



Submission to the

BETHWAITE REVIEW
of food regulation

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About CHOICE

CHOICE (formerly known as the Australian Consumers' Association) is an independent, not-for-profit, non-party-political organisation established in 1959 to provide consumers with information and advice on goods and services, health and personal finances, and to help maintain and enhance quality of life for consumers. CHOICE provides consumer education, conducts surveys into consumer attitudes, lobbies for improved conditions for consumers and distributes unbiased consumer advice.

Independent from government and industry, it lobbies and campaigns on behalf of consumers to advance their interests. CHOICE is primarily funded through subscriptions to its magazines and website, fee-for-service testing and other related expert services. There is no government funding for normal running expenses of CHOICE, and no commercial sponsorship or advertising.

Background

Food regulation has long been one of CHOICE's key policy priorities. For many years we have worked with regulators, enforcement agencies, governments, industry and other non-government organisations to ensure that food regulation protects the interests of consumers. CHOICE believes that food regulation should ensure that the food supply is safe to eat, that it protects and promotes the health of Australian consumers, that consumers are able to make informed choices about the food they buy and that food is not sold or marketed in a misleading or deceptive manner.

Regulation is increasingly being subject to scrutiny in order to minimise any negative impact on business. In 2005, CHOICE provided a detailed submission to the Taskforce on Reducing the Regulatory Burden on Business (the Banks Review). The Banks Review made a number of recommendations about the burden of food regulation. CHOICE understands that the Bethwaite review aims to address these recommendations. CHOICE also participated in a similar review being conducted by the Victorian Competition and Efficiency Commission into the impact of food regulation in Victoria.

CHOICE has considered the role of regulation in protecting consumers in various industries, and generally. This work underpins many of the points raised in this submission. For further information, please see the box "*The role of red tape*" (page 3) and our submission to the Australian Government's Review of Regulatory Burden on Business (available on our website www.choice.com.au/regulation).

The following submission has not been structured in such a way that it responds to each of the terms of reference of the Bethwaite review separately. However, the submission does provide comments on a range of issues that affect the capacity of the food regulatory system to protect the interests of consumers.

The submission addresses the following issues:

- the objectives of food regulation and the extent to which these are being met,
- our views and experiences of food regulatory processes,
- consumer consultation and engagement in food regulation, and
- inconsistencies in regulation and enforcement.

Where possible, CHOICE has provided examples to illustrate our concerns or experiences. Our recommendations for improvement are at the conclusions of the submission.

The role of red tape

CHOICE does not believe in regulation for regulation's sake. Government regulation will not always be the best and most effective way of protecting consumers, nor is it always necessary. Poor or ineffective regulation will usually be just as bad for consumers as having no regulation where regulation is required.

Some regulation is introduced as a knee-jerk reaction or irrational response to community fears or concerns. If the feared harm is unlikely to occur or the potential consequences are not significant then the greater good might be better served by letting the risks lie where they fall.

On the other hand, much regulation is essential to the practical operation of markets and to creating and preserving the trust of consumer and businesses in them. Further, good quality regulation is often the most efficient way to protect consumers from unfair practices when those markets don't work as well as they should or fail to adequately protect consumers.

CHOICE rejects an approach which views regulation solely as 'red tape' that unnecessarily stifles innovation and limits the legitimate activity of business. Naturally, views will differ depending on whether one's interest is in promoting industry innovation or protecting consumers from inappropriate products and practices. In our view there should be as little regulation as possible but as much as is necessary to protect consumers.

The Bethwaite Review must balance the need to protect consumers from unsafe foods and unscrupulous practices in the food industry, with the desire to reduce cost on industry and to promote innovation and development within the food industry.

Objectives of Food Regulation

In a joint submission to the Blair Review of food regulation conducted in 1997, CHOICE and the Public Interest Advocacy Centre argued that any new system of food regulation in Australia must:

- ⇒ protect public health as its prime objective;
- ⇒ include the provision of adequate and appropriate consumer information as an equally important objective;
- ⇒ continue to fall under the health portfolio;
- ⇒ separate consumer and producer interests; and
- ⇒ support a national public health nutrition policy.

Following the review, the primary objectives of food regulation in Australia were set out in Food Standards Australia New Zealand (FSANZ) Act 1991. They are:

1. The protection of public health and safety.
2. The provision of adequate information relating to food to enable consumers to make informed choices.
3. The prevention of misleading and deceptive conduct.

CHOICE supports these as the key objectives as it makes public health and consumer protection the ultimate goals of food regulation in Australia. Despite this, CHOICE is concerned that a number of food regulatory decisions and reviews have prioritised the interests of the food industry in relation to competition, product innovation and marketing, above the interests of consumers and public health.

CHOICE understands that the aim of this review is to identify ways in which the food regulatory framework can be streamlined and made nationally consistent in order to improve the competitiveness of the Australian food industry. CHOICE acknowledges that streamlining and improving the consistency of food regulation may also have benefits for consumers but we are concerned that efforts to improve the food regulatory system in this way may compromise public health and consumer protection objectives.

Prioritising public health

Despite the fact that the “protection of public health and safety” is the primary objective of food regulation there is no definition of “public health” or “public health and safety”. This results in varying interpretations of this objective. In some cases it is interpreted as pertaining only to food safety and food-borne illness. Such a limited view of public health and safety only addresses the short-term health impact of food regulation rather than the long-term impact on the health and nutrition of individuals and populations.

Overweight and obesity

More than half of all Australian adults are overweight or obese. The total cost of obesity in Australia in 2005 was \$3.767 billion¹. This includes direct health care costs as well as the indirect costs of lost productivity resulting from obesity related illness.

There are many causes of overweight and obesity but for most people it is preventable through healthy eating and regular exercise. CHOICE believes that there needs to be greater consistency between the Commonwealth government’s obesity prevention strategy and the decision-making processes of FSANZ, the Food Regulation Standing Committee (FRSC) and the Ministerial Council.

As overweight and obesity is one of the biggest public health problems facing Australia today, obesity prevention should underpin all food regulatory decisions. Such an approach would be consistent with the primary objective of protecting public health and safety.

¹ Access Economics (2006), The economic costs of obesity. Access Economics Pty Ltd.

A number of recent decisions suggest that FSANZ does not give adequate consideration to obesity prevention and the long-term public health and nutrition implications of food regulation.

Health claims

The FSANZ Draft Assessment Report on nutrition, health and related claims established a set of disqualifying criteria that would prevent foods that are too high in kilojoules, saturated fat and sodium from making claims about potential health benefits of other nutrients.

CHOICE supports this in principle but in practice the criteria prohibited a number of nutritious foods from making claims while some energy dense foods would be permitted to carry claims. For example, because of its small (30g) serving size Kellogg's Coco Pops (a kids' breakfast cereal which is high in sugar and low in fibre) would be permitted to carry claims about being a source of calcium for strong bones because it is fortified with a range of vitamins and minerals. Full cream milk would be prohibited from carrying a similar claim because a 250ml serve of milk was considered too high in fat.

This conflicts with healthy eating messages which encourage consumers to limit sugary foods and consume dairy products as part of a healthy diet. Few nutritionists would recommend a sugary breakfast cereal as an appropriate source of calcium over a glass of milk.

CHOICE understands that FSANZ have reconsidered this proposal and will soon present a model that takes better account of the overall nutritional quality of foods and drinks.

Formulated beverages

A second example relates to a decision by FSANZ to allow the production of formulated beverages in Australia. These water-based beverages can also contain fruit juice, sugar and/or artificial sweeteners. The distinguishing factor between formulated beverages and other beverages is that they can be fortified with a range of vitamins and minerals.

FSANZ limited the sugar content of formulated beverages but that limit was set so high that one 600ml serve of a formulated beverage could provide an adult with 50% of their recommended daily intake of sugar. Given that sugar is likely to be consumed in many other foods throughout the day (e.g. fruit, breakfast cereals, milk and sugar added to tea and coffee) it is likely that a person who consumes one of these beverages would exceed their recommended sugar intake.

Presenting sugary drinks as a source of vitamins and minerals undermines public health efforts encouraging consumers to reduce intake of sweetened beverages and other energy dense foods. Decisions such as this only serve to add to Australia's escalating levels of overweight and obesity as they enable energy dense foods to be marketed as healthy foods because of added vitamins and minerals.

In addition to this, at the time FSANZ proposed to permit these beverages it was also considering two proposals on the mandatory fortification of folate and iodine

in order to prevent neural tube defects and iodine deficiency disorder respectively. Given that mandatory folate and iodine fortification is intended to address the public health consequences of deficiencies in these nutrients, CHOICE believes that had FSANZ given adequate consideration to the public health implications of folate and iodine fortification it would not have permitted the voluntary addition to formulated beverages until the mandatory fortification proposals had been finalised. Instead, folate and iodine were among the vitamins and minerals that FSANZ allowed manufacturers to add voluntarily to formulated beverages.

Review of FSANZ assessment and approval processes

In the 2005/06 review of FSANZ assessment and approval processes nutrition and health claims were not considered to be issues of public health and safety. Rather health claims were considered consumer information only. It was on this basis that the FRSC working group justified the removal of all public consultation on health claims applications in order to encourage industry innovation. The report reasoned that only matters directly relating to public health and safety should require a full, open and transparent assessment process.

For many years CHOICE has opposed the use of health claims on food labels. We believe that they are little more than marketing messages encouraging consumption of processed foods because of their potential health benefits. In reality, it is unlikely that an individual product will deliver a health benefit. Yet, the food industry and regulators have previously defended health claims on food labels suggesting that they would assist consumers to make healthy choices thus improving public health.

In this case, authorities were selective in their interpretation of “public health and safety”. Authorities initially supported the use of health claims because of the potential public health benefits. Later authorities suggested that health claims provided consumer information only, in order relax regulatory measures.

General comments

CHOICE acknowledges that FSANZ has recently employed a public health nutritionist. We hope that this will assist FSANZ to better address the broader public health consequences of food regulatory decision-making. However, there also needs to be greater public health consideration at the policy development level. CHOICE believes that defining “public health and safety” would ensure that “public health and safety” addresses more than just food safety and food-borne illness.

Increasingly, regulatory decisions are based on an analysis of the impact of regulation on business, consumers and governments. However, there are inconsistencies between the level and type of information available to assess the costs and benefits to industry compared to information available to assess the impact on public health and consumers. Businesses may invest in collecting cost-benefit information but it is often left to government agencies to collect data on the positive or negative impacts on public health and consumers. CHOICE believes there is considerable underinvestment in collecting public health and consumer data. This results in one-sided analyses of the impact of food regulation because

costs and benefits to business are more easily quantified and more likely to be collected.

There is no ongoing investment in the collection of public health and consumer data needed to inform food regulation. The last extensive collection of data on Australians' food consumption patterns was the 1995 National Nutrition Survey. Now 12 years old, this data is outdated yet it is still used to inform food regulatory decisions such as selecting appropriate foods for mandatory fortification. The Commonwealth Government and the Australian Food and Grocery Council have funded similar research but the first stage of research is limited to children only so it will not provide detailed information about the food consumption habits of all Australians.

As previously mentioned FSANZ is currently considering proposals for the mandatory fortification of folate and iodine to address the health problems associated with deficiencies in those nutrients. Both proposals are yet to be finalised but the latest advice from FSANZ suggests that bread will be fortified with both folate and iodine. FSANZ and state food and health authorities can assess the extent to which bread manufacturers comply with the new standard yet there has been no funding committed to assess the intended impact of mandatory fortification on the health of the target groups and any potential adverse impact on non-target groups.

Food regulatory processes

For many years CHOICE has participated in the development of food policy and regulation; acting as a consumer representative on committees and working groups, participating in public forums and stakeholder workshops, providing written submissions, conducting consumer research, and presenting our position directly to Ministers.

Through a long involvement in food regulatory processes, CHOICE has gained an understanding of how this system operates and how to become involved in that process. CHOICE feels that the most positive attribute of the FSANZ process is its openness and transparency. There is a statutory requirement for FSANZ to conduct at least one round of public consultation, usually through submissions to FSANZ on its Initial or Draft Assessment Reports.

The FSANZ assessment and approval processes are laid out in the FSANZ Act. In contrast, the processes used by the Food Regulation Secretariat are ad-hoc and often unclear. Our experience during the review of the FSANZ assessment and approval process left us with the impression that the Food Regulation Secretariat is more concerned about satisfying the food industry than protecting public health and consumer interests.

In 2005, the Ministerial Council commissioned a review of the FSANZ assessment and approval processes with a view to streamlining these processes and reducing barriers to innovation and product development. A number of the recommended changes attempt to streamline processes that were unnecessarily lengthy. We see merit in introducing new processes to expedite minor changes to the Food Standards Code (for example, fixing typographical errors). However, other changes will unnecessarily limit the level of public consultation in an attempt to promote innovation and development in the food industry.

As part of the consultation process, CHOICE participated in two general stakeholder consultation meetings/workshops, two public health and consumer group consultation meetings, a preliminary meeting with the consultant conducting the review and also provided two written submissions. CHOICE used these opportunities to reiterate its opposition to removing opportunities for participation of consumers and public health experts and the degree to which industry interests were prioritised over public health and consumer interests. Public health groups expressed similar concerns.

The proposed changes to the health claims process remove public consultation altogether. It appears that the views of public health and consumer groups have been ignored. In CHOICE's opinion this threatens the integrity of the FSANZ processes and undermines its primary objectives. CHOICE believes that changes such as this place the interests of the food industry above the interests of the consumers that FSANZ is charged to protect.

In addition, there is insufficient information available to stakeholders on how Ministers reached a particular decision, why some comments are accepted or rejected, and why certain public health and consumer issues are not taken into consideration.

Currently, the main feedback mechanism through which stakeholders can receive information about Ministerial Council decisions is the communiqué that is issued shortly after each Ministerial Council meeting. These communiqués provide a summary of the decisions made but they do not provide sufficient detail for stakeholders who have participated in the policy development process.

Consumer Consultation

Effectively engaging consumers in food regulatory processes is no simple task and the mechanisms used for engaging industry and government are not necessarily effective in gaining consumer input. There should not be a 'one size fits all' approach to stakeholder consultation.

Most consumers don't have the expertise to analyse a FSANZ report or policy paper and many would not have the capacity to prepare a formal submission. Most consultation forums are held in one city only, yet few consumers would be able to fund their own travel outside their city or state of residence to attend a consultation forum.

In the past, CHOICE has been critical of the degree to which consumer views were incorporated into FSANZ recommendations given that few consumers have the desire or the capacity to provide written submissions.

A number of recent initiatives indicate FSANZ's willingness to improve consumer input into its decision-making. FSANZ has established a new social research position which has increased its capacity to conduct consumer research. FSANZ recently conducted consumer research on nutrition and health claims to inform the development of this standard.

A Consumer Liaison Committee has also been established. The committee of 12 'grass roots' consumers and consumer representatives meets a number of times a

year to discuss issues on the FSANZ workplan as well as other food regulatory issues that affect consumers.

The extent to which FSANZ incorporates these views in its decision-making processes remains to be seen as the committee has only been operating for a year. The extent to which the committee encourages two-way consultation is also unclear. Recently, the committee raised with FSANZ its concern that the Food Standards Code did not address the labelling and marketing of foods sold as organic or free-range. While the committee felt FSANZ had a responsibility to regulate this labelling information, FSANZ felt it was outside its scope of responsibility.

CHOICE acknowledges the recent investments that FSANZ has made to improve consumer participation but CHOICE believes that all levels of food regulation (particularly the Food Regulation Secretariat and state and territory agencies) need to improve consumer participation, beyond involvement in formal public consultation on reports and papers.

There needs to be greater investment in:

- consumer research to inform food regulatory decisions,
- building the capacity of individuals to act as consumer representatives, and
- financial commitment for individuals who devote their own time to participate in consumer consultation.

CHOICE was disappointed to see that the final Food Regulatory Model did not include a Consultative Council. The proposed Consultative Council that appeared in earlier drafts was replaced by a 'Consultative Mechanism'. The principle of a flexible stakeholder consultation mechanism has its merits but CHOICE is not confident that the flexible consultative process has served consumers well to date.

Ministerial Reviews

On a number of occasions food industry representatives have expressed frustration over the statutory obligation for Ministers to have two opportunities to request a review of any FSANZ application or proposal. The food industry claims that these reviews unnecessarily prolong the standard development process, and prevent the commercial benefits of getting new innovative products onto the market quickly. Recent applications relating to the addition of phytosterols and calcium to food were cited as examples of this.

We are not aware of any case where consumers have been disadvantaged when application processes are prolonged as a result of ministerial requests of review. Reviews of phytosterol and calcium fortification have been requested to further investigate the public health impact of these applications in which case the capacity of Ministers to request reviews is in fact protecting consumers' interests.

CHOICE is concerned that FSANZ fails to give adequate consideration to the long term public health consequences of some applications and proposals. We feel that in requesting these reviews Ministers are in fact looking after the interests of their constituents when they feel consumer and public health interests have not been adequately addressed. Limiting the capacity of Ministers to request a review would limit their ability to protect the interests of consumers.

CHOICE did not support a previous proposal to amend the FSANZ Act to allow Ministers only one opportunity to request a review. CHOICE suggests that it would be more appropriate to amend the conditions under which Ministers can request a review and the need for FSANZ to consult directly with jurisdictions; and retain the opportunity for a second review should the majority of Ministers feel it is warranted.

Consistency between State and Territory and Commonwealth Regulation

There may be some inconsistencies between Commonwealth and state and territory regulations that place undue burden on members of the food industry. Producers and manufacturers that conduct business in a number of states and territories are often required to meet different state and territory regulations.

The involvement of state and territory and Commonwealth governments in food regulation may result in duplication of regulation or inconsistencies between requirements of state government and Commonwealth regulations. CHOICE agrees with the principles of minimising duplication and addressing inconsistencies provided that food safety, public health and consumer protection requirements are still met. Failure to adequately protect consumers could be more costly in the long term than duplications in regulation.

As a result of the Blair Review, FSANZ has commenced developing a number of primary production and processing standards. This will ensure that the Food Standards Code covers the entire food supply from “farm to fork”. Until these standards were developed the affected industries were governed primarily by state-based regulation. CHOICE was involved in the development of the seafood and poultry primary production and processing standards. We are aware that there is uncertainty among industry groups and enforcement agencies about the implementation and enforcement of the new standards. CHOICE believes that this uncertainty must be addressed in order for the regulation to be effective.

More generally, the division of responsibility for standard development at the Commonwealth level and enforcement and monitoring by the states and territories can also create inconsistencies. FSANZ must give consideration to how the standard would be enforced when developing or amending a standard. The reality is that enforcement agencies do not have the resources to enforce all aspects of the Food Standards Code.

Enforcement of Food Regulation

The primary focus of food regulation is correctly placed on protecting the health and safety of consumers. Yet enforcement efforts usually focus on more immediate issues relating to food safety. Issues that aren't related to food safety (such as food labelling) are often low on enforcement agencies' list of priorities and may not be actively enforced at all.

The Code of Practice on Nutrition Claims states that a manufacturer can only make a percentage fat free claim (e.g. 98% fat free) on a low fat product. A low fat product is defined as having no more than 3% fat. This means that only 97%, 98% or

99% fat free claims are permitted. Yet regulators in any state and territory could walk into a supermarket and find a number of products carrying inappropriate fat free claims (e.g. 96% fat free and below). Regulators appear unwilling to enforce this code of practice and manufacturers continue to exploit this.

There are also inconsistencies in the way regulation is enforced across jurisdictions. For example, one state might be interested in policing country of origin labelling while another may see health claims as an enforcement priority.

Consumers should be able to expect the same level of protection and regulatory action regardless of where in Australia they live. Yet the reality is that different enforcement priorities and different interpretation of food standards means that enforcement action is not consistent across states and territories.

There are benefits in exploring the capacity for a Commonwealth agency to take responsibility for food labelling issues. An area that could be used to pilot a single regulator approach is the new nutrition, health and related claims standard. A health claims “watchdog” has been established but it is currently little more than a single mailbox where complaints can be directed then distributed to the relevant state or territory enforcement agency for action.

CHOICE believes that the health claims watchdog should be responsible for pro-actively monitoring the use of nutrition and health claims and compliance with the new regulation and undertaking enforcement action where breaches are detected.

Areas for improvement

In summary, CHOICE sees a number of areas of improvement in order to deliver on the primary objectives of food regulation.

1. Greater priority given to the public health and consumer objectives of food regulation over food industry interests.
2. A clear definition of “public health” and “public health and safety” and a consistent interpretation of these principles among regulators.
3. Investment in collecting data on the impact of regulation on public health and consumers.
4. Food regulation and food policy that does not undermine obesity prevention strategies and healthy eating messages, e.g. preventing unhealthy foods being presented as healthy foods because of added vitamins and minerals.
5. Improvement of the processes leading up to Ministerial reviews in order to avoid the need for a second review, but retaining the opportunity for a second review should improved processes not achieve this aim.
6. Clear and consistent processes for conducting reviews and developing food policy and regulation. This might include setting out processes in legislation or clearly outlining the processes (including opportunities for consultation) under which a review will be conducted as soon as it has been announced publicly.

7. Open and transparent food regulatory processes and improved feedback to stakeholders. As far as possible, consultation should occur in the public domain (i.e. current FSANZ consultation processes) and the reasons behind particular decisions or outcomes should be made public.
8. Investment in improving consumer engagement at all levels of food policy and standard development.
9. Streamlining of food regulatory processes and removal of duplication in food regulation and enforcement.
10. Better co-ordination of enforcement activities.
11. Consideration of establishing a single Commonwealth regulator for some aspects of food regulation, e.g. health claims labelling.

CHOICE appreciates the opportunity to provide these comments and hopes that the issues raised in this submission will be given due consideration in this review of food regulation. Should you wish to discuss any of the issues raised in this submission please do not hesitate to contact CHOICE's food policy officer Ms Clare Hughes on (02) 9577 3375 or at chughes@choice.com.au.