AUSTRALIAN FOOD & GROCERY COUNCIL

AFGC SUBMISSION

AUSTRALIAN CONSUMER LAW REVIEW INTERIM REPORT

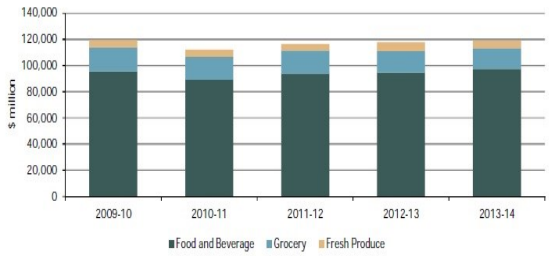
Sustaining Australia

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] SUMMARY

The AFGC provides this submission in response to *Australian Consumer Law Review Interim Report* of October 2016. The AFGC has previously commented on the Australian Consumer Law (ACL) Review *Issues Paper* of 31 March 2016.

The AFGC notes that its previous submission is referenced in the *Interim Report's* discussion of the issues where relevant, and in this submission will therefore focus only on the two issues where the Interim Report does not seem to have captured the details of the AFGC's concerns –

- the need for a general requirement for safety; and
- the need to better target mandatory reporting.

In each instance, the AFGC appreciates, and in most cases supports, the policy intent of the proposals. Consumer safety, whether as a general principle or when considering specific measures, is paramount to the fast moving consumer goods (FMCG) sector, and none are more aware than the FMCG sector of the business disincentives that arise where trading terms are not equitable.

The AFGC's concerns are rather directed to the proposed regulatory interventions in the ACL, and in particular the potential for unexpected and perverse outcomes. The *Interim Report's* analysis does not address the potential for such outcomes, which in the AFGC's consideration is an essential part of proper policy development.

[2] SPECIFIC COMMENTS

[2.1] A GENERAL REQUIREMENT FOR SAFETY

Section 2.2.3 of the Interim Report canvasses the concept of a general requirement for safety. This section includes statements such as –

> *Many consumers assume (incorrectly that Australia's product liability laws impose a clear obligation on suppliers not to supply unsafe products, and that because a product is offered for sale in Australia it has met minimum safety standards. These consumers are often surprised to learn that not all products are inspected and tested before being available for sale in Australia.*

The *Interim Report* cites no evidence to support such assertions, but the AFGC is greatly concerned at any suggestion that consumer misunderstanding is sufficient policy justification for regulation – such a position that is untenable under both Commonwealth and COAG regulatory policy.

As indicated in the AFGC's submission to the *Issues Paper*, a legislated general requirement for safety needs to be more than wishful thinking. The must be an identified problem (beyond consumer misunderstanding) which a regulatory intervention can solve, and this is where, in the AFGC's view, insufficient policy analysis has been undertaken. As the AFGC previously noted, and as reflected in the *Interim Report*, the ACL already has a proactive system for safety regulation through Ministerial order and a reactive system of compensation for death, injury or damage resulting from unsafe products ('defective' according to the ACL product liability scheme arises where a product does not have the degree of ***safety*** that persons generally are entitled to expect). With such schemes in places, in addition to contract and tort law remedies, is not clear what problem a general safety requirement is intended to solve, nor what evidence exists to demonstrate how a general safety requirement would be a solution.

The AFGC second concern in relation to the proposal is its potential for perverse outcomes. The problem with a general requirement for safety is that it can act as a disincentive to address safety and instead rely on insurance. Such behaviour arises where a manufacturer or seller believes that they will be judged with "20/20 hindsight" and that, as no safety measures can ever be fully effective at all times and in every instance, it is not worth trying to achieve an unrealistic end. To counter this, any general requirement would need to be qualified, for example by reference to the state of scientific knowledge, and limited by language such as 'the degree of safety to which persons generally are entitled to expect' – and with such considerations you are back to existing ACL product liability provisions.

The AFGC recommends instead that attention be given to international safety tools such as hazard assessment (critical control point) or HA(CCP). This requires manufacturers to systematically identify potential hazards, identify points in the manufacturing process where the hazard can be minimised (a 'control point') and then implement manufacturing protocols to maximise safety. HA(CCP) also can include record keeping to demonstrate the functional operation of control point measures, and third part auditing to review the hazard assessment and control point identification process and to verify the correct operation of the control measures during manufacture.

ANZ Food Standard 3.2.1 (https://www.legislation.gov.au/Details/F2011C00551) makes a HA(CCP) type food safety plan a mandatory requirement for operating a food business in Australia. This is further reflected in State and Territory Food Acts, which provides an 'all reasonable precautions and all due diligence' defence where the food operation was undertaken in accordance with a food safety plan – see NSW Food Act s.26(4)-

> *(4) Without limiting the ways in which a person may satisfy the requirements of subsection (1) or (2) (b) (i), a person may satisfy those requirements by proving that:*
>
> > *(a) in the case of an offence relating to a food business for which a food safety program is required to be prepared in accordance with the regulations, the person complied with a food safety program for the food business that complies with the requirements of the regulations, or*
> >
> > *(b) in any other case, the person complied with a scheme (for example, a quality assurance program or an industry code of practice) that was:*

(i) designed to manage food safety hazards and based on Australian national or international standards, codes or guidelines designed for that purpose, and

(ii) documented in some manner.

The AFGC recommends that similar regulated reliance on more formal risk assessment and risk management tools such as HA(CCP) would be a more constructive, and more effective, measure at improving the safety of products on the Australian market than a wishful statement about general safety.

[2.2] MANDATORY REPORTING

The AFGC notes with some concern the following comments attributed to CAANZ in Section 2.2.10 of the Interim Report in relation to the definition of 'serious injury or illness'.

"CAANZ notes that the definition of 'serious injury or illness was inserted into the ACL in order to capture all serious injuries and illnesses regardless of where treatment was received. Accordingly, a narrower test of 'hospital admission' may not capture all relevant injuries and illnesses to which a reporting requirement should attach."

The AFGC submissions, and those of others to the same effect, are not concerned with the place of treatment so much as the seriousness of the injury or illness. The problem with CAANZ has failed to address is that there are many serious incidents that are NOT being captured by the existing system, which instead is being so swamped with noise that it cannot act effectively. The example at the end of 2015 should be taken seriously by CAANZ, where a teenager was admitted to hospital suffering anaphylaxis due to ingestion of an undeclared dairy ingredient in coconut water, and subsequently died. This incident was never reported under the ACL scheme because no-one in the supply chain was notified, nor was it notified to health agencies because anaphylaxis is not reportable. It took many weeks for the matter to come to the attention of food regulators and for the product recalled, and it transpired that there were many other coconut water products on the market with undeclared milk protein. Vulnerable milk allergic consumers were at risk of a severe, potentially fatal reaction during this period. The ACL mandatory reporting system was an abject failure in this instance and the various stakeholder submissions deserve greater respect that the somewhat dismissive remarks cited above.

"CAANZ also notes that to provide the information currently required for a mandatory report, a medical practitioner would need to draw detailed conclusions about the –

- *identity of the product*
- *quantity of products in circulation*
- *circumstances of the death, injury or illness*
- *steps taken to address safety risks."*

The AFGC submission is not that doctors make the full report, but that hospital admission be the threshold for company reporting. That said, the AFGC certainly agrees there is a role for medical practitioner reporting which could then trigger notification to, and report

by, the relevant company. In the coconut allergy incident discussed above, it is salutary that medical staff and other attempted to make a report but were advised they could not do so unless they were manufacturers or suppliers of the goods in question.

"CAANZ notes that regulators already receive valuable safety information from the health system which is complemented by intelligence sourced from mandatory reports. To maximise the quality of information received from the health system, regulators should continue efforts to strengthen their relationships with hospital and medical clinics."

The AFGC does not consider that mandatory report data can be legitimately viewed as being meaningful as the nature, or even existence of, a safety incident due to the nature of the trigger threshold and the short time for submission. The AFGC endorses the need for ongoing close ties between regulators and medical facilities, but this need itself highlights the failures of mandatory reporting which is not, and by its nature cannot, provide a meaningful picture of emerging safety concerns.

The AFGC reiterates that the mandatory safety reporting system is broken and requires significant reform, as stated by AFGC and many others in response to the Issues Paper. Rather than dismissing these concerns, CAANZ should recognise that the existing mechanism is not achieving its intended outcome and engage with stakeholders to achieve substantive reform.