AUSTRALIAN FOOD & GROCERY COUNCIL

AFGC SUBMISSION

SUBJECT DESCRIPTION

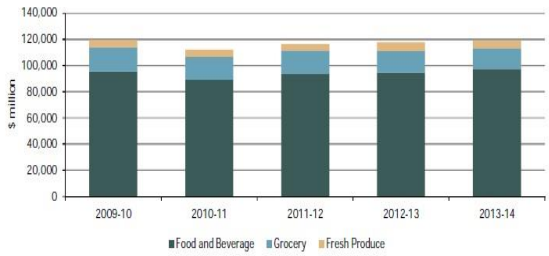
Sustaining Australia

PREFACE

The Australian Food and Grocery Council (AFGC) is the leading national organisation representing Australia's food, drink and grocery manufacturing industry.

The membership of AFGC comprises more than 190 companies, subsidiaries and associates which constitutes in the order of 80 per cent of the gross dollar value of the processed food, beverage and grocery products sectors.

Figure 3.1: Composition of the defined industry's turnover ($2013-14)[11]



Source: Based on ABS, catalogue number 8221.0, 8159.0 and 8155.0

Australia's food and grocery manufacturing industry takes raw materials and farm products and turns them into foods and other products that every Australian uses every day. With an annual turnover in the 2013-14 financial year of $118 billion, Australia's food and grocery manufacturing industry makes a substantial contribution to the Australian economy and is vital to the nation's future prosperity. It adds over $32 billion to the value of the products it transforms.

Manufacturing of food, beverages and groceries in the fast moving consumer goods sector is Australia's largest manufacturing industry. The diverse and sustainable industry is made up of over 26,651 businesses and represents 30% (almost one third) of the total manufacturing industry in Australia.

The food and grocery sector accounts for over $61.7 billion of the nation's international trade in 2014-15, with a trade surplus worth over $10 billion to the Australian economy in 2014-15. These businesses range from some of the largest globally significant multinational companies to family-based small and medium enterprises.

The food and grocery manufacturing sector employs more than 322,900 Australians, paying around $16.1 billion a year in salaries and wages.

Many food manufacturing plants are located outside the metropolitan regions. The industry makes a large contribution to rural and regional Australia economies, with over 40% of the total persons employed being in rural and regional Australia. It is essential for the economic and social development of Australia, and particularly rural and regional Australia, that the magnitude, significance and contribution of this industry is recognised and factored into the Government's economic, industrial and trade policies.

The contribution of the food and grocery sector to the economic and social well-being of Australia cannot be overstated. Australians and our political leaders overwhelmingly want a local, value-adding food and grocery manufacturing sector.

Data source: AFGC and EY State of the Industry 2015: Essential Information: Facts and Figures

[1] OVERVIEW

The AFGC provides this submission in response to the March 2016 Issues Paper released as part of the review of the Australian Consumer Law (ACL).

The AFGC supports the ACL as an important measure to protect consumers against conduct that is false, misleading or deceptive, to ensure the contractual rights of consumers meet minimum standards and to provide consumers with remedies and redress in the event that products fails to meet community minimums for safety.

This submission does not address all the questions raised in the Issues paper, but rather focuses attention on the practical issues that affect food and grocery manufacturers and brand owners operating under the ACL.

[2] SUPPORT FOR THE ACL

The AFGC, as noted above, considers the ACL to be fit for purpose and achieving its intended purposes. The introduction of the (then) Trade Practices Act in 1974 has proven to be a landmark in consumer protection which, in its evolution into the ACL, has stood the test of time. The later introduction of product liability and safety standards expanded the scope of the ACL to cover the broad range of issues where regulatory intervention is necessary to protect consumers.

That said, at the same time there has burgeoned a plethora of product specific regulation in areas such a food standards, cosmetics, personal car and over-the-counter pharmaceuticals. In some cases this regulation duplicates or refines the operation of the ACL, in other cases may contradict the ACL with consequent jurisdictional problems. An emphasised in the recent Competition Policy Review, this burgeoning product regulation developed without regard to the coverage of the ACL represents a significant drag on innovation and competition, against the long term interests of consumers.

[3] A GENERAL REQUIREMENT FOR SAFETY

An issue canvassed in the Issues Paper, and commented publicly by Australian Competition and Consumer Commission chairperson Rod Simms, is whether the safety provisions in the ACL are providing adequate protection to consumers, or whether there should be a general provision requiring products to be safe, somewhat akin to the general requirement in s.18 of the ACL requiring conduct to not be misleading or deceptive.

The AFGC agrees that consumer safety is a key issue for governments, regulators and indeed the industry itself. However, the AFGC questions whether, in the ACL's product liability regime, Australia does not already have a general requirement for safety. This product liability regime provides compensation for loss or damage due to defects in a product (including informational defects in labelling and warnings), with a very limited and constrained range of defences. "Defect' is defined in terms of not providing the degree of safety that persons generally are entitled to expect, taking into account a non-exclusive list of factors.

Now it is true that the liability regime is not cast in the same fashion as, say, s.18, but in the AFGC's submission its effect is greatly the same. Section 18 states that you must only engage in conduct that is accurate and truthful, and there are consequences if you do not. The product liability regime provides that you must only market products that have the degree of safety that the community expects, and there are consequences if you do not.

It must also be recognised that the ACL is not the only source of product safety regulation. As noted previously, the regulation of foods, therapeutic goods and industrial chemicals is voluminous and growing, and there is a real sense of pre-emption that food safety, for example, is a matter to be regulated specifically by food regulation and not generally in the ACL. Criminal sanctions with significant penalties exist in food legislation, for example, should a company place onto the market a food that causes illness, injury or death to a consumer.

On this basis the AFGC considers Australia's product safety regime is already fit for purpose when taken in its entirety, and is concerned that a focus on the ACL alone misses the bigger picture of safety regulation that exists. It is not convinced that a general requirement for safety in the ACL has merit in the absence of compelling evidence to the contrary.

[4] NON-REGULATED POLICIES

[4.1] THE ISSUE

While the AFGC supports the ACL, there are some issues relating to its application and enforcement that the AFGC considers could and should be addressed in the ACL Review.

[4.2] SECTION 218 UNDERTAKINGS

The AFGC supports the range of tools available to enforcement bodies under the ACL, including the ability to allow entities to enter into undertakings as an alternative to taking a matter to litigation. There are genuine cases where a contravention of the ACL may be unintentional or an alleged contravention being a 50/50 call, and in such cases a company may well be happy to desist in the conduct impugned. It is right that not every case needs to be taken to litigation and judgement, and it is also right that the decision as to whether or not to pursue litigation or accept an undertaking lies with the regulator and can be assessed in the light of all the circumstances.

The AFGC's concern lies where the enforcement policy of regulators demands that companies in effect admit to a contravention of the ACL as a condition of qualifying for an 'undertaking' process rather than a litigious process. Given the desire of a business to address the issue and move on, this requirement can lead to false admissions of a contravention. As notifications are made public, such 'false admissions' may tend to convey a false or misleading impression as to the state of legal interpretation, replacing judicial pronouncement with a series of examples of the law as interpreted by the regulator. A statutory statement to the effect that an undertaking need not involve an

admission of contravention is all that is required to remedy this situation. Regulators remain at liberty to state in their public notices why they consider a contravention to have occurred – indeed such an indication is useful to industry to illustrate the state of regulatory thinking on issues that might otherwise remain unclear – but there should be no compulsion on the entity offering the undertaking to admit ti a contravention.

[4.3] 'FREE' CLAIMS

The AFGC is concerned at regulatory approaches to 'free' content claims in relation to food and grocery products. These can be food nutrient claims such a 'sugar free', cosmetic claims such as 'paraben free' and so on. The regulatory approach appears to be that such claims are false and misleading if the product has any detectable amount of the substances declared as being 'free'.

While simplistically attractive as an approach ('free' means free), the technical reality is that a regulatory level of 'nil detected' is a moveable standard dependent upon technical advances in detection methodology. As detection science improves, so does the claim threshold. The difficulty is that at some point almost any chemical will be detected as being present at microscopic amounts, and so the regulatory approach has only one end point – the eventual elimination of 'free' claims. The AFGC does not consider this to be in the interests of consumers, not does it align with international practice.

The approach also suffers from an incongruity with the judicial approach to the question of misleading representations, which is in fact to disregard technical interpretations and instead consider the effect of the representation on the range of people in the target audience. The current regulatory approach, seeking to detect even small amounts of chemical, would seem to be overly technical and not entirely connected with consumer understanding. A claim as to 'sugar free', for example, should not in the AFGC's view be understood in technical terms of no detectable sugar at any level, but should consider what consumers expect from a product described in such terms – for example that sugar is not an ingredient of the food and any sugar present (eg as a component in a food additive) should be residual in nature only, and contribute practically nothing in terms of energy and sweetness.

The AFGC notes that the issue has been resolved internationally through the promulgation of specific criteria for 'free claims' – for example, the international standards agency Codex Alimentarius (a joint United Nations WHO/FAO agency) has Guidelines for Use of Nutrition and Health Claims (CAC/GL 23-1997) which allow sugar free claims to be made where the food contains not more than 0.5g/100g sugars (0.5g/100mL for liquids). This is a level assessed by the international community as being of negligible dietary impact.

Whether or not the ACL is amended to reflect international standards, the key point in the AFGC's consideration is that a less technical, more consumer-facing approach to 'free' claims is required. The current technical approach creates issues when importing products (labels need to be changed if 'free claims' are made, notwithstanding such claims being accepted in developed overseas markets) and impedes the flow of

information to consumers who are unlikely to be in a position to assess the science of chemical detection methods.

[4.4] MANDATORY SAFETY REPORTING

The Australian Consumer Law requires mandatory reporting by manufacturers, wholesalers and retailers to the ACCC within 48 hours of them becoming aware of a report of a safety incident involving goods.

The notification requirement imposes a significant burden due to the reporting trigger of "becoming aware", the reporting threshold of "serious illness or injury" and the short time frame of 48 hours. This means that reports are often required based on mere allegations of harm, with only the most basic fact checking investigation by the manufacturer and usually well before any conclusions of causation can be determined. Further, reporting in practice is triggered by the mere act of the consumer seeking medical advice, because companies are not privy to the details of any ensuing medical treatment.

A three year review of mandatory reporting in relation to food showed that –

- Food Standards Australia New Zealand received 2887 food-related mandatory report referrals from the ACCC. This figure represents approximately 46% of all mandatory reports (food and non-food) received by the ACCC.
- A 2012 AFGC study of 457 food-related "incidents" showed that 75% were actually false (in the sense that the product was unrelated to the alleged harm), only 17 (4%) were actively followed up by the ACCC but satisfactorily resolved by the manufacturer.
- None resulted in a mandatory product recall.

The AFGC is further disenchanted with mandatory reporting from its knowledge of an example where a food-related fatality (allergen related anaphylaxis) was never reported to the ACCC because no entity in the product's supply chain was ever made aware of the incident.

Manufacturers take their safety responsibilities seriously, and are highly responsive to consumer complaints: commercial factors ensure this. Mandatory reporting does not prevent harm, it is simply an expensive and burdensome system to report allegations of harm that in the vast majority of cases have proven to be unsubstantiated. The system needs to be better targeted if it is to serve its intended function as a touchstone for emerging safety issues.

To achieve this, the threshold for reporting should in the AFGC's view be changed to hospital admission or death. This would 'declutter' the system and allow for attention to be focussed on serious safety issues. The time for reporting should be further extended to at least 15 days – in both respects aligning with the requirements for adverse event notifications for therapeutic goods. It seems incongruous that, under the present arrangements, reporting is more burdensome for a bagel than it is for a medicine.

[5] NOT SO SAFE HARBOURS

The ACL includes prohibitions against false, misleading or deceptive representations as to place of origin.

Part 5-3 of the ACL then sets out the so-called safe harbours, providing that representations that meet specified criteria are deemed not to contravene sections 18, 29(1)(a) or (k) or 151(1)(a) or (k) of the ACL.

A problem that has been identified to Government a number of times since the safe harbours were enacted is that the protection afforded by these safe harbours is less than complete. In particular, section 33 of the ACL provides –

> **33 Misleading conduct as to the nature etc. of goods**
>
> *A person must not, in trade or commerce, engage in conduct that is liable to mislead the public as to the **nature**, the manufacturing process, the **characteristics**, the suitability for their purpose or the quantity of any goods.* (emphasis added)

Section 155 of the ACL establishes a criminal offence in the same terms.

It seems unlikely that the ACCC or any other enforcement agency would seek to use s.33 or s.155 in relation to an origin representation that fell within the terms of a safe harbour, the ACL provides civil rights of action which allows any affected person to institute proceedings. If the safe harbours are to truly fulfil their intention, the language of deemed compliance must be extended to cover all aspects of sections 29 and 151, as well as section 33 and 155. Only then will the harbours be truly safe.

[6] COSMETICS, PERSONAL CARE AND HOUSEHOLD PRODUCT REGULATION

The AFGC is concerned at the range of regulatory interventions governing cosmetics, personal care and household products, leading to conflicting polices and siloed regulations that bear no reference to other measures. This has led to bizarre outcomes, for example that sunscreens may be regulated by the Therapeutic Goods Authority (TGA) or the National Industrial Chemicals Notification and Assessment Scheme (NICNAS) depending on the size of the package in which the product is sold. Tampons are regulated as therapeutic goods, sanitary pads are not. The individual ingredients in a cosmetic are controlled by NICNAS, but cosmetics labelling is mandated by an ACL Information Standard.

This regulatory mishmash, as identified in the recent Competition Policy Review, is not in the long term interests of consumers: it impedes innovation, creates artificial barriers to market entry and competition, and increases the costs of doing business in Australia.

The AFGC considers that the ACL Review should seriously consider the potential for product regulatory regimes in areas, such as cosmetics, that are not directly addressed

elsewhere by a consistent regulatory measure. This goes somewhat against the received wisdom that the ACL applies generally to all products, but this has never really been the case – the ACL has intervened with product specific standards, including for cosmetics, and in other areas ranging from children's nightwear to bicycles. The possibility for specific safety and information standards is clear, and may be the best way of resolving the issues created by the current siloed arrangements.

[7] SUMMARY

The AFGC welcomes the ACL Review and considers that, in its five years of operation, the ACL has proven itself fit for purpose. While there are a number of technical and policy issues on which the AFGC has commented above, these can be addressed by relatively minor tweaks rather than fundamental reform. The AFGC does not consider that any case for more fundamental reform has been established in those areas upon which it has commented.

The AFGC appreciates that consumer law faces uncertainties through technological disruption and the ability of consumers to directly engage in global market - the old warning of 'caveat emptor' may be returning as a consequence. That said, consumers are more informed, and have access to more product information, than ever before. Such issues, however interesting, should not detract from the need to make sure the ACL functions as an effective market tool to protect consumers in the Australian marketplace. The AFGC's submissions are intended to facilitate this outcome.