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Food Law Update

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In the past six months, the Australian Competition and Consumer Commission (**ACCC**) has been very active in targeting misleading statements made by food manufacturers and retailers.

Since our last edition, we have seen the ACCC take action against various water manufacturers for "organic" water claims, court proceedings initiated against Coles Supermarkets for marketing bakery products as "Baked Today, Sold Today" and "Freshly Baked In-Store", the Federal Court decision that the statement "free to roam" was misleading and deceptive, infringement notices issued for products labelled "Extra Virgin Olive Oil" and "100% Olive Oil", and substantial fines imposed for statements concerning ducks being "range reared and grain fed". It is these cases that feature in this edition of *Food Law Update*.

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MOVING TOWARDS THE NEW HEALTH CLAIMS STANDARD

As reported in our last edition of *Food Law Update*, food businesses in Australia and New Zealand have until **18 January 2016** to meet the requirements of the new Standard in the Australia New Zealand Food Standards Code to regulate nutrition content claims and health claims on food labels and advertisements. As **there is no stock in trade option** at the end of the transitional period, businesses need to commence developing strategies for the implementation of the new Standard 1.2.7.

What's in a name? Removal of misleading "organic" water claims

WHAT YOU NEED TO KNOW

- The ACCC negotiated the removal of "organic" claims from the labelling and marketing material of seven suppliers of bottled water on the basis of them being misleading.
- The ACCC argued that relevant standards do not support the notion that water can be organic and any claims that water is organic would be misleading or deceptive.

WHAT YOU NEED TO DO

- Credence claims can be a powerful marketing tool for businesses but any claim made must be genuine. Businesses that make organic claims, or other credence claims, must be able to substantiate those claims.

In July this year, the ACCC negotiated the removal of "organic" claims from the labelling and marketing material of seven suppliers of bottled water and the basis that the ACCC considered them to be misleading or deceptive in contravention of the Australian Consumer Law (Schedule 2, *Competition and Consumer Act 2010* (Cth)) (**ACL**). As a result of the negotiations, enforcement action was avoided. The products in issue were Active Organic, Lithgow Valley Springs Organic, Nature's Best Organic, Organic Australia, Organic Falls, Organic Nature's Best and Organic Springs, all of which have been renamed without the word "organic".

Current "organic" standards

Two key standards govern the production, processing and labelling of organic food in Australia, namely the National Standard for Organic and Bio-Dynamic Produce – AS6000-2009 (domestic and import standard) and the National Standard for Organic and Bio-Dynamic Produce (export standard). Such standards tend to proceed on the basis that water does not derive from any agricultural product, it cannot be produced and as such, cannot be organic or bio-dynamic.

The ACCC argued that in relation to food and drink, "organic" is understood to refer to agricultural products which have been farmed according to certain standards. As a result, the ACCC argued that claims that water is organic are misleading or deceptive.

Some of the manufacturers argued that the word "organic" was used, not as a representation, but as part of the brand name. However, the ACCC rejected this argument.

ACCC priorities

The ACCC's Compliance and Enforcement Policy lists credence claims as a new priority area, particularly those in the food industry. Other examples of credence claims include "free range" and "made in Australia". In this instance there was no indication that consumers had paid higher prices for the water in question but it is generally accepted that consumers are often prepared to pay a premium price for products that make credence claims.

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Chickens too cooped up to be free to roam

WHAT YOU NEED TO KNOW

- The ACCC is vigilant about monitoring and taking action against food/beverage growers, manufacturers and suppliers in connection with the use of potentially misleading statements to describe their food or beverages. Another similar case example is *ACCC* v *Pepes Ducks Ltd* [2013] FCA 570 where Pepes' statements that the ducks were "open range" and "grown nature's way" were found to be misleading.

WHAT YOU NEED TO DO

- Consider how consumers are likely to understand these words and statements, rather than relying on how these words and statements are acceptably understood within the industry.

Australian Competition and Consumer Commission v *Turi Foods Pty Ltd* (No 4) [2013] FCA 665

The Federal Court of Australia in *Australian Competition and Consumer Commission v Turi Foods Pty Ltd (No 4)* has held that "free to roam" statements used in connection with chicken meat, in circumstances where the chickens were raised in such close proximity to one another that they could not move around unimpeded, were misleading and deceptive in contravention of sections 52 and 53(a) of the *Trade Practices Act 1974* (Cth) (**TPA**) (now contained in sections 18 and 29 of the ACL).

The facts

The ACCC brought an action against the respondents for misleading and deceptive conduct arising from the use of "free to roam" statements in relation to meat chickens.

The second and third respondents, Baiada Poultry Pty Ltd (**Baiada**) and Bartter Enterprises Pty Ltd (**Bartter**) are growers and suppliers of meat chickens under brand names such as "Steggles". The fourth respondent, Australian Chicken Meat Federation Inc (the **Association**), is a national association which promotes and protects the interests of the chicken meat industry.

Baiada's and Bartter's chickens are raised in large barns which vary in size from about 1,000 to 3,000 square metres. At any one time, the barns hold an average of 30,000 to 40,000 chickens. The stocking densities for the chickens vary, reaching between 17.4 and 19.6 chickens per square metre between days 12 and 33 of the growth cycle and dropping to below 10.8 chickens per square metre after 42 days.

Baiada and Bartter used statements such as "free to roam", "free to roam around in large barns", "Barn Raised Without Cages" and "Steggles chickens are free to roam in large barns without cages" on the packaging and marketing materials for their chicken meat. The Association used similar statements on its website in connection with the chicken meat promoted on the site, which included Baiada's and Bartter's chicken meat.

The first respondent, Turi Foods Pty Ltd, who had also used the phrase "free to roam" on its packaging and publications had earlier settled its dispute with the ACCC on terms which included payment of a pecuniary penalty of $100,000, publishing corrective advertisements and implementing a compliance training programme.

The ACCC's claims

The ACCC alleged that the respondents' use of the "free to roam" statements in connection with Baiada's and Bartter's chicken meat constituted a representation that the chickens "have substantial space available allowing them to roam around freely" during their growing cycle, when in fact the chickens were "subjected to such stocking densities that they do not, as a practical matter, have substantial space available to roam around freely".

The ACCC claimed that the respondents had:

- engaged in misleading and deceptive conduct, or conduct likely to mislead or deceive in contravention of section 52 of the TPA (and section 18 of the ACL for conduct after 1 January 2011);
- made false representations in contravention of section 53(a) of the TPA (and section 29(1)(a) of the ACL for conduct after 1 January 2011); and
- engaged in conduct liable to mislead the public about the nature and/or characteristics of the meat chickens in breach of section 55 of the TPA (and s33 of the ACL for conduct after 1 January 2011).

The Court's decision

The central issue in this case was whether reasonable consumers would be likely to be misled or deceived about the growing conditions for the chickens because of the "free to roam" statements. The Court noted that an ordinary and natural meaning of "free to roam" when applied to chickens is "the largely uninhibited ability of the chickens to move around at will in an aimless manner" and this is how the phrase would be understood by consumers of the meat chickens.

The Court considered the meaning of "free to roam" in the context of Baiada's and Bartter's growing conditions for their chickens, observing that, prior to day 42 of their growth cycle, the chickens were in such close proximity to one another that they could not be said to be free to move around the barns at will and unimpeded.

On this basis, the Court held that the respondents' "free to roam" statements were misleading and deceptive and amounted to a false representation in contravention of sections 52 and 53(a) of the TPA in respect of conduct up to 31 December 2010 and sections 18 and 29(1)(a) of the ACL after 1 January 2011.

However, the respondents' "free to roam" statements were found not to contravene section 55 of the TPA. The "free to roam" statements related to the circumstances in which the chickens were raised rather than the inherent qualities of the chickens and were therefore not liable to mislead the public about the nature and characteristics of the chickens meat.

This was a split trial, with questions of liability being determined first and separately from consideration of the remedies being sought by the ACCC.

In a separate judgment (*Australian Competition and Consumer Commission v Turi Foods Pty Ltd (No 5)* [2013] FCA 1109*)* considering the remedies sought by the ACCC, the Court ordered Baiada and Bartter to pay, jointly, a pecuniary penalty of $400,000. The Association was ordered to pay a pecuniary penalty of $20,000, as well as to send a prescribed letter to its members advising them of the outcome of the case and provide trade practices compliance training to all its staff.

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An oily product is less than premium: misleading olive oil labels

WHAT YOU NEED TO KNOW

- Misleading labels claiming that a canola-olive oil blend was "extra virgin olive oil" have resulted in MOI International (Australia) Pty Ltd paying two infringement notices totalling $20,400.
- The ACCC has reminded olive oil suppliers that "the term 'extra virgin' is widely understood by consumers to mean a premium product".

WHAT YOU NEED TO DO

- Suppliers need to remember that even in the absence of mandatory standards for labelling, inaccurate labels can still be found to be misleading claims or representations and incur significant financial penalties.

On 30 May 2013, MOI International (Australia) Pty Ltd paid two infringement notices totalling $20,400 for misleading labels on its "Mediterranean Blend" product, which prominently stated that it was "Extra Virgin Olive Oil" and "100% Olive Oil" when in fact it was 93% canola oil and 7% extra virgin olive oil.

The facts

MOI International is the Australian and New Zealand branch of MOI Foods (Malaysia), a wholly owned subsidiary of the Mewah Group. Between 2012 and 2013, it imported the infringing Mediterranean Blend from Malaysia and sold it in Australia in three litre tins. The tins were prominently labelled as "Extra Virgin Olive Oil" and "100% Olive Oil", but stated in fine print on the side that the oil was composed of 93% canola oil and only 7% extra virgin olive oil.

The ACCC's action

The ACCC issued infringement notices against MOI International on the basis that the descriptions "represented that the oil was completely or predominantly composed of extra virgin olive oil" when that was not the case.

In a release to the media, ACCC chairman Rod Sims stated that "The term 'extra virgin' is widely understood by consumers to mean a premium product. Consumers should be able to trust that what's on the label is what's in the bottle when making purchasing decisions." He went on to note that "Traders who mislead consumers in this manner leave themselves wide open to enforcement action from the ACCC."

Under section 134A of the ACL, the ACCC is able to issue infringement notices where it has reasonable grounds to believe a person has contravened certain consumer protection laws. Payment of the notice is not an admission of the contravention.

Getting the Good Oil

While there is no mandatory standard for determining extra virgin olive oil in Australia, the ACCC and Food Standards Australia New Zealand (**FSANZ**) have produced a guide to olive oil labelling called "The Good Oil".

The two page guide aims to clarify the different types of olive oils available to consumers and the terms commonly used on olive oil packaging. It explains that olive oils are either classed as "virgin" or "refined" depending on the extraction process.

Virgin olive oils are extracted using mechanical or physical means and without using chemicals, while refined olive oils are oils of a lower quality grade that have had to be refined using chemical processes to remove impurities. The guide describes extra virgin olive oil as "the fresh juice from the olive" which is "considered to be the highest grade olive oil." Its defining features are low acidity and the absence of flavour defects.

There are also voluntary industry standards that provide guidance regarding the quality required for "extra virgin olive oil", such as Australian Standard for Olive Oils and Olive Pomace Oils (AS5264-2011) (published in July 2011) and the International Olive Council's Trade Standard for Olive Oil. The ACCC has taken the view that it is "widely accepted" that extra virgin olive oil refers to oil:

- of the highest grade, obtained from the first press of the best quality olives;
- that is not blended with other oil; and
- which does not contain solvents or refining in the manufacturing process.

Although compliance with these standards is voluntary, manufacturers and suppliers need to remember that compliance with consumer protection laws is not. If claims about the standard, grade or quality of olive oil are misleading or deceptive, they will contravene the ACL.

Industry standards and guides produced by FSANZ and the ACCC can be good indicators of consumers' expectations about a product and can assist suppliers in making sure that their packaging does not mislead consumers about the product inside.

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FOOD LAW BITE

ACCC takes action against Coles

On 12 June 2013, the ACCC commenced proceedings in the Federal Court of Australia against Coles Supermarkets Australia Pty Limited. The proceedings concern various "Cuisine Royale" and "Coles Bakery" branded bread products which have been "par baked" – that is, partially baked and frozen off-site, and then transported to Coles stores and "finished" in-store.

The ACCC has alleged that Coles has engaged in misleading and deceptive conduct, in breach of the ACL, by labelling products that are "par baked" as being "Baked Today, Sold Today" and "Freshly Baked In-Store". The ACCC has contended that this conduct is likely to mislead consumers that the bread was prepared from scratch in Coles' in-house bakeries and was baked entirely on the day it was offered for sale.

The matter was in the Federal Court for directions in November 2013 and has been set down for trial in February 2014. We will report on the outcome in our next edition of *Food Law Update*.

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Luv-a-Duck comes unstuck

WHAT YOU NEED TO KNOW

- The Federal Court has found that Luv-a-Duck, a major Australian duck meat supplier, made statements in its advertising and promotional material which were misleading and deceptive. Statements that the ducks were "grown and grain fed in the spacious Victorian Wimmera Wheatlands" and "range reared and grain fed" were held to represent (among other things) that the ducks spent a substantial amount of time outdoors. In fact, the ducks did not spend any time outside of the barn.
- The Federal Court ordered by consent that Luv-a-Duck pay $360,000, and pay $15,000 of the ACCC's legal costs. The Court also restrained Luv-a-Duck from re-using the misleading statements for the next three years, and further ordered that it establish a compliance program and publish a range of corrective notices.

WHAT YOU NEED TO DO

- Claims made about the conditions in which animals are raised, and the quality of meat products processed from these animals, are likely to influence customers' purchasing decisions. As such, companies should ensure the truth of any such statements before publication.

Australian Competition and Consumer Commission v Luv-a-Duck Pty Ltd **[2013] FCA 1136**

The Federal Court has ordered by consent that duck meat supplier Luv-a-Duck pay $360,000 in pecuniary penalties for breach of the ACL, as well as contributing $15,000 to the ACCC's costs.

The Court found that false representations made by Luv-a-Duck relating to the condition in which its ducks were kept amounted to misleading and deceptive conduct under the ACL.

In light of this case and other recent Federal Court decisions (such as *Australian Competition and Consumer Commission v Turi Foods Pty Ltd (No 4)* [2013] FCA 665), companies should be careful when making claims in their product packaging and other product promotional material about the conditions in which animal meat products are made, grown or produced.

In particular, companies should be careful when making statements which imply that animals are "range reared" or raised in "spacious" outdoor areas, or which suggest the animals are fed in a certain way.

These statements may also be held to represent that the quality of meat products processed from these animals is of a different quality to meat products processed from barn-raised animals.

Luv-a-Duck supplies around 40 per cent of the Australian market for duck meat products, selling around 80,000 ducks per week.

Over a period of time ranging from March 2009 to December 2012, Luv-a-Duck made false representations about its products by stating on its packaging, website, brochures and in a promotion for the 2012 Adelaide Good Food & Wine Show that its ducks were:

- "grown and grain fed in the spacious Victorian Wimmera Wheatlands"; and/or
- "range reared and grain fed".

The Federal Court found that by including these statements in its advertising and promotional material, Luv-a-Duck represented that the duck meat products that it sold or offered for sale:

- were processed from ducks that spent at least a substantial amount of their time outdoors;
- were or would be processed from ducks that were grown in a spacious outdoor environment; and
- were or would be of a different quality than duck meat products processed from barn-raised ducks.

The Federal Court then found that in reality, the duck meat products sold or offered for sale by Luv-a-Duck:

- were processed from ducks that did not spend any of their time outside of their barn;
- were processed from ducks that were not grown in a spacious outdoor environment; and
- were not of a different quality than duck meat products processed from barn-raised ducks.

The Court accepted that when making the representations, Luv-a-Duck's senior management knew about the conditions in which the ducks were raised, but did not consider that "range reared" could be understood by consumers as meaning "free range" or that the statement that ducks were "grown and grain fed in the spacious Victorian Wimmera Wheatlands" could be misleading to consumers. Luv-a-Duck claimed that it did not intend to convey that the ducks were free range, and that it would not have made the offending representations if it had considered that its statements were capable of that representation.

What did the Federal Court order?

The Federal Court held that the conduct of Luv-a-Duck constituted misleading or deceptive conduct, or conduct that was likely to mislead or deceive, in contravention of the ACL. According to Davies J, Luv-a-Duck's representations "…would have been an inducement to consumers to prefer Luv-a-Duck's products and give Luv-a-Duck a competitive advantage in the industry."

The Federal Court ordered by consent that Luv-a-Duck pay $360,000 in pecuniary penalties for breach of the ACL, as well as contribute $15,000 to the ACCC's costs. The parties had previously agreed on $360,000 as an appropriate penalty to be imposed on Luv-a-Duck. Although Luv-a-Duck faced maximum penalties of $1.1 million for its conduct, the Federal Court accepted the lower penalty agreement, recognising that the ACCC had acknowledged that Luv-a-Duck's misleading conduct was not deliberate and that Luv-a-Duck had assisted the ACCC with its admissions and cooperation throughout the proceeding.

As part of its orders, the Federal Court also:

- issued an injunction restraining Luv-a-Duck from using the offending phrases for the next three years;
- required that Luv-a-Duck implement a trade practices compliance program and maintain that program for three years; and
- required Luv-a-Duck to publish corrective notices on its website and business premises and send a corrective notice to its customers.

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ACCC franchise audits to target fast food industry

WHAT YOU NEED TO KNOW

- The ACCC will be focusing its audit powers on the fast food industry.
- The ACCC can compel a trader to provide information or produce documents it is required to keep, generate or publish under the Franchising Code.
- The Franchising Code is currently under review.

WHAT YOU NEED TO DO

- Franchisors should ensure that potential franchisees receive the disclosure document, a final copy of the franchise agreement and copy of the Franchising Code 14 days before the agreement will be signed.
- Disclosure documents must be kept up-to-date and include all relevant information.
- Franchisors must ensure that documents provided to a potential franchisee do not misrepresent potential franchise earnings.

The ACCC has announced that it will focus the use of its audit powers on the fast food and fitness industries to ensure that franchisors are compliant with the Franchising Code of Conduct (**Franchising Code**). This announcement follows a disproportionate number of complaints in these industries.

ACCC's audit powers

Section 51AD of the CCA provides that a corporation must not, in trade or commerce, contravene an applicable industry code. The Franchise Code is such a code. Under section 51ADD the ACCC has the power to compel a trader to provide information or produce documents it is required to keep, generate or publish under a relevant prescribed code. Under the Franchising Code of Conduct this includes disclosure documents, marketing fund statements and franchise agreements.

Each year the ACCC receives over 600 complaints about franchising contracts. Since the ACCC's audit power was introduced in 2011, it has conducted 49 audits of franchisors. The Franchising Code is a mandatory industry code, and applies to the parties to a franchising agreement.

A key requirement of the Franchising Code is that a franchisor must provide a prospective franchisee with a disclosure document, a final copy of the franchise agreement and a copy of the Franchising Code at least 14 days before the franchising agreement is signed.

It is critical that documents provided to potential franchisees accurately reflect the future potential earnings of the franchise.

The most common complaint received by the ACCC under the Franchising Code is related to disclosure documents, with a large number of complaints also relating to misleading conduct and false representations, particularly in relation to potential earnings made by a franchisor.

Penalties for breach of section 51AD include recovery for loss or damage, remedial court orders and injunctions.

Current review

Traders should also be aware that the Franchising Code is currently under review. The review was conducted by Alan Wein and made a number of recommendations including civil pecuniary penalties for Franchising Code breaches, increased ACCC investigatory and remedial powers, and the inclusion of a statutory obligation that parties act in good faith in the Franchising Code.

The then Labor Government accepted a large number of these recommendations, however, the election was called while it was consulting on these recommendations. The future of any reform under the new Government is currently unclear.

Future reform

Franchisors and franchisees should continue to monitor this space to ensure that they are aware of any future changes as they are announced.

"The ACCC can compel a trader to provide information or produce documents it is required to keep, generate or publish under the Franchising Code."

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FOOD LAW BITE

Code of Practice - whole grain claims

The Grains & Legumes Nutrition Council (**GLNC**) has established an industry standard to guide the use of whole grain ingredient content claims on food labelling and marketing in Australia and New Zealand, known as the *Code of Practice for Whole Grain Ingredient Content Claims* (**Code**). There is currently no specific regulation in Australia or New Zealand for whole grain ingredient content claims.

The GLNC has stated that the objectives of the voluntary Code are to:

- Describe the industry-standard provisions for the minimum whole grain content required to make whole grain ingredient content claims.
- Ensure clear and consistent messaging around whole grain content.
- Provide a tool to encourage the development and promotion of more nutritious whole grain foods.
- Facilitate widespread uptake of, and compliance with, these provisions by industry.
- Provide an effective complaints resolution procedure for all stakeholders.

In November 2013, the GLNC announced that three of Australia's largest core grain food manufacturers – Goodman Fielder, Sanitarium and Bakers Delight – had become the first registered users of the Code.

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You "Glow Girl"! Television commercial breaches AANA Code

WHAT YOU NEED TO KNOW

- The Advertising Standards Board (**Board**) considered that the overall effect of a television commercial for Devondale Long Life Milk, which used the phrase "PRESERVATIVES HAVE CONSEQUENCES" in combination with a green glowing girl, amounted to an overall message which would be considered misleading by reasonable members of the community.
- The humorous and unrealistic elements of this particular advertisement were not enough to overcome the implication contained in the statement in question that "preservatives might be harmful".

WHAT YOU NEED TO DO

- While the decision was not unanimous, the Board's determination is a reminder for businesses to consider the overall impression of their advertisements. Humorous and unrealistic elements in an advertisement will not necessarily overcome nor sufficiently dilute the possibility that other elements of the same advertisement could be misleading or deceptive.

In September this year the Board determined that a Devondale Long Life Milk television commercial breached the Australian Association of National Advertisers (**AANA**) Food and Beverages Advertising and Marketing Communications Code (**AANA Code**). The Board considered that the overall effect of the advertisement, using the phrase "*PRESERVATIVES HAVE CONSEQUENCES*" along with a depiction of a girl with glowing green hair, would be considered misleading by reasonable members of the community.

The television commercial in question featured a girl who glows bright green. "Melancholy" music plays over footage of the glowing girl's "awkward life". Text appeared on the screen reading "*PRESERVATIVES HAVE CONSEQUENCES*". The complaints received by the Board and the advertiser's responses included the following:

Complaints	**Advertiser's responses**
The advertisement breaches the AANA Code for Advertising and Marketing Communications to Children and the AANA Food and Beverages Advertising and Marketing Communications Code. The advertisement is misleading to children because it implies that preservatives make you glow green. This would confuse children and is in fact incorrect. The advertisement may confuse children and influence their choices regarding milk. By portraying milk in this way, the advertisement portrayed a 'healthy choice' as unhealthy or dangerous. The advertisement would lead to persons watching the tv ad to draw a conclusion that fresh white milk (non uht) contains preservatives which it does not.	The advertisement was part of a broader campaign of seven television commercials and the intent of the whole campaign is to "provide a light touch and engage viewers on the basis of humour". The advertisement dramatized the "accurate substantiation of Devondale milk being '100% natural, zero preservatives' with no preservatives added". The advertiser provided the substantiating evidence. The advertisement was not inferring either that fresh milk has preservatives or that milk should not be consumed. The advertiser was encouraging the consumption of dairy food by promoting its purity without preservatives and therefore its healthy consumption. The girl character was used for comedic effect and the clearly over the top treatment of her "glow" was not to be taken literally or seriously.

The AANA Code

The Board considered whether the advertisement breached the AANA Code, in particular section 2.1 which provides:

> "*Advertising or marketing communications for food…shall be truthful and honest, shall not be or be designed to be misleading or deceptive or otherwise contravene prevailing community standards, and shall be communicated in a manner appropriate to the level of understanding of the target audience of the Advertising or Marketing Communication with an accurate presentation of all information including any references to nutritional values or health benefits*."

The Board's findings

The Board reviewed the complaints, the response to the complaints and the advertisement itself and it made some findings in favour of the advertiser. The Board considered that the assertion the product does not contain preservatives was not misleading and the advertisement did not suggest that non-UHT milk contains preservatives.

The Board agreed with the advertiser that the depiction of the green glowing girl was humorous and not of itself misleading. In addition, the Board commented that a 'preservative free' claim gives consumers information about the content of a product which is beneficial for consumers who may wish to avoid particular preservatives.

While each of these points are in favour of the advertiser, the undoing of the commercial was the phrase "*PRESERVATIVES HAVE CONSEQUENCES*". A minority of the Board considered that this statement, in conjunction with the unrealistic image of the green glowing girl, was simply a humorous way of portraying the fact that the Devondale product is preservative free and that this was "acceptable hyperbole".

However, the majority of the Board determined that the statement, used in conjunction with the image of the green glowing girl, amounted to an overall suggestion that preservatives are bad for you.

The Board considered that the reference to preservatives having consequences "plays to the fears of members of the community who are concerned about the health risks associated with some preservatives and additives in food and beverage products" and it was "likely to imply to reasonable members of the community that preservatives might be harmful". The Board found this implication to go beyond factual representation and to create a misleading impression about preservatives generally.

The advertisement has now been modified and the statement has been replaced with "*WHAT ARE YOU FEEDING YOUR KIDS?*".

"The humorous and unrealistic elements of this particular advertisement were not enough to overcome the implication contained in the statement in question that 'preservatives might be harmful'."

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Changing caffeine culture: The regulation of caffeine

WHAT YOU NEED TO KNOW

- In August 2013 the Food Regulation Standing Committee Caffeine Working Group (**FRSC Working Group**) produced a Policy Options Paper (**Options Paper**) into the regulation of caffeine in foods in Australia and New Zealand.
- The FRSC Working Group, endorsed by the Food Regulation Standing Committee (**FRSC**) recommended that the 2003 Ministerial Council Policy Guideline (**2003 Policy Guideline**), which currently governs the policy regulation of caffeine in food, should be amended to include clearer guidelines for the relevant regulatory body.
- FRSC invited public consultation on this Options Paper by 18 October 2013. The Options Paper, together with public submissions, will be provided to the Legislative and Governance Forum on Food Regulation which will assist in formulating policy guidelines in relation to the regulation of caffeine in Australia and New Zealand food supplies.

WHAT YOU NEED TO DO

- As public submissions have closed, food manufacturers and distributors both in Australia and New Zealand should watch this space with interest.

In the wake of a changing caffeine culture and increased caffeine product market and health concerns, the FRSC (being the committee responsible for providing food regulation policy advice to the Australian Federal and State Governments and the New Zealand Government) released an Options Paper in August 2013 on the regulation of caffeine in foods.

The purpose of the Options Paper was to review the 2003 Policy Guidelines on the Addition of Caffeine to Foods to assess their effectiveness and whether they should be updated, maintained or rescinded.

Snapshot of current market regulation

Food Standards Australia New Zealand (**FSANZ**), is the body responsible under the *Food Standards Australia New Zealand Act 1991* (Cth) (**Act**) for developing and reviewing food regulatory measures such as the *Australian and New Zealand Food Standards Code* (**Code**). This code regulates the composition and labelling of food and dictates the maximum level of added caffeine in soft drinks, and since 2001, formulated caffeinated beverages (**FCBs**) (such as energy drinks).

Under the Act, food regulation policy guidelines can be notified to FSANZ. While not bound or directed by the guidelines, FSANZ is obliged to 'have regard' to policies which may impact on the scope of its work.

Until further evidence became available, the 2003 Policy Guideline maintained the then existing caffeine regulations in Australia and New Zealand, including the additive permissions for caffeine, and restricting the use of new products containing non-traditional caffeine-rich ingredients (including guarana) to boost caffeine in other foods.

However, the 2003 Policy Guideline contained a number of issues including:

- lack of clarity regarding the addition of caffeine to foods other than soft drinks and FCBs, for example, sports foods (in 2004 the World Anti-Doping Agency took caffeine off the prohibited list which led to the addition of caffeine to sports foods) and energy shots;
- lack of substantive guidance being provided to FSANZ;
- ambiguity surrounding "further evidence" provisions, for example, who is responsible for determining whether further evidence is available, and what further evidence is required; and
- failure meet the objective of trans-Tasman harmonisation.

Since 2003, there have been further studies reporting the negative side effects of caffeine – even contributing to death in extreme circumstances.

As a result, an Options Paper was commissioned to determine whether the 2003 Policy Guideline still provides an effective framework to guide a FSANZ review of caffeine in the food supply.

The 2013 Options Paper recommendations

The FRSC Working Group recommended that the 2003 Policy Guidelines be amended to address the issues raised in the 2003 Policy Guidelines, and that its name be changed to "Policy Guideline on the Regulatory Management of Caffeine in the Food Supply" (**Amended Policy**).

The Amended Policy would contain specific principles to assist FSANZ in undertaking a review. The Amended Policy would include guidelines on food and ingredients with both naturally occurring and added caffeine, as well as possible future uses for caffeine in food.

It would focus on managing risks of vulnerable population groups (such as children), and take into account international policies.

Potential effect on the Industry

The recommendations and public submissions will be sent to the Legislative and Governance Forum on Food Regulation for consideration. No date has been announced for a decision. However, as FSANZ is not strictly required to comply with policy guidelines, it is questionable whether the review and any amendments will have a substantive effect in any case.

Note: The issue of mixing alcohol with energy drinks is outside the scope of the review, and is being addressed separately by the Intergovernmental Committee on Drugs and FRSC.

"In the wake of a changing caffeine culture and increased caffeine product market and health concerns, an Options Paper was released in August 2013 on the regulation of caffeine in foods."

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