

**Submission by the Australian Treasury to the House of Representatives
Standing Committee on Economics on the *Food Standards Amendment
(Truth in Labelling – Palm Oil) Bill 2011***

The Australian Treasury (Treasury) welcomes the opportunity to make this submission on the *Food Standards Amendment (Truth in Labelling – Palm Oil) Bill 2011* (Bill). The Bill proposes to amend section 33 of the Australian Consumer Law (ACL) to insert a specific reference to palm oil.¹

In summary, the Treasury does not support the amendments proposed to section 33 of the ACL in the Bill, for the following reasons:

- section 33 of the ACL, as it currently applies, is sufficiently broad to include palm oil as a relevant characteristic of any goods, and therefore does not need to be amended;
- the proposed amendments are inconsistent with the generic nature of the ACL, which is currently sufficiently broad to cover conduct relating to the representation of ingredients (such as palm oil);
- passage of the Bill has the potential to erode the benefits of having a national, generic consumer law, that is the ACL, which only commenced on 1 January 2011;
- passage of the Bill would be inconsistent with the *Intergovernmental Agreement for the Australian Consumer Law* (IGA);
- the amended section 33 would have limited application if the States and Territories decide not to apply the amendments because the changes were not made in accordance with the IGA; and
- a limited application of the amendments would undermine the currently nationally-consistent approach to consumer law.

The above points are discussed in greater detail below.

The Australian Consumer Law (ACL)

The Bill, as it is currently drafted, proposes to make a number of amendments to the ACL. The ACL is the principal, national consumer law in Australia.² It contains a number of consumer protection provisions against unfair business practices. The ACL commenced on 1 January 2011 following a Productivity Commission's recommendation for Australian governments to implement a national, generic consumer law that would apply in all jurisdictions.³

The PC estimated that as a result of the consumer law reforms, Australian consumers and businesses will obtain benefits of up to \$4.5 billion a year.⁴ The main sources for this gain arises from reduced consumer detriment (by increasing the capacity of consumers to make informed choices), reduced businesses compliance burdens (reflecting the removal of variations in laws), enhanced productivity

¹ The ACL is located in Schedule 2 to the *Competition and Consumer Act 2010*

² Further information about the ACL is available at www.consumerlaw.gov.au

³ Productivity Commission (2008), *Review of Australia's Consumer Policy Framework*, recommendation 4.1

⁴ Productivity Commission (2008), *Review of Australia's Consumer Policy Framework*, p.323

and innovation, and reduced transaction costs (from minimising the variations of obligations between jurisdictions).

The implementation of the ACL also fulfils key deregulatory reform priorities under COAG's *National Partnership Agreement to Deliver a Seamless National Economy*, aimed at reducing regulatory duplication and inconsistency. Specifically, the ACL has replaced provisions in at least 20 overlapping and duplicative Commonwealth, State and Territory laws.

The ACL applies nationally in all Australian States and Territories through an 'application law' scheme. Under this scheme the principal text of the ACL is located in Commonwealth legislation and applied as a law of the Commonwealth (through the *Competition and Consumer Act 2010*),⁵ and in each of the States and Territories through the State and Territory application laws.⁶ Under this scheme, any amendment that is made by the Commonwealth to the ACL is automatically applied in the States and Territories via their application laws.⁷

Section 33 of the ACL and the proposed amendments

Section 33 of the ACL currently states that a person must not, in trade or commerce, engage in conduct that is liable to mislead the public as to the nature, manufacturing process, characteristics, suitability for purpose or quantity of any goods. The Bill proposes to amend section 33 of the ACL in the following ways:

- the current section 33 would become a new subsection 33(1);
- a new subsection 33(2) would be inserted, which would state that for the purposes of subsection 33(1), the characteristics of any goods include the use of palm oil in the goods or to produce the goods; and
- a new subsection 33(3) would be inserted, which would apply subsection 33(2) to goods manufactured 12 months after the commencement of subsection 33(2).⁸

No amendment to section 33 of the ACL is necessary

The Treasury considers the current section 33 of the ACL is sufficiently broad to include ingredients (such as palm oil) as a relevant characteristic of any goods. In other words, section 33 of the ACL is not considered to currently exclude palm oil as a relevant characteristic of a good. Accordingly, the proposed amendments to section 33 are not necessary.

The Bill is inconsistent with the Intergovernmental Agreement for the ACL

The ACL is supported by the *Intergovernmental Agreement for the Australian Consumer Law (IGA)*, which was signed by members of the Council of Australian Governments (COAG) on 2 July 2009.⁹ The IGA provides that before the Commonwealth can amend the ACL, the States and Territories must be consulted and the amendment must be supported by the Commonwealth and at least four other jurisdictions (including three States).

⁵ Before 1 January 2011, the CCA was known as the *Trade Practices Act 1974*

⁶ See www.comlaw.gov.au for individual State and Territory application laws.

⁷ In Western Australia any amendment made to the ACL by the Commonwealth does not automatically apply in that State but must first go through the Western Australian legislative process before the changes can have legal effect in the State.

⁸ Subsection 33(2) is proposed to commence 12 months after the date of Royal Assent.

⁹ A copy of the IGA is available at www.consumerlaw.gov.au

Passage of the Bill would be inconsistent with the IGA as it involves the Commonwealth unilaterally amending the ACL without the agreement of the States and Territories. As a result, there is a risk that the amended section 33 could be opposed by the States and Territories and the States and Territories may decide not to apply the changes under their application laws.¹⁰ This could in turn limit the application of the amended section 33 and could see differences emerge over time in consumer laws across Australia. This has the potential to erode the benefits of a national consumer law.

An important benefit of the ACL is the removal of differences that existed between Commonwealth, State and Territory consumer laws. Before the ACL commenced on 1 January 2011, State and Territory consumer laws were generally in parallel with the Commonwealth law, but the provisions were not uniform and inconsistencies existed.¹¹ This gave rise to large compliance costs for businesses, which contributed to the PC making a recommendation for the development of a single national consumer law.¹²

The Bill is inconsistent with the generic nature of the ACL

An important feature of the ACL is that it applies generically across the economy to all goods and services, in all sectors. This is a continuation of how the *Trade Practices Act 1974* had applied for the past 36 years. The proposed amendments are inconsistent with the generic nature of the ACL as it involves inserting ingredient-specific provisions. The ACL, including section 33, is currently sufficiently broad to cover goods which contain or use palm oil without needing an ingredient-specific provision of the kind proposed in the Bill.

In addition, singling out palm oil in section 33 of the ACL may create an expectation that the Australian Competition and Consumer Commission (ACCC) would actively monitor compliance and take enforcement action in relation to goods which mislead consumers about the presence of palm oil. The ACCC enforces the ACL (including section 33) in accordance with its *Compliance and Enforcement Policy*.¹³ Under this Policy, matters involving significant public concern, resulting in significant consumer detriment, relating to a national issue or concerning widespread misconduct, are accorded higher enforcement priority. If the Bill is passed, the ACCC would continue to enforce the ACL, including the amended section 33, in accordance with its Policy.

The Bill would apply to all suppliers

While it remains the Treasury's view that it is not necessary to amend section 33 of the ACL to include palm oil as a relevant characteristic of a good, the Bill would not alter the effect of how section 33 currently applies. The Treasury considers the amendments would simply clarify, or place beyond doubt, that ingredients (such as palm oil) are a relevant characteristic of any goods for the purposes of considering whether conduct is liable to mislead under section 33 of the ACL.

¹⁰ While an amendment made by the Commonwealth to the text of the ACL (in Schedule 2 to the *Competition and Consumer Act 2010*) would automatically apply in all States and Territories (except in Western Australia), a State or Territory may choose to dis-apply a particular amendment under its application law if the amendment was made unilaterally and was not agreed to in accordance with the IGA.

¹¹ Prior to 1 January 2011, key consumer laws in Australia were located in the *Trade Practices Act 1974* (at the Commonwealth level) and in the Fair Trading Acts of the States and Territories.

¹² Productivity Commission (2008), *Review of Australia's Consumer Policy Framework*, recommendation 4.1

¹³ The ACCC's *Compliance and Enforcement Policy* is available on the website www.accc.gov.au

Section 33 of the ACL applies to all suppliers across the supply chain for all goods that are supplied in Australia.¹⁴ This application would continue under the proposed amendments. That is, section 33 of the ACL applies to manufacturers, retailers, distributors and importers. State and Territory application laws extend the application of the ACL to the activities of individuals and unincorporated entities. Accordingly, a supplier (such as a retailer) who has engaged in misleading conduct about whether a good which they sell contains or uses palm oil (for example, by making a misleading representation), would be liable to be in breach of section 33 of the ACL.

¹⁴ The definition of 'goods', 'supply' and 'supplier' are located in section 2 of the ACL in Schedule 2 to the *Competition and Consumer Act 2010*.