

Submission on the Exposure draft of the Consumer Information Standards (Origin of Food) Regulations 2019

Submitted to

Ministry of Business, Innovation and Employment.

10 February 2020





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Introduction

1. The Commerce Commission (the Commission) appreciates the opportunity to make a submission on the Ministry of Business, Innovation and Employment's (MBIE) December 2019 Exposure draft consultation: Consumer Information Standards (Origin of Food) Regulations 2019 (the Regulations).
2. We would be happy to discuss any of the points raised in this submission and look forward to further engagement with MBIE as the Regulations are finalised.

Format of our submission

3. This submission on the Exposure draft of the Regulations focusses on the Commission's ability to effectively enforce them and issues which we consider may lack clarity for businesses and/or consumers.
4. We have not responded to all the questions raised in the consultation document because we consider some are questions of policy, technical questions outside our experience and, in other cases, the drafting appears workable and appropriate. We have instead commented on a selection of issues where we submit that further consideration by MBIE may be beneficial.
5. We have also included at **Attachment 1** some additional drafting issues that we suggest MBIE considers addressing.

The Commission's role

6. The Commission is New Zealand's primary competition and consumer regulatory agency. We enforce legislation that promotes competition in New Zealand markets and prohibits misleading and deceptive conduct by traders, including the Fair Trading Act 1986 (the FT Act).
7. Under section 28(1) of the FT Act, if a consumer information standard applies, a person must not supply, or offer to supply, or advertise to supply those goods or services unless that person complies with that consumer information standard. Once enacted, the Regulations will be declared the consumer information standard for the regulated foods.
8. The Commission has a range of tools available to it when enforcing a consumer information standard. Depending on the scale and seriousness of the alleged breach, the Commission's response can range from providing guidance about how to comply with the law, issuing a warning letter to the trader about likely non-compliant

conduct, issuing the trader with an Infringement Notice/s requiring the payment of a fine¹ or taking a prosecution against the trader.²

9. Given the Commission's enforcement role, including the provision of guidance and advocacy on the laws we enforce, it is fundamental that the legal requirements should be clear for all and straightforward to investigate.
10. This is particularly important because the Commission can issue Infringement Notices where it believes on reasonable grounds that a consumer information standard has been breached. The purpose of Infringement Notices is to provide a quick and cost-effective way of sanctioning breaches and driving compliance in relation to relatively minor and easily identified contraventions of consumer laws.
11. For completeness, we note that, if disclosed country of origin information was false or misleading, the Commission could take enforcement action under section 13(j) of the FT Act, which prohibits false or misleading representations concerning the place of origin of goods.

Advertising requirements and exemption

12. We understand that the origin requirements that are expressed in the Act and in the proposed Regulations were conceived initially and primarily as food labelling requirements enabling consumers at point-of-sale to understand the provenance of the food being offered for sale.
13. However, when passed the Act went beyond food labelling and extended the disclosure requirements to offers or advertisements to sell food: section 5(3)(b) states that **regulated food** includes food that:

... is supplied, or offered or advertised for supply, at retail.
14. What is currently left undefined is what "at retail" means, and we suggest that this term may benefit from a definition.
15. In particular, the Regulations could usefully clarify whether an offer or advertisement to supply "at retail" extends only to offers or advertisements made at the point-of-sale (eg posters, signage, produce stickering), or whether it also includes offers or advertising that do not occur at point-of-sale (eg media advertising, mail-outs and promotional brochures).
16. In our view the labelling requirements seem obviously and directly applicable to advertising in store and online at sites where goods can be purchased. For example, supermarket websites that list and promote goods for sale and that also accept orders and payment. In our view, this poses few difficulties for enforcement.

¹ Section 40D(1) of the FT Act.

² We have published *Enforcement Response Guidelines*, which explain this decision-making and the relevant considerations. The Guidelines are available online at <http://www.comcom.govt.nz/the-commission/commission-policies/enforcement-response-guidelines/>

17. The labelling requirements also appear to apply to offers or advertisements for products available for retail sale that are made in media where purchases cannot be completed. For example, advertising on television, radio or through direct mail. However, in our view this could be clarified in the Regulations to assist retailers with compliance and to assist the Commission with enforcement.
18. We note that clause 16 appears to assume that the labelling requirements extend to offers and advertising made through media where purchases cannot be completed. This is because it makes use of the Minister's power under sections 5(4)-(5) of the Act to exclude foods or methods of sale by excluding from the requirements food that is advertised on radio.
19. If, as a matter of policy, it is considered that advertising made through media when purchases cannot be completed is intended to be included within the scope of the Regulations, and it is considered appropriate to exclude radio from the Regulations, then we invite MBIE to consider further whether the radio exemption should also apply to advertising in other non-point-of-sale media. In particular, it may be worth considering whether practical compliance issues arise with television offers and advertising, and through the use of other advertising media, which may similarly prompt consideration of an exemption.

Exemption for uncertain supply

20. We consider that the exemption in clause 12 of the Regulations is of potentially broad application which could undermine the intention of the Regulations.
21. The purpose of the Act is to (emphasis added):

....provide for a simple mandatory system in New Zealand that provides consumers with accurate information about the country or place of origin of certain foods **to enable informed decisions** about purchasing the food.
22. Clause 12, however, permits an advertiser who believes that the source of supply will differ from that advertised to include a statement to the effect that:

... by the time of supply, the origin information of the food supplied may have changed from when the food was offered or advertised.
23. We understand that a statement in these terms would protect an advertiser from misrepresenting the provenance of food on offer, where the source of supply may change after advertising.
24. However, we are concerned that the protection offered by clause 12 could incentivise advertisers to include this statement instead of taking care to specify the provenance of the food. This practice could undermine the quality of origin information that is made available to consumers and could operate as 'fine print' that effectively renders nugatory the information as to origin that is featured in the advertising.

25. In our view, the objectives of the Regulations may be better achieved if they required the advertising of multiple named places of origin as potential sources of supply, where the source of supply may change after the offer or advertisement.

Definition of ‘grown’

26. The Commission agrees that clause 9(1) appropriately addresses the issue of where a fruit or vegetable was grown, or an animal reared.
27. Since plants or animals may materially increase in size in more than one place, this clause could require disclosure of more than one country – which we consider both informative and consistent with the stated objectives of the Regulations.
28. In contrast, we consider the alternative concept of “predominantly grown” as uncertain and involving the application of retailers’ judgment, likely leading to inconsistent approaches and the potential for enforcement action to obtain greater clarity from the courts as to the proper approach to be followed. It would also mean that consumers receive less information – only one named country, and other countries where production steps also took place would not be named. We consider that accuracy about provenance is best achieved by stating all of the places of origin; in this context, more information is better than less to support informed decision making among consumers.
29. To conclude, we thank MBIE for this submission opportunity and would be pleased to provide any further assistance that you may require. If you have any specific questions on this submission please contact Yvette Popovic in the first instance.

Attachment 1

Additional drafting points

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| <p>1. Clause 6 (meaning of fresh) and clause 7 (meaning of minimally processed) – to assist with interpretation, we suggest that consideration is given to drafting these definitions affirmatively. For example:</p> <p>1.1 listing examples of processing that mean a food is fresh rather than examples of processing that do not prevent a food from being fresh.</p> <p>1.2 listing processes that are examples of minimally processed rather than examples that do not prevent a food from being only minimally processed.</p> |
| <p>2. Clause 5(2)(a)(ii) – we query the need for the words in brackets ‘(but would otherwise be fresh)’. We understand this was included to clarify that food that has been cured/pickled/fermented etc and then frozen are not covered by the regulations. However, these foods would not, in any event, be captured as they would be more than minimally processed.</p> |

3. Clause 10(2)(b) – states ‘to enable each person.....to be informed of the relevant country, countries or ocean’. We suggest it would be more correct to state ‘to enable each person to be informed of the relevant origin information’ given that ‘origin information’ is defined.