

# ORGANIC FOOD LABELLING IN AUSTRALIA: A ‘MURKY ENVIRONMENT’ IN NEED OF REFORM

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## I INTRODUCTION

The Australian organic industry recently had a spotlight shone on it in the high profile Supreme Court of Western Australia case *Marsh v Baxter* (2014) 46 WAR 377. Martin J’s judgment described the Australian organic labelling framework as ‘a somewhat murky environment’ due to the use of ambiguous terminology, in particular the use of the terms ‘organic’ and ‘certified organic’.<sup>1</sup>

The Australian organic food labelling framework is indeed murky. There are presently two standards operative in Australia that purport to outline the production and labelling requirements for organic produce. The application and enforceability of the standards is dependent on whether the organic produce is intended for exportation or the domestic market, or whether the produce has been imported into Australia. Organic produce intended for exportation must be ‘certified organic’, whereas organic produce intended for the domestic market or imported into Australia can be either ‘certified organic’ or merely labelled as ‘organic’.

The unclear position on organic labelling is incongruous with the otherwise strict food labelling requirements enforced in Australia in order to ensure consumers are adequately protected, informed and confident when purchasing and consuming food. The organic labelling regime does not lend itself to the formation of such consumer confidence within Australia. Instead, the current organic labelling regime in Australia appears to nurture consumer uncertainty, confusion and increased consumer vulnerability.

The lack of consistency and clarity within the Australian organic industry has had adverse effects on consumers, suppliers and the industry as a whole. The organic regulatory framework is in need of reform, namely the implementation of a solitary legally mandated organic standard, with a single organic identification mark.

## II FOOD LABELLING AND OTHER INFORMATION REQUIREMENTS

Whilst food labelling was traditionally a marketing tool for suppliers, its function has substantially evolved.<sup>2</sup> Food labels have become the ‘primary interface’ between suppliers and consumers – it is a communication channel for suppliers to explain to consumers the contents and information relevant to the produce.

In Australia, the development of food labelling standards has been driven by various factors. Standards were developed to address public health issues, and to provide consumers with detailed product information and enable them to make

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<sup>1</sup> *Marsh v Baxter* (2014) 46 WAR 377, 413.

<sup>2</sup> Council of Australian Governments and Australian and New Zealand Food Regulation Ministerial Council, *Labelling Logic: Review of Food Labelling Law and Policy (2011)* (27 January 2011), Review of Food Labelling Law and Policy <[http://www.foodlabellingreview.gov.au/internet/foodlabelling/publishing.nsf/content/48C0548D80E715BCCA257825001E5DC0/\\$File/Labelling%20Logic\\_2011.pdf](http://www.foodlabellingreview.gov.au/internet/foodlabelling/publishing.nsf/content/48C0548D80E715BCCA257825001E5DC0/$File/Labelling%20Logic_2011.pdf)> 29.

informed choices about the products they consume.<sup>3</sup> Food labelling standards were also developed in order to protect consumers from false and misleading product claims and to ensure a level playing field for all suppliers.

The Food Standards Australia and New Zealand (FSANZ) (formally Australia New Zealand Food Authority) is the independent statutory authority responsible for the development of food standards in Australia and New Zealand.<sup>4</sup> The overarching objective of the FSANZ is to 'ensure a high standard of public health protection throughout Australia and New Zealand'.<sup>5</sup> In the light of its primary objective, the goals of the FSANZ are to ensure:

- (a) a *high degree of consumer confidence* in the quality and safety of food produced, processed, sold or exported from Australia and New Zealand;
- (b) an *effective, transparent and accountable regulatory framework* within which the food industry can work efficiently;
- (c) the provision of adequate information relating to food to *enable consumers to make informed choices*; and
- (d) the establishment of *common rules* for both countries and the *promotion of consistency* between domestic and international food regulatory measures without reducing the safeguards applying to public health and consumer protection.<sup>6</sup> (emphases added)

The *Australia New Zealand Food Standards Code*, developed by the FSANZ, outlines the minimum standards for food production in Australia and New Zealand.<sup>7</sup> The Code is an enforceable legislative instrument in the States, Territories and Commonwealth of Australia and New Zealand.<sup>8</sup> Whilst the Code outlines the minimum requirements with respect to food production and labelling, the Code does not prescribe the enforcement measures in the event of a contravention. The responsibility of enforcement rests with the regulatory bodies within each of the respective jurisdictions.

Whilst the Code specifies minimum standards with respect to the complete food production process, this paper will only focus on the Code's labelling standards. Labelling and other information requirements for food produce are outlined in chapter 1, part 1.2 of the Code. The Code details the information that must appear on labels for food intended for retail sale and the circumstances in which food labels are not

<sup>3</sup> Marion Healy, Simon Brooke-Taylor and Peter Liehne, 'Reform of food regulation in Australia and New Zealand' (2003) 14 *Food Control* 357, 364 and Tracey Rumble et al, 'New food labelling initiatives in Australia and New Zealand' (2003) 14 *Food Control* 417, 426.

<sup>4</sup> The Australia New Zealand Food Authority was formed as a product of the 'Agreement Between the Government of Australia and the Government of New Zealand Concerning a Joint Food Standards System' treaty signed in 1996. In July 2002, the ANZFA became the FSANZ. In Australia, the FSANZ operates as a statutory authority in accordance to the *Food Standards Australia New Zealand Act 1991* (Cth).

<sup>5</sup> *Food Standards Australia New Zealand Act 1991* (Cth) s 3.

<sup>6</sup> *Food Standards Australia New Zealand Act 1991* (Cth) s 3.

<sup>7</sup> Food Standards Australia and New Zealand, *Australia New Zealand Food Standards Code* (at 20 December 2000) standard 1.1.1.

<sup>8</sup> In Australia, the Code is a declared legislative instrument under the *Legislative Instruments Act 2003* (Cth). Furthermore, the Code is adopted as the requisite standard for food production in the following legislative instruments: *Food Act 1981* (New Zealand), *Food Act 1984* (Vic), *Food Act 2001* (ACT), *Food Act 2001* (SA), *Food Act 2003* (NSW), *Food Act 2003* (Tas), *Food Act 2004* (NT), *Food Act 2006* (Qld), *Food Act 2008* (WA) and *Imported Food Control Act 1992* (Cth).

required, but where the produce information must be readily available at the point of sale.<sup>9</sup>

The Code specifies that the following information must appear on food labels:

- information pertaining to the identification and nature of the food (e.g. name of the food, lot identification and the supplier's details);
- warning and advisory statements and declarations;
- ingredients;
- date marking of packaged food;
- directions for use and storage;
- nutrition, health and related claims;
- nutrition information; and
- advisory statements and declarations with respect to prescribed food.<sup>10</sup>

The Code's stringent food labelling standards were established pursuant to the FSANZ's overarching objective of ensuring a high standard of public health protection and its goals of ensuring consumer confidence, protection, informed decision-making and the facilitation of an efficiently regulated food industry.<sup>11</sup> Indeed such stringent requirements are necessary in order to protect the health of consumers and to place consumers in a position to make confident and informed decisions about the food they purchase and consume.

Despite these prescriptive food labelling requirements, the standards regulating the labels conveying information on organic composition of a product (often referred to as 'organic claims') are inconsistent, ambiguous and in certain circumstances, optional. The lack of consistent regulatory standards compromises the integrity of the organic industry as a whole and adversely impacts suppliers and consumers of organic produce. Reform is necessary to enable the FSANZ to achieve its goals in the organic industry.

### III ORGANIC LABELLING REGIME

There are presently two standards in Australia that outline the production process and labelling requirements with respect to organic produce:

- the National Standard for Organic and Bio-Dynamic Produce (National Standard) – applicable to produce intended for exportation; and
- the Australian Standard 6000-2009 Organic and biodynamic products (AS 6000-2009) – the standard applicable to produce intended for the domestic market, and produce that is imported into Australia.

Whilst the National Standard and AS 6000-2009 outline the production process and labelling requirements for organic produce, the focus of this paper is solely on the two standards' organic labelling requirements.

In 1992, the National Standard was implemented. The National Standard specifically states that it is the 'Australian Export Standard for products labelled

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<sup>9</sup> Food Standards Australia and New Zealand, *Australia New Zealand Food Standards Code* (at 20 December 2000) standard 1.2.1. Clause 2 outlines the circumstances where food produce is exempt from the requirement to display a food label.

<sup>10</sup> *Ibid* standards 1.2.2 – 1.2.11.

<sup>11</sup> *Food Standards Australia New Zealand Act 1991* (Cth) s 3.

organic' and thereby can only be strictly enforced in relation to produce intended for exportation.<sup>12</sup> Whilst the National Standard only technically applies to organic produce intended for exportation, the National Standard did have 'spillover' consequences for the domestic organic market and acted as a de facto standard until 2009.<sup>13</sup> In 2009, due to an increase in unsubstantiated organic claims and a lack of clear definition of the term 'organic',<sup>14</sup> the AS 6000-2009 was created and implemented as the domestic standard for organic produce, which was also extended to include organic produce imported into Australia. The AS 6000-2009 was modelled on the National Standard,<sup>15</sup> and as a result the two standards are very similar.

The Australian Commonwealth Parliament adopted a co-regulatory approach with respect to the two organic standards. The two organic standards are 'complementary and additional to other health, agricultural or food standards or regulatory requirements recognised by or enacted by the Commonwealth, States and Territories'.<sup>16</sup> Whilst the two organic standards have no legal effect on their own, they are legally enforced in conjunction with existing legislative instruments. Organic produce that is intended for exportation is regulated by the National Standard in conjunction with the *Export Control (Organic Produce Certification) Orders* (Cth) and *Export Control Act 1982* (Cth). Organic produce that is intended for the domestic market is regulated by the AS 6000-2009 in conjunction with the *Competition and Consumer Act 2001* (Cth). Finally, organic produce imported into Australia is also regulated by the AS 6000-2009 in conjunction with the *Competition and Consumer Act 2001* (Cth) and the *Imported Food Control Act 1992* (Cth).

Given that there are two organic standards and the enforceability of the two standards is dependent on various existing legislative instruments, it cannot be said that there is a single definitive organic labelling regime within Australia. The organic standard varies depending on whether the organic produce is intended for exportation, the domestic market or is being imported into Australia. The intended purpose of the organic product in question will have a direct bearing on which organic standard and accompanying legislation is applicable. To better understand the organic labelling requirements within Australia, the various regimes must be considered separately.

#### A Organic produce intended for exportation

The *Export Control (Organic Produce Certification) Orders* (Cth) (Orders) outline the requirements for production processes and the labelling of organic produce in Australia intended for exportation.<sup>17</sup> The Orders state that 'the export of organic produce is prohibited unless an organic produce certificate has been issued under these

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<sup>12</sup> Organic Industry Standards and Certification Committee, *National Standard for Organic and Bio-Dynamic Produce* (at 1 February 2013) 1.

<sup>13</sup> *Marsh v Baxter* (2014) 46 WAR 377, 413.

<sup>14</sup> See, eg, *Australian Competition & Consumer Commission v G.O. Drew Pty Ltd* [2007] FCA 1246 (16 August 2007) [40]. In this case, the ACCC prosecuted G.O. Drew Pty Ltd for labelling regular eggs as certified organic eggs. Gray J, who presided over the matter, found that there was an 'absence of a commonly accepted, or recognised standard for determining what is an organic egg' at the time the matter was being heard.

<sup>15</sup> Standards Australia, *Australian Standards 6000-2009 Organic and biodynamic products* (at 9 October 2009) 3.

<sup>16</sup> Organic Industry Standards and Certification Committee, *National Standard for Organic and Bio-Dynamic Produce* (at 1 February 2013) 2; and Standards Australia, *AS 6000-2009 Organic and biodynamic products* (at 9 October 2009) 2.

<sup>17</sup> Pursuant to *Export Control Act 1982* (Cth) ss 7 and 23; and *Export Control (Orders) Regulations 1982* (Cth) reg 3.

Orders for the produce'.<sup>18</sup> 'Organic produce' is defined as 'produce that, for the purpose of marketing, is described as 'organic', 'bio-dynamic', 'biological', 'ecological' or by 'any other word of similar indication'.<sup>19</sup> Therefore, in order to market a product intended for exportation as 'organic', an organic produce certificate must be issued by an approved certifying organisation or authorised officer with respect to the produce.<sup>20</sup>

An 'approved certifying organisation' is an organisation with a Quality Management (QM) system and manual which has been accredited with a QM certificate from an authorised officer (i.e. the relevant Australian government authority).<sup>21</sup> The QM system refers to the procedures and processes that the certifying organisation subjects the organic produce to in order to determine whether the produce qualifies as organic. The QM manual outlines and describes the organisation's QM system processes and procedures. Provided the organic produce satisfies the approved certifying organisation's QM system and manual, an organic produce certificate will be issued. This in turn entitles the organic producer to label the assessed organic produce with the approved certifying organisation's identification mark.

Currently there are seven approved certifying organisations in Australia, each with its own unique organic identification symbol:

- Australian Certified Organic;
- National Association for Sustainable Agriculture Australia;
- AUS-QUAL Pty Ltd;
- Bio-Dynamic Research Institute;
- Organic Food Chain;
- Safe Food Production Queensland; and
- Tasmanian Organic-dynamic Producers.

The seven organic identification symbols are as follows:



*Image of the seven Australian organic certification bodies' symbol (from left to right): Australian Certified Organic, National Association for Sustainable Agriculture Australia, AUS-QUAL Pty Ltd, Bio-Dynamic Research Institute, Organic Food Chain, Safe Food Production Queensland, and Tasmanian Organic-dynamic Producers.*

The Orders state that the certifying organisation's QM system 'must ensure that organic produce subject to the system: (i) conforms to trade description of produce; and (ii) complies with the requirements of importing country authorities'.<sup>22</sup> However, the Orders do not specify the minimum requirements which the organic produce must satisfy in order to be legally exported from Australia.

<sup>18</sup> *Export Control (Organic Produce Certification) Orders* (Cth) O 1.05.

<sup>19</sup> *Ibid* O 1.06.

<sup>20</sup> *Ibid* OO 2.02-2.03.

<sup>21</sup> *Ibid* 1.06; and *Export Control Act 1982* (Cth) s 20.

<sup>22</sup> *Ibid* O 3.01.

By virtue of the co-regulatory approach adopted by the Australia Commonwealth Parliament, the minimum requirements are specified in the National Standard. Given that the National Standard outlines the minimum requirements that must be satisfied in order for organic produce to be legally exported from Australia, an approved certified organisation's QM system and manual must meet the National Standard as a minimum requirement.<sup>23</sup>

Evidently, in order to export organic produce from Australia the produce must be 'certified organic'. That is, organic produce must bear an approved certifying organisation's identification symbol. Produce claiming to be organic without an approved certifying organisation's identification symbol will not be permitted to leave Australia's borders.

The purpose and intent behind the implementation of the National Standard was to facilitate international trade and market access for Australian organic producers and suppliers, by ensuring that the National Standard complies with the requirements of importing countries.<sup>24</sup> Given that the National Standard was created to address the needs of international trade, and as a result is only strictly enforceable on organic produce intended for exportation, the domestic organic market is effectively left to its own devices.

#### B Organic produce intended for the domestic market

Organic produce intended for the domestic market, i.e. consumption within Australia, does not require an organic produce certificate from an approved certifying organisation nor need it bear an approved certifying organisation's identification mark, in order to be labelled 'organic'. This process is entirely voluntary for organic produce intended for the domestic market. However, organic producers who label their produce as 'organic' must be able to substantiate their claim otherwise they risk prosecution by the Australian Competition and Consumer Commission (ACCC) for misleading and deceptive conduct under the *Competition and Consumer Act 2010* (Cth).<sup>25</sup>

In 2009, to address the 'recognized need to standardize the sectors of the organic industry', Standards Australia published the AS 6000-2009.<sup>26</sup> The AS 6000-2009 stipulates organic production and labelling guidelines with respect to organic produce intended for retail sale in the domestic market. Compliance with the AS 6000-2009 is voluntary for organic produce intended for the domestic market. The purpose of the AS 6000-2009 was to provide the domestic organic industry and the ACCC with guidance on the minimum requirements of what constitutes 'organic' produce.<sup>27</sup>

Whilst the National Standard is legally enforceable, as it is enforced in conjunction with the *Export Control Act 1982* (Cth) and the Orders on all organic produce intended for exportation, the AS 6000-2009 does not have the same level of

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<sup>23</sup> Organic Industry Standards and Certification Committee, *National Standard for Organic and Bio-Dynamic Produce* (at 1 February 2013) 1.

<sup>24</sup> Department of Agriculture, Commonwealth of Australia, *Exporting organic and bio-dynamic products* (25 February 2015) <<http://www.agriculture.gov.au/export/food/organic-bio-dynamic?wasRedirectedByModule=true>>. For instance, jurisdictions such as the European Union and United States of America (which are the two largest organic markets) have implemented strict organic standards which regulate the production of organic produce and of organic produce that is imported into that jurisdiction. Therefore, in order for Australia to export organic products to these jurisdictions, the Australian organic produce has to meet the jurisdictions' respective standards.

<sup>25</sup> *Competition and Consumer Act 2010* (Cth) sch 2 s 18.

<sup>26</sup> Standards Australia, *Australian Standards 6000-2009 Organic and biodynamic products* (at 9 October 2009) 3.

<sup>27</sup> *Ibid* 2.

legislative support. Technically, the AS 6000-2009 is only legally enforceable on organic produce within Australia when the ACCC pursues actions for misleading and deceptive conduct pursuant to the *Competition and Consumer Act 2010* (Cth). Even then the AS 6000-2009 only acts as a guide for the ACCC in prosecuting unsubstantiated organic claims.

The AS 6000-2009 provides the ACCC with a 'useful reference point' when determining the technical meaning of 'organic' in prosecutions alleging misleading and deceptive organic claims under the *Competition and Consumer Act 2010* (Cth).<sup>28</sup> Therefore, the AS 6000-2009 is merely a guideline and compliance with the standard is voluntary. The responsibility of policing organic claims in the domestic market is left up to consumers, suppliers and the ACCC. However, it must be noted that the ACCC will only pursue matters that are likely to 'result in widespread consumer detriment', given its limited resources.<sup>29</sup>

In 2013, the ACCC demonstrated reliance on the AS 6000-2009 when it negotiated with eight suppliers of bottled water to remove 'organic' claims from their product labels and marketing materials.<sup>30</sup> The ACCC contended that '[t]he word 'organic' in the context of food and drink refers to agriculture products which have been farmed according to certain practices'.<sup>31</sup> Therefore, given that bottled water is not an agricultural product, it cannot be labelled and marketed as 'organic'. The ACCC interpretation is consistent with the AS 6000-2009 which states that 'natural products such as minerals, salt or water shall not be collected or harvested or processed and labelled as 'organic''.<sup>32</sup>

Although the pursuit of 'organic' claims in the domestic market is somewhat murky due to a lack of definitive legal definition, 'certified organic' claims are relatively straightforward to prosecute. If organic produce is labelled as 'certified organic', the producers must be able to substantiate their claim, namely that the produce has been certified by an approved certifying organisation, otherwise such a claim would be misleading and deceptive, thereby contravening the *Competition and Consumer Act 2010* (Cth).<sup>33</sup>

Evidently, in order to supply organic produce to the Australian domestic market the produce does not have to be 'certified organic'. That is, organic produce does not have to bear an approved certifying organisation's identification symbol. Instead, organic produce can simply state that it is 'organic' on the food label.

It must be noted that although organic produce intended for the domestic market does not need to be 'certified organic' a number of organic products sold within Australia are certified. This is the result of the 'spillover' effects that the National Standard has had on the domestic market, as identified by Martin J in *Marsh v Baxter*.<sup>34</sup>

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<sup>28</sup> Australian Competition & Consumer Commission, *Organic claims* <<https://www.accc.gov.au/consumers/groceries/organic-claims>>.

<sup>29</sup> Australian Competition & Consumer Commission, *Compliance & enforcement policy* <<http://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy>>.

<sup>30</sup> Australian Competition & Consumer Commission, *ACCC negotiates removal of misleading 'organic' water claims* (16 July 2013) <<http://www.accc.gov.au/media-release/accc-negotiates-removal-of-misleading-%E2%80%98organic%E2%80%99-water-claims>>.

<sup>31</sup> *Ibid.*

<sup>32</sup> Standards Australia, *Australian Standards 6000-2009 Organic and biodynamic products* (at 9 October 2009) s 6.2.3.

<sup>33</sup> *Competition and Consumer Act 2010* (Cth) sch 2 s 18.

<sup>34</sup> *Marsh v Baxter* (2014) 46 WAR 377, 413.

### C Organic produce imported into Australia

Produce imported into Australia must comply with the *Imported Food Control Act 1992* (Cth) and *Imported Food Control Regulations 1993* (Cth). The Act requires that food imported into Australia must meet the ‘applicable standards relating to information on labels for packages containing food’.<sup>35</sup> Therefore, imported food produce must meet the Code with respect to food labelling.

Organic produce imported into Australia is subject to the same organic labelling regime as organic produce intended for the domestic market, being the voluntary AS 6000-2009. The importer bears the responsibility for the labelling and marketing claims of the imported organic produce.<sup>36</sup> Therefore, if an organic claim on an imported organic produce is questioned or disputed by the ACCC, the importer bears the responsibility of substantiating the claim.

## IV THE NEED FOR REFORM

Generally, consumers of organic produce are vulnerable in that they must rely on the produce label for information pertaining to the nature and composition of the product. Such claims cannot be easily verified by the consumer independently. Such products are often referred to as credence products. In addition to this, organic produce is commonly sold at a premium price, due to the perceived health and environmental benefits.<sup>37</sup> These two factors place Australian organic consumers in a vulnerable position as suppliers can easily take advantage of the financial benefits associated with such organic claims without due substantiation. This is particularly true with the labelling of organic products intended for the Australian domestic market as such products can claim to be ‘organic’ without meeting the relevant standards, namely the AS 6000-2009.

Although organic produce intended for exportation is subject to strict standards and regulations, the domestic market is effectively left to its own devices with voluntary standards. Australian organic consumers are exposed to various organic labels and terminology, such as ‘certified organic’, ‘organic’ and overseas ‘certified organic’ labels imported into Australia. The lack of consistent and clear organic labelling requirements and terminology within the Australian organic industry causes consumer confusion,<sup>38</sup> which in turn undermines and compromises the integrity of the organic industry as a whole.

In 2014, the results of a survey conducted by Mobium Group inquiring how consumers determine whether a product is organic were published in that year’s Australian Organic Market Report.<sup>39</sup> Of 1001 Australian consumers that were

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<sup>35</sup> *Imported Food Control Act 1992* (Cth) s 8A. It is an offence to deal with imported food that does not comply with Australian labelling standards. This offence attracts a maximum penalty of 10 years imprisonment.

<sup>36</sup> *Ibid* s 8. The person who imports food into Australia, i.e. the importer, is held personally liable for the produce if it does not meet the applicable Australian standards. This offence attracts a maximum penalty of 10 years imprisonment.

<sup>37</sup> See, eg, Lisa Oates, Marc Cohen and Lesley Braun, ‘Characteristics and consumption patterns of Australian organic consumers’ (2012) 92(14) *Journal of the Science of Food and Agriculture* 2782 and Justin Paul and Jyoti Rana, ‘Consumer behaviour and purchase intention for organic food’ (2012) *The Journal of Consumer Marketing* 412.

<sup>38</sup> Joanna Henryks and David Pearson, ‘Misreading between the lines’ (2010) 37(3) *Australian Journal of Communication* 73.

<sup>39</sup> Swinburne University of Technology, Australian Bureau of Statistics and Mobium Group, ‘Australian Organic Market Report 2014’ (Report, Australian Organic Ltd, 2014) 38.



surveyed, 64% believed that an item was organic if the term 'organic' appeared on the produce label, whereas 34% of consumers surveyed believed the item was organic if an organic certification symbol appeared on the produce label.<sup>40</sup> The variation in results demonstrates that there is a lack of understanding amongst Australian organic consumers about the organic industry and organic certification processes.

Despite the stringent food labelling requirements enforced by the FSANZ, the inconsistent organic labelling requirements undermine the rationale for the strict Code labelling requirements, namely achievement of the FSANZ's goals of ensuring consumer confidence, protection, informed decision making and the facilitation of an efficiently regulated food market.<sup>41</sup> This inconsistent approach to organic labelling not only causes confusion, but also further contributes to the organic consumer's vulnerability and further exposes organic consumers to the risk of potential misleading and deceptive claims. The lack of mandatory standards and regulation within the Australian domestic organic market makes it easier for suppliers to take advantage of already vulnerable consumers.

The ACCC stipulates that '[c]onsumers purchasing organic products should be able to feel confident that the ingredients are in fact organic'.<sup>42</sup> Whilst 'truth in advertising' is consistently on the ACCC's Compliance and Enforcement Policy priority list, given the vulnerability of consumers of premium and credence produce (including but not limited to organic produce),<sup>43</sup> it is questionable whether the current organic co-regulatory framework within Australia adequately protects consumers. The AS 6000-2009 on its own has no legislative effect and is only legally enforceable when it is read and enforced in conjunction with *Competition and Consumer Act 2010* (Cth) by ACCC. Therefore, unless the ACCC is continually monitoring the market for unsubstantiated organic claims, there is no legislative instrument ensuring compliance. Therefore, the lack of a definitive regulation framework within the organic market increases the likelihood of unsubstantiated organic claims at the expense of consumers and organic suppliers who play by the rules.

The call for labelling reform is not novel in the Australian organic industry.<sup>44</sup> Despite this fact, and the numerous calls for reform for the implementation of a singular mandated organic labelling regime, the Australian Commonwealth Parliament has not obliged. In 2009, the Chairman of the Organic Federation of Australia (the

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<sup>40</sup> Ibid.

<sup>41</sup> *Food Standards Australia New Zealand Act 1991* (Cth) s 3.

<sup>42</sup> Australian Competition & Consumer Commission, *Organic claims*, Commonwealth of Australia <<http://www.accc.gov.au>>.

<sup>43</sup> Australian Competition & Consumer Commission, *Advertising and selling guide: Environmental and organic claims* <<http://www.accc.gov.au/publications/advertising-selling/advertising-and-selling-guide/marketing-claims-that-require-extra-care-premium-and-credence-claims/environmental-and-organic-claims>> and Australian Competition & Consumer Commission, *Compliance & enforcement policy* (February 2015) <<http://www.accc.gov.au/system/files/ACCC%20Compliance%20and%20Enforcement%20Policy%202015.pdf>>.

<sup>44</sup> See, eg, Australian Quarantine and Inspection Service, Submission to Australian New Zealand Food Authority, *Labelling of food described as 'organic' – application to vary the Australian New Zealand Food Standards Code*, 1997. The Australian Quarantine and Inspection Service (now Department of Agriculture, Fisheries and Forestry) submitted to the Australia New Zealand Food Authority (now Food Standards Australia New Zealand) to amend the *Australia New Zealand Food Standards Code* to incorporate regulation of organic production and labelling. The Australian Quarantine and Inspection Service's submission was unsuccessful. See generally Hui-Shung (Christie) Chang, 'Labelling issues of organic and GM Foods in Australia' (2005) *Australasian Agribusiness Review* <<http://www.agrifood.info/perspectives/2005/Chang.html>>.

peak organisation for the Australian organic and biodynamic industry) Andre Leu, suggested:

Despite repeated requests from the industry, successive Australian governments have refused to do this due to a reluctance to have mandatory systems unless there is a *proven failure* of the existing regulatory systems (emphasis added).<sup>45</sup>

Mr Leu's statement implies that a drastic, unwarranted and wholly unnecessary event causing market failure needs to occur before government intervention and action is likely to be pursued. Mr Leu's assessment of the Australian Commonwealth Government approach is relatively consistent with the current Australian Commonwealth Government's more general approach to regulation,<sup>46</sup> namely that the Government will only intervene through regulatory measures as a 'means of last resort'.<sup>47</sup>

Whilst the Australian Commonwealth Government's 'if it ain't broke, don't fix it' approach was potentially suitable for a once small organic industry, this approach is no longer appropriate given the current size of the Australian organic industry and its predicted yearly growth. The Australian Organic Market Report 2014 estimated that the value of the Australian organic industry was \$1.72 billion in 2014 and is predicted to grow by approximately 15.4% each year.<sup>48</sup> This makes the organic industry one of Australia's fastest growing industries.<sup>49</sup> Given the size and exponential growth experienced by the organic industry in recent years, it is critical that the organic labelling regime in Australia is reformed in order to ensure market integrity and consumer protection.

A single, legally mandated organic standard with one organic identification mark is necessary in order to resolve the shortcomings of the current framework. Only through such reform can the organic industry achieve FSANZ's goals of ensuring consumer confidence, protection, informed decision making and an efficiently regulated food industry for suppliers.<sup>50</sup> Each reform recommendation will be discussed in turn.

#### A Single Organic Standard

The creation and implementation of the National Standard in 1992 was 'seen as essential to protect the image and credibility of the [Australian] organic produce industry' as no organic standard existed at the time.<sup>51</sup> The National Standard was implemented as the Australian Export Standard for products labelled as 'organic'.<sup>52</sup> In 2009, in an attempt to 'standardize the sectors of the organic industry' within Australia, Standards Australia, in conjunction with a committee comprised of various organic

<sup>45</sup> Andre Leu, *OFA Directors Report for 2008-9* (October 2008) Organic Federation of Australia <<http://d3n8a8pro7vhm.cloudfront.net/ofa/pages/94/attachments/original/1391142749/Directors-Report-2009.pdf>>.

<sup>46</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 19 March 2014, 2355 (Tony Abbott).

<sup>47</sup> *Ibid* 2365 (Josh Frydenberg).

<sup>48</sup> Swinburne University of Technology, Australian Bureau of Statistics and Mobium Group, 'Australian Organic Market Report 2014' (Report, Australian Organic Ltd, 2014) 2.

<sup>49</sup> *Ibid*.

<sup>50</sup> *Food Standards Australia New Zealand Act 1991* (Cth) s 3.

<sup>51</sup> Organic Produce Advisory Committee, Parliament of Australia, *Report from Organic Produce Advisory Committee Meeting 22 November 1991* (1991) 5.

<sup>52</sup> Organic Industry Standards and Certification Committee, *National Standard for Organic and Bio-Dynamic Produce* (at 1 February 2013) 1.

stakeholders, prepared and implemented the voluntary AS 6000-2009.<sup>53</sup> The implementation of AS 6000-2009 was an attempt to bring the organic domestic and imported sectors in line with the organic exportation sector.

However since the implementation of AS 6000-2009, there are now two standards regulating the one industry. Although the two standards are similar,<sup>54</sup> it is ill-advised to have two standards. In pursuit of a uniform organic regulatory framework, it is recommended that the two standards merge and form one standard; or the two standards be assessed to determine which standard is most appropriate in light of exportation obligations, in order to continue to facilitate international trade.<sup>55</sup> The adoption of a single standard will ensure the equal application of a standard to all organic produce, regardless of whether the produce is intended for exportation, the domestic market or is being imported into Australia.

The existence of two different standards in the one industry creates the perception of inconsistency and confusion. The discernment of inconsistency by some undermines the integrity of the industry as a whole and lowers consumer confidence.<sup>56</sup> Furthermore, it is questionable whether having two standards regulating the one industry is an efficient approach to regulation, especially in circumstances where the standards are similar and the differences in their respective purposes are more superficial than substantive. Therefore, in order to ensure uniformity, and in turn improve consumer confidence and regulation in the Australian organic industry, adoption of a single organic standard is necessary.

Adoption of a single organic standard will bring Australia into line with the two largest existing geographical organic food markets, the United States of America and Europe.<sup>57</sup> Both jurisdictions have one national organic standard that applies to all organic products produced and imported into their respective borders.<sup>58</sup> The adoption of a single organic standard in the above jurisdictions has not resulted in any known harm, and in the absence of negative consequences, can be deemed a beneficial outcome.

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<sup>53</sup> Standards Australia, *AS 6000-2009 Organic and biodynamic products* (at 9 October 2009) 2.

<sup>54</sup> Ibid 3. The AS 6000-2009 *Organic and biodynamic products* was modelled from the National Standard for Organic and Bio-Dynamic Produce. Hence, the similarity between the two Standards.

<sup>55</sup> Organic Federation of Australia, *National Organic & Biodynamic Seal* <[http://www.ofa.org.au/national\\_organic\\_mark](http://www.ofa.org.au/national_organic_mark)>. Organic Federation of Australia has proposed that the AS600-2009 be adopted and replace the National Standards as the domestic and export organic standard.

<sup>56</sup> See, eg, Joanna Henryks and David Pearson, 'Marketing communications creates confusion: Perception versus reality for Australian organic food consumers' (Paper presented at Australian and New Zealand Communications Association Annual Conference, Canberra, 7-9 July 2010) and Nick Galvin, 'Hazy truth about organics', *The Sydney Morning Herald* (online), 22 August 2010 <<http://www.smh.com.au/lifestyle/diet-and-fitness/hazy-truth-about-organics-20100821-139pn.html>>.

<sup>57</sup> Swinburne University of Technology, Australian Bureau of Statistics and Mobium Group, 'Australian Organic Market Report 2014' (Report, Australian Organic Ltd, 2014) 2.

<sup>58</sup> *Organic Foods Production Act of 1990*, 7 USC § 6505 and *Regulation (EEC) No 2092/91 of the Commission of 24 June 1991 on organic production of agricultural products and indications referring thereto on agricultural products and foodstuffs* [1991] OJ L 198 E/1. In the United States of America there is a certification exemption for small organic producers, i.e. organic producers who annual sales are under \$5,000 (USD).

### B Legally Enforceable Standard

The co-regulatory approach adopted by the Australian Commonwealth Government is the primary cause of confusion and inconsistency within the organic domestic market. The confusion and inconsistency stem from the lack of legal enforceability of the AS 6000-2009. Given the AS 6000-2009 is not legally enforceable on its own within the domestic market, Australian organic consumers are exposed to a range of organic products that may or may not meet organic standards. Furthermore, consumers of domestic organic produce are exposed to a variety of inconsistent organic labels – some products are ‘certified organic’ (as result of the ‘spillover’ consequences of the National Standard), whereas others are merely labelled as ‘organic’.

The co-regulatory approach with respect to organic exports has worked well, as the National Standard is enforced in conjunction with legislative instruments that *actively* and *consistently* regulate the entire organic export sector.<sup>59</sup> By contrast, the co-regulatory approach with respect to the organic domestic market has not worked well as the AS 6000-2009 is only enforced in conjunction with the *Competition and Consumer Act 2001* (Cth), through the ACCC prosecuting misleading and deceptive claims. Therefore, the Australian organic domestic sector is not consistently regulated and monitored to ensure compliance with the AS 6000-2009.

The lack of a legally enforceable framework within the Australian organic industry exposes consumers to a greater risk of exploitation. The AS 6000-2009 merely acts as a guide for the ACCC in its prosecution of misleading and deceptive claims of products that claim to be ‘organic’ but fall short of a legally enforceable standard. Whilst to the average consumer the various labels and terminology that can be employed may appear to be the same or at least similar, the degree in which these products are organic can vary substantially – indeed the organic claims can prove to be untrue.

An adoption of a single legally enforceable organic labelling standard within Australia, which does not vary depending on whether the organic product is intended for exportation or domestic consumption, will remove the inconsistency that currently exists. In particular, it will resolve the current inconsistency and uncertainty that affects the Australian domestic market. Incorporating a single legally enforceable labelling standard within Australia will not only reduce consumer vulnerability, but also build consumer confidence and allow consumers to make informed choices regarding the products they purchase.

In order for Australian organic producers to continue to meet the organic requirements and standards of importing countries, all organic products produced in Australia need to be ‘certified organic’.<sup>60</sup> Therefore, if a single legally enforceable organic labelling standard were to be adopted within Australia, the standard must specify that all organic products produced within Australia must be ‘certified organic’ regardless of whether the organic product is intended for exportation or domestic consumption. Similarly, organic produce imported from overseas must also be ‘certificated organic’ by an equivalent organic certification body from the organic product’s country of origin. The requirement that all organic produce be ‘certified organic’ will reduce organic claims in the domestic market that in fact do not meet the requisite standard as such products will have to undergo third-party certification, periodic audits and reviews in order to be sold in the domestic market. This will ensure a consistent definition and understanding of the term organic within Australia.

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<sup>59</sup> *Export Control (Organic Produce Certification) Orders* (Cth) and *Export Control Act 1982* (Cth).

<sup>60</sup> *Ibid* and National Standard.

There are two possible avenues for a legally enforceable framework to be incorporated into the organic industry. The first option is to have the FSANZ incorporate a set of organic standards within its existing Code. Such amendments will become legally enforceable within the States, Territories and Commonwealth of Australia by virtue of existing legislative instruments.<sup>61</sup> It must be noted that at the time the National Standard was implemented, the majority of the Organic Produce Advisory Committee supported the proposal for the National Standard to be submitted to the National Food Authority (now FSANZ) as the standard for labelling requirements of organic produce within the domestic market.<sup>62</sup> This submission did not eventuate despite numerous submissions of this nature. One of the reasons why FSANZ did not accept the submission was on the grounds that the management and administration of organic standards was not a matter of significant public health or food safety concern.<sup>63</sup>

The second avenue is for the States and Territories of Australia to pass uniform legislation with respect to the organic industry. The Australian Commonwealth Government is unable to legislate with respect to this matter as it is not within its constitutional scope, unless this power is referred to the Commonwealth Government by the States and Territories.<sup>64</sup> Whilst this second avenue is plausible in theory, in practice it will be logistically very difficult to coordinate and implement. Therefore, the most feasible method of implementing a legally enforceable framework within the Australian organic industry is through the first mentioned avenue, namely FSANZ.

Adopting a single legally enforceable organic standard will benefit multiple stakeholders, including consumers, suppliers and regulators. Australian consumers would be confident that goods sold domestically were subject to the same stringent processes as organic goods produced for export and sold internationally. Furthermore, organic labelling in Australia will become standardised, allowing consumers to make confident informed choices.

Organic suppliers also stand to benefit from the adoption of a single organic standard as it ensures a level playing field for all suppliers of organic produce. It eliminates from the market suppliers who label their products as 'organic', without having undergone stringent organic assessments.

Finally, regulators benefit from the adoption of a single organic standard as they can rely on the legislative instruments to enforce and uphold the law. The organic standards will no longer merely be a point of reference for the ACCC in determining the meaning of 'organic'. Through the implementation of a legally enforceable organic standard, the ACCC can pursue misleading and deceptive claims by reference to a legally enforceable legislative instrument.

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<sup>61</sup> *Food Act 1981* (New Zealand), *Food Act 1984* (Vic), *Food Act 2001* (ACT), *Food Act 2001* (SA), *Food Act 2003* (NSW), *Food Act 2003* (Tas), *Food Act 2004* (NT), *Food Act 2006* (Qld), *Food Act 2008* (WA) and *Imported Food Control Act 1992* (Cth).

<sup>62</sup> Organic Produce Advisory Committee, Parliament of Australia, *Report from Organic Produce Advisory Committee Meeting 22 November 1991* (1991) 6.

<sup>63</sup> See, eg, Els Wynen, 'Standards and compliance systems for organic and bio-dynamic agriculture in Australia: Past, Present and Future' (2007) 2(2) *Journal of Organic System* 38, 44; and Hui-Shung (Christie) Chang, 'Labelling issues of organic and GM Foods in Australia' (2005) *Australasian Agribusiness Review* <<http://www.agrifood.info/perspectives/2005/Chang.html>>.

<sup>64</sup> *Australian Constitution* s 51(xxxvii).

### C Single Identification Symbol

As there are seven organic certifying organisations within Australia, consumers in the organic market are exposed to seven competing organic identification symbols. It must be noted that this does not include the organic products that are imported from overseas displaying different organic symbols.

In 2008, the organic industry commissioned Newspoll to conduct a market research survey to investigate consumer opinion about the current certification system for organic food in Australia.<sup>65</sup> Not surprisingly, a large proportion of consumers did not recognise or understand the organic certification symbols, and felt ‘burdened with a sense of “confusion”’.<sup>66</sup> The results from the survey indicated that a vast majority of consumers surveyed (72%) would prefer the organic industry to adopt a new certification symbol as it would be ‘easier, clearer, [and] less confusing’.<sup>67</sup>

The adoption of one organic symbol would provide clarity, consistency and ensure uniformity within the organic market. Furthermore, it will assist consumers to distinguish between genuine organic products from products with unsubstantiated organic claims.<sup>68</sup> Similar to the recommendations offered by the Organic Federation Australia, it is contended that a national organic symbol should be incorporated within Australia.<sup>69</sup>

The implementation of a national organic symbol would not only benefit consumers by making organic products readily identifiable, it also has the potential to fuel growth in the organic industry. In 2002, the USDA national organic seal was introduced in the United States of America. From 2002 to 2012, retail sales in organic products increased from \$8.1 billion to \$29 billion.<sup>70</sup> Similarly, the European Union organic symbol (the Euro-leaf) became compulsory for ‘organic pre-packaged food produced in the European Union’ on 1 July 2010.<sup>71</sup> Therefore, adopting a single organic symbol within Australia will bring the domestic market into line with the United States of America and Europe.<sup>72</sup>

<sup>65</sup> Newpoll Report, Organic Food Newpoll Report 2008 (October 2008) National Association for Sustainable Agriculture Australia (NASAA) <[http://www.nasaa.com.au/data/pdfs/OFA\\_Newpoll\\_Report\\_2008.pdf](http://www.nasaa.com.au/data/pdfs/OFA_Newpoll_Report_2008.pdf)>.

<sup>66</sup> Ibid 3.

<sup>67</sup> Ibid 5. Furthermore, when asked to rate the current system of the various certification symbols on a scale from 0 to 10 (where 0 is ‘very confusing and hard to identify organic foods’ and 10 is ‘very clear and simple to identify organic foods’) the average rating was 3.1 out of 10.

<sup>68</sup> Andre Leu, *Discussion Document on a National Organic Mark* (May 2010) *Organic Federation of Australia* <<https://d3n8a8pro7vhnmx.cloudfront.net/ofa/pages/96/attachments/original/1391288271/NO-M-Discussion-Docment-20100510.pdf?1391288271>>.

<sup>69</sup> Organic Federation of Australia, *National Organic & Biodynamic Seal* <[http://www.ofa.org.au/national\\_organic\\_mark](http://www.ofa.org.au/national_organic_mark)>.

<sup>70</sup> Barbara Fitch Haumann, ‘Another Milestone Year for the U.S. Organic Industry’ in Helga Willer and Julia Lernoud (eds), *The World of Organic Agriculture. Statistics and Emerging Trends 2014. FiBL-IFOAM Report*. (24 February 2014) Research Institute of Organic Agriculture (FiBL) <<https://www.fibl.org/fileadmin/documents/shop/1636-organic-world-2014.pdf>>, 243.

<sup>71</sup> *Commission Regulation (EU) No 271/2010 of 24 March 2010 as regards the organic production logo of the European Union* [2010] QJ C 84 E/19.

<sup>72</sup> Swinburne University of Technology, Australian Bureau of Statistics and Mobium Group, ‘Australian Organic Market Report 2014’ (Report, Australian Organic Ltd, 2014) 2.

## V CONCLUSION

The Australian organic food labelling framework is indeed murky and is in need of reform. Waiting for a complete market failure to occur before the Australian Commonwealth Government will intervene and regulate as a 'last resort' is not a desirable option or course of action.

Consumers of organic products are particularly vulnerable as they are consumers of premium credence products. They are paying top dollar for their organic products; the composition of which cannot be easily substantiated independently by the consumer. As a result consumers are heavily dependent on the food labels when selecting the organic products they purchase. The current co-regulatory framework within the Australian organic industry further perpetuates Australian organic consumers' vulnerability as there is no legally enforceable standard enforced with respect to organic products intended for the domestic market. Whilst the various food labels and terms should ideally represent the same thing or standard, the degree in which the product is indeed organic can vary substantially.

Unsurprisingly the current co-regulatory organic labelling regime in Australia appears to nurture consumer uncertainty, confusion and increases consumer vulnerability. The only solution is government intervention and regulatory reform.

The paramount priority is the implementation of a national organic standard, with legislative effect, within the Australian organic industry. The adoption and implementation of a uniform legally enforceable standard will lower the confusion currently experienced by organic consumers and in turn enhance consumer perceptions of, and confidence in, the organic industry within Australia. Furthermore, it will reduce the organic consumers' vulnerability.

The use of one organic certification symbol will also enhance the profile of Australia's organic industry amongst consumers domestically and internationally. It is critical for customers to understand and be familiar with organic standards and symbols. This can only be achieved through a consistent and unified approach.

