

## Compliance and enforcement

- 3.1 Chapter two of the report outlined how the two regulatory frameworks, the *Australia New Zealand Food Standards Code* (the Code) and the Australian Consumer Law (ACL), work in tandem to establish Australia's country of origin food labelling system. This chapter examines the rates of compliance with this system, and how it is enforced by regulators.
- 3.2 The Code is the product of negotiations between the Commonwealth, state and territory governments and the New Zealand Government. Similarly, the ACL is a model law that was negotiated through the Council of Australian Governments and has been subsequently implemented within each jurisdiction's consumer laws. Consequently, the enforcement of those two legal frameworks is the concurrent responsibility of federal as well as state and territory government agencies.
- 3.3 This chapter will first examine the compliance rates with the Code and the ACL, before discussing the enforcement options available to regulators at the state and federal levels.

### Compliance

- 3.4 Regulators and government departments reported that compliance rates with the overall food labelling system are 'generally good'.<sup>1</sup> The Department of Industry reported:
- ... compliance and enforcement activity by consumer agencies has revealed minimal evidence of false or misleading claims in relation to [country of origin labelling] and minimal evidence of consumer

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1 Mr Peter Day, Director, Compliance, Investigation and Enforcement, NSW Food Authority, *Committee Hansard*, Sydney, 9 May 2014, p. 12.

detriment in the market in terms of false or misleading [country of origin labelling].<sup>2</sup>

- 3.5 Both the Australian Competition and Consumer Commission (ACCC) and the NSW Food Authority reported similar trends based on their compliance surveillance activities. The ACCC stated:

... we do not see large swathes of blatant conduct that we feel we are not taking on when we should. That is not the sense that we get from our complete analysis.<sup>3</sup>

- 3.6 According to the ACCC, a national survey undertaken in 2012 by the state regulators examined 245 products in respect of their country of origin labelling compliance. The ACCC was of the view that these products were specifically targeted by state regulators, and not randomly selected as there was 'some question' over their compliance with the ACL. Of those 245 products, 23 were identified as non-compliant with the ACL and were subsequently removed from sale. In addition, 25 traders were issued with substantiation notices of which three were then issued with infringement notices.<sup>4</sup> More information on the enforcement activities of regulators is included later in this chapter.

- 3.7 Mr Peter Day, Director of Compliance, Investigation and Enforcement at the NSW Food Authority stated that the Authority regularly undertakes compliance surveys to determine whether there is a significant level of non-compliance. If there is, the Authority will:

... do further program work in that regard. Given the limitation on resources, it is a bit more of a filtering process to see how widespread the problem out there is.<sup>5</sup>

- 3.8 Mr Day also described the Authority's compliance surveillance activities:

We have a specialist enforcement unit that will do a variety of enforcement programs throughout the year. They are a team of about six people who operate fully into that program, based on market intelligence, previous issues that we have found, issues in the media and the like. So based on intelligence we will start a campaign where we will look for information to see whether it is substantiated in terms of noncompliance. Not all of their work is

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2 Department of Industry, *submission 20*, p. 3.

3 Mr Scott Gregson, Group General Manager, Enforcement Group, Australian Competition and Consumer Commission, *Committee Hansard*, Canberra, 8 May 2014, p. 46.

4 Mr Nigel Ridgway, Group General Manager, Compliance and Product Safety, Australian Competition and Consumer Commission, *Committee Hansard*, Canberra, 8 May 2014, p. 46.

5 Mr Peter Day, Director, Compliance, Investigation and Enforcement, NSW Food Authority, *Committee Hansard*, Sydney, 9 May 2014, p. 14.

around country-of-origin labelling, of course. But, given the sensitivity of the issue, probably about half of that work is involved in labelling work generally, of which country of origin is a component.<sup>6</sup>

- 3.9 This surveillance activity has led the Authority to focus further work on seafood, fruit and vegetable suppliers.<sup>7</sup> However, the Authority did comment that some non-compliance has been caused by a lack of understanding amongst industry rather than 'blatant' deception or misleading conduct.<sup>8</sup>
- 3.10 Indeed, as a result of its annual audits, Mr Day reported that:
- ... although there is always a minority that will attempt to operate outside the law, the majority of noncompliance that the authority comes across more often reflects a lack of understanding about [labelling] provisions and/or lack of effective systems in that process rather than a deliberate attempt to mislead consumers.<sup>9</sup>
- 3.11 Simplot Australia also speculated that the complex and 'unclear' regulatory framework has caused industry confusion and ambiguity about what is required, and therefore has limited compliance.<sup>10</sup>
- 3.12 Similar comments were made by Australian Made Campaign Limited which submitted that many of their members are confused and uncertain as to what claims they should be making.<sup>11</sup> The Committee received further evidence of confusion amongst industry. This is addressed in greater detail in chapter four.

## Enforcement

### Activities at the state level

- 3.13 In NSW, penalties under the *Food Act 2003* (NSW) will range from on-the-spot fines up to court action which can impose financial penalties of up to \$250 000. Mr Day of the NSW Food Authority stated that they undertake

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6 Mr Peter Day, Director, Compliance, Investigation and Enforcement, NSW Food Authority, *Committee Hansard*, Sydney, 9 May 2014, p. 14.

7 NSW Food Authority, *submission 45*, p. 3.

8 NSW Food Authority, *submission 45*, p. 3.

9 Mr Peter Day, Director, Compliance, Investigation and Enforcement, NSW Food Authority, *Committee Hansard*, Sydney, 9 May 2014, p. 12.

10 Simplot Australia Pty Ltd, *submission 17*, p. 2.

11 Australian Made Campaign Limited, *submission 18*, p. 10.

an escalation process or a graduated response to enforcement.<sup>12</sup> Mr Day explained:

We would have a pyramid where, obviously, the bulk is at the lower end – warning letters, advice information and education to businesses out there. But where needed, and where significant, we would issue on-the-spot fines or take prosecutions in significant cases.<sup>13</sup>

3.14 According to Mr Day, many cases of non-compliance are resolved through warnings, other minor penalties, warnings and education without the need for further enforcement action.<sup>14</sup> Industry representatives have stated that this form of enforcement activity has been successful. For example, Citrus Australia – SA Region stated:

... recent fines imposed on retailers that were not labelling fresh fruit correctly is a very effective way to ensure compliance with labelling laws of fresh fruit.<sup>15</sup>

3.15 Mr Day stated that the majority of its compliance effort involves seafood suppliers or retailers. After a fairly sustained campaign between 2004 and 2007, over 70 penalty notices were issued to operators in the seafood sector. Mr Day commented however, that:

What that demonstrated is that sustained compliance action can actually result in better compliance overall in that performance, and we are seeing good compliance in that sector at the current time.<sup>16</sup>

3.16 Between 2004 and 2013, the Authority issued over 112 penalty notices for breaches of country of origin labelling requirements across a wide range of food commodities.<sup>17</sup> In more serious cases, the Authority conducted 12 further prosecutions during this period which involved hundreds of charges involving more serious country of origin labelling or substitution offences.<sup>18</sup> For example, the ‘most significant’ court action taken by the

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12 Mr Peter Day, Director, Compliance, Investigation and Enforcement, NSW Food Authority, *Committee Hansard*, Sydney, 9 May 2014, pp. 14-15.

13 Mr Peter Day, Director, Compliance, Investigation and Enforcement, NSW Food Authority, *Committee Hansard*, Sydney, 9 May 2014, pp. 14-15.

14 Mr Peter Day, Director, Compliance, Investigation and Enforcement, NSW Food Authority, *Committee Hansard*, Sydney, 9 May 2014, p. 12.

15 Citrus Australia – SA Region, *submission 28*, p. 2.

16 Mr Peter Day, Director, Compliance, Investigation and Enforcement, NSW Food Authority, *Committee Hansard*, Sydney, 9 May 2014, p. 12.

17 Mr Peter Day, Director, Compliance, Investigation and Enforcement, NSW Food Authority, *Committee Hansard*, Sydney, 9 May 2014, p. 12.

18 Mr Peter Day, Director, Compliance, Investigation and Enforcement, NSW Food Authority, *Committee Hansard*, Sydney, 9 May 2014, p. 12.

Authority involved charges of misleading and deceptive conduct by a manufacturer for packaging and labelling imported bacon products as product of Australia.<sup>19</sup> Many other prosecutions involved seafood operators.<sup>20</sup>

- 3.17 The Authority regularly takes enforcement action in regards to the display of fresh produce without appropriate labelling as well as missing or incorrect labelling on packaged food.<sup>21</sup> The Authority has also taken enforcement action where imported produce is displayed in close proximity to signage that implies Australian produce, such as ‘good for Aussie farmers’, or ‘supporting Aussie farmers’. In such cases, the consumer is led to believe at first glance that the product is Australian. Mr Day commented that ‘We are very strong on that. In that regard we do mirror the ACCC; they have taken similar action in that regard as well’.<sup>22</sup> In the case brought by the Authority, the particular signage was found to be deceptive advertising and prohibited under the *Food Act 2003* (NSW).<sup>23</sup>

### Activities of the ACCC at the federal level

- 3.18 A large component of the enforcement activities of the ACCC is directed toward prevention of breaches by educating industry and consumers about their rights and obligations under the ACL. These efforts may take the form of publications, as well as speeches, presentations and submissions.<sup>24</sup>
- 3.19 However, the ACCC has ‘actively enforced’ compliance with consumer law protections to address false, misleading or deceptive claims in relation to country of origin and place of origin.<sup>25</sup>
- 3.20 Similar to the escalation process of the Authority described above, the ACCC has a range of enforcement actions it can commence in circumstances of non-compliance, including infringement notices, enforceable undertakings, and criminal proceedings.

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19 Mr Peter Day, Director, Compliance, Investigation and Enforcement, NSW Food Authority, *Committee Hansard*, Sydney, 9 May 2014, p. 12.

20 Mr Peter Day, Director, Compliance, Investigation and Enforcement, NSW Food Authority, *Committee Hansard*, Sydney, 9 May 2014, p. 12.

21 NSW Food Authority, *submission 45*, p. 3.

22 Mr Peter Day, Director, Compliance, Investigation and Enforcement, NSW Food Authority, *Committee Hansard*, Sydney, 9 May 2014, p. 15.

23 Mr Peter Day, Director, Compliance, Investigation and Enforcement, NSW Food Authority, *Committee Hansard*, Sydney, 9 May 2014, p. 16.

24 Australian Competition and Consumer Commission, *submission 41*, p. 2.

25 Australian Competition and Consumer Commission, *submission 41*, p. 3.

- 3.21 Under the ACL, the ACCC is authorised to issue infringement notices with a financial penalty where it has reasonable grounds to believe that a person has contravened particular sections of the ACL. This includes the prohibition on false or misleading representations and the prohibition on misleading conduct. The penalties for most contraventions are \$102 000 for publically listed corporations, \$10 200 for bodies corporate and \$2 040 for individuals.<sup>26</sup> These penalty amounts are for each individual contravention, and the ACCC is authorised to issue more than one infringement notice for each distinct contravention.<sup>27</sup>
- 3.22 The ACCC may also choose to settle the matter administratively with the particular business or individual by accepting formal, court enforceable undertakings under section 87B of the ACL. Such arrangements are often referred to as ‘section 87B undertakings’ and might include one or more of the following:
- compensating consumers who suffered from the conduct;
  - running corrective advertisements of similar frequency and prominence to those that misled consumers;
  - paying for a company or industry trade practices compliance program; and
  - making administrative changes within the business to reduce the risk of future misleading conduct.<sup>28</sup>
- 3.23 For serious cases of non-compliance, the ACCC is enabled to commence criminal proceedings under the ACL. If a business or individual is found to have breached a provision of the ACL, the court may impose any of the following penalties or remedies:
- monetary penalties of up to \$1.1 million for companies and up to \$220 000 for individuals;
  - injunctions to prevent the prohibited conduct continuing or being repeated or to require that some action be taken;
  - adverse publicity orders; or
  - probation orders, community service orders and corrective advertising orders.<sup>29</sup>

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26 Australian Competition and Consumers Commission (2014), *Country of origin claims and the Australian Consumer Law – A guide for business*. April 2014. Available at <[www.accc.gov.au/system/files/Country%20of%20origin%20and%20the%20Australian%20Consumer%20Law.pdf](http://www.accc.gov.au/system/files/Country%20of%20origin%20and%20the%20Australian%20Consumer%20Law.pdf)> accessed 1 September 2014, p. 24.

27 Mr Scott Gregson, Group General Manager, Enforcement Group, Australian Competition and Consumer Commission, *Committee Hansard*, Canberra, 8 May 2014, pp. 44-45.

28 Australian Competition and Consumers Commission (2014), *Country of origin claims and the Australian Consumer Law – A guide for business*. April 2014, p. 24.

29 Australian Competition and Consumers Commission (2014), *Country of origin claims and the Australian Consumer Law – A guide for business*. April 2014, p. 24.

- 3.24 Mr Scott Gregson, Group General Manager, Enforcement Group at the ACCC described how the ACCC will employ these three different enforcement activities:

We have a number of tools available to deal with the formal resolution of matters ... section 87B undertakings, infringement notices and going to court for other remedies including pecuniary penalties. Which of those tools we use might be influenced by a number of factors. We will have regard to the seriousness of the conduct, and the most serious we pursue to court. We might have regard to the size of the company. So if there is a small company, in the first instance, absent of other factors we might seek to resolve it through an enforceable undertaking. The difference between an enforceable undertaking and an infringement notice is that, if we want further remedies, a big part of the reason we take on conduct is not just to deal with a previous instance but to ensure future compliance. We may want a compliance program. We may want to deal with corrective notices. You cannot deal with that through an infringement notice only. So you might get an 87B either separately or in addition.<sup>30</sup>

- 3.25 Mr Gregson stated that, in most cases, enforcement and compliance actions brought by the ACCC are resolved by consent.<sup>31</sup>

### Examples of enforcement action taken by the ACCC

- 3.26 Between 2009 and 2014, the ACCC commenced 20 country of origin enforcement actions covering a wide range of products generally, of which ten specifically involved food products. The ACCC provided details about some of the more recent matters including action commenced against Coles Supermarkets where six separate infringement notices were paid totalling \$61 200 for alleged misleading representations about the country of origin of fresh produce made in five of its stores between March 2013 and May 2013.<sup>32</sup>
- 3.27 The ACCC has also taken action where by reason of a trading name and logo, in this case, Kingisland Meatworks & Cellars Pty Ltd, as it falsely represented that it entirely or substantially supplied meat grown or raised on King Island when this was not the case. The proprietor faced a \$50 000

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30 Mr Scott Gregson, Group General Manager, Enforcement Group, Australian Competition and Consumer Commission, *Committee Hansard*, Canberra, 8 May 2014, pp. 44-45.

31 Mr Scott Gregson, Group General Manager, Enforcement Group, Australian Competition and Consumer Commission, *Committee Hansard*, Canberra, 8 May 2014, pp. 46-47.

32 Australian Competition and Consumer Commission, *submission 41*, p. 3.

penalty and a three year injunction.<sup>33</sup> Actions have also been taken against Aldi Foods Pty Ltd and Spring Gully Foods Pty Ltd in July 2011 for the sale of honey that was falsely labelled 'produced' or 'made with honey produced' on Kangaroo Island, when this was not the case.<sup>34</sup>

- 3.28 The ACCC has also taken enforcement action against a business where it used the Australian Made, Australian Grown logo without authorisation (see chapter two for more information on the regulation and use of the logo). However, it is worth noting that in this instance, the particular product was not a food product.<sup>35</sup>

### Resource issues with enforcement activity

- 3.29 Enforcing the country of origin labelling framework was described during the inquiry as a 'resource intensive' operation. For example, Mr Day from the NSW Food Authority commented that:

... while the authority actively enforces country of origin requirements, these can be resource intensive operations and they need to be carefully prioritised against overarching food safety priorities in terms of resource allocation. Accordingly, the authority notes that the emphasis given to country of origin compliance does vary between food regulatory jurisdictions.<sup>36</sup>

- 3.30 The ACCC echoed these concerns. Mr Gregson from the ACCC stated:

In terms of prioritising our work ... we receive about 160 000 contacts a year in relation to all matters. At the end of the day, through various investigative processes, we may institute proceedings in around 30 matters. That is across our full range of enforcement work.

We use our compliance enforcement policy to seek to prioritise. It does that in two ways. The first is actually setting out what areas we are going to focus on in a particular area in a year. ... Credence claims, which would include country of origin, have been a priority for the last two years ... We seek to maximise our impact by taking on those who are either blatant or who impact on a large number of consumers, but also ones that might make a difference

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33 Australian Competition and Consumer Commission, *submission 41*, p. 12.

34 Australian Competition and Consumer Commission, *submission 41*, pp. 4, 13.

35 Australian Competition and Consumer Commission, *submission 41*, p. 3.

36 Mr Peter Day, Director, Compliance, Investigation and Enforcement, NSW Food Authority, *Committee Hansard*, Sydney, 9 May 2014, p. 12.



in providing deterrence. That could be because they set out new areas of focus for us.<sup>37</sup>

3.31 Mr Gregson further commented that regulators have limited resources, which need to be directed in the most meaningful way:

There is no doubt that with a larger organisation we would be up to follow-up on further matters and potentially take more action ... We set our priorities because we do have limited resources.<sup>38</sup>

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37 Mr Scott Gregson, Group General Manager, Enforcement Group, Australian Competition and Consumer Commission, *Committee Hansard*, Canberra, 8 May 2014, p. 44.

38 Mr Scott Gregson, Group General Manager, Enforcement Group, Australian Competition and Consumer Commission, *Committee Hansard*, Canberra, 8 May 2014, p. 46.

