The Pure Food Laws and Regulations:
Burdensome Laws in Search of Meaningful Objectives?

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Foreword

Ross Parish

Pure food laws are among the earlier examples of consumer protection legislation. Most of us no doubt regard them as being justified — in general if not in all particulars — on health and safety grounds. Professor Swan tells us of his surprise at discovering that 'food laws are almost entirely about the avoidance of fraud and deception. Health and safety hardly come into it at all'. Much of the legislation is concerned with defining in great detail the composition of standard foodstuffs, the manner and content of labelling, and prescribing and proscribing the names that may be given to food items.

Food laws exemplify the technocratic view, espoused by most consumer protectionists, which favours 'government or control of society or industry by technical experts'. The experts in this case are food technologists and lawyers. These technocrats are relied on to decide upon the 'acceptability', 'quality', and 'safety' of goods, and on the 'fairness' of contracts; and to lay down standards to which goods must conform; and to dictate ingredients or features that they must incorporate. Those who elevate the role of the expert tend to denigrate the ability of consumers to look after their own interests, and of market forces to serve those interests. Hostility to the market economy is a strong element in consumer protectionism — as it is in protectionist thought in general. This is directed not merely against market imperfections well known to, and analysed by, economists, but at the central proposition of economic theory, that voluntary exchange is mutually beneficial. Instead, consumer protectionists tend to see the economic game as being zero-sum, with producers possessing 'market power' whereby they 'exploit' consumers.

Many economists share quite a different view. The great competitive struggle is not between producers and consumers, but between consumers and consumers, on the one hand, and producers and producers, on the other. Consumers compete with one another for the

supplies provided by producers, and producers compete with one another for the custom of consumers. Producers and consumers are thus in a complementary relationship: each needs the other and each gains from a transaction with the other. Interventions that tend to reduce competition among producers or consumers, or to limit exchanges, are likely to be negative-sum.

Professor Swan is sympathetic to the aim of food laws and by no means wholly critical of them. However, he considers that they are overly prescriptive and proscriptive and so unduly limit the consumer's freedom of choice and the manufacturer's ability to innovate. He draws attention to the technocrat's incentive to pursue safety at any cost, since a lack of safety is readily apparent, while the cost is largely hidden. He advocates the conversion of mandatory standards and recipes into voluntary standards and guidelines; and the placing of less reliance on detailed regulation and more on judicial enforcement and interpretation of general prohibitions and guidelines. He thus upholds the role of markets and judge-made law against the rigidities of technocratic regulation.

Executive Summary

This study of Australian food legislation concludes that much more is required to improve our burdensome food laws than the will-o'-the-wisp of uniformity. Meaningful reforms would go well beyond this to:

1. convert the existing compulsory product standards and recipes into voluntary standards and guidelines to assist both consumers and the courts, with greater ingredient disclosure when voluntary product standards are not met so that consumers are fully aware of the reasons when a product differs from the guidelines;
2. remove the ban on likening 'food not elsewhere standardised' to 'standardised food';
3. relax the proscription and prescription of product names subject to a general prohibition on deceptive or misleading labelling;
4. remove the prohibitions on claims and ingredients;
5. remove the prohibitions on specific ingredients when they are safe or if they are permitted in specific products;
6. simplify complex labelling specifications by replacing the minute details with a requirement that labels be 'conspicuous, prominent and discernible'; and
7. rely on a general prohibition against fraud or deceptive practices under the Commonwealth Trade Practices Act and general State consumer protection legislation.

Deregulation along these lines would give both manufacturers and consumers a far better deal. Innovative products could be readily introduced using names that accurately describe them; consumers would have a much greater choice of qualities and prices; and compliance costs would be lowered significantly.

If all States agreed to legislation embodying these principles, lack of uniformity would not be the problem it is now. Commonwealth legislation is probably essential to achieve complete uniformity. The unqualified support of the food industry will be required if these reforms are to give food consumers a better deal and at the same time reduce the unnecessary burden of highly specific and detailed regulation on food manufacturers and distributors.

The outline of this study is as follows: Following the Introduction, the regulatory–deregulatory environment is considered in Chapter 1. Chapter 2 criticises the philosophy and ideology of the consumer protectionist movement, which relies heavily on the assertion that competition cannot operate in the consumers' interest. A more market oriented philosophy is expressed in Chapter 3. Chapter 4 outlines the nature of the food legislation and its objectives as seen by the proponents of prescriptive and proscriptive regulation. In Chapter 5 the costs associated with lack of uniformity are presented and examined. Chapter 6 illustrates by means of numerous examples how compositional standards can deprive consumers of innovative and desirable new food products. In Chapter 7 it is recommended that compulsory standards be replaced by voluntary standards or guidelines so as to provide consumers with greater quality choice. Chapters 8, 9, and 10 look critically at prescribed names of food products and prohibitions on claims and ingredients, and Chapter 11 offers some conclusions.

Introduction and Acknowledgements

While I initially prepared this paper on behalf of the Institute of Public Affairs (NSW), the views expressed are my own and not necessarily those of the Institute or the Centre for Independent Studies. My approach is that of an economist interested in questions of regulation and deregulation. Although I have had the advantage of considerable expert legal advice in the preparation of this paper, I am not a lawyer and nor do I claim expertise regarding the food industry or in food technology. In fact what little expertise I can claim in this area stems from being a food consumer — a characteristic shared by the entire population. The main justification I can claim for my temerity in writing this paper is that an outsider's view from someone who is familiar with notions of costs and benefits can be a useful antidote to the cosy relationships that often exist between the regulators and at least a portion of the regulated.

I wish to express my thanks to the legal firm of Baker and McKenzie and particularly to Jill Holmes for considerable assistance in the preparation and updating of this study. I also wish to thank the Hon. Peter Philips MLA for his encouragement, and also Anthony B. McDonald and Anne F. Davies of Baker and McKenzie for assistance.

Professor R.A. Edwards was kind enough to discuss the issues and express his disagreement with my interpretation of the food legislation. Useful comments by David Band have been gratefully accepted. The Institute of Public Affairs (NSW) through its former director, Alex Simpson, provided some financial assistance. A number of individuals within a variety of companies provided information, encouragement and support.

About the Author

Peter Swan is a market-oriented economist and Professor of Management at the Australian Graduate School of Management in the University of New South Wales. He holds an Honours Degree from the Australian National University and a PhD from Monash University. He taught for some years at the ANU before coming to the AGSM in 1982. Professor Swan is the author of numerous articles and publications and has a place in *Who's Who in Economics* (second edition). He has long been involved in the deregulatory process, especially in work done for the Campbell Committee on financial deregulation and business tax reform.

Chapter 1

The Regulatory–Deregulatory Environment

The time for deregulation is propitious. The Prime Minister Mr Hawke committed the federal Labor government to a program of deregulation in an address to the Business Council of Australia (21 September 1984):

> I am convinced that after 84 years of federation, we have accumulated an excessive and often irrelevant and obstructive body of laws and regulations. We seek your assistance in removing from this accumulation as many as possible of those laws and regulations which serve no clear and useful purpose. We see the removal of unnecessary regulation as contributing significantly to improved economic growth performance.

This speech has been followed up by a meeting between government ministers and the major employer and union groups with the aim of establishing a deregulation review committee. Subsequently the Business Regulation Review Unit was formed. Interestingly, one of its first publications (1986) is on the food laws and has a similar thrust to the present study.

Mr Hawke's speech and subsequent action are by no means mere pre-election window dressing given the substantial implementation of the financial deregulation recommendations of the Campbell Committee (1981) and the Martin Committee (1984) by the Federal Treasurer, Paul Keating. The floating of the Australian dollar, the creation of new official foreign exchange dealers, a better deal for trading bank customers with the possibility of the payment of interest on cheque accounts, and the entry of new banks including foreign banks in 1985 have created a financial deregulation revolution for which Paul Keating justly won *Euromoney's* Finance Minister of the Year Award.

Financial deregulation in Australia is not an isolated incident but part of a wider movement, which has its origins in the burst of deregulation in the United States during the Ford and Carter presidencies. At that time the Civil Aeronautics Board began freeing up entry into airline operations, some of the controls on the interstate movement of

trucks were removed, a number of restrictions on banks were lifted, and new operators were allowed to compete with Bell Telephone in the long-distance telecommunications market. The partial deregulation of the US interstate trucking industry was preceded by almost complete deregulation in Australia approximately 26 years earlier when the Hughes and Vale case, which was decided on appeal to the Privy Council, determined under section 92 of the Constitution that the States could not impose taxes on the interstate movement of trucks simply to protect their high-cost rail operations (see Joy, 1964).

Not all the evidence is in yet on the benefits of increased competition to consumers in these areas, but the evidence from the major affected industries such as airlines, buses, coaches and trucking appears to be favourable. In the early 1970s the income transfer from customers to union members and owners of certificates and permits in the US was estimated to be of the order of $2.5 to $3.3 billion p.a. (Moore, 1978). In the US airline industry deregulation has permitted the entry of new airlines. The average fares in markets served by these new airlines were 19 per cent lower in 1980 and 26 per cent lower in 1981, compared with the previous regulated situation. It is apparent that service competition has been replaced by price competition (Graham, Kaplan and Sibley, 1983). The increased availability of discounts for long-haul passengers has increased passenger traffic by nearly 60 per cent. Despite the financial problems of a number of airlines including Braniff, shareholders in airlines have done well out of deregulation with the value of shares in trunk airlines remaining relatively static in real terms but the value of regional airlines increasing sixfold in real terms (Moore, 1986). Coming closer to home, Wallis (1980) finds that the costs of private bus operators in urban areas of Australia are between half and two-thirds those of equivalent public sector operations. When coach services between Canberra and Sydney were recently deregulated, the number of coaches on the route increased considerably and fares were reduced.

Meanwhile the record in Australia outside the finance industry has not been so good, with high costs to the consumer resulting particularly from the Two-Airline Policy (Kirby, 1979, 1981), protection to the automobile (Swan, 1977) and textile footwear and clothing industries, and from so called 'orderly marketing' schemes for a number of primary products including eggs (Bureau of Agricultural Economics, 1983) and whole milk. Kirby (1986) finds, after adjusting for a number of other factors that might cause differences between airline costs in Australia and the United States, that Australian airline costs are 55 per cent higher due to the effects of the Two-Airline Policy. Protection to the egg industry alone, which is done in the name of assisting the consumer via 'orderly marketing', costs the consumer $70m per annum. Only if, according to the regulators, the supply of whole fresh milk for consumption is

ensured by an elaborate system of quotas can the consumer be protected against the vagaries and seasonal uncertainties of competitive milk markets. The result of this regulation has been the grossest exploitation of the consumer, with the regulated price of whole milk far higher than that of identical milk used for manufacturing purposes such as cheese production. It is not surprising that in Victoria, where a high percentage of milk is sold at low manufacturing prices, there should be an incentive for border dairy farmers to ship fresh milk across into NSW supermarkets and undercut artificially high-priced NSW milk. The best overall treatment of rural protectionism via regulation is by Sieper (1982). When the Two-Airline Policy was first introduced by the Menzies Government to restrict competition to TAA (now Australian Airlines) and ANA (now Ansett Airlines), the magic name of the consumer was once again invoked. After all, would not too much competition result in monopoly and exploitation of the consumer?

In summary, while it seems apparent that the deregulatory tide that has been sweeping the world has finally reached Australia's shores, a great deal more still has to be done.

Chapter 2

The Philosophy of the Consumer Protectionists

The NSW Pure Food Act of 1908 and the more than 100 related Acts and sets of Regulations Australia-wide (for some examples see Goldring and Maher, 1983:131) represent a part — and only a small part at that — of a whole host of consumer protectionist oriented legislation. Although a great deal of this movement is seen as recent in origin, stemming particularly from publicity-conscious disciples of Ralph Nader, laws against adulterated bread, beer and other consumer products have a history in places like England going back hundreds of years. In the United States particularly the movement was given a considerable boost by Upton Sinclair's fictitious expose of the Chicago meat trade in *The Jungle* (1906).

In the preamble to the NSW Pure Food Act 1908 we read that it is an 'Act for securing the wholesomeness and purity of food, and fixing standards for the same; for preventing the sale or other disposition, or the use of articles dangerous or injurious to health; for the prevention of deception and fraud; ...' the need for which may seem self-evident to the majority of people. Yet the Act and its vast compendium of Regulations cannot be understood in isolation from the belief systems, philosophy or ideology of the consumer protectionist movement itself.

Suck It and See

The very fact that, according to consumer protectionists, legislation needs to be passed in order to protect consumers implies that consumers unaided by special laws cannot take advantage of competition between suppliers, of trial and error, and of their own native horse sense to protect themselves in the market place against unwholesome food and other shoddy products. Why should this be the case when, particularly with foodstuffs, unit costs are low and trial purchases can readily be made? For this reason most food manufacturers and retailers who had to rely solely on initial rather than repeat purchasers would soon go to the wall; perhaps it is also this knowledge that makes consumers

particularly wary of so-called 'tourist-traps' often located in popular sight-seeing areas where repeat visits are most unlikely.

From the almost universal experience of consumers with unsatisfactory trial purchases of products, whether because of the consumer's own tastes or some defect in the product itself, come such popular expressions as 'suck it and see', 'the test of the pudding is in the eating', and 'once bitten, twice shy'. When a food or a product or a brand is discovered that does not live up to expectations, either there is 'voice' and a complaint is made with no repurchase until quality is improved or price lowered further, or there is 'exit' and that particular product or brand is shunned in favour of products that have satisfied the taste test.

This is such an elementary and, to my mind, devastating argument against highly elaborate and legalistic controls such as are embodied in the food laws and associated regulations that the best legal minds that support such legislation are going to pull no punches in giving it the lie. For example Professor John Goldring (1982:17,159), as well as denouncing what he calls the 'doctrinaire rantings of the Friedmanites' and other believers in the benefits that free markets bring to otherwise powerless consumers, provides this response:

> Modern marketing techniques create in the consumer the feeling that certain goods or services are *necessary;* and this need becomes a real one for many consumers. Faced with the alternative of consuming what is available, or going without, consumers tend, except in the most difficult of circumstances, to grab what they can. An individual consumer, whose purchases may amount to only a few dollars per year, is powerless to confront the production or marketing techniques of a multinational (or even a large local) corporation whose sales run into millions annually.

Of course this Galbraithian conviction of consumer helplessness and incompetence is so self-evident that no evidence, let alone example, is required. Apparently consumers can be ripped off and defrauded time and time again without even being aware of what is going on! The classic Australian treatments of the adverse effects on consumers of the consumer protectionist movement are Sieper (1978) and Parish (1980); also see Swan (1982).

Goldring and Maher (1983:3) criticise the rationalist 'free market' response to the excesses of the consumer protectionists on the grounds that it ignores the fact that consumers too are humans. Goldring and Maher deny that 'all human values can be quantified in terms of dollars', yet go on to point out that the contribution of this literature is to stress the importance of looking carefully at the costs and benefits of any

specific consumer protectionist measure. How is one in principle going to assess these costs and benefits if no single measuring stick such as money exists?

The response by Goldring and Maher is based on a misunderstanding of what economists do (or should be doing). Economists do not generally assert that pleasure, pain and human (or for that matter animal) values can be measured directly in terms of 'money'. Rather, they ask the easier question: what sum of money income would be necessary to compensate for some postulated policy change that may cause pleasure or pain or affect some human value? Indifference can be expressed between a money sum and a policy change without requiring that human values as such be directly quantifiable.

The food laws are examples par excellence of laws that lay down uncompromising quality and safety standards for the protection of consumers. Naturally, experts in the areas of food technology and public health draw up and occasionally revise highly complex sets of regulations. According to the value system underlying this approach, the technological experts know best how to look after consumers' interests. Additives, sweeteners, preservatives, etc. will not be permitted if there is slightest doubt about their long-term efficacy or safety. While it is obvious that poisons or other products with no redeeming virtues have no place in food, the same cannot necessarily be said in general of all conceivable additives or qualities of other products that are prohibited because of quality or safety regulations. The reason is that consumer preferences generally relate to a whole host of product characteristics of which safety and quality are obviously important but need not be overriding characteristics.

Not only will such obvious attributes as taste, texture, flavour, colour, energy content, cost, etc. be important as well, but the relative weightings attached to different attributes will vary from consumer to consumer. It is generally difficult if not impossible for the best-qualified and intentioned experts to make these difficult tradeoffs on behalf of all consumers in ways that are necessarily in the best interests of diverse consumers.

Nor can we presume that regulators always have the best interests of consumers at heart. While it is difficult to see into the minds of regulators, they, like ourselves, are human, and are subject to the same human foibles as ourselves. A desire for power, prestige and influence may well dominate their altruistic feelings towards consumers. In a provocative piece Hartwell (1987) has questioned the motivations of intellectuals and regulators in attempting to control the actions and limit the choices of others.

While experts have a great deal to contribute where consumers cannot be expected to have sufficient knowledge to always make the right decisions, there is still a presumption that the consumer is the best

judge of his or her own self-interest, with technical experts operating in an advisory capacity. Mandatory product standards and prohibitions do not necessarily guarantee the best possible outcome for the consumer in all circumstances. The consumer ultimately has to make his or her own choice given the consumer's own preferences, economic position, and perception of all the surrounding circumstances.

An illustration of the terrible harm that can arise when one attribute out of many is selected as the imperative value that must dominate all others is the prohibition on the use of the most effective pain killer — heroin — for terminally ill patients in Australia. Naturally food consumers in general need to be protected against addictive and dangerous drugs and substances. But surely the regulators are a little overzealous in this regard in Australia. In England heroin is readily available for such uses on prescription. Terminally ill patients are not in a position to suffer as addicts, at least for any length of time.

The Payoff to Regulators

A difficulty facing even the best-intentioned of technical regulators is the severe asymmetry in the payoffs facing them. For example, if the regulator prohibits every conceivable additive and chemical, no matter how potentially beneficial, unless it is established that the substance is completely safe, then deaths, illness and adverse reactions will be at a minimum with no blame attached to the regulators. On the other hand, the regulator who attempts to act in the best interests of consumers by using his expert knowledge to permit foods, additives or even drugs that may not have been proven completely safe under all circumstances but are of benefit to consumers because of a valuable contribution to diet, an economical contribution to some important product attribute, or even to the saving of lives, takes the risk of having caused injury or worse should a safety defect in the product eventuate.

Because of this strong asymmetry in payoff to regulators, regulatory agencies, and governments establishing safety laws, it is not surprising that most safety regulators shun cost-benefit analyses that take into account the costs of the additional safety requirements as well as the benefits from lower accident and death rates. A variety of methods exist for placing values on human lives and also for placing monetary costs on accidents in terms of the required compensation. A study by Grabowski and Vernon (1978) of the priorities of the Consumer Product Safety Commission, a United States agency set up in 1972, found that the highest priorities tend to be given to products with a high frequency and severity of injury, even where the costs of reducing accidents are very high relative to the benefits. Low priority is given to some products with highly favourable benefit/cost ratios. For example, power mowers have a number one priority but a benefit/cost ratio of only 0.4,

indicating a benefit of 40 cents for each outlay of $1. Bathtubs and showers, with a priority of only 12, have the highest benefit/cost ratio of 2.7. Extension cords have an even higher priority of 8 but an abysmal benefit/cost ratio of 0.1.

Grabowski, Vernon, and Thomas (1978:150) studied the rate of discovery and introduction of new pharmaceuticals per dollar of research and development outlay. They found that, in the United States in the five-year period 1966–70, productivity measured in this way was only one-sixth of what it had been in 1960–61; in the UK during the same period productivity had declined to one-third of its previous level. The authors attribute a large part of the poorer US performance to the 1962 Amendments to the Act governing the Food and Drug Administration (FDA), which followed in the wake of the thalidomide tragedy in Europe. FDA controls were expanded to cover the clinical testing and development process and the need to demonstrate therapeutic efficacy in addition to safety.

The much higher costs of new drug development that have resulted from the additional controls have forced many consumers to forgo health benefits, either because beneficial drugs that would once have been discovered are no longer being discovered, or because of the much longer delays before drugs are approved for use in the United States. Even if it were true that the overall FDA program has benefits that exceed its costs, the benefit/cost ratio could be improved by introducing less restrictive policies that take into account costs as well as benefits of regulation.

In effect the Australian pharmaceutical benefits scheme attempts to free-ride on research and development expenditure in the US and elsewhere by setting low prices for drugs, which are dispensed in large quantities at a standard prescription price. While Australians can 'afford' the products of the past, they make little contribution to the development of new drugs. Producers can opt out of the scheme, but when they do so it is hard for them to sell sufficient volume to make it worthwhile.

Much so-called consumer protection rhetoric and legislation is not only insulting to the intelligence of consumers, but can and does actually kill consumers in the sense that consumers are either denied life-saving drugs or may be forced to do without them for many years after they could have been available. Consumer protectionist sentiments are also used to justify the agonising deaths of many terminally ill patients and to support the high air fares and other consequences of the Two-Airline Policy.

Chapter 3

The Philosophy of Genuine Protection for the Consumer

Genuine protection for the consumer and the consumer's sensitive hip-pocket nerve is based on principles entirely different from those underlying the conventional consumer protection movement so beloved of interventionist-inclined lawyers and judges and occasionally economists as well. The fundamental principle of the 'invisible hand' of the market based on the self-interested profit motivation of competitive businesses, as described two centuries ago by Adam Smith, provides the major protection to consumers. If one firm offers a product of some specified quality, which is not necessarily the most desirable quality, to consumers at a price that is 'too high' in that other firms may be willing to supply the same product or a superior product at a lower price, then consumers will switch their allegiance from the high-priced to the low-priced suppliers. In a situation where initially there are no low-priced suppliers, then profit opportunities arising from the high prices of the incumbent supplier will attract new entrant firms into the industry. In a relatively open economy such as Australia, at least as far as the food sector is concerned, this entry may take place at least partly by imports.

This 'price competition' that takes place between suppliers is important, but in reality (as opposed to conventional textbooks) most of the competition does not take place directly in terms of varying prices but rather in terms of varying product qualities and promotion. Innovative products including new food lines will be introduced or a variant will be made on an existing and relatively established product. Consumer preferences are so diverse, and the technology for producing foods and other products is changing so rapidly, that in a relatively free and competitive market so-called standardised products or foods are not likely to play a major role. Firms are continually attempting to make profits by introducing new varieties and qualities of (say) foodstuffs by changing recipes, ingredients, tastes, flavours, and a whole variety of product characteristics. Food products, like products generally, are not immutable to change, which sometimes occurs in large discrete jumps and other times in relatively subtle ways.

A Theory of 'Adulteration'

To examine the nature of the competitive process and the way it tends to make consumer protection laws and their enforcement largely redundant in some circumstances, let us ask what happens when a manufacturer or distributor secretly 'adulterates' or dilutes some beverage such as 'beer', 'wine', 'spirits' or, in more contemporary fashion, 'orange juice' by (say) adding water to it. In fact 'orange juice' can be legally diluted so long as it is called 'orange drink' and not 'orange juice'. There are also a variety of fruit drinks in NSW that are classified according to the percentage of fruit juice: orange juice, fresh orange drink, orange juice drink, orange drink, orange flavoured drink.

(The 'cutting' of illegally imported heroin with a variety of sometimes deadly but usually harmless powders and additives in street sales provides another contemporary example. Deaths from drug overdoses and poisonous cutting agents are usually a result of the illegality of heroin and the consequent denial of legal remedies and suppression of competition in the drug trade.)

If the product is regarded initially as a 'standardised' one by consumers, and if consumers cannot detect the unannounced addition of small quantities of water, then such 'unethical' behaviour may allow the individual supplier to shave costs and increase custom, thus temporarily boosting profits, so long as consumers do not notice the difference. Naturally the affected competitors will 'cry foul' and lobby the authorities to prosecute the 'unethical' supplier. If no action is taken the affected competitors may be forced to lower their own prices to retain business; in order to avoid making losses they may also begin 'adulterating' their own products.

Before the other competitive suppliers copy the actions of the 'unethical supplier', customers of the unethical supplier may objectively appear to be worse off in that they may be paying 'too much' for the added water content in the beverage despite the apparent price reduction. In this world of imperfect information consumers may actually think they have gained by the lower price of the product, and in a sense they may have.

Once there has been a general price reduction, with competitors following suit by adding water, consumers generally may end up buying 'lower quality' products at reduced prices with all suppliers making just 'normal' competitive profits. By now the added water content has reached the point where the deterioration in quality is noticeable. A consumer protectionist viewing this situation would say that consumers have lost out and that standards should be raised by enforcing the law against 'adulteration'. In reality the outcome may be just the opposite. Suppose for example that the original standardised product was of too

high a 'quality', in the sense that consumers do not place sufficient value on the quality attributes commensurate with the costs of supply. In the new situation consumers may recognise the quality decline but applaud the greater 'value for money' that has resulted from the competitive process. The 'right' quality is now being offered at the 'right price'.

To add realism let us permit consumers to have a range of preferences from 'high' to 'low' quality. Some prefer 'pure' orange juice while others find it to be too strong and prefer (say) 80 per cent juice and 20 per cent water. The competitive market outcome would allow a variety of different dilutions to be offered at prices that reflect the degree of dilution. Moreover each supplier, in an endeavour to attract the appropriate clientele, will have an incentive to indicate the degree of dilution, although to some extent prices alone will tend to convey this information.

A Monopoly Supplier

In the competitive world described here, compulsory product standards designed to protect consumers against deception are largely redundant and may discourage an appropriate range of product qualities from being offered. Suppose we now go to the other extreme and repeat the analysis with a single monopoly supplier. Surely under these (to my mind, unlikely conditions) the view of the consumer protectionists is vindicated! No, not necessarily. If consumers have a preference for one quality of product, which is not necessarily the standard product, then the monopoly will have an incentive to provide that quality because failure to do so will detract from the profits the monopoly supplier could earn. This will be true even if preferences are only latent because the opportunity to examine or purchase some item of specified quality may not be available. It will be in the interests of the monopolist to discover these latent preferences. It is more 'efficient' for the monopoly to generate its profits by charging higher than competitive prices for product qualities that consumers want. The monopoly has no interest in forcing consumers to buy a product quality that they do not want because the reduction in demand resulting from such a policy would detract from the profitability of the supplier. The actual outcome in terms of the monopolist's choice of quality may also be influenced by interaction between the quantity and the quality of the good that the consumer desires. Once again compulsory product standards are redundant and potentially costly to the consumer.

Situations can arise in which monopolies may not be able to produce 'optimal' product quality or qualities from the consumers' viewpoint. For instance if there are a variety of consumer tastes it may pay the monopolist to suppress particular product qualities because the supplier cannot prevent costly (from the supplier's viewpoint) consumer

switching between different product qualities. It is not clear, however, in these more complex situations, that given the lack of information by regulators of consumer preferences, product quality regulations can be of any real assistance to consumers. If there is a problem it is the absence of competition, not the lack of compulsory product standards.

The point being made in this section is that the profit motive is the friend of consumers, both when competition exists and when it is lacking. Consumers punish firms who inflict on consumers inappropriate quality choices by switching their custom elsewhere or by spending less and thus lowering profitability. Consumers are likely to face the worst of all possible worlds in terms of the responsiveness of suppliers to consumer preferences and the choice of most appropriate product specifications if there is a combination of complete monopoly control and no profit motive to guide product choice. The privatisation of British Telecom, for example, may be seen as owing in part to consumer frustrations. Unfortunately many public utilities fall into the category of not-for-profit monopolies with protection by statute from competition.

Some Costs and Benefits of Consumer Protection

To suggest that the consumer can be fully protected by regulations during a continual process of evolutionary and revolutionary change is of course complete nonsense. No system of price, quality or other regulations could possibly keep up with all the changes and reflect the diversity of consumer preferences, the diversity of suppliers, and rapidly changing demand and cost/supply situations. The only consumers 'fully protected' against everything that could possibly go wrong are likely to be in a static unchanging situation as might occur when they are finally interred six feet under; although, of course, even cemeteries are often converted to other uses after the lapse of some time.

However the consumer is not as helpless as may at first appear to be the case. In the first place consumers are provided with a great deal of information, both from labels and advertising messages and, most importantly for foodstuffs, from price labels and signs in supermarkets, food outlets and the like. Regulations can play a part here in ensuring a national market via uniformity of labelling laws, and by providing consumers with additional useful information that can easily be assimilated, about both contents and ingredients.

The advantages to consumers from competitive national markets in providing diversity, scope for reaping scale economies, and the maximum competition with respect to both quality and price, are the same as those stemming from international markets and free trade generally. One often suspects, for example, that a number of quarantine regulations restricting imports of popular European unpasteurised cheese

into Australia have more to do with protecting the local cheese industry and similar domestic beneficiaries than they do with protecting the consumers' health. Unfortunately, as we shall see, the reality is that regulations have been and are a barrier to national and international markets rather than a facilitating mechanism. Additional information is provided by (one hopes) objective consumer reports, but in fact the bulk of information about 'tastes' and likes and dislikes is provided by trial and error sampling, purchasing and consumption as well as by word of mouth. I think that on the whole *Choice*, to which I subscribe, does a good job of providing information to consumers, but it is not the only source of relatively objective information.

Of course, not only is the regulatory system as it is presently conceived a barrier to national markets, but whatever the useful function of legislation and regulation is, it may be better provided by other means. For example, had there not been such detailed food regulation, general consumer protection law and common law (judge-made law) would have provided an entirely different — and I would suspect, better — framework.

Second, as many product liability laws change from *caveat emptor* (let the buyer beware) to *caveat venditor* (let the seller beware), the consumer has additional legal protection — which of course is often purchased at the cost of higher product prices reflecting the changed liability situation. The cost of undertaking legal action may put it out of the reach of some people, at least in the case of relatively minor irritations, but if the prospective damages are high enough legal costs are unlikely to be an obstacle. The purpose of the court system is to set appropriate guiding precedents. Thus damages should be set sufficiently high to ensure that courts are effective. High legal costs are not necessarily a bad thing if they ensure that the right precedents are set in the generally small proportion of common law cases that do go before the courts and frivolous actions are discouraged.

Third, despite all the information available to consumers, some consumers may still have difficulty assessing the long-term impact of some products on their health or safety. In particular, some potential food additives that preserve or add colour or taste may cause problems, or a small minority of consumers may react adversely to some additives. Once again there may be a role here for regulations to require disclosure of such additives, and in some cases prohibitions may be in order. But it is important to maintain a sense of proportion. Compulsory disclosures may at best confuse the bulk of consumers. Prohibitions may provide some marginal benefit for a tiny minority of consumers but impose severe costs on the great bulk of consumers. These may not be justified in cost-benefit terms. The argument is **not** that all regulations are necessarily bad and should be abolished. In fact some degree of regulatory control may well be the best option when all alternatives are

examined and both the costs and benefits of regulations and their alternatives are examined. An open mind should be maintained at all times.

Finally we come back to the main protection for consumers: competition between firms and suppliers for the consumers' patronage. Here, as already mentioned, quality competition is not only as important as price competition but is really part of it. Firms may offer higher quality products at the same price, or higher or lower quality products at higher or lower prices.

Since there is a general presumption that competition acts in the consumer's interest, the starting point for regulatory controls must be the demonstration that markets unaided cannot provide a socially desirable outcome. Technically a socially desirable outcome is one in which, according to the Pareto criterion, a potential gainer from a change cannot compensate the losers from that change. No one can be made better off without making someone else worse off. There must be some demonstrable defect or deficiency in the way the market works to justify regulatory intervention. In my view this defect needs to be more than simply asserted. The onus of proof should be on those demanding regulation to demonstrate the harm that is in need of correction. Furthermore, it should also be demonstrated that the proposed remedy will be effective in the sense that not only will benefits flow from the remedy, but that these benefits to consumers will more than exceed the often considerable enforcement and compliance costs of the regulations. In other words the onus of proof rests on the lobbyists for regulation to show that the regulations are 'cost-effective'.

Often regulations appear to be made for not much better a reason than that the power to regulate exists. Not only are the benefits of regulation often hard to assess, but the costs, both direct and indirect, are also difficult to assess and can sometimes more than swamp any benefit. In fact the very group — the consumers — who are supposed to benefit from regulations may end up actually being made worse off.

The costs of regulations include not only the valuable time of the regulators themselves but enforcement and compliance costs as well. Often the time of highly paid members of the community is tied up in interminable committees and meetings, not to mention the time of supporting bureaucrats and the legislature itself. Enforcement costs also include the courts and the judicial system, numerous inspectors, and a large bureaucracy. These costs are usually paid indirectly by consumers via taxes levied on the community at large. The most difficult to measure are compliance costs by the firms or individuals affected. Whole legal departments in firms may be devoted to keeping up with the constant flow of new and amended regulations in the various States. Products may have to be withdrawn or ingredients changed. New labels

may have to be continually redesigned and printed to cover the variety of non-uniform regulations in the different States.

These are a portion of the direct compliance costs that would normally be passed back to consumers in the form of higher prices needed to cover the increased costs of doing business. In addition, indirect compliance costs may arise because competition may be reduced in certain areas. For example it may be difficult if not impossible for some overseas suppliers to comply with regulations unique to Australia. As a result competition may be reduced and prices to the consumer raised. It is possible that only certain types of firms, for example large firms, may be in a position to get new products approved by regulators where existing standards are inappropriate in that they deny consumers choice or make new products very difficult and expensive to introduce. Once again competition may be reduced as small innovative firms are squeezed out of the market place. The net result is to worsen the overall position of the consumer not only through higher product prices but also by giving an early 20th century flavour to today's products, reflecting ossification in the market place. The important conclusion to emerge is that competitive markets, for both products and information, act to protect consumers in a variety of ways, especially when consumers are in a position to carry out their own 'trial and error' experiments and 'suck it and see'.

Chapter 4

The Nature of the Food Acts and Regulations

The Food Acts cover an important consumption activity. For the year 1984–85 the Australian National Accounts indicate that the expenditure on food was $19.9 billion or about 16 per cent of private final consumption expenditure. If alcoholic drinks are added this ratio increases to about 17.7 per cent. Food manufacturing in Australia employs about 15 per cent of the manufacturing workforce. Given the importance of food, not as much attention seems to have been paid to the food laws by economists and others as might be expected.

The major prescriptions of the various State Food Acts are summarised in a crude way in Table 1, which is an updated version of a table prepared by Goldring and Maher (1983:132). The Queensland Food Act 1981 is based on the Model Food Act, an Act agreed to by the Health Ministers from the various States as the basis for a uniform State approach to the food laws. The new Victorian Food Act 1984, which was proclaimed in 1986, is also based on the Model Food Act although there are differences. The South Australian Food Act 1985 also came into operation in 1986. The Western Australian Health Act 1911 was amended in 1985 to closely resemble the Model Act.

It should be clear from the Table that the broad thrust of the Food Acts is similar in all the States and based largely on the Model Food Act. It is in the fine legal details and in the Regulations that accompany the Acts that some differences still arise. As discussed in Chapter 5 below, the States have now agreed to a (virtually) uniform set of Regulations. The Model Act and the State Acts based on it all set out to accomplish much the same things by what could be called a set of proscriptions, which prohibit certain actions, and by positive prescriptions, which permit certain actions, with all other actions prohibited.

Adulterated Food

The first of these proscriptions can at least be partly justified in terms of the preservation of the health of the food-consuming public and attempting to ensure that food is wholesome in nature. Sections 9–11 of the Queensland Act prohibit the preparation, packaging and sale of certain food that is (a) unfit for consumption by man; (b) adulterated; or (c) damaged, deteriorated or perished.

There is not likely to be much controversy about categories (a) and (c) except that it may not always be easy to tell whether food is unfit for consumption, damaged, deteriorated or perished. There may be more controversy attached to the very broad definition of adulterated, which apart from vague statements such as 'injurious to health, dangerous or offensive' also includes a 'substance prescribed as prohibited generally or in relation to that food'. This is where the very detailed regulations come in, for they usually operate by permitting certain food additives such as specified preservatives to otherwise 'pure' food and anything not covered by this positive prescription is prohibited.

Controversy can arise in relation to permitted ingredient lists, prohibited additives, and ingredients where the justification for the prohibition on health grounds is not clear-cut. A good treatment of food safety regulation is found in Campbell (1974). Apart from obvious poisons, such health grounds are not always as straightforward as one might like since just about any substance if taken to excess could lead to permanent injury or worse. Even pure water and wholesome food if taken to excess can cause serious problems. Since the regulators do not decide the diets of consumers they cannot know what the total quantities consumed by individuals of particular substances will be. The penalties for violating Sections 9–11 range from $2500 to $5000.

The Quality of Food Demanded

The second major proscription has very little rationale in terms of the protection of the health of the consuming public. Section 12 of the Queensland Act makes it a serious offence with a penalty of $2000 for a person to sell food that is not of the (a) nature; (b) substance; or (c) quality of the food demanded by the purchaser. Thus if I as a consumer walk into a shop and ask for a meat pie or a kilo of sausages, and if these products do not comply with the minimum standards prescribed in the Regulations accompanying the Act, then the seller could be prosecuted. Similarly if a package is bought with a label indicating it contains a particular type or quality of foodstuff and the foodstuff is not that specified on the label, then once again an offence may have occurred. Such an offence is obviously easier to establish if the product label or

Table 1
Outline of State Food Legislation
(Section Numbers of Each Act)

	NSW Food Act 1908	QLD Food Act 1981	SA Food Act 1985	TAS Public Health Act 1962	VIC Food Act 1984	WA Health Act 1911
Prohibition on sale of adulterated food	10	9–11,16	—(a)	90–92	8,10	246L–N
Definition of adulterated food	5	17	—	63	4(2)	246I
Mixing, colouring, etc. of ingredients so as to render same dangerous or injurious to health	11	17	—	93	—	—
Selling food not of nature demanded	12(2)	12	—(b)	92C, 94(2)	9	246O
Sale of mixtures	13	—	—	94(1),95,96	—	—
Sale of bad milk and other dairy produce	21	—	—(c)	—	—	213–220
Analysis	Part III ss. 22–35	29	24(6)	67,68 Div IV 75–86	23, 30–34	Part VIIA 247A–247F
Penalties	36	44	18–25,27, 34(2)(q)	101,134	53	246ZJ–K 246ZS–T

Local administration	9	23–28	6–17	64–66,119	20	246H 246ZA–ZM
Obstruction of officials	38	30	24(8)	130–132	29	246ZD
Prohibition orders	39A,51A	21	25–27	—	44	246ZA
Time limit for prosecution	41	45	—	105	45(2)	246ZR
Evidentiary	43–46	55	31	107–110,133	50	246ZZ

Key: —(a) now 'unfit for consumption', s.18
—(b) now 'misrepresent nature or quality', s.19
—(c) moved to r.6 of Food Regulations, 1986

Source: A version of a table originally prepared by Goldring and Maher (1983:132) and updated by Anne F. Davies and Jill M. Holmes of Baker and McKenzie.

the seller's description corresponds to that of a product standardised in the Regulations.

According to a standard legal reference in the consumer protection area by Goldring and Maher (1983:137), the similar Section 12(2) in the NSW Pure Food Act recognises that 'consumers will normally expect and demand the highest quality in the foodstuffs which they purchase' according to this legal interpretation. To me, such an interpretation would seem to be misconceived. Consumers are given only the 'nature', 'substance' or 'quality' of the good they ask for, or more likely, the good that is specified on the label. It cannot be inferred that consumers who do not specify a quality implicitly choose the highest quality, or that a product label that does not specify a quality automatically implies a 'premium quality'.

If the Act were to be interpreted by the courts as inferring that when consumers ask for a food product they are automatically asking for the highest quality product, when in fact they are receiving a product of lower quality that nonetheless meets the requirements of the Act and paying a price that reflects that lower quality, then a farcical situation arises in which food suppliers would be expected to supply high quality products at less than high quality prices — something for nothing. Since food suppliers are not in the charity market, any attempt by the courts to interpret the Act the way Goldring and Maher (1983) do would disadvantage consumers by foisting on them high quality products at higher prices than before. This would particularly disadvantage lower-income consumers who may well prefer lower quality products at bargain basement prices. According to Goldring (1982:150) this is the consumer group most in need of assistance and protection.

It is interesting to note that the new South Australian Food Act 1985 has revised the obscure wording of this section of the Model Act as follows:

> 19(1) A person who misrepresents the nature or quality of food that he offers for sale shall be guilty of an offence.

This wording is not only much clearer but also closer to the Trade Practices Act prohibition on misleading and deceptive conduct. Under the South Australian Act the sale of food that does not comply with a prescribed standard is still deemed to be 'misrepresentation' even though the label may truthfully describe the contents.

A general prohibition on misrepresentation can be justified on the grounds of reducing informational costs to consumers. It is not so clear why a product should have to comply with a prescribed standard if the product is accurately described.

Minimum Product Standards

The rationale for specifying detailed recipes for numerous types of foodstuffs including flour, meals and bread, meat and meat products, fish, vegetables, edible fats and oils, margarine, milk, milk products, butter and butter products, cheese, cocoa, spices, jams, fruit, and alcoholic beverages, beer and spirits, is not the protection of the consumer's health but rather protection from deception and fraud. Despite the fact that the Commonwealth Trade Practices Act already legislates against deception and fraud, albeit in general terms not specific to the food industry, as well as in general consumer protection laws at the State level, the proponents of the Food Laws and Regulations see such additional protection to food consumers as (a) essential, and (b) provided at very low cost.

Apart from the fact that we all consume food, proponents of special food legislation never stop to explain what is so special about deception and fraud in relation to food that justifies such special emphasis on food, and food for human consumption at that. Why are not cats and dogs and their owners similarly 'protected' in relation to pet food? Perhaps pets and their masters are also subject to human foibles and thus need greater protection in regard to food they consume themselves. Perhaps 'pure pet food' laws and regulations will be with us before long.

Let us put aside the completely unsupportable and unsupported claim that such laws are essential. Then we can see that the basis for the second claim, that consumers are not harmed by the operation of these laws, lies in the proposition that the laws do not attempt to prescribe and proscribe what consumers can consume but rather to define certain standardised products in so-called 'minimum standards of identity', in ways that convey information to consumers both efficiently and cheaply. According to these proponents consumers are not forced to consume these standardised products since food manufacturers are free to produce other foods that are 'not elsewhere standardised' in the Regulations (Section 69 of the NSW Pure Food Regulations 1937). These non-standardised foods may be prepared from two or more wholesome foods either in their natural state or as standardised in the Regulations. Many foods in the market place are non-standardised foods.

Foods Not Elsewhere Standardised

Thus on the surface at least the Regulations do not appear to restrict the consumer's choice of food to just those standardised foods and qualities specified in the Regulations. Manufacturers of so-called standardised foods may produce 'higher quality' products than are specified in the minimum product standards, and so-called 'lower quality' products could be sold under s.69 of the NSW Regulations. There is, however, a major

catch. Regulation 69(4) and equivalent Regulations in the other States specify that:

> Subject to Regulation 1(5) [which refers to ingredient lists], a food not elsewhere standardised shall not be described or portrayed in such a manner as, or by a name or pictorial or other device which is suggestive of another article of food which it is intended to be an imitation of or a substitute for or which it resembles.

Sellers of 'high-quality' products whose standards exceeded the standards laid down would be required to use the standardised names so long as they can conform with the standard. Depending on the products concerned and the nature of the specific regulations, sellers of these products may be able to indicate the 'superiority' of their product by specifying on the label the higher quality input. For example, among other things jam must contain at least 40 per cent fruit. Jams with a higher fruit content could presumably indicate this premium aspect of quality on the label.

Manufacturers and sellers of products that do not meet the minimum standards laid down are required under the Regulations to choose a product name that is not suggestive of the so-called standardised product that their product most closely resembles. So-called 'inferior substitutes' or 'imitations' are not encouraged or permitted even when the contents are fully specified on the label. According to the proponents of regulation, even the use of a standardised name when the product does not meet the standard laid down amounts to fraud and deception, no matter how obvious it may be to the consumer via a taste test or the ingredients label that the product is of a lower standard than others on the market. Proponents of regulation use the analogy here of proprietary trade names: just as the Ford Motor Company and McDonald's hamburgers are protected against inferior imitations by laws prohibiting rival companies from copying the brand name, consumers of standardised products should be protected against inferior substitutes that may attempt to pass themselves off as equivalent to the product in question. Fortunately there is no standard for 'hamburgers'.

This then is the basis of the claim that compulsory minimum standards for standardised products do not interfere with consumer choice. The rejected inferior product can be produced and sold under some other name so long as it does not mislead by being associated in some way with the standardised product. Superior products that do not conform to the standardised product must also meet this requirement. The question then needs to be asked: do meaningful names exist for so-called inferior substitutes, or superior ones for that matter, that are not suggestive of the standardised product yet provide a clear description of what the non-

standardised product really is? Imposing some other non-suggestive name on the product may both harm its chances to succeed in the market and mislead consumers even more.

Labelling Requirements

A third area of prescriptions that are generally positive rather than negative in character relate to labelling requirements. Section 18 of the Queensland Act, for example, requires the prescribed name for a standardised food and the name and business address in Australia of the vendor or manufacturer, or packer or importer in the case of imported food, to appear on the label. In addition the Regulations normally prescribe further labelling requirements such as a list of ingredients of the food to the desired degree of detail, the place of manufacture, the country of origin, and a specified date marking.

A convenient summary of the Food Laws and Regulations as they relate to packaging and labelling is provided by the Trade Practices Commission (1977:56-58):

a. The legislation requires all pre-packaged food to be labelled, and the label must conspicuously and prominently, provide certain information in contrasting colour print of prescribed size;
b. The label must state the common name of the food, which may be either a name indicating its true nature (e.g. coconut) or the name specified in any regulation laying down the permissible composition for an individual food product. (A wide range of individual foods are so standardised in permissible composition, such as bread, ice cream and custard powder.)
c. The label must state the name of the manufacturer, packer, importer or vendor, together with his address. In some circumstances a company, or a person using a registered business name, may dispense with an address, or abbreviate the required address, to the name of a city or town in which the company or business name is registered.
d. Where the food is compounded, blended or mixed, this must be disclosed; in addition, compositional standards for particular foods often require further disclosure where this is felt to be in the interests of consumers, e.g. a declaration of the level of cholesterol present in polyunsaturated fats and oils, or a disclosure of the presence and proportion of cereal in canned fish products.
e. The use of such words as 'pure', 'imitation', or 'preservative' must be in accordance with the prescribed meaning, and may only be used where specifically permitted.

f. The addition of vitamins and minerals to food, and claims based on the presence of a vitamin or mineral, are strictly regulated.
g. In all States, labelling of food with a statement of its nutritional value is permissible only in respect of cereals, fruit juice, invalids' foods, butter, margarine, infants' food, milk powder, wheaten flour, some biscuits and extracts of meat, vegetable or yeast. Claims such as 'vitamin enriched' or comparison of one food's vitamin content with another are prohibited. Foods which naturally contain vitamins and minerals may be labelled as a source of these as ordinarily consumed if they contain at least one-sixth of a theoretical daily allowance.
h. Meat (not being chilled packaged meat) and food packaged on a retailer's premises or in the presence of the purchaser are exempted from the general labelling requirements but their composition must comply with the prescribed standards. The precise exemptions vary from State to State.
i. Misleading or false claims on labels are prohibited.
j. A statement of ingredients must be provided where required by specific composition standards. However where a standard requires ingredients to be stated these may not in every case give consumers adequate information. In South Australia, ingredients listed, whether voluntarily or in compliance with a prescribed standard, must be listed in descending order of proportion. New South Wales now requires the listing of ingredients in descending order for all foods not standardised by regulations. The NSW requirements conform with recommendations of the international Codex Alimentarius Commission.

This TPC summary made some years ago it is still a reasonable description of the broad packaging and labelling requirements of the various States. The differences at the detail level are taken up in the following section. The Codex Alimentarius Commission is an international organisation with membership of over 100 countries including Australia. Its aim is the preparation of International Food Standards for adoption by member countries to protect the health of consumers and to facilitate international trade in foodstuffs.

The major purpose of such detailed packaging and labelling regulations must be to provide valuable information to consumers in ways that are useful and can be easily understood and absorbed. Implicit in this regulatory approach is the notion of market failure: that competition between suppliers, marketing efforts to improve sales and the desire on the part of both manufacturers and retailers to build up reputations of honesty and reliability cannot be relied on to provide

consumers with the kind of information they desire. Given the low price and repeat purchase nature of most food items, it is not clear on the basis of the 'suck it and see' principle that the consumer really needs such protection. Unscrupulous suppliers who cheat or who do not produce adequate information about their product are likely to be harmed in the market place so long as on purchase consumers can identify the nature of the incomplete or misleading information. Where health risks are involved or where the nature of the deficiency may not be discernible except over a long time period then the case for disclosure is more clear-cut. The general presumption is that it is usually more cost-effective for a manufacturer or seller who is aware of the product's qualities to make this known to consumers than for consumers to have to discover the required information themselves.

Where the knowledge of specific ingredients is valuable to only a small minority of potentially allergic consumers, there is potential conflict between providing information that may simply confuse the majority of purchasers and information essential to a few. Should all the possibly hundreds of ingredients and additives be listed? Should common or technical names be used? Should proportions either by weight or volume be given? Is a degree in chemistry or biochemistry necessary in order to read the label? The answers to these sorts of questions are not easy. In 1987 a coding system will be introduced whereby numbers are allocated to particular additives. I can see some advantages in this approach as only the small minority of sensitive consumers need to translate the numbers into potentially harmful additives or substitute other products if they react to a particular additive. The vast majority of consumers for whom the information is unnecessary are less likely to be confused by numbers than they are by complex chemical names. The coding system could be interpreted as a form of substitute for the kinds of precautions a food manufacturer might have to take if the courts were to adopt a *caveat venditor* approach and make sellers responsible for any harm done to a small minority of sensitive consumers.

When I first became interested in food laws I was amazed to find that, contrary to my prior belief, food laws are almost entirely about avoiding fraud and deception. Health and safety hardly come into it at all. Since stringent laws already exist against deceptive practices, it is not at all clear why we need such elaborate and complex food laws.

Chapter 5

The Lack of Uniformity in the Food Acts

Although the Food Acts in the different States and Territories are approximately similar in terms of their objectives and their major features, neither the Acts nor the accompanying Regulations are by any means uniform. This is a most peculiar but not entirely uncharacteristic state of affairs in a country that was capable of building railways with quite different gauges in the different States.

This lack of uniformity causes quite severe costs to Australians as a whole, and particularly to food consumers, in what ought to be a national market place in which products can be transported not only nationally but internationally as well. The advantages of uniformity have been perceived from the time of the first Food Act in Australia, the 1905 Food and Drug Act in Victoria. Only two years later the Federal Council of the Associated Chambers of Manufacturers of Australia began lobbying the Commonwealth and State governments for uniformity in food standards, unfortunately to no avail. In 1908 the Pure Food Act was passed in New South Wales. It differed from the Victorian Act, as did the various other State Acts that followed. These differing State Acts and Regulations came into being despite numerous resolutions from conferences of State Premiers and health departments that standardisation is desirable.

After the Second World War the Food Standards Committee (FSC) of the National Health and Medical Research Council (NH-MRC) was set up in 1952 to advise on all aspects of food legislation and standardisation. The NH-MRC had been established in 1937 to advise the States and Commonwealth on health matters. However, it was not until 1975 that the Conference of Health Ministers from the various States agreed to form a Joint Working Party to draw up Model Food Legislation suitable for Australia-wide introduction by the individual States. The idea was that each State would have its own Acts and Regulations with uniformity achieved by adoption of the Model Act and Regulations. This would have the advantage as far as the States are

concerned of enabling the continued administration and policing of the Act on a State or local basis. In Victoria policing is on a local basis.

It seemed that progress was being made when the Health Ministers' Conference approved in 1980 the Model Act and in 1982 the Model Food Regulations designed to complement the Act. These Regulations would continue to be updated on the basis of recommendations of the Food Standards Committee of the NH-MRC. However, only the Queensland Parliament adopted the Model Act following this agreement in principle (in 1981), and with a number of modifications that would prevent complete uniformity being achieved. Subsequently Victoria passed the Model Act (in 1984) with proclamation in 1986, and South Australia's Food Act 1985 came into operation in 1986. The South Australian Act is quite similar to the Model Act. Both Tasmania and Western Australia chose to amend earlier Acts to bring them into closer agreement with the Model Act. The NSW Pure Food Act 1908 was amended in 1979 along the lines of the Model Act. The Regulations in each State have now been amended to bring them substantially into agreement with the NH-MRC Regulations, but agreement is still not complete. A stumbling block is that the Model Regulations have not been reviewed by legislative draftsmen so that States such as NSW are unwilling to have the Model Regulations adopted into law automatically in case they are subject to legal challenge. There is also the problem that Victoria's legislation is administered on a local rather than on a State-wide basis, unlike the other States. The Food Industry Council of Australia (1984) has provided a useful description of the efforts that have been made to obtain uniformity. Thus 80 years or more of efforts to achieve uniformity by 'cooperative federalism' between the States cannot be said to be a roaring success. Each State still has in operation its own non-uniform Act and Regulations.

Despite the considerable activity in the last few years under the threat of direct Commonwealth legislation in the food area, a number of differences remain. In some instances certain States require more information or more detailed information than others. The costs associated with meeting such labelling requirements may not be excessive if a national label can be devised that meets the minimum requirements in the most stringent States as well as Regulations in the less severe States. This would normally be cheaper than devising separate labels in the different States. Three examples of the remaining disparities are as follows:

1. In Western Australia peanut butter must be called 'PASTE' with or without the addition of the word 'PEANUT' and the word 'butter' is prohibited from appearing on the product. The word 'PASTE' must appear in letters of at least 1.5mm in height. In South Australia, the product may be called either

'PEANUT PASTE' or 'PEANUT BUTTER' in letters of at least 3.0mm in height. In NSW the product may be called either 'PEANUT PASTE' or 'PEANUT BUTTER' in letters of at least 3.0mm in height and the word 'butter' may not appear on the label unless preceded by the word 'PEANUT' in letters of the same size, style and colour.

2. In NSW, foods that contain flavouring substances must bear the words 'FLAVOUR ADDED' in standard type of at least 1.5mm in height unless their ingredient lists include the word 'flavour'. The requirement has limited effect because all foods are required to include the word 'flavour' in their ingredient lists (the requirement therefore applies only to those very few foods not required to bear an ingredient list). In Western Australia, foods that contain flavouring substances must bear the words 'ARTIFICIALLY FLAVOURED' in letters at least 2.0mm high.

3. The artificial sweetening substance acesulphame K is a permitted sweetener in NSW and SA. It is not permitted in Victoria. The sweetener thaumatin is permitted in SA but not in NSW or Victoria. In NSW, foods sweetened with aspartame must bear the words 'phenylketonurics: contains phenylalanine'. There is no such requirement in Victoria, although packages of artificial sweeteners containing aspartame must be labelled with the words 'PHENYLKETONURICS: CONTAINS PHENYLALANINE, not suitable for use in cooking'.

For particular products such as margarine, which are in competition with dairy products such as butter, considerable problems arise from the powerful lobbying influence of the dairy industry. For many years there were strict quotas on the production of margarine designed to protect the butter industry, but fortunately these have now broken down. The collapse of the quota laws occurred once one State, South Australia, would no longer restrict margarine production. The remaining States in which the dairy industry lobby was more powerful were soon forced to follow suit.

As far as packaging is concerned, Western Australia's Margarine Act still requires table margarine to be packaged in a cubed tub to differentiate it from butter — as if consumers cannot make the distinction from the label (*Sydney Morning Herald*, 5/4/84). This adds to costs since special tubs and filling machines have to be devised. See Business Regulation Review Unit (1986:Appendix 9) for a treatment of regulations relating to margarine in the different States.

The Costs of Non-Uniformity

There are a number of costs associated with lack of uniformity in the food laws and differences in food regulations owing to non-adoption of the latest recommendations of the NH-MRC, or because of lobbying by particular interests in individual States.

For a national marketer, there is the cost of designing and producing special labels that may differ for each State. Manufacturers may have to bear the costs of shortening or interrupting production runs due to special compositional and packaging requirements. There is the cost of discovering and complying with a whole host of different and changing regulations. There is also reduced competition arising from artificial barriers to trade between the States, with higher prices to consumers as the likely consequence. There are also costs associated with making and modifying laws and regulations and enforcing them. These costs are borne by the taxpayers.

Naturally it would be very difficult to quantify the costs to both manufacturers and consumers of the lack of standardisation of food laws. Very bravely, the Food Industry Council of Australia (1984) has attempted to quantify the costs to food manufacturers of complying with non-uniform legislation, which it estimates at a conservative $50m per year or $500m over ten years. According to information supplied verbally by the Food Industry Council, the estimates are based on the cost of a new label design of about $9000 to the manufacturer and an estimate of the number of additional labels required because of the lack of uniformity in the laws and regulations. The additional costs to manufacturers for label design, etc. are assumed to be multiplied by a factor of about 2.9 due to wholesale and retail mark-ups on the higher prices charged by manufacturers. One dollar of additional cost to the manufacturer translates into $2.90 additional cost to consumers once a variety of mark-ups has been allowed for.

The difficulty with this rather simplistic form of cost estimation is that it assumes that mark-ups are not cost-related but rather written in unalterable tablets of stone. Naturally some of the middleman's costs are related to the price of the item at the wholesale level, in particular inventory costs associated with funds tied up in the product, but they are by no means the only costs incurred by wholesalers and retailers. Storage space, shelf space, transport, display, advertising, storemen and packers, price markers and checkout operators represent only some of the numerous costs incurred by food distributors that are largely unrelated to manufacturing costs.

Thus when manufacturers' costs are increased their prices are likely to go up, with increased wholesale prices being passed on ultimately to retail consumers. However, the price increases to consumers are likely

to reflect only higher costs incurred at different stages in the supply chain, not some artificial multiplier that ignores the forces of competition, which will act to squeeze percentage price mark-ups when only the manufacturer's costs have risen. Consequently I would conclude that the Food Industry Council's compliance cost estimates are too high, perhaps by as much as the 2.9 multiplier effect.

Even so, this does not mean that the unnecessary costs incurred are not worth saving by introducing uniformity. Moreover, I doubt whether the Food Industry Council has included more than the tip of the iceberg as far as additional and unnecessary costs brought about by the food regulations are concerned. The costs of label changes to the manufacturer may be understated. In evidence to the Trade Practices Commission (1977:11) one manufacturer stated that for only one product line uniformity could reduce labelling costs from $18000 to $3000 p.a. Even if the estimates are restricted to lack of uniformity there are the costs of shortened production runs, the additional capital costs associated with differences in compositional and packaging requirements, the frequent changes to labelling laws requiring label changes, and so on. It seems doubtful that allowances for these additional costs have been included because they are by their nature very difficult to quantify. The higher prices resulting from reduced interstate trade are also difficult to quantify.

Some additional evidence is provided by a survey by the Business Regulation Review Unit (1986) of six major food-related firms. Additional annual costs of $1.3 million were found, with additional one-off costs of $1.1 million.

Explanations for the Persistence of Non-Uniformity

Why has this lack of uniformity persisted for so long when both manufacturers and consumers have a great deal to gain from uniformity? The supply of manufactured food items is likely to be fairly responsive to the demand for foodstuffs, suggesting that most of the higher manufacturing costs arising from lack of uniformity are passed on to consumers rather than simply absorbed by manufacturers in the form of reduced profits. Nonetheless this consideration has not stopped the food manufacturers and major food retailers from lobbying heavily for uniformity, albeit without a great deal of success so far.

The explanation is not that the States believe that non-uniformity has any intrinsic merit but rather the political gains that each State feels it obtains from autonomy. Without State autonomy the special interests that lobby for regulations favourable to particular industries such as the dairy industry would have to look elsewhere for preferred treatment. The States might fear the loss of political and electoral support, especially in relation to campaign fundraising. It may be sufficient for State public

officials to have such a perception, even if there is very little hard evidence to support such a view.

The States, and particularly the powerful State bureaucracies, might also worry about the long-term effects of uniform acts and regulations that effectively would be promulgated by the Commonwealth government. If control ultimately passes to the Commonwealth, is not the administration and enforcement of the legislation also likely to come under Commonwealth control? This might not be welcomed by the large numbers of bureaucrats employed in the various State Health Departments. Either responsibilities may shift to Canberra-based Departments, or parts of the State Departments may need to be absorbed into the Commonwealth Public Service, presumably with reduced status and responsibilities.

Regardless of whether these sorts of fears are justified the fact is that politicians and bureaucrats rarely give up powers voluntarily, no matter how considerable the overall gain to the nation. In NSW date-marking requirements have been introduced in the absence of a NH-MRC standard, which has resulted in non-uniformity. These facts of life suggest that the States are unlikely to voluntarily transfer their powers to the Commonwealth, as the Food Industry Council (1984:12) recommends. The only way that complete uniformity is likely to be achieved is if the Commonwealth government enacts a National Food Act and Regulations based on the Model Act and Regulations, on much the same constitutional grounds on which the Trade Practices Act 1974 was enacted. Such action could precipitate expensive constitutional legal challenges along the lines of the Tasmanian Dams Case, but this may be the price that must be paid for achieving uniformity.

In the last few years enormous efforts have gone into attempting to amend the food laws and regulations in the individual states to achieve uniformity: 'one nation — one market' as the saying goes. In the process no one has stopped to ask the obvious question: if the laws and regulations were changed so that prohibitions were replaced by guidance, could not uniformity and a national market be achieved much more easily?

Chapter 6

The Effect of Food Legislation on New Products

The well-meaning efforts of the food industry to achieve uniformity have happened within the context of the existing legislative approach, which is based on setting food compositional standards. In my opinion there are other deficiencies in the existing legislation that adversely affect both manufacturers and consumers alike. In particular, insisting on strict compliance with compositional standards can severely reduce the consuming public's enjoyment of innovative products and techniques by excessively delaying the introduction of such products. There is an analogy here between the delays in the introduction of new, effective life-saving drugs under the tight FDA rules in the United States and the introduction of innovative foods.

A new product, by its nature, is unlikely to be the subject of a current food standard. If the product does not comply with the NSW Regulation 69, which refers to foods not elsewhere standardised, then the only legal course of action is to attempt to have a new food standard approved and adopted throughout Australia. This could take many years. Submissions have to be made to the State Health Departments, which then put them forward to the Food Standards Committee (FSC) of the NH-MRC. This is quite a large committee with representatives from the Commonwealth and various State Departments of Health plus a number of other representatives including an observer from the Food Industry Council of Australia. According to the Food Industry Council (1984:8) its operations are well regarded overseas, particularly in relation to the degree of industry involvement.

If the FSC decides that a standard is warranted, the preparation of a first draft is initiated. It is referred to various subcommittees of the FSC, to its State members, and to the Confederation of Australian Food Technologists (CAFTA) for their various viewpoints. After this review process has continued for some time the FSC may make a recommendation to the Public Health Advisory Committee of the NH-MRC. If the standard is approved by the Committee and the Council it is then recommended to the various States for adoption into the State

food legislation. Some States may then decide to approve the Model Regulations without amendment, others may wish to make their own amendments, and yet others may defer the introduction of the new standard indefinitely.

The FSC and related committees tend to be dominated by persons with technical backgrounds who give questions of cost-effectiveness relatively little attention. Compositional standards that cannot be justified on any cost-benefit ground promote the general interests of technical people such as food technologists. Far more weight should be given to economic, consumer-related and marketing considerations.

In order for the standard to become law the State Departments of Health must have the standard approved by the Minister, published in the Gazette and laid before both Houses of Parliament. If not disallowed the new Regulations will have the force of law.

An example of a new product that has been included in the Model Regulations and has gradually been accepted in the various States is the artificial sweetener aspartame, which can be used as a table-top sweetener and included in brewed soft drinks. Other artificial sweeteners such as acesulphame K and thaumatin have not yet been generally agreed to. The marketers of such a product may be able to obtain an agreement with the authorities pending the adoption of the new standard. Such an agreement may work so long as the competitors of the new product do not object by lobbying the authorities to prosecute or even launch their own private action.

I can summarise via a simple if not simplistic maxim: if one wishes to preserve a bygone era, enshrine it in a set of regulations and set up a bureaucracy to administer them. Severe testing requirements for new pharmaceuticals slow down the introduction of new life-saving drugs. Highly detailed food regulations and compositional standards tend to limit the types of food we eat to the foods that were popular when the regulations were framed. We can consider ourselves fortunate that when the Model T Ford was released its design was not enshrined in the 'Model Ford' Act and Regulations.

Chapter 7

Brand Names and Compositional Standards

As has been stated in Chapter 4 above, the proponents of food compositional standards draw an analogy between the protection offered by compositional standards, and the protection to the consuming public and to manufacturers offered by the enforcement of trademarks. For example, anyone buying a Ford car should be confident that it is produced by the Ford Motor Company with Ford's quality standards. Remarkably enough this analogy leads to the conclusion that compositional standards are redundant. Fortunately for car buyers there are no 'compositional standards' laid down for Fords, Hondas or cars of any brand for that matter. If detailed recipes for the construction of cars had to be specified in legal regulations the task of designing new car models with consumer appeal would be very difficult if not impossible. Admittedly there are 'design rules', which often complicate the process, and vehicle registration requirements.

Nonetheless the principle for cars and other sophisticated consumer durables is that the manufacturer succeeds or fails in the market place according to the confidence consumers have in the manufacturer's brand name. Complex regulations, if they exist, generally only add to the costs consumers must bear. Food products, which are cheaper and less sophisticated than cars, should be treated similarly. As with cars, food consumers are protected by the trademarks and brand names of reputable food manufacturers and the choices of reputable food outlets. Food compositional standards are not only redundant but expensive to introduce, enforce and comply with.

Jam

The difficulties with compositional standards can perhaps best be illustrated by means of actual examples. Although jam would not on the face of it appear to be a new product, the compositional standards laid down for jam illustrate many of the problems with the present legislative approach. The NH-MRC Model Food Regulations for jam

and jam products state, inter alia, that jam or conserve shall contain not less than 400 grams per kilogram (i.e. 40 per cent) of fruit of the variety named, save in the case of gooseberry jam or conserve or quince jam or conserve. The Regulations also require a minimum soluble solids content of 66 per cent. While there are minor variations in the individual State Regulations, the 40 per cent fruit content and 66 per cent soluble solids content requirements are common to all States except the Northern Territory and the ACT.

Recently a great deal of information on the regulations pertaining to the jam industry has become available thanks to a Trade Practices Commission (TPC) Discussion Paper (1984) on the industry. An inquiry was held in response to allegations by the jam maker, Cottee's, that some jams sold on the Australian market do not comply with the standard in that they do not meet the minimum fruit content of 40 per cent. The complaint was made particularly against some generic brands and against imported jams that comply with overseas standards requiring a 33 per cent minimum fruit content but not necessarily with the higher Australian standards. Cottee's allegations were made in the overall context of a declining Australian jam market in which generic brands are gaining a larger share.

The TPC found no conclusive evidence to support Cottee's allegations, but this is perhaps not surprising when the TPC (1984:16) raised as an option repealing the jam standard as unenforceable:

> Given the present situation where the jam standard, in practical terms, is unenforceable (either because of analytical problems or because of insufficient enforcement resources) should the jam standard be repealed? This leaves open for argument whether consumer interest would be better served if market forces were allowed to determine consumer preference of price and fruit content.

The problem is that the fruit content of jam cannot be determined by analytical methods and that it is virtually impossible by visual inspection or by tasting to discern the difference between jam with 40 per cent fruit content and jam with 25 per cent (TPC, 1984:16). Enforcement would be possible for Australian-made jams only by strict monitoring of the inputs into jam at the time of manufacture or perhaps by disclosure of fruit content on the label, which might provide opportunities for prosecution for false representations if manufacturers could not substantiate claims made on the label. A minimum standard would not be necessary for such action.

Not surprisingly, all State and Territory health officers contacted by the TPC gave a low priority to the fruit content of jam when there are more important health matters to be considered. In fact there has been

only one consumer complaint against suspected low fruit jam. This occurred in NSW in 1953. The case failed because there was no reliable analytical method to determine fruit content (TPC, 1984:45).

Why There Is No 'Low Sugar' Jam

The lack of appropriate food standard regulations was instrumental in preventing the introduction of a new jam product that was likely to find favour with health conscious consumers. The problem was not the minimum fruit content of 40 per cent because the manufacturer, Henry Jones (IXL), planned to have a fruit content as high as 50-55 per cent or more. Their aim was to meet the desires of a large part of the market by bringing out a premium low sugar jam that was not a low energy dietary jam but intermediate between conventional jams and dietary jams.

The stumbling block was (and is) the requirement for a 66 per cent soluble solids content. Fruit itself has a varying soluble solids component largely consisting of natural sugars with some fibre. For example raspberries vary from a minimum of 7 per cent to a maximum of 15 per cent, while apricot's soluble solids component varies from 11 to 20 per cent (TPC, 1984:48). If we suppose that the average soluble solids content of fruit is (say) 10 per cent, then the 40 per cent minimum fruit content will provide only about 4 per cent of the required soluble solids content of 66 per cent. In conventional jams the difference in soluble solids content is made up by using more than 60 per cent sugar, which has a soluble solids content of about 100 per cent. In addition small quantities of other substances such as pectin are allowed.

In the new Henry Jones (IXL) product the sugar content was to be reduced from about 63 per cent to about 37. Together with the soluble solids provided by the fruit, this would provide an overall soluble solids content of about 41 per cent, which would not satisfy the standard requirement of 66 per cent. Since the standard is designed to provide a natural preservative via a soluble solids content equal to 66 per cent or more, Henry Jones (IXL) jam would require the addition of some preservative such as sorbic acid to prevent the formation of mould with exposure to air. Table 2 provides a comparison between the composition of a normal and a high fruit/low sugar strawberry jam.

Had Henry Jones (IXL) attempted to market high/low jam, which would have been called a 'reduced joule jam' under the international Codex Regulations, it would have been illegal in Australia as a form of adulterated jam with less than the prescribed soluble solids content. Not only would it be uneconomic to raise the natural soluble solids content by concentrating the fruit content by boiling, but the resulting product would not be acceptable to consumers. Moreover, had the sugar content been reduced drastically to try to qualify as a dietary or low joule jam,

colour, flavour and consumer acceptance would have suffered, according to a spokesman for the company.

An attempt could possibly have been made to market the reduced joule jam under the NSW Regulation 69 — foods not elsewhere standardised — and equivalent Regulations in the other States, but as indicated above in Chapter 4, the product would have been classified as an imitation of or a substitute for jam if it were portrayed or described in a truthful manner and would thus not have been permitted. Perhaps a name such as 'fruit sauce' or 'topping', which is not suggestive of jam, might have been permitted, but this would not have described the product and it is doubtful if it could have been marketed under such a name. Perhaps following the milk marketing example, 'Hi Lo', or a similar term could have been applied, but presumably the word 'jam' could not have been included.

Table 2
Comparing the Composition of Normal Jam and High Fruit/Low Sugar Strawberry Jam
(weight per 100 kg)

	Normal	High/Low
Cane sugar	63.1	38.8
Strawberries	40.5	60.0
Citric Acid	0.3	0.3
Pectin	0.1	0.8
Preservative	nil	0.1
	100.0	100.0
approximate soluble solids	66.5%	40.0%

Source: Kindly supplied by Henry Jones Foods.

According to a representative from Henry Jones (IXL) a proposal to introduce a new 'reduced joule' category of jam along the lines of the Codex International Standards was considered and rejected by the FSC of the NH-MRC on the grounds that there were already sufficient standards for jam. This explanation seems of very doubtful validity given the manifest desires of Australians to improve their diets by reducing the sugar content in the foods they eat.

In a well-publicised speech Mr. John Elliott (1983) stated that IXL wished to market a high quality jam with a 65 per cent fruit content and a low sugar content:

> We believed we had a very innovative product that would sell at a premium and meet market demand. We went to the Victorian Government to obtain the permission to market the product. We found we couldn't call it jam. Their reason: the product did not contain 45 per cent sugar. This law was introduced in the 1920s to help stimulate the sugar industry ...

As we have seen the sugar content required is actually closer to 60 per cent than 45 per cent but it is not specified directly, only indirectly via the soluble solids content. A possible explanation for this requirement, an explanation perhaps more charitable towards the sugar industry, is that the standard was adopted when suitable preservatives were not readily available and when a 66 per cent soluble solids content would ensure a 'natural' form of sterility. While the sugar industry has a great deal of clout with governments, particularly in Queensland, it is doubtful that this power extends to the food regulations in every State, including States with no local sugar industry. Of course, the sugar lobby and companies such as CSR with considerable sugar interests are free to put their point of view via industry channels, and doubtless they do. In any case, whatever the historical explanation, there appears to be no need to preserve the requirement on solids/sugar content.

Reduced Alcohol Beer

When is a beer not a beer? According to NSW Regulation 67(3) early in 1984 'beer' must contain not less than 1.15 per cent ethyl alcohol at 20 degrees Celsius. Anything with less than 1.15 per cent alcohol must be called 'Brewed Soft Drink' and cannot use the words 'beer' or 'lager' or other words that suggest or imply that the product is an alcoholic drink (Regulations 60(1), 60(4) and 60(5)).

This was the situation the Bond Corporation, manufacturers of Swan Special Light Reduced Alcohol Beer, and Farmer Brothers, wine and spirit merchants, faced in trying to market a beer in NSW with only 0.9 per cent alcohol. Normal beer has 4.6 to 4.8 per cent alcohol with conventional light beers between 2.2 and 3.3 per cent alcohol. Brewed soft drinks such as Tarex Export Light with an alcohol content of between 1.1 and 1.15 per cent and Northern Light with 1.0 per cent comply with the NSW Regulations.

Swan Special Light is brewed as a full-strength beer and then the excess alcohol is removed through a vacuum alcohol extraction process, which is exclusive to Swan Special Light and preserves the flavour of beer. With brewed soft drinks and conventional light beers the process is different in that the fermentation process is stopped at an earlier stage. Thus the correct description of the Swan beer is 'reduced alcohol beer' rather than some other misleading title such as 'brewed soft drink'.

In July 1984 Farmer Brothers began marketing Swan Special Light in NSW illegally under the label of 'reduced alcohol beer' with the low alcohol content clearly stated. A series of full-page advertisements announced the sales campaign with the pitch: 'You could drink 8 of these in an hour and stay out of gaol but by selling just one can — we could go to gaol!' This represented a 'full-page' confrontation with the food and beverage compositional standards designed to protect consumers from deception, yet there was clearly no deception in that the low alcohol content was clearly stated.

Despite legal action by the NSW brewers to try to enforce the law and keep out the 'illegal' Western Australian imports, the NSW Wran Government succumbed to the pressure and recognised that reduced alcohol beer would help to reduce the road toll. No official action has been taken against the reduced alcohol beer, and amendments have been made to the NSW Regulations to introduce a new category of de-alcoholised beer that must contain alcohol in the range 0.9 to 1.15 per cent. In South Australia 'low alcohol beer' must contain alcohol (ethanol) in the range 0.5 to 1.15 per cent. In Western Australia the names and regulations are different again. Presumably eventually a national standard will be prepared for reduced alcohol beer.

Yoghurt and Cheese Products

There are many other examples of innovative products that companies have not been able to market because of highly restrictive food legislation. For example, according to a representative of the manufacturer the Kraft Cheese Company was not able to market a new product it had developed that combined both dairy and fruit juice based products in the form of a 'fruit yoghurt drink'. Existing standards for fruit yoghurt, which treat it as a solid rather than as a liquid or drink, would have made such a name illegal. Once again there is no suitable standard or name description of the product that could have been used. Kraft was also unable to obtain a national launch of a reduced fat processed cheese because of the nature of the Regulations Australia-wide.

I have also been informed about other instances where the lack of suitable standards has prevented the introduction of new products like whey-based drink powders and ultra-heat treated yoghurt. Whey is a by-product of cheese production. In the United States I am informed that whey-based drink powders are sometimes recommended for children with a lactose intolerance. Margarine with a greater than 16 per cent water content cannot be marketed in Australia whereas it is possible in Europe. Some consumers might prefer a cheaper product with different properties to existing margarine.

The Business Regulation Review Unit (1986) suggests that a number of unique Australian products including Vegemite are unlikely to

have been launched had they been subject to the present regulations at the time of introduction. Presumably this is because there is no prescribed standard for Vegemite and it is therefore a food 'not elsewhere standardised', although not made from two or more prescribed foods. It also contains added vitamins and minerals which, strictly speaking, may not be permitted. Milo is another famous product that may transgress for similar reasons.

I have provided a range of examples and case studies of how compositional standards for jam, beer, yoghurt and cheese products have denied consumers innovative products. In some cases, such as low alcohol and reduced alcohol beers, the food regulations have come into direct conflict with other regulatory initiatives, such as discouraging drink-driving and reducing the road toll. Most of these examples bear out the adage that vested interests are usually able to tame, if not entirely capture, the regulatory process. Since vested interests normally represent the once powerful, it is not surprising that regulations are used as a means to prevent overdue change.

Chapter 8

What Can Be Done about Compositional Standards?

It is disturbing to discover, for example in the case of jam, that compositional standards that have been in operation for decades cannot even be applied because once a jam has been manufactured it is impossible to tell whether or not it satisfies the standard. The TPC (1984:10,11) has drawn attention to other products for which misleading labelling may be present including fish (a great deal more barramundi is sold than is caught), orange juice (which contains added water), meat and wine (more Barossa Valley wine is marketed than is grown there). In these cases existing labelling laws seem incapable of preventing deception although one notes that consumers on the whole do not seem to be too worried about the situation. They continue to buy the products they like at the prices at which they are offered. What is even more disturbing is that consumers have been denied numerous products or variations on existing products, even where no deception is possible or intended, because of prescribed compositional standards that sometimes cannot even be enforced.

One possible solution would be to introduce a quick clearance system that would permit new standards to be introduced rapidly. Given the nature of the present long drawn-out process, where cost-effectiveness takes a back seat to technological specifications and the interests of food technologists, such a reform would be difficult to achieve.

A much more promising avenue of reform, which would not require the regulators to introduce new standards overnight, is to convert existing compulsory standards into voluntary or advisory standards that would serve as guidelines. This proposal is not as revolutionary as it may appear, as it retains the useful informational content of the present laws and regulations while at the same time providing for flexibility, change and innovation. Under this proposal the legislation would be altered to permit any manufacturer to violate an existing standard, yet to use the name associated with that standard. Fraud and deception could still be avoided, which in any case is the purpose of the existing

legislation, by requiring that the label specify where the product differed from the voluntary standard or guideline.

Retaining advisory standards might still fulfil a useful purpose and help to reduce the number of legal actions and their cost as well. In effect the courts would be guided by the advisory standards in a more cost-effective and less restrictive system. Manufacturers who could not justify their choice of product name in a court of law would still be subject to possible prosecution if they could be shown to be deceptive or misleading. In my opinion virtually all the new products that have not appeared because of the regulations — reduced sugar jam, for example — could be fully justified in a court of law. Using this approach to deregulation, the manufacturers and the courts acting in conjunction could rapidly establish new and meaningful product standards where they are warranted by consumer demands. The tyranny of compulsory product standards and formulae could rapidly become a thing of the past. Consumer preferences and tradeoffs between price and quality of ingredients could have a direct influence on what is marketed instead of the experts telling us what products we are allowed to consume.

To provide a few examples, jam labels would specify the fruit content of the jam if it were below 40 per cent. The label could indicate that the advisory standard is 40 per cent. Similarly the sugar or soluble solids content could be indicated if it did not meet the voluntary standard or guidelines. Jam manufacturers who specified less than (say) 20-25 per cent fruit on a container labelled 'jam' would risk prosecution for using a misleading or deceptive description of the product 'jam' unless they could justify usage of the term in a court of law. The reason for this is that the product begins to lose its taste and consumer appeal as 'jam' when the fruit content falls below a certain level.

At the same time the newer and more innovative firms will be able to meet changing consumer requirements in ways that were never contemplated under the staid existing regime. Some manufacturers are, of course, afraid that any uncertainty relating to product guidelines or standards will open the floodgates of litigation and will perhaps result in their safe and well-established products suffering more competition. For many producers, 'the devil you know is better than the devil you don't', especially when the regulations protect them against a variety of innovative products.

Under the proposed voluntary standard system manufacturers who can find a market for high quality and premium products would do so. Once again the fruit content where it exceeds 40 per cent could be specified on the label, and consumers willing to pay a price premium for a 'high quality' product could do so. Manufacturers at the moment are free to introduce jams with a higher fruit content than 40 per cent and to specify it on the label, but this appears to be relatively rare. Compulsory minimum product quality standards often seem to be

translated into both maximum and minimum quality standards. The introduction of voluntary or recommended minimum standards should encourage both greater diversity of product quality choice by manufacturers and the ability to exercise that choice by consumers.

The same disclosure principle would apply under a system of recommended non-compulsory standards for other products such as beer and wine. There would be no minimum alcohol per unit volume requirements so long as the alcohol percentage was clearly marked on the label. All forms of yoghurt and yoghurt fruit drinks would be allowed so long as the contents were clearly stated. Even 'low fat' margarines with a water content in excess of 16 per cent would be permitted with the water percentage specified on the label along with the voluntary standard when the water content was in excess of the recommended maximum. Consumer acceptance and the market place in which 'lower quality' products at lower prices compete with 'higher quality' products at higher prices would become the ultimate test of a satisfactory product. No longer would 'experts' in such areas as health and food technology dictate the compositional standards of the foods we consume bereft of the expert knowledge of our own tastes and the size of our wallets.

This proposal is an essentially evolutionary rather than revolutionary solution to the food regulatory 'time warp' that has tended to confine society's spending pattern to whatever worked with yesterday's technology. Rather than proposing a new broom to dislodge the old cobwebs, I propose to preserve the useful informational content of the regulations in the form of advisory rather than compulsory standards. So long as consumers are warned that a departure has been made from advisory standards, the advantages and disadvantages of such departures can be explained to consumers. Over time I would expect that the community and the courts would continue the process of changing standards and the determination of what components, if any, of compositional standards need to be enforced via the common law process.

Chapter 9

Prescribed Names

Another deficiency in the food legislation relates to what some may regard as an excess of zeal on the part of the regulators in prescribing standardised names for some products. For example Regulation 46 in NSW and equivalent Regulations in the other States classify ice cream and related products into 'ice cream', 'flavoured ice', and 'ices or ice blocks', with the latter category further classified into 'milk ices or milk ice blocks', 'fruit ices or fruit ice blocks', 'water ices or water ice blocks' and 'ice confections', the last being ices or ice blocks not elsewhere standardised in the Regulation. The major determinants are the percentages of milk fats and fruit juice in each product.

I think it is valid to ask whether these names convey a great deal of useful information to consumers when personal preferences and price will be the major determinants of repeat purchases. While it is possible that a consumer who perhaps ignores ingredient lists may be misled the first time by a 'looser' set of product labels, this is not likely to happen again once the product has been subject to a 'taste test'.

It is also valid to ask how far the health authorities should go in terms of prosecuting technical violations of labelling laws when the product description is truthful. By way of example, the manufacturers of an ice cream product called 'raspberry cream' were (unsuccessfully) prosecuted in NSW because the package described the product as 'ice cream and fruit ice'. The product consisted of an ice cream core surrounded by raspberry fruit ice. When the two components were mixed together the resulting mixture was neither 'ice cream' nor 'fruit ice' according to the authorities.

Chapter 10

Prohibitions on Claims and Ingredients and Complex Label Specifications

Many prohibitions specified in the Regulations on the making of particular claims and on ingredients appear to be both unjustified and inconsistent. For example NSW Regulation 3A prohibits the addition of specified vitamins to any food article except for a list of foods including biscuits, bread, butter or margarine, flour, formula dietary foods, fruit and vegetable juices and milk powders. It is far from clear why harmless additives are allowed in some foods but not in others. This has the effect of penalising importers and distributors who may not be aware of the Regulations. In some cases food imports of non-listed goods have had to be re-exported at considerable expense. Any claim that can be justified or is true should be permitted.

The labelling regulations in all the States specify markings on labels to be of a particular minimum size, style (e.g. boldface, sans serif, capital letters) and sometimes colour. Detail of this kind is quite unnecessary and causes enormous problems with respect to uniformity. It would be quite sufficient to require markings to be 'conspicuous, prominent and discernible'.

Chapter 11

Conclusions

An enormous amount of effort and energy has gone into the production of complex sets of food laws and regulations. A considerable amount of effort on behalf of the food industry and food consumers has also gone into so far unsuccessful attempts to achieve uniformity Australia-wide although considerable progress has been made in the last few years. While we may have a great deal of sympathy with these efforts, perhaps after 80 years it is time to sit back and take stock.

The first point to recognise is that the food laws do not have a great deal to do with protecting the health of food consumers, although where a clear-cut health or medical reason exists a particular prohibition may well be justified. Much of the legislation is really concerned with protecting consumers, who are implicitly regarded as largely incompetent, against fraud and deception. While this may be a worthwhile objective it is far from clear that compulsory compositional requirements, detailed 'recipes', and specific proscriptions and prescriptions are cost-effective means of achieving this objective. In fact the likely consequences, as we have seen, are increased costs resulting from the imposition on manufacturers of almost incomprehensible quantities of minutiae and a reduction in the options available to consumers in terms of quality, taste, innovative products and price.

The solution to these problems that will still protect the consumer from fraud and deception is to amend the Model Act and Regulations and the individual State legislation to:

1. convert the existing compulsory product standards and recipes into voluntary standards and guidelines to assist both consumers and the courts, with greater ingredient disclosure when voluntary product standards are not met so that consumers are fully aware of the reasons when a product differs from the guidelines;
2. remove the ban on likening 'food not elsewhere standardised' to standardised food (that is, NSW Regulation 69(4) quoted in Chapter 4 above);

3. relax the proscription and prescription of product names subject to a general prohibition on deceptive or misleading labelling;
4. remove prohibitions on specific claims about products and qualities when the claims are truthful;
5. remove the prohibitions on specific ingredients when they are safe or permitted in specific products;
6. simplify complex labelling specifications by replacing the minute details with a requirement that labels be 'conspicuous, prominent and discernible'; and
7. rely on a general prohibition against fraud or deceptive practices under the Commonwealth Trade Practices Act and general State consumer protection legislation.

If these principles are adopted Australia-wide any remaining problems with respect to lack of uniformity are likely to be relatively minor. Complete uniformity designed to assist national marketing and interstate competition would probably require Commonwealth intervention in the form of national legislation.

To achieve reform along the above lines the unqualified support of the entire food industry is essential. The resulting increased choice to consumers with lowered prices and costs of compliance to manufacturers will more than repay the effort involved.

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