

FOOD LABELLING LEGISLATION

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ABSTRACT

Food labelling serves to (a) inform consumers about the attributes of a food product so that they can make rational and well-informed choices; (b) assist manufacturers in marketing their product; and (c) warn consumers about the inherent risks of certain products, or ingredients in the product. The costs of labelling products fully and informatively are borne by consumers, but the benefits of labelling outweigh the costs. To understand the role of labelling in a regulatory system it is vital to consider the arrangement of the provisions protecting consumers generally before considering food laws and the labelling regulations. Furthermore, due to food being an international product, it is necessary to consider foreign countries and the manner they go about in protecting consumers.

The United Nations, under the auspices of the Food and Agriculture Organization (FAO) and the World Health Organization (WHO), established a Joint FAO/WHO Food Standards Programme, called "Codex Alimentarius". The aim of the programme is to establish standards that can be used internationally to narrow the gap between developed countries and developing countries. To establish a standard various organs of the Codex Alimentarius are consulted. In addition, the standards have to comply with a prescribed format and follow a specified procedure. For the standard to be observed the member country has to incorporate the standard into its domestic laws. One of the advantages of the Codex Alimentarius is that the procedure to establish a standard is flexible. Australia, United Kingdom and the United States of America are member of the Codex Alimentarius.

Australia, a federation of states, protects consumers by legislating either state and/or Commonwealth laws. Often there is a combination of statutes. Examples of subjects that are governed by both Commonwealth and states include false or misleading trade practices, and weights and measures. Commonwealth laws only deal with the freedom of information. Food laws are governed exclusively by state legislation. A significant area for future reform is uniformity of the state food laws. There are also other areas for future reform (eg date marking).

England and Wales protect consumers by enacting statutes that relate to private and public rights. The important Acts that protect public rights are the Trade Descriptions Act, Weights and Measures Act, Consumer Protection Act, Fair Trading Act and Food Act. One of the provisions of the Criminal Courts Act is to protect personal rights when a consumer suffers personal injury, loss or damage as a result of the offender committing a criminal offence. Food labelling is governed by regulations, that are progressive. A fundamental

criticism of the legislation and regulations is the lack of appropriate enforcement of the laws. The enforcement of most of the above Acts is delegated to the local weights and measures authorities. A further complication is the United Kingdom's membership of the European Economic Community.

The United States of America enacts federal and state legislation. In protecting consumers in respect of food, it enacts federal legislation. The important Acts include the Fair Packaging and Labelling Act, the Meat Inspection Act, the Poultry and Poultry Products Inspection Act and the Federal Food, Drug and Cosmetic Act. The United States government also encourages openness, with regards to its public agencies, by creating the Freedom of Information Act. The class action is an innovative remedy established in terms of the Civil Procedure Act. The enforcement of food laws is delegated to the Food and Drug Administration (FDA). The protection afforded by the United States government is complex and sophisticated. Its laws serve as model for many countries.

The common law of South Africa has limited value in safeguarding consumers. Consumer protection arise mostly by way of legislation and regulations. Consumers are protected generally by the Measuring Units and National Measuring Standards Act, Trade Metrology Act, Trade Practices Act and Harmful Business Practices Act, Standards Act, Dairy Industries Act and the Marketing Act. Consumers are protected against harmful and injurious foodstuffs by the Foodstuffs, Cosmetics and Disinfectants Act, and the regulations promulgated in terms of the Act. There are several problems with the laws, eg lack of enforcement, lack of consumer awareness and education, and so on.

An analysis of the foreign countries discussed in Part II result in the indication of twelve themes.

Part III examine the twelve themes and present solutions. Some of the solutions are based on comparisons with foreign countries discussed in Part II.

The main issues that need to be addressed in the short-term are the lack of consumer education and problems of enforcement of consumer protection. Long-term issues include the feasibility of introducing a department of consumer affairs and the provision of statutory civil remedies for consumers.

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PREFACE

My curiosity in food labelling was aroused when I examined general labelling legislation for a LL.B. Research Project. During my research it was evident that food labelling legislation is crucial if the laws are to safeguard the national food supply and public health. Furthermore, the lack of any study carried out in South Africa in respect of food law was unusual, considering the volumes written about it in other countries. This encouraged me to undertake the task of examining food law, and in particular food labelling legislation in South Africa.

My greatest regret is that the foreign component cannot always reflect the present position in the various countries discussed. This is due to the lack of sufficient informative material available in South Africa. Every effort has been made to ensure that the laws stated are as recent as possible.

Due to the lack of any study of food labelling legislation in South Africa, it was necessary to cover a broader prospective. Therefore, I have scanned most of the major issues in a summary fashion. In addition, many changes are anticipated due to the establishment of the Food Legislation Advisory Group (FLAG). Thus, it was not feasible to do a in-depth study of the substantive provisions affecting food labelling.

I found it more beneficial to speak to people in industry, government bodies, organizations, academia, and consumer bodies than employing questionnaires. The views, however, offered by each interviewee is limited by his/her personal expertise and the questions asked by me. I will like to take this opportunity to thank the various people who

willingly consented to speak to me (see Appendix 1). Furthermore, I express my sincere thanks to Prof R Walker (Professor in the Department of Biochemistry at the University of Surrey) and Dr R L Hall (Former President of the International Union of Food Science and Technology (IUFoST) and former Vice President of McCormick and Co., Inc.) for forwarding information to me.

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Furthermore, I will like to thank my supervisor, Prof D J McQuoid-Mason, (Dean of the Faculty of Law at the University of Natal), and co-supervisor, Prof A E J McGill, (Professor in the Department of Food Science at the University of Pretoria), for their unwavering assistance (especially at the end, when time was of the essence).

The whole thesis, unless specifically indicated to the contrary in the text, is my own work.

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Freedom of Information Act 5 USCS § 552.
Meat Inspection Act 21 USCS §§ 601-695.
Poultry and Poultry Inspection Products Act 21 USCS §§ 451-470.
Privacy Act 5 USCS § 552.

Regulations

9 CFR Part 317.
9 CFR Part 317.10.
9 CFR Part 317.7.
9 CFR Part 317.4.
9 CFR Part 318.132.
21 CFR Part 101.
21 CFR Part 101.3.
21 CFR Part 101.4.
21 CFR Part 170.71.

South AfricaActs

Criminal Procedure Act No 51 of 1977.
Dairy Industries Act No 30 of 1961.
Foodstuffs, Cosmetics and Disinfectants Act No 54 of 1972.
Harmful Business Practices Act No 71 of 1988.
Marketing Act No 59 of 1968.
Measuring Units and National Measuring Standards Act No 76 of 1973.
Scientific Research Council Act No 32 of 1962.
Standards Act No 30 of 1982.
Standards Act No 24 of 1945.
Trade Metrology Act No 77 of 1973.
Trade Practices Act No 76 of 1976.

Regulations

GN R35 GGE 3757 of 12 January 1973 (Reg Gaz 1723).
GN R115 GGE 10073 of 24 January 1986 (Reg Gaz 3917).
GN R406 GGE 6873 of 7 March 1980 (Reg Gaz 2964).
GN R756 GGE 5537 of 6 May 1977 (Reg Gaz 2263).
GN R908 GGE 5565 of 27 May 1977 (Reg Gaz 2471).
GN R965 GGE 5575 of 3 June 1977 (Reg Gaz 2473).
GN R1146 GGE 4326 of 5 July 1974 (Reg Gaz 1999).
GN R1610 GGE 7168 of 8 August 1980 (Reg Gaz 3043).
GN R1600 GGE 8820 of 22 July 1983 (Reg Gaz 3600).
GN R1881 GGE 4048 of 12 October 1973 (Reg Gaz 1855).
GN R2362 GGE 5806 of 18 November 1977 (Reg Gaz 1977).
GN R2507 GGE 8448 of 19 November 1982 (Reg Gaz 3506).

PART I: INTRODUCTION

CHAPTER 1: INTRODUCTION

"A young man unconcernedly tosses this canned food product and that packaged food item into his supermarket cart. Across the aisle, a woman picks through the products, carefully reading the labels to make sure that none of the items she puts into her basket contains sugar. Another shopper checks the ingredient labelling with a pleased expression on his face, assured that there's no monosodium glutamate (MSG) in the food he's buying, since he's allergic to MSG. A fourth person intently reads the labels on one can and scans another, occasionally shaking her head in dismay.

Such scenes occur daily in supermarkets across the country. Some people read labels, others don't. Some scan them intently for what seems to be trivial information. Others find the information confusing, bewildering, uninteresting."¹

1. ORIGINS OF LABELLING

The development of any economy is reflected in the development of its food labelling. It was only in the eighteenth century that consumers required containers. Previously consumers either grew food to meet their needs or exchanged goods with neighbours. With the advent of general stores in the early eighteenth century, a demand for containers commenced. At this stage consumers took along their own containers. In the mid-eighteenth century food manufacturers began to ship goods due to the onset of urbanization. This resulted in a need for foodstuffs to be prepacked in containers.²

The containers had to be labelled with the contents. The information provided was basic. In the late eighteenth century with the change in technology, (which resulted in a larger scale of food production), the need for packaging and labelling increased. The need was satisfied by advancements in packaging and labelling technologies. By the late eighteenth century and beginning of twentieth century there were considerable changes in

¹J T Heimbach "Food Labels get High Readership" (July-August 1979) 13 FDA Consumer 10 10.

²S G Hadden Read the Label (1986) 3.

techniques of production, distribution and marketing of consumer goods. During these changes labelling began to play a prominent role.³ One of the initial pieces of legislation that affected labelling was passed in 1906 in the United States of America, (i.e. the Pure Food and Drug Act). Thereafter, governments in other countries began intervening with food labelling. The simple label, (which required only the name of the product), has changed to the present label, which is regulated by government agencies.

2. FEATURES OF A LABEL

The characteristics of a label and the objectives of labelling have altered since its inception. At present, the characteristics of a label include:

- (a) Identifying the product (eg the name and description of the product, etc.);
- (b) informing consumers about the product (eg ingredient list, durability dates, price, etc.);
- (c) presenting⁴ the product so that it does not deceive consumers; and
- (d) individualizing the product by using claims.⁵

When providing information on a label the universal policy is to ensure that the labelling is truthful, informative and unambiguous, (i.e. it must not mislead or deceive consumers).⁶

The initial objective of a label was to inform consumers about the name of the product. At present, however, labels have several objectives:

- (a) To inform consumers.⁷ For consumers to make a rational and well-informed choice information is a fundamental requirement.⁸ Accordingly, consumers rely on prior knowledge and information available at the point of sale. Moreover, with the advent of supermarkets and self-service it became

³ *ibid.*

⁴ Presentation is wide enough to encompass presentation of the product on the shelves and not only the label on the package.

⁵ A van Hecke "Aspects of International Food Legislation" Unpublished paper presented at the Food Law Seminar (1988) University of Stellenbosch.

⁶ W E Byerley "Food Labelling" (1974) 29 *Food Drug Cosmetic Law Journal* 229 229.

⁷ A Gerard *An Outline of Food Law (Structure, Principles, Main Provisions)* (1975) 51.

⁸ D Shannon "The Law of the Label" (1975-1976) 1 *University of New South Wales Law Journal* 241 241.

necessary for sellers to inform consumers about the attributes of the product. Consumers also need to be informed about new products and new technologies.⁹ Thus a label contains - (i) descriptive information (eg name of the product); (ii) usage information (eg directions of use); (iii) precautionary information (eg safety); (iv) service information (eg warranties); and (v) other information (eg brand names).¹⁰

- (b) A label also functions as a marketing tool.¹¹ Due to self-service shopping and the present method of packaging products, a label is a tool that can be used by marketers. A label (and the package) can develop a distinctive image. Furthermore, it can be used to make a package look attractive.¹² In addition, a label with full information can be used to enhance consumer confidence and satisfaction.¹³
- (c) A label can be used to warn consumers about the risks inherent in a product.¹⁴ The information on a label could also include antidotes if dangerous ingredients are used.¹⁵ An example of a label being used to warn consumers about risks is found in the United States of America where any food containing saccharine (a sweetener) has to include a warning on the label.¹⁶

The use of labelling is not without cost. Costs include: (a) The cost of enforcement;¹⁷ (b) the cost of compliance;¹⁸ (c) the cost of legislating; and (d) the cost of educating

⁹Shannon *op cit* 254.

¹⁰International Advertising Association (IAA) Labelling and Advertising: Their Function in Consumer Information (1987) 5.

¹¹Shannon *op cit* 241.

¹²J Gray Food Intolerance: Fact or Fiction (1986) 112.

¹³S Barnes & M Blakeney Advertising Regulations (1982) 150.

¹⁴Hadden *op cit* 258.

¹⁵Hadden *op cit* 3.

¹⁶For further details see below 128.

¹⁷Barnes & Blakeney *op cit* 150.

¹⁸*ibid.*

consumers to read the label.¹⁹ The justification for labelling, however, compensates for the cost of labelling. The justification for labelling products includes inter alia:

- (a) Labelling tends to be cheaper than direct regulation for both the manufacturer and the regulatory agencies.²⁰
- (b) Labelling is flexible.²¹
- (c) Labelling also ensures that there is fair competition among competitors.²²
- (d) Labelling allows for a balance of power between buyers and sellers.²³
- (e) Labelling also permits consumers to consider whether the product suits their needs and to compare one brand with another to ensure that they purchase products to suit their needs.²⁴ This leads to a better quality of products because consumers will choose the brand they prefer.²⁵
- (f) Due to advancement in technology, products are complex and a label assists consumers.²⁶

Food (and other products) have become mass produced, pre-packaged and mass marketed.²⁷ Thus, there is a need to label products. Each product requires different information to be disclosed to consumers so that consumers can make wise and rational choices.

¹⁹Without education a label is futile. The information is provided but consumers can disseminate the information. (See Shannon *op cit* 241).

²⁰Hadden *op cit* 258.

²¹*ibid.*

²²Hadden *op cit* 3.

²³*ibid.*

²⁴Barnes & Blakeney *op cit* 150.

²⁵*ibid.*

²⁶R Cranston Consumers and the Law 2 ed (1984) 1.

²⁷P M Holt "Food Packaging and Labelling" A J Duggan & L W Darvall (eds) Consumer Protection Law and Theory (1980) 57.

3. PRINCIPLES

Due to (a) the debasement of food and (b) the sophistication and complexities attached to the labelling of foods, it became necessary for governments to intervene. Consequently, many governments established food laws.²⁸ There are four aspects to food laws. These are:

- (a) Definitions: These define not only food but also other essential terms used in the legislation.
- (b) General principles: For example, the wording of the legislation may differ but most countries provide that food must not be adulterated or harmful.
- (c) Enabling clauses: These specify the public bodies vested with the power of enforcing the rules and the nature and limits of powers to be exercised.
- (d) Penal provisions: Penalties cannot be imposed upon an offender unless they are provided for by the law. Thus, it is necessary for the law to define the offences that can be committed and the resultant penalties. It also has to lay down the procedures before an offender can be convicted.²⁹

One of the functions of food laws is to ensure that consumers are informed adequately. This is facilitated by labelling. Labelling also has to comply with certain general principles. These are summed up by the United Kingdom's Food Standards Committee as follows:³⁰

- (a) "All food whether prepacked or non-packed should be identified in ways readily visible to the purchaser. This should apply whenever the food is sold and should no longer be restricted to retail sales. The only exception should be sales to a manufacturer for the purpose of his business;

²⁸The United States passed the Pure Food and Drug Act in 1906.

²⁹Gerard *op cit* 17-18.

³⁰HMSO Food Standards Committee Second Report on Food Labelling (1979) FSC/REP/69. (Hereafter referred to as the Food Standards Committee Report).

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- (b) food should be sold without deceit to composition and character and should be so labelled as to enable a prospective purchaser to make a fair and informed choice based on clear and informative labelling;
 - (c) established food names should be protected: debasement of accepted and common food names should be prevented;
 - (d) pedantic detail and excessive labelling should be avoided as this may confuse or mislead the consumer;
 - (e) pictures on labels, shapes of packages and the presentation of food may exert powerful influences on the prospective purchaser and should be considered as candidates for control in the same way as the words used on labels: indeed for some sectors of the population, they may have a greater significance than names and descriptive material;
 - (f) legislation should protect both consumers and honest and diligent traders: it should allow fair comparison between products;
 - (g) the interests of consumers should be paramount.³¹

These principles should be kept in mind when food labelling regulations are considered.

4. DEFINITIONS

It is necessary to define two essential terms, i.e. "labelling" and "food". These definitions are considered in light of developments in foreign countries.

(a) "Labelling"

The definition of "labelling" in South Africa is to be found in the Foodstuffs, Cosmetics and Disinfectants Act.³² It means-

"any brand or mark or any written, pictorial or other descriptive matter appearing on or attached to or packed in or packed with any foodstuff, cosmetic or disinfectant or its package, and referring to such foodstuff, cosmetic or disinfectant; and when used as a verb, means to brand or mark or to attach or to provide in any other manner with, any written, pictorial or other descriptive matter."³³

³¹Food Standards Report op cit 12.

³²No 54 of 1972.

³³s 1.

The Codex Alimentarius³⁴ defines a "label" as-

"any tag, brand, mark, pictorial or other descriptive matter, written, printed, stencilled, marked, embossed or impressed on, or attached to, a container of food,"³⁵

and "labelling" as-

"any written, printed or graphic matter that is present on the label, accompanies the food, or is displayed near the food, including that for the purpose of promoting its sale or disposal."³⁶

Australia defines a "label" as-

"any tag brand mark or statement in writing or any representation or design or other descriptive matter on or attached to or used or displayed in connection with or accompanying and food or any package or food; and 'to label' has a corresponding interpretation."³⁷

The United Kingdom defines "labelling" as-

"in relation to food, ... any words, particulars, trade mark, brand, name, pictorial matter or symbol relating to the food and appearing on the packaging of the food or any other document, notice, label, ring, or collar accompanying the food."³⁸

Finally, the United States of America defines a "label" as-

"a display of written, printed or graphic matter upon the immediate container of any article; and a requirement made by or under authority of this Act that any word, statement, or other information appear on the labels shall not be considered to be complied with unless such word, statement, or other information also appears on the outside container, wrapper, if any there be, of the retail package of such article, or is easily legible through the outside container or wrapper,"³⁹

and "labelling" as-

"all labels and other written, printed, or graphic matters (1) upon any article or any of its containers or wrappers or (2) accompanying such article."⁴⁰

³⁴ A joint food standards programme established by the United Nations' Food and Agriculture Organization (FAO) and World Health Organization (WHO).

³⁵ Codex Alimentarius Commission Report of the Eighteenth Session of the Codex Committee on Food Labelling 11-18 March 1985 (ALINORM 85/22A). This definition is found in the "Draft General Standard for the Labelling of Prepackaged Foods". In 1985 the draft standards had advanced to Step 8 of the Codex procedures (see below 25).

³⁶ Ibid.

³⁷ s 3 of the Model Food Act.

³⁸ Reg (2) of the Food Labelling Regulations 1984 (No 1305).

³⁹ Para (k) of 21 USCS § 321.

⁴⁰ Para (m) of 21 USCS § 321.

The various definitions of "labels" and "labelling" are similar except for variations in the wording. However, it must be noted that the United States deviates from the general definition by ensuring that statements that accompany a package and not visible to the consumer, are not part of the definition of a "label" (but they do form part of "labelling"). In comparison, the other definitions include such statements as part of the "label." Furthermore, the United Kingdom is the sole definition that includes "trade marks" in the definition of a label.

(b) Food

The definition of "food" is also essential for the study of food labelling legislation. South Africa defines "foodstuff" as-

"any article or substance (except a drug as defined in the Drugs Control Act, 1965 (Act No. 101 of 1965)) ordinarily eaten or drunk by man or purporting to be suitable, or manufactured or sold, for human consumption, and includes any part or ingredient of any such article or substance, or any substance used or intended or destined to be used as part or ingredient of any such article or substance."⁴¹

Codex Alimentarius defines "food" as-

"any substance, whether processed, semi-processed or raw, which is intended for human consumption, and includes drinks, chewing gum and any substance which has been used in the manufacture, preparation or treatment of 'food' but does not include cosmetics or tobacco or substances used only as drugs."

Australia defines "food" in the Model Food Act as-

"a substance or matter ordinarily consumed or intended to be consumed by man and includes-

- (a) drink;
- (b) chewing gum;
- (c) any ingredient food additive or other substances that enters into or is capable of entering into or is used in the composition or preparation of food;
- (d) any other substance for the time being proclaimed under subsection (3) to be food - but does not include a drug."

⁴¹s 1 of the Foodstuffs, Cosmetics and Disinfectants Act.

The United Kingdom defines "food" as-

"unless the context otherwise requires, 'food' includes drink, chewing gum and other products of a like nature and use, and articles and substances used as ingredients in the preparation of food or drink or of such products, but does not include-

- (a) water, live animals and birds;
- (b) fodder or feeding stuffs for animals, birds or fish; or
- (c) articles or substances used only as drugs."⁴²

The United States defines "food" in the Federal Food, Drug and Cosmetic Act simply as-

"meaning (1) articles used for food or drink for man or other animals, (2) chewing gum, and (3) articles used for components of any such article."⁴³

The definition of food in South Africa is wide enough to include all foods and drinks consumed by man. A variation of the definition is found in the United Kingdom definition where "food" includes articles consumed by animals, while the United States expressly prohibits the inclusion of this item as food. Another difference is that all definitions, except South Africa, specifically includes chewing gum in the definition of food. A common feature among the definition of "food" discussed above is that all the definitions include food, drinks, and food additives as part of the definition of food.

5. SCOPE OF RESEARCH

Food law is no longer a national issue. It has developed into an international concern. Due to shortages in the food supply and consumers demanding certain foods all year around it has become necessary to trade in foods. Furthermore, issues that affect consumers are communicated quickly. In addition, it is expensive for every country to investigate the safety of all foods. By relying on tests done in other countries costs can be reduced. Thus, any study of food laws, (and specially labelling legislation), will be incomplete if it does not include an examination of foreign legislation (Part II).

⁴²s 131(1) of the Food Act 1984.

⁴³Para (f) of 21 USCS § 321.

The first important organization that sets international standards is the Codex Alimentarius. The importance of studying the Codex Alimentarius is based on the fact that it is the only international assembly that concerns itself with consumer protection and food laws. The Codex Alimentarius not only concerns itself with the developed countries but also assists developing countries in setting standards. The problem with the Codex Alimentarius, however, is that the established standards may be acceptable for developed countries, but developing countries may not have the equipment; expertise; and the infrastructure to comply with the set standards.

The countries chosen for discussion in this work are Australia, England and Wales, and the United States of America. All three are developed countries. South Africa is unique in comparison because it is partially developed and partially developing. The food laws in South Africa, however, are regulated as if the country is fully developed and do not take into account the developing section of the population.

Australia was selected because it is a southern hemisphere country and has a federal constitution (which can be compared to the United States). In addition, Australia substantially observes the standards and the pronouncements of the Codex Alimentarius.

England and Wales (as representing the United Kingdom) were chosen because (a) they are part of the EEC (and a member of the Codex Alimentarius); (b) they have historic ties with South Africa; and (c) England and Wales' food laws often serves as a model for South Africa.

The United States of America was selected because (a) its Food and Drug Administration (FDA) and its food laws have served as a model for numerous foreign countries; (b) it is more consumer protection orientated than the United Kingdom; and (c) it also complies with the Codex Alimentarius to a limited extent. The United States is considered to be in the forefront of food laws.

This study excludes a discussion of trade marks, patents and designs. The labelling aspect of food laws deals with the information that is supplied on the "main panel" of a label. A "main panel" is defined as-

"such part of the label as bears the brand or trade name of the product in greatest prominence and any such other part of the label as bears the brand name or trade name in equal prominence."⁴⁴

In this work a comparative study is made of those Acts that indirectly protect consumers in the area of food law before turning to food laws in particular. Thereafter the country's laws (and the application of the laws) are criticized before a comparison is drawn.

Part III of the study deals with twelve important issues that need to be examined. The issues investigated are those features that are of benefit, (or detriment), to the country discussed in Part II. Recommendations for solving the problems peculiar to South Africa are also made.

Part IV deals with the conclusions.

⁴⁴Reg (1) of GN R908 GGE 5565 of 27 May 1977 (Reg Gaz 3506).

PART II: FOREIGN COMPONENT

CHAPTER 2: INTERNATIONAL STANDARDS FOR FOOD PRODUCTS

1. INTRODUCTION

"Food is an international language which everybody understands. People around the world also understand, appreciate, and support efforts to upgrade and improve diets which brings us to Codex Alimentarius - the United Nations organization that develops international standards for food products."¹

For several years attempts had been made by various developed countries to improve food laws so that foodstuffs could be traded freely in the international marketplace. An international marketplace will result in economies of scale for producers and increased choice of products for consumers.² On the other hand, in the developing countries adulteration had persisted. The authorities were concerned with removing contaminants as well as controlling additives. Furthermore, the British colonies in Africa introduced the laws of Britain. The legislation was based on the British Food and Drug Act 1875. The problem was that- (a) few countries updated their legislation; (b) the standard of control was inadequate because of lack of skilled people to enforce the laws; and (c) the colonies lacked the infrastructure necessary to implement basic food laws which satisfied their resources and needs. As a result many countries had inappropriate food laws. A solution was repealing and replacing the existing legislation³ to boost much needed foreign trade and avoid the wastage of raw materials. An alternative was an international programme that assisted the former British colonies to eliminate adulteration in a manner that is comparable to modern developed countries.

¹E F Kimbrell "Food Composition Regulation and Codex Standards" (1978) 30 Food Drug Cosmetic Law Journal 145

²R J Taylor Food Additives (1980) 88.

³ibid.

The United Nations saw a need to- (a) remove duplication of work, avoid conflict between participating organizations, and coordinate the efforts of the developed countries;⁴ and (b) assist the developing countries to introduce a system whereby the country could repeal and replace existing laws with internationally recognized rules.⁵ In 1963 the United Nations, under the auspices of its specialized agencies, the Food and Agriculture Organization (FAO) and the World Health Organization (WHO), established a new Joint FAO/WHO Food Standards Programme. The programme is named "Codex Alimentarius".

The purpose of the Codex Alimentarius is to:

- (a) Protect consumer health⁶ by providing consumers with a wholesome supply of well-produced⁷ and good quality food products;⁸
- (b) ensure fair practice in food trade;⁹
- (c) co-ordinate all international food standards¹⁰ work undertaken by governmental and non-governmental organizations;¹¹
- (d) harmonize domestic food laws by harmonizing legal requirements of participating countries;¹²
- (e) "determine priorities, initiate and guide the preparation of draft standards through, and with the aid of, appropriate organizations; finalize the standards and, after acceptance by the various participating governments, publish them in the Codex Alimentarius";¹³

⁴Kimbrell *op cit* 145.

⁵Taylor *op cit* 88.

⁶Joint FAO/WHO Food Standards Programme "Statutes of the Codex Alimentarius" (hereafter referred to as "Codex Statutes") Codex Alimentarius Commission, Procedural Manual (hereafter referred to as Codex Procedural Manual) 2 ed (1969) Article 1(a).

⁷Kimbrell *op cit* 145-146.

⁸D M Levie International Regulatory Regimes vol 2 (1976) 379. •

⁹"Codex Statutes" Codex Procedural Manual *op cit* Article 1(a).

¹⁰These standards contain specifications in respect of compositional criteria; quality; labelling provisions; factors concerning food hygiene; permissible food additives; contaminants; permissible quantities of pesticide residue; and methods of analysis and sampling.

¹¹"Codex Statutes" Codex Procedural Manual *op cit* Article 1(b).

¹²Kimbrell *op cit* 145-146. Consequently, removing non-tariff barriers to trade in the international marketplace.

¹³"Codex Statutes" Codex Procedural Manual *op cit* Article 1(c), (d).

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- (f) amend published standards after carrying out an appropriate survey in the light of innovative developments;¹⁴ and
 - (g) assist developing countries to achieve effective controls like the developed countries.¹⁵

Membership of the Codex is voluntary for all members and associate members of the FAO and/or WHO. Any country wishing to participate must notify the Codex Alimentarius Commission. In 1963 the Codex had a membership of 40 countries but increased its membership to 129 countries by 1987.¹⁶

2. STRUCTURE

The Joint FAO/WHO Food Standards Programme ("Codex Alimentarius") consists of several divisions. These include the Codex Alimentarius Commission; the Executive Committee; the Secretariat; and the Subsidiary bodies.

A. The Codex Alimentarius Commission¹⁷

The Commission is recognized as the plenary body of the organization and all member countries are represented in the Commission. The Commission meets at appropriate intervals during the year.¹⁸ The primary function of the Commission is to co-ordinate the various efforts of different countries and organizations in respect of food standards. The Commission is empowered to establish subsidiary bodies to fulfil its functions. Furthermore, it can exchange information and views with other bodies and discuss standards that are being prepared.¹⁹

¹⁴"Codex Statutes" Codex Procedural Manual op cit Article 1(e).

¹⁵Taylor op cit 92-93.

¹⁶D L Houston "Codex Alimentarius Commission: 25 Years of Fair Trade and Consumer Protection" (1987) 42 Food Drug Cosmetic Law Journal 163 163.

¹⁷"Codex Statutes" Codex Procedural Manual op cit Article 1.

¹⁸Levie op cit 386.

¹⁹S Shubber "The Codex Alimentarius Commission Under International Law" (1972) 21 International and Comparative Law Quarterly 631 646.

B. The Executive Committee²⁰

The Executive Committee is a smaller body incorporating ten members. The Committee consists of the Commission's chairman, three vice-chairmen and six elected members to ensure that there is global representation.²¹ The primary function of the Committee, which meets semi-annually, is to consider controversial issues and submit recommendations to the Commission.²²

C. The Secretariat

The Codex Alimentarius' Joint Secretariat consists of fifteen members. They serve an administrative function which includes:

"...coordinating the development of Codex standards, assuring appropriate review of specific matters by different committees, and bringing unresolved issues and potential inconsistencies with prior decisions to the attention of the appropriate Codex organ."²³

D. Subsidiary Bodies²⁴

In order for the Commission to carry out its mandate, several subsidiary and associated bodies have been established.²⁵ The creation of a subsidiary body is dependent on two conditions: (a) The subsidiary body must be, in the Commission's judgement, necessary for the accomplishment of the Commission's tasks; and (b) there must be sufficient funds available.²⁶

The types of subsidiary bodies that have been established include the Worldwide General Subject Codex Committee; Worldwide Commodity Codex Committee; Regional Committees; Associated Advisory Committees; and other committees.

²⁰"Codex Statutes" Codex Procedural Manual *op cit* Article 6.

²¹*ibid.*

²²Levie *op cit* 386.

²³Levie *op cit* 552.

²⁴"Codex Statutes" Codex Procedural Manual *op cit* Article 7.

²⁵"Rules of Procedure of the Codex Alimentarius Commission" (hereafter referred to as "Codex Rules of Procedure") Codex Procedural Manual *op cit* Rule IX.

²⁶Shubber *op cit* 639.

I. Worldwide General Subject Codex Committee²⁷

The primary function of the General Subject Codex Committee is to prepare draft standards for the approval of the Commission. The Committee consists of representatives from the various member countries. The frequency of meetings varies from committee to committee depending on factors such as workload and available funds.²⁸

II. Worldwide Commodity Codex Committee²⁹

The function of the Commodity Codex Committee is to prepare draft standards for particular commodities for the approval by the Commission.³⁰ The frequency of meetings varies. Membership consists of representatives from member countries. By 1987 the Commission had established approximately two hundred commodity standards.³¹

A unusual feature of both, the General Subject Codex Committee and the Commodity Codex Committee, is that their operating expenses are borne by a "hosting" member country. Any member of the Codex Alimentarius can agree to "host" a committee on a permanent basis. The duties of the host country includes the duty to provide the locale, appoint the chairman, and bear the expense of the meeting.³² For example, the function of the General Subjects Codex Committee on Food Labelling is- (a) to draft guidelines that are of assistance to commodity committees in respect of elaborating labelling provisions in the Codex standards; and (b) to consider amendments to established standards, to endorse labelling provisions prepared by individual commodity committees, or to draft the necessary provisions.³³ Canada is the host for the General Subjects Codex Committee on Food Labelling. Its first session was held in Ottawa, Canada from 21-25 June, 1965. The nineteenth session was held in Ottawa, Canada from 9-13 March, 1987. In the nineteenth session the Committee amended the revised text of the "General Standards

²⁷General subjects include food hygiene; food additives; pesticide residue; food labelling; and methods of analysis and Sampling.

²⁸Levie *op cit* 435.

²⁹Eg sugars, processed foods, vegetables, oils and fats, etc.

³⁰"Codex Rules of Procedure" *Codex Procedural Manual op cit* Rule IX.

³¹Houston *op cit* 164.

³²Levie *op cit* 387.

³³Codex Alimentarius Commission Report of the Eighteenth Session of the Codex Committee on Food Labelling (hereafter referred to as Eighteenth Session Report) 11-18 March 1985 (ALINORM 85/22A).

for the Labelling of Prepackaged Foods" that had reached step 8³⁴ in the eighteenth session. The "General Standards for the Labelling of Prepackaged Foods" was first adopted in 1969.³⁵ The Committee's other accomplishments include the drafting of guidelines in respect of nutritional labelling; date marking; claims; etc.³⁶

III. Regional Committees

There are two types of regional committees. The first is the Regional Co-ordination Committee, whose function is to co-ordinate the preparation of draft standards pertaining to a particular region, and the second type is a Regional Committee, whose function is to prepare draft regional standards on specific subjects.³⁷

IV. Associated Advisory Committees

The advisory committees comprise of experts appointed by the FAO and WHO. The experts are chosen because of their specialized knowledge and experience in the field they represent. Consequently, the experts are appointed in their individual capacity. They give technical and scientific advice³⁸ but are independent from the Codex Alimentarius Commission.³⁹

Examples of two relevant expert committees are: (a) the Joint FAO/WHO Expert Committee on Food Additives (JECFA); and (b) the Joint FAO/IAEA/WHO Expert Committee on Wholesomeness of Irradiated Food.

(i) Joint FAO/WHO Expert Committee on Food Additives (JECFA)

JECFA consists of individual experts acting in their personal capacity because of their specialized knowledge and experience in the field of food additives.

³⁴Of its ten-step legislative procedure. See below 24.

³⁵Codex Alimentarius Commission Recommended International General Standards For the Labelling of Prepackaged Foods (1969) (CAC/RS 1-1969).

³⁶Eighteenth Session Report *op cit.*

³⁷Levie *op cit* 387.

³⁸Codex Alimentarius Commission Food Additives (1983) (CAC/VOL. XIV - Ed.1) 3.

³⁹Levie *op cit* 388.

"Their recommendations are based on scientific and technical considerations regarding safety of food additives. The Expert Committee evaluates food additives on the basis of available scientific data and, where appropriate, establishes "acceptable daily intake" (ADI) and "specifications of identity and purity for the food additives." ... The views and recommendations form part of the deliberations of the Codex Committee on Food Additives as the basis for reaching decisions concerning the safety or otherwise of substances intended to be added to food."⁴⁰

There is a publication of a single volume⁴¹ of all the provisions relating to food additives which have been adopted by the Codex Alimentarius Commission due to JECFA's recommendations. This volume is an advisory document and, therefore, not subject to formal acceptance.

(ii) Joint FAO/IAEA⁴²/WHO Expert Committee on Wholesomeness of Irradiated Food

This expert committee's task is to consider all aspects of food irradiation, including the wholesomeness of food processed by ionizing energy. The expert committee published the "Codex General Standard for Irradiated Foods" and a "Recommended International Code of Practice for the Operation of Radiation Facilities".⁴³ The established standard requires acceptance by member countries before it becomes binding, while the code of practice is merely an advisory document.⁴⁴

V. Other Committees⁴⁵

Other committees include (a) the Joint FAO/WHO Committee of Government Experts on the Code of Principles Concerning Milk and Milk Products; and (b) the United Nations Economic Commission for Europe (UNECE).⁴⁶

⁴⁰Food Additives *op cit* 3.

⁴¹*ibid*.

⁴²International Atomic Energy Agency.

⁴³Codex Alimentarius Commission Codex General Standard for Irradiated Foods and Recommended International Code of Practice for the Operation of Radiation Facilities Used for the Treatment of Foods (1984) (CAC/VOL. XV - Ed. 1).

⁴⁴See below 26.

⁴⁵The responsibilities of these bodies is beyond the scope of the topic, but have been mentioned for completeness.

⁴⁶Levie *op cit* 604.

The structure of the Codex Alimentarius is elaborate and complex.⁴⁷ Often the activities of the various organs of the Codex Alimentarius overlap. The task of the Secretariat is to co-ordinate the work of the several organs in such a manner that the recommendation of standards is not delayed.

3. ESTABLISHMENT OF STANDARDS

The primary function of the Codex Alimentarius is to design food standards that will be accepted internationally. The purpose of a food standard is to-

"establish objectives and permanent reference grounds for the purpose of:

- (a) Identifying the product which is the subject of the standard (i.e. identity standard);
- (b) determining the substantial minimal quantities it should offer, namely as regards its contents (compositional standard);
- (c) defining, contingently, the differential grades of quality for the same product (quality standards); and
- (d) standardizing and rationalizing the modes of presentation to the public (labelling and presentations)."⁴⁸

Standards may be either specific or general:

- (a) Specific or vertical standards involve a determined product, or a very specific category of products, (eg dairy products, products with a milk base, etc.);
- (b) General or horizontal standards are linked to the definition of common characteristics of foodstuffs, or beverages as a whole, or to a generic and wide range of products.⁴⁹

The Codex Alimentarius drafts several types of standards. These include:

- (a) General standards which deal with groups of food (eg Recommended International General Standards for the Labelling of Prepackaged Foods);⁵⁰

⁴⁷See Appendix 2 for an organizational chart.

⁴⁸A Gerard "International Food Standards and National Laws" (1978) 33 Food Drug Cosmetic Law Journal 281 281.

⁴⁹ibid.

⁵⁰Levie op cit 393.

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- (b) Specific commodity standards which deal with, or are ultimately intended to cover, all principal processed; semi-processed; or raw foods intended for distribution to consumers (eg Recommended International Standards for Canned Applesauce);⁵¹ and
- (c) Regional standards which are often considered as alternatives to worldwide standards (eg Recommended European Regional Standards for Honey). The regional standards may be either general or specific.⁵²

For the correct drafting of a standard a prescribed format is to be complied with. The format includes the following:

- (a) The name of the standard.
- (b) The scope of the food to which the standard is applicable.
- (c) The definition or description of the food.
- (d) The essential composition and quality factors concerned, including requirements as to compulsory and optional ingredients.
- (e) The permitted food additives and, where appropriate, the maximum amounts permitted in that food.
- (f) The permissible contaminants, including pesticide residues and the permitted amounts of such contaminants.
- (g) Provisions relating to food hygiene.
- (h) Provisions relating to weights and measures.
- (i) The labelling provisions, which include the precise specification as to what may be and can be included on the label and what must be excluded from the label.
- (j) The method of analysis and sampling.⁵³

⁵¹ *ibid.*

⁵² *Levie op cit* 409.

⁵³ *Levie op cit* 394-395.

The Codex Alimentarius also publishes supplementary material (i.e. advisory material) in place of standards. The advisory material is not intended to be binding on member countries. The aim of the advisory material is to provide useful and practical advice that can be used in conjunction with the standards. The importance of the material is apparent if one considers that there is a vast gap between developed and developing countries. The advisory material is designed to narrow the gap for developing countries so that the draft standards can be used by all member countries.

Advisory material may take the form of codes, general principles, and guidelines.

These are:

- (a) Codes. The function of the codes is to assist a member country in meeting the requirements set out in a standard (eg Codes of Hygienic Practice). The matters covered by such codes include raw material requirements; transportation; equipment; environmental factors such as sanitation, lighting, and ventilation; packaging; storage; etc.⁵⁴
- (b) General principles. The aim of this type of advisory material is to set out fairly general rules covering a wide variety of products or processes (eg General Principles for the Use of Food Additives).⁵⁵
- (c) Guidelines. This is a general category that can be used for various purposes and in various contexts (eg Guideline for Labelling Provision in Codex Standards).⁵⁶

Advisory material serves two purpose: (a) Direct use by members as they see fit, and at their discretion, so that the member can improve food laws applying in that country; and (b) selective use of such material by the committees in regard to individual standards.⁵⁷

⁵⁴Levie op cit 417-419.

⁵⁵Levie op cit 422-433.

⁵⁶ibid.

⁵⁷Levie op cit 428.

4. LEGISLATIVE PROCESS

An elaborate procedure has to be complied with before a draft standard can be issued as a recommended standard, or for advisory material to be established.

The rationale for the prescribed procedure is that in order for a standard, or advisory material, to be effectively applied in a domestic market, it should allow for participation by the government, interested bodies and organizations of the member countries.⁵⁸ Furthermore, the procedure to establish standards should be reassuring and familiar to the government representatives because the government representative encourage the standards' acceptance into the domestic marketplace.⁵⁹ It is suggested that the lack of proper procedures has caused several international agreements to fail.⁶⁰

The ten-step guideline for a draft procedure can be summarized as follows:

- (a) Step 1: The Commission decides that a standard should be introduced and sets up a committee.
- (b) Step 2: The committee produces a draft which at this stage is called a "proposed draft standard".
- (c) Step 3: The draft is circulated within member countries for comments.
- (d) Step 4: The draft is re-considered and, if necessary, amended.
- (e) Step 5: The amended draft is presented to the Commission as a "proposed draft standard" and the Commission uses it as the basis for producing a "draft standard".

⁵⁸Levie *op cit* 389-390.

⁵⁹*ibid.*

⁶⁰G O Kermode "Food Standards for the World" (1968) 78 Public Health Inspector 616 617.

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- (f) Step 6: The draft standard is sent to member countries for comment.
 - (g) Step 7: The draft standard is further considered by the co-ordinating committee.
 - (h) Step 8: The Commission reconsiders the draft standard and adopts it as a "recommended standard".
 - (i) Step 9: The recommended standard is forwarded to member countries for acceptance.
 - (j) Step 10: The recommended standard is published in the Codex Alimentarius as a "Codex standard" when the Commission determines that it is appropriate to do so in the light of the acceptances received.⁶¹

The procedure is flexible, and not applied rigidly or in a circumscribed order. Flexibility arises because: (i) Each step does not have to be followed sequentially; (ii) no time limit is set for each step; (iii) steps can be repeated, if necessary; (iv) the procedure permits the "holding back" of the draft standard at a particular step when it can neither be sent back nor proceed until certain problems are resolved or further comments received; and (v) the procedure can be accelerated by eliminating certain steps (eg steps 6, 7 or 8).⁶²

The procedure for introducing a recommended standard is described as:

"Informal negotiation whereby an exchange of views and comments on a given draft standard takes place; and ample opportunity for discussion, revision and other refining processes is available, before the standard matures into a recommended standard. These opportunities may help to narrow the areas of disagreement between the members of the Commission with respect to Codex standards, thus enhancing their chances of acceptance by members of the Commission."⁶³

⁶¹"Procedure for the Elaboration of Codex Standards and Codes of Practice" (hereafter referred to as "Codex Elaboration Procedure") Codex Procedural Manual op cit 25.

⁶²Levie op cit 440-441.

⁶³Shubber op cit 641.

5. ACCEPTANCES

Once a draft standard has reached the recommended stage (i.e. step 8), the Codex Commission distributes it to the member countries for acceptance or rejection (i.e. step 9). An implication of acceptance is that the member country will amend its domestic laws to incorporate the requirements of the recommended standard and enforce it within its territory.⁶⁴ The acceptance of a standard, however, only extends to goods that are to be distributed domestically. The member country remains free to export non-conforming products to other countries.

Due to the implications of accepting a standard, the Codex Alimentarius recognises that a member country cannot always accept the standard in its entirety and, accordingly, allows for variations in acceptance. There are three types of acceptances: full acceptance, target acceptance, and minor deviations.

A. Full Acceptance

Full acceptance⁶⁵ by a member country means that a member will unconditionally accept all the requirements of the standard and not only accept those commodities that conform with the standard. The implication of such acceptance is that the member country agrees to harmonize its domestic legislation with the established standards so that the standard becomes an integral part of the laws of that country.

Furthermore, the member country also accepts that it will not allow distribution within its territorial jurisdiction of commodities that do not comply with the provisions laid down in the standard.⁶⁶

⁶⁴Gerard (1978) *op cit* 284.

⁶⁵"General Principles of the Codex Alimentarius Commission" (hereafter referred to as "Codex General Principles") *Codex Procedural Manual op cit* para 4A(i).

⁶⁶A. Gerard *An Outline of Food Law - Structure, Principles, Main Provisions* (1975) 30.

B. Target Acceptance

Target acceptance⁶⁷ means that a member country will not obstruct products conforming with the standard from being distributed freely within its territorial jurisdiction but it will not conform with the requirements of the standard itself. A member country, however, has to indicate that it is willing to accept the standard after a stated number of years. This means that the member country only accepts the standard partially into its domestic laws.⁶⁸

The problem with this type of acceptance is that no outer limit is fixed by the Commission before a member country is forced to comply with the recommended standard. If, however, an outer limit were to be fixed the Codex Alimentarius will lose its key attraction - flexibility. Thus, the setting of outer limits is discretionary and dependant on factors such as why the standard is not fully acceptable.⁶⁹

An advantage of target acceptance is that the member country warrants that it will not hinder goods complying with the standard being distributed domestically. The aim of the Codex Alimentarius is to remove non-tariff trade barriers.

This will be achieved if, for example, country "A" accepts products that conform with the standards from country "B," although its domestic compositional standard is different because it has not fully accepted the standard.

The difference between target acceptance and full acceptance is that in the former the member country is not initially obliged to import or manufacture products that comply with the requirements of the standard, while in the latter the member country has to introduce or amend its domestic laws.

⁶⁷"Codex General Principles" Codex Procedural Manual op cit para 4A(ii).

⁶⁸Gerard (1975) op cit 30.

⁶⁹Levie op cit 466.

C. Acceptance with Minor Deviations

Acceptance with specified minor deviations⁷⁰ is a variation of full acceptance. Here, the member country conditionally accepts the standard but for certain requirements, which it cannot comply with. There may be various reasons for non-compliance, eg religious reasons; the country's geographic location; climatic conditions; etc. By accepting a standard in this form the member country is obliged to include, in its declaration, the reasons why it cannot fully accept the standard and also state whether- (a) products fully complying with the standard may be distributed freely within its territorial jurisdiction; and (b) if the member country expects to give full acceptance to these standards at some future date and, if so, when.⁷¹

This type of acceptance is regarded as an escape mechanism for those member countries that cannot accept the recommended standard and will otherwise reject the standard. The major problem, however, is that "minor deviations" have not been defined.

A further problem is that such acceptance does not require the member country to warrant that it will encourage domestic distribution of products which conform with the requirements of the recommended standard.⁷² This may result in indirect non-tariff trade barriers being created, rather than removed, because a member country, who has accepted a standard, will be barred from distributing its products freely in other member countries because of specified minor deviations.⁷³ Furthermore, the Codex Alimentarius does not encourage a member country, who has accepted at standard with minor deviations, to move towards full or target acceptance in the future.⁷⁴

⁷⁰"Codex General Principles" Codex Procedural Manual op cit para 4A(iii).

⁷¹Gerard (1975) op cit 30.

⁷²Levie op cit 467-468.

⁷³Gerard (1975) op cit 30.

⁷⁴ibid.

The Codex Alimentarius also requires member countries, who cannot comply with the standards, to inform the Commission of their reasons for the lack of acceptance and whether products conforming with the standard can be distributed within their territorial jurisdiction.⁷⁵

The Codex Alimentarius also provides mechanisms for a member country to amend or withdraw its acceptance.⁷⁶ This can be done at any time and is free of any limitations. The member country is merely required to give notice to the Commission. A proviso, however, states that a member country amending or withdrawing its acceptance is required to stipulate: (a) Whether or not it will allow free distribution of products complying with the standard within its country; (b) in what way its present or proposed domestic legislation deviates from the Codex standard; and (c) if possible, the reason for amending or withdrawing its acceptance.⁷⁷

The success of the Codex Alimentarius cannot be measured by the number of member countries formally accepting the recommended standards. Often there are justifiable reasons for a member country rejecting a standard. It may be found, however, that the non-accepting member country does not necessarily follow the requirements of the standard for internal distribution of the product. It will have to comply, however, with the standard informally if it wants to export that product to member countries who have accepted the standard.

6. CRITICISMS AND ADVANTAGES

A. Criticisms

An international programme will have to contend with political and technical difficulties before it can improve international trade. The Codex Alimentarius is no

⁷⁵"Codex General Principles" Codex Procedural Manual op cit para 4A(i).

⁷⁶"Codex General Principles" Codex Procedural Manual op cit para 6.

⁷⁷ibid.

exception. Furthermore, there are additional problems with the Codex Alimentarius. These include the following:

- (a) Recommended standards become mandatory only if a member country accepts them. As a result a country may be a member of the international programme, but does not have to comply with a recommended standard.
- (b) Representation is irregular from developing countries, while representation from developed countries is consistent. This can be attributed to: (i) The lack of general expertise; (ii) there are limited experts available in developing countries and they cannot be spared to do Codex Alimentarius work; and/or (iii) the lack of funds.⁷⁸ By not sending representatives, the developing countries face the risk of unacceptable standards being adopted by the Commission. Once a Codex standard reaches step 10 it has a significant financial and economic impact on a member country, whether it accepts or rejects the standard. This was one of the reasons why Regional Committees were established, especially for Africa.⁷⁹
- (c) Committees frequently get tied up in red tape. Thus they are unable to serve the function for which they were established.⁸⁰ For example, should the Committee on Methods of Analysis and Sampling concern itself with refereeing methods to be used in the case of a dispute? Or should it be more actively involved in developing methods of analysis that must be used to determine compliance with international legislation for food products?⁸¹
- (d) The spectrum of products covered by the established standards has been criticized. For example, no standards have been developed for raw

⁷⁸Levie *op cit* 435-436.

⁷⁹*ibid.*

⁸⁰Kimbrell *op cit* 147.

⁸¹*ibid.*

materials.⁸² This is problematic for developing countries because the subject-matter of present standards may be of little relevance to them.⁸³ Furthermore, some standards deal with items that are of interest to a small minority of countries, eg edible ices.

Such an esoteric category depletes resources, in the form of expertise and funds, that can be made available for other beneficial uses.⁸⁴

- (e) The Codex Alimentarius is silent on the question of non-compliance. There are two types of non-compliance: (i) A member country accepts the recommended standard, but does not amend its domestic legislation to comply with the standard, (it does not, however, hinder the distribution of goods that do comply with the standard); or (ii) a member country, after accepting the standard, amends its domestic legislation to conform with the standard, but does not enforce it by allowing non-conforming goods to be distributed domestically, or does not comply at a later stage because it lacks the control; organization; facilities; or man-power required to determine whether a product conforms with the requirements.⁸⁵ The philosophy of the Codex Alimentarius regarding enforcement is that it is for the member countries, and not the Commission, to ensure compliance with a standard. Therefore, the Commission has not involved itself in adopting any dispute-settlement procedures to resolve inter-state conflict.⁸⁶
- (f) Target acceptance requires member countries to specify how many years the country will need before it can fully comply with the standard. It often happens that the member country ignores the period specified and does not

⁸²The position appears to be changing. The Commission has established committees on Vegetable Protein; Cereals, Pulses and Legumes.

⁸³Levie *op cit* 589.

⁸⁴Levie *op cit* 550.

⁸⁵Levie *op cit* 485-486.

⁸⁶Levie *op cit* 577.

comply with the recommended standard.⁸⁷

- (g) Since the Codex Alimentarius permits alternatives to full acceptance of its standards, it weakens the achievement of harmony. Harmony cannot be achieved if member countries are allowed to deviate from the established standards.
- (h) The developing countries maintain that the Codex Alimentarius does not provide assistance in respect of their immediate needs and requirements. For example, the Codex Alimentarius does not address issues such as control within food laboratories, food inspection systems, qualified personnel and essential equipment.⁸⁸
- (i) Consumer interests do not appear to be well represented in the various Codex Committees.

B. Advantages

Despite criticisms against the Codex Alimentarius there are several advantages. These include the following:

- (a) Allowance is made for informal acceptance:

"Codex standards are already being incorporated into contracts by buyers and sellers in different countries because they provide internationally agreed upon norms in highly technical and disputed areas. Accordingly, a lack of formal acceptance does not necessarily mean that the regulatory instrument is not being observed. Similarly, formal acceptance does not necessarily mean that the instrument is being observed."⁸⁹

⁸⁷Levie op cit 466-467.

⁸⁸Levie op cit 539.

⁸⁹Levie op cit 557.

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- (b) The elaborate ten-step procedure is multi-functional in that it: (i) Fosters open, regular, and continuing participation of the various members in the development of the standards;⁹⁰ (ii) has an educational value;⁹¹ (iii) provides an opportunity for inter-state consultation and negotiations; and (iv) is a legislative procedure that can be followed.⁹²
- (c) The ten-step procedure is flexible.⁹³
- (d) The Codex Alimentarius assists developed and developing countries to achieve uniformity to a great extent. Even though countries may not accept the standards in a uniform manner, they achieve uniformity in the sense that it is the starting point for countries that are developing or amending their food laws.
- (e) The Codex Alimentarius allows a member country to indicate the reasons why it cannot accept a recommended standard. This is important for the drafting of future standards and the amendment of present standards.
- (f) In terms of step 10 the Codex Alimentarius keeps itself informed of the position of member countries in respect of the degree of implementation of the standard within its regulatory instruments and decisions concerning acceptances, rejections or restrictions.⁹⁴
- (g) Although the Codex Alimentarius is a subsidiary body of the specialized agencies of FAO and WHO, it is autonomous. It, however, does not operate in a vacuum. Frequently, there is an overlap between the work carried out

⁹⁰Levie *op cit* 588.

⁹¹*ibid.*

⁹²Levie *op cit* 554.

⁹³See above 24.

⁹⁴Levie *op cit* 559.

by one or both of its parent organizations. Common areas of overlap concern issues such as nutrition, food additives, pesticide residue, technology codes, etc.⁹⁵ In the circumstances the various organizations share the information.

- (h) The Codex Alimentarius does not merely harmonize food laws throughout the international community, but its salient benefits are that it- (i) provides a forum for regulators to discuss problems and learn from another's experience in an informal environment; and (ii) provides scientists with an arena to share their findings.⁹⁶
- (i) The work of the expert committees (eg JECFA) are recognized internationally and many countries (including non-members) consider the recommendations made by the expert committees.

Though the criticisms facing the Codex Alimentarius are harsh, the advantages of an international forum outweigh them. The work of the Codex Alimentarius is on-going, and it should remain so.

7. FUTURE TRENDS

In recent years the shift of emphasis towards the needs and special problems of the developing countries has resulted in the introduction of committees such as the Committee on Cereals, Pulses and Legumes.⁹⁷ Furthermore, the emphasis in developed countries is towards more informative labelling; additives and contaminants; residues of pesticides; and methods and analysis of sampling,⁹⁸ and less towards recipe standards.

⁹⁵Levie *op cit* 383.

⁹⁶Houston *op cit* 164.

⁹⁷L Erwin "Regulation/Deregulation: International Changes - The Codex Alimentarius Commission" (1988) 40 Food Technology in Australia 64 64.

⁹⁸*ibid.*

Due to the shift of emphasis away from individual commodity standardization, the tendency in the Codex Alimentarius is towards horizontal standards.⁹⁹ This trend is accepted by most developed countries and amendments have already been made to domestic laws.

8. CONCLUSION

In the developed countries there was a need to improve international trade, while the developing countries required assistance to amend or repeal their inadequate food legislation that dated back to the colonial era. Thus, in 1963, the United Nations took steps to resolve the problems. The Joint FAO/WHO Food Standards Programme (Codex Alimentarius) was established. This is the result of co-operation between the two specialized agencies, FAO and WHO, of the United Nations.

The Codex Alimentarius serves several purposes, but its principal purpose is to protect the health of the consumer and to ensure fair practice in the food trade.

Membership of the Codex is voluntary for members or associate members of FAO and/or WHO. Furthermore, the structure of the Codex Alimentarius also enables non-members to notify the Commission that they intend complying with a particular standard.

The structure of the Codex Alimentarius is complex and requires considerable effort to mesh the interests of the various organs. The first organ is the Codex Alimentarius Commission, which is the plenary body. The second is the Executive Committee. The third is the Secretariat, which co-ordinates the efforts of the Codex Alimentarius Commission and/or the subsidiary bodies. The fourth are the subsidiary bodies, which consist of the General Subjects Codex Committee; the Commodity Codex

⁹⁹ibid.

Committee; Regional Bodies; Associated Advisory Bodies and other bodies. The work of the various organs is arranged in a manner whereby the views of the various member countries are represented in the development of the standards.

The Codex Alimentarius fulfils its purpose by drafting standards. It recommends either General Standards; Specific Commodity Standards; or Regional Standards. The establishment of a standard has to follow a prescribed format which has ten prerequisites.

The Codex Alimentarius also publishes advisory material. Advisory material is not binding on member countries. The material can take one of the following forms: (a) Codes; (b) general principles; or (c) guidelines.

There is an elaborate and flexible ten-step procedure to be followed before a standard is established. The procedure requires consultation between the Commission, subsidiary bodies, and other international organizations interested in food standards. It also allows for comments by governments of the member countries and interested bodies.

A recommended standard is not binding per se. A member country is required to accept the standard into its domestic legislation before it has any effect. Acceptance may either be (a) full acceptance; (b) target acceptance, (i.e. reservations as to the date of operation); or (c) acceptance with minor deviations, (i.e. acceptance by qualifications). Alternatively, a member country may reject the standard.

There are disadvantages and advantages to the Codex Alimentarius. The disadvantages include problems such as the spectrum of products covered is limited; sanctions for non-compliance are virtually non-existent; consumer needs are not well represented; etc. The advantages include issues such as the Codex Commission is independent and autonomous from its parent organizations; uniformity is achieved to a great extent by establishing standards; there is provision for informal acceptance; etc.

"[The] Codex may not be the perfect solution, but it is the best game around in the food standards area."¹⁰⁰

Australia, United Kingdom and the United States of America are members of the Codex Alimentarius and it is intended to examine their labelling laws in the next chapters.

¹⁰⁰Kimbrell [op cit](#) 150.

CHAPTER 3: AUSTRALIA

1. INTRODUCTION

"Manufacturers, endeavouring to present their products attractively, are faced with the onerous task of ascertaining and satisfying the diverse regulations in each state. Consumers need to be as fully informed as possible as to the nature and contents of the goods they are purchasing. They also need to be protected from deceptive ... practices."¹

Australia, being a federation of states, enacts either state² or Commonwealth legislation to protect consumers. Often, however, there is a combination of state and Commonwealth legislation. The two types of laws usually complement each other or, at times, contradict each other.

The law can be divided into three categories: General consumer protection legislation; weights and measures; and food laws. General consumer protection legislation and weights and measures laws are established by individual states and Commonwealth, while food laws are enacted by the various states only. Consequently, there are nine regulatory systems of food law.³

It is also necessary to examine the reforms legislation will have to take into account in the future as to consider Australia's compliance with the Codex Alimentarius.

¹D Shannon "The Law of the Label" (1975-1976) 1 University of New South Wales Law Journal 241 241.

²Australia consists of 6 states and 2 territories.

³For this reason the author found it unnecessary to make a detailed analysis of the regulations affecting food laws.

2. THE SOURCES OF LAW

A. General Consumer Protection Laws

The state and Commonwealth governments have legislated in a manner that affords general protection to consumers. The operation of both sets of legislation is co-extensive.⁴ Although these provisions deal with general consumer protection they can be applied to consumers purchasing foodstuffs.

I. State Laws

Consumer protection laws at state level have relevance to packaging and labelling because they strike at false or misleading statements.⁵ For a long time the use of false or misleading statements has been a criminal offence in various states.⁶ Non-compliance with the provisions of the state legislation usually results in a fine of approximately \$ 200.⁷

The first problem with state laws is that they are drafted in general terms. The laws generally state what must not appear on labels (while the weights and measures legislation and food laws specify what must be stated on a label).⁸ This limits the application of the Act. For example, most provisions only apply to "statements and advertisements made in the conduct of, or for the purpose of, a trade or a business".⁹ Consequently most provisions ignore "silent" deceptions arising from omissions.¹⁰ Secondly, due to food laws and labelling legislation being state-based, the area is virtually dealt with by the health authorities.¹¹

⁴P M Holt "Food Packaging and Labelling" A J Duggan & L W Darvall (eds) Consumer Protection Law and Theory (1980) 58.

⁵ibid.

⁶s 13 of the Consumer Affairs Act 1972 (Vic); s 32 of the Consumer Protection Act 1969 (NSW); s 32 of the Consumer Affairs Act 1970-1974 (Qld); s 3 of the Unfair Advertising Act 1970-1972 (SA); s 8 of the Trade Descriptions and False Advertisements Act 1936-1973 (WA); and s 3 of the False Advertising Ordinance 1970 (NT).

⁷Shannon op cit 255.

⁸ibid.

⁹ss 24 and 25 of the Consumer Protection Act 1969-1972 (NSW) and s 4 of the Misrepresentation Act 1971-1972 (SA).

¹⁰Shannon op cit 255.

¹¹Duggan & Darvall op cit 58.

Consumer protection legislation does not only exist at state level but has also been introduced by the Federal Government.

II. Commonwealth Laws:¹²

The Federal Trade Practices Act 1974-1975 (Cth)

It has been contended that the Trade Practices Act and its amendments are "radical and far-reaching."¹³ The underlying rationale for the Trade Practices Act is that in the light of modern methods, (in respect of packaging, labelling, distribution and promotion of goods), the liability for defects should be borne by manufacturers rather than retailers. This is justified on the basis that it is the manufacturer who produces goods that may be unsuitable or defective and, therefore, he should bear the responsibility. The effect on reputable manufacturers (who stood by their products in the past), is that they are not only morally bound but also legally liable.¹⁴

The Trade Practices Act contains a blanket provision that prohibits a "corporation in a commercial transaction from engaging in conduct that is misleading or deceptive or likely to mislead or deceive."¹⁵

This blanket provision is supplemented by a section that forbids a number of specific practices. Some of the practices that are prescribed include-

"making false or misleading representations about the price, quality, grade, nature, manufacturing process, characteristics, suitability or quantity of goods."¹⁶

Section 52 has been termed a "catch-all" provision. This section is couched in wide terms so as to include a variety of conduct and to meet new types of deceptive practices

¹²It is common for countries to ensure that labelling is controlled by mandatory trade description legislation. Australia is unique because it specifically excludes food labelling from the ambit of trade descriptions. Consequently, it is not necessary to consider the Trade Descriptions Act.

¹³K C Sutton "Let Sellers and Manufacturers Beware" (1980) 54 Australian Law Journal 146 155.

¹⁴ibid.

¹⁵s 52.

¹⁶s 53.

as they appear. Section 52 overlaps with the more specific types of practices mentioned in s 53.¹⁷

There is uncertainty in respect of the operation of s 52 because there is no statutory definition of "misleading" or "deceptive".¹⁸ Undoubtedly the facts of each case will be investigated before the practice is labelled "misleading" or "deceptive," but it has been established that an intention to deceive is not a prerequisite. It is sufficient if the practice complained of has the capacity or tendency to deceive. The test to be applied is:

"There must be a fair probability of deceiving an ordinary purchaser, including the ignorant, the unthinking and the credulous."¹⁹

All the necessary elements have to be met before an action is brought in terms of s 53. Often all the elements cannot be satisfied. In these circumstances it may be possible to bring an action in terms of s 52, the "catch-all" provision. The importance of this distinction is that if there is a conviction in terms of s 53 then it is a criminal offence. If, however, a s 52 action is initiated it only gives rise to a civil action. In the latter case the remedy may be damages,²⁰ an injunction,²¹ and/or such order as the court deems fit to redress the injury caused.²²

Labelling is as much a part of the promotion and marketing of food products as it is advertising. Thus, misleading statements on a label or deception created by packaging constitutes conduct prohibited under the Trade Practices Act.²³

In addition, the Trade Practices Act permits promulgation of regulations in respect of the prerequisites and conditions of labelling and packaging.²⁴ The regulations in respect of a consumer product safety standard regarding packaging prescribe (a) the form; and (b)

¹⁷Sutton *op cit* 147.

¹⁸*ibid.*

¹⁹Parish v World Series Cricket Pty Ltd (1977) 16 A.L.R. 171 179.

²⁰s 82.

²¹s 80.

²²s 87.

²³Shannon *op cit* 257.

²⁴Shannon *op cit* 242.

the content of markings, warnings and instructions accompanying the goods.²⁵ The consumer product information standard prescribes regulations concerning:

- (i) "The disclosure of information relating to the performance, composition, contents, design, construction, finish or packaging of the goods; and
- (ii) the form and manner in which that information is to be disclosed on or with the goods."²⁶

Furthermore, if a standard has been prescribed, the manufacturer commits an offence if he supplies goods which do not comply with the prescribed standard.²⁷ Finally, consumers are able to employ the "self-help" provision of the Trade Practices Act²⁸ which provide that-

"a person who suffer loss or damage by an act of another person that was done in contravention of a provision of ... Part V may recover the amount of the loss or damage by action against that other person."²⁹

Section 80 provides that "any other person" may obtain a restraining injunction and ancillary orders in the injunction proceedings, pursuant to s 87, if the prescribed standards were breached. It is the "self-help" provision which makes the Trade Practices Act an important consumer protection statute compared with any other state and Federal statutes that regulate the information that must (or may) be supplied on a label.³⁰

Section 65(e) provides for the Minister to declare, in whole or in part, as a standard "a standard prepared by other recognized voluntary associations" (eg The Standards Association of Australia³¹ (SAA)).³²

In 1986 s 65 was amended to provide for voluntary or compulsory recalls of unsafe products and the banning of goods.³³ The scope of s 65 has been vastly improved, but it is premature to review the application of the provision.

²⁵ s 65(c) as amended in 1986.

²⁶ s 65(d) as amended in 1986.

²⁷ J Goldring, L W Maher & J McKeough Consumer Protection Laws in Australia 3 ed (1987) 133.

²⁸ Shannon op cit 243.

²⁹ s 82(1).

³⁰ Shannon op cit 244.

³¹ The SAA is the principal organization responsible for prescribing voluntary standards. Membership and participation is entirely voluntary. The importance of SAA being a voluntary association is that the standards have no force unless they have been adopted by a state as legislation. (See S Barnes & M Blakeney Advertising Regulations (1982) 157-159).

³² Goldring, Maher & McKeough op cit 133.

³³ Goldring, Maher & McKeough op cit 129.

A further provision is the establishment of a Trade Practices Commission (TPC).³⁴ One of the Commission's responsibilities is to investigate complaints against the infringement of the Trade Practices Act.³⁵ The advantage of the TPC, (compared to state enforcement agencies), is that the TPC is "armed with the threat of being able to secure very substantial penalties through the courts."³⁶

Historically, consumer protection legislation originated with the states rather than the Commonwealth. This resulted in two problems:

- (a) The potential for conflict between the states and the Commonwealth. The matter was resolved by s 75 of the Trade Practices Act which provides that where a party commits an offence against both the Commonwealth and the state, he can only be convicted under one law. However, the situation can arise where there is an inconsistency between state and Commonwealth laws, i.e. where the two cannot be read together. In such cases the state law is invalidated by the Commonwealth legislation.³⁷
- (b) The second problem deals with administration. There is uncertainty as to which body should receive and process consumer complaints because there is a central Commonwealth TPC and the various state consumer affairs authorities. This matter was amicably resolved by the relevant parties agreeing that the TPC shall deal with those matters associated with multi-states, national or international issues, and matters of such gravity that warrant nation-wide treatment. Other matters are to be dealt with by the state authorities.³⁸

³⁴ s 6(A) of the Trade Practices Act.

³⁵ s 7.

³⁶ Shannon *op cit* 258.

³⁷ W Pengilly & A Ransom Federal Deceptive Practices and Misleading Advertising Law: Judgments, Materials and Policy (1987) xxvii.

³⁸ *ibid.*

Freedom of Information Act 1982 (Cth)

The object of the Freedom of Information Act is to make information regarding the Commonwealth departments and public authorities accessible to the Australian community. An exception is information that has to be preserved in the public interest or in the interest of private and business affairs.³⁹ Furthermore, Part V allows a scheme for the amendment of personal records.⁴⁰

The Act permits three categories of disclosures:

- (a) "Disclosure by publication of information concerning the operations of agencies;⁴¹
- (b) disclosure by publication of certain documents;⁴² and
- (c) disclosure of documents to persons who make a freedom of information request for documents which are not excluded from the Act, exempt from disclosure or amenable to discretionary withholding in defined circumstances."⁴³

The right of access to information is made available to "every person". Thus there is no need for the individuals to show interest before the information is made available.

These requirements are merely minimum requirements. The Act does not prohibit or inhibit publication of information or document for general public consumption.⁴⁴

B. Weights and Measures Laws

The laws relating to weights and measures apply generally to all goods. The laws, however, have special significance for food labelling because, by restricting weights and measures, undue proliferation of packages can be minimized. This means that there is standardization of package quantities and size ranges which allows consumers to make

³⁹s 3(1).

⁴⁰P J Bayne Freedom of Information (1984) 1-2.

⁴¹s 8.

⁴²s 9.

⁴³Bayne op cit 8.

⁴⁴Bayne op cit 8. Also see Bayne op cit 8-23.

value comparisons.⁴⁵ Once again, Australia has two levels of legislation - state and Commonwealth.

I. State Laws

State legislation, dealing with packaged goods, is found in a host of statutes.⁴⁶ They are collectively called the "uniform packaging legislation".⁴⁷ The Acts are simply a framework of the principles, while the regulations set out the details and elaborate the working of the statutory principles.⁴⁸ The numerous pieces of legislation and regulations are, to a great extent, uniform and reflect the recommendations of the Standing Committee on Packaging (SCP).⁴⁹ Formulation of uniform standards occur in respect of length, area, weight, volume, etc.⁵⁰ Furthermore, the legislation prescribes certain information which must be stated on all pre-packaged goods.⁵¹

The statutory principles of the Weights and Measures Acts of the states provide for a number of things. Some of the common features are:

- (a) The maintenance of standards of measurements in keeping with the Commonwealth legal units of measurements formulated in accordance with the Weights and Measures (National Standards) Amendment Act 1984;
- (b) the prescription of compulsory units of measurements for trade and commerce;
- (c) the regulation of retail sales by weight and measure; and

⁴⁵Duggan & Darvall *op cit* 58-59.

⁴⁶Weights and Measures Act 1915 (NSW); Weights and Measures Act 1958 (Vic); Weights and Measures Act 1951-1978 (Qld); Trade Standards Act 1979 (SA); Weights and Measures Act 1915-1976 (WA); Weights and Measures Act 1934 (Tas); Weights and Measures (Packaged Goods) Ordinance 1974 (ACT); Weights and Measures (Packaged Goods) Ordinances 1970-1973 (NT).

⁴⁷Shannon *op cit* 244.

⁴⁸Goldring, Maher & McKeough *op cit* 169-170.

⁴⁹The SCP was established in 1967. Its aim was to co-ordinate the various states' efforts regarding weights and measures. Although the SCP is not authorised by statute but has been widely accepted by industry. The SCP consists of representatives from each state and the Commonwealth. (See Duggan & Darvall *op cit* 62).

⁵⁰Goldring, Maher & McKeough *op cit* 170.

⁵¹Report by the Trade Practices Commission to the Minister for Business and Consumer Affairs on the 30 June 1977

48. Commonly referred to as the TPC Report.

- (d) the creation of various offences in connection with the overall scheme of things.⁵²

Responsibility and administration of weights and measures is divided between a central administration and local municipalities.⁵³

The weights and measures legislation prescribes certain types of information which must be contained on all packages. These are:

- (i) Name of the packer or principal. This provision requires that the product must disclose, clearly and legibly, either the name and address of the packer or an "approved brand" code.⁵⁴ The addition of any words that will create confusion as to the identity of the packer or the place of packing is not permitted.⁵⁵
- (ii) The statement of quantity. All pre-packed products must be marked with a statement of net weight or measure of their contents. Regulations prescribe, in detail, the position of the statement of quantity on the label or pack; minimum print height; colour contrast; and permitted units of measure.⁵⁶ Thus, each product must be sold in its standard weight or measure. A failure to comply with the provisions results in the manufacturer committing an offence and a fine not exceeding \$ 200 can be imposed.⁵⁷ Furthermore, it is mandatory to include the word "net" on all weight statements. With certain products, however, the expression "net weight when packed" or "net weight at standard condition" has to appear.⁵⁸

⁵²ibid.

⁵³ibid.

⁵⁴ibid.

An "approved brand" is a code number, which is issued either by the Department of Primary Industry (for export) or by the weights and measures authority in the state, for the purposes of packaging. The aim of the code is to assist the authorities rather than a means of imparting information to consumers. The code is kept confidential and the name and address of the packer is not revealed to consumers. Usually manufacturers state their name and address even though they have an "approved brand" code.

⁵⁵TPC Report op cit 48-49.

⁵⁶ibid.

⁵⁷Goldring, Maher & McKeough op cit 170-171.

⁵⁸Shannon op cit 245.

(iii) Prescribed quantities. Most states have regulations with tables prescribing denominations of weight or measure applicable in respect of each pre-packed product. An offence is committed if an article is not packed according to the denomination of weight or measure set out in the regulations.⁵⁹

(iv) Prohibited and restricted expressions. An offence is committed if a prohibited or restricted expression is used.⁶⁰ Prohibited expressions are expressions that "relate directly or indirectly to, or qualify, a unit of measure of a physical quantity."⁶¹ Restricted expressions, (eg the use of words such as "Giant", "Jumbo", "King size", etc.), may only be used-

"provided that the statement of weight or measure is marked so that it may be clearly seen on every part of the package carrying the restricted expressions and provided the markings comply with specified size or print requirements."⁶²

Furthermore, undue prominence must not be given to the restricted expressions.⁶³

Efforts to unify weights and measure legislation inter-state has been successful. This success can be attributed to (a) effective policing by the weights and measures authorities in the various states,⁶⁴ and (b) the fact that there is both Commonwealth and state legislation.

II. Commonwealth Laws: The Weights and Measures (National Standards) Amendment Act (1984) (Cth)

The Commonwealth Weights and Measures Act provides for:

⁵⁹Duggan & Darvall *op cit* 172.

⁶⁰Goldring, Maher & McKeough *op cit* 173.

⁶¹TPC Report *op cit* 51.

⁶²See, for example, reg 20Q of the Commerce (Import) Regulations 1940.

⁶³Goldring, Maher & McKeough *op cit* 173.

⁶⁴Shannon *op cit* 244.

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- (i) The establishment and use of uniform units of measurement⁶⁵ and uniform standards of measurement⁶⁶ of physical quantities;
 - (ii) the establishment of a National Standards Committee,⁶⁷ which consists of five members; and
 - (iii) the verification of state and territory standards of measurement in respect of physical quantities for which there is a Commonwealth standard of measurement.⁶⁸

Despite the existence of both state and Commonwealth legislation, regarding weights and measures, uniform standards have been maintained. This can be attributed to the fact that state and Commonwealth legislation deal with different areas of weights and measures and there is effective policing by the authorities.

C. Food Laws

Food laws, unlike consumer protection laws or weights and measures legislation, are not controlled by the Commonwealth. There are only state laws.

Manufactured and processed food products are controlled by a host of state regulations.⁶⁹ Although the regulations cover a wide area they are uniform in most respects.⁷⁰ Uniformity has been achieved largely in the last eight years due to the effect of the Model Food Act.⁷¹ Despite several efforts to achieve uniformity it is impossible for manufacturers to have a standard label for their product if they want to sell the product inter-state. Furthermore, the manufacturer has to consult several authorities before establishing the packaging and labelling requirements.⁷²

⁶⁵That is, the use of kilograms, metres, etc.

⁶⁶Eg a kilogram in New South Wales must be the same as a kilogram in Queensland.

⁶⁷The responsibility of the Commission is to advise the Minister of Science on areas concerning weights and measures.

⁶⁸TPC Report *op cit* 47.

⁶⁹Pure Food Act 1908 (NSW); Food Act 1981-1984 (Qld); Food Act 1985 (SA); Public Health Act 1962 (Tas); Food Act 1984 (Vic) and Health Act 1985 (WA).

⁷⁰Duggan & Darvall *op cit* 53.

⁷¹For further details on the Model Food Act see below 55.

⁷²Barnes & Blakeney *op cit* 163.

The state food laws are based largely on the National Health and Medical Research Council's (NH&MRC)⁷³ recommendations embodied in the Model Food Act. Therefore, the laws follow a similar structure and observe common principles. There are, nevertheless, several differences between the various states.⁷⁴ The common features can be summarized as follows:

- (a) Most of the states require all pre-packaged food to be labelled. Furthermore, the label must provide certain information in contrasting colour print of prescribed size. This information must be conspicuous and prominent.
- (b) The label must state the common name of the food, (which may be either a name indicating its true nature (eg coconut) or the name specified in any regulation laying down the permissible composition for an individual food product).
- (c) The label must state the name of the manufacturer, packer, importer or vendor and his business address.
- (d) There must be a disclosure if the food is a compound, blend or mixture. In addition, compositional standards of particular foods often require further disclosures when it is in the interest of consumers.
- (e) The use of words such as "pure", "imitation", or "preservative" must be in accordance with the prescribed meaning and may only be used where specifically permitted.

⁷³The NH&MRC was established in terms of the Medical Research Endowment Act 1937 (Cth). It consists of representatives from the Commonwealth; the states; various Medical colleges and universities; eminent laymen; and a representative from the Australian Federation of Consumer Organizations. One of the NH&MRC's function is to advise the Commonwealth and the various states governments on health issues. They have also assisted in the drafting of the Model Food Act. (See TPC Report op cit 54-55; for contemporary structure of the NH&MRC see E J Wright "The Development of Food Standards in Australia - An Aussie Recipe for Cooperative Federalism" (1989) 44 Food Drug Cosmetic Law Journal 251 257-264).

⁷⁴Eg margarine legislation in New South Wales prohibits the use of any artificial colouring while Victoria permits colouring without requiring any declaration on the label but the other states require a declaration if colouring is used. (See TPC Report op cit 64).

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- (f) The addition of vitamins and minerals to food, (and claims based on the presence of a vitamin or mineral), are strictly regulated.
 - (g) The 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 package meat, and food packaged on the 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.
 - (i) Misleading or false claims on labels are prohibited.
 - (j) A statement of ingredients must be provided when required by specific compositional standards.⁷⁵

The main difficulty for consumers and manufacturers is that food legislation is state-based and is not uniform.⁷⁶ Non-uniformity occurs in two respects: (i) The content of the label and compositional requirements; and (ii) the number of authorities involved.⁷⁷

⁷⁵TPC Report op cit 56-58.

⁷⁶This issue is dealt with below 50.

⁷⁷Barnes & Blakeney op cit 183.

3. FUTURE REFORM

The TPC, in its 1977 Report, investigated several issues and made recommendations. Some of these included: Uniformity; date marking; unit pricing and standardization of packaging; deceptive packaging; other labelling; and universal product codes.

A. Uniformity

"... Australian regulators are noted for their inability to make their nine regulatory clocks chime in unison."⁷⁸

Uniformity "in a country that has become a national market for many goods ...[is] an essential policy goal."⁷⁹ It has been said that the role of uniformity will:

- (a) Facilitate free flow of trade among the states.⁸⁰
- (b) Encourage manufacturers to expand their markets and, consequently, promote competition. This can benefit consumers by lower prices.⁸¹
- (c) Assist manufacturers selling nationally or inter-state. This will result in manufacturers achieving economies of scale in respect of labelling. Consequently, consumers may benefit by lower prices because of savings on the part of the food industry.⁸²
- (d) Encourage wider product selection to a larger cross-section of consumers.⁸³
- (e) Allow for the efficient use of production facilities by removing the need for interruptions to production runs to meet the different labelling requirements of each state.⁸⁴

⁷⁸Pengilley & Ransom op cit 911.

⁷⁹Duggan & Darvall op cit 61.

⁸⁰ibid.

⁸¹ibid.

⁸²TPC Report op cit 9-10.

⁸³Duggan & Darvall op cit 61.

⁸⁴ibid.

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- (f) Eliminate the need for separate stock management in order to meet the different labelling requirements of each state.⁸⁵
 - (g) Ensure that deception in packaging and labelling is avoided.⁸⁶
 - (h) Minimize the cost of compliance.⁸⁷

It must be emphasized that the lack of uniformity is not due to any disagreement with policy objectives, but rather individual actions of legal draftsmen and the lack of joint action.⁸⁸ The TPC contended that non-uniformity was created by one of the following:

- (i) The imposition of different requirements by legislation in the various states.
- (ii) The imposition of additional requirements by many states.
- (iii) Despite an agreement on uniform legislation, some states are slower than others to bring it into force.
- (iv) In spite of uniform legislation, administrative interpretations differ between states.⁸⁹

The state authorities have acknowledged that there is a need to unify food laws. No consensus can be reached as to the method and manner of unification. The TPC investigated three alternatives".

First, the states and Commonwealth should endorse the "objective of uniformity" by making a special drive to achieve this uniformity. The way to achieve greater uniformity will be by requesting the various bodies to- (i) meet regularly with each other; (ii) consult each other on common concerns; and (iii) report regularly to the appropriate

⁸⁵TPC Report op cit 11.

⁸⁶TPC Report op cit 8.

⁸⁷ibid.

⁸⁸Duggan & Darvall op cit 61.

⁸⁹TPC Report op cit 10.

Ministers regarding the achievement of uniformity.⁹⁰

The TPC, however, negated this solution by stating that-

"special effort made within the existing machinery would be likely to be "once only". In other words there would be nothing to maintain the momentum of the initial effort and ensure it was a continuing one."⁹¹

The second alternative investigated was the enactment of Commonwealth legislation and the elimination of state-based laws. The TPC rejected this alternative on the grounds that:

- (a) There was uncertainty as to whether the Commonwealth had constitutional power to legislate in this area.
- (b) The Commonwealth and the states would have to reach agreement on which legislative framework is to apply.
- (c) There is a possibility that the states will not co-operate in the formulation and administration of such laws.
- (d) There would be a need to make changes in Ministerial responsibilities and the administrative arrangements.
- (e) All the problems do not relate exclusively to packaging and/or labelling.⁹²

Thirdly, the TPC recommended that a co-ordinated National Packaging Committee (NPC) and Ministerial Council be established. The NPC should consist of members from the Commonwealth, the six states and the two territories, industry and consumers.⁹³ The task of the NPC would be to set up a Council of Commonwealth and state Ministers, who would

⁹⁰TPC Report *op cit* 14-16.

⁹¹*ibid.*

⁹²TPC Report *op cit* 23-29.

⁹³*ibid.*

meet regularly to deal with the relevant issues.⁹⁴ An important function of the NPC should be the preparation and maintenance of up-to-date information about packaging and labelling requirements in the different states and the Commonwealth.⁹⁵

The TPC submitted that the NPC was the best alternative on the basis that it would be a "information provider". Consequently, the NPC would perform this task by assisting industry, and save costs, because it would gather information in respect of the different requirements for packaging and labelling at a central office. The TPC maintained that a central office would still be required even if labelling legislation was unified and inconsistencies (and conflicts) reduced.⁹⁶

These recommendations, however, were not unanimous. Two Commissioners, Venturini⁹⁷ and Pengilley⁹⁸, argued strongly that the only solution available was the second alternative - a new framework of Commonwealth legislation.⁹⁹ Commissioner Venturini's reason was:

"Attempts to develop state and territory laws through piecemeal legislation are the expression of a social policy which demonstrably failed in the past and foredoomed to fail. They cannot fit yesteryear's ways to tomorrow's needs."¹⁰⁰

Commissioner Pengilley's reason was the same as Commissioner Venturini's. He added, however, that the lack of uniformity was-

"not a lack of commitment by all legislative bodies to the ideal of uniformity. ... Yet uniformity has not come to pass and one must ask why."¹⁰¹

He also emphasized that the present system was, for historic reasons, "commercially unacceptable."¹⁰²

⁹⁴ *ibid.*

⁹⁵ TPC Report *op cit* 21.

⁹⁶ *ibid.*

⁹⁷ Commissioner Venturini's note of dissent: TPC Report *op cit* 291-303.

⁹⁸ Commissioner Pengilley's note of dissent: TPC Report *op cit* 304-332.

⁹⁹ TPC Report *op cit* 302 and 329.

¹⁰⁰ TPC Report *op cit* 300.

¹⁰¹ TPC Report *op cit* 317.

¹⁰² TPC Report *op cit* 321.

In 1975 the Ministers of Health, under the auspices of the NH&MRC, unanimously agreed to establish a joint working party of the Commonwealth, states and territories to draft a Model Food Act. The purpose of the Model Food Act was that it should be uniformly applied throughout Australia. In the 1980 Conference of Ministers of Health the Model Food Act was endorsed¹⁰³ and the Ministers agreed to encourage the adoption of the Act.¹⁰⁴ The Model Food Act also permits the control of food by means of regulations. Accordingly the first set of Model Food Standards Regulations were drafted by 1981 and, subsequently, superseded in 1987.¹⁰⁵ The regulations established a National Food Standards Council which is composed of the federal Minister of Consumer Affairs and the eight Ministers of Health from the states and territories.¹⁰⁶ The task of the NFSC is to establish regulations and ensure that each state and territory incorporates the regulations into domestic food laws.

Goldring, Maher and McKeough submitted that very little uniform legislation has been achieved and maintained,¹⁰⁷ but conceded that the Act cannot be adopted in its entirety because it is an-

"expression of principles which leaves room for variation in areas which include the penalties, administration and enforcement of the state Acts and Regulations to other legislation."¹⁰⁸

They further believed that the Commonwealth has "sufficient legislative power to establish a comprehensive national food and drug law including all the necessary detailed standards."¹⁰⁹ Gerkens and Gerkens¹¹⁰ also criticized the Model Food Act on the basis that no one state has enacted the legislation in the form it was endorsed by their own

¹⁰³ This is contrary to Commissioners Venturini's and Pengilley's appeal to encourage Commonwealth-based legislation.

¹⁰⁴ At present Queensland, Victoria, South Australia, Tasmania and Western Australia have adopted the Model Food Act. New South Wales was expected to pass new food legislation in 1986, so was the Australian Capital Territory. Legislation is being drafted in the Northern Territory.

¹⁰⁵ Wright *op cit* 256.

¹⁰⁶ *Ibid.*

¹⁰⁷ Goldring, Maher & McKeough *op cit* 159.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ M W Gerkens & R J Gerkens Food Law in Australia (1985) vii.

Ministers.¹¹¹ Furthermore, its acceptance in the different states has been piecemeal.¹¹² Barnes and Blakeney suggested that there is little possibility of the Model Food Act becoming uniformly accepted like the Commonwealth's weights and measures legislation.¹¹³

B. Date Marking

Presently products are packaged in a manner whereby consumers cannot use their physical senses (smell, sight, sound, taste or touch) to judge food products. Consumers would like to know about the age of foodstuffs. Open date marking is a system which informs consumers about either (a) the date of manufacture or packing ("commencement date"); or (b) the "sell by", "use by", or "best by" ("expiry date").¹¹⁴

The TPC recommended that the law should prescribe that commencement date marking should be applicable to all goods. Quality, safety or the deterioration of performance with age should be the criteria upon which selection of goods, which are to be marked with commencement dates, should be based. Furthermore, commencement date marking should be complemented with information about storage and/or the durable life of the product, where appropriate.¹¹⁵

Several states have regulated some form of open-date marking, but their approach differs, eg Western Australia¹¹⁶ has opted for either use-by date or date of packaging, while New South Wales¹¹⁷ requires use-by date marking.¹¹⁸

¹¹¹ibid.

¹¹²Barnes & Blakeney op cit 162.

¹¹³ibid.

¹¹⁴TPC Report op cit 90.

¹¹⁵TPC Report op cit 36.

¹¹⁶Food Standards Regulation 1985 (SA).

¹¹⁷Consumer Protection (Date Stamping) Regulation 1978 (NSW).

¹¹⁸Goldring, Maher & McKeough op cit 177.

C. Unit Pricing and Standardization of Packaging

Unit pricing is a statement, at the point of sale, informing consumers about the price of the product for a basic unit of measure in which that product is normally sold.¹¹⁹ Standardization occurs when either the content size (i.e. by weight or volume) or container size (i.e. by dimensions or capacity of container) is fixed for a particular product.¹²⁰ Both, unit pricing and standardization of packaging, assist consumers to make value comparisons.

The TPC recommended that standardization of packaging was a better alternative than unit pricing of all goods. Standardization, however, should not discourage innovation and development in technology. Standardization should be aimed at content size and container size. The TPC urged that unit pricing should not be extended to all consumer goods and its application should only be considered for those items where standardization of packaging is difficult.¹²¹

D. Deceptive Packaging

Deceptive packaging or slack-fill occurs when the package content is not filled to capacity. In other words, it is not full as the size of the package suggests.¹²²

The TPC recommended that slack-fill regulations should be developed in a manner that avoids consumer deception, but industry should be provided with laws that are workable.¹²³

¹¹⁹TPC Report op cit 138-139.

¹²⁰TPC Report op cit 154.

¹²¹TPC Report op cit 36-37.

¹²²H L Marquis "Fair Packaging and Consumer Protection" (1961) 18 Journal of Public Law 61 80.

¹²³TPC Report op cit 36-37.

E. Other Labelling

This deals with those aspects that are related to labelling of a product so that consumers can make informed choice about products they are purchasing.

I. Ingredient labelling.

Processed foodstuffs use a variety of ingredients. For several reasons¹²⁴ consumers would like to be informed about the ingredients present in the particular foodstuff.

In this respect the TPC recommended that there should be ingredient labelling of those items which consist of more than one ingredient.¹²⁵

II. Nutritional labelling.

Nutritional labelling is when the label of that foodstuff specifies its calorie content, amount and type of carbohydrates, fats and fatty acids, vitamins and minerals."¹²⁶

The TPC recommended that nutritional labelling should only apply to those "processed foods whose list of ingredients would allow an assessment of its nutritional value."¹²⁷

F. Universal Product Coding

Under this system each product is not individually priced, but the price appears in prominent print on the shelf where the product is stored. On the product, however, there

¹²⁴Eg special diets; health; etc.

¹²⁵TPC Report op cit 36-37.

¹²⁶Shannon op cit 248.

¹²⁷TPC Report op cit 39.

would be a code of symbols and numbers which would be scanned at the check-out. The scanner also produces a receipt with the name of the product and the price.

The TPC's recommended that universal product codes should be voluntary. But retailers should still be obliged to provide prices at the point where consumers choose between products.¹²⁸

G. The Direction

Even though a great deal of changes have taken place in Australia since the TPC Report in 1977, Pengilley and Ransom (in 1987) maintained that the only answer to the problem of non-uniformity was the introduction of Commonwealth legislation.¹²⁹ They suggest that it will be appropriate at this stage to review the efforts that have occurred in the name of "greater uniformity" and examine what has been achieved. If necessary the time may be right to jettison the idea of "inter-governmental consultation" and revise the present system by introducing Commonwealth legislation. He believes that nothing structural was done.¹³⁰

The introduction of Commonwealth legislation will most certainly assist Australian states and territories. As already mentioned, state legislation in respect of consumer protection, especially in the field of packaging and labelling, is moving in various directions. This is no fault of the states, but the fact remains that a state will only regulate when it has a problem. Furthermore, most of the states want to see how the laws work in other states before applying it locally.

A further complexity was added to the state-based rules when Australia joined the Codex Alimentarius.

¹²⁸ibid.

¹²⁹Pengilley & Ransom op cit 914.

¹³⁰ibid.

4. CODEX ALIMENTARIUS

Australia's response to the Codex Alimentarius is co-ordinated by the Commonwealth Department of Primary Industry. The Department, in conjunction with other departments,¹³¹ chairs an inter-departmental committee. Furthermore, the Department consults with other bodies such as state health authorities, industry and consumers.¹³²

The adoption of the Codex Alimentarius standards is not easy or quick¹³³ because food legislation is dealt with by each individual state or territory on the recommendation of the NH&MRC. Should food legislation become Commonwealth-based then it will become easier to implement the Codex Alimentarius standards.

5. CONCLUSION

The TPC made the following observations when explaining the existing legislative and administrative arrangements:

- (a) Packaging and labelling is not treated by Commonwealth government as a subject in its own right and many states prescribe packaging and labelling laws.
- (b) Food legislation is predominantly by state and territory not Commonwealth legislation.

¹³¹That is, Department of Health; Department of Science; Department of Business and Consumer Affairs; and the Commonwealth Scientific and Industrial Research Organization.

¹³²TPC *op cit* 60-61.

¹³³L Erwin "Regulation/Deregulation: International Changes - The Codex Alimentarius Commission" (1988) 40 Food Technology in Australia 64 64.

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- (c) The laws involved are administered by various Ministers and state bodies, independently of other Ministers and bodies in the same state and independently of Ministers and bodies in other states.
 - (d) In some areas there is established Commonwealth or state machinery that attempts to achieve uniformity.
 - (e) The degree of success in achieving uniformity varies but much remains to be done.
 - (f) The problems caused by non-uniformity are likely to be magnified in the future.¹³⁴

Has there been any progress noted since the publication of the Report in 1977? It is noted that:

- (i) Packaging and labelling are not treated separately. They exist within legislation protecting consumers- weights and measures and food laws (eg health acts, consumer affairs acts, etc.).
- (ii) There is both state and Commonwealth legislation in respect of consumer protection legislation and weights and measures. The Commonwealth and state laws often complement each other. Modern food laws, although based on NH&MRC's Model Food Act, are predominantly state legislation. There are people, especially Pengilley, who encourage the view that food laws ought to be Commonwealth legislation and not state-based. The basis for Commonwealth food laws can be justified on the basis that consumer protection and weights and measures legislation are either state- or Commonwealth-based.

¹³⁴TPC Report op cit 5-7.

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- (iii) Consumer protection legislation involves the Commonwealth's TPC, and various state and territorial authorities. The different authorities have demarcated which body is to deal with the assorted issues. The position is the same for weights and measures, although it seems that the state authorities do most of the enforcing. The enforcement of food laws is left in the hands of the state health authorities and local municipalities on the grounds that the range of regulations regarding compositional standards and labelling requirements are extensive. The other reason is that legislation is not uniform from one state to the next, because the laws are enacted by the states.
- (iv) Uniformity in respect of weights and measures has certainly been achieved. Consumer protection legislation has the potential for conflict. The Trade Practices Act settled the issue by saying that the Commonwealth legislation will be enforced above state legislation when the two conflict, otherwise the Trade Practices Act expressly gives recognition to the operation of state legislation and regulations, which achieve uniformity. An attempt has been made by the NH&MRC to achieve uniformity in food law by drafting a Model Food Act. This attempt at unifying "chaotic multi-regulation,"¹³⁵ however, has been criticized by many because each state still has the capacity to alter its provisions and pace of change.
- (v) Consumer protection legislation, although not entirely uniform, does not create problems because the issue has been settled by the Trade Practices Act. Uniformity in respect of weights and measures is heading in the right direction. Food laws, however, even after the multitude of changes and a Model Food Act, still require a great deal of work before they will achieve uniformity.

¹³⁵Goldring, Maher & McKeough *op cit* 158.

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- (vi) The lack of uniformity has certainly become magnified. Goldring, Maher and McKeough submit that the public (consumers and manufacturers) will save \$ 50 million a year if uniformity in respect of labelling requirements and compositional standards occurred.¹³⁶ Furthermore, there will be a free flow of products among the states and this will give consumers a greater variety of products.

Australia has a great potential to reform its food laws. Issues such as date marking; unit pricing and standardization of packaging; deceptive packaging; other labelling and universal product coding still have to be dealt with so that the six states and two territories have uniform requirements.

¹³⁶Goldring, Maher & McKeough op cit 159.

CHAPTER 4: ENGLAND AND WALES¹

1. INTRODUCTION

"To be forewarned is to be forearmed and so the first vital need is information. There are several sources. It is prudent to tap more than one..."²

Consumer law in England and Wales is diverse. It relates to rights which are public and private. It is criminal offences, based on public policy, that implement public rights effectively, while private rights are personal and may be pursued through the civil courts. Legislation, however, is drafted in a manner that will protect both, consumers and honest traders.³

The source of consumer law in the England and Wales can be divided into two categories: General consumer protection laws and food laws. There are several general consumer protection laws. The main laws protecting consumers can be narrowed down to (a) the Trade Descriptions Act;⁴ (b) the Weights and Measures Act;⁵ (c) the Consumer Protection Act⁶ and (d) the Fair Trading Act^{7,8} Food law is adequately covered by (a) the Food Act⁹ and (b) the Food Labelling Regulations¹⁰ enacted in terms of the Food Act.

¹ United Kingdom includes England and Wales, Scotland and Northern Ireland. The legal system and organization of local authorities in Scotland and Northern Ireland differs from England and Wales. Consequently, three sets of legislation and regulations are enacted. The difference lies in the enforcement and administration of the Acts rather than in substance.

² A Turner "Coping With Food Law" (February 1988) 63 Food Manufacture 55-55.

³ P Clayton Consumer Law for the Small Business (1983) 3-9.

⁴ Of 1968.

⁵ Of 1985.

⁶ Of 1987.

⁷ Of 1973.

⁸ Another Act that is of importance is the Food and Environment Protection Act (of 1985) which deals with emergency orders that can be issued should there be an "escape of substances that is hazardous", pesticides, etc.

⁹ Of 1984.

¹⁰ Of 1984 (No 1305).

The administration and enforcement of these Acts is multifarious. The role of central government is generally to-

"promote legislative policy, oversee the implementation of legislation and oversee the work of various government agencies."¹¹

Various bodies are established to administer the laws, while local authorities normally enforce the provisions of the Acts. When the law is breached proceedings are launched by the statutory authorities, and consumers are not required to have either knowledge of their rights or a willingness to approach the courts to seek redress.¹²

2. GENERAL CONSUMER PROTECTION

A. THE TRADE DESCRIPTIONS ACT¹³

The Molony Committee recommended that the Merchandise Marks Acts¹⁴ be simplified and consolidated.¹⁵ The Committee further recommended that the appropriate name for such an Act would be the Trade Descriptions Act. The Trade Descriptions Act was enacted in 1968. It repealed and replaced the Merchandise Marks Acts.¹⁶ The Trade Descriptions Act is wider in scope¹⁷ and more powerful,¹⁸ even though it enacts major provisions of the Merchandise Marks Act.

The Act creates criminal offences in respect of the following-

- (a) false or misleading descriptions applied to goods;

¹¹B W Harvey The Law of Consumer Protection and Fair Trading 2 ed (1982) 41.

¹²ibid.

¹³Of 1968.

¹⁴Merchandise Marks Acts of 1887, 1891, 1911 and 1953. These Acts exclude the 1926 Act. The latter was repealed and replaced by the Trade Descriptions Act 1972. Subsequently, the 1972 Act was repealed and replaced by Part III of the Consumer Protection Act 1987. The 1987 Act deals with goods that have been manufactured or produced outside the United Kingdom but carry a United Kingdom name or trade mark. Such goods must be accompanied by an indication of the country of origin. (See M J Leder Consumer Law 2 ed (1986) 172; and P Circus "Origin Marking: The New Law" (1989) 10 Business Law Review 70.)

¹⁵HMSO Final Report of the Committee on Consumer Protection (July 1962) Cmnd 1781 202. Commonly referred to as the Molony Committee Report.

¹⁶Of 1887-1953.

¹⁷HMSO Fair Trading and Consumer Protection in Britain (1978) 9.

¹⁸48 Halsbury Statutes of England 3 ed (1984) para 251.

- (b) false or misleading statements about services, accommodations or facilities;
and
- (c) false or misleading indications as to the price of goods^{19,20}

Of major concern is false or misleading descriptions applied to goods.²¹ Section 1(1) makes it an offence for a person to apply a false trade description to any goods. A "trade description" is defined as-

"an indication, direct or indirect, and by whatever means given, of any of the following matters with respect to any goods or parts of goods:

- (a) Quantity, size or gauge;
- (b) method of manufacture, production, processing or reconditioning;
- (c) composition;
- (d) fitness for purpose, strength, performance, behaviour or accuracy;
- (e) any physical characteristics not included in heads (a) to (d);
- (f) place or date of manufacture, production, processing or reconditioning;
- (g) person by whom manufactured, produced, processed or reconditioned."²²

Furthermore, in terms of s 3, a trade description has to be false or misleading to a material degree.²³

The application of s 1 is inflexible although there are defences available, eg an accident or a mistake.²⁴ A trader can also utilize a "disclaimer" to avoid liability.²⁵ A disclaimer "neutralizes the trade description," i.e. the effect of a disclaimer is as if no trade description has been made.²⁶

The provisions of the Trade Descriptions Act are enforced by the local weights and measures authorities.²⁷ Authorized officers have the power to make test purchases, to enter

¹⁹This part has since been amended and repealed by Part III of the Consumer Protection Act 1987. See below 72.

²⁰National Federation of Consumer Groups A Handbook of Consumer Law (1982) 119.

²¹Eg of false or misleading descriptions include statements as to dimension, cubic capacity, weight and number, and expressions such as "home-made", "AA tested", etc. Clayton op cit 23.

²²There are three other requirements which relate to the history of the goods.

²³Further definitions are found in ss 2-6 of the Act.

²⁴s 24.

²⁵Leder submits that a disclaimer is an effective defence in avoiding liability, "even though the Act nowhere expressly recognizes the disclaimer". Leder op cit 176.

²⁶Leder op cit 176.

²⁷s 26.

premises to inspect goods, and to seize and detain goods or documents.²⁸

A breach of the provisions of the Trade Descriptions Act is merely a criminal offence. Thus if consumers have been misled they have no redress under the provisions of the Act. Previously consumers had to proceed via the civil courts for breach of contract. Subsequently, the Criminal Courts Act²⁹ was passed. This modified the position. Section 35 of the Criminal Courts Act provides that should a court find a trader guilty of a criminal offence, it may instead of, or in addition to, holding him criminally liable, make a compensation order requiring the offender to pay the consumer compensation for-

"any personal injury, loss or damages resulting from that offence or any other offence which is taken into consideration by the court in determining sentencing."³⁰

Such orders, however, cannot be granted in favour of dependents should there be death of the breadwinner due to road accidents (i.e. exclusion of the loss of support claims).³¹ Furthermore, the magistrates' court cannot grant an order exceeding £ 2,000 as compensation in respect of each offence,³² but in the higher courts there are no such financial limitations.³³ A compensation order can be made by the court even though the injured party has not requested such an order.³⁴ The justification for introducing such orders is that it reduces the duplication of court proceedings by consumers attempting to obtain civil redress.³⁵

The advantage of the Criminal Courts Act is two-fold: (a) The Act provides for consumers to secure a cheaper and easier remedy in order to be compensated rather than proceeding via the civil courts; and (b) it facilitates future governments to create new offences for consumer issues.³⁶

²⁸ ss 27-28.

²⁹ Of 1973.

³⁰ s 35(2) of the Criminal Courts Act.

³¹ s 35(3).

³² s 40.

³³ Leder *op cit* 191-192.

³⁴ G Borrie & A L Diamond The Consumer, Society and the Law 4 ed (1981) 151.

³⁵ *ibid.*

³⁶ P Smith & D Swann Protection of the Consumer: An Economic and Legal Analysis (1979) 152.

The Trade Descriptions Act is valuable because it introduces uniformity. Furthermore, the Act is well drafted and the adopted definitions are workable and easily understood. The application of the provisions of the Act, however, has been disappointing.³⁷

B. WEIGHTS AND MEASURES ACT³⁸

The Weights and Measures Act consolidates the various Acts relating to weights and measures. The Act is divided into several parts: Part I - units and standards of measurement; Part II - weighing and measuring for trade; Part III - public weighing or measuring equipment; Part IV - regulation of transactions of goods; Part V - packaged goods; Part VI - administration; and Part VII - general.

(a) Parts I and II

One of the objectives of the Weights and Measures Act is to standardize weights and measures used in trade so consumers are not confused and find it easy to compare, (and understand), the units of measures.³⁹ Section 8 prescribes the units of weights and measures that may be used lawfully or those that are excluded from use in trade. These relate to imperial and metric units.

(b) Part IV

The Secretary of State may issue an order stating that certain goods are to be sold in fixed quantities and that the containers must be marked with those quantities.⁴⁰ In terms of s 23 the Secretary of State may promulgate regulations indicating the manner in which a container should be marked and the information to be supplied under certain conditions.

³⁷Smith & Swann op cit 154.

³⁸Of 1985.

³⁹Harvey op cit 369.

⁴⁰s 22(1)(a), (b).

Should these orders or regulations not be complied with the offender will be guilty of an offence.⁴¹ Section 26 requires the quantity of certain goods to be stated in writing.

The Act also creates general offences concerning short-weights, misrepresentation, quantity statements and incorrect statements.

(i) Short-weight

Section 28 provides that a person selling or delivering goods of-

- (a) "a lesser quantity than that purported to be sold, or
 - (b) a lesser quantity than corresponds with the price charged,
- shall be guilty of an offence."⁴²

This applies to sale of goods at any point, including retail sales,⁴³ and is governed by the general principle that "whatever is not forbidden can be done".⁴⁴ Although the Act restricts the freedom to pack goods in various weights or measures, goods excluded from specific regulations will have to comply with s 28.⁴⁵

(ii) Misrepresentation

Section 29 provides that a person making a misrepresentation-

"whether oral or otherwise as to the quantity of the goods, or does any other act calculated to mislead a person buying or selling the goods as to the quantity of the goods, shall be guilty of an offence."⁴⁶

(iii) Quantity statements less than that stated in writing

In terms of s 30(1) a person will be guilty of an offence if he provides goods whose quantity is less than that stated on the container, i.e. slack-fill. Furthermore, in terms of s 30(2) if a document supplied with certain goods⁴⁷ states an incorrect quantity the supplier is guilty of an offence.

⁴¹s 25.

⁴²s 28(1).

⁴³Harvey *op cit* 380.

⁴⁴F A Paine Packaging and the Law (1973) 32.

⁴⁵*ibid.*

⁴⁶s 29(1).

⁴⁷The Secretary of State can order that the purchaser be furnished with a document "containing a statement of the quantity of the goods in question expressed in such manner and a statement of such other particulars, ..." (s 22(h)).

(iv) Incorrect statements

This section provides that if any document furnished with the goods is found to contain an incorrect statement the person who-

"knowing, or having reasonable cause to suspect that statement to be materially incorrect, inserted it or caused it to be inserted in the document, or used the document for the purposes of this Part of the Act while that statement was contained in the document, shall be guilty of an offence."⁴⁸

Certain defences are available. These include "warranties," i.e. a trader has purchased goods from another who guaranteed that the container, (or the document supplied), reflects the correct quantity. As long as the warranty is written it may be used as a defence.⁴⁹ Other defences include reasonable precautions, due diligence,⁵⁰ subsequent deficiency,⁵¹ and excess due to precautions.⁵²

(c) Part V

Section 47 imposes a duty upon packers or importers to ensure that the prescribed packaged goods are selectively tested for their nominal quantity. Section 48 imposes a further duty upon the importer or packer-

"to ensure that the container included in the package is marked before the prescribed time and in the prescribed manner with-

- (i) a statement of quantity in prescribed units either of weight or volume, as regulations require, and
- (ii) his name and address or a mark which enables his name and address to be readily ascertained by an inspector ..."⁵³

The packer or importer is, however, protected to some extent. Such statements of quantity will not fall within the ambit of a "trade description" in terms of the Trade Descriptions Act.⁵⁴ A breach of these provisions will result in the offender being convicted of an offence under the Weights and Measures Act.⁵⁵

⁴⁸ s 31(1).

⁴⁹ s 31. Other conditions are also specified in the section.

⁵⁰ s 34.

⁵¹ s 35.

⁵² s 36. The section provides that should a offence be committed whereby the person has supplied an excess quantity then the defence that the "excess was attributable to the taking of measures reasonably necessary in order to avoid the commission of an offence in respect of a deficiency in those or other goods" is acceptable.

⁵³ s 45(1).

⁵⁴ s 45(4).

⁵⁵ s 50(1).

The enforcement of this Part of the Act is in the hands of the local weights and measures authorities.⁵⁶ Section 55, however, establishes the National Metrological Co-ordinating Unit⁵⁷ (NMCU) to oversee Part V of the Act. The NMCU consists of not less than five people but not more than fifteen people.⁵⁸ Its members are empowered- (i) to review the operation of the Act; (ii) to provide information regarding the operation of the Act; (iii) to advise the local authorities regarding their duties; (iv) to collaborate with similar bodies abroad on matters connected with the Unit; and (v) to advise on the preparation of the documents.⁵⁹ The Secretary of State has the power to amend and regulate Part V.⁶⁰

(d) Part VI

The Act is administered by the local weights and measures authorities.⁶¹ Furthermore, this part deals with appointment of inspectors,⁶² their duties and their fees.⁶³ The inspectors also acquire general powers of inspection and entry.⁶⁴ In addition, the local weights and measures authorities are empowered with the right to prosecute offenders⁶⁵ and s 84 lists the penalties.

Since the Act merely consolidates the previous Act and subsequent amendments, it does not modify the previous unsatisfactory provisions. It does, however, bring the Act in line with the European Economic Community's (EEC) Directives.⁶⁶ For this Act to have any meaning, however, it is necessary to promulgate regulations.⁶⁷

⁵⁶s 52.

⁵⁷P Circus "Consumer Law Enforcement: A National Trading Standards Service?" (1988) 9 *Business Law Review* 20
20, however, submitted that "... the creation of the NMCU has helped enormously to help traders to overcome the problems
relating to the introduction of the average system under the Weights and Measures Act (1955). It also enabled the trading
standards service to speak with one voice to Government and to international bodies. However, the NMCU is now to be
abolished as part of the Government's attack on quangos."

⁵⁸s 53(1).

⁵⁹s 56 includes further duties imposed upon the NMCU.

⁶⁰ss 65-66.

⁶¹Defined in s 69.

⁶²ss 72-75.

⁶³ss 76-78.

⁶⁴Part VII - General (s 79).

⁶⁵ss 82-83.

⁶⁶Directive 79/112 of 18 December 1978 OJ 1979 No L33/1; Directive 83/463 of 22 July 1983 OJ 1983 No L255/1 and
Directive 86/197 of 26 May 1986 OJ 1986 No L114/38.

⁶⁷Of significance is the Weights and Measures (Packaged Goods) Regulations 1986.

C. CONSUMER PROTECTION ACT⁶⁸

In protecting consumers it is necessary to avoid inherently dangerous goods, either because the goods are unsafe or they are a health hazard, from entering the marketplace. This, however, is not always done timeously. Furthermore, there is a need to prohibit the sale of such goods. This can be done by legislation and regulations. In addition, publicity needs to be given to goods that can be hazardous to health or unsafe.⁶⁹ The various consumer needs are served by the Consumer Protection Act.

The Act is arranged in five parts. These are: Part I - product liability; Part II - consumer safety;⁷⁰ Part III - misleading prices; Part IV-enforcement of Parts II and III; and Part V - miscellaneous and supplementary provisions.

(a) Part III

Part III of the Act repeals s 11 of the Trade Descriptions Act 1968⁷¹ and the Price Marking (Bargain Offers) Order⁷² ("1979 Order").⁷³

A general offence is created if a person indicates misleading prices. Section 20(1) provides:

"Subject to the following provisions of this Part, a person shall be guilty of an offence if, in the course of any business of his, he gives (by any means whatever) to any consumers⁷⁴ an indication which is misleading as to the price at which any goods, services, accommodation or facilities are available (whether generally or from particular persons)."

⁶⁸Of 1987.

⁶⁹Clayton *op cit* 50.

⁷⁰This Part is excluded from the discussion because s 10(1) specifically excludes food from its ambit. See, however, E Jacobs "The Consumer Protection Act 1987: Product Liability and Consumer Safety" (1987) 8 Business Law Review 224 and K Cardwell "The Consumer Protection Act 1987: The Enforcement of Provisions Governing the Safety of Consumer Goods" (1987) 50 The Modern Law Review 622.

⁷¹See above 65.

⁷²Of 1979.

⁷³See A A Painter "Consumer Protection Act 1987, Part III: Misleading Indications of Price" (1987) 8 Business Law Review 227.

⁷⁴Section 20(6) defines "consumers". It does seem to be a narrow definition but R J Bragg "The Consumer Protection Act 1987 - New Controls on Misleading Pricing" (1988) 50 The Modern Law Review 210 215 said that it includes person that uses the goods for private purposes and not solely for business. He gives some examples. One such example is if "a computer is used partly for business and partly to play games then it would be within the definition".

This provision creates a criminal offence that is wider in scope compared to s 11 of the Trade Descriptions Act⁷⁵ but less complex than the 1979 Order.⁷⁶

The provisions also cover the situation where an indication may become misleading after it has already been made. This offence, however, will only occur when-

- (i) the indication is made in the course of the trader's business;
- (ii) consumers are expected to rely upon such indications; and
- (iii) the trader failed to take steps to prevent consumers from relying on the indication.⁷⁷

This will apply to brochures and catalogues when there is "a increase in price during the currency of its publication."⁷⁸ The offender is penalized by having to pay a fine on summary conviction or conviction on indictment.⁷⁹ The value of the fine is limited by statute.

"Misleading" is defined in s 21. This section creates various presumptions. Painter⁸⁰ summarizes the presumptions as follows-

- (i) "a price indication is misleading if it is less than the price in fact is;⁸¹
- (ii) if the applicability of the price depends on facts or circumstances and the circumstances are wrongly represented (or not stated), the indication of that price becomes misleading;⁸²
- (iii) if a price indication does not include matters for which an additional charge is made it is misleading;⁸³
- (iv) where it is wrongly suggested that prices will be increased, reduced or will remain the same irrespective of any time or amount which may be stated, and consumers rely on such a suggestion, an offence may be committed; or
- (v) if the facts or circumstances on which consumers might reasonably judge the validity of any price comparison made or implied by the price indication are not in fact what they are the indication may be judged to be misleading."

⁷⁵Includes services, accommodation and facilities which was previously excluded in s 11.

⁷⁶Bragg *op cit* 210.

⁷⁷s 20(2).

⁷⁸Painter *op cit* 227.

⁷⁹s 20(4).

⁸⁰Painter *op cit* 225.

⁸¹This deals with understated prices on shelves; price lists; etc.

⁸²Eg surcharge; discounts; etc.

⁸³Eg value added tax or postage and packaging charges.

To encourage self-regulation the Act empowers the Secretary of State, (in consultation with the Director-General of Fair Trading⁸⁴ and other persons), to approve of and establish voluntary codes of conduct.⁸⁵ The codes may relate to the application of s 20 and the promotion of desirable practices in indicating price.⁸⁶ Though it is made clear that a contravention of the approved code will not result in a criminal offence or a civil wrong, it can be used to indicate that the offender committed the offence or negate the offender's defence.⁸⁷ In turn, compliance with the code can be used to indicate that an offence has not been committed or a defence has been made out.⁸⁸

Voluntary codes are not always feasible. Occasionally it is necessary to legislate. The Secretary of State, (in consultation with the Director-General of Fair Trading and other appropriate persons), is empowered to promulgate regulations. Areas that can be regulated include-

- (i) the circumstances and manner in which a person indicates a price;
- (ii) the circumstances and manner in which other matters may be indicated which will result in the price being misleading; or
- (iii) facilitating the enforcement of s 20 or any other regulations.⁸⁹

(b) Part IV

The enforcement of Part III is once again in the hands of the local weights and measures authorities,⁹⁰ though their powers under this Act are restricted.⁹¹

⁸⁴ See below 75.

⁸⁵ s 25(1).

⁸⁶ *ibid.*

⁸⁷ s 25(2). Painter *op cit* 228.

⁸⁸ Painter *op cit* 228.

⁸⁹ s 26(1).

⁹⁰ s 27.

⁹¹ ss 28-35.

The Act is regarded as an improvement to s 11 of the Trade Descriptions Act and the 1979 Order. It has, however, been suggested that traders should not abuse the freedom contained in this Act. Continued abuses may result in the Secretary of State tightening the regulations.⁹²

D. THE FAIR TRADING ACT⁹³

Various pieces of legislation were enacted to protect consumers from objectionable marketing and promotional practices. This resulted in two problems: (a) Legislation was piece-meal and scattered; and (b) objectionable practices developed quicker than amendments to legislation.⁹⁴ There was a need for a flexible mechanism that allowed rapid changes to occur as frequently as new objectionable practices developed. As a result the Fair Trading Act was enacted.⁹⁵

The aim of the Act is not to involve itself with individual consumer complaints but with developing-

"new procedures for formulating control and a new technique for disciplining businesses whose behaviour fails to match suitable standards."⁹⁶

This does not mean that the Office of Fair Trading (OFT) is unwilling to hear consumer complaints. The OFT will hear complaints in order to review a trader or trading practices.

(a) Part II

The Fair Trading Act establishes a Director-General of Fair Trading and the Consumer Protection Advisory Committee (CPAC).⁹⁷

⁹²Painter *op cit* 229.

⁹³Of 1973.

⁹⁴R Cranston *Consumers and the Law* 2 ed (1984) 336.

⁹⁵*ibid.*

⁹⁶*A Handbook of Consumer Law op cit* 132.

⁹⁷ss 1 and 3.

I. Director-General of Fair Trading

The Director-General is appointed by the Minister of Consumer Affairs. The office is government financed. The Director-General's duties include-

- (i) to keep a watch on trading practices;
- (ii) to report bad trading practices to the Minister and to recommend action;
- (iii) to take action against traders who are persistently unfair to consumers;
- (iv) to encourage trade associations to produce voluntary codes;
- (v) to publish information and advice for consumers;⁹⁸ and
- (vi) to be responsible as directed by other Acts.⁹⁹

One of the duties of the Director-General is to review commercial activities that are detrimental to consumers. The activity may adversely affect economic (or other, i.e. health, safety, etc.) interests of consumers. The Director-General discharges the duty by collating the various complaints made to different departments and bureaus. Once the data is collated he can recommend a course of action to the Minister of Consumer Affairs or any other Minister.¹⁰⁰ Accordingly, legislation can be influenced by the OFT.

The Director-General can, in terms of Part II, review complaints lodged against a practice or a trader and the OFT can draw up proposals and make recommendations to the CPAC in respect of the practice or individual trader.¹⁰¹

II. Consumer Protection Advisory Committee (CPAC)

The CPAC consists of fifteen independent members who are appointed by the Secretary of State. They may be full-time or part-time members.¹⁰²

⁹⁸ A Handbook of Consumer Law *op cit* 131.

⁹⁹ These include the Competition Act 1980, Restrictive Trade Practices Act 1977 and Consumer Credit Act 1974.

¹⁰⁰ s. 2.

¹⁰¹ Part II - s 14.

¹⁰² s. 3.

A matter has to be referred to the CPAC by the OFT, the Minister or the Secretary of State. The CPAC's duty is to consider proposals, which includes representations made by interested parties, and to weigh up the OFT's recommendations.¹⁰³ A trade practice has to be detrimental to consumers before the CPAC will declare it to be objectionable. The test is two-fold:

- (i) Does the practice adversely affect the consumer's economic interest?¹⁰⁴
- (ii) Does it have the effect of misleading the consumer, pressurizing the consumer to enter into the transaction, or has the consumer entered into contracts that incorporate unfair contract terms?¹⁰⁵

The CPAC could either accept, reject or modify the recommendations of the OFT. If the recommendations are accepted (or modified to some extent), it is likely that the Secretary of State will draft an order that corresponds with the recommendations.¹⁰⁶ The order is enforced by the local weights and measures authorities.¹⁰⁷

The Fair Trading Act only creates criminal offences. The penalty is either summary conviction or a fine not exceeding a set limit or a conviction on indictment and a fine or imprisonment.¹⁰⁸ The legislature did not take the opportunity of creating a remedy whereby consumers can be personally compensated by the offender for damages suffered.¹⁰⁹

The orders have also been criticized as being ineffective because (a) the procedure is time consuming and inflexible; (b) the CPAC is a consultative body rather than legislative; and (c) the government's discretion is often confined to the OFT's recommendations.¹¹⁰

¹⁰³ s 14.

¹⁰⁴ This phrase only examine economic loss and will not consider health or safety interests (s 14(1)).

¹⁰⁵ s 17(2).

¹⁰⁶ s 22.

¹⁰⁷ s 27.

¹⁰⁸ s 23.

¹⁰⁹ *ibid.*

¹¹⁰ Cranston *op cit* 338.

(b) Part III

The Swedish experience with "cease and desist" orders have been reproduced in Part III of the Fair Trading Act. This part discourages the continuation of objectionable trade practices by making them unprofitable. Previously businesses continued with objectionable conduct even after prosecution. The reason was attributed to apathy on part of consumers in claiming civil redress and/or the fact that traders found it worthwhile paying the fine and carrying on with the practice. With the introduction of the "cease and desist" order the continuation of such practices is prevented.

The Director-General can request an assurance from a senior executive of a company or individuals that the offender will cease such objectionable conduct. The test for objectionable conduct is two-fold:

- (i) Is the conduct detrimental to the interests (including economic, safety, health, etc.) of the consumer?
- (ii) Can it be regarded as unfair?¹¹¹

If the trader is willing to give an assurance and, thereafter, comply with the assurance the matter comes to an end. If, however, the trader fails to give an assurance or comply with it, the Director-General has the power to obtain an order from the Restrictive Trade Courts or the county courts.¹¹² The order is specifically against the objectionable trade practice and it will include substantially harsh penalties (and imprisonment of senior officials of the company) if the order is not complied with.¹¹³ The motive behind the order is not to penalize past wrongs or to "appropriate illegal profits that have accrued,"¹¹⁴ but it is to be prospective, i.e. to halt such objectionable behaviour in the future.

¹¹¹s. 34(1).

¹¹²s. 35.

¹¹³Cranston *op cit* 350.

¹¹⁴Cranston *op cit* 352.

The "cease and desist" order is seen as a legal remedy that improves consumer protection. The order, however, needs to be extended to apply to all types of objectionable behaviour rather than those merely declared criminally offensive.¹¹⁵

(c) Part X

Part X introduces a novelty in England and Wales legislation. Section 124(2) requires the OFT to encourage associations to prepare voluntary codes of practices. This section has been used fairly frequently. Some codes, however, are not sanctioned by the OFT but are complied with by the members of the association.

The advantages of voluntary codes are obvious. For example, they minimize the need to approach the courts and reduce the demand on public resources. Their disadvantages include a heavy reliance on self-regulation and co-operation,¹¹⁶ and problems with enforcement.¹¹⁷

The Fair Trading Act has introduced novel concepts, but these often contain certain disadvantages, eg the lack of provisions that compel offenders to compensate consumers without proceeding via the civil courts, CPAC has limited powers, and so on. Some limitations will always exist in legislation but that is no reason why the novel concepts introduced by this Act should be negated. The aim should be to protect consumers from objectionable practices.

3. FOOD LAW

The primary statute dealing with food laws is the Food Act¹¹⁸. In addition various regulations have been promulgated to give effect to the Act. These include regulations

¹¹⁵Cranston *op cit* 335.

¹¹⁶K Puttick "Trading Fairly: Would A 'General Duty' Help?" (1968) 7 *Business Law Review* 299-299.

¹¹⁷See also Cranston *op cit* 59-62.

¹¹⁸Of 1984.

concerning food labelling¹¹⁹ and the control of additives.

A. FOOD ACT¹²⁰

The Food Act, which came into force on the 26 September 1984, consolidated¹²¹ the earlier Food and Drug Acts¹²² and various other Acts.¹²³ The Act consists of several parts. Of relevance is: Part I - which covers food generally; and Part VI - which deals with administration, enforcement and legal proceedings in terms of the Act.¹²⁴

The aim of the Act is to protect consumers.¹²⁵ It does so by creating general criminal offences in Part I of the Act. These offences fall under the following categories: Preparation or sale of injurious foods (i.e. adulteration); compositional standards; false descriptions of food; sale of unfit food (i.e. contaminated food); and hygiene matters.

I. Preparation or sale of injurious foods

Section 1 of the Act creates the offence of preparing or selling adulterated foods for human consumption. Food is adulterated when- (i) a substance is added; (ii) a substance is used in the preparation of the food; (iii) a substance is abstracted from food; or (iv) a process or treatment of food is used, such that it is injurious to consumer health.¹²⁶

The test for whether a specified food is injurious to health takes into account the "probable effect" of that food on the health of an adult. This test also extends to the

¹¹⁹Of 1984 (No 1305).

¹²⁰Of 1984.

¹²¹The 1984 Act does not deal with offences relating to drugs.

¹²²Of 1955-1982.

¹²³These include the Sugar Act (of 1956), the Food and Drug (Milk) Act (of 1970), European Communities Act (of 1972) (s 7(3) and (4)); Local Government Act (of 1972) (s 198) and Local Government (Miscellaneous Provisions) Act (of 1982) (Part IX).

¹²⁴The other parts include milk, dairies and cream substitutes (Part II); markets (Part III); sale of food by hawkers (Part IV); sugar beet and cold storage (Part V); and general and supplementary (Part VII).

¹²⁵A Turner "The Development and Structure of Food Legislation in the United Kingdom and its Interaction with European Community Food Laws" (1984) 39 *Food Drug and Cosmetic Law Journal* 430 431.

¹²⁶Eg "a piece of green straw is found in a bottle of milk, although unpalatable, is apparently harmless, but nevertheless sufficient to contaminate milk." (*A Handbook of Consumer Law* *op cit* 113).

cumulative effect of consumption on invalids or children and not only healthy adults.¹²⁷

In addition, a person is guilty of an offence if he sells food which is not of the nature, substance or quality demanded.¹²⁸ To contravene the Act, however, the sale has to "obviously prejudice" the purchaser, for example, by requiring the purchaser to return or throw away the spoilt food. "Prejudice" also covers "any injury or damage suffered by the purchaser which can be linked to the purchase."¹²⁹ It is not an offence, however, if the seller brought to the notice of the purchaser that the goods are not of the nature, substance or quality demanded (eg the manufacturer claims on the label that the food is sub-standard).¹³⁰

Section 3 provides that-

(i) if there was no fraud, and

(ii) proper notice or labels with appropriate details have been supplied, then the "offender" has a defence.¹³¹ When some extraneous matter is found in the food the offender can defend the charge by claiming that the "presence of the matter was an unavoidable consequence of the process of collection or preparation."¹³² Clayton submits that in employing this defence it may be difficult to discharge the burden of proof but it can be used as an explanation in mitigation.¹³³

II. Compositional standards

A device used to avoid consumer fraud is to ensure that products described by a particular name have a fixed composition.¹³⁴ Once a compositional standard is established

¹²⁷ *Cullen v McNair* (1908) 99 LT 358. (Referred to in *A Handbook of Consumer Law* *op cit* 113).

¹²⁸ s 2.

¹²⁹ *A Handbook of Consumer Law* *op cit* 114.

¹³⁰ s 4 (1) *Halsbury Statutes of England* 3 ed (1984) 478.

¹³¹ s 3(1).

¹³² s 3(2).

¹³³ *A Handbook of Consumer Law* *op cit* 115.

¹³⁴ D J Jukes *Food Legislation in the United Kingdom: A Concise Guide* 2 ed (1984) 4.

for a particular product then that is called a "reserved description" and it can only be used to describe goods conforming to the standard.¹³⁵

Ministers¹³⁶ have the power to promulgate regulations for various categories of food. Regulations cover the setting of compositional standards and the process or treatment that may, or may not, be used.¹³⁷ The regulations will be promulgated if it is expedient and if it is (i) in the interest of the public; (ii) for the protection of the public; or (iii) required in terms of United Kingdom's obligation to the EEC.¹³⁸ The power to establish standards has been used extensively by the Minister.¹³⁹

The Food Standard Committee¹⁴⁰ (FSC) is entrusted with the task of making recommendations regarding the regulation of compositional standards. The FSC takes various factors into account when setting compositional standards, eg nutritional importance, its value either in diet or the marketplace; the potential for adulteration; and the necessity to frustrate inferior and debased products from entering the marketplace.¹⁴¹ Despite its importance, Cranston commented that compositional standards have been governed in an ad hoc manner. His justification for this view was that primary foods, eg breakfast cereals, are left uncontrolled while minor products, eg salad creams, have reserved compositional standards.¹⁴²

An apparent advantage of compositional standards is that it makes the task of implementing and enforcing food laws much simpler. The manufacturer is aware of what is required from him and once his products comply with the standard he will not be prosecuted. The problem, however, is that very few infringements are prosecuted. This can

¹³⁵ ibid.

¹³⁶ These include the Minister of Agriculture, Fisheries and Food (MAFF), the Secretary of State for Social Services and the Secretary of State for Wales.

¹³⁷ s 4 sets out the other categories.

¹³⁸ s 4(1).

¹³⁹ Eg Food (Control of Irradiation) Regulations (of 1967) (and amendments); Sweeteners in Food Regulations (of 1983) (and amendments); Food Labelling Regulations (of 1984) (and amendments); etc. (See 54 (1) Halsbury Statutes of England 3 ed (1984) 482).

¹⁴⁰ See below 110.

¹⁴¹ Cranston op cit 326-327.

¹⁴² ibid.

be attributed to poor detection or the failure to prosecute by enforcing authorities.¹⁴³

The current trend, however, is to reduce the number of compositional standards (i.e. establish standards for basic products only). This will enable manufactures to produce a multiplicity of products.¹⁴⁴ Thus the authorities introduced full, informative labelling to prevent consumer fraud.¹⁴⁵

III. Labelling

Section 6 makes it an offence for a seller to display or sell food that has a label, wrapper or container attached to it which (i) falsely describes the food, or (ii) is calculated to mislead as to its nature, substance or quality.¹⁴⁶ The proviso, however, is that if the seller can prove that he did not know, and could not with reasonable diligence have ascertained, that the label was false or calculated to mislead as to the nature, substance or quality,¹⁴⁷ it would be a complete defence to the offence charged. An additional offence is created if a person is party to a publication or advertisement that is either false or calculated to mislead as to the nature, substance or quality of the product.¹⁴⁸ This does not apply, however, if he did not know, and could not with reasonable diligence have ascertained, that the label was of the character mentioned or he received the publication or advertisement in the ordinary course of his business.¹⁴⁹

Section 7 provides the Minister with the power to promulgate regulations imposing labelling, marking or advertising requirements.¹⁵⁰ Ministers have frequently used this provision.¹⁵¹

¹⁴³ *ibid.*

¹⁴⁴ Jukes *op cit* 5.

¹⁴⁵ *ibid.*

¹⁴⁶ s 6(1).

¹⁴⁷ *ibid.*

¹⁴⁸ s 6(2).

¹⁴⁹ s 6(3)(b).

¹⁵⁰ s 7(1).

¹⁵¹ See below 84.

IV. Contaminated Foods

The Act also makes it an offence to supply food intended, but unfit, for human consumption.¹⁵² "Unfit" is defined as food that is "unwholesome or putrid"¹⁵³ but it need not necessarily be injurious to health.¹⁵⁴ It is a matter of degree.¹⁵⁵ Moreover, it is generally a question of fact in each case.¹⁵⁶ The defences available are: (i) The food was never intended for human consumption; (ii) at the time of despatch or delivery it was fit for human consumption; or (iii) the offender did not know, or could not with due diligence have ascertained, that it was unfit.¹⁵⁷

V. Hygiene Matters

Regulations may be promulgated to observe sanitary and clean conditions in connection with the sale of food.¹⁵⁸ The part also deals with the registration of premises, handling and transportation of food.¹⁵⁹

In terms of Part VI, s 71, responsibility for enforcing the Act lies in the hands of the local authorities.¹⁶⁰ The latter consist of two groups - the environmental health officers (EHOs) and the trading standards officers (TSOs).¹⁶¹ The EHOs are responsible for enforcing food hygiene regulations and controlling contaminated foods. The TSOs¹⁶² are responsible for labelling regulations and compositional standards for food.¹⁶³

¹⁵²s 8(1).

¹⁵³*ibid.*

¹⁵⁴Clayton *op cit* 117.

¹⁵⁵*David Greig Ltd v Goldfinch* (1961) 59 LGR 304.

¹⁵⁶*Wave v Thompson* [1885] 15 QBD 342.

¹⁵⁷s 8(3).

¹⁵⁸s 13(1).

¹⁵⁹ss 13-31.

¹⁶⁰Called the Food and Drug Authorities.

¹⁶¹Jukes *op cit* 7.

¹⁶²These are also the local weights and measures authorities.

¹⁶³Jukes *op cit* 8.

B. FOOD LABELLING REGULATIONS¹⁶⁴

The Food Labelling Regulations are measures promulgated to protect and inform consumers.¹⁶⁵ These regulations, which update the 1970 regulations and the subsequent amendments, are drafted with the view to changes in technology and to meet United Kingdom's obligations to the EEC.

The regulations are divided into the following: Part I - preliminary; Part II - presentation; Part III - food to be delivered as such to the ultimate consumer or to the caterers; Part IV - claims; Part V - offences and enforcement; and, Part VI - amendments, revocations and transitional provisions.

(a) Part II

This short part provides that "presentation of food shall not be such that a purchaser is likely to be misled to a material degree as to the nature, substance or quality of the food."¹⁶⁶ This provision does not expand s 2 of the Food Act 1984.¹⁶⁷ The emphasis lie on the presentation of the food.

(b) Part III

The principal consideration of the regulations is the labelling of foods. Paragraph 6 of the regulations provide that prepackaged foods¹⁶⁸ shall be marked or labelled with the following information: Name of the food; list of ingredients; an indication of minimum durability; any special storage conditions or conditions of use;¹⁶⁹ the name or business

¹⁶⁴Of 1984 (No 1305).

¹⁶⁵J Gray Food Intolerance: Fact or Fiction (1986) 108.

¹⁶⁶Para 4.

¹⁶⁷See above 81.

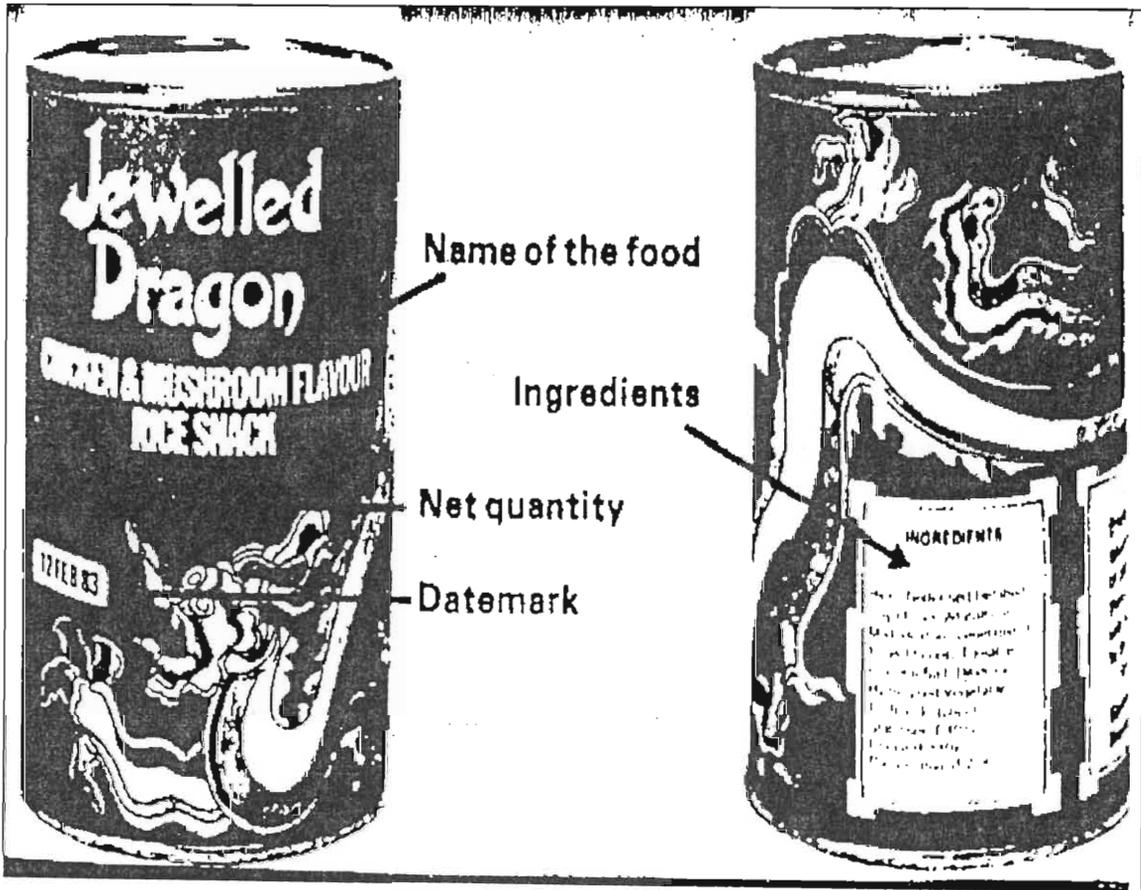
¹⁶⁸Except those specifically excluded by paras 5(2) and (3), eg cocoa and chocolate products; coffee and coffee mixtures; etc. Most of these items are specifically regulated by other agencies.

¹⁶⁹For an indication of the minimum durability to be effective it is necessary to reflect the conditions of storage so that the item can retain its freshness. For example, a typical indication on a container of yogurt will be "Best before 5 August 1989. Store in a cool, dry place." (See Figure 4).

name and an address or registered office of the manufacturer, packer or seller established within the EEC;¹⁷⁰ particulars of the place of origin of the food, if failure to give such particulars might mislead a purchaser to a material degree as to the true origin of the food; and, instructions for use, if it would be difficult to make appropriate use of the food in the absence of such instructions.¹⁷¹ The rules for non-packed and packed foods for direct sales are less demanding and are covered by paras 28 to 31.

An example of the requirements is illustrated in the following figures:

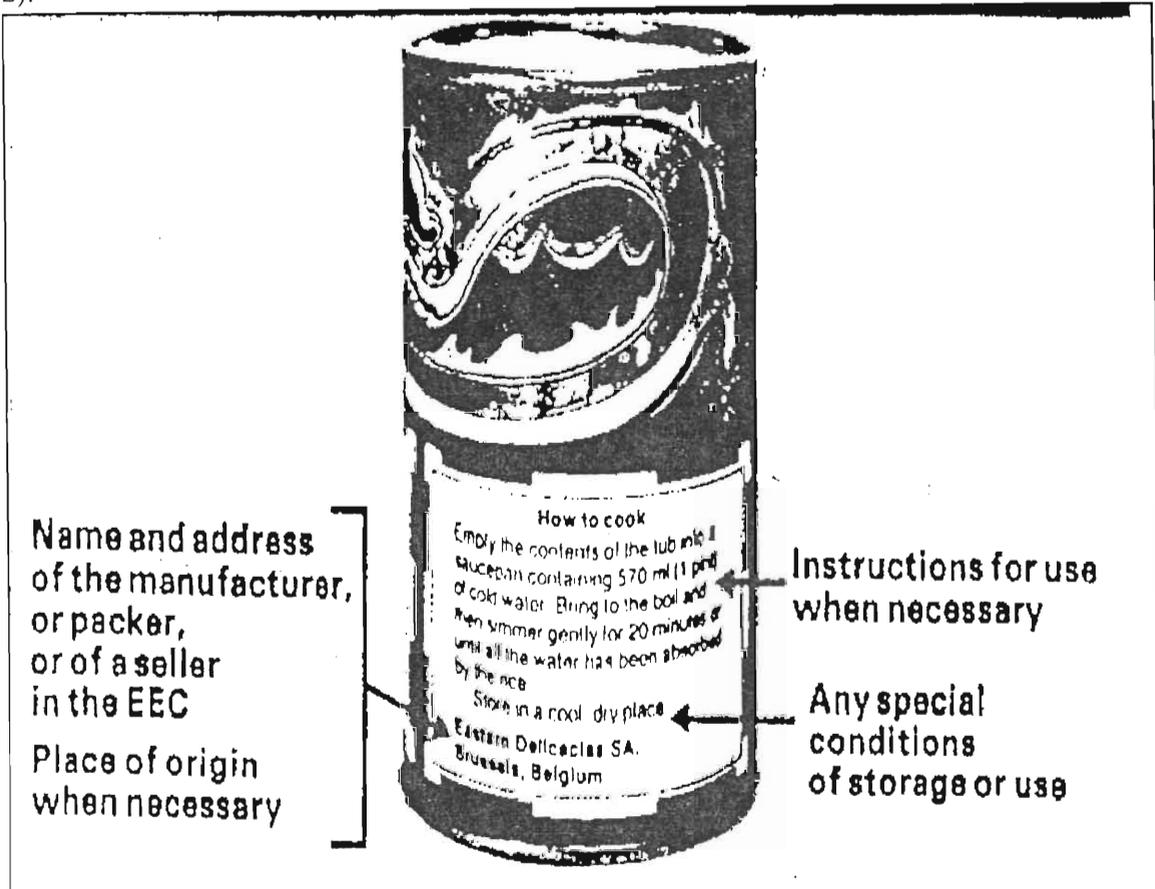
Figure 1 What a label must show:



¹⁷⁰The manufacturer, packer or seller is obliged to meet the requirements set out in the regulations and comply with certain conditions set out by the EEC. The name and address of the manufacturer, packer or seller is required to appear on the label so that the consumer is aware of who is responsible. (Gray *op cit* 113).

¹⁷¹It is necessary for the manufacturer, packer or seller to indicate instructions on how to use the food if it will be difficult to use without them, eg "boil-in-the-bagkippers are bound to go peculiar if they are fried." (MAFF *Look at the Label* (1985) 7).

Figure 1 (continued): The requirements of a label. (Source: MAFF Look At the Label 2).



(i) Name of Food

The regulations provide that prepacked foods and most non-packaged foods¹⁷² must contain the name of the food. If the food has a "prescribed name in law" that name has to be used.¹⁷³ Names are prescribed by law when they have a fixed compositional standard.¹⁷⁴ Furthermore, if a food has a specified name in Schedule 1¹⁷⁵ that name has to be indicated on the label. In addition, prescribed names or Schedule 1 names can be qualified by the use of descriptions.¹⁷⁶ The provision is used to distinguish foods with names similar to each other, eg malted milk and chocolate milk drink.¹⁷⁷

¹⁷²As defined in para 5.

¹⁷³Para 7(1).

¹⁷⁴See above 81.

¹⁷⁵Schedule 1 covers names for fish, melons, potatoes and vitamins.

¹⁷⁶Para 7(3).

¹⁷⁷Gray *op cit* 110.

Foods frequently have neither a prescribed name nor a name specified in Schedule I, in such circumstances their customary name¹⁷⁸ may be used.¹⁷⁹ A customary name is defined as "a name which is customary in the area where the food is sold."¹⁸⁰ Should there be no prescribed name or customary name, the regulations provide that an alternative may be to use a name that-

"shall be sufficiently precise to inform a purchaser of the true nature of the food and enable the food to be distinguished from products with which it could be confused, [and,] if necessary, shall include a description of its use."¹⁸¹

The regulations require not only an indication of the name of the food, but also an indication of the physical condition or treatment.¹⁸² This indication is necessary when, by omission, it will mislead the purchaser. The treatments considered in the regulations cover foods that have been powdered; dried; freeze-dried; frozen; concentrated; smoked or subjected to any other treatment.¹⁸³ Schedule 2 specifies some of the treatments that have to be included on the label, eg foods frozen with dichlorodifluoromethane which must be accompanied by the words "contact frozen with dichloride-fluoromethane".

(ii) List of Ingredients¹⁸⁴

The regulations require food to be marked or labelled with a list of ingredients. The list should have a heading that includes the word "ingredients".¹⁸⁵ Furthermore, ingredients are required to be listed in descending order of quantity. The quantity has to be measured at the "time of their use in the preparation of food."¹⁸⁶ It has been recommended that the primary ingredient should be declared in percentage terms.¹⁸⁷ The recommendation is justified on the grounds that simple ingredient listing, (by descending order of weight), is

¹⁷⁸Eg pizza, muesli and fish fingers.

¹⁷⁹Para 8.

¹⁸⁰*ibid.*

¹⁸¹Para 9.

¹⁸²Para 12.

¹⁸³Thus allowing for development of new technologies.

¹⁸⁴This discussion does not include compound ingredients (para 16), added water (para 17), or concentrated and dehydrated foods (para 14(3) and (4)).

¹⁸⁵Para 13.

¹⁸⁶Para 14(1).

¹⁸⁷Cranston *op cit* 292.

not always helpful as to the composition of the food. "By using two substances with similar functions in a food instead of one, it may appear that the primary ingredient is present in greater amounts than is really the case."¹⁸⁸

Water and volatile products, when added to other ingredients, are quantified by their use in the final product. For example, water will only be quantified when the final product is weighed and the weight of the other ingredients deducted.¹⁸⁹ The problem with such a calculation is that when a combination of water and a volatile product is used, (or when two or more volatile products are used), it will be difficult to quantify the quantity of water and the volatile ingredient.

The "name" is meant to describe the "true nature" of the food. This can, however, often be misleading. For instance, consumers are misled by the terms "flavour" and "flavoured" in respect of strawberry yogurt. The former can only be used to describe yogurt with no strawberry in it and the latter to describe a yogurt with a reasonable amount of strawberries.¹⁹⁰

The name used in the list of ingredients should be the name given to that ingredient as "if the ingredient was itself being sold as a food."¹⁹¹ If, however, the use of this name will mislead the purchaser than a description qualifying the ingredient should accompany it.¹⁹² Generic names are acceptable as long as they comply with the conditions set out in Schedule 3. For example, one of the scheduled items is "cheese". The term "cheese" can be

¹⁸⁸Cranston *op cit* 292. For example, two jams labelled in terms of the present requirements are illustrated below. They are also labelled in terms of percentages. These show that although the fruit content has remained the same, by substituting more glucose syrup for sugar in Jam 2, it may imply that Jam 2 has more fruit.

<i>Jam 1</i>		<i>Jam 2</i>	
Sugar	45%	Fruit	35%
Fruit	35%	Sugar	31%
Glucose Syrup	15%	Glucose Syrup	29%
Pectin, etc.	5%	Pectin, etc.	5%

¹⁸⁹Para 14(2).

¹⁹⁰London Food Commission *Food Adulteration and How to Beat Them* (1988) 28.

¹⁹¹Para 15(1).

¹⁹²Para 15(2).

used for any type of cheese only if "the labelling of the food of which the cheese is an ingredient does not refer to a specific type of cheese."

Additives are categorized by the function they perform. There are eighteen categories,¹⁹³ eg acids; antioxidants; flavourings; stabilizers and preservatives. A food label is required to indicate the category of additive and its specified name or serial number,¹⁹⁴ if any, or both.¹⁹⁵ If an additive does not fall within the categories specified in para 15(4), in terms of para 15(5) they can be indicated by their specified name. It is envisaged that additives can be multifunctional and in those circumstances they should be categorized according to the primary function they serve.¹⁹⁶

The regulations also specify those ingredients that need not be listed. These include the constituents of an ingredient that have become temporarily separated during the manufacturing process and are later re-introduced in their original proportion.¹⁹⁷ They also include additives which are a carry-over from another ingredient used in the food. These additives play no role in the final product,¹⁹⁸ eg cheese in canned macaroni and cheese may contain the colour annatto which need not be listed.¹⁹⁹ Also excluded from ingredient listing are those additives that are used solely as processing aids.²⁰⁰ And the final exception are those substances, (excluding water), that are used as solvents or carriers for additives.²⁰¹

Certain foods are excluded from having to list their ingredients.²⁰² These include fresh fruit and vegetables, cheese, butter, etc. However, should such foods voluntarily carry an ingredient listing they will have to comply fully with the regulations.²⁰³ This

¹⁹³ See Schedule 4 of the regulations.

¹⁹⁴ These are specified in the additives regulations. See below 98.

¹⁹⁵ Para 15(4).

¹⁹⁶ *ibid.*

¹⁹⁷ Para 18(a).

¹⁹⁸ Para 18(b).

¹⁹⁹ Gray *op cit* 111.

²⁰⁰ Para 18(c). This has been criticized by the London Food Commission. They argued that additives used as processing aids are not always of insignificant quantities (London Food Commission *op cit* 34).

²⁰¹ Para 18(d).

²⁰² Para 19.

²⁰³ Para 19(3).

prevents consumer fraud because manufacturers, who voluntarily label their products, could delete from the ingredient list those ingredients that are frowned upon.

(iii) Ingredients given Special Emphasis

Often certain ingredients are given special emphasis because of a high or low content.²⁰⁴ Such emphasis can only be made if it is accompanied by the minimum or maximum percentage of the ingredient likely to be present at the time of preparation of the food.²⁰⁵ The declaration has to be made either "next to the name of the food, or in the list of ingredients, in close proximity to the name of the ingredient in question."²⁰⁶ Special emphasis need not be made when there is a reference to the name of the ingredient in the food²⁰⁷ nor when reference is made to an ingredient used in small quantities or as a flavouring.²⁰⁸

(iv) Indication of Minimum Durability

With the advent of frozen foods, convenience foods, and innovative processes it has become necessary for consumers to be told how long food will remain fresh and safe. The need seems best served by "date marking". The regulations provide that the minimum durability of food has to be indicated by date marking. The indication should consist of the words "best before" and a date (see Figure 3). Also included on the marking or label should be any special storage conditions that are required to retain the quality of food until that date.²⁰⁹

²⁰⁴Eg "high in fibre" or "low in salt".

²⁰⁵Para 20(1) and (2).

²⁰⁶Para 20(3).

²⁰⁷Para 20(4).

²⁰⁸Para 20(5).

²⁰⁹Para 21(1).

The "best before" date is defined as "a date up to and including which the food can reasonably be expected to retain its specific properties²¹⁰ if properly stored."²¹¹ Generally, this date is expressed in terms of the day, month and year.²¹² But if the food is expected to retain its specific properties for three months or less, it would be sufficient to indicate only the day and the month.²¹³ Furthermore, if the food is expected to retain its specific properties for more than three years only the month and year need to be indicated and the words "best before" must be replaced by "best before end" (see Figure 5).²¹⁴

The date marking has to be indicated in the designated place. The date and year may be indicated separately from the words "best before" or "best before end" as long as there is an indication on the label that the consumer is expected to locate the date at a different place (see Figure 5).²¹⁵

A minimum durability date is optional in perishable foods that are intended for consumption within six weeks. Here, however, a "sell by" date must be used (see Figure 4). This is an indication of the latest recommended date of sale and is expressed in terms of the day and month. In addition, the manufacturer, packer or importer is required to indicate the period for which the food may be stored after purchase. The storage conditions must also be indicated.²¹⁶ The indication may appear on the label or the label may inform the consumer that the indication is to be found elsewhere on the package.²¹⁷

There are several foods that are exempt from bearing an indication of minimum durability.²¹⁸ Some of these include foods with a minimum durability of more than eighteen months,²¹⁹ edible ices,²²⁰ cooking salt,²²¹ deep frozen foods,²²² etc. These

²¹⁰Eg colour, texture and safety.

²¹¹Para 21(1)(a).

²¹²Para 21(2).

²¹³Para 21(2)(a).

²¹⁴Para 21(2)(b).

²¹⁵Para 21(3).

²¹⁶Para 21(4).

²¹⁷Para 21(5).

²¹⁸Para 22.

²¹⁹Para 22(m).

²²⁰Para 22(k).

²²¹Para 22(e).

exceptions arise because the foods are very stable or a date cannot be determined.²²³

Figure 3 "Best By" Date

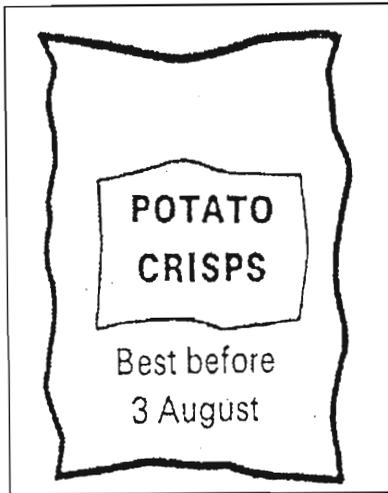


Figure 4 "Sell By" Date

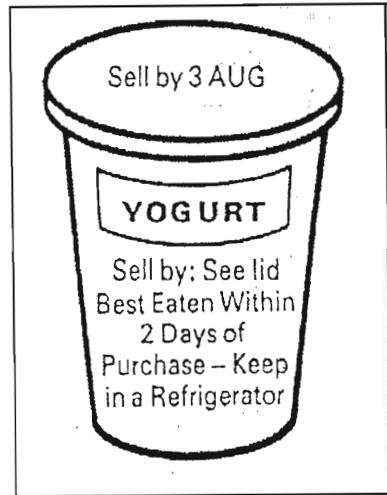
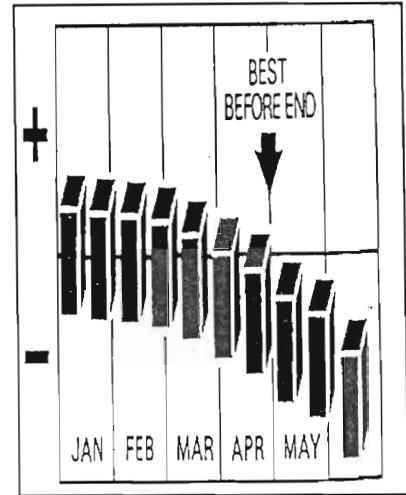


Figure 5 "Best Before end" Date



(Source: MAFF Look at the Label (1985) 5-6).

The problem with date marking is that it may lead to wastage because there is an inherent implication that to eat the food after the "best before" date is unsafe.²²⁴ Gray²²⁵ submitted that it is not illegal to sell consumers food that has an expired date mark, on condition that it does not contravene the Food Act. This means that the food must not be unfit for human consumption or mislead the consumer. Another problem arises when goods are not stored according to instructions. To counter this manufacturers often consider the worst storage conditions when determining the minimum durability of foods. This can lead to further wastage because the product lasted longer as it was stored properly, but due to the date mark it is considered unsafe.²²⁶

²²²Para 22(j). These products are exempt from date marking because England and Wales has introduced "star rating". This system informs the consumer how long they can store such foods in their freezers (Gray op cit 112).

²²³Gray op cit 113.

²²⁴Cranston op cit 295.

²²⁵Gray op cit 112.

²²⁶ibid.

(v) Omission of Certain Particulars

(a) Foods that are not prepacked, packed for direct sales or "flour confectionery".

The specified foods, if packed in the manner described, are exempt from complying with the regulations.²²⁷ The exception operates in respect of foods such as white bread and flour confectionery that are required to be labelled with their names. The problem is that, for example, cakes (i.e. flour confectionery) are of varying quality and may contain additives such as tartrazine (a colourant).²²⁸

(b) "Fancy confectionery" that is individually wrapped and not enclosed in further packaging is also exempt from complying with the regulations. Only their names have to be stated. Fancy confectionery is defined to include "confectionery products in the form of a figure animal, cigarette, egg or in any other fancy form."²²⁹

(c) Problems arose with the use of additives in these excepted categories. Hence, para 26(1) provides that the listed additives (i.e. additives performing the function of antioxidants, artificial sweeteners, colour, flavour enhances, flavouring or preservatives) must be indicated as ingredients when they are contained in the foods exempted from the labelling requirements by virtue of paras 24 and 25. The list stipulated in para 26(1) is less exacting than Schedule 4, which deals with eighteen categories of additives. The list in terms of para 26(1) include those categories that contain problematic additives. For example, fancy confectionery is aimed at children and normally children are intolerant towards tartrazine.

(d) Packages having an area less than ten square centimetres are generally exempt from complying with the labelling requirements because they are too small. They are, however, required to indicate their name.²³⁰

²²⁷ Para 24(2).

²²⁸ London Food Commission *op cit* 34.

²²⁹ Para 25(2).

²³⁰ Para 27(1).

(e) Foods sold for immediate consumption are also exempt from having to comply with the labelling regulations. Foods that are exempt have been strictly defined, eg foods sold at a catering establishment; prepared meals; foods which are sold hot and are ready for consumption without any further cooking, heating or other preparation; etc.²³¹

(f) Special requirements are set out for food sold from vending machines²³² and alcoholic drinks.²³³

(vi) Manner of Marking or Labelling

Markings or labels may appear (a) on packages; (b) attached to packages; or (c) on labels that are clearly visible through packaging.²³⁴ If food is sold to a person other than the ultimate consumer, trade documents handed over before (or at delivery) of the food can be used as an alternative to labelling.²³⁵

Should a food fall within the exempted categories (where only the name is required to be marked), it is sufficient if the label is attached to the food on a ticket or a notice is displayed in the immediate proximity of the food.²³⁶

The particulars on a label has to be easily understood, clearly legible and indelible, and marked in a conspicuous position.²³⁷ Pictorial representations or other writing should not in any way obscure or interrupt the label.²³⁸

²³¹See paras 28 and 29.

²³²Para 30.

²³³Para 31.

²³⁴Para 32(1).

²³⁵Para 32(2).

²³⁶Para 33(1).

²³⁷Para 34(1).

²³⁸Para 34(2).

The information required to be disclosed in terms of the regulations is required to be within the consumer's field of vision. Where minimum durability has to be marked or labelled it has to be indicated on the label in the same place as the name of the food, unless there is a reference on the label to where the date marking may be found.²³⁹ Furthermore, the net quantity, required in terms of the Weights and Measures Act,²⁴⁰ has to appear in the same place as the name of the food.²⁴¹

(c) Part IV

Part 1 of Schedule 6 to the regulations lists those claims that cannot be made on a label.²⁴² These include inter alia: (i) Claims that a food has tonic properties and (ii) claims that food which is intended for babies is equivalent, or superior, to the milk of a healthy mother.

Part II of Schedule 6, however, lists claims that may be made on condition that specified requirements are fulfilled.²⁴³ For example, claims relating to food suitable for, or specially made for, babies or young children must comply with conditions such as:

- (i) The food must be capable of fulfilling the claim.
- (ii) If the food has been specially made for babies or young children
 - (a) the food must be marked or labelled with an indication that it is intended for babies or young children;
 - (b) the food must be marked or labelled with the prescribed energy statement; and
 - (c) when sold to the ultimate consumer, the food must be prepacked and completely enclosed by its packaging.²⁴⁴

²³⁹Para 35(1).

²⁴⁰See above 68.

²⁴¹Para 35(2).

²⁴²Para 36(1).

²⁴³Para 36(2).

²⁴⁴Part II - Schedule 6.

Paragraph 38 provides for words and descriptions that can only be used if the conditions laid out in Schedule 7 are complied with, eg "the word "cream" or any other word or description which implies that the food being described contains cream shall not be applied to any chocolate confectionery or sugar confectionery, or to any part of any chocolate confectionery or sugar confectionery, unless at least four per cent of the confectionery or part of which the word or description is applied consists of milk fat."

(d) Part V

Should a person contravene the provisions of the regulations he is guilty of an offence and liable on conviction of a fine not exceeding £1,000.²⁴⁵ The enforcing authorities are the food and drug authorities.²⁴⁶

Figure 6 An illustration of the legal requirements of a food label. (Source London Food Commission Food Adulteration and How to Beat It (1988) 28.)

PROCESSED CHEDDAR CHEESE	Description of the Food
200 gram 7.05 oz.	Weight of the food
Best Before 25 JUL	"Best before" date
Keep refrigerated	Special Storage needs
<div style="border: 1px solid black; padding: 5px;"> Added Ingredients: Water, Emulsifying salt; E331; Salt; Preservative: E220; Colour: E160 </div>	List of ingredients
G. Foodstores Ltd, Warwick St., London	Name and address of manufacturer or supplier

²⁴⁵Para 40.

²⁴⁶Para 41(1).

The regulations bring England and Wales in line with changes in the food industry and the obligations imposed in terms of the EEC Directives. A discussion on food labelling, however, is incomplete without a discussion on additives.

C. ADDITIVES

The Food Act makes it illegal for any food to contain an ingredient that will be injurious to consumers.²⁴⁷ Consequently, manufacturers cannot elect to add any additive to foodstuffs manufactured by them. The Ministers²⁴⁸ are empowered under s 4(1)(a) of the Food Act to publish regulations concerning compositional standards. One of the components of compositional standards is additives.

The Food Act is silent on the definition of "additives". It is, however, defined in the Food Labelling Regulations as-

"any substance, not commonly regarded or used as food, which is added to, or used in or on, food at any stage to affect its keeping qualities, texture, consistency, appearance, taste, odour, alkalinity or acidity, or to serve any other technological function in relation to food, and includes processing aids in so far as they are added to, or used in or on, food ..."²⁴⁹

Additives are controlled in the regulations as follows:

- (a) Indicating a list of permitted additives, which include the names of those additives that are acceptable for use.
- (b) Indicating a list of the types of food to which certain additives may be added.
- (c) Restricting the quantity of permitted additives used in a particular food. It would be an offence to produce foods with additives in excess of the limits allowed.

²⁴⁷s 1 of the Food Act.

²⁴⁸These are the Minister of Agriculture, Fisheries and Food (MAFF); the Secretary of State for Social Services; Secretary of Social Services for Wales; Secretary for Social Services for Scotland; and the Head of the Department of Health and Social Services for Northern Ireland.

²⁴⁹Para 2. The definition also specifically excludes certain items that will not be an additive, eg salt, starter cultures, herbs and spices, etc.

-
- (d) Restricting the additives that may be permitted in a compositional standard, eg in bread, jams, etc. The regulations may also include quantitative limitations.
 - (e) Controlling the manner of labelling additives.
 - (f) Restricting the use of particular additives in distinctive food groups, such as baby foods or foods for diabetics.
 - (g) Establishing purity standards for chemical compositions of the additives.²⁵⁰

An additive has to be approved before it is incorporated in the permitted additives list. This requires compliance with several steps before an additive may be permitted for use.²⁵¹ These steps are as follows: Step I -referral by Ministers; Step II - test for necessity; Step III - test for safety; Step IV - report by Food Advisory Committee (FAC); Step V - publication of proposed regulations; and Step VI - signing of regulations and their placement before Parliament.

(a) Step I

The Ministers refer the additives to the Food Advisory Committee (FAC) for several reasons: (i) General review of the additives; (ii) introduction of a new additive by a manufacturer; or (iii) an extension of conditions of current use.²⁵² In respect of a general review, the reasons for reviewing an additive may be-(a) the particular class of additives is being reviewed; (b) it is necessary to consider a further class of additives; (c) new evidence necessitates a review; or (d) the additive was being temporarily used pending further research.²⁵³

A manufacturer, intending to introduce a new additive, has to bear the cost of research. The research must investigate the need for and the safety of the additive. The

²⁵⁰G Janner "Food Additives and the Law" (September 1987) 62 *Food Manufacture* 59 59.

²⁵¹See Appendix 3 for the steps taken for approving an additive.

²⁵²MAFF "Information Sheets - Additives" *Food Facts* No 3 (1986) 2.

²⁵³*ibid.*

research must be submitted to the Ministers for referral to the FAC.²⁵⁴ The Minister informs the public, (by announcing in the media), that an additive is being investigated. Interested parties are invited to comment or give evidence to an expert committee.²⁵⁵

(b) Step II

The FAC must advise the Ministers as to the necessity for and safety of the additive under consideration.

The FAC was established in 1983 by the amalgamation of the Food Standards Committee (FSC) and the Food Additives and Contaminants Committee (FACC). The FAC has a total membership of fifteen independent experts from industry, consumer organizations, enforcement authorities, the medical world, academia and the retailing profession.²⁵⁶ The FAC has developed guidelines to assist them in their task. The FAC considers whether-

- (i) "there is a genuine demonstrable need;
- (ii) it can be established to the satisfaction of Committee on Toxicity of Chemicals in Food, Consumer Products, and the Environment (COT) that its use would not prejudice the health of consumers;
- (iii) there is satisfactory evidence that its presence would not adversely affect the nutritive value of food;
- (iv) it conforms with an adequate and appropriate specification of purity;
- (v) the quality of any additive permitted in food should, where necessary, be restricted to that which in the judgement of the Committee is needed to achieve its effect; and
- (vi) the addition of any additive to a food should be identified to the consumer to enable an informed choice to be made²⁵⁷.

²⁵⁴ ibid.

²⁵⁵ Turner op cit 432.

²⁵⁶ MAFF "Information Sheets - Additives" Food Facts No 2 (1986) 3.

²⁵⁷ Para 1. This is linked to the Committee's other function, which is to consider and recommend any labelling requirements that will be imperative to ensure that consumers are not misled as to the nature, substance or quality of the food in which an additive has been added.

²⁵⁸ MAFF "Information Sheets - Additives" Food Facts No 7 (1986) 2.

The manufacturer has to prove to the FAC that the use of the additive will be of a "clear benefit" to consumers.²⁵⁹ A clear benefit is one that cannot "be achieved by an already approved additive or other means"²⁶⁰ (eg a change in production technique). A clear benefit is achieved if one of the following needs is fulfilled:

- (i) The need for the food to be attractively presented (i.e. cosmetic need).
- (ii) The need to keep food wholesome until it is eaten (i.e. preservation and safety).
- (iii) An extension in dietary choices.
- (iv) The convenience of purchasing, packaging, storing, preparation and use.
- (v) The need for nutritional supplement.
- (vi) Any economic advantage (eg reduction of price, improvement of shelf-life, etc.).²⁶¹

The FAC can either reject or accept that there is a need for the additive. Should it establish that there is a need for the additive the FAC will call upon the COT or other expert Committees²⁶² to advise it on the issue of safety.

(c) Step III

The Committee on Toxicity of Chemicals in Food, Consumer Products, and the Environment (COT) is an independent body "which assesses and advises on the toxic risk to man of chemicals to which he is exposed from food, consumer products and the environment."²⁶³

In deciding whether an additive is safe the COT (or other expert Committees) will consider the toxicity tests carried out by the manufacturer; the likely consumption patterns

²⁵⁹MAFF Food Additives: A Balance Approach 12.

²⁶⁰ibid.

²⁶¹ibid.

²⁶²ibid.

²⁶³Other expert committees include: Advisory Committee on Pesticides; Committee on the Medical Aspects of Food Policy; Advisory Committee on Irradiation and Novel Products and MAFF's Steering Group on Food Surveillance.

²⁵³MAFF "Information Sheets - Additives" Food Facts No 2 (1986) 4.

by certain sectors of the community (eg children and the elderly) and any other evidence including research carried out by the British Industrial Biological Research Association (BIBRA) or other research groups; recommendations of the Joint FAO/WHO Expert Committee on Food Additives (JECFA); and the EEC's Scientific Committee for Food.²⁶⁴ All this information is carefully scrutinized for any factors that may affect the safety of the additive.

It has been submitted that should an additive be found to be unsafe it will not be permitted as an approved additive, irrespective of the need.²⁶⁵

(d) Step IV

The COT's advice is considered by the FAC which then makes a final recommendation to the health and food Ministers. The FAC's recommendations may include:

- (i) Rejection of the submission (with reasons);
- (ii) a failure to recommend, pending supply of further information on either need or safety;
- (iii) temporary permission for a specified period, after which the additive will be reviewed; or
- (iv) acceptance of the submission but, if applicable, with limitations on the quantity used and/or the foods to which it is added.²⁶⁶

The Ministers are not bound by the recommendations made by the FAC. It is only an advisory body. The Ministers, however, can consult all interested parties and propose regulations that permit the use of the additive.²⁶⁷

²⁶⁴R. J. Taylor Food Additives (1980) 84 and National Dairy Council Food Additives: In Focus (1986) 13.

²⁶⁵National Dairy Council op cit 13.

²⁶⁶Taylor op cit 83.

²⁶⁷National Dairy Council op cit 12.

(e) Step V

The Ministers propose regulations. These are made public to allow for objections. Publication occurs by circulating the proposed regulations to interested individuals and organizations. Furthermore, press notices are released to the media.²⁶⁸ Any comments received are taken into account, if they are valid. If no new evidence is forthcoming the proposed regulations will be accepted by the Ministers.²⁶⁹

(f) Step VI

The Ministers sign the regulations and lay them before Parliament for forty days. Members of Parliament are given an opportunity to object to them within forty days. If there are no objections then the regulations are finalized.²⁷⁰ New additives are usually given a serial number and are controlled by MAFF.²⁷¹

The United Kingdom must not only consider domestic controls but also the EEC's Directives. The Directives contain lists of additives that member states are permitted to use for specified purposes.²⁷² Permitted additives are given "E" numbers. For an additive to be given an E number it must undergo a further process of approval laid down by the EEC. Certain additives, however, will not be permitted for use in the United Kingdom until they have been accepted by the EEC and granted an E number (eg sweeteners). The implication of an additive not having an E number is that food containing the unapproved additive may be sold domestically within the United Kingdom, but may not be exported to the members of the EEC.²⁷³

²⁶⁸MAFF *op cit* 16.

²⁶⁹*ibid.*

²⁷⁰*ibid.*

²⁷¹*ibid.*

²⁷²*ibid.*

²⁷²MAFF "Information Sheets - Additives" *Food Facts* No 5 (1986) 1.

²⁷³Janner *op cit* 59.

Food laws are developing rapidly in the United Kingdom and the development has intensified since it joined the EEC.²⁷⁴ The trend appears to be towards informative labelling, i.e. full ingredient listing together with percentage declarations of the major ingredients in a product.²⁷⁵ This reduces the demand for compositional standards. In addition, there seems to be a preference for self-regulation by commerce and industry. Self-regulatory codes, however, have no legal standing. They are preferred by businessmen because they minimise the resources required to enforce legislation; are less annoying to industry; and supposedly protect the consumer.²⁷⁶

4. CRITICISMS

The aims of the food laws, applicable in England and Wales, are contradictory. Some regulations are there to counteract consumer demands and others respond to the needs of manufacturers and retailers. The laws, though noteworthy, are not free from criticism. These criticisms include:

- (a) Food laws lack a coherent and a co-ordinated food policy.²⁷⁷
- (b) The lack of regular monitoring of the laws has resulted in the renewal of food adulteration. This has occurred despite the established enforcement agencies.²⁷⁸
- (c) At present most food scientists are employed by industry. Thus there is a shortage of independent food scientists who can pronounce on the issues without any personal interest in the outcome.²⁷⁹

²⁷⁴Turner op cit 443.

²⁷⁵ibid.

²⁷⁶Turner op cit 445.

²⁷⁷London Food Commission op cit 5.

²⁷⁸London Food Commission op cit 10.

²⁷⁹ibid.

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- (d) The introduction of the Official Secrets Act²⁸⁰ results in the disclosure of insufficient information.²⁸¹
- (e) Departments that are responsible for food laws and consumer protection are scattered and their functions often overlap.²⁸²
- (f) There is a need for greater awareness in respect of how foods, and their ingredients, are produced.²⁸³ The position is further exacerbated²⁸⁴ because of the lack of independent food scientists who can act on behalf of consumers.²⁸⁵
- (g) Consumers hear about new developments too late. The government committees, (such as FAC and COT), have already made their recommendations by the time the new developments are publicized. It is too late for independent bodies to make a meaningful impact on the decisions.²⁸⁶
- (h) The reports published regarding the safety of additives are brief and the problems not always manifest.²⁸⁷ Furthermore, consumer bodies cannot always afford acquiring photocopies of the full reports to consider the problems.²⁸⁸
- (i) While informative labelling is an improvement, it is unacceptable unless it is accompanied by high standards of ingredients.²⁸⁹

²⁸⁰ Of 1939.

²⁸¹ London Food Commission op cit 36.

²⁸² Harvey op cit 41.

²⁸³ London Food Commission op cit 12.

²⁸⁴ This is true not only for England and Wales but other countries as well.

²⁸⁵ ibid.

²⁸⁶ London Food Commission op cit 21.

²⁸⁷ ibid.

²⁸⁸ ibid.

²⁸⁹ London Food Commission op cit 35.

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- (j) There is a lack of enforcement and the emphasis is not on prosecutions but on reaching agreement.²⁹⁰ Mistakes in complying with the law arise due to a misunderstanding or misinterpretation of expansive and complex laws. It is more sensible to advise manufacturers of the laws than to prosecute offenders for minor breaches.²⁹¹ The problem, however, is that unscrupulous manufacturers may take advantage of the agency's policy not to prosecute.
- (k) Local authorities are the enforcing agency. Different local authorities encounter different conditions, therefore, the application of the law is not always uniform.²⁹²
- (l) The abundance of new products, ingredients and processes results in the stretching of the enforcement agencies such as the TSOs, EHOs, and Public Analysts.²⁹³ Furthermore, the financial cut-backs in the funding of local authorities exacerbates the weakened circumstances of the local authorities.²⁹⁴
- (m) Government agencies are no longer in a position to pre-empt food related problems. In effect their reaction time to changes in the industry has been further delayed.²⁹⁵
- (n) Enforcement occurs mainly at the retail level. Consequently, detailed analyses regarding the ingredients of foodstuffs have to be undertaken. The results are not always accurate because the tests often do not consider (i) ingredients that are not expected to be in the food, or (ii) whether the listed ingredients have gone into the food. Inspectors should be permitted to enter

²⁹⁰London Food Commission *op cit* 5.

²⁹¹HMSO *op cit* 28.

²⁹²Smith & Swann *op cit* 30.

²⁹³London Food Commission *op cit* 10.

²⁹⁴*ibid.*

²⁹⁵*ibid.*

the premises where the foodstuff is being produced, not only to check the present products, but also to inspect the records of goods that have already been processed.²⁹⁶

- (o) A major problem with prosecuting an offender is that the damage has already been done.²⁹⁷ Consequently it is necessary to include recall orders in the laws to ensure that problematic foods that have entered the marketplace are removed quickly and cause as little damage as possible.

Consumers are also protected by legislation in England and Wales. The provisions discussed relate directly or indirectly to food laws. Some indirect Acts are useful to consumers, eg the Criminal Courts Act, Consumer Protection Act, etc., while other Acts hinder consumer protection, eg Official Secrets Act. Food laws are provided for directly in the Food Act 1984 and Food Labelling Regulations. The laws are complex because England and Wales do not follow a coherent policy of food law, but legislate on an ad hoc basis. Furthermore, food laws also have to comply with EEC Directives.

5. THE EUROPEAN DIMENSION

The aim of the European Economic Community²⁹⁸ (EEC) is to create a common, integrated market among its member states so that goods can be distributed within its member states without tariff and barriers to trade.²⁹⁹

"By way of background, it is necessary to bear in mind that the international framework of the Community consists of the Council of Ministers, the Commission, (which supplies the bureaucracy of the system), the European Parliament, (which at present is advisory and consultative only), and the European Court. The Court has exclusive jurisdiction in the interpretation of Community laws as between Member States inter se and also between

²⁹⁶Cranston op cit 34.

²⁹⁷Cranston op cit 334.

²⁹⁸Which consists of France, West Germany, Belgium, Luxembourg, Holland, Italy, United Kingdom, Denmark, Ireland, Greece, Portugal and Spain. Turkey still awaits acceptance into the EEC. (S Teale "The EEC Experience" (July 1987) 62 Food Manufacture 67-67).

²⁹⁹Jukes op cit 44.

Member States and their nationals inter se. It is the supreme tribunal on matters of interpretation of the Treaty of Rome and the other treaties constituting the EEC, such as the Treaty of Accession. The Council is the final decision-making body for all major Community questions, and most of its decisions are taken as a result of a proposal from the Commission."³⁰⁰

The EEC operates by establishing regulations and directives. The regulations typically deal with primary agricultural products and do not require further legislating by the various member states.³⁰¹ While the EEC directives are binding on the member states, the form and method of legislation in a particular country is to be determined by national policy. Therefore, there is a need for national government agencies to take into account the directives when legislating.³⁰² This basically requires member states to agree to common standards so that barriers to trade are eliminated.³⁰³

Food laws, and specifically food labelling and advertising, are governed by several directives established since 1979. Issues such as additives, pesticide residues, baby foods, irradiation, etc. are also covered by the EEC. An issue of importance is the control of additives in the EEC. Additive listing is a positive list, i.e. a list of additives which are permitted for specific purposes. Before granting approval of an additive, the EEC considers the reports of its Scientific Committee for Food. This Committee does not work in isolation but also considers the FAO/WHO Joint Expert Committee on Food Additives (JECFA).³⁰⁴

The United Kingdom has been a member of the EEC since 1973.³⁰⁵ Consequently, it has to ensure that its legislation conforms with the directives publicized by the Commission.

The fundamental criticisms by manufacturers in the United Kingdom has been that-

(a) the EEC has failed to recognise that there are different tastes, cultures and traits

³⁰⁰Harvey op cit 60.

³⁰¹Jukes op cit 44.

³⁰²Harvey op cit 60.

³⁰³Jukes op cit 44.

³⁰⁴MAFF "Information Sheets - Additives" Food Facts no 5 (1986) 2.

³⁰⁵Jukes op cit 44.

among the continental consumers;³⁰⁶ (b) the EEC has done nothing to eliminate the language barrier among the member states;³⁰⁷ and (c) compliance with the directives is expensive for manufacturers.³⁰⁸

6. CONCLUSION

Food laws in the United Kingdom, and especially England and Wales, relate mainly to criminal offences. Civil compensation is also authorized, but it is inadequate. Food laws can be divided into two categories: General consumer protection laws and food laws.

There are several Acts that generally protect consumers. The first Act is the Trade Descriptions Act.³⁰⁹ The Act creates offences for false (or misleading) descriptions made in respect of goods, services and facilities, or false (or misleading) indications made as to price.³¹⁰ The Act is assisted by the Criminal Courts Act,³¹¹ which allows natural persons to be compensated if they suffer harm or injury due to the offence that is being prosecuted.³¹² The importance of the provision is that the individual does not have to institute a separate action. After the offender is found guilty the presiding officer can grant compensation.³¹³ The Weights and Measures Act³¹⁴ provides for the standardization of units of measures in England and Wales. The Act protects consumers by ensuring that consumers are not confused by different units of measure and makes it easy for consumers to compare products.³¹⁵ The Consumer Protection Act³¹⁶ prevents inherently dangerous products from entering the marketplace.³¹⁷ The Act also covers misleading or false prices.³¹⁸ The final Act considered was the Fair Trading Act.³¹⁹ The Act establishes a

³⁰⁶Teale *op cit* 69.

³⁰⁷Teale *op cit* 71. The consequent problem is that the language barrier can cause difficulties with labelling.

³⁰⁸Teale *op cit* 69.

³⁰⁹Of 1968.

³¹⁰s 3.

³¹¹Of 1973.

³¹²s 35.

³¹³Cf s 300 of Criminal Procedure Act No 51 of 1977.

³¹⁴Of 1985.

³¹⁵s 8.

³¹⁶Of 1987.

³¹⁷Part II.

³¹⁸s 8.

Director-General of Fair Trading whose task it is to keep up-to-date with new and novel objectionable practices, and where possible to rule them out. The Act also establishes a Consumer Protection Advisory Group (CPAC). A common problem with most of these Acts, (except the Criminal Courts Act), is that enforcement is delegated to local weights and measures officers. Consequently, enforcement is not uniform.

The Food Act³²⁰ specifically provides consumer protection in respect of injurious or harmful foods. The Act creates criminal offences if adulterated or injurious foods is sold. It also provides for compositional standards and other matters. Food labelling is governed by the Food Labelling Regulations.³²¹ The regulations deal with technical issues, (eg size of lettering, contrasting colours, etc.), and the requirements of the label, (eg the name of the food, the address of the manufacturer, instructions for use, etc.). The regulations are complex but they have been acclaimed by many countries. Food additives are an integral part of food laws. The United Kingdom has specified a procedure that has to be complied with before an additive is approved and used in foodstuffs. The procedure is not perfect, but it is more advanced than South Africa.

The United Kingdom food laws are not without criticism, but they serve as models for many other countries, when amending their laws, (eg South Africa), or introducing new laws.

A major challenge for the United Kingdom is its commitment to the European Economic Community (EEC). It not only has to satisfy consumer demands and manufacturer needs, but also to take into account the directives and regulations issued by the EEC. Furthermore, the harmonization of the EEC countries in 1992 means that the United Kingdom will have to make amendments to its laws. In respect of food, it did so in 1984, and only minor amendments remain to be executed.

³¹⁹ Of 1973.

³²⁰ Of 1984.

³²¹ Of 1984 (No 1305).

The United Kingdom is also a member of the Codex Alimentarius. However, not much is written about its compliance with the Codex Alimentarius because its membership of the EEC predominates. The United Kingdom is also adhering to the universal trend of establishing fewer compositional standards and more full and informative labelling:

"None of us would claim that United Kingdom food law is the very best of its kind, but it must feature among the most advanced. More, importantly it works³²² ..."³²³

³²²This should be compared with the criticism made by the London Food Commission (London Food Commission op cit 4) who submitted that the United Kingdom public has lost confidence in the food policy. This has been attributed to the fact that production interests have over-riden other interests.

³²³Turner op cit 445.

CHAPTER 5: UNITED STATES OF AMERICA

1. INTRODUCTION

In the United States each state and local authority has the power to legislate in the area of food. This results in forty-nine different state laws. Thus federal legislation and regulations are vital to achieve uniformity.¹ At present the states are empowered to deal with those products that are excluded from federal legislation and they can also have separate boards of health whose primary purpose is to deal with sanitation.²

The underlying policy of food legislation is the desire to protect the consumer's health and pocketbook. Consequently all facets of food law are governed by some form of legislation, eg there is control over (a) the land on which the food is grown; (b) the safe use of pesticides; (c) the various technologies used to process foods; (d) the appropriateness and safety of ingredients which are present in foods; (e) the representation of the foods to consumers in the form of labelling and advertising; and the like.³ For this reason Schultz stated that-

"of all industries in the United States, the food industry must ... be the most regulated by law."⁴

The development of food law in the United States has relied largely on government officials to ensure that the health and pocketbook of consumers are protected. This, however, does not exclude consumer action. The consumer's role lies in deciding public policy concerning the extent and means by which the administration must be carried out.⁵

¹I D Garard The Story of Food (1974) 92.

²Garard op cit 106.

³H W Schultz Food Law Handbook (1981) v.

⁴ibid.

⁵ibid.

The United States legislation, which changes occasionally compared to regulation, is divided into separate categories of concerns. Firstly, quality and cost are dealt with by the Fair Packaging and Labelling Act (FPLA).⁶ Secondly, most food law is embodied in the Federal Food, Drug and Cosmetic Act (FDCA);⁷ Meat Inspection Act;⁸ and Poultry and Poultry Products Act.⁹ Thirdly, the enforcement of food law is entrusted to the Food and Drug Administration (FDA), Federal Trade Commission (FTC) and other agencies.¹⁰ The FDA is of fundamental importance. Fourthly, other related legislation also needs to be discussed, eg Freedom of Information (FOI) Act¹¹ and the class action established in terms of the Civil Procedure Act^{12,13}

2. THE FAIR PACKAGING AND LABELLING ACT¹⁴

Prior to 1966 packaging legislation covered "chemicals that may migrate into packaging materials" and labelling legislation was "concerned with protecting the health of the consumer as well as preventing deceptive practices".¹⁵ The lack of suitable legislation led to abuses (eg misinformation) which resulted in the consumer lobby groups pressurizing the federal government in the 1960s and 1970s to force manufacturers to disclose information about the quality and cost of products.¹⁶ This resulted in the Fair Packaging and Labelling Act (FPLA) being enacted in 1966.

⁶ 15 USCS (1982) §§ 1451-1461.

⁷ 21 USCS (1984) §§ 301-392.

⁸ 21 USCS (1984) §§ 601-695.

⁹ 21 USCS (1984) §§ 451-470. There are other Acts such as Tea Importation Act; Egg Inspection Act, etc. Since they are of minor significance and deal specifically with one particular food product they are not considered here.

¹⁰ Eg United States Department of Agriculture (USDA).

¹¹ 5 USCS § 552.

¹² Rule 23.

¹³ This is not an exhaustive list.

¹⁴ 15 USCS (1982) §§ 1451-1461.

¹⁵ S Sacharow Packaging Regulations (1979) 59.

¹⁶ Anonymous "Truth-in-Packaging Under the Fair Packaging and Labelling Act: An Untrapped Source of Consumer Protection" 6 *Columbian Journal of Law and Social Problems* 280 282. This article shall be called "Truth-in-Packaging".

Prior to 1966 the various states had legislated on these issues, but the legislation was fragmented and inconsistent. A potential advantage of federal regulation is in cases of conflict between state and federal regulations the federal regulations must prevail. The FPLA, however, provides that only when there is conflict between state and federal regulations in respect of a net quantity statement the FPLA will prevail.¹⁷ Despite this provision, the outcome is uniformity of standards which encourages the free-flow of goods throughout the country.¹⁸

The Congressional statement of policy provide that:

"Informed consumers are essential to the fair and efficient functioning of a free market economy. Packages and labels should enable consumers to obtain accurate information as to the quantity of the contents and should facilitate value comparisons. ..."¹⁹

To advance this policy the FPLA makes it unlawful to distribute any "consumer commodity"²⁰ if the packaging or labelling of the product fails to conform with the requirements laid down in the Act.²¹

A. PROVISIONS

The substantive provisions of the FPLA are divided into two parts: mandatory provisions²² and discretionary regulations.²³ The Act, further provides for regulation concerning the location, type, size and other features of the label.²⁴

I. Mandatory Provisions

There are four mandatory provisions:

¹⁷ § 1461.

¹⁸ Truth-in-Packaging *op cit* 282.

¹⁹ § 1451.

²⁰ Which is defined to include products such as food, drugs and cosmetics but excludes meat, poultry or their products.

²¹ § 1459.

²² § 1453.

²³ § 1454(c).

²⁴ § 1453. Also see L W Stern & L Eovaldi Legal Aspects of Marketing Strategy (1984) 112.

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- (i) The label must contain an identity statement and the name and business address of the distributor.²⁵ An identity statement must contain either the product name, common or usual name, or an appropriate descriptive term used by consumers.²⁶
- (ii) An accurate net quantity statement must be separately stated on the principal display panel²⁷ in a uniform location on the label.²⁸ Such statements must be distinct and in contrasting colour compared to the rest of the package.²⁹ In addition, no qualifying words or phrases may be used in conjunction with the separate statement of net quantity. This, however, does not outlaw supplementary statements that are not part of the principal display panel and are not descriptive of net quantity.³⁰
- (iii) Depending on the weight of the package, a dual net quantity statement of contents must be provided.³¹ The dual statement, which is a separate declaration of contents in ounces and pounds, is considered to be an improvement. It does not, however, aid comparison of prices because of the diverse number of brands and proliferation of container sizes. Furthermore, the requirement of a dual content statement does not deter manufacturers from stating the contents in fractional ounces. This is significant only for small packages. Though the fractional ounce is often misused by manufacturers, it cannot be abolished because the FPLA does not empower the federal agencies to regulate this aspect.

²⁵ § 1453(a)(1).

²⁶ Sacharow *op cit* 53.

²⁷ This is defined by the Food and Drug Administration (FDA) and is dependent on the size and shape of the package.

See Sacharow *op cit* 53.

²⁸ § 1453(a)(2).

²⁹ Sacharow *op cit* 53. Also see § 1453(3)(B).

³⁰ § 1453(t).

³¹ § 1453(a)(3)(A).

- (iv) If the quantity is given in servings, the net quantity of each serving must be stated.³² Consumer confusion, however, still occurs when manufacturers affix supplementary information on the principal display panel of the package.

II. Discretionary Regulations

The FPLA empowers the authorized federal agencies to regulate on several issues. These regulations may be to:

- (i) Define and establish standards for size characterization³³ used to supplement the net quantity statement.³⁴ By introducing such a measure the authorized agency can strive to prevent consumer confusion from occurring when descriptive terms regarding quantity accompany net quantity statements. Unfortunately, this does not solve the problem because manufacturers simply exclude the use of such designations on their labels. A further problem is that each product category has to be regulated individually.³⁵ Furthermore, this measure was not introduced to avoid proliferation of sizes of packages.³⁶
- (ii) Control (but not to prohibit) "cents-off" promotions.³⁷ Cents-off promotions occur when retailers secure discounts from manufacturers, who mark the labels of their products with "X cents off". This promotional tool has been abused by manufacturers who extend the time period of the offer so that the "reduced" price becomes the regular price with the label "X cents off". Moreover, abuses occur when retailers are unwilling to pass the benefit to consumers or give the impression that the commodity is being sold at a special price.³⁸ Once again the FPLA only provides authority to control

³² § 1453(a)(4).

³³ Eg "small", "medium", "large", etc.

³⁴ § 1454(c)(1).

³⁵ M L Marquis "Fair Packaging and Consumer Protection" (1961) 18 Journal of Public Law 61 82.

³⁶ Marquis op cit 80.

³⁷ § 1454(c)(2).

³⁸ Marquis op cit 82.

rather than prohibit this practice.

- (iii) Require labels on products (excluding food as defined in the FDCA) to bear:
- (a) The common or usual name of such consumer commodities; and
 - (b) if the commodity consists of two or more ingredients, the common or usual name of each ingredient must be listed in order of decreasing pre-dominance, but excluding divulgence of trade secrets.³⁹

The FDA requires all ingredients to be listed together on the information panel of the label. The manner of listing the various ingredients is strictly regulated, especially for food products.⁴⁰

- (iv) Prohibit nonfunctional slack-fill.⁴¹ Slack-fill occurs when a package is not filled to its capacity as stated.⁴² In other words, it is not filled to the extent the package suggests.⁴³ There are, however, two exceptions: (a) Slack-fill occurs to protect the contents of the package; or (b) it fulfils the requirements of the machine used for enclosing the contents of such products.⁴⁴ A problem with this provision is that each commodity size has to be regulated individually.⁴⁵

Over and above the additional regulations, a further provision is made for the Secretary of Commerce to develop voluntary product standards for those commodities or class of commodities where there is an "undue proliferation of weights, measures or quantities". There are two requirements that have to be met before the Secretary can request the manufacturers, packers, and distributors (in conjunction with consumer representatives), to develop a product standard: (i) There must be an "undue proliferation"

³⁹ § 1454(c)(3).

⁴⁰ See Sacharow *op cit* 56.

⁴¹ § 1454(c)(4).

⁴² W E Forte "The Fair Packaging and Labelling Act: Its History, Content and Future" (1967-1968) 21 Vanderbilt Law Review 761 780.

⁴³ Marquis *op cit* 80.

⁴⁴ § 1454(c)(4).

⁴⁵ D P Rothschild & D W Carroll Consumer Protection Reporting Service (1973) 236.

of consumer commodities or class of consumer commodities; and (ii) it must "impair the reasonable ability of consumers to make value comparisons with respect to such" consumer commodities or class of commodities.⁴⁶ The problem with the provision is that the development of product standards is merely a request to the interested parties. Congress, appreciating the problems that can arise, further provided that should- (a) such interested parties not develop standards within one year after the date the Secretary has made such a request; or (b) the voluntary standards have been published but they are not being observed; the Secretary should report the matter to Congress and make a recommendation. Congress will consider the matter and determine whether legislation should be enacted and be enforced by the federal agencies.⁴⁷

Paragraph 1454(e) is a useful provision but unnecessary if the federal agencies were empowered, in the first instance, to deal with the situation and had the right to enforce the standards without having to involve Congress. The problem with involving Congress is the time taken which results in it becoming a political game (eg the Saccharin ban by the FDA in 1977 and the subsequent action taken by Congress).⁴⁸ It is understandable, and commendable, to involve manufacturers, packers and distributors because they may be adversely affected. Therefore, a workable solution is required but as § 1454(e) shows that involving Congress does not always work. Also, it is unnecessary to involve a further department, the Department of Commerce, to deal with such a provision when two other federal agencies are empowered to administer, regulate and enforce the provisions of the FPLA.⁴⁹ Moreover, as Sacharow commented, although most European countries have fully standardized their descriptive labelling, in USA these "concepts are still in their infancy,"⁵⁰ and have remained so today.

⁴⁶§ 1454(d).

⁴⁷§ 1454(e).

⁴⁸For further details on the Saccharin ban see L P Feldman Consumer Protection: Problems and Prospects (1980) 98

or E O'Kegan "Update of Food Regulations 1978" (1979) 34 Food Drug Cosmetic Law Journal 48.

⁴⁹§ 1454(a).

⁵⁰Sacharow op cit 59.

In addition, § 1456 makes it an offence not to comply with the FPLA mandatory provisions or the discretionary regulations.

B. ENFORCEMENT

The administration of the FPLA is divided between three federal agencies:

- (a) The Food and Drug Administration (FDA) which controls food, drug and cosmetic products;
- (b) The Federal Trade Commission (FTC) which controls other "consumer commodities" that fall outside the ambit of the FDA; and
- (c) The Department of Commerce (DOC) which controls the proliferation in the sizes of packages.⁵¹

Should there be an infringement of any of the provisions of the FPLA the infringement will be dealt with by the appropriate agency.⁵² The FPLA creates offences but no penalties and procedures to enforce the legislation. Enforcement is limited to the power granted in the FTC Act and the FDCA. The system used by the FDA and FTC is to go to court and obtain a "cease and desist" order. Critics consider the lack of effective enforcement as a discrepancy in the Act. It is a slow process for any agency to go to court to obtain a cease and desist order. This results in products that are "misbranded,"⁵³ "unfair," or "deceptive"⁵⁴ being on the shelves for many months and presumably being sold.⁵⁵

C. WEAKNESSES IN THE FPLA

Weaknesses in the FPLA exist in the wording of the Act and in certain statutory omissions. These include the following:

⁵¹Sacharow *op cit* 51.

⁵²§ 1456.

⁵³A term used for products infringing the FDCA.

⁵⁴A term used for consumer commodities falling outside the ambit of the FDCA.

⁵⁵Sacharow *op cit* 51.

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- (a) The Act, by its very nature, excludes many products. The FPLA's major concern is supermarket goods.⁵⁶
- (b) The Act provides for numerous exceptions. For example, if a consumer commodity is of the nature, form or quantity that full compliance with all the requirements is impractical or not necessary then it may be exempted from the requirements.⁵⁷ The Act further excludes meat, poultry and their products; tobacco; beverages; etc. from the ambit of its provisions.⁵⁸
- (c) The Act assumes that consumers are rational.⁵⁹ This assumption has been criticized because "it presupposes values, motivations and knowledge which do not generally exist among low income consumers."⁶⁰ It is these low income earners who normally require the protection of legislation.
- (d) Enforcement of the Act is divided between the FDA and FTC. It is often difficult for the two agencies to agree on parallel regulations.
- (e) The FTC Act prohibits unfair competition and deceptive practices in commerce.⁶¹ The FPLA does not supersede the Act. Therefore, in certain areas, due to the FPLA, the federal authority is the FDA and, due to the FTC Act, the FTC also has jurisdiction over those offences (eg slack-fill; cents-off).⁶²
- (f) Consumers often encounter difficulty in locating prices on packaged goods because the price is either absent, illegible or not in an obvious location. Furthermore, retailers frequently omit prices so that they can quote

⁵⁶Rothschild & Carroll *op cit* 237.

⁵⁷§ 1454(b).

⁵⁸§ 1459(a).

⁵⁹Marquis *op cit* 65.

⁶⁰Anonymous "Consumer Legislation and The Poor" (1987) 76 Yale Law Journal 745 754.

⁶¹§ 1460.

⁶²Forte *op cit* 781.

different prices to consumers. Marquis⁶³ criticized the Act for not making it mandatory for retailers or manufacturers to affix prices in a particular location.

- (g) Subtle deceptions can arise if pictorial representations are used on packages. This happens because manufacturers are in the habit of depicting goods with higher quality or fanciful attributes. The Truth-in-Packaging Bill provided for the agencies to regulate pictorial representation. When the FPLA was enacted, however, these powers were omitted. It has been suggested that this was a mistake.⁶⁴
- (h) Marquis submits that one significant aspect that has not been considered is the possibility of the United States converting to a metric system of weights and measures. He argues that this would achieve far greater uniformity.⁶⁵
- (i) Although the purpose of the FPLA is to promote value comparisons, consumers cannot judge on the basis of price per unit without performing time-consuming and cumbersome calculations.⁶⁶
- (j) The Act affects packers, manufacturers and distributors but excludes retailers with whom most consumers deal.⁶⁷
- (k) The effective operation of the FPLA has also been weakened by "delays". Such delays can be attributed to apathy but, more importantly, to the lack of funds. It has been said that it is not an expensive Act to administer, but lack of funds prevents it from operating effectively.⁶⁸ This may have been

⁶³Marquis *op cit* 85-87.

⁶⁴Marquis *op cit* 87-88.

⁶⁵Marquis *op cit* 72.

⁶⁶Rothschild & Carroll *op cit* 239.

⁶⁷*ibid.*

⁶⁸Truth-in-Packaging *op cit* 289.

the position in the early days of the Act. Since then, however, the FDA and FTC have grown in size, but are still not satisfactory.⁶⁹

The above are some of the weaknesses in the present FPLA. What can be done about them?

Although the FPLA has been called a "useless piece of legislation," attempts should be made to ensure that the Act works rather than to introduce new legislation. The latter will be time-consuming and costly. There are several solutions that will render the Act more effective. These are:

- (a) It has been suggested that regulations should have more teeth.⁷⁰
- (b) It will also be useful to include the concept of "unit pricing" in the FPLA. This will guarantee that consumers have an opportunity to carry out meaningful price comparisons. Unit pricing will have to be carried out by the retailer, who will have to show two prices for each product: (i) The cost of the entire package; and (ii) the cost per standard unit size of measure. Such a provision would comply with the FPLA's Statement of Policy.
- (c) It is contended that the consumer is not protected any better today than prior to the FPLA because of the lack of suitable policing of the Act. Thus it is suggested that the Act should provide consumers (or consumer groups) with the right to bring an civil action for damages under the FPLA. The consumer should be entitled to allege a violation of the FPLA in the federal courts and to sue for consequential damages.⁷¹ This will mean that class actions⁷² will be extended to apply to consumer law issues.

⁶⁹See below 161.

⁷⁰Truth-in-Packaging *op cit* 291.

⁷¹Truth-in-Packaging *op cit* 297-301.

⁷²See below 170.

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- (d) Marquis suggested that there should be a "prior approval" system for new labels. This will eliminate potential deceptions. Before a manufacturer, packer or distributor introduces a newly packaged commodity, he will have to obtain the prior approval of the federal agency concerned certifying that the new label complies with the requirements of the FPLA and its current regulations.⁷³ This will not only simplify enforcement but will also supply the regulatory authorities with the necessary machinery to prevent subtle forms of deception from occurring.⁷⁴ As a result most of the agency's time will be spent on "prior approval" rather than enforcement of the Act.

E. CONCLUSION

The FPLA does little to extend previous consumer law provisions. The impact of the legislation is more economic than legal.⁷⁵ The mandatory provisions of the Act are significant in that they satisfy the consumer's needs for particular information, especially in the area of net quantity statements.

The most novel and significant provision of the FPLA is found in § 1454, which sets out the discretionary regulations. These seek to control practices that may lead to potential abuse. Only ingredient labelling requires disclosure. Other provisions prohibit certain deceptive practices regardless of whether or not the facts have been disclosed to consumers. This means that these practices are deceptive per se regardless of disclosure.

It has been suggested that although there are inherent weaknesses in the FPLA it can be made to work, and it should be made to work, because it meets the needs of all the parties concerned. Consumers have the benefit of being fully informed about the commodity they wish to purchase; the federal government gains control over labelling

⁷³This is being done by the USDA. See below 163.

⁷⁴Marquis op cit 99-100.

⁷⁵Porte op cit 782.

practices; and, manufacturers work with uniform labelling regulations instead of products being handled on a state by state basis.

3. FEDERAL FOOD DRUG AND COSMETIC ACT⁷⁶

The first federal food legislation, the predecessor to the Federal Food, Drug and Cosmetic Act (FDCA), was the Pure Food and Drug Act 1906 ("Pure Food Act").⁷⁷ The Pure Food Act was concerned with labelling statements in respect of compositional and identity standards. It was not an all-embracing Act as it contained several lacuna.⁷⁸ Despite the criticisms, the Act was considered to be a step in the right direction because it "implements by law social change for the benefit of the entire people ..."⁷⁹ The loopholes in this Act (despite several amendments);⁸⁰ the establishment of the FDA in 1931,⁸¹ and other pressures⁸² led to the repeal of the Pure Food Act and the enactment of the improved Federal Food, Drug and Cosmetic Act (FDCA) in 1938.

The policy of the FDCA is to protect the health and the pocketbook of consumers. For this reason the Act and the court-

"endeavour to protect the public from interstate commerce in food products so adulterated as to injure or endanger health and to see to it that food products are so branded that consumers would know that there was no misrepresentation as to substance, and that food purchased was what it purported to be."⁸³

This Act aims at protecting consumers against foods that are harmful and misleading.⁸⁴ The Act requires the government to:

- (a) Investigate the manner of producing food and its ingredients;

⁷⁶21 USCS (1984) §§ 1451-1461.

⁷⁷Sacharow *op cit* 3.

⁷⁸Eg violators could not be prosecuted until 1912 when an amendment was passed.

⁷⁹H A Toulmin A Treatise on the Law of the Federal Food Drug and Cosmetic Act (1942). Reported in Schultz *op cit* 496.

⁸⁰See Sacharow *op cit* 19-20.

⁸¹Schultz *op cit* 20.

⁸²Eg support from the members of the USDA. See Schultz *op cit* 20-21.

⁸³United States v 55 Cases Popped Corn (1943, DC Idaho) 62 F Supp 843.

⁸⁴It also applies to drugs, devices and cosmetics.

- (b) research the consequences and effects of various foods;
- (c) remove harmful or misleading foods, so that they will not reach consumers;
- (d) set standards of identity and quality and prevent slack-fill; and
- (e) ensure that labelling is informative and truthful.⁸⁵

The Act does not, however, control the advertising of food unless it relates to labelling of the product.⁸⁶

The FDCA has a vast range of provisions.⁸⁷ There have also been several amendments to the Act. The fundamental provisions, however, relate to the declaration of food as being adulterated or misbranded. There are also provisions that deal with food additives;⁸⁸ colour additives;⁸⁹ food standards;⁹⁰ and labelling.⁹¹

A. ADULTERATED AND MISBRANDED FOODS

The FDCA does not define "adulteration" or "misbranding". Chapter III of the Act, however, prohibits adulteration and misbranding of food.⁹²

I. Adulterated Foods

Schultz submitted that there are four types of adulteration:

- (i) purposeful additions of substances to food for economic advantage;⁹³
- (ii) accidental, unavoidable and natural adulteration;⁹⁴
- (iii) contamination because of insanitary conditions in the manufacturing, processing, packaging or holding together of the food; and
- (iv) use of additives for technological benefits^{95, 96}.

⁸⁵ Schultz *op cit* 496.

⁸⁶ *ibid.*

⁸⁷ See Appendix 5 for a full detail of the scope of the Act.

⁸⁸ § 376.

⁸⁹ § 348.

⁹⁰ § 341.

⁹¹ 21 CFR Part 101.

⁹² § 231.

⁹³ *E.g.* adding water to milk.

⁹⁴ *E.g.* soil; mould; bacteria; etc.

⁹⁵ *E.g.* preserve the food.

The FDCA aims at regulating all these potential forms of adulteration.

The Act lists five circumstances which result in adulterated food. Food will be deemed to be adulterated when-

- (i) there is an addition of any poisonous or deleterious substances in food such that it may be rendered injurious to the health of the consumer.⁹⁷ It will also be considered to be adulterated if the food is putrid or decomposed;⁹⁸ if it is packed under insanitary conditions;⁹⁹ if it is part of a diseased animal or one that has died otherwise than by slaughter;¹⁰⁰ or if the container consists of anything deleterious.¹⁰¹ Furthermore, food will also be deemed to be adulterated if it has been intentionally subjected to radiation, unless the use of the radiation¹⁰² conforms with the regulations or exemption;
- (ii) there is an omission or abstraction of any valuable constituents, substitution of substances, concealment of damaged or inferior food, or the addition of any food such that it alters the food;
- (iii) any unsafe¹⁰³ colour additive is used;
- (iv) confectionery contains alcohol and non-nutritive substances;
- (v) oleomargarine, margarine or butter contains filthy, putrid or like matter.¹⁰⁴

The provision is aimed at preventing intentional practices that either affect the pocketbook of the consumer¹⁰⁵ or are injurious to public health.¹⁰⁶

⁹⁶ Schultz *op cit* 522.

⁹⁷ § 342(a)(1) and (2).

⁹⁸ § 342(a)(3).

⁹⁹ § 342(a)(4).

¹⁰⁰ § 342(a)(5).

¹⁰¹ § 342(a)(6).

¹⁰² This is an example of the misconception that irradiation is an additive and not a process like canning.

¹⁰³ Which is defined within the meaning of § 376(a). See above 138.

¹⁰⁴ § 342(a)-(e).

¹⁰⁵ That is, § 342(b), (d).

¹⁰⁶ § 342(a), (c) and (e).

II. Misbranded Foods

The fundamental aim of the Pure Food Act was to prevent adulterated foods. Provisions relating to misbranded foods merely required the manufacturer, packer or distributor to label products truthfully.¹⁰⁷ This was inadequate and when enacting the FDCA Congress endeavoured to rectify the position.

The FDCA provide the circumstances in which food is deemed to be misbranded. Furthermore, in certain instances, it lays down the conditions that will have to be complied with. Misbranding occurs if-

- (i) false or misleading labels are used;
- (ii) a food is offered for sale under another name;
- (iii) "imitation" food is used, unless it is labelled in accordance with the requirements laid down in the Act;
- (iv) the container is made, formed or filled in a manner that misleads the consumer;
- (v) consumers are not informed about the name and place of business of the manufacturer or there is an inaccurate statement of quantity of content;
- (vi) the labelling of food is not prominent, conspicuous, readable and easily understood by the ordinary individual under the customary conditions of purchase and use;
- (vii) the food purports to be or is represented as a food for which there is a prescribed definition or standard of identity unless it bears the specified name and conforms with the definition and standard;
- (viii) the food does not comply with the quality of the prescribed standard or if filled below the standard fill of the container, unless the label states that it is sub-standard;
- (ix) when a common name or usual name does not appear on the container;

¹⁰⁷Schultz op cit 530.

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- (x) the food makes a special dietary claim unless the manufacturer has included a nutritional label in accordance with the regulations;
 - (xi) a food contains any artificial flavouring, artificial colouring or chemical preservatives unless it is stated on the label;
 - (xii) pesticides are used on raw agricultural products unless they are so labelled;
 - (xiii) colour additives have been used that do not conform with the requirements stated in § 376; and
 - (xiv) the food contains saccharin unless there is a prescribed warning¹⁰⁸ close to the name of the food.¹⁰⁹

The purpose of declaring foods "misbranded" is to ensure that manufacturers present their products truthfully and provide additional information. In addition, the provision ensures economic advantages for the consumer (i.e. protecting the pocketbook of the consumer) rather than directly protecting consumer health. Such information, however, can indirectly protect consumer health. For instance, consumers who are sensitive or intolerant towards a particular ingredient are protected because the label will, in terms of this section, list the ingredients.¹¹⁰

The differences between "adulteration" and "misbranding" are:

- (i) Adulteration deals with the product before it is ready for presentation, while misbranding is concerned with the presentation and use of the product.
- (ii) Adulteration ensures that products are wholesome and not dangerous or injurious to the health of the consumer, while misbranding assures consumers that the presentation is truthful and additional information is supplied.

¹⁰⁸The warning states: "USE OF THIS PRODUCT MAY BE HAZARDOUS TO YOUR HEALTH. THIS PRODUCT CONTAINS SACCHARIN WHICH HAS BEEN DETERMINED TO CAUSE CANCER IN LABORATORY ANIMALS." There are other requirements stated in the Act.

¹⁰⁹§§ 343(a)-(o).

¹¹⁰Schultz *op cit* 533.

- (iii) Adulteration protects the health and the pocketbook of consumers, while misbranding only protects the pocketbook of the consumer directly and consumer health indirectly.¹¹¹

The FDCA prohibits adulterated and misbranded foods. The Act deems five ways of adulterating and ten ways of misbranding foods.¹¹² The penalties for adulterating or misbranding foods is a fine not exceeding \$ 1,000 or one year imprisonment or both.¹¹³ Where, however, the manufacturer intended to defraud the consumers, the fine is \$10,000 or a minimum of five years of imprisonment or both.

B. FOOD ADDITIVES

The first major amendment to the FDCA was the Food Additives Amendment Act of 1958.¹¹⁴ The aim of this provision is to control the use and safety of food additives. It does so by "allowing or regulating food additives".¹¹⁵

"Food additives" are defined in § 321(s) as:

"Any substance the intended use of which results or may reasonably be expected to result, directly or indirectly, in its becoming a component or otherwise affecting the characteristics of any food, ..."

The section goes on to exclude certain substances from being defined as food additives-

- (a) substances generally recognized as safe (GRAS) by experts;
- (b) pesticide chemicals;
- (c) colour additives;¹¹⁶

¹¹¹ *ibid.*

¹¹² Garard *op cit* 96.

¹¹³ § 333.

¹¹⁴ § 348.

¹¹⁵ Schultz *op cit* 572.

¹¹⁶ See below 138. The FDCA draws an artificial distinction between food additives and colour additives. Colour additives are "materials which- (A) is a dye, pigment or other substances made by a process of synthesis or similar artifice, ..., from a vegetable, animal, mineral, or other sources, and (B) when added or applied to food, ..., is capable (alone or through reaction with other substances) of imparting colour thereto". (§ 321(t)).

- (d) substances that have been sanctioned or granted prior approval either by the FDA or the USDA; or
- (e) new animal drugs.¹¹⁷

The definition draws a distinction between food additives and several other substances. GRAS substances and prior approved (or sanctioned) substances are particularly important.

I. GRAS Substances

A substance is considered to be GRAS, and not a food additive, when it is recognized as being safe after an evaluation of its safety for its intended use is carried out by experts who have qualified by scientific training and experience.¹¹⁸ These substances are excluded from the definition of "food additives" for two reasons: (a) To avoid needless testing of certain substances which have been used without evidence of harmful effects for some period of time, (eg salt); and (b) to accommodate the food industry in respect of those additives already in the market^{119,120}.

The criteria for declaring a substance GRAS is either the substance (a) must currently recognized as safe by experts because of common usage, or (b) has undergone toxicological testing either pre- or post-1958.¹²¹ The tests must have been undertaken with due considerations for the regulations prevailing at that point in time but must exclude "considerations of utility and benefit".¹²²

¹¹⁷ § 321(s).

¹¹⁸ *ibid.*

¹¹⁹ Congress reached a compromise with the food industry because the industry wanted a blanket provision exempting those food additives already in the market prior to 1958, while some wanted all substances which were neither scrutinized or tested for safety prior to 1958 to undergo testing.

¹²⁰ Schultz *op cit* 576.

¹²¹ § 321(s).

¹²² R. A. Merrill "Regulating Carcinogens in Food: A Legislative Guide to the Food Safety Provisions of the FDCA" (1978) 77 *Michigan Law Review* 171 210-211.

A significant implication of GRAS substances is that the "Delaney Clause"¹²³ does not apply to GRAS substances. But this does not preclude a substance from being withdrawn from the list of GRAS substances because if, on testing for safety, it is found to induce cancer in animals or humans it will thwart the general recognition of safety. This results in the substance no longer being termed GRAS and it will require prior approval for use as a food additive by the FDA.¹²⁴

Criticisms relating to GRAS substances include the following:

- (i) The fact that a substance is declared GRAS does not necessarily imply that it is safe.¹²⁵
- (ii) The protection is self-limiting because if tests uncover that the substance is carcinogenic the substance will be deprived of the protection afforded by GRAS. Consequently it will fall within the definition of a "food additive" and have to undergo pre-market testing and prior approval. As a result the Delaney Clause will apply and it is quite possible that the substance will be declared "unsafe".
- (iii) The list bars substances being labelled GRAS after 1958 by reason of their usage.¹²⁶ The substances will be termed "food additives" and will have to undergo toxicological testing for pre-market clearance.
- (iv) The GRAS substances list also includes tolerance levels, sources, purposes, etc. This is no different from food additives.¹²⁷ Therefore, the fact that GRAS substances are an exempted category does not afford them any

¹²³§ 348(c)(3) is an anti-cancer clause. See below 135.

¹²⁴Merrill *op cit* 212. This is not a remote possibility. As Merrill noted the story of cyclamates (an artificial sweetener) illustrated this. This sweetener was on the market prior to 1958 and it was considered a GRAS substance until its principal manufacturer, in 1970, reported that certain safety tests undertaken disclosed that it might be carcinogenic. This revelation turned "a GRAS substance into an illegal substance overnight" stated Merrill.

¹²⁵Schultz *op cit* 577.

¹²⁶Merrill *op cit* 210.

¹²⁷Merrill *op cit* 211.

advantages in this respect.¹²⁸

- (v) The FDA lacks a comprehensive list of GRAS substances and is unable to provide a list because it lacks the necessary information about these substances.¹²⁹

As a result of the criticisms against GRAS substances the FDA found it necessary to mount a programme whereby it could control, and assure consumers of, the safety of GRAS substances. The programme entails a review of all the available scientific testing done on these substances. Moreover, the FDA has created a formal procedure to validate GRAS substances.¹³⁰ The validating procedure requires objective investigation under controlled conditions.¹³¹ Hadden noted that in 1982, seven years after the start of the review, the FDA had reviewed approximately 220 substances at a cost of \$ 18 million. In the process they had listed 549 GRAS substances for 700 uses.¹³²

II. A Substance Granted Prior Approval or Sanction

Other items excluded from the definition of "food additive" are substances that have been sanctioned or granted a prior approval for use either by the USDA or the FDA.¹³³ This clause is commonly referred to as the "grandfather clause".¹³⁴

Such exceptions developed because-

- (i) the FDA routinely answered requests for an opinion about individual ingredients from the period 1938 to 1958;¹³⁵
- (ii) the FDA exercised pre-market control over, and thus approved, the numerous

¹²⁸It is submitted that General Manufacturing Practice (GMP) should be used for these substances because if the substance is considered to be safe there is no need to limit its use.

¹²⁹Schultz op cit 577.

¹³⁰Merrill op cit 214.

¹³¹Schultz op cit 577.

¹³²S G Hadden Read the Label (1986) 132.

¹³³§ 321(s)(4).

¹³⁴Merrill op cit 214.

¹³⁵These queries mainly covered those additives in use after the introduction of the Pure Food and Drug Act 1906.

- ingredients to be used in foods covered by the standards of identity; and
- (iii) the USDA issued formal regulations describing permitted uses of many ingredients in meat and poultry products (which were often acknowledged by the FDA).¹³⁶

These exceptions arose despite the fact that the FDA and the USDA lacked the authority to approve food ingredients for general use prior to 1958.¹³⁷

Merrill noted that these exemptions are limited. The ingredients are only exempted from requiring to be approved as food additives for the purpose for which they were approved. They still have to comply with the other provisions of the Act (eg such substances can be deemed to be an adulterant).¹³⁸

Merrill criticized the "grandfather clause" (and GRAS substances) on the basis that there is no need to distinguish food additives used prior to 1958 and to treat them differently from those introduced after 1958. In addition, there is no theoretical basis for the FDA to "consider the countervailing benefits of one class of ingredients but not the others."¹³⁹

III. Food Additives

The primary object of the Food Amendment Act, 1958¹⁴⁰ was to ensure that chemical food additives obtain a pre-market clearance by scientific testing to demonstrate their safety prior to their usage.¹⁴¹ A significant effect of this amendment is that it shifted the burden of proof from the federal government, who had to prove that the food additive was harmful or unsafe, to the manufacturer, who now has to prove its safety prior to using it as an ingredient.¹⁴²

¹³⁶Merrill op cit 215.

¹³⁷ibid.

¹³⁸ibid.

¹³⁹Merrill op cit 217.

¹⁴⁰§ 348.

¹⁴¹Schultz op cit 580.

¹⁴²Hadden op cit 131. Also, Schultz op cit 604.

The Act declares the use of food additives to be unsafe unless (a) it conforms with an exemption;¹⁴³ or (b) the use of the additive conforms with the established regulations which prescribe the conditions under which it may be used safely.¹⁴⁴ Should neither of the two requirements be met and the manufacturer uses this food additive, the food will be labelled unsafe and deemed to be an adulterated food.¹⁴⁵

Manufacturers can request the FDA to promulgate regulations relating to a new chemical food additive.¹⁴⁶ The section lays down the procedure and the time period within which a petition, requesting promulgation of regulations, has to be answered.¹⁴⁷ On request for further regulations in respect of food additives, the FDA has to consider:

- (i) Whether the additive will be safe under the conditions of use;
- (ii) whether it can function in a manner to accomplish its aim in respect of technical effect; and
- (iii) whether there is any benefit served by the food additive.¹⁴⁸

When promulgating such regulations the FDA could also incorporate conditions of use, such as limitation of use¹⁴⁹ (eg to be used only as a sweetener); the purpose for which it is to be used (eg sodium nitrate can only be used to cure meat products); labelling requirements (eg the warning statement on saccharin); etc.¹⁵⁰

Manufacturers, when forwarding their petitions, are required to include results of safety tests prescribed by the FDA.¹⁵¹ To investigate safety, the FDA requires the manufacturer to undertake toxicological tests on animals. These tests cannot be carried out on humans unless it is to determine functionality and palatability. The toxicological testing

¹⁴³The exemption in terms of § 348(a)(1) read together with § 348(i) relates to additives used for investigational purposes by qualified experts at the discretion of the FDA. Furthermore, the experiments must only relate to animal studies and when the additive is used for human consumption a warning statement must appear. (21 CFR part 170.71).

¹⁴⁴§ 348(a)(2).

¹⁴⁵§ 342(a)(2).

¹⁴⁶§ 348(b).

¹⁴⁷§ 348(b)-(h). Also see Merrill *op cit* 208f.

¹⁴⁸Merrill *op cit* 204.

¹⁴⁹§ 348(c)(4).

¹⁵⁰Merrill *op cit* 205.

¹⁵¹§ 348(b).

does not ensure that an additive may not prove to be harmful,¹⁵² but it provides a "greater deal of reliability".¹⁵³

Another important provision of the Food Additive Amendment Act is the so-called "Delaney Clause".¹⁵⁴ The Delaney Clause arose because the Federal government perceived a need to minimize the chances of the public encountering serious defects in food and to protect consumers. This could only be "satisfied by safety standards" rather than informative labelling.¹⁵⁵ The general aim of the clause is to ban the use of carcinogenic food additives in order to prevent them from entering the marketplace. This happens when the FDA evaluates toxicological tests conducted by manufacturers when petitioning the FDA to regulate a food additive. If the additive is found to induce cancer, when ingested by either man or animal, it is deemed to be unsafe. There is an explicit mandate on the FDA to ban substances that induce cancer.¹⁵⁶ The toxicological tests are essential. In such circumstances functionality or benefit of use will not be considered. Toxicological tests also exclude judgement in evaluating its use.¹⁵⁷

The anti-cancer ban does not apply to natural food constituents¹⁵⁸ or constituents unavoidably "added" to food¹⁵⁹.¹⁶⁰ The application of this clause is, however, limited to those substances that are intentionally added to food or become components of food because of their intended use.¹⁶¹ Substances that fall within the ambit of ingredients that are added intentionally to food are food additives, colour additives, GRAS substances,

¹⁵²The debate on toxicological testing is concerned with the method of testing. Issues such as: (i) Experimental animals may not be suitable models to evaluate safety; (ii) a 100-fold safety factor is arbitrary; and (iii) a relatively small number of additives are used in testing and this weakens the statistical reliability of the test, are some of the issues discussed by Merrill *op cit* 207-208. Other issues include the large quantity of additives fed to experimental animals over a short period of time and the unreliability of extrapolating results from test animals to humans. This is not an exhaustive list of the problems associated with toxicological testing. Also see T Larkin "Animal Tests and Human Health" (June 1977) 11 *FDA Consumer* 12-15).

¹⁵³Merrill *op cit* 207-208.

¹⁵⁴§ 348(c)(3)(A).

¹⁵⁵Hadden *op cit* 136.

¹⁵⁶Schultz *op cit* 579.

¹⁵⁷D Melnick "Economics in Food and Nutrition Issues" F M Clydesdale (ed) *Food Science and Nutrition* (1979) 118.

¹⁵⁸Eg caffeine in coffee.

¹⁵⁹Eg aflatoxin in nuts.

¹⁶⁰E J Allera "An Overview of How the FDA Regulates Carcinogens under the FFD&CA" (1978) 33 *Food Drug Cosmetic Law Journal* 59 66-68. In such a situation the only remedy available is to consider whether the food can be considered adulterated by the presence of such a substance.

¹⁶¹Allera *op cit* 66. Eg sweeteners.

prior sanctioned substances, and new animal drugs. The Delaney Clause, however, applies directly to food additives;¹⁶² colour additives¹⁶³ and new animal drugs^{164, 165} GRAS substances can only be indirectly affected by the clause. The "grandfather clause" retains its status permanently for the function for which it obtained the sanction. For this reason the "grandfather clause" will not fall within the ambit of food additives and, therefore, not be subjected to the Delaney Clause. A prior sanctioned substance can only be tested to see whether it is an adulterant.¹⁶⁶

The Delaney Clause has been widely criticized and several attempts have been made to amend it. The criticisms include the following:

- (i) The clause is applied inconsistently;¹⁶⁷
- (ii) it does not balance the risks and benefits;¹⁶⁸
- (iii) it allows no room for considerations of dosages;¹⁶⁹
- (iv) it presumes, as a matter of law, that no level of exposure to an animal carcinogen can be considered safe;¹⁷⁰
- (v) it does not define critical terms such as "induce", "cancer" and "test appropriate for evaluation of the safety of food additives";¹⁷¹
- (vi) people have queried the appropriateness of the toxicological tests;¹⁷²
- (vii) the clause is too inflexible to consider utility and benefit once the substance is declared carcinogenic;¹⁷³ and
- (viii) the clause does not take into account rising costs, the need for better quality, and the need for an increasing food supply.¹⁷⁴

¹⁶²§ 348(c)(3).

¹⁶³§ 346(b)(5)(B).

¹⁶⁴§ 360(a)(1)(H).

¹⁶⁵Allera *op cit* 68-69.

¹⁶⁶Allera *op cit* 70-71.

¹⁶⁷Merrill *op cit* 173. For example this clause does not apply directly to GRAS substances, prior sanctioned substances, etc.

¹⁶⁸*ibid.*

¹⁶⁹Merrill *op cit* 181.

¹⁷⁰*ibid.*

¹⁷¹See Merrill *op cit* 182 for further explanation.

¹⁷²*ibid.*

¹⁷³Merrill *op cit* 183.

¹⁷⁴Meinick *op cit* 202.

It is submitted by Schultz¹⁷⁵ that an equitable answer to the problems concerning the anti-cancer clause is to allow a risk/benefit evaluation prior to the banning of the substance. Hadden, however, contended that the lack of flexibility of this clause is overstated because the FDA has freedom in defining the clause. Thus, the "law itself provides several loopholes."¹⁷⁶ Melnick suggested that there should not be a total elimination of the clause, but it should be amended to allow judgement by "scientists who are qualified by training and experience to permit use of a carcinogenic material when it is present at a level below biological significance".¹⁷⁷ Another solution is to educate consumers by using knowledgeable and responsible health professionals.¹⁷⁸

The attempt by the United States government to make food safe is unavoidably influenced by competing causes such as the "desire to retain traditional foods, the wish to produce food abundantly and cheaply, and the practical limitation on our ability to detect and eliminate contaminants."¹⁷⁹

Though the aim of the FDA is to minimize risks, several problems have arisen with the legislation:

- (i) Public awareness with regard to food additives that pose a potential risk to health has increased.¹⁸⁰ Thus, there is no need to prohibit the use of certain substances. This is borne out by the fact that the public appreciate the benefits related to some of the risk-creating constituents (eg saccharin).¹⁸¹
- (ii) There are substantive and procedural flaws in the Act that strain the present system.¹⁸²

¹⁷⁵Schultz *op cit* 580.

¹⁷⁶Hadden *op cit* 133.

¹⁷⁷Melnick *op cit* 201-202.

¹⁷⁸*ibid.*

¹⁷⁹Merrill *op cit* 241-242.

¹⁸⁰*ibid.*

¹⁸¹Merrill *op cit* 243.

¹⁸²Merrill *op cit* 244.

- (iii) The Delaney Clause is inhibiting.
- (iv) The Act fails to consider the possibility that warnings on labels may be adequate consumer protection.¹⁸³
- (v) Risks in respect of food additives are continually understated and the benefits overstated because the regulatory process is not sophisticated enough to consider cumulative exposure to the same additive in various foods.¹⁸⁴

The use of all food additives, under the Food Additive Amendment Act, is presumed appropriately to be unsafe, while the Pure Food Act required an additive to be shown to be injurious to health before it could be banned.¹⁸⁵

C. COLOUR ADDITIVES

The legislation dealing with colour additives was enacted in 1960 in the form of the "Colour Additive Amendment Act".¹⁸⁶ The aim of this amendment was to regulate the use of colour additives in food, drugs, devices and cosmetics.¹⁸⁷

Colour additives used prior to 1960 were treated differently from food additives.¹⁸⁸ All colours in use prior to 1960 were placed on a provisional list and an initial two-and-half year moratorium¹⁸⁹ was granted for their use. During this period the FDA's task was to evaluate the safety of these colours in terms of existing tests. If the information was insufficient the FDA had the power to direct the manufacturer to provide new evidence. On evaluation the FDA could either place the colour additive on the permanent list or

¹⁸³Merrill *op cit* 248.

¹⁸⁴Hadden *op cit* 145.

¹⁸⁵Hadden *op cit* 129.

¹⁸⁶§ 376.

¹⁸⁷Schultz *op cit* 604.

¹⁸⁸There was no category for GRAS substances or prior sanctioned substances.

¹⁸⁹The moratorium has been extended several times.

declare it to be unsafe.¹⁹⁰ The amendment, like the Food Additive Amendment Act, shifted the burden of proof from the federal government to manufacturers to prove the safety of the colour additive. As a result manufacturers are required to obtain a pre-market clearance for a colour additive prior to using it as a food ingredient.¹⁹¹

The definition of "colour" is broad and includes synthetic and natural substances. An important requirement for a substance to be a "colour additive" is that it must be capable of imparting colour to food. The definition also specifically excludes things like pesticides, soil and plant nutrients.¹⁹²

The Act provides for the use of colour additives to be unsafe unless the colour- (a) is listed in accordance with the regulations dealing with safety; (b) is issued with a batch certificate; or (c) conforms with an exemption.¹⁹³ The failure to comply with this provision results in the food being adulterated because the food contains an unsafe ingredient.¹⁹⁴

The Colour Additive Amendment Act also provides for the FDA to promulgate regulations for- (a) the conditions of safe use,¹⁹⁵ (b) the listing of colour additives that have been approved,¹⁹⁶ and (c) the setting of tolerance limits which specify the maximum quantity of the colour additive to be used or permitted to remain in a product.¹⁹⁷

To approve a colour additive several safety tests have to be undertaken. These are no different from those required by the FDA for approving a food additive. Colour additives, however, require additional safety tests to be undertaken, eg external application of the colour to test whether it induces cancer.¹⁹⁸ The Delaney Clause is also applicable to this amendment. The provisions also lists the procedures that have to be complied with

¹⁹⁰Schultz *op cit* 607.

¹⁹¹Schultz *op cit* 604.

¹⁹²The reason for this is that they are governed by different sections of the Act.

¹⁹³§ 376(a).

¹⁹⁴§ 342.

¹⁹⁵§ 376(b)(5)(A).

¹⁹⁶§ 376(b)(1) and (2).

¹⁹⁷§ 376(b)(3).

¹⁹⁸Schultz *op cit* 605.

prior to a colour additive being listed as approved.

This amendment to Act was not significant as it followed the amendments made in respect of food additives. But it differed in the way that it handled previously used colour additives. It is submitted that this is a better way of handling previously used colour additives than declaring exemptions, such as GRAS substances or prior approved substances.

D. FOOD STANDARDS

The provisions discussed thus far deal with (a) defining unsafe and undesirable foods, and (b) ensuring that a procedure was available to prevent such foods from entering the marketplace. Government intervention, however, does not end there. It also extends to ensuring that- (a) the quality of food is maintained, (b) there is measurement and designation of quantity, and (c) there is characterization of foods.¹⁹⁹

The Pure Food Act did not provide for mandatory food standards.²⁰⁰ This was considered to be a deficiency.²⁰¹ The situation was remedied in respect of canned foods in 1930 when the McNary-Mapes Amendment was passed. This required the Secretary of Agriculture to standardize canned products, with the exception of meat and meat food products. Should products not comply with the standards they had to "plainly and conspicuously" indicate this.²⁰²

The FDCA broadened the scope of the McNary-Mapes Amendment and provided for the Secretary²⁰³ to regulate standards in respect of all foods. The reason for including standards in the Act was three-fold:

¹⁹⁹Schultz *op cit* 196.

²⁰⁰Schultz *op cit* 197-198.

²⁰¹Anonymous "Developments in the Law of the Federal Food Drug and Cosmetic Act" (1953) 67 Harvard Law Review 632-659. The article shall be referred to as "Developments in the Law".

²⁰²Schultz *op cit* 199.

²⁰³This task has been delegated to the FDA.

- (a) An increase in the population moving into urban areas meant that processed foods became more fashionable.
- (b) There was a marked increase in fraud and deception by food manufacturers and the FDA was unable to deal with it.
- (c) Manufacturers pressurized the government to legislate for standards in order to avoid bad publicity for the industry.²⁰⁴

The Act provides that the Secretary has the discretion to promulgate regulations in respect of standards when it will "promote honesty and fair dealing in the interest of consumers".²⁰⁵ The standards included standards of (a) quality, (b) fill, and (c) identity. The provision goes further to exclude certain foods such as butter, fresh and dried fruits, fresh and dried vegetables, and the like from its ambit. A failure to comply with these regulations result in the manufacturer misbranding the product.²⁰⁶ This provision is not concerned with the safety of the product.²⁰⁷

I. Standard of Quality

The standard of quality is concerned with-

"a statement of measurement to be made on a product, the methods to be used in making these measurements, the values which are to serve in determining minimum quality, and how the product shall be labelled if it falls below the minimum quality and yet is fit to eat and usable as a food".²⁰⁸

This results in each food having a standard of quality.²⁰⁹ Clearly these standards relate to a minimum level of quality.²¹⁰ There are no degrees of quality above or below the standard set.²¹¹ In determining a standard of quality there are several factors that have to be considered:

²⁰⁴R A Merrill & E M Collier " 'Like Mother Used to Make': An Analysis of FDA Food Standards of Identity" (1974) 74 Columbia Law Review 561 566.

²⁰⁵§ 341.

²⁰⁶§ 343(g) and (h).

²⁰⁷Schultz op cit 212.

²⁰⁸ibid.

²⁰⁹Developments in the Law op cit 664.

²¹⁰Schultz op cit 214.

²¹¹Schultz op cit 212.

"Colour, texture, general appearance and presence of certain quantities of specified constituents, objectively stated to make them suitable for use in enforcement actions."²¹²

This, however, does not mean that foods failing a standard of quality cannot be sold. The legislation allows goods falling below the standard to bear appropriate "crepe labels" which shall be prescribed by the Secretary.²¹³ The present prescribed "crepe label" must state in bold letters the words "Below Standard of Quality" and in smaller type "Good Food - Not high Grade," or some other words which may be specified by the regulations pertaining to that particular standard.²¹⁴



Figure 7: Food Products of sub-standard quality.

²¹²Developments in the Law op cit 664.

²¹³ibid.

²¹⁴ibid.

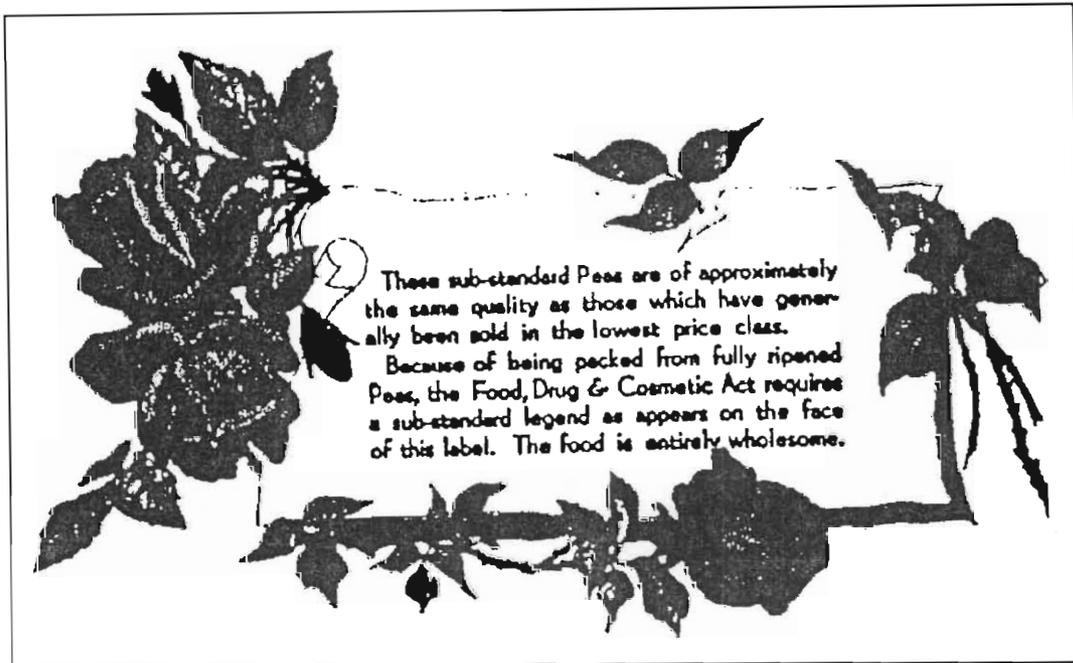


Figure 8: The prescribed message to accompany a sub-standard product.(Source: Hadden *op cit* 129)

The major problem with the standard of quality is that there is an presumption that a minimum level of quality can be defined and it can be measured accurately.²¹⁵ Furthermore, a standard has to be set for each product (eg a standard for apples, oranges, peas, etc.). Moreover, the dilemma is that no objective standard can be set for most food items because of regional variations.²¹⁶

The solution offered was "grade labelling."²¹⁷ Such labelling allows for gradation of quality. The requirements can be regulated by the Secretary. Manufacturers maintain that grade labelling destroys consumer confidence in brand names. This, in turn, impedes them from producing premium products which exceed the minimum requirement of the best grade. Furthermore, there is difficulty in deciding high and low quality objectively.²¹⁸

²¹⁵Schultz *op cit* 212.

²¹⁶Developments in the Law *op cit* 664.

²¹⁷Developments in the Law *op cit* 665.

²¹⁸*ibid.*

For this reason the Secretary has not used this type of regulation frequently. The failure to use grade labelling has been criticized because it is seen as the solution to avoid the rigidity of quality standards.²¹⁹

II. Standard of Fill

The standard fill pertains to establishing "the minimum weight or volume of a food which the container must hold."²²⁰ The concern of standard fill is (i) the "head space" or "vacant space" of the container; and (ii) it can be independent of size^{221,222}.

A significant problem with such a scheme is that there is a proliferation of sizes because foods damage at various stages of compression.²²³ Consequently, this has not proved to be a successful provision.

III. Standard of Identity

From the three types of standards established in terms of § 341, the standard of identity is known to be the most significant innovation.²²⁴ A standard of identity can be defined as:

"The composition of a food, prescribing the ingredients that must be included (mandatory ingredients), as well as those that may be included (optional ingredients). Many standards also prescribe the method of production or formulation. The resulting regulation closely resembles a recipe for the standardized food as part of the standard, the FDA assigns to its "recipe," the name under which all conforming products shall be called."²²⁵

The latter is called a "common or usual" name. An identity standard has two objectives: (a) "A product may contain these ingredients and no others; and (b) a product made with these ingredients is unlike any other product."²²⁶

²¹⁹ *ibid.*

²²⁰ Schultz *op cit* 214.

²²¹ Schultz noted that this is possible because "fill of a container can be designated in terms of the height of the product in relation to the top of the container ...". Schultz *op cit* 214.

²²² *ibid.*

²²³ Developments in the Law *op cit* 666.

²²⁴ Developments in the Law *op cit* 660.

²²⁵ Merrill & Collier *op cit* 563.

²²⁶ Schultz *op cit* 212.

The Act provides that once a standard of identity has been established²²⁷ any departures from the standard recipe will be inadmissible if the manufacturer intends calling the product by its common or usual name. Thus, any foods "purporting to be or represented as" that food may not be marketed under that common or usual name. This applies irrespective of whether the label truthfully and conspicuously indicates that this product is a variation of the identity standard.²²⁸

In addition, legislation provides for labelling of ingredients in respect of non-standardized foods only and foods having an identity standard are not required to have mandatory ingredient labelling.²²⁹

The major problems with standards of identity are the following:

- (i) "... Inflexibility tends to suppress competition, restricts the availability of desirable substitutes to standardized foods, imposes barriers to market entry by standardizing products, distorts demand, and inhibits innovation. Inflexibility is simply a built-in-cost."²³⁰
- (ii) The FDA tends to interpret and enforce the provisions rigidly. This is seen as "overkill".²³¹
- (iii) There has been an "increased social misallocation and undesirable income distribution".²³²
- (iv) Significant administrative costs have been incurred which could have been avoided.²³³

²²⁷ § 341 does not legislate the manner of initiating such regulations but rather authorizes the promulgation of regulations. The method of promulgating such regulations are to be found in 21 CFR Part 10.

²²⁸ Developments in the Law op cit 660.

²²⁹ Merrill & Collier op cit 567.

²³⁰ J. Agar "Generally Recognized as Sour Cream: Treating Standards of Food Quality as a Success" (1989) 44 Food Drug Cosmetic Law Journal 237-241.

²³¹ Agar op cit 244.

²³² Merrill & Collier op cit 521.

²³³ ibid.

On the other hand, many see the standards as being an effective innovation. Their advantages are:

- (a) They protect consumers because consumer deception is obstructed by using basic food formulas.²³⁴
- (b) They curb the increasing use of untested chemical additives in the production of food.²³⁵
- (c) It permits food containing numerous ingredients to be sold under a characteristic name.²³⁶
- (d) They prevent economic fraud on the part of fringe producers and preserve the integrity of the food supply.²³⁷
- (e) They satisfy consumer needs.²³⁸
- (f) Their existence assures consumers that they are not being deceived.²³⁹

Despite the problems with food standards it is unlikely that consumers wish to return to a non-standardized marketplace.²⁴⁰ The solution seems to lie in the interpretation of the provisions by the FDA.²⁴¹

The FDA is also introducing labelling of standardized foods.²⁴² Using this justification the FDA has indicated its intention to decrease identity standards.²⁴³ It has

²³⁴Merrill & Collier op cit 568. Also, this protects consumers "against any food which appears to be something which it is not, no matter how minor the deviation in ingredients." Developments in the Law op cit 664.

²³⁵Merrill & Collier op cit 568.

²³⁶Agar op cit 241.

²³⁷ibid.

²³⁸Agar op cit 242.

²³⁹ibid.

²⁴⁰ibid.

²⁴¹ibid.

²⁴²O'Kegan op cit 9.

²⁴³Merrill & Collier op cit 521-522.

been suggested that this may be damaging because consumers consider labelling as part of federal food policy, which includes standards and specifications.²⁴⁴ On the other hand, it is conceded that although government intervention is justified, the enactment of food standards is an overreaction.²⁴⁵ A beneficial response (which the FDA is following) is to increase the amount of information provided on a label to make a rational choice.²⁴⁶

E. FOOD LABELLING

The Pure Food Act did not provide ingredient information that could be used rationally by consumers. It merely provided for the name and quantity of the product in question.²⁴⁷ On enactment of the FDCA Congress took a positive approach by requiring manufacturers to provide relevant information about the product. The aim of this information is to assist consumers to make a rational choice.²⁴⁸

Issues involving labelling of food products are dealt with exclusively in the section dealing with misbranded products.²⁴⁹ This ensures that the product is truthfully presented and consumers are assisted by additional information.²⁵⁰

The information required on a food label is not dealt with in the Act. This is to be found in regulations.²⁵¹ The regulations also deal with where the information is to appear, the type size, etc.²⁵² Effective regulations, however, have been promulgated since 1974.²⁵³

The FDCA, FPLA and the regulations²⁵⁴ require the following information to be provided on a label:²⁵⁵

²⁴⁴ Agar *op cit* 242.

²⁴⁵ Merrill & Collier *op cit* 562.

²⁴⁶ *ibid.*

²⁴⁷ Schultz *op cit* 530.

²⁴⁸ *ibid.*

²⁴⁹ See above 126.

²⁵⁰ Schultz *op cit* 533.

²⁵¹ 21 CFR part 101.3.

²⁵² *ibid.*

²⁵³ Anonymous "The Food Labelling Revolution" (April 1974) 8 *FDA Consumer* 23 25.

²⁵⁴ 21 CFR part 101.4.

²⁵⁵ P. Khan "Food Labelling: More or Better?" (1980) 35 *Food Drug Cosmetic Law Journal* 160 161.

Table I: The requirements of a label (Source Melnick *op cit* 212).

<p>PRESENT LABEL ON A FOOD PRODUCT MUST SHOW:</p> <p>Name of product- brand and identity; Ingredient listing (will also be required for standardized foods); Manufacturer or distributor - name and address; Net weight or net volume; Price for the given unit.</p> <p>PRESENT LABEL MAY SHOW:</p> <p>Instructions on how to open the unusual package; Directions for using product and specific recipes; Precautions for safe use; Special promotional material (cents off regular price, etc.)</p> <p>MOST NEW LABELS ARE NOW SHOWING IN ADDITION TO ABOVE:</p> <p>Open code dating - "Do not use after <u>(date)</u>"; Code dating, showing plant, line, time of production, etc. (for possible recall); Unit pricing (eg cents per ounce) to permit comparative shopping; Nutritional information, including a listing of specific nutrients in a given serving, the number of servings in the container, and a specific sentence when fat composition is shown; Sodium content (when pertinent); Percentage of the high-cost key ingredient; Universal product code endorsed by industry to expedite accurate checkouts in store and to save on labour costs.</p> <p>ADDITIONAL LABEL DECLARATION URGED BY CONSUMER ACTIVISTS:</p> <p>Uniform grade classification according to recipe and specification requirements set by the government; Fat-oil source and degree of hydrogenation; Drained weight, when applicable; Functional value of food additive present; Formulation disclosed in full, via percentage composition; Storage conditions for product before and after opening.</p>
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With the promulgation of the new regulations there was a profound change in ingredient labelling. The change can be seen in the following illustration:

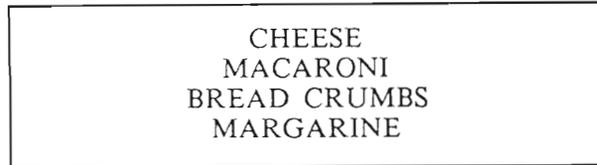


Figure 9: A label for Macaroni and Cheese prior to 1978.

Macaroni (Durum and Patent flour, Niacin, Sodium Iron Phosphate, Thiamine Mononitrate, Riboflavin), **American Cheese** (Water, Cream, Milk, Sodium Citrate, Disodium Phosphate, Salt, Artificial Colour and Sorbic Acid (a preservative)); **Bread Crumbs** (Enriched Flour, Wheat flour, Niacin, Reduced iron, Thiamine Hydrochloride, Riboflavin), **Corn Syrup, Sugar, Vegetable and/or Animal Shortening** (contains one or more of the following: Hydrogenated Soybean Oil, Hydrogenated Cottonseed Oil, Hydrogenated Palm Oil, Lard), **Salt, Yeast Whey, Soy Flour, Dough Conditioner**, (Sodium Stearoyl-2-Lactylate), **Yeast Nutrients**, (Contains one or more of the following: Monocalcium Phosphate, Calcium Sulphate, Ammonium Chloride, Potassium Bromate), **Calcium Propionate** (to retard spoilage); **Margarine** (Liquid Corn Oil, Partially Hydrogenated Soybean Oil, Water and/or Pasteurized Skim Milk and/or Non-fat Milk, Salt, Lecithin, Artificial flavour, Coloured with Carotene and Vitamin A Palmitate).

Figure 10: The label for Macaroni and Cheese after the 1978 regulations (Kahn *op cit* 161).

The regulations have been criticized as overcrowding a label and, despite there being more information the label, it is not considered as an improvement.²⁵⁶ Furthermore, the requirement that the terms must include the chemical name is considered not to assist consumers, eg rather than "Thiamine mononitrate" call it "vitamin B₁".²⁵⁷ It is submitted²⁵⁸ that where foods have been standardized the usual or common name will suffice, eg in Figure 10 the ingredients of "bread crumbs" is considered to be unnecessary and, if excluded, it will reduce the label by ten words. The solution is to simplify the label so that it assists consumers.²⁵⁹

²⁵⁶Khan *op cit* 161.

²⁵⁷Khan *op cit* 164.

²⁵⁸*ibid.*

²⁵⁹*ibid.*

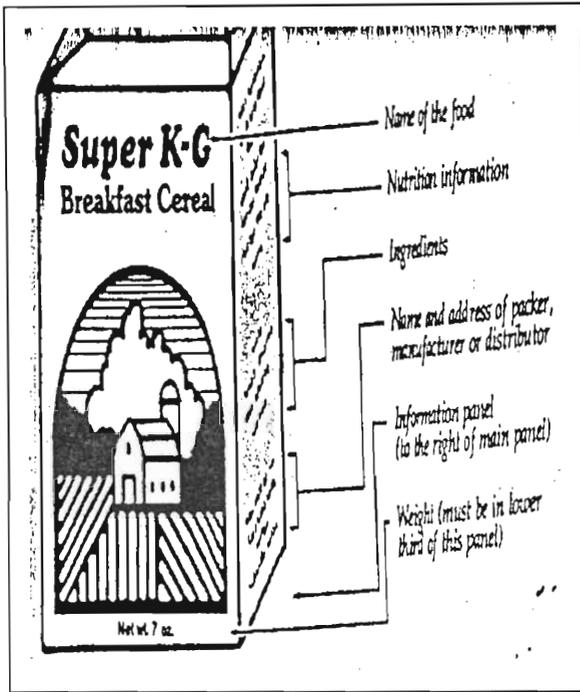


Figure 11: Labelling requirements for a food products.

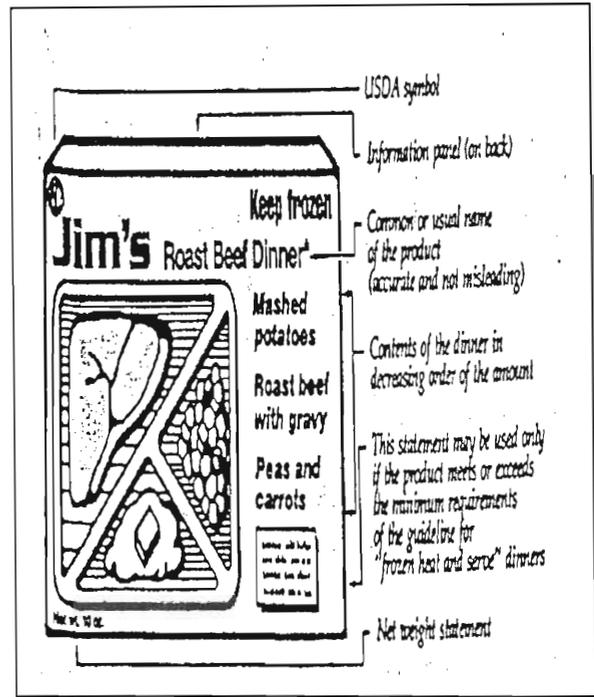


Figure 12: Labelling requirements for meat products.

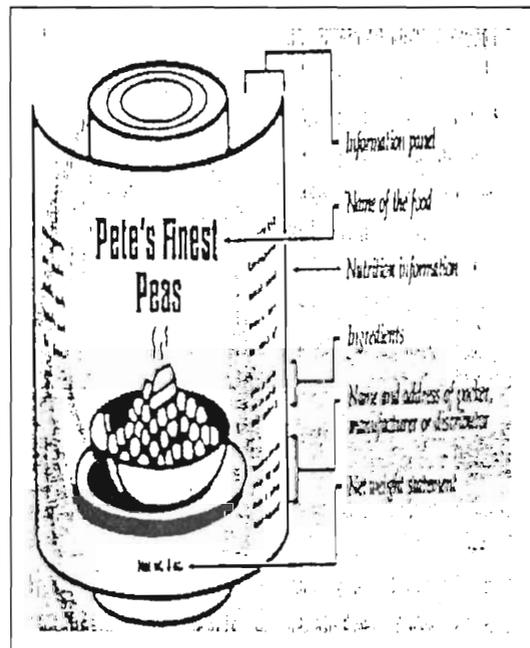


Figure 13: Labelling requirements for food products.

(The Food Labelling Revolution op cit 23).

The use of innovative labelling is to be found in nutritional labelling ordered in terms of § 341(a).²⁶⁰ The regulations provide that nutritional labelling is voluntary unless (a) a nutrient has been added; or (b) a nutritional claim has been made, then nutritional labelling is mandatory.²⁶¹

The purpose of nutritional labelling is that such labelling is to allow consumers to make food value comparisons and to compare nutritional values.²⁶² A summary of the essential features are:

- (a) Serving size;
- (b) servings per container;
- (c) calories per serving
- (d) protein per serving;
- (e) carbohydrates per serving;
- (f) fat per serving;
- (g) percentage U.S. Recommended Daily Allowance (RDA²⁶³) per serving for certain essential nutrients, eg protein, vitamin A, vitamin C, thiamine, riboflavin, niacin, calcium and iron;
- (h) OPTIONAL INFORMATION: Sodium and cholesterol.²⁶⁴

The regulations also deal with which claims can be made and the circumstances under which they can be made.

²⁶⁰ Schultz *op cit* 535.

²⁶¹ The Food Labelling Revolution *op cit* 23.

²⁶² *ibid*.

²⁶³ This tells a consumer how much of a particular vitamin or mineral is required to maintain good health.

²⁶⁴ The Food Labelling Revolution *op cit* 24.

NUTRITION INFORMATION	
Per Serving	
Serving size = 8 oz.	
Servings per container = 2	
Calories	560
Protein	23 g
Carbohydrates	43 g
Fat	33 g
(Percentage of Calories from fat = 53%)	
Polyunsaturated*	22 g
Saturated	9 g
Cholesterol* (20mg/100g)	40 mg
Sodium (365 mg/100g)	810 mg
Percentage of U.S. Recommended Daily Allowance (U.S. RDA)	
Protein	35
Vitamin A	35
Vitamin C	10
Thiamin	15
Riboflavin	15
Niacin	25
Calcium	2
Iron	25
Vitamin B ₆	20
Vitamin B ₁₂	15
* Information on fat and cholesterol content is provided for individuals who, on the advice of a physician, are modifying their total dietary intake of fat and cholesterol.	

Figure 14: An example of Nutritional Labelling (Source: Hadden *op cit* 147)

A vital requirement of a successful labelling programme is the education of consumers in respect of nutritional information labelling.²⁶⁵ This is taken seriously by the FDA. The aim, however, of shifting demand away from food products with marginal nutritional value is unlikely to be realized.²⁶⁶ Also, there is an indication that consumers tend to make mediocre choices when there is an increase in the amount of information provided on the label and lack of knowledge on how to use the information.²⁶⁷

The FDA enforces the provisions of the FDCA in conjunction with the FTC and other minor agencies. Offenders are penalized by being ordered to pay fines, but the

²⁶⁵ O'Kegan *op cit* 11.
²⁶⁶ W A French & H C Barksdale "Food Labelling Regulations: Efforts Towards Full Disclosure" (1974) 38 *Journal of Marketing* 14 16.
²⁶⁷ French & Barksdale *op cit* 17.

agencies also establish procedures for seizures, recalls, and warnings.

A "seizure" occurs when the government seizes a product because it is illegal. Two purposes are served: (a) It is a penalty for breaching the law; and (b) it protects consumers, i.e. even if the product reached the marketplace it is removed because of its illegality.²⁶⁸ It is an effective way of controlling products and Schultz²⁶⁹ note that it is the most common remedy. Another advantage is that it is quick and effective. Once a product is seized several things can be done to it: (a) It can be destroyed; (b) it can be reconditioned so that it is safer; (c) it may be relabelled (especially if it is sub-standard); or (d) it may be put to an alternative use.²⁷⁰ This, however, has to be done by a court order.²⁷¹ In addition, the company is required to bear the cost.

A "recall" occurs when,

"a product is believed to be hazardous through contamination with microorganisms, toxic substances, foreign material, etc.; is not of correct potency; is malfunctioning; is mislabelled as to composition, fill of container; etc.; (or) does not meet applicable standards in other respects (and) the company responsible for the manufacture or distribution is asked to recall the faulty lots."²⁷²

By using this device, the government is no longer responsible for seizing the product. The company is responsible for ensuring that the product is removed from the shelves. This requires publicity in the media and elsewhere. The amount of publicity required by the government depends on the seriousness of the defect. There are three categories of recalls:

- (a) Class I: The use of this product may cause grave health consequences or possible death.
- (b) Class II: The use of this product may cause temporary or medically reversible adverse health consequences.
- (c) Class III: The use of this product is not likely to cause grave health problems.²⁷³

²⁶⁸Schultz *op cit* 61.

²⁶⁹*ibid.*

²⁷⁰*ibid.*

²⁷¹*ibid.*

²⁷²*ibid.*

²⁷³*ibid.*

Recalls have been used recently in the United States and United Kingdom.²⁷⁴ At present companies are ensuring that there is a built in procedure whereby recalls can be carried out cheaply and with little harm being done to the company's image.

The third innovative device is "a warning". This is a simple, but a valuable remedy. This remedy is provided for in the FDCA and, therefore, it carries the force of law and cannot be overlooked.²⁷⁵ The FDA uses regulatory letters in warning manufacturers, distributors, and retailers that there has been a violation. The sanctions that will follow due to the failure to comply with the terms of the warning will also be enumerated in a letter. Corrective action has to be undertaken within a stated period otherwise the offender will be penalized in terms of the letter. The letters are open for public scrutiny in terms of the Freedom of Information (FOI) Act^{276, 277}

Therefore, apart from the basic penalty of a fine the United States government has included other remedies that may be more effective than a fine (eg as a result of the publicity that accompanies a recall, a company's image may be injured).

In spite of the FDA heeding consumer needs there are several problems and criticisms levelled at the FDCA and the regulations. These include the following:

- (a) Flavouring, spices and colours are potential allergens to consumers yet ingredient labelling does not require them to be fully labelled. Only the category needs to be stated unless a specific indication is required (eg tartrazine).²⁷⁸
- (b) In the past standardized foods did not require ingredient labelling because they had a fixed recipe. As a quid pro quo the FDA allowed manufacturers

²⁷⁴See P A McCracken "Role of the Media in Promoting Food safety" Proceedings of the 10th SAAFoST Biennial Congress on Technology and the Consumer (August 1989) Durban 105-112.

²⁷⁵Schultz op cit 61.

²⁷⁶See above 167.

²⁷⁷Schultz op cit 61.

²⁷⁸Hadden op cit 140-141.

to use various substitutes (i.e. by increasing the number of optional ingredients). This policy, however, has changed, i.e. at present standardized foods are also to be labelled. The present problem is that ingredients (basic and optional) are listed on the product, but the label does not always reflect which ingredient it has used specifically. This creates problems for those people who are allergic to one of the optional ingredients.²⁷⁹

- (c) By standardizing products ingredients cannot be substituted and this results in a higher cost being borne by consumers.²⁸⁰
- (d) Consumers purchasing a particular food may not notice a change in the ingredients²⁸¹ if the food is not rigidly standardized.
- (e) Obstacles to listing all food ingredients are compounded by the difficulties consumers have with chemical names of additives.²⁸²
- (f) Manufacturers do not like drawing attention to the label and for this reason they tend not to carry additional words of caution or any sort of supplementary warnings on the label.²⁸³
- (g) With the introduction of open-date marking, consumers tend to choose products with a more distant dates thus allowing foods with earlier expiry dates to spoil.²⁸⁴
- (i) There is a marked increase in costs due to open-date marking, nutritional information, unit pricing, uniform grading while, in return, the benefit to

²⁷⁹ *ibid.*

²⁸⁰ *ibid.*

²⁸¹ *ibid.*

²⁸² *ibid.*

²⁸³ *ibid.*

²⁸⁴ Hadden *op cit* 142.

Melnick *op cit* 212.

consumers in disproportionate.²⁸⁵

- (j) The regulations are piece-meal.²⁸⁶
- (k) There are nomenclature problems.²⁸⁷
- (l) There is a need for the FDA to re-examine food standards because of technological innovations.²⁸⁸

It is submitted that an attempt to educate consumers in the science of food technology is futile. The responsibility to ensure that the nation's food supply is wholesome and healthy can only be done by regulatory agencies and professionals. Education can help to reassure consumers, but labelling "cannot provide any meaningful education in this area."²⁸⁹ Despite this criticism, the primary purpose of the legislation is to protect consumers from their ignorance.²⁹⁰ This, however, is not sufficient because consumers need to be informed about the ingredients, size, cost, etc.

The FDA aspire to ensure that the goals of the FDCA are met. At this stage, however, it is important to consider the direction the FDA is taking in labelling policies. The FDA has already indicated that it would no longer follow a strict regulatory regime as it did in the 1970s.²⁹¹ The present trends include the *inter alia*:

- (a) A more prominent role played by individual states.²⁹²
- (b) The overall credibility of the food label has declined among consumers.²⁹³
- (c) The trend is to de-regulate rather than to regulate strictly.²⁹⁴

²⁸⁵ *ibid.*

²⁸⁶ B A Silverglade "Current Issues in Food Labelling - An Overview" (1989) 44 *Food Drug Cosmetic Law Journal* 231

²⁸⁷ *ibid.*

²⁸⁸ Silverglade *op cit* 235.

²⁸⁹ Melnick *op cit* 215.

²⁹⁰ French & Barksdale *op cit* 16.

²⁹¹ Silverglade *op cit* 231.

²⁹² For a detailed analysis on this issue see Silverglade *op cit* 233-234.

²⁹³ *ibid.*

²⁹⁴ *ibid.*

- (d) De-regulation has extended the health claims made by manufacturers.²⁹⁵
- (e) As a result of the political environment, issues that ought to be decided on the basis of science, law, or public policy are now decided on the basis of politics.²⁹⁶
- (f) There have been drastic reductions in the budget of the FDA with increased duties being imposed without corresponding increases in the budget.²⁹⁷
- (g) Some new scientific findings have linked disease and diet, but have not been uniformly accepted by the various agencies.²⁹⁸
- (h) As a result of de-regulation by the FDA, Congress members are taking a keener interest in protecting consumers.²⁹⁹
- (i) As a result of problems with the present state of regulations there is a need to reconsider the overall food information system.³⁰⁰
- (j) Changes that simply sounded like a good idea a decade ago have now become a public necessity.³⁰¹

Silverglade predicts that the future will "continue to be chaotic and characterized both by shifting sands and changing rules."³⁰²

The effectiveness of food labelling is as good as its enforcement. The FDA is the agency authorized to enforce the regulations and legislation. In some areas both the USDA and the FTC have such authority. The FDA, however, is the most important agency.

4. THE FOOD AND DRUG ADMINISTRATION

"The principal job of the Food and Drug Administration (FDA) is to enforce

²⁹⁵ *ibid.* This move has been criticized by Silverglade on the basis that it does not benefit consumers. Furthermore, the proliferation of these claims are such that the business community has questioned the suitability of this new policy. Silverglade *op cit* 231-232.

²⁹⁶ Silverglade *op cit* 231-232.

²⁹⁷ *ibid.*

²⁹⁸ *ibid.*

²⁹⁹ Silverglade *op cit* 234.

³⁰⁰ *ibid.*

³⁰¹ Silverglade *op cit* 235.

³⁰² *ibid.*

the Federal Food, Drug and Cosmetic Act and thereby carry out the purpose of Congress to ensure that foods are safe, pure and wholesome and made under sanitary conditions; ... and all of these products are honestly and informatively labelled and packaged. FDA does not have jurisdiction over the advertising of such products."³⁰³

A. HISTORICAL BACKGROUND

Table II The History of the Food and Drug Administration (Source: Schultz op cit 157).

<u>YEARS:</u>	<u>AUTHORITATIVE AGENCY</u>
1906 - 1927:	Bureau of Chemistry (Department of Agriculture)
1927 - 1931:	Food, Drug and Insecticidal Administration (Department of Agriculture)
1931 - 1940:	Food and Drug Administration (Department of Agriculture)
1940 - 1953:	Food and Drug Administration (Federal Security Agency)
1953 - 1980:	Food and Drug Administration (Department of Health, Education, and Welfare)
1980 - :	Food and Drug Administration (Department of Health and Human Services).

B. POWER

The FDCA empowers the Secretary of Health and Human Services to enforce the provisions of the Act. This authority is delegated to the Commissioner of the FDA, who in turn, delegates this power to the officers in the FDA. The role of the FDA is purely regulatory.³⁰⁴

The FDA concerns itself not only with the FDCA but also with other Acts. These include: The Fair Packaging and Labelling Act, the Federal Meat Inspection Act, the

³⁰³From FDA Leaflet No. 1 (1981) and other subsequent FDA publications. Cf Schultz op cit 157.

³⁰⁴Schultz op cit 155.

Poultry Products Inspection Act, the Saccharin Study and Labelling Act, the Freedom of Information Act, etc.³⁰⁵

The Commissioner and Deputy Commissioner of the FDA administer the activities of six Bureaus (eg Bureau of Foods or Bureau of Drugs); the National Centre for Toxicological Research and ten regional operations.³⁰⁶

C. BUREAU OF FOODS

There is clear demarcation of power within the Bureau of Foods. The Bureau is administered by the Director who is assisted by several others:

Table III The Division of the Bureau of Foods (Source: Schultz *op cit* 159).

<p>ASSOCIATE DIRECTOR FOR COMPLIANCE Division of Regulatory Guidance Division of Compliance and Industry Program Division of Food and Colour Additives</p> <p>ASSOCIATE DIRECTOR FOR SCIENCE Division of Chemistry and Physics Division of Toxicology Division of Pathology Division of Microbiology Division of Mathematics</p> <p>ASSOCIATE DIRECTOR FOR TECHNOLOGY Division of Food Technology Division of Chemical Technology Division of Colour Technology Division of Cosmetics Technology</p> <p>ASSOCIATE DIRECTOR FOR NUTRITION AND CONSUMER SCIENCES Division of Consumer Studies Division of Retail Foods Division of Nutrition.</p>
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The role of the Bureau of Foods can be described as follows:

- (a) It develops FDA policy with respect to the safety, composition, quality

³⁰⁵ *ibid.*
³⁰⁶ Schultz *op cit* 157-158.

-
- (including nutrition), and labelling of foods, food additives, colours and cosmetics;
- (b) it conducts research and develops standards in respect of the composition, quality, and safety of foods; food additives; colours; and cosmetics;
 - (c) it conducts research designed to improve the detection, prevention, and control of contamination that may be responsible for illness or injury conveyed by foods, food additives, colours and cosmetics;
 - (d) it develops and promulgates current good manufacturing practices for the food processing industry, and drafts model ordinances, codes and regulations for state and local government to use in assuring food safety and quality;
 - (e) it plans FDA surveillance and compliance programmes and evaluates progress towards objectives of planned programmes and regulatory activities relating to foods, food additives, colours and cosmetics;
 - (f) it reviews industry petitions and recommends promulgation of regulations for food standards and for the safe use of colour and food additive;
 - (g) it collects and interprets data on nutrition, food additives, and environmental factors affecting the total chemical composition on direct and indirect food additives;
 - (h) it analyses regulatory samples that are necessary to support Bureau compliance programmes;
 - (i) it participates in training FDA field personnel and provides guidance to the regulated industries in the application of the most effective procedures to assure food safety and quality;
 - (j) it studies consumer experience with expectations of, and exposure to, Bureau-regulated products and maintains a nutritional data bank; and
 - (k) it recommends to the Office of the Commissioner new or revised legislation relevant to the Bureau's responsibilities.³⁰⁷

³⁰⁷ Schultz *op cit*: 160-161.

The Bureau's objectives are fulfilled by its various divisions. These divisions have demarcated functions. The functions vary from division to division and are too numerous to be dealt with here.³⁰⁸

D. REGIONAL OPERATIONS

The role of regional operations is to-

- (a) enforce the legislation and regulations by carrying out field work such as inspections, sampling and laboratory testing;
- (b) serve as a headquarters for co-operative programmes and plans regarding state and local agencies; and
- (c) direct the FDA's State-Federal programme policy.³⁰⁹

Regional operations are guided by an Executive Director.³¹⁰ The Executive Director administers twenty-one district offices for direct programme operations.³¹¹

E. SOME PROBLEMS WITH THE FDA

Since 1931 the FDA has grown in size and authority. The number of Acts under its jurisdiction have also expanded. Despite this the FDA still encounters several problems. These include:

- (a) There are too few inspectors enforcing the various Acts under the jurisdiction of the FDA.³¹²
- (b) Inspectors may enter a food plant and observe what is happening at present, but cannot query what happened on the days they did not inspect.³¹³
- (c) Once a food additive has been approved for use there is no liability on the manufacturer to report deficiencies or other problems to the FDA.³¹⁴

³⁰⁸These may, however, be found in Schultz op cit 160-169.

³⁰⁹Schultz op cit 158.

³¹⁰ibid.

³¹¹Schultz op cit 158.

³¹²Feldman op cit 44.

³¹³ibid.

³¹⁴ibid.

- (d) Responses by the FDA have been tardy although it has a clear mandate to act.³¹⁵
- (e) The FDA is guilty of "clientalism"; i.e. it is sometimes commandeered by the very industry it is required to regulate.³¹⁶
- (f) There are too few incentives for the FDA to acquire accurate and detailed scientific information. With the result that-
- (i) this influences regulatory decisions made by the FDA;
 - (ii) Congress can review decisions made by the FDA thus attacking its credibility as an independent agency; and
 - (iii) the FDA tends to be conservative.³¹⁷
- (g) Increased codification and unification have weakened the power of the FDA resulting in a rigidity that conflicts with the dynamic nature of science. In addition, its regulations inhibit research and flexibility.³¹⁸

The FDA's expansive duties and functions have been curtailed by lack of manpower and cutbacks in its budget.³¹⁹

F. FDA'S ROLE IN THE FUTURE

The FDA is the oldest health-orientated agency in the United States.³²⁰ Its role, however, is not clear-cut. At one stage there was pressure on the FDA to de-regulate and allow for increased state activity.³²¹ This was accompanied by a demand for uniformity among the various states. These are conflicting goals. There are, however, certain areas where the FDA can play a dynamic role³²² and others where state legislation will be competent^{323, 324} The FDA's present role has been described as incorporating stability,

³¹⁵ *ibid.*

³¹⁶ E J Burger Protecting the Nation's Health (1976) 2.

³¹⁷ Burger *op cit* 5.

³¹⁸ Burger *op cit* 6.

³¹⁹ Feldman *op cit* 43.

³²⁰ Burger *op cit* 1.

³²¹ G M Burditt "Quo Vadit FDA?" (1983) 38 Food Drug Cosmetic Law Journal 87 91.

³²² Eg enforcement; labelling; common or usual name; imitation labelling; etc.

³²³ Eg tamper-resistant packaging.

³²⁴ Burditt *op cit* 91.

modernization and statesmanship. The latter are described as follows:

"Stability means having a clear, consistent plan for the future with the leadership, support and resources to get the job done.

Modernization evolves from stability, and involves putting policies and practices into action that will serve both the needs of today and those of the future.

Statesmanship is synonymous with the objectivity during this process and the principle that reminds us that the FDA is first and foremost an agency that is here to serve the public. We must always clearly enunciate this principle of service."³²⁵

Even though at present the FDA is nothing more than an enforcement agency,³²⁶ it is an agency worth noting. It has been said to be a sensible organization that does not pursue the trivial.³²⁷

5. MEAT AND POULTRY PRODUCTS ACTS³²⁸

The Congressional statement of findings for the Meat Act and Poultry Act is that meat, poultry, and their products are essential sources of food.³²⁹ Congress contended that it was in the public interest to protect the health and welfare of consumers by ensuring that meat, poultry and their products were "wholesome, not adulterated, and properly marked, labelled and packaged."³³⁰

Both the Acts apply to interstate and federal activities but exclude regional activities. Further, these Acts are similar to the Federal Food, Drug and Cosmetic Act (FDCA). Issues such as the inspection of the defined products; appointment of inspectors; listing of prohibited acts; labelling and container requirements; etc. are covered in the Acts.

³²⁵F E Young "Strengthening the FDA through Stability, Modernization, and Statesmanship" (1988) 43 Food Drug Cosmetic Law Journal 447 447-448.

³²⁶Burditt *op cit* 91.

³²⁷Dr R L Hall (Former President of International Union of Food Science and Technology (IUFoST) and former Vice President (Science and Technology) of McCormick & Co., Inc.) personal communication (5 May 1988).

³²⁸These products are governed by the Federal Meat Inspection Act of 1907 which is found in 21 USCS (1984) §§ 601-695 and the Poultry and Poultry Products Inspection Act of 1957 which is found in 21 USCS (1984) §§ 451-470. Reference will only be made to the Federal Meat Inspection Act, as similar provisions are to be found in the Poultry and Poultry Products Act.

³²⁹§ 602.

³³⁰*ibid.*

Generally, these Acts prohibit (1) adulteration;³³¹ (2) misbranding;³³² (3) insanitary conditions;³³³ etc.³³⁴

The provisions relating to labelling of these defined products authorize the Secretary of Agriculture to deal with the issues by means of regulation. He may regulate the following matters:

- (a) The inspection of meat, poultry or their products that are found to be unadulterated and the power to request certain information to be provided.³³⁵
- (b) The style, size of type and materials required to be incorporated in labelling to avoid false or misleading labelling or marking of items that fall under the scope of these Acts.³³⁶
- (c) The establishment and definition of standards of identity; composition or fill of products that are not inconsistent with any such standards established in terms of the FDCA.³³⁷

The Secretary is also authorized to withhold the sale of articles that he "has reason to believe" are false or misleading until the label, marking or container is modified to prevent the article from being false or misleading.³³⁸ Furthermore, should the interested party be unwilling to accept the Secretary's determination a further administrative process can be set in motion.³³⁹ Penalties fluctuate from a refusal to permit the product shipment to criminal prosecution.³⁴⁰

³³¹That is, "something wrong with the product". (J W McCutcheon "Labelling: USDA's Process and Policy" (1988) 43 Food Drug Cosmetic Law Journal 387 387.)

³³²That is when something is wrong with the product's label or labelling. (McCutcheon op cit 387).

³³³§ 608.

³³⁴Eg assaulting a Food Safety and Inspection Services (FSIS) employee and bribery.

³³⁵§ 607(a), (b).

³³⁶§ 607(b).

³³⁷ibid.

³³⁸§ 607(e).

³³⁹Cf quote below 167.

³⁴⁰McCutcheon op cit 205.

The Secretary is accorded the power to co-opt State agencies and Federal agencies to administer the Acts. The extent of co-operation includes advisory assistance, technical and laboratory assistance and training; and financial and other aid. The Federal agency co-opted to assist is the United States' Department of Agriculture (USDA). The USDA is divided into various divisions of which the Food and Consumer Service division is important. An illustration of the structure of the Food and Consumer Service is found in Table IV. The aim of the Food Safety and Quality Services division is to:

- (a) Ensure that meat, poultry and eggs are safe for consumption;
- (b) provide an unbiased opinion in respect of the quality of canned, frozen and dried foods; and
- (c) "provide a purchasing service for USDA food assistance programs".³⁴¹

The FSIS assign Federal employees to deal with different aspects of the Acts and regulations. Some of the employees or inspectors inspect the establishments and others are compliance officers who are the police-force of FSIS. There are also sub-departments in the FSIS, eg the Food Labelling Division and the Technical Services Section.³⁴²

As indicated, one of the Secretary's responsibilities is to regulate the information to be stated on the labels of products. He has prepared regulations requiring prior approval of labels before they can be placed on meat, poultry and their products for sale.³⁴³ There are two reasons for such an approach: (i) The changes in advertising trends make guidance to labelling restrictive, and (ii) the regulatory process is cumbersome and slow to adapt to changes.³⁴⁴ The regulations deal with (a) defining the prior approval system,³⁴⁵ (b) defining the information required on a label; (c) providing supplementary detailed definitions of false and misleading labelling or practices under the Acts,³⁴⁶ (d) defining the requirements

³⁴¹Schultz *op cit* 171.

³⁴²R L Franks & D R Johnson "The USDA's Compliance and Enforcement Programs" (1989) 44 *Food Drug Cosmetic Law Journal* 205 205-206.

³⁴³9 CFR part 317.

³⁴⁴McCurtcheon *op cit* 385-386.

³⁴⁵9 CFR part 317.4

³⁴⁶9 CFR parts 317.4 and 318.132

for labelling of products that are for export;³⁴⁷ and (e) defining special situations such as re-use of labels, labelling of imported products, etc.³⁴⁸ The responsibility for approving these labels delegated to the Technical Services (TS) of the FSIS. The role of the TS is to approve the labels and maintain and develop labelling policies.³⁴⁹

Table IV The Food and Consumer Services Division (Source: Schultz *op cit* 170-171)

<p>FOOD AND CONSUMER SERVICES</p> <p>Food Safety and Quality Service Meat and poultry Inspection Service¹ Commodity Services²</p> <p>Food and Nutrition Services Family Nutrition Programmes Special Nutrition Programmes</p> <p>¹Also known as the Food Safety and Inspection Services (FSIS).</p> <p>²There are sub-divisions in this division as well. For example Fruit and Vegetable Quality Division, Meat Quality Division; etc. For further details see Schultz <i>op cit</i> 170.</p>
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There are several aspects to the "prior approval system". The first is the actual process of "approving a label". This process requires a submission of the label to the Standards and Labelling Division (SLD) of the FSIS. Approval on their part will entail compliance with the requirements laid down in the regulations which include the mandatory features of the FDCA and additional or voluntary information such as nutritional labelling, claims, instructions for preparation, etc.³⁵⁰

The second aspect of the "prior approval system" is "standard setting". The standards cover either standards of composition³⁵¹ or standards of identity.^{352, 353} The SLD has to ensure that the standards do not conflict with those established by the FDCA.

³⁴⁷ CFR parts 317.7 and 318.128

³⁴⁸ CFR part 317.10.

³⁴⁹ McCutcheon *op cit* 385.

³⁵⁰ McCutcheon *op cit* 386.

³⁵¹ This defines the required ingredient in a product and the minimum meat or poultry content.

³⁵² This define what the product must be in order to be called a particular name.

³⁵³ § 607(c).

The third aspect covers the making of "claims" by manufacturers. These claims have to be verified for accuracy. The FSIS has developed a system to control the accuracy of claims. When a claim is made the manufacturer will have to establish the authenticity of the claim. Thereafter, he has to develop a quality control programme. The programme is controlled by the SLD/FSIS and has to meet their approval. The programme has to ensure that a specification of the product can be set and that the specification is controlled by the programme. The programme must include internal checks and balances such as quality checks of the ingredients; hourly weight checks of the ingredients; verification of cooking temperatures; etc. The checks must also allow in-plant federal inspectors to monitor the various processes to ensure that corrective action is taken should a variation occur.³⁵⁴

The "prior approval system" has been termed "dynamic"³⁵⁵ because it ensures consistency in the application of the labelling policy while meeting the changing needs of the industry.³⁵⁶ It has been reported that,

"during a typical year the SLD will review approximately 125,000 labels. ... Of the labels submitted approximately twenty percent are rejected, but many of them have minor problems that can be readily corrected by the submitting company. Less than one percent of the labels are appealed to the SLD's director. Of these about 15 to 20 decisions go to the Deputy Administrator of the FSIS to review and only about five a year reach the Administrator. If a company still feels strongly about a particular label, the FSIS' decision may be appealed to a USDA Administrative Law Judge.³⁵⁷ In the past four years one appeal has reached the Administrative Law Judge level."³⁵⁸

A fair share of the FSIS' resources are spent on the "prior approval system" because it is method whereby the USDA can prevent problems from occurring rather than trying to cure the mistakes. For this reason the legislation and regulations deal adequately with issues such as methods of production and the labelling of products.³⁵⁹

³⁵⁴McCutcheon op cit 388.

³⁵⁵McCutcheon op cit 389.

³⁵⁶ibid.

³⁵⁷§§ 457(d) and 607(e).

³⁵⁸McCutcheon op cit 387.

³⁵⁹Frank & Johnson op cit 206.

6. OTHER ACTS

A. FREEDOM OF INFORMATION (FOI) ACT³⁶⁰

The Act is part of the Administrative Procedure Act and was amended in 1967 and 1974.³⁶¹ By the provisions of this Act government officials are held accountable to the public. This Act is a procedural tool whereby Congress checks that an agency is accountable, not only to Congress, but also to the citizens.

By means of the FOI Act a government office has to release records requested by the public. Should a record be denied such denial has to be justified. Should there be an unjustifiable denial the individual has recourse to the courts to ensure that the records are obtained.³⁶²

Paragraph 552 provides that each agency has to establish guidelines stating-

- (a) how FOI requests will be serviced;
- (b) the established uniform fees for the search and reproduction of paperwork; and
- (c) a 10-day time period during which the agencies must decide whether to release or deny the record.³⁶³

Denials may occur if they fall within an excepted category, which include the following:³⁶⁴

- (a) Internal operating rules of the agencies;
- (b) information protected by statute (including trade secrets and financial data from private businesses) obtained by the FDA in carrying out its statutory obligations;

³⁶⁰ 5 USCS § 552.

³⁶¹ Schultz op cit 228.

³⁶² J Greene "FOI: How to Learn Federal Secrets" (April 1979) 13 FDA Consumer 16 21.

³⁶³ Greene op cit 21. Also § 552(a)(4).

³⁶⁴ § 552(a)(1).

- (c) trade secrets obtained under explicit or implicit pledges of confidentiality;
- (d) intra-agency and inter-agency memoranda and letters that precede adoption of an official position;
- (e) personal and medical files whose disclosure will constitute an invasion of privacy under law;
- (f) information that is part of an investigation for law enforcement purposes,³⁶⁵ and
- (g) information specially authorized to be kept secret in the interest of national defence or foreign policy.³⁶⁶

Each agency is accountable to Congress. They have to submit yearly reports with the following information: (a) Number of denials and reasons for denying requests; (b) number of appeals and the result of the appeals; (c) a copy of every rule made by such agency; etc.³⁶⁷

The FOI Act does not operate without any limitations. It is limited by the Privacy Act of 1974.³⁶⁸ The Act protects the records of individuals from being subjected to the FOI Act. This protection is to prevent certain private information falling into the competitor's hands.

The FDA receives FOI requests in respect of drugs, foods, medical devices and administrative guidelines.³⁶⁹ It is reported that the FDA's work load has been increasing annually under this provision.³⁷⁰ "The Act has achieved its primary goal of opening the majority of Government files to public scrutiny ..."³⁷¹ This system is much more preferable than the secrecy clause enacted in South Africa.³⁷²

³⁶⁵Greene *op cit* 21.

³⁶⁶§ 552(a)(1).

³⁶⁷§ 552(d).

³⁶⁸§ 552(a).

³⁶⁹Greene *op cit* 21.

³⁷⁰*Ibid.*

³⁷¹Greene *op cit* 22.

³⁷²Section 18 of the Foodstuffs, Cosmetics and Disinfectants Act No 54 of 1972.

B. CLASS ACTION³⁷³

The class action³⁷⁴ is a procedural tool which can be used by-

"an individual, who is representative of those who have been damaged by the action of the defendant, suing for damages on his behalf and all others similarly situated."³⁷⁵

Prior to 1966 class actions were only available at state level. However, the Federal Rule 23 of the Civil Procedure Act was amended in 1966. This amendment ensured that the class action can also be claimed as a remedy in the federal courts.

The first issue is the definition of "class". In principle neither the parties nor the court need know the particular person, or even the exact number of people, the action involves but there must be an appreciation of who it includes.³⁷⁶

The four requirements of a class action are to be found in Rule 23(a). These are:

- (a) Numerosity: There is no specific number of persons required but factors such as geographic location of the plaintiffs; whether a joinder will not be practical; etc. are considered.³⁷⁷
- (b) Commonality: There must be a question of law or fact that is common to the class which prevails over any question affecting a particular class member.³⁷⁸
- (c) Typicality: The issue is whether the "representative plaintiff" has a claim of any type against any defendant.³⁷⁹

³⁷³United Kingdom also uses the class action but it is not provided for in legislation. See A Lockley "Regulating Group Actions" (1989) 139 *New Law Journal* 798.

³⁷⁴This is distinguished from a "joinder" as the latter deals with a case where the parties are identifiable. Furthermore, in a class action one person may bring the action, while a joinder requires all parties to be named and each brings the action on his or her own behalf. See Feldman *op cit* 160.

³⁷⁵Feldman *op cit* 160.

³⁷⁶R L Marcus & E F Sherman *Complex Litigation: Cases and Materials on Advanced Civil Procedure* (1985) 243.

³⁷⁷*Board of Education of Township High School v Olinatemp. Inc.* United States District Court, Northern district of Illinois, 1981. Reported in Marcus & Sherman *op cit* 262.

³⁷⁸Marcus & Sherman *op cit* 285.

³⁷⁹*La Mar v H & B Novelty & Loan Co.* 489 F. 2d 461. Reported in Marcus & Sherman *op cit* 301.

- (d) Representativeness: The plaintiff is required to establish that—(i) he (or she) does not have any interests which conflict with other members of the class, and (ii) his attorney is capable of prosecuting the claim with a degree of expertise.³⁸⁰

For a class action to succeed it must fall within the one of the three categories specified in Rule 23(b).³⁸¹

The concept of the class action is novel and innovative, but, at the same time, controversial. The proponents of this action argue that it is beneficial because—

- (a) there is a reduction in the work to be carried out by the judiciary,³⁸²
- (b) there is a decrease in costs on behalf of the plaintiffs,³⁸³
- (c) an individual plaintiff's claim may be too trivial to justify a redress by the courts,³⁸⁴
- (d) no other remedy is available (eg joinder is not possible),³⁸⁵
- (e) it will attract top legal talent because of the incentive of higher fees,³⁸⁶
- (f) it serves as a deterrent because a potentially high award for damages may be made against the defendant;³⁸⁷ and

³⁸⁰ *Piel v National Semiconductor Corp.*, United States District Court, Eastern District of Pennsylvania 1980. 86 F.R.D. 357. Reported in Marcus & Sherman *op cit* 311.

³⁸¹ A detailed analysis of Rule 23(6) lies outside the scope of this work. See, however, J H Friedenthal, M K Kane & A R Miller *Civil Procedure* (1985) 732-735.

³⁸² Feldman *op cit* 160.

³⁸³ Feldman *op cit* 160-163.

³⁸⁴ *Ibid.*

³⁸⁵ *Ibid.*

³⁸⁶ *Ibid.*

³⁸⁷ *Ibid.*

(g) it is the only viable method of ensuring that social issues can be litigated.³⁸⁸

Opponents of class actions argue that-

- (i) the action is futile for restricting unscrupulous sellers;
- (ii) it serves as a tool for consumers to harass sellers rather than protect consumers;
- (iii) the action burdens the overcrowded federal courts;³⁸⁹
- (iv) the action increases social action litigation;³⁹⁰ and
- (v) the action increases the burden of certain classes of litigants.³⁹¹

In spite of these criticisms Feldman concludes that the advantages outweigh the disadvantages.³⁹² It will require time and amendments to the procedural rules and the regulations to ensure that the procedural problems related to class actions are resolved. The experience so far has been that class actions are protective tools that should be maintained, even though they are not entertained favourably in the federal courts.³⁹³

7. CONCLUSION

When considering food law in the United States a multitude of legislation protects consumers. This includes federal and state legislation and regulations.

³⁸⁸Friedenthal *et al* *op cit* 722.

³⁸⁹Feldman *op cit* 160-163.

³⁹⁰Friedenthal *et al* *op cit* 722.

³⁹¹*ibid.*

³⁹²*ibid.*

³⁹³*Cf* Feldman *op cit* 163-165.

The legislation governing the labelling of any product in the United States is the Fair Packaging and Labelling Act which includes mandatory provisions (eg the name and address of the manufacturer), and discretionary regulations (eg defining and establishing standards of identity, fill and quality). Although the Act has been criticised a number of solutions (eg authorizing consumers to bring civil actions against offenders) have also been offered.

When considering food labelling one has to inspect the Federal Food, Drug and Cosmetic Act. The Act deals with issues such as misbranding and adulteration of food. Labelling is required to follow the prescribed format laid down in the Act or else it will be deemed to be misbranded. Furthermore, issues such as food additives, colour additives, food standards and regulations dealing with labelling of products are dealt with in the Acts and regulations.

The leading enforcement agency is the Food and Drug Administration (FDA). The FDA is an agency within the Department of Health and Human Services. Enforcement of the food laws falls within the ambit of the Bureau of Foods. Its role is vast and far-reaching but it is not without problems. Its future role is of great importance, not only for the United States, but also for the international markets, as the first world countries look to the FDA for guidance.

The FDA is the agency authorized to enforce the FDCA, FPLA and other Acts. The FDA is a complex agency and, as a result, it has to be divided into several divisions. Problems such as lack of manpower, lack of funding, lack of incentives to acquire accurate and detailed information has troubled the FDA. Their future role is not clear, however, the FDA has indicated that it will encourage de-regulation.

Since meat and poultry products are specifically excluded from the FDCA there is a need to consider the Meat Inspection Act and the Poultry and Poultry Products Inspection

Act. These Acts are enforced by the United States Department of Agriculture (USDA). The USDA's role differs from the FDA and its problems vary. A notable innovation of the USDA is the "prior approval" system for labels. The "prior approval" system requires manufacturers to ensure that a label is approved prior to the launch of a product, (i.e. a pre-market tool). The USDA has an opportunity to inspect labels to ensure that consumers will not be deceived. This is valuable because it is preferable to ameliorate the label before it becomes costly and difficult once the product has been launched.

There are other Acts that promote consumer protection, eg Acts such as the Freedom of Information Act. This Act allows an individual to obtain certain records and information from any federal agency. It has its limitations but it is a method whereby checks can be made concerning the activities of any agency.

Another mechanism worthy of consideration is the class action which is found in the Civil Procedure Act. This provides for an individual to bring an action on behalf of a group of people, who are similarly affected by another's conduct, to claim for consequential damages. It is not an unfettered remedy.

Consumer problems are complex and, from the above, it is clear that there is disagreement among consumers, retailers, legislator and enforcers regarding the solutions.³⁹⁴ A major criticism, however, is that as a consequence of the interest shown by the FDA, Congress, and other interested bodies, the food industry in the United States is overregulated.³⁹⁵ Furthermore, the United States lacks a coherent consumer protection policy. As a result legislation and regulations are promulgated as and when problems arise thus fulfilling short-term needs and being potentially detrimental to future developments.³⁹⁶

³⁹⁴Feldman *op cit* 217.

³⁹⁵Schultz *op cit* v.

³⁹⁶Feldman *op cit* 217.

Possible future trends should consider issues such as self-regulation; public participation; and effective agency enforcement programmes.³⁹⁷ Also issues such as standards of identity; claims; testing methods; risk warnings of cancer and other diseases; and the effect it will have on consumers, will have to be examined.

³⁹⁷Feldman *op cit* 217-239.

CHAPTER 6: SOUTH AFRICA

1. INTRODUCTION

"The word "consumer" is not a legal term of art known in our common law, nor is consumer law one of the traditionally recognized branches of our law. In fact, consumer law is a relatively modern legal discipline ..., a fair amount has been said and written about the need to protect consumers and this problem has also engaged the attention of the legislature ..."¹

South African common law is of limited value in the area of consumer law and is of no assistance in food labelling. Furthermore, it cannot be said that consumers are adequately protected by consumer bodies, business self-regulation or consumer awareness.² Consequently, it is necessary to consider to what extent the legislature protects the health and pocketbook of South African consumers. There is a myriad of legislation that can be considered in this area. The important laws protecting consumers indirectly in the field of food are: (a) Measuring Units and National Measuring Standards Act,³ (b) Trade Metrology Act,⁴ (c) Trade Practices Act⁵ and the Harmful Business Practices Act,⁶ (d) Standards Act,⁷ (e) Dairy Industries Act,⁸ and the Marketing Act.⁹ Food and food products are legislated for in (a) The Foodstuffs, Cosmetics and Disinfectants Act (the "Foodstuffs Act")¹⁰ and (b) a number of regulations.

¹The Honourable Mr Justice M M Corbett "Common Law Protection of the Consumer Under South African Law" in published proceedings of South African Law Conference (1981) 3.

²D J McQuoid-Mason "The Harmful Business Practices Act: Does it Obviate the Need for further Legislative Changes in Consumer Law?" (Unpublished paper) Checkers Consumer Journalist Awards Seminar (21 November 1988).

³No 76 of 1973.

⁴No 77 of 1973.

⁵No 76 of 1976.

⁶No 71 of 1988.

⁷No 30 of 1982.

⁸No 30 of 1981.

⁹No 59 of 1968.

¹⁰No 54 of 1972.

2. GENERAL CONSUMER PROTECTION LAWS

A. MEASURING UNITS AND NATIONAL MEASURING STANDARDS ACT¹¹

The aim of the Act is to: (a) Provide for the orderly introduction of the measuring units of the International System of Units and certain other measuring units within South Africa; (b) indicate national measuring standards; and (c) deal with incidental matters.¹²

Furthermore, the Minister is empowered to designate the appropriate units and symbols of measure,¹³ while the Secretary of Commerce or the Secretary of Industry is empowered to administer the Act.¹⁴ National measuring standards may also be designated by the Minister. The maintenance of the national measuring standards, however, is entrusted to the Council for Scientific and Industrial Research (CSIR).¹⁵

In terms of this Act it is an offence to use any measuring unit other than the designated metric unit. The units designated are kilogram (kg) for mass; cubic metre (m³) for volume;¹⁶ and litres ("L", "l", or "ℓ") for liquids.¹⁷

The Act is fundamentally a unifying statute. It ensures that South Africa has a uniform method of measuring mass, volume or liquid.

B. TRADE METROLOGY ACT¹⁸

The Trade Metrology Act is enacted to consolidate and amend the laws relating to trade metrology. The scope of this Act is to deal with issues such as:

¹¹No 76 of 1973.

¹²Long title of the Act.

¹³s 3.

¹⁴s 2.

¹⁵Established in terms of s 2 of the Scientific Research Council Act No 32 of 1962.

¹⁶See GN R1146 GGE 4326 of 5 July 74 (Per Gaz 1999).

¹⁷GN R1610 GGE 7168 of 8 August 1980 (Per Gaz 3043).

¹⁸No 77 of 1973.

-
- (a) The establishment of a Director and Deputy Director of Trade Metrology;¹⁹
 - (b) the appointment of inspectors;²⁰
 - (c) the establishment of a Metrology Council;²¹
 - (d) the creation of departmental, regional or inspectional standards;²²
 - (e) the control, manner of use, etc. of measuring instruments;
 - (f) trade dealing and sale of goods; and
 - (g) empowering the Minister to promulgate regulations in matters incidental to trade metrology.²³

The Act prohibits false or incorrect statements of quantity.²⁴ The statements prohibited may be made directly or indirectly, but they must be incorrect, false, untrue or intentionally misleading as to the net weight, (or number), of items in a package. Failure to comply with this prohibition results in the offender committing an offence,²⁵ unless short-weight²⁶ is permitted by the Act or regulations.²⁷

The Minister is empowered to promulgate regulations in many matters relating to trade metrology. He is authorized to promulgate regulations for:

- (a) Prescribing the manner in which appointees are to carry out their duties;²⁸
- (b) prescribing the manner of indicating or determining the quantity, size or number of goods or articles sold;²⁹
- (c) prescribing the permissible limits of error or differences (i.e. tolerance levels) which may exist between the actual and represented quantity, size and dimensions of goods or articles;³⁰ etc.³¹

¹⁹ s. 2.

²⁰ s. 3.

²¹ s. 6.

²² ss 8-10.

²³ s. 42.

²⁴ s. 37.

²⁵ s. 37(1).

²⁶ "Slack-fill" is used synonymously with short-weights.

²⁷ s. 37(2).

²⁸ s. 42(d).

²⁹ s. 42(x).

³⁰ s. 42(aa).

³¹ s. 42.

The regulations incorporate issues such as the prescribed quantities, the manner of marking a quantity statement and the permissible descriptive terms that may be used in a package.³²

Regulation 10 provide that prepacked foodstuffs must be sold in units of prescribed quantities. Thus all goods listed in Schedule 6 have to be packed in the prescribed units. Exemptions can be granted for goods that are imported, but the manufacturer must have the written authority of the Director. Another exception is made for free samples in packs which are not an integral part of the package. They need not be packed in the prescribed quantities.³³ Schedule 6 specifies a table of goods (or articles), and prescribed quantities (and occasionally the conditions) that have to be met. The Schedule contains 131 items.³⁴ These include foods such as margarine, coffee, tea, baby food, dried beans, etc. Failure to comply with this provision is a criminal offence, but consumers have no relief against an unscrupulous manufacturer or retailer. This, however, is not the only penalty. If a product does not conform with the prescribed quantities it cannot be sold in the marketplace.³⁵ Should such products reach the marketplace the directorate may initiate an embargo on the sale of the product from retail outlets. When a bona fide mistake is made, however, the directorate may grant a concession so that existing stocks of the product can be sold. The embargo is probably more effective than a criminal prosecution.³⁶

The manner of describing a price, marking of a price and quantity of prepacked products is governed by reg 7. The first requirement is that the prescribed quantity must be labelled in the manner specified in the regulation.³⁷ If price is used to bait consumers to purchase an item it is necessary to indicate the net quantity of the article.³⁸ In addition, a statement of quantity must be located on the immediate container holding the product

³²GN R2362 GGE 5806 of 18 November 1977 (Reg Gaz 1977).

³³reg 10(3).

³⁴Mr L Schwulst (Deputy Director of Department of Trade and Industry) personal communication (17 July 1989).

³⁵s 14.

³⁶Schwulst op cit.

³⁷reg 7(1).

³⁸reg 7(2).

and on any outer wrapper.³⁹ The net quantity statement has to be clearly, legibly and indelibly marked on a conspicuous part⁴⁰ of the label⁴¹ in contrasting colour.⁴² Furthermore, the height of the statement has to be and not less than twenty-five percent of the average of the smallest and the largest characters used for the brand name or descriptive name, whichever is the larger of the product, with the proviso that the minimum height for such a statement is 1,5 mm and the maximum 15 mm.⁴³



Figure 15: An example of the size a quantity statement has to be in relation to its brand name or descriptive name. This is found on the top panel of the box.

The use of descriptive terms is permitted, but only if the stipulated conditions are fulfilled.⁴⁴ For example, terms such as "giant", "jumbo", and words that tend to indicate that the product is increased in size or quantity cannot be labelled larger or brighter than the quantity statement.⁴⁵ The regulation also provide that such a description need not be placed in an obscure position, but it cannot be more prominent than the name of the product.⁴⁶

³⁹reg 7(3).

⁴⁰Not necessarily on the main panel of the label.

⁴¹reg 7(4).

⁴²reg 4(g).

⁴³reg 7(5).

⁴⁴reg 8.

⁴⁵reg 8(a).

⁴⁶reg 9.

The directorate prosecutes more cases of short-weight compared to other technical breaches of the regulations⁴⁷. The Act does not allow concessions or condonations for short-weights.⁴⁸ In determining whether a product is short-weighted the directorate follows the "average system". The system allows the inspector to select randomly ten samples of the product in order to ensure that the average actual weight of the product is not less than the represented quantity. There is, however, a tolerance level for each product.⁴⁹ This system allows some packs to be slightly short-weighted provided they are within the tolerance level. The justification for establishing tolerance levels is to allow for the settling of fillers (or ingredients), or restrictions caused by packaging machines. An accepted tolerance level is an advantage when considering large bulky products.⁵⁰

By and large consumers are protected against short-weights by the legislation and regulations. There are, however, several lacuna in the Act:

- (a) Retailers and manufacturers attempt to exploit consumers by short-weights;⁵¹
- (b) practices such as supermarkets erroneously labelling their shelves with incorrect mass statements⁵² still occur;⁵³
- (c) when foodstuffs have to be measured at the point of sale, (eg vegetables and fruits), the scales are frequently inaccurate,⁵⁴
- (d) products of the same kind, (eg soaps), are packed in the same size boxes but with different weights;⁵⁵ and

⁴⁷Eg size of the mass statement, contrasting colour, etc.

⁴⁸Schwulst *op cit*.

⁴⁹Eg Product Y has a quantity statement of 1 kg. Its tolerance level is 2 %. Of ten products, randomly chosen, five weigh 998 g while the other five weigh 1.02 kg each. Using the average system this will not be considered as short-weight.

⁵⁰Eg ten products randomly selected have a prescribed quantity of 1 kg and each weighs 998 g. On the average system this will be considered as short-weight but if one considered each individual product in the light of the tolerance level then each individual product will not be considered short-weighted.

⁵¹These criticisms are stated in a letter by K Doyle in *The SA Consumer* (First Quarter 1988) 31.

⁵²Eg the shelf may specify that the price is R 1.10 for 450 g of dog food when in fact the weight is 410 g.

⁵³Doyle *op cit* 31.

⁵⁴*ibid*.

⁵⁵Previously a commercial soap powder, "ABC", with a net mass of 750 g was packed in the same size box as 1 kg boxes. The manufacturer's argument was that the filler required him to pack the soap powder in a 1 kg size box. One of the problems with the soap powder was that the manufacturer's theme was "Why pay more?". This was eventually resolved by the manufacturer having to pack his soap powder in the 1 kg size box with the weight being 1 kg.

- (e) a lack of awareness on the part of consumers⁵⁶ results in an urgent need to educate consumers, but there are cost implications.⁵⁷

Despite these problems the benefits of the Act are:

- (i) There is a reduction in the proliferation of product sizes.⁵⁸
- (ii) The Act is enforced by the central government and the directorate has its own force of inspectors^{59, 60}.
- (iii) Since the inspectors do the work at factory level there is not a great demand for a large workforce.⁶¹
- (iv) Fewer inspectors are required because of improvements in quality control and quality assurance techniques.⁶²
- (v) Consumers can easily compare products without conducting cumbersome calculations to compare prices.
- (vi) It excludes the use of fractions from quantity statements,⁶³ which makes it easier for consumers to compare products.

Trade metrology requires government intervention. It is not an area that can be self-regulated. Despite criticisms from the business sector that there should be no government intervention in this area, businessmen are unwilling to accept that there is no longer a need for such regulations.⁶⁴ The Act is a valuable tool of consumer protection and should remain a central government mechanism.

⁵⁶Schwulst *op cit*.

⁵⁷Some attempt in educating consumers in consumer rights has been undertaken by a project called "Street Law." (Also see D J McQuoid-Mason Street Law: Practical Law for South African Students (Book 3): Consumer Law (Student Text) (1989)).

⁵⁸This is a problem in the United States of America, while England and Wales have enacted the Weights and Measures Act (of 1985).

⁵⁹The advantage is that the Act can be uniformly interpreted and applied. Furthermore, it is economical as it avoids each local authority from establishing separate standards.

⁶⁰Schwulst *op cit*.

⁶¹*ibid*.

⁶²*ibid*.

⁶³*ibid*.

⁶⁴P Pretorius An Evaluation of the Provision Made in the South African Legislation for the Informative Labelling of Locally Produced and Marketed, Treated and Packed Foodstuffs (1978) 68.

⁶⁵Schwulst: *op cit*.

C. TRADE PRACTICES ACT⁶⁵ AND HARMFUL BUSINESS PRACTICES ACT⁶⁶

I. Trade Practices Act⁶⁷

"Trade is the life-blood of a capitalistic society. While the free enterprise system should as far as possible be left to formulate its own trade criteria there are nevertheless practices which occur in the exercise of trade which either singularly or collectively have a harmful effect on the principles of competition. The Trade Practices Act is but one of several legislative measures enacted to safeguard free enterprise and place restraints on certain trade practices which may jeopardise competition serving the public interest...."⁶⁸

The Trade Practices Act was enacted to provide for- (i) the control of certain advertisements; (ii) the regulation of the use of trade coupons; (iii) the prohibition or control of certain trade practices; and (vi) other incidental matters.⁶⁹

One of the incidental matters dealt with by the Act was the establishment of a Trade Practices Advisory Committee (TPAC).⁷⁰ The TPAC was empowered to appoint members;⁷¹ to convene meetings;⁷² and appoint sub-committees;⁷³ etc.

The Act also allowed for the appointment of inspectors with discretionary powers to assist in investigating any matter requested by the committee.⁷⁴ Inspectors were given the authority to enter premises to inspect goods (and documents), and to seize them if necessary.⁷⁵

A notable provision of the Act was s 15 which prohibited certain "trade practices". The Minister of Economic Affairs and Technology could prohibit, restrict or control any

⁶⁵No 76 of 1976.

⁶⁶No 71 of 1981.

⁶⁷The Harmful Business Practices Act repeals most of the Trade Practices Act. The author, however, found it necessary to discuss the provisions of this Act as it forms the basis of the Harmful Business Practices Act.

⁶⁸J P Horn "Trade and Industry" in 28 Law of South Africa (1987) 234.

⁶⁹Long title.

⁷⁰s 2.

⁷¹s 3.

⁷²s 4C.

⁷³s 4.

⁷⁴s 7.

⁷⁵ibid.

"trade practices" that may injure: (a) The relationship between businesses and persons who are engaged in the sale of any goods; or (b) the relationship between businesses and consumers. A necessary requirement, however, was that the prohibition could only come about if the Minister was satisfied that this step was necessary or expedient in the interest of such persons, consumers or businesses. "Trade practices" was, (and still is), defined as:

"Not including any trade practice which in the opinion of the Minister is a restrictive practice as defined in s 1 of the Maintenance and Promotion of Competition Act No 96 of 1976."⁷⁶

It is a wide definition and not very helpful as a consumer protection device.

The main problem with the Act was that despite the powers conferred on the Minister they were seldom used. Furthermore, most members of the TPAC were closely associated with commerce and industry.⁷⁷ As a result the Committee did not have a high profile among consumers and consumer organisations.⁷⁸ Despite the provisions of the Act injurious trade practices continued and increased after its promulgation in 1976.⁷⁹

II. Harmful Business Practices Act

The failure of the Trade Practices Act led to the introduction of the Harmful Business Practices Act in 1988. The object of the Act is to provide for the prohibition or control of certain business practices.⁸⁰ The Act repeals the Trade Practices Act, except for those sections dealing with false or misleading advertisements.⁸¹

"Harmful business practice" is defined in s 1 as-

"meaning any business practice which, directly or indirectly, has or is likely to have the effect of-

- (a) harming the relations between businesses and consumers;
- (b) unreasonably prejudicing any consumer; or
- (c) deceiving any consumer."

⁷⁶s 1.

⁷⁷McQuoid-Mason (1988) *op cit* 1-2.

⁷⁸*ibid.*

⁷⁹*ibid.*

⁸⁰Deals with issues such as "harmful trade practices", pricing policies, etc.

⁸¹That is, ss 1, 9, 10, 13 and 19. Note advertisements are also controlled by the Advertising Standards Authority of South Africa (ASA). See ASA's "Code of Advertising Practice and Constitution".

The definition is flexible, but it does not elucidate harmful business practices. Each practice is to be considered exclusively on the facts by the Business Practices Committee. An advantage of a flexible definition is that it is wide enough to include the "greatest possible range of harmful activities," but it will fail if the definition is not applied consistently and clearly.⁸²

The Act provides for the establishment of a Business Practices Committee. The Committee consists of four to seven members. Members are appointed on the basis of special knowledge or experience in consumer affairs, economics, industry, commerce, law, or the conduct of public affairs.⁸³

The function of the Committee is three-fold:

- (i) To inform the public, at regular intervals, regarding current policy in relation to harmful business practices;⁸⁴
- (ii) to deal with representations received in terms of the Act; and
- (iii) to perform other functions assigned to it under the Act.⁸⁵

The Act also sets out methods to be used in accomplishing the Committee's functions.⁸⁶

The operation of the Harmful Business Practices Act is not significantly different from the Trade Practices Act. The first difference, however, involve the penalties imposed upon the offender. The Harmful Business Practices Act provides for harsher penalties. For certain offences⁸⁷ the penalty is a fine of R 200,000 or imprisonment not exceeding five years or both.⁸⁸

⁸²D Woolfrey "The Harmful Business Practices Act, 1988" (1988) 10 Modern Business Law 174-177. (Also see R W Alberts "Die Wet op Skadelike Sakepraktyke: Opmerkings Oor die Betekenis Daarvan vir Verbruikers en Ondernemers" (1988) 10 Modern Business Law 178-181.)

⁸³s 2.

⁸⁴This is to provide general guidelines for the business community.

⁸⁵s 4.

⁸⁶Eg its scope in investigating complaints.

⁸⁷Eg if the manufacturer continued with a practice that has been declared a "harmful business practice".

⁸⁸s 15(b).

Another major difference, (between the Trade Practices Act and the Harmful Business Practices Act), is the creation of a special court.⁸⁹ After a notice has been issued by the Minister declaring a business practice "harmful" the person affected by such a notice may appeal to the special court. The special court consists of a president and two other members appointed by the State President. The president must be a judge of the Supreme Court of South Africa, while the first member must be knowledgeable in economics whereas the other member may be involved in commerce, industry or other financial matters.⁹⁰ The procedures for lodging and hearing an appeal are dealt with in the Act.⁹¹ A novel provision is that there is no review or appeal from the special court to any other court of law.⁹²

Criticisms levelled at the Harmful Business Practices Act are extensive. These include inter alia:

- (i) The lack of an executive officer who will initiate an investigation when a consumer complaint has been received. At present consumers rely on the Committee and the Department of Trade and Industry to ensure that the provisions of the Act are implemented.⁹³ It has been mentioned that the Trade Practices Committee was not successful in carrying out consumer protection activities and the new Business Practices Committee is still operating under the same conditions. The solution, suggested by McQuoid-Mason,⁹⁴ is a Business Practices Committee that works on a full-time basis.
- (ii) Unlike the Office of Fair Trading (OFT) in England, the Committee has no power to obtain individual assurance from unprincipled traders who continue the same practices by merely changing the name of their operations. There is no opportunity of limiting their activities.⁹⁵

⁸⁹ s 13.

⁹⁰ s 13(3).

⁹¹ s 13(4)-(9).

⁹² s 13(13).

⁹³ McQuoid-Mason (1988) op cit 19.

⁹⁴ ibid.

⁹⁵ Cf above 77, 78.

- (iii) The Act does not allow the Committee to pierce the corporate veil and permit company executives to be held liable for the company's deeds.⁹⁶
- (iv) Unlike England,⁹⁷ there are no civil penalties provided for in the Act.⁹⁸
- (v) There is considerable red tape involved in having a business practice declared harmful. The Committee has the power to declare a practice harmful but, unless it is gazetted by the Minister, the declaration is only temporary. A further problem is the time taken before a practice can ultimately be declared harmful.

Industry has criticised the Act for- (a) linking consumer protection to inflation by controlling prices;⁹⁹ (b) re-introducing price control;¹⁰⁰ and (c) entrusting the Minister with unrestricted powers.¹⁰¹ It is submitted by Tager¹⁰² that the Act is a deviation from the government's policy of deregulation. The criticism, however, must be seen against the background of the repealed Trade Practices Act. Changes have been made in the method of enforcement, the name of the committee, the penalties provided and other cosmetic amendments, although by and large the essential features of the Trade Practices Act have been re-enacted.

"The Business Practices Committee and the special court are the functionaries charged with creating and defining policy in relation to harmful business practices. Through their guidelines and decisions respectively, these bodies will contribute to the growth of a consumer protection jurisprudence centred on the pivotal concept of harmful business practice. With little to go on by way of authority, and nothing by way of precedent, they face a formidable task. However, their composition is designed to ensure that they are equal to it. The present legislation has the potential for providing effective protection to consumers against sharp practices in the market place. It remains to be seen whether their potential will be realised."¹⁰³

⁹⁶Cf s 39 of the Fair Trading Act (of 1973). (See above 77, 78).

⁹⁷See above 67.

⁹⁸McQuoid-Mason (1988) *op cit* 21.

⁹⁹Anonymous "Information or Deprivation" (May 1988) 108 *Financial Mail* 36 37.

¹⁰⁰L Tager "General Principles of Contract" (1988) *Annual Survey of SA Law* 105.

¹⁰¹Information or Deprivation *op cit* 37.

¹⁰²Tager *op cit* 105.

¹⁰³Woolfrey *op cit* 177.

D. STANDARDS ACT¹⁰⁴

The aim of the Standards Act is to- (a) promote and accomplish standardization with regard to commodities; (b) provide for the establishment and application of marks of proof and marks of authenticity on commodities; and (c) provide for the continued existence of the South African Bureau of Standards and the council of the bureau.¹⁰⁵

Section 2 of the Act ensures the continued existence of the South African Bureau of Standards (SABS) established in 1945.¹⁰⁶ The primary objectives of the SABS are:

- (a) To provide information, guidance, instruction and promote standardization;
- (b) to assist foreign governments in respect of information dealing with standardization;
- (c) to obtain the co-operation of State departments, commerce and industry to accomplish standardization;
- (d) to examine, test, or analyze articles;
- (e) to frame and issue specifications, codes of practice and standard methods, and to control the use thereof; and
- (f) to assess quality management systems and to control such systems.¹⁰⁷

The SABS may establish "standards"¹⁰⁸ and "codes of practice"¹⁰⁹ to accomplish its objectives. Furthermore, the SABS may utilize marks of authenticity¹¹⁰ or proof. The use of these marks is regulated by the Minister, who may control: (i) The application of the mark to a product in accordance with its characteristics, (including nature; quality; strength; purity; composition; quantity; dimensions; mass; grade; durability; origin or age; whichever may be applicable), or the material or substance from or with which, or the manner in which, it has been manufactured; (ii) the placing of the mark by persons

¹⁰⁴No 30 of 1982.

¹⁰⁵Long title.

¹⁰⁶Established in terms of s 2 of the Standards Act No 24 of 1945.

¹⁰⁷s 3. This section also lists other objectives.

¹⁰⁸Governed by s 19.

¹⁰⁹Governed by s 18.

¹¹⁰See Figure 15.

representing the Bureau; and (iii) incidental matters.¹¹¹

The Act also permits the appointment of inspectors,¹¹² whose powers and duties of inspection include: (a) Entering the premises of a manufacturer at any time without notification if there is a compulsory specification or standardization mark in force; (b) taking a sample or an analysis of the commodity involved; (c) examining the operation or process of manufacture; (d) examining records, lists or other relevant documents that pertain to the process of manufacture; etc.¹¹³

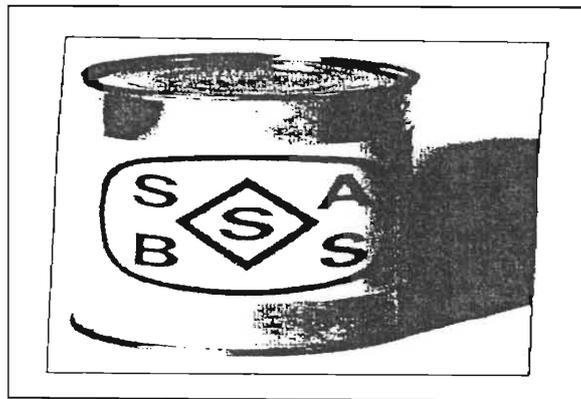


Figure 16: An example of a mark of authenticity from the SABS. (Source: SABS Canned Foods: The Role of the Food Standards and Inspection Division (1989)).

Members of the council, inspectors, and other members are required to keep secret any information obtained in terms of the Act. This does not, however, apply to information to be disclosed to the Minister; to any person who requires this information to perform his function; to any competent authority; or if the information is required in terms of any law or as evidence in court.¹¹⁴

¹¹¹ s 20.

¹¹² s 26.

¹¹³ s 27.

¹¹⁴ s 29.

The Minister is empowered to make regulations to ensure that the objectives of the SABS can be carried out.¹¹⁵ Regulations may include the collection of fees, the amount to be collected, etc. Thus the SABS is self-sufficient and is not totally reliant on government funding.

The varied work of the SABS has made it necessary for the creation of several departments. One of the essential departments is the Biological Sciences Department. A division of this department is the Food Standards and Inspection Division (FSID). The FSID is-

"responsible for the administration of compulsory specification for various processed food products, as well as a number of standard specifications in connection with the use of the SABS mark. The main functions of the Division include physical inspections and approval or rejection of a variety of locally produced or imported commodities. The necessary attention is also given to the improvement and/or maintenance of local factories' quality management systems."¹¹⁶

The main office of the FSID is situated in Pretoria with approximately twenty-five inspectors¹¹⁷ scattered throughout the Republic.

The FSID draws up three types of specifications:

- (a) Standard specifications - these are national standards which are mainly voluntary or, alternatively, compulsory and are connected with the SABS mark schemes;¹¹⁸ (eg standard includes (i) frozen fish, frozen marine molluscs, and frozen fish and frozen marine mollusc products;¹¹⁹ (ii) canned meat products;¹²⁰ etc.).
- (b) Private specifications - such standards are drawn up at a sponsor's request.¹²¹

¹¹⁵s 36.

¹¹⁶SABS Canned Foods: The Role of the Food Standards and Inspection Division (1987) 1.

¹¹⁷The Biological Science Department has 52 inspectors in total. Mr G J Joubert (Deputy-Director of the Food Standards and Inspection Division of the South African Bureau of Standards) personal communication (19 July 1989).

¹¹⁸SABS op cit 2.

¹¹⁹GN R35 GGE 3757 of 12 January 1973 (Reg Gaz 1723).

¹²⁰GN R406 GGE 6873 of 7 March 1980 (Reg Gaz 2964).

¹²¹SABS op cit 2-3.

- (c) Co-ordinating specifications (CKS) for government purchases - CKS are specifications which are streamlined standards for government use.¹²²

The drawing up these standards is governed by the relevant regulations promulgated in terms of the Foodstuffs Act or Trade Metrology Act. Therefore, it is necessary that close contact is maintained between the Department of Health, Department of Trade and Industry, and other departments, such as the Department of Agricultural Economics and Marketing.¹²³ A necessary link is also maintained with consumer bodies and other interested parties.¹²⁴

Inspectors are empowered to enter factory premises to inspect foodstuffs. The theory of the FSID, however, is that safety and quality cannot be "inspected" but need to be "built in".¹²⁵ Hence FSID's interest in quality management. The appointment of permanent inspectors in factories to monitor the entire process, (rather than using samples to inspect quality and compliance with specifications), is necessary to ensure that quality is maintained.¹²⁶ Inspections, therefore, examine the suitability of raw materials until the finished product.

If, on inspection, a product is found not to comply with the specifications, but is still fit for human consumption, it may be downgraded and can be sold as "sub-standard" foodstuffs. However, should there be a health risk the product will be rejected totally, cannot be sold and must be destroyed.¹²⁷

Manufacturers support the Act because many of the established standards are voluntary. Usually the voluntary standards are established when an association of the industry or a particular manufacturer approaches the SABS to devise suitable standards.¹²⁸ The compulsory standards are an exception as they are few and far between.

¹²² *ibid.*

¹²³ SABS *op cit* 3-5.

¹²⁴ *ibid.*

¹²⁵ SABS *op cit* 5.

¹²⁶ *ibid.*

¹²⁷ SABS *op cit* 7.

¹²⁸ Joubert *op cit.*

E. OTHER ACTSI. The Dairy Industries Act¹²⁹

The preamble to the Dairy Industries Act states that it has been enacted:

"To consolidate and amend the laws relating to the registration of dairy premises, the marketing of dairy produce and the regulation of certain other matters connected with the dairy industry, and to amend the Dairy Industries Control Act of 1930."

The Act covers all dairy products including margarine, cheese, cream, butter, milk, etc.

The Minister of Agriculture and Marketing is empowered to promulgate regulations in connection with dairy products. These are set out in s 29 of the Act. The powers to regulate, for example, include-

- (i) The use of preservatives, colouring matter and other foreign substances that may be permitted in dairy produce;¹³⁰
- (ii) the standards for the composition, purity and quality of dairy produce, and the ingredients for any composition of such produce, or the type or kind of ingredient or the mixture of different types or kinds of ingredients manufactured;¹³¹ and
- (iii) the manner in which dairy produce, containers or packages containing dairy produce must be marked and labelled.¹³²

In addition, in terms of the Act, specific "dairy premises" are required to be registered. These include factories where margarine is manufactured.¹³³ The registration may be

¹²⁹N_o 30 of 1961.

¹³⁰s 29(i).

¹³¹s 29(p).

¹³²s 29(tA).

¹³³s 4.

cancelled if the manufacturer does not comply with the requirements of the Act and its regulations.¹³⁴

It is evident that the Minister of Agriculture and Marketing not only deals with the registration of dairy products, but also with the labelling of dairy products, containers or packaging. This responsibility conflicts with the authority granted to the Minister of Health, Welfare and Pensions, who is empowered to regulate labelling and advertising under the Foodstuffs Act.

II. The Marketing Act¹³⁵

The preamble to the Marketing Act provides that the aim of the Marketing Act is:

"To consolidate the laws providing for the regulation of the production and sale of agricultural products; for the establishment of certain boards in connection therewith; for the establishment of a national mark for the grading and standardization of agricultural products; and for matters incidental thereto."

Agricultural products, for example, include-

- (i) barley, grain, sorghum, maize, oats, etc. or any commodity which contains a substantial portion of barley, grain, sorghum, maize, oats, rye or wheat;
- (ii) beans, peas, and all other leguminous seeds;
- (iii) meat and meat products;
- (iv) dairy products, imitation dairy products and margarine;
- (v) canned foodstuffs; etc.

In terms of s 89 the Minister is authorized to regulate in respect of several matters. These include inter alia:

- (i) The standard of composition of a product, or any class of product, and the ingredient and other substances which a product or class thereof shall

¹³⁴s 8. Consequently if a manufacturer fails to comply with the ingredients of margarine, his registration can be cancelled and he will no longer be allowed to manufacture margarine.

¹³⁵No 59 of 1968.

contain, or substances which a product or a class thereof may not contain;¹³⁶
and

- (ii) the particulars with which and the manner in which any product or container containing such product shall be marked or labelled, and the persons by whom the product (or container) shall be so marked or labelled, or the particulars with which (or manner in which), any such product or container may not be marked or labelled.¹³⁷

The Marketing Act, like the Dairy Industries Act, overlaps with the Foodstuffs Act when considering compositional standards and labelling (or marking) of labels, containers or packaging. Furthermore, there is an overlap between the products considered in the Marketing Act and the Dairy Industries Act, (eg dairy products).

3.FOOD LAWS

A. FOODSTUFFS, COSMETICS AND DISINFECTANTS ACT¹³⁸

The 1929 Act was repealed by the 1972 Act, but any proclamations, regulations or notices made in terms of the 1929 Act, as long as they were compatible with the 1972 Act, were deemed to have been proclaimed in terms of the 1972 Act.¹³⁹ This was necessary because various regulations enacted under the 1929 Act still remained in force until repealed. Since 1972, however, many of the regulations have been repealed or amended.

The objectives of the Act are to:

"Control the sale, manufacture and importation of foodstuffs, cosmetics and disinfectants; and to provide for incidental matters."¹⁴⁰

¹³⁶s 89(cA).
¹³⁷s 89(dA).
¹³⁸No 54 of 1972.
¹³⁹s 29(2).
¹⁴⁰Long title.

The aims of the Act are achieved by (a) creating criminal offences; (b) providing for the inspection of premises and substances; and (c) permitting the analysis of foodstuffs, cosmetics and disinfectants.¹⁴¹ Consequently, a number of offences have been created by the Act.

Section 2 prohibits the sale, manufacture or importation of foodstuff that-

- (a) contains or has been treated with prohibited substances;¹⁴²
- (b) contains a particular substance in greater measure than permitted by the regulations;¹⁴³
- (c) does not comply with any standard of composition, strength, purity or quality prescribed by the regulation for, or in respect of, it or any standard so prescribed for, or in respect of, any of its other attributes;¹⁴⁴
- (d) is contaminated, impure, decayed, harmful or injurious to human health;¹⁴⁵
- (e) contains or has been treated with a substance not present in any such foodstuff when it is normal, pure and of sound condition;¹⁴⁶
- (f) has any substance added to it so as to increase the mass or volume of such foodstuff with the object to deceive;¹⁴⁷
- (g) has any substance or ingredient removed with the result that its nutritive value or other properties, in comparison with those of such a foodstuff in a normal, pure and sound condition, are diminished or otherwise detrimentally affected; or
- (h) has been treated in such a manner that it is damaged, or of an unsound condition, or inferior quality which is concealed whether partially or entirely.¹⁴⁸

¹⁴¹J H Hugo "Food and Drugs" 10 The Law of South Africa (1980) 234.

¹⁴²s 2(1)(a)(i).

¹⁴³s 2(1)(a)(ii).

¹⁴⁴s 2(1)(a)(iii).

¹⁴⁵s 2(1)(b)(i).

¹⁴⁶s 2(1)(c)(i).

¹⁴⁷s 2(1)(c)(ii).

¹⁴⁸s 2(1)(c)(iv).

The Act goes on to list three exclusions:

- (i) Foodstuffs that have been treated or contain substances which are not harmful or injurious to human health and, in addition, are not intended to deceive or mislead any consumer by increasing the mass (or volume) or concealing (or lowering) the quality;
- (ii) foodstuffs which contain a foreign substance which is unavoidably present as a result of the process of collection or manufacture; or
- (iii) foodstuffs that have substances removed from them for the purpose of ensuring that they will remain in a fit condition or form to be packed, stored or conveyed.¹⁴⁹

The sale of mixed, compounded or blended foodstuffs is prohibited, unless they comply with the labelling requirements.¹⁵⁰ A person who uses prohibited processes, methods, appliances, containers or objects is guilty of an offence.¹⁵¹ Various offences may also be committed against inspectors and their regulated duties.¹⁵² False descriptions of foodstuffs are also prohibited. The latter include descriptions as to the origin, nature, substance composition, quality, strength, nutritive value or other properties.¹⁵³

The Act, however, provides for special defences: (a) The foodstuff was not sold for human consumption; or (b) there was a written warranty that the foodstuff complied with the provisions of the Act, and the seller at no time had reason to suspect that the article in question contravened the Act.¹⁵⁴

¹⁴⁹ s 2(2).

¹⁵⁰ s 3(1).

¹⁵¹ s 4.

¹⁵² s 10-11.

¹⁵³ s 5(1).

¹⁵⁴ s 6.

The penalties for the criminal offences are provided for in s 18. The penalties, which are not very severe, depend upon the number of times a person has been convicted of an offence under the Act. A first conviction gives rise to a fine not exceeding R 400 or imprisonment not exceeding six months or both, while a second conviction results in a fine not exceeding R 800 or to imprisonment not exceeding twelve months or both. A third (and subsequent) conviction results in a fine not exceeding R 2000 or to imprisonment not exceeding twenty-four months or both.¹⁵⁵

The enforcement of the Act is delegated to the local health authorities; the South African Police or an officer from the Department of Customs and Excise.¹⁵⁶

The Minister of Health, Pensions and Welfare is delegated to promulgate regulations under the Act. The present regulations cover such issues as-

- (a) the quality, strength, purity, or compositional standards;¹⁵⁷
- (b) the prescription; prohibition; restriction or regulation of the use of any substance; appliance; container or other object, or any process or method used in the manufacture; treatment; packaging; labelling or storing of foodstuffs;¹⁵⁸
- (c) the prescribing of any foodstuffs that, for the purpose of the Act, are deemed to be harmful or injurious to human health;¹⁵⁹
- (d) the labelling of foodstuffs;¹⁶⁰ and so on.¹⁶¹

Section 16 provides for the preservation of secrecy. This provision not only ensures that any information acquired by the inspector in the course of his business is kept secret, but also that the contents of any certificate or report on the analysis or examination of any sample taken in terms of the Act is to be kept secret.

¹⁵⁵ s 18.

¹⁵⁶ s 10(3).

¹⁵⁷ s 15(1)(a) and s 15(1)(h).

¹⁵⁸ s 15(1)(b).

¹⁵⁹ s 15(1)(e).

¹⁶⁰ s 15(1)(k).

¹⁶¹ The Minister is empowered to deal with fifteen issues under this section.

In terms of s 23 the Minister has delegated the authority to enforce this Act to the local authorities. This creates difficulties because the various authorities interpret the Act differently. Furthermore, they may not have the requisite knowledge. In addition, they deal with various other Acts and regulations (eg health regulations) and cannot concentrate exclusively on the provisions of the Foodstuffs Act. The result is that enforcement occurs at the retail level rather than the manufacturing level.

The Act is short and unpretentious and, as a result, has its drawbacks.

B. REGULATIONS UNDER THE ACT

At present there are approximately 25 regulations promulgated under s 15 of the Foodstuffs Act. The Department of National Health and Population Development (Department of Health) has established a Food Legislation Advisory Group (FLAG) which serves as a forum for manufacturers, retailers, the Department of Health, consumer bodies and other state departments to discuss their requirements in respect of food laws. FLAG is to propose several new regulations and amendments to many of the existing regulations.¹⁶² One of the major proposed amendments concerns food labelling. Another major change affects the meat regulations. Moreover, the Department of Health hopes in future to reduce compositional standards.¹⁶³

Regulations governing food and labelling are vital for proper consumer protection. There are several regulations in this area, including: (a) Natural and artificial sweeteners; (b) irradiated foodstuffs; (c) food colourants; (d) preservatives, antioxidants, and other additives; and (e) labelling and advertising.

¹⁶²Some of these proposals will be discussed in a table form.

¹⁶³Dr G J H Stevens (Director of the Directorate of Foodstuffs, Cosmetics and Disinfectants in the Department of National Health and Population Development) personal communication (17 July 1989).

I. Natural and Artificial Sweeteners¹⁶⁴

The use of sweeteners is limited to certain artificial and natural sweeteners. These include:

- (i) NATURAL SWEETENERS: Sucrose, glucose, fructose, maltose and lactose; mannitol, sorbitol and xylitol, thaumatin; and,
- (ii) PERMITTED ARTIFICIAL SWEETENERS: Saccharin; saccharin calcium; saccharin sodium; calcium cyclamate; sodium cyclamate; acesulfame potassium and aspartame.¹⁶⁵

The addition of a sweetener to foodstuffs is prohibited unless it is one of the permitted sweeteners.¹⁶⁶ This is restricted further by the amount that can be used.¹⁶⁷ For example, the use of any of the saccharin sweeteners cannot exceed 500 mg/kg, while the various cyclamate sweeteners cannot exceed 2 500 mg/kg.¹⁶⁸ The use of aspartame, however, is limited to the products it may be added to and the amount that may be used varies accordingly.¹⁶⁹ Furthermore, the use of aspartame requires a warning to phenylketonurics that it contains phenylalanine. The warning must be not less than 2 mm in height.¹⁷⁰ Similar provisions exist for other sweeteners.¹⁷¹

The labelling and advertising regulations¹⁷² have also to be complied with. Regulation 12 of the sweetener regulations, however, reproduces the provision. It requires the following to be included on the label:

- (i) The name of the permitted artificial sweetener immediately followed in the list of ingredients by the words "a non-nutritive sweetener";

¹⁶⁴GN R1881 GGE 4048 of 12 October 1973 (Reg Gaz 1855).

¹⁶⁵reg 1.

¹⁶⁶reg 2.

¹⁶⁷reg 3.

¹⁶⁸ibid.

¹⁶⁹reg 5.

¹⁷⁰reg 8.

¹⁷¹regs 10-11.

¹⁷²reg 3 of GN R908 GGE 5885 of 27 May 1977 (Reg Gaz 2471).

- (ii) the words "no sugar added", "without sugar added" or "sugar added," as the case may be, in letters not less than 2 mm in height; and
- (iii) the name of the foodstuff immediately preceded by the words "artificially sweetened" in letters of the same size and prominence as the name of the foodstuff.¹⁷³

Natreen is ideal for those who want to stay slim and avoid the intake of kilojoules. One tablet has the equivalent sweetness of one teaspoon of sugar. This convenient, elegant dispenser releases one tablet at a time. Natreen is also available in a 500-tablet pocket dispenser, in a 70 g bottle of granulate and in a special liquid form ideal for cooking and baking.

NATREEN IS SUITABLE FOR DIABETICS.

Ingredients: Aspartame, Carboxy-methylcellulose, L-Leucin, Lactose.

Aspartame may lose its sweetness after prolonged baking or cooking at high temperatures. Natreen liquid has been specifically formulated for these applications.

CONTAINS PHENYLALANINE

100 g contains		/tablet
Assimilable glucides	55.0 g	Kcal: 0,2
Proteins	41,5 g	Kj: 0,8

Bayer South Africa (Pty) Ltd. 27 Wrench Road, Isando, TVL.

Figure 17: An example of labelling a sweetener for table use.

¹⁷³See Figure 17 as an example of a table top sweetener.

These regulations are considered outdated because of new carcinogenic studies and innovative changes in technology that have occurred since 1973. New regulations have been drafted by a sub-committee of FLAG, but they have yet to be gazetted.¹⁷⁴

II. Irradiated Foodstuffs¹⁷⁵

The regulations governing irradiated food only contain two sections. The first section defines "irradiation" as-

"deliberate exposure to ionising radiation and "irradiated" has corresponding meaning."

It also defines "ionising radiation" as-

"radiation capable of producing ions directly or indirectly in its passage through matter".¹⁷⁶

Section 2 provides that irradiated foodstuff cannot be sold unless it has been approved by the Minister of Health, Welfare and Pensions or the Director-General in writing. The reason for this is the adverse publicity irradiation received overseas.¹⁷⁷ The Directorate concludes that it can better control the use of irradiation by ensuring that a written approval is required.

¹⁷⁴ See Table V.

¹⁷⁵ GN R1609 GGE 5820 of 22 July 1983 (Reg Gaz 3600).

¹⁷⁶ reg 1.

¹⁷⁷ For example, due to the controversy, United Kingdom only indicated in 1989 that it will permit the use of irradiation once the appropriate regulations are promulgated.

Table V The Proposals Submitted by the FLAG Working Group on Sweeteners in 1989.

1. In addition to the sweeteners listed above, permitted sweeteners also include corn syrup, dextrose, dextrose syrup, fructose syrup, glucose syrup, hydrogenated glucose syrup, isomalt, lactitol, malitol, and sorbitol syrup. There is no longer a distinction between artificial and natural sweeteners.
2. Permitted sweeteners will have to comply with criteria of purity.
3. Only permitted sweeteners may be added to foodstuffs.
4. Limitation as to the quantity of permitted artificial sweetener used in foodstuffs has remained.
5. Permitted sweeteners may be sold for table use. The labelling requirements for these are:
 - (a) The name of the permitted sweetener;
 - (b) the words "for use in foodstuffs";
 - (c) the inclusion of direction for use;
 - (d) the name and business address of the manufacturer or seller or on whose behalf such sweetener was prepacked;
 - (e) if aspartame is one of the ingredients, proper notice must be given.
6. The label of any sweetener having aspartame as a ingredient must bear a warning "PHENYLKETONURICS: CONTAINS PHENYLALANINE."
7. The label must contain other information distinctive to the various permitted sweeteners.
8. The claim "contains no sugar" or similar words cannot be used on foodstuffs containing certain of the permitted sweeteners, for example, fructose, lactose, sorbitol, etc.
9. The claims "diet", "low energy", "low joule", "non-nutritive", "artificial" or words of a similar meaning cannot be used unless the energy value of the sweetener equivalent to 5 gm of sucrose is not more than 8 kilojoule.
10. The claims "sugar-free" or "contains no sugar" cannot be used in foodstuffs which normally contain sugars and if no sugars are present.
11. Foodstuffs which normally contain added sweeteners may, if no such sweeteners have been added, be described as "unsweetened".
12. Diabetic claims and slimming claims with regard to sweeteners are to be dealt with under the Labelling Regulations.

Table VI FLAG's proposed regulations for the labelling of irradiated foods.

1. All containers of first generation irradiated foodstuffs must bear the "Radura" emblem (the international emblem used to mark all irradiated foodstuffs) (see Figure 18) and one of the following terms: "Irradiated", "radurised", "bestraald" or "gereduriseerd" directly below the emblem.
2. When bulk containers of first generation irradiated foodstuffs are opened at the point of sale and the original label is obscured from consumers, a notice with the information prescribed above must be displayed in the immediate proximity of such foodstuff and in clear view of the consumer.
3. In the case of second generation irradiated foodstuffs, where the irradiated foodstuff is a component of the final product, the words "irradiated", etc. shall appear opposite the relevant ingredient in the list of ingredients on the label. In such a case the "Radura" emblem is not necessary.
4. Where second generation irradiated foodstuffs are present in foodstuffs which are for sale in such a manner that the consumer can no longer see that the foodstuff contains an irradiated component, a notice with the information shall be displayed in immediate proximity of such foodstuff and in clear view of the consumer.
5. Where perishable foodstuffs have been irradiated the date of irradiation must be indicated or the "Radura" emblem with the words "irradiated"; etc. must appear on the label.
6. The producer of irradiated foodstuffs may also indicate the purpose of irradiating, eg "IRRADIATED FOR PURPOSES OF INSECT CONTROL".

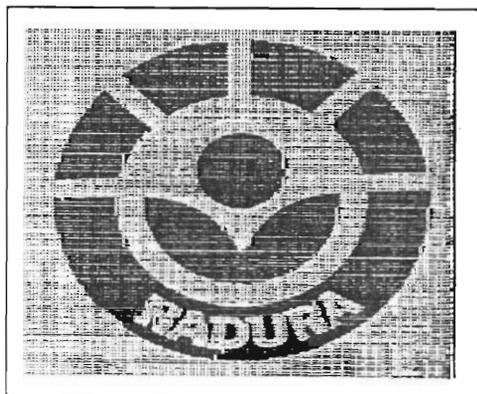


Figure 18 The Radura emblem that indicates irradiated foodstuffs.

III. Food Colourants¹⁷⁸

The regulation provides that colourants can only be used as prescribed in the regulations.¹⁷⁹ Colourants, however, cannot be used in foodstuffs intended for infants, young children or children.¹⁸⁰

The use of colourants is limited in two ways: Firstly, certain colourants can only be used in specified foodstuffs; and, secondly, there may be conditions of use (i.e. a limit as to the amount of colourant that may be used). For example, the Annexure lists butter and whey butter as follows:

Foodstuffs	Colour Index Number	Name of Colour-ant	Conditions and limits (mg/kg)
BUTTER AND WHEY BUTTER	75120	Annatto extracts	GMP ¹⁸¹
	75130	Beta-carotene	GMP
	---	Caramel	GMP

Furthermore, the regulations do not permit the use of a diluent unless it is sanctioned in the regulations.¹⁸²

The use of tartrazine,¹⁸³ a yellow colourant, is also specified in this regulation. It is permitted to be used in 22 of the 54 foodstuffs that are listed in the Annexure.

These regulations specify the amounts to be used, in which of the foodstuffs colourants are permitted, and other conditions of use.¹⁸⁴ It is, however, merely one of a number of regulations dealing with additives.

¹⁷⁸GN R756 GGE 5537 of 6 May 1977 (*Reg Gaz* 2263).

¹⁷⁹reg 2.

¹⁸⁰reg 2(a).

¹⁸¹Good manufacturing practice (GMP) is an ill-defined phrase. Consequently it is open to abuse.

¹⁸²reg 4 - Annexure v.

¹⁸³It is claimed that tartrazine is a reactive azo-dye. It can initiate asthma attacks, rashes, migraine, or hyperactivity in some people. It is banned in Norway, Finland, India and heavily restricted in Austria. (*The London Food Commission Food Adulteration and How to Beat It* (1985) 54).

¹⁸⁴Eg a warning.

IV. Preservatives and Antioxidants¹⁸⁵ (and other Additives)

Regulation 1 defines an "antioxidant" as-

"any substance which delays, retards or prevents the development in foodstuffs of rancidity or other deterioration due to oxidation but does not include substances added to foodstuffs for purposes other than antioxidation which nevertheless have an antioxidant action;"

and a "preservative" as-

"any substance which inhibits, retards or arrests fermentation, acidification or other decomposition of foodstuffs but does not include preservatives such as common salt; sugar; lactic acid; vinegar; alcohol or potable spirit; herbs; hop extracts; and essential oils."

A person is guilty of an offence if he sells foodstuffs that contain any preservative that has not been permitted in Annexure A of the regulations. A similar provision is made for antioxidants, but the food must then comply with Annexure B. An example of Annexure A:

FOODSTUFFS	PRESERVATIVE	QUANTITY PERMITTED mg/kg or mg/l
Yogurt	Sorbic Acid Pimaricin	1 000 10

Annexure A consists of approximately 70 permitted preservatives, while Annexure B consists of approximately 30 permitted antioxidants.

There are similar regulations for other additives. These include regulations dealing with:

- (i) Acids, bases and salts;¹⁸⁶
- (ii) stabilisers, emulsifiers and thickeners;¹⁸⁷
- (iii) anti-caking agents.¹⁸⁸

¹⁸⁵GN R965 GGE 5575 of 3 June 1977 (Reg Gaz 2473).

¹⁸⁶GN R115 GGE 10073 of 24 January 1986 (Reg Gaz 3917).

¹⁸⁷These regulations are under consideration by a FLAG Specialist Working Group at the present moment.

¹⁸⁸GN R2507 GGE 8448 of 19 November 1982 (Reg Gaz 3506).

V. Labelling and Advertising¹⁸⁹

The Labelling and Advertising Regulations promulgated in 1977 deal with a range of issues such as the language to be used on the label, the size of lettering, claims, ingredient listing, etc.

Regulation 2 provides that the ingredient list required in terms of s 3¹⁹⁰ of the Foodstuffs Act shall be in descending order of mass or value. This, however, is not absolute because ingredients such as spices, seasonings and herbs; flavours and flavour enhancers; food additives; etc. are merely required to be listed as ingredients at the end. Furthermore, the ingredient list need not be on the main panel of the package.

Identification of the foodstuff and the manufacturer, packer or seller is also significant. Regulation 3 provides that the name of the foodstuff should appear on the main panel in writing and not less than 4 mm in height. The manufacturer's name and business address should also appear on the label. The presentation of the name, address and other requirements must be clear, prominent and readily legible.¹⁹¹

The language to be used must be either of the official languages.¹⁹² The size of the letters is to be 1 mm unless the package in question is small.¹⁹³ The size of writing for smaller packages is dependent on the area of the package.¹⁹⁴

Often products are not sold in prepacked wrappers and it is necessary to regulate bulk stock. The regulations provide that receptacles containing bulk stock are required to be labelled in writing that is not less than 4 mm in height. Furthermore, the writing must be placed in a manner that is easily legible to the consumer.¹⁹⁵

¹⁸⁹GN R908 GGE 5565 of 27 May 1977 (Reg Gaz 2471).

¹⁹⁰Which requires the listing of ingredients if more than one ingredient is present.

¹⁹¹reg 4.

¹⁹²reg 5.

¹⁹³reg 6.

¹⁹⁴reg 6(2).

¹⁹⁵reg 8.

Certain other provisions have been promulgated in respect of additives. These include:

- (i) The use of caramel in bread: The use of this colourant must be indicated in letters of not less than 3 mm in height.¹⁹⁶
- (ii) The use of tartrazine: In 1985 the Directorate reacted to adverse publicity concerning this colourant by ensuring that persons affected by tartrazine shall be adequately warned (without banning the additive totally). The regulation requires the use of tartrazine to be indicated in writing not less than 2 mm in height. Furthermore, its use is limited to foodstuffs permitted to include it in Annexure A of the Colourant Regulations.¹⁹⁷ Many consider that these two requirements protect consumers adequately, but others disagree.
- (iii) The use of artificial sweeteners is allowed, but they must be labelled and followed immediately by the words "a non-nutritive"¹⁹⁸ sweetener".¹⁹⁹ The requirements are no different from those already discussed.

The use of water as an ingredient need not be indicated in the ingredient list. This is not absolute because in certain circumstances it may be specified that the use of water, as an ingredient, must be indicated.²⁰⁰

Often manufacturers use pictorial representations to tempt consumers to purchase their brands. The use of pictorial representations, unless the package is transparent, has to be qualified by the words "serving suggestions" or such words. This has to be in the immediate proximity of the picture and should not be less than 3 mm in height.²⁰¹

¹⁹⁶ reg 11(b).

¹⁹⁷ See above 204.

¹⁹⁸ The use of this term has been reconsidered by the FLAG Specialist Working Group on Sweeteners and consensus has not been reached. The matter has been referred to the Directorate of Foodstuffs, Cosmetics and Disinfectants for a decision.

¹⁹⁹ reg 13.

²⁰⁰ reg 18.

²⁰¹ reg 21.

A person is guilty of an offence if he makes reference to the Department of Health or an official of the Department on the label.²⁰²

Several other claims are also governed by the regulations. These include:

- (i) The use of the term "natural". This word can only be used for foodstuffs that have all the ingredients in their natural form. A failure to ensure the naturalness of all the ingredients renders the manufacturer guilty of an offence.²⁰³
- (ii) A claim that a foodstuff is nutritious. Such a claim requires the manufacturer to include nutritional information on the label. The information to be supplied is strictly regulated^{204, 205}.



Figure 19 Nutritional Claim that requires Nutritional labelling to Accompany it

Nutrition Information per 180 ml serving	
Energy:	160 KJ
Protein:	0,7 g
Carbohydrates:	6,4 g
Fat:	1,2 g
Dietary Fibre:	1,0 g
160 KJ = 38 Calories.	

Figure 20 Nutritional Information Accompanying a Nutritional Claim for a Soup Product

- (iii) A claim that the product is "recommended by doctors" or a pictorial representation indicating acceptance by medical practitioners. Such claims are prohibited and it is an offence if they are made.²⁰⁶

²⁰² reg 25.

²⁰³ reg 24.

²⁰⁴ Examples are to be found in Figure 19 to Figure 23.

²⁰⁵ reg 29.

²⁰⁶ reg 7.

Kellogg's® CORN FLAKES

INGREDIENTS: CORN, SUGAR, SALT, MALT, THIAMIN (VIT B₁), RIBOFLAVIN (VIT B₂), NICOTINAMIDE AND FOOD IRON.

We guarantee the freshness and quality of this product. If you are not entirely satisfied, please return this box and its contents to us.

Ons waarborg die varsheid en gehalte van hierdie produk. Indien u nie volkome tevrede is nie, kan u hierdie karter saam met sy inhoud na ons terug stuur.

Nutrition Information: Serving size: 30 g.
Servings per package: 16.
Voedingsinligting: Porsie grootte: 30 g.
Bedienings per pak: 16.

		30 g Cereal kors	+100 ml Milk afgeroende melk
Kilojoules	Kilojoule	400	622
Protein	Proteïene	1.8 g	5.1 g
Carbohydrate	Koolhidrate	25.5 g	30.1 g
Fat	Vet	0.1 g	0.1 g
Cholesterol	Cholesterol	0 g	0 g
Sodium	Natrium	330 mg	380 mg
Potassium	Kalium	28 mg	172 mg

Percentage of RDA* provided by one 30 g serving for persons of 4 years and over.
Persentasies van die ADP* wat voorsien word in elke 30 g porsie vir persone van 4 jaar en ouer.

Protein	Proteïene	3	9
Vitamin B ₁	Vitamiën B ₁	26	29
Vitamin B ₂	Vitamiën B ₂	26	36
Nicotinamide	Nikotienamied	26	26
Food Iron	Voedselyster	16	16

Whole milk provides an extra 100 kilojoules, 3.3 g fat and 14 mg cholesterol.
Volroom melk voorsien 100 kilojoule, 3.3 g vet and 14 mg cholesterol ekstra.

Carbohydrate Information	Koolhidrate Inligting		
Starch and related	Sjokolade verwante	24.2 g	24.2 g
Carbohydrates	Koolhidrate	1.0 g	6.4 g
Sugars	Suiker	0.3 g	0.3 g
Dietary fibre	Dieetvesel	0.3 g	0.3 g
Total Carbohydrates	Totale Koolhidrate	26.5 g	30.1 g

*RDA Recommended Daily Allowance.
*ADP Aanbevole Daelings porsie.

**MADE BY KELLOGG COMPANY OF SOUTH AFRICA (PTY) LTD
77 STEEL ROAD, NEW ERA, SPRINGS.
REGISTERED USERS OF THE TRADE MARKS BELONGING TO THE KELLOGG COMPANY.
REGISTERED TRADE MARKS OF THE KELLOGG COMPANY.
© 1974/1989 KELLOGG COMPANY.**

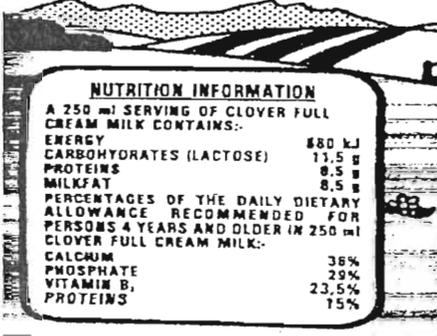



6 001306 000910

Figure 21 A responsible manufacturer may include more nutritional information than is required by regulation.

Fresh MILK

1 LITRE



NUTRITION INFORMATION

A 250 ml SERVING OF CLOVER FULL CREAM MILK CONTAINS:-

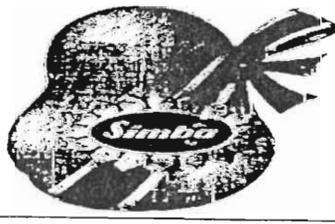
ENERGY	680 kJ
CARBOHYDRATES (LACTOSE)	11.5 g
PROTEINS	8.5 g
MILKFAT	8.5 g

PERCENTAGES OF THE DAILY DIETARY ALLOWANCE RECOMMENDED FOR PERSONS 4 YEARS AND OLDER IN 250 ml CLOVER FULL CREAM MILK:-

CALCIUM	38%
PHOSPHATE	29%
VITAMIN B ₁	23.6%
PROTEINS	15%

Figure 22 Example of Milk being labelled with nutritional information

Simba POTATO CHIPS



Ingredients:
Potatoes, vegetable oil with antioxidant and salt.

Nutritional information	
Kilojoules	690
Protein	2 g
Carbohydrate	13 g
Fat	11 g
Dietary Fibre	3.4 g

per 30 g serving

Manufactured by:
Simba-Chips Ltd.
Andre Greyvensteyn Avenue,
Isando 1600.



A FEEDCOO COMPANY



150 g

Figure 23 Example of nutritional information.

Table VII The changes proposed by the FLAG Specialist Working Group on labelling. The version discussed is what is called Mark III of the proposed regulations.

1. The new proposed regulations do not include labelling of cosmetics and disinfectants in the same regulations as foodstuffs.

2. Additional definitions such as "contaminants", diet sweeteners", "nutrient", etc. have been included in the proposed regulations.

3. The arrangement of the provisions has been improved. The arrangement commences with definitions and goes on to deal with general provisions, special provisions regarding foodstuffs, (which includes the control of several new claims), exemptions, and three annexures.

4. The general provision that all foodstuffs must bear a label in accordance with the regulations still remains. Furthermore, the regulations regarding size of lettering, language of the label, presentation of the label, name of the foodstuff, name and address of the manufacturer, etc. will remain in force.

5. Negative claims are provided for more strictly. For example, proposed reg 2(9) provides:

"The label of any foodstuff shall not contain-

(d)(iii) a claim that a foodstuff is "free from" one category of additive when an additive of another category, or an ingredient, having broadly a similar effect is used."

6. Regulation 14 provides for sea foods that have been frozen or chilled. The provision has been extended to include all frozen and chilled foods. For example, regulations governing frozen foods now provide that (a) the words "raw -" or "uncooked - keep frozen" shall appear in letters not less than 3 mm in height on the main panel of every package containing uncooked food products that must be kept frozen (reg 8(a)), or (b) the words "cooked" or partly-cooked -keep frozen - do not refreeze when thawed" shall appear in 3 mm height on the main panel of the label of every package containing cooked or partly cooked food products that must be kept frozen (reg 8(b)). Similar provisions exist for chilled foods.

7. The proposed regulations also provide for the labelling of monosodium glutamate (MSG). (It has been alleged that MSG (a flavour enhancer) causes brain damage).

8. The proposed regulations also cover several claims that were not covered by the previous regulations. These include "unsaturated fatty acid claims", "claims which depend on other foodstuff", "irradiation" (which has been dealt with above (see Table VI), etc.

9. There is no longer a blanket exemption from labelling of products such as ice-cream, coffee, tea, etc. The exemptions relate to those foodstuffs that are regulated or basic foodstuffs, eg milk products to which no ingredient other than a starter culture or rennet has been added (reg 2(b)(iii)).

10. Exemptions also extend to foodstuffs such as eggs, fresh vegetables, sugar confectionery, foodstuffs sold for immediate consumption, and small packages whose exterior is less than 2 000 mm² in size.

A canned product must include the date of manufacture but this can be in a code form.²⁰⁷ The code must be revealed to an inspector on demand.²⁰⁸ Other conditions relating to canned goods are controlled by the SABS.²⁰⁹

Foodstuffs such as ice cream, coffee, tea, etc. are not required to comply with ingredient listing.²¹⁰ The same applies to (a) products sold outside the Republic; (b) foodstuffs sold in catering establishments; (c) flour confectionery sold in wholly transparent packaging; etc.²¹¹

The regulations are extensive. With constant changes in technology some of regulations may soon become inappropriate.²¹² Amendments to regulations take time. As mentioned, the Directorate has established a Food Legislation Advisory Group (FLAG), which is likely to recommend numerous changes.

4. CRITICISMS

Several criticisms concerning food labelling in South Africa have been expressed by industry, consumer bodies and other interested parties. These include inter alia:

- (a) Food law, including labelling legislation, is scattered piece-meal in various acts and regulations.²¹³ There is a need to consolidate the various pieces of legislation.

²⁰⁷This is unsatisfactory for consumers because they have no knowledge of the expiry dates of canned goods that have been coded. The reason for allowing coded date marking is a compromise reached by the Directorate and manufacturers, who were resisting the introduction of open-date marking.

²⁰⁸reg 31.

²⁰⁹See above 188.

²¹⁰reg 32(c).

²¹¹reg 34(d). There are other exceptions as well.

²¹²See Table VII.

²¹³Mr B Morris (Consumer Affairs Manager at Checkers South Africa Limited) personal communication (18 July 1989). Mr C Nel (Former Group Public Relations Manager of Fedfood Ltd and Legal Advisor to the SA Soya Association (in his personal capacity)) personal communication (1 February 1988). Dr A C Gain (Divisional Director of Premier Food Management Services) personal communication (18 July 1989). Mr B Drury (Assistant Company Secretary of Unilever South Africa (Pty) Ltd) personal communication (27 November 1989).

- (b) Most of the Acts are reactive rather than proactive.²¹⁴ Furthermore, reaction time is lengthy.²¹⁵
- (c) South African legislation is not sufficiently strict when compared to foreign legislation,²¹⁶ for example, South African legislation is not health conscious.²¹⁷ Despite that fact that South Africa usually follows foreign trends and is two or three years behind,²¹⁸ enough is still not being done.
- (d) There is a lack of adequate education and exposure.²¹⁹
- (e) It is necessary to simplify the laws in a manner that makes them accessible and understood by all manufacturers, consumers and enforcing authorities.²²⁰
- (f) There is a need for uniformity and standardization.²²¹
- (g) Food labels must be written in either of the official languages, but the majority of South Africans are neither English nor Afrikaans speaking. Time, effort and money is being spent on food labels which the majority of the population cannot read or even understand.
- (h) There is a lack of policing by the authorities.²²²

²¹⁴Joubert *op cit.*

²¹⁵Drury *op cit.*

²¹⁶Drury *op cit.* Mr C H Olivier and Mr P Roux (Technical Manager and Product Manager, respectively, of Nola Industries (Pty) Ltd) personal communication (13 July 1989).

²¹⁷Drury *op cit.* For example, margarine regulations (i.e. Margarine Regulation (of 1967) (No 1867), amended by (1982) (No 1727) and (1985) (No 67)) in the United Kingdom provide for the limited use of certain trace elements (eg nickels). There is no corresponding regulations in South Africa.

²¹⁸Dr P van Twisk (Research and Development Director of Fedfood Ltd) personal communication (16 August 1989).

²¹⁹See below 276.

²²⁰Mr S H Elms (Development Executor of the Food Group of the OK Bazaars Ltd) personal communication (12 July 1989).

²²¹For example, the various grades in canned products. (Morris *op cit.*)

²²²Drury *op cit.* Mrs J Tatham (Vice President of the Housewives League of South Africa) personal communication (12 July 1989). Dr I B Zondagh (Senior Agricultural Researcher in Meat Quality at the Meat Science Centre of the Animal and Dairy Science Research Institute) personal communication (20 July 1989).

- (i) No single piece of legislation protects consumers completely.²²³ Though many are of the view that food law should be concerned with health and quality control, there is a need to protect consumers adequately in South Africa.²²⁴
- (j) The authorities tend to grant too many exemptions,²²⁵ often for an indefinite period^{226, 227}.
- (k) There is a lack of expertise within South Africa. The Directorate lacks the expertise to handle all aspects of food law. It has adequate laboratory facilities, but lacks the manpower required to operate them.²²⁸ There are also insufficient suitably qualified people in the Directorate.²²⁹ This problem is aggravated by the lack of expertise within South Africa.²³⁰
- (l) There are not only too many scattered pieces of legislation, as many businessmen claim, there are too many rules (i.e. overregulated).²³¹ This results in (a) manufacturers having to monitor a host of laws to keep up to date;²³² and (b) a lack of understanding of the rules by manufacturers and consumers.²³³ Inherent in food law, however, is the fact that there are various types of products that have to be accounted for.²³⁴ Thus, for example, there is a need for regulations to cover frozen and chilled foods, processed foods, meat products, canned foods, etc. The need is for

²²³Tatham *op cit.* Prof A E J McGill (Professor of Food Science at the University of Pretoria and Director of Foodnetwork CC) personal communication (10 July 1989).

²²⁴Morris *op cit.* For example, some juices are not sweetened with sugar, but with natural fruit syrups. This is still problematic for diabetics. Another problem is that consumers are not informed as to the exact amount of orange they are getting in an orange juice that has been blended with clarified and de flavoured apple. (See J Tatham "Labelling of Blends must be Improved" (1988) 15 *Food Review* 63).

²²⁵Drury *op cit.*; Elms *op cit.*

²²⁶Drury *op cit.* For example, "Kraft", a trade name for a salad dressing, contained a claim that the dressing was a "low calorie" salad dressing. The Trade Metrology regulations provided that "kilojoule" was the metric unit. "Kraft" was granted an exemption for three years.

²²⁷See Appendix 6.

²²⁸Mr W A Parsons (Technical Director of Haarman and Reimer (SA) (Pty) Ltd) personal communication (11 July 1989).

²²⁹There were no food technologists employed by the Directorate at the beginning of 1990.

²³⁰Prof H J H de Muelenaere (Professor of Food Science at the University of Natal and Director of Research and Development for Anglovaal Industries) personal communication (2 November 1989).

²³¹Drury *op cit.*; Nel *op cit.*

²³²Drury *op cit.*

²³³Mr J H Potgieter (Secretary (Technical) at the Wheat Board) personal communication (12 July 1988).

²³⁴Nel *op cit.*

better regulations rather than more regulation.²³⁵

- (m) Regulations should take into account potential changes in technologies, products and processes without the need to promulgate new regulations.²³⁶
- (n) The regulatory authority requests comments from interested parties before new regulations are promulgated. Industry responds by commenting either as associations and/or individuals. Problems arise, however, when a government agency does not respond to their comments²³⁷ or subsequent drafts do not deal with the problems raised.²³⁸
- (o) There is often a lack of prompt rulings from the Foodstuffs Directorate. When a problem arises with a label, (either because of an inspection check or before a launch of a new product), industry cannot obtain a quick ruling from the Directorate. This contrasts with the Directorate of Trade Metrology. Here, when a regional office is contacted with a query, if the office cannot give an immediate response, the regional office contacts Pretoria and obtains a ruling for the manufacturer. This is done quickly and the ruling is adhered to. In comparison, the Foodstuffs Directorate may not give an prompt answer because- (i) it does not know the answer, or (ii) there is no answer.²³⁹ Furthermore, local authorities may interpret the regulations differently from the Directorate.
- (p) Many of the regulations are outdated and industry does not bother to comply with them. This can be attributed to two factors: (i) science is developing at such a rapid pace that it makes the regulations obsolete,²⁴⁰ or (ii) the regulations have not been

²³⁵ *ibid.*

²³⁶ *ibid.*

²³⁷ *ibid.*

²³⁷ Drury *op cit.*; Elms *op cit.*

²³⁸ Drury *op cit.*

²³⁹ *ibid.*

²⁴⁰ Olivier & Roux *op cit.*

revised to account for changes.²⁴¹

- (q) There are too many authorities empowered to deal with food law.²⁴² These bodies include the Department of National Health and Population Development, the Foodstuffs Directorate, Department of Agriculture, Council for Scientific and Industrial Research (CSIR), South African Bureau of Standards (SABS), Department of Trade and Industry, local health authorities, Department of Custom and Excise, and various boards.²⁴³
- (r) The handling of frozen and chilled foodstuffs, (i.e. the cold chain), is complex and managed inadequately. This results in an unwillingness by manufacturers²⁴⁴ to open-date their products^{245, 246}.
- (s) There is inadequate control of raw products imported from neighbouring countries.²⁴⁷ It is uncertain whether they meet South Africa's requirements regarding the content of pesticide residues; etc.
- (t) Legislation is promulgated on an ad hoc basis as and when the need arises.
- (u) There is often a problem in identifying the applicable legislation.²⁴⁸ As a result, manufacturers waste time, effort, and money in attempting to establish the relevant regulation.²⁴⁹ For example, the chief current legislation and regulations governing "margarine" are:
- (I) Dairy Industries Act²⁵⁰

²⁴¹For example, the meat regulations promulgated in 1975 are obsolete and, therefore, manufacturers do not comply with them. (Zondagh *op cit*).

²⁴²Elms *op cit*; Drury *op cit*. Mr D Classen (Plant Manager of Bull Brand Foods (Pty) Ltd) personal communication (13 July 1989).

²⁴³For example, the Potato Board, the Dairy Board, the Meat Board, Wheat Board, etc.

²⁴⁴The meat industry presently codes their date marking for certain products.

²⁴⁵Zondagh *op cit*.

²⁴⁶For a further discussion on the cold chain see Appendix 7.

²⁴⁷Nel *op cit*.

²⁴⁸Drury *op cit*.

²⁴⁹*ibid*.

²⁵⁰No 30 of 1981.

- (i) GN R1716 GGE 5725 of 2 September 1977 (Reg Gaz 2520), and
- (ii) GN R2121 GGE 9935 of 20 September 1985 (Reg Gaz 3869);

(II) Foodstuffs, Cosmetics and Disinfectants Act²⁵¹

- (i) GN R908 GGE 5565 of 27 May 1977 (Reg Gaz 2471),
- (ii) GN R756 GGE 5537 of 6 May 1977 (Reg Gaz 2263), and
- (iii) GN R965 GGE 5575 of 3 June 1977 (Reg Gaz 2473);

(III) Trade Metrology Act:²⁵²

- (i) GN R2362 GGE 5806 of 18 November 1977 (Reg Gaz 1977).

So far regulations have been proposed to cover fat spreads²⁵³ and labelling.²⁵⁴ Furthermore, other Acts and regulations may still apply. These include: (i) Measuring Units and National Measuring Standards Act;²⁵⁵ (ii) Trade Practices Act;²⁵⁶ and (iii) Harmful Business Practices Act.²⁵⁷ The Codes of Advertising Practice established by the Advertising Standards Authority of South Africa are also applicable^{258, 259}

- (v) The interpretation of certain of the provisions is difficult because of ambiguities or contradictions. For example, the Trade Metrology regulations²⁶⁰ provide that when a supplementary statement, (eg "large size"), is used then it has to be accompanied by a mass statement. The regulation is unclear whether this must be in conjunction with the mass statement on the main panel of the product. The problem often is that there may be more than one supplementary statement and this may result in more than one mass statement being printed on the package.²⁶¹

²⁵¹No 54 of 1972.

²⁵²No 77 of 1973.

²⁵³These drafts were not gazetted but they were publicized internally among the five margarine manufacturers in 1985 and 1988. The reason for this is that there are only 5 manufacturers of fats and spreads. Therefore, the process of promulgating regulations is easily expedited by using informal channels. It is anticipated that these regulations will be finalized in early 1990.

²⁵⁴Notice 323 GGE 10225 of 9 May 1986 (Reg Gaz 3951).

²⁵⁵No 76 of 1973.

²⁵⁶No 76 of 1976.

²⁵⁷No 71 of 1988.

²⁵⁸Code of Advertising Practice.

²⁵⁹Drury *op cit*.

²⁶⁰GN R2362 GGE 5806 of 18 November 1977 (Reg Gaz 1977).

²⁶¹Drury *op cit*.

- (w) There are conflicts among different enactments. For example, in terms of the Dairy Industries Act the prescribed quantities for margarine are "250 g, 500 g, 1 kg, and 12,5 kg".²⁶² The regulations²⁶³ in terms of the Trade Metrology Act, however, prescribe "125 g, 250 g, 500 g, 1 kg, 12,5 kg, and in the case of white margarine also 25 kg." Furthermore, the Director of Trade Metrology permitted a manufacturer to produce a 8 g margarine block. Subsequently this was deemed to be illegal in terms of the Dairy Industries Act.²⁶⁴
- (x) The various draft regulations make it difficult to plan for the future. This problem is exacerbated because the draft regulations are published with expected commencement dates, but are not promulgated as regulations on that date. Furthermore, despite the regulation not yet being promulgated the departments often grant exemptions in terms of the proposed regulations^{265, 266}
- The difficulty concerning draft regulations is whether manufacturers should comply with existing, (possibly outdated), regulations or with draft regulations which do not have the force of law.
- (y) The authorities lack the ability to monitor labelling in the marketplace on a continual basis^{267, 268}

²⁶²GN R1716 GGE 5725 of 2 September 1977 (Reg Gaz 2520).

²⁶³Item 30 of Schedule 6 of GN 2362 GGE 5806 of 18 November 1977 (Reg Gaz 1977).

²⁶⁴Drury op cit.

²⁶⁵Drury op cit. Drury gives the example of the proposed regulations in respect of fat spreads. He further remarked that the Department of Agriculture has apparently granted an exemption to market low fat spreads, which are catered for in the draft regulation, but not permitted under the present regulations.

²⁶⁶Another problem that arises is that regulations are often repealed without the proposed regulations coming into effect. This results in the enforcing agencies being powerless to prosecute offenders. For example, the regulations concerning boerewors (and other meat products have been repealed) and the proposed amendments have not yet been promulgated. Many manufacturers are taking this opportunity to deceive consumers because the local authorities are powerless to prosecute. (Mr R C Warthington (Divisional Senior Health Inspector) Mr C A Powell (Inspector) & Mr J H Lategan (Inspector) of the Local Health Authorities (Zone 8) Durban - Food Section) personal communication (9 March 1990).

²⁶⁷Mr J G C Siebert (Executive Director of Advertising Standards Authority of South Africa (ASA)) personal communication (26 January 1988).

²⁶⁸The local authorities tend to examine local products. Those products manufactured by national companies are not inspected often because the products have been tried and tested. (Warthington, Powell & Lategan op cit).

(z) Manufacturers often find loopholes in the law and misuse the provisions to ensure that their interests are best served. For example, the tartrazine regulation provides that if tartrazine is used it must be indicated in 2 mm height lettering, while the minimum requirement for other ingredient labelling is 1 mm. Thus there is a need to display the use of tartrazine prominently. The difficulty is that many manufacturers find that their products do not sell well when it is marked with tartrazine. Therefore they attempt camouflaging its presence by ensuring that all ingredients are also labelled in 2 mm lettering. The following examples illustrate the point:

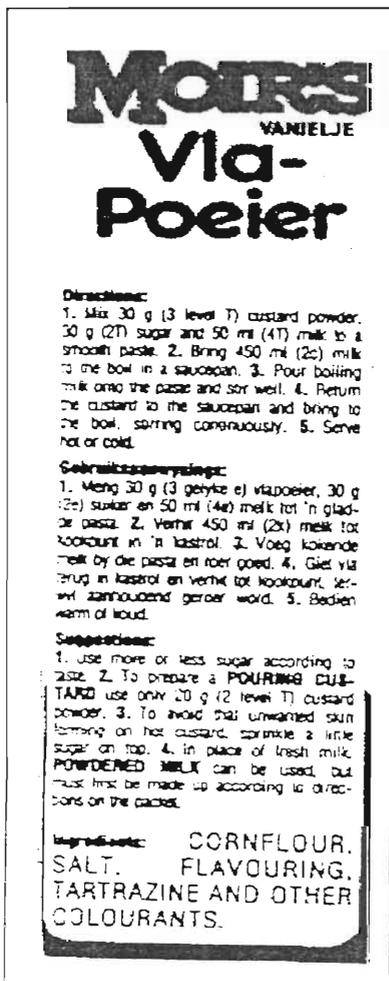


Figure 24 Example of labelling tartrazine and the ingredient list 2 mm

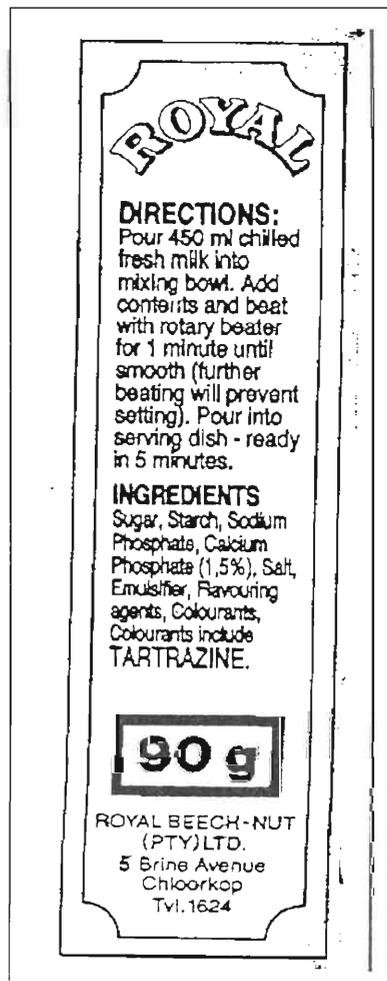


Figure 25 An example of ingredient labelling being 1 mm and tartrazine being labelled 2 mm. The use of tartrazine is displayed prominently.

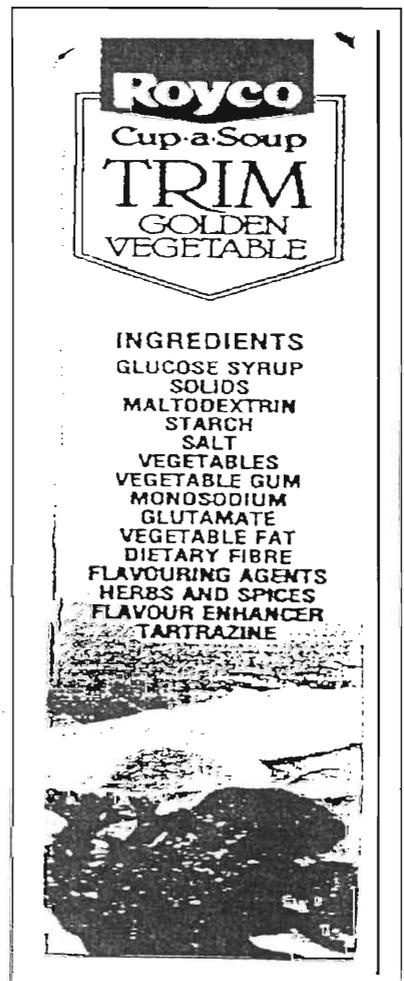


Figure 26 Example of labelling tartrazine and the ingredient list 2 mm

This is legally permissible in terms of the regulation which specifies only a minimum requirement for lettering. Such camouflaging, however, frustrates the spirit of the provisions which require that the lettering concerning tartrazine to be prominent^{269, 270}.

- (aa) Certain consumer bodies regard the 1 mm height requirement as too small to make the label comprehensive.²⁷¹ The issue is not whether consumers can read the label, but whether they can understand the label. It has been argued, however, that this is a mere technicality and other issues, such as consumer education, are more important.²⁷²
- (bb) It is impractical to label small products (eg "one bite sweets") or other foodstuffs that need to be labelled in the immediate vicinity^{273, 274}.
- (cc) The Act lacks incentives to compel manufacturers or consumers to report mislabelling because of the secrecy clause. The manufacturer or consumer is not informed as to the outcome of the complaint.²⁷⁵
- (dd) The additive regulations list additives in a negative fashion.²⁷⁶ They list the food product and then say what additive may be included (i.e. a negative list). This inhibits new product development. It would be more appropriate to list additives positively. Thus, there should be a list of permitted additives and, thereafter, a list of the particular substances to which they cannot be added.²⁷⁷

²⁶⁹In defence of manufacturers labelling all the ingredients in 2 mm height, it must be mentioned, that often certain products are very small and the ridiculous occurs. Due to the label size, tartrazine appears to be much bigger than any other component. Thus it results in consumers disseminating the information in a distorted way.

²⁷⁰Another example is to call the food product something other than its standardized name, eg calling boerewors "wors" (Warthington, Powell & Lategan *op cit*).

²⁷¹Tatham *op cit*.

²⁷²van Twisk *op cit*. His suggestion is that issues such as methods to fully inform the consumer; educate consumers etc. are more important. The other problem with labelling foodstuffs in heights greater than 1 mm is that there will be insufficient space on the label.

²⁷³It has been suggested that packaging inserts may be used to resolve this problem. See Appendix 8.

²⁷⁴Elms *op cit*.

²⁷⁵Tatham *op cit*; Drury *op cit*; McGill *op cit*.

²⁷⁶Zondag *op cit*.

²⁷⁷The Directorate intend amending the regulations to list additives positively.

(ee) Despite the laws many ingredients are included in the foodstuffs that should not be.²⁷⁸

The above deals with the problems faced by the food industry and consumers. Some of these problems affect the food manufacturers or retailers, while the others affect consumers. In dealing with the criticisms it is not always possible to satisfy all parties. In most cases it is essential to consider consumer's needs, but often it is necessary to satisfy manufacturer's demands.²⁷⁹ The solution to the problem, however, must not ignore the capabilities and functions of the department entrusted with the administration of the legislation and regulations. The department must be capable of enforcing the provisions.

5. CONCLUSION

South African common law is of limited value in consumer law. As a result several Acts have been enacted to protect consumers.

The first Act is the Measuring Units and National Measuring Standards Act.²⁸⁰ The primary aim of this Act is to incorporate the units of measure established by the International System of Units within South Africa.²⁸¹ In addition, the units of measures are prescribed in the regulations and failure to comply with the regulations results in the offender committing a criminal offence. The Act also provides for the appointment of inspectors, defines their duties, etc.

The Trade Metrology Act²⁸² is directed at consolidating and amending laws relating to trade metrology. It also establishes the office of Director and Deputy Director of Trade Metrology.²⁸³ Furthermore, the regulations prescribe fixed quantities for 131 products (that

²⁷⁸Zondagh *op cit*.

²⁷⁹These demands may arise because of the particular process of manufacture.

²⁸⁰No 76 of 1973.

²⁸¹Long title of the Act.

²⁸²No 77 of 1973.

²⁸³s 2.

include foodstuffs such as tea, coffee, etc.). The regulations also provide for the marking and labelling of quantity statements, the height of the quantity statements, etc.

The Trade Practices Act,²⁸⁴ although most of the provision have been repealed, presently provides for the control of advertisements. One of the repealed sections provided for the establishment of the Trade Practices Advisory Committee.²⁸⁵ One of the Committee's task was to investigate complaints against trade practices. The Harmful Business Practices Act²⁸⁶ was enacted to replace the Trade Practices Act. An advantage of the Harmful Business Practices Act is that it permits harsher penalties. The Act also creates a Business Practices Committee,²⁸⁷ (whose powers are magnified compared to the Trade Practices Advisory Committee). The Act, however, fails to appoint a officer who will monitor trade practices on a full-time basis.

The Standards Act²⁸⁸ promotes standardization of commodities. To permit standardization it assures the continued existence of the South African Bureau of Standards.²⁸⁹ The Bureau is entrusted with the task of establishing compulsory and voluntary standards.²⁹⁰ The Food Standards and Inspection Division (FSID) is a division in the Biological Science Department. The FSID deals with the drawing up of specifications or standards. The business community approves of the Act because most of the standards can be established on a voluntary basis rather than compulsory.

Two other Acts also need to be mentioned: (a) The Dairy Industries Act,²⁹¹ which deals with all dairy products, and (b) the Marketing Act,²⁹² which deals with agricultural products and the creation of various boards.

²⁸⁴No 76 of 1976.

²⁸⁵s 2.

²⁸⁶No 71 of 1988.

²⁸⁷s 2.

²⁸⁸No 30 of 1982.

²⁸⁹s 2.

²⁹⁰s 3.

²⁹¹No 30 of 1981.

²⁹²No 59 of 1988.

The Foodstuffs, Cosmetics and Disinfectants Act²⁹³ deals with food and food products. The general provision prohibits the sale of injurious or adulterated foods.²⁹⁴ Furthermore, the sale of mixed, compounded or blended foodstuffs is prohibited unless they comply with the labelling requirements.²⁹⁵ The Act also provides for the protection of manufacturers, (i.e. the secrecy clause),²⁹⁶ the appointment of inspectors²⁹⁷ and public analysts,²⁹⁸ etc.

There are 25 promulgated regulations in terms of the Foodstuffs, Cosmetics and Disinfectants Act. Not all deal with foodstuffs. They also deal with cosmetics and disinfectants. The relevant regulations cover labelling and advertising, antioxidants and preservatives, etc. The labelling and advertising regulations are of primary importance. The regulations cover technical issues, (eg contrasting colour, size of the writing, the language, etc.), and the requirements of a label, (eg the name of the food, the name and address of the manufacturer, the ingredients list, etc.). These regulations are likely to be amended because of (a) the establishment of the Food Legislation Advisory Group (FLAG) and (b) the worldwide move away from compositional, recipe standards.

The essential problems with the South African laws and regulations are that (a) the provisions are scattered piece-meal in several Acts; (b) there are too many authorities involved; (c) the lack of suitable enforcement; and (d) the lack of consumer education.

²⁹³ No 54 of 1972.
²⁹⁴ s 2.
²⁹⁵ s 3.
²⁹⁶ s 16.
²⁹⁷ s 10.
²⁹⁸ s 12.

Food law, especially food labelling, in South Africa is complex and confusing. It requires a knowledge of numerous Acts and regulations before a foodstuff can be labelled lawfully. This should, however, be considered in the light of consumer protection in South Africa:

"It is clear that consumers in South Africa are being short-changed concerning their rights to safety, honesty, fair agreements, knowledge, choice, privacy, and a fair hearing. Their counterparts in the United Kingdom, Australia and the United States obtain a far better deal. If it is necessary to secure these rights for consumers in highly sophisticated societies like those, it is even more necessary in a country like South Africa with its large population of disadvantaged and semi-literate consumers."²⁹⁹

The South African government has tried to respond to the consumers' need to be protected from unprincipled retailers and manufacturers. Its response is often overdue or inadequate. Furthermore, even if legislative enactments have the capacity to protect consumers their enforcement is unsatisfactory.³⁰⁰ Another major problem is that many of the laws protect the consumer's health but ignore his pocketbook.

²⁹⁹D J McQuoid-Mason "Consumer Law: The Need for Reform" (1989) 52 THRHR 228 243.

³⁰⁰Eg the Foodstuffs Act.

CHAPTER 7: AN ANALYSIS OF THE FOREIGN COMPONENT

Since neither of the regulatory systems discussed can be applied wholly and exclusively to South Africa, it is necessary to examine the positive and negative features of the various regulatory schemes investigated in this part. Furthermore, it is also essential to indicate features that may be used to improve South African legislation.

1. CODEX ALIMENTARIUS¹

It will be meaningless to consider the positive and negative attributes of the Codex Alimentarius because of its structure and purpose. An examination, however, of the application of the established standards in South Africa is useful.

The aim of the Codex Alimentarius is to establish food standards that will be accepted and utilized internationally. Once a standard is established, the accepting member country has to incorporate it into its domestic laws.

Since 1974 South African representatives have been excluded for political reasons from taking a seat in the General Assembly of the United Nations.² Thus, South Africa can no longer participate in any activities of the United Nations agencies (including the Food and Agriculture Organization (FAO) and the World Health Organization (WHO)). The Codex Alimentarius, however, provides for non-members to accept an established standard and inform the Codex Alimentarius Commission of its

¹See Chapter 2.

²General Assembly Resolution No. 2238 (xxix).

acceptance. Hence, South Africa is not prevented from complying with the established standards. Moreover, South Africa can informally adopt an established standard as part of its domestic laws.

In addition, invaluable work is undertaken by the expert committees (eg Joint FAO/WHO Expert Committee on Food Additives (JECFA)). For South Africa to trade successfully in food it has to take heed of the recommendations made by the various expert committees. It can also avoid expenditure on tests and investigations already undertaken by the expert committees (especially in the area of food additives testing).

The Codex Alimentarius is the first, and only, international organization that considers the needs of developed and developing countries and attempts to narrow the gap between the two.

2. AUSTRALIA³

Australia safeguards its food supply and protects its consumers by passing either Commonwealth and/or state legislation and regulations. The provisions can be classified as either positive or negative features.

The positive features include, firstly, certain innovative provisions of the Federal Trade Practices Act 1974-1975 (Cth). Two sections, (i.e. ss 52 and 82) provide for consumers to bring civil actions against those offenders who are engaged in false or deceptive transactions. This is innovative because most laws provide merely for criminal offences, and no statutory compensation is provided for consumers. The Act also provides for standards prepared by voluntary associations to be recognized as by the Minister. Furthermore, an amendment to s 65 provides for either voluntary or compulsory recalls of unsafe goods.

³See Chapter 3.

The second positive feature of Australian legislation is the openness encouraged by the Commonwealth government. In terms of the Freedom of Information Act 1982 (Cth) certain information located in government departments is made accessible to consumers. These provisions, however, are not as broad as those of United States of America.

The third positive feature of Australian legislation is that the laws permit advisory bodies (eg the Standing Committee on Packaging (SCP), National Health and Medical Research Council (NH&MRC)) to make recommendations to the appropriate Ministers before legislation is enacted. The future of these committees is guaranteed because they are provided for in statutes.

The most crucial negative feature is the fragmentation of food laws. This is due to food laws being state-based and not Commonwealth legislation. (This can be compared to the weights and measures legislation which is both, Commonwealth- and state-based). Although most of the food laws are based on the Model Food Act and the Model Food Regulations, (which were endorsed by the Ministers of the Commonwealth and the states), there are still several variations in the laws which result in the lack of uniformity.

By considering the positive features of these laws South African legislation can be improved. South Africa only creates criminal offences for infringements of the food laws. Furthermore, the government encourages secrecy to protect manufacturers by introducing clauses such as s 16 of the Foodstuffs, Cosmetics and Disinfectants Act⁴ (Foodstuffs Act). Moreover, the Department of National Health and Population Development (via the Directorate of Foodstuffs, Cosmetics and Disinfectants) consults with the Food Legislation Advisory Group (FLAG) but FLAG has no status.

Since South Africa is a unitary state it does not face the problem of state-based legislation. However, South Africa has delegated the power of enforcing the provisions of

⁴No 54 of 1972.

the Foodstuffs Act to the local authorities. Therefore, although food legislation is not fragmented its enforcement is.

3. ENGLAND AND WALES⁵

Consumer legislation enacted in England and Wales complies not only with the Codex Alimentarius, but also with the regulations and Directives of the European Economic Communities (EEC). Consequently, the laws are complex although innovative features has been established.

There are several positive and negative features. The positive features are as follows:

- (a) By enacting s 35 of the Criminal Courts Act⁶ the law provides for compensation to be granted to consumers even though the action is a criminal case. The order to pay compensation may be made during the criminal trial irrespective of whether the injured party has requested such an order.

- (b) Advisory bodies (eg National Metrological Co-ordinating Unit (NMCU); Food Advisory Committee (FAC); Committee of Toxicity of Chemicals in Food, Consumer Products and Environment (COT); and the Consumer Protection Advisory Committee (CPAC)), are voluntary.⁷ Although the bodies are only advisory (compared to legislative), their position is secured, because the bodies are established by the Ministry of Agriculture, Food and Fisheries (MAFF), rather than a division of the Ministry.

⁵ See Chapter 4 .

⁶ of 1973 .

⁷ s 55 of Weights and Measures Act (of 1985).

- (c) Consumer statutes, (eg Consumer Protection Act⁸ and Fair Trading Act⁹), encourage the establishment of voluntary codes of practice.
- (d) An innovative provision in terms of the Fair Trading Act is the establishment of the Office of Fair Trading (OFT) and the office of the Director-General of Fair Trading. The role of the Director-General is unique. He is permitted to bring actions against traders who are involved in undesirable trade practices; to make recommendations to the Minister with regards to amendments to legislation to prevent undesirable trade practices from continuing; to encourage the establishment of voluntary codes; and to advise consumers.¹⁰
- (e) Undesirable trade practices are prevented by "cease and desist" orders. The consequences of continuing with such practices may result in the offender facing harsh penalties and even imprisonment. Senior officials of companies can also be imprisoned if they breach a cease and desist order.¹¹
- (f) The Food Act¹² provides for compositional standards.¹³
- (g) The food labelling regulations provide for full ingredient labelling, (i.e. all food additives utilized in food must be indicated by either a E number or by the chemical (or common) name of the additive).¹⁴
- (h) The food labelling regulations also require the minimum durability of food to be indicated by open-date marking.¹⁵ This marking has to be understood

⁸(Of 1987).

⁹(Of 1973).

¹⁰Part II of the Fair Trading Act (of 1973).

¹¹Part III of Fair Trading Act.

¹²(Of 1984).

¹³s 4 of Food Act.

¹⁴reg 15(4) of Food Labelling Regulations 1984 (No. 1355).

¹⁵reg 31.

by all consumers and should not be in codes.

- (i) The approval of ingredients as accepted food additives require scientific tests to be undertaken by the manufacturer. Furthermore, when making recommendations as to its safety COT considers recommendations made by JECFA or the Scientific Expert Committee (established by the EEC). If there is inadequate information, it can recommend that further tests be undertaken. These tests may be undertaken by government.¹⁶

The negative aspects of the laws enacted by England and Wales include the following:

- (i) The government protects manufacturers and members of the committees by establishing the Official Secrets Act¹⁷.
- (ii) Food laws, though innovative, are governed in an ad hoc manner.
- (iii) The enforcement of laws affecting food directly or indirectly are entrusted to the local weights and measures authorities. This results in enforcement scattered amongst various departments whose roles often overlap.
- (iv) There is a general lack of consumer awareness and this is exacerbated by the lack of consumer education. The Director-General of OFT is also required to advise consumers.¹⁸
- (v) Enforcement of laws by local authorities leads to a lack of uniformity in the application of the laws.
- (vi) The laws do not provide for recall orders for unsafe goods that have already reached the marketplace. Industry has, however, voluntarily introduced such procedures within their organizational structures.
- (vii) The authorities permit informal defences to arise, such as disclaimers against false or misleading trade practices.¹⁹
- (viii) The Fair Trading Act only creates criminal offences.

¹⁶MAFF "Information Sheet - Food Additives" Food Facts No 2 (1986) 1-2.

¹⁷(Of 1939).

¹⁸Part II of Fair Trading Act.

¹⁹M J Leder Consumer Law 2 ed (1986) 176.

South Africa is steeped in a conservative tradition. This tradition is also found in consumer law. Thus innovative concepts, (such as the office of Fair Trading, compensation of consumers by criminal offenders,²⁰ etc.) have not been introduced in South African law. Furthermore, the remedies provided for are either fines or imprisonment of individuals. The notion of piercing the corporate veil to imprison senior officials for continuing with undesirable trade practices has certainly not crossed the legislature's mind.²¹

The tradition followed in South Africa incorporates most of the negative features of the law in England and Wales laws, (eg delegating the enforcement of food laws to local authorities which result in fragmented enforcement).

Thus several features applicable in the United Kingdom need to be further examined for application in South Africa.

4. UNITED STATES OF AMERICA²²

The United States, like Australia, is a federation of states. Most of its food laws, however, are laws passed mainly by the federal government. Thus, most of its provisions are uniform.

The positive features include inter alia:

- (a) The policy of the federal government not only protects consumer health, but also the consumer's pocketbook.²³
- (b) The Federal Packaging and Labelling Act encourages the development of voluntary product standards.²⁴

²⁰The Criminal Procedure Act No 51 of 1977 (In South Africa) does provide for personal compensation to the injured party in respect of criminal offences. This, however, is limited to damage to or loss of property (s 300). The offence of mislabelling usually results in personal injury.

²¹Cf Part III of Fair Trading Act.

²²See Chapter 5.

²³Congressional Statement in Fair Labelling and Packaging Act §§ 1451-1451.

²⁴§ 1454(d).

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- (c) There has been a greater tendency to de-regulate than to enact regulations (eg health claims have been de-regulated).²⁵
- (d) The enforcing authorities are permitted to use remedies such as cease and desist orders.
- (e) The United State's Department of Agriculture (USDA) is empowered to approve labels prior to the launch of new or improved poultry, meat and other products.²⁶
- (f) The Food and Drug Administration (FDA) carries out limited independent tests of additives. That is, all GRAS substances²⁷ are being tested by the FDA.
- (g) Legislation requiring warnings to be stated on labels if potentially harmful ingredients are used in foodstuffs, eg the warning in respect of saccharin.²⁸
- (h) The law permits the establishment of standards of identity, fill and quality.²⁹
- (i) General innovative remedies such as class actions³⁰ are available, but do not specifically provide for consumers to bring such an action for consumer offences. They are available to anyone who qualifies.
- (j) The government has assisted consumers to gain access to information that has been obtained by government agencies by creating the Freedom of

²⁵B A Silverglade "Current Issues in Food Labelling - An Overview" (1989) 44 Food Drug Cosmetic Law Journal 231

²⁶Meat Inspection Act 21 USCS (1984) §§ 601-625. And the Poultry and Poultry Products Act §§ 451-470.

²⁷That is, Generally Recognized As Safe by experts in the field. (See § 321(s)).

²⁸§ 343(a).

²⁹§ 341.

³⁰Federal Rule 23 of the Civil Procedure Act.

Information Act.³¹

- (k) The law also provides for recalls, seizures and warnings to be made against manufacturers of unsafe foodstuffs.³²
- (l) The enforcement of regulations is not scattered among various departments and Acts. The FDA and USDA deal with foodstuffs, while certain practices are dealt with by the Department of Commerce and the Federal Trade Commission.³³

The laws and regulations passed by the United States are complex and sophisticated. The laws protect consumer health and pocketbooks, but the laws are not without negative attributes. The negative attributes are, first, that the laws do not prevent a proliferation of product sizes, (i.e. the laws do not require standardisation of the products). Secondly, consumers are not entitled to claim personal compensation for consumer offences that are criminal. Thirdly, the laws provide for arbitrary categories of food additives, (eg GRAS substances, prior sanctioned additives, etc).³⁴ Fourthly, the Delaney clause³⁵ (i.e. the anti-cancer clause) is impractical, because it does not provide a balance between the risks and benefits of the additives in question.³⁶ And finally, there is overregulation in this area. It is submitted that this inhibits innovation in the industry.³⁷

All of the negative features of the United States legislation are not common to South Africa. Firstly, South African legislation provides for standardization of product sizes. Secondly, South African law does not draw arbitrary distinctions between food additives. Finally, there are no laws equivalent to the anti-cancer clause.

³¹ 5 USCS § 552.

³² H W Schultz *Food Law Handbook* (1981) 61.

³³ See the Fair Packaging and Labelling Act, Federal Food Drug and Cosmetic Act, Meat Inspection Act and Poultry and Poultry Products Act.

³⁴ § 321(s).

³⁵ § 348.

³⁶ Schultz *op cit* 580.

³⁷ Schultz *op cit* v.

Many of the positive features are new to South African law and it is necessary to consider them in detail to decide whether they should be applied in the Republic.

5. COMMON THEMES

In concluding, it is necessary to indicate the common themes that arise due to the negative or positive attributes of food labelling legislation in various countries. These themes will be considered against the background of the criticisms levelled against South Africa in the previous chapter. The following themes emerge:

- (a) The lack of suitable criminal and civil remedies.
- (b) Self-regulation.
- (c) The secrecy of information available to enforcing authorities.
- (d) Advisory bodies and their status in law.
- (e) The need to consolidate and index fragmented food legislation and regulations.
- (f) Establishment of standards (i.e. compositional standards).
- (g) Full ingredient labelling.
- (h) The treatment of food additives.
- (i) The lack of uniform and suitable enforcement.
- (j) Consumer education.
- (k) The need for a Department of Consumer Affairs that protects not only consumer health, but also their pocketbooks.
- (l) Prior approvals of labels.

These themes will be examined in detail in the next part.

PART III:

SOUTH AFRICA: AN EXAMINATION

CHAPTER 8: THE SOUTH AFRICAN
SITUATION: AN EXAMINATION

The foregoing parts dealt with diverse countries and the Codex Alimentarius. The discussion examined the background of food law in Australia, United Kingdom, United States of America and South Africa. The establishment of standards by the Codex Alimentarius was also discussed. The benefits and drawbacks of the various systems of food laws were examined. None of the systems can serve South Africa comprehensively, therefore, it is necessary to consider not only the problems facing South Africa,¹ but also the solutions that can be offered to remedy some of the difficulties.

This chapter will deal with consider solutions for those themes outlined in chapter 7 and recommendations will be submitted. Where possible, the solutions will examine how an foreign country, (addressed in Part II), has dealt with the issue.

A. SOLUTIONS

1. REMEDIES

The Foodstuffs, Cosmetics and Disinfectants Act² (Foodstuffs Act) only provides for criminal sanctions. To be punished, the manufacturer's breach has not only to be discovered, but also has to be proved. The process is drawn out and the resultant punishment is insignificant. For example, the fine for a first offender is an amount not exceeding R 400 or to imprisonment for a period not exceeding six months or both, while the penalty for a second offender is a fine of an amount not exceeding R 800 or

¹See above 211.

²No 54 of 1972.

imprisonment not exceeding twelve months or both, and a third or subsequent conviction results in a fine not exceeding R 2000 or the maximum period of imprisonment is twenty-four months or both.³ Often the manufacturer pays the fine, charges it to consumers by increasing prices, and forgets about the fine because it is insignificant. The punishment is not harsh enough to prejudice manufacturers so that they will think hard and long in the future before they breach the regulations.

In addition, the criminal penalties do not provide for a procedure whereby (a) unsafe products in the marketplace can be recalled; or (b) unscrupulous practices can be ceased.

A further problem is that the fines reach the coffers of the local health authorities. A consumer's only incentive for complaining about a manufacturer is that the breach will, hopefully, not continue in the future. This is an insufficient incentive for consumers to ensure that they complain about mislabelling.⁴

Thus, first, there is a need to increase the fines and period of imprisonment in respect of offenders. For example, the Harmful Business Practices Act⁵ provide for offenders to be fined for a maximum amount of R200,000 in certain circumstances.

The second area where amendments can be made to the Foodstuffs Act is to authorize the enforcing authorities to obtain "cease and desist" orders against the continuation of unscrupulous (or harmful) practices. They should also be authorized to recall unsafe goods that have already reached the marketplace. Moreover, the Fair Trading

³ s 18(1) of the Foodstuffs Act.

⁴ Consumers seldom complain about mislabelling of foodstuffs to the local authorities. (Mr R C Warthington (Divisional Senior Health Inspector), Mr C A Powell (Inspector) & Mr J H Lategan (Inspector) of Zone 8 (Durban) Local Authorities - Food Section) personal communication (9 March 1990).

⁵ No 71 of 1988.

Act⁶ provide for the imprisonment of senior officials of a company if the company does not comply with a "cease and desist" order. In comparison, South Africa will only imprison individual offenders. The courts shy away from imprisoning senior officials of a company. Therefore, there is a need for statute to provide for imprisonment of company officials.

The third area for reform is to permit consumers to claim compensation from manufacturers who have breached the law. At present the Criminal Procedure Act⁷ provides for the court to award compensation where offences cause damage to or loss of property.⁸ The difficulties with this provision are that, firstly, it only provides compensation for damage to, or loss of, property. Secondly, it requires the injured party, or the prosecutor acting on behalf of the injured party, to claim the remedy.⁹ Compensation, however, is unavailable to consumers when they are personally injured. In comparison, s 35 of the Criminal Courts Act¹⁰ in England and Wales provide for the compensation to be granted for "any personal injury, loss or damage" and, furthermore, the section authorizes the court to make an order for compensation without the injured party requesting such an order.¹¹

The granting of compensation orders to an individual can be provided for by statute, eg in a Consumer Protection Act. The provision should be such that the court can apply it without the need for the injured party or the prosecutor to request compensation, and without limiting the compensation to loss of, or damage to, property. The remedy, however, cannot be limitless. It must be permitted only if the offender was convicted in a criminal action.

As consumer law develops in South Africa, the opportunity may arise to introduce class actions. Class actions are legislated for in the United States¹² and Australia. Such

⁶Of 1973. See above ?.

⁷No 51 of 1977.

⁸s 300.

⁹For the application of s 300 see D J McQuoid-Mason *An Outline of Legal Aid in South Africa* (1982) 66-68.

¹⁰Of 1973.

¹¹See above ?.

¹²See above 170.

actions are used in the United Kingdom, but they have no statute governing them. Notwithstanding that South Africa is developing in the area of consumer law and consumer protection, it is inappropriate to introduce class action at this stage, because consumers are unaware about their rights as consumers. With improved consumer education, however, the feasibility of class action becomes a distinct possibility.¹³ Consumer education is necessary to ensure that consumers are aware of calls made by others to join in a class action. With the want of education consumers will be afraid to join such action because of their belief that the action will be expensive.

There is a need to improve criminal penalties. However, even if criminal sanctions are increased, they will be unsatisfactory for consumers. Proper protection can only be available if consumers are given the right to claim personal compensation for injury, harm of loss suffered.

2. SELF-REGULATION

Several features have contributed to the failure of regulations and their objectives. These include: (a) The inflexibility of regulations; (b) the red tape involved in amending regulations;¹⁴ (c) the excessive time taken for regulations to react to changes in industry; (d) numerous regulations result in confusion; (e) the excessive costs of regulation;¹⁵ and (f) the complexities of regulations.¹⁶

Foreign countries encourage the establishment of voluntary codes of practice and/or standards. The Office of Fair Trading (OFT),¹⁷ (in England and Wales), is the agency responsible for approving the codes of practice and voluntary standards. The OFT

¹³ Cf D J McQuoid-Mason "Consumer Law: The Need for Reform" (1989) 52 THRHR 228-240.

¹⁴ Eg to amend regulations at least one draft is published in the Government Gazette to allow for comments and criticisms from interested parties. A practice, however, has developed whereby most proposed regulations are published twice with approximately one or two years gap between the publications.

¹⁵ S Barnes & M Blakeney Advertising Regulations (1982) 25.

¹⁶ Ibid.

¹⁷ Part II of the Fair Trading Act.

approved approximately twenty codes during 1974 and 1984,¹⁸ however none of them concern the food industry.¹⁹ Section 65 of the Australian Trade Practices Act 1974-1975 (Cth) provides for the Minister to approve a standard prepared by an association, but it does not encourage self-regulation exclusively. The Food and Drug Administration (FDA) of the United States is the only government agency that has encouraged "co-regulation" in respect of certain aspects of food labelling (eg health claims).²⁰ This is a recent development, therefore, it is difficult to evaluate the success of employing co-regulation in this area. It must be noted that with co-regulation regulations are not discontinued by the FDA, but the standards merely co-exist with the established regulations.²¹

Thus, an alternative is business self-regulation. Self-regulation requires codes of practice and/or voluntary standards to be established in place of regulations.²² For an appraisal of self-regulation, as an alternative to regulations in the food industry, it is necessary to consider the advantages and disadvantages of self-regulation. In addition, it is useful to consider the desirability of a self-regulated industry (eg the Advertising Standards Authority of South Africa (ASA)).

The advantages of self-regulation are:

- (a) It avoids the procedural difficulties encountered in a legal system,²³ eg the use of consumer surveys will not be accepted as evidence in a court of law because of the hearsay rule.²⁴
- (b) It encompasses a wider area of conduct than legal control.²⁵ Furthermore, a code of practice can cover specific technicalities, which cannot be

¹⁸Cranston *op cit* 32.

¹⁹Items such as cars, domestic appliance, etc. and services such as dry cleaning, travel, etc. have approved codes of practice.

²⁰B A Silverglade "Current Issues in Food Labelling - An Overview" (1989) 44 *Food Drug Cosmetics Law Journal* 231-234.

²¹See below 242.

²²R Cranston *Consumers and the Law* 2 ed (1984) 31.

²³Barnes & Blakeney *op cit* 22.

²⁴Barnes & Blakeney *op cit* 27.

²⁵Barnes & Blakeney *op cit* 22.

regulated.²⁶

- (c) An authorized body can incorporate the expertise said to be lacking in the regulating agencies.²⁷
- (d) It is effective, efficient, expeditious and less expensive than government institutions.²⁸
- (e) Agencies dealing with self-regulation are concerned with preventing wrongs from occurring rather than curing wrongs after the deed has been done.²⁹
- (f) Self-regulated industries usually comply with self-imposed codes in spirit and letter, while traders often try to find loopholes in the law and to see how far the regulations can be exploited.³⁰

The disadvantages of self-regulation include:

- (a) Implementing self-imposed standards can be complex because compliance is voluntary and it is not obligatory for all manufacturers to participate,³¹ i.e. there is no compulsory participation.³²
- (b) A self-regulated industry may ignore consumer interests,³³ which, in turn, will weaken the voluntary measure.³⁴

²⁶Barnes & Blakeney *op cit* 463.

²⁷Barnes & Blakeney *op cit* 22.

²⁸Barnes & Blakeney *op cit* 461.

²⁹Barnes & Blakeney *op cit* 463-464.

³⁰W. Pengilly & A. Ransom Federal Deceptive Practices and Misleading Advertising Law: Materials, Judgement and Policy (1987) 989.

³¹Cranston *op cit* 60-61.

³²Barnes & Blakeney *op cit* 23.

³³*ibid.*

³⁴Cranston *op cit* 61.

- (c) Voluntary standards can be generalised to such an extent that they are rendered relatively worthless, i.e. "window-dressing"³⁵ or standards that are impartial towards traders.³⁶
- (d) The self-regulating body may find it difficult to enforce the codes because-
- (i) they share the same values as the wrongdoer;³⁷
 - (ii) they wish to avoid disharmony in the industry,³⁸ or
 - (iii) they do not want to alienate their source of funding.
- (e) Consumers are only protected against those traders who are members^{39,40}

An example of the workings of self-regulation in South Africa is the Advertising Standards Authority of South Africa (ASA). (See Table VIII).

Representatives of the food industry in South Africa regard regulations as vital and self-regulation as not the solution to overregulation.⁴¹ They give the following reasons:

- (a) Self-regulation is easier to accomplish for non-food items because it does not affect personal health.⁴²
- (b) Self-regulation opens up the field for fly-by-night operators.⁴³

³⁵Cranston *op cit* 60-61.

³⁶Barnes & Blakeney *op cit* 23.

³⁷Cranston *op cit* 61.

³⁸*ibid.*

³⁹Pengilley & Ransom *op cit* 990.

⁴⁰Other disadvantages include: The self-regulating industry may be too diverse to design meaningful codes and standards or to ensure an adherence and control of the self-regulating industry; the self-regulating industry may allocate minimum resources to the enforcement of their codes because they view the cost of policing as extravagant; the sanctions, if enforced, may not be substantial enough; and members will be cautious because non-members are free to do as they please, while voluntary members are bound by the codes and standards.

⁴¹Mr B Drury (Assistant Company Secretary of Unilever South Africa (Pty) Ltd) personal communication (27 November 1989). Mr S H Elms (Development Executor of the Food Group of the OK Bazaar Ltd) personal communication (12 July 1989). Mr B Morris (Consumer Affairs Manager at Checkers South Africa Ltd) personal communication (18 July 1989). Mr C Nel (Former Group Public Relations Manager of Fedfood Ltd and Legal Advisor to the Soya Association - in his personal capacity) personal communication (1 February 1988). Mr W A Parsons (Technical Director of Haarman and Reimer (SA) (Pty) Ltd) personal communication (11 July 1989). Dr G J H Stevens (Director of the Directorate of Foodstuffs, Cosmetics and Disinfectants in the Department of National Health and Population Development) personal communication (17 July 1989). Mrs J Tatham (Vice President of the Housewives League of South Africa) personal communication (12 July 1989). Dr P van Twisk (Research and Development Director of Fedfood Ltd) personal communication (16 August 1989).

⁴²Nel *op cit*. Mr C H Olivier and Mr P Roux (Technical Manager and Product Manager, respectively, of Nola Industries (Pty) Ltd) personal communication (13 July 1989).

⁴³Elms *op cit*. But in defence of such manufacturers he suggested that the regulations should be made available to them.

- (c) The problem does not lie with responsible manufacturers, (they will participate in a scheme of self-regulation and adhere to the codes), but those who do not participate.⁴⁴
- (d) Self-regulating health issues is not in the interests of the public or industry.⁴⁵

The major problems with self-regulations lie, however, with the disadvantages. Self-regulation may be cheaper, expeditious and quicker, but the industry cannot guarantee that all traders will comply with the codes or standards. In addition, in view of the other criticisms it is submitted that self-regulation is not the answer to overregulation.

Despite overwhelming support for regulations, industry recommended that the regulations need to be "thinned out".⁴⁶ This process will have to be carried out carefully⁴⁷ and it will have to be done within the framework of government regulation,⁴⁸ eg a company should be required to be registered, have a fixed address, etc. This alternative favoured by industry is called "co-regulation".

"Co-regulation" is defined as "self-regulation with a government agency playing a watchdog role".⁴⁹ Furthermore, standards and codes of practice are established within the framework of regulations. The dilemma is to strike the correct balance between what is to be regulated and what is to be left unregulated. The factors to consider include the following:

- (a) The need to repeal regulations dealing with foods which-
- (i) do not form part of a staple diet;
 - (ii) are not purchased habitually; or
 - (iii) do not have a record of deceptive or misleading practices.⁵⁰

⁴⁴Morris *op cit*; Tatham *op cit*.

⁴⁵van Twisk *op cit*.

⁴⁶Drury *op cit*; Morris *op cit*; Parsons *op cit*; Timm *op cit*; Mr J Hele (Executive Director of Grocery Manufacturers' Association of South Africa (GMA)) personal communication (12 July 1989).

⁴⁷Dr A C Gain (Divisional Director of Premier Food Management Services) personal communication (18 July 1989).

⁴⁸Morris *op cit*.

⁴⁹Barnes & Blakeney *op cit* 23.

⁵⁰G Cheng "The Extent of De-regulation" (1988) 40 *Food Technology in Australia* 63-63.

Table VIII The Advertising Standards Authority of South Africa - a summary of its workings.

1. The ASA is a voluntary association which has been established by the advertising industry. (See Appendix 9 for an outline of ASA).
2. The ASA has published Codes of Advertising Practice. The codes deal with general principles of advertising and specific categories of advertising, eg medicinal and related products and advertisements containing health claims; advertising for "slimming"; advertising for breast milk substitutes; etc.
3. The aim of the codes is to ensure that (a) advertising is legal, decent, honest, and truthful; (b) all advertisements are formulated with a sense of responsibility to the consumer; (c) all advertisements conform to the principles of fair competition in business; and (d) no advertisements brings advertising into disrepute or reduce confidence in advertising as a service to industry and to the public. (Section 1(1) of the Codes of Advertising Practice).
4. The ASA does not claim to be punitive *per se*, however, it achieves its aim by requesting the media not to grant advertising space to unscrupulous traders. This can be utilized against members or non-members.
5. It often requires members who have breached the established codes to clear their advertisements before publication. This is not punitive but it irritates the trader and, thereafter, he tends to abide by the codes.
6. It is a simple system and decisions can be taken quickly. Thus the wrongdoer can start planning the changes immediately. The estimated longest period for a ruling is six months and that is if the trader appeals. (If the matter is prosecuted it probably will not reach the courts within six months).
7. The major disadvantage of the ASA is that it is voluntary and this excludes the fly-by-night operators who need to be controlled. Furthermore, fly-by-night operators seldom use the media for advertising so there is no indirect control.
8. Since the ASA consists of three full-time representatives, there is a limitation on the operation of the agency.
9. The long term preference is for consumer education so that they can look after themselves because manufacturers, as long as they can introduce valueless products in the market, may attempt to launch valueless products.
10. The ASA plays a vital role because it controls an industry which cannot adequately be served by regulation.
11. It has the ability to monitor on an on-going basis and it is willing to penalize an unscrupulous trader for violating the codes.
12. The future role of the ASA includes:
 - (a) Monitoring foreign trends so that it can be preventative rather than curative; and
 - (b) the monitoring of the black media.

(This information has been supplied by Mr J G C Siebert (Executive Director of ASA) personal communication (26 January 1989).

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- (b) The regulations should relate to items and rules that can be complied with.⁵¹ For example, it will be meaningless to ensure that meat manufacturers declare the meat content of a meat product when it is difficult to test scientifically the correctness of the statement. Thus, those issues and concerns that cannot be complied with may be part of a voluntary standard.
 - (c) The codes or voluntary standards should encompass areas worthy of consideration.⁵²
 - (d) The enacted regulations, codes and voluntary standards should be simple.
 - (e) Future developments must not be inhibited or restricted by regulation.⁵³
 - (f) The regulations, codes and voluntary standards must be drafted in a manner that maximizes "choices for consumers and widens marketing opportunities for manufacturers".⁵⁴
 - (g) Substantial fines should be introduced to protect honest manufacturers and restrain unscrupulous manufacturers, especially if the deception is intentional.⁵⁵

Food law is an important area because it affects public health. Therefore, the rules have to be credible and responsible. There are difficulties with the regulations (i.e. overregulation) but self-regulation is not the answer. A feasible solution is co-regulation. This will also assist in consolidating the scattered legislation and regulations. The support of manufacturers, however is vital.

⁵¹ Ibid.

⁵² Cheng *op cit* 63-64.

⁵³ Cheng *op cit* 63.

⁵⁴ Ibid.

⁵⁵ Ibid.

3. THE SECRECY CLAUSE

"State security is used in wartime and emergencies to ensure food supplies; to guarantee the population is fed; and to stop enemies from disrupting food availability. In such dire circumstances, this may be fair enough, but the UK is not at war. We are involved in trade wars but these cannot be used to justify food secrecy now."⁵⁶

The Foodstuffs Act includes a "secrecy clause". This provides:

"No person shall, except for the purpose of carrying out his function or the performance of his duties under this Act or for the purpose of legal proceedings under this Act or when required to do so by any court or under any law-

- (a) without the authority in writing of the Director-General disclose to any other person the contents of any certificate or report on the analysis or examination of a sample in terms of this Act; or
- (b) disclose to any other person any information acquired by him in the carrying out of his function or the performance of his duties under this Act and relating to the business or affairs of any other person."⁵⁷

This clause is considered to be inhibitive by consumer bodies;⁵⁸ academics;⁵⁹ and manufacturers.⁶⁰ There is a need to protect trade secrets, but this clause is regarded as unduly inhibitive. The authorities claim that such a clause is necessary to ensure that manufacturers reveal their recipes to them.⁶¹

In contrast, the United States and Australia has introduced the Freedom of Information Act⁶² which ensures that government agencies have to provide certain information requested by consumers, and it has to be done within a limited time period. This encourages openness in the regulatory system. By comparison, the United Kingdom has introduced the Official Secrets Act (1939) which not only has a similar effect as the secrecy clause, but it extends to members sitting in various committees, (eg COT), forbidding them from disclosing what occurred in meetings.

⁵⁶London Food Commission Food Adulteration and How to Beat It (1988) 26.

⁵⁷s 16(1).

⁵⁸Tatham *op cit*.

⁵⁹Prof A E J McGill (Professor of Food Science at the University of Pretoria and Director of Foodnetwork CC) personal communication (10 July 1989).

⁶⁰Drury *op cit*; Mr R G Timm (Technical Director of Royal Beech-Nut (Pty) Ltd) personal communication (14 July 1989).

⁶¹Stevens *op cit*.

⁶²That is 5 USCS § 552 and Freedom of Information Act 1982 (Cth). (See above 43 and 168).

The problem with the secrecy clause is that it does not permit the Directorate or the local authority to inform consumers that there has been a breach of the regulations by a particular manufacturer; that steps have been taken to remedy the position; and what the penalty is.

It is necessary to eliminate the secrecy clause and to introduce legislation that encourages openness of information. The South African provision does not have to go as far as the provisions in the United States or Australia, but it should allow publication of information by the relevant department. So, for example, the Directorate and/or local authorities must be able to inform consumers and manufactures about infringements and the steps they have taken to ensure that the breach does not continue. The elimination of the secrecy clause, and the introduction of provisions that encourage openness, will serve three purposes: (a) It will permit complainants to be informed about the results of analyses carried out by the Directorate as a result of their complaint; (b) it will ensure that manufacturers and consumers are aware that the regulations are being enforced; and (c) manufacturers who infringe the law will receive adverse publicity, and this will often be punishment enough without having to introduce harsh monetary fines.

There is a need to remove this obstructive clause. Trade secrets can be protected. The provisions in the United States and Australia provide sufficient protection for manufacturers.⁶³

4. ADVISORY BODIES

Due to (a) the lack of expertise within the Department; (b) the diverse nature of food laws⁶⁴; (c) the need to keep up-to-date on foreign trends; and (d) the necessity to

⁶³The United States Act is criticized as being too wide. A limitation is that most requests for information come from companies wanting to know about their competitors. (Dr R L Hall (Former President of the International Union of Food Science and Technology (IUFoST) and former Vice President (Science and Technology) McCormick and Co., Inc.) personal communication (5 May 1988).

⁶⁴Food law includes, for example, nutritional information; safety of additives; concern with consumer health; technology and their rapid changes; hygiene in preparing food; etc.

enact acceptable and up-to-date legislation, the Directorate has established a Food Legislation Advisory Group (FLAG).

Establishing an advisory body to assist with food legislation is not new. Australia has the National Health and Medical Research Council (NH&MRC)⁶⁵ that assists in recommending food legislation, while the United Kingdom has the Food Advisory Committee (FAC) and the Committee on Toxicity of Chemicals in Food, Consumer Products, and the Environment (COT).⁶⁶

FLAG's status is (a) advisory; (b) honorary;⁶⁷ (c) experimental;⁶⁸ and (d) voluntary and by invitation⁶⁹.⁷⁰ The function of FLAG is to—(a) advise the Director on scientific and health aspects of food legislation; (b) deal with matters that have been referred to it by the Director, consumers, law enforcers, and food industry; (c) assist in de-regulation where possible; and (d) amend previous provisions or promulgate new regulations, where necessary.⁷¹

For FLAG to operate effectively it was necessary to ensure that Specialist Working Groups⁷² could be appointed to deal with specific matters or special regulations.⁷³ While FLAG members are invited participants, the members of the Specialist Working Groups are nominated by participants in FLAG. Generally, the members of the Specialist Working

⁶⁵The Council was established in terms of the Medical Research Endowment Act 1937 (Cth).

⁶⁶These advisory bodies are established voluntarily by the Ministry of Agriculture, Food and Fisheries (MAFF).

⁶⁷The members will not be compensated for either travelling expenses or time spent within the Group.

⁶⁸Due to past experience it was necessary to keep FLAG experimental at the initial stages.

⁶⁹Participation in FLAG is by invitation. The following disciplines, organizations and associations are represented in FLAG: (a) **Academic**: University of Natal, University of Pretoria, and University of Stellenbosch; (b) **Research**: Council for Scientific and Industrial Research (CSIR); (c) **Standardization**: South African Bureau of Standards (SABS); (d) **Technical/ industrial**: South African Association for Food Science and Technology (SAAFoST); (e) **Food Industry**: Grocery Manufacturers Association (GMA); (f) **Consumers**: South African Co-ordinating Consumer Council (Consumer Council), Black Consumer Union, Housewives League of South Africa; (g) **Regulatory Bodies**: United Municipal Executive Health Officers Association of South Africa; and (h) **Public Service**: Department of Agriculture Economics and Marketing, Department of National Health's Laboratory Services (ex officio), Directorate of Public Hygiene (ex officio).

⁷⁰Directorate of Foodstuffs, Cosmetics and Disinfectants "The Terms of Reference of the Food Legislation Advisory Group" (Unpublished Document) 1.

⁷¹ibid.

⁷²Examples of some areas where Specialist Working Groups have been appointed to deal with include: Meat; labelling and advertising; chocolate and cocoa; stabilizers, thickeners and emulsifiers; lysosomes; etc.

⁷³Terms of Reference op cit 2.

Group are experts in the area under consideration. Furthermore, interested parties⁷⁴ can also be nominated despite the fact that they have commercial interests in the outcome of the regulations. The role of the Specialist Working Group is to investigate matters referred to them and to forward recommendations to FLAG. Thereafter, recommendations made by FLAG are forwarded by the Director of the Directorate to the Director-General of the Department of National Health and Population Development (i.e. Department of Health). Thus, if there are parties with commercial interests in the Specialist Working Group it does not matter, because the recommendations are reviewed by the Director to ensure that the proposals protect consumer health.

There are advantages and problems associated with FLAG. The advantages include:

- (a) The need for all sectors of the food chain to be able to talk amicably about their needs and to ensure that workable legislation and regulations are enacted.
- (b) The use of Specialist Working Groups results in a discussion among people who know what they are talking about.⁷⁵
- (c) The Specialist Working Group cuts down the number of people involved and the time taken to ensure that the recommendations to FLAG are acceptable to all parties affected by the regulations.⁷⁶
- (d) The Specialist Working Groups can involve commercial interests because the group's role is merely to recommend proposals. It is vital that people whose interests are affected have a say as to what is occurring.⁷⁷

⁷⁴Eg the South African Sugar Association was nominated to participate in the Specialist Working Group on Sweeteners; the South African Soya Association was included in the Meat Specialist Working Group; etc.

⁷⁵Gain *op cit*.

⁷⁶*Ibid*.

⁷⁷Prof H J H de Muelenaere (Professor of Food Science at the University of Natal and Director of Research and Development for Anglovaal Industries) personal communication (2 November 1989).

- (e) Discussion occurs on an informal basis and on trust.⁷⁸
- (f) Due to previous experience, the belief is that FLAG must not be separated from the Directorate (i.e. the advisory body must not be independent from the Directorate).⁷⁹ Furthermore, to negotiate workable regulations there is a need for the Directorate to be involved.⁸⁰

The problems with the scheme include: (a) No tangible benefits have yet resulted from FLAG;⁸¹ (b) it has no status in terms of the law;⁸² (c) its existence is not guaranteed beyond the present Director;⁸³ and (d) at times members of the Specialist Working Groups are there merely to protect their own product and do not have sufficient knowledge about the broader issues.⁸⁴

From the point of industry, consumer bodies, and the present Director the future of FLAG is essential. Its future, however, depends on the Directorate continuing with the scheme, because it has no status in law. There is a need for legislation to permit the establishment of FLAG, while its status should remain advisory.

5. CONSOLIDATION AND CENTRALIZATION

As a result of scattered legislation and a variety of bodies involved in enforcing food laws⁸⁵ it is necessary to consolidate South African food laws. This should be accompanied by centralization and unification.⁸⁶ This will serve the purpose of- (a)

⁷⁸Tatham *op cit.*

⁷⁹Hele *op cit.*

⁸⁰Parsons *op cit.*

⁸¹Though FLAG has been operating for more than 2 years no proposed changes to the regulations have yet to be gazetted. Though the Directorate is more approachable. (This is the position as at 25 January 1990).

⁸²Consequently, if the Department of Health or the Directorate decides there is no further use for FLAG then it can dissolve the group.

⁸³Stevens *op cit.*

⁸⁴Mr D Classen (Plant Manager of Bull Brand Foods (Pty) Ltd) personal communication (13 July 1989).

⁸⁵Drury *op cit.*; Nel *op cit.*

⁸⁶Timm *op cit.*

combining all food laws under one agency,⁸⁷ therefore, it will become easier to obtain a ruling that will be adhered to; (b) eliminating conflicts that exist between the different departments at present; and (c) improving the understanding and administration of food law.⁸⁸ This can be accompanied by an index of food laws so that it will be easy to identify the applicable legislation.⁸⁹

It is submitted that food legislation is not easy to consolidate. Scattered legislation, and the difficulty of consolidating the laws, is experienced by Australia and United Kingdom. The United States, because its laws are encompassed in three pieces of federal statutes that apply to food and food products, does not encounter too much fragmentation. It has, however, reached a stage whereby its regulations are fragmented.

Consolidation and centralization can come about with the introduction of a Department of Consumer Affairs.⁹⁰

6. FOOD STANDARDS

Standards are established when accurate requirements can be laid down. This occurs when there are readily identifiable characteristics that can be described exactly.⁹¹ Furthermore, subjective or objective methods must exist to verify the requirements. A product's conformity can be compared against the accurate requirements set out in the standard.⁹² Food standards, accordingly, are the-

"link of identity between the name of the food product and a specific composition, which link has to be made by way of a regulation. Therefore, if a name of a food product is only customarily linked to a composition, i.e. there is no legislation explicitly establishing the link between the name and composition of such product, no food standard exists."⁹³

⁸⁷Gain *op cit.*

⁸⁸Morris *op cit.*

⁸⁹Drury *op cit.*

⁹⁰See below 282.

⁹¹A Gerard *An Outline of Food Law (Structure, Principles, Main Provisions)* (1975) 19.

⁹²*ibid.*

⁹³A van Hecke "Food Legislation: How to Get Food Product Innovation to Its Rightful Market" (unpublished paper)

There are different types of standards. The first distinction is between "compulsory" and "voluntary" standards. Compulsory standards are standards set out by law. They specify requirements, methods of testing, and penalties if the standards are breached or not complied with. The basis of compulsory standards is that they apply to all manufacturers of the specified food. Voluntary standards also specify the requirements, methods of testing, and penalties, but the difference is that they apply only to those manufacturers who are willing to obey the standards.

Distinction can also be drawn between "general" (i.e. horizontal) and "specific" (i.e. vertical) standards. A general standard is "one which applies to all products or to a very large group of products and relates to matters common to all of them."^{94,95} In comparison, a specific standard is one which "applies to an individual product or type of product"⁹⁶ or deals with a specific characteristic of a product^{97,98}.

International standards are created by the Codex Alimentarius.⁹⁹ The Codex Alimentarius was established jointly by the World Health Organization (WHO) and Food and Agricultural Organization (FAO) to deal with food policies. The approach is to establish worldwide food standards. The standards are voluntary and not compulsory. The Codex comprises of three types of committees: Regional committees; horizontal committees and vertical committees. The horizontal committees "deal with subjects such as standards of hygiene, food additives, food labelling and methods of analysis."¹⁰⁰ Vertical committees, also called "commodity committees," "deal with minimum compositional standards worldwide for specific food products or groups such as processed meat and poultry products, cereals, vegetable protein products."¹⁰¹ The Food Act 1984¹⁰² of England and

⁹⁴ Eg the general category could be prepacked foods, frozen foods, etc. and standards could be established in relation to prepackaged foods and the use of additives; labelling and advertising; food hygiene; etc.

⁹⁵ Gerard *op cit* 19.

⁹⁶ Eg salad dressing standards.

⁹⁷ Eg the standard dealing with the conditions governing the use of an application of origin.

⁹⁸ Gerard *op cit* 19.

⁹⁹ See Chapter 2 above.

¹⁰⁰ van Hecke *op cit* 4.

¹⁰¹ *ibid.*

¹⁰² s 4 of the Food Act (of 1984).

Wales and the American Federal Food, Drug and Cosmetic Act¹⁰³ provide for the establishment of compositional standards.

In South Africa standards can, (and have), been established by the South African Bureau of Standards (SABS) in terms of the Standards Act.¹⁰⁴ These standards may be compulsory or voluntary. Furthermore, they are either general or specific. The Directorate establishes either general¹⁰⁵ or specific¹⁰⁶ standards.¹⁰⁷ The tendency has been to create specific (i.e. vertical) standards. The problem is that each product has to be regulated individually. This results in too many individual regulations. It has become necessary to change the position.

The fundamental justification for food standards is "protectionism".¹⁰⁸ Protectionism considers the protection of consumers against economic fraud and the protection of manufacturers against unfair competition.¹⁰⁹ The disadvantages of food standards include:

- (a) Standards inhibit food innovation.¹¹⁰
- (b) Standards tend to protect unfair competition rather than consumer health.¹¹¹
- (c) Establishing new standards, or the amendment of previously established standards, is costly and time consuming.¹¹²

¹⁰³ 15 USCS § 341.

¹⁰⁴ No 30 of 1982.

¹⁰⁵ Eg regulations dealing with colourants, sweeteners, etc.

¹⁰⁶ Eg regulations dealing with salad dressing.

¹⁰⁷ The Directorate is not authorized by the Foodstuffs Act to provide compositional standards.

¹⁰⁸ van Hecke *op cit* 3.

¹⁰⁹ van Hecke *op cit* 1.

¹¹⁰ van Hecke *op cit* 8. Also see R A Merrill & E M Collier "Like Mother Used to Make": An Analysis of FDA Food Standards of Identity" (1974) 74 *Columbia Law Review* 561-601.

¹¹¹ van Hecke *op cit* 8-9.

¹¹² C W Lecos "Rethinking the Needs for Food Standards" (March 1985) 19 *FDA Consumer* 22-26.

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- (d) Standards do not keep up-to-date with current nutritional and health requirements.¹¹³
- (e) Inflexibility: Standards "tend to suppress competition, restrict the availability of desirable substitutes to standardized foods, impose barriers to market entry by standardizing products, (i.e. is anti-competitive), distort demand, and inhibit innovation."¹¹⁴
- (f) Standards may result in consumer confusion. For example, there may be a substitute for a standardized food that is much healthier, but is labelled "imitation" (or something else), because it does not consist of the ingredients required for the standardized food. Consumers, however, regard imitation food as inferior.¹¹⁵
- (g) Standards may involve high minimum requirements which result in increased costs: Low income earners may not be able to afford the food.¹¹⁶
- (h) Discount in prices will only exist above the cost of the ingredients required due to the compositional standard.¹¹⁷
- (i) If standards are not applied uniformly they will result in unfair competition.¹¹⁸
- (j) Food standards are controlled in an ad hoc manner.¹¹⁹

¹¹³J Agar "Generally Recognized as Sour Cream: Treating Standards for Food Identity as a Success" (1989) 44 Food Drug Cosmetic Law Journal 237-238.

¹¹⁴Agar op cit 241.

¹¹⁵Agar op cit 246.

¹¹⁶Merrill & Collier op cit 599.

¹¹⁷ibid.

¹¹⁸ibid.

¹¹⁹Cranston op cit 328.

Most countries are developing new ways of handling food standards.¹²⁰ South Africa is no different. The Directorate has announced that they will no longer promulgate regulations that establish specific (vertical) standards. Instead their aim will be to provide general (horizontal) standards.¹²¹ This change, however, will not be restrictive. Overseas legislation is often vertical, rather than horizontal, and South Africa intends to follow the latter.¹²² The reasons for this preference are that (a) the Foodstuffs Act is not the place to deal with standards, (i.e. vertical standards should be dealt with by the SABS); and (b) South African legislation should conform to foreign legislation to prevent further barriers to trade¹²³.

An alternative to compositional standards or vertical standards is the increased use of full labelling. This has been canvassed by Australia; the United States; and the United Kingdom.¹²⁴ The difficulty, however, is that South Africa is moving towards horizontal standards without the benefit of full labelling. At present full labelling may not be beneficial for South African consumers,¹²⁵ therefore, the Directorate is not striving towards full labelling. The current trend of introducing horizontal standards, however, may create problems if vertical standards are repealed and basic foods are declared non-standard in a unfettered manner.

Many industry representatives argue that compositional standards play a significant role in food law.¹²⁶ Various reasons are given in justification. They include: (a) Standards assist manufacturers in planning factories, the processes required, budgets, etc.;¹²⁷ (b) standards ensure that consumers purchase uniform products;¹²⁸ and (c) it takes too long for

¹²⁰See E J Wright "The Development of Food Standards in Australia - An Aussie Recipe for Cooperative Federalism" (1982) 44 *Food Drug Cosmetics Law Journal* 251. Cranston *op cit* 317. Lecos *op cit* 23. Agar *op cit* 237.

¹²¹Stevens *op cit*.

¹²²M M Benade "The New Approach to Food Legislation in South Africa" Unpublished paper presented at the Food Law Seminar (March 1987) University of Stellenbosch 12.

¹²³*ibid*.

¹²⁴These are the countries discussed in Part II. Other countries include the EC countries, etc.

¹²⁵Due to the lack of consumer education.

¹²⁶Mr G J Joubert (Manager of Food Standards Inspection Division of the SABS) personal communication (19 July 1989); Mr J H Potgieter (Secretary (Technical) at the Wheat Board) personal communication (12 July 1988); Timm *op cit*. Cf. Tatham *op cit*, however, felt that standards are inhibitive and therefore there is no need for them.

¹²⁷Potgieter *op cit*.

¹²⁸*ibid*.

market forces to eliminate unscrupulous manufacturers.¹²⁹ They see problems, however, with the policing of standards.¹³⁰

Food standards play an important role in food laws and it is inconceivable that manufacturers will prefer to move to a non-standardized industry. The issue is whether a country should establish vertical or horizontal standards. There are arguments in favour of and against establishing rigid, vertical standards. Thus a compromise has to be achieved. The compromise reached by South Africa seems sensible. The Directorate is to deal with horizontal standards, (but when necessary it will enact vertical standards), and agencies such as the SABS deal with vertical standards that are either voluntary or mandatory, depending on the circumstances. The foreign trend of full labelling is not being employed in South Africa. The latter is a lacuna in the law that needs to be addressed.

7. FOOD ADDITIVES

A controversial area of food law is food additives. At present there is widespread confusion among consumers about additives and their role. This is the result of contradictory reports about food additives.¹³¹ Groups, such as the London Food Commission,¹³² claimed that most additives are cosmetic and, therefore, superfluous in foods. In comparison, manufacturers claimed that additives have been used for many centuries and often they improve consumer health.¹³³ A further problem is that each group alleges that the other has hidden motives in ensuring that consumers believe them.¹³⁴ Consumers are not sufficiently educated to decide which view is correct. They are confused by the contradictory views.

¹²⁹Morris *op cit*.

¹³⁰Classen *op cit*.

¹³¹See London Food Commission *op cit* 38 for some common themes.

¹³²London Food Commission *op cit* 39.

¹³³G von Rymon Lipinski & E Lück "Plain Man's Guide to Additives" (May 1981) 56 *Food Manufacturer* 51-51.

¹³⁴A Turner "A Technologist Looks at Additives" (July 1986) 61 *Food Manufacture* 40-41-42 submitted that "One must look at the motives of those who have effectively reversed the interpretation ... in the minds of the public." While London Food Commission *op cit* 47 submitted that "There are economic pressures on a manufacturer to debase food."

Varying definitions have been given to "food additives". "Food additives" are defined differently in various countries:

(a) South Africa:

"Any substance not normally consumed as a foodstuff, intentionally added to foodstuff for a technological (including organoleptic¹³⁵) purpose, but shall not include substances added to improve nutritional value".¹³⁶

(b) The Codex Alimentarius:

"Any substance not normally consumed as a food by itself and not normally used as a typical ingredient of food, whether or not it has nutritive value, the intentional addition of which to food a technological (including organoleptic) purpose in the manufacture, processing, preparation, treatment, packing, packaging, transport, or holding of such food results in, or may be reasonably expected to result (directly or indirectly) in it or its by-products becoming a component of or otherwise affecting the characteristics of such. The term does not include 'contaminants' or substances added to food for maintaining or improving nutritional qualities."¹³⁷

(c) England and Wales:

"'Additive' means any substance, not commonly regarded or used as food, which is added to, or used in or on, food at any stage to affect its keeping qualities, texture, consistency, appearance, taste, odour, alkalinity or acidity, or to serve any other technological function in relation to food, and includes processing aids in so far as they are added to, or used in or on, food as aforesaid, but does not include-

- (a) vitamins, minerals or other nutrients in so far as they are used solely for the purpose of fortifying or enriching food or of restoring the constituents of food,
- (b) herbs or spices when used as seasoning,
- (c) hops, ..."¹³⁸ etc.

¹³⁵This means "sight, taste, smell, and texture as perceived by the senses." (M Hanssen & J Marsden *The New E for Additives* (1987) 24).

¹³⁶Reg 1 of GN R908 *GGE* 5565 of 27 May 1977 (*Reg Gaz* 2471).

¹³⁷Joint FAO/WHO Food Standards Programme "Statutes of the Codex Alimentarius" *Codex Alimentarius Commission Procedural Manual*, 5 ed (1984).

¹³⁸Reg 2 of Food Labelling Regulations (of 1984) (No 1305).

(d) United States of America:

"Means any substance the intended use of which results or may reasonably be expected to result, directly or indirectly, in it becoming a component or otherwise affecting the characteristics of any food (including any substance intended for use in producing, manufacturing, packing, processing, preparing, treating, packaging, transporting, or holding food; including any source of radiation intended for any such use), if such substance is not generally recognized, among experts qualified by scientific training and experience to evaluate its safety, as having been adequately shown through scientific procedures (or, in the case of substance used in food prior to January 1, 1958, through either scientific procedures or experience based on common use in food) to be safe under the conditions of its intended use; except that such term does not include-

- (1) a pesticide chemical in or on a raw agricultural commodity; or
- (2) a pesticide chemical to the extent that it is intended for use or is used in the production, storage, or transportation of any raw agricultural commodity; or
- (3) a colour additive; or
- (4) any substance used in accordance with sanctions or approval granted prior to the enactment of this paragraph pursuant to this Act ..., the Poultry Products Inspection Act ... or the Meat Inspection Act ... as amended and extended ...; or
- (5) a new animal drug."¹³⁹

The definition of a "food additive" in South Africa is narrow. The definition correctly excludes "any substance not normally consumed as a foodstuff," but narrows its application by saying that only ingredients that are intentionally added to serve a technological (including organoleptic) purposes will be considered as food additives. This is narrow because it does not include those ingredients that may be added to food from packaging materials or due to transporting of food.¹⁴⁰ Secondly, it does not lend itself to be divided into categories of function (eg colours, antioxidants, etc.), yet the authorities have divided additives into several categories.¹⁴¹ Thirdly, the South African definition does not exclude items like pesticide residues from its definition but regards such items separate from general provisions affecting food additives.¹⁴²

¹³⁹ 21 USC § 321.

¹⁴⁰ Of the definitions of Codex Alimentarius and United States.

¹⁴¹ Cf definition of a "food additive" in England and Wales. See Appendix 10 for a discussion on the categories of food additives.

¹⁴² Eg it does not require an indication that pesticide has been used on a fruit.

Food additives can either be listed negatively or positively by the authorized agency in each country. A negative list is a list that prohibits the use of additives or amounts beyond a fixed level. The list may also limit the use of certain additives and prescribe the conditions of use.¹⁴³ A positive list is one that prohibits the use of additives, unless they are specifically approved for use in a list of permitted additives. It will also list the maximum amount to be used and/or the conditions of use.¹⁴⁴

South Africa follows a positive listing of additives, but this will soon change to negative listing.¹⁴⁵ The problem with positive lists is that they inhibit the development of new product and amendments to regulations are time consuming.¹⁴⁶

To introduce a new food additive a manufacturer has to demonstrate to the Directorate that there is a need for the additive and that it is safe. This two-pronged test is also used in the United Kingdom. The United States, however, only concerns itself with the safety of the additive. Thus there is no limitation on the number of approved additives on the basis of need.¹⁴⁷

When applying the two-pronged test, additives are often not approved because there is no need for them. For example, the FAC in the United Kingdom recommended that cyclamates, a sweetener, should not be permitted because the COT has recommended that the use of cyclamates be limited. The second reason was that it is not an intense sweetener, i.e. requires more cyclamates than, for example, saccharin to achieve the same sweetness. Furthermore, two other intense sweeteners are permitted in the United Kingdom.¹⁴⁸

¹⁴³Gerard *op cit* 33.

¹⁴⁴*ibid.* The advantages and disadvantages of the two types of listing is arranged in Gerard *op cit* 33-41.

¹⁴⁵Stevens *op cit*.

¹⁴⁶Dr I B Zondagh (Senior Agricultural Researcher in Meat Quality at the Meat Science Centre of the Animal and Dairy Research Institute) personal communication (20 July 1989).

¹⁴⁷P Lehmann "More Than You Ever Thought You Would Know About Food Additives ... Part I" (April 1979) 13 *FDA Consumer* 10 11.

¹⁴⁸HMSO Food Additives and Contaminants Committee Report on the Review of Sweeteners in Food (1982) FAC/REP/84 12.

Unfortunately this is not so in South Africa. The sweetener regulations¹⁴⁹ in South Africa not only permit the use of cyclamates, but also sets the maximum quantity five times higher than saccharin. Thus cyclamates have a limit of 2,500 mg/kg while saccharin has a 500 mg/kg limit. This is contrary to the recommendations made by COT.¹⁵⁰

To ensure that food additives are safe, manufacturers are required to undertake toxicological tests on animals. The information required to evaluate safety includes-

"composition of the additive, its function, the amounts to be used in foods, in what foods it will be used, the testing procedures and the results of the tests."¹⁵¹

The Directorate in South Africa assumes the safety of an additive on the basis that it has been accepted as safe by the FDA; Joint FAO/WHO Expert Committee on Food Additives (JECFA); and/or the Scientific Committee on Food Additives of the European Economic Community (EEC).¹⁵² This policy is justified on the basis that-

- (a) toxicological tests are carried out on rats, mice and other rodents, and thus the important feature of the test is the safety factor that is contemplated when extrapolating the results for humans;¹⁵³
- (b) the toxicological tests are very expensive¹⁵⁴ and time consuming;¹⁵⁵
- (c) South Africa lacks the skilled manpower required to undertake toxicological tests;¹⁵⁶
- (d) South Africa will be reinventing the wheel if it duplicates the tests,¹⁵⁷ and
- (e) foreign standards for toxicological tests are more stringent than those in South Africa.¹⁵⁸

Despite the present adequate system, various concerns have arisen in respect of the safety of additives. These include:

¹⁴⁹Reg 3 of GN R1881 *op cit*.

¹⁵⁰It is conceded that South Africa is not obliged to accept recommendations made by COT, however, the South African authorities should take cognisance of the recommendations made by the COT because they rely on research done by foreign countries.

¹⁵¹M F Jacobson *Eater's Digest: The Consumer's Factbook of Food Additives* (1972) 24.

¹⁵²Stevens *op cit*.

¹⁵³Timm *op cit*.

¹⁵⁴Morris *op cit*; Olivier & Roux *op cit*; Tatham *op cit*.

¹⁵⁵Such toxicological tests can take as much as 13 years.

¹⁵⁶Gain *op cit*; Olivier & Roux *op cit*.

¹⁵⁷Stevens *op cit*; Timm *op cit*.

¹⁵⁸Drury *op cit*.

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- (a) Most additives regulations in South Africa permit manufacturers to use additives in terms of good manufacturing practices (GMP). Such practices are safe in the hands of responsible manufacturers. The difficulty, however, is with unscrupulous manufacturers who protect their own interests, rather than those of consumers.¹⁵⁹ This is a legitimate concern because it is claimed that South African manufacturers (legally) use more colourants and flavours than their foreign counterparts.¹⁶⁰ Furthermore, the lack of strict enforcement results in uncertainty as to the compliance with the regulated limits.
- (b) There are problems with some of the safety tests undertaken overseas.¹⁶¹
- (c) There is no information about the various additives and their effect on South Africans. Most of the statistics relate to the United Kingdom or the United States. No statistics or analyses are available in respect of South African consumers.
- (d) Manufacturers, legislators, retailers and technologists resist informing consumers about additives.¹⁶²

One of the solutions to these problems will be for manufacturers, retailers, technologists, and legislators to be involved in communicating with consumers. At present the number of manufacturers informing consumers about the use and function of additives is virtually non-existent. Consumers acquire most of their information about food additives from magazines.

In addition, the system of labelling food additives in South Africa is by class names. Potentially harmful additives are being used in some classes.¹⁶³ At present only one potentially harmful additive has to be specifically listed on all labels, i.e. tartrazine. The

¹⁵⁹Parsons *op cit.*

¹⁶⁰S Jones "Poisons on Your Plate" (January 1990) *Living & Loving* 19-21. There is a need to reduce the amount of food additives consumed in South Africa.

¹⁶¹See Jacobson *op cit.* 23-38.

¹⁶²A Turner "Putting Additives Into Perspective" (July 1987) 62 *Food Manufacture* 81-81.

¹⁶³See Appendix 10.

proposed regulations also require monosodium glutamate (MSG) to be specifically listed in the ingredients.¹⁶⁴ This is inadequate information regarding the additives used in foodstuffs. Adequate information can only be achieved by full and informative labelling of foodstuffs. The need for this type of information is justified by the consumer's concern with health,¹⁶⁵ religious beliefs or moral convictions.¹⁶⁶ The employment of E numbers would assist local manufacturers by keeping the labels compact and also ensuring that labelling would not be very expensive.

Once consumers are informed they would be capable of making rational decisions that could be trusted.¹⁶⁷ The manufacturer has an important role to play in educating consumers. In addition, it is left to manufacturers to ensure that their methods of production, ingredients, recipes, etc. are revised in the light of changes in technology and new product development in a manner that balances consumer benefit and personal gain.¹⁶⁸ This requires manufacturers to keep consumers informed by comprehensive labels and other methods. Many South African manufacturers are more inclined to keep their heads down and say nothing. Consequently the industry has acquired a poor image.¹⁶⁹ This can be improved by opening the channels of communication.¹⁷⁰

Food additives are integral to the industry. South Africa follows a two-pronged test for permitting the use of a food additive: Need and safety. The problems with labelling additives are numerous, but the major problems can be resolved by the use of full ingredient labelling, (possibly with the use of E numbers), and manufacturers, retailers,

¹⁶⁴ Proposed amendments to the labelling regulations (i.e. Mark III).

¹⁶⁵ Though there are some people in the industry who suggest that allergies and intolerance should not be the reason for full ingredient labelling. The purpose of full ingredient labelling should remain consumer information. Those who are troubled by intolerance and allergies should use the Intolerance Databank soon to be introduced in South Africa. (Timm *op cit*). The Intolerance Databank (like that in the United Kingdom and Holland) will "produce a list of brands of foodstuffs 'free from' one or more of ten substances most commonly associated with food intolerance. These lists will be available through suitably qualified professional sources" (J Hele "Food Intolerance Databank Update" *Technology and the Consumer Proceedings of the SAAFoST Tenth Biennial Congress and A Cereal Science Symposium (August 1989)* 117).

¹⁶⁶ J D McLeay "Food Law in New Zealand: Additives, Allergens and Labelling" (1987) 17 *Victoria University of Wellington Law Review* 253-259-260.

¹⁶⁷ Turner (1987) *op cit* 81.

¹⁶⁸ Turner (1987) *op cit* 86.

¹⁶⁹ J Hele "Additives - The South African Manufacturer's Viewpoint" P B Bush, I R Clarke, M J Kort, and M F Smith (eds) *Additives in the Food Industry* (1988) 59.

¹⁷⁰ *Ibid*.

legislators, and technicians opening the channels of communication with consumers.

8. FULL LABELLING

At present the regulations require only the class of additives to be labelled, eg permitted colourants.¹⁷¹ The United Kingdom followed this system until consumer pressure and an EEC Directive¹⁷² required full ingredient labelling. The Codex Alimentarius and United States also encourage full ingredient labelling. The following is an example of full ingredient labelling¹⁷³:

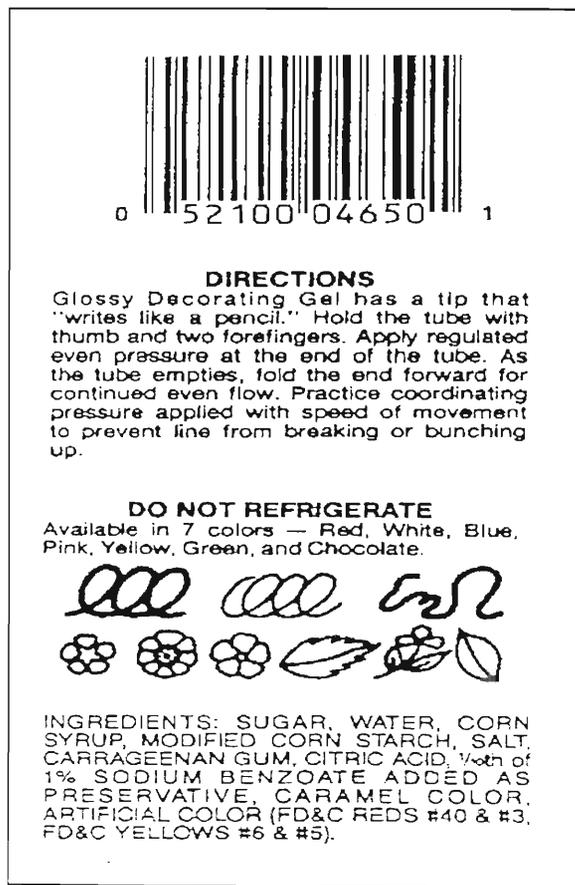


Figure 27 Example of full ingredient labelling observed in America

¹⁷¹Unless it is tartrazine which needs to be labelled in 2 mm size height.

¹⁷²Article 6 of Directive 79/112 of 8 December 1978 OJ 1979 No L33/1.

¹⁷³Eg of full labelling in the EEC - see Figure 28.

The argument against full labelling is that consumers are afraid of chemical names and will be confused.¹⁷⁴ Also the fact that there is more on a label is no indication that the food is healthier compared to another that has not been labelled fully.¹⁷⁵ Furthermore, there is no need for full labelling, because every additive is not a problem, only certain additives are problematic.¹⁷⁶ Another disadvantage is that manufactures use longer labels which not everyone will understand.¹⁷⁷ In addition, full labelling give away trade secrets.¹⁷⁸ The converse of this argument is that consumers are required to make a rational choice, and the only way to do so is when they are fully informed. Moreover, it is not sufficient to know that colourants are used, it may also be necessary to know which ones.¹⁷⁹ In any event, foreign countries are labelling additives fully and to keep in line with foreign legislation South Africa should also do likewise.

It will be an improvement to introduce full labelling, but unfortunately the proposed amendments to the regulations do not provide for it. It is submitted that with the present level of consumer education it may not be beneficial to introduce full ingredient labelling in the short-term. Something first needs to be done to educate consumers before full labelling is introduced.

Another alternative to full labelling by names is "E" numbers. This system is formulated by the EEC. It requires all additives used in a foodstuff to be indicated in conjunction with their class names. The system advocates the use of numbers in place of chemical names. Thus the additive will not only be labelled in terms of its class, eg colourants, but also a number allotted to the colourant specifically used in that foodstuff, eg E102. Alternatively the manufacturer can use the chemical name, eg tartrazine, rather than the E number. In this way consumers are informed of each ingredient, (in descending order of weight), and every food additive that has been included in the foodstuff. The use

¹⁷⁴ de Muelenaere *op cit*; Mrs S I Glass (Research and Development Manager of Simba-Quix (Pty) Ltd) personal communication (18 July 1989).

¹⁷⁵ Tatham *op cit*.

¹⁷⁶ *ibid*.

¹⁷⁷ de Muelenaere *op cit*.

¹⁷⁸ That is, recipes will be published on the label.

¹⁷⁹ Morris *op cit*.

of numbers also benefits manufacturers by allowing them to keep their labels brief. The following is an illustration:

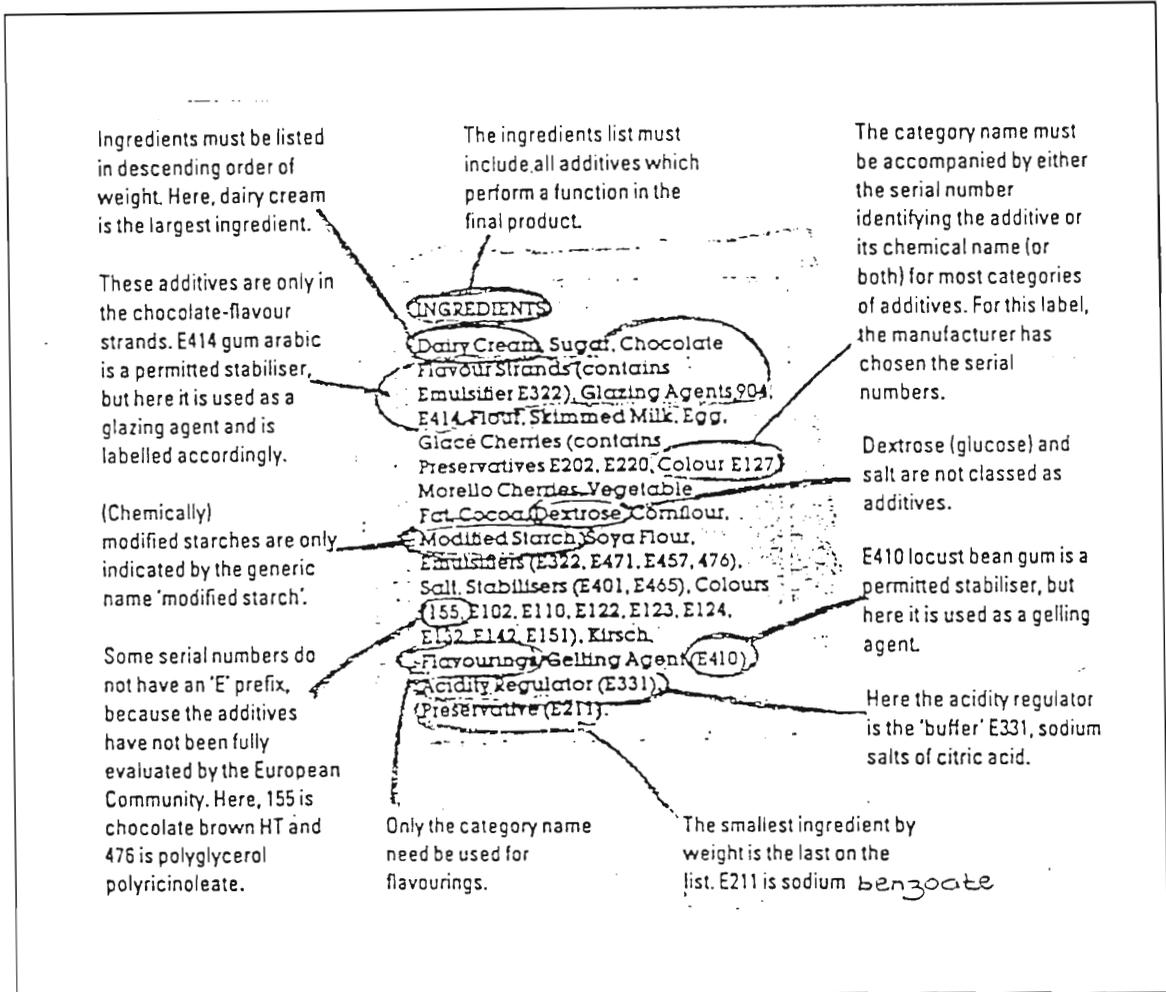


Figure 28 An example of labelling of E numbers. (Source MAFF Food Additives: A Balanced Approach 20).

Difficulties have arisen with this system. The effect of full labelling is that consumers view E numbers as bad.¹⁸⁰ This can be attributed to the fact that consumers are currently more health conscious and, now that additives are fully labelled, the ingredients of a foodstuff are noticeable. Furthermore, problems have arisen because of the contradictory reports about additives.¹⁸¹

¹⁸⁰ Turner (1986) *op cit* 41.

¹⁸¹ See for example Hanssen & Marsden *op cit*, E Millstone Food Additives: Taking the Lid Off What We Really Eat (1986), C Walker & G Cannon The Food Scandal (1986), G Cannon The Politics of Food (1987), British Nutrition Foundation Food Fit to Eat (1988), London Food Commission *op cit*.

Due to the negative reaction to E numbers the Directorate is unwilling to consider the application of E numbers in South Africa.¹⁸² South African consumers would be well served by the use of E numbers because of the multi-lingual society, and it could be a tool to educate consumers.¹⁸³ Due to the adverse effect overseas, local manufacturers are sceptical about using the system.¹⁸⁴ It has been suggested that the alternative to E numbers, which labels only additives, is a system that numbers all ingredients and additives with a number.¹⁸⁵ Further investigation will have to be undertaken as to the feasibility of such a system, but one negative reaction to that system is that there will be too many numbers¹⁸⁶ and people will be confused, and eventually ignore them. It is submitted that the underlying principle of E numbers is that consumers should only take note of the numbers of the additives they wish to avoid. They will not be required to carry bulky booklets with them to supermarkets. Also, supermarkets could display the numbers in various places in the store.

E numbers can be used to eliminate the language barrier,¹⁸⁷ and also be used to educate consumers. But this system cannot be advanced unless full ingredient labelling is encouraged.

Concerns in respect of food additives require solutions if the South African consumer is to maintain confidence in the food supply. It is submitted that full ingredient labelling (with E numbers) are proposals that should be implemented. Furthermore, the manufacturers, retailers, educators, technologists and legislators should ensure that they communicate information about food additives (and other issues) to consumers.

¹⁸²Stevens *op cit*.

¹⁸³Tatham *op cit*.

¹⁸⁴Elms *op cit*; Olivier & Roux *op cit*; Tatham *op cit*.

¹⁸⁵Timm *op cit*.

¹⁸⁶Morris *op cit*.

¹⁸⁷Because the booklets can be published in various languages.

9. ENFORCEMENT

"...[L]aws which lay down limits which are neither enforced nor observed are of no benefit or protection to the consumer."¹⁸⁸

Section 23(1) of the Foodstuffs Act provides for the Minister of Health, Welfare, and Pensions to delegate the power of enforcing the provisions of the Act and regulations to the local authorities and town municipalities. This has to be done by notice in the Government Gazette. As a result, the Department of Health, (via the Directorate), drafts and amends legislation, while enforcement is delegated to the local authorities and town councils. Such a form of delegation is unusual. The norm is some delegation of authority, but the "central services usually reserve to themselves exclusive jurisdiction to formulate rules for carrying out the principles laid down in the basic Act."¹⁸⁹

Similar problems are faced by Australia and United Kingdom. The Commonwealth government in Australia has delegated the legislating and enforcing of food laws to the eight states and territories. The United Kingdom has delegated the task of enforcement to the local weights and measures officers.¹⁹⁰ The United States, however, has a centralized enforcement service; i.e. the Food and Drug Administration (FDA).

The key factor in enforcement is the balance that has to be struck between the need to enforce the regulations rigidly and the flexibility to deal with mistakes and lack of knowledge. If there is a minor infringement that does not affect the health of the consumer there is no need for the goods to be removed from the shelf and destroyed. But if the infringement concerns health, (eg the food is contaminated), the foodstuff must be destroyed, irrespective of the cost.

¹⁸⁸A Woollen "How Safe is Food?" (December 1982) Food Manufacture 49-49.

¹⁸⁹Gerard *op cit* 60. Eg United Kingdom.

¹⁹⁰See P Circus "Consumer Law Enforcement: A National Trading Standards Service?" (1988) 9 Business Law Review 20.

Generally, enforcement problems arise because of lack of resources, lack of scientific methodology necessary to carry out effective investigations, and weaknesses in the drafting of regulations. The basic problem with the present method of enforcement is that the delegated authorities are ill-equipped to handle food laws and regulations (including labelling regulations). Specific criticisms include the following:

- (a) The authorities lack the manpower required to ensure that there are frequent and regular inspections.¹⁹¹
- (b) The inspectors are inadequately trained to cope with all facets of health and safety laws.¹⁹² The local authorities tend to ensure that one inspector is competent to deal with food labelling. The inspector will be required to inspect an area, and also check on labels. Other inspectors will also inspect labels, but will refer a questionable label to the inspector who is specialised in food labelling regulations.¹⁹³
- (c) The primary interest of the local authorities is hygiene and sanitary matters.¹⁹⁴ Consequently, they spend time inspecting restaurants, take-away establishments, supermarkets, etc. and do not have an opportunity to visit manufacturers regularly and frequently.¹⁹⁵ In their defence, however, it must be mentioned that the Foodstuffs Act does not require inspectors to visit a factory because the adulterated or misbranded food has to be offered for sale, i.e. therefore local authorities purchase the food from a retail outlet for prosecution purposes. Furthermore, to ensure that the ingredients used are all listed on the label, or the additives used are permitted, either in the product or in quantity used, the local authority will have to undertake independent analysis of the foodstuff. Therefore, it is not imperative for inspectors to visit the manufacturer's premises to ensure compliance with labelling regulations.

¹⁹¹ Classen *op cit*; Drury *op cit*; Gain *op cit*.

¹⁹² Gain *op cit*; Olivier & Roux *op cit*.

¹⁹³ Warrington, Powell & Lategan *op cit*.

¹⁹⁴ Classen *op cit*; Glass *op cit*.

¹⁹⁵ Parsons *op cit*; Potgieter *op cit*; Glass *op cit*.

- (d) Inspectors lack the ability to analyze products.¹⁹⁶ It should be mentioned, however, that the Foodstuffs Act provides for the appointment of analysts.¹⁹⁷ They are employed by the Department of Health (i.e. analysts are central government employees). Moreover, even if the inspectors have the knowledge to analyze foodstuffs they lack the laboratory facilities needed to test them.

The problem is that s 23(4) provides that-

"the Director-General (of Health, Welfare and Pensions) may in writing permit a local authority ... to transmit to any analyst free of charge, such number of samples as the Director-General may specify ..."

Consequently, each local authority is permitted a limited number of free analyses. Should the local authority exceed the number permitted it has to pay for the analyses from its own budget. This limits the number of analyses forwarded for inspection.¹⁹⁸

The Durban local authority is permitted 700 analyses. It is submitted that the analyses are sufficient in view of the number of staff available, (because of the lack of funding), and area covered.¹⁹⁹

- (e) In addition, inspectors are not only required to have knowledge of the Health Act and regulations, but also the Foodstuffs Act and 25 regulations.²⁰⁰ In addition, inspectors are also required to have knowledge of the various exemptions granted to the manufacturers. The situation is complicated, and it is too much for the local inspectors to handle.²⁰¹

¹⁹⁶Gain *op cit.*

¹⁹⁷s 12.

¹⁹⁸McGill *op cit.*

¹⁹⁹Warthington, Powell & Lategan *op cit.* The aim of a local authority is to inspect local products. National products manufactured by trustworthy companies are not inspected regularly, because the products have already been tried and tested.

²⁰⁰Issues examined by the local authorities include: All matters pertaining to (a) foodstuffs (viz. hygiene, handling and preparation of foodstuffs, labelling, sampling, condemnations in terms of s 3 of the Foodstuffs Act; etc.); (b) cosmetics (eg the use of permitted and non-permitted skin lighteners); and (c) disinfectants (eg the indication of active ingredients in a bleach).

²⁰¹Olivier & Roux *op cit.*

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- (f) The local authorities have limited resources.²⁰² This affects the number of inspectors employed; the quantity of foodstuffs that can be purchased for the purpose of inspection; the number of analyses they can request; etc.
- (g) The inspection services tend to be arranged on an ad hoc basis because there are too few inspectors. Furthermore, when they do get around to inspecting the foodstuff they have problems interpreting the regulations.²⁰³
- (h) An inherent problem with local enforcement is that the inspectors are easily subjected to influences, (eg in a small town it is conceivable that the mayor, who is the inspector's "employer", is the owner of a food factory), or the inspectors can easily be bought-off.²⁰⁴ Furthermore, the general perception is that local authorities lack the competence of a central state authority because of lack of facilities, limited resources, etc.²⁰⁵
- (i) Enforcement is not noticed by consumers because of the secrecy clause^{206, 207} Neither the Department nor the inspection services inform the public that an infringement has occurred and the steps taken to ensure that the infringement does not recur.
- (j) The regulations are not applied uniformly among the various local authorities²⁰⁸ because there are no guidelines issued by the Department. Consequently, each local authority can read and interpret the provisions of the regulations as they wish. This can cause problems for a manufacturer who supplies his goods nationally. For example, his label may be accepted as complying with the law in Durban,

²⁰²Hall *op cit.*

²⁰³Gain *op cit.*

²⁰⁴Hall *op cit.*

²⁰⁵*ibid.*

²⁰⁶s 18 of the Foodstuffs Act.

²⁰⁷Tatham *op cit.*

²⁰⁸Drury *op cit.*

Pietermaritzburg, and Cape Town, but Port Elizabeth, Pietersburg, and East London may write and inform him that his label does not comply with the provisions of their regulations. The manufacturer will have to reply to all the local authorities explaining how he has complied with the regulations. The problem is that the three authorities may have picked on different provisions of the regulations.

It is submitted, however, that the local authorities are restricted when interpreting the regulations, because they deal specifically with what is permitted and not permitted in the regulations. Should there be doubt as to the application of a provision the foodstuff in question is forwarded to Pretoria (i.e. State Health) for an analysis.²⁰⁹

- (k) The fact that the law is reactive also allows many manufacturers to escape detection when they breach the regulations.²¹⁰
- (l) The local authorities do not prosecute those who breach the labelling regulations to deter manufacturers from breaching the regulations. The local authorities policy is to first warn a manufacturer about the breach in labelling and allow him to amend the label. Prosecutions, however, do occur in the area of condemnations.²¹¹ The problem with such prosecutions is that there is no publicity.²¹²

There are several programmes in South Africa that have effective enforcement schemes. These include the ASA; the SABS; the Inspection Services of Trade Metrology, and the Wheat Board. It is necessary to consider the factors that make their enforcement successful before considering methods of improving enforcement of the food laws.

²⁰⁹ Warthington, Powell & Lategan *op cit.*

²¹⁰ Hale *op cit.*

²¹¹ That is, s 3 of the Foodstuffs Act.

²¹² Warthington, Powell & Lategan *op cit.*

 I. ADVERTISING STANDARDS ASSOCIATION OF SOUTH AFRICA (ASA)

The ASA no longer requires government regulations to be enacted to deal with false and misleading advertising.²¹³ The reason for its success can be attributed to the fact that the media (i.e. press and broadcasting services) are members.²¹⁴ When there has been a breach of the ASA code, the advertiser is warned and given an opportunity to organize his advertisements so that they comply with the code. Thereafter, should he still persist in the misconduct the ASA will inform the media that that advertiser's advertisements should no longer be accepted for publication until he conforms with the ruling of the ASA.²¹⁵ This method of enforcement can be utilized against members and, in certain circumstances, non-members. Furthermore, the ASA's constitution allows it to publicise details of an investigation, the name of the person transgressing the code, and the penalty enforced. The resultant publicity is also a method of ensuring that responsible manufacturers will not breach the code again. Moreover, if the code is breached by a first time offender, the ASA often requires the offender to clear future advertisements before publication.²¹⁶

The ASA does not affect labelling directly. Claims, however, made on a label can be controlled by the ASA because they constitute advertising.

This simple system works because the ASA has the support of the media in ensuring that offenders do not get their advertisements published. This, however, does not hinder fly-by-night operators who rarely purchase advertising space.²¹⁷

²¹³The Trade Practices Act No 76 of 1976.

²¹⁴Mr J G C Siebert (Executive Director of Advertising Association of South Africa (ASA)), personal communication (17 July 1988).

²¹⁵*Ibid.*

²¹⁶*Ibid.*

²¹⁷*Ibid.*

II. SOUTH AFRICAN BUREAU OF STANDARDS (SABS)

The SABS has established a Food Standards and Inspection Division in Pretoria. The inspectors, however, are based throughout South Africa.²¹⁸ The inspectors serve in-plant. This means that the major factories have SABS inspectors established in them, while only a few inspectors serve the smaller factories by conducting routine checks which, if possible, are daily. It is not always necessary to do routine checks if the factory has established a proper system of quality assurance. Despite the use of in-plant inspectors the SABS still ensures that uniform standards are maintained by inspectors. Members of the head office undertake regular and scrupulous inspections of the various in-plant premises and smaller factories.²¹⁹

The advantages of the inspection services of the SABS are that the inspectors serve in-plant wherever possible, and the inspectors have to comply with the uniform standard of inspection. An extraneous factor that makes the SABS popular is the fact that it usually deals with voluntary, rather than compulsory, standards.

III. TRADE METROLOGY INSPECTORS

The Inspection Services of the Trade Metrology Act are a central government service. Due to the geographic lay-out of South Africa, however, fifteen regional offices have been established in the major centres,²²⁰ coastal cities,²²¹ and other areas^{222,223} The regional offices have to comply with guidelines established by head office. This results in a uniform application of the Act.²²⁴ It is better than delegating this function to the local authorities, and allowing each authority to create independent guidelines to enforce the

²¹⁸There are 10 inspectors in the Western Cape; 4 in Johannesburg; 1 in Pietersburg; 3 in Durban; 4 On the West Coast; 2 in Port Elizabeth and 1 each in Walvis Bay and Windhoek. (Joubert *op cit*).

²¹⁹Joubert *op cit*.

²²⁰Eg Pietermaritzburg.

²²¹Eg Durban

²²²This includes Kimberly, Pietersburg, Springs and Vereeniging.

²²³Mr L Schwulst (Deputy Director of the Department of Trade and Industry) personal communication (17 July 1989).

²²⁴*Ibid*.

provisions. Furthermore, the Trade Metrology Act, by its nature, does not require extensive policing.

The prescribed quantities are established after consultation with the particular sector of the industry, (eg by consulting with established trade associations), or other organizations. Therefore, consensus is reached before regulations are promulgated.²²⁵ A further advantage is the present system of quality assurance employed in the factories to deal with slack-fill as it arises when the product is being manufactured.²²⁶ Thus the need to police slack-fill is reduced. Moreover, the cost of manufacturing moulds for plastic packaging is excessive.²²⁷ Once the manufacturer has purchased moulds that comply with the regulations, he will make use of them.²²⁸ This, however, will not prevent slack-fill because the manufacturer can easily fill an amount less than that specified in the regulations in the same container made from the mould.

The advantages of the Trade Metrology inspection system are that it is controlled by a central government agency and it does not require too many inspectors. Furthermore, the regulations are applied uniformly because the regional offices comply with guidelines established by the head office.

IV. WHEAT BOARD INSPECTORS

The inspection services of the Wheat Board deal with a different issue. The Board is not specifically concerned with analyses of the specified products, but rather the administration of subsidies. This requires the inspection services of the Board to inspect the financial records of its members (which include bakers, millers, etc.). Should there be discrepancies in the financial records, the Board will not pay the subsidy.²²⁹ Thus, if

²²⁵ *ibid.*

²²⁶ *ibid.*

²²⁷ *ibid.*

²²⁸ *ibid.*

²²⁹ *ibid.*

²²⁷ *Postgate et al.*

specifications are not complied with they will be revealed in the financial records, because the inspectors scrutinize the raw products purchased; the number of products produced; the number of products sold; etc. before subsidies are paid out. These checks can be carried out fairly frequently.²³⁰ The system works because payment of subsidies is an incentive for members to comply with the Board's directions.

CONCLUSION:

Neither of the above schemes can by themselves administer food regulations because- (a) there is no one organization that can control food laws as effectively as the ASA does advertising; (b) the regulations governing food laws are not voluntary and it is expensive installing in-plant inspectors; (c) the Directorate believes that enforcement of the Act and the regulations must be done by local authorities and not the central government²³¹, (despite the fact that there are State Health Inspectors); and (d) food processing is not controlled by subsidies.

A number of solutions have been offered:

- (a) Competitors should complain about manufacturers who do not comply with the laws because they are in a position to inspect the competitor's product and it is to their benefit to complain about non-compliance.²³² Retailers and merchandisers should also scrutinize the marketplace to ensure that they purchase goods that comply with the regulation and are correctly labelled.²³³ This solution is not all that simple to follow. The problem is that competitors, who do complain, find that they are debarred from being informed about the outcome of their complaint.²³⁴ Sometimes even if the

²³⁰ ibid.

²³¹ Stevens op cit.

²³² Hall op cit. Gain op cit. The incentive is that while they are ensuring that they handle the products carefully and comply with the regulations it costs them money, while a competitor, who cares less, will save money. (M N Cohen "Legal/Regulatory Development Affecting Food - Perspective of the Consumer Union" (1974) 29 Food Drug Cosmetic Law Journal 604 605).

²³³ Gain op cit.

²³⁴ Drury op cit.

complaint is valid the competitor is granted an exemption.²³⁵ Many businessmen feel that it is not their function to enforce the laws.

- (b) An alternative to local authorities enforcing the laws is delegating these powers to the SABS, which already has a number of in-plant inspectors.²³⁶ It may require the appointment of more inspectors, but the SABS will probably be able to recover the costs through levies. This proposal, however, will serve to remove central government's responsibility, (of safeguarding public health), into the hands of a semi-private organization.
- (c) There is a need for a few "seeing eyes" to inspect products as to correct labelling. Thus a system like the Inspection Services of Trade Metrology based in regional offices would be adequate. There is a need for "food inspectors," rather than health inspectors, to investigate complaints about food.²³⁷ The feasibility of having a mobile unit of food inspectors who deal with food laws needs to be investigated. This will cost the government in salaries, travel expenses, etc., but the resultant confidence in the food supply will be beneficial.
- (d) The Directorate or local authorities should not be inhibited from publicizing breaches of regulations by clauses such as the secrecy clauses. They should be allowed to publicize, (not only to the complainant but also to all consumers), the name of the company, the infringement alleged, the outcome of their investigation and the judgement of the decision if the case went to court. The FDA publicizes this sort of information quite successfully in their magazine called the FDA Consumer.²³⁸ This publication will not

²³⁵ *ibid.*

²³⁶ Classen *op cit.* MAFF Review of Food Legislation: Consultative Document 50 recommends that "further consideration and study should be given to a more general move towards in-factory enforcement ..."

²³⁷ Jones *op cit.* 21.

²³⁸ See Appendix 11.

require trade secrets to be revealed. The present system requires the manufacturer to pay a fine but this is easily done and the punishment is forgotten because the fine is charged to consumers by increases in the purchase price and consumers are unaware of the contravention.²³⁹

- (e) Should the scheme of prior approval of labels²⁴⁰ be accepted, the need for several field inspectors will be eliminated.²⁴¹

It is conceded that the local authorities have the teeth and incentive²⁴² to enforce the regulations,²⁴³ but there are grave doubts whether they are competent to do the job. The suggested solutions may cost the government more but the response from consumers, manufacturers, and retailers will outweigh the costs.

Consumers in South Africa rely on the government to ensure that their food supply is healthy and safe. There are no procedures whereby consumers can complain and obtain personal redress for unsatisfactory or unsafe goods.²⁴⁴ A government programme has to be reputable and responsible.

10. EDUCATION

"But what we can and should do is make sure that tomorrow's adult citizens are furnished with the basic tools of knowledge and appreciation which will enable them to exercise their freedom of choice and their personal and collective responsibilities in the light of the different options and the manifold problems which will face them as consumers - not only in today's, but in tomorrow's, society."²⁴⁵

²³⁹Stevens *op cit*.

²⁴⁰See above 165.

²⁴¹Though people will be required to inspect the labels timeously.

²⁴²That is, the Foodstuffs Act empowers the local authorities to enforce the laws. The incentive of prosecuting is the fines received on conviction goes into the coffers of the local authority.

²⁴³Stevens *op cit*.

²⁴⁵"Consumer Education in Schools" Paper published by Working Party No 2 Consumer Protection and Education Council of Europe (1971) Strasburg. Reproduced in A Williams Educating the Consumer (1985) 182.

Often the question is asked: Is there a need to educate consumers? The answer is most certainly yes. The lack of education and information results in consumers being confused.²⁴⁶ For consumers to purchase safe and healthy foods they require information. Labelling is one method of informing consumers. The present problem, however, is that consumers do not read the labels. The reasons are: (a) The lack of consumer awareness; (b) consumers are apathetic;²⁴⁷ (c) consumers require time to read labels; (d) consumers are confused by the technical terms on labels; (e) consumers are bewildered by the confusing reports published in the press about food and their ingredients; and (f) majority of the South African population do not understand English or Afrikaans.²⁴⁸

Consumers will pay attention to labels if they are enlightened about them. The need for upgrading the low level of consumer literacy is recognized by many²⁴⁹ but the issues are complex and the answers rest on extraneous factors.

A fundamental factor is that consumers cannot be educated unless they are willing to be informed. Thus education will not help those consumers who do not want to be helped.²⁵⁰ There is also a possibility that consumers will become confused when they are educated in only few aspects of food law.²⁵¹ Prior to any scheme of education, however, it will be necessary to consider consumer perceptions and their needs.²⁵²

The main question is: Who should be responsible for consumer education? It is submitted that no one group, organization or institution should be entrusted with the task of consumer education. The role of education involves:

²⁴⁶J Tenney "Food Standards and the Consumer" (1978) 33 Food Drug Cosmetic Law Journal 151 155.

²⁴⁷That is, they are not concerned with safety and health issues nor do they want to be bothered.

²⁴⁸The majority of the population do not begin to speak English until they are approximately nine years of age. (Mrs M Lewis (Manager of Nutrition Education Service and Test Kitchen in Van Den Bergh and Jurgens) personal communication (18 October 1989)).

²⁴⁹Drury op cit; Gain op cit; Hall op cit; Hele op cit; Lewis op cit; McGill op cit; Morris op cit; Nel op cit; Olivier & Roux op cit; Parsons op cit; Potgieter op cit; Stevens op cit; Tatham op cit; Timm op cit; van Twisk op cit; Zondagh op cit.

²⁵⁰Gain op cit; Hall op cit. A fair amount of consumer education is done in overseas countries (eg United States and United Kingdom) but nevertheless their statistics for "unhealthy" products have remained static while purchases of "healthy" foods have increased slightly. (Also see J Salmon "Is Food 'Education' a Waste of Time?" (December 1987) 62 Food Manufacture 39).

²⁵¹de Muelenaere op cit.

²⁵²Potgieter op cit.

(a) Consumer bodies. Consumers bodies (like the Housewives League, Black Consumer Union, South African Consumer Council, etc.) should assist in disseminating the facts and supplying consumers with information. The problem, however, is that they must be equipped with adequate and correct information.²⁵³

(b) Manufacturers and retailers. Manufacturers and retailers should accept consumer education as part of their social responsibility.²⁵⁴ They benefit by educating consumers, because consumers will be informed about their products.²⁵⁵ It is submitted that it is feasible for manufacturers²⁵⁶ and retailers²⁵⁷ to be involved in educating consumers.²⁵⁸ The complication, however, is that consumers view manufacturers as interested parties and often accuse them of lying.²⁵⁹

(c) The Directorate of Foodstuff, Cosmetics, and Disinfectants. The Directorate may seem to be the obvious choice as to who should provide consumer education, but the answer is not so simple. Complications arise because the Directorate is not allocated funds to educate consumers. Their role is to administer the Foodstuffs Act and to propose amendments to the Act and regulations. There is a separate Directorate in the Department of Health that is entrusted with education, but their funds are also limited because their portfolio includes education in respect of all health issues.²⁶⁰ This situation can be compared with that of the Ministry of Agriculture, Food and Fisheries (MAFF) in United Kingdom. Included in their duties is the responsibility of educating and informing consumers, retailers and manufacturers. They publish booklets²⁶¹ and updates in pamphlet form.²⁶² Likewise the FDA plays a prominent role in educating American consumers. It publishes a magazine called the FDA Consumer that deals with all types of issues covering

²⁵³Elms *op cit.*

²⁵⁴Drury *op cit.*

²⁵⁵Olivier & Roux *op cit.*

²⁵⁶See Table IX.

²⁵⁷See Table X.

²⁵⁸Olivier & Roux *op cit.*

²⁵⁹Elms *op cit.*

²⁶⁰Eg with the recent discovery of AIDS, there is the question of priorities as to how the Department's budget should be spent.

²⁶¹Eg MAFF Food Additives: The Balanced Approach.

²⁶²Eg Food Facts. See Appendix 13 for a list of Information Sheets available in the series called Food Facts. Appendix 14 is an eg of the an Information Sheet.

Table IX An example of a manufacturer's role in education.

1. **The Beginning:** In 1980, after government's discussion with manufacturers, Fedfood Ltd introduced a mealie meal that was fortified with two vitamins that were deficient in the black diet. Despite the advertisements prior to the launch of the product, Fedfood found that this product did not sell as they envisaged. Thus Fedfood saw the need to educate consumers not only about their product but also nutrition. The belief was that such education will best serve children rather than the adults. The programme was started in 1981 in Soweto's primary and high schools.

2. **Its Expansion:** One of the organizational goals of Unilever South Africa (Pty) Ltd (based in Durban) is "education". The company saw the merits of the education programme initiated by Fedfood and negotiated with Fedfood. The outcome was that Van Den Bergh and Jurgens (VDB&J) (a subsidiary of Unilever) was to introduce a nutritional programme in Natal beginning in January 1984.

3. **The Target:** The reason behind a nutritional programme aimed at children is that adults have established eating patterns and see little reason to change their eating habits. Furthermore, they may change their diet but for a short period and revert to old habits because of convenience, etc.

4. The A1 Rama Nutritional Education Programme is aimed at higher primary school children aged between nine and thirteen years of age (i.e. standards 3, 4 and 5).

5. Nutrition became a school subject for twenty Umlazi schools in 1984.

6. The programme involves training teachers to teach nutritional education to the children rather than VDB&J staff going to the schools and teaching it. The teachers are also supplied with manuals to assist them. The VDB&J staff, however, assess the teachers by visiting each school regularly.

7. Children learn nutrition and carry the message home, but the problem was that they receive nutritious meals infrequently because of the cost of vegetables and fresh fruit. For example, most families consume fresh fruit and vegetables only on Sunday. They receive sufficient, say for example, vitamin C. The problem with vitamin C is that the surplus of vitamin C is not stored in the body and, therefore, it is pointless for the family to have all its requirements of vitamin C on one day. The solution was the establishment of the "Best Vegetable Garden" competition in schools. A school is given prize money for the best vegetable garden and a further prize is awarded to the school if a randomly selected pupil also has a proper vegetable garden. This results in children taking home the nutrition message and also ensuring that there is a home garden that will take care of the family's nutritional needs. The promotion of home gardens has been encouraging because many children produce vegetables and not only feed the family, but also sell surplus vegetables and fruit to earn money.

8. Due to the success of the pilot project, in May 1984 the programme was expanded to a total of 180 schools. Furthermore, 1,830 teachers have been trained and there are 170,000 children involved in the programme.

9. The aim of VDB&J to ensure that this programme becomes self-generating. Furthermore, due to the rapid expansion of the programme, the Department of Education and Training has seconded three teachers to the programme and Kwa Zulu's Department of Education and Culture has seconded a further two teachers.

10. The major difficulty with this programme is the lack of scientific research. This has since been remedied. The House of Representatives (Department of Health and Welfare) has established a controlled pilot programme in the George area.

11. In 1987 Fedfood withdrew totally from the programme.

12. The progress of Fedfood (while in the programme) and VDB&J in this field is seen to be the tip of the ice-berg. There is a need for a programme of this nature to be instituted nationally and to cover all race groups.

(Source: Report of the "The A1 Rama Nutrition Education Programme: Van Den Bergh and Jurgens, South Africa" (unpublished) and Mrs M Lewis (Manager of the Nutrition Education Service and Test Kitchen in Van Den Bergh and Jurgens) personal communication (18 October 1989)).

food, drugs and cosmetics.²⁶³

Table X An example of a retailer's effort to educate consumers.

1. Checkers South Africa Limited is a supermarket chain that is located nationally within South Africa.
2. One of its organizational goals is commitment to consumer affairs.
3. It has achieved its goal by establishing a Department of Consumer Affairs, which is presently managed by Mr B Morris.
4. The department achieves its goals by holding consumer seminars, annually presenting consumer journalists various awards, regular publications of leaflets of varying topics, etc.
5. Some of the topics discussed in the leaflets include: "Need to complain? Here's how"; "We're listening"; "Call us anything, but call us!"; etc. An example of a leaflet is found in Appendix 12.
6. The problem with the publication of these leaflets is that Checkers has no statistical records of how many people are reading them, what topics interest consumers, and whether consumers are making use of the information within the leaflets. Mr Morris, however, submits that the leaflets are being taken by consumers and that is all they know. Unfortunately it is not possible to determine statistically what benefits are being gained from consumers by such publications.
7. The lack of data has not deterred Checkers in publishing these leaflets at their own cost. The department has in fact requested consumers to write in if they will like to be placed on a mailing list.

The question of funding and responsibility for education are the issues that must be faced by the South African Directorate when education is mentioned.

(d) Education departments. Other departments that should include consumer education within their syllabi are the various departments of education. The prevailing belief is that children are the obvious people to teach, because they have not yet developed habits that are difficult to change.²⁶⁴ In addition, children can carry the information to their parents.²⁶⁵

²⁶³ An example of a typical article appearing in the FDA Consumer is to be found in Appendix 15.

²⁶⁴ Lewis *op cit.*

²⁶⁵ van Twisk *op cit.*

The present school system does not encourage consumer education.²⁶⁶ Knowledge about food can be encouraged by introducing course such as food science and technology,²⁶⁷ nutrition in Biology classes,²⁶⁸ consumer education and protection; etc.

(e) The universities could also offer consumer education in adult education courses.²⁶⁹

Food issues are hardly ever publicised (and food laws even less) in South Africa. Consumer awareness and education is inadequate in this field. The major issue is who should be responsible? The answer is not clear. It is submitted that children should be the target so that they make better consumers when they become adults. A nutritional programme has been introduced in schools, but it is not national and does not reach every child. Furthermore, issues on food need to be debated,²⁷⁰ rather than allowing the press to invoke sensationalism when revealing information. The use of television, in-store promotions, magazines, radio and seminars are some methods that can be utilized to educate adult consumers.²⁷¹ The Department of Health should play an active role in warning people when things go wrong and what to look out for.²⁷²

In addition, it is submitted that if consumers are not educated about expected changes in the regulations there may be difficulties. For example, the labelling of irradiated foodstuffs will be changed dramatically.²⁷³ There is a need to educate consumers as to what irradiation is; the effects of irradiation; and inform consumers that they have the choice of whether they want to consume irradiated products (or not) by checking on the label. Some attempts have already been made to educate consumers.²⁷⁴ Lack of

²⁶⁶Zondagh *op cit.*

²⁶⁷Parsons *op cit.*

²⁶⁸Gain *op cit.*

²⁶⁹The University of Cape Town included a course on Consumer Law in their summer school in January 1990. Also,

Street Law, a project introduced by the University of Natal's (Durban) Law Faculty, aimed at school children, has introduced a consumer law text. (See D J Mcquoid-Mason Street Law: Practical Law for South African Students (Book 3): Consumer Law (Student Text) (1989)).

²⁷⁰Elms *op cit.*

²⁷¹Nel *op cit.*

²⁷²Olivier & Roux *op cit.*

²⁷³See above ?.

²⁷⁴Eg see Anonymous "Have you Seen This Sign?" (January 1990) Living & Loving 23.

education could lead to chaos²⁷⁵ or just continual apathy.

11. DEPARTMENT OF CONSUMER AFFAIRS

"Over the past 20 years, there has been a growing public and political awareness of the weakness of the consumer in the marketplace. It is now widely accepted (with some dissent from business) that there are gross inequalities of economic power and of information between trader and the individual consumer and that intervention by public authorities may be needed. This intervention can and does take a wide variety of forms. Actions of traders which damage the economic or other interests of consumers may be made a criminal law ... In other cases, the consumer's position under the civil law may be strengthened, in recognition of the unequal bargaining power of the consumer vis à vis the trader ...

These changes in the legal framework of consumer protection have in many cases been reinforced by the establishment of public bodies which have the specific function of safeguarding consumers' interests and which are often equipped with a battery of powers to help them carry out this function."²⁷⁶

At present the administration and enforcement of food law is divided between many departments and institutions. Each one handles a different aspect of food law, but this often results in overlapping regulations and rules. Furthermore, despite the various departments and institutions none of them is entrusted with the task of dealing extensively with consumer issues. Thus there is a need for one agency to deal with consumer issues. The need for such an agency is based on the following factors:

- (a) Current consumer bodies do not keep real consumer issues alive.²⁷⁷
- (b) The ten basic consumer rights²⁷⁸ are not being fulfilled by present business practices in South Africa.

²⁷⁵Glass *op cit*. This was the problem faced with labelling tartrazine.

²⁷⁶Pengilly & Ransom *op cit* 988.

²⁷⁷Morris *op cit*.

²⁷⁸Consumers have the right to be heard; right to be informed; right to safety; right choose; right to expect quality design, workmanship, and ingredients in consumer products and services; right to be charged fair prices for consumer goods; right to receive courteous and respectful treatment from the business firms which provide consumer products and services; right to expect consumer products and services to be ecologically sound; right to expect business firms to offer products and services whose uses by the consuming public are consistent with the values of a humane society; and right to redress of legitimate grievances relating to purchased products and services. (The first 4 rights are those specified by President J F Kennedy in his message sent to Congress in "A Special Message on Protecting the Consumer Interest" (15 March 1962) and the latter 6 rights have been included by M J Gardener (former member of the Federal Trade Commission) and R Nader (member of Congress and a consumer advocate). See A W Troelstrup & E C Hall The Consumer in American Society 6 ed (1978) 28-29.

- (c) A department of consumer affairs can play a role in educating consumers.²⁷⁹
- (d) The department can be used to evaluate consumer complaints and to cut out the investigation of useless complaints.²⁸⁰ The South African Consumer Council plays a role in dealing with consumer complaints, but it cannot reach everyone. Therefore, there is a need for a central body that everyone can reach, and is substantial enough to deal with all consumer issues.
- (e) Such a department can also assist South African consumers to be more proactive.²⁸¹

The success of such a department is dependent on consumer awareness. Although today's consumers are not the same as those of ten years ago,²⁸² they are not adequately prepared to deal with real issues.²⁸³ Furthermore, consumers are often indifferent to the real issues.²⁸⁴ For example, foreign consumers demand much more information on their labels.²⁸⁵ South African consumers have not as yet recognized that if they organize themselves they can make demands and ensure that they get what they need.²⁸⁶ Another problem is that due to the information publicized overseas, consumers are more confused as to what they should be eating, or looking out for.²⁸⁷ For example, a few years ago it was declared that consumers should concern themselves with calcium. A few months ago the concern was oat bran. A few weeks ago the issue was rice bran. Does the average consumer now think that calcium is no longer of concern?²⁸⁸ Such issues can be confronted by such a department.

279 Nel *op cit.*

280 *ibid.*

281 Olivier & Roux *op cit.*

282 Parsons *op cit.*

283 Morris *op cit.*

284 Hall *op cit.*; Morris *op cit.*

285 van Twisk *op cit.*

286 Gain *op cit.*; McGill *op cit.*; Potgieter *op cit.*

287 van Twisk *op cit.*

288 *ibid.*

At present, the MAFF (in the United Kingdom) and the FDA (in the United States) deal with consumer education and consumer issues. Furthermore, the consumer advocates (eg Mr R Nader²⁸⁹) are active on behalf of the consumers and endeavour to safeguard consumer rights.

Industry representatives argue that there is no need for a Department of Consumer Affairs, because it will amount to over-protection. They further argue that market forces are strong enough and should be left to do the work of consumer protection.²⁹⁰ There is some validity in this argument, but the difficulty is that South Africa has an abnormal market. It is an abnormal market because the majority of consumers are more concerned with survival.²⁹¹ The majority of the population cannot understand the official languages. Furthermore, the majority of the population is under-educated due to the political circumstances that exist in South Africa. Therefore, the need for a department that concerns itself with consumer issues (such as prices, quality, etc.) outweighs the need to leave market forces alone in a totally free economy.

12. PRIOR APPROVALS

"Prior approvals" refer to the condoning of labels, before the launch of a new or altered product, by a government (or government approved) agency. Such a system of "prior approval" is used successfully in the United States of America in the Department of Agriculture (USDA).²⁹²

There are, however, certain prerequisites for the prior approval of labels. These include:

- (a) Most of the food laws must be controlled by one department or body, or the agency enforcing the labels must be affiliated to the department handling

²⁸⁹Member of Congress.

²⁹⁰Gain *op cit*; Hele *op cit*; Timm *op cit*.

²⁹¹Morris *op cit*.

²⁹²See above 185.

the laws.²⁹³

- (b) One of the conditions of prior approvals must be that the department accepts responsibility that the labels are correct at that moment in time.²⁹⁴
- (c) The time taken to approve the labels must be limited.²⁹⁵

Industry will accept any new approach as long as it improves the present situation.²⁹⁶ Accordingly, the negative features of a "prior approval" system have to be considered. The department entrusted with the task of "prior approval" will require the infrastructure to approve labels quickly and without involving too much red tape. Furthermore, there must be total secrecy otherwise it will upset the launch of the new product.²⁹⁷ Such a system may, however, over-burden the Department of Health and an alternative department may have to be established,²⁹⁸ which will be costly.

The South African Bureau of Standards (SABS) does a fair amount of prior approvals with labels that comply with voluntary standards. It is submitted that this system works²⁹⁹ because it avoids wastage of labels.³⁰⁰

The introduction of "prior approvals" will assist manufactures because-(i) legislation takes long to change because the Foodstuffs Act is reactive;³⁰¹ (ii) reaction time is lengthy; and (iii) the introduction of proactive legislation is expensive to administer and restrictive.

²⁹³This is vital because manufacturers prefer not to show outsiders their labels prior to a launch, unless it is necessary to do so by law. Therefore, the body entrusted with condoning the labels must have some force in law.

²⁹⁷Drury *op cit*. The present experience with the Department of Agriculture is that the central office will approve the labels but when inspectors come around they may find that the labels breach the regulations (Elms *op cit*).

²⁹⁵Drury *op cit*; Elms *op cit*; Tatham *op cit*. Manufacturers do not have time to wait before a launch of a new or improved product. They have to ensure that the product is out in the marketplace as quickly as possible before the competitor comes to hear about it. Therefore, a manufacturer cannot wait for a long period before receiving approval (or disapproval) of the label.

²⁹⁶Parsons *op cit*.

²⁹⁷Tatham *op cit*. Also see Oude Meester Group v Stellenbosch Wine Trust 1972 (3) SA 153 (C).

²⁹⁸Stevens *op cit*; Timm *op cit*.

²⁹⁹Joubert *op cit*.

³⁰⁰*Ibid*.

³⁰¹Reactive means that: "The manufacturer, seller or importer (a) does not have to register a product; (b) does not have to submit data on the safety or the composition of the product; and (c) does not have to justify any claims he intends making for the product; before placing it on the market." (Benade *op cit* 1).

Reactive legislation reacts slowly to changes in the industry. The alternatives, however, are expensive to implement. Therefore, in the short term, authorities should ensure that the reaction time to changes in manufacturing practices is shortened. For the long term, however, there is a need to introduce "prior approvals" of a label by a government agency.³⁰² The granting of approvals can be governed by the Department of Consumer Affairs.

The solutions presented above may sometimes contradict each other, and it may be necessary to balance the needs of consumers and those of the manufacturing industry. The fact that it may be inconvenient for manufacturers to comply with a provision should not prevent the introduction of such a provision, because the ultimate issue is consumer health. Food law is an issue that affects all consumers. Unfortunately, this is not often understood by the majority of consumers. Thus it is necessary for the South Africa government to take the initiative in ensuring that consumer protection is paramount when legislating in this area. Often it may be necessary to reach a compromise with manufacturers, retailers, and consumers, but this can only take place in cases where it does not affect national health and a safe food supply. Many responsible manufacturers are willing to ensure that consumer health is protected. The problem arises with unscrupulous manufacturers or ignorant manufacturers who are unenlightened about health complications.

B. RECOMMENDATIONS

This chapter discusses problems faced by the food industry, consumers, legislators and others. Some solutions were offered to assist in resolving the problems. The following recommendations are made in the order of importance perceived by the author.

³⁰²An alternative, to a prior approval system that requires involvement of a government or government approved agency, is to employ food lawyers. South Africa, however, lacks lawyers who are skilled in this area. If this issue can be addressed then it may be feasible to consider this as an alternative to prior approval.

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1. There is a need for consolidation and centralisation of food laws. This must be accompanied by eliminating legislation and regulations that overlap and/or conflict amongst the various departments. The laws should also be indexed in a manner that makes them accessible to all.
 2. Enforcement of the regulations is inadequate. The use of central government inspectors will be advantageous. Should the use of central inspectors be impractical the Directorate should control the uniform application of the regulations. Alternatively, if labels are approved prior to the launch of a new or improved product then fewer field inspectors will be required to examine the labels.
 3. The lack of consumer education needs to be addressed. Such education should reach all school children. Magazines, radio, television, and other sources should be used to educate adult consumers. The task of educating consumers cannot be borne by any one group. It must be done by consumer bodies; legislators; educators; manufacturers; retailers; and technical people.
 4. There is a crucial need to introduce a "Department of Consumer Affairs". Such a department will not only deal with consumer complaints, but also ensure that consumers are adequately protected. It can also play a role in educating consumers; assisting consumers in bringing personal actions for damages against manufacturers; etc.
 5. There is a need to introduce full ingredient labelling. This can be done by introducing a system similar to E numbers.
 6. Criminal sanctions are an inadequate remedy for breaches of food laws. Consumers should be allowed to claim for damages for any personal harm suffered. Another area that can also be considered in the future is the possibility of class actions to reduce the cost and duplication of individual consumer actions.

7. Penalties should be increased by harsher fines, and the imprisonment of senior company officials should be entertained if the company persists in breaching the laws. Furthermore, "cease and desist" orders and product recalls should be allowed in terms of statute.

8. The use of cosmetic additives in food needs to be reduced in South Africa. Consumers need to be educated as to the use of additives and the possible problems associated with them.

9. The Department of Health or local authorities should be able to publicize the names of offending manufacturers, as well as their misdemeanours and any penalty imposed. This can only occur if the secrecy clause is repealed.

10. Self-regulation is an alternative to over-regulation. The use of self-regulation is strongly resisted by industry, consumer bodies and consumer advocates. It is, however, unsuitable for food laws. The conclusion reached is that co-regulation is an alternative that may work.

11. FLAG is a useful body. Its role should remain advisory, but its existence should be established in terms of the law.

12. "Prior approval" of labels is an alternative to proactive legislation. With such a system legislation remains reactive, but the enforcing authority ensures that labels are truthful, decent and keep pace with changes in industry. The use of such a system, however, can only be implemented in the long term. In the short term, reduction in reaction time to changes in manufacturing process and practises will be sufficient.

13. The use of food standards is a crucial means of protecting under-educated consumers. Food standards inhibit new product development, but their benefits outweigh

the disadvantages. The cutback of vertical food standards cannot occur unless foodstuffs are accompanied by full ingredient labelling.

14. Magazines such as the FDA Consumer³⁰³ and Which?³⁰⁴ are valuable tools for educating consumers. The Housewives' League and the South African Co-ordinating Consumer Council publish magazines called "Rands and Sense" and "The SA Consumer", respectively. These magazines can be used as tools to educate consumers.

15. Certain non-controversial issues have not been discussed: For instance the requirement- (a) the brand and descriptive name of the product; (b) the name and address of the manufacturer; (c) instructions for use, if necessary; and (d) instructions for storage, if required. The regulations already provide for these and, it was not considered necessary to discuss such non-controversial aspects.

Food law in South Africa is not as strict as in some foreign countries. On the whole, however, its substantial provisions are not that inferior to other countries. The above recommendations deal with areas that need to be addressed. The proposed amendments to the food regulations were not introduced before the conclusion of this work. These changes can only be evaluated once they have been promulgated.

³⁰³Produced by the FDA in America.
³⁰⁴A United Kingdom magazine.

PART IV: CONCLUSION

CHAPTER 9: CONCLUSION

In the light of the above examination the following **conclusions** may be drawn concerning food labelling legislation:

1. Food laws, and especially food labelling legislation in many countries, is controlled in an ad hoc manner. Legislation and regulations are enacted as and when the need arises.
2. Australia, the United Kingdom, the United States and South Africa, to some extent, have problems with enforcement, i.e. there is a lack of adequate enforcement by the responsible agencies.
3. All the countries discussed require basic information to be declared on the label, e.g. the name of the food; the name and address of the manufacturer; instructions for use; storage instructions, if necessary; a net quantity statement; and the date mark. The areas of deviation deal with issues such as the methods of approving food additives, permitted claims, approved ingredients, and the line.
4. The current tendency is for countries to reduce the number of compositional standards and to introduce full, informative labelling.
5. As countries develop regulatory regimes become more complex.

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6. The regulatory schemes discussed involve a degree of informality and voluntary co-operation between the business sector and government departments. South Africa and the United Kingdom are the only countries that do not incorporate an advisory body in their statutes.
 7. The degree of openness or secrecy varies in different countries. The United States of America and Australia ensure that consumers have access to information by means of Freedom of Information Acts, while the United Kingdom and South Africa protect manufacturers by ensuring that most information is kept secret.
 8. Codes of practice and self-regulation have gained popularity in some areas of the law. In the field of food law, however, government regulation is vital because it is necessary to protect the health of the consumer.
 9. The Codex Alimentarius is an international forum that attempts to narrow the gap between developed countries and developing countries, Despite a tendency to decrease the number of compositional, (or recipe), standards, the work done by the Codex Alimentarius must not be decreased. It should be increased to ensure that the gap between developed and developing countries does not grow.
 10. All the countries discussed in the comparative study deal with food laws and protecting consumers through legislation. The problem, however, is that there is a myriad of laws and regulations that often overlap with each other.

The following issues require immediate attention in South Africa:

1. There is a need to consolidate and centralize food laws.

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2. There is a need to introduce statutory civil remedies for consumer law offences. At present, the consumer has limited recourse against the offender for injury or personal harm in terms of the common law via the aquilian action.
 3. The penalties applicable to food laws, despite the possibility of serious implications for consumer health by breaches of such laws, are inadequate.
 4. There is a urgent need to introduce a Department of Consumer Affairs that will concern itself with consumer issues and guarantee that legislation or regulations safeguard consumer health.
 5. The need for consumer education needs to be addressed.

The following issues require attention in the long term in South Africa:

1. The introduction of prior approval of labels.
2. Enforcement must be centralized and unified.
3. The need to eliminate the secrecy clause and encouraging openness by publicizing information regarding offenders who have been warned or prosecuted.
4. The need to introduce modern remedies such as "cease and desist" orders and product recalls.
5. The need to introduce "full labelling" to satisfy the consumer's right to an informed choice which can only be accomplished if the consumer is provided with full ingredient labelling.

APPENDICES

APPENDIX 1: LIST OF INTERVIEWEES

Classen D (Mr) (Plant Manager of Bull Brand Foods (Pty) Ltd).

De Muelenaere H J H (Prof) (Professor of Food Science at the University of Natal and Director of Research and Development for Anglovaal Industries).

Drury B (Mr) (Assistant Company Secretary of Unilever South Africa (Pty) Ltd).

Elms S H (Mr) (Development Executor of the Food Group of the OK Bazaars Ltd).

Gain A C (Dr) (Divisional Director of Premier Food Management Services).

Glass S I (Mrs) (Manager of Research and Development at Simba-Quix (Pty) Ltd).

Hall R L (Dr) (Former President of International Union of Food Science and Technology (IUFoST) and former Vice President of McCormick and Co., Inc.).

Hele J (Mr) (Executive Director of the Grocery Manufacturers' Association (GMA) of South Africa).

Joubert G J (Mr) (Deputy-Director of the Food Standards and Inspection Division of the South African Bureau of Standards).

Lategan J H (Mr) (Inspector at the Durban Local Health Authority, Food Section).

M Lewis (Mrs) (Manager of the Nutrition Education Service and Test Kitchen at Van Den Burgh and Jurgens).

McGill A E J (Prof) (Professor of Food Science at the University of Pretoria and Director of Foodnetwork CC).

Morris B (Mr) (Consumer Affairs Manager of Checkers South Africa Limited).

Nel C (Mr) (Former Group Public Relations Manager of Fedfoods Limited and Legal Advisor to the Soya Association -in his personal capacity).

Olivier C H (Mr) (Technical Manager of Nola Industries (Pty) Ltd).

Parsons W A (Mr) (Technical Director of Haarman & Reimer (SA) (Pty) Ltd).

Potgieter J H (Mr) (Secretary (Technical) at the Wheat Board).

Powell C A (Mr) (Inspector at the Durban Local Health Authority, Food Section).

Roux P (Mr) (Product Manager of Nola Industries (Pty) Ltd).

Schwulst L (Mr) (Deputy Director of Department of Trade and Industry).

Siebert J G C (Mr) (Executive Director of Advertising Standards Authority of South Africa (ASA)).

Stevens G J H (Dr) (Director of the Directorate of Foodstuffs, Cosmetics and Disinfectants in the Department of National Health and Population Development).

Tatham J (Mrs) (Vice-President of Housewives' League of South Africa).

Timm R G (Mr) (Technical Director of Royal Beech-Nut (Pty) Ltd)).

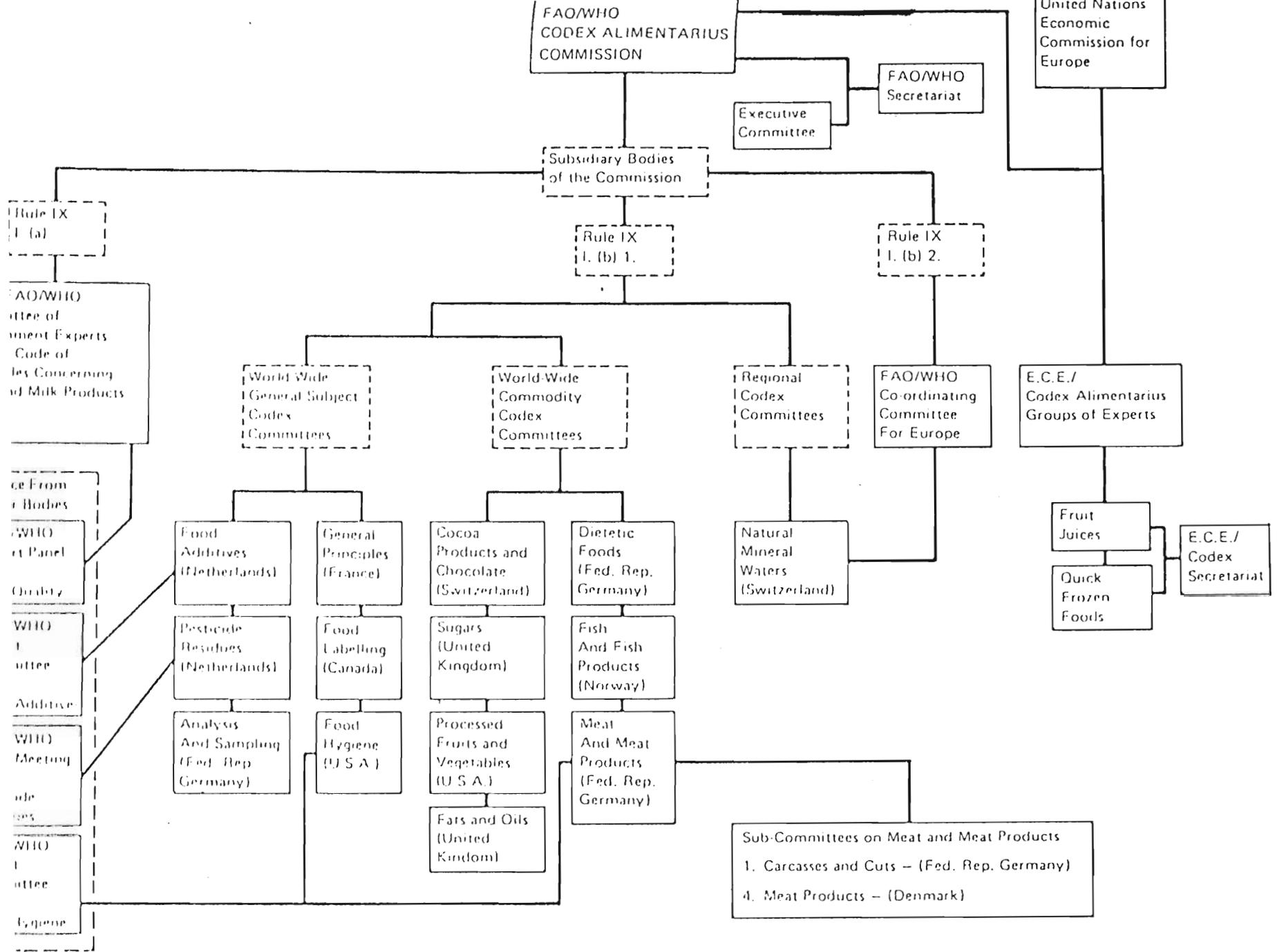
Van Twisk P (Dr) (Research and Development Director of Fedfoods Limited).

Van Hecke A (Mr) (Director of Food International).

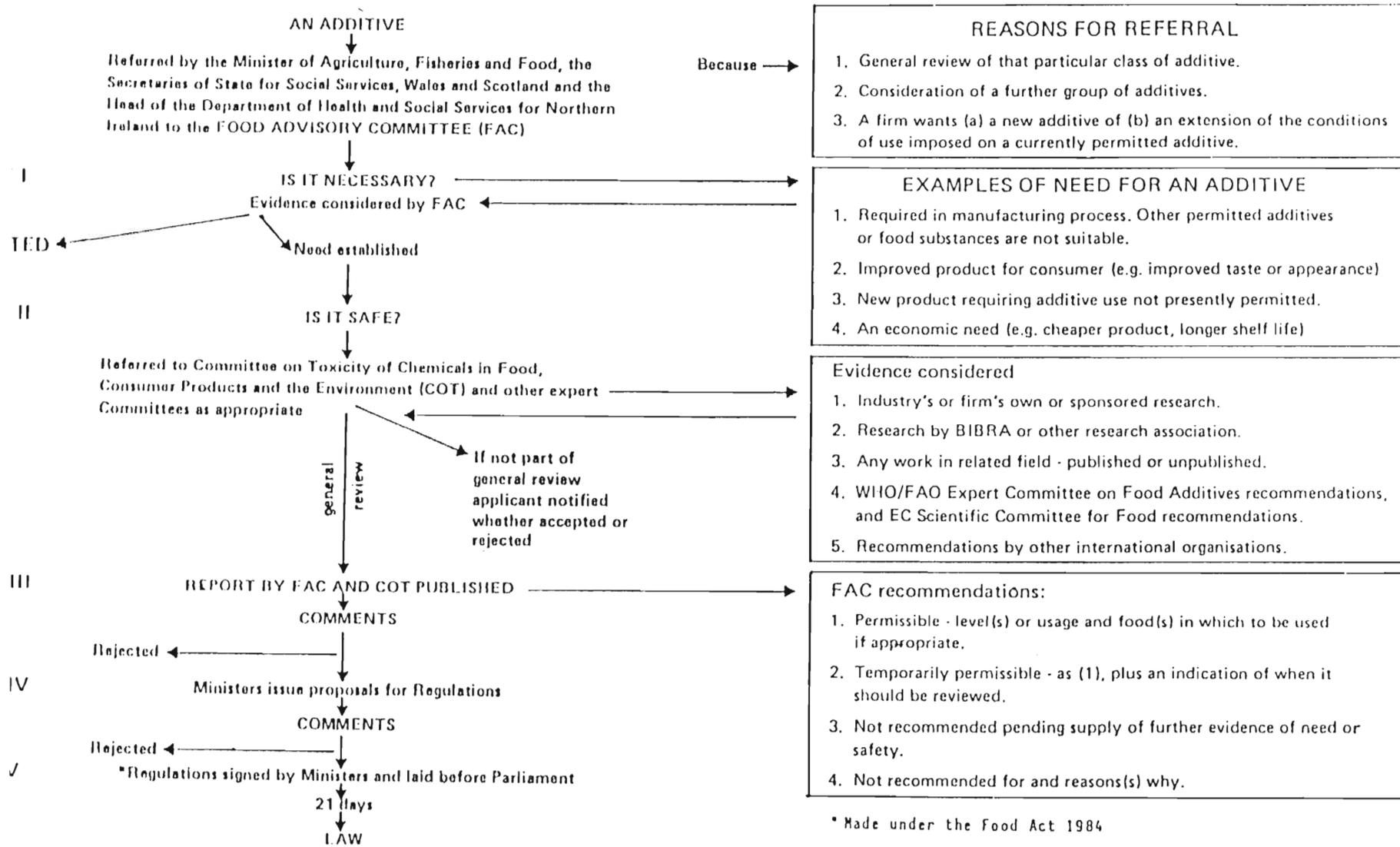
Warthington R C (Mr) (Divisional Senior Health Inspector at the Durban Local Health Authority, Food Section).

Zondagh I B (Dr) (Senior Agricultural Researcher in Meat Quality at the Meat Science Centre of the Animal and Dairy Science Research Institute).

APPENDIX 2: ORGANIZATIONAL STRUCTURE OF THE CODEX ALIMENTARIUS
 (Source: D M Levie International Regulatory Regimes vol 2 (1976) 603.)



**Ministry of Agriculture, Fisheries and Food
FLOW CHART FOR CONSIDERATION OF FOOD ADDITIVES**



APPENDIX 3: THE STEPS TO BE COMPLIED WITH FOR APPROVING AN ADDITIVE
(Source: MAFF "Information Sheets - Additives" Food Facts (No 3) (1986) 2.)

Similar regulations are normally made by the Secretary of State for Scotland and by the Head of the Department of Health and Social Services for Northern Ireland under the Food and Drugs Acts applying to those countries.

APPENDIX 4: REFERENCE TO EUROPEAN ECONOMIC COMMUNITY (EEC)

1. Books

- Commission of the European Communities Food Additives and the Consumer (1980).
- M Hanssen & J Marsden The New E For Additives (1987).
- L Krämer EEC Consumer Law (1986).
- D J Jukes Food Legislation of the UK 2 ed (1987).
- D Lasok & J W Bridge Law and Institutions of the European Communities 4 ed (1987).
- N Reich & H W Micklitz Consumer Legislation in the EC Countries -A Comparative Analysis.
- P Smith & D Swann Protecting the Consumer: An Economic and Legal Analysis (1979).
- G Woodroffe Consumer Law in the EEC (1984).

2. Articles

- S Crossick "1992 and All That" (1988) 138 New Law Journal 13.
- R Haigh "Harmonization of Legislation on Foodstuffs, Food Additives and Contaminants in the European Economic Community -Part I" (1978) 13 Journal of Food Technology 255.
- R Haigh "Harmonization of Legislation on Foodstuffs, Food Additives and Contaminants in the European Economic Community -Part II" (1978) 13 Journal of Food Technology 491.
- J T O'Reilly "Three Dimensions of Regulatory Problems: United States, European Economic Community, and National Laws" (1986) 41 Food Drug Cosmetic Law Journal 131.
- S Teale "The EEC Experience" (July 1987) 62 Food Manufacture 67.
- A Turner "The Development and Structure of Food Legislation in the United Kingdom and its Interaction with European Community Food Laws" (1984) 39 Food Drug Cosmetic Law Journal 430.

3. EEC Directives¹

- Directive 79/112 of 18 December 1978 OJ 1979 No L33/1.
- Directive 83/463 of 22 July 1983 OJ 1983 No L255/1.
- Directive 86/197 of 26 May 1986 OJ 1986 No L114/38.
- Directive 87/250 of 15 April 1987 OJ 1897 No L113/57.
- Regulation (Euratom) No 3954/87 of 22 December 1987 OJ 1987 No L371/11.

¹The listed Directives are not all-embracing. Furthermore, no proposals have been listed. See Jukes op cit 140.

APPENDIX 5: THE SCOPE OF THE FOOD, DRUG AND COSMETIC ACT (USA)

The Act:

1. Covers all kinds of foods.
2. Covers food destined for human or animal consumption, whether raw or in another condition.
3. Covers all kinds of substances which may be found in foods naturally or by intentional or unintentional addition.
4. Covers all the major portions of the nation's total food supply - all food in interstate commerce.
5. Covers imports and exports.
6. Covers all food crossing state boundaries.
7. Covers circumstances where state laws do not afford adequate protection for citizens.
8. Authorizes promulgation of a reasonable definition and standard of identity, a reasonable standard of quality, and a reasonable standard of fill of container, if it will promote honesty and fair dealing in the interests of consumers, but exempts almost all fresh and dried fruit and vegetables.
9. Authorizes factory inspections.
10. Authorizes government cooperation in voluntary seafood inspection programmes.
11. Prohibits false and misleading labelling of foods.
12. Prohibits interstate traffic in food which may be injurious to health.
13. Prohibits interstate traffic in confectionery containing inedible substances such as trinkets.
14. Prohibits the presence in food of any poisonous or deleterious substances, which are not added, unless they are in such quantities that they would not ordinarily be injurious to health.
15. Prohibits addition of a poisonous or deleterious substance to food except where such addition is required in the production of the food or cannot be avoided by good manufacturing practices; even then, tolerance is authorized limiting the amount to protect public health.
16. Prohibits addition of a pesticide to a raw agricultural commodity unless it is within the limits of an established tolerance or is exempt from such tolerance.
17. Prohibits addition of a substance to a food unless it is declared generally recognized as safe, it conforms to conditions under which the food additive may be safely used, or the food additive is declared exempt from such prescribed condition of use.
18. Prohibits addition of colour to food unless such colour is listed as safe for use in food.

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19. Prohibits establishment of maximum limits on the potency of any synthetic or natural vitamins or minerals within a food.
 20. Requires labelling of food for which there is no definition of standard of identity to disclose the ingredients by name, except for spices, colours, and flavours which do not have to be named individually.
 21. Requires label declaration of artificial colours and flavours, but exempts butter, cheese and ice cream from the requirements in respect of artificial colours.
 22. Requires labelling of special dietary foods to inform purchasers of their vitamin, mineral and other nutritional properties.
 23. Requires officials enforcing the Act to inform the Federal Trade Commission before initiating any action with respect to advertising which is believed to cause a food to be misbranded.
 24. Requires food containing saccharin to bear a warning label concerning health risks.
 25. Requires minimum nutrient levels, and a quality factor control for infant formulas.

[Source: H W Schultz Food Law Handbook (1981) 488]

APPENDIX 6: EXEMPTIONS

Numerous exemptions have been granted under the various Acts. They are granted informally or formally in terms of the legislation.¹ One exception is the Department of Agriculture. The Department of Agriculture maintains that it is not authorized to grant exemptions in terms of the Marketing Act.² However, it is the manufacturer's prerogative to ensure that he complies with the Act.³

Most Acts provide for exemptions. The advantages of such provisions are:

- (a) If the infringement is of a "technical nature,"⁴ manufacturers can be granted an exemption such that they are allowed to utilize existing labels without wastage by destroying them.
- (b) Exemptions can be granted, because the cost of removing the product from supermarket shelves, amending the labels, and then re-shelving, the product is too costly and the consumer will bear the cost indirectly by increased purchase prices.
- (c) They prevent the financial ruin of small manufacturers.⁵

The problems associated with such exemptions are:

- (a) Certain manufacturers find it unfair that they comply with the legislation while competitors are granted exemption when they deviate from the law.
- (b) Often manufacturers misunderstand the extent of the exemptions. For example, the ice cream industry is exempted from ingredient labelling unless specifically provided for in other provisions of the regulations.⁶ When the tartrazine controversy arose the Department of Health amended the regulations and provided that all foodstuffs containing tartrazine could not be sold unless they include a reference to tartrazine in the ingredient list in not less than 2 mm height size lettering.⁷ The ice cream industry mistakenly believed that since they were exempted from ingredient labelling they were not required to comply with this requirement.⁸
- (c) Exemptions are granted over long periods of time.
- (d) Manufacturers find loopholes and exploit them.
- (e) They make administration of the Act difficult.⁹

¹ Eg s 15(1)(l) of the Foodstuffs, Cosmetics and Disinfectants Act No 54 of 1972 and reg 32(c) of GN R908 GGE 5565 of 27 May 1977 (Reg Gaz 2471).

² No 59 of 1968.

³ The Durban local authority also maintain that it is the manufacturer's responsibility to ensure that he complies with the regulations. Thus, if the manufacturer is at fault he must rectify the label. Furthermore, the Durban local authority finds that manufacturers are willing to ensure that they comply with the regulations. (Warthington, Powell & Lategan op cit).

⁴ Eg if it is not in contrasting colour; size of lettering is not 1 mm; etc.

⁵ Mr B Drury (Assistant Company Secretary of Unilever South Africa (Pty) Ltd) personal communication (27 November 1989).

⁶ Reg 32(c) of GN R908 op cit.

⁷ Reg 11(c) of GN R908 op cit.

⁸ Mr S H Elms (Development Executor of the Food Group of OK Bazaars Ltd) personal communication (12 July 1989).

⁹ Dr G J H Stevens (Director of the Directorate of Foodstuffs, Cosmetics and Disinfectants in the Department of National Health and Population Development) personal communication (17 July 1989).

The advantages of exemptions are such that they will not be removed from the Act. The problems associated with them, however, will have to be addressed. Possible solutions include, inter alia:

- (a) Exemptions relating to technical problems could only be granted for a maximum period of six months. This is long enough for the manufacturer to use up stocks of labels. Thereafter, if there are any labels remaining they should be destroyed.¹⁰ There may be some wastage,¹¹ but it must be measured against the fact that competitors suffer marketing disadvantages if exemptions are granted for long periods to particular manufacturers.
- (b) Other exemptions must also have time limits, (eg six to nine months). Furthermore, exemptions should only be granted twice, i.e. for a maximum of twelve to eighteen months. Thereafter only in exceptional circumstances should the department grant an extension of an exemption. In granting such exemptions the department should have to weigh up the advantages of granting the exemption against the marketing disadvantages endured by competitors.

Often labels are given timeless exemptions. For example reg 32(c) provides that certain blended, compounded or mixed foodstuffs need not be labelled with an ingredient list. The exemptions that have been granted in terms of reg 32(c) can be divided into three categories:

- Type A: Those products that are governed by separate Acts, eg sorghum.
- Type B: Those products that are difficult to label, eg tea, coffee, etc.
- Type C: Those products such as ice cream and sorbet that have been granted exemptions because of pressure by certain industries.

Informal exemptions are also granted when a manufacturer mislabels a foodstuff and the department grants the manufacturer a "concession". Exemptions granted to Type A and Type B categories are acceptable. Problems arise concerning Type C exemptions and the informal concessions. These should be avoided.

It is difficult to govern exemptions by rigid rules of law. The department, however, should be unwilling to grant exemptions without strong justification. The Directorate has acknowledged the problem, and intends amending the present practices and regulations. The aim is to revoke all exemptions that have been granted. To do this, however, many of the regulations need to be amended so that all manufacturers will find the law relating to labelling more easy to comply with.¹²

¹⁰Drury op cit.

¹¹Elms op cit.

¹²Stevens op cit.

APPENDIX 7: THE COLD CHAIN

At present manufacturers are resisting open-date marking because of the mishandling of chilled and frozen foods in the retail sector.¹ The problems with the cold chain include:

- (a) The individual store managers do not understand and appreciate the cold chain. They allow delivery trucks, (which carry frozen or chilled foods), to wait before taking delivery. Further, they permit the foodstuffs to lie in the sun or in the aisles rather than storing them in refrigerators. This is due to the lack of education and training.²
- (b) Consumers do not handle frozen and chilled foods with the respect due to them.³ For example, they purchase ice cream first and by the time they reach the tills to pay for their purchases, it has defrosted. So they leave it at the tills. Alternatively, consumers will leave the ice creams in their heated cars while they have coffee, thereafter take it home and refreeze it.⁴
- (c) Often the equipment, such as refrigerators, are deficient. For example, if there has been a power failure there is no warning.⁵ There are also problems with the minimum standards of the refrigerator units. A manufacturer may comply with the voluntary standards established by the SABS, but not many manufacturers use the standard.⁶
- (d) There is insufficient legislation regulating the handling and labelling of frozen and chilled foods. For example, the Department of Agriculture has regulated the temperature required for frozen foods but the regulations do not cover dairy products, etc.⁷

The operation of the cold chain does not fall under the ambit of the Foodstuffs Act but the under Health Act.⁸ FLAG, however, has established a Specialist Working Group⁹ to advise the Department of Health.

¹Eg the meat packers are coding the open-date marking, the snack industry also code marks the manufacture date, etc.

²Mr B Morris (Consumer Affairs Manager of Checkers South Africa Ltd) personal communication (18 July 1989).

³Mr S H Elms (Development Executor of the Food Group of the OK Bazaars Ltd) personal communication (12 July 1989).

⁴Prof A E J McGill (Professor of Food Science at the University of Pretoria and Director of Foodnetwork CC) written communication (20 March 1990).

⁵Few years ago, however, an engineer developed a system whereby alarms are triggered. (Elms *op cit*). This is expensive, therefore, all retailers do not introduce such mechanisms.

⁶Elms *op cit*. The reason is that compliance with the standards is expensive.

⁷Act No 63 of 1977.

⁸Under the chairmanship of Mr S H Elms.

APPENDIX 8: PACKAGING INSERTS

Often manufacturers claim that regulations require too much information to be placed on a label and that packages are too small to label fully in terms of the regulations. The solution to this problem is the use of packaging inserts.

It seems, however, that the problems far outweigh the advantages that can be gained by packaging inserts. The problems include the following: (a) Packaging inserts are very costly;¹ (b) consumers want to see the name of the product, the mass statement, the ingredients, etc. when purchasing the product,² (but it may also be desirable to display for information such as instructions for use, instructions for storage, address of the manufacturer; recipes etc.³); and (c) the use of packaging inserts will still be inappropriate, for example, for "one bite" sweets.⁴

Although the use of packaging inserts may assist those manufacturers who prefer to use the space for artwork, the problems far outweigh the advantages. Consequently, they should only be made voluntary rather than mandatory for small packages.⁵

¹Dr A C Gain (Divisional Director of Premier Food Management Services) personal communication (18 July 1989).

²Mrs J Tatham (Vice President of the Housewives League) personal communication (12 July 1989).

³Mr B Drury (Assistant Company Secretary of Unilever South Africa (Pty) Ltd) personal communication (27 November 1989).

⁴Mr R G Timm (Technical Director of Royal Beech-Nut (Pty) Ltd) personal communication (14 July 1989).

⁵Mr C H Olivier & Mr P Roux (Technical Manager and Product Manager, respectively, of Nola Industries (Pty) Ltd) personal communication (13 July 1989).

APPENDIX 9: OUTLINE OF THE ADVERTISING STANDARDS ASSOCIATION OF SOUTH AFRICA

PAGE 1

CODE OF ADVERTISING PRACTICE

(As amended from time to time to 1987 08 14)

Preface

The Advertising Control System

The Advertising Standards Authority of South Africa is an independent body set up and paid for by the advertising industry to ensure that its system of self-regulation works in the public interest. It has an independent Chairman.

The following organisations, which are members of the Advertising Standards Authority, support and are obliged to adhere to the provisions of the Code -

The Association of Advertising Agencies (Pty) Limited
 South African Direct Marketing Association
 SA Printing & Allied Industries Federation
 Cinemark (Pty) Limited
 Newspaper Press Union of South Africa
 Association of Marketers
 South African Broadcasting Corporation (Radio)
 South African Broadcasting Corporation (Television)
 The Grocery Manufacturers' Association of South Africa
 Pharmaceutical Manufacturers' Association of South Africa
 Specialist Press Association
 The Proprietary Association of SA
 SWA Broadcasting Corporation
 Institute of Sales Promotion
 Outdoor Advertising Association of SA
 Furniture Traders' Association
 Agricultural & Veterinary Chemicals Association
 SA Co-ordinating Consumer Council ASSOCOM
 Motor Industries' Federation
 The Health Products Association of SA

The Code is administered by a committee drawn from the constituent member bodies. Powers are vested in the ASA Copy and Advertising Properties Committees who deal with all complaints received from the public, media and advertisers.

This Code is supplemented by individual codes which are enforced by the various member organisations. All such codes conform to the general principles laid down by the Advertising Standards Authority Code and differ only in detail where the individual needs of the medium are to be met. No constituent member may be required by the ASA to accept any advertising which such member has ruled to be in conflict with its own Code or to be unacceptable for any reason. However, the ASA may require advertising which is acceptable to a constituent member to be withdrawn if the ASA rules that such advertising is contrary to the General Advertising Code of the ASA.

Responsibility for observing the Code rests primarily with the advertiser. But it also

applies to any advertising practitioner or medium involved in publication of the advertiser's message to the public.

While the interpretation of the Code is vested in the ASA Copy and Advertising Properties Committees, its performance of this task is supervised by the Executive Committee of the Advertising Standards Authority. The decisions of the Copy and Advertising Properties Committees may be taken on appeal to an ASA Appeal Committee appointed by the Executive Committee. The Authority maintains close contact with government departments, consumer organisations and trade associations, and deals with complaints received through them or direct from the public.

Sanctions

The sanctions which exist are principally the withholding of advertising space or time from advertisers, and the withdrawal of trading privileges from advertising practitioners. These sanctions are applied by the ASA through its media members. To these sanctions has been added the sanction of adverse publicity. This is wielded by the Advertising Standards Authority which has the right to publish details of the outcome of investigations it has undertaken naming those who have offended against the Code.

Complaints

Complaints from members of the public - or those representing them - that the Code has been breached should be addressed to the Advertising Standards Authority. All that is necessary is a letter indicating the basis of the complaint. It is helpful if complainants can, wherever possible, provide examples or copies of any advertisements to which they take exception. Advice is willingly given by telephone to prospective complainants and others as to the scope of the Authority's activities and its likely reaction to any complaint, but investigations will not be undertaken without written confirmation from the complainant.

Complaints should be addressed to -

The Advertising Standards Authority of South Africa
 PO Box 2560
 JOHANNESBURG
 2000

All complaints will be dealt with as expeditiously as possible. Delays may, however, occur where it is necessary to obtain technical or expert advice.

The Purpose of the Code

Advertising is a service to the public and, as such, should be informative, factual, honest, decent and its content should not violate any of the laws of the Country. All members who subscribe to the Code shall neither prepare nor accept any advertising which conflicts with the Code and shall withdraw any advertising which has subsequently been deemed to be unacceptable by the ASA Copy, Advertising Properties or Appeal Committees.

The Code is based upon the British Code of Advertising Practice and on the International Code of Advertising Practice, prepared by the International Chamber of Commerce. This is internationally accepted as the basis for domestic systems of self-regulation. It forms the foundation of this Code in which the basic principles laid down in the International Code are related to the particular circumstances of advertising in South Africa.

The main purpose of the Code is twofold. For those in advertising it lays down criteria for professional conduct. And for the public it gives a clear indication of the self-imposed limitations accepted by those using or working in advertising. Its rules form the basis for arbitration where there is a conflict of interest within the business, or between advertisers and the general public. The provisions of the Code are mostly in general, but special rules covered by Appendices hereto apply to particular audiences such as children and young people, and to certain categories of products and services.

One may ask: with legislation protecting the consumer from dishonest and fraudulent trading practices, is there any need for a Code of Practice? The answer is an emphatic yes - for three reasons.

First, legal controls are not adapted to distinguishing between advertisements which live up to the best professional standards and those which do not. This is the concern of advertising people themselves. And this is why they have voluntarily adopted a code of conduct to maintain the standards of fair dealing and honest trading in advertising that the community is entitled to expect. They believe that professional regulations, voluntarily applied, can ensure the elimination of dubious practices more speedily and less costly than government legislation; and are also more easily adaptable to changing economic and social conditions.

The second reason for a self-regulatory Code is that all concerned agree to observe it in the broad spirit as well as in the letter, and not to circumvent it by dubious ingenuity. All accept a straight-forward obligation

the public and to one another. This obligation involves advertisers in making promises that are honest and intelligible; offering performance that matches promises, and in using fair methods of selling. Advertisers also recognise that continued observance of the Code does much to advance the standing of advertising as an essential element in the marketing of goods and services and thus promote goodwill and understanding between them and the Consumers.

Thirdly, a Code of Practice can maintain standards in an area of communication which defies legal definition – that of good manners and taste. Advertisers are expected at all times to be scrupulous in their respect for individual privacy and personal susceptibilities.

This new edition of the Code embodies several changes from the previous versions. The Code now becomes a major source of guidance. Some existing provisions have been rephrased for the sake of clarity.

Definition of Advertising

For the purpose of this Code, "Advertisement" shall mean any visual or aural communication, other than editorial material, which is intended to promote the sale or use of goods and/or services or which appeals for the support of any cause and notifications of any kind and includes any displayed material.

(Please refer to Clause 2 of Section I)

Amendments to the Code

a. This Code of Practice and Appendices thereto may only be amended by a majority of votes of those present and entitled to vote at a meeting of the Executive Committee of the Authority provided that written notice of the proposed amendments shall have been given to all members of the Authority not less than one month before the date fixed for the meeting.

b. Notwithstanding the provisions of paragraph a. above the Code and its Appendices may be amended without notice at a properly constituted meeting of the Executive Committee by a two-thirds majority vote.

APPENDIX 10: THE CATEGORIES OF FOOD ADDITIVES

Food additives are used to serve one of the following functions: (a) To assist in processing or preparing food; (b) to maintain freshness thus preserving and lengthening the shelf-life of foodstuffs; (c) to improve quality; and (d) to make food more appealing, i.e. cosmetic reasons.¹ Food additives are further divided into seven basic categories that fall within one of the four functions:

(a) Colours: Colours are substances that are either soluble in water or oil² and are used for cosmetic purpose.³ The origin of colours is either natural or synthetic.⁴ Colours are used to increase the acceptability and attractiveness of foods; to add or restore loss of natural colour that occurs during processing and storage of food; or to ensure that the final product is consistent and uniform.⁵

It is argued that colours do not contribute to nutrition, safety, or ease of processing of foodstuffs.⁶ Manufacturers, however, maintain that if colours are not used the final product does not appeal to consumers and, therefore, consumers do not purchase the product.⁷

(b) Preservatives: Preservatives are employed to "retard or prevent the growth of mould, bacteria and yeast."⁸ They also extend the shelf-life of certain foodstuffs and make seasonal foods available all year round.⁹

(c) Anti-oxidants: Anti-oxidants are preservatives utilized to prevent oils and fats, and foodstuffs containing oils and fats, from acquiring an unpleasant rancid smell and taste.¹⁰

(d) Emulsifiers, stabilisers, and thickeners: Emulsifiers are substances that ensure that two incompatible substances, (eg water and oil), can be mixed together and remain in a stable state.¹¹ Emulsifiers can be derived from natural or artificial sources.¹²

Thickeners and stabilisers are compounds that improve the appearance of food and the way it feels in the mouth by achieving a uniform and consistent texture.¹³

(e) Solvents: Solvents are substances that do not occur naturally in foodstuffs, but are either extracts or substances that dissolve substances so that they can be incorporated into other foods.¹⁴ Solvents are used to combine colours and flavours into foodstuffs.¹⁵

(f) Mineral hydrocarbons / oils: These additives are used to prevent the drying out of certain foodstuffs or for producing a glossy surface on certain foodstuffs.¹⁶

¹P Lehmann "More Than You Ever Thought You Would Know About Food Additives ... Part I" (April 1979) 13 FDA Consumer 10 10-11 and National Dairy Council Food Additives in Focus (1988) 8.

²M Hanssen & J Marsden The New E For Additives (1987) 351.

³A Gilchrist "Food: Is It Safe to Eat?" (April 1988) Femina 96 97.

⁴Hanssen & Marsden op cit 351.

⁵National Dairy Council op cit 15.

⁶P Lehmann "More Than You Ever Thought You Would Know about Food Additives ... Part III" (June 1979) 13 FDA Consumer 12 12.

⁷National Dairy Council op cit 16.

⁸National Dairy Council op cit 14.

⁹Ibid.

¹⁰National Dairy Council op cit 17.

¹¹National Dairy Council op cit 15.

¹²Hanssen & Marsden op cit 351.

¹³Lehmann (Part III) op cit 14.

¹⁴Gilchrist op cit 118.

¹⁵National Dairy Council op cit 17.

¹⁶National Dairy Council op cit 18.

(g) Miscellaneous additives: This category of additives includes "acids, anti-caking agents, anti-foaming agents, bases, buffers, bulking agents, firming agents, flavour enhancers, flour bleaching agents, flour improvements, glazing agents, humectants, liquid freezants, packaging gases, propellants, release agents, and sequestrants."¹⁷

(h) Other categories of food additives also include flavours and sweeteners. South African legislation, however, does not define these items as food additives.

Although the definition of a "food additive" does not provide for categorizing additives into classes, the Directorate has distinguished additives in the above manner. A food label merely requires the classes of additives to be indicated in the label (compared to the class name and the chemical or common name of the food additive to be indicated).¹⁸ Examples of the classes to be indicated include: Acidifying agents, antioxidants, colourants, vegetable fats, thickeners, etc. The regulations may provide, in certain circumstances for the chemical or common name of the food additive to be indicated (eg tartrazine¹⁹).

¹⁷National Dairy Council op cit 18. For definitions of these see Hanssen & Marsden op cit 347-357; Lehmann (Part I) op cit 10; Lehmann (Part III) op cit 12 and P Lehmann "More Than You Ever Thought You Would Know About Food Additives ... Part II" (May 1979), 18.

¹⁸reg (22)(b) of GN R208 op cit.

¹⁹reg (11)(c) of GN R308 op cit.

**APPENDIX 11: AN EXAMPLE OF A SUMMARY OF PENDING COURT ACTIONS IN THE
UNITED STATES OF AMERICA**

(Source: (March 1988) 22 FDA Consumer 33-36.)

Summaries of Court Actions

Summaries of Court Actions are given pursuant to section 705 of the Federal Food, Drug, and Cosmetic Act. Summaries of Court Actions report cases involving seizure proceedings, criminal proceedings, and injunction proceedings. Seizure proceedings are civil actions taken against *goods* alleged to be in violation, and criminal and injunction proceedings are against *firms* or *individuals* charged to be responsible for violations. The cases generally involve foods, drugs, devices or cosmetics which were alleged to be adulterated or misbranded or otherwise violative of the law when introduced into and while in interstate commerce, or while held for sale after shipment in interstate commerce.

Summaries of Court Actions are prepared by Food and Drug Division, Office of the General Counsel, HHS.

Published by direction of the Secretary of Health and Human Services.

SEIZURE ACTIONS

Foods/Contamination, Spoilage, Insanitary Handling

PRODUCT: Apple slices, dried, Del Monte, at Portland, Dist. Ore.; Civil No. 86-919-FR.

CHARGED 7-16-86: When shipped by Del Monte Corp., San Jose, Calif., the article was unfit for food due to its objectionable odor (sulfites)—402(a)(3).

DISPOSITION: Default—ordered destroyed. (F.D.C. No. 64936; S. No. 86-465-375; S.J. No. 1)

PRODUCT: Apple slices, dried, Del Monte, at Rochelle, N. Dist. Ill.; Civil No. 86-C-20296.

CHARGED 8-29-86: When shipped by Del Monte Corp., San Jose, Calif., the article was unfit for food due to a strong, burning, and irritating odor—402(a)(3).

DISPOSITION: The article was claimed by the shipper. Subsequently, a consent decree of condemnation ordered destruction. (F.D.C. No. 64996; S. No. 86-432-312; S.J. No. 2)

PRODUCT: Cashew nuts, salted, Nutcracker, at Chesapeake, E. Dist. Va.; Civil No. 86-232-N.

CHARGED 8-10-87: When shipped by International Nut Corp., Billerica, Mass., the article contained insect filth—402(a)(3).

DISPOSITION: Default—ordered destroyed. (F.D.C. No. 64884; S. No. 86-468-893; S.J. No. 3)

PRODUCT: Conch meat fillets, frozen, at Rio Piedras, Dist. Puerto Rico; Civil No. 86-0928 (GG).

CHARGED 6-16-86: When imported into Puerto Rico, the article, labeled "Frozen . . . Peeled Conch Meat . . . Manufactured in the Dominican Republic," contained decomposed conch meat—402(a)(3).

DISPOSITION: Default—ordered destroyed. (F.D.C. No. 64918;

S. No. 86-327-229; S.J. No. 4)

PRODUCT: Flour, and other food stocks, at San Antonio, V. Dist. Texas.

CHARGED 10-31-86: While held by National, Inc., San Antonio, Texas, the articles had been held under insanitary conditions—402(a)(4).

DISPOSITION: Consent—authorized release to the dealer for salvaging. (F.D.C. No. 65051; S. No. 86-363-782 et al.; S.J. No. 5)

PRODUCT: Green pepper strips, canned, and canned mandarin orange segments, at Virginia Beach, E. Dist. Va.; Civil No. 87-25-N.

CHARGED 1-20-87: While held for sale, the articles were unfit for food due to swollen and leaking cans—402(a)(3).

DISPOSITION: Default—ordered destroyed. (F.D.C. No. 65103; S. Nos. 87-441-681/2; S.J. No. 6)

PRODUCT: Nuts, candy, and other food stocks, at Marion, N. Dist. Iowa; Civil No. C86-151.

CHARGED 11-10-86: While held by Linn Candy Co., Inc., Marion, Iowa, the articles had been held under insanitary conditions—402(a)(4).

DISPOSITION: Consent—authorized release to the dealer for salvaging. (F.D.C. No. 65055; S. No. 86-495-636 et al.; S.J. No. 7)

PRODUCT: Olives, Spanish, canned, at Philadelphia, E. Dist. Pa.; Civil No. 87-0397.

CHARGED 1-21-87: While held for sale, the article was unfit for food due to swollen and leaking cans—402(a)(3).

DISPOSITION: Default—ordered destroyed. (F.D.C. No. 65107; S. No. 87-474-119; S.J. No. 8)

PRODUCT: Peanuts, shelled and unshelled, at Suffolk, E. Dist. Va.; Civil No. 86-583-N.

CHARGED 8-15-86: While held by Mar-Ja, Inc., Suffolk, Va., some lots of the articles contained insect and/or rodent filth, and all the articles had been held under insanitary conditions—402(a)(3), 402(a)(4).

DISPOSITION: The two large lots of peanuts (2,875 bags and 1,050 bags) were claimed by the dealer. The other lots of peanuts were jointly claimed by the dealer as possessor and by Producer Peanut Co., Suffolk, Va., as owner. Subsequently, consent decree authorized release of the articles to the claimants for salvaging. (F.D.C. No. 64966; S. No. 86-361-062 et al.; S.J. No. 9)

PRODUCT: Rice, at Brooklyn, E. Dist. N.Y.; Civil No. 87-044

CHARGED 2-18-87: While held by Fook Wah Trading Corp., Brooklyn, N.Y., the article contained rodent filth and had been held under insanitary conditions—402(a)(3), 402(a)(4).

DISPOSITION: Default—ordered destroyed. (F.D.C. No. 65089; S. No. 87-457-739; S.J. No. 10)

APPENDIX 11



PRODUCT: Sesame seeds, at Portland, Dist. Ore.; Civil No. 87-313-FR.

CHARGED 3-26-87: While held for sale, the article contained rodent filth and had been held under insanitary conditions—402(a)(3), 402(a)(4).

DISPOSITION: Consent—authorized release to Tuck Lung Co., Portland, Ore., for salvaging. (F.D.C. No. 65154; S. No. 87-416-725; S.J. No. 11)

Vitamins/Special Dietary Foods

PRODUCT: Spirulina powder, chewable wafers, and tablets, Earthrise, at North Bergen, Dist. N.J.; Civil No. 85-1248.

CHARGED 3-15-85: When shipped by Earthrise Co., San Rafael, Calif., the articles contained insect, bird, rodent and/or animal filth—402(a)(3); and the articles' labeling contained the following: false and misleading claims about the articles being "one of nature's best sources of protein," when the represented serving sizes failed to supply sufficient amounts of protein to significantly supplement the diet; false and misleading claims concerning the amounts and equivalent percents of the U.S. Recommended Daily Allowances of niacin, iron, magnesium and phosphorus supplied by the powder; and misleading statements because the labeling of the articles represented that the tablets contained 11 calories per serving and such calorie content per serving was not expressed to the nearest 2-calorie increment, and that the powder contained 36 calories per serving and this statement was not expressed to the nearest 5-calorie increment—403(a)(1); the labeling of the tablets gave prominence to and emphasized the ingredient spirulina, which was not a vitamin, mineral, or a source of a vitamin or mineral, and the terms "Spirulina ABC" appeared prominently on the principal display panel and the statements "Three (3) tablets contain 1500 mg Spirulina Microalgae" and "Spirulina is the new microalgae food" appeared elsewhere on the label—402(a)(2); the name and/or place of business of the manufacturer did not appear on the label of some of the articles in the established type size or in the specified location—403(f); the label of the chewable wafers lacked the common or usual name of each ingredient (i.e., "maple syrup granules" and "natural sweeteners" were not common or usual names of ingredients)—403(f)(2); and some of the articles were also in violation of the Fair Packaging and Labeling Act, since the quantity of contents statement was not expressed in the required dual fashion, and since the quantity of contents statements were in a type size less than $\frac{3}{16}$ -inch high—15 U.S.C. 1453(a)(3)(A)(i), 1453(a)(3)(C)(i).

DISPOSITION: The articles were claimed by Proteus Corp. Sent

sent of the parties, a default decree was entered condemning the articles, ordering their destruction, acknowledging that the claimant had been permitted to withdraw its claim and answer, and imposing the costs of seizure and destruction upon Proteus Corp. (F.D.C. No. 64536; S. No. 85-364-537; S.J. No. 12)

Drugs/Human Use

PRODUCT: Acetaminophen and hydrocodone bitartrate combination analgesic tablets, at Birmingham, N. Dist. Ala.; Civil No. 85-AR-1888-5.

CHARGED 7-16-85: While held for sale (after manufacture locally using interstate components), the article (labeled "Norcet . . . capsule-shaped tablet . . . Holloway Pharmaceuticals, Inc., Birmingham, Ala.") was a new drug without an effective approved New Drug Application—505(a); and the article's labeling lacked adequate directions for use, and the article was not exempt due to its new drug status—502(f)(1).

DISPOSITION: Default—ordered destroyed. (F.D.C. No. 64670; S. No. 85-481-967; S.J. No. 13)

PRODUCT: Benzalkonium chloride complex solution with finger cots, at Miami, S. Dist. Fla.; Civil No. 87-0572.

CHARGED 3-25-87: When shipped by Dalin Pharmaceuticals, Farmingdale, N.Y., the article (labeled "HVS 1+2 The Solution . . . Aids In The Treatment and Healing of Herpes Virus . . . Distributed by Chemi-Tech Labs., Inc. Farmingdale, N.Y.") was a new drug without an effective approved New Drug Application—505(a).

DISPOSITION: Default—ordered destroyed. (F.D.C. No. 65138; S. No. 86-515-702; S.J. No. 14)

PRODUCT: Calcium glycerophosphate and calcium lactate combination for injection, and calcium glycerophosphate and calcium lactate combination for veterinary injection, at Tenafly, Dist. N.J.; Civil No. 85-3190.

CHARGED 6-25-85: When shipped by Torigian Laboratories, Inc., Queens Village, N.Y., the human drug labeled "Calphosan B12 . . . For Intramuscular Injection . . . Distributed by the Carlton Corp., Tenafly, New Jersey" was a new drug without an effective approved New Drug Application—505(a); and the veterinary drug labeled "Calphosan Solution (Veterinary) B12 For Intramuscular Injection . . . Distributed by the Carlton Corp., Tenafly, New Jersey" was a new animal drug, and no approval of a New Animal Drug Application was in effect with respect to the uses or intended uses of the article—501(a)(5).

DISPOSITION: Default—ordered destroyed.



PRODUCT: Envert (Modified) dimenhydrinate tablets, at Monroe, W. Dist. La.; Civil No. 86-1713.

CHARGED 8-5-86: While held for sale after manufacture by LuChem Pharmaceuticals, Inc., Shreveport, La., using interstate dimenhydrinate, the circumstances used for the articles' manufacture and processing failed to conform with current good manufacturing practice—501(a)(2)(B); and the quality of the articles fell below the U.S.P. standards because the articles failed the dissolution test—501(b).

DISPOSITION: Default—ordered destroyed. (F.D.C. No. 64961; S. No. 86-494-347; S.J. No. 16)

PRODUCT: Starch blocker tablets, and starch blocker powder, at Waterbury, Milford, Trumbull, Bridgeport, Stamford and Farmington, Dist. Conn.; Civil No. N-83-391(EBB).

CHARGED 7-15-83: When shipped by General Nutrition Corp., Pittsburgh, Pa., the articles, labeled "Advantage . . . Starch Block Special Legume Protein Concentrate . . . Tablet . . . Dist. by Advantage Supplements . . . Carnegie, PA" and "Advantage . . . Starch Block Sprinkle Special Legume Protein Concentrate . . . Dist. By Advantage Supplements . . . Carnegie, PA," were new drugs without effective approved New Drug Applications—505(a).

DISPOSITION: The action was transferred to the Southern District of New York for consolidation with a request for injunction brought against the government by the possessor of the articles. After the court of appeals affirmed that starch blocker products were violative new drugs as charged, the articles were destroyed. (F.D.C. No. 64053; S. No. 83-391-369 et al.; S.J. No. 17)

PRODUCT: Thyroidglan raw thyroid concentrate tablets, and other raw tissue concentrate tablets, at Batesville, E. Dist. Ark.; Civil No. B-C-84-61.

CHARGED 5-1-84: While held by V. M. Nutri, Inc., Batesville, Ark., who had manufactured at Batesville the Thyroidglan tablets, Glanplex-F tablets, Protoglan-F tablets, Tri-Glan 42 tablets, and Glanplex-M tablets using interstate components and who had shipped the Multiglanmeg-S tablets, Multiglangen-P tablets, and Protoglan-M tablets from the firm's Lake Geneva, Wis., plant, the articles (labeled "Thyroidglan raw thyroid concentrate . . . tablets . . . Distributed By: V. M. Nutri, Inc. . . . Lake Geneva, WI . . . raw thyroid concentrate (thyroxin free) . . . of Bovine source," "Multiglanmeg-S Raw Tissue Concentrate . . . tablets . . . Distributed By: V. M. Nutri, Inc. . . . Lake Geneva, WI . . . raw tissue concentrate . . . from . . . thyroid," "Glanplex-F High Ovary Raw Tissue Concentrate . . . tablets . . . Distributed By: V. M. Nutri, Inc. . . . Lake Geneva, WI . . . raw tissue concentrate . . . from . . . thyroid (thyroxin free)," and similar labels)

were prescription drugs, and their labels lacked the prescription legend—503(b)(4); the articles' labels lacked the established name of the drug and the established name of the active ingredient, thyroid, including the quantity, kind and proportion of thyroid contained in the article—502(e); and the articles' labeling lacked adequate directions for use by licensed practitioners for their intended purposes and lacked the required warning statement for drugs with thyroid activity for human use—502(f)(1).

DISPOSITION: The articles were claimed by the manufacturer, who denied the charges generally, stated as follows: that V. M. Nutri, Inc., was an Arkansas corporation that manufactured "defendant food supplements"; that none of the articles were drugs; that none of the articles contained thyroid hormone activity; that all thyroid or raw thyroid concentrate in all of the articles were thyroxin free; that the labeling for the Multiglanmeg-S and Multiglangen-P articles failed to state that the articles were thyroxin free, but in fact they were thyroxin free; that this claimant had unintentionally labeled Multiglanmeg-S as containing "thyroid 10mg" and Multiglangen-P as containing "thyroid 10.5mg"; and that the claimant should be allowed to relabel those two articles and should be allowed to continue to manufacture and distribute its thyroxin-free articles.

The claimant also filed a counterclaim against the government and FDA for wrongful seizure of articles. The government moved to dismiss the counterclaim for lack of jurisdiction and on the ground that sovereign immunity precluded the exercise of jurisdiction over such a counterclaim. The government served requests for admissions upon the claimant. The government's motion to dismiss the counterclaim was granted by the court without objection by the claimant.

Subsequently, a consent decree of condemnation ordered the articles destroyed. In addition, without admitting liability for any violations of the Federal Food, Drug, and Cosmetic Act, the claimant further consented to cease both the manufacture and distribution of any and all products containing ingredients made or derived from animal thyroid tissue without full compliance with such act. (F.D.C. No. 64270; S. No. 84-371-938 et al.; S.J. No. 18)

Drugs/Veterinary

PRODUCT: Potassium penicillin for turkey erysipelas, at Springdale, W. Dist. Ark.; Civil No. 86-5193.

CHARGED 12-22-86: While held for sale, the article's label lacked the name and place of business of the manufacturer, packer or distributor, and lacked an accurate statement of quantity of contents—502(b)(1), 502(b)(2); and the article was a new animal drug, and no approval of a New Animal Drug Application was in effect with respect to its use or intended use—501(a)(5).

is upon us. While the 1980's were years in which South
 mers grew to respect themselves as individuals with
 's promise to bring those rights to fruition. The time has
 o take consumerism into your own hands and use it to
 u.

igh economic times. Gone are the days of frivolous
 ty saving and a lax attitude to budgeting. Every rand and
 nt if the years ahead are to be ones of prosperity and
 umers all over this country.

mitment to consumerism is not a new one, but it is about
 radical facelift. To aid you in your bid for active
 CHECKLINE is being launched to cater for many of your
 is.

all yourself an active consumer when you participate in
 ' addressing your fundamental rights. You may have
 ternational Code of Consumer Rights but chances are
 / what this code is all about. This important document
 mers have the following rights:

is means knowing that your security and well being are
 it importance to us at Checkers when you do your

ou are entitled to make choices when it comes to the
 your family. Checkers gives you this right by stocking a
 f products for you to choose from;

red. Having the right to choose is not enough if you are
 nake informed choices. Checkers strives to give you
 n a whole range of important issues to help you in this

It is through your voice as an individual who is part of a
 hat will enable you to gain satisfaction;

ction. While you have the right to be heard as an
 u have greater power when you join hands with
 ho share your feelings on issues close to your heart.

our right to redress is the culmination of all of the above
 is no point in complaining either individually or as a
 complaints are not responded to or acted upon. Hence,
 ups you CHECKLINE: your toll free hotline; your means
 istraction through redress.

ow what your rights are as a consumer, how do you go
 hese rights? You need to actively champion your own
 essage the issues that concern you as a matter of
 bracing the idea of a pleasant, hassle free shopping
 taking us to task when we don't deliver the goods.

number: CHECKLINE: 0-100-709. It is your immediate
 checkers head office where every call will be treated as a
 ve a complaint or complaint, an idea or suggestion, a
 ties to the running of our business, call us. We are on
 to hear from you.

you are entitled to the best service when you shop in a
 In return for your hard-earned money, you deserve to
 spect, courtesy and efficiency. No Checkers shopper
 otile for anything less.

Your shopping needs must be satisfied. If you are unhappy with your
 purchase then we will do everything within our power to rectify the
 problem. You are entitled to exchange merchandise that is unsuitable
 or be fully refunded for an item that does not meet with your satisfaction.
 If an item is faulty or inadequate, please let us know about it and we will
 gladly see to it that you are satisfied.

We offer you service with a smile. Our staff are happy to be of service to
 you. You are entitled to a friendly greeting and a pleasant interaction
 with Checkers staff. Take us to task if we fall short of the mark.

Should you require assistance in a Checkers store, then please do ask
 for it. You may need to know where to find a product or which product is
 best suited to your needs. You may need help with a heavy trolley.
 Whatever your needs are, we are there to help you fulfil them.

You have the right to expect service that is consistent, accessible,
 prompt and accurate. Good service is a right, not a privilege!

Do you know how to complain, should the need arise? Follow these
 easy steps and you will get the results that you want:

1. Identify your complaint clearly, go back to where you made the
 purchase and address the problem to the right person.
2. Identify the desired result of your complaint.
3. Gather records including all appropriate documentation so that you
 have ready facts at your fingertips to help you in finding a solution.
4. Be prepared to put your complaint into writing. This formalises your
 complaint if all else fails.
5. Don't give up! Keep complaining until you are satisfied.

If your complaint cannot be dealt with to your satisfaction at store level,
 call CHECKLINE - 0-100-709. We will treat every complaint as a
 matter of urgency. YOU are our priority.

Up-to-date information is something else that you are entitled to. For
 this purpose all Checkers stores have Consumer Centres. Please
 consult our Consumer Centres for information on topics as diverse as
 diabetes, the dangers of taking drugs, the benefits of breast feeding,
 caring for your pets properly and much more. There is sure to be a
 leaflet that will be of particular interest to you and your family.

This is a free service which we provide with the greatest of pleasure. If
 there are topics that would be of particular interest to you, call
 CHECKLINE with the suggestion.

Consult these Centres for information on weekly/daily specials, com-
 munity events that may be of special interest to you and details of
 promotional activities as well. There is always something exciting
 happening at your local Checkers store.

**WE ARE LISTENING TO YOU. WE ARE ON LINE.
 WE ARE AS CLOSE AS YOUR TELEPHONE.
 CALL US ANYTHING, BUT CALL US!**

0-100-709

For further information:
Adele Gouws or Jo Terk
Checkers Public Relations Department
P.O. Box 1264, Johannesburg 2000

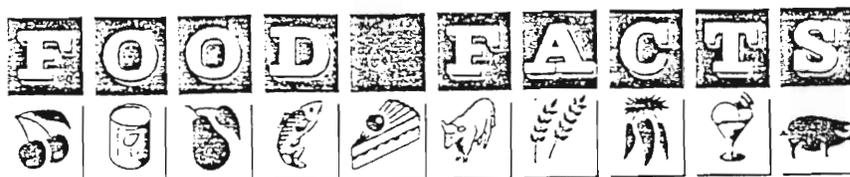


Noem ons wat u wil, maar SKAKEL ONS!



APPENDIX 13: FOOD FACTS
(Source: MAFF Food Facts (Index).)

MINISTRY OF AGRICULTURE, FISHERIES AND FOOD

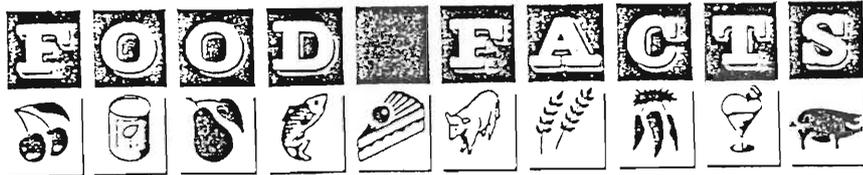


Information sheets

		Date Prepared
Additives	No 1 Main types of additives	December 1986
	No 2 Evaluation of permitted additives	December 1986
	No 3 Procedure for considering and regulating food additives	December 1986
	No 4 Allergies and additives	December 1986
	No 5 Systems of control of food additives in the UK and European Community	December 1986
	No 6 Control of flavourings	December 1986
	No 7 Assessment of Food Additives by the Food Advisory Committee	December 1986
Pesticide residues	No 1 Current controls	December 1986
	No 2 Working party on pesticide Residues	
Labelling	No 1 Fat content labelling on food	December 1986
	No 2 Nutrition labelling	December 1986

APPENDIX 14: AN EXAMPLE OF AN INFORMATION SHEET
(Source: MAFF "Information sheets - Additives" Food Facts (No 7) (1986).)

MINISTRY OF AGRICULTURE, FISHERIES AND FOOD



INFORMATION SHEET

Additives No. 7

ASSESSMENT OF FOOD ADDITIVES BY THE FOOD ADVISORY COMMITTEE

Introduction

1. The use of food additives in the UK is controlled by the Food Act and, for most classes of additives, only those that appear on lists in Regulations made under the Act can be added to food. Food flavours are at present the one major exception to this rule but they are nonetheless subject to the general controls of the Food Act. In order to appear in the lists, a new additive must first receive approval from the Food Advisory Committee (FAC) and the Committee on Toxicity of Chemicals in Food, Consumer Products and the Environment (COT), who also undertake periodic reviews of existing permitted additives. The advice of the two Committees is given to Health and Agriculture Ministers, who, if they agree that the new substance might be added to the Regulations, must first consult the whole spectrum of interests including consumer organisations, enforcement authorities and manufacturers of additives and foods. After taking account of views expressed during this consultation process, Ministers may propose new legislation which has to be laid before Parliament before it can operate.

2. The first hurdle faced by an applicant for a new additive is to convince the FAC that there is a genuine need for it. Section 4(2) of the Food Act 1984 requires that:

"Ministers shall have regard to the desirability of restricting, so far as practicable, the use of substances of no nutritional value as foods or as ingredients of foods."

Similar provisions apply in Scotland and Northern Ireland.

The applicant must make a case in writing that the additive performs a new function in the food, or better performs an existing function, with clear benefits to the consumer. The case must be supported by full details of the substance, evidence of trials in use and of substantial support among food manufacturers. Only if the FAC agrees that a case of need has been made is the COT asked to assess the extensive data needed to judge its acceptability for use in food. This paper is not concerned with the extensive and detailed examination by the COT, information on which may be found in "Guidelines for the Testing of Chemicals for Toxicity" (HMSO, £4.30), but sets out below the general principles used by the FAC in its assessment of food additives, and the particular criteria applied to an assessment of "need".

General Principles

3. In preparing its advice to Ministers on additives a set of general principles has been evolved by the FAC, and its predecessor the Food Additives and Contaminants Committee. The Committee intends that these principles shall be kept under regular review and recognises that they may need to be adapted with changes in the requirements of consumers and food manufacturers. The principles are that an

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additive should be permitted in food only where:

- (1) there is a genuine demonstrable need (see paragraph 4 below);
- (2) it can be established to the satisfaction of the Committee on Toxicity of Chemicals in Food, Consumer Products and the Environment (COT) that its use would not prejudice the health of consumers;
- (3) there is satisfactory evidence that its presence would not adversely affect the nutritive value of food;
- (4) it conforms with an adequate and appropriate specification of purity;

Furthermore:

- (5) the quantity of any additive permitted in food should, where necessary, be restricted to that which in the judgement of the Committee is needed to achieve its effect: and
- (6) the addition of any additive to a food should be identified to the consumer to enable an informed choice to be made.

ASSESSMENT OF 'NEED'

4. In assessing the need for a particular additive the FAC must be satisfied by adequate supporting evidence that there is a clear benefit to the consumer that cannot reasonably be achieved by use of an already permitted additive, or by any other means. In deciding whether there is benefit to the consumer, the Committee will take into account:

- (1) the need to maintain the wholesomeness of food products up to the time they are consumed;
- (2) the need for food to be presented in a palatable and attractive manner;
- (3) convenience in purchasing, packaging, storage, preparation, and use;
- (4) the extension of dietary choice;
- (5) the need for nutritional supplementation; and
- (6) any economic advantage.

LABELLING

5. The Committee will also consider and recommend any labelling provisions that may be necessary to ensure that the consumer is not misled as to the nature, substance or quality of the food to which an additive may be added.

APPENDIX 15: AN EXAMPLE OF AN TYPICAL ARTICLE IN THE FDA CONSUMER
 (Source: L Goossens "How to Get FDA's Attention" (May 1979) FDA Consumer 10.)

How To Get FDA's Attention

Lilyan Goossens, a consumer affairs officer at FDA's Indianapolis office, concluded some time ago that people wanted to talk to FDA but didn't know how. So Lilyan sat down and put some things together. What she came up with is a kind of poopsheet the consumer will find useful for getting a handle on FDA activities. It appears to be a long document but its length only testifies to its comprehensiveness, for Lilyan didn't leave a stone unturned.

Ms. Goossens drew up the paper for distribution to consumers in her own territory. However, she showed a copy to Dorothy Dunn, regional program manager for consumer affairs at Region V headquarters in Chicago. Dr. Dunn liked it so well she decided consumer affairs officers throughout the region would find it useful to pass out to consumers in their territories. Eventually, a copy came to the attention of the editors. We liked it so well, that we decided all FDA Consumer readers ought to have a copy. So, here it is.

Part I: Terms you should know

CODE OF FEDERAL REGULATIONS (CFR): The CFR is an organized listing of the current regulations of all Federal agencies. The CFR is divided into 50 titles; the Food and Drug Administration regulations are in Title 21. Each title is further divided into chapters, parts, and sections. The CFR is published in revised form once a year and is kept up to date by weekday issues of the FEDERAL REGISTER.

FEDERAL REGISTER (FR): Before FDA can establish, amend, or repeal any of its rules and regulations, it is required by law to announce its intentions in the FEDERAL REGISTER. The REGISTER publishes regulations, orders, and other documents. It informs citizens of their obligations, rights, and benefits. Copies of the FEDERAL REGISTER are usually available at main branch public libraries and local U.S. congressional offices.

PROPOSED REGULATIONS: Documents intended by an agency to result in new rules and regulations are published in the FEDERAL REGISTER as proposed regulations. These notices, by inviting comments, offer interested persons the opportunity to participate in the rulemaking process, prior to the adoption of the final rule.

RULES AND REGULATIONS: Final rules and regulations published in the FEDERAL REGISTER inform interested parties of the final decisions made on an issue and have a legal effect on the marketplace. Most of these final regulations

are keyed to and are codified in the CODE OF FEDERAL REGULATIONS when it is republished each year.

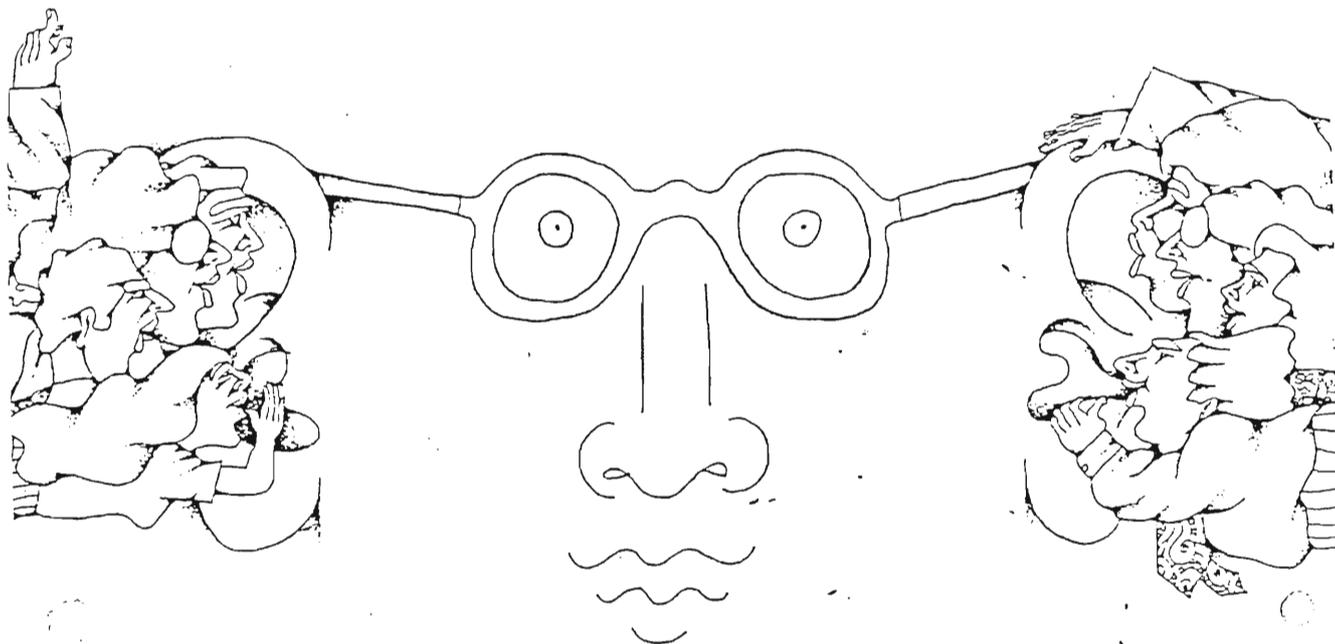
NOTICES: In the notices section of the FEDERAL REGISTER, FDA prints documents that inform the public about hearings, investigations, committee meetings, Agency decisions and rulings, delegations of authority, filing of petitions, applications, and Agency statements of organization and function. All these types of notices are used to communicate with citizens and encourage them to express their views. Some examples of the titles used for these notices are:

- **Notices of Intent.** FDA invites public comment at the earliest opportunity through "Notices of Intent." Such notices state FDA's intention to develop a proposal to change or issue a new regulation. They also identify the issues and invite public comment. The notice may be issued as a press release, or as an announcement at public meetings or offered as a study draft. The purpose of a study draft is to foster comments and ideas, before a formal proposal is made, from those who may be affected.

- **Notices of Public Meetings or Briefings.** FDA uses public meetings and briefings to explain significant issues to the public. FDA may schedule public meetings before developing a proposal or after a program change is proposed. FDA will issue a press release to notify interested organizations of the date, time, and place, the issues to be considered, and their significance. The meetings provide for an open discussion of the anticipated effects and purpose of the proposed action.

- **Notices of Public Hearings.** The public hearing is a legal process used in administering the Agency's regulatory programs. A hearing may also be scheduled to obtain public viewpoints concerning Agency programs and issues. At such hearings, an official record of evidence composed of testimony on specified program proposals is maintained. All interested persons are invited to present either oral or written testimony.

There are times, however, when legal constraints prohibit the presiding officer or Commissioner from considering comments from the general public. For example, during a formal evidentiary hearing or a hearing before a public board of inquiry only evidence on the record—that is, witnesses called by either party and subject to cross-examination or exhibits presented by either party and admitted into evidence—may be weighed in reaching a decision. From the time that a notice of opportunity is published for such a hearing, the officer presiding or the Commissioner is prohibited from receiving *ex parte* (off the record) communications on any issue presented at the hearing. However, interested consumers may at any time submit comments to the hearing clerk or to the parties included in the hearing.



Petitions: A petition is a request or application by a person or company to the Commissioner of FDA requesting the establishment, amendment, or revocation of a regulation or order. It can also request the Commissioner to refrain from taking an administrative action.

FDA Consumer Exchange Meetings: FDA wants comments and ideas from both national and local consumer leaders. Consumer exchange meetings are held regularly in the Washington, D.C., area with national consumer leaders. All FDA district offices schedule regular meetings conducted by district directors. They are held for discussion between consumers and FDA officials to establish priorities of current and future health concerns, to facilitate exchanges between local consumers and the FDA offices, and to permit consumers to contribute to the Agency's policy-making decisions. For more information, contact your local consumer affairs officer.

Reporting Product Defects: The first contact many consumers have with FDA is when they come across a food, drug, medical device, cosmetic, or electronic device they believe is mislabeled, insanitary, or otherwise harmful. Consumers can report their complaints in writing or by phone to the nearest FDA field office. These 130 offices, in as many cities, are listed in the telephone directory under: U.S. Government; Department of Health, Education, and Welfare; U.S. Public Health Service; Food and Drug Administration. Your library may also be a good source of addresses of FDA offices.

Educational Materials: Consumers, educators, students, and industry representatives often need information on current consumer issues concerning foods, drugs, cosmetics, electronic devices, and medical devices. Any local FDA

office can put you in contact with a consumer affairs officer who can provide information or service.

Part II: Questions and answers about consumer contributions

- *How do consumers talk with FDA?* FDA provides a number of opportunities for consumers to express their wishes or views and become part of the Government decisionmaking process. The consumer can: respond to the rulemaking proposals published in the FEDERAL REGISTER, petition directly to the Commissioner of FDA for a change in a regulation, participate in a consumer exchange, or become a consumer representative on one of the FDA advisory committees.

- *Why does a Government agency make rules and regulations?* Many of the laws (acts) passed by Congress are written in general terms. They do not take care of all the details that are necessary to put the laws into effect. This responsibility is delegated to the Government agency that will be held responsible for the act or law. The agencies that put the laws into effect have to make rules to provide the details. These rules interpret the law and have the same general effect as an act of Congress but cannot go beyond it. The rules and regulations are published in the FEDERAL REGISTER and the next annual issue of the CFR.

- *How do you find current FDA proposals and how do you comment on them?* Proposals are notices of rules or future regulations that are published in the FEDERAL REGISTER. These proposed rules or regulations may be guidelines of how a section of a law will be interpreted for compliance. For example, the Food, Drug, and Cosmetic Act states:

"(k) The term 'label' means a display of written, printed, or graphic matter upon the immediate container of any article; and a requirement made by or under authority of this Act that any word, statement, or other information appearing on the label shall not be considered to be complied with unless such word, statement, or other information also appears on the outside container or wrapper, if any there be, of the retail package of such article, or is easily legible through the outside container or wrapper.

"(l) The term 'immediate container' does not include package inserts.

"(m) The term 'labeling' means all labels and other written, printed or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article."

The regulations provide an explanation of general labeling requirements, providing for the format of the label, different types of wrapping, type size, and basic required information to inform the consumer what is in the package; i.e., listing of ingredients, weight statements, identity statement, and the address of the manufacturer or distributor.

The rules/regulations would first be published as a proposal, and FDA would follow these steps:

1. Notice of the proposed rulemaking is published in the FEDERAL REGISTER.
2. Interested persons are given the opportunity to submit written or oral data, views, and arguments. A time limit, which may range from 30 days to 1 year, is set for receipt of comments.
3. When the comment period for a particular proposal has expired, all comments received are carefully studied. The Agency must balance the favorable and unfavorable comments against one another, consider all supporting facts, reasons, research, or other evidence and arrive at an equitable decision.
4. When the decision is made, the regulation is published in final form in the FEDERAL REGISTER, with the date it will go into effect.

For proposals involving Agency actions or issues likely to have a significant marketplace impact, FDA actively seeks the input of consumers, industry, and other affected groups.

• *How do you change or modify a rule or regulation once it is in effect?* Any consumer, group of consumers, or industry group can petition the Commissioner of FDA to initiate, change, or revoke a regulation.

The petitioner addresses the Commissioner (as shown in the CFR, Title 21, part 10.30) clearly stating the problem or circumstance he or she feels requires action, and then proposes specifically what the new regulation should include.

If the Commissioner finds the petition has reasonable merit, notice of its filing and availability is published in the

FEDERAL REGISTER with a request for public comment. The Agency may also publish simultaneously the petition and its own version of such a proposal, also for public comment, in which case the response to both proposals would be weighed in preparing a final regulation.

The petitioner should base the proposal on sound and supportable facts, on the needs of all consumers, and on reasonable grounds for industry compliance.

• *What is the purpose of the FDA Advisory Committees and how does one become a member?* FDA broadens its own expertise in areas it regulates by calling on competent people outside the Agency to serve as advisers in their fields of knowledge. Today these advisers compose more than 45 groups. Their job is to discuss problems of concern singled out by the Commissioner and to offer what they consider the best solutions and alternatives.

Most of the meetings are open to the public, and announcements of these meetings appear in the FEDERAL REGISTER. Also, announcements of vacancies and invitations to nominate a new member appear in the REGISTER. A person may nominate himself or someone else, but all vital information on pertinent professional and academic accomplishments must be supplied to indicate qualifications for membership. Qualifications sought by FDA vary, depending on the type of committee, the position, and the current area of concern. On many committees, there is standing membership offered for consumer representatives.

For those interested in finding out the authority, structure, functions, and memberships of each committee, a free 144-page paperback booklet entitled *Food and Drug Administration Public Advisory Committees* is available from: Committee Management Office, HFS-20, Rm. 7-83, FDA, 5600 Fishers Lane, Rockville, Md. 20857.

• *How can an individual consumer keep informed?*

1. Review the FEDERAL REGISTER at the local library.
2. Ask for news releases from the Office of Information in various Federal and State agencies.
3. Review newspapers, radio, television, and magazines for current issues.
4. Read FDA CONSUMER, the official magazine of the Agency. It carries feature articles on foods, drugs, cosmetics, medical devices, and radiological health. It is available on a subscription basis through the Superintendent of Documents, Washington, D.C. 20402, or can be reviewed at a local FDA office.

The Consumer's Role: It is important that individual consumers be informed. As new scientific discoveries are made, marketplace conditions change. To paraphrase a statement by President James Monroe: Only enlightened public opinion based on accurate information, and full and free discussion of facts and issues, can provide protection in the marketplace and still offer the consumer a free choice of products.