

CEO Lorraine Gordon
RDA (Midnorth Coast)
Level 1, Suite 9 111 William Street
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5 December 2014

Dear Lorraine,

Re: Part Four Agricultural Competitiveness Green Paper

My response to the RDA request for feedback in relation to Part Four Agricultural Competitiveness Green Paper: Competition and Regulation, follows. As requested I have directed commentary towards the use of genetic modification (GM) in agriculture.

As will be apparent from the review, I consider that the use of GM in agriculture is fundamentally anti-competitive and that use of such technology is likely to lead to a monopoly over agricultural processes (and indeed, already is). Thus, while I indicate support for amendments to the Competition and Consumer Act (section 46 amendments and penalties) I do not consider that such initiatives will ultimately satisfy the identified objectives. Still, it is better for the amendments to be enacted than not.

I consider that nothing short of dedicated governmental and social support for initiatives that specially seek to empower primary producers while severally limiting power of trans-nationals is necessary if the identified policy objectives are to be realised. This of course is no small feat, and would require widespread cultural and social change, decentralisation of agricultural systems, increased use of sustainable agricultural practices, diversification (as opposed to monoculture) and sufficient capital. As similar position was supported at the United Nations Conference on Trade and Development, which declared that ‘the world needs a paradigm shift in agricultural development from a ‘green revolution’ to [an] ‘ecological intensification approach’.

Sincerely,

Kelly A. Tudhope
LLB/BSocSc

Review of Part Four Agricultural Competitiveness Green Paper: Competition and Regulation

Part Four of the Green Paper identifies a three overarching policy ideas; together with potential ways regulation (or deregulation) can assist in rectifying issues identified by stakeholders in consultation.

The policy ideas seek to address the following issues:

- (1) Imbalance of market power (and negotiating power) between producers – processors – supermarket retailers
- (2) Limited farmer options in relation to point of sale;
- (3) High production costs v stagnant farm gate returns;
- (4) Lack of transparency and certainty in price (which in turn affects farmer's decision making capacity)

The extent to which the policy ideas are likely to achieve the identified issues (with specific application to GM in agriculture) are discussed below.

A. POLICY IDEA SEVEN (improving market conditions) comprises of three strategies:

(a) Introduce options to increase price transparency throughout the domestic supply chain

I support this policy idea. It will help address imbalances in market power by enabling farmers to have access to critical information necessary to enhance bargaining powers, as well as provide information to assist farmers to make better business planning decisions.

Ideally, establish price and market monitoring observatories that can be used as reference to farmers in negotiations with processors/wholesalers etc. Establish public awareness raising campaigns in relation to the same.

I would further suggest, in relation to GM, price and market monitoring observatories that disclosure actual cost of GM production compared to other farming options (e.g. traditional/organic/humane) – include parameters such as patent licence costs, herbicide costs, soil nutrient costs. From an economic perspective, it will enable farmers to make a fact-based decision.

Such decision-making would of course be better enhanced if comparison were made regarding farm-gate returns for each method of production (e.g. traditional, GM, organic, biodynamic etc).

Consideration should also be given to whether written contracts should be mandatory – it is my understanding that typically farmers work on a 'gentleman's agreement' (oral contract). This can be very disadvantageous to weaker parties. On the other hand, I note increased costs associated with introduction of this requirement, as well as issues inherent in use of standard form contracts (which I suspect would become the trend if this was adopted). However, I note that the government is currently determining if unfair contract provisions of the Australian Consumer Law should be extended to small business, which, if enacted, could provide some relief to small businesses.

(b) Introduce new marketing mechanisms, which might restore the balance of power to the producer.

I support this policy idea, as it is most likely to address all identified issues.

I would suggest promotion and development of decentralised methods of primary produce distribution including methods such as farmer cooperatives, producer groups, direct marketing, farmers markets, community supported agriculture initiatives, and localised distribution/processing hubs and suitable distribution networks. As a solicitor specialising in direct marketing techniques, I

have considered direct marketing to be a marketing avenue worth seriously investigating by the farming industry (especially organic/biodynamic).

In order for such mechanisms to be effective, suitable awareness raising/training programs would be required. Specific research and development grants, and promotion of methods to increase adoption of sustainable growing systems should be encouraged. Support from local councils and public education campaigns would also help with the successful introduction of new marketing mechanisms. Such approach would be strengthened by the simultaneous introduction of levies on use of GM technologies.

(c) Facilitate greater cooperative structures

I support this policy idea, as it is will likely help address all identified Issues. Promoting greater use of cooperative structures would provide greater bargaining power to farmers.

However, there are a number of social impediments to promoting greater use of cooperative structures. I consider that encouraging primary producers to join cooperatives would require a structured and multifaceted educational campaign utilising a variety of information/communication methods. From a social perspective, reliance on one or two methods of information/communication (e.g internet/TV campaigns) may be insufficient. Farmers may be technology avoidant (common in aging populations) or be situated in remote areas and not have access to Internet. Time constraints arising by virtue of the intensity of farming may also prove an impediment to joining/establishing cooperatives, as well as educational level of primary producers.

Increased resources to suitable bodies to enable creation of multifaceted educational campaigns (including adoption of grass-roots approach), mentoring and grants to assist with establishment of cooperatives would be advantageous to achieve this policy idea.

Further Commentary on Improving Market Conditions

Strategies need to be developed and adopted to address the aging agricultural population and to develop pathways to attract the younger generation to the agricultural industry. As identified in the Agricultural Competitiveness Issues Paperⁱ (“Issues Paper”), this will require innovative and attractive remuneration strategies, coupled with training initiatives. The issue of an aging population and training initiatives is covered in chapter 7 of the Green paper. I have not had opportunity to review Chapter 7.

Increased awareness of our global environmental crisis and increased consumer demand, for sustainably produced foods, I would suggest education pathways and remuneration strategies enabling youth to enter the organic/biodynamic production systems should be developed and implemented. Increase in alternative production methods such as organic agriculture and biodynamic systems would help address imbalances in power, develop competitiveness between types of agriculture production, increase farmer options in relation to point of sale, and potentially increase farm gate returns due to premiums paid for such produce.

The Green Paper states “[t]he Government believes that farmers should have the choice to adopt the approaches that best suit their business needs, including through the use of GM technologies”.ⁱⁱ The Green Paper specifically promotes GM as a means to increase yield, lower input costs, and improve environmental outcomes.ⁱⁱⁱ GM of course also trends towards monoculture farming methods and as discussed below, monopolisation of the supply chain. Commentary on research and development is also directed towards genetics.

Despite its statement that “[t]he Government believes that farmers should have the choice to adopt the approaches that best suit their business needs ...” sustainable growing systems such as organic/biodynamic systems go virtually unmentioned in either the Issues Paper or the Green Paper. This is a glaring oversight given the potential such production methods hold to address identified issues.

Similarly unrecognised in the Green Paper is the extent to which costs associated with the current regulatory environment governing organic and biodynamic certification hinders the development of the industry. Such oversight is mentionable due to the emphasis put on deregulation of agri-chemicals and use of GM technology, as is the absence of commentary on research and development in alternative growing systems.

Notably, the United Nations has recently supported a shift away from monoculture towards greater varieties of crops, reduced use of fertilisers and other inputs, greater support for small-scale farmers, and more locally focused production and consumption of food,^{iv} positions unrecognised or reflected in either the Issues or the Green Paper.

C. POLICY IDEA 8 (Strengthening Competition Laws) offers four strategies:

(a) Revisions to the CCA

In order to comment on Policy Idea 8, I have referred to the Competition Policy Review September 2014.

Suggested revisions to the CCA include:

(i) Amendments to section 46 CCA (in relation to market power)

“The Competition Policy Review considers that the section should be reframed to prohibit a corporation that has a substantial degree of power in a market **from engaging in conduct if the proposed conduct has the purpose, or would have or be likely to have the effect, of substantially lessening competition in that or any other market**” (page 44).

As currently drafted, section 46 CCA states

- (1) A corporation that has a substantial degree of power in a market shall not take advantage of that power in that or any other market for the purpose of:
 - (a) eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market;
 - (b) preventing the entry of a person into that or any other market; or
 - (c) deterring or preventing a person from engaging in competitive conduct in that or any other market.

The suggested amendments may well make it easier to prove misuse of market power, especially by removing the requirement that a corporation ‘take advantage’ of their market power – a requirement which has led to a number of cases failing. If a corporation could have been seen to engage in the same conduct despite their market position, the courts refused to find a contravention of s46 even if the purpose has been established.

The policy idea also poses the introduction of certain defenses, with the onus on the Corporation engaging in the alleged conduct. Placing onus on those companies most likely to afford legal costs in defense is a positive inclusion.

While there are some positive aspects of the proposed amendments, my support will ultimately come down to the actual drafting of the revisions. This being said, if worded as above, I would support the amendments.

This said, I consider the proposed amendments carry limited potential to be utilised by affected primary producers, the reasons for which I discuss in detail below.

(ii) Increase penalties for breach of the CCA

High financial penalties for breach of applicable laws are most effective against small-medium businesses that are unable to factor in potential costs of enforcement actions. In my experience, large multinationals are less phased with the threat of financial penalties, and are known to have a contingency funds established to pay fines incurred in breach of relevant laws.

Therefore, for the penalties to be effective, it will be important to determine the amount the penalty should be for it to actually act as a disincentive in relation to large multinational companies. The maximum penalty is currently up to \$10 million for corporations, with the highest penalty being awarded in 2006 against Safeway, being about \$8.9 million.

General comments in relation to proposed amendments of CCA

As noted above, the proposed amendments to the misuse of market power provisions and increased penalties would in theory would go some way in addressing imbalances within the agribusiness market (and particularly because of the placement of the onus on the Corporation engaging in the alleged conduct). This said, the effectiveness of the amended provisions to increase competition in agribusiness (and especially between GM and non-GM producers, suppliers and manufacturers) in practice dubious at best.

When read together with the Issues Paper, it is apparent that the Agricultural Green Paper and the Competition Review operates from the assumption that use of GM technology is necessary for the promotion of competition in agribusiness, and indeed that using GM technology promotes greater competition.

Agricultural biotechnologies, such as genetically modified crops, have the potential to transform agricultural productivity by delivering increased yields and lowering input costs. They can also improve environmental outcomes by reducing the need for inputs such as herbicides and water. Looking to the future, GM crops could better equip cropping systems to withstand drought, frost and other climate challenges. Biotechnology may also enable agricultural systems to be adapted to produce pharmaceuticals and products with industrial applications, potentially expanding the markets in which farmers can operate.^v

Given the above assumptions, the Competition Review discusses regulatory restrictions on growing GM crops in South Australia and Tasmania and notes that they can adversely influence competition. The Review advocates removing regulatory restrictions in relation to using GM technology in agriculture, based on claims that existing Federal Regulations and Food Standards Australia New Zealand (FSANZ) are sufficient.

I consider the underlying assumption that GM technology will promote competition to be fundamentally flawed. Reflecting on a 2008 World Bank Report, the World Farmers Organisation stated:

In 2004 the four largest agrochemical and seed companies reached 60% for agrochemicals and 33% for seeds. In 2004 one company had 91% of the worldwide transgenic soybean area. **Generally it is considered that at a market concentration of the top 4 companies of more than 40%, the competitiveness begins to decline, leading to higher spreads between what consumers pay and what producers receive for their produce.** As an example, coffee is produced by around 25 million farmers and farm workers and consumed by around 500 million consumers, yet the four biggest international traders have 40% of the market and the four biggest roasters have 45% of the markets (World Bank 2008).^{vi}

Australia permits two broadacre GM crops to be grown for human consumption, namely GM canola and GM Cotton (seeds made by four different GM producers). A number of GM food products are also approved human/animal consumption in Australia under FSANZ codes, including canola, corn, cotton, lucerne, potatoes, rice, soybean, sugarbeet, as well as a number of processing aids.^{vii}

Ownership of GM seed stock for GM canola in Australia is concentrated in the hands of three companies - Monsanto, Aventis CropScience, and Pioneer-Hi Breed. Five companies produce Australia's GM cotton - Monsanto, Aventis CropScience, Syngenta, Dow AgroSciences, and Bayer CropScience.^{viii} In 2007, GM cotton accounted for 90% of Australian cotton crop.^{ix}

If the 2008 World Bank Report is correct, competitiveness within Australia's GM cotton industry is already well past the a point of decline due to market concentration into the hands of a limited number of mostly transnational corporations. In 2012, all of the GM canola grown in Australia was produced by Monsanto – which represented 10% of the Australian canola crop.^x

There have been a number of consolidations of transnational GM/agribusiness companies that are likely to adversely impact on competitiveness in the agricultural supply change. “As agglomerates of vertical activities related to agricultural production, they encompass seeds and chemicals, processing, packaging and trading activities, and for more than one commodity” (UNCTAD, 2009: 152^{xi}). Consolidations include consolidations between Monsanto/Cargill, ConAgra and Novartis/ ADM (Archer Daniels Midland). “As agglomerates of vertical activities related to agricultural production, they encompass seeds and chemicals, processing, packaging and trading activities, and for more than one commodity” (UNCTAD, 2009: 152^{xii}). Monsanto, Cargill, ConAgra, and Novartis (Syngenta) are all producers of GM seedstock and agricultural chemicals.^{xiii}

Such amalgamations will tip the balance of power further into the hands of multinationals which is likely to pass down to their Australian subsidiaries or sister companies. Proposed revisions to s 46 CCA are unlikely to be capable of being used to prevent this type of monopolisation.

Revisions of s 46 are also unlikely to prevent cases where a multinational GM agribusiness company engages in actions against primary producers who inadvertently infringe GM patents due to GM crops cross-pollinating with their existing seed stock or from self-seeding. Under the current s 46, it would be hard to illustrate that a transnational had the required purpose, and I suspect the actual drafting of an amended s46 would not be wide enough to prohibit such conduct. In any case, it is arguable companies have the right to enforce their patents, and that

such conduct is not of the type contemplated to fall within the meaning of ‘misuse of market power’.

Indeed, misuse of market power provisions, as drafted or amended are not designed to deal with potential implications of cross-pollination and cross-contamination. It may well be that the most appropriate way to view GM technology is that by its very nature it promotes monopolisation and centralisation of agribusiness, and carries the potential to damage competition in a manner that cannot be addressed by amendments to the CCA.

(ii) Reviewing competition laws to consider whether there are any barriers to greater consolidation among agribusiness firms.

While identifying barriers to consolidation in competition laws may well benefit some of the major producers (especially in relation to international trade), the removal of identified barriers is likely to be of little benefit to many small-medium primary producers.

(iii) Increase the resources to the ACCC

I support this policy idea.

Increased specialist knowledge within the ACCC on agribusiness will be beneficial to strengthening competition in the industry. However, for the new provisions to be effective, the ACCC will need to be proactive in their investigative and enforcement of new provisions. The ACCC will also need to adopt a suitable policy decision in relation to the same.

In the event that the ACCC has insufficient funds or capacity to enforce amended CCA provisions, any amendments to the CCA is unlikely to address the identified core issue of imbalance in power. I note that misuse of market power cases are: complex, expensive and long-winded: the 2006 Safeway case took 9 years from start to handing down of penalties. Any benefit of successful cases for breach of the new s 46 CCA to small agri-business are likely to be negated.

(iv) Creating a supermarket ombudsman with penalty powers and mandatory code of conduct for supermarkets

I support this option if used in conjunction with other policy initiatives.

Establishment of a Supermarket Ombudsman, implementation of a mandatory code of conduct with suitable enforcement powers will help strengthen competition laws and provide a means to redress power imbalances.

I would suggest that such an ombudsman be responsible for price and market monitoring observatories.

C. POLICY IDEA 9 (Improved Regulation) suggests the following policy reviews:

(a) AgVet chemicals regulation

It is my understanding that new legislation removing AgVet chemical regulations was passed in July 2014, with an estimated 1.3 million reduction costs associated with previous legislation.^{xiv}

Given the established nexus between GM and agricultural chemical companies, I consider that such deregulation is likely to result in significant economic benefits for certain GM/agri-chemical companies. If my assumption is correct, further deregulation is likely to exasperate imbalances in the status quo.

I do not support this deregulation.

Further Commentary: Deregulation

I would support investigation into ways sustainable growing systems regulatory systems could be enhanced with a view to meeting objectives identified in Part 4 of the Green Paper. Ideally, this would include inquiry into relevant pricing structures, costs of certification, as well as incorporating ideas discussed under Policy Idea 7.

(b) Country of Origin Labelling for Food

I support this policy idea. Consumers hold a significant degree of power, but this can only be utilised if they are able to make informed choices. Greater clarity as to the origin of domestic and imported components of foodstuffs would certainly help consumers make better-informed choices. This may have a flow down effect to primary producers, assuming of course consumers are making choices to purchase Australian produce.

In instances where producers/manufacturers use claims such as “Made in Australia from local and imported ingredients’ there is uncertainty as to what percentage of ingredients are local and what proportion are imported. Requiring producers/manufactures to disclose percentage of imported ingredients would provide a means to promote more transparency and greater consumer awareness. However, it is also likely to increase costs associated with production, and there is a risk such costs will be passed downline to primary producers.

I note that under current FSANZ Standards:

GM foods that do not contain any novel DNA or protein or altered characteristics do not require labelling ... These foods are typically highly refined foods, such as sugars and oils, where processing has removed DNA and protein from the food, including novel DNA and novel protein.

Flavours containing novel DNA or protein in a concentration of no more than 0.1% are also exempt from labelling.

Labelling is also not required when there is no more than 1% (per ingredient) of an approved GM food unintentionally present as an ingredient or processing aid in a non-GM food. This means labelling is not required when a manufacturer genuinely orders non-GM ingredients but finds that up to 1% of an approved GM ingredient is accidentally mixed in non-GM ingredient.

None of the above exemptions apply if the GM food has altered characteristics.^{xv}

Governmental inquiry into the adequacy of food labelling was undertaken in 2011, and it was determined not to pursue the following recommendation:

Recommendation 28: That as a general principle all foods or ingredients that have been processed by new technologies (i.e., all technologies that trigger pre-market food safety assessments) be required to be labelled for 30 years from the time of their introduction into the human food chain; the application of this principle to be based on scientific evidence of direct impact on, or modification of, the food/ingredient to be consumed. At the expiry of that period the mandatory labelling should be reviewed.^{xvi}

The determination not to pursue was made on the basis that it would place a significant cost burden on industry, may be trade-restrictive, and may inhibit investment in new technologies.^{xvii}

Better country of origin labelling may enable astute consumers to identify GM foodstuffs that not labelled under existing FSANZ Standards. Of course, for this avenue to be utilised by consumers would require suitable information as to the origins of GM foodstuffs being publically available. This being said, it is my position that GM ingredients should be labelled and that this is the best way for consumers to make informed choices in relation to consumption of GM foodstuffs.

ⁱ Australian Government, *Agricultural Competitiveness Issues Paper*, Commonwealth of Australia 2014 at p. 25.

ⁱⁱ Agricultural Green Paper at p. 31.

ⁱⁱⁱ I have challenged the correctness of claims as to productivity and environmental sustainability in my 2009 report, and thus do not do so herein.

^{iv} UNCTAD *Trade and Environment Review 2013 – Wake up Before its too Late: Make Agriculture Truly Sustainable for Food Security in a Changing Climate*

^v *Infra i* at p. 26.

^{vi} <http://www.wfo-oma.com/value-chain/articles/a-fair-and-balanced-functioning-food-chain.html>

^{vii} OGTR, Record of GM Product Dealings, current 30 October 2014

^{viii} *Ibid.*

^{ix} OGTR “GM Crops and Stockfeed” Factsheet December 2008

^x Agricultural Biotechnology Council of Australia *Genetically Modified Canola: A Resource Guide: 2012*

^{xi} UNCTAD (2009a) *World Investment Report: Transnational corporations, agricultural production and development*. Geneva

^{xii} *Ibid.*

^{xiii} I would be interested in ascertaining the extent of a nexus between GM agri-business and transnational retail supermarkets such as Woolworths and Coles.

^{xiv} Hon. Banaby Joyce MP, Agvet chemical reform reduces burden on Australian farmers, 14 July 2014,

<http://www.maff.gov.au/Pages/Media%20Releases/agvet-chemical-reform-reduces-burden-on-australian-farmers.aspx>

^{xv} FSANZ GM Food Labelling (August 2013)

<http://www.foodstandards.gov.au/consumer/gmfood/labelling/Pages/default.aspx>

^{xvi} Legislative and Governance Forum on Food Regulation (convening as the Australian and New Zealand Food Regulation Ministerial Council *Response to the Recommendations of Labelling Logic: Review of Food Labelling Law and Policy* (2011) page 34

^{xvii} *Ibid.*