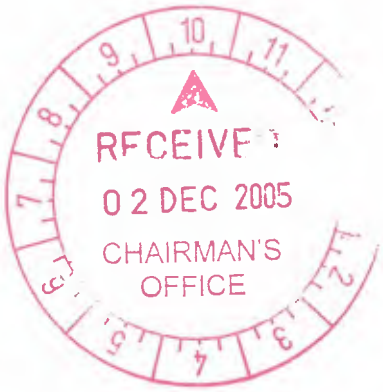
Australian Government
Department of Agriculture, Fisheries and Forestry



Ms Vicki Wales
Regulation Taskforce
PO Box 282
BELCONNEN ACT 2616

Dear Vicki

Please find enclosed the Department of Agriculture, Fisheries and Forestry's submission to the Taskforce on Reducing the Regulatory Burden on Business. The Department strongly supports the need to continually review and reduce red tape where possible.

The Department has identified one key area for regulatory reform relating to Australia's food regulatory system. Please find attached the Department's submission, "Streamlining Australia's Food Regulatory System".

If you have any queries about the Department's submission please contact Richard Souness

Yours sincerely

Don Banfield
Deputy Secretary

30 November 2005

Australian Government

Department of Agriculture, Fisheries and Forestry

Submission to

Taskforce on Reducing the Regulatory Burden on Business

November 2005

STREAMLINING AUSTRALIA'S FOOD REGULATORY SYSTEM

Background to the development of Australia's Food Regulatory System

The Australian Government has no specific Constitutional head of power to regulate the domestic food supply. Domestic food regulation is therefore the Constitutional right of states and territories. Prior to attempts to introduce a model food act into state law in 1975 each state had its own food law which varied significantly between jurisdictions. The more than 700 local councils can also make by-laws or ordinances to regulate the activities of food businesses.

Since 1975 states, territories and the Australian Government have endeavoured to construct a cooperative model with the aim of nationally consistent food law. It was anticipated that consistent food law would deliver safer food and reduce the regulatory burden on the food industry.

In 1991 states and territories entered into an agreement with the Australian Government, agreeing to adopt, without variation, food standards developed by the newly created National Food Authority. The 1991 agreement significantly reduced the inconsistency in food law between states and territories but they could still enact separate food standards and the enabling legislation, the Food Acts, were not uniform.

In 1997 the Prime Minister announced the Blair Review of the food regulatory system by the Australian Government, states and territories. The key objectives of the review were to:

- reduce the regulatory burden on the food sector; and
- improve the clarity, certainty and efficiency of food regulatory arrangements.

The review found that despite the cooperative model that had been developed, the regulatory framework for food in Australia was complex and fragmented. The review suggested that there was a need for governments to:

- implement an integrated and coordinated food regulatory system;
- improve compliance and enforcement arrangements;
- improve legislation and national decision-making processes;
- improve monitoring and surveillance systems.

In response to the 1997 review the Australian Government and states and territories signed an inter-governmental agreement in 2001 implementing changes to the food regulatory system in response to the findings of the review. Five years on there appears to have been mixed success in addressing the problems identified in the review.

In recognition of ongoing problems, a review of Food Standards Australia New Zealand (FSANZ) assessment and approval processes and treatment of confidential commercial information was undertaken by the Australia New Zealand Food Regulation Ministerial Council (ANZFRMC) in October 2005. This review identified a number of legislative and other impediments affecting FSANZ's ability to expedite new or amended standards, and to protect commercially valuable information. While FSANZ and jurisdictions are currently working to implement recommendations flowing from the review, this work is not expected to address the fundamental flaws in the Food Regulatory System.

Overview of Australia's Food Regulatory System

Development of domestic food regulations and standards in Australia is undertaken by FSANZ, working in partnership with the Australian, State and Territory Governments and the New Zealand Government. New Zealand's involvement is based on an agreement that builds on the Closer Economic Relations Trade Agreement between the two countries that was established in March 1983. It recognises the inter-connectedness of food standards with the international business world and contains a commitment to avoid unnecessary barriers to trade and to work towards harmonising food standards across Australia and New Zealand.

FSANZ is a bi-national independent statutory authority that develops food standards for composition, labelling and contaminants, including microbiological limits, that apply to all foods produced or imported for sale in Australia and New Zealand. In Australia, FSANZ develops food standards to cover the whole of the food supply chain.

There is a clear separation between risk assessment and policy setting. FSANZ undertakes risk assessment based on science while policy is determined through the ANZFRMC.

The ANZFRMC has the capacity to adopt, amend or reject standards and to request that these be reviewed. The Council comprises Health Ministers from all Australian states and territories, the Australian Government, and New Zealand as well as other Ministers from related portfolios (Primary Industries, Consumer Affairs etc) where these have been nominated by their jurisdictions. The Australian Government Health Minister chairs the Council.

The Food Regulation Standing Committee (FRSC) provides policy advice to ANZFRMC and its Implementation Sub-Committee (ISC) is tasked with ensuring a nationally consistent approach to implementation and enforcement of the food standards.

The Australian Food Industry

The food industry offers significant opportunities for Australia to better leverage its international comparative advantage in agricultural production to generate increased employment and wealth, including in regional and rural communities. The processed foods and beverages sector employs about 200,000 people and had sales of nearly $66 billion in 2002-03. Of Australia's 7,800 food processing establishments, about 40 per cent are located in rural and regional Australia. Food and beverage exports were valued at nearly $25 billion in 2004-05 while imports were nearly $7 billion.

Many parts of the industry need to enhance competitiveness against increasing competition. Technological capabilities are improving in low-cost competitor countries and local food retailers, in response to commercial pressures, are benchmarking supplier competitiveness on an increasingly wider geographical basis to give effect to global sourcing policies.

Local food producers and manufacturers are being challenged to be internationally competitive in domestic as well as export markets as market pressure increases. Indeed, the future viability of Australia's processed fruit and vegetable sector is largely dependent on the anchoring of world-class food processing facilities in Australia - only

limited quantities of fruit and vegetables are likely be sourced from Australia for canning, processing, freezing or as ingredients to packaged meal solutions should domestic food manufacturers relocate off-shore.

Fresh horticultural produce grown locally needs to also make improvements in plant technologies, better handling practices and enhanced cool-chain storage and distribution systems that are extending the shelf-life of many fresh products and enabling transportation of perishable foods over greater distances.

The commercial success of the Australian food industry lies in its capacity to innovate its practices, processes and products and exploit niche markets through the supply of specialised, high-quality, differentiated products. Integral to this objective is a food regulatory framework that not only safeguards human health but allows innovation to be appropriately rewarded.

The current food regulatory environment in Australia is cumbersome, fragmented and unresponsive to the realities of the global marketplace. If Australia is to continue to develop its credentials as a reliable supplier of value-added food products, it requires an internationally competitive food regulatory framework that provides greater certainty and confidence to industry investors, including the many multinational companies that face the choice of relocating, upgrading or expanding their existing Australian operations. In particular, Australia needs a food regulation framework that allows domestic companies to adopt the latest innovations and technologies so as to keep pace with overseas competitors in a rapidly evolving international market.

Key Industry Concerns

There is a range of issues facing industry in the operation of the food regulatory system. Industry consistently maintains that the system is excessively complex and costly, providing poor delivery in commercial time frames. It believes that it is disadvantaged by the complexity of regulatory requirements which provide no corresponding benefit for consumers, government or industry.

Issues of greatest concern, which are addressed in detail in this submission, include:

- inconsistent application of standards across jurisdictions;
- timeframes for decision making, including a Ministerial Council review process that is unresponsive to industry needs;
- the complex processes for developing food standards;
- the inability of the system to adequately protect commercially sensitive information; and
- the cost to business of regulation.

The Australian Food and Grocery Council (AFGC), the Australian Chamber of Commerce and Industry and the Australian Beverages Council in particular have been critical of the food regulatory system for some years, citing many of the above problems. They believe that the implementation of changes to the food regulatory system in 2002 has not helped industry as intended, as the prescriptive nature of standards and complex standard development processes cannot keep pace with innovation in the food industry.

Key Regulatory Issues

Inconsistent implementation and enforcement of food regulations and standards across Australia

While the responsibility for developing all domestic food regulations and standards is a partnership between the Australian, State and Territory Governments and New Zealand, implementation and enforcement of the regulations and standards is solely a state and territory responsibility. ISC has been tasked to address inconsistent implementation and enforcement issues and has developed a strategic plan and work program. However, the Department of Agriculture, Fisheries and Forestry considers that this issue needs to be given a higher priority by states and territories. We believe that ISC has had limited success in achieving its objectives of nationally consistent implementation and enforcement of food standards.

There are inconsistent approaches across jurisdictions to the enforcement of food regulations and standards, which not only cause inequities for industry across Australia but can also impact on importers and exporters. Compliance assessment is not integrated across public and private sector providers, including local government. Charges for these services vary widely across jurisdictions. There is inadequate mutual recognition of compliance verification procedures such as inspection and audit across jurisdictions. There are also differences in the levels to which regulations are enforced.

These inconsistencies result in an uneven playing field and unfair advantage across jurisdictions. There is uncertainty for businesses operating across state borders, and ineffective regulation when states differ in their compliance approach to the same food standard. For example, the wine industry faces situations such as in Victoria where the use of the herbicide 2,4-D is prohibited in certain areas between 1 August and 30 April, and yet on the other side of the Murray River in NSW there are no restrictions. Problems associated with spray drift of the chemical onto Victorian grapes cannot be legally addressed.

Decision making, Ministerial Council and review processes

All proposed new standards or amendments to standards are subject to Ministerial Council consideration, and may also be subject to review by Ministers, sometimes adding a further year or more to the time involved in developing or amending the standard.

There is often inconsistency between agreed positions taken by jurisdictions at Standing Committee level and outcomes reached by Ministers in Council. This can lead to uncertainty by industry in its commercial decision-making processes.

This requirement for food standards to be endorsed by Ministerial Council can result in the Australian Government being unable to develop national responses to policy issues that have a national or international priority. Individual State or Territory Ministers, and New Zealand, can request reviews of standards, often on limited or political grounds, and a standard can be rejected by a majority of states and/or territories. The Australian Government has been outvoted by states in the Ministerial Council on a number of important issues, leading to inconsistent domestic and international regulatory policy.

In regard to Ministerial Council review of FSANZ decisions in the domestic context, in 2004-05 FSANZ notified the Ministerial Council of thirty two amendments to the Food Standards Code and eight (or 25%) received requests for review by states. To date in 2005-06 eight out of thirteen (or 62%) of notifications have attracted requests for review. Most of these requests have not been backed up by any substantial documentation or valid reasons for requesting a review. Many appear to be based on ideological grounds. For example, there have been five applications for food derived from genetically modified crops since 2003 and all have been reviewed by FSANZ at the request of the same jurisdiction. FSANZ has maintained its initial decision regarding the safety of the relevant food in response to each one of these requests for review. More important work is being held up within FSANZ while it responds to these requests for review, leading to uncertainty by industry of eventual outcomes and lost business opportunity.

The complex processes for developing food standards

The existing processes for developing and amending food regulations are lengthy and overly cumbersome with a 'one size fits all' approach and an inconsistent approach to managing identified risks. FSANZ undertakes risk assessments and then develops standards through a process that typically requires two rounds of public consultation, input from industry and governments, FSANZ Board approval and Ministerial Council endorsement. It lacks flexibility and is unable to respond to consumer trends and industry needs in a timely fashion. For example, an application for the addition of calcium to juices and cracker biscuits, submitted by industry in 2001, was finally endorsed by Ministerial Council in October 2005 – taking some four and a half years.

Further, the risk-based approach to consumer health taken by FSANZ, and prescribed in its legislation, is based on no food standard or new food product being approved for commercial release until it is proven that there is minimal risk to human health. This becomes problematic in that legislation does not set clear definitions for 'minimal risk' and there is no agreed understanding of this concept between jurisdictions. Rather, guidelines are developed on a case by case basis through the Ministerial Council processes, resulting in further inconsistencies in the approach taken to risk in developing the various food standards. This is inconsistent with other risk based regulation, such as the 'appropriate level of risk' or protection which determines Australia's quarantine protocols.

The protection of commercially sensitive information

Industry is concerned with the way commercially sensitive information is treated in the food regulation process – the current consultation and review process does not allow industry to exclusively capture the benefits of the innovation.

Under the existing assessment process, applications are entered on the FSANZ workplan which is made publicly available. This potentially provides a signal to competitors about the proposed amendment being sought by an applicant. Information provided to FSANZ in support of an application is also disclosed to the public through assessment reports. This information can be in the public domain for an extended period of time, often in excess of 12 months.

Once an amendment to the standard is made, it has general application to all foods of that type. Once the changes to a standard have been made, others can take advantage of the changes causing a 'free rider' effect.

Recent decisions by ANZFRMC in regard to health claims have gone some way to alleviate this problem but industry still has concerns about other business areas, particularly in relation to novel foods (ie foods that have no history of use).

The cost of regulation

The complex and inefficient food regulatory system in Australia and overly prescriptive safety standards impose costs on food businesses that are passed on to consumers.

In 1997, Price Waterhouse undertook a survey that estimated the cost burden of food regulation to be over $13,700 per business annually. It can be assumed that costs would have risen substantially since this survey was undertaken due to further legislative requirements placed on industry, some of which are not related to food safety – such as labelling requirements. The above costs exclude those associated with lost business opportunities and inability to innovate. They are highest for small to medium enterprises and for exporters, and have their origins in inconsistencies and duplication between regulatory agencies and across jurisdictions.

Responding to the problem

Australia's food regulatory system needs consistency across international and domestic food regulation that provides for minimum effective regulation while ensuring the safety of the food supply. The rigorous standard development process must be proportionate to the risk to public health. Duplication and inconsistency in enforcement of standards needs to be removed. Overly prescriptive standards require simplification. The system needs to facilitate export opportunities for Australian produce, while providing adequate communication of information to consumers on the foods they purchase.

Food regulations must be risk based, but be implementable and enforceable across jurisdictions to provide a consistent approach to food safety, resulting in:

- consistent interpretation and enforcement of food standards across jurisdictions;
- consistent application of food standards for imported and domestic food;
- alignment of approaches to food safety between Australia and New Zealand, and other international trading partners;
- timely and unambiguous processes for developing and amending food standards;
- removal of constraints on industry innovation and commercial competitiveness; and
- transparent processes for consumers.

The current food regulatory system was developed in response to the Blair food regulation review of 1997. While there have been significant improvements as a result of implementing Blair review recommendations, it is now timely to take a stocktake of outcomes to identify the extent and effect of ongoing issues.

The AFGC have recommended that the powers of the Australian Government to regulate food safety be reviewed to address the complexity of legislation that includes State and Territory Food Acts, the Australia New Zealand Food Standards Code, the Imported Food Control Act and Fair Trading provisions. AFGC also suggests a review of the powers of the Australian Government with respect to the Council of Australian Governments (COAG) agreement on food regulation, and a review of the composition of ANZFRMC.

DAFF suggests that the food regulatory system needs to provide the Commonwealth with greater influence over decision making processes to allow it to take a leadership role in providing nationally consistent approaches to food regulation in Australia. This would require a partnership with states and territories that provides the Commonwealth with appropriate leverage to achieve national outcomes.

Consistent interpretation and enforcement by states and territories is another objective that all jurisdictions must commit to. At the very least all states and territories must implement all of the recommendations of the Blair review relating to consistent application of food law.

Pending any major review of the food regulatory system, the Australian Government, through DAFF and DoHA, will continue working within the FRSC and ISC framework to progress a nationally consistent approach to implementation and enforcement, and will progress initiatives to address constraints, either through the existing state/territory arrangements or if necessary through new national policy settings and structural arrangements.