

## Senate Economics Legislation Committee

### ACCC'S ANSWERS TO QUESTIONS ON NOTICE

Inquiry into the Food Standards Amendment (Truth in Labelling Laws) Bill 2009

30 October 2009

#### **Question One (Hansard Ref E 52):**

**Senator XENOPHON**—Mr Weymouth, how do you respond to Ausbuy's claim that the ACCC has not responded appropriately to complaints about Dairy Farmers and Golden Circle labelling—its claim that these now foreign-owned companies still display the labels 'Australian owned and made'?

**Mr Weymouth**—I do not have the details in front of me. Mr Ridgway may have. However, it is my understanding that there has been some discussion with those parties and an agreement for a transitional arrangement to move to a label that accurately reflects the current ownership structure in place.

**Senator XENOPHON**—They are foreign-owned companies. I have nothing against foreign-owned companies, but how is it that they are allowed to get away with saying 'Australian owned'?

**Mr Weymouth**—I would have to take on notice whether we have any specific action that we have taken. I do not have those details in front of me. Is that all right, Senator?

**Mr Ridgway**—I can comment with respect to Dairy Farmers. I am not sure that I have the immediate information in relation to Golden Circle. With respect to Dairy Farmers, I do not have the detail of correspondence with Ausbuy per se but I understand that Ausbuy were formally responded to on 5 June this year, with the response confirming that the ACCC has raised the matter with Dairy Farmers with respect to the issues identified by Ausbuy and outlined the corrective action that has been undertaken by Dairy Farmers and agreed to by the ACCC. This includes: publication of corrective advertisements on the Dairy Farmers website; publication of corrective advertisements in several metropolitan newspapers, including the *Australian*, the *Courier Mail*, the *Sydney Morning Herald*, the *Age*, the *Adelaide Advertiser*, the *West Australian* and the *Mercury*; and the fixing of shelf wobblers at the point of sale of the relevant products, such as milk and cheese products. So there has been a fairly substantial—

**Senator XENOPHON**—Presumably that was in relation to Dairy Farmers. Is that right?

**Mr Weymouth**—That is correct.

#### **Answer:**

#### ***Dairy Farmers***

In January 2009 the ACCC received a complaint alleging that National Foods Limited (National Foods), a company owned by Japanese company, Kirin Holdings Pty Ltd, continued to advertise Dairy Farmers products as '100% Australian owned' after it acquired Dairy Farmers in 2008.

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The ACCC commenced an investigation into the conduct of National Foods and administrative undertakings were accepted from National Foods. These undertakings included:

- the publication of corrective advertisements in a number of newspapers: The Australian, Courier Mail, Sydney Morning Herald, The Age, Adelaide Advertiser, West Australian and The Mercury
- requiring retailers of Dairy Farmers products to display a corrective notice on the shelves where products are displayed to assist consumers in making an informed buying decision in the period between the ACCC raising concerns with National Foods, and the Dairy Farmers packaging being updated
- corrective advertising to be displayed on the National Foods website
- amended packaging to be issued by no later than 29 June 2009.

#### ***Golden Circle***

ACCC records do not indicate that any correspondence has been received from Ausbuy relating to Golden Circle advertising.

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#### Question Two (Hansard Ref E 53):

**Senator XENOPHON**—I am acutely aware of the time constraints so, if I am trying to get through questions, I am not trying to be abrupt; I am just trying to get through it because I know Senator Joyce has a number of questions. Can you take this on notice: how does the ACCC determine the question of an appropriate level of corrective advertising in the context where you may have a corporation that spends millions of dollars building up an image which says, 'We are an Australian owned brand,' and then all they have to do is run a few newspaper ads? In terms of penetrating to consumers and effectively getting that through to consumers, it is inadequate. Also, how do you determine whether a company ought to be prosecuted, rather than simply have to do corrective advertising, when Australian consumers clearly rely on the 'Australian owned and made' label?

#### Answer:

The ACCC directs resources to the investigation and resolution of matters that provide the greatest overall benefit for consumers and businesses. The ACCC will take legal action against a trader, rather than negotiating an administrative outcome or accepting s. 87B undertakings, in circumstances where the ACCC considers that litigation is the best way to deliver an effective outcome. The ACCC is more likely to proceed to litigation in circumstances where the conduct is particularly egregious, where there is reason to be concerned about future behaviour or where the party involved is unwilling to provide a satisfactory resolution.

As outlined in the ACCC's *Compliance and Enforcement Policy*, the ACCC views conduct as particularly egregious where the conduct:

- is of significant public interest or concern
- results in significant consumer detriment
- demonstrates a blatant disregard for the law
- involves national or international issues.

On some occasions the ACCC may choose to accept an administrative resolution. Administrative resolutions may include corrective advertising.

Corrective advertising must be appropriate to the circumstances of the conduct. In some cases, a small campaign in local print media may be appropriate, whereas in the case of a national trader a small campaign may miss consumers who saw the original representation. When negotiating corrective advertising, the ACCC endeavours to ensure that the advertising matches the conduct of concern.

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In the case of National Foods, the ACCC resolved the matter administratively. As the most beneficial outcome for consumers was to alert them to the conduct, the ACCC required the Dairy Farmers packaging to be amended in a timely manner and to advise consumers of the conduct in national print media, on the shelves where Dairy Farmers products were displayed and on the Dairy Farmers website.

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**Question Three (Hansard Ref E 57):**

**Senator JOYCE**—I would love that to be the case but I am using it as a mechanism to show how difficult it is at the moment. How many cases do you have before you at the moment that you are pursuing in regard to misleading and deceptive conduct? We can do the last year, the last two years, currently at foot, whatever you like.

**Mr Weymouth**—I would have to take that sort of detail on notice.

**Senator JOYCE**—Do you have one?

**Mr Weymouth**—In the courts right now?

**Senator JOYCE**—Yes.

**Mr Weymouth**—I think the answer is no. This is where it is a little bit difficult to answer the questions because the provisions we are talking about cover all goods and we do not necessarily break them into food and other. I would have to take that question on notice if you want details of food related origin.

**Answer:**

The ACCC currently has 21 matters in litigation which allege a contravention of s. 52 of the TPA. None of these cases relate to food labelling.

Since 1 January 2007 the ACCC has taken four actions in relation to misleading or deceptive food labelling; including:

- Harvey Fresh (1994) Limited in relation to representations that cheese products were produced in Western Australia
- Nudie Foods Australia Pty Ltd in relation to representations about the content of particular juice products
- Australian Co-operative Foods Ltd in relation to representations about the style of cheese products
- Arnott's Biscuits in relation to representations about the content of particular biscuits.

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**Question Four (Hansard Ref E 58):**

**ACTING CHAIR**—We are now considerably over time, having gone through and past our afternoon tea break. I would like to thank the ACCC. Unfortunately, I have not had an opportunity to ask a question, so I will submit mine on notice if that is okay.

**Senator XENOPHON**—Will that be about the palm oil issue?

**ACTING CHAIR**—Yes, the palm oil question will go in on notice as well.

**Senator XENOPHON**—Supplementary to the palm oil question is whether palm oil is from a fruit or a vegetable. I think Senator Pratt will provide that question on notice: how something that is a fruit can be labelled as a vegetable oil. That is on notice. It will make more sense when you see the question in writing.

**Answer:**

The TPA does not include any definition on what is included within the definition of 'vegetable oil'.

The ACCC's primary concern with advertising or representations relating to palm oil, is that these representations are accurate and do not give consumers a false impression about the product. The ACCC cannot assess whether conduct is likely to be misleading or deceptive in the hypothetical, as the application of the TPA requires the law to be applied to the specific circumstances of the conduct.

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**Additional questions in writing received on 5 November 2009**

**Question One:**

Could you please outline how the provisions in the Trade Practices Act interact with the obligations in the Food Standards Code in relation to country of origin food labelling?

**Answer:**

While the Australia New Zealand Food Standards Code (the Code) and the *Trade Practices Act 1974* (the TPA) seek to address broadly similar conduct within the food and beverage industry, their focus and approach in addressing these issues vary in a number of important ways. A trader who supplies food products must comply with both the Code and the TPA, adhering only to the Code does not protect from otherwise misleading or deceptive conduct.

Country of origin requirements are dealt with Standard 1.2.11 which came into force on 8 December 2005. Broadly, the standard provides that country of origin labelling should:

- be included on unpackaged fresh pork, ham and bacon products and processed unpackaged seafood, vegetables, nuts and fruit
- be included on unpackaged products that are included in the standard; and
- be consistent with trade practices legislation and trade practices law.

The TPA places some obligations on manufacturers and sellers of products that carry country of origin labelling. Specifically, s. 52 of the TPA prohibits corporations engaged in trade and commerce from engaging in behaviour that is misleading or deceptive or is likely to mislead or deceive. Section 53(eb) of the TPA also prohibits businesses from making false or misleading representations concerning the place of origin of goods.

The TPA also contains safe harbours or defences which set out tests which traders can to choose to meet to ensure they do not breach the TPA:

- s. 65 AB – General country of origin claims

Under the general country of origin defence set out under s. 65AB of the TPA goods must pass two tests:

1. **The goods must be substantially transformed in the country that is subject of the representation.** Section 65AE states that for a 'substantial transformation' to have occurred, the product must undergo a fundamental

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change in form, appearance or nature such that, after the change, the goods are new and different goods from those existing before the change.

2. **50 per cent or more of the cost of production or manufacture of the goods must be incurred in relation to processes that occurred in that country.**

If goods pass both these tests for a particular country, the manufacturer (or distributor or retailer) may apply the defence.

- s. 65AC – ‘Product of’

The safe harbour for claims that a good is a product of a certain country is much stricter than the one for general origin claims. The ‘product of’ defence requires that each significant component (or ingredient) of the good must originate from the country of the claim and all, or virtually all, of the production or manufacturing processes must take place in that country.

Therefore, any country of origin labelling required under the Code must also comply with the TPA.



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**Question Two:**

Suppose the provisions within the bill were to become part of the Food Standards Code. How would these provisions be enforced? Would FSANZ have a role in enforcement or would it be left to the ACCC? How would the new requirements interact with the provisions in the Trade Practices Act?

**Answer:**

At present, the State and Territory Health Departments within Australia and New Zealand are responsible for the enforcement and interpretation of the Code. Neither FSANZ nor the ACCC have any role in the enforcement of the Code. The proposed amendments do not change this.

It is the ACCC's view that the new requirements would interact with the TPA in the same way that the Code currently does. That is, traders must comply with both the Code and the TPA, and compliance with one does not necessarily ensure compliance with the other.

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**Question Three:**

What discussions have you had with the Department of Agriculture, Fisheries and Forestry (or other government departments) on the proposed 'grown in Australia' label?

**Answer:**

In July 2009 the ACCC has met once with officials from the Department of Agriculture, Fisheries and Forestry (DAFF) and the Department of Innovation, Industry Science and Research to discuss a potential 'grown in' safe harbour under the TPA. This discussion focused on contacts received by DAFF raising concerns that food with significant imported content may in some circumstances be labelled as 'made in Australia'. The discussion canvassed various options to remedy this concern. In this meeting, the ACCC noted that it could not provide a view on any proposed amendments to the TPA without further information on the proposed provisions. As yet, the ACCC has not received any further information.

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**Question Four:**

What is your view of a labelling requirement along the lines suggested by Dick Smith Foods (X% Australian product; Y% Australian owned)?

**Answer:**

The ACCC's view is that where a business makes a representation about a food product, it must ensure that the overall impression of the representation is not misleading or deceptive. This applies equally to representations relating to the origin of a food product as it does to representations about the content of a food product.

The ACCC's view of the labelling requirement suggested by Dick Smith Foods would depend on all the circumstances of the matter, the overall impression of all packaging and advertising of the product and whether either of the safe harbours apply.

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**Question Five:**

What would be a reasonable font size for country of origin food labels?

**Answer:**

The TPA does not include any specific requirements on what font size will ensure that packaging will not contravene the TPA.

It is the ACCC's view that in order to avoid contravening s. 52 of the TPA, the trader should ensure that the overall impression of any packaging or advertising used in the promotion of a product is not misleading in any way. The specific nature of the font will always depend on the case at hand.

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##### **Question Six:**

A number of submitters to the inquiry have raised the issue of palm oil (often labelled as vegetable oil) – its production is said to lead to destruction of orang-utan habitat. What is your view of the call to have palm oil identified specifically on lists of ingredients?

##### **Answer:**

The ACCC is aware of community concerns relating to the use of palm oil and particular concerns with the destruction of native rainforest habitat for orang-utans.

The ACCC's role is to administer the provisions of the TPA and is not in the position to comment on whether manufacturers of food products should be required to specifically identify palm oil in a list of ingredients.

The ACCC's primary concern with advertising or representations relating to palm oil is that these representations are accurate and do not give consumers a false impression about the product or its environmental benefits.