Christopher Preston
Principal Legal Counsel, Australia
FOOD REGULATION AND MARKETING

CONTENT

▸ Session 1: Mandatory Labelling
- Name of Food (Standard 1.2.2)

  NOT brand or trade name

  Name or description to indicate true nature of the food

  Possible implications for % labelling
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- Name and Street Address (Standard 1.2.2, TMA)

NOT PO Box

Address at which legal notices may be served

Does not need to be the same across all SKUs, in fact may be reasons to spread them

What to do if you change premises
Lot Identification (Standard 1.2.2)

Big batches vs small batches

Use of date mark as lot identification
Allergen and Sensitivity Statements (Standard 1.2.3)

- The labelling that can kill!
- Includes processing aids
- Use VITAL not blanket statements
- Remember lupins
Date Marking (Standard 1.2.4)

Base on shelf life testing

USE BY illegal sales
Ingredient List (Standard 1.2.5)

Two ways of declaring compound ingredients - make conscious choice

Highlight allergens as best practice

Two ways of declaring allergens

“Vitamin C” vs “Ascorbic Acid”
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- Country of Origin (ACL Information Standard)

  Box, Logo, Barchart, Wording

  Priority vs non-priority foods

  Substantial transformation: identity, nature and essential character

  Hierarchy: Product of, Made in, Imported
Storage and Usage Instructions (Standard 1.2.6)

Only required in two cases: safety issues and durable life

Consider “after opening” instructions if appropriate

Use plain English
Nutrition Labelling (Standard 1.2.8)

Read and know Std 1.2.8, there is a lot to get through

Panel format - get it right

%DI columns, vit & min declarations

Triggered extra nutrient declarations
Percentage Ingredient Labelling (Standard 1.2.10)

Characterising Ingredients and Components

Rounding - “may be rounded”

Average quantity unless specified as minimum
Quantity Marking (Trade Measurement Act)

NIL Average Deficiency vs AQS

Use of ‘e’ symbol

16 presentational requirements!
FOOD REGULATION AND MARKETING

CONTENT

▸ Session 1: Mandatory Labelling
▸ Session 2: Claims
NUTRIENT CONTENT CLAIMS

- Presence, absence of nutrient
- Schedule 4-3
- Qualifiers
- Nutrients not in Schedule 4-3

Naturally A1 protein-free

a2 Milk™

Regular milk
GENERAL LEVEL HEALTH CLAIMS

- Wide definition
- NPS Calculator (Sch.4-6)
- Std 1.2.7 list in Schedule 4-5
- Self-substantiation through systematic review (Sch.6)
- Presentational AND contextual requirements

Milk also … is a natural source of carbohydrate for energy.
HIGH LEVEL HEALTH CLAIMS

- Std 1.2.7 Schedule S4-4
- No alternative mechanism
- NPS Calculator
- Presentational and contextual requirements
INGREDIENTS THAT TRIGGER ALARMS

- ... used as a nutritional substance
- ... used as a food additive
- ... used as a processing aid
- added vitamins and minerals (and claims about them)
- prohibited or restricted botanicals
- novel foods
- GMOs
- Irradiated foods
- Apricot kernels, kava
- Watch out for contaminants and agvet residues
OTHER CLAIMS
* Std 1.2.7 NIPs
  * sugars
  * salt
  * nutrient extra labelling

ALL claims are regulated by the ACL
ACCC approaches
* Nil, No, Free all mean not detectable (as distinct from insignificant)
* Can understate but never overstate
* Science is secondary to public opinion
* Order in which things are stated is relevant

Read the s.87 undertakings!
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AN EXERCISE ....

MARTIAN MUSHROOMS ®
FOOD REGULATION AND MARKETING

CONTENT

▸ Session 1: Mandatory Labelling
▸ Session 2: Health and Ingredient Claims
▸ Session 3: Australian Consumer Law
FOOD REGULATION AND MARKETING

THE RULE

A corporation must not, in trade or commerce, engage in conduct that is misleading or deceptive or that is likely to mislead or deceive.

ACL s.18
FOOD REGULATION AND MARKETING

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A corporation must not, in trade or commerce, engage in conduct that is misleading or deceptive or that is likely to mislead or deceive.

ACL s.18

“LEAD INTO ERROR”

“CREATE WRONG IMPRESSION”

THE POSSIBILITY IS ENOUGH

YOU ARE (ALMOST CERTAINLY) A CORPORATION

YOU ARE IN TRADE

BROAD TERM COVERS ALL ACTIVITIES
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THE TEST

- Does the impression created by the conduct
- In the minds of the range of consumers
- Comprising the target audience
- Possibly lead them into error
- Taking into account all the circumstances
FOOD REGULATION AND MARKETING

THE TEST

- Does the impression created by the conduct
- In the minds of the range of consumers
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NOT A 51% TEST

NOT INDIVIDUAL ELEMENTS BUT THE WHOLE IMPRESSION

ALL OPEN IMPRESSIONS MUST BE CONSIDERED

BOTH THE EDUCATION AND THE LESS EDUCATED

AT WHOM IS THE CONDUCT DIRECTED?

SILENCE CAN BE MISLEADING

HOW MUCH TIME CAN THE CONSUMER SPEND THINKING?
FOOD REGULATION AND MARKETING

SOME POINTERS

- Claims must be complete in themselves
- Asterisk text can explain and refer but not qualify or vary the claim
- Rear label qualifiers of the claim will be ignored
- Need to consider the total packaging
FOOD REGULATION AND MARKETING

SOME POINTERS

- Claims must be substantiable (ie able to be proven)
- Evidence needs to be good quality
- Evidence needs to match the claim
- ACCC can demand to see your evidence
- Reliance on third party documents may not be sufficient
Interpret claims from the consumer’s perspective

Do not rely on technical or scientific meanings

Don’t rely on fine distinctions

Refer to dictionaries for common meaning
EXAMPLES

ACTUALLY, NO!
FOOD REGULATION AND MARKETING

EXAMPLES

BUT IS IT FREE RANGE?
“... We are doing an RRP review at present which is projected to be in line with CPI, but take an opportunity to make some moves in June and July, let the Carbon tax take the blame, after all your costs will be going up due to it.”
EXAMPLES

A BAROSSA FOOD TRADITION?

MADE IN VICTORIA?
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EXAMPLES

CONTAINS STORED JUICE
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EXAMPLES

USED TO CLAIM “MADE WITH 65% REAL FRUIT”
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EXAMPLES

MADE WHERE?
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EXAMPLES

DECLARED FRUIT CONTENT INCLUDED SIGNIFICANT AMOUNTS OF ADDITIVES

HERO IMAGES
FOOD REGULATION AND MARKETING

EXAMPLES

MYTH: MAKES YOU FAT

MYTH: ROTS YOUR TEETH

MYTH: PACKED WITH CAFFEINE
COUNTRY OF ORIGIN LABELLING

OFFENCES

- ACL s.203
- $10 million per offence
- includes individuals “knowingly concerned”
Session 1: Mandatory Labelling
Session 2: Health and Ingredient Claims
Session 3: Australian Consumer Law
Session 4: Managing Risk
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MANAGING RISK

- Know how to IDENTIFY risk, known and unknown
- Assess LIKELIHOOD and CONSEQUENCE
- Choose to ACCEPT, MITIGATE or ELIMINATE
- What is PLAN B and how will it be implemented
- Establish clear risk APPROVAL / SIGN OFF
CRIMINAILITY CANNOT BE MANAGED

- It is legitimate to explore the grey areas but it is NEVER legitimate to knowingly contravene a legal requirement on the basis that detection is unlikely.
WHAT SHOULD GUIDE RISK?

- Retaining consumer trust in the brand
- Integrity of brand values
- Integrity of customer values
- Situational Competitor Awareness
- Situational Regulator Awareness
FOOD REGULATION AND MARKETING

CONTENT

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▸ Session 2: Health and Ingredient Claims
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▸ Session 4: Managing Risk
▸ Session 5: Q & A
THANK YOU

Christopher Preston
Principal Legal Counsel,
Australia