CropLife AUSTRALIA

SUBMISSION TO THE PRODUCTIVITY COMMISSION

IN RESPONSE TO THE STUDY

REGULATORY IMPACT ANALYSIS: BENCHMARKING

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INTRODUCTION

CropLife Australia (CropLife) is pleased to provide a response to the Productivity Commission's Issues Paper in respect of *Regulatory Impact Analysis: Benchmarking.*

CropLife (CropLife) is the peak industry organisation representing the agricultural chemical and biotechnology (plant science) sector in Australia. CropLife represents the innovators, developers, manufacturers and formulators of crop protection and agricultural biotechnology products. The plant science industry provides products to protect crops against pests, weeds and diseases, as well as developing crop biotechnologies that are key to the nation's agricultural productivity, sustainability and food security. The plant science industry is worth more than $1.5 billion a year to the Australian economy and directly employs thousands of people across the country.

CropLife and its members are committed to the stewardship of their products throughout their lifecycle and to ensuring that human health, environment and trade issues associated with agricultural chemical use in Australia are responsibly and sustainably managed. Our member companies spend more than $13 million a year on stewardship activities to ensure the safe and effective use of their products. CropLife ensures the responsible use of these products through its mandatory industry code of conduct and has set a benchmark for industry stewardship through programs such as ***drum****MUSTER*, ChemClea® and Agsafe Accreditation and Training. Our stewardship activities demonstrate our commitment to managing the impacts associated with container waste and unwanted chemicals.

Both crop protection chemicals and crop biotechnology products are heavily regulated in Australia. Regulation is conducted through a complex framework with multiple regulators across all jurisdictions and levels of government having an interest in the responsible, sustainable and safe management of our industry's products. As a result, CropLife engages with a range of regulators on a wide variety of issues regarding the registration approval, safety, transport, security and use of agricultural chemicals and crop biotechnology products in Australia. CropLife regularly engages with government to identify and determine the regulatory impact of new policies and proposals and does observe that regulatory impact analyses vary greatly in their quality and utility. Poor analysis or regulatory (and non-regulatory) options minimises the capacity of regulators to deliver effective regulation that achieves its objectives in the most cost effective and efficient manner possible.

EXECUTIVE SUMMARY

CropLife supports the use of regulatory impact analysis as an important tool to identify the most effective and efficient means to achieve a desired policy objective. CropLife also considers that the current arrangements in most jurisdictions are broadly capable of achieving this. However, regulators and other agencies often fail to apply impact analysis guidelines in a manner that will deliver an accurate measure of the impact on governments, industry and the community.

CropLife has concerns that some regulatory impact analyses tend to be used by regulators to justify decisions that have already been taken by regulators and to support preferred regulatory options. This approach undermines the true purpose of regulatory impact analysis, which is to objectively identify the most efficient and effective option for achieving a regulatory or policy outcome. On this basis, CropLife welcomes the Productivity Commission's study. Clear, consistent and transparent benchmarks for assessing the quality of regulatory impact assessment should result in higher quality analysis across all levels of government and support measurable improvements in regulatory decision making.

This concern is highlighted by the fact that many impact analyses severely underestimate implementation and other regulatory costs, and over-estimate benefits expected to accrue. Some impact statements that have identified regulatory impacts as being small and net positive for governments, community and industry have, on closer examination, been reliant on overly optimistic and inaccurate assumptions that undermine the validity of the conclusion.

Finally, 'quality checks' by independent agencies such as The Office of Best Practice Regulation are often insufficient to identify key failings in impact analyses. Indeed, while they can provide assurance that government guidelines have been strictly followed, they are not able to identify or challenge many of the key assumptions contained within the analysis.

THE PROBLEMS

ESTIMATES OF THE COSTS OF REGULATIONS

- **Insufficient consideration of indirect costs**

  Regulatory impact analyses are regularly able to identify and assess the ***direct*** cost to industry and other stakeholders from regulatory proposals. However, the magnitude and impact of ***indirect*** costs are usually insufficiently addressed. Agricultural chemicals are a key input to Australia's agricultural industries and as a result, the indirect costs of additional regulation are magnified as costs flow through the supply chain. Indirect costs are regularly many times the magnitude of direct costs.

  The problem of inadequate consideration of indirect costs can be demonstrated through Australia's deficient approach to minor uses of agricultural chemicals. Currently, product registrants must show that a particular use of a chemical product will not result in any unacceptable risks to users, consumers or the environment. This requires registrants to develop extensive and costly scientific data. Where the costs of generating this data exceed the likely economic return, no investment by registrants is made. Farmers are therefore left with fewer treatment options for minor pests and specialty crops. Each additional regulatory burden placed on registrants increases the likelihood that the available market for product in Australia will not be sufficiently large to justify the investment needed to meet the regulatory burden. These costs are rarely considered in any regulatory analysis.

- **Over-reliance on subjective analysis**

  Subjective analyses attempt to estimate the regulatory impact where there is limited reliable data available about the impact of a regulatory proposal. While they can be useful in estimating regulatory impact, they are often unreliable and used to support a preferred regulatory option, rather than looking to identify the costs and benefits of all options.

  For example:

  - In November 2011, the Australian Government released a Regulation Impact Statement that sought to identify the regulatory impact associated with the introduction of a 'reconsideration scheme' for agricultural chemicals. While the direct costs associated with a reconsideration scheme were considered in the analysis, the indirect consequences from:

    - Higher product prices;
    - Potential removal of safe products from the market and consequent impacts on resistance management, agricultural productivity and invasive species control; and
    - Costs associated with administrative compliance and provision of additional data to regulators,

    were only afforded cursory and subjective analysis. These costs represent the largest and most significant impacts associated with the regulation, and the regulatory impact was not identified. A limited and subjective analysis of the costs and benefits limits the capacity of key stakeholders (especially industry) to respond, as objective measures of expected costs are absent. This approach increases the risk that the most effective and efficient solution will be reached.

  - The regulatory impact analysis of the impact of nationally harmonised laws for the control of workplace hazardous chemicals under the new Work Health and Safety Act considered the impact of placing additional information onto agricultural chemical labels. The subjective analysis resulted in a small net positive impact from the reform. However, the analysis failed to recognise other key regulatory interventions that already address the same problem. As a result, rather than providing a net benefit, new measures impose additional obligations and compliance costs on governments and industry, and are likely to result in poorer workplace safety outcomes.

The difficulty in estimating the indirect costs of regulations and an over-reliance on subjective analysis can result in significant underestimation of the total cost of potentially even minor changes to regulatory requirements.

Finally, regulatory impact analyses often regularly omit significant areas of costs. For example, impact analyses conducted by states and territories regularly ignore costs from creating inconsistencies between other Australian jurisdictions. For example, impact analyses for the control of security sensitive ammonium nitrate (SSAN) did not consider the costs associated with increasing the inconsistency with other jurisdictions. The additional administrative cost for national SSAN suppliers was significant, requiring some suppliers that operate across state and territory borders to employ additional staff to meet additional regulatory requirements.

ESTIMATES OF THE BENEFITS OF PROPOSED REGULATORY MEASURES

In contrast to estimates of costs associated with regulatory impact analysis, estimates of benefits are often based on unjustified presumptions that increase the assessed benefit of preferred regulatory options. This occurs through:

- **Ignoring the impact of other regulatory responses to the same issue and misrepresenting the 'do nothing' option**

  CropLife notes that some impact analyses tend to over-estimate the benefits from a proposed reform by assuming that all policy improvements result from the reform being assessed. This ignores existing regulatory interventions administered by other regulators. For example, all improvements in worker safety from agricultural chemical use are assumed to result from improved labelling proposed by the Hazardous Chemicals Work Health and Safety Regulatory Impact Statement, when the reforms provide no additional measure over existing Australian Pesticides and Veterinary Medicines requirements.

  In this example, the 'do nothing' option misrepresented the status quo as not being able to address the problem as described. The most efficient and effective option was not identified by the regulator seeking to impose a desired regulatory option rather than genuinely assess impacts.

- **Assessing all improvements as a function of the proposed reforms and over-estimating compliance levels**

  CropLife notes that in many Regulatory Impact Statements, regulators expect that regulatory change will create comprehensive behavioural change in the regulated community and completely address the assessed problem. Again, the impact analysis conducted by Safe Work Australia for new workplace health and safety laws for hazardous chemicals expects that all workplace incidents from agricultural chemical use will be prevented by better labelling. As most cases of health and safety impacts from agricultural chemicals come from deliberate and intentional misuse, the effects of different labelling are likely to be insignificant and expected outcomes are unlikely to be achieved.

UTILITY OF REGULATORY IMPACT ANALYSIS PROCESSES

CropLife strongly supports regulatory impact analysis as an important measure to improve the transparency of decision making by government. Analyses provide a basis upon which stakeholders can engage to challenge presumptions and information being used to support a particular course of action.

The design of Regulatory Impact Statement processes does accommodate stakeholder engagement. However, not all Statements are prepared to the same standard. Ideally, Regulatory Impact Statements should be prepared objectively and not reliant upon subjective opinion regarding potential impacts. While precise data about expected impacts may not be available and may lead agencies to rely on a subjective assessment of impacts, an over reliance of subjective assessment increases the risk that expected costs and benefits may not be reflected post implementation.

Regulatory impact analysis offers most benefits when it impartially presents objective evidence that a proposed course of action will maximise the potential benefits and minimise consequent costs. Most jurisdictions employ sound regulatory impact analysis processes that, when used appropriately, do support the transparent identification of effective and efficient options. However, guidelines may be misinterpreted and misapplied and result in a flawed analysis.

For example:

An important element of any regulatory impact analysis process is clear identification of an issue that is sought to be resolved through a regulatory process. CropLife has observed impact analyses that rather than identifying a desired outcome, describe the problem to be resolved as the lack of a regulatory measure. All options that do not include the preferred regulatory measure can therefore be dismissed as not addressing the problem being considered by the impact analysis.

The Department of Agriculture, Fisheries and Forestry's Consultation Regulatory Impact Statement for the *Better Regulation of Agricultural and Veterinary Chemicals* demonstrates this. That analysis considers how governments can be assured of the continuing safety of agricultural and veterinary chemical products used in Australia. However, all options that did not involve a variant of a preferred 'reregistration' scheme were dismissed as not meeting the desired outcome. The incremental costs and benefits over the existing provisions for reconsideration of products were dismissed. Such an approach perverts the objective assessment of regulatory options.

Additionally, excessive reliance on subjective assessment of costs and benefits increases the likelihood that the expected net impact post implementation will not be realised.

For Commonwealth and COAG Regulatory Impact Statements, these issues should be identified and addressed by the *Office of Best Practice Regulation* (OBPR). However, the OBPR rarely has the necessary expertise to understand the detail of measures being proposed or to assess whether the identified costs and benefits are a realistic assessment of the likely impact of proposed measures. The OBPRs assessments are able to ensure that Regulatory Impact Statement guidelines are followed, but are limited in their capacity to identify the accuracy of any assumptions contained within the analysis.

POTENTIAL SOLUTIONS

Many of these issues could be addressed by improving the review mechanisms employed by governments when reviewing Regulatory Impact Statements. Potential solutions could include:

- Allowing reviewing agencies (for the Commonwealth, the OBPR) to access technical expertise held by key stakeholder groups. This will enable the OBPR to assess the validity of core assumptions made in Regulatory Impact Statements.

- Requiring agencies to prepare written responses after public consultations on Regulation Impact Statements to demonstrate whether comments made in submissions were taken into account, and if not, then to justify the reasons why not.
    - Where a Regulatory Impact Statement relies exclusively on subjective opinion, the OBPR should have the capacity to require that some objective data be included to test key assumptions.

    - Ensure that the OBPR maintains a structural separation from other regulatory agencies to maintain its independence. Current arrangements where the OBPR sits within the Department of Finance and Deregulation is inappropriate for *Better Regulation Partnerships* between the Minister for Finance and other Ministers responsible for reform.

CONCLUSIONS

Current processes for identifying the impact of regulatory proposals are largely sufficient. However, their utility and accuracy is undermined by agencies that see Regulatory Impact Statements as a hurdle that must be met to deliver preferred options, rather than a tool to investigate the costs and benefits of all potential options. Better review mechanisms and measures to enable Regulatory Impact Statement reviewers to access the technical expertise held by stakeholders may assist in delivering improved outcomes from the Regulatory Impact Statement process.

Successfully identifying the best and most efficient way of achieving a policy objective will deliver efficiency benefits and better outcomes for governments, communities and industry collectively.