

17 June 2009

Regulation Benchmarking Study: Food Safety
GPO Box 1428
Canberra City ACT 2601
Australia

To whom it may concern,

Re: Performance Benchmarking of Australian Business Regulation: Food Safety

Woolworths is pleased to provide the following comments in response to the Productivity Commission's Issues Paper, 'Performance Benchmarking of Australian Business Regulation: *Food Safety*'.

As a leading national food retailer in Australia, Woolworths supports any efforts to improve food safety regulations. However, we are concerned that the lack of legislative consistency and administrative co-ordination between the State and Local Government jurisdictions continues to impose significant and unnecessary burdens on industry with little or no consumer benefit.

Woolworths contends that the duplication and inconsistencies across regulations present an opportunity to improve the governance of Australia's food regulatory system.

Consumers are entitled to expect an identical set of legislative standards and consistency in regulatory administration and enforcement across all the States and Territories of Australia. A single national system also delivers lower costs for industry and minimised compliance difficulties.

Woolworths considers that there is an urgent need for improvement in the areas of product recall, co-ordination between and within jurisdictions, stakeholder consultation/ communication, overlapping roles of FSANZ and the Ministerial Council and food safety plans/audits.

If you have any questions regarding the matters raised in the submission, please contact me on 02 8885 3446 or nsamia@woolworths.com.au.

Yours sincerely,

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WOOLWORTHS LIMITED

Woolworths Limited

Performance Benchmarking of Australian
Business Regulation: *Food Safety* –
Productivity Commission Issues Paper

17 June 2009

1 Executive summary

Woolworths welcomes the opportunity to make the following submission regarding the Productivity Commission's Issues Paper, 'Performance Benchmarking of Australian Business Regulation: *Food Safety*'.

As a leading national retailer in Australia, Woolworths supports any efforts to improve food safety regulations. However, we are concerned that the lack of legislative consistency and administrative co-ordination between the State and Local Government jurisdictions continues to impose significant and unnecessary burdens on industry with little or no consumer benefit.

It is our view that there should be a single national approach to food standards, so that all Australian consumers have uniform rights. A single national system also delivers lower costs for industry and reduces difficulties with compliance.

Inconsistency in food safety regulations across jurisdictions either means that differing levels of consumer protection exist depending on location of residence, or that business is being burdened with unreasonable and unnecessary regulation.

Literally hundreds of agencies are involved in the enforcement and administration of food laws at a Federal, State and Local government level and there are often different interpretations and approaches across agencies. This results in inefficiencies and inconsistent implementation of otherwise uniform laws.

Woolworths also considers that there is an urgent need for improvement in the areas of product recall, co-ordination between and within jurisdictions, stakeholder consultation/communication, overlapping roles of FSANZ and the Ministerial Council and food safety plans/audits.

Woolworths acknowledges that elements of the Australian regulatory system have improved, however the lack of legislative consistency and administrative co-ordination between the State and Local Government jurisdictions continues to impose significant and unnecessary burdens on industry with little or no consumer benefit.

2 Consistent Legislation

Woolworths is Australia's leading retailer of private and generic label food, grocery and liquor products. As a national retailer, inconsistencies and duplication between jurisdictions have the potential to impose a compliance cost on our business.

Despite the Model Food Act having been adopted in most States and Territories, we note that food safety legislation and responsibility for enforcement differs significantly from State to State.

It is our view that Woolworths' customers are entitled to expect an identical set of legislative standards and consistency in regulatory administration and enforcement across all the States and Territories of Australia. What level of protection the law affords should not depend upon the State in which a consumer resides.

Woolworths is not proposing a lower level of regulation. As a national business, State boundaries are irrelevant to Woolworths' operations and in most cases, Woolworths' own systems for managing food safety adopt the most stringent State regulations, and then for consistency implement this requirement throughout all supermarkets. It is important that *Food and Fair Trading Laws* be enacted in a uniform manner and without additional, individual State requirements.

A lack of a single, national system means there are inefficiencies which may in some instances lead to unnecessarily higher cost to food manufacturers, processors, distributors and retailers.

Having different food safety standards across jurisdictions either means that consumers in jurisdictions with lower safety standards are not being adequately protected or if the less stringent standards suffice, then accordingly it must mean that additional regulation represents an unreasonable and unnecessary impost on industry. Either scenario is undesirable from a public policy viewpoint.

Finally, having inconsistent legislation across jurisdictions poses difficulties for a national business, such as Woolworths. For example, in Queensland, legislation provides for businesses to be named in a 'name and shame' register, published on the Queensland Health website, if they have been convicted of a Food Safety Breach. Conversely, in NSW all misdemeanours are listed on a Name and Shame Register irrespective of the issue. All NSW businesses are listed for minor 'quality' issues where an Infringement Notice has been issued and these minor issues 'sit' alongside other businesses which have been convicted through the Court System of major breaches against the Food Act.

Other States (Vic., SA & WA) are considering Naming and Shaming businesses if they are convicted of a breach of the Food or Health Acts. Woolworths has no issue with Governments wishing to 'Name & Shame' businesses convicted of significant Food Safety breaches, however when these breaches are listed together with minor Quality issues, prospective customers to a business cannot distinguish the difference and the final outcome for smaller businesses could be disastrous.

Having a national approach would ensure all consumers across all jurisdictions enjoy the same level of protection from food safety laws.

3 Consistent Implementation

In Woolworths' experience, even where legislation is uniform or close to uniform, regulatory implementation and interpretation differ significantly.

Like inconsistencies in regulation across jurisdictions, different interpretation and implementation of regulations can result in a higher cost to industry, either differing levels of food safety depending on location, or unreasonable and unnecessary regulation on business; and difficulties with compliance.

All levels of government (Federal, State and Local) are responsible for the enforcement of Food Laws to a greater or lesser extent. At the Federal level, AQIS is responsible for imported food. Depending on the particular jurisdiction and type of business conducted, a number of State Departments/Agencies are involved. For example, in Victoria, the Food Safety Unit, PrimeSafe, and the Dairy Food Safety Victoria each have responsibility for the administration of Food Law. In Queensland, Queensland Health and SafeFood Queensland have responsibility for the administration of Food Law. In New South Wales, State Government agencies have been amalgamated into the New South Wales.

Food Authorities. Local Council EHO's also have a role in all jurisdictions. All up, hundreds of agencies are responsible for the enforcement/administration of Food Laws.

Woolworths has encountered many examples of inconsistent implementation across jurisdictions. For example, Woolworths has received different advice from jurisdictions regarding the interpretation of the word "meat" in the Uniform Trade Measurement legislation which provides that "meat" must be sold by weight. Woolworths has been advised by the Queensland Office of Fair Trading that "meat" means red meat only. However, the Victorian and Tasmanian Consumer Affairs Departments have advised Woolworths that it applies to all animal flesh other than seafood. The New South Wales Department of Fair Trading takes a more stringent interpretation still, excluding crustaceans, but not other types of seafood. In respect of value added products, there is no consensus regarding when a product is so significantly altered, that it ceases being meat. We believe these problems will be rectified from 1 July 2010 when Trade Measurement Legislation will be administered by the Commonwealth Government.

There appears to be a general lack of knowledge or understanding amongst Local Councils EHO's when using guideline documents. Safe Food Australia offers a Guide to Food Safety Standards, which is often quoted by EHO's as enforceable requirements rather than a guide to the Food Standards Code.

There is also an inconsistent approach to registration requirements and food safety audits (such as the frequency and duration) across Australia. Whilst this is partly due to different legislative frameworks, it can also be due to inconsistent interpretation and implementation. For example, some Local Councils in Tasmania count each department within a supermarket (eg, butcher, bakery, deli) as separate food businesses requiring separate registration and are invoiced separately.

Audits are most frequent in jurisdictions that have implemented fee-for-service premises inspection or audit arrangements, for example Local Government EHO's & PIRSA Auditors in South Australia; Local Government EHO's & New South Wales Food Authority for Meat Department Audits and SafeFood Queensland for Meat and Deli Department audits etc. Safe Food Queensland use contract auditors and there are numerous occasions when Major Non-Conformances (NCR's) are raised and in some instances for seemingly trivial matters. The raising of Major NCR's is justification for a return visit to the store to verify corrective action has been taken and to close out the NCR. Fees are charged at the applicable rate for this return service. There is also a discrepancy between the fees Local Governments in NSW charge for EHO inspections, as well as a varying requirement between States for Food Safety Supervisors.

Under the *Model Food Act*, Woolworths is responsible for all food sold even where it has no practical control over the manufacture, processing, packaging and distribution. A good example is Nutrition Information Panels. Some Local Councils undertake routine sampling and testing. If a problem is identified, retailers may be called upon to ensure the problem is corrected. This is, strictly, the responsibility of the manufacturer and communication should be between the Council EHO and the manufacturer, rather than the retailer.

Differences in interpretation of the *Food Standards Code* also can and do occur within jurisdictions. For example, some Councils in New South Wales require specific signage for Hand Wash Basins, but this requirement is not consistent across the State. There is also a lack of consistency across Councils and State Government Authorities on the display of raw seafood for customer self service. Primesafe in Victoria do not permit such displays nor do some Council jurisdictions in NSW, however most other States permit these displays.

Finally, there is duplication of food regulation contraventions at both a State and Federal level and this extends to intra-State regulation (for example, dealing with false and misleading representations in connection with the supply of a food product).

Notwithstanding that Woolworths is a retailer and effectively has no control over the claims made in labelling by the manufacturer, it is exposed to liability. For example, sections 13(3) and (4) of the New South Wales *Food Act* (and provisions in other State Food Legislation) make it a serious offence to sell food which has been falsely described (and similar provisions exist in other States). Very limited defences are available - in particular, a defence of mistaken and reasonable belief and a warranty defence which were available under Act's predecessor are no longer available.

Similar offences also exist under the *Trade Practices Act* (section 75AZC - including that the goods have a particular composition and in relation to the Country of Origin of a product) and equivalent offences in the State *Fair Trading Acts*. The result is that alleged breaches of the labelling of national brands are frequently brought to the attention of Woolworths by regulators and Woolworths is exposed to direct liability despite the fact that the appropriate approach is for regulators to take action with the manufacturer. In some instances Woolworths has been prosecuted as a result, eg application of Expiry Dates is often misunderstood by industry, consumers and regulators alike. All too often the application of Use By (UB) and Best Before (BB) Dates are used interchangeably. This exposes the retailer to significant risk of prosecution because it is illegal to present for sale food that is past its UB Date, but it would not be illegal to present it for sale if it was past its BB Date if that was the appropriate label. Further, there is no equivalent legislation internationally and in many instances imported food will be labelled with a UB Date even though under Australian Law, this may be unnecessary.

Woolworths believes that consistency in interpretation and implementation of regulations and legislation is just as important as having nationally consistent legislation.

4 Governance

Woolworths considers that there is an urgent need for improvement in a range of areas with regard to food safety that can be addressed by national uniform legislation.

4.1 Product Recall

Depending upon the nature of the product concerned, a product recall must be notified to a number of regulators at the State and Federal level, for example the ACCC and FSANZ and the State Offices of Fair Trading and State Departments of Health. There seems to be no logical reason for the multiplicity of recall notification requirements which the law technically requires.

There is no guidance given in any government document about what level of risk requires a recall (Safety versus Quality). For example, concerns in the past have been expressed about the long terms risks of the presence of some chemicals in food. Where guidelines as to maximum limits exist, they can be applied. However, on one view, any level has the potential to cause injury and some would advocate for a recall although the reasonable man might dismiss the risk as far-fetched.

Although not strictly a "recall" issue, Queensland also has separate provisions relating to notification of food tampering incidents in the *Food Act* which are not replicated in other

state laws. This requirement does not exist for other products - including pharmaceuticals where there has been tampering incidents in Australia in the past.

In practice, the Queensland provisions mean that two bodies are involved in relation to such incidents - the Police and Queensland Health. Other State laws make it an offence to contaminate goods (for example section 93IB of the New South Wales *Crimes Act* Contaminating Goods with Intent to Cause Public Alarm or Economic Loss). In New South Wales, it is an offence to conceal a serious indictable offence. The Police will need to be involved in intentional contamination issues, and it makes sense that any reporting requirements be included in State *Crimes Acts*.

4.2 Co-ordination between jurisdictions

Woolworths acknowledges that in some areas co-ordination between the States and Territories is good. For example, in respect of recalls the practice is that a manufacturer only needs to notify the ACCC, FSANZ and the manufacturer's "home state". Nevertheless, a legal obligation to notify the States also exists in the *Fair Trading Act*. However, on many important issues, including food poisoning outbreaks, there is a lack of co-ordination between the jurisdictions.

A recent example is the investigation into an outbreak of Hepatitis A thought to involve Semi-dried tomatoes. Whilst investigations were initiated by SA Health, all jurisdictions along the East Coast of Australia required Woolworths to provide them with essentially the same information. It would have been more efficient if the information could be provided once to a central Commonwealth authority (for example, Department of Health and Ageing). This example also highlighted that there was limited coordination between jurisdictions which limited the effectiveness of the response.

A co-ordinated approach for investigation into food poisoning outbreaks is essential and specifically this responsibility should not be left solely to ad hoc investigations and samplings by local government EHO's.

4.3 Stakeholder Consultation/ Communication

Woolworths believes that stakeholder consultation is vital for a robust and adequate system of food safety regulation. Whilst FSANZ is obliged to undertake stakeholder consultation, it is our view there that more can be done.

There is also a need for improved consumer education carried out at Government and industry levels. For example, most consumers, media, business and government (local & state) do not fully understand the difference between a "best before" and a "use by" date. Woolworths suggests that this is a task that should properly be undertaken at the national level (for example, FSANZ).

4.4 Roles of the FSANZ and the Ministerial Council

Both FSANZ and the Ministerial Council are involved in the standards setting process, often leading to waste and inefficiency.

Under the *Food Standards Australia New Zealand Act 1991*, FSANZ is responsible for the assessment of applications and proposals to amend the *Food Standards Code*. Generally, this involves two rounds of public consultation, and the preparation of applications and submissions is a time consuming and costly exercise for industry (and Government). At the conclusion of this process FSANZ either rejects the

application/proposal, or makes a recommendation to the Ministerial Council to approve the amendment. The Ministerial Council can either approve the amendment (after which it will be Gazetted), or request a further review by FSANZ. After this review has been conducted, the Ministerial Council may request a second review, and after this second review is completed, the Ministerial Council may amend or reject FSANZ's recommendation.

In this way, the process of standards setting may be seen to be politicised. It is only at the very end of the standards setting process that an applicant knows whether their application will be rejected. This creates waste (in terms of the costs associated with preparing applications/submissions) and uncertainty (in that an applicant cannot know whether their application will be accepted even if the application is supported by science).

4.5 Food Safety Plans/ Audits

Woolworths is a responsible retailer and ensures compliance with regulations and whilst it is not necessary in most States, Woolworths has introduced and complies with food safety programs in accordance with the *Food Standards Code* Standard 3.2.1 (Food Safety Programs). These programs are audited by trained internal food safety auditors and in addition in Victoria all stores are audited by third party food safety auditors.

This ensures a consistent approach to food safety throughout all Woolworths Supermarkets and is a self imposed requirement.

For national businesses, Woolworths proposes the implementation of a single food safety plan covering the whole of its food retailing activities, together with a single audit program to ensure lower cost and ease of compliance, as well as consistently higher standards.

5 Conclusion

Woolworths welcomes any initiatives that aim to harmonise legislative and regulatory requirements across jurisdiction. Woolworths contends that there are significant legislative inconsistencies between Australian jurisdictions as well as inconsistencies in the implementation of Food Laws across the country. As a result, there exists opportunities for improvements in the governance of Australia's food regulatory system.

Consumers are entitled to expect an identical set of legislative standards and consistency in regulatory administration and enforcement across all the States and Territories of Australia. The level of protection the law affords should not depend upon the State in which a consumer resides. Under the present system it cannot be said that Australian consumers have uniform rights. At the same time, businesses that operate across State borders are burdened with the costs associated with a lack of uniformity.