

**REPORT -  
DEVELOPMENT OF THE  
BI-NATIONAL  
FOOD LABELLING  
COMPLIANCE AND ENFORCEMENT FRAMEWORK**

Prepared by the  
Joint Food Regulation Standing Committee (FRSC)/ Implementation  
Sub-Committee for Food Regulation (ISFR) Working Group on Food Labelling Monitoring  
and Enforcement

**Working Group Members:**

Department of Health, South Australia (Chair)  
Commonwealth Department of Health  
Department of Health & Human Services, Victoria  
New South Wales Food Authority  
New Zealand Ministry for Primary Industries  
Queensland Health

**Acronyms and Abbreviations**

<b>ACCC</b>	Australian Competition and Consumer Commission
<b>ANAO</b>	Australian National Audit Office
<b>FRSC</b>	Food Regulation Standing Committee
<b>ISC</b>	Implementation Sub-Committee (now the Implementation Sub-Committee for Food regulation)
<b>ISFR</b>	Implementation Sub-Committee for Food Regulation (formerly the Implementation Sub-Committee (ISC))
<b>the Forum</b>	The Australia and New Zealand Ministerial Forum on Food Regulation [formerly the COAG Legislative and Governance Forum on Food Regulation and before that the Australia and New Zealand Food Regulation Ministerial Council (The Forum)]
<b>the Enforcement Guideline</b>	Australian and New Zealand Food Regulation Enforcement Guideline, Version 8, 10 November 2009
<b>the Framework</b>	The Food Labelling Compliance and Enforcement Framework
<b>Labelling Logic</b>	Final report of the Review of Food Labelling Law and Policy (2011)
<b>the Strategy</b>	The Food Labelling Compliance and Enforcement Strategy
<b>the Working Group</b>	Joint ISFR/FRSC Working Group on Food Labelling Monitoring and Enforcement

## Contents

EXECUTIVE SUMMARY .....	iii
1. BACKGROUND .....	1
2. THE TASK OF THE WORKING GROUP .....	2
3. METHODOLOGY OF THE WORKING GROUP.....	2
4. EXISTING AND BEST PRACTICE POLICY AND REGULATORY APPROACHES .....	3
4.1 Existing and Best Practice Overarching Principles.....	3
4.2 Existing and best practice policy approaches to generating compliance .....	6
4.3 Existing and best practice policy and regulatory approaches to monitoring compliance.....	7
4.4 Existing and best practice policy and regulatory approaches to responding to non-compliance .....	8
4.5 Co-ordination efforts between regulators to achieve a consistent approach to compliance and enforcement.....	11
5. CONCLUSIONS OF THE WORKING GROUP.....	15
5.1 Overarching Principles and Improved Co-ordination and Consistency.....	15
5.2 Generating compliance.....	16
5.3 Monitoring compliance.....	16
5.4 Responding to non-compliance .....	17
6. THE WORKING GROUP'S ADVICE AND ACTIONS.....	20
7. THE WORKING GROUP'S RECOMMENDATIONS .....	24
APPENDIX A – CONSULTATION ON THE BI-NATIONAL FOOD LABELLING COMPLIANCE AND ENFORCEMENT FRAMEWORK.....	26
A.I Purpose and Scope of the Consultation .....	26
A.II Questions Asked at Consultation .....	27
A.III List of Submitters .....	27
A.IV Summary of Submissions .....	28
Response to Questions.....	28
Additional Comments.....	28
Working Group Actions .....	32

## **EXECUTIVE SUMMARY**

### **The task of the Working Group**

The task of the Working Group is to provide advice to the Implementation Sub-Committee for Food Regulation (ISFR) and Food Regulation Standing Committee (FRSC) regarding implementing the COAG Legislative and Governance Forum on Food Regulation (FoFR) [now the Australia and New Zealand Ministerial Forum on Food Regulation (the Forum)] responses to Recommendations 3, 57 and 58 of *Labelling Logic: Review of Food Labelling Law and Policy* (2011) [*Labelling Logic*].

The specific task is to provide advice to ISFR and FRSC about:

1. the exploration of a range of options to improve the capacity of the food regulatory system to monitor and enforce food laws in a more consistent and effective way, taking into account risk management principles;
2. a high-level regulatory monitoring and enforcement strategy and its practical implementation;
3. the consideration of the work already completed by the ISC [Implementation Sub-Committee of FRSC (now ISFR)] and the range of potential enforcement tools that could be available to address noncompliant labelling; considered a possible package of enforcement tools and consideration of how this will be used;
4. the consideration of amendments to the Model Food Provisions.

The Food Labelling Compliance and Enforcement Framework forms part of the Working Group's advice to ISFR and FRSC.

### **Process used by the Working Group**

The Working Group considered existing and best practice policy and regulatory approaches to monitoring and enforcement of food labelling:

In addition, the Working Group considered existing co-ordination efforts between regulators to achieve a consistent approach to compliance and enforcement.

### **Summary of findings and conclusions of the Working Group**

The full findings and conclusions of the Working Group are discussed on pages 3 to 19 of this report. In summary they are:

- The outcome that all food regulators seek to achieve is consistent industry compliance with food labelling requirements and jurisdictional food laws.
- Food regulators apply the concept of a compliance and enforcement continuum: generating compliance; monitoring compliance; and responding to non-compliance.
- Food regulators apply resources across the whole continuum and apply a consistent risk based, graduated, and proportionate approach across the continuum. The criteria used by food regulators in consistently determining risk, graduation and proportionality are not articulated anywhere.

- The objectives and principles of this consistent approach are articulated in the Australia & New Zealand Enforcement Guideline (the Enforcement Guideline) which only applies to enforcement not the whole continuum.
- Significant resources have been expended in the last six years (since 2008 when the previous ISC work was undertaken) to improve co-ordination and consistency of activity and actions across jurisdictions. However, these efforts are not articulated anywhere.
- The existing policy and regulatory approaches applied by food regulators to the administration of food labelling regulation are consistent with best practice. It is only where the existing approaches fall short (or are not fit for purpose) that additional regulatory measures should be pursued; this is consistent with best practice regulation. Therefore, existing policy and regulatory approaches to the administration of food labelling regulation should not be amended.
- All regulators adopt consistent principles for selecting an enforcement response, based on the Enforcement Guideline. These principles facilitate the application of actions for addressing non-compliance in a timely, risk-based, graduated and proportionate manner.
- The existing, risk-based approach applied by food regulators to compliance, monitoring and enforcement (the continuum), which is supported by the Forum, is consistent with the Food Labelling Conceptual Framework proposed by Labelling Logic that was added to the Overarching Strategic statement for the food regulatory system in 2012.
- Regulators adopt a risk-based, proportionate response to any non-compliance. Relevant considerations include:
  - the public health and safety risk, including whether there has been illness, injury or death;
  - the severity of the non-compliance; and
  - the compliance history of the food premises/proprietor.
- These considerations and influencing factors are consistent with those of other like regulators including the Australian Competition and Consumer Commission (ACCC). As noted in the ACCC's compliance and enforcement policy: *"The ACCC cannot pursue all the complaints it receives about the conduct of traders or businesses and the ACCC rarely becomes involved in resolving individual consumer or small business disputes...The ACCC therefore exercises its discretion to direct resources to the investigation and resolution of matters that provide the greatest overall benefit for competition and consumers."*
- Many of the overarching principles currently consistently applied by food regulators which result in the food labelling compliance and enforcement system being consistent with best practice are transparently articulated in different public documents (e.g. the Enforcement Guideline), some are not. They are not articulated in a bi-nationally agreed document.

- Not all complaints relate to labelling non-compliance. In many cases the complaint relates to a misunderstanding about the requirements of the food labelling Standards. In some jurisdictions this is up to 50 per cent of all food labelling complaints received by the food regulator. Therefore, the number of complaints should not be used as a proxy for the number of reported examples of labelling non-compliance; or the level of labelling non-compliance.
- When non-compliance is identified food regulators have an existing and effective graduated range of actions to address it. These include verbal and written warnings, improvement notices, prohibition orders, seizure powers, penalty and infringement notices (PINs), prosecution and court orders, publication of names, recalls, emergency orders and actions relating to registration/licensing.
- This range of enforcement actions enables flexibility in responding to non-compliance and facilitates a risk-based, graduated and proportionate response to non-compliance. Food regulators use a hierarchy of graduated regulatory responses; using informal responses (such as encouragement, education, warnings and engagement) while reserving more punitive measures for serious non-compliance or for when lower level responses fail to achieve the desired regulatory outcomes. The aim is to enable jurisdictions to achieve the same outcome - which is industry compliance.
- Food regulators reserve more punitive measures for serious non-compliance or for when lower level responses fail to achieve the desired regulatory outcomes.
- *Labelling Logic* states that:
  - if prosecutions are taken to be the sole measure of enforcement, this overlooks the fact that jurisdictions use informal approaches to achieve compliance and also that prosecution is not appropriate in every case where a breach has occurred;
  - under current legislation, formal enforcement actions for breaches of food labelling are almost always limited to prosecutions, which are often time-consuming and expensive to mount; and
  - more immediate and productive ways of securing compliance with the Code should be considered such as orders and undertakings, prosecutions only being required when the breach is regarded as sufficiently serious to warrant it, for repeat offenders or where the person has not complied with an order of an undertaking.
- The majority of food labelling non-compliance can be effectively managed and resolved administratively rather than through enforced, statutory enforcement actions. However, the fact that these informal approaches are valid, best practice, cost effective and produce a timely outcome is not articulated anywhere.
- The Enforcement Guideline includes the breadth of enforcement actions available to regulators enabling a risk based, graduated and proportionate response - from informal actions to those prescribed by law. However, a number of enforcement actions reflected in the model food provisions are missing from the Enforcement Guideline (e.g. mandated recalls).

- In terms of enforcement actions reflected in the Model Food Provisions, not all jurisdictions currently have all the actions at their disposal for responding to labelling non-compliance (e.g. improvement notices, PINs). Should a jurisdiction wish to address this, it does not require amendment to the Model Food Provisions because the Model Food Provisions already provide for these enforcement actions. It would, however, require amendments to existing legislation in the affected jurisdictions and the agreement of the relevant Government.
- In terms of enforcement actions not reflected in the Model Food Provisions which are available to other like regulators (e.g. the ACCC), the most relevant to food regulators is Enforceable Undertakings. However, as demonstrated in the case of Victoria, provisions enabling the issue of Enforceable Undertakings can already be introduced into food laws while remaining consistent with the Model Food Provisions. An Enforceable Undertaking can be designed to simply achieve compliance rather than apply a penalty or designed to also deliver other outcomes, such as remedying the harm caused by conduct.
- The existing actions available to regulators enable flexibility in responding to non-compliance such that the response is targeted at the risk posed. The fact that different jurisdictions have slightly different actions does not fundamentally undermine their capacity to respond flexibly to most non-compliance and to achieve the desired regulatory outcomes –which is compliance – in a timely and cost effective manner (because most issues are dealt with administratively).
- There are also mechanisms for jurisdictions to discuss and devise an agreed co-ordinated consistent approach to an enforcement response.

Opportunities for improvement identified by the Working Group are:

- A bi-national Food Labelling Compliance and Enforcement Framework, particularly the high-level Strategy that the Forum agreed should be developed by FRSC, should transparently articulate :
  - the existing overarching principles which result in the food labelling compliance and enforcement system being consistent with best practice, such as the application of a risk-based approach; and
  - the mechanisms used by food regulators to facilitate co-ordination and consistency.
  - that consistently with best practice administration food regulators consider generating compliance important and invest in activities both locally and nationally to generate compliance.
  - that consistently with best practice administration food regulators use a consistent, risk-based, graduated and proportionate approach that uses both proactive and reactive activities in monitoring compliance with food labelling requirements.
  - the criteria used by food regulators in determining risk, graduation and proportionality.
  - that consistently with best practice administration the use of informal actions to gain compliance is valid, timely and cost-effective
  - that food regulators use a hierarchy of regulatory responses; using lower level responses (such as encouragement, education, warnings and engagement) while reserving more punitive measures for serious non-compliance or for when lower level responses fail to achieve the desired regulatory outcomes.

## **Consultation with stakeholders**

Consultation with key stakeholder peak bodies was held in May 2015 on the findings and conclusions of the Working Group about existing and best practice policy and regulatory approaches to food labelling compliance, monitoring and enforcement using a consultation paper based on this Report and the draft Food Labelling Compliance and Enforcement Framework.

The Working Group received 10 submissions expressing general support. In response to feedback the Working Group made some minor amendments to the high-level Compliance and Enforcement Strategy. Further details regarding the consultation and stakeholder feedback can be found in Appendix A of this report at pages 26 to 32.

## **Advice and Actions of the Working Group**

Based on its findings, conclusions and stakeholder consultation, the Working Group has developed advice and undertaken actions to enable it to make recommendations to ISFR and FRSC regarding implementing the Forum's response to *Labelling Logic* recommendations 3, 57 and 58. A summary of advice and actions is below. For the full advice and actions see pages 20 to 23.

### **Recommendations 3 and 57**

The Working Group has explored a range of options to provide the best capacity for the food regulatory system to monitor and enforce food labelling laws in a more consistent and effective way, taking into account risk management principles.

To implement the Forum's response to recommendations 3 and 57, and to address a number of the gaps identified, the Working Group has developed a Food Labelling Compliance and Enforcement Framework (the Framework). It is a bi-national, risk-based, consistent, proportionate, graduated, prompt, effective and transparent framework for the monitoring and enforcement of food labelling. It has three components: a high level strategy; a suite of food labelling enforcement actions; and guidance for food regulators about labelling compliance, monitoring and enforcement.

The Working Group advises that the high level strategy (the Strategy) should be implemented using the other two components of the Framework – the suite of enforcement actions which is an amended Appendix 1 of the Australia and New Zealand Enforcement Guideline and the guidance to food regulators which is the Australian National Audit Office's (ANAO) *Better Practice Guide to Administering Regulation* (2014). There is a section in the Strategy that articulates this.

In Working Group has also considered monitoring and enforcement outcomes.

In relation to a possible package of enforcement tools and how it will be used, see implementation of the Forum's response to Recommendation 58 below.

No further policy advice or action is required regarding implementing the Framework or the Forums response to this recommendation.

### **Recommendation 58**

The Working Group has considered the work already completed by the Implementation Sub-Committee of FRSC (ISC, now ISFR) and the range of potential enforcement tools that could be available to address non-compliant labelling; consideration of a possible package of enforcement tools, and consideration of how this will be used.

The Working Group has considered amendments to the Model Food Provisions and advises that amendments of those provisions is not necessary. Jurisdictions should seek the agreement of their Governments to develop amendments to their existing legislation should they wish to expand their suite of enforcement actions.

The Framework developed by the Working Group articulates that food regulators use a hierarchy of graduated regulatory responses; using informal responses (such as encouragement, education, warnings and engagement) while reserving more punitive measures for serious non-compliance or for when lower level responses fail to achieve the desired regulatory outcomes. It also articulates that this is in line with best practice regulation as established by the ANAO *Better Practice Guide* (2014). The Framework provides guidance to food regulators about how to use these available enforcement actions in a risk-based, graduated and proportionate way.

The Working Group has updated the Enforcement Guideline to include a description of all the actions reflected in the model food provisions available to food regulators and to include a description of enforceable undertakings.

No follow on work needs to be undertaken to implement the Framework, the Forum's response to this recommendation or the practical implementation of recommendation 3 which is addressed above.

### **The recommendations of the Working Group**

The full recommendations can be found on pages 24 and 25. In summary they are:

#### **1. In relation to the exploration of a range of options to provide the best capacity for the food regulatory system to monitor and enforce food labelling laws in a more consistent and effective way, taking into account risk management principles, the Working Group recommends:**

1. That existing policy and regulatory approaches used by regulators should remain flexible so that compliance and monitoring activities, and enforcement actions, can be targeted at the risk posed.
2. Risk management, which is an integral component of good regulatory administration, should continue to underpin food labelling regulatory activity.
3. That existing policy and regulatory approaches applied by food regulators to the administration of food labelling regulation are consistent with best practice.
4. That existing policy and regulatory approaches to the administration of food labelling regulation not be amended, but that those approaches and their underpinning objectives and principles be transparently articulated in a food labelling compliance

and enforcement framework.

**2. In relation to a high-level regulatory monitoring and enforcement strategy and its practical implementation, the Working Group recommends:**

5. That the high-level, bi-National Food Labelling Compliance and Enforcement Strategy is adopted by jurisdictions.

**3. In relation to the consideration of the work already completed by the ISFR and the range of potential enforcement tools that could be available to address non-compliant labelling; the consideration of a possible package of enforcement tools and the consideration of how this will be used, the Working Group recommends:**

6. That jurisdictions also adopt :
  - a suite of enforcement actions for food regulators for addressing non-compliance with labelling requirements, which are contained in a revised Appendix 1 to the Australia and New Zealand Enforcement Guideline; and
  - the Australian National Audit Office's [Better Practice Guide to Administering Regulation](#).
7. To achieve industry compliance, jurisdictions should continue to apply the existing, effective range of enforcement actions to address non-compliance which are flexible, risk-based, graduated and proportionate.

**4. In relation to the consideration of amendments to the Model Food Provisions, the Working Group recommends:**

8. Where jurisdictions wish to expand their statutory enforcement actions prescribed by law, they should continue to introduce them into their food laws while remaining consistent with the Food Regulation Agreement.

## 1. **BACKGROUND**

In 2010, an independent review of food labelling law and policy was commissioned by the Forum. The review presented its final report entitled *Labelling Logic: Review of Food Labelling Law and Policy* in January 2011 (*Labelling Logic*).

Three recommendations of *Labelling Logic* are relevant to compliance, monitoring and enforcement of food labelling laws:

*Recommendation 3: That once the case for a labelling standard has been established and becomes part of the Food Standards Code, sufficient resources be allocated to ensure that it is effectively monitored and enforced.*

*Recommendation 57: That monitoring and enforcement of food labelling requirements of the Food Standards Code (accuracy as well as the presence of labelling information) be considered equally important as other aspects of the Food Standards Code and the responsible agencies be given the appropriate level of resources to meet their obligations.*

*Recommendation 58: That the Model Food Provisions and the food acts of the jurisdictions be amended to allow a more versatile range of enforcement provisions, such as the power to make orders or require user-paid compliance testing consequent on a breach or impose enforceable undertakings in relation to non-compliant labelling.*

The Forum's proposed actions in response these recommendations were:

Recommendation 3 - The FoFR will explore a range of options to improve the capacity of the food regulatory system to monitor and enforce food laws in a more consistent and effective way. This work will take into account risk management principles. The Food Regulation Standing Committee (FRSC) (in consultation with its Implementation Sub-Committee (ISC) members) will develop a high-level regulatory monitoring and enforcement strategy and a possible package of enforcement tools (refer also to the response to recommendation 58) with advice on how this will be used.

Recommendation 57 - The FoFR supports the existing risk-based approach to monitoring and enforcement. It will continue to receive advice from the FRSC on monitoring and enforcement outcomes, and respond to issues when appropriate.

Recommendation 58 - The FoFR will request the FRSC to consider the work already completed by the ISC and the range of potential enforcement tools that could be available to address noncompliant labelling and make recommendations to the FoFR regarding amendments to the Model Food Provisions to be adopted by all jurisdictions. The practical implementation of recommendation 3 will also be considered as part of this work.

To undertake this work, FRSC and ISFR established a Joint FRSC /ISFR Working Group on Food Labelling Monitoring and Enforcement (the Working Group).

## **2. THE TASK OF THE WORKING GROUP**

The task of the Working Group is to provide advice to ISFR and FRSC regarding implementation of the Forum's response to *Labelling Logic* recommendations 3, 57 and 58 (discussed above in section 1).

To develop this advice in Stage 1 of the project the Working Group has:

1. explored a range of options to provide the best capacity for the food regulatory system to monitor and enforce food laws in a more consistent and effective way. This work has taken into account risk management principles in the context of the administration of food labelling regulation;
2. developed a high-level regulatory monitoring and enforcement strategy and considered its practical implementation;
3. considered the work already completed by the ISC (now ISFR) and the range of potential enforcement tools that could be available to address non-compliant labelling; considered a possible package of enforcement tools and how this will be used; and
4. considered amendments to the Model Food Provisions.

In doing the above work the Working Group considered existing and best practice policy and regulatory approaches to monitoring and enforcement of food labelling and the existing co-ordination efforts between regulators to achieve a consistent approach to compliance and enforcement.

The Food Labelling Compliance and Enforcement Framework (the Framework) forms part of the Working Group's advice to ISFR and FRSC.

At the end of Stage 1 of the project the Working Group is to provide advice to ISFR and FRSC regarding follow on work to be undertaken in Stage 2 to implement the framework; which would include implementation of recommendations 57 and 58.

## **3. METHODOLOGY OF THE WORKING GROUP**

The Working Group considered existing and best practice policy and regulatory approaches to monitoring and enforcement and considered existing co-ordination efforts between regulators to achieve a consistent approach to monitoring and enforcement.

The considerations of the Working Group were informed by:

- an environmental scan;
- the previous ISC work regarding food labelling enforcement tools;
- advice and data from food regulators;
- the advice of a consultant;
- the *Australian Government Guide to Regulation*<sup>1</sup>;
- the Australian National Audit Office (ANAO) *Better Practice Guide*<sup>2</sup> and similar state and territory documents<sup>3</sup>;
- the *Labelling Logic* report and the Forum's response to *Labelling Logic*;
- Compliance and Enforcement Guidelines and Policies of food regulators in Australia, New Zealand and other international jurisdictions.

---

<sup>1</sup> Commonwealth of Australia, Department of the Prime Minister and Cabinet 2014, *The Australian Government Guide to Regulation*, Canberra, <<https://cuttingredtape.gov.au/handbook/australian-government-guide-regulation>>

<sup>2</sup> Australian National Audit Office 2014, *Administering Regulation - Better Practice Guide*, Canberra, <<http://www.anao.gov.au/Publications/Better-Practice-Guides/2013-2014/Administering-Regulation>>

<sup>3</sup> State and Territory like documents, for example: NSW Department of Premier and Cabinet 2014, *Guidance for regulators to implement outcomes and risk-based regulation*

## **4. EXISTING AND BEST PRACTICE POLICY AND REGULATORY APPROACHES**

This section simply articulates what the Working Group identified from its consideration of:

- existing and best practice policy and regulatory approaches to food labelling monitoring and enforcement and
- existing co-ordination efforts between regulators to achieve a consistent approach to compliance and enforcement.

The Working Group considered a range of Commonwealth, State and Territory best practice guidelines. For the sake of simplicity the Working Group decided to base its consideration on the following Commonwealth documents - the *Australian Government Guide to Regulation* and the Australian National Audit Office (ANAO) *Administering Regulation Better Practice Guide*, June 2014.

### **4.1 Existing and Best Practice Overarching Principles**

#### **4.1.1 Existing Overarching Principles**

The Working Group identified that food regulators consistently apply a number of overarching principles to monitoring and enforcement, these are described below.

##### *Primary objective of food regulators*

The primary objective of all food regulators is to achieve the same outcome - industry compliance with food labelling requirements and jurisdictional food laws.

##### *A compliance and enforcement continuum*

A significant finding is that food regulators consistently apply the concept of a compliance and enforcement continuum<sup>4</sup>:

- generating compliance;
- monitoring compliance; and
- responding to non-compliance.

The table below provides some examples of food labelling regulatory activities and actions across the continuum.

---

<sup>4</sup> Canadian Food Inspection Agency 2012, Compliance and Enforcement Operational Policy, viewed 20 June 2014, <[www.inspection.gc.ca/about-the-cfia/accountability/compliance-and-enforcement/operational-policy/](http://www.inspection.gc.ca/about-the-cfia/accountability/compliance-and-enforcement/operational-policy/)>, CFIA, Canada.

Table 1. Proactive and reactive food labelling regulatory activities and actions across the compliance and enforcement continuum.

**Continuum of Compliance and Enforcement**

<p>Activities for generating compliance <i>Proactive &amp; reactive</i></p>
Education
Information and Advice
Use of the Integrated Model in Standards Development
Mediation
Public disclosure e.g. register of prosecutions

<p>Activities for monitoring compliance <i>Proactive &amp; reactive</i></p>
Audits and Inspections
Sampling and Surveys
Trend analysis of data

<p>Actions for responding to non-compliance <i>Reactive</i></p>
Warning
Notice / Order
Conditions on / Cancellations of Registration
Seizure or Mandated Recalls
Enforceable Undertakings
Expiation
Prosecution

Food regulators apply resources across the whole continuum and also apply a risk-based, graduated, and proportionate approach across the continuum.

Therefore, the remainder of this document is framed around the compliance, monitoring and enforcement continuum:

- generating compliance;
- monitoring compliance; and
- responding to non-compliance.

*A risk-based approach*

*Labelling Logic* recommended a Food Labelling Conceptual Framework for food regulators to provide a principles-based approach for decision making regarding food labelling regulation. It is underpinned by a risk-based issues hierarchy.

In its response to *Labelling Logic*, the Forum supported the existing risk-based approach to monitoring and enforcement and agreed that action in response to *Labelling Logic* recommendations 3 and 57 would take into account risk management principles.

The Forum also agreed to the addition of the Food Labelling Conceptual Framework to the Overarching Strategic Statement for the food regulatory system in 2012. The Framework establishes that food labelling policy is to be guided by a risk-based, three tier issues hierarchy in the descending order of risk priority:

- food safety;
- preventative health; and
- consumer values issues.

The existing risk-based approach applied by food regulators to compliance, monitoring and enforcement, which is supported by the Forum, is consistent with the Food Labelling Conceptual Framework added to the Overarching Strategic Statement for the food regulatory system in 2012.

### **Summary of findings:**

The overarching principles identified above, which food regulators consistently apply to compliance, monitoring and enforcement, are not articulated in any bi-nationally agreed document.

#### **4.1.2 Best Practice Overarching Principles**

##### **The Australian Government Guide to Regulation**

This Guide provides that regulation should not be the default option for policy makers and should be imposed only when it can be shown to offer an overall net benefit. While the Guide is an Australian Government publication, it reflects the general policy approach of most Governments.

##### **Administering Regulation Better Practice Guide (ANAO June 2014)**

The ANAO *Better Practice Guide* was published in a period of change in regulatory approach. It replaces the ANAO's 2007 Administering Regulation Best Practice Guide and aims to provide guidance to regulators on how to efficiently and effectively administer regulation. The content of the guide has been revised to reflect the changing focus of regulatory administration. The forward states:

*“In particular, greater attention is given in this guide to the importance of risk management, effective stakeholder engagement, the value of data analysis as a source of regulatory intelligence, regulator behaviour, and regulator and regulatory performance.”*

Further, the introduction states:

*“Sound regulatory administration is risk-based and should generally be proportionate to the risk of non-compliance or regulatory failure. Adopting a risk-based approach can assist a regulator in minimising compliance costs for regulated entities, streamlining interaction between them and regulated entities, and enhancing the benefits derived for the community. Decisions made in administering regulation should be objective and, made without undue bias and in the absence of conflicts of interest”.*

The Guide contains key principles and guidance for regulators to support effective regulatory practice. Those relevant to this section are identified below.

##### *A risk – based approach to regulatory administration*

In relation to this matter, the ANAO *Better Practice Guide* states:

- Risk management is an integral component of good regulatory administration and underpins almost all regulatory activity. It can be used to guide the development of management systems, processes and structures to support regulatory administration, the monitoring and management of regulatory compliance, and the efficient allocation of available resources.
- A risk-based approach can also assist in engendering support for the regulatory regime with stakeholders having confidence in the regulators approach and ability to manage risks. Nevertheless, stakeholders' tolerance to risk can vary and regulators, in managing risk, need to be flexible and adaptable in responding to changes in stakeholder expectations.
- It is important to highlight that a regulator's role is not to completely eliminate risk, but to effectively manage risk, as the cost associated with eliminating risk would in most cases be prohibitive. In adopting a risk based approach regulators should consider stakeholder expectations, while at the same time acknowledging that some level of residual risk will exist in the system.
- Risk-based approaches provide regulators with a structured framework to identify, analyse, prioritise and respond to risk. Regular monitoring of regulatory risk enables a regulator to adjust its strategies, activities and enforcement activities to reflect changing priorities that result from new and evolving regulatory threats and changes in stakeholder expectations.

It also states that the key considerations for regulators about a risk-based approach to regulatory administration are:

- Promote a risk management culture that supports an integrated approach to the identification and management of risk, while recognising that a level of residual risk will remain as the cost associated with eliminating risk would in most cases be prohibitive.
- Integrated risk management into strategy, planning, decision-making and other processes.
- Regularly monitor and review risks – this information can be shared across the regulator and used to adapt or tailor risk management processes and effort according to the likelihood, consequences and nature of risks identified.

## **4.2 Existing and best practice policy approaches to generating compliance**

### **4.2.1 Existing policy approaches to generating compliance**

The Working Group identified that all food regulators place significant investment “upfront” in generating industry compliance through:

- jurisdictional initiatives; and
- bi-national, co-ordinated approaches e.g. the integrated model for standards development.

#### **Summary of findings:**

There is no bi-nationally agreed, high-level document which articulates that food regulators invest in generating food labelling compliance. The Enforcement Guideline only briefly discusses generating compliance.

### **4.2.2 Best practice policy approaches to generating compliance**

The *ANAO Better Practice Guide* provides regulators with guidance about generating compliance (called “educating regulated entities about the regulatory regime”) and suggests that:

- the achievement of the Governments’ economic, social or environmental policy objectives through the administration of regulation will generally depend upon the level of compliance by regulated entities;
- to secure regulated entities’ compliance, regulators should encourage regulated entities to comply with regulatory requirements by providing advice and guidance that is readily accessible and in a format that is appropriate for the intended audience.

A key principle of the *ANAO Better Practice Guide* about generating compliance is that:

- regulated entities need to be aware of and understand their compliance obligations, and have the ability to readily access information about them; and that
- this requires regulators to effectively communicate to regulated entities their compliance obligations and their rights as a participant in a regulatory regime.

#### **4.3 Existing and best practice policy and regulatory approaches to monitoring compliance**

##### **4.3.1 Existing policy and regulatory approaches to monitoring compliance**

The Working Group identified that:

- Food regulators monitor compliance using a risk-based, graduated and proportionate approach;
- Food regulators monitor compliance using a variety of means including, proactive activities such as audits and inspections and surveys, as well as reactive responses to complaints.
- All jurisdictions have processes for reviewing and prioritising complaints in accordance with the risk posed. The nature of the complaint influences how the complaint is investigated.
- Not all complaints relate to labelling non-compliance. In many cases the complaint relates to a misunderstanding about the requirements of the food labelling Standards. In some jurisdictions this is up to 50 per cent of all food labelling complaints received by the food regulator.

##### **Summary of findings:**

In some jurisdictions up to 50 per cent of food labelling complaints are ultimately found not to be non-compliance.

The use of a risk-based, graduated and proportionate approach for food labelling monitoring is not articulated in any existing bi-nationally agreed document.

##### **4.3.2 Best practice policy and regulatory approaches to monitoring compliance**

A key principle in the *ANAO Better Practice Guide* for regulators that relates to the above activity (called “monitoring compliance with regulatory requirements”) is that:

- a key component of any regulatory regime is monitoring compliance with regulatory requirements; and that

- a risk-based approach to these activities assists a regulator in addressing the most serious risks, patterns of systemic non-compliance and effectively allocating resources while avoiding imposing unnecessary costs on regulated entities.

The Guide provides regulators with guidance about monitoring compliance with regulatory requirements stating that:

- a systematic, risk-based program of compliance review activities provides a regulator with a cost-effective approach to monitoring compliance, enables available resources to be targeted to higher priority regulatory risks and to respond pro-actively to changing and emerging risks;
- developing a monitoring strategy based on the assessment of risks can assist a regulator to give confidence to key stakeholders that regulatory risks are being appropriately managed and that the level of residual risk is acceptable;
- understanding risk in the regulatory environment also supports regulators in selecting the most appropriate compliance monitoring activities and to direct resources towards the areas of higher risk, where maximum benefit can be achieved;
- a compliance monitoring strategy should usefully describe the types of activities to be undertaken, the reasons for their selection, and the frequency of the activities.

A key consideration for regulators about monitoring compliance is:

- Adopting and promoting a risk-based approach to compliance monitoring.

#### **4.4 Existing and best practice policy and regulatory approaches to responding to non-compliance**

##### **4.4.1 Existing policy and regulatory approaches to responding to non-compliance**

The Working Group identified that policy and regulatory approaches that relate to responding to non-compliance fall into three areas:

1. Making decisions about appropriate actions
2. The actions that are available to food regulators to address non-compliance; and
3. Selecting an enforcement response once a decision is made to act.

##### *Decisions about appropriate actions*

- Regulators adopt a risk-based, proportionate response to any non-compliance. Relevant considerations include:
  - the public health and safety risk, including whether there has been illness, injury or death;
  - the severity of the non-compliance; and
  - the compliance history of the food premises/proprietor.
- These considerations and influencing factors are consistent with those of other like regulators including the Australian Competition and Consumer Commission (ACCC). As noted in the ACCC's compliance and enforcement policy:

*“The ACCC cannot pursue all the complaints it receives about the conduct of traders or businesses and the ACCC rarely becomes involved in resolving individual consumer or small business disputes...The ACCC therefore exercises its discretion to direct resources to the investigation and resolution of matters that provide the greatest overall benefit for competition and consumers.”*

- There are also mechanisms for jurisdictions to discuss and devise an agreed co-ordinated consistent approach.

### **Summary of findings:**

There is no bi-nationally agreed, high level document, which articulates:

- the consistent application of the above existing principles by food regulators in responding to food labelling non-compliance.
- the mechanisms available to jurisdictions to agree a consistent approach. One mechanism only - the Home Jurisdiction Rule – is mentioned briefly in the Enforcement Guideline.

#### *Actions available to food regulators to address non-compliance*

- There are a range of enforcement actions available to food regulators. These include verbal and written warnings, improvement notices, prohibition orders, seizure powers, penalty and infringement notices, prosecution and court orders, publication of names, recalls, emergency orders and actions relating to registration/licensing.
- The Enforcement Guideline includes the breadth of enforcement actions available to regulators enabling a risk-based, graduated and proportionate response - from informal actions to those prescribed by law.
- Some jurisdictions would like the capacity to issue Improvement Notices, Prohibition Orders and/or PINs (where they do not currently have such capacity) for labelling non-compliance.
- Provisions relating to Enforceable Undertakings available to other like regulators (the ACCC) are not part of the model food provisions, but have been introduced into food law by Victoria. In Victoria enforceable undertakings are designed to achieve compliance rather than apply a penalty. While, the ACCC's enforceable undertakings are designed to also deliver other outcomes, such as remedying the harm caused by the conduct.
- The existing actions available to food regulators enable flexibility in responding to non-compliance.

### **Summary of findings:**

A number of enforcement actions reflected in the model food provisions are missing from the Enforcement Guideline (e.g. mandated recalls). The existing actions available to food regulators enable a timely, flexible, risk-based, graduated and proportional response to non-compliance.

Enforceable undertakings can be designed to simply achieve compliance (e.g. as designed in Victoria) or can be designed to also deliver other outcomes, such as remedying the harm caused by conduct (e.g. as designed by the ACCC).

#### *Selecting an enforcement response once a decision is made to act*

- Regulators use principles for selecting an enforcement response based on the Enforcement Guideline. These principles are also reflected in a number of local monitoring and enforcement policies.
- Food regulators use a hierarchy of graduated regulatory responses; using informal responses (such as encouragement, education, warnings and engagement) while reserving more punitive measures for serious non-compliance or for when lower level responses fail to achieve the desired regulatory outcomes.
- In the vast majority of cases, food regulators resolve labelling non-compliance administratively through informal mechanisms such as discussions, meetings and

written correspondence with the offending business, rather than using enforcement actions prescribed in law.

- *Labelling Logic* states that:
  - if prosecutions are taken to be the sole measure of enforcement, this overlooks the fact that jurisdictions use informal approaches to achieve compliance and also that prosecution is not appropriate in every case where a breach has occurred;
  - under current legislation, formal enforcement actions for breaches of food labelling are almost always limited to prosecutions, which are often time-consuming and expensive to mount; and
  - the panel believes that more immediate and productive ways of securing compliance with the Code should be considered such as orders and undertakings, prosecutions only being required when the breach is regarded as sufficiently serious to warrant it, for repeat offenders or where the person has not complied with an order of an undertaking.
- There are also mechanisms for jurisdictions to discuss and devise an agreed co-ordinated consistent approach to an enforcement response.

### **Summary of findings:**

Food regulators use a hierarchy of graduated regulatory responses; using informal responses (such as encouragement, education, warnings and engagement) while reserving more punitive measures for serious non-compliance or for when lower level responses fail to achieve the desired regulatory outcomes. However, in the majority of cases compliance can be achieved successfully by informal approaches. This hierarchy of graduated response, including informal actions, is included in the Enforcement Guideline.

There is no bi-nationally agreed, high level document which articulates the numerous mechanisms available to jurisdictions to agree a consistent approach to selecting an enforcement response.

#### **4.4.2 Best Practice Policy and Regulatory Approaches to responding to non-compliance**

A key principle in the *ANAO Better Practice Guide* for regulators that relates to the above activity (called “managing non-compliance”) is that:

- a key component of any regulatory regime is managing non-compliance;
- a risk-based approach to these activities assists a regulator in addressing the most serious risks, patterns of systemic non-compliance and effectively allocating resources while avoiding imposing unnecessary costs on regulated entities; and that
- in the circumstances where a risk event occurs that has the potential to cause harm, a regulator may also need to have in place strategies to respond to the risk to minimise the potential harm and prevent its recurrence.

The *ANAO Better Practice Guide* provides regulators with guidance about managing non-compliance:

- there is no ‘one-size-fits-all’ approach to addressing non-compliance;
- it is generally accepted that regulators need a range of response options that are proportionate to the risks presented by an entity’s non-compliance;
- when a regulated entity fails to meet compliance obligations (generally referred to as non-compliance), a regulator should assess the extent of the non-compliance and the potential for harm, and initiate proportionate action to address the risks posed;

- the seriousness of the non-compliance and the regulated entity's compliance history may influence the design of a regulator's response; and
- where a regulator has an on-going relationship with a regulated entity, the aim is to reduce and/or eliminate the risk of non-compliance. However, in some instances, the public interest may be best served by a regulator revoking an entity's permission to operate and the entity exiting the regulated industry sector.

Key considerations for regulators about responding to non-compliance are:

- develop a set of relevant graduated responses to address non-compliance; and
- develop and communicate criteria to assist decision makers in designing a regulatory response that is consistent and proportionate to the risks posed by the non-compliance.

#### **4.5 Co-ordination efforts between regulators to achieve a consistent approach to compliance and enforcement**

Prior to *Labelling Logic*, since 2008, when the previous ISC work was undertaken, food regulators have adopted a number of measures and continue to improve consistency and co-ordination with respect to:

- the implementation of Standards;
- responding to complaints and monitoring compliance; and
- the taking of enforcement action.

Examples of these initiatives are discussed below:

- ISFR
- the ISFR Integrated Model for Standards Development and Consistent Implementation (the ISFR Integrated Model);
- the ISFR Coordinated Food Survey Plan;
- the ISFR Home Jurisdiction Rule;
- sector focused reviews to identify areas for improvement; and
- the Jurisdictional meeting.

#### **ISFR**

ISC [Implementation Sub-Committee of FRSC (now ISFR)] was set up by FRSC to foster a consistent approach across jurisdictions to implementing and enforcing food regulation.

ISFR allows Australian and New Zealand food regulators to discuss common approaches to implementation and develop agreed strategies to achieve a consistent approach to the way food regulations are implemented, interpreted and enforced across jurisdictions.

Food regulators highlighted the value of ISFR including how ISFR processes have improved (and co-operation strengthened) over the years.

#### **The ISFR Integrated Model**

The Integrated Model was developed by ISC to:

- assist in facilitating a nationally consistent approach to the implementation and

- enforcement of Primary Production and Processing (PPP) Standards;
- provide the tools to assist businesses to achieve compliance with the PPP Standard, and;
- provide constructive implementation and enforcement advice to Food Standards Australia New Zealand (FSANZ) during the FSANZ Standards development process.

#### The Integrated Model:

- describes a holistic approach to compliance that promotes greater collaboration between FSANZ and ISFR during Standards development, particularly in regard to implementation matters so as to minimise the risk of non-compliance;
- engages jurisdictions and industry earlier in the Standards development process, helping regulators to understand the implications of introducing a Standard and promoting better adoption and compliance in the longer term; and
- ensures that consideration is given to the implementation of proposed PPP Standards prior to the Forum's approval, thereby reducing delays in the adoption of PPP Standards by industry sectors and individual businesses.

While this Integrated Model was originally developed for PPP Standards, the model has also been used for the most recent Nutrition, Health and Related Claims (NHRC) Standard. The development of the NHRC Standard involved:

- close collaboration between FSANZ and ISC/ISFR to deal with implementation issues before the Standard was made;
- the development of detailed guidance material for industry; and
- ongoing discussions between jurisdictions about how the Standard will be implemented, monitored and enforced.

This approach focuses on investing resources 'up-front' to ensure that industry is well briefed on regulator expectations and to ensure that regulators have a shared understanding of how the Standard should be implemented. The expectation is that this reduces the risk of non-compliance (because industry is clear about regulator expectations).

#### **The ISFR Coordinated Food Survey Plan**

The Coordinated Food Survey Plan (CFSP) was developed by ISC to prioritise, plan and implement key survey activities of national and bi-national significance. The overarching objective of the CFSP is to achieve collective and strategic data generation, through the coordination and integration of surveillance, monitoring and evaluation activities, to address ISFR priorities. The CFSP is another co-ordinated approach that can assist with sector focused reviews across jurisdictions.

#### **The ISFR Home Jurisdiction Rule**

As noted in the Australian and New Zealand Food Regulation Enforcement Guideline:

ISC has created the Home Jurisdiction Rule to aid in resolving cross-jurisdictional issues involving food. The Home Jurisdiction Rule is an administrative process for liaison and coordination between food regulators where goods produced and used by food businesses

are traded across borders and where the head office of a business is located in a different state or territory.

The Home Jurisdiction Rule aims to:

- provide a framework for food regulators to manage issues of legislative non-compliance or complaints outside the scope of the National Food Incident Response Protocol for foods processed in one state or territory and sold, transported or traded to another;
- facilitate and support efficient communication between food regulators on cross jurisdictional matters;
- reduce duplication of enforcement action in more than one jurisdiction;
- promote the provision of information to another jurisdiction of any compliance or enforcement activities involving a business that is based in the other state/territory.

Food regulators confirmed that most jurisdictions consider that the Home Jurisdiction Rule has significantly clarified responsibility for dealing with complaints, including labelling complaints.

### **Sector focused reviews to identify areas for improvement**

Food regulators work together in innovative ways and develop fit for purpose solutions to try to achieve a consistent and co-ordinated approach to dealing with a particular issue of labelling non-compliance. One example of this is the labelling of infant formula which is described below.

In 2009, NSW undertook a review of compliance, by suppliers of infant and toddler formula products, with the labelling requirements of the Australia New Zealand Food Standards Code (the Code).

A report of the initial findings was provided to the infant formula industry in 2010. NSW also referred the findings to ISC (now ISFR) to develop and implement strategies including formation of an inter-jurisdictional Working Group to facilitate consistent regulatory action.

The Working Group (that included representatives from NSW, Victoria, Tasmania and NZ – the locations of the head offices of suppliers of infant formula products):

- categorised the 48 breaches identified by NSW into: breaches requiring follow-up action in accordance with the Compliance Strategy; breaches that were “grey” and required further clarification or clearer definition under the Code; matters where there was no consensus as to whether the issue identified amounted to a breach; and breaches that had since been rectified or the product was no longer available; and
- agreed that, due to the review (and further development of NHRC Standard) only breaches in the first category would be actively addressed by the responsible jurisdiction in accordance with the Enforcement Guideline. This meant issuing a warning or advisory letter and, if required, a face-to-face meeting with the company involved to encourage discussion and consultation. The Working Group agreed on the wording of correspondence. If compliance was not achieved using this approach it was agreed that the relevant jurisdiction could apply a higher level of sanction in accordance with the Enforcement Guideline.

This example demonstrates:

- the value of a collaborative approach by jurisdictions to address labelling non-compliance. Without this approach and agreed strategy, the issues arising from interpretation would have impaired management of non-compliance, particularly for non-compliance falling in the 'grey' area;
- the effectiveness of a whole-of-sector approach to enforcement rather than dealing with individual complaints; and
- the value of more informal enforcement approaches including discussions and warning letters. In each case this resolved the issue and delivered compliance in a cost effective and timely manner.

The example also highlighted issues with the drafting of the relevant standards because 40 of the 48 possible breaches fell in the 'grey' category and required further clarification or clearer definition under the Code. This reinforces the value of the Integrated Model for Standards Development where these issues can be ironed out prior to the making of the relevant Standard.

### **The Jurisdictional meeting**

The Jurisdictional meeting is an informal arrangement of food regulators to:

- provide an information sharing and educative environment for discussing current and emerging operational issues of interest (e.g. fee structures, third party auditing models, stakeholder engagement models);
- promote collaboration;
- provide networking/relationship/capacity and capability building opportunities. This includes opportunities to share training and development.

The Jurisdictional meeting is not intended to assume the roles or functions of ISFR, FRSC or FSANZ. Although some matters discussed may result in project proposals being brought to ISFR for consideration.

### **Summary of findings:**

These efforts between food regulators to improve co-ordination to achieve a consistent approach to compliance and enforcement of food labelling are not articulated in any existing bi-nationally agreed, high-level document. The Enforcement Guideline does mention the Home Jurisdiction Rule.

## **5. CONCLUSIONS OF THE WORKING GROUP**

The conclusions of the Working Group based on the above findings are set out below.

### **5.1 Overarching Principles and Improved Co-ordination and Consistency**

#### *Primary Objective and the Compliance and Enforcement Continuum*

The outcome that all food regulators seek to achieve is consistent industry compliance with food labelling requirements and jurisdictional food laws. To achieve this, food regulators apply resources, activities and actions in a risk-based, proportionate and graduated manner across the continuum of compliance and enforcement:

- generating compliance;
- monitoring compliance; and
- responding to non-compliance.

#### *A risk – based approach to regulatory administration*

Risk management is an integral component of good regulatory administration and underpins almost all regulatory activity. It can be used to guide the development of management systems, processes and structures to support regulatory administration, the monitoring and management of regulatory compliance, and the efficient allocation of available resources.

A risk-based approach can also assist in engendering support for the regulatory regime with stakeholders having confidence in the regulators approach and ability to manage risks. Nevertheless, stakeholders' tolerance to risk can vary and regulators, in managing risk, need to be flexible and adaptable in responding to changes in stakeholder expectations.

It is important to highlight that a regulator's role is not to completely eliminate risk, but to effectively manage risk, as the cost associated with eliminating risk would in most cases be prohibitive. In adopting a risk-based approach regulators should consider stakeholder expectations, while at the same time acknowledging that some level of residual risk will exist in the system.

#### *Improved Co-ordination and Consistency*

Significant resources have been expended in the last six years (since 2008 when the previous ISC work was undertaken) to improve co-ordination and consistency of activity and actions across jurisdictions, and to achieve the consistent outcome of industry compliance.

Efforts to improve co-ordination and consistency have occurred in the areas of:

- the implementation of Standards;
- responding to complaints and monitoring compliance; and
- the taking of enforcement action.

The mechanisms used include protocols, meetings, models and frameworks which can be applied to many different food labelling issues. Also, since 2008 food regulators have developed and used innovative fit for purpose solutions to address specific food labelling issues.

The Enforcement Guideline mentions briefly only one of these co-ordination mechanisms, because many have been developed and implemented since the Guideline was written.

## **Summary of Conclusions:**

The above principles and mechanisms to improve co-ordination and consistency result in a bi-national approach to compliance, monitoring and enforcement of food labelling which is holistic and meets the current best practice guide to administering regulation (Australian National Audit Office (ANAO) *Administering Regulation, Better Practice Guide*, June 2014).

Many of the overarching principles currently applied by food regulators which result in the food labelling compliance and enforcement system being consistent with best practice, such as the application of a risk-based approach as discussed above, are transparently articulated in different public documents, some are not.

The mechanisms developed by food regulators to improve co-ordination and consistency are not articulated in a document.

This is an area for improvement. A bi-national, food labelling compliance and enforcement framework, particularly the high-level Strategy that the Forum agreed should be developed, should consolidate:

- all the existing overarching principles which result in the food labelling compliance and enforcement system being consistent with best practice, such as the application of a risk-based approach; and
- an explanation of the mechanisms used by food regulators to facilitate co-ordination and consistency.

### **5.2 Generating compliance**

All food regulators place significant investment “upfront” in generating industry compliance. This is consistent with the ANAO *Better Practice Guide to Administering Regulation*.

Currently there exists a bi-national, agreed guideline for enforcement – the Enforcement Guideline. However, this is not a compliance guideline articulating that, in line with best practice, food regulators consider generating compliance important and invest in activities both locally and nationally to generate compliance.

This is an area for improvement. The high-level, bi-national monitoring and enforcement strategy agreed by the Forum (to be developed by FRSC in consultation with ISFR) should address this issue.

### **5.3 Monitoring compliance**

Food regulators monitor compliance using a consistent risk-based, graduated and proportionate approach which uses both proactive and reactive approaches. All jurisdictions have processes for reviewing and prioritising complaints in accordance with the risk posed. The nature of the complaint influences how the complaint is investigated. This is consistent with the ANAO *Better Practice Guide* which states:

- A risk-based approach to these activities assists a regulator in addressing the most serious risks, patterns of systemic non-compliance and effectively allocating resources while avoiding imposing unnecessary costs on regulated entities.
- Adopt and promote a risk-based approach to compliance monitoring.

The agreed bi-national public documents have a gap in relation to articulating and promoting that, in line with best practice, food regulators use a consistent, risk-based approach and both proactive and reactive activities in monitoring compliance with food labelling requirements. The high-level, bi-national monitoring and enforcement strategy agreed by the Forum to be developed by FRSC (in consultation with ISFR) should address this issue.

Not all complaints relate to labelling non-compliance. In many cases the complaint relates to a misunderstanding about the requirements of the food labelling Standards. In some jurisdictions this is up to 50 per cent of all food labelling complaints received by the food regulator. Therefore, the number of complaints should not be used as a proxy for the number of reported examples of labelling non-compliance; or the level of labelling non-compliance.

#### **5.4 Responding to non-compliance**

##### *Decisions about appropriate actions*

Food regulators cannot pursue or prosecute all labelling non-compliance. Decisions are made, applying consistent principles and taking into account local resources and priorities to determine the appropriate response (if any) to non-compliance. The principles, considerations and influencing factors used by food regulators to make decisions about pursuing non-compliance are consistent with those of other like regulators including the ACCC, and are consistent with the Forum's response to *Labelling Logic*.

Also, different enforcement actions may be appropriate for the same type of offence where the circumstances in each case are different.

These approaches are consistent with the ANAO *Better Practice Guide*, which states that:

- *“When a regulated entity fails to meet compliance obligations, a regulator should assess the extent of the non-compliance and the potential for harm, and initiate proportionate action to address the risks posed. The seriousness of the non-compliance and the regulated entity’s compliance history may influence the design of the regulator’s response.”*
- *“For example, a regulator may adopt a different regulatory posture with an entity displaying persistent non-compliant behaviour to an entity that has made a mistake, but has no past history of non-compliance or which is new to the sector and may not clearly understand its obligations”.*

##### *Actions available to food regulators to address non-compliance*

Food regulators have available a wide range of actions for addressing non-compliance - from verbal and written warnings, to prosecution and court orders and emergency orders. These enable a timely, risk-based, graduated and proportionate response to non-compliance. The aim is to enable jurisdictions to achieve the same outcome - which is industry compliance. This is consistent with the ANAO *Better Practice Guide*:

- there is no ‘one-size-fits-all’ approach to addressing non-compliance;
- it is generally accepted that regulators need a range of response options that are proportionate to the risks presented by an entity's non-compliance; and
- develop a set of relevant graduated responses to address non-compliance.

The existing actions available to regulators enable flexibility in responding to non-compliance such that the response is targeted at the risk posed. The fact that different jurisdictions have slightly different actions does not fundamentally undermine their capacity to respond flexibly to most non-compliance and to achieve the desired regulatory outcomes – which is compliance - in a timely and cost effective manner (because most issues are dealt with administratively).

The Enforcement Guideline should be updated to include a description of all the actions reflected in the model food provisions available to food regulators to address non-compliance.

Some jurisdictions would like the capacity to issue Improvement Notices, Prohibition Orders and/or PINs (where they do not currently have such capacity) because they considered that this would provide them with a more graduated response for dealing with resistant businesses. This does not require amendment to the Model Food Provisions because the Model Food Provisions already provide for these enforcement actions. It would, however, require amendments to existing legislation in the affected jurisdictions and the agreement of the relevant Government.

In terms of enforcement actions not reflected in the Model Food Provisions which are available to other like regulators (e.g. the ACCC), the most relevant to food regulators is Enforceable Undertakings. Enforceable undertakings can be designed to simply achieve compliance (e.g. as designed in Victoria) or can be designed to also deliver other outcomes, such as remedying the harm caused by conduct (e.g. as designed by the ACCC). As demonstrated in the case of Victoria, provisions enabling the issue of Enforceable Undertakings can already be introduced into food laws while remaining consistent with the Model Food Provisions. The Enforcement Guideline should also include a description of enforceable undertakings.

#### *Selecting an enforcement response*

All regulators adopt consistent principles for selecting an enforcement response, based on the Enforcement Guideline. These principles facilitate the application of actions for addressing non-compliance in a timely, risk based, graduated and proportionate manner. As noted by the ANAO in its *Better Practice Guide*:

*“When a regulated entity fails to meet compliance obligations, a regulator should assess the extent of the non-compliance and the potential for harm, and initiate proportionate action to address the risks posed. The seriousness of the non-compliance and the regulated entity’s compliance history may influence the design of the regulator’s response.”*

The Enforcement Guidelines reflect these best practice principles.

Food regulators use a hierarchy of graduated enforcement actions; using informal actions such as education, written warnings and meetings and escalating to more serious actions prescribed in law, such as prosecution, for serious non-compliance or when informal actions fail to achieve compliance.

Because the consistent primary objective of food regulators is to achieve food industry compliance, in the vast majority of cases, regulators resolve labelling non-compliance through the informal actions such as discussions, meetings or written correspondence with

the offending business.

This approach is consistent with *Labelling Logic* and the Forum's response. It is also consistent with the ANAO *Better Practice Guide* which describes a hierarchy of regulatory responses and suggests using lower level responses (such as encouragement, education, warnings and engagement) while reserving more punitive measures for serious non-compliance or for when lower level responses fail to achieve the desired regulatory outcomes.

### **Summary of Conclusions:**

The agreed bi-national public documents have a gap in relation to:

- articulating the criteria used by food regulators in determining risk.
- promoting the best practice nature, validity, timeliness and cost-effectiveness of the use of informal actions to gain compliance.

This is an area for improvement. The Strategy agreed by the Forum (to be developed by FRSC in consultation with ISFR) should address these issues. It should also articulate that food regulators use a best practice approach because they have a hierarchy of regulatory responses; using informal actions (such as education, written warnings and meetings ) while reserving more punitive measures (such as prosecution) for serious non-compliance or for when informal actions fail to achieve compliance.

## 6. THE WORKING GROUP'S ADVICE AND ACTIONS

Based on its findings, conclusions and stakeholder consultation (discussed in Appendix A of this report at pages 27 to 30) in Stage 1 of the project, the Working Group has developed the advice and undertaken the actions set out below to enable it to make recommendations to ISFR and FRSC regarding implementing the Forum's response to *Labelling Logic* recommendations 3, 57 and 58.

### **Recommendations 3 and 57**

The Working Group has explored a range of options to provide the best capacity for the food regulatory system to monitor and enforce food labelling laws in a more consistent and effective way, taking into account risk management principles.

The extensive findings and conclusions of the Working Group can be found in sections 4 and 5 above. In summary, the Working Group advises that:

- Food regulators consistently apply the compliance and enforcement continuum to the administration of food labelling: generating compliance; monitoring compliance; and responding to non-compliance.
- Food regulators consistently apply a risk-based, graduated, and proportionate approach across the continuum and apply resources across the whole continuum. The objectives and principles of this consistent approach are articulated in the Australia & New Zealand Enforcement Guideline (the Enforcement Guideline) which applies to enforcement only not the whole continuum. Also, the criteria used by food regulators in consistently determining risk, graduation and proportionality are not articulated anywhere.
- The existing policy and regulatory approaches applied by food regulators to the administration of food labelling regulation are consistent with best practice. Consistent with best practice regulation it is only where the existing approaches fall short (or are not fit for purpose) that additional regulatory measures should be pursued. Therefore, existing policy and regulatory approaches to the administration of food labelling regulation should not be amended.
- The existing, risk-based approach applied by food regulators to compliance, monitoring and enforcement (the continuum), which is supported by the Forum, is consistent with the Food Labelling Conceptual Framework proposed by *Labelling Logic* added to the Overarching Strategic statement for the food regulatory system in 2012.
- Many of the overarching principles currently applied by food regulators which result in the food labelling compliance and enforcement system being consistent with best practice are transparently articulated in different public documents (e.g. the Enforcement Guideline), some are not. They are not all articulated in a single, bi-nationally agreed document.

To implement the Forum's response to recommendations 3 and 57, and to address a number of the above gaps, the Working Group has developed a Food Labelling Compliance and Enforcement Framework (the Framework). It is a bi-national, risk-based, consistent, proportionate, graduated, prompt, effective and transparent framework for the monitoring and enforcement of food labelling. It has three components: a high level strategy (the Strategy); a suite of food labelling enforcement actions; and guidance for food regulators about labelling compliance, monitoring and enforcement.

The Working Group advises that the Strategy should be implemented using the other two components of the Framework – the suite of enforcement actions which is an amended Appendix 1 of the Australia and New Zealand Enforcement Guideline and the guidance to food regulators which is the Australian National Audit Office's (ANAO) *Better Practice Guide to Administering Regulation* (2014). There is a section in the Strategy that articulates this.

In relation to advice about monitoring and enforcement outcomes, the findings and conclusions of the Working Group can be found in sections 4 and 5 above. In summary, the Working Group advises that:

- The outcome that all food regulators seek to achieve is consistent industry compliance with food labelling requirements and jurisdictional food laws.
- Not all complaints relate to labelling non-compliance. In many cases the complaint relates to a misunderstanding about the requirements of the food labelling Standards. In some jurisdictions this is up to 50 per cent of all food labelling complaints received by the food regulator. Therefore, the number of complaints should not be used as a proxy for the number of reported examples of labelling non-compliance or the level of labelling non-compliance.
- The majority of food labelling non-compliance can be effectively managed and resolved administratively rather than through enforced, statutory enforcement actions. However, the fact that these informal approaches are valid, best practice, cost effective and produce a timely outcome is not articulated anywhere.
- Significant resources have been expended in the last six years (since 2008 when the previous ISC work was undertaken) to improve co-ordination and consistency of activity and actions across jurisdictions. However, these efforts are not articulated anywhere.

In relation to a possible package of enforcement tools and how it will be used, see implementation of the Forum's response to recommendation 58 below.

No further policy advice or action is required regarding implementing the Framework or the Forum's response to recommendations 3 and 57.

### **Recommendation 58**

The Working Group has considered the work already completed by the ISC (now ISFR) and the range of potential enforcement tools that could be available to address non-compliant labelling, consideration of a possible package of enforcement tools and consideration of how this will be used.

The extensive findings and conclusions of the Working Group can be found in sections 4 and 5 above. In summary, the Working Group advises that:

- When non-compliance is identified, food regulators have an existing and effective graduated range of actions to address it. These include verbal and written warnings, improvement notices, prohibition orders, seizure powers, penalty and infringement notices, prosecution and court orders, publication of names, recalls, emergency orders and actions relating to registration/licensing.
- This range of enforcement actions enables flexibility in responding to non-compliance and facilitates a risk-based, graduated and proportionate response to non-compliance. Food regulators use a hierarchy of graduated regulatory responses; using informal

responses (such as encouragement, education, warnings and engagement) while reserving more punitive measures for serious non-compliance or for when lower level responses fail to achieve the desired regulatory outcomes. The aim is to enable jurisdictions to achieve the same outcome - which is industry compliance.

- The Enforcement Guideline includes the breadth of enforcement actions available to regulators enabling a risk-based, graduated and proportionate response - from informal actions to those prescribed by law. However, a number of enforcement actions reflected in the model food provisions are missing from the Enforcement Guideline (e.g. mandated recalls).
- The majority of food labelling non-compliance can be effectively managed and resolved administratively rather than through enforced, statutory enforcement actions. The use of administrative actions is supported by the ANAO *Best Practice Guide* and the *Labelling Logic* report. However, the fact that these informal approaches are valid, best practice, cost effective and produce a timely outcome is not articulated anywhere.
- Some jurisdictions would like the capacity to issue Improvement Notices, Prohibition Orders and/or PINs (where they do not currently have such capacity) because they considered that this would provide them with a more graduated response for dealing with resistant businesses. This does not require amendments to the model food provisions because the provisions already provide for these enforcement actions. It would, however, require amendments to existing legislation in the affected jurisdictions and the agreement of the relevant Government.
- In terms of enforcement actions not reflected in the model food provisions which are available to other like regulators (e.g. the ACCC), the most relevant to food regulators is Enforceable Undertakings. Enforceable undertakings can be designed to simply achieve compliance (e.g. as designed in Victoria) or can be designed to also deliver other outcomes, such as remedying the harm caused by conduct (e.g. as designed by the ACCC). As demonstrated in the case of Victoria, provisions enabling the issue of Enforceable Undertakings can already be introduced into food laws while remaining consistent with the model food provisions.
- An Enforceable Undertaking can be designed to simply achieve compliance rather than apply a penalty or designed to also deliver other outcomes, such as remedying the harm caused by conduct.
- The existing actions available to food regulators enable a timely, flexible, risk-based, graduated and proportional response to non-compliance.
- There are also mechanisms for jurisdictions to discuss and devise an agreed co-ordinated consistent approach to an enforcement response.

The Working Group has considered amendments to the model food provisions. The extensive findings and conclusions of the Working Group can be found in sections 4 and 5 above.

The Working Group advises that amendment of the model food provisions is not necessary because:

- There is already an effective and flexible suite of graduated enforcement actions available to food regulators. These include verbal and written warnings, improvement notices, prohibition orders, seizure powers, penalty and infringement notices, prosecution and court orders, publication of names, recalls, emergency orders and actions relating to registration/licensing.

- These enable flexibility in responding to non-compliance and facilitate a risk-based, graduated and proportionate response to non-compliance.
- The majority of food labelling non-compliance can be effectively managed and resolved administratively rather than through enforced, statutory enforcement actions. This is consistent with the ANAO Better Practice Guide which describes a hierarchy of regulatory responses and suggests using lower level responses (such as encouragement, education, warnings and engagement) while reserving more punitive measures for serious non-compliance or for when lower level responses fail to achieve the desired regulatory outcomes.

In addition, the Working Group advises that food regulators should seek the agreement of their Governments to develop amendments to their existing legislation should they wish:

- to have the capacity to issue Improvement Notices, Prohibition Orders and/or PINs (where they do not currently have such capacity), because these are included in the model food provisions
- to introduce provisions enabling the issue of Enforceable Undertakings into their legislation, because they can already be introduced into food laws while remaining consistent with the model food provisions.

The Framework developed by the Working Group articulates that food regulators use a hierarchy of graduated regulatory responses; using informal responses (such as encouragement, education, warnings and engagement) while reserving more punitive measures for serious non-compliance or for when lower level responses fail to achieve the desired regulatory outcomes. It also articulates that this is in line with best practice regulation as established by the ANAO *Better Practice Guide* (2014). The Framework provides guidance to food regulators about when to use these enforcement actions available in a risk-based, graduated and proportionate way.

The Working Group has updated the Enforcement Guideline to include a description of all the actions reflected in the model food provisions available to food regulators and to include a description of enforceable undertakings.

No further advice or action is required regarding implementing the Forum's response to this recommendation or regarding the practical implementation of recommendation 3 which is addressed above.

At the end of Stage 1 of the project, the Working Group is to provide advice to ISFR and FRSC regarding follow on work to be undertaken in Stage 2 to implement the framework; which would include implementation of recommendations 57 and 58.

The implementation of the Framework and the opportunities for improvement identified in the Working Group's Report (Attachment 1) were addressed in Stage 1 of the project. A summary of how these issues have been addressed is provided in Attachment 4.

The Working Group advises that no follow on work needs to be undertaken to implement the Framework or the Forum's response to recommendations 57 and 58 and that Stage 2 of the project is not required.

## **7. THE WORKING GROUP'S RECOMMENDATIONS**

The Working Group's task is to provide advice to ISFR and FRSC about:

1. the exploration of a range of options to provide the best capacity for the food regulatory system to monitor and enforce food labelling laws in a more consistent and effective way, taking into account risk management principles;
2. a high-level regulatory monitoring and enforcement strategy and its practical implementation;
3. the consideration of the work already completed by the ISC and the range of potential enforcement tools that could be available to address non-compliant labelling; consideration of a possible package of enforcement tools and consideration of how this will be used;
4. the consideration of amendments to the model food provisions.

The Working Group's advice is as follows.

### **1. In relation to the exploration of a range of options to provide the best capacity for the food regulatory system to monitor and enforce food labelling laws in a more consistent and effective way, taking into account risk management principles, the Working Group recommends:**

1. That existing policy and regulatory approaches used by regulators should remain flexible so that compliance and monitoring activities, and enforcement actions, can be targeted at the risk posed.
2. Risk management, which is an integral component of good regulatory administration, should continue to underpin food labelling regulatory activity.
3. That existing policy and regulatory approaches applied by food regulators to the administration of food labelling regulation are consistent with best practice<sup>5</sup>.
4. That existing policy and regulatory approaches to the administration of food labelling regulation not be amended, but that those approaches and their underpinning objectives and principles be transparently articulated in a food labelling compliance and enforcement framework.

### **2. In relation to a high-level regulatory monitoring and enforcement strategy and its practical implementation, the Working Group recommends:**

5. That the high-level, bi-National Food Labelling Compliance and Enforcement Strategy<sup>6</sup> is adopted by jurisdictions.

---

<sup>5</sup> "Consistent with best practice" means consistent with the *Better Practice Guide to Administering Regulation*, Australian National Audit Office, as issued from time to time, and is intended to ensure that additional regulatory measures are pursued only where existing approaches fall short (or are not fit for purpose).

<sup>6</sup> The high-level Bi-National Food Labelling Compliance and Enforcement Strategy is one component of a Food Labelling Compliance and Enforcement Framework that articulates, in a transparent manner, the bi-national, best practice, risk-based, graduated and proportionate approach to the continuum of compliance and enforcement already being consistently applied by food regulators.

**3. In relation to the consideration of the work already completed by the ISFR and the range of potential enforcement tools that could be available to address non-compliant labelling; the consideration of a possible package of enforcement tools and the consideration of how this will be used, the Working Group recommends:**

6. That jurisdictions also adopt<sup>7</sup> :
  - a suite of enforcement actions for food regulators for addressing non-compliance with labelling requirements (see below), which are contained in a revised Appendix 1 to the Australia and New Zealand Enforcement Guideline; and
  - the Australian National Audit Office's [Better Practice Guide to Administering Regulation](#).
7. To achieve industry compliance, jurisdictions should continue to apply the existing, effective range of enforcement actions to address non-compliance which are flexible, risk-based, graduated and proportionate<sup>8</sup>.

**4. In relation to the consideration of amendments to the Model Food Provisions, the Working Group recommends:**

8. Where jurisdictions wish to expand their statutory enforcement actions prescribed by law, they should continue to introduce them into their food laws while remaining consistent with the Food Regulation Agreement.

---

<sup>7</sup> The revised appendix to the Australia and New Zealand Enforcement Guideline and the *Better Practice Guide to Administering Regulation*, Australian National Audit Office, issued from time to time, comprise the remaining two components of the Food Labelling Compliance and Enforcement Framework.

<sup>8</sup> While there is some variation in the statutory enforcement actions available to regulators, this does not appear to have inhibited the capacity of regulators to respond flexibly to labelling non-compliance (because most issues are dealt with administratively) and achieve the desired outcomes in a timely and cost effective manner.

## APPENDIX A – CONSULTATION ON THE BI-NATIONAL FOOD LABELLING COMPLIANCE AND ENFORCEMENT FRAMEWORK

### A.1 Purpose and Scope of the Consultation

The purpose of the consultation was to provide stakeholders with an opportunity to comment on the matters within the scope of the Joint Implementation Sub-Committee for Food Regulation (ISFR) / Food Regulation Standing Committee (FRSC) Working Group (the Working Group), which were:

- The consideration of existing and best practice policy and regulatory approaches for food labelling monitoring and enforcement; and
- The development of a bi-national Food Labelling Compliance and Enforcement Framework which has three components:
  1. A draft, high-level, bi-national Food Labelling Compliance and Enforcement Strategy (Attachment 1);
  2. A suite of enforcement actions available to food regulators which are described in the revised Appendix 1 of the Australia & New Zealand Food Regulation Enforcement Guideline (the Enforcement Guideline)<sup>9</sup> (Attachment 2); and
  3. [Guidance for food regulators](#) about food labelling compliance, monitoring and enforcement.

Matters outside the scope of the Working Group's task and consequently outside the scope of the consultation were:

- The *Labelling Logic* report<sup>10</sup>
- The Forum's response to the *Labelling Logic* report<sup>11</sup>
- The development of food labelling policy, standards and laws
- Specific food labelling standards and specific food labelling compliance issues.
- Labelling covered by other legislation e.g. *Competition and Consumer Act 2010* (Commonwealth) and New Zealand Fair Trading Act.

As the above matters were outside the scope of the Working Group's task and the consultation, the Working Group was not able to accept submissions on these matters.

The report prepared for the Working Group by mpconsulting was provided as background information only, it was not provided for consultation or comment.

The Working Group has made minor revisions to Appendix 1 of the Enforcement Guideline in line with its scope of work, which was food labelling only and not the broader scope of food regulation that includes administration of food safety standards. The Working Group could not address comments regarding the revised Appendix 1 that relate to matters broader than food labelling.

---

<sup>9</sup> Implementation Sub-Committee Enforcement Guideline Working Group 2009, *The Australia and New Zealand Food Regulation Enforcement Guideline*, Canberra, <<http://www.health.gov.au/internet/main/publishing.nsf/Content/foodsecretariat-enforcement-guideline.htm>>

<sup>10</sup> *Labelling Logic: Report of the Review of Food Labelling Law and Policy*, 2011, Canberra, <<http://www.foodlabellingreview.gov.au/internet/foodlabelling/publishing.nsf/content/labelling-logic>>

<sup>11</sup> Legislative and Governance Forum on Food Regulation (convening as the Australia and New Zealand Food Regulation Ministerial Council) 2011, *Response to the Recommendations of Labelling Logic: Review of Food Labelling Law and Policy*, Canberra, <<http://www.foodlabellingreview.gov.au/internet/foodlabelling/publishing.nsf/content/home>>

## **A.II Questions Asked at Consultation**

1. Does the Framework facilitate a timely, risk-based, proportionate and graduated approach to food labelling compliance and monitoring activities and enforcement actions by food regulators? If not, why?
2. Does the Framework facilitate improved clarity and transparency about how food regulators administer food labelling regulations? If not, why?
3. Is the Framework consistent with the principles of Best Practice as set out in current best practice documents - Australian Government Guide to Regulation and the Australian National Audit Office (ANAO) Administering Regulation Better Practice Guide, June 2014? If not, why?
4. Does the Strategy clearly explain risk in the context of food labelling? If not, why?
5. Does the suite of enforcement actions give food regulators flexible, timely and cost effective options for addressing food labelling non-compliance? If not, why?
6. Does the *Administering Regulation Better Practice Guide*, Australian National Audit Office, June 2014 provide effective, clear and transparent guidance to food regulators about administering food labelling regulation? If not, why?

## **A.III List of Submitters**

Allergy & Anaphylaxis Australia  
Allergy New Zealand  
Australian Food and Grocery Council (AFGC)  
Coeliac Australia  
Dairy Australia  
Dietitians Association of Australia (DAA)  
New Zealand Food & Grocery Council (NZFGC)  
New Zealand Wine Growers  
The Australian Beverages Council  
The Australian Industry Group (Confectionary Sector)

## **A.IV Summary of Submissions**

### **Response to Questions**

Stakeholder answers to questions 1 to 6 were:

Q1	5 submitters said yes (yes/support/accept/no concerns), 1 said yes with 2 exceptions 3 submitters said yes partly agree/broad agreement/in principle support 1 did not indicate
Q2, Q3	6 submitters said yes (yes/support/accept/no concerns) 3 submitters said yes partly/broad agreement/in principle support 1 did not indicate
Q4, Q5	7 submitters said yes (yes/support/accept/no concerns) 2 submitters said broad agreement/in principle support
Q6	8 submitters said yes (yes/support/accept/no concerns) 2 submitters said broad agreement/in principle support 1 did not indicate

### **Additional Comments**

Stakeholders provided additional comments which fell into seven broad areas. A summary of comments is provided below.

#### **1. Elements and scope of the Framework and separation/overlap of the three elements of the Framework**

##### *Summary of Stakeholder comments*

- There is no clear separation between the Strategy, Framework and Enforcement Guideline.
- Strategy should say that it applies to all the examples listed.
- Support a risk-based, graduated and proportionate approach to compliance, monitoring and enforcement.
- Agree food safety matters remain highest priority.

##### *Working Group response*

- The lack of clear separation between the Strategy, Framework and Enforcement Guideline is deliberate because the Strategy and Enforcement Guideline are two of the three elements which make up the Framework. The Enforcement Guideline was already in existence and covers enforcement across the full scope of the responsibilities of food regulators not just food labelling. The Enforcement Guideline contains objectives and principles which would probably better sit in a high-level strategy. However, the Working Group was tasked with developing a high-level Strategy and Framework with the narrower scope of food labelling.

- There are examples of food labelling in the Strategy which are indicative of the scope of the Strategy and the Framework. However, these examples are not an exclusive list of what is covered by the Strategy and Framework.

## 2. The level of detail in the high-level Strategy and Framework

### *Summary of Stakeholder comments*

- ANAO *Better Practice Guide* is a comprehensive document
- The Framework does not fully address the element 'generating compliance'. There should be greater focus on this. It is not clear about what is proposed in relation to generating compliance
- Include more detail/emphasis and guidance in the Strategy to ensure consistent interpretation on the following matters:
  - priority, what is high priority;
  - high risk issues, where in the 'risk' hierarchy do all the labelling standards sit, definition/indication of how to do a risk based assessment;
  - matters other than risk for decisions about enforcement action;
  - clear guidelines around timing and timeframes, they could be according to degree of risk and should be set for all steps of the process;
  - the steps required in a case;
  - communication to the offender and complainant of outcomes during the process of investigation; and
  - timeframe and regularity of statistics and reports.
- Enforcement actions should be tabulated/in a matrix with clear and practical guidelines with appropriate timeframes.

### *Working Group response*

- The Forum agreed to the development of a high-level strategy. Therefore, the Framework and Strategy are high-level and never intended to include the level of detail sought by a number of stakeholders.
- The Framework includes compliance as one of the three elements of the compliance, monitoring and enforcement continuum. The Strategy contains a section about generating compliance, and the ANAO *Better Practice Guide* has significant guidance about this matter. Generating compliance is appropriately addressed.
- The Strategy is high-level and was never intended to detail matters such as: how to do a risk assessment, high risk areas, the risk rating of each standard, priority, set timeframes for enforcement actions, flow of food regulator activities, or reporting by regulators.
- The Strategy appropriately covers the matter of risk through the labelling conceptual framework.
- Timing of actions by food regulators is affected by a number of factors including: the risk, magnitude of the issue, capacity, resources, level of co-operation of a business and is determined on a case by case basis. A comment regarding this has been added to the Strategy to address stakeholder comments.
- The strategy discusses that matters other than risk are taken into account by food regulators before enforcement action is taken (e.g. performance history of a business), as does the ANAO *Better Practice Guide*. This is good regulatory practice.

- When ISFR reviews the Enforcement Guideline, it could consider whether it should be a Compliance and Enforcement Guideline, or where there is the need for a separate Compliance Guideline which would address generating compliance.

### **3. Consistency**

#### *Summary of stakeholder comments*

- The Framework presents a great opportunity to drive consistency and co-ordination between jurisdictions. We welcome a framework that improves collaboration and co-ordination between jurisdictions.
- Lack of uniformity of action between jurisdictions has been a major problem over many years.

#### *Working Group response*

- The role of ISFR is to facilitate consistency. The Strategy contains a section which articulates that jurisdictions adopt a number of measures to improve consistency and co-ordination with respect to implementing Standards, responding to complaints and monitoring compliance and responding to non-compliance.
- To facilitate consistency ISFR has developed a specific tool to be used for investigations about allergens in food.
- The review of the Code Interpretative Service identified the existing mechanisms in place by the jurisdictions and FSANZ to facilitate consistency of interpretation of standards. ISFR is charged with promoting these mechanisms.

### **4. Transparency for complainants versus confidentiality for food businesses**

#### *Summary of stakeholder comments*

- Complainants should be advised of the nature of action taken by enforcement agency. Timeframes need to be set. They could be according to degree of risk and should be set for all steps of the process otherwise follow up and evaluation of a complaint is difficult to monitor by complainants and third parties.

#### *Working Group response*

- In relation to transparency for complainants and third parties, food regulators are bound by confidentiality requirements of their organisations, but do provide general information to complainants about assessment and investigation of complaints. However, food regulators submit annual reports to Parliament regarding their compliance, monitoring and enforcement activities.

### **5. Enforcement actions available to and used by food regulators**

#### *Summary of stakeholder comments*

- Jurisdictions are actively encouraged to amend legislation for consistency of enforcement actions to use enforceable undertakings (EUs).
- Agree no changes to the model provisions are necessary.

- Seeking more transparency by recording of whether a light touch (i.e. administrative responses) are effective

#### *Working Group response*

- Data from jurisdictions indicates that the vast majority of non-compliance is addressed through administrative means – which means it is effective. The *ANAO Better Practice Guide* establishes that administrative actions are appropriate and cost effective.
- Food regulators do trend analysis of their monitoring and enforcement data (including effectiveness of activities and actions, such as administrative actions) to inform future compliance and monitoring activities and enforcement actions. This activity has been added to Table 1 in the Strategy which provides examples of activities and actions across the compliance, monitoring and enforcement continuum. The table has also been amended to clearly state that food regulators undertake both pro-active and reactive compliance and monitoring activities.
- Under the Food Regulation Agreement jurisdictions can choose which enforcement actions in Annex B of the model provisions to adopt. EUs are not part of the model provisions and the model provisions do not prevent jurisdictions adopting EUs, therefore it is the discretion of each jurisdiction whether this enforcement action is adopted.
- The Enforcement Guideline did not contain EUs; it has been amended to include them.

## **6. Imported food labelling**

#### *Summary of stakeholder submissions*

- The Commonwealth Department of Agriculture (DA) Imported Food Inspection data reports labelling non-compliance as being the major contributor to import failure. Its January to June 2014 report indicates that labelling breaches accounted for 78% of non-compliances. A reporting mechanism for state/territory/local council enforcement authorities to the Department of Agriculture import inspection program should be introduced to facilitate improved import compliance.
- It is not clear if inspection by the Commonwealth at the border is covered by the Framework.

#### *Working Group response*

- ISFR established a working group in 2011 to consider the issue of imported food labelling. The Working Group has been in abeyance for two years. The Joint ISFR/FRSC Food Labelling Monitoring and Enforcement Framework Working Group will bring to ISFRS attention general matters raised in submissions regarding imported food labelling and suggest that ISFR may wish to refer them to the Imported Food Labelling Working Group.
- DA is a member of ISFR and the DA Imported Food Inspection Program will be covered by the Framework.

## 7. Matters not within the scope of the Working Group

### *Stakeholder comments*

- Add a section to the Strategy about evaluation.
- There needs to be sufficient allocation of resources to food labelling compliance and monitoring activities and enforcement actions.
- Some specific food labelling non-compliance issues were raised.

### *Working Group response*

- The evaluation of compliance and monitoring activities is outside the scope of the Working Group. However, food regulators submit annual reports to Parliament regarding their compliance and monitoring activities and enforcement actions.
- Resourcing is not a matter within the scope of the Working Group.
- Specific food labelling non-compliance issues are not within the scope of the Working Group.

## **Working Group Actions**

In addition to the responses above the Working Group has taken the following actions to address stakeholder comments:

- The Working Group will suggest to ISFR that when ISFR reviews the Enforcement Guideline, it should consider whether it should be a Compliance and Enforcement Guideline, or whether there is the need for a separate Compliance Guideline which would address generating compliance.
- The Enforcement Guideline has been amended to include enforceable undertakings.
- Minor amendments have been made to the Strategy:
  - addition of trend analysis to table 1 under monitoring activities;
  - it has been made more clear that compliance and monitoring activities are both pro-active and reactive;
  - discussion regarding timeframes has been added; and,
  - table 2 amended to make it even clearer that these are examples and not an exclusive list of the scope of the Framework and Strategy.
- The Working Group will bring to ISFR's attention general matters raised in submissions regarding imported food labelling and suggest that ISFR may wish to refer them to the Imported Food Labelling Working Group.