



Draft guidance to food regulators in conducting their compliance, monitoring and enforcement activities

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The Dietitians Association of Australia (DAA) is the national association of the dietetic profession with over 6000 members, and branches in each state and territory. DAA is a leader in nutrition and advocates for food and nutrition for healthier people and healthier nations. DAA appreciates the opportunity to provide feedback on the draft guidance to food regulators in conducting their compliance, monitoring and enforcement activities by the Implementation Subcommittee for Food Regulation (ISFR).

Contact Person:

Position: Dietitian Practice Support
Organisation: Dietitians Association of Australia
Address: 1/8 Phipps Close, Deakin ACT 2600
Telephone: 02 6189 1203
Facsimile: 02 6282 9888
Email: practicesupport@daa.asn.au

DAA interest in this consultation

DAA is the peak professional body for dietitians in Australia and is responsible for the Accredited Practising Dietitian (APD) program as the basis for self-regulation of the profession.

DAA advocates for a safe and nutritious food supply in which the community has confidence and which meets the nutritional needs of all Australians, including groups with special needs.

As experts in nutrition, APDs assist the general population and groups with special dietary needs to meet their nutritional needs, as well as with the translation of food labels and nutrition content claims. APDs also work in food industry in food regulatory issues, food safety and quality systems, and it is therefore of interest to APDs to know there is clear guidance for food regulators in conducting their compliance, monitoring and enforcement activities.

Summary or key messages

Overall, DAA supports the draft guidance and recognises that food regulators' activities will range from supporting a culture of compliance, monitoring for compliance and effectively addressing non-compliance.

DAA would like to see the objectives of the policy recognise the public expectation of an effective food regulation system. Consumers and market participants need confidence in the integrity and effectiveness of the system. Without that confidence, consumers' health may be put at risk, for example, if they make food choices based on unsubstantiated health claims, or are not properly warned of allergens. Furthermore, the economic viability of Australia's food industry is partially based on national and international consumer confidence in its effective regulation. At the same time, DAA recognises that regulators have limited resources and the balance must be struck between managing regulatory burden and maintaining confidence in the system of regulation. In this regard, we have considered the OECD Guidelines for Regulatory Enforcement and Inspections¹ as well as the practices of other Australian government agencies when developing our comments on the draft guidance.

Discussion

Guiding Principles

DAA has four comments in relation to the guiding principles.

1. Based on OECD Guidelines and the approaches of ASIC and ACCC, DAA recommends that the preferred regulatory approach be 'risk based and

proportionate’ and delete the word ‘graduated’. The concept of graduation undermines the focus on actual risk posed by non-compliance, ignores the opportunity to deter industry participants from similar conduct and detracts from an effective risk based policy. DAA appreciates that compliance history is one of the factors to be taken into account when considering appropriate enforcement strategies. However, this factor should be taken into account with a range of factors including the nature and seriousness of the misconduct, cooperation with regulators, the evidence and likelihood of success of any enforcement action, the risk to public health and safety and any other mitigating factors such as inadvertent conduct.

2. Particularly because of the limited resources available to regulators, the guidelines should explicitly recognise that enforcement action needs to be prioritised and those priorities will be openly communicated and reviewed in consultation with stakeholders. DAA notes that very general enforcement priorities are set out for 2017-2021 but detailed, targeted priorities should be identified to build a culture of compliance. ASIC² and ACCC³ clearly signal their specific enforcement priorities as part of their compliance promotion strategies and in doing so create an extremely cost-effective means to build a culture of compliance and educate all stakeholders of relevant and high-risk conduct.

3. The guiding principles would be more comprehensive if they acknowledge the role of other regulators such as the ACCC and state consumer regulators in enforcing the Australian Consumer Law in relation to misleading and deceptive conduct in trade and commerce, including the sale of food. Further, the criminal law is still relevant to the failure to protect people from known allergens. In the recent UK manslaughter case of *R. v Zaman* (unreported, 2016)⁴ a restaurant owner was convicted after selling a meal that he knew contained nuts even though the victim had clearly specified he had a nut allergy. Although this is a UK case, it is still relevant to Australian law and is likely to be persuasive if a similar case occurred here.

4. DAA notes that enforceable undertakings are listed as an option for non-compliance. These are being widely used by ACCC, including in cases of misleading and deceptive food labelling⁵, and ASIC and are now also used for workplace safety and environmental protection. The specific power to enter into enforceable undertakings allows for effective, rapid and commercial resolution of enforcement action and supports a culture of compliance. The enforceable undertaking is a form of settlement that may be enforced in court by the regulator if the party who agreed to the terms of the undertaking does not comply. Typically, the regulator will obtain a promise to cease the alleged contravention, implement a compliance program and rectify any negative impact of the conduct. Examples include s 87B of the *Australian Consumer Law* and s 93A and 93AA of the *Australian Securities and Investments Commission Act 2001*. In the context of food regulation, enforceable undertakings are already available under

s 69EL of the *Agricultural and Veterinary Chemicals (Administration) Act 1992* and s 145E of the *Agvet Code*. DAA strongly supports law reform to enable food regulators to seek enforceable undertakings for non-compliance with the Food Standards Code.

Generating compliance

DAA supports the draft policy in relation to generating compliance and recognises the value of effective communication to encourage compliance by businesses to educate consumers of their rights.

Monitoring and assessing compliance

DAA supports the draft policy in relation to monitoring and assessing compliance. DAA recognises that proactive and reactive monitoring supports a culture of compliance.

Responding to non-compliance

DAA recognises high levels of compliance by the majority of food businesses. However, non-compliance endangers public health and undermines confidence in the integrity of the food regulation system and the responsible agencies. In view of the limited resources available to food regulators it is important to expressly recognise that not all matters will be investigated or subject to enforcement action.

As noted in our comment on the guiding principles, DAA would prefer if the word 'graduated' were removed from the regulatory approach since it undermines the risk-based and proportionate approach recommended by the OECD. DAA do not object to the factors to be considered in decision-making, however recommend expressly including the strength of the case including evidence and prospects and the expected level of any public benefit from the action including a deterrent effect to the broader business community, clarification of the law and the range of available remedies.

Appendix 1: Actions for Food Regulators for Generating Compliance

DAA supports the strategies for building compliance outlined in Appendix 1. DAA supports transparency in food regulation, therefore we suggest specific enforcement priorities should be clearly outlined every year to build a culture of compliance. DAA would be happy to facilitate or support access to information on

issues of common concern such as listeria risks, allergens, food safety for vulnerable populations, and accurate food labelling.

Appendix 2: Actions for Food Regulators for Monitoring and Assessing Compliance

DAA supports the strategies for monitoring and assessing compliance outlined in Appendix 2.

DAA note the risk-based approach has not been defined, and are unsure if this will be further discussed in future consultations. DAA would appreciate the opportunity to be involved in future consultations regarding this if the opportunity arises.

Appendix 3: Actions for Food Regulators for Responding to-Non-Compliance

DAA supports the strategies outlined in Appendix 3, however in the interests of the health of all Australians supports a risk-based and proportionate approach to enforcement for non-compliance.

References

1. Organisation for Economic Co-operation and Development (OECD). Regulatory Enforcement and Inspections. Paris: OECD Publishing; 2014. 70p
2. Australian Securities & Investments Commission (ASIC). Information Sheet 151 ASIC's approach to enforcement. Australian Securities & Investments Commission; 2013. 12p
3. Australian Competition & Consumer Commission (ACCC). ACCC Compliance and Enforcement Policy. Australian Competition & Consumer Commission; 2017. 8p
4. The Crown Prosecution Service (CPS). Restaurant owner guilty of manslaughter [Internet]. London: The Crown Prosecution Service; 2016. Available from: https://www.cps.gov.uk/news/latest_news/restaurant_owner_guilty_of_manslaughter/index.html
5. Australian Competition & Consumer Commission (ACCC). Maggie Beer Products acknowledges labelling likely to be misleading [Internet]. Australian Competition & Consumer Commission; 2014. Available from: <https://www.accc.gov.au/media-release/maggie-beer-products-acknowledges-labelling-likely-to-be-misleading>