



Australian Government

Department of Health

30 August 2016

Consumer Law Enforcement and Administration Study
Productivity Commission
GPO Box 1428
Canberra City ACT 2601

Dear Commissioner Abramson

Department of Health Submission to the Productivity Commission Inquiry into Consumer Law Enforcement and Administration

Thank you for the opportunity to comment on the Commission's Issues Paper on *Consumer Law Enforcement and Administration*.

The Department of Health, working with other key government agencies, has policy responsibility for food regulation. This submission provides an overview of the food regulatory system, and provides comment on areas of overlap between the enforcement and administration of the food regulatory system and the Australian Consumer Law (ACL).

Food regulation

Overview of the food regulatory system

Australia's food regulation system is a cooperative bi-national arrangement involving Australia and New Zealand. In Australia, responsibility for the food regulatory system occurs at all levels – Commonwealth, State, Territory and local governments.

The food regulation system is overseen by the Australia and New Zealand Ministerial Forum on Food Regulation (the Forum) which has ministerial representatives from all Australian Governments (Commonwealth and states and territories) and the New Zealand Government.

The Forum has responsibility for:

- the development of domestic food regulation policy;
- the development of policy guidelines for setting domestic food standards;
- the promotion of harmonised food standards within Australia and with Codex Alimentarius (domestic and export standards with international food standards set by Codex Alimentarius);
- the general oversight of the implementation of domestic food regulation and standards; and
- the promotion of a consistent approach to the compliance with, and enforcement of, food standards.

Food Standards Australia New Zealand (FSANZ) is an independent statutory authority responsible for the development and maintenance of food standards in the *Australia New Zealand Food Standards Code* (the Code). All food produced or imported into Australia must comply with requirements in the Code.

The Code sets out requirements for food in four chapters:

1. General food standards
2. Food product standards
3. Food Safety standards (Australia only)
4. Primary production standards (Australia only)

In addition to standards in the Code, guidance materials that are not legislated, but assist manufacturers, retailers and food officers interpret and apply the Code are also made available by FSANZ and individual State and Territory enforcement agencies. In Australia, enforcement of food standards is the responsibility of State and Territory enforcement agencies and the Department of Agriculture and Water Resources for imported food.

The food regulatory system has a role in preventing misleading conduct in relation to information presented on food. In order for this to occur there are close linkages between the food regulatory system and the Australian Competition and Consumer Commission (ACCC), New Zealand Commerce Commission, and State and Territory fair trading bodies.

I note the description of the specialist food safety regime in Box 4 on page 12 of the Issues Paper. Food is said to be administered by both FSANZ and the Therapeutic Goods Administration (TGA), but this description is inaccurate as the TGA does not regulate food. The potential regulatory overlap between certain foods and medicines is referred to as the 'food medicine interface' and regulators, manufacturers and importers work with the TGA to establish whether or not a product is a therapeutic good. Products that are classified as therapeutic goods are regulated by the TGA at a federal level through the *Therapeutic Goods Act 1989* while foods are predominantly regulated by State and Territory regulatory bodies. Further information on the food medicine interface can be found on the following webpage: <https://www.tga.gov.au/community-qa/food-and-medicine-regulation>

One of FSANZ's functions is responsibility for coordinating recall action, at the request of Australian States and Territories. In Australia food recalls are generally initiated by food businesses; however, the Commonwealth Minister responsible for consumer affairs and state and territory food enforcement agencies have the legislative power to order a food recall when a serious public health and safety risk exists.

FSANZ, in consultation with State and Territory governments, monitors the effectiveness of food recalls on behalf of the ACCC. The ACCC is obliged to satisfy the Parliamentary Secretary to the Treasurer, who is responsible for consumer affairs, that a recall has been conducted satisfactorily and that consumers have been protected.

The food labelling hierarchy

In 2011 the Forum (convening as the Australia and New Zealand Food Regulation Ministerial Council) responded to the recommendations of *Labelling Logic: Review of Food Labelling Law and Policy (2011)* (the Blewett Review).

As part of its response to the Blewett Review, the Forum endorsed a risk based hierarchy to guide decisions about government regulatory intervention. They agreed upon a three tiered hierarchy listed in descending order of priority: food safety; preventive health; and consumer

values issues. An overarching strategic statement for the food regulatory system was endorsed as complementary to the hierarchy. The statement refers to consumer values as being reflective of consumer perceptions and ethical values. It states that “usually, any regulatory action would be under consumer protection law rather than food regulation”. The full statement can be found at:

<http://www.health.gov.au/internet/main/publishing.nsf/Content/foodsecretariat-strategic-statement>.

Duplication of regulation

There are a number of similarities between the objectives of FSANZ as a statutory agency as determined in the *FSANZ Act 1991* and the Australian Competition and Consumer Commission (ACCC), as determined in the *Australian Competition and Consumer Act 2010*. While many of these similarities are consistent and, in many cases, appropriate, duplication of regulation is often considered burdensome to consumers and businesses.

The FSANZ Act specifies that the objectives of food regulatory measures are: the protection of public health and safety; the provision of adequate information relating to food to enable consumers to make informed choices; and the prevention of misleading and deceptive conduct.

The ACL, as set out in Schedule 2 of the *Australian Competition and Consumer Act 2010*, is confined to consumer protection issues, such as general consumer rights not to be misled or treated unconscionably when buying goods or services, and consumer product safety.

When assessing the ‘single law, multiple regulator model’, this duplication complicates the administration and enforcement of food and consumer protection legislation. States and Territories are better placed to discuss the administration and enforcement difficulties faced in food regulation.

The regulation of sports foods

Sports foods are regulated in the Code under Standard 2.9.4 – *Formulated supplementary sports foods*. This class of food is defined as foods specially formulated to help people achieve specific nutritional or sporting performance goals. The Standard allows for the addition of substances that are not permitted or are restricted in other foods as well as higher levels of some vitamins and minerals. The Standard also sets out labelling requirements and safety information which are constant across all sports foods (e.g. ‘Not suitable for children under 15 years of age or pregnant women. Should only be used under medical or dietetic supervision’).

However, the Code regulates the activity of food businesses which is then enforced by individual State and Territory enforcement agencies. FSANZ defines a food business as:

“A business, enterprise or activity (other than primary food production) that involves:

(a) the handling of food intended for sale; or

(b) the sale of food;

regardless of whether the business, enterprise or activity concerned is of a commercial, charitable or community nature or whether it involves the handling or sale of food on one occasion only.”

It is common that many importers and retailers of sports foods are not registered as food businesses, as levels of engagement differ between food businesses and State and Territory enforcement agencies. Further, as many importers or retailers of sports foods engage in the

selling of a variety of food and non-food products, a food business may not be aware that a sports food is subject to regulation at all levels of Government.

As the demand for sports foods continues to grow, the risk of introducing unsafe products to the markets grows and the likelihood of harm to consumers increases. In this discussion of specialist consumer safety regulatory regimes that interact with the ACL, the food regulatory system faces increasing pressure from new products like sports foods. Sports foods, like all new food products, are of a higher risk to consumer safety as there is less reliable information and support to determine which sports foods are safe and effective. The flexibility of the ACL should be retained and, in some instances, increased as specialist safety regulatory regimes are put under pressure by consumer demand for new products and sports foods are being marketed to consumers in a way that does not fit clearly within the regulatory jurisdictions of either the TGA or FSANZ.

The Department of Health would welcome the opportunity to discuss the regulation of sports foods with the ACCC.

Future concerns in food regulation

There are a number of new and emerging issues facing food regulators that neither the specialist regulatory regime nor the ACL are able to address effectively. It is important that the ACL remains flexible to respond to these potential threats to consumer safety. Examples of future concerns that are not currently adequately regulated include:

- the sale of food via the internet where misleading claims are made; and
- third party food delivery services.

My Department would be happy to discuss these issues further with the Productivity Commission should you require any further information. The contact officer for this submission is Ms Elizabeth Flynn, Assistant Secretary, Preventive Health Policy Branch

Yours sincerely

Martin Bowles PSM
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