



Submission to the ACCC regarding the Australian Consumer Law Review

This submission will be confined primarily to food labelling and the role of the ACCC in ensuring the veracity of labels.

Labelling is hardly mentioned in the Interim Report, despite the fact that the Consumer Survey 2016 identifies misleading labelling as a major issue for consumers, particularly in relation to food.¹

While the Interim Report notes general support for having a nationally consistent scheme to protect consumers, the current *Competition and Consumer Act (CCA)* does not provide either consistent or useful protection for citizens in relation to the labelling of food products. It appears the role of regulating food labelling is primarily being left to Food Standards Australia New Zealand (FSANZ). This is despite the Food Standards Australia New Zealand Act having very few enforceable or enforced standards and extremely limited rights of public review - unlike the CCA; and FSANZ only being prepared to address a very narrow range of labelling issues.

There are a number of specific labelling issues that we urge be included in any reform of the ACCC and the CCA:

1. Responsibility for food labelling;
2. Lack of enforcement of existing food labelling laws;
3. Misleading and ambiguous labelling;
4. Lack of labelling on issues of broad public concern;
5. Lack of labelling of products produced using new technologies and techniques when risks and safety have not been assessed.

Responsibility for food labelling

The ACCC and FSANZ share the responsibility for enforcing the current labelling laws related to food. Labelling under the Food Standards Australia New Zealand Act (Food Act) is provided for in the Objects clause (s.3), which requires the provision of adequate information for consumers to make informed choices. Certain labelling laws (e.g. Country of Origin and Free Range) are within the jurisdiction of the ACCC.

These jurisdictional decisions appear to have no regulatory or other basis.

The regulatory systems, requirements and public rights are quite different in these two regulatory schemes. This degree of inconsistency is unfair for everyone.

The regulatory regimes of the two agencies are very different, with FSANZ having no formal labelling complaint procedures and no citizen remedies for breaches of labelling. *Ad hoc* systems are inefficient and rarely used well. State and territory governments have enforcement responsibilities but no capacity or political will to implement them.

Based on our experience and the experience of others with whom we work, complaints made regarding food labelling to the ACCC are often ‘turfed’ back to FSANZ, which referred them to the ACCC in the first place. So, for instance, a complaint was made that removing the labelling requirement from irradiated fruits and vegetables would leave shoppers unable to discern the difference between fresh and highly processed produce, marketed side by side. The ACCC has declined to take even a provisional view on this issue, pending removal of the irradiated food labelling requirement. It may then entertain a complaint.

Developing a systematic approach to labelling is necessary and would appropriately rest with the ACCC. It could be grounded in the ACCC’s responsibility to ensure that false and deceptive claims are not made. This should include deception by omission when labels are manifestly inadequate, uninformative or disingenuous. Such an approach would complement the proposal for a general requirement of safety for products.

While agencies with particular expertise should advise on labelling laws relevant to their expertise, having all labelling issues addressed by one agency would simplify the process for the public to seek redress and presumably ensure labelling issues are dealt with more efficiently and cost-effectively.

Lack of enforcement of existing food labelling laws

Food labelling laws are *ad hoc* and poorly enforced.

For example, in almost 20 years FSANZ has only conducted one audit of genetically modified (GM) ingredient labelling.²

Currently, FSANZ has no formal process for responding to public complaints regarding labelling - unlike the ACCC. Decisions by FSANZ regarding whether to respond to a labelling complaint or to enforce existing laws are not decisions made under an enactment and are therefore not reviewable decisions.

For this reason, we recommend the ACCC assume responsibility for enforcement and review of labelling laws and compliance.

At a minimum, clear delineation of responsibilities and roles is needed.

Misleading and ambiguous labelling

Certain labelling requirements are in themselves deeply misleading. For example, the GM laws permit a suite of exceptions, meaning that the vast majority of foods produced using GM technology are not labelled at all. In light of the fact that GM labelling was introduced primarily because of

consumer's demand to know whether GM was being used in food production, the labelling laws themselves are misleading.

Similarly, food additives are frequently labelled but not using commonly understood names. We are aware of workshops that lawyers give advising food producers how to avoid labelling requirements using arcane terms. For example, consumers have identified 129 ways in which glutamate, the active ingredient in monosodium glutamate (MSG) which many seek to avoid, can be legally added to foods while still claiming 'no added MSG'.³ Similarly, the bread preservative propionate (280-283) is frequently hidden by about 10 different deliberately misleading names, such as cultured dextrose, while claims are made that the product is preservative-free.⁴ Complaints on this issue to ACCC and to FSANZ are not acted upon by either organisation and are routinely cross-referred. The result is that consumers are being misled by food producers gaming the system and agencies not responding to legitimate and serious issues associated with labelling.

Recently, the decision was made to permit stocking levels of egg laying chickens (10,000 birds/hectare) that provide each chicken with a mere one square meter of space. Free Range is not an accurate term in these circumstances and should not be permitted. When the Government misleads its own people, it is as serious as misleading them in the course of trade and commerce.

We note that the Consumer Survey 2016 recorded that 13% of respondents had found food labels misleading, though it isn't clear whether those labels satisfied legal requirements or not. In either case, it reflects a serious problem.

The issue of how the ACCC deals with labelling laws that are in themselves misleading needs to be addressed, as does the question of whether the ACCC should be charged with preventing the Government from engaging in misleading practices.

Lack of labelling on issues of broad public concern

An additional problem that this review needs to consider is how lack of labelling impacts on the right of consumers to know what is in their food and how this can result in consumers being misled.

The current rules for labelling food are not systematic and fail to meet the requirements, in our view, of 'adequate information'.

Failure to inform is recognised by the ACCC as potentially misleading.⁵

A healthy and efficient market depends on consumers having access to the information that other actors in the market place have. Otherwise the market will not perform optimally to provide everyone with the outcomes they want.

Labelling should facilitate and empower consumers to make informed choices regarding the foods they buy and consume. This may be for health, environmental, social or ethical reasons and is underpinned by section 3 of the Food Standards Australia New Zealand Act.

As the Blewett Labelling Review (Labelling Logic 2011) noted, the majority of people making submissions to that review called for better information on environmental, social and ethical issues

of concern to them. This includes, for example, the use of GM techniques, irradiation, land use practices, climate change, worker exploitation, animal welfare and forest destruction.

Some agencies have tried to characterise these issues as 'choices' or 'values' based issues as opposed to health issues, which are deemed more important. Many of these issues go to both environmental and human health. For example, many of these issues relate to the loss of biodiversity, ecosystems and life support systems. All of them relate to issues that are important to consumers in making informed choices. To not provide necessary and desired information results in consumers being misled and results in market failure.

We note FSANZ's current proposal to eliminate the labelling of irradiated food, while at the same time increasing the number of foods permitted to be irradiated to 25. Food irradiation alters the quality and characteristics of food. Consumers have a right to know that this processing of supposedly fresh food has taken place, so they can exercise their right to eat fresh rather than processed foods.

The argument that the labels should be removed because no-one will buy the product holds no water. Public opinion surveys consistently show that a proportion of shoppers are unconcerned about how or why food was processed. In any event, if no one buys a product because the technology used in producing it is so distrusted, then the market is functioning as it should and producers need to change their practices.

Lack of labelling of products produced using new technologies

New GM

Two regulatory agencies, the Office of the Gene Tech Regulator and Food Standards Australia New Zealand are responsive to a global push to deregulate certain new GM techniques and their products. This would mean that products produced using these techniques would not be assessed for safety or labelled as GM. This industry push is based on claims that the technology is precise and the results are predictable and safe.

The evidence does not support such claims of precision and safety. In fact, reviews commissioned by the Austrian and Norwegian Governments concluded that not enough is yet known about these techniques to justify a decision not to regulate them and their products. They concluded that organisms derived from these techniques pose similar risks to older GM techniques and that they be assessed for safety before being allowed in the food chain.

Both FSANZ and the OGTR have relied on industry experts with extensive conflicts of interest, including pecuniary interests in the technology, to advise them. Not surprisingly, they have recommended the non-regulation of several of these techniques.⁶

Following over a year of consultation with industry, the OGTR has now initiated an eight week public consultation process that they are calling a technical review of the OGTR regulations 2001. The concern of those who have followed this process is that the OGTR appears to have already made its decision regarding these new GM techniques and will allow them on the market with no safety

testing and no labelling. It is unacceptable if the OGTR is permitted, without parliamentary or other independent public review, to resolve what and what not to regulate, and how.

There are two issues that arise from such a laissez faire approach: the public is not given adequate information on an issue that has remained a prominent public concern for well over 20 years. In fact they are being misled with the complicity of regulators. Furthermore, without labelling, consumers are denied the choice to avoid ingredients produced using these techniques if they want to. There will also be no capacity to track the effects of such foods through the food chain.

The defects in the current monitoring of products produced using new technologies are important. Health effects can be detected much more quickly and accurately if such products are properly labelled. Indeed, the Blewett review recommended that food products produced using new technologies be labelled for 30 years so that long term safety could be established. That recommendation has not been implemented.⁷

Even chemical residues are inadequately monitored in the food supply and are not labelled at all.⁸

The implications for this review are clear: there is an urgent need to ensure that adequate information is provided to consumers. It is our view that this requirement is being subverted by agencies and that stronger consumer protections are needed.

Other issues from the Interim Report

The Interim Report notes that the current CCA does not include objectives or definitions ensuring sustainability or protection of the environment. We would support changes that recognise that consumption generally is a primary cause of environmental harm and climate change and that citizens have rights to make informed choices about what they buy in order to reduce or limit such harm.

Signatories to this submission strongly support the proposal to put a general safety provision in the CCA. We support a legislative approach (generally option 3, p. 71). We don't agree with the use of the concept of 'proportionate' regulation because it is a euphemism used to reduce, cut or minimise regulatory approaches. The regulatory options should be sufficient to address both risks and public expectations.

The new GM techniques issue is profoundly relevant to this question. Currently, industry is advocating for no regulation for a number of these techniques without safety testing. A general provision requiring safety research, assessments and regulation would help to ensure that such decisions cannot be made or could be challenged.

We are seeing similar problems with other new technologies as well. Currently, nanomaterials in food, which are novel ingredients with no history of safe use in Australia, are being widely used in foods sold in Australia with no safety testing whatsoever and no labelling.⁹

Jurisdictional uncertainty also applies to food safety generally. Does FSANZ have exclusive jurisdiction in matters of food safety, when FSANZ's own definition of safe food is explicitly limited to certain levels of safety?

While we recognise some of the complexities involved in a general standard, particularly ensuring that it effectively ensures the safety of consumer products, there are some general principles that we would recommend form part of any such provision:

The Precautionary Principle

Principle 15 of the Rio Declaration asserts: "Where there are threats of serious or irreversible damage, lack of scientific certainty shall not be used as a reason for postponing cost effective measures to prevent environmental degradation."¹⁰

Precaution dictates that we regulate processes which experts do not fully understand or disagree about. The precautionary principle is embodied in many international and national laws, including the Gene Technology Act 2000.

"The core concept of precaution can be viewed as a mechanism to counter a widespread regulatory presumption in favour of allowing development/economic activity to proceed when there is a lack of clear evidence about its impacts."¹¹

Internationally, the precautionary principle is widely used in the areas of health and food safety. It is explicit in both European and American food safety law. In the United States, the Food and Drug Administration (FDA) requires a "reasonable certainty that the...substance is not harmful under the intended conditions of use."¹²

Any use of the precautionary principle in Australia must include the mechanics of implementation since historically in Australia, the precautionary principle has been used as a motherhood statement but not as an assessment and decision-making tool.

General rule scope

The general safety rule must override other safety provisions to the extent that they are weaker than the general rule. The FSANZ definition of safe food is so weak and so filled with loopholes, that it would render a general rule meaningless should it be allowed to prevail over a general standard. For example, a food is not deemed unsafe if less than half the population has an adverse reaction to that food.¹³

Safety

FSANZ is currently required to take steps to ensure that harm is prevented as well as remediated. However, FSANZ currently limits its protection of public health to acute health issues such as food poisoning. A general standard of safety should operate to ensure that, as relevant, acute, lethal and sub-lethal harms, including long term harm and harm from combined uses are all covered in the scope of 'safety'.

Sub-lethal harms are not relevant to all products, but are certainly critical in ensuring food safety and the health and well-being of the human population. Long term, cumulative and compound harms are all critical issues in food safety, although they are currently ignored. Food related allergies have increased dramatically and our three largest public health epidemics – obesity, diabetes and heart disease – are all strongly linked to the amount and types of foods eaten, yet no safety standard is applied to the foods most responsible, nor is there any reporting requirement related to these epidemics. This slows intervention and allows space for industry to manufacture doubt, thereby making interventions less likely. The definition of safety must recognise and incorporate precautionary and preventative complexities.

Serious harm: The ACCC is already responsible for addressing serious harm caused by products. While with many products, determining that harm has occurred is reasonably obvious, that is not always true of food.

A definition of serious harm should recognise social, physical, behavioural and mental harm. Serious harm must be understood more broadly than simply acute harm. For example, obesity is clearly serious harm but may not 'qualify' under some definitions – as are behavioural problems associated with certain additives. A more sophisticated and nuanced definition of harm and its prevention is needed in relation to food.

Data and testing requirements: The details of such requirements may need to be process, product or product-type specific, but we support a general requirement that the manufacturer has sufficient data to ensure their product is safe. This data must be subject to regular audits by regulators.

Mandatory reporting of adverse reactions: We support maintaining the 48 hour reporting period, although we would support a two part reporting time-frame, which ensures that serious harm is reported immediately, even if the investigation into the harm takes longer.

We would propose that mandatory reporting be broadened to include long term adverse reactions or adverse reactions that may be caused by unexpected synergistic interactions, cumulative or compound effects.

We support the idea, cited by Baker McKenzie and used in food safety reporting regimes in the Australian Capital Territory, South Australia (SA) and Tasmania, which requires that a medical practitioner, rather than a supplier, report food-related illness or death, although we would further recommend that adverse reactions as well as illness or death be reported. (p. 96)

Transparency: Transparency provisions could include the right of the public to be informed of the product testing that has been done, the data produced and any audits undertaken.

Enforcement and public rights of review: There should be public review rights to allow claims of safety to be tested. These should be merits-based not process-based reviews.

While we do not have the capacity to analyse the costs of such a regulatory regime, it is crucial that positive externalities and preventative savings are properly recognised and costed in. A European Environment Agency report - *Late Lessons from Early Warnings* - identifies costs associated with not taking a precautionary approach to safety.¹⁴ The costs of failure to act on early warnings can be enormous. Tobacco, asbestos and DDT are some obvious examples.

Use of the term ‘free’.

We support the ACCC’s view that ‘free’ is an absolute term with zero tolerance at the technical thresholds of detection which may change from time to time. Whether the technology to measure ‘free’ exists is a different issue - but in terms of consumer law, free should continue to mean ‘without’. Contamination, adventitious or otherwise, should not be permitted in foods or products labelled as ‘free’ from a certain ingredient. Contrary to the AFGC claim, this is not just an issue of dietary safety, but an issue of informed choice and citizen empowerment to create a level playing field for all participants in commerce. We also disagree with the AFGC in relation to imported foods using the term ‘free’. Australia should not participate in a regulatory race to the bottom. If other countries permit the term ‘free’ to be used loosely (and contrary to its commonly understood meaning), then labels must be altered on products for sale in Australia and NZ.

¹ Australian Treasury (2016). Consumer Survey 2016. <http://consumerlaw.gov.au/files/2016/05/Consumer-Survey-2016.pdf>, p. 42

² Australian pilot survey of GM food labelling of corn and soy food products by the TAG Working Group on GM food labelling. FSANZ, Canberra, 2003.

³ Han, E., (2015). Avoiding MSG? Try memorising the 129 terms food companies prefer to use. <http://www.smh.com.au/national/health/avoiding-msg-try-memorising-the-129-terms-food-companies-prefer-to-use-20150804-gir4e4.html>

⁴ Food Intolerance Network (2016). 280-283 Propionic acid and its salts: The bread preservative. <http://fedup.com.au/factsheets/additive-and-natural-chemical-factsheets/280-283-propionic-acid-and-its-salts-the-bread-preservative>

⁵ see, e.g., ACCC (nd). Country of Origin Claims and the Australian Consumer Law, <https://www.accc.gov.au/publications/country-of-origin-claims-the-australian-consumer-law/country-of-origin-claims-and-the-australian-consumer-law/labelling-issues/remaining-silent>

⁶ Friends of the Earth (2016). GM 2.0: Australian regulators engineering the truth. <http://emergingtech.foe.org.au/wp-content/uploads/2015/12/FOE-GM2-Report-A4-interactive.pdf>

⁷ Commonwealth Government (2011). Labelling Logic: Review of food labelling law and policy. [http://www.foodlabellingreview.gov.au/internet/foodlabelling/publishing.nsf/content/48C0548D80E715BCCA257825001E5DC0/\\$File/Labelling%20Logic_2011.pdf](http://www.foodlabellingreview.gov.au/internet/foodlabelling/publishing.nsf/content/48C0548D80E715BCCA257825001E5DC0/$File/Labelling%20Logic_2011.pdf), recommendation 28

⁸ SBS (2016). Imported rice in Australia: pesticides and chemicals found to be above safe levels. <http://www.sbs.com.au/yourlanguage/punjabi/en/article/2016/11/24/imported-rice-australia-pesticides-and-chemicals-found-be-above-safe-standards>

⁹ Friends of the Earth (2016). Independent testing finds potentially harmful nanoparticles in common food products. <http://emergingtech.foe.org.au/resources/independent-testing-finds-illegal-and-potentially-harmful-nanoparticles-in-common-food-products/>

¹⁰ IUCN Policy and Global Change Group (2004). The Precautionary Principle in Biodiversity Conservation and Natural Resources Management. <http://www.the-eis.com/data/literature/IUCN%20Precautionary%20Principle%202004.pdf>

¹¹ Goklany, I. (2002). The Precautionary Principle: A critical appraisal of environmental risk assessment. Center for Independent Studies magazine book review. <https://www.cis.org.au/app/uploads/2015/04/images/stories/policy-magazine/2002-winter/2002-18-2-sarah-tyrell.pdf>

¹² Regulation (EC) No 178/2002. <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002R0178&from=GA>; see also Druker, S (2015). *Altered Genes, Twisted Truth*. Clear River Press, p. 265

¹³ Friends of the Earth *et al.*, (2015) Submission to FSANZ Review of Safe Food Australia. <http://emergingtech.foe.org.au/wp-content/uploads/2015/09/Submission-to-FSANZ-review-final.pdf>

¹³ Food Code Standard 3.1.1.1, section 2(2) – Safe Food. <https://www.comlaw.gov.au/Details/F2009C00816>; see also NSW Food Act 2003, s8

¹⁴ European Environment Agency (2013). *Late Lessons from Early Warnings: Science, precaution, innovation*.