

## COVER SHEET FOR SUBMISSIONS

### REVIEW OF FOOD LABELLING LAW AND POLICY

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13 May 2010

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Food Labelling Review Secretariat  
Department of Health and Ageing  
MDP 138  
GPO Box 9848  
CANBERRA ACT 2601

Dear Sir/Madam

### **Food Labelling Review**

The Animal Law Committee of the Law Society of South Australia (the **ALC**) would like to thank the Review Committee for the opportunity to comment on the Food Labelling Law and Policy Review (the **Review**).

The ALC makes this submission on the assumption that the Review Committee will be provided with evidence-based information from groups such as the RSPCA, Humane Society International, Animals Australia, and State based Animal Liberation organisations regarding the confusing and misleading labelling currently being utilised on animal derived food products and as such, will avoid replicating such information.

The ALC submits that decisive action must be taken to ensure that where a consumer wishes to purchase animal derived food products from producers using more humane methods, they can do so with confidence. The ALC also submits that the presence of animal derived ingredients in food products should be clearly indicated on the label to enable consumers to make an informed choice about whether they wish to purchase that particular product.

The ALC submits that the most effective way to facilitate these objectives is to create legally enforceable definitions for the production methods used in animal-derived food products (**Defined Terms**). These Defined Terms should be made to apply nationally with accompanying obligations with respect to how the terms are used in food labelling. The ALC has outlined three ways in which these measures could be implemented. Ultimately, the ALC recommends that a scheme which consists of both reactive and proactive obligations with respect to the use of the Defined Terms represents the most effective option for achieving our policy objectives.

## Summary of recommendations

The ALC recommends:

1. That terms used to either:
  - a. Refer to the absence of certain animal derived ingredients in the product (for example “vegan”, “vegetarian”, “lacto-ovo vegetarian”, etc); or
  - b. Refer to the method of production of any animal-derived food product relevant to animal welfare (for example “free range”, “barn laid”, etc)  
be legally defined in the Food Standards Code.
  
2. That use of Defined Terms be accompanied by:
  - a. Reactive labelling obligations which require compliance with the Defined Terms producers choose to use on their product labels;
  - b. Proactive labelling obligations which require the use of certain Defined Terms in labelling of products derived from particular methods of production (for example “caged eggs”, “sow stall pork” or “intensive pork”); and
  - c. A prohibition on the use of any logos or pictures which may be inconsistent with the Defined Terms used on the relevant label.
  
3. The establishment of mandatory labelling requirements for animal derived products or additives either:
  - a. Present in a food product regardless of quantity; or
  - b. Used in the manufacture of a food product, regardless of whether the ingredient or additive is present in the final product.

## Policy objectives

It is currently very easy for producers to mislead consumers through the use of ambiguous and confusing labels such as “free range”, “grass fed”, “grain fed” and so on. Often these labels mean nothing except a higher price and provision of some sense of comfort to the consumer who believes they are making a healthier choice for their family and assisting in the goals of animal welfare by supporting the humane treatment of farm animals.

The lack of a clear definition for terms such as ‘free range’ also results in confusion about what the term actually means to the producer and consumer alike. Each individual consumer is likely to have their own understanding of the terms used on food labels. In the absence of a commonly agreed definition for terms such as ‘free range’, it can be difficult, if not impossible, to prove that a particular label is misleading or likely to mislead consumers.

A further concern for consumers is that current laws allow producers to disguise animal derived products in code numbers and technical names. Although the most scrupulous and passionate consumers will take the time to research the meaning of “Enzyme 1104”, an enzyme derived from “bovine stomach; salivary glands or forestomach of calf, kid or lamb; porcine or bovine pancreas”,<sup>1</sup> the majority will remain unaware.

In addition, one of the main purposes of food labels is to inform consumers of the ingredients in the product. A label which requires a consumer to perform exhaustive additional research can defeat the very purpose of a food labelling regime. The ALC believes that information about food additives and code numbers is only accessible to consumers who have a reasonable standard of literacy and a good command of the English language. A consumer with poor literacy or English language skills will probably find it difficult to find clear and precise information about food additives. In an increasingly time poor society, this enables producers to list less than the whole truth on their packaging and potentially fool a well meaning but busy customer into a purchase they did not in fact intend to make.

Further, the current food standards do not require ingredients used in the process of manufacturing a food product to be listed on packaging if that ingredient is not present in the final product. For example,

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<sup>1</sup> Vegetarian Action, nd, “Common animal-derived additives”, online, available 16<sup>th</sup> June 2008, URL: <http://www.vegetarianaction.org.au/Living/VLAdditives.htm#Label>.

isinglass, a protein derived from the swimbladder of fish and used in the production of most Australian beers, need not be listed on packaging per the Australia New Zealand Food Standards Code, Standard 1.2.4.3 (b). This information would be of high interest to many consumers but, as with numerated and encrypted ingredients, it would only be known to the most inquisitive and astute of them.

In order to purchase what they want, Australian consumers need clear and complete product information. Product packaging may not allow sufficient room for the full title and explanation of each ingredient but with the use of Defined Terms, a product can be easily identified as “vegetarian” or “vegan”.

The objectives of the Food Standards Australia and New Zealand Act 1991 include:-

- the provision of adequate information relating to food to enable consumers to make informed choices; and
- the prevention of misleading or deceptive conduct.

Regulation of method of production and animal derived ingredient labelling is clearly within the scope of the Review. In fact, the ALC submits that upon receiving the evidence of current misleading production method labelling, the Review Committee has a positive obligation to make recommendations to address and deter such behaviour. Further, the structures required to regulate production method food labelling already exist in relation to Genetically Modified foods, Country of Origin and ingredient information.

Whilst not claiming to be market experts, the ALC would also like to briefly address the positive contributions that such measures will make to the proper functioning of the Australian food market in general. Facilitating and promoting greater and more accurate information exchange between producer and consumer enhances ‘allocative efficiency’ in the market. Without effective information exchange it is more difficult for consumers to give effect to their willingness to pay more for humanely produced foods, and some unscrupulous producers may seek to take advantage of this through misleading labels. This type of imperfect information between producer and consumer leads to the misallocation of resources whereby producers are paid for goods that they are not actually providing (i.e. producer receives the price of non-caged eggs for the production of caged eggs). Ultimately this results in allocative inefficiencies which can be a cause of market failure. It is therefore submitted that the Government has a responsibility

to intervene in the market through the implementation of the recommended Defined Terms to ensure the market is capable of responding appropriately to consumer demands.

## **Options for Implementation**

In order for the Defined Terms to apply to food labelling at a national level it is recommended that the Defined Terms be enacted through amendments to the Food Standards Code. This is recommended regardless of whether the labelling scheme is to be voluntary or mandatory. Amendments at a State level through State and Territory Food Acts or Fair Trading Acts would be cumbersome and may result in legislative inconsistencies.

A complex mesh of State based regimes may also lead to unnecessary compliance costs for producers who sell products in more than one State which would defeat one of the key purposes behind Government food labelling interventions which is to “provide a fair playing field to competitors in the food industry”.<sup>2</sup> It is also likely that each State and Territory will have to expend significant resources to ensure compliance with their respective State based schemes. It is far more efficient and cost effective for one national compliance scheme to be implemented and administered.

The Defined Terms should be developed through a consultative process between producers, retailers, consumer groups and animal protection representatives. To enhance national consistency and clarity it would be preferable if the Defined Terms were consistent with the description given to methods of production outlined in the national Animal Welfare Standards and Guidelines. The Defined Terms could then be incorporated in to the appropriate Food Standards, which would most likely be 2.2.1 Meat and Meat Products and 2.2.2 Egg and Egg Products.

It should be noted that while implementation of Defined Terms is desirable, this measure will not address the issue of misleading or deceptive logos and pictures which could serve to defeat the desired objectives of including Defined Terms on labels for animal-derived food products. For example, the desired objectives of communicating to a consumer that eggs have come from a battery cage facility through use of the term

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<sup>2</sup> Issues Consultation Paper: Food Labelling Law and Policy Review, 5 March 2010, pg 2.

“caged eggs”, may be totally defeated if the carton of eggs also includes a picture of a chicken standing in a grassy paddock.

While the existing misleading and deceptive conduct provisions of consumer protection laws such as the Commonwealth Trade Practices Act and State and Territory Fair Trading Act equivalents (**Consumer Protection Laws**) may be utilised to address the use of misleading pictures and logos, there are many difficulties associated with establishing these offences.

It is therefore suggested that the Defined Terms be accompanied by obligations with respect to labelling. The ALC has outlined three broad categories of such obligations and recommends that the third category represents the most effective for achieving the policy objectives of this submission.

#### **1. *Defined Terms with no accompanying labelling obligations***

This option would consist of implementing the Defined Terms in the Food Standards Code but without any accompanying obligations with respect to labelling. This option could be considered a ‘voluntary’ labelling scheme.

While it will be desirable to have Defined Terms in the Food Standards Code, without any attached obligations with respect to using the Defined Terms in labelling, producers may still be able to use the Defined Terms even if the production methods used to produce the food product do not accurately match those outlined in the relevant Defined Term. In such cases, a complainant would have to rely on Consumer Protection Laws. However, a breach of a Defined Term may not necessarily constitute misleading or deceptive conduct for the purposes of establishing a claim under Consumer Protection Laws. This issue was identified by Review Panelist Dr Chris Reynolds.<sup>3</sup>

It is for this reason that it would be desirable to create obligations which attach to the use of Defined Terms in labelling within the Food Standards Code so that a complainant would not have to rely solely on misleading and deceptive conduct claims which are difficult to establish.

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<sup>3</sup> Food Labelling Law and Policy Review public submissions, Adelaide, 23 April 2010.

## ***2. Defined Terms accompanied by 'reactive' labelling obligations***

This option would provide for an obligation within the Food Standards Code that requires producers to ensure that their production methods meet the descriptions of those outlined in the Defined Terms they choose to include on their product labels. This requirement has been described as 'reactive' in nature as it will only apply if the producer *chooses* to use one of the specified Defined Terms to advertise the food product (for instance "free range", "barn laid" etc).

The effect of such an obligation is that if a producer includes a Defined Term on a label of a food product that has not been produced in accordance with the production methods as prescribed in the Defined Term it will constitute a breach of the Food Standards Code and nothing further will be required to prove the offence. A complainant would not have to rely on misleading and deceptive conduct offences in Consumer Protection Laws to hold the producer accountable. However, if the breach of the Defined Terms was very serious, the misleading and deceptive conduct provisions could still be utilised in addition to offences under the Food Standards Code.

As noted above, the Defined Terms will not cover the use of misleading pictures or logos. As such, it is also recommended that in conjunction with the Defined Terms and accompanying reactive obligations, a prohibition on the use of pictures or logos that are inconsistent with the production methods outlined in the relevant Defined Term be included. For instance, a picture of a chicken in a grassy paddock could not be used on a carton of eggs using the Defined Term "barn laid".

## ***3. Defined Terms accompanied by 'proactive' labelling obligations***

This option would place a proactive or positive obligation on producers to display certain Defined Terms for particular methods of production. Such an obligation would be intended to apply to the more controversial methods of production such as the use of "battery cages" or "sow stalls" and could be used in conjunction with the 'reactive' obligations as outlined above. This option would be considered a 'mandatory' labelling scheme.

Traditionally, Governments have been reluctant to intervene through the enactment of mandatory labelling requirements that are not for health and safety objectives, preferring instead to defer to voluntary schemes in which the “market is left to decide.” However, a mandatory labelling scheme for animal-derived food products would not present significant issues of competing interests. The Review Issues Consultation Paper identified four competing interests that the Review Panel would have to balance in determining whether to recommend a particular labelling measure:

“The crux of this Review will be to address the tensions between fair and competitive trade in the market, the minimisation of the regulatory burden for business, the securing of government objectives in food labelling and the needs of consumers in order to make informed choices.”<sup>4</sup>

A mandatory labelling scheme would facilitate fair and competitive trade in the market and meet the needs of consumers in making informed choices with only a slight increase in regulatory burden for business. Producers would simply have to determine what labelling requirements apply to their methods of production and amend their labels accordingly, if amendments were in fact required. There would be no requirement to change their actual methods of production. Any change in methods of production would be at the volition of the producer. Therefore, based on the competing interests identified by the Issues Consultation Paper, mandatory labelling requirements should be seen as a desirable option.

The ALC recommends that a mandatory labelling scheme be enforced by the creation of a series of strict liability offences for non compliance with the scheme. A strict liability offence would not require any evidence of the producer’s intention to mislead or deceive the consumer and it would place the onus on the producer to ensure that their food labels comply with the requisite labelling laws. Penalties for offences can range from an administrative penalty for minor infractions (such as an ‘on the spot’ fine with an option for judicial review) to significant fines imposed by a judicial officer for major breaches. The use of administrative penalties reduces the cost of enforcement by allowing the authorities to impose immediate penalties without commencing a prosecution. It is also an advantage to the producers who can avoid the costs of defending a prosecution by paying the fine and make the necessary changes to ensure that they comply with the scheme.

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<sup>4</sup> Issues Consultation Paper, page 2.

The ALC also submits that such a labelling scheme would not be considered a potential barrier to trade under World Trade Organisation (WTO) rules. There are a number of grounds that provide legal justification for such labelling schemes. The Voiceless publication *From Label to Liable*<sup>5</sup> provides a succinct summary of these grounds:

- Article XX of the General Agreement on Tariffs and Trade (GATT) which allows for deviation from WTO rules for the purposes of protecting public morals or animal health;
- The WTO's Agreement on Technical Barriers to Trade, which provides that discrimination between imported products may be allowed, where they fulfil a country's legitimate environmental or animal health and safety objectives; or
- The Agreement on the Application of Sanitary and Phytosanitary Measures, if the measure can be shown to be based on international standards, not disproportionately discriminatory to international trade, based on scientific justification and necessary for the protection of animal or human health.

The fact that there has never been a challenge to a country's mandatory labelling scheme at the WTO is probably a reflection of the strength of these justifications.<sup>6</sup> As such, any reliance by Government on concerns over WTO rules for justifying a decision to reject such a mandatory labelling scheme will not be accepted as constituting a legitimate justification by the ALC.

It is also worth noting that the Food Standards Code has already enacted a mandatory non health and safety labelling requirement. The 'Country of Origin' labelling requirement was introduced in 2005 due to strong consumer demand that Australian-made products be easier to identify. Upon considering the competing interests identified in the Issues Consultation Paper there does not appear to be any greater justification for mandatory labelling with respect to Country of Origin than there does for animal-derived food production methods.

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<sup>5</sup> Voiceless Report *From Label to Liable*, 2007, page 25-26. Available at [http://www.voiceless.org.au/The\\_Issues/Labelling/From\\_Label\\_to\\_Liable\\_Scams\\_Scandals\\_and\\_Secrecy.html](http://www.voiceless.org.au/The_Issues/Labelling/From_Label_to_Liable_Scams_Scandals_and_Secrecy.html)

<sup>6</sup> Dr Laura Nielsen of the University of Copenhagen Law School published an entire book on this subject in 2007: *The WTO, Animals and PPMs* [process and production methods] which outlines how countries can justify trade barriers on the basis of animal welfare concerns. See also D.J.F Eaton, J. Bourgeois and T.J Achterbosch, *Product Differentiation under the WTO: An Analysis of Labelling and Tariff Tax Measures Concerning Farm Animal Welfare* 2006.

It would also be desirable for this category of implementation to contain a prohibition on the use of pictures or logos that are inconsistent with the production methods outlined in the relevant Defined Term. For instance, a picture of a chicken in a grassy paddock could not be used on a carton of eggs that was required to be labelled with the Defined Term "caged eggs".

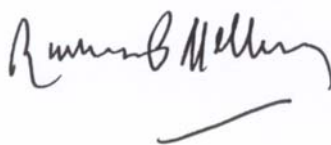
## Conclusion

On the assumption that the Review Committee has received a number of submissions based on the animal welfare and public health and safety arguments for reform in the food labelling law and policy area, the ALC suggests three options for implementing measures to effectively address issues for consumers with regards to products which have a high likelihood of causing confusion among consumers.

Of the three options presented in this submission, the ALC recommends that the most desirable and effective option is option 3, which involves introducing a mandatory labelling scheme for animal products, particularly meat and egg products, and animal derived food products.

The ALC would be pleased to consult further with the Review Committee as to any of the options presented in this submission, or any other aspect of the review with which the Review Committee may require assistance.

Yours sincerely

A handwritten signature in black ink, appearing to read "Richard Mellows", with a horizontal line underneath.

Richard Mellows  
**PRESIDENT**