

Analysis of the Bill

- 2.1 This chapter analyses the Bill in relation to five key issues that were raised throughout the inquiry. These were:
- its unintended consequences;
 - whether the Bill properly informs consumer choices in relation to health risks;
 - whether the Bill properly informs consumer choices in relation to deforestation;
 - whether costs to industry would increase and by how much; and
 - its effects on international trade.
- 2.2 For some of these issues, the evidence was contradictory and the committee was not able to draw a definitive conclusion. Where the evidence on an issue was clear, the arguments opposed the Bill. In no case did the committee find clear evidence in support of the Bill.

Unintended consequences

Background

- 2.3 The Bill seeks to amend two Acts: the *Food Standards Australia New Zealand Act 1991* and the Australian Consumer Law under the *Competition and Consumer Act 2010*. Both Acts have been the product of a great deal of negotiation and agreement between the Commonwealth and the States and Territories.

- 2.4 The Department of Health and Ageing advised the committee that the reason for this approach for food standards is that the Commonwealth does not have power under the Constitution to legislate for food. Regulation (including legislating) and enforcement in this area is primarily the responsibility of the States and Territories. However, by setting up an agreed national system, which has taken ‘many decades’, Australia now enjoys the benefits of nationally consistent food standards. The main cost of this system is the complexity required to coordinate and take into account the views of the different jurisdictions.¹
- 2.5 As the Department of Health and Ageing noted, the same reasoning applies to the amendments to the Australian Consumer Law.² Treasury stated that this legislation originated in a Productivity Commission report in 2008, which estimated that the national economy would benefit by up to \$4.5 billion a year if the different consumer laws across the country were standardised. The benefits would accrue through such mechanisms as reduced compliance and transaction costs.³
- 2.6 In evidence, Treasury confirmed that many firms operate at a national level, stating:
- We have all been round long enough to know that the economy has changed markedly since 1900. We basically deal in national markets.⁴
- 2.7 In other words, the two Acts are coordinating legislation that the States and Territories follow and support because they are involved in policy development, and there are substantial benefits in having a nationally consistent approach.

Analysis

- 2.8 Treasury and Food Standards Australia New Zealand (FSANZ) both gave evidence to the committee that the Bill would be of limited effect. In the case of FSANZ, this was because it is only changing a coordinating Act and that the processes under the various pieces of legislation that trigger legal effect have not been complied with:

The first thing to note if this bill were passed, which would oblige FSANZ to prepare the standard, is that the standard would not go

1 Ms Megan Morris, *Committee Hansard*, Canberra, 18 August 2011, p. 2.

2 *Submission 15*, p. 5.

3 *Submission 22*, pp. 1-2.

4 Mr Bruce Paine, *Committee Hansard*, Canberra, 18 August 2011, p. 32.

into the Australia New Zealand Food Standards Code, because it has not been developed under the process that has been agreed through the intergovernmental agreements. Essentially that standard would go onto the website and would sit there. In that respect there would be no enforcement of the standard because States and Territories would not have adopted it. The mechanism by which they adopt standards is that, once they go into the code, then they are automatically adopted into State and Territory legislation under their food acts. In this instance that would not happen because the standard would not be in the code.⁵

- 2.9 In the case of Treasury, the Bill would be of limited effect because it would not materially change the meaning of the current section 33 of the Australian Consumer Law, which is the misleading conduct provision:

Our submission mentioned that the current section 33 is already sufficiently broad enough to capture characteristics, including palm oil being a characteristic of a good. Our view is that you really do not need to amend section 33 to capture palm oil as a particular characteristic of a good.⁶

Can I just add there that my understanding is that if a good – talking here about food – listed a list of ingredients and the good actually included palm oil, it would be misleading under the current section 33 if that list did not indicate that it included palm oil. Just to repeat that: if the good lists its ingredients and it actually contains palm oil, it would be misleading to omit palm oil from that list under the current law.⁷

- 2.10 Therefore, if a producer of food provided an ingredients list on the packet and the label omitted to mention palm oil when this was an ingredient, then it would breach section 33 regardless of whether the Bill became law or not. However, current labels do not breach section 33 because they do not claim to be a complete ingredients list and there is no legal requirement for them to fully list the ingredients either. The Bill would not change the operation of section 33 if it became law.
- 2.11 Further, the Bill has the potential to jeopardise the benefits gained from nationally consistent legislation, particularly in relation to the Australian Consumer Law. Treasury stated in evidence:

5 Mr Steve McCutcheon, *Committee Hansard*, Canberra, 18 August 2011, p. 32.

6 Ms Danielle Staltari, *Committee Hansard*, Canberra, 18 August 2011, p. 29.

7 Mr Bruce Paine, *Committee Hansard*, Canberra, 18 August 2011, p. 29.

There is a potential consequence if the Commonwealth parliament passed the law and one or more of the States or Territories decided not to apply that. That could result in individuals and unincorporated businesses in those jurisdictions being subject to a different set of requirements. As I understand it, there was a brief period 20 or 30 years ago where the consumer law was quite homogeneous across the country, and quite quickly that unravelled.⁸

- 2.12 The committee also notes that the current food labelling and consumer law systems have a great deal of support from industry. For example, the Australian Food and Grocery Council mentioned in evidence that the Bill has ‘circumvented the process,’ that ‘The process is really quite clear’ and that FSANZ had already considered an application from the public to specifically label palm oil and rejected it.⁹ In relation to the Australian Consumer Law, Accord Australasia stated that, ‘the decision of the Senate to tinker with this law for very specific single-issue legislative goals, such as palm oil labelling, to be somewhat reckless’. It also described the Bill as a ‘willy-nilly piecemeal amendment’ of an ‘important micro-economic reform law’.¹⁰ The Bill has increased risk for food and cosmetic producers because it has bypassed widely known and supported regulatory systems.
- 2.13 Finally, the committee observes that the current system is already considering labelling specific vegetable oils through the *Labelling Logic* review. Implementing recommendation 12 of the review would make practice in Australia similar to that in Canada and the United States. The Bill is superfluous in this context.

Conclusion

- 2.14 One of the strongest reasons to reject the Bill is that it interferes with stable, well known processes that deliver uniformity to Australian consumers and businesses. The Bill does not recognise the regulatory systems that give Australia uniformity while remaining true to our constitutions, where a great deal of lawmaking power rests with the States and Territories.
- 2.15 The same food labelling system that the Bill seeks to override is already considering labelling individual vegetable oils. The committee is of the view that this process should run its course.

8 Mr Bruce Paine, *Committee Hansard*, Canberra, 18 August 2011, p. 28.

9 Ms Kate Carnell, *Committee Hansard*, Canberra, 18 August 2011, p. 17.

10 *Submission 29*, p. 4.

Consumer choices about health risks

Background

2.16 The Palm Oil Action Group stated that the Bill was worthy of support because it would allow consumers to determine if a product has high levels of saturated fat. The Group also argued that higher intake of saturated fat is associated with increased rates of diabetes, heart attacks and angina.¹¹

Analysis

2.17 The counter argument presented to the committee is that current labelling standards already require that the level of saturated fats be included in labels and that it is an individual's total intake of saturated fats that is the most relevant to health outcomes. Sanitarium made this point, as did Professor Sinclair of Deakin University and the Department of Health and Ageing.¹²

2.18 Further, Sanitarium raised the possibility that, if palm is the only oil that is specifically labelled, then consumers may make purchasing decisions based only on this criterion, without considering the more important, general question of the total amount of saturated fats in a product:

The TILPO Bill would single out [palm] oil, even if it were added at nutritionally insignificant levels. A consumer driven to avoid palm for 'health' reasons may end up choosing products higher in saturated fat than one containing a small amount of palm oil. Not all saturated fats are the functional equivalent of palm oil, and for that reason are not necessarily nutritionally equivalent at the 'functional' level of addition.¹³

2.19 In fact, palm oil has fewer health implications than other oils that are high in saturated fats. The Department of Health and Ageing advised the committee that, 'There are no known safety issues with palm oil'.¹⁴ This contrasts with other oils such as peanut, soybean or sesame. FSANZ stated

11 *Submission 13*, p. 2.

12 *Submission 26*, p. 5; Professor Andrew Sinclair, *Committee Hansard*, Canberra, 19 August 2011, p. 35; Ms Megan Morris, *Committee Hansard*, Canberra, 18 August 2011, p. 6.

13 *Submission 26*, p. 5.

14 Ms Megan Morris, *Committee Hansard*, Canberra, 18 August 2011, p. 6.

in evidence that these are specifically labelled because they represent an allergy risk.¹⁵

Conclusion

2.20 The committee concludes that there is no particular health reason to specify palm oil alone on food labels if other saturated fats are not labelled in the same way. What is important for health outcomes is the amount of saturated fat in the food and the amount of particular foods that consumers choose to eat. Specifying palm oil singly may lead consumers to focus on one ingredient at the expense of total intake of saturated fats, when the latter is the relevant factor for health outcomes. Therefore, the Bill may have the result of distorting consumers' choices about their health.

Consumer choices about deforestation

Background

2.21 One reason for popular support for the Bill is the claim that Malaysia and Indonesia are clearing forest to increase palm oil production. The Australian Orangutan Project stated that the Sumatran orangutan is critically endangered with less than 6,300 alive in the wild. The Bornean orangutan is endangered with 55,000 alive in the wild. Eighty percent of the current population live outside protected areas. Clearing forest will reduce food for orangutans and reduce the population.¹⁶ As the Taronga Conservation Society Australia stated in evidence, 'the only chance for survival, of course, is protection of habitat'.¹⁷

2.22 This issue has generated a great deal of concern in the community. In 2009, Zoos Victoria ran a public campaign in support of protecting the native habitat of orangutans and the need to label palm oil in food. The campaign produced approximately 70,000 online responses where individuals wanted to have palm oil labelled in order to prevent the loss of orangutan habitat. Zoos Victoria also received approximately 164,000 cards signed by individuals to the same effect.¹⁸

15 Mr Steve McCutcheon, *Committee Hansard*, Canberra, 18 August 2011, p. 2.

16 *Submission 3*, pp. 3-4.

17 Mr Cameron Kerr, *Committee Hansard*, Canberra, 19 August 2011, p. 13.

18 Ms Jennifer Gray, *Committee Hansard*, Canberra, 19 August 2011, p. 15.

2.23 The Palm Oil Action Group described the business model behind palm oil production:

Palm oil is one of the most profitable crops in the world, mainly because the true cost of the degradation of the environment is not costed into it. As a palm oil company, your first preference is to get some beautiful rainforest, chop down the trees and sell them for a massive price and then plant palm oil on that land. Your second choice, however, is to take already degraded land and plant palm oil on that ...

... they can chop down the trees and sell them for a terrific price, as the introduction to that bit of commerce; so they have a large amount of money in the bank to then go and plant the palm oil trees with ...

[Pulp paper and rubber are] nowhere near as profitable, which is why there is so much palm oil and so little of all the other things. In fact, in Malaysia virtually all the rubber plantations have now been planted out as palm oil plantations and, no, the pulp paper industry is nowhere near as profitable at the moment as the palm oil industry.¹⁹

2.24 In other words, conservation groups argued before the committee that economic forces and development are reducing natural habitat for orangutans and reducing their numbers in the wild. The Institute of Public Affairs interpreted events differently. They suggested that poverty was the underlying cause of deforestation as farmers seek to raise their incomes through commodities that have international demand.²⁰

2.25 These developments have encouraged industry to develop the Roundtable on Sustainable Palm Oil (RSPO) on a voluntary basis. The Roundtable grew out of discussions between the World Wildlife Fund and industry between 2001 and 2003. In 2004, the Roundtable was established under Swiss law. It is formally located in Zurich with offices in Kuala Lumpur and Jakarta. The Roundtable's mission is to, 'transform markets to make sustainable palm oil the norm'.²¹

2.26 There is a number of criteria required to classify palm oil as sustainable. In evidence, the Palm Oil Action Group stated that one of the main criteria is

19 Mr Tony Gilding, *Committee Hansard*, Canberra, 19 August 2011, pp. 44-45.

20 *Exhibit 3*, p. 13.

21 RSPO, 'History,' 2009, <<http://www.rspo.org/?q=page/10>>; RSPO, 'Vision, Mission and Aspirations,' <<http://www.rspo.org/?q=page/16>>, both viewed 6 September 2011.

that land cannot be cleared for planting after a certain date.²² Documentation produced by the Roundtable indicates that primary forest or areas of high conservation values cannot be cleared for palm oil production after November 2005.²³ The principal goal for many firms and industry groups during the inquiry is to use sustainable palm oil by 2015. In most cases this statement was made with the caveat of 'supplies permitting'.²⁴

Analysis

2.27 This aspect of the inquiry was subject to a high degree of factual disagreement. For example, the Malaysian Palm Oil Council stated in evidence that a large degree of forest will be preserved:

... for every one hectare of land developed for oil palm, four hectares of forest are preserved. This is due, in large part, to the remarkable properties of the oil palm being high yielding but, more importantly, to Malaysia's decision to ensure that its environment would be preserved in perpetuity for our people, even though we know that revenue from forest land is 30 times less than revenue from agricultural land.

We hope that you recognise the commitment for what it is: an unsolicited promise to curtail or sacrifice economic development for the national and world good. We set a high standard for ratio of forest to total land area in our country of at least 50 per cent.²⁵

2.28 Conversely, the Taronga Conservation Society Australia argued that the 50 per cent figure does not fully reflect how the land will be used in future:

A report from the Malaysian Timber Council lists that, of the total forest area in Malaysia, 74 per cent of that land is allocated as permanent reserved forest. So that sounds good. However, if we look at the detail, the report lists that the majority of this permanent reserved forest – 78 per cent of it or 11 million hectares – is actually allocated to a term called 'production forests'

22 Mr Tony Gilding, *Committee Hansard*, Canberra, 19 August 2011, p. 44.

23 RSPO, *RSPO Principles and Criteria for Sustainable Palm Oil Production: Including Indicators and Guidance*, October 2007, <<http://www.rspo.org/sites/default/files/RSPO%20Principles%20&%20Criteria.pdf>> viewed 6 September 2011.

24 For example, George Weston Foods, *Submission 8*, p. [1]; Unilever, *Submission 28*, p. [2]; Campbell Arnott's, *Submission 35*, p. [1]; Australian Food and Grocery Council, *Submission 27*, p. 4.

25 Dr Yusof Basiron, *Committee Hansard*, Canberra, 18 August 2011, pp. 24-25.

for growth and harvesting for timber export. So the landmass and the vast tracts of production forests are grouped together with the lesser areas of protected forests. This produces some confusing statistics and can cause us to misunderstand the impact on the species that rely on these habitats. The source for that information is Malaysia: sustainable forest management, March 2007, page 7, the Malaysian Timber Council. So that is the Timber Council's own understanding of how the reserved forest is split up.²⁶

2.29 Another example of the wide difference in views relates to the number of orangutans in the wild. The Malaysian Palm Oil Council stated that numbers are increasing, whereas the Australian Orangutan Project stated that numbers are decreasing.²⁷

2.30 The effectiveness of the RSPO was also the subject of debate. The Palm Oil Action Group argued that the system does not work in practice because of the difficulty in drawing a distinction between an independent audit of compliance with RSPO requirements and simply being a member of the RSPO:

But, importantly, it needs to be certified by an independent body and not by the RSPO themselves. This is one of the big problems – people are claiming that their palm oil is okay because they are members of the RSPO and, so far, the RSPO has expelled nobody.²⁸

2.31 Industry's response has been that it has taken some time to develop the appropriate production and supply chains to commence large scale production of palm oil. The New Zealand Food and Grocery Council stated:

Efforts to date have been criticised but the momentum has taken time to build and in 2010 the volume of certified sustainable palm oil doubled from the previous year. If this pace of sustainability continues, the majority of palm oil production could be certified as sustainable within 5 years.²⁹

2.32 The Department of Innovation, Industry, Science and Research advised that Roundtable certified sustainable palm oil accounts for eight per cent of world output.³⁰ Given that oil palms take a few years to start bearing

26 Mr Cameron Kerr, *Committee Hansard*, Canberra, 19 August 2011, p. 13.

27 Dr Yusof Basiron, *Committee Hansard*, Canberra, 18 August 2011, p. 24; Mr Leif Cocks, *Committee Hansard*, Canberra, 19 August 2011, pp. 36-37.

28 Mr Tony Gilding, *Committee Hansard*, Canberra, 19 August 2011, p. 44.

29 *Submission 12*, pp. 3-4.

30 *Submission 23*, p. 7.

fruit, it would appear that this 8 per cent figure is likely to grow in the next few years.

- 2.33 A final case of a divergence of views relates to the economic benefits of palm oil production in Malaysia and Indonesia. World Growth, an international consultancy, argued that the World Bank has used palm oil as a way of alleviating poverty:

Since the 1960s the Malaysian Government and the Federal Land Development Authority (FELDA) has used palm oil as a highly successful poverty alleviation tool. In just 10 years between 1970 and 1980, poverty levels amongst oil palm smallholders in Malaysia fell from over 30 per cent to 8 per cent – the lowest incidence of poverty in any Malaysian agricultural sector. Poverty levels amongst subsistence farmers including paddy farmers was at 73 per cent at the same time.³¹

- 2.34 On the other hand, Taronga Conservation Society Australia advised the committee that the World Bank's investment arm, the International Finance Corporation (IFC), had placed a moratorium on palm oil investments due to 'very concerning practices by a large palm oil producer'.³²
- 2.35 In March 2011, the World Bank and the IFC released their new policy on investing in palm oil, which ensures that investment decisions will fully incorporate social and environmental considerations, which are among these organisations' goals. The report also states that, 'The industry has played a significant role in generating export earnings and reducing poverty in the producing countries'. The report is supportive of the role of agriculture more generally in reducing poverty. It states, 'growth originating in agriculture has been three times more effective in raising the incomes of the poor than growth generated from other sectors'.³³

Conclusion

- 2.36 Given the shift by palm oil producers, food producers and the World Bank towards sustainable palm oil, in the committee's view, the Bill's focus on the product palm oil, whether produced sustainably or not, is heavy

31 *Submission 30*, p. 2.

32 Mr Cameron Kerr, *Committee Hansard*, Canberra, 19 August 2011, p. 14.

33 The World Bank and IFC, *The World Bank Group Framework and IFC Strategy for Engagement in the Palm Oil Sector*, 31 March 2011, p. 10, <<http://www.ifc.org/ifcext/agriconsultation.nsf/Content/KeyDocuments>> viewed 29 August 2011.

handed and ignores the significant work being done to move towards sustainable palm oil by 2015, supplies permitting.

- 2.37 The committee is of the view that the Bill would not affect deforestation of orangutan habitats because it will not act on the factors driving deforestation. Deforestation is occurring because Indonesia and Malaysia wish to improve their living standards, and one of the most effective means of doing so is through agriculture. Further, one of the most commercially successful crops in the tropics is palm oil.
- 2.38 While the committee is very much aware of community support in preserving orangutan habitats, the Bill is unlikely to achieve that aim. The committee notes that the Australian Government already funds projects over \$300 million, which seek to address deforestation and illegal logging in South East Asia.³⁴

Costs to industry

Background

- 2.39 A common theme during the inquiry was that the Bill would increase costs to industry due to the work required, within a relatively short space of time, to change labels on a large number of products. The Australian Food and Grocery Council gave an overall view of the costs to industry:

Firstly, for people to change their labels, the costs range from about \$5,000 for a minor change to about \$15,000 for a major change. In many cases this could be a minor change, depending on the size of the label, how much you have to rejig it, all that sort of stuff. Of the 30,000 products on supermarket shelves in Australia, a very large percentage has palm oil. Some already are labelled, some are not. We do not have the figures on exactly how many are and how many are not, but it is a new cost.³⁵

- 2.40 Industry representatives from the Australian Chamber of Commerce and Industry gave a small business view of the potential costs:

When the last mandated labelling changes were put through, we ran surveys, both nationally through AFGC and locally through the WA Chamber of Commerce and Industry, and the result there

34 Department of Foreign Affairs and Trade, *Submission 32*, p. 1.

35 Ms Kate Carnell, *Committee Hansard*, Canberra, 18 August 2011, p. 15.

was quite horrifying. The cost of the labelling change was, on average, \$60,000 to each small business concerned. Across the nation, it was around half a billion dollars. They are great concerns for industry, and they should be of great concern to the committee.³⁶

Analysis

- 2.41 The committee accepts that a one-off label change at short notice can have significant costs for industry and that label changes are a serious matter. However, a number of factors need to be taken into account. For example, the committee notes that the cost of a minor change to a label was costed by consultants for FSANZ in 2008. For eight out of the 11 types of packaging considered in the study, the cost of a minor change was between \$3,000 and \$4,000. For aluminium cans, plastic bottles, and plastic jars, the cost approaches \$5,000.³⁷
- 2.42 Further, the cost of changing a label depends on the lead time in which industry has to act. In Schedule 1, the Bill gives six months for FSANZ to develop a food standard requiring the labelling of palm oil. Schedule 2 of the Bill, relating to amendment of the Competition and Consumer Act will apply to goods manufactured after 12 months starting from the date of assent. This compares with the two year period that the Food and Grocery Council states is the standard minimum time.³⁸
- 2.43 The committee also notes that businesses can turn the cost of a minor label change into an opportunity to update labels more comprehensively. While there is still a cost to businesses, they can limit it if their wider business strategy permits. This argument is similar to comments made by the CEO of Taronga Conservation Society:

I have to let you know that, throughout the 1990s, I worked for three multinational organisations in consumer marketing roles, consumer health care and consumer cosmetics – Wella, Schwarzkopf and Faulding. I can confirm that, during this time, package labelling was a useful marketing tool for me and would often include short-term promotional offers for special information – 'new improved' and all those sorts of things which I

36 Mr Iain Macgregor, *Committee Hansard*, Canberra, 18 August 2011, p. 35.

37 PriceWaterhouseCoopers, *Cost Schedule for Food Labelling Changes (Food Standards Australia New Zealand)*, *Final Report*, 7 March 2008, p. 3, <[http://www.foodstandards.gov.au/_srcfiles/Final%20report-%20FSANZ%20-%207%20March%202008%20\(2\).pdf](http://www.foodstandards.gov.au/_srcfiles/Final%20report-%20FSANZ%20-%207%20March%202008%20(2).pdf)> viewed 29 August 2011.

38 *Submission 27*, p. 6.

am sure that you see on a regular basis as you go through the aisles. Today – a luxury that I did not have when I was in the industry – we have digital technology, which has made the process even less of an impost to consumer packaged goods companies and their marketing departments.³⁹

Conclusion

- 2.44 The committee is of the view that the cost of a label change must be compared against the benefits that society expects to gain from the improved information to consumers. For example, if in the unlikely event a common food ingredient is found to have adverse health effects, then the committee would expect that food labelling standards would be changed in short order and products recalled. While the costs to business would be considerable, they would be far exceeded by the benefits to consumers.
- 2.45 It is noted that the food sector is competitive and businesses must constantly monitor costs. Industry groups have advised that the Bill would result in compliance costs due to the need to re-label certain food and groceries. While this point is noted it is not the major reason why the committee is opposed to the Bill.
- 2.46 As stated earlier, the committee is of the view that there is considerable doubt that the Bill will deliver its required effect. Further, there are two very important reasons why the committee opposes the Bill. These are its unintended consequences, discussed earlier, and its effects on international trade, which are discussed below.

International trade

Background

- 2.47 There were two concerns raised about the Bill under this category. The first was that it potentially breached a food agreement made in 1995 with New Zealand. The Australian Food and Grocery Council, the New Zealand Food and Grocery Council, the New Zealand High Commission and the Department of Health and Ageing all raised this in their

39 Mr Cameron Kerr, *Committee Hansard*, Canberra, 19 August 2011, p. 14.

submissions.⁴⁰ Article 4(4) of the food regulation treaty⁴¹ between the Governments of Australia and New Zealand states:

Australia shall not introduce any amendments to the Australian legislation establishing the Authority, or move government amendment to that legislation, without effective consultation with New Zealand during their development. Australia shall use its best endeavours, including reflection of New Zealand's position in any relevant papers for the Australian Commonwealth government, to reach agreement with New Zealand on these, and any other, amendments to the Australian legislation.

2.48 Article 4(5) applies with similar effect to New Zealand. Article 5(3) states:

Subject to Annexes D and E of this Agreement, neither Member State shall by legislation or by other means establish or amend a food standard falling within the scope of this Agreement other than in accordance with this Agreement.

2.49 The second concern was that the Bill breaches Australia's commitments under the World Trade Organisation (WTO). Accord Australasia, the Indonesian Palm Oil Commission, the Department of Foreign Affairs and Trade, and World Growth all raised this in their submissions.⁴²

2.50 The basis for this claim is that the Bill only requires the labelling of palm oil and not other oils. Therefore, it may be more trade restrictive than necessary to fulfil a *legitimate objective*. The Department of Foreign Affairs and Trade advised that a legitimate objective should have a:

... domestically focused nexus and can include: prevention of deceptive practices in Australia; protection of human, animal or plant life or health in Australia; or protection of the Australian environment.⁴³

2.51 The Department of Health and Ageing advised that the European Union is in the process of mandating more comprehensive labelling of vegetable oils, in particular that the vegetable origin of the oils used (palm, coconut etc.). This is also a current requirement in the United States and Canada.⁴⁴ This approach is similar to that proposed in recommendation 12 of the *Labelling Logic* review.

40 *Submission 27*, p. 7; *Submission 12*, p. 2; *Submission 24*, p. 2; *Submission 15*, p. 4.

41 The full title is: *Agreement between the Government of Australia and the Government of New Zealand Concerning a Joint Food Standards System*, done at Wellington 5 December 1995.

42 *Submission 29*, p. [8]; *Submission 4*, p. 1; *Submission 32*, pp. 1-2; *Submission 30*, p. 2.

43 Australian Oilseeds Federation, *Submission 32*, pp. 1-2.

44 *Submission 15*, p. 5.

2.52 This type of provision does not raise trade issues because it does not discriminate between different types of vegetable oils.⁴⁵ Although this approach solves one problem, it should be kept in mind that it would require additional record keeping for businesses and their suppliers because chemical analysis cannot distinguish the vegetable origin of an oil once processing takes place. It would also reduce sourcing flexibility for producers.⁴⁶

Analysis

2.53 The position in relation to the food regulation treaty is clear. The committee is aware of no consultation between the Australian and New Zealand Governments about the Bill. At the minimum, it would appear that this should occur before the Bill proceeds any further in the Parliament. The treaty supports economic, social and political benefits that flow from increased trade with New Zealand, with which Australia has a very close and highly valued relationship. The importance of this relationship far outweighs the potential gains from the Bill.

2.54 The Department of Health and Ageing is coordinating the Government's response to the *Labelling Logic* review of food labelling, which is expected to go to the Ministerial Council on 9 December 2011. New Zealand is represented on this body.⁴⁷ The committee would expect that, if the Government decided to accept recommendation 12 of the review, then the appropriate consultations with New Zealand would occur as a matter of routine.

2.55 The position in relation to Australia's WTO commitments is also clear. In the previous Senate committee inquiry, World Growth provided a legal opinion on the original version of the Bill by Andrew Mitchell and Elizabeth Sheargold of Melbourne University Law School. Although the Bill has since been amended, their observations still apply to the new version.

2.56 In particular, the legal opinion states that the original Bill was more restrictive than necessary to achieve either a health or environmental purpose. As discussed earlier in this chapter, the key health objective with oils generally is to describe the saturated fat content of a food, which is already a labelling requirement. In order to meet an environmental

45 Senate Community Affairs Legislation Committee, Inquiry into Food Standards Amendment (Truth in Labelling – Palm Oil) Bill 2010, World Growth, *Submission 301*, Attachment 1, p. 13.

46 *Submission 20*, pp. 2-3.

47 *Submission 15*, pp. 3-4.

objective, the Bill would have to show that it reduces the amount of unsustainable palm oil produced and that this reduction makes 'a material contribution to' reduced deforestation. The legal opinion then states:

Although evidence might be produced to show that the Palm Oil Labelling Bill would reduce consumption of non-sustainably produced palm oil in Australia, it would be difficult to establish that this would stop or materially reduce deforestation in Malaysia or Indonesia. A reduction in the land used to produce palm oil would not necessarily restrict land clearing. Deforestation is still likely to occur, to support the production of timber and other commodities.

Even if it could be shown that the Palm Oil Labelling Bill would make a material contribution to the objective of reducing or stopping deforestation, the Bill may still be more trade restrictive than necessary to achieve that aim. The Bill does not explicitly discriminate between imported and domestic goods, but it is likely to restrict or distort trade because palm oil is predominantly produced in Malaysia and Indonesia, and other vegetable oils that may be substitutes for palm oil (such as rapeseed, sunflower seed and soya oils) are largely produced in other countries, including Australia. By making palm oil a less competitive product, the Palm Oil Labelling Bill has the effect of restricting imports of palm oil from Malaysia and Indonesia to Australia.⁴⁸

- 2.57 The first passage is consistent with the committee's earlier reasoning that the Bill is unlikely to prevent or slow down rates of deforestation. The second part shows that Australia is unlikely to win a complaint made by either country if the Bill became law.
- 2.58 The Department of Foreign Affairs and Trade noted that, 'Defending a WTO dispute is a costly, resource intensive and lengthy exercise'. If Australia was found to have contravened its trade obligations, Australian exports could be subject to retaliation in the form of higher tariffs overseas.⁴⁹

Conclusion

- 2.59 As currently drafted, the Bill most likely contravenes Australia's WTO obligations because it only requires the specific labelling of palm oil and
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48 Senate Community Affairs Legislation Committee, *Inquiry into Food Standards Amendment (Truth in Labelling – Palm Oil) Bill 2010, Submission 301, Attachment 1, p. 8.*

49 *Submission 32, p. 2.*

not other oils. Requiring each type of vegetable oil to be labelled, along the lines of recommendation 12 of the *Labelling Logic* review, would address this problem.

- 2.60 In addition, the Bill is also inconsistent with the food regulation treaty between Australia and New Zealand, which requires that both countries effectively consult with each other on changes to food standards. No such consultation has yet occurred, although the committee expects that it would occur if the Australian Government accepted recommendation 12. Our international obligations and the importance of our relationship with New Zealand are sufficient reasons to oppose the Bill.

Overall conclusion

- 2.61 The inquiry has demonstrated that some consumers do want accurate labelling information so that they can make informed decisions about whether they purchase groceries or goods containing palm oil. The Senate Committee inquiry into the Food Standards Amendment (Truth in Labelling-Palm Oil) Bill, received over 520 submissions mostly from individuals arguing that palm oil be listed on food and grocery labels. In 2009, Zoos Victoria ran a public campaign in support of protecting the native habitat of orangutans and the need to label palm oil. The campaign produced approximately 70 000 online responses. In addition, Zoos Victoria also received approximately 164 000 cards signed by individuals to the same effect. This level of concern about deforestation of orangutan habitat for palm oil production cannot be dismissed. However, the committee does not accept that this is an excuse for passing flawed and potentially damaging legislation which would not achieve the results intended.
- 2.62 If the Bill was passed it could have a range of serious unintended consequences including circumventing the proven food labelling practice administered by FSANZ. This body advised the committee that if the Bill was passed it would have to prepare a standard 'that would not go into the Australia New Zealand Food Standards Code because it has not been developed under the process that has been agreed through the intergovernmental agreements'.⁵⁰ This would mean that there would be no enforcement of the standard because State and Territories would not have adopted it.

50 Mr Steve McCutcheon, *Committee Hansard*, Canberra, 18 August 2011, p. 3.

- 2.63 Similarly, Australian Consumer Law would be compromised if the Bill were passed. Treasury advised that the Bill has the potential to jeopardise the benefits gained from nationally consistent legislation. This would occur if the Commonwealth passed the law and one or more States or Territories did not. The Treasury noted that this 'could result in individuals and unincorporated businesses in those jurisdictions being subject to a different set of requirements'.⁵¹
- 2.64 In view of these major concerns, the committee is not prepared to recommend that the House pass defective legislation that would have serious unintended consequences.
- 2.65 It should be noted that a process for dealing with all oils has commenced through the report *Labelling Logic: Review of Food Labelling: Law and Policy*. In particular, Recommendation 12 of this report stated:
- That where sugars, fats or vegetable oils are added as separate ingredients in a food, the terms 'added sugars' and 'added fats' and/or 'added vegetable oils' **be used in the ingredient list** as the generic term, followed by a bracketed list (e.g., added sugars (fructose, glucose syrup, honey), added fats (**palm oil, milk fat**) or added vegetable oils (sunflower oil, palm oil)).
- 2.66 On 9 December 2011 the Australian and New Zealand Food Regulation Ministerial Council will consider a whole of Commonwealth, State, Territory and New Zealand Government response to the Report, *Labelling Logic: Review of Food Labelling Law and Policy*. The committee notes recommendation 12 of the report and encourages the Ministerial Council to give it serious consideration.

Recommendation 1

- 2.67 **The House of Representatives should not pass the Food Standards Amendment (Truth in Labelling-Palm Oil) Bill 2010 because the legislation is flawed and would result in a range of unintended consequences. The House should note that an alternative and superior approach to addressing palm oil labelling is already under consideration.**

On 9 December 2011 the Australian and New Zealand Food Regulation Ministerial Council will consider a whole of Commonwealth, State,

51 Mr Bruce Paine, *Committee Hansard*, Canberra, 18 August 2011, p. 28.

**Territory and New Zealand Government response to the Report,
*Labelling Logic: Review of Food Labelling Law and Policy.***

Recommendation 12 of this reports states:

- That where sugars, fats or vegetable oils are added as separate ingredients in a food, the terms 'added sugars' and 'added fats' and/or 'added vegetable oils' be used in the ingredient list as the generic term, followed by a bracketed list (e.g., added sugars (fructose, glucose syrup, honey), added fats (palm oil, milk fat) or added vegetable oils (sunflower oil, palm oil)).

The committee supports the Ministerial Council giving serious consideration to recommendation 12 of the report.

Julie Owens, MP

Chair

14 September 2011

