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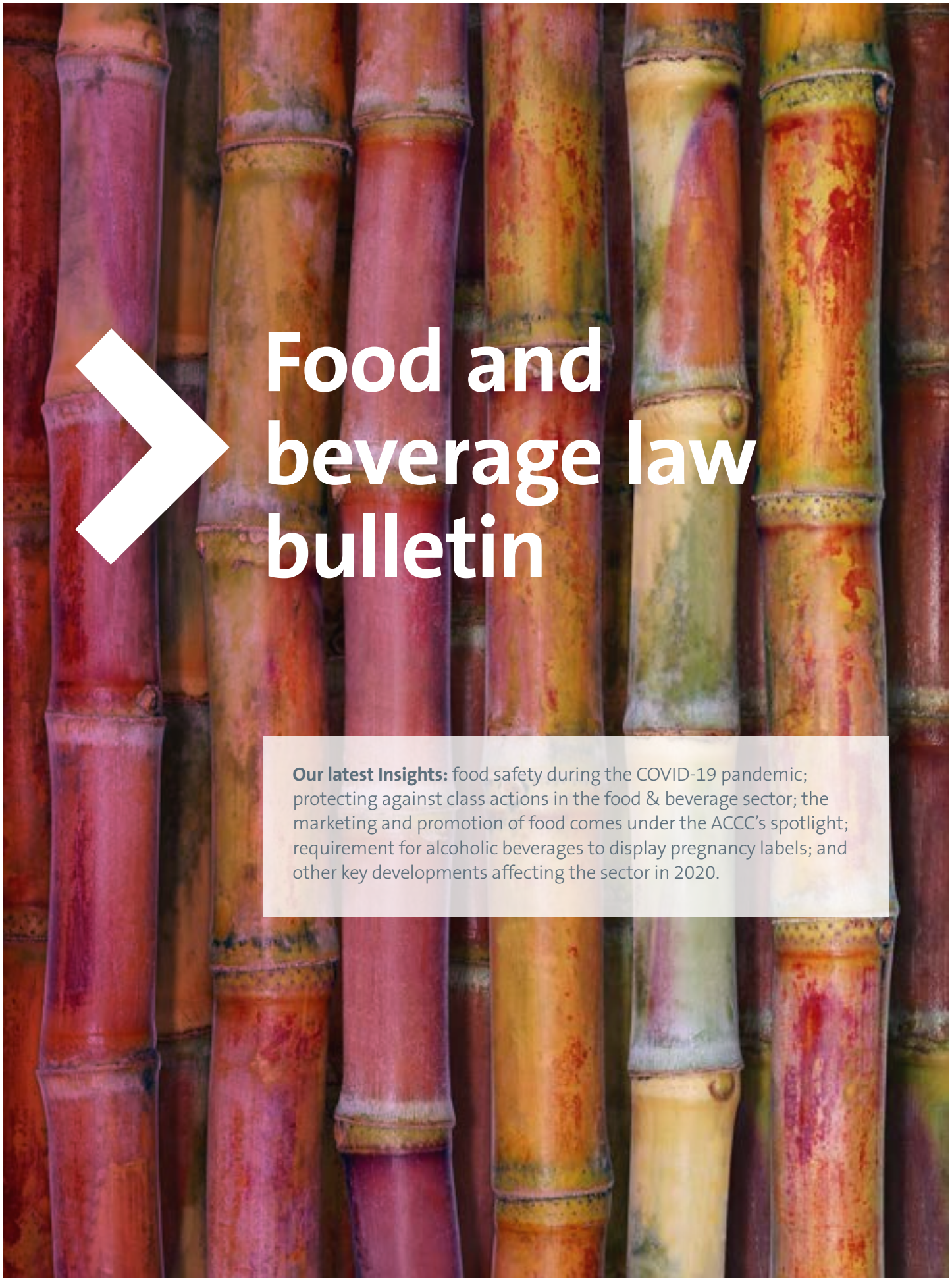

Food and beverage law bulletin

Our latest Insights: food safety during the COVID-19 pandemic; protecting against class actions in the food & beverage sector; the marketing and promotion of food comes under the ACCC's spotlight; requirement for alcoholic beverages to display pregnancy labels; and other key developments affecting the sector in 2020.

Unpacking recent updates in food and beverage

Tommy Chen, Jessye Freeman, Nick Li

IN BRIEF

We unpack the developments from the first half of 2020 likely to affect food and beverage businesses.

KEY TAKEAWAYS

- Changes to the Health Star Rating System penalising high sugar and salt content in foods will start coming into effect from 15 November 2020.
- The annual modern slavery reporting deadline for entities operating on a financial year which ended on or before 30 June 2020 has been extended to 31 December 2020, in recognition of the impact of COVID-19.
- Food and beverage businesses should review their anti-bribery policies and procedures in light of the standards set out in the *Draft guidance on the steps a body corporate can take to prevent an associate from bribing foreign public officials*, in anticipation of the introduction of an offence for 'failing to prevent foreign bribery', which will capture the conduct of the company and its agents, contractors and service providers.
- Parmesan and the names of other foods remain contentious as the Australian Government and the EU negotiations over geographical indications continue, with the next round set for September 2020.

WHO IN YOUR ORGANISATION NEEDS TO KNOW ABOUT THIS?

Legal and regulatory teams.

RECENT UPDATES

HEALTH STAR RATING SYSTEM REFORMS COMING

Food and beverage manufacturers participating in the voluntary Health Star Rating System (***HSR***) will need to review the star ratings for their products, after the Australia and New Zealand Ministerial Forum on Food Regulation (***Forum***) agreed at its July meeting to set 15 November 2020 as the implementation start date for changes to the HSR.

The Forum published its response to the five-year review of the HSR at the end of 2019 (see our previous coverage of the review), supporting each of the review's 10 recommendations (some in full, and others in principle, or subject to funding).

The Forum, among other things, supported the continuation of the HSR as a voluntary scheme, and accepted among other matters, that:

- the HSR energy icon (mostly used on beverages and confectionery products) should be removed from packaging and replaced with an alternative HSR graphic (such as the star rating); and
- subject to advice from the Food Regulation Standing Committee (***FRSC***), there should be changes to the calculation of HSR values such that:
  - products with high total sugars have decreased star ratings;
  - products with high sodium have decreased star ratings;
  - jellies and water-based ice confections have decreased ratings;
  - fruits and vegetables have increased star ratings;
  - dairy foods such as cheeses and yoghurts have increased star ratings; and
  - dairy foods such as chilled dairy desserts have decreased star ratings.

The recommendation to change the calculation of the star ratings was based on stakeholder concerns of the high star ratings of certain high sugar or high salt foods. Separately, survey results showed consumers found the energy icon confusing and made it difficult to compare like products. If the modelling described in the review's final report is correct, 10% of foods (mostly discretionary foods) will experience a reduction to their star rating.

Further, the Forum decided at the July meeting:

- to increase the minimum calcium content for dairy substitute beverages to be considered within HSR to 100mg per 100mL or greater; and
- to reject the proposal of the Federal Government to automatically assign 100% fresh fruit and vegetable juice 5 stars under the HSR or to include such products within the definition of 'minimally processed fruit and vegetables'. The Forum has sought further advice from the FRSC on 100% fruit and vegetable juice and artificially sweetened beverages, and will consider the issue again in its next meeting in November.

As at the date of this article, the full details of any applicable transition periods for the above changes had not yet been published. However, it is expected that the new HSR calculations may be subject to a two-year transition period, given the FRSC advice.

MODERN SLAVERY

As discussed in our previous coverage, the *Modern Slavery Act 2018* (Cth) (the ***Act***) was introduced on 1 January 2019. The Act is designed to combat modern slavery by improving transparency in global supply chains. Supply chains within the food and beverage industry are at potentially higher risk of modern slavery practices, especially those supply chains involving fruit, nuts and spices.

The Act requires reporting entities to submit an annual modern slavery statement. That statement must describe the risks of modern slavery practices in the entity's operations and supply chains, as well as the measures it is taking to address those risks.

Many of our clients are well progressed with their modern slavery work programs and are beginning to draft their statements. Some relevant updates include:

- **Reporting deadline extension for certain entities**. In April 2020, the Government announced that due to the impacts of COVID-19 it was granting a temporary three-month extension to the reporting deadline for entities whose reporting periods ended on or before 30 June 2020. This means that reporting entities operating on a 1 April to 31 March financial year now have until 31 December 2020 to submit their statements, while those operating on a 1 July to 30 June financial year have until 31 March 2021.
- **Addressing COVID-19 impacts in your modern slavery statement**. The Federal Government has recognised that COVID-19 may have negatively impacted reporting entities' modern slavery work programs and/or statement preparation. It has also recognised that the impacts of COVID-19 may have increased the risks of modern slavery practices in some entities' operations and supply chains (eg by creating extreme demand for large volumes of certain products – such as personal protective equipment – in a short timeframe). The Government is therefore encouraging reporting entities to address the relevant impacts of COVID-19 in their statements. Learn more about the Government's expectations here.
- **Preview of the Government's modern slavery statement**. On 1 June 2020, the Australian Border Force published a scoping paper on the Government's modern slavery statement. The paper is available here. It outlines how the Government will be responding to each of the seven mandatory reporting criteria in its statement. While you should treat the document with caution (as it is just a summary), it may be useful as a reference in drafting your own statement.

RENEWED PUSH FOR ANTI-BRIBERY AND CORRUPTION LAW REFORM

Reform of Australia's foreign bribery laws is firmly back on the legislative agenda, with the proposed introduction of a new corporate offence of 'failing to prevent foreign bribery'.

All multinational businesses need to contend with foreign bribery risk, but especially if they frequently interact with foreign public officials and/or use third party agents to sell or market their products.

In December last year, the Government tabled the Crimes Amendment (Combatting Corporate Crime) Bill 2019 (the ***Bill***). This bill is substantially the same as an earlier version (the Combatting Corporate Crime Bill 2017), which lapsed in early 2019.

Under the new offence, a company will be automatically criminally liable for the bribery conduct of their associates (which includes its employees, agents, contractors, subsidiaries and service providers) unless it can show it had 'adequate procedures' in place designed to prevent that conduct.

Draft regulatory guidance issued with the Bill provides detail on how companies can fulfil the 'adequate procedures' requirement. The Draft Guidance is broadly consistent with the UK equivalent. It sets out a principles-based approach to anti-bribery compliance (centring on effectiveness and proportionality), as well as several 'fundamental elements' for inclusion in anti-bribery policies.

Further detail on the Bill and draft regulatory guidance can be found here.

EU GIs RUMBLE ON

The disruptions caused by COVID-19 have not halted the negotiation of the free trade agreement between Australia and EU (the ***A-EU FTA***). As we reported in 2019, as part of the A-EU FTA, the EU is requesting that Australia give much wider protection to the names of hundreds of EU food, beverage and agricultural goods (geographical indications or GIs), which would significantly impact the rights of Australian producers and importers of non-EU products to use (or invoke) a variety of names, such as 'parmesan', 'feta' or 'Scotch beef'. The round 7 negotiations for the A-EU FTA took place in May 2020 via video conferencing, and included discussion of stakeholders' objections to the EU's proposed list of protected names, which were submitted during the objection process in 2019. Further engagement on EU GIs is expected during the next round of negotiations, planned for September 2020.

NO SUGAR TAX FOR NOW

Earlier this year, there was a renewed push from the Cancer Council, the Obesity Coalition and 2020 Australian of the Year, Dr James Muecke, for a tax on sugar-sweetened beverages as a means of combating growing obesity rates in Australia. While the Federal Minister for Health confirmed the Government is looking at ways to rein in Australia's obesity problem, especially in youth, he rejected the idea that a 'sugar tax' would be the solution to the problem.

FSANZ putting sugar and alcohol labels under the microscope

Alison Beaumer and Sarah Muller

IN BRIEF

Beverage manufacturers have three years to include pregnancy warnings printed in red, black and white on their alcoholic beverage products, after the change to the Food Standards Code (***Code***) was approved by the Ministerial Forum. Food Standards Australia New Zealand (***FSANZ***) is also focussing on added sugar in its separate reviews of sugar claims on food and alcoholic beverages. Those reviews will likely take place after new food labelling policy guidelines are published later this year.

KEY TAKEAWAYS

- Pregnancy warnings printed in red, black and white will need to be added to alcoholic beverage labels within a three-year period.
- FSANZ is conducting separate reviews on the Code's regulation of sugar claims on food and alcoholic beverages.
- FSANZ will release updated policy principles for food label reviews later this year.

LABELLING OF ALCOHOLIC BEVERAGES

FSANZ has been conducting various reviews of alcoholic beverage labels. The first, concluded in June 2020, related to warnings against the consumption of alcohol during pregnancy. Another two reviews, which are ongoing, will collectively consider sugar and energy measurement labelling on alcoholic beverages.

PREGNANCY WARNINGS ON ALCOHOLIC BEVERAGES

Alcoholic beverage manufacturers will need to review their product labels after the Australia and New Zealand Ministerial Forum on Food Regulation (***Forum***) accepted changes to the Code on 17 July 2020.

Based on recommendations by FSANZ in late June, the Code will be amended to require that packaged alcoholic beverages display a warning not to consume alcohol while pregnant. Alcohol producers will have **three years** from the date of gazettal of the proposal to implement the new warning on their labels. The new compulsory warning is as follows:

Alcoholic beverages containing less than 200ml will only need to display the pictogram, including the red cross, while larger beverages will need to display the full warning.

FSANZ commenced its review in October 2018 with a view to improving labelling to reduce or prevent Fetal Alcohol Spectrum Disorder (***FASD***).

Pregnancy warnings have previously been voluntary for alcoholic beverages. A 2014 study found that 38% of the alcohol products examined contained a pregnancy health warning of some type, but the proportion varied substantially by the type of alcohol. Where warnings were displayed, the majority used a simple small black-and-white circular image with a cross through it.

FSANZ initially approved a draft variation in January 2020, which would have required alcohol products to use the signal wording, 'HEALTH WARNING' in red text, with black text saying, 'Alcohol can cause lifelong harm to your baby'. The Forum requested a review of that decision in April in response to concerns that the mandatory warning label would place an 'unreasonable cost burden on industry or consumers'. Alcohol producers considered that the proposed black, white and red text label would be expensive to print, and suggested the wording 'HEALTH WARNING' should be changed to 'PREGNANCY WARNING'.

FSANZ's second report, released in late June 2020, reaffirmed its first decision and concluded the cost for alcohol companies would not be unreasonable. The Report considered evidence that red text increases the attention given to a label and is more likely to be interpreted as a warning. Without the red text, a larger warning would be needed to attract attention.

Additionally, after considering quotes for black-and-white and colour printed labels and the cost of treating FASD, the Report found only 1.3% of FASD cases per year would need to be prevented to offset the total cost of label changes. It noted there are 'large human, social and financial benefits to the community from avoiding or mitigating new FASD cases'. FSANZ suggested a longer transition period of three years would provide flexibility for alcohol companies to combine the changes with other voluntary label changes.

However, FSANZ ultimately agreed to modify the signal words to 'PREGNANCY WARNING'. The Report noted that there was no research considering those signal words specifically, but FSANZ accepted they 'target a specific group at whom the warning label message is ultimately directed'.

SUGAR CLAIMS AND ENERGY LABELLING ON ALCOHOLIC BEVERAGES

FSANZ is also continuing work on a proposal relating to carbohydrate and sugar claims on alcoholic beverages. Many alcoholic beverages on the market make claims about their sugar content, such as '99% sugar free', '50% less sugar' or 'low sugar'.

But various enforcement agencies expressed concerns that the Code is unclear about whether or not these claims are permitted.

The existing Standard 1.2.7 in the Code prohibits the making of nutrition, health or related claims on products containing more than 1.15% alcohol by volume. But the Standard allows claims about energy, carbohydrate and gluten content – which is how 'low carb' beers are marketed.

FSANZ released a Technical Assessment in May 2018 considering whether changes to the Code are necessary. FSANZ's view was that Standard 1.2.7 was intended to prohibit claims about low sugar content on alcohol – but it considered it may be necessary to amend the Code to ensure this is clear. The Technical Assessment observed that consumer awareness of sugar and carbohydrate content in alcoholic beverages is patchy. As such, FSANZ reported concerns that 'sugar claims on alcoholic beverages are misleading and that alcohol is being promoted as a healthier choice for consumers when public health advice is to limit alcohol intake'.

The Forum agreed to create a proposal. The timeline for assessing the proposal is unclear, but it will likely coincide with another review into alcohol labelling. The additional review will consider whether energy content should be displayed on alcoholic beverages, as is currently required for food products. In August 2019 the Forum formally referred a request to FSANZ to consider the issue. So far there is little information available about the scope of this additional review, but we will provide an update of further developments as they occur.

ADDED SUGAR LABELLING

FSANZ is preparing a further review into whether the Code should be amended to improve consumer awareness of added sugar content in food products.

Currently, Standard 1.2.8 of the Code mandates that the total quantity of sugar in a product must be included on its Nutrition Information Panel (***NIP***). However, this includes both naturally occurring sugar and added sugar. NIPs may include the proportion of the recommended daily intake of sugar that a serve of the product represents – though this is complicated by the somewhat inconsistent measurement of a 'single serve'.

Nutrition content claims about sugar are also addressed by the Code. Schedule 4 sets out requirements for a product to claim it is '% sugar free', 'low' sugar, or 'reduced or light/lite'. Products that claim to have 'no added sugar' must not contain added sugars, honey, malt or malt extracts, or, unless it is not a type of beverage, any kind of concentrated or deionised fruit juice. Products that claim to be unsweetened must meet the definition of 'no added sugar' and also must not contain any 'intense [non-sugar] sweeteners'.

There is a perception, however, that despite these requirements, consumers find it difficult to understand the meaning of such claims and compare like products.

In August 2019 the Forum asked FSANZ to consider amendments to the Code to improve the accessibility of information about added sugar content. FSANZ has signalled that, as part of its review, it will consider options, international approaches and technical issues – such as how to define 'added sugars'.

The review follows a preliminary policy paper by the Joint Food Regulation System published in June 2019. The Policy Paper concluded that introducing an added sugar content measure on NIPs would be the best approach to ensure consumers can compare products. It also considered it could be beneficial to include on soft drinks and similar beverages a pictorial display of the number of teaspoons of sugar in a specified portion.

A key challenge for FSANZ will be balancing the need to accurately inform consumers about sugar content against the risk of overwhelming consumers with already overcrowded product labels. Requiring too much information to be labelled can have the unintended consequence that consumer attention is not drawn to the most important elements. Additionally, there is a further risk that emphasising added sugar in products may mislead consumers in relation to products which have no added sugar, but which can still be very high in intrinsic sugars.

The timeline for the review remains unclear. We will provide further updates when there are developments.

FOOD LABELLING POLICY GUIDELINES

Relevant to FSANZ's various labelling reviews is a policy guideline currently being prepared by the Food Regulation Standing Committee. The guidelines will not change label requirements, but FSANZ will consider them as part of its current and future reviews of labelling and product claims – including the added sugar review and the reviews of sugar claims and energy content on alcoholic beverages.

The draft guidelines set out broad policy principles, including that food labels should:

- include information to allow consumers to 'identify foods that contribute to healthy dietary patterns aligned with the recommendations of the dietary guidelines';
- provide information about energy content to support consumers in monitoring healthy body weight;
- be presented in a way that is easily understood by customers, and consistent so as to allow comparison of foods and monitor intake;
- not emphasise one nutrient category over others; and
- not promote foods or patterns that do not align with dietary guidelines.

The draft guideline noted that food labelling rules are important because they not only help consumers select which foods to eat, but can also encourage food reformulation, resulting in health benefits even for those who do not read nutrition information.

Public consultation for the Committee's draft guideline closed in February 2020, with final guidelines expected to be released later this year.

We will keep you updated.

Food marketing in the spotlight

Rosannah Healy, Nick Li and Annie Cao

IN BRIEF

Misleading conduct in relation to the sale and promotion of food products (including health and nutritional claims, credence claims and country of origin) is one of the ACCC's compliance and enforcement priorities for 2020. In this article, we take a look at likely areas of focus for the ACCC, as well as the key components of an effective compliance program to minimise regulatory risk in this area.

KEY TAKEAWAYS

- Expect increased regulatory scrutiny of advertising in the food and beverage sector, particularly for claims made in relation to health and nutritional content, as a result of the ACCC's compliance and enforcement priority.
- The ACCC is likely to focus on areas including country of origin claims (eg 'Made in Australia'), health and nutritional claims (eg 'high protein' or 'nutritious') and sustainability claims (eg 'sustainably sourced'). These claims are in the spotlight as they are often used by businesses as a point of differentiation, and sometimes to justify premium prices. The ACCC is concerned about the potential for significant consumer detriment to arise if those benefits are not realised.
- To reduce compliance risks, it is essential that businesses have in place an effective internal compliance program which ensures that all food claims are considered carefully and can be substantiated in the event of regulatory contact.

INCREASED SCRUTINY OF THE FOOD AND BEVERAGE SECTOR

In February 2020, the ACCC announced that misleading conduct in relation to the sale and promotion of food products was one of the ACCC's compliance and enforcement priorities for 2020. This follows the ACCC's enforcement action against Heinz in 2018, where Heinz was fined $2.25m for misleading claims that its Little Kids Shredz products were beneficial for young children.

In announcing the priority, the Chairman of the ACCC, Rod Sims, expressed concern about businesses either confusing consumers or deliberately making misleading claims to gain an advantage in the market, particularly in the context of growing community attention to health-related issues such as obesity.

The ACCC will be focusing on misleading claims about the health or nutritional content of foods, either on the product itself and/or in its associated marketing, which have capacity to cause substantial consumer detriment. [1]

The ACCC will be working closely with other regulators to improve compliance. This is significant given the many labelling and regulatory requirements for foods and beverages which exist in addition to the ACL, including those under the Australia and New Zealand Food Standards (***FSANZ***) Code, trade descriptions legislation and trade measurements regulations.

KEY RISK AREAS

Claims that are likely to be scrutinised closely in the food and beverage sector are discussed below.

COUNTRY OF ORIGIN CLAIMS

The ACCC has expressly called out country of origin claims as a focus area. This is unsurprising given the continued preference for many consumers to buy food and beverages which are grown or produced locally. There are two ACL requirements to be aware of: first, the labelling requirements of the Country of Origin Food Labelling Information Standard 2016 (***COO Standard***), and second, the general prohibition against false or misleading representations.

Compliance with the COO Standard

Except for certain 'non priority' foods (such as confectionery, biscuits, snack foods and soft drinks), foods sold in Australia must comply with the COO standard. The COO Standard prescribes mandatory country of origin labelling requirements for identifying where a product was made, produced, grown or packed. [2]

Determining country of origin is not always straightforward, and can be particularly complex for foods where ingredients are imported, but the final form of the food is made in Australia. The ACCC has issued a guide on complying with the COO Standard.

As with any marketing claims, businesses should keep records that support country of origin claims in case they are called upon by a regulator to justify the claim. The Standard requires these records to be kept for at least 12 months after the sale of the food item.

Compliance with the ACL

All country of origin claims must be accurate and able to be substantiated. Helpfully, the ACL contains safe harbour defences in relation to certain country of origin claims such as 'grown in', 'produce of' or 'made in' claims, provided that the requirements

1 See https://www.accc.gov.au/speech/accc-2020-compliance-and-enforcement-priorities.

2 You can read more about the COO Standard in our Insight publication here.

of those defences are satisfied. In addition, compliance with the mandatory labelling requirements in the COO Standard also provides a safe harbour defence in respect of that particular claim. With all other claims, the question is simply how reasonable consumers will interpret the claim and whether the business can substantiate the claim as accurate and not misleading.

Particular care should be taken with colour schemes, phrases or graphics that allude to country of origin. For example, using green and gold, the terms 'Aussie' or 'Down Under' or Australian caricatures such as bush rangers may suggest the product is made or grown in Australia. Businesses should also be mindful of making claims about their product range as a whole, eg that all of their produce is grown in Australia. These claims tend to be higher risk unless it remains true in respect of all products (and all applicable stores) for the duration of the advertising.

HEALTH AND NUTRITIONAL CLAIMS

Nutritional content labelling

Accuracy when labelling the nutritional content of foods is important. A failure to list all ingredients is likely to breach the FSANZ Code and may also amount to misleading conduct by omission / silence.

For example, in May this year, the ACCC took its first enforcement action in the food and beverage sector against Queensland Yoghurt Company Pty Ltd (***QYC***), following the announcement of its compliance and enforcement priorities. QYC paid a penalty of $12,600 after the ACCC issued it with an infringement notice for misleading customers by omitting gelatine as an ingredient in some of its yoghurt products. The conduct was of particular concern to the ACCC given that a large number of consumers who don't consume meat products rely on product labelling to ensure that food items meet their dietary requirements.

Health claims on high sugar foods

The increased consumer focus on healthier food and beverage options has in turn attracted the attention of the ACCC. The dangers of representing high sugar products as 'healthy' or 'nutritious' was highlighted in the Federal Court decision in *ACCC v J. Heinz Company Australia Ltd*, where Heinz was ordered to pay penalties totalling $2.25 million for making misleading health claims that its high sugar products were beneficial for young children. [3]

Any claims on packaging or in promotional materials which seek to emphasise certain nutritional benefits should be assessed against the health credentials of the product as a whole. For example, a 'high protein' claim is permitted under the FSANZ Code provided the conditions are met. However, it may be misleading to combine that claim with images suggestive of health and nutrition if the product is also high in added sugar.

CREDENCE CLAIMS

Another category of claims that is likely to draw the attention of the ACCC are those that suggest the product (or an ingredient of) is 'premium' in some way, eg 'natural' or 'organic'.

Premium claims require extra care. They need to be assessed against how an ordinary and reasonable consumer (and not industry) is likely to understand the term. Similarly, compliance with industry standards may not provide sufficient justification for a premium claim if it does not align with the views of ordinary and reasonable consumers. One example of this is the labelling of eggs as 'free-range' prior to the introduction of the National Information Standard in April 2018. During this period, there were a number of voluntary certification standards concerning free-range systems. The ACCC, however, expressed concern that some of these standards did not accord with consumer expectations, and that 'free-range' claims which relied on compliance with these standards could still potentially mislead consumers.

SUSTAINABILITY CLAIMS

There has also been heightened focus around 'green marketing' claims, eg claims that foods are 'sustainably sourced'. The ACCC has released guidelines on making environmental claims.

Generally, broader or more general environmental claims such as 'green' or 'environmentally friendly' are higher risk as they are ambiguous and do not explain any specific environmental benefit. Care should also be taken to ensure that claims about the environmental benefits of a product are not overstated. For example, claims that a product is 'sustainability sourced' in its entirety may be misleading if it only applies to some of the key ingredients, such as sugar, tea, cocoa or palm oil. Most importantly, businesses should ensure that any 'green marketing' can be substantiated. As noted above, reliance on independent certification programs is not a silver bullet. Businesses should consider the reasonable expectation of the consumer when making such claims.

IMPORTANCE OF HAVING ADEQUATE COMPLIANCE MECHANISMS

Having a robust internal compliance program reduces the risk of your business making food related claims which cannot be substantiated, and which may mislead customers. In the event of a breach of the ACL, a robust compliance program is also critical to demonstrating the steps your business did take to create a culture of compliance and reduce the risk of breaches. This is relevant to the likelihood of the regulator commencing court proceedings and also the level of any penalty imposed.

The significance of having effective compliance mechanisms in place was evident in the recent Federal Court decision in *ACCC v Bupa Aged Care Australia Pty Ltd* [2020] FCA 602. In that case, Bupa was found to have contravened the ACL by representing that certain extra services would be provided to residents at its residential aged care facilities, then failed to provide those services either wholly or in part.

3 You can read more about the ACCC v J. Heinz Company Australia Ltd decision in our Insight article here.

BUPA self-reported the conduct to the ACCC, and although the ACCC ultimately instituted court proceedings, it sought a 50% discount on account of Bupa's admissions and significant early cooperation. While the court considered the penalty to be on the lower end, it ultimately accepted the proposed penalty, in part due to the significant customer remediation and compliance measures Bupa had already undertaken or agreed to undertake. For example, Bupa had taken steps to implement new systems designed to prevent a repeat of the conduct the subject of the proceeding. Bupa also agreed to establish a comprehensive competition and consumer law compliance program.

This decision demonstrates the role effective compliance programs can play in not only reducing a company's exposure to competition and consumer law risk, but also in mitigating the consequences that may result from a breach. The case also provides guidance as to the best practice for implementing an effective compliance program. The compliance program ordered by the court included the following requirements:

- **Compliance officer**: appointing a compliance officer to ensure the compliance program is effectively designed, implemented and maintained;
- **Risk assessment**: conducting a competition and consumer law risk assessment within three months of the appointment of a compliance advisor;
- **Compliance policy**: issuing a policy statement outlining the company's commitment to compliance with the ACL;
- **Complaints handling system**: establishing a competition and consumer law complaints handling system;
- **Whistleblower protection**: establishing whistleblower protection mechanisms to protect those coming forward with competition and consumer law complaints;
- **Staff training**: regular staff training (at least once a year) on compliance with the ACL;
- **Reports to Board / senior management**: reporting by the compliance officer to the Board / senior management every six months on the effectiveness of the compliance program;
- **Compliance review**: an annual independent review of the compliance program, and rectification of any material failures (including notification to the ACCC); and
- **ACCC recommendations**: prompt implementation of any recommendations made by the ACCC considered reasonably necessary to ensure continued maintenance and implementation of the compliance program.

These requirements also align with the compliance program templates made available by the ACCC. These templates provide an indication as to what the ACCC considers an acceptable baseline in compliance programs implemented by companies.

Class actions and employment law – latest developments

Jaime McKenzie, Ingrid Weinberg, Veronica Siow, Katherine Werren and Zoe Chapman

IN BRIEF

Consumer-facing businesses and ASX-listed entities face the highest class action risk. There has also been an increase in employee class actions, especially relating to claims of misclassification. These trends bear significant implications for food and beverage businesses.

In this article, our class actions and employment teams reports on the latest developments and how food and beverage businesses can protect against class action risk.

KEY TAKEAWAYS

- Consumer claims are now the most common type of class action brought in Australia. Consumer-facing businesses, such as food and beverage manufacturers and retailers, face increasing class action risk in Australia.
- Employment claims continue to increase and are likely to persist as Australia battles the COVID-19 pandemic. Employee misclassification (leading to underpayment of entitlements) remains a key area of risk. In particular, employers should be mindful of the importance of correctly classifying employees, including casual employees and independent contractors.
- Recently announced reforms to litigation funding may result in a softening of the number of third party funded class actions. However, any reduction in claims may be counteracted somewhat by Victoria's recent removal of the prohibition on lawyers charging contingency fees.

AUSTRALIA'S CLASS ACTIONS LANDSCAPE

For over 25 years, class actions have been a fundamental part of Australia's legal landscape. A company is more likely to face a class action in Australia than in any other country apart from the United States – the result of a plaintiff-friendly regime coupled with entrepreneurial firms and third party litigation funders. The food and beverage sector has not been immune from this trend. In fact, being a consumer-facing business is currently the biggest indicator of class action risk in Australia, followed by being an ASX-listed entity.

Another area of emerging class action risk with implications for the food and beverage sector is the rise in employment class actions. A recent decision of the Full Federal Court in *WorkPac Pty Ltd v Rossato* (***WorkPac v Rossato***),[1] handed down in May this year, has equally significant implications for the sector – particularly those businesses that employ casual employees.

Our annual Class Action Risk Reports identify and monitor trends in Australia's class action landscape as well as key indicators of class action risk for business. A roundup of these trends as they apply to the food and beverage sector, as well as some predictions for the remainder of 2020, are set out below.

CLASS ACTIONS FILED IN 2019 AND 2020

In 2019, the number of class actions filed fell from 2018's record high of 55 to 44. In the first half of 2020, approximately 23 class actions were filed. If this rate remains steady, 2020 is on track to be relatively on par with 2019 (or higher once competing class actions which address essentially the same legal issues are excluded). The impact of the COVID-19 pandemic (which may dampen some class action activity but gives rise to its own COVID-19-related class action risk) and recent reviews and reforms to Australia's class action regime may alter this trajectory in the second half of 2020.

CONSUMER CLASS ACTIONS

More than 40% of the class actions filed in 2019 were against consumer-facing businesses – a trend that has continued in 2020. Operating a consumer-facing business is now the biggest indicator of class action risk in Australia.

Food and beverage-related class actions in other common law jurisdictions provide an indicator of what we might expect in Australia. In South Africa, a packaged foods company is defending an action over its role in a listeria outbreak that killed over 200 people. In the United States, another company is facing a suit over its alleged failure to disclose an artificial flavouring in its products.

SHAREHOLDER CLASS ACTIONS

Shareholder claims remain the second most common type of class action filed. In 2019, 23 shareholder class actions were filed. The softening of shareholder class actions in recent years is likely due in part to the uncertainty and competitive pressures arising from the Australian courts' variable approach to litigation funding models and competing class actions.

Listed food and beverage companies remain attractive targets for shareholder class actions. Two competing class actions were filed against an Australian winemaker in the first half of 2020 and there is a current investigation into a beverage franchisor following last year's Parliamentary inquiry into the franchise sector.

1 *WorkPac Pty Ltd v Rossato* [2020] FCAFC 84

EMPLOYEE CLASS ACTIONS

Employee class actions have steadily increased over the decade and now comprise 15% of total class actions in Australia, with three filed in the first half of 2020 alone. Most claims relate to whether workers have been misclassified as independent contractors or casual employees, and consequently had been underpaid as a result of not having received the entitlements that arise from permanent employment. Other claims relate to working conditions, and illnesses and injuries sustained at work.

Such claims are likely to increase in light of the COVID-19 pandemic, including as a result of employees having inappropriate remote-working arrangements, or employees being exposed to COVID-19 in the workplace. As at July 2020, the New South Wales State Insurance Regulatory Authority reported 267 workers compensation claims related to the pandemic. The United States has seen class actions filed against fast food chains, among others, based on an alleged failure to adopt government safety guidance on COVID-19 and endangering employees and their families.

RECENT REVIEWS AND REFORMS IMPACTING CLASS ACTION RISK

Following the announcement of a Parliamentary inquiry into litigation funding and regulation of the class action industry (see here for more), COVID-19 has been the catalyst for several reforms to Australia's class actions landscape that are likely to impact class action risk.

- **Regulation of litigation funders**: From 22 August 2020, litigation funders operating in Australia will be required to hold an Australian financial services licence and comply with the managed investment scheme regime in the *Corporations Act 2001* (Cth). The higher compliance burdens on, and greater regulatory oversight of, third party funders will likely see a softening of class action filings in (at least) the short term. The reforms are more likely to affect smaller and overseas funders and are less likely to have an impact on larger Australian funders, who may find the compliance burden more manageable.
- **Temporary amendments to continuous disclosure obligations**: Continuous disclosure obligations are a common trigger for shareholder class actions. Temporary amendments have recently been made to the continuous disclosure regime so that, in civil proceedings, directors and officers will now only be liable for failing to disclose price-sensitive information where they knew or were reckless or negligent as to whether that information was price-sensitive. We welcome and support these recent measures; however, the measures are temporary and have clear limitations (we have separately reported on those changes here and here). Despite those limitations, this may provide some relief for listed companies during the COVID-19 pandemic.
- **Introduction of contingency fees in Victoria**: In June 2020, Victoria removed the prohibition on lawyers charging contingency fees, allowing plaintiff firms to recover a percentage of a successful claim similar to models used in entrepreneurial legal systems like the United States. The introduction of contingency fees may see plaintiff firms choosing the Victorian Supreme Court as their forum of choice, and may offset any softening caused by the other measures described above.

EMPLOYMENT CLASS ACTION RISK: EMPLOYEE MISCLASSIFICATION

A class action is currently on foot against WorkPac for misclassification of workers and associated underpayments. The recent *WorkPac v Rossato* decision may contribute to a rise in these types of claims as it has caused further uncertainty about the nature of casual employment. Employers of casual employees should be aware of the decision and its implications.

SUMMARY OF DECISION

In this case, WorkPac, a recruiter for mining, construction and engineering jobs, had engaged an employee under six consecutive employment contracts over a period of almost four years. WorkPac sought declarations from the court in order to clarify the nature of the employment relationship, to the effect that:

- the employee was engaged on a casual basis within the meaning of the *Fair Work Act 2009* (Cth) and the applicable enterprise agreement. If this was the case then he would not be entitled to paid leave entitlements that are due to permanent employees such as annual leave, paid personal/carer's leave, paid compassionate leave and public holidays;
- if the employee was not a casual, then WorkPac could set off any payments it had made to him that were above the minimum rates in the applicable enterprise agreement (including casual loading) against any entitlements he was ultimately owed by virtue of being a permanent employee; and
- WorkPac could alternatively recover, by way of restitution, the casual loading paid to the employee as it had been paid on the basis of mistake or failure of consideration.

The court declined each of the above.

DECISION

- **The employment was not casual**: This aligned with the court's earlier decision relating to another WorkPac employee.[2] The description given by the parties as to the nature of their relationship, while relevant, is not conclusive and the arrangement needs to be considered as a whole. Relevant factors include whether the employment contract provides for the parties to offer work, or elect to work, on a particular day. In this case, the employment arrangement was for an

2 WorkPac v Skene [2018] FCAFC 131.

indefinite duration and was stable, regular and predictable rather than casual in nature. A 'firm advance commitment' was evident in each of the six employment contracts.

- **Set-off not available**: WorkPac could not set-off the casual loading payments that it had made to the employee against the entitlements he was owed as a permanent employee. These payments did not have a close enough correlation because an entitlement to paid leave is not simply monetary in nature and rather allows an employee to have a period of paid absence from work.
- **No restitution of casual payments**: WorkPac could not recover, by way of restitution, the casual loading that it had paid to the employee. There had been no relevant mistake and WorkPac could not show that the casual loading it had paid formed a distinct and severable part of the employee's remuneration for which there had been a failure of consideration.

WorkPac is currently seeking leave to appeal its case to the High Court. For a more detailed analysis of this case, see our Insight: Permanent casual – like smart casual, a very ambiguous category indeed.

ACTIONS FOR EMPLOYERS

Casual employment provides flexibility and administrative convenience for employers, and can be an attractive employment model for businesses with fluctuations in their staffing requirements. For these reasons, manufacturers and retailers in the food and beverage sector typically employ a portion of their workforce on a casual basis.

However, in light of *WorkPac v Rossato*, employers of casual employees should consider whether they are exposed to any risk by reason of their casual employment arrangements. Employers may take steps to assess their risk, including:

- **Reviewing arrangements and contracts**: Employers should review their casual employment arrangements, including the patterns of work and rostering, to ensure they are not regular or predictable in nature. Employers should also review their casual employment contracts, which should properly reflect the casual nature of the relationship. Contracts should provide for employees to accept or decline each casual engagement and include wording that enables the recovery of casual loading if an employee is misclassified.
- **Considering alternative arrangements**: Employers should consider whether an alternative working arrangement may be appropriate for any new or existing casuals, including whether it may be appropriate to offer eligible casuals the option to convert to full-time or part-time employment.

COVID-19 and food: navigating food and health safety in the workplace

Nick Li and Stephanie Kelly

IN BRIEF

The challenges posed by the novel COVID-19 pathogen means food and beverage manufacturers will likely need to adopt additional measures, such as increased cleaning and sanitation, masks and social distancing, to comply with their food safety obligations. We examine the latest guidance from Food Standards Australia New Zealand and Safe Work Australia, and assess how these new measures – aimed at reducing the spread of COVID-19 – are likely to impact food and beverage businesses.

KEY TAKEAWAYS

- Increased cleaning and sanitation of premises, equipment and other food contact surfaces, diligent hygiene practices, in combination other measures (eg masks, social distancing etc) should be implemented appropriately to ensure the safety and suitability of food, and the health of food handlers.
- FSANZ has issued guidance for food businesses on recommended practices to ensure ongoing compliance with the Food Safety Standards.
- Food and beverage manufacturers should keep up to date with developments and further guidance from FSANZ or Safe Work Australia, as recommendations may change as the scientific knowledge around COVID-19 continues to develop.

WHO IN YOUR ORGANISATION NEEDS TO KNOW ABOUT THIS?

Legal counsel and managers responsible for workplace health and safety at food and beverage manufacturing businesses.

FOOD SAFETY AND HYGIENE IN THE MIDST OF A PANDEMIC

The COVID-19 pandemic presents unique challenges for food and beverage manufacturing businesses and regulators alike. Food Standards Australia and New Zealand (***FSANZ***) and State and Territory governments have so far refrained from introducing new food safety and hygiene requirements in response to the pandemic. However, food and beverage manufacturing businesses should have regard to the guidance issued by FSANZ and states and territories relating to COVID-19, and implement changes to existing practices, policies and procedures in accordance with those guidelines to minimise the risk of transmission and ensure compliance with their food safety obligations.

It is useful to review what is presently known about the COVID-19 virus, and the safety and hygiene requirements applying to all food and beverage manufacturers, in order to understand the new guidance.

THE VIRUS – CLASSIFICATION AND MEANS OF TRANSMISSION

SARS-CoV-2 (the pathogen behind the COVID-19 pandemic) is a virus that primarily causes respiratory illness, though illness associated with the disease can range from mild to very severe. It is widely accepted that COVID-19 is a highly transmissible disease, however, scientific knowledge about the ways in which COVID-19 is transmitted is still emerging. According, to the World Health Organisation's (***WHO***) most recent scientific briefing, transmission via respiratory droplets and contact (whether by direct contact or through contact with surfaces touched by an infectious person) remain the primary modes of transmission. However, the briefing also acknowledged the increasing scientific evidence indicating that COVID-19 can be transmitted by airborne aerosols in indoor settings.

COVID-19 is not currently classed as a foodborne disease, since there is no evidence to date that the virus is transmitted in food. However, transmission in food manufacturing or retail settings remains a risk because of the potential for COVID-19 to be transmitted via contaminated surfaces, as well as through person to person transmission. This is demonstrated by the clusters emerging at abattoirs — where social distancing between employees can be difficult to maintain.

Food businesses, therefore, face real challenges in attempting to limit the potential for transmission in their workplaces.

LEGAL OBLIGATIONS FOR FOOD AND BEVERAGE MANUFACTURERS

Food and beverage businesses in Australia are subject to the Food Safety Standards in Chapter 3 of the Australia and New Zealand Food Standards Code (***Food Code***). The Standards impose a range of health and hygiene obligations on food businesses in Australia to take practical steps to prevent contamination and ensure the safety or suitability of food is not compromised.

Specific health and hygiene obligations imposed by the Food Code include, relevantly:

- that food businesses must have a food safety program;
- that food businesses must ensure persons undertaking food handling have skills and knowledge in food safety and hygiene matters;
- that food handlers known or suspected to be suffering from a condition or foodborne disease must notify their supervisor, and are not to engage in food handling;
- obligations requiring food handlers to take all practicable measures to avoid food contamination;
- that food handlers are required to wash their hands with warm water and soap before commencing or recommencing handling of food, after touching their hair, scalp or body opening, and after sneezing, coughing, eating or drinking;
- that food businesses must ensure appropriate hand washing facilities are provided and can be easily accessed; and
- a range of obligations for food businesses to ensure that food contact surfaces (including facilities and equipment) and eating and drinking utensils are satisfactorily cleaned and sanitised.

The Food Safety Standards are adopted by each Australian state and territory. In addition, each state and territory government can impose further requirements on food and beverage businesses, for example:

- In Victoria, the *Food Act 1984* (Vic) requires the proprietor of certain food premises to have a food safety supervisor who knows how to alleviate hazards associated with the handling of food at that premises.
- In New South Wales, the *Food Act 2003* (NSW) allows an authorised officer to issue an improvement notice if they believe a premises or any equipment is in an unclean or insanitary condition. Failure to comply with an improvement notice can result in a premises being issued an order prohibiting it from handling food intended for sale on that premises.

Workplace health and safety laws (***WHS***) also apply to food and beverage manufacturing businesses, in addition to the food safety requirements imposed in each state and territory. The model WHS law (in place in all jurisdictions expect Victoria and Western Australia, which have their own legislation) requires businesses to take care of the health, safety and welfare of staff, contractors and customers or visitors. These duties are broad, and critically in the context of COVID-19, require workplaces to:

- maintain an environment that does not carry a risk for health and safety; and
- monitor the health of workers and workplace conditions to prevent illness or injury.

COVID-19 GUIDANCE

Regulators appear to consider the existing regulatory food safety and WHS frameworks adequate to address the risks posed by COVID-19. While this may be correct, the pandemic does pose new questions for food and beverage businesses in terms of how they go about practically complying with the legal requirements during the pandemic. Existing hygiene, cleaning and sanitation practices may be insufficient to comply with food regulatory and WHS requirements, in the context of dealing with a highly transmissible disease for which there is no known cure.

To assist businesses understand their obligations, FSANZ and Safe Work Australia have each published guidance for food businesses on complying with the food safety and WHS regulatory regimes in the context of the COVID-19 pandemic.

There is significant overlap between the Safe Work Australia and FSANZ guidance. Both outline a variety of general measures aimed at reducing the spread of COVID-19. Key recommendations include:

- **Control measures** such as:
  - spacing workers 1.5 metres apart to ensure physical distancing;
  - implementing good hygiene measures;
  - increased cleaning and disinfecting of work surfaces (at least daily) with additional cleaning and disinfecting of high touch-point areas like door handles; and
  - providing information to workers on protecting against the spread of COVID-19;
- **Workplace planning and monitoring measures** such as:
  - monitoring workers for any symptoms associated with COVID-19;
  - undertaking a specialised risk assessment for any vulnerable workers;
  - reviewing shift arrangements to limit likelihood of large gatherings in breakrooms, changerooms or car parks; and
  - dividing staff into teams with limited exposure between them to reduce the number of staff that might be exposed should an employee develop symptoms.
- **Deep cleaning and sanitising following any COVID-19 detection on site**: a workplace will need to be thoroughly cleaned and sanitised after exposure to COVID-19. FSANZ's joint food regulation system has issued a fact sheet which gives further details on the nature of the cleaning that should be conducted following COVID-19 exposure.

Safe Work Australia has further stated that masks in food manufacturing and meat processing plants may be appropriate where control measures like physical distancing and barriers cannot be implemented because of the nature of the work and design of the workplace (eg on the kill floor of an abattoir). If a workplace is considering requiring employees to wear masks, it is critical they provide training to workers on fitting them, since inappropriate or incorrect use of face masks may increase the risk of COVID-19 or create new workplace health and safety risks. It should be noted that, effective Thursday 23 July 2020, masks became mandatory for all workplaces in Victoria until further notice.

In the context of food manufacturing and food handling businesses, FSANZ's recommendations acknowledge that businesses already have to adhere to safety and hygiene protocols to protect against any contamination of food, such as handwashing requirements and wearing personal protective equipment. However, it is important that even workplaces with existing safety and hygiene measures in place review their practices against the guidelines to consider whether more stringent measures are needed to guard against COVID-19.

All food businesses (even those with stringent measures in place) should review their practices against the guidelines and implement further measures recommended by FSANZ and Safe Work Australia where possible to reduce the risk of transmission and contamination.

ONGOING VIGILANCE

The ever-evolving knowledge around the science of COVID-19 and its public health response, both in Australia and around the world, means there will likely be further developments which will affect how food businesses are to comply with food safety and WHS laws and regulations.

The increased sanitation, hygiene and reporting practices adopted during this pandemic are likely to be in place moving into the foreseeable future as part of the 'new normal'.

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