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INDUSTRY NEWS

Food Law Update

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In this edition of *Food Law Update*, we update you on the ACCC's continued focus on misleading and deceptive claims in relation to food products as well as highlight some of the important changes happening to the Australian New Zealand Food Standards Code in 2016.

A reminder too that the transitional period for the new Nutrition, Health and Related Claims standard (Standard 1.2.7) ended on 16 January this year. From now on, manufacturers are not permitted to rely on the old health claims standard (Standard 1.1A.2). The only aspect of the new standard that does not yet apply is the section dealing with dietary fibre claims. For further information on the extension of the transitional period for dietary fibre claims see our article on page 4 of this publication.

We hope you enjoy this issue of *Food Law Update*.

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Recent fowl play in the egg industry – it's no yolk to the ACCC

What you need to know

- Throughout 2015, the ACCC has continued to crack down on the egg industry for anticompetitive conduct and alleged breaches of the Australian Consumer Law (**ACL**). In light of the regulator's recent increase of enforcement activity in the egg and poultry industry, in October 2015, the ACCC released enforcement guidelines, "Free Range Hen Egg Claims", (**Free Range Guidelines**) to assist egg producers in understanding their fair trading obligations when promoting or selling free range eggs.
- The release of the guidelines follows the ACCC's increased enforcement activities in the egg and poultry industry. In September 2015, the Federal Court ordered Darling Downs Fresh Eggs (**Darling Downs**) to pay $250,000 for breaching the ACL, for misleadingly representing that eggs produced by hens which were unable to move freely on an open range were "free range". The ACCC is also currently pursuing Federal Court proceedings against numerous egg producers including Snowdale Holdings Pty Ltd (**Snowdale**), Pirovic Enterprises Pty Ltd (**Pirovic**), Derodi Pty Ltd (**Derodi**), Holland Farms Pty Ltd (**Holland**).
- On 10 February 2016, the Federal Court held that the ACCC failed to establish that the Australian Egg Corporation (**AECL**), two egg producers and three executives attempted to induce egg producers to enter into a cartel arrangement to reduce egg production and limit egg availability for commercial and retail supply.

What you need to do

- Ensure that all claims regarding a product's standards or attributes can be substantiated and are accurate.
- Be cautious and seek advice before entering into discussions with competitors or industry members regarding coordinated conduct, fixed pricing structures, or agreements to control output or to limit the supply of goods or services.
- Take note of the ACCC's enforcement priorities:
  - Misleading conduct and anti-competitive behaviour in the egg and poultry industry has faced increased scrutiny by the regulator.
  - Detection and prevention of cartel conduct also remains a focus for the regulator, who will not overlook unsuccessful attempts to induce parties into anti-competitive arrangements.

No free reign on "free range" claims

According to the Free Range Guidelines, an egg producer will be taken as making a "free range" claim if they use the phrase "free range" (or equivalent phrases) on packaging or advertisements, or use pictures of hens ranging freely, including in grassy fields.

The ACCC considers that the concept of "free range" implies that most of a producer's hens can move around freely on an open range on most days. As consumers may be willing to pay a premium for eggs produced from hens which have this freedom, the ACCC has been focused on ensuring that egg producers making these claims can substantiate them.

The ACCC has recently pursued three cases involving egg producers making allegedly misleading "free range" claims in relation to their eggs.

In September 2015, the Federal Court held that R.L. Adams Pty Ltd (trading as Darling Downs), engaged in misleading and deceptive conduct, by labelling its "Mountain Range" label and products sold under the "Drakes Home Brand Free Range" brand as "free range", when in fact the eggs were produced by laying hens unable to move freely on an open range. R.L. Adams Pty Ltd was ordered to pay a pecuniary penalty of $250,000, publicise its infringements on its website and establish an ACL Compliance Program.

In December 2014, the ACCC also commenced Federal Court proceedings against Derodi and Holland alleging that their use of "free range" in relation to their "Ecoeggs", "Field Fresh" and "Port Stephens" egg brands was false and misleading. The ACCC claims that the eggs advertised under the "free range" label were produced by hens that were unable to move about freely on an open range on most days. This matter is set down for further directions before Justice Edelman in early March 2016.

The ACCC also instituted separate proceedings in December 2013 against Snowdale and Pirovic. The ACCC alleges that Snowdale and Pirovic supplied eggs from hens that were not able to move freely about in

an open range, but were labelled and advertised as "free range" products. This case was heard before Justice Siopis in April and May 2015; judgment is reserved.

These cases follow the ACCC's successful action against Baiada Poultry Pty Ltd and Bartter Enterprises Pty Ltd in 2013, who were ordered to pay $400,000 in civil pecuniary penalties for misleading "free to roam" claims in relation to poultry, and against Luv-a-Duck Pty Ltd in 2013, for their misleading use of "range reared and grain fed" for duck meat. These cases were discussed in detail in our December 2013 edition of *Food Law Update*.

Egging on cartel conduct

On 28 May 2014, the ACCC commenced proceedings in the Federal Court of Australia against the AECL, its managing director, Mr James Kellaway, two other AECL directors (Mr Jeffrey Ironside and Mr Zelko Lendich) and two egg producing companies owned by those two directors (Twelve Oaks Poultry and Farm Pride).

The AECL is an industry corporation that provides marketing, promotional and research services on behalf of members, principally egg producers. Based on the 2014/15 AECL annual report, the egg production market had a value of $1.836 billion in 2014/15.

The ACCC claimed that from November 2010, the AECL and other respondents, attempted to induce over 100 member egg producers to enter into arrangements to reduce the availability of eggs by culling hens or otherwise disposing of eggs. In February 2012, the AECL also held an "Egg Oversupply Crisis Meeting" in Sydney, where the AECL allegedly sought to encourage egg producers to implement a plan to reduce the supply of eggs in response to an apparent egg oversupply.

In *Australian Competition and Consumer Commission v Australian Egg Corporation Limited* [2016] FCA 69, the Federal Court dismissed the ACCC's claims against all respondents. Justice White considered that the ACCC's largely circumstantial case supported an inference that the respondents intended that egg producers should take action to address and correct the egg oversupply. However, the ACCC failed to establish that this conduct constituted an attempt to bring about an arrangement or understanding between egg producers to reduce the supply of eggs.

The ACCC is yet to announce whether it will appeal the decision.

ACCC focus on "fowl play"

These enforcement activities demonstrate the ACCC's zero tolerance for any "fowl play" which has the potential to mislead consumers or result in consumer harm. A number of the proceedings against egg producers arose from a large investigation the ACCC conducted in April 2013, where the ACCC requested numerous egg producers substantiate claims that their eggs were truly "free range".

The ACCC's action against the alleged egg cartel attempt also follows a series of recent successful prosecutions of cartel conduct and anti-competitive arrangements. In March 2014, the Federal Court ordered Flight Centre to pay $11 million in penalties for its attempts to induce airlines to enter into price-fixing arrangements on six occasions. Further, the air cargo cartel proceedings have resulted in around $85 million in penalties against local and internationally based airlines.

Until the respective judgments are delivered, watch this space to see which other companies have "egg on their face" for their free range claims!

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Manufacturers have more time to comply with new rules for dietary fibre claims

What you need to know

- The transitional period for the rules regarding the making of dietary fibre claims in the new Health Claims Standard will be extended until 17 January 2017 (12 months after the transitional period ended for the rest of the Standard).
- This extension does not apply to any other aspect of the new Health Claims Standard. Manufacturers must comply with all other aspects of that Standard on and from 16 January 2016.

What you need to do

- If you are a manufacturer and you need to update your product formulations or packaging to ensure compliance with the new health claims standard, you have extra time to do so in relation to dietary fibre claims.

As reported in the *May 2013 edition of Food Law Update*, Standard 1.2.7 – Nutrition, Health and Related Claims came into force on 16 January 2013. The transitional period (during which companies can comply with the old health claims standard (Standard 1.1A.2) or the new Standard 1.2.7) ended on 16 January 2016.

How are dietary fibre claims regulated under the new Standard?

Among other things, the new Standard regulates how dietary fibre content claims are made. Essentially, the new standard requires a serving of a food to contain at least 2 g of dietary fibre for a content claim about dietary fibre to be made (unless the claim is about low or reduced dietary fibre). It also states when the descriptors "good source", "excellent source" and "increased" can be used.

How did the extension of the transitional period for dietary fibre claims arise?

Following commencement of Standard 1.2.7, as a result of industry concern, Food Standard Australia New Zealand (**FSANZ**) agreed to review the qualifying criteria for nutrition content claims about dietary fibre. Industry members believed that the qualifying criteria were too onerous. After public consultation FSANZ decided to maintain the qualifying criteria for dietary fibre claims in Standard 1.2.7. Stakeholders were notified of this decision in December 2013.

During the period of review, some companies decided to not take any steps to address the changes required regarding dietary fibre to avoid wasting time and money should the qualifying criteria be changed. In effect, those manufacturers lost 11 months in which to prepare for the dietary fibre changes (from January 2013 when the new Standard came into force until December 2013 when FSANZ advised of its decision not to change the qualifying criteria).

As a result, the Australian Food and Grocery Council applied to FSANZ to extend the transition period for dietary fibre claims for one year until 17 January 2017 to allow for the fact that manufacturers lost 11 months of the three year transition period in which to prepare for the dietary fibre claim changes.

Following public consultation, FSANZ agreed to extend the transition period in relation to dietary fibre claims for 12 months until 17 January 2017. While there were not a huge number of submissions made, the majority supported the extension of the transition period. They argued that the further time was needed to reduce compliance costs including for anticipated product withdrawals and packaging write off. Those who opposed the extension argued that two years was sufficient time to make the necessary changes.

Following public consultation, FSANZ agreed to extend the transition period in relation to dietary fibre claims for 12 months until 17 January 2017.

What claims regarding dietary fibre can be made during the transitional period?

During the transitional period (which commenced on 18 January 2016), manufacturers can choose to either comply with the new Standard (the requirements for which are summarised above), or the requirements specified in the transitional standard (new transitional Standard 1.1A.8). That transitional standard mirrors the dietary fibre claims requirements that were in the old health claims standard. They are that a claim about the presence of dietary fibre using the descriptor "increased" or a similar word can only be made if the food contains 25% more dietary fibre than the same quantity of food being referenced.

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Frozen berries go viral – confirmed cases of hepatitis A spark push for labelling reform

What you need to know

- Confirmed cases of hepatitis A in Australia have been linked to ready-to-eat frozen berries imported from China.
- The outbreak led to a push for reform in Australia's country of origin labelling requirements.
- The outbreak has also led to increased testing of imported ready-to-eat frozen berries at Australia's borders.

Confirmed cases of hepatitis A across almost all of the States and Territories in Australia have been linked to packages of ready-to-eat frozen berries supplied by Patties Foods under the Nanna's and Creative Gourmet brands. The berries in question included raspberries and strawberries grown and packaged in a factory in northern China.

Product safety recalls were issued on 13 February and 15 February 2015 for four different products, being Nanna's Mixed Berries, Nanna's Raspberries and two Creative Gourmet Mixed Berries products. The outbreak has led to a push for reform of the country of origin labelling requirements in Australia.

Country of origin labelling

The Australia New Zealand Food Standards Code (**Food Standards Code**) is administered by the bi-government body, Food Standards Australia New Zealand (**FSANZ**). The Food Standards Code covers the requirements for food labelling, food additives, genetically modified foods and some aspects of food safety.

Under Standard 1.2.11 of the Food Standards Code, all packaged food sold in Australia must indicate a country of origin. The specific requirements for the different country of origin statements are set out in the Australian Consumer Law. Country of origin information is commonly indicated by statements such as "Product of…" and "Grown in…", which both mean that each ingredient or part originated in the country claimed and the production processes occurred in that country, and "Made in…", which means that the goods have undergone a "substantial transformation" in that country and at least50% of production costs were incurred in that country.

The hepatitis A outbreak has led to a political push for a change in food labelling. The Government announced a proposed new country of origin food labelling system on 21 July 2015. The new system requires the agreement of the States and Territories, which must then implement the necessary legislative changes. The Consultation Regulation Impact Statement (**RIS**), containing details of the proposed new system, was released on 4 December 2015, and was open for stakeholder submissions up until 29 January 2016.

The proposal divides food categories into "priority" and "non-priority" based on consumer preferences for more information about the country of origin.

"*Priority food*" includes fruit and vegetables, meat, fish, eggs, dairy products, fruit and vegetable juices and drinks, bread, edible oils, grains and jams.

"*Non-priority food*" includes seasonings, confectionery, biscuits and snack food, bottled water, soft drinks and sport drinks, and alcoholic beverages.

For "priority" foods, the proposed labels will have two new elements. First, the new proposed labels will include a green gold kangaroo in a triangle where the product is made in Australia or grown in Australia. Second, the new proposed labels will include a bar chart, which indicates the percentage of ingredients by weight which are Australian ingredients, rounded to the nearest 10% or 25%. The bar chart is also proposed to be included on foods packed in Australia.

Importantly, products which are only packed in Australia are not proposed to bear the green and gold kangaroo in a triangle symbol. All priority foods will also need to state the origin of the product, for example, "Packed in Australia, Made in Canada" or "Made in Canada from local and imported ingredients", in a clearly defined box. Country of origin information may also be contained in the barcodes of products and be readable by smartphones.

The previous labelling requirements for statements of "grown", "made" and "produced" are also subject to proposed changes, and will apply to both priority and non-priority foods. A food with multiple ingredients will only be considered "grown" in a country where each significant ingredient is grown in that country, and virtually all of the processing occurred in that same country. A similar test is implemented for "produced", with the addition that the significant ingredients may be wholly obtained within the country as well as grown. The 50% test for the current "made" claim will be removed under the proposal, and replaced with an amended "substantial transformation" test. Details of the amended test are yet to be finalised.

There are currently two transition periods for consideration included in the proposal, the first being a flat transition period of no more than 24 months, and the second a phased transition in line with the shelf life of food products. Currently, there will be no requirement to change labels on foods produced prior to the commencement of any amended standard.

Food safety

While the hepatitis A outbreak sparked the debate in relation to country of origin labelling, food safety is obviously a critical issue.

Currently, foods imported into Australia are subject to the Imported Food Inspection Scheme administered by the Department of Agriculture (**Department**) on the advice of FSANZ. All foods are subject to a visual assessment and a label assessment. Additional analytical testing takes place based on the risk level of the food, which FSANZ advises the Department on.

Surveillance foods

Surveillance foods are considered low-risk to human health. Five percent of imported surveillance foods are subject to analytical testing. Most imported fruit fall within the surveillance food category. The most common analytical tests applied to imported fruit are residue tests, for example, for traces of pesticides, and not microbiological tests.

Risk foods

Risk foods are considered high-risk to human health. One hundred percent of imported risk foods are subject to analytical testing.

On the advice of FSANZ, the Department now tests 100% of ready-to-eat frozen berries sourced from the factory in question in northern China, and has added ready-to-eat frozen berries imported from all other facilities to the list of surveillance foods. The analytical test applied to ready-to-eat frozen berries is for E.coli, a type of bacteria which can be an indicator of the hygiene of the conditions in which the food was prepared. It is not usual practice of the Department to test for the presence of viruses.

It remains to be seen if any legislative reform in relation to food safety and inspection of food at Australia's borders will arise from the hepatitis A outbreak.

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ACCC infringement notices – food claims a continuing focus

The ACCC has continued its focus on false and misleading claims by food manufacturers and has recently issued a number of infringement notices to manufacturers in the food industry. Two recent cases are discussed below.

- The ACCC issued infringement notices to Supabarn Supermarkets Pty Ltd and The Real Juice Company Pty Ltd about claims they made in relation to the composition of The Real Juice Company apple juice and cranberry juice products. In particular, the infringement notices related to false and misleading representations that the apple juice product was made fresh from apples grown in Australia when in fact it was made from reconstituted apple juice concentrate from China, and that the cranberry juice product had no added sugar, artificial flavours or preservatives when the product did in fact contain added sugar and other additives. Supabarn Supermarkets and The Real Juice Company each paid penalties of $20,400.
- The ACCC issued an infringement notice to Kallis Bros Pty Ltd in relation to the claims made on the packaging for its "Just Caught Prawn meat" product. The packaging of the product contained various images and statements included the words "Australian Caught Raw Prawns" and images of the Australian flag and a map of Australia. The ACCC considered that those various representations indicated that the prawns were caught and processed in Australia when in fact they were packed and processed in Thailand. Kallis Bros were required to pay a penalty of $10,800.

Removal of Country of Origin Labelling requirements from Food Standards Code

On 17 December 2015 Food Standards Australia New Zealand announced a proposal (P1041) to remove the Country of Origin Labelling requirements from the Australia New Zealand Food Standards Code.

Currently, country of origin claims for food are regulated both under the Food Standards Code and under the Australian Consumer Law. If the proposal is accepted, the regulation in the Food Standards Code will be removed and country of origin claims will be solely regulated under the Australian Consumer Law.

FSANZ released its Calls for Submissions document on 22 January. The deadline for providing comments on the proposal is 6pm, 4 March 2016.

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Organic certification in the shadow of Monsanto – GM farmers do not owe duty of care in mixed agricultural zones

Marsh v Baxter [2014] WASC 187

What you need to know

- Business models relying on continued organic certification will need to be aware of the crop types being planted in nearby or neighbouring agricultural zones.
- Court-awarded damages may not be available if GM seed is found within the boundaries of a previously certified paddock, leading to the loss of organic certification.

What you need to do

- While future statutory protections are possible, agriculturalists should consider other risk-mitigating strategies in the short- to mid-term to protect their business if organic certification is relied upon.

In February 2014, Justice Martin of the Supreme Court of Western Australia (**WASC**) handed down his judgment in *Marsh v Baxter*. The plaintiffs, Steve and Susan Marsh, two farmers from Kojonup in Western Australia, failed in their claim for damages and were denied a permanent injunction against a neighbouring farmer, the defendant, Michael Baxter. The Marshes are currently appealing the verdict before a three member panel of the Supreme Court. This case is of significant interest to pastoralists, graziers and other agriculturalists, as regards the use of genetically modified (**GM**) crops, the regulation of "organic" certification in Australia, and the duties owed by neighbouring farmers to one another.

Background

The Marshes ran a farm, ”Eagle Rest", and were approved growers of organic produce under a contract with the National Association of Sustainable Agriculture Australia (**NASAA**) and NASAA's subsidiary certifying organisation, NASAA Certified Organic Pty Ltd (**NCO**). Neighbouring Eagle Rest was Mr Baxter's farm, "Sevenoaks". Mr Baxter was a conventional farmer growing a variety of crops, including GM Canola. In 2010, it became lawful for farmers in Western Australia to grow GM canola, after the Agriculture Minister made an order under s6 of the *Genetically Modified Crops Free Areas Act* 2003 (WA) (**GMCFA Act**). Since 2010, Mr Baxter had used a variety of GM Canola known as Roundup Ready, which had the property of being immune to a herbicide manufactured by the Monsanto Group, glyphosate (branded as "Roundup").

Mr Baxter harvested his GM Canola crop in November 2010 utilising a technique known as swathing, the first phase of which consists of a crop being cut and stacked in windrows and left to dry. The Marshes complaint was that some GM Canola swathes blew from Sevenoaks and onto Eagle Rest. In December 2010, 70% of the Eagle Rest area was decertified by NCO. The NCO Officers determined that there was an "unacceptable risk" of "contamination" by the GM canola seeds which had blown over from Sevenoaks. The Marshes could no longer label as "NASAA Certified Organic" any products grown or raised on decertified paddocks, including organically grown cereal crops and organic meat (lamb). Significantly, the Court noted that the decision to decertify the Marshes' paddocks was "occasioned by the erroneous application [by NCO Officers] of governing NASAA standards" as regards GM organisms.

The litigation

The Marshes claimed two causes of action, the first for common law negligence (asserting that Mr Baxter had breached an asserted duty of reasonable care owed to the Marshes) and the second claim being for the tort of private nuisance. The Marshes sought common law damages and a permanent injunction. Significantly, the Marshes only claimed a financial injury against Mr Baxter: it was uncontested at trial that GM canola was physically harmless to persons, animals or land, even if consumed. The Court dismissed both causes of action.

The Court found that Mr Baxter had grown a lawful crop in 2010, and in deciding how to grow and swathe that crop, had acted on expert advice, using an orthodox harvesting methodology and engaging specialist contractors. The end of season winds blowing the swathes from Sevenoaks and onto Eagle Rest had not been intended by Mr Baxter, and in any case, no physical injury had been sustained at Eagle Rest as a consequence. Accordingly, it had not been shown that there had been any unreasonable interference by Mr Baxter in the Marshes' use and enjoyment of Eagle Rest, and the action for private nuisance failed.

Justice Martin also found that Mr Baxter could not be held responsible for the "unjustified reaction" by the

NCO to what had occurred. The Court also rejected the Marshes' cause of action in negligence. The Court noted a cautious attitude when allowing claims for pure economic loss, and that no basis in principle was shown to extend the law to this case. In any event, the Court adopted a similar analysis as above in determining that Mr Baxter had not been shown to act negligently, either by growing or swathing his GM crop in 2010.

Having failed on both causes of action, the Marshes claim for a permanent injunction restraining Mr Baxter from swathing a GM canola crop in the paddocks adjoining their property also failed, although the Court noted that this claim would have "failed in its own right".

On 18 June 2014, the Marshes announced that they would appeal the decision, and a notice of appeal was lodged with the Court of Appeal. The appeal was held in the WASC Court of Appeal before a three member panel on 23-24 March 2015. In a 2:1 decision the Court of Appeal rejected the appeal, upholding the finding at first instance, noting in the majority judgment that Mr Baxter's "lawful" use of his land did not constitute "a wrongful interference with the appellants' use or enjoyment of their land". The majority noted that the Marshes had freely decided to "put their land to an abnormally sensitive use" and that they could not "unilaterally enlarge" their rights in terms of any duties or obligations owed by their neighbours. On 12 February 2016 the High Court of Australia rejected an application filed by the Marshes for leave to appeal the decision.

Government response

In response to the issues raised by this case, the Western Australian Government has flagged its intention to explore potential statutory change to shore up the rights of conventional agriculturalists who utilise GM crops, including a proposal to repeal the GMCFA Act.

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When "fresh" really isn't "fresh" - taking care with food descriptors

What you need to know

- Use of descriptive terms like the word "fresh" in relation to food can be problematic and often raises the attention of regulators such as the ACCC in Australia.
- Coles was required to pay a penalty of $2.5 million after it was found liable for misleading and deceptive conduct for describing its bread products as "freshly baked" when they were par-baked and frozen by suppliers off-site and transported to Coles where the baking process was completed.
- Some similar cases in the US have not been successful. In one case in the US claims relating to "fresh" bread were dismissed because the plaintiffs did not provide evidence of the actual loss they had suffered as a result of the alleged misrepresentations.

What you need to do

- Use caution when making "fresh" claims. Think about whether it is appropriate to use the word "fresh" for your particular food product. Put yourself in the shoes of your consumers. Is there any risk that a consumer would be misled or deceived about the true nature of the product as a result of use of the word "fresh"?

What does the word "fresh" mean and when is it acceptable to use in relation to food products? The word is a simple one which is appealing to both manufacturers and consumers, but its meaning can differ depending on the food it is being used for and the context of the use. For example, if the word is used in relation to seafood it is likely to be taken by consumers to mean that the seafood has not been frozen (and was recently caught), whereas if it was used in relation to a product liked tinned vegetables it is likely to be understood to mean that the vegetables were packaged when they were fresh, or just after they were picked. Whether other words or any images are used as well is likely to impact the way the word is interpreted.

How is use of the word "fresh" regulated in Australia?

In Australia, use of the word "fresh" in relation to food products is not specifically regulated. Rather, its use falls under the misleading and deceptive conduct provisions in the Australian Consumer Law. In other words, the term "fresh" can be used provided its use is not misleading or deceptive. The question to be asked is what the word "fresh" means to consumers and whether that meaning is true for the product for which it is being used.

The ACCC has provided some guidance on how it views the word and has stated in its Food Descriptor Guidelines that "fresh generally refers to food that is put on sale at the earliest possible time and close to the state it would be in at the time of picking, catching, producing etc. The term generally implies that food has not been frozen or preserved." However, the guidelines go on to the state that foods vary and that it is therefore not appropriate to give guidance on all foods.

Legal action in relation to the word "fresh"

Use of the word "fresh", like other similar descriptors such as "natural", is monitored carefully by the ACCC because it believes that such words have significant bearing on whether products are purchased by consumers. One company in Australia that has been recently taken to task by the ACCC about its use of the word "fresh" is Coles Supermarkets.

ACCC action against Coles

Coles Supermarkets used the phrases "baked today, sold today", "freshly baked", "baked fresh", "freshly baked in-store" and "Coles Bakery" to sell bread which was par-baked and frozen by suppliers off-site, and transported to Coles supermarkets where the baking process was completed in-store. The ACCC claimed that use of these statements by Coles in relation to bread which was not wholly baked in-store amounted to misleading or deceptive conduct under the Australian Consumer Law.

In a judgment handed down on 18 June 2014, the Federal Court of Australia found that Coles had contravened the Australian Consumer Law by using such statements to describe bread which was not wholly baked on the day of sale. On 10 April 2015 the Federal Court ordered Coles to pay a penalty of $2.5 million for its misleading and deceptive conduct.

A different approach in the US

There have also been some recent cases in the US in relation to "fresh" claims. A judge of the United States District Court of New Jersey recently dismissed claims against Whole Foods Markets, Inc. and Wegmans Food Markets in relation to "fresh" bread claims.

The claims included that the companies misrepresented that some bread and bakery products were fresh baked in the store when they were actually frozen or baked at another location, very similar claims to those made against Coles by the ACCC. The judge dismissed the claims on the basis that he considered them to be too vague because there was no real notice of which signs or advertisements were alleged to have misrepresented. The judge also stated that the plaintiffs did not establish that they had suffered real loss as a result of the alleged misrepresentations. In particular, the judge noted that the plaintiffs never stated which products they bought or the prices they paid so he saw no reason to award them any amount for the losses they said they suffered.

There is also another similar case on foot in the Federal District Court of Illinois. A class of consumers has alleged that Sturm Foods, Inc. misled them into believing that single-serving coffee cartridges it manufactured and sold contained "fresh" coffee when the products in fact contained instant coffee. The case has not yet been heard so it will be some time until there is a decision.

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A new version of the Australia New Zealand Food Standards Code is coming

What you need to know

- On 1 March 2016 a new version of the Australia New Zealand Food Standards Code will come into force.
- The changes made to the Code are not substantive. The changes are intended to make the Code easier to navigate and understand, and to make the Code more effectively interact with the offence provisions under the Acts which give force to the Code.

What you need to do

- If you are a food manufacturer you should familiarise yourself with the new version of the Code, especially the new standard setting out the structure of the Code (Standard 1.1.1) and the new definitions standard (Standard 1.1.2).

On 1 March 2016 a new version of the Australia New Zealand Food Standards Code (**Code**) will come into force. The intention of the changes is to make the Code easier to navigate and understand, and for it to more effectively interact with the offence provisions in the Acts which give the Code legal force (for example, the *Food Act 1984* in Victoria).

Why has the Code been revised?

The revision of the Code largely came about following a New South Wales Supreme Court case in 2008, *Christine Tumney (NSW Food Authority) v Nutricia Australia Limited* [2008] NSWSC 1382, in which a large number of the prosecution's claims which related to non-compliance with the Code were permanently stayed or dismissed because essential elements of the charges could not be proven. Throughout the judgment comments were made regarding the lack of certain definitions and drafting inconsistencies in the Code.

What changes have been made to the Code?

The main changes that have been made are as follows:

Change of structure and clarification of requirements

The entire Code has been given a more defined structure. Standard 1.1.1 (Structure of the Code and general provisions) has been modified significantly and clearly sets out the structure of the Code and how it should be interpreted. For example, it includes provisions that clarify how the Code should be interpreted (eg, confirming that the *Commonwealth Acts Interpretation Act 1901* applies to interpretation, not the State or Territory legislation).

Standard 1.1.1 also contains express statements regarding the provisions that must be complied with under the Code. For example, it contains a provision that provides that foods must comply with any provisions of the Code relating to the composition of that kind of food. It also contains all of the relevant prohibitions. For example in relation to food additives, it contains a provision which states that a food must not have as an ingredient or component a substance that was used as a food additive unless expressly permitted. The relevant permissions are then contained in the food additives standard (Standard 1.3.1).

All of these changes make it easier to determine what compositional requirements need to be met and when an offence has taken place as there is a specific provision in the Code that can be pointed to where the basic requirement is stated.

Definitions

An extensive dictionary of defined terms has been created to facilitate navigation and understanding of the Code. All definitions used throughout the Code from 1 March 2016 will be contained in the dictionary (Standard 1.1.2 – Definitions used throughout the Code). As well as bringing together all of the definitions already in the Code, the dictionary will also include definitions for some previously undefined words and phrases such as "carbohydrate" and "used as a food additive". The definitions are also replicated in the notes sections of the standards in which they are used.

Grouping of all labelling requirements

In the current version of the Code the various labelling requirements are spread throughout the Code and there is no easy way of finding all of the requirements without checking all parts of the Code. The new version of the Code has a standard (Standard 1.2.1) which sets out the labelling requirements that apply to different types of foods and refers to any other applicable standards. This will make it considerably easier for manufacturers to ensure that they are complying with all of the labelling requirements of the Code.

What next?

The new Code has already been gazetted however a proposal was recently approved by Food Standards Australia New Zealand to correct some minor errors which have been noticed. These will be made before the new Code takes effect on 1 March 2016.

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FSANZ Review: Migration of chemicals from packaging into food

What you need to know

- The Food Standards Authority Australia New Zealand (FSANZ) is conducting a review into whether chemicals in food packaging present any health and safety concerns for consumers and, if so, whether the current regulatory framework adequately manages any risks.
- So far, most of the chemicals tested have been found to be safe. FSANZ is conducting a further survey on two phthalates to determine whether there are any health and safety concerns.

In 2014, the FSANZ called for an assessment of any unmanaged public health and safety risks in relation to chemical migration from packaging into food (CMPF). Primarily, the proposal (Proposal P1034) aims to deepen the FSANZ's understanding of the nature and risks of CMPF, and also to assess whether the current regulatory system adequately manages these risks. The proposal also aims to provide greater clarity and certainty for industry to adequately manage potential food safety risks that may arise from CMPF.

Concerns

From preliminary research, FSANZ concluded that there is significant uncertainty about the nature of the potential health risks from CMPF, particularly from repeated exposure over the long term to certain chemicals.

Further, FSANZ identified that there is a lack of knowledge regarding the composition of recycled material used for food packaging, which raises potential concerns about the migration of unexpected or uncharacterised substances from such packaging into food. At present, the Code makes no specific reference to the use of recycled materials in packaging.

Initial consultation with industry also indicated that some businesses, particularly small to medium enterprises, may not be aware of the potential risks from CMPF and may not have appropriate mitigation measures in place.

Health risks of chemical migration

Chemical migration into food generally occurs through direct contact of packaging with food. However, contamination may also occur, less frequently, from secondary packaging or from printing inks used on packaging. The nature and extent of the migration depends largely on the kind of packaging that is used. For example, contamination from chemicals is more likely to occur from packaging materials such as plastic, elastomers, paper and board.

Most of the chemicals that migrate into food are recognised not to be a health risk. The levels of contamination are also typically too low to cause adverse health effects. On 19 January 2016, the FSANZ reported the results of a study on packaging chemicals in food. Of the 30 chemicals tested, 28 were either not detected or were found at very low and safe levels.

However, the study identified that more work needed to be done on two phthalates (chemicals which are used as plasticisers) to determine whether there are any health and safety concerns. Studies have shown that phthalates exhibit efficient migration from packaging into foods and have had adverse effects on reproduction and development in animals. FSANZ is planning to conduct a further survey to estimate the dietary exposure to the two phthalates of concern.

Australia's current regulatory system and comparison with other jurisdictions

The current control measures for CMPF in Australia are found in the Food Standards Code and the State and Territory Food Acts. The Food Acts contain general provisions for packaging that make it an offence to sell food packaging or handling materials that are unsafe or will make food unsafe. Businesses must also comply with the specific requirements under the Code, including:

- Standard 3.2.2 (Food Safety Practices and General Requirements) which requires that only packaging material that is fit for its intended use and is not likely to cause food contamination must be used; and
- Standard 1.4.1 (Contaminants and Natural Toxicants) which provides for management of contamination risks by establishing a maximum level at which the contaminant is permitted to be present.

The Australian Standard for Plastic Materials for Food Contact Use, set by Standards Australia, also provides a guide to industry on the production of plastic materials for food contact use.

The FSANZ considers that the requirements in the Code and the Food Acts are not as extensive as regulations in other jurisdictions. In particular, Europe has a system which provides that all food contact materials need to be safe. They must not change the properties of food in ways that are unacceptable. All

materials need to be approved, based on a toxicological evaluation. In the USA, the materials must be shown to be safe (that there is a reasonable certainty of no harm). The USA has several processes for the approval of such materials.

The FSANZ observes that, as a practical matter, larger packaging manufacturers and food businesses may be required to comply with the legislative requirements and voluntary Codes of Practice in other countries such as the US and in Europe. It is likely, therefore, that any changes to the Code and Food Acts will reflect the approach taken in the US and Europe.

Next steps

The assessment under the proposal commenced in June 2014, and the first call for submissions was completed by the end of 2014. The second call for submissions was scheduled for March 2016 but has been delayed due to the complexity of the issues, and the need for further targeted consultation with small and medium enterprises. The next call for submissions, along with the draft preparation of food regulation measures, is scheduled for August 2016. In the meantime, FSANZ will continue to conduct surveys and consult with industry about CMPF.

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