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Subject: Submission on future regulatory reform, with a focus on the rural sector

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The Australian Centre for Agriculture and Law is a specialist law and institutions research centre with a focus upon issues affecting rural communities and industries. One of the core components of our work has been evaluation of the effectiveness, efficiency and fairness of natural resources rules frameworks. This submission is intended to bring to the attention of the group this body of work, and to propose some specific future regulatory reform directions based upon this work.

We welcome and support the decision by COAG to address the issue of environmental law reform, and to identify the particular need for reform in the rules governing primary production. We believe that there is a number of pathways to potentially add impetus and innovation into this mix, and the purpose of this submission is to point to some of these directions.

We will not attempt to reiterate here the detailed research we have conducted, to which we will refer you later in this submission. The Deregulation Group can evaluate this information without our assistance, and we are always happy to respond to questions.

There is a number of aspects of the Stakeholder consultation paper where we think the discussion can be criticised, but it does not seem to be useful to focus on these issues as they will probably come into focus at the implementation stage. However if the Deregulation Group wishes to have comments on these matters, that would be possible.

**Basic considerations for rural regulatory reform**

There are some basic matters that need to be considered by the Deregulation Group:
1. Regulation and laws are not synonymous. Farming industries (along with most others) are regulated by an increasing array of rules, and a declining proportion of these are State statutes. Even within the category of State rules, not all are statutes (for example, administrative requirements, regulation and process arrangements, mandatory codes, or strongly applied guidelines). “Solving” the statutory complexity issue without addressing the other rules frameworks will be an incomplete outcome to the competitiveness matters raised by the discussion paper. It is the system of rules, including both public and private arrangements and the implementation structure for these that should be the focus if the intention is optimal effectiveness, efficiency and fairness.

2. In this regard, we note that there is a proliferation of new legal and administrative arrangements associated with the concept of eco-system service markets. These include new property rights, and various administrative arrangements. Our work demonstrates that there are serious risks evolving, not only to the effectiveness of these instruments but also to the effectiveness of other property arrangements (notably the efficiency and effectiveness of the Torrens system) that need to be addressed. The shift from ‘traditional’ to ‘modern’ management arrangements using markets does not necessarily mean that the institutional arrangements are any more efficient (nor indeed is the empirical evidence universally convincing that these arrangements are indeed more effective, though this is the received wisdom).

3. Related to this, we are concerned about an undue focus on the instruments rather than the governance system that includes the rules, their administration and coordination arrangements and the roles, responsibilities and strategies of the implementation bodies. Our work highlights for example that the proliferation of agencies and bodies, including non-government or hybrid bodies, and the weak coordination arrangements between them, is in itself a source of transaction costs but also misdirection of limited government funds that ought be addressed. Unless the complete governance system is the target for reform, opportunities to improve efficiency without necessarily having to change formal instruments, or opportunities to improve efficiency that are not directly linked to particular instruments, will be lost.

4. A case for deregulation (substantive reduction in regulatory controls) is often confused with the case for streamlining or harmonisation of rules. This is because concerns with the transaction costs of regulation are often intermixed with concerns about the substantive controls. The case for streamlining is an efficiency case, and in general should not be confused with the argument for or against deregulation that are about community preference for the use or conservation of resources. Most of the analysis about environmental regulation in Australia does not distinguish between these factors. We appreciate that the Stakeholder Consultation Paper is clearly focused on the transaction costs component of the regulatory challenge, and we think that it is in this aspect of regulation where the ‘low hanging fruit’ that can be harvested without excessive political conflict over community values may lie.

5. Related to this, one of the concerns we have is a consistent bias in the way in which environmental regulatory reform is couched, and this concern extends to the Stakeholder Consultation Paper, and to the way in which the reform agenda of COAG itself is framed. The document begins at Page 1 with a statement that “regulation can positively or negatively affect productivity, growth and competitiveness…”, but from that moment on there is no consideration or illustration of any benefits from regulation.
The idea embodied in Benefit/Cost assessment as best practice regulatory evaluation is that it is unbalanced to consider either side of the equation without considering the other. This same imbalance is apparent with the various business and farming organisation submissions (and on the other side, in environmental NGO submissions) on regulatory reform, and the lack of careful balance is most clearly and improperly evident with Productivity Commission studies of rural regulation. Whilst our work also demonstrates that the system is inefficient and sometimes unfair, we do not believe that it is at all in the public interest to consider only the costs side of the equation, without also making an equally serious attempt to evaluate both the nature of the benefit and the extent to which the regulatory arrangements are likely to be efficient and effective in delivering these benefits.

6. Alongside this, in considering regulatory reform it is surely necessary to consider the effectiveness of the chosen methods. We have noted above our concerns with the contemporary belief in the relative efficacy of markets, but we also note that regulatory arrangements are often created without the benefit of sophisticated behavioural input. We note that laws are mechanisms for community behavioural change, and that there are various sciences (including but not limited to economics) that are applied in the commercial sector particularly that could be applied to improve effectiveness. We believe the effectiveness issue should be of no less priority than the costs issue.

7. There is an over-arching economic concern that needs to be given far more attention in considering rural regulation in particular, and that is capacity to implement governance arrangements. This has a number of aspects.

8. There are fundamental reasons to doubt the fiscal and managerial capacity of government to implement the programmes that it has in place, or to which it aspires. We note that in many important areas of rural natural resource governance (eg invasive species, or biodiversity protection) traditional services like extension and on-ground work have been significantly reduced for fiscal reasons. We note also that the two Intergenerational Reports (and the derived State IGRS produced by private consultants) clearly signal an increased scarcity of funds for government to carry out many of its roles. We also note that these reports do not seem to have even considered the extent to which rural environmental investment may be required, nor the effect of new initiatives like rural carbon emissions and related management. It seems on the basis of present projections the question of ‘what we can afford to do’ needs to be given more fundamental consideration.

9. Coupled with this is the issue of the capacity of rural communities to do what is expected of them under existing or proposed arrangements. Apart from the well-known issues of economic strains on the farm sector, particular attention needs to be given to rural groups whose capacity to do what is formally required of them under legislation is very limited. Among others, we refer to the most economically vulnerable farmers particularly those in marginal districts, peri-urban landowners, and Indigenous land custodians. The issues with each group are different, but the effect is the same: a degree of unreality in the belief that existing rules can be reliably implemented by these people.

10. There is an important and perverse systemic interaction that is being un-managed under present arrangements. Many rural natural resource management/ environmental issues require systemic action over large areas. Examples include weed and animal control. Legal fragmentation across individual titles, coupled with variable capacity and variable motivations to act in a coordinated manner, undermines landscape-scale action.
A result is that the works of those who are committed and able are continually undermined, resulting in an inequitable and inefficient outcome. In looking at reform of rural environmental regulation, this is a strategic issue that deserves significant consideration.

11. There is a need for significant innovation in rural environmental governance if these complex issues are to be addressed. Among the matters that need attention is the need to create mechanisms that better enable and support non-government led action and resourcing, which includes consideration of taxation arrangements. Also necessary to consider is the means through which laggards are addressed, which requires in some cases consideration of resourcing arrangements and means to oblige and manage cooperation (including of government landscape managers).

The Centre is currently involved in further research touching on these matters, particularly in relation to invasive species and the future design of landscape governance arrangements, including laws. We anticipate that this work will result in further specific recommendations in the following aspects of the regulatory framework:

- Methods to better integrate non-State regulation (eg industry codes, supplier and buyer standards and various forms of certification and branding) with State regulation in its many forms, so as to create a streamlined and more efficient system rather than a set of competing and confusing mix.
- Approaches to the achievement of harmonisation and streamlining of the State regulatory architecture
- Finding ways to apply behavioural science-informed methods such as social psychology, sociology, political science and marketing to the design and implementation of regulation.

Recommendations

The attached outline of our prior studies highlights specific matters that are addressed in each. Most of the studies are accessible through public channels, including our own website if the document is likely to be out of print or no longer online. Summarising the recommendations, we propose the following as the essence of a programme for reform of rural natural resource / environmental governance for consideration by COAG.

A staged process of consolidation of statutory instruments

We have proposed the concept for a national coordinated code, akin to the earlier approach to corporations law reform (including trade practices under that broad banner), that could be the basis for a more effective and consolidated approach. However we propose moving towards such an outcome through a progressive process over a number of years. The focus would be upon harvesting the low hanging fruit first, build confidence and community support in the process of doing so, and then to move towards the more challenging matters as social capital and relevant skills develop. The timing will of course be largely dependent on the resources invested, but a five-year programme does not seem unrealistic. It is possible to use relatively straightforward research approaches (though these would be inevitably painstaking and detailed and require a lot of effort by a lot of people) to identify what are the recurrent themes in the various pieces of legislation and to see where
consolidation ought be relatively easy, and thence to progressively move towards consensus on the less aligned elements in the various state and federal laws.

We believe that there is particular value in seeking common national definitions early on. In the stakeholder consultation paper emphasis is placed upon labour mobility, and one of the limits to efficient mobility in the regulatory sphere is the non-transerabi
lity of basic skills from one jurisdiction to another due in part to non-harmonised definitions and processes. Common definitions would be one way of better enabling this.

Coupled with this ought be a ‘root and branch’ reconsideration of the administrative structures for rural resource governance. Complexity has evolved and bodies have proliferated, without consolidation and coordination of processes. We believe that a consideration of process alignment is most likely to show redundancy exists, allowing for cost savings as well as improved service efficiency. We anticipate that such studies will require some questioning of (for example) the overlaps and interactions between regional NRM bodies, invasive species control authorities, regional development bodies, and region-specific bodies like the Murray Darling Basin Authority, the Great Barrier Marine Park Authority and so forth. Whilst there may be justification in the existence of such entities, the opportunity for streamlining processes and better economies of scale and specialisation ought be considered.

A programme for governance innovation research and implementation

There are many opportunities for greater innovation in all aspects of rural natural resource governance, and indeed without radical innovation we expect that for economic and social reasons the total system will increasingly be unable to deliver on the promise of landscape scale sustainability improvement. We also anticipate that the existing problems of inefficiency and unfairness in the system will increase, potentially resulting in significant community resistance.

We believe that it is possible to create a programme of rural regulatory reform innovation, with particular attention to finding areas where consensus is possible. Among the areas worthy of consideration are

• Methods to support and enable community-led action on landscape governance;
• Institutional arrangements for integrating private sector initiatives such as rural EMS systems, certification and best practice with government approaches pursuing similar goals;
• Approaches to reducing the fragmentation effects of the increasing variety of property interests and contractual instruments being used to pursue environmental goals;
• Mechanisms to stimulate substantial private resourcing of rural environmental public good activities.

These issues are all matters where regulatory reform will be pivotal, and where the goals and actions are aligned with the goals outlined in the Consultation Paper.

More comprehensive and effective regulatory evaluation

The final area where attention is needed is in the processes of regulatory review themselves. Current processes deliver poorly on the promise of objective scrutiny leading to more
effective and efficient laws, at least insofar as rural environmental laws are concerned. We have previously proposed a number of reforms to these processes. The key elements include

01. Greater rigour in the existing processes themselves
02. The addition of a distributional impact evaluation
03. Policy risk assessment.

Such reforms are needed to help to overcome the sorts of ‘sustainability of reform’ issues raised in the Stakeholder Consultation paper.

REFERENCE AND SUPPORT MATERIALS

Papers and book chapters

2. Shepheard, Mark L. and Martin, Paul V. 2009. ‘The multiple meanings and practical problems with making a duty of care work for stewardship in agriculture’ Macquarie Journal of International and Comparative Environmental Law Volume (6):191. This paper outlines some of the difficulties associated with the transfer of international concepts for environmental regulation into national law.
3. Paul Martin and Elodie Le Gal Concepts for Industry Co-Regulation of Bio-fuel Weeds IUCN Academy of Environmental Law eJournal, Vol 1, May 2010. This paper demonstrates conceptually an integrated approach. Please note that this is not intended to represent that this is a feasible model, but only as a ‘straw man’ for research.
4. Paul Martin Finding a Partial Cure for Rural Policy Insanity Australian Farm Policy Journal, Vol. 7. 2, May Quarter 2010. This paper presents the challenges of regulatory reform within the context of the totality of resource governance requirements.
10. P. Martin The changing role of Law in the pursuit of sustainability in Bridging the North South Divide Ed: Michael Jeffrey, Jeremy Firestone, Karen Bubna-Litic, IUCN Academy of Environmental
Law, Cambridge University Press 2008 (Book chapter) This paper looks at the failure of specific instruments and proposes some new directions.


Books, monographs and technical or government reports


15. Paul Martin, Jim Binney, Amanda Kennedy, Jacqueline Williams, and John Page Evaluation of the Risks and Benefits of Granting Rights in Land, report commissioned from the Australian Centre for Agriculture and Law and Marsden Jacobs Associates by the Department of Environment, Water, Heritage and the Arts, August 2010. This paper highlights the risks and complexities arising from the implementation of ‘market instrument’ approaches.


20. Paul Martin, Miriam Verbeek, Sophie Thomson, Julie Martin The Costs and Benefits of a Proposed Mandatory Invasive Species Labelling Scheme, September 2005. ISBN 1 921031 00X. This illustrates the potential to use other forms of regulation and civil liability to address shortfalls in regulation.

21. P. Martin and M. Verbeek Sustainability strategies Federation Press 2006 ISBN 1 86287 555 3 (Book). This book provides the framework of systems thinking about sustainability strategies that can be used to found innovative approaches to regulation.

Natural Resource Management – People and Policy II, 2002 as *Using Environmental Law for Effective Regulation Research* project number TPF1 of the Social and Institutional Research Program of Land & Water Australia. This report provides a systems-based conceptual framework for understanding regulation, and includes an inventory of the then extant statutes.