase the value of primary industries within NSW by 30% by 2020[1] and we firmly believe that land use policy reform across the varying levels of government is needed to achieve this target.

NSW Farmers' submits that poor regional planning is a result of excessive compliance combined with a lack of strategic planning for agriculture and aquaculture. Furthermore, land use conflicts, as well as retaining the ability to farm are major planning issues faced by both the agriculture and aquaculture industries in NSW. The following interconnected issues, if addressed properly, could go a long way to enhancing not only the strategic approach to regional planning, but the value of NSW agriculture as well.

- On-farm management and development is currently seriously curtailed, farmers have effectively lost the ability to manage and/or expand their farming operation, and have lost the ability to perform important enhancements to the natural resource base;
- Local planning is currently prohibitive. The drafting of the standard instrument local environmental plans in some areas has led to a lot of land locked away in standard instrument environmental zones (E-Zones);
- Many farmers are being driven off the land, particularly at the rural-urban interface, due to poor planning decisions and a lack of a legislated 'right to farm' in NSW;
- State significant development assessment processes in particular for the extractive industries pose a huge threat to the natural resource base and the future of agriculture and there is currently no process to prevent the potential loss of valuable agricultural land because of these industries.

NSW Farmers' policy position is that the way it currently stands, the NSW Planning scheme is failing in the protection and promotion of agricultural land use. As stated above these issues are interconnected and may overlap, but represent on the whole, a need to re-evaluate how we plan for the best use of land in regional NSW.

[1] Department of Primary Industries (NSW), *Strategic Plan 2015-2019* (2015).

Key measures NSW Farmers recommend be implemented within the planning system to better connect these issues include:

- The assessment of on-farm developments at a regional or district level using triple bottom line considerations.
- A regional planning focus that draws on strategic plans that integrate the necessary trade offs to ensure a genuine triple bottom line approach to planning, recognising the value of agriculture socially, environmentally and economically to the community.
- The creation of certainty to farming businesses through the creation of a legislated right to farm and the prohibition of the application of environmental zones over farm land.
- The use of regional planning policies to identify areas of NSW that contain highly productive and sensitive natural resources that are inappropriate for development for extractive industries and other areas where such development may be appropriate depending on further assessment.

1.2 Pastoral Leases - Is diversification of agricultural activity unnecessarily restricted by conditions in pastoral leases?

The majority of leaseholders in the western Division are happy with their leasehold status, but some would like more flexibility with their covenants. The current system presupposes a homogenous landscape and does not allow for potential economic developments to the land. For this reason, the Association has policy that any conversion to freehold land occurs without restrictions or impediments.

The cost of converting a perpetual lease to freehold is a major concern for farmers. This cost of conversion for most grazier leases would be far greater than the cost of converting a cultivation or agricultural lease due to the sheer size of most grazier leases, which make up the majority of the Western Division in NSW. As such, the costs are likely to far outweigh the benefits of conversion in most cases. In addition, the terms upon which such conversions are calculated also need to be consistent with 'unimproved capital value'.

1.3 Native title

Our members are concerned about equity in the native title process. In particular we are concerned with the costs of representing the interests of landholders and the community in defending native title claims. Legal aid should be available to landholders and local councils if they are involved in native title litigation. Ongoing Government funding is required to ensure a coordinated approach to native title.

2. Environmental protection

2.1 Native Vegetation and biodiversity management

Agricultural landscapes are part and parcel of the wider environment and farmers are significant landholders and managers of the environment. However, as a consequence of the framework having evolved from consecutive pieces of legislation, it has taken on a sole environmental focus and not the desired triple bottom line approach encompassing economic, environmental and social outcomes. In contrast, the key drivers such as the

International Conventions that are supposed to underpin many aspects of this framework, do. Furthermore we argue that the current framework has done little to recognise that the performance of the legislation and policies is reliant on human actions. Farmers are not the landscape's adversaries, our management practices have evolved to be more efficient with less, to sustainably produce food and fibre in combination with providing ecosystem services.

A key case in point is the *Native Vegetation Act 2003* ("NV Act") plank of the biodiversity framework. NSW Farmers continues to take pride in the role our industry plays in sustainably producing food and fibre whilst providing ecosystem services. However, current native vegetation rules represent one of the biggest impediments to the sustainable production of food and fibre in NSW. A key aspect to the Association's policy position on native vegetation is that farmers are responsible land managers who do not need heavy handed regulation in order to do the right thing.

It is our submission that the current NV Act is the product of an ideological debate about tree clearing, as opposed to the active management of our natural resources. As it is currently implemented the social and economic impact on NSW communities is also being ignored. Previous investigations by the Productivity Commission have found the NV Act to be a barrier to improvements in farm sustainability.

Consequently native vegetation reform has continued to be a key policy priority for the Association. We maintain that urgent legislative change is required to refocus the native vegetation framework into something that farmers can work with and which does not jeopardise the future of environmental values and in turn a vibrant agricultural industry. In short what we need is a framework that recognises agriculture and within which, farmers can innovate.

To be clear, NSW Farmers does not advocate for broad scale destruction of the landscape. Rather, the Association has supported and continues to support an end to broad scale clearing which is not in the interests of rural communities and the environment within which rural communities exist. This framework currently in place was intended to establish a triple bottom line framework (balanced social, economic and environmental outcomes), delivered by the advisory services at a local level and resulting in cost effective collaboration between farmers and government.

However, as outlined below, these intentions were lost in the detail of implementation. As it currently stands, the policy framework is focused on micro-management of individual plants and properties, with decision making taking place via 'black-box' software, with settings controlled by the Office of Environment and Heritage (OEH). This approach has failed both procedurally as well as substantively. Formerly CMAs, and now LLSs, have stilted decision making power and consequently have been unable to consolidate their intended advisory services role in natural resource management.

Economic costs of the Native Vegetation Act

Farmers in NSW bear a multi-million dollar opportunity cost each year in the interest of conserving environmental assets for the people of NSW. The fundamental injustice of this, in addition to uncertainty about the future direction of native vegetation laws, fosters

a distrust of government and any associated conservation or ecological outcomes. To the detriment of the above three outcomes, the current context is one of distrust, unwillingness, disconnect and confusion. Current laws have lead to perverse social, economic and environmental outcomes.

Despite this, farmers are fundamentally interested in conservation of biodiversity and willing to continue to play an active role in managing their landscapes to promote that objective. To create a clear break from the current system which pits land managers against government requires the sound policy decision to facilitate payments through LLSs to farmers who bear the burden of native vegetation law.

Red tape in this context is embodied through the use of the Property Vegetation Plan (PVP) and the Environmental Outcomes Assessment Methodology (EOAM) process, the significant back log in the processing of PVP applications found across a number of LLSs, and more, the state-wide legislation prohibiting sustainable development. Red tape is also found in proposals designed to 'reduce red tape' such as the proposed self-assessable codes for thinning, invasive species management and paddock trees. Excessive regulation in these proposals includes excessive prescription within codes of conduct as well as mandatory notification requirements,

In 2005, in the largest study of its kind, the Australian Bureau of Agricultural and Resource Economics (ABARE) made an attempt to measure opportunity costs, noting that:

> Regulations that prevent the clearing of vegetation on private agricultural land can impose large opportunity costs; that is, the cost of forgoing a profitable activity'.[2]

As part of the study, ABARE conducted face-to-face surveys with 386 broadacre farmers across a 400 000km^2 region of central and western NSW in an attempt to quantify the extent to which native vegetation is having an impact on farm productivity and returns.

The study highlighted that:

> Native vegetation regulations can impose opportunity costs on the farm sector that take the form of lost annual income, which has consequential effects on land values because farmers are unable to clear and crop as they would wish. [3]

It further found that:

> The opportunity cost of preventing this development in order to conserve native vegetation for environmental services was estimated to be as much as $1.1 billion across the study region in net present value terms.[4]

The median cost of foregone crop development across the survey region was approximately $156,000 per farm.[5]

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[2] Davidson, Alistair & Lawson, Kenton & Kokic, Philip *et al*., *Native vegetation : management on broadacre farms in New South Wales : impacts on productivity and returns*, (ABARE, Research Report 2006)
[3] Ibid p 2.
[4] Ibid.
[5] Ibid p 16.

Perhaps the most telling finding of the ABARES study is that a 'broad based regulatory approach to managing native vegetation may fail to differentiate between sites where conserving native vegetation generates net benefit versus net costs'.[6] As stated above, NSW Farmers believes the objectives of the Act are fundamentally at odds with seeking or considering balanced outcomes.

A study completed by the Productivity Commission further provided estimates of potential impacts of broadscale clearing restrictions in Moree Plains and Murweh Shires (using applicable NSW findings only) which calculated:

> Prohibitions on broadscale clearing could reduce the present value of expected net returns (2003 dollars) to land, capital and management (over a 40-year period) in Moree Plains Shire (NSW) by $27-$84 million, depending on the productivity of newly-cleared land.[7]

Perverse environmental outcomes of the Native Vegetation Act

The *Native Vegetation Act 2003* has caused perverse environmental outcomes. These outcomes are noted below with further specificity. In considering the impact of the Act it is further worth considering the wider environmental impacts that cannot be specified through a specific farm case study. For example, farmers' reluctance to engage with advisory services or even in explicit conservation management for fear of locking up land which may be in the better utilised in production have origins in the impositions created by the Act.

Key to this aspect is adaptability of legislation to suit both the varying needs of the "bio-regions" as well as the current social or other needs of a region which may vary over time. Whilst the Act is clearly prohibitive in its ability to improve agricultural outcomes, flexibility to *improve* environmental outcomes is also not something that the Native Vegetation Act is known for.

In an inquiry into native vegetation legislation in Australia, the Productivity Commission noted:

> To the extent that effectiveness (of environmental goals) is monitored, it tends to be measured by changes in the estimated level of clearing of native vegetation – a somewhat more tractable but partial and imperfect proxy measure of environmental outcomes.[8]

Numerous independent reports since the introduction of land clearing laws in NSW have pointed to the unforeseen environmental impacts of prescriptive regulation. In its 2004 inquiry into native vegetation laws, the Productivity Commission identified the following environmental impacts as a result of native vegetation laws:

- Premature clearing of re-growth and more intensive rotation of paddocks, contributing to soil degradation;
- Woodland thickening has promoted soil erosion and biodiversity loss in some cases;

[6] Ibid 22.
[7] Productivity Commission, *Impacts of Native Vegetation and Biodiversity Regulations* (Research Report, 2004) XXXII.
[8] Ibid XXVI.

- Innovations in farming practices (such as water saving centre-pivot irrigation) which improve farm productivity and environmental sustainability can be prevented by the effective prohibition on the removal of paddock trees;
- Prevention of effective weed and pest management;
- Incentives to voluntarily conserve or re-establish native vegetation are diminished because of fear of future native vegetation restrictions;
- Strict enforcement and penalty provisions have created an adversarial climate between landholders and government and eroded landholder goodwill.[9]

More effective and less burdensome ways to manage biodiversity

NSW Farmers has endorsed the recommendations contained within the final report of the NSW Government's Independent Biodiversity Legislation Review Panel as the basis for the future of land and biodiversity management in NSW. The panel found that the current regulatory framework was not working, that it delivered no practical outcomes for farmers and that it was questionable whether it was able to deliver tangible environmental benefits. To remedy these failings the panel made 43 recommendations to facilitate reform. These included:

- A repeal of the *Native Vegetation Act 2003* and the creation of a new biodiversity act;
- A focus on conserving biodiversity at a bioregional or state scale (instead of the current site-scale);
- Management of native vegetation to be through LLS and local planning (rather than the current OEH).
- Reserve system changes, and broader application of offsetting.
- Development of a comprehensive system of reporting the condition of biodiversity.

The NSW Government has committed to the implementation of all 43 recommendations as part of its pre-election Memorandum of Understanding with NSW Farmers. We continue to work with the Government as part of this implementation.

2.2 Regulation of use of Agricultural Chemicals

All chemicals used in Australian agriculture are required to be registered or available under permit issued by the Australian Pesticide and Veterinary Medicines Authority (APVMA) under the Agricultural and Veterinary Chemicals Code. In order to receive registration or permit approval a chemical product must meet the statutory safety criteria when used 'in accordance with any instructions approved ... by the APVMA'.[10]

The safety criteria include the requirement that the chemical product 'is not, or would not be, likely to be an undue hazard to the safety of people exposed to it during its handling or people using anything containing its residues'. It further requires that the product 'is not, or would not be, likely to have an unintended effect that is harmful to animals, plants or things or to the environment'. For human health and safety assessment of the safety criteria includes an assessment of occupational health and safety during the handling and

[9] Ibid XXVII.
[10] *Agricultural and Veterinary Chemicals Code Act 1994* (Cth) s 5A.

use of chemicals and re-entry into treated crops or areas. For environmental safety assessment includes potential harmful effects on non-target flora, fauna (including insects and other invertebrates) and soil microbiological processes.

As a result of the registration process, agricultural chemicals are required to have an approved label that specifies the risk control methods required to meet the safety criteria. These risk controls are required to be approved by the APVMA in light of the detailed risk assessment that has been undertaken to register or approve the label of the chemical in question.

Control of Use Regulation

Under NSW control of use legislation, the *Pesticides Act 1999*, it is mandatory for users of agricultural chemicals in the farming workplace to:

- Read and follow the APVMA approved label or permit use requirements.[11]
- Have undertaken mandatory training every 5 years.[12]
- Maintain records of chemical application.[13]

Certain pesticides, particularly those used for invertebrate animal control, are subject to pesticide control orders. These orders may require a range of specific control measures including eligibility to use the pesticide, additional training and public notice provisions.[14]

The *Pesticides Regulation 2009* requires pesticide users to be qualified in order to use pesticides in a farming situation. In order to be qualified, a person must have completed assessment in specified units of competency in the past five years.[15]

The regulation enables the NSW Environment Protection Agency to approve units of competency from the national vocational education training and assessment framework by notice.[16] Presently this requires training to be undertaken at Australian Quality Framework (AQF) level 3, except that where a user has language and literacy issues preventing them from fulfilling these requirements they may be considered competent for the purpose of the regulation if they have completed training at the AQF 2 level.[17]

The training requirement ensures that persons applying pesticides in the farming workplace have the underpinning understanding and skills to undertake the application in accordance with the science based risk control measures approved by the APVMA. However, the requirement for the training to be undertaken within the last five years creates a situation in which many farmers and skilled farm workers are required to undergo the same training every five years. This not only results in unnecessary regulatory burden, but creates perverse outcomes with regard to the attitudinal behaviour this creates towards good agricultural practice.

[11] *Pesticides Act 1999* (NSW) s 14-15.
[12] *Pesticides Regulation 2009* (NSW) cl 9-10.
[13] *Pesticides Regulation 2009* (NSW) cl 13-15.
[14] *Pesticides Act 1999* (NSW) s 38-39.
[15] *Pesticides Act 1999* (NSW) s 14-15.
[16] *Pesticides Regulation 2009* (NSW) cl 9 and Schedule 1.
[17] NSW Office of Environment and Heritage, 'NSW - Pesticides Regulation 2009, Clause 9 (1) (d) (ii) and Schedule 1 – Notice of Approved Units of Competency', in NSW, *Government Gazette,* No. 59, 17 June 2011, p 4481.

NSW Farmers has a commitment from the NSW Government to review regulatory obligations where best practice is demonstrable. This includes reviewing of the training obligations under the Pesticide Regulation. NSW Farmers is seeking alternative pathways to demonstrate farmers' commitment to implementing good agricultural practice with the aim of reducing regulatory burden and reducing perverse outcomes.

Pesticide Control Orders - Training

As outlined above, training requirements additional to those required by the Regulation may be placed within a pesticides control order. For the majority of agricultural chemicals subject to pesticide control orders, the order mirrors the requirement of the Regulation; however a specific training order exists for the use of 1080 Ejector Capsules used in canid pest ejectors. This order requires the completion of an approved ejector course to obtain authorisation to use the capsules.[18]

One of the key outcomes from undertaking AQF level 3 training in chemical use is the ability to comprehend and apply the risk control measures contained within the registered label or permit. As such this training has applicability to the use of ejectors, with the label for Canid Pest Ejector 1080 capsules containing safety information that has been considered by the APVMA to meet the requirement to ensure worker and environmental safety.

Occupational Health and Safety Regulation

Global Harmonised System of Classification of Agricultural Chemicals

The commencement of the Global Harmonised System of Classification of Agricultural Chemicals (GHS) requirements for the labelling of agricultural chemicals that are hazardous chemicals, proposed to commence 1 January 2017, will create unnecessary red tape resulting in unnecessary expense that will be borne by farmers given the labelling requirements for these chemicals under the *Agricultural and Veterinary Chemicals Code*.

Currently, agricultural chemical labels that comply with the requirements of the *Agricultural and Veterinary Chemicals Code* are considered to also comply with Work Health and Safety Regulations.

However, Safe Work Australia's Model Work Health and Safety Regulations 2011 require that agricultural chemicals are also subject to additional labelling requirements based on the GHS. The new regulations are subject to a transition period which ends at the end of 2016.

From 1 January 2017, agricultural chemical labels are to include:

- any hazard statement that is consistent with the correct classification of the chemical, and

[18] Minister for the Environment (NSW), 'Pesticides Act 1999 – Pesticide Control Order under section 38', in NSW, *Government Gazette*, No. 64, 31 July 2015, p 2272.

- any precautionary statement that is consistent with the correct classification the chemical.

The APVMA requires hazard statements that reflect the risks of the final product based on those hazards that remain a risk after expert scientific risk assessment; by contrast GHS hazard statements may reflect hazards that are of negligible risk.

The additional regulatory burden represents a duplication of red tape and subsequent compliance cost with no evidence that it will improve worker safety. In fact, the additional statements may conflict with the APVMA label requirements, creating confusion and increasing risk to the worker.

NSW Farmers seeks an exemption under cl 335 of the *Work Health and Safety Regulation 2011* for agricultural chemicals registered or with use permitted under the Agricultural and Veterinary Chemicals Code, similar to that provided to therapeutic goods that are hazardous chemicals labelled in accordance with the *Therapeutic Goods Act 1989* (Cth).

Safety Data Sheets

It is a requirement of the model OHS regulation for a person conducting a business or undertaking at a workplace to hold a copy of the current safety data sheet (SDS, formerly Material Safety Data Sheet – MSDS) for each hazardous chemical and to maintain them as part of a hazardous chemical register.[19]

The requirements to hold a SDS originated in 1994 when the National Occupational Health and Safety Commission (NOHSC) established model regulation for the Control of Workplace Hazardous Substances. This required manufacturers and importers to determine the hazards of the substances and to produce labels along with an SDS for all hazardous substances. The underlying rationale behind this development was to mandate the provision of information to enable the development of a workplace specific risk assessment for the use of the hazardous substances at the workplace. This would then lead to improved adoption of workplace risk controls.

A registered label approved by the APVMA is required to contain all the pertinent information a user would need to use the product and to understand the risks associated with it.[20] This includes first aid instructions, safety directions, use patterns, safe handling procedures, safe disposal of the chemical and the container necessary to ensure the safety of workers using the chemical. The development of these instructions is informed by the detailed risk assessments by the Office of Chemical Safety and the Department of Environment.

We argue that it is reasonably practicable for a user to rely solely on the product label, as it meets the criteria for a user to conduct a safe operation. The user does not require the extraneous hazard based chemical information that is contained in the SDS and the requirement to hold an SDS creates a regulatory burden on the user.

[19] See, eg *Work Health and Safety Regulation 2011* (NSW) cl 344-346.
[20] *Agricultural and Veterinary Chemicals Code Act 1994*.

NSW Farmers recommends that the obligation for a farmer to hold a current SDS should be waived for a chemical product registered or being used under permit by the APVMA on the basis that the regulatory purpose it holds in other workplaces is better served by the labels and permits approved by the APVMA.

3. Access to Technologies and Chemicals

3.1 Regulation of access to Genetically Modified Crops

NSW Farmers supports the ability of a farmer to select the farming system they seek to implement, including the use of genetically modified crops, such as cotton and canola, or alternatively the implementation of conventional and organic farming systems. Research surveying canola growers over the period 2008-2010 found that co-existence did not appear to be a major factor within the majority of the farming community.[21] As part of continuing the good will between those who seek to engage in separate production systems, NSW Farmers encourages those within the supply chain to make the appropriate arrangements to segregate GM and non-GM products.

NSW Farmers supports the approach taken by the Office of the Gene Technology Regulator to the approval of genetically modified crops for use in Australian agriculture to ensuring that there are no detrimental health implications associated with genetically modified food in the human diet. This endorsement recognises that the current testing regimes implemented are current with world's best practice. Likewise present labelling systems required by Food Standards Australia and New Zealand is considered by NSW Farmers to be adequate.

3.2 Regulation of access to agricultural and veterinary chemicals

Crop protection products and veterinary medicines play an important role in maintaining and improving the international competitiveness of Australian agriculture. In 2012, independent analysis undertaken by Deloitte Access Economics found that up to 68% of the value of, or alternatively expressed $17.6 billion, Australia's horticultural, grains and fodder crop production is achieved as a direct result of crop protection products.[22]

To ensure that the benefits to agriculture and environmental land management do not create adverse impacts to human health or unacceptable environmental outcomes, Australia implements a science based regulatory framework for the registration of agricultural and veterinary chemicals. This framework is administered by the Australian Pesticides and Veterinary Medicines Authority (the APVMA). Essential to the registration framework is the assessment of hazard and risk posed by the use of these chemicals to determine, where feasible, measures that would enable these risks to be managed at application. Where the APVMA is not satisfied that measures may be successfully managed, it will refuse registration.

[21] David Hudson and Rosemary Richards, 'Evaluation of the Agronomic, Environmental, Economic and Coexistence Impacts Followin the Introduction of GM Canola to Australia (2008-2010), *The Journal of Agrobiotechnology Management and Economics*, 17(1) 9-10.
[22] Deloitte Access Economics, 'Economic activity attributable to crop protection products' (Research Paper commissioned paper CropLife Australia, 2013) 3.

However, Australia faces a number of challenges to maintain the benefits presently gained from the use of these products. Specifically, risks associated with resistance to chemicals and the opportunity costs associated with Australia not having access to chemicals used by international competitors are threats to the international competitiveness of Australian agriculture.

These risks are largely created by the high and growing costs and risk of investment in plant science and animal medicine required to undertake the innovation, development and commercialisation of agricultural and veterinary medicines. In 2010 these costs for a single active ingredient was $256 million USD.[23] This is up from $4 million USD in 1960 (approximately $31 million USD in real terms),[24] and $152 million in 1995.[25] It has been estimated that the largest component of increase between 1995 and 2008 was arose from development costs associated with regulatory approval.[26]

At the same time, Australia is a relatively small portion of the global market for agricultural and veterinary chemicals. For crop protection chemicals alone, the Australian market accounts for one sixth of the value of USA sales, and one tenth of sales made in Europe.[27]

This combination of high development costs and comparatively low volume demand for product has seen Australia fall into the tail of the commercialisation cycle for new products. This not only means that Australian farmers are waiting longer for newer novel chemistries to be available compared to international competitors, but also that regulatory development costs are only incurred for uses where there is a commercial return for the company. As a result, many desired uses for smaller specialty crops are not registered by manufacturers at the time market access is sought.

Compounding this impact is the market trend to shorten the investment strategy for the development of new actives; in which additional expenditure to extend registration into lower value markets becomes a lower priority. This is outlined in Figure 1, in which the blue investment line represents historical investment strategies with a tail of investment for expanded uses and the red line represents the current new norms, where investment focuses only upon major commodities.

In considering existing market impediments and trends, it is imperative for Australia to develop innovative policy which leverages increased investment from chemical registrants to development in Australia earlier in a product's commercial life.

The Australian Government's Agricultural Competitiveness Whitepaper has committed to further streamlining the approval of agricultural and veterinary chemicals with the aim of improving access to productivity enhancing chemicals, while maintaining key safety standards. This initiative has been allocated $20.4 million to resource the project.

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[23] Phillips McDougall, *Research and Development; Cost and Return,* (AgriFutura No. 125, March 2010) 2.
[24] Thomas Sparks, 'Insecticide discovery: An evaluation and analysis', *Pesticide Biochemistry and Physiology* 107 (2013) 8, 9.
[25] Phillips McDougall as above n 23, 2.
[26] Ibid.
[27] Deloitte Access Economics (2012) 'Review of APVMA Cost Recovery Discussion Paper', 13.

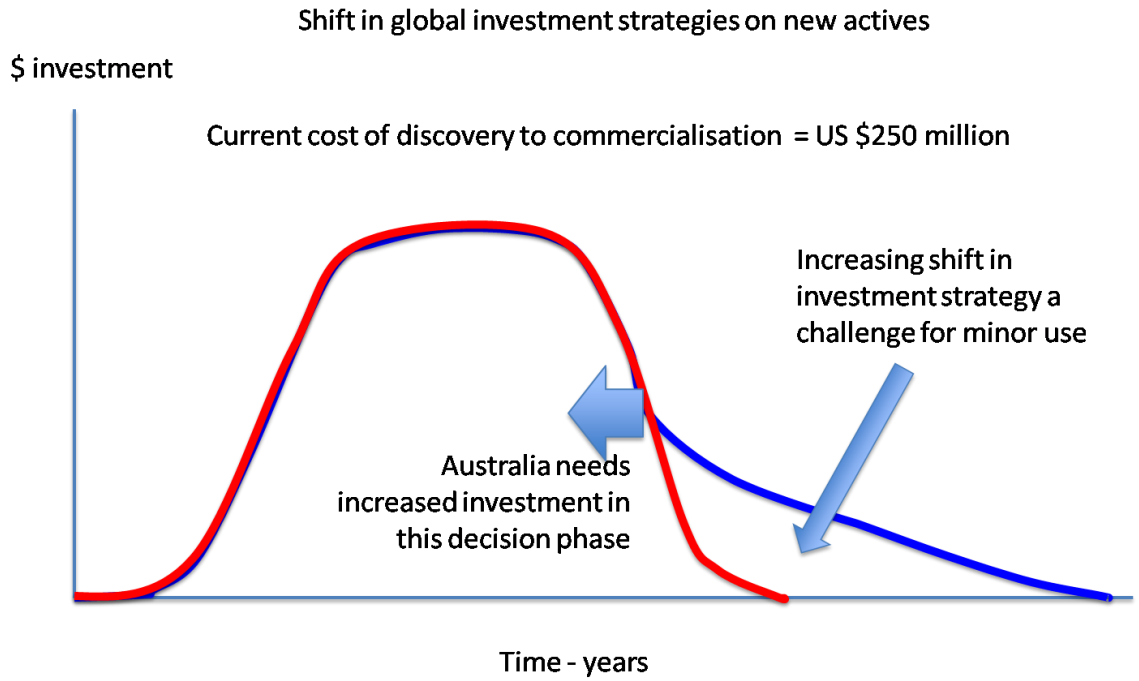

Figure 1: Crop Protection Australia, 'Making the most of the Minor Use Program' (Presentation to CropLife Australia Members Forum November 2014).

NSW Farmers has welcomed this initiative and has actively engaged in the consultation currently being undertaken by the Department of Agriculture and Water Resources to implement this commitment. In considering the implementation of this commitment, it is essential to include the range of market drivers that may be associated with commercial decisions by patent holders and generic manufacturers to delay/withhold investment in regulatory approval in Australia.

Noting the large costs associated with bringing an active ingredient to commercialisation, cost and return on investment for market specific approval is one of these factors; however other factors are also important to this investment decision. This includes aspects such as reputation associated with delay or refused registration and product liability. As a result, the key for regulatory reform of Australia's regulation of crop protection products and animal medicines lies in innovative policy that fosters and facilitates investment decisions in Australia. While this may include the removal of regulatory processes, we note that this of itself may develop other forms of market failure.

Does the regulatory system for agvet chemicals effectively align regulatory effort with risk? How can a better system be achieved?

Essential to achieving greater innovation in policy to achieve this outcome, will be looking at alternative ways in which community expected levels of oversight may be achieved. Key to this will be developing processes that align regulatory effort with risk. To this extent, the APVMA has engaged the University of Melbourne's Centre of Excellence for

Biosecurity Risk Assessment (CEBRA) to develop options that may better align regulatory effort, required by both the registrants and the APVMA, to the risk of a product.[28]

As part of the consultancy, CEBRA identified opportunities to utilise a graduated approach to regulatory approval, whereby depending upon the known risk of a product a registrant may have the option of progressing through one of the alternative registration pathways:

- Listing or self assessment
- Product monograph based approvals
- Reliance on existing approvals in other regulatory schemes

In considering these recommendations, the APVMA is developing an application profiling tool that will enable the APVMA and potential registrants to determine if a regulatory pathway of lower effort is available.

Concurrently, the APVMA are also developing processes that will enable a fully modular assessment process for the registration of products. We encourage the development of a similar risk based approach to the assessment of each module required for registration to enable manage a risk based to approval for each module within a product registration.

An example where a lower regulatory pathway for the assessment of a specific module may be considered would be the assessment of trade risk for veterinary medicines registered for use on companion animals, or efficacy testing on consumer products that are not used in agricultural production.

Other opportunities to align regulatory burden include:

Crop Groupings

The Association supports the APVMA's work to introduce crop groupings. The establishment of these crop groupings that will enable the assessment of a broader range of crop commodities for registration based on data generated for the representative crop. This will reduce the cost associated with registration of some minor uses and facilitate improved access for farmers who produce specialty crops.

Permit to Label Migration

The Australian Government has provided funding to the APVMA to develop and implement a regulatory pathway for chemical use patterns currently on minor use permits to be migrated to full registration. This will provide end users who access these chemicals through the use of minor use permits with greater regulatory certainty through bringing the mandated good agricultural practice of the minor use permit onto the label directions. Further, by placing the use on label, which continue until voluntary withdrawal or reconsideration by the APVMA, savings in regulatory effort are created by removing

[28] Andrew Bartholomaeus, 'Employment of risk proportionate chemical regulatory regimes in Australia and selected international jurisdictions' (Report 1, BartsCroft Scientific Services Pty Ltd for the Australian Pesticide and Veterinary Medicines Authority, February 2015.)

the need to apply for a new permit. These savings are both to the end user industry, who hold minor use permits, and to the regulator.

Introduction of provisional registration

Introducing a system of provisional registration would enable the APVMA to provide a provisional registration to products where a high degree of satisfaction about the ability of the product to meet legislative requirements has been achieved, but more data is required to fulfil all obligations of registration. This would reduce the time taken to commercialise chemical products into Australia. It would also provide an incentive for registrants to broaden the scope of registration to different uses, through enabling the cost of generating additional data to be offset by revenues already occurring from sales.

Provisional registration would also create a pathway to full registration that provides greater certainty and benefit than the need to apply for minor use permits. It further may create opportunities to transition minor use permits to full registration, creating synergies with the APVMA's current investigation of permit to label migration.

Is there scope for Australian regulators of agvet chemicals to recognise the tests and standards developed by their overseas counterparts?

NSW Farmers supports efforts to improve the capacity of the APVMA to use international data and assessments where appropriate. Specifically we support greater use of hazard assessments, such as human toxicological assessment where undertaken utilising an approach in accordance with Australia's present assessment, such as the Joint FAO/WHO Meeting on Pesticide Residues (JMPR) or the Global Joint Review program.

Where hazard assessments are accepted, products should still be subject to the present risk based approval regime, which has been built on meeting the needs of Australian community and industry.

We note that the APVMA is currently undertaking a process aimed at facilitating greater use of international data and assessments, and is already accepting international data in some circumstances. Further safeguards should be considered on a risk basis to ensure benefits presently gained from the present administration of the AgVet code, such as management of resistance risk, are not foregone.

Industry continues to look to the APVMA to provide greater clarity on the criteria which will be employed to determine the eligibility of international inputs, including which overseas regulators will be a source of trusted assessments.

One option that may be available as part of the development of such an approach would be the development of an agro-ecological regional co-equivalency model to guide the APVMA's ability to rely on international data depending on the source of data generation and the target pest and host in its application to the Australian operating environment. This could create a lower regulatory pathway for assessment modules by enabling reliance upon overseas data where agro-ecological co-equivalency exists.

International Regulatory Decisions

However, we do not accept the *ipso facto* use of regulatory decisions made in other jurisdictions as a valid justification for a domestic regulatory decision for chemicals used as part of agricultural production. This is likely to lead to less stable decision making and increases the risks of the politicisation of the approval of chemicals for use by the Australian farm sector due to the different tests used in overseas jurisdictions.

Minor use: regulatory incentives and investment in data generation to support registration

NSW Farmers supports the initiatives undertaken by the Australian Government to increase access to chemicals for minor uses. These activities include the funding of the Rural Industries Research and Development Corporation's (RIRDC) project to develop a minor use collaborative forum and the grants scheme to fund data generation by Research and Development Corporations. As part of the first of these projects, significant strides have been taken to improve collaboration with international jurisdictions to share minor use priorities and data generated to support registration.[29]

As part of its contract with RIRDC to deliver the minor use collaborative forum, Crop Protection Australia identified the essentiality of a suite of regulatory provisions to incentivise commercial investment in the registration of minor use chemicals. Crop Protection Australia's findings drew on the experience of the two North American minor use programs where administrators and participants made the following comments:

- Without the development of suitable incentives for commercial investment in the registration of minor use chemicals, Government initiatives to provide farmers with access to these chemicals are unlikely to be sustainable.
- Well designed incentive programs reduce market failure in the registration of minor use chemicals and in some jurisdictions have been so successful that the *need for Government co-investment no longer exists.*

On this basis, NSW Farmers recommends that further investigation be undertaken to design appropriate regulatory incentives for inclusion within the *Agricultural and Veterinary Chemicals Code*. An appropriate commencement point for such an investigation is the suite of incentives identified by the OECD. They are:[30]

- Economic incentives:
    - data protection and extension of data protection.
    - expedited reviews.
    - fee reduction or waivers.
- Technical arrangements based on sound science:
    - extrapolation and mutually accepted data.
    - reduced requirement for trials.
- Promotion of safer alternatives:
    - reduced risk incentives.

[29] Rohan Rainbow, 'Delivery of Access to AgVet Chemicals Collaboration System' (RIRDC Final Report to Department of Agriculture and Water Resources.
[30] OEDC, 'Guidance Document on Regulatory Incentives for the Registration of Pesticide Minor Uses' (2011).

- Liability:
    - liability waivers and disclaimers.

NSW Farmers also recommends that the development of a system of regulatory incentives should be accompanied by strategic co-investment by Government and industry to generate data necessary to support registration of minor use chemicals. As part of its 2013 election commitment, the Australian Government has made an investment of $8 million over four years to improving access to chemicals, which includes cash grants available to Rural Research and Development Corporations for data generation. We have welcomed this program and look forward to the announcement of the successful applicants for the first round of funding and future evaluation of the program and believe that future funding for the program beyond 2017-18 will be of benefit.

Any future program for the public funding of minor use data generation needs to ensure appropriate governance structures are incorporated to focus investment towards highest value uses. This should include limiting investment to chemicals prioritised through the minor use collaborative forum and dovetail with regulatory incentives proposed above.

NSW Farmers acknowledges the concerns the Productivity Commission held over the cost benefit of public investment in the registration of chemicals as part of its research report into *Chemicals and Plastics Regulation*.[31] As part of the RIRDC project to develop the minor use collaborative forum, CropProtection Australia collaborated with Applied Economic Solutions (AES) to develop benefit cost models associated with investment in the registration of minor use chemicals. We recommend the Commission engage with CropProtection Australia and AES to further understand the applicability of their modelling.

4. Transport

Integral to the operation of a farm business is the use of road transport to freight farm produce to either an intermediary, such as a grain receival site, saleyard or abattoir, or an end user. Likewise farmers rely on the road network to move their own farm machinery between properties or for farm services contractors, such as planting, hay making and harvesting, to move between different farm business clients.

In general, NSW Farmers is seeking more flexibility including increases in carrying capacity (legal load limits), more effective registration renewals (longer periods) and an exemption from the installation of regulatory tracking devices. We are concerned that there is neither a demonstrable productivity benefit, nor safety benefit associated with proposals to mandate the use of such devices; rather they form a further level of red tape with regard to the movement of agricultural produce.

4.1 Would alterations to the HVNL offer material benefit in terms of reducing regulatory burden on farmers? At what cost?

The unintended consequences of the application of NHVR changes by jurisdictions have placed considerable stress on farmers. In particular, issues such as ‘chain of

[31] Productivity Commission, ‘Chemicals and Plastics Regulation’ (Research Report, July 2008) 214-214.

responsibility' and OSOM requirements increase the regulatory burden on farmers and over complicate the accountability issues involved with the transport of stock and commodities.

Oversize Over Mass Obligations

Permits and Transport Management Plans

As part of the drive towards improving productivity, Australian cropping production systems have adopted wideline broadacre machinery. To further increase efficiencies and drive lower marginal cost of production, farmers will seek to utilise this machinery, such as broadacre planting drills and combine harvesters across as large an area as practical. This will either be across large holdings owned by the farmer, or by undertaking contract planting for off farm income, or by engaging a contract planting business.

All three of these options will often result in the need to move a tractor and planting machinery on public roads. This will often be required at late notice as the farmer or contractor responds to a variety of time production pressures such as a breakdown or rain events that prevent planting in a specific location.

Due to the size of some of this machinery, particularly broadacre planting drills, many of these movements are presently considered to be 'High Risk' by the NSW Roads and Maritime Service (RMS).[32] This is regardless of the actual risk posed by the permutation of the machinery combination and the road route undertaken.

Once a movement is designated as being High Risk, the operator is required to submit a traffic management plan as part of the requirements for seeking a permit. Feedback received from members of NSW Farmers indicates that this obligation presents a substantial administrative task and also reduces flexibility of movement. Specifically, a requirement exists to contact the NSW Police regarding escort requirements a minimum of five days prior to the planned movement and to obtain approval from a Rail Infrastructure Manager if the movement involves traversing a railway crossing.[33] During the time sensitive planting window the period of time required prior to approval constitutes a major cost to a farmer's productivity, or to a contract planting operator's ability to work.

The Association has been engaging with RMS, seeking a review of the risk posed by these movements with the aim of considering if the transport management plan requirement and notification requirements could be lifted. If they are to be maintained, NSW Farmers is seeking substantially reduced requirements, such as the use of an online transport management plan development tool. Such a tool could enable a farmer/contractor seeking to make a movement to draw the route on an online map with the capacity to issue a permit on the spot where no complications existed with the

[32] The definition of High Risk movement includes all movements over 6.0 m width or agricultural combinations in the NSW Western zone greater than 6.5 m width see NSW Roads and Maritime Service, *Oversized and/or overmass (OSOM) vehicles and loads* (2016) < http://www.rms.nsw.gov.au/business-industry/heavy-vehicles/road-access/restricted-access-vehicles/oversize-overmass.html#TransportManagementPlans(TMPs)>.
[33] NSW Roads and Maritime Service, *Oversized and/or overmass (OSOM) vehicles and loads* (2016) < http://www.rms.nsw.gov.au/business-industry/heavy-vehicles/road-access/restricted-access-vehicles/oversize-overmass.html#TransportManagementPlans(TMPs)>.

proposed movement. This permit could then be printed by the farmer/contractor or stored electronically on an electronic tablet.

Escort Scheme

The proposed changes to the Oversize Over mass (OSOM) Escort Scheme may reduce the difficulty and cost involved in accessing escort vehicles poses an unnecessary bureaucratic impost on farmers and all heavy vehicle operators. We argue that rather than regulate escort or pilot vehicle drivers it would be better to educate the general public who are unfamiliar with OSOM movements to best ensure public safety.

One of the objectives of the scheme is to free the Police Service up from needing to undertake escort vehicle services. However there is a real risk that when implemented the reform will vastly increase red tape associated with the movement of OSOM vehicles. As outlined above the current arrangements for a *High Risk* movement, requires contacting the NSW Police regarding escort requirements a minimum of five days prior to the planned movement.[34] Once notified, the Police hold discretion on whether or not an escort is required based on a risk assessment of the proposed movement. If the Police elect not to provide the service the movement may proceed with the normal pilot vehicle arrangements.

In contrast, the proposed third party escort scheme will no longer enable the use of a risk assessment prior to determining whether an escort vehicle is required. Instead the requirement will arise as a result of a standardised matrix. The likelihood is that the operation of this matrix will result in a number of standard agricultural movements requiring an escort where presently this would not be the case.

Further the Association has concerns over the 'fit and proper person' test requiring criminal check, medical declaration and references create further red tape for business and have little bearing on the ability to manage the risk of an OSOM vehicle movement and represent unnecessary red tape. We believe the sole requirement for an escort driver ought to be a driver's license.

Lastly, the Escort Vehicle Driver scheme is obviously aimed at firms who will seek to become professional escort companies. There is little chance that farm businesses will either gain accreditation as trainers or as escort vehicle drivers. Inevitably the accredited firms for these movements would end up in centralised locations.

RMS should consider exemptions from the requirements around having escort vehicles in certain circumstances such as short distances on straight quiet country roads without pinch points. Otherwise, personnel to escort vehicles may not be readily available for remote areas. If the RMS is to insist that farmers comply with escort vehicle requirements in all circumstances, farmers should have the right to request police provide the escort where no other solution is apparent.

[34] Ibid.

Chain of Responsibility

In terms of Chain of Responsibility NSW Farmers members are concerned that whilst they are caught within the chain they have little ability to exercise power over the process of ensuring a road transport operator is meeting their legal obligations. These concerns are particularly held with regard to chain of responsibilities for fatigue management and road worthiness. Often, farmers will not be the party who has contracted road haulage; however are responsible under contracts of supply to assist the road transport operator with livestock, grain or other farming produce. These aspects are made more difficult by the remote location of farms where the loading of this produce takes place and the vulnerability that arises from these facilities often being located in proximity to the family home.

Further, the imprecise nature of the duty held and the *reasonable steps* defence creates regulatory uncertainty as to what efforts a farmer is required to take in order to meet the obligations of the duty. For these reasons the farming community questions as to why these duties are applied to farmers.

In the effort to create greater regulatory certainty for our farming members, we have sought the development of farm specific guidance on chain of responsibility by RMS. Such guidance should specify the actions available to a farmer in order to successfully fulfil this legal duty. Once this guidance material is available, NSW Farmers will consider whether a code of practice should be developed for the movement of agricultural produce.

4.4 How could access decision-making by road managers be improved to allow freer movement of agricultural produce?

One of the most perceived outcomes of the introduction of the NHVL for farmers has been an increase in the time to process applications for a permit to allow road access to a restricted vehicle. It appears that this is linked to the creation of the legislative requirement for local government, as a road manager, to grant access for restricted vehicles.[35] NSW Farmers is engaged in discussions with the NSW Roads and Maritime Services about options that may reduce the regulatory burden attached to the existing permit process. This would include gazetting routes for specific types of agricultural combination movements and other restricted access vehicle access.

5. Animal welfare

The Association's position on regulation regarding animal welfare is that a minimalist approach should be enshrined in regulation, in accordance with a full understanding of the current 'problem/mischief' and in line with best practice regulation principles.

Prevention of cruelty to animals legislation

Whilst Australians are broadly comfortable about the use of animals as part of either consumption or entertainment there is a clear line embodied within the existing legislative

[35] National Heavy Vehicle Regulator, 'Approved Guidelines for Granting Access' (Version 1.0, February 2014) 10.

standards that cruelty to any animal is unacceptable. NSW Farmers policy on the regulation of animal welfare mirrors this clear community expectation.

Relevant state legislation, such as the *Prevention of Cruelty to Animals Act 1979* (NSW), provide a fundamental pillar of regulation across Australia that reflects these contemporary social aspirations with regard to the treatment of animals. As such, based on an undistorted view of the public policy mischief associated with animal welfare, the Association maintains that the existing Prevention of Cruelty to Animals Acts continue to meet the aims of public policy and purposes for government intervention.

NSW Farmers also supports the Export Supply Chain Assurance Scheme (ESCAS) and we endorse the comments provide by Australian Live Exporters Council (ALEC) on its support for the four underpinning principles of ESCAS.

NSW Farmers support for ESCAS parallels our position that preventing cruelty to animals is unacceptable. We recognise that the community response to revelations in the live export industry created a widespread reaction from the public and that regulatory intervention to respond to this level of public reaction was not inappropriate.

We consider that ESCAS, as a regulatory measure, in response to public opinion is comparable to the domestic application of prevention to cruelty to animals legislation.

Defining the 'problem'

At the outset, NSW Farmers notes that it considers itself a champion of best practice animal welfare and advocates, amongst the broader farming community and through its membership base, for the implementation of such practices. Further, the Association is responsive to changes in production practices that are accompanied by consumer or market-based economic drivers.

The egg industry provides a relevant case study. Through the 1980s, egg production was regulated by State marketing boards and hens were predominantly kept in cages. Deregulation in most states during the 1990s lead to the development of small scale free range egg production. This free range segment has continued to grow and now represents approximately 39% of eggs sold in supermarkets in Australia.

The relevant animal welfare concern that drove the growth of free range was that the quality of life and health of caged hens could be improved if they had greater mobility and were housed in production facilities that more closely reflected the natural environment. In response to consumer demand, the free range category developed.

The evolution of the free range category is an explicit demonstration of the way in which market forces and economic drivers are the single best measures to drive changes to farm animal husbandry.

It may seem plain to consumers that free range egg farming provides higher animal welfare standards, however this production system increases mortality rates and disease in birds, whereas caged production increases life expectancy and creates an environment where the threat of predators is prevented through confinement. Irrespective of the fact that some welfare benefits are created through increased confinement, NSW Farmers

takes an agnostic position with regard to regulation. Rather we suggest that it is the market which is driving these alternate forms of husbandry. In short, the market has responded by providing consumers with a choice to buy into alternate production systems. These alternate production systems have higher cost profiles and these costs are passed onto consumers. Indeed, in the egg sector, consumers have the capacity to choose between a variety of production systems; from cage through to organic free range.

It is notable that deregulation was the single biggest driver in creating these alternate consumer driven constructs of animal welfare in the egg industry and maintaining a minimalist regulatory approach enshrines the capacity for ongoing production innovation in other supply chains.

Constructs of Animal Welfare

Undoubtedly, the current consumer constructs of animal welfare have more to do with philosophical considerations and anthropomorphism than they have to do with science. The Association remains eager to be more engaged with the community on understanding the intricacies, nuances and benefits of different production systems as part of informing the consumer constructs that drive market behaviour. This is consistent with broader economic principles of consumer behaviour where a competitive and innovative economy provides consumers with a variety of choices about the types of products they choose to buy. However, with regard to the market's capacity to drive alternative husbandry practices, these changes emphasise that regulatory approaches are not required beyond that to prevent cruelty.

Retaining a minimalist regulatory approach to farm animal welfare requires that the government recognise that there is not a relevant "problem" which requires regulatory resolution. In support of this, NSW Farmers would draw the Commission's attention to the evolution of animal welfare activism and advocacy. Whilst publications such as Harrison's *Animal Machines,* Singer's *Animal Liberation,* and the more recent *Eating Animals* penned by American author Safron Foer have created important platforms for the public's consideration of how society rationalises animal consumption, their core epistemological foundations are philosophical and contested. NSW Farmers argues that it is these epistemological bases that place such issues of moral concern outside the realm of governmental regulatory principles relating to equality, fairness and justice.

NSW Farmers would note that these are important discussions for the community and we raise no objection in relation to a contest of these philosophical questions. But we urge the government to deal with these issues within an appropriate regulatory framework which should have little to do with matters as subjective as this.

Rationalising the place for 'regulation' in the animal welfare space

NSW Farmers would argue that no case for additional regulation above and beyond the Prevention of Cruelty to Animals Acts administered by state governments has been made. Therefore the appropriate course of action is to allow changes in production practices to be guided by economic drivers in the consumer sphere. Allowing economic drivers to facilitate changes to production practices ensures that unnecessary regulation

will not distort innovation and create a disincentive for changes in types of production practices desired by consumers.

Regulation in response to broad public opinion already exists through both the prevention of cruelty to animals and the ESCAS regime. Further regulation is not required and would only act to distort innovation.

To the extent that the public demands alternate animal husbandry practices, market-based drivers are the best mechanism to provide signals to producers. Good government regulation should recognise that these market based signals exist and that additional regulation is therefore unnecessary and disadvantageous.

6. Biosecurity

The approaches to the management of biosecurity at both the Commonwealth and NSW jurisdictions under went legislative reform in 2015 with the modernisation and particularly in the case of NSW streamlining of biosecurity legislation. Together the state and federal reforms seek to implement a science based risk management approach across the biosecurity continuum through:

- Border and prior to the border obligations to prevent the entry of biosecurity threats.
- Surveillance and regulated activities to eradicate identified incursions by biosecurity threats.
- Management obligations to minimise the impact of biosecurity threats that cannot be eradicated by preventing further spread and reducing impact on the industry, community and the environment.

Biosecurity regulation is an important tool for Governments to both protect existing agricultural production and the value of exports and to provide a favourable environment in which the value of agriculture to the Australian and NSW economies are able to grow.

Over many years members of the NSW agriculture and fisheries industries have a demonstrated strong and positive voluntary commitment to managing biosecurity. This commitment has not only been to the benefit of their own enterprises; but also to the public good. This is through enhancing economic activity in regional and state economies and minimising the impacts of weeds, diseases and pests on the environment leading to improved public amenity.

The position of our members upon the frontline of the biosecurity continuum provides them with an important insight as to the regulatory settings that will be effective in promoting positive behaviour in the management of biosecurity risks.

The following makes comment with regard to the new regulatory frameworks adopted by the Commonwealth and NSW jurisdictions separately.

6.1 Federal Regulation of Biosecurity

NSW Farmers' members have expressed a clear desire for the Australian Government's regulation of entry points of Australia to biosecurity risk to be conducted through a clear regulatory science framework operating independently of political pressures.

This principle is in the process of being embedded in the *Biosecurity Act 2015* (Cth) through the development of regulations which ensure that expert scientific advice is central to the development of Biosecurity Import Risk Assessments (BIRA) through the oversight of a Scientific Advisory Group (SAG). Further, the independence of a statutory position of Inspector-General of Biosecurity (IGB) to review a BIRA provides a level of transparency that will ensure the primacy of science in the making of regulatory decisions over the importation of produce into Australia.

NSW Farmers has made specific comment to the development of these regulations seeking clarity over:

- The oversight of the SAG over the making of draft and provisional BIRA reports.
- The obligation of the proponent of import to substantiate evidence surrounding management of biosecurity risk.
- The primacy of finalising any review of a BIRA by the IGB prior to commencement of importation.

NSW Farmers supports these processes as being necessary to ensure that we do not place Australia's biosecurity at unnecessary risk. As the then Parliamentary Secretary to the Minister for Agriculture, Senator the Hon Richard Colbeck, stated in his conclusion to his second reading speech on the Biosecurity Bill 2014:

> *Countries might like to criticise us for our strong biosecurity system and our very strong appropriate level of protection, but we do not apologise for it, and we are quite frank with anyone who wants to go down that path. Our biosecurity system is not up for trade.*[36]

6.2 NSW Biosecurity Regulation

NSW Farmers welcomes the underpinning philosophy of the *Biosecurity Act 2015* (NSW) that biosecurity is a shared responsibility. This recognises that actions made within the latter two components of the biosecurity continuum, surveillance and eradication and management to minimise impact, will be more effective where responsibility for these actions is held across the entire community. The implementation of this through the creation of the General Biosecurity Duty (GBD) offers the opportunity to enhance the efficacy of existing biosecurity legislation, while at the same time focusing on the lowest cost burden to achieve this efficacy.

However, to be effective and to ensure the certainty that reduces the transaction cost associated with broad overarching duties, such as the GBD, the new biosecurity framework will need to strategically partner the GBD with:

[36] Commonwealth, *Parliamentary Debates*, Senate, 11 May 2015, 2758 (Senator Colbeck, Parliamentary Secretary to the Minister for Agriculture).

- A suite of mandatory obligations that will require duty holders to undertake specified risk control measures and to provide a framework for tenure neutral control.
- The development of advisory tools, such as codes of practice that provide clear guidance to duty holders as to how to meet compliance with the GBD.
- Investment in extension services to industry that provides duty holders with an awareness of advisory tools and mechanisms through which they are able to meet compliance with the GBD.
- A well articulated and communicated compliance policy that provides greater certainty to duty holders as to how the regulator will utilise its discretion in the enforcement of biosecurity legislation, particularly the General Biosecurity Duty.
- Adequate resourcing of compliance activity to provide sufficient deterrence to prohibited behaviours.

This recommendation has been made to the NSW Government as part of the development of the regulations that will underpin the *Biosecurity Act 2015* (NSW) when it commences in 2017.

In developing this position, NSW Farmers has noted that while the GBD provides flexibility to duty holders in meeting their obligation, the technical nature of biosecurity risk, similar to that in workplace safety, means that expertise plays a large role in establishing adequate risk controls. Often this expertise is more likely to reside with Governments and regulators than with small businesses who hold duties.[37] Likewise, where a known duty exists, transaction costs savings can be made, with the duty holder being able to understand and implement risk control measures.[38]

7. Competition regulation

The development of Australia's agricultural capacity is a matter that is firmly in the national interest. To this extent the Federal Government has highlighted that agriculture is one of the five pillars of the Australian economy and has outlined the desire to double the contribution of agriculture to the economy.

As part of the Government's efforts to develop a white paper to guide initiatives to improve Australia's agricultural competitiveness, it has indicated that providing the conditions under which improved farm gate returns can be achieved are essential to attaining these outcomes. The Agricultural Competitiveness Green Paper outlined that the flow on outcomes from improving farm gate returns includes financial investment in the industry, increased export receipts, stronger regional economies and jobs.[39] The value of farm production to the Australian economy in 2013/14 was $51 billion.[40] The

[37] For eg. see *Maxwell, C. Occupational Health and Safety Act Review (1994)* 357-358 for the consideration of this concept in workplace safety.
[38] For eg. The Allen Consulting Group, 'Proposed Occupational Health and Safety Regulations 2007; Proposed Equipment (Public Safety) Regulations 2007' (Regulatory Impact Statement prepared for Worksafe Victoria, 2007) 173 estimates $5 million savings from the removal of a requirement to asses risk.
[39] Australian Government, Department of Prime Minister and Cabinet (2014) *Agricultural Competitiveness Green Paper*, *vii*.
[40] Australian Government, Department of Prime Minister and Cabinet (2014) *Agricultural Competitiveness White Paper,* 4.

benefits of growth in the farm sector to rural and regional Australia are self-evident, with agriculture being the backbone of much industry across non-metropolitan Australia.

However for these benefits to arise, participants in the farm sector of agricultural supply chains must invest in on-farm innovation that will result in greater productivity.[41] In examining the actions required to 're-establish [the] growth engines' of Australian agriculture, the ANZ's Greener Pastures report, highlighted that the key to industry growth was establishing clear market signals for the farm sector to invest in the sought growth.[42] This included ensuring the ability of the supply chain to provide clear market signals to the farmers and growers to invest in growing productivity.[43]

As part of our advocacy towards enhancing agriculture's capability to contribute to the Australian economy, NSW Farmers supports policy that will facilitate competitive and dynamic market places in agricultural supply chains. However, this outcome is presently impeded with our membership, made up largely of small to medium sized businesses in remote areas with limited access to market information and opportunities for collective organisation, regularly experiences the restriction in competition via the rapid consolidation of the supply chain. Of the total number of agribusinesses in Australia, 99 per cent are fully Australian owned and around 97 per cent of farms are classified as small businesses, having annual turnovers of less than $2 million.[44]

Figure 2 outlines the consolidation that has occurred in the grains industry in the period 1985-2010. This symbolises trends that are being seen in other sectors of agriculture, most notably the red meat processing sector.

A balance must be developed to ensure a clear distinction is made between an environment that fosters healthy and constructive competition, and the misuse of market power. Fluctuations in input costs, the impact of climatic variations, limitations in infrastructure and the perishable nature of produce leave some farmers in an economically vulnerable position operating under extremely tight margins.

These market factors result in imbalances between participants in the supply chain. Where anti-competitive behaviour leveraged off this imbalance occurs, it may be subtle and difficult to clearly distinguish from legitimate business conduct. However, due to the nature of the markets, the conduct still has a substantial impact on competition.

[41] Port Jackson Partners 'Greener Pastures: The Global Soft Commodity Opportunity for Australia and New Zealand' (ANZ Insights Report, Issue 3, October 2012) 33-34; 37.
[42] Ibid.
[43] Ibid 48-49.
[44] Australian Government, Department of Prime Minister and Cabinet (2014) *Agricultural Competitiveness White Paper,* 4.

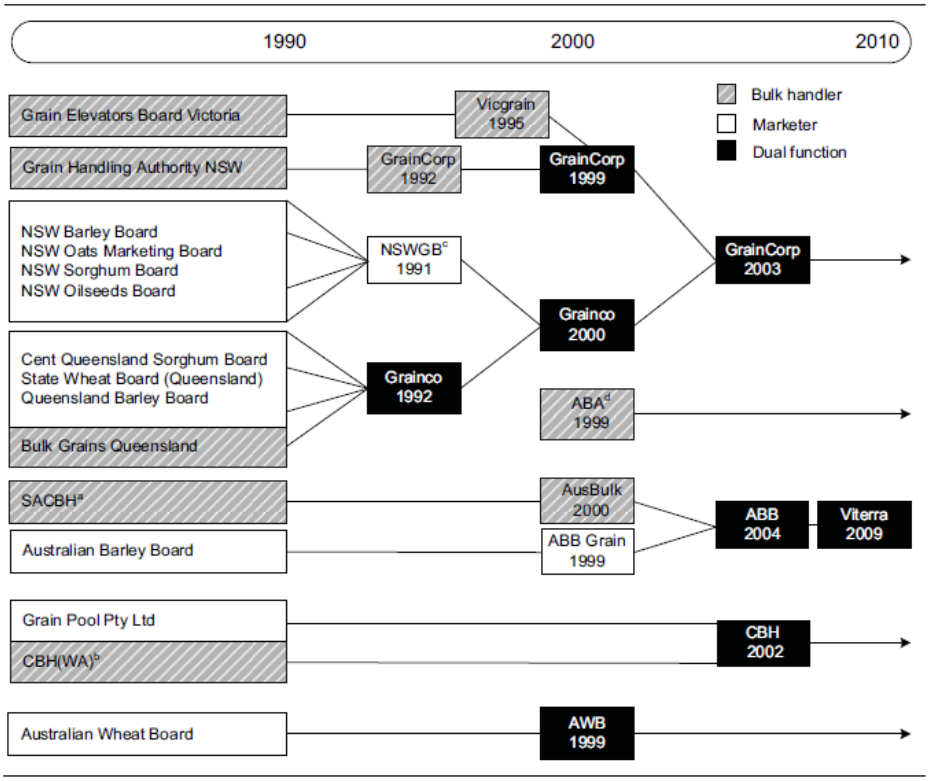

Figure 2 Grain Industry Consolidation
Productivity Commission (2010) *Wheat Export Marketing Arrangements* 50.

In simple terms the farm sector has specific characteristics that mean the impacts of ineffective competition legislation can have a more detrimental bearing than other businesses in the economy.

Where are the restrictions on competition in the agricultural sector or its supply chains?

NSW Farmers members have particularly identified restrictions on competition that inhibit the ability of markets to distribute value as it would if it was well informed and functioning:

- The red meat processing markets and the opportunity to bypass established vertically integrated red meat companies through access to third party service kill space.
- The market for grain storage, handling and freight.
- Centralised markets for fresh horticultural produce.

Red Meat

One of the important mechanisms within a well functioning market will be the availability of by-pass opportunities which will enable upstream producers to chose alternative routes to provide their produce to end users. However, the consolidation of the red meat sector in NSW has effectively shut farmers out of these more profitable pathways through the supply chain. For instance, historically, processing facilities have provided consignment/service kill services, whereby processing services are provided under contract to third parties according to specifications. These services have continued to be

provided as processors became increasingly vertically integrated into red meat marketing activities. However, more recently, as processors have became larger; there has been a gradual but sustained reduction in service kill capacity.

Whilst processing facilities are private facilities and are not the subject of third party access obligations, the trend of reduced access to service kill services has had a significant impact on competition. Farmers' ability to access kill space is one of the means by which they are able to increase the value of their produce. The significance of this access is heightened by concerns regarding the integrity of the saleyard auction process on the basis that farmers are forced to look elsewhere for opportunities to enhance their profitability. Further, an inability to access kill space may also prevent access to gaining traction further up the supply chain.

The importance of third party access to kill space was highlighted in the approval of the sale of Primo to JBS, where the then Treasurer, Joe Hockey, placed a condition on the sale that the Scone abattoir must retain its capacity for consignment killings accessible by third parties. This decision reflected the challenge of preserving appropriate competitive tension around the key ‘bottlenecks’ in the red meat supply chain.

The availability of kill space is an important aspect of the supply chain as it represents a source of countervailing power for producers. Where a producer is dissatisfied with the pricing outcomes available from sale yards or processors, they have traditionally had the ability to by-pass these sale methods and retain ownership in their livestock beyond the processing stage. This has facilitated direct relationships between producers and retailers and supported the growth of the higher value 'farm to plate' niche markets for red meat products.

The inability to obtain kill space has arisen in circumstances where there remains a clear demand for these services, where there is understood to be capacity available and where such arrangements have been undertaken on a commercially viable basis for producers. The consolidation in the processing sector has reduced the number of processing options available (*i.e.* there is little risk that producers will take livestock elsewhere for processing).

This thin market provides the context for greater competition regulation. With growing innovation in the farm sector through research and development, farmers are continuing to push for opportunities to directly access premium export markets. Without the capacity to access a service kill, the ability of farmers to gain traction in those premium export markets is disrupted. This has the added implication of reducing the incentives for farmers to grow the best produce. Growing the best no longer comes with a guarantee that quality will be rewarded through price.

Grains Storage and Handling

Operation of the market for grain storage and handling

The price received by grain farmers is directly related to the bulk export of grain, and predominantly wheat, which other grain and oilseed commodities are priced against.

Specifically, the domestic farm gate price of grain is a function of the price on world markets, less the cost of the export supply chain and the margins of grain traders.

Distortions in the market for supply chain storage and handling that result in supply chain costs higher than that which would be available in a competitive market impede the ability of the Australian grain market to distribute value back to the farm gate. However, unlike in many other dependent markets, the market for farmers' grain is an upstream market in which the producer operates as a price taker. The implication of this is that costs incurred downstream by grain purchasers are passed back to the grain producer. The impact of this in the Australian grain market is very evident through the process of selling grain using a port price and then deducting supply chain costs; but is also reflected in the less visible practice of reduced FOB prices.[45] This situation is further exacerbated by the stranding of growers, as the ultimate bearer of these costs, from the negotiation over the cost of access.

As a result farmers require strong competition in the market for storage and logistics, and specifically in the market for port terminal services for bulk grain, to ensure upwards pressure on service delivery to reduce the cost of risk, and maintenance of downward pressure on service delivery costs. Both of these factors contribute to lifting the floor price in the market for farmers' grain.

However, in contrast to beneficial downward competition on supply chain costs, predominantly the Australian grain supply chain has seen the perpetuation of regional quasi natural monopolies across the major growing regions of Eastern Australia, South Australia and Western Australia as a result of corporatisation (or in the case of WA the formation of a grower cooperative) statutory grain handling authorities.

These regional natural monopolies arise as a result of the freight costs associated with moving grain. As a result of these costs, each grain growing location has a lowest cost path to an upcountry receival site and then onto port that reduce the economic feasibility of arbitraging grain away from the established lowest cost path. These include:

- price received;
- cost of delivery to silo/domestic user;
- FOB costs, such as the location differential to port; and
- other transaction costs such as the speed of turnaround at receival point and the impact this has on the progression of harvest.

The following examines the structure of the market for port terminal services and upcountry storage and handling for grain.

[45] See Tamara Stretch, Chris Carter and Ross Kingwell 'The cost of Australia's bulk grain export supply chains' (Information Paper, Australian Export Grains Innovation Centre, January 2014) 23. This outlines that unreliability of the supply chain exposes exporters to risks of demurrage and other costs with these risks passed onto grain farmers through reducing quoted Free On Board prices.

Market for grain port terminal services

Despite recent investments in port terminal capacity, the cost of port capacity across eastern Australia remains a major impediment to improved farm gate grain revenues and maintaining global competitiveness.

Recent reports by the Australian Export Grains Innovation Centre (AEGIC) and Rabobank have indicated that Australia's export grain supply chains are not only expensive; but also as a result of low global shipping freight rates have reduced the freight advantage that Australian grain has traditionally held into southern Asia.[46] The AEGIC analysis has identified port costs are growing at a rate that is faster than other supply chain costs.[47]

Table 1 (below) outlines that the port costs associated with the export of wheat from GrainCorp's Port Kembla terminal start at $25.15 per tonne. This compares unfavourably to costs incurred at Canadian ports, which have been identified as being around **$14 per tonne**.[48]

NSW Farmers is aware of a number of market analysts who are of the belief that the port costs charged in Australia are excessively high.

The Association welcomes efficient capital investment in grain supply chains that develop the competitive tension necessary to drive down supply chain costs borne by farmers. We are however concerned that without sufficient levels of horizontal competition at port, any efficiency realised within the supply chain will not be distributed back upstream to the farm gate. Present investment in each port zone has seen the addition of a single provider with commercial capacity, creating a market place in which the competitors are likely to operate in a fashion similar to non-competitive duopoly with regard to pricing.

The impact of this market structure has greater implications if this investment in port capacity has increased the marginal cost of the supply chain across the whole export task for a port zone. Under these conditions the increased marginal costs are passed back to the farm gate creating economic inefficiency creating economic inefficiency. This is opposed to the market dynamic that would be achieved in a competitive market where increased cost structures would be absorbed by the port terminal operators in response to genuine competitive constraint.

[46] Tamara Stretch, Chris Carter and Ross Kingwell as above n 45. Graydon Chong 'Australian Grains – Competitive Strains' (Rabobank Agriculture in Focus Report, November 2013).
[47] Tamara Stretch, Chris Carter and Ross Kingwell, as above n 45, 2, 5.
[48] Peter White, Chris Carter and Ross Kingswell 'The puck stops here! Canada challenges Australia's grain supply chains' (Information Paper, Australian Export Grains Innovation Centre, May 2015) 44.

Table 1: Port Kembla charges 2015-16 for wheat deliveries[49]

Basic service	**($/t)**
Basic intake receival fee - rail	0.00
Basic intake receival fee - road	1.98
Vessel nomination	8.00
Vessel loading	10.92
Storage (per month)	1.17
Inspection charges	0.26
Miscellaneous port/wharf fees	2.07
Dust	0.25%
Base cost at $300 FOB/t (Rail)	**$25.15**

The ability of port terminal service providers to pass back these inefficient costs to farmers creates an appropriation of rents from the farm gate, inturn impacting the international competitiveness of Australian agriculture. This was identified by the Australian Competition and Consumer Commission Chairman (ACCC) Mr Rod Sims stated in his address to the Gilbert + Tobin Regulated Infrastructure Policy Workshop in late 2015 where he stated:

> [T]hat 'expropriation of rents by a monopoly service provider may also discourage Australian farmers from investing …" in productivity enhancing technology.[50]

The Chairman's comments have application to all market structures in which there is a transfer of rents to participants exercising market power.

This proposition is exacerbated by the position of grain farmers as price takers in the market. The implication of this is costs incurred downstream by grain exporters at port are passed back to the grain producer, who has no ability to engage in negotiations over reasonable conditions of access. This is to be distinguished from the vertically integrated upstream producer in other dependent markets, such as the market for ship loading in the coal industry. In these situations, the person seeking access to port terminal services is the coal producer and has full economic incentive to negotiate the best terms with regard to price and service.

[49] GrainCorp, 'Bulk Wheat and Non-Wheat Port Terminal Services Agreement 2015/16'; and Tamara Stretch, Chris Carter and Ross Kingwell as above n 45, 24.
[50] Rod Sims, 'How did light handed regulation of monopolies become no regulation' (Speech delivered at the Gilbert + Tobin Regulated Infrastructure Policy Workshop, Melbourne, 29 October 2015).

Upcountry market for handing and storage

Recent analysis of the upcountry market for grain storage and handling by the ACCC has confirmed GrainCorp's status as the dominant market participant across country NSW. In making these findings the ACCC recognised that GrainCorp operates:

- 79% of grain receival sites in the Port Kembla Zone
- over 60% of grain receival sites in the Newcastle Port Zone

This confirms industry understanding that to accumulate a bulk export cargo, the majority of traders will need to acquire grain from within GrainCorp's upcountry network. The result of this market dominance is that GrainCorp has the ability to use its market dominance in ways that would not be available in a competitive market. An example of this is the recent placing of its discriminatory Third Party Export Rail Outload Fee of $2.50 per tonne upon grain exporters loading grain by rail to a non-GrainCorp port terminal facility.

This is an attempt to tie third party exporters into using GrainCorp's port terminal facilities for the export of bulk grain by penalising a trader who seeks to bypass GrainCorp at port. The use of this market power upcountry reduces the need for GrainCorp to compete on service and price in its provision of port terminal services. NSW Farmers will expand on this matter later when discussing the proposed implementation of an effects test for the misuse of market power provisions within the *Competition and Consumer Act 2010*.

Regulatory settings for competition in the market for the storage and handling of wheat

Presently the provision of port terminal services for bulk wheat is regulated by the *Competition and Consumer (Industry Code – Port Terminal Access (Bulk Wheat)) Regulation 2014* (port access code). Part 2 of the code requires all operators of port terminal facilities used for the export of bulk wheat to:

- deal in good faith with an access seeker;
- publish the shipping stem for the port terminal facility;
- make available policies and procedures for managing demand for port terminal services; and
- make available standard terms and reference prices at which an access seeker may obtain capacity at the terminal.

Parts 3-6 of the code require a further tier of obligations to manage the capacity allocation for a terminal in an approved non-discriminatory way, to have a procedure to settle disputes around the terms of access to capacity at the facility and reporting obligations. Where the ACCC considers it relevant based on the competitive landscape it may exempt the operation of a facility from these higher level obligations. Additionally, the Minister for Agriculture and Water Resources may exempt port facilities where they are operated by a cooperative where the majority of growers within the port's catchment area are members of that cooperative.

The ACCC has delivered exemptions to all port facilities within NSW despite the concerns of NSW Farmers.

While competition in the upcountry market for storage and handling and for grain marketing is a factor that may be taken into account with regard to a regulatory decision by the ACCC to exempt a facility there is no regulation of this upcountry market. This leaves GrainCorp with the ability to exercise its upcountry market power at its unilateral determination as has been seen with the imposition of the discriminating Third Party Rail Export Outloading Fee. Other exercises of market power by GrainCorp could include foreclosing access to its upcountry receival network.

We have identified the following concerns with the operation of the port access code:

- No clear metrics that monitor and identify the impact of horizontal competition and disruptive supply chain options on the competitive landscape and its influence on the upstream market for farmers' grain.
- The lack of understanding of the operation of the grain market and the impact of exempting a port terminal facility prior to the emergence of genuine competition that results in downwards price pressure on the supply chain by the ACCC's decisions to exempt these facilities.
- No focus on price as an important component of reasonable access. A properly focused oversight of port access should include investigations on whether cost of port services is in line with what would be available in a competitive market. This would include the use of the Gross Replacement Value methodology to ensure that where inefficient investment has been made that increases the marginal cost of the supply chain, this cost is not passed back up the supply chain to farmers.

Centralised markets for horticultural produce

The Government of Australia recently released the final report of the independent review into the Horticulture Code of Conduct. The key outcome of the review was that a 'properly functioning Horticulture Code is vital to ensuring the sustained viability of Australia's horticulture sector'.[51]

Issues identified by the code that inhibited its ability to achieve the outcomes it was developed for included:

- Limitations of its applications as a result of the exclusion of trade under contracts made prior to the commencement of the code and the exclusion of supply agreements made with retailers.
- '[I]rrelevant, inappropriate and largely ... [unadopted] dispute resolution provisions.
- Failure in creating general deterrence to prevent breaches of the code through strategic enforcement.
- Inability of the code to bring about greater transparency.

The reviewers also made a series of recommendations that will enhance the operation of the code to ensure that it functions properly. These include:

[51] Mark Napper and Alan Wein, *Independent Review of the Horticulture Code of Conduct: Final Report*, (Report to the Department of Agriculture and Water Resources, 2015) iii.

- Removing the grandfather clause that excludes contracts formed (or backdated) before the commencement of the code from the oversight of the code and requiring supply contracts with retailers not covered by the *Food and Grocery Code of Conduct* to be subject to the code.
- Improving transparency within supply contracts, including the final sale price where a trader sells produce on behalf of a grower without a fixed price.
- The inclusion of a duty of good faith.
- Introduction of civil penalty provisions and enhanced audit capabilities to enable the ACCC to more appropriately target and graduate its compliance practices.
- Improved independent dispute resolution provisions that will enable more rapid implementation of on site conciliation.
- Removing the existing rules within the code that prescribe different requirements depending on whether the trader was acting as a "merchant" or and "agent", substituting provisions for when there is no agreement to sell the produce for a fixed price.

NSW Farmers has welcomed the report and its recommendations; however has indicated concerns with the proposal to remove of the historical distinction between "merchant" and "agent", which has formed an important protection around the assignment of risk in the sale of horticultural produce at centralised markets. These rules were initially put in place to provide certainty to a grower that the return they were receiving for produce was reflective of the market conditions. The need for these rules arose as a result of the opaqueness of market signals back to growers created by the physical distance between farm and the market and a lack of real time market transparency. On this basis, NSW Farmers has argued that a more flexible commercial measure for managing this risk would be to mandate real time price reporting.

7.2 What are the likely effects of the changes suggested in the Government's Agricultural Competitiveness White Paper and the Harper Review?

NSW Farmers supports provisions that prohibit a firm with substantial market power from taking advantage of that power if the effect is to cause harm to the competitive process. Competition legislation must be focussed on the effect of conduct on competition, not necessarily the purpose of the conduct. The rationale for this is that it is the anti-competitive effect of conduct that is the negative impact and is detrimental to community or individuals benefit. Therefore we support the proposal put forward by Professor Harper in relation to changes to s46 of the Act.

In the case of agriculture, there is an existing imbalance between participants in the supply chain. When parties with market power engage in unilateral conduct that discriminates against their competitors, the discrimination may be subtle and difficult to clearly distinguish from legitimate business conduct; however, due to the structure of the market, the conduct would still have a substantial impact on competition.

An example of this imbalance is found in the grain sector in NSW:

With the development of competition at port terminals with the commissioning of the Newcastle Agri-Terminal and Quattro's Port Kembla terminal facility and the introduction of the Port Access Code GrainCorp has imposed a discriminatory Third Party Export Rail Outload Fee of $2.50 per tonne upon grain exporters loading grain by rail to a non-GrainCorp port terminal facility. This correlates to an increase of almost 40 percent on the base outload fee.

For exporters seeking to utilise a competing port terminal facility the additional fee increases the upcountry storage and handling costs by an estimated 12 percent.

Due to localised freight advantages most farmers have limited choice as to their use of grain receival sites. During the 2015 winter cereal harvest, NSW Farmers' members have reported that as a result of this additional fee, some third party grain exporters reduced the amount the amount they offer for grain at GrainCorp receival sites.

The ability of GrainCorp to impose such a discriminatory charge is directly related to the level of competitive tension within market for upcountry storage and handling. This is because GrainCorp would not be in a commercial position to impose such a surcharge in a competitive market, on the basis that exporters would be able to shift their preference to accumulate grain for export to other providers of these services.

The move has had an anti-competitive impact in the east coast grains market on the basis that by increasing the costs of access to GrainCorp's upcountry network to exporters seeking to utilise a competitor's port, it decreases the ability of these exporters ability to bid for farmers' grain by the amount of the discriminatory charge. This in-turn removes upward competitive pressure on the price of grain across the market.

In addition to the changes to s46, the new White Paper commitment to an Agricultural Unit in the ACCC will be of considerable assistance to the ACCC as they seek to better understand markets that impact on the agricultural sector. The industry consultative committee which accompanies that reform will be a vital 'ground truthing' for the work of the unit. The appointment of an Agricultural Commissioner and the establishment of the Unit responds to criticism that the ACCC in the past has lacked the necessary expertise in these markets; the highest profile of these concerns articulated by the Senate Rural and Regional Affairs and Transport References Committee as part of its inquiry into the ownership arrangements of grain handling.[52]

[52] Senate Rural and Regional Affairs and Transport References Committee, Commonwealth of Australia, Inquiry into the ownership of grain handling (Second Interim Report, 2013) 11-14.

8. Investment

NSW Farmers support a register of foreign investment, believing the appropriate threshold for the collection of this information to be $5 million cumulatively. The development of the register forms an important mechanism to maintain transparency. Understanding that FIRB tests include an assessment of social, environmental and economic impacts, it is important to limit foreign investment in Australia's strategic industries and primary commodity reserves to secondary positions behind controlling Australian interests.

A register increases transparency in the administration of the FIRB approval regime and allows the public and industry to map any investment that increases consolidation in the agricultural sector. Foreign investment should take place under the same tax regime as domestic business to combat against transfer pricing in both goods and services.

ENDS