

THE CONTEST OVER 'VALUABLE LABEL REAL ESTATE': PUBLIC HEALTH REFORMS TO THE LAWS ON ALCOHOL BEVERAGE LABELLING IN AUSTRALIA

PAULA O'BRIEN*

I INTRODUCTION

The demand for the space on food labels is intense. In 2011, the chair of Australia's comprehensive review of food and beverage labelling, Dr Neal Blewett, claimed that the food label 'is one of the most highly valued and sought after communication channels in the marketplace'.¹ Food suppliers regard the label space as their property. They are doggedly defending this property, including through legal channels, from claims by consumers and their advocates for more of this space to be given over to additional product information. Consumers around the world are increasingly seeking more information on food labels about matters such as the country of origin of the product,² the inclusion of

* Senior Lecturer at Melbourne Law School, The University of Melbourne. Email: obrienpl@unimelb.edu.au.

1 Neal Blewett et al, *Labelling Logic: Review of Food Labelling Law and Policy* (Australia and New Zealand Food Regulation Ministerial Council, 2011) iii.

2 There have been several unsuccessful attempts to introduce more accurate country of origin labelling rules in Australia by way of private members' bills in the Commonwealth Parliament: Competition and Consumer Amendment (Australian Country of Origin Food Labelling) Bill 2013 (Cth); Competition and Consumer Amendment (Australian Food Labelling) Bill 2012 (Cth); Food Standards Amendment (Truth in Labelling Laws) Bill 2009 (Cth). See also Senate Rural and Regional Affairs and Transport Legislation Committee, Parliament of Australia, *Competition and Consumer Amendment (Australian Food Labelling) Bill 2012 (No 2)* (2013). Country of origin labelling laws in the United States which apply to commodities such as beef and pork have led to a long-running dispute in the World Trade Organization ('WTO'): see Ashley Peppler, 'Where Is My Food From? Developments in the WTO Dispute over Country-Of-Origin Labeling for Food in the United States' (2013) 18 *Drake Journal of Agricultural Law* 403.

palm oil,³ and the use of genetically modified material.⁴ A voluntary front-of-pack ‘health star rating’ system is being developed for Australian food labelling (albeit amidst intense controversy)⁵ and a ‘traffic light’ labelling scheme now exists in the United Kingdom.⁶ At the same time as consumers are demanding more detailed information about the foods they are being sold, the industry’s use of the food label to make claims about their products is being reined in. New restrictions on food-related health and nutrition claims now apply in Australia and New Zealand.⁷

The intense conflict about label space extends to alcohol, which is the focus of this article. Although alcohol is a food, it is exempt in Australia from many of the labelling requirements which apply to other ‘ordinary’⁸ food commodities, such as ingredient listing and nutrition information panels. Although alcohol is also a drug – a psychoactive substance, similar to a barbiturate,⁹ which has toxic effects and carries risks of intoxication and dependence¹⁰ – it carries none of the warnings or consumer information messages seen on other legal drugs such tobacco and prescription or over-the-counter pharmaceuticals in Australia. Public health advocates are constantly calling for government to mandate further health-related information on alcohol beverage containers, especially health warnings. At an international level, they are backed up by the World Health Organization (‘WHO’), whose *Global Strategy to Reduce the Harmful Use of Alcohol* includes

-
- 3 See Food Standards Amendment (Truth in Labelling–Palm Oil) Bill 2009 (Cth); Food Standards Amendment (Truth in Labelling–Palm Oil) Bill 2010 (Cth). The bills were the subject of parliamentary committee inquiries which recommended against their passage: Senate Community Affairs Legislation Committee, Parliament of Australia, *Food Standards Amendment (Truth in Labelling–Palm Oil) Bill 2010* (2011) vii; House of Representatives Standing Committee on Economics, Parliament of Australia, *Advisory Report on the Food Standards Amendment (Truth in Labelling–Palm Oil) Bill 2011* (2011) iv. Palm oil labelling also raises issues under WTO law: see Elizabeth Sheargold and Andrew D Mitchell, ‘Oils Ain’t Oils: Product Labelling, Palm Oil and the WTO’ (2011) 12 *Melbourne Journal of International Law* 396.
 - 4 See Food Standards Amendment (Truth in Labelling–Genetically Modified Material) Bill 2010 (Cth). Like the ‘Truth in Labelling’ bills referred to in the previous footnotes, this bill did not pass and the inquiring parliamentary committee recommended against its passage: see Senate Community Affairs Legislation Committee, Parliament of Australia, *Food Standards Amendment (Truth in Labelling–Genetically Modified Material) Bill 2010* (2011) 12.
 - 5 Department of Health (Cth), *Front-of-Pack Labelling Updates* (30 June 2014) <<http://www.health.gov.au/internet/main/publishing.nsf/Content/foodsecretariat-front-of-pack-labelling-1>>; Amy Bainbridge, ‘Controversial Star Rating System for Food Packaging May Not Go Ahead, Says AMA Expert’, *ABC News* (online), 28 February 2014 <<http://www.abc.net.au/news/2014-02-28/key-group-to-meet-on-vexed-issue-of-food-labelling/5287908>>.
 - 6 Jacqui Wise, ‘Consistent Food Labelling System is Rolled Out Across UK’ (2013) 346 *British Medical Journal* 4010.
 - 7 *Australia New Zealand Food Standards Code* (‘Code’), standard 1.2.7 (‘Nutrition and Health Claims Standard 1.2.7’).
 - 8 Thomas Babor et al, *Alcohol: No Ordinary Commodity: Research and Public Policy* (Oxford University Press, 2nd ed, 2010).
 - 9 World Health Organization, *Lexicon of Alcohol and Drug Terms Published by the World Health Organization* (2014) <http://www.who.int/substance_abuse/terminology/who_lexicon/en/>.
 - 10 Babor et al, above n 8, 11.

labelling alcoholic beverages to indicate the harms related to alcohol consumption.¹¹ The rationale for demanding the inclusion of such information extends beyond a consumer's 'right to know' and is directed towards minimising the considerable harm which arises from the consumption of alcohol.¹²

The WHO estimates that 4 per cent of all deaths worldwide and 'approximately 4.5 per cent of the global burden of disease and injury [are] attributable to alcohol'.¹³ Alcohol is the world's leading risk factor for death among males aged 15–59 years.¹⁴ It has been estimated that, in 2003, 2.3 per cent of the burden of disease and injury in Australia was attributable to alcohol.¹⁵ But physical and psychological harms are by no means the full extent of the harms from alcohol misuse. Loss of productivity and absenteeism from work,¹⁶ and property theft are other negative effects.¹⁷ Further, it is not only the drinker him or herself who may be harmed by alcohol. The family of the drinker is one group obviously affected by alcohol misuse,¹⁸ and strangers can also be seriously injured by the conduct of intoxicated persons in public places.¹⁹ Collins and Lapsley estimated the cost of alcohol to *Australian society* in 2004/2005 was \$15.3 billion.²⁰ In 2010, Laslett et al estimated the annual cost of alcohol's harm to *others* in Australia at about \$20.6 billion.²¹

However, the alcohol industry sees the alcohol beverage label as its 'valuable label real estate'.²² Given this, it has fiercely opposed recent measures by governments in developed and developing countries to introduce alcohol health warning labels. For example, a proposal by the Thai government to include graphic warnings on alcohol beverage containers has been opposed by

11 World Health Organization, *Global Strategy to Reduce the Harmful Use of Alcohol*, WHA 63.13, WHA Res, 63rd sess, WHA63/2010/REC/1 (2010) ('*WHO Global Strategy on Alcohol*').

12 Ministerial Council on Drug Strategy, *National Alcohol Strategy 2006–2011* (2006). The Strategy was initially drafted for 2006–09 but was extended to 2011. There has been no further extension to cover the current year. In effect, Australia is without a national alcohol strategy. In February 2011, the Council of Australian Governments also decided to abolish the Ministerial Council on Drug Strategy, which had determined Australia's drug policy since 1985: Ministerial Council on Drug Strategy, *National Drug Strategy 2010–2015* (2011) 24.

13 World Health Organization, *Global Status Report on Alcohol and Health* (2011) 20. See also Jürgen Rehm et al, 'Global Burden of Disease and Injury and Economic Cost Attributable to Alcohol and Alcohol-Use Disorders' (2009) 373 *Lancet* 2223.

14 World Health Organization, *Global Status Report on Alcohol and Health*, above n 13, 20.

15 Stephen Begg et al, Australian Institute of Health and Welfare, *The Burden of Disease and Injury in Australia 2003* (2007) 74, 84–7.

16 David J Collins and Helen M Lapsley, Department of Health and Ageing, *The Costs of Tobacco, Alcohol and Illicit Drug Abuse to Australian Society in 2004/2005* (2008) 24–5.

17 Ibid 44–5.

18 See also Anne-Marie Laslett et al, AER Foundation and Turning Point Alcohol and Drug Centre, *The Range and Magnitude of Alcohol's Harm to Others* (2010) chs 7–8.

19 Ibid ch 11.

20 Collins and Lapsley, above n 16, xi–xii.

21 Laslett et al, above n 18, 178.

22 Australian Alcoholic Beverage Industries, *Submission to the Labelling Review Response Secretariat on Alcoholic Beverages* (5 September 2011) 14.

other alcohol producing countries in the WTO.²³ There was also an unsuccessful constitutional challenge to an alcohol health warning measure introduced in Kenya.²⁴ In the Australian context, the industry has had some success in convincing the government not to mandate health warnings and other nutritional information on alcohol beverage containers. Between 1996 and 2013, the Australian federal, state and territory governments passed up every opportunity for reform of the laws relating to alcohol beverage labelling.

This article analyses the public health proposals for reforming Australia's alcohol labelling laws, the industry's arguments in opposition to these proposals, and the Australian federal, state and territory governments' resistance to multiple attempts and expert recommendations to bring these public health proposals into law from 1996 to 2013. The governments' reasons for not implementing such reforms are a particular focus of this article, as its central aims are to identify the specific points of disagreement between public health advocates and the alcohol industry in relation to alcohol labelling, and to understand the position which governments have taken in respect of these policy disputes. This article finds that there are certain evidentiary issues which have dominated the debate about alcohol labelling in Australia since 1996 and continue to do so. These include the prevalence of harms from alcohol, the relationship between population-level alcohol consumption and alcohol-related harms, and the effectiveness of warning labels in reducing harm. However, this article also identifies two significant shifts in the labelling debate: one arising from the new and incontrovertible evidence of harm from drinking during pregnancy; the other related to the alcohol industry and governments' recent preference for industry self-regulation as the vehicle for introducing changes to alcohol labelling.

This article commences by outlining the current Australian law on alcohol labelling in Part II. This is followed in Part III by a review of public health proposals which have been made to reform the laws relating to alcohol labelling for the purposes of harm minimisation. This Part examines the merits of these proposals and also critically discusses the counter arguments from the alcohol industry. Part IV starts with an analysis of the unusual international and domestic legal powers and processes, which apply to lawmaking in the area of food standards in Australia. Against this background, Part IV reviews the various attempts to change Australia's alcohol labelling laws in the period 1996 to 2013, including the reasons proffered by government for having not introduced labelling changes.

23 Paula O'Brien, 'Australia's Double Standard on Thailand's Alcohol Warning Labels' (2012) 32 *Drug and Alcohol Review* 5.

24 *East Africa Breweries Ltd v A-G* [2013] eKLR (High Court of Kenya, Petition 84 of 2011, 27 February 2013).

II ALCOHOL BEVERAGE LABELLING LAWS IN AUSTRALIA

A Introduction

The principal labelling requirements for alcoholic beverages in Australia are found in the *Australia New Zealand Food Standards Code*. The *Code* sets out the information which must be included on alcoholic beverage labels. It also prescribes the information which must *not* be included on such labels, unless certain conditions are met. The *Code* requirements will be discussed in detail below. In addition to the *Code*, alcoholic beverages, like all goods and services in Australia, are subject to the general requirement under Australian law that misleading or deceptive representations must not be made in relation to the products.²⁵ The misleading and deceptive conduct prohibition will not be discussed further here.

The process by which the *Code* becomes the standard for alcohol beverage labelling in Australia is unusual and does not conform to the normal legislative pattern. Instead, the standards for alcohol labelling arise from a complicated arrangement which involves the Governments of Australia, New Zealand and each of the Australian states and territories. A Commonwealth statutory agency, Food Standards Australia New Zealand ('FSANZ'),²⁶ is empowered to set standards in relation to 'food', including its labelling.²⁷ The body of standards created by FSANZ constitute the *Code*. Australia and New Zealand have agreed, by way of an international treaty, to apply the *Code* in their territories.²⁸ In Australia, however, it is the state and territory governments which have the main role in the application and enforcement of the *Code*.²⁹

25 See *Competition and Consumer Act 2010* (Cth) ss 6, 131, 140B, sch 2.

26 *Food Standards Australia New Zealand Act 1991* (Cth) ('*FSANZ Act*') s 12(1). FSANZ was previously known as the National Food Authority (1991–6) and the Australian New Zealand Food Authority (1996–2002): FSANZ, *History of FSANZ* (2013) <<http://www.foodstandards.gov.au/scienceandeducation/aboutfsanz/background/historyoffsanx.cfm>>.

27 *FSANZ Act* ss 13(1)(a)–(b), 16. The powers and processes for food standard setting are discussed further in Part IV(A) below.

28 Food Standards Australia New Zealand, *Agreement between the Government of Australia and the Government of New Zealand Concerning a Joint Food Standards System* (Unauthorised Updated Version) (2011) art 3(1) ('*ANZ Food Standards Treaty*') <<http://www.foodstandards.gov.au/about/background/foodregagreements/pages/default.aspx>>. This unauthorised version of the Agreement is a compilation of the following official documents: (1) *Agreement between the Government of Australia and the Government of New Zealand Establishing a System for the Development of Joint Food Standards*, signed 5 December 1995, [1996] ATS 12 (entered into force 5 July 1996), as amended by (2) *Agreement between the Government of Australia and the Government of New Zealand Concerning a Joint Food Standards System*, signed 25 October 2001, [2002] ATS 13 (entered into force 1 July 2002) and (3) *Exchange of Letters Amending the Agreement between the Government of Australia and the Government of New Zealand Concerning a Joint Food Standards System*, signed 3 March 2010, [2008] ATS 15 (entered into force 6 July 2010).

29 'Food Regulation Agreement' (Intergovernmental Agreement, Council of Australian Governments, 3 July 2008) cls 10, 19, 21–2.

The *Code* sets standards for ‘food’ which is sold or prepared for sale in Australia or New Zealand, and imported into these countries.³⁰ ‘Food’ is inclusively defined in a broad manner as ‘any substance or thing of a kind used, capable of being used, or represented as being for use, for human consumption ...’.³¹ Alcohol is treated as falling within the definition of ‘food’, although it is notable that there is no separate definition of ‘alcohol’ in the *FSANZ Act* or the *Code*. The *Code* does provide a definition of several alcoholic beverages, including beer, spirits and wine.³² These definitions have some relevance to the labelling requirements, as alcoholic beverages produced – or to use the language of the *Code*, ‘standardised’ – in accordance with the definitions are exempt from some labelling requirements.

The requirements for the labelling of alcohol beverages under the *Code* derive from two sources: (1) a set of labelling standards specific to alcohol in *Alcohol Labelling Standard 2.7.1* of the *Code*;³³ and (2) a set of labelling standards applicable to all ‘food’. As alcohol is a food for the purposes of the *Code*, it is subject to these general labelling requirements as well. The *Code*’s labelling requirements apply differently to ‘packaged’ and ‘unpacked’ alcohol.³⁴ There is an onerous set of requirements which apply where alcohol is provided to the consumer in a ‘package’, such as a bottle or can, and conversely, a much reduced set of requirements which applies to ‘unpacked’ alcohol, such as a glass of beer served in a pub.³⁵ In the sections below, the packaged and unpacked alcohol requirements are analysed separately.

The *Code* defines a ‘label’ as ‘any tag, brand, mark or statement in writing or any representation or design or descriptive matter on or attached to or used in connection with or accompanying any food or package’.³⁶ The *Code* also requires that the content of labels be written ‘legibly and prominently such as to afford a

30 *Code*, standard 1.1.1 cl 1(1) (*Preliminary Provisions Standard 1.1.1*).

31 *FSANZ Act* s 5(1)(a). Section 5(2) states ‘food does not include a therapeutic good within the meaning of the *Therapeutic Goods Act 1989* (Cth)’, such that pharmaceuticals are not treated as food (emphasis altered).

32 See *Code*, standards 2.7.2, 2.7.3, 2.7.4, 2.7.5, 4.5.1.

33 *Code*, standard 2.7.1 (*Alcohol Labelling Standard 2.7.1*).

34 There is also a general exception from all labelling standards for wine that was bottled before 20 December 2002 or that is labelled with a vintage date of 2002 or earlier and that otherwise complies with all standards which applied on the date of bottling: *Preliminary Provisions Standard 1.1.1* cl 1(5).

35 ‘[F]ood for retail sale must bear a label setting out all the information prescribed in this Code’, *except* where the food is ‘(a) ... not in a package; or ... (c) made and packaged on the premises from which it is sold; or (d) ... packaged in the presence of the purchaser ...’: *Code*, standard 1.2.1, cls 2(1)(a), (c)–(d). The relevant definition for interpreting cl 2(1) is ‘package’ which means ‘any container or wrapper in or by which food intended for sale is wholly or partly encased, covered, enclosed, contained or packaged ...’: *Preliminary Provisions Standard 1.1.1* cl 2 (definition of ‘package’).

36 *Preliminary Provisions Standard 1.1.1* cl 2 (definition of ‘label’). The label on a package of food ‘must not be altered, removed, erased, obliterated or obscured except with the permission of the relevant authority’: *Preliminary Provisions Standard 1.1.1* cl 11. Furthermore, any statement or information, which is required to be included on the label, ‘may include words which modify that statement or information provided that those words do not contradict, or detract from the intended effect of, the required statement or information’: *Preliminary Provisions Standard 1.1.1* cl 12.

distinct contrast to the background and in the English language'. Any warning statements must be in a minimum size font of 3 millimetres.³⁷

B Packaged Alcohol Requirements

1 Basic Identifying Information

The label on packaged alcohol must include basic information, such as a name 'sufficient to indicate the true nature of the food',³⁸ the product's 'lot identification number',³⁹ the supplier's name and address,⁴⁰ and a 'use-by' or a 'best-before date' for the food.⁴¹

2 Alcohol Content and Standard Drinks

The most onerous requirements for the labelling of alcoholic beverages are mandatory statements of (a) the product's alcohol content; and (b) the number of standard drinks in the package. In terms of including a statement about the food's alcohol content, food (including alcoholic beverages) containing more than 1.15 per cent alcohol by volume must state the amount of alcohol in millilitres per 100 grams, millilitres per 100 millilitres, or X per cent alcohol by volume.⁴² For *alcoholic beverages* containing 1.15 per cent or less alcohol by volume and *other beverages* (such as some brewed soft drinks) containing more than 0.5 per cent but less than 1.15 per cent alcohol by volume, they must include a statement in the form 'CONTAINS NOT MORE THAN X% ALCOHOL BY VOLUME'.⁴³ A bottle of wine would comply with the requirement where its label stated, for example, that it contained '11% ALCOHOL BY VOLUME'.

The more significant alcohol labelling requirement is in clause 3(2) of *Alcohol Labelling Standard 2.7.1* which mandates that the label include a statement⁴⁴ of the approximate number of 'standard drinks' contained in the

37 *Code*, standard 1.2.9, cls 2–3.

38 *Code*, standard 1.2.2, cl 1(1)(b) ('*Food ID Standard 1.2.2*').

39 *Food ID Standard 1.2.2* cl 2.

40 *Food ID Standard 1.2.2* cl 3.

41 *Code*, standard 1.2.5, cl 2.

42 *Alcohol Labelling Standard 2.7.1* cl 2(1), table to cl 2(1).

43 *Ibid.*

44 Graphical representations of standard drinks are not mandated by the *Code*, but the use of logos to represent a number of standard drinks was developed by alcohol industry representative bodies, the NSW Government and the Commonwealth Government, and 'endorsed' by the Ministerial Council on Drug Strategy: Christopher Pyne and John Hatzisterogios, 'New Standard Drink Logos to be Introduced on Alcohol' (Media Release, CP32/06, 15 May 2006).

package of alcohol.⁴⁵ The rule applies to alcohol sold as a beverage, which contains more than 0.5 per cent alcohol by volume. A ‘standard drink’ is set as the amount of a beverage which contains 10 grams of alcohol, measured at 20 degrees Celsius.⁴⁶ The statement must be accurate to the first decimal place for packages containing 10 or less standard drinks and to the nearest whole number for all other packages.⁴⁷ There is an exception to this rule for any beverages packed prior to 20 December 2002 (which might have some ongoing relevance to long shelf life products like spirits).⁴⁸

3 *Statement of Ingredients and Additives*

Standardised alcoholic beverages are exempt from the obligation to list their ingredients on the package.⁴⁹ ‘The primary role of the ingredient list is to reassure the purchaser that the food contains the ingredients expected to be present, as depicted by the name of the food’.⁵⁰ The exemption for alcohol is said to be justified because the fermentation process involved in making alcohol ‘substantially transform[s]’ the ingredients in the product such that an ingredient list ‘not would not accurately represent the components of the food as purchased’.⁵¹ However, the label of such beverages must bear a set of mandatory advisory statements and declarations if certain ingredients or additives are part of the product. For example, if the alcohol contains aspartame,⁵² a kola beverage with added caffeine,⁵³ added sulphites in concentrations of 10 milligrams per kilogram or more,⁵⁴ egg or egg products,⁵⁵ or milk and milk products,⁵⁶ the label

45 *Alcohol Labelling Standard 2.7.1* cl 3(1). This requirement became part of the *Code* with effect from 22 December 1995. In 1991, the Ministerial Council on Drug Strategy made a successful application to the National Food Authority to add standard drink labelling to the *Code*. For an account of how a small research study was pivotal to the process of the Ministerial Council on Drug Strategy deciding to make the application for the standard drink labelling amendment, see Tim Stockwell, ‘Influencing the Labelling of Alcoholic Beverage Containers: Informing the Public’ (1993) 88 *Addiction* 53S; Tim Stockwell and Eric Single, ‘Standard Unit Labelling of Alcohol Containers’ in Martin Plant, Eric Single and Tim Stockwell (eds), *Alcohol: Minimising the Harm: What Works?* (Free Association Books, 1997) 85.

46 *Alcohol Labelling Standard 2.7.1* cl 1.

47 *Alcohol Labelling Standard 2.7.1* cl 3(1)(a)–(b).

48 *Alcohol Labelling Standard 2.7.1* cl 3(2).

49 *Code*, standard 1.2.4, cls 1, 2(c), 4–5. There is an obligation to list ingredients if the alcohol is not standardised in accordance with standards 2.7.2–2.7.5: see text accompanying above n 32. However, where the alcohol is an ingredient in another food, then the alcohol must be listed in the ingredient list. Still, the ingredients in the alcohol do not need to be separately identified: standard 1.2.4, cl 6(3).

50 Blewett et al, above n 1, 59.

51 Ibid 82.

52 *Code*, standard 1.2.3, cl 2, table to cl 2 (‘Warning and Advisory Statement Standard 1.2.3’).

53 *Warning and Advisory Statement Standard 1.2.3* cl 2, table to cl 2.

54 *Warning and Advisory Statement Standard 1.2.3* cl 4, table to cl 4.

55 *Warning and Advisory Statement Standard 1.2.3* cl 4, table to cl 4. Sometimes, egg white is used to refine alcohol during the production process: FSANZ, *Warning and Advisory Statements and Declarations. User Guide to Standard 1.2.3 – Mandatory Warning and Advisory Statements and Declarations* (January 2014) 15.

56 *Warning and Advisory Statement Standard 1.2.3* cl 4, table to cl 4.

must include a statement to the effect that the food contains that particular ingredient or additive.⁵⁷ Labels also need to declare the presence of cereals containing gluten, but there is an exception where those substances are present in beer or spirits, as long as the beer or spirits are standardised in accordance with the *Code*.⁵⁸ Similarly, food labels must declare the presence of fish or fish products, except for isinglass, a substance derived from swim bladders and used as a clarifying agent in beer and wine.⁵⁹ The exemption is permitted because isinglass-fined beer and wine has been accepted as posing no risk to fish-allergic consumers.⁶⁰

4 Nutrition, Health and Related Claims and Nutrition Information Panels

(a) Health Claims and Nutrition Content Claims

The *Code* prohibits the making of 'health claims' about alcohol products with more than 1.15 per cent alcohol by volume.⁶¹ So a claim could not be made on a label that red wine reduces the risk of cardiovascular disease.

The *Code* also prohibits 'nutrition content claims' about alcohol products with more than 1.15 per cent alcohol by volume, except for claims about the product's carbohydrate or energy content.⁶² However, such nutrition content claims must comply with the conditions in the *Code*.⁶³ The *Code* places

57 The European Union has recently required that wine be labelled to show the presence in the final product of (i) eggs and egg-based products, (ii) sulphites, (iii) milk and milk-based products: *Commission Implementing Regulation (EU) No 579/2012* [2012] OJ L 171/4 (amending *Regulation (EC) No 607/2009* [2009] OJ L 193/60 laying down certain rules for the implementation of *Council Regulation (EC) No 479/2008* [2008] OJ L 148/1 as regards protected designations of origin and geographical indications, traditional terms, labelling and presentation of certain wine sector products).

58 *Warning and Advisory Statement Standard 1.2.3*, cl 4, table to cl 4. The rationale for exempting alcohol from the requirement to declare gluten is not explained by FSANZ. Presumably, the process of distillation involved in making spirits may change the gluten-bearing product, such as oats, so that it no longer poses a threat to gluten-intolerant consumers. It is not known whether other processes used in making alcohol, such as fermentation, have the same effect.

59 *Warning and Advisory Statement Standard 1.2.3*, cl 4, table to cl 4. Note the exemption is cast as applying to 'beer' and 'wine' and not limited to beer or wine standardised in accordance with the *Code*. It is not clear whether this is intentional or a drafting oversight.

60 *FSANZ, Final Assessment Report Application A490 Exemption of Allergen Declaration for Isinglass* (2009) iii.

61 *Nutrition and Health Claims Standard 1.2.7* cl 3(b). A 'health claim' means a claim (being 'an express or implied statement, representation, design or information in relation to a food or property of food which is not mandatory in this Code': *Preliminary Provisions Standard 1.1.1* cl 2 ('definition of claim') which 'states, suggests or implies that a food or a property of food has, or may have, a health effect': *Nutrition and Health Claims Standard 1.2.7* cl 2 (definition of 'health claim'). A 'health effect' means an effect on the human body including an effect on one or more of the following: ... (e) physical performance; (f) mental performance; (g) a disease, disorder or condition': *Nutrition and Health Claims Standard 1.2.7* cl 2 (definition of 'health effect').

62 *Nutrition and Health Claims Standard 1.2.7* cl 3(b). A 'nutrient content claim' means 'a claim about (a) the presence or absence of ... (iii) energy; or (iv) minerals; ... (vii) carbohydrate; ... (x) salt; or (xi) sodium; or (xii) vitamins... that does not refer to the presence or absence of alcohol, and is not a health claim': *Nutrition and Health Claims Standard 1.2.7* cl 2 (definition of 'nutrient content claim').

63 *Nutrition and Health Claims Standard 1.2.7* cl 11(1)–(3).

conditions on making the nutrition claim that the food has a ‘reduced or light/lite’ carbohydrate content, with such a claim only being permitted if the product contains ‘at least 25 [per cent] less carbohydrate than in the same quantity of reference food’.⁶⁴ Beyond this, the *Code* does not restrict the claims which might be made or descriptors which might be used about carbohydrates and alcohol.⁶⁵ The restriction regarding ‘reduced or light/lite’ also applies where synonyms of those terms are used,⁶⁶ such that the rule might capture beers marketed as ‘low carb’,⁶⁷ such as ‘Pure Blonde’ by Carlton & United Breweries. Pure Blonde beer can only be called ‘low carb’, ‘reduced carb’ or ‘light carb’ if it contains 25 per cent less carbohydrate than the ‘reference food’. ‘A reference food’ is a comparator – a food ‘of the same type as the food for which a claim is made and that has not been further processed, formulated, reformulated or modified to increase or decrease the energy value or the amount of the nutrient for which the claim is made’.⁶⁸ Here, the reference food might be ‘Fosters’ beer by Carlton and United Breweries. Similarly, with claims about the energy content of alcohol, there are conditions that must be met if the descriptors ‘low’, ‘reduced’, ‘light/lite’ or ‘diet’⁶⁹ are used. For example, a claim that the alcohol beverage is ‘low in calories’ can only be made if the average energy content of the food is not more than 80 kilojoules per 100 millilitres.⁷⁰

The ban on health claims and nutrition content claims (other than those relating to carbohydrates and energy) applies to products with more than 1.15 per cent alcohol by volume. This means that for alcohol products with 1.15 per cent or less alcohol by volume, any health claims or nutrition content claims can be made, as long as they comply with any conditions in the *Code*.⁷¹

64 *Nutrition and Health Claims Standard* 1.2.7 cl 11(3), sch 1. See item 1 (‘carbohydrate’).

65 *Nutrition and Health Claims Standard* 1.2.7 cl 11(8).

66 *Nutrition and Health Claims Standard* 1.2.7 cl 11(3).

67 It is not certain that ‘low’ is a synonym for ‘reduced or light’. In relation to other food properties listed in sch 1, the descriptor ‘low’ is often separately listed to the descriptor ‘reduced or light’, suggesting that ‘low’ is a different concept altogether. See, eg, ‘cholesterol’ or ‘energy’: *Nutrition and Health Claims Standard* 1.2.7 sch 1.

68 *Nutrition and Health Claims Standard* 1.2.7 cl 2 (definition of ‘reference food’).

69 A claim that ‘meets the conditions to use the descriptor diet must not use another descriptor that directly or indirectly refers to slimming or a synonym for slimming’: *Nutrition and Health Claims Standard* 1.2.7 cl 14.

70 *Nutrition and Health Claims Standard* 1.2.7 cl 11(3), sch 1. See item 4 (‘energy’).

71 *Nutrition and Health Claims Standard* 1.2.7 cls 11(1), 17(1). To be clear, the provisions around health claims and nutrition content claims in the *Code* operate differently. Only health claims which comply with the *Code* can be made in relation to food. *Other health claims are not permitted*: see *Nutrition and Health Claims Standard* 1.2.7 cl 17(1). These are health claims which are listed in the *Code* or which the proponent of the claim has notified to FSANZ: *Nutrition and Health Claims Standard* 1.2.7 cl 17(3)–(4). There is a process in the *FSANZ Act* for additional health claims to be authorised under the *Code*: see *FSANZ Act* ss 46–53. However, with nutrition content claims, if the property of the food which is the subject of the claim (eg, calcium content, vitamin C content) is mentioned in sch 1, then the conditions attaching to the making of the claim about that property must be met. However, if a property of a food is not mentioned in sch 1, then there are no restrictions on the making of that claim: see *Nutrition and Health Claims Standard* 1.2.7 cl 11(1), sch 1.

Finally, the *Code* expressly states that a claim about the risks or dangers of alcohol consumption or about moderating alcohol intake is not a health claim or nutrient content claim or otherwise covered by the Standard. This provision prevents voluntary and mandatory health warnings from running into trouble with the health or nutrient content claims restrictions in the *Code*.⁷²

(b) Nutrition Information Panels

A nutrition information panel ('NIP') is required for most foods. But it is not required for alcoholic beverages which are (a) standardised in accordance with the *Code*,⁷³ or (b) not standardised in accordance with the *Code* but contains no less than 0.5 per cent alcohol by volume,⁷⁴ *unless* 'a claim requiring nutrition information' is made in relation to the beverage.⁷⁵ This broad carve out for alcoholic beverages from the NIP requirement covers 'straight' alcohol but it also covers drinks which contain alcohol and other foods, such as a ready-to-drink alcoholic beverage which is alcohol mixed with a flavoured soda. A flavoured soda on its own requires an NIP, but as soon as alcohol is added to it, the requirement for the NIP is anomalously lifted.⁷⁶ The requirement for an NIP where a 'claim requiring nutrition information' is made means that where an alcoholic beverage includes a health claim or a nutrition content claim,⁷⁷ an NIP *must* be included on the product. For example, a beer which claims to be 'light' in carbohydrates must include an NIP. The NIP must include certain information, such quantities of energy, protein, fat, sodium – and not just information about the nutrition content claim which is being made.⁷⁸

On the other hand, an alcohol manufacturer could decide to *voluntarily* include an NIP on its product. If the product contains more than 1.15 per cent alcohol by volume and the NIP only includes certain limited information, then the NIP will not be held to be a nutrition content claim.⁷⁹ However, if the manufacturer were to include additional information in the NIP, it would be considered to be a nutrition content claim and may lead the manufacturer to be in breach of the *Code*. As discussed above, alcohol with more than 1.15 per cent alcohol by volume is only permitted to bear nutrition content claims about carbohydrates and energy under limited conditions. For alcohol beverages with 1.15 per cent or less alcohol by volume, if they voluntarily include an NIP, it will be considered to be a nutrition content claim and must comply with the conditions discussed above if it is to be lawful under the *Code*.

72 *Nutrition and Health Claims Standard* 1.2.7 cl 5(b).

73 *Code*, standard 1.2.8, cl 3(b) ('*Nutrition Information Standard* 1.2.8').

74 *Nutrition Information Standard* 1.2.8 cl 3(p).

75 *Nutrition Information Standard* 1.2.8 cl 4(2).

76 Blewett et al, above n 1, 83.

77 *Nutrition Information Standard* 1.2.8 cl 4(1).

78 *Nutrition Information Standard* 1.2.8 cl 5. See especially cl 5(1)(d)–(e).

79 *Nutrition Information Standard* 1.2.8 cl 19(2)–(4).

5 *Directions as to Safe Use and Storage*

Directions for Use and Storage Standard 1.2.6 requires the inclusion of directions for the *use* or storage of the food ‘if the food is of such a nature as to require the directions for health or safety reasons’.⁸⁰ However, reading clause 1(1) *in the context* of the remainder of the clause would suggest that only a narrow understanding of health or safety, as being concerned with food-borne illnesses, is intended. This rule is seemingly not concerned with providing direction to avert the health and safety problems which arise from consumption of alcohol.

6 *Restricted Representations*

The *Code* imposes restrictions on the making of certain positive representations about alcohol. ‘An alcoholic beverage which contains more than 1.15 [per cent] alcohol by volume must not be represented as a low alcohol beverage’;⁸¹ a beverage with more than 0.5 per cent alcohol by volume must not be represented as ‘non-intoxicating’ or words to that effect;⁸² and food containing alcohol must not be represented as a non-alcoholic confection or beverage.⁸³ Yet, there is nothing in the *Code* which defines the terms ‘lite’, ‘mid-strength’ and ‘full-strength’ which are terms often used in relation to beer.

C *Unpackaged Alcohol Requirements*

Understandably, unpackaged alcohol does not have any labelling requirements, but there is some very limited information which must be ‘displayed on or in connection with the display of the [beverage] ... or provided to the purchaser on request’.⁸⁴ These items are the name of the beverage,⁸⁵ any advisory statements or declarations about select ingredients or additives (see Part II(B)(3) above),⁸⁶ any directions for use and storage (see Part II(B)(5) above),⁸⁷ and the information which forms part of the NIP if ‘a claim requiring nutrition information’ is made (see Part II(B)(4)(b) above).⁸⁸ For example, where a pub has

80 *Code*, standard 1.2.6, cl 1(1) (*‘Directions for Use and Storage Standard 1.2.6’*).

81 *Alcohol Labelling Standard 2.7.1* cl 4. This effectively means that beverages with 1.15 per cent alcohol or less may be represented as ‘low’ alcohol. Note the anomaly whereby the *Alcohol Beverages Advertising Code* (*‘ABAC’*) defines a low alcohol beverage as having an alcohol content/volume of less than 3.8 per cent: The ABAC Scheme Ltd, *The ABAC Scheme: Alcohol Beverages Advertising (and Packaging) Code* (definition of ‘low alcohol beverage’). As cl 4 of *Alcohol Labelling Standard 2.7.1* applies the *Code* to statements made in advertising as well as on labels (see *Preliminary Provisions Standard 1.1.1* cl 13), advertisers of alcohol should be observing the definition of ‘low alcohol’ under the *Code* rather than under the *ABAC*.

82 *Alcohol Labelling Standard 2.7.1* cl 5.

83 *Alcohol Labelling Standard 2.7.1* cl 6.

84 *Food ID Standard 1.2.2* cl 1(2)(c)–(d).

85 *Food ID Standard 1.2.2* cl 1(2).

86 *Warning and Advisory Statement Standard 1.2.3* cl 2(2).

87 *Directions for Use and Storage Standard 1.2.6* cl 1(2).

88 *Nutrition Information Standard 1.2.8* cl 4(3).

a 'low carbohydrate' beer on tap, one option is that the publican displays the nutritional information about the beer on the beer tap. The other way to fulfil the requirements of the *Code* is that the publican must provide nutritional information about the beer to a consumer on request. It seems unlikely that retailers are fulfilling this obligation by displaying this information. At the same time, it is questionable whether alcohol service staff would be able to provide all of this information when it is requested by a customer. This is of possible significance, as 38 per cent of alcohol purchases by value in Australia are consumed on licensed premises.⁸⁹

D Application and Enforcement of the Code

Although the *Code* is made by a Commonwealth statutory agency, the principal obligation to obey the *Code* arises under the *Food Act* in each State and Territory. For example, there is a general obligation under section 16(1) of the *Food Act 1984* (Vic) that a person must comply with any requirement imposed on the person by a provision of the *Code* in relation to food for sale or food intended for sale. Section 16(1) is complemented by a more specific obligation in section 16(3) that a person must not sell or advertise any food that is labelled in a manner that contravenes a provision of the *Code*. The penalty for the commission of the offence is \$40 000 for an individual or \$200 000 for a corporation.⁹⁰ A person allegedly contravening section 16(3) may escape conviction if suitable undertakings are given about remedial action to be taken in relation to the packaging or labelling contravention.⁹¹

The Commonwealth applies the *Code* to 'imported foods' under the *Imported Food Control Act 1992* (Cth).⁹² There is a labelling offence in section 8A(1) of the *Imported Food Control Act 1992* (Cth) which states that 'a person may only deal with food imported into Australia if the food meets applicable standards relating to information on labels for packages containing food'. The 'applicable standards' are those established by the *Code*⁹³ and the penalty for noncompliance is severe: 10 years imprisonment.⁹⁴ The wrong is in 'dealing with' the goods *after*

89 David Richardson, 'The Liquor Industry' (Technical Brief No 14, Australia Institute, August 2012) 12.

90 *Food Act 1984* (Vic) s 16(3). In other states and the territories, there is the same or very similar obligation to comply with the *Code*: *Food Act 2001* (ACT) s 27; *Food Act 2003* (NSW) s 21; *Food Act 2004* (NT) s 20; *Food Act 2006* (Qld) s 39; *Food Act 2001* (SA) s 21; *Food Act 2003* (Tas) s 21; *Food Act 2008* (WA) s 22.

91 *Food Act 1984* (Vic) s 19BB.

92 'Imported food' does not include food which was made or produced in New Zealand (and is not otherwise a food declared a risk to public health): *Imported Food Control Act 1992* (Cth) s 7(1)(aa); *Imported Food Control Regulations 1993* (Cth) regs 3A, 9. This treatment of New Zealand produce accords with the terms of the *Arrangement between the Australian Parties and New Zealand Relating to Trans-Tasman Mutual Recognition* (1996) cls 4.1.1–2.

93 *Imported Food Control Act 1992* (Cth) s 3(1) (definition of 'applicable standard'). This defines 'applicable standard' as the 'the national standard'. 'National definition' is defined in s 3(1) (definition of 'national standard') as the standard in the *Code*.

94 *Ibid* s 8A(1).

they have been imported into Australia. 'Dealing with' is defined inclusively as 'moving, altering or interfering with in any physical manner whatsoever' or 'entering into a transaction whereby the ownership of the food, or of any beneficial interest in the food, passes from one person to another'.⁹⁵ However, section 8A(2) permits dealing with unlabelled foods if it is for the purpose of altering or replacing the label on the package to meet the applicable standards. This provision allows an overseas manufacturer of a good, say beer, to manufacture the beer in one country (eg, China) and send shipments of the beer to a variety of countries (eg, Australia), where it can be relabelled on arrival in accordance with the particular country's (eg, Australia's) domestic labelling requirements.

III PUBLIC HEALTH CRITIQUES OF THE ALCOHOL BEVERAGE LABELLING LAWS

The current alcoholic beverage labelling regime has been criticised by a range of community organisations. In Part III(A) below, the criticisms of the current regime for its lack of warnings about health risks are presented, along with the detailed proposal for reform which is being advocated by community organisations. The arguments for, and against, warnings generally and the current proposal in particular are discussed in Part III(B) below. This serves to highlight the points of tension between alcohol policy advocates and the alcohol industry. In Part III(C), the criticisms of other aspects of alcohol labelling, such as ingredient lists, nutrition panels and health claims are briefly considered.

A Health Warnings

The most constant criticism of alcohol beverage labelling in Australia relates to the absence of any requirement for labels to bear warnings about the harms associated with alcohol consumption. There is no requirement at present for the labels to include advice (such as '[f]or women who are pregnant or planning a pregnancy or breastfeeding, not drinking is the safest option'),⁹⁶ or 'facts' about risks (such as '[e]xcessive consumption of alcohol may cause liver cirrhosis or liver cancer and is especially detrimental to the mental and physical health of minors')⁹⁷ or information about accepted drinking guidelines (such as the

95 Ibid s 3(1) (definition of 'deal with').

96 National Health and Medical Research Council ('NHMRC'), *Australian Guidelines to Reduce Health Risks from Drinking Alcohol* (2009) 67 ('*Guidelines to Reduce Health Risks*').

97 This is text taken from the warning required on alcoholic beverages in South Korea: see Tim Stockwell, Centre for Addictions Research of BC, *A Review of Research into the Impacts of Alcohol Warning Labels on Attitudes and Behaviour* (2006) 3.

NHMRC guidelines).⁹⁸ There is not even a requirement to include a weak advisory message, such as 'drink responsibly'.

The most developed proposal by the alcohol policy community for alcohol warnings comes from the Foundation for Alcohol Research and Education ('FARE').⁹⁹ Its policy has been approved by the Executive of the National Alliance for Action on Alcohol,¹⁰⁰ which has 75 organisational members across Australia. The Australian Medical Association ('AMA') also actively advocates the position put by FARE and asserts 'health warning labels on alcohol must contain clear, strong messages about the negative effects of excessive or irresponsible drinking.'¹⁰¹

Critical to FARE's proposal is that the labelling scheme be mandated by government. In this scheme, there would be five different health warnings (one of which would be a pregnancy-related warning) which would use simple, direct, active language, be factual and educative, and be related to the *specific* risks associated with alcohol. The warnings would consist of text and a symbol, such as '[d]rinking any alcohol can harm your unborn baby' with a pictogram of a woman with a foetus in her uterus, a glass in her hand and a line across the image.¹⁰² There would be an obligatory font and minimum size for all warnings which would have to be marked out with a border and have a heading in capital letters: 'HEALTH WARNING'. The warning would need to consist of black text on a white background and be horizontally displayed on the *front* of the alcohol container.¹⁰³ The labels would be rotated regularly to ensure that consumers do not become immune to the messages.¹⁰⁴

The Australian alcohol industry has a united voice in opposing public health proposals, like FARE's, for warnings on alcoholic beverages. The main plank of the industry's argument is that warnings are simply ineffective as a strategy for preventing the harms which can arise from alcohol consumption. Even though the industry acknowledges the links between alcohol consumption during

98 NHMRC, *Guidelines to Reduce Health Risks*, above n 96. Guideline 1 states that 'for healthy men and women, drinking no more than two standard drinks on any day reduces the lifetime risk of harm from alcohol-related disease or injury': at 2. Guideline 2 states that 'for healthy men and women, drinking no more than four standard drinks on a single occasion reduces the risk of alcohol-related injury arising from that occasion': at 3.

99 Alcohol Education and Rehabilitation Foundation ('AERF'), *Alcohol Product Labelling: Health Warning Labels and Consumer Information* (2011). The FARE was previously known as the AERF.

100 FARE, *Labelling* <<http://www.fare.org.au/policy-advocacy/alcohol-product-labelling/>>.

101 AMA, 'AMA Urges Government to Introduce Mandatory Alcohol Health Warning Labels' (Media Release, 16 August 2011); See also AMA, *AMA Position Statement: Alcohol Consumption and Alcohol-Related Harms* (2012); Julian Drape, 'Get Tough on Alcohol Ads and Labels: AMA', *The Sydney Morning Herald* (online), 18 July 2012 <<http://news.smh.com.au/breaking-news-national/get-tough-on-alcohol-ads-and-labels-ama-20120718-22a80.html>>.

102 AERF, above n 99, 17. The other warnings proposed by FARE say, in words and pictures: '[d]rinking alcohol increases the risk of injury', '[d]rinking alcohol and driving increases the risk of injury or death', and '[d]rinking alcohol damages the young developing brain': at 18.

103 AERF, above n 99, 9.

104 *Ibid* 8.

pregnancy and harm to the foetus, the industry maintains that warnings will do no good. Beyond the situation of drinking during pregnancy, the industry also questions the harmfulness of alcohol, insists that harmful alcohol use is not widespread in the community and asserts that any interventions should target the 'troublesome' sub-populations. The industry adds that the burden of implementing warnings is significant, especially given the claimed ineffectiveness of the strategy.¹⁰⁵ At the same time as pushing these lines of argument, the industry advocates for its system of voluntary 'consumer information messages' on alcohol.¹⁰⁶ These arguments are analysed in detail below.

B The Merits of the Proposal for Mandatory Warnings on Alcoholic Beverage Labels

1 Objectives

In Australia, those who argue for the mandatory inclusion of warnings on alcoholic beverages from a harm minimisation perspective claim that warnings should be included because 'they are effective both in raising awareness of health risks and changing health behaviours'.¹⁰⁷ Similarly, the AMA insists that warnings on labels 'would be a valuable *deterrent* in critical areas such as teenage drinking and drinking when pregnant'.¹⁰⁸ These are, in effect, claims that the warnings would be a mechanism by which the individual's consumption of alcohol would be reduced, whether by way of a change in a drinker's own knowledge and beliefs about the product or in some other person who can influence the drinker. In accordance with this view, FARE suggests that the introduction of health warning labels should be accompanied by an evaluation which tests, at baseline and at 12 month intervals post-introduction, the effect of the labels on alcohol-related attitudes and behaviours.¹⁰⁹

An additional harm minimisation objective for warnings could be that they have the capacity to change the 'social climate' in relation to alcohol. The social climate is defined as 'the mix of different ways of thinking about drinking, conceiving alcohol-related problems and defining appropriate measures for dealing with them, which exists in a society at a given point of time and which may change over time'.¹¹⁰ According to this objective, even if the warnings do not change individuals' drinking behaviour, a change in the social climate around alcohol would be an achievement. Wilkinson and Room speak of 'shifting the

105 Australian Alcoholic Beverage Industries, above n 22, 2.

106 Ibid 10.

107 AERF, above n 99, 2.

108 AMA, 'AMA Urges Government to Introduce Mandatory Alcohol Health Warning Labels', above n 101 (emphasis added).

109 AERF, above n 99, 12.

110 Griffith Edwards et al, *Alcohol Policy and the Public Good* (Oxford University Press, 1994) 178 (citations omitted). See also ch 8; 178–80.

place of alcohol in the culture'.¹¹¹ Edwards argues that one of the effects of changing the social climate about alcohol would be that it becomes more acceptable to propose and implement other governmental policies known to reduce harms from alcohol,¹¹² such as increasing the price of alcohol or limiting its physical availability.¹¹³

2 Effectiveness of Alcohol Warnings in Minimising Harm

If the objective of introducing warning labels is to change the way people drink so as to minimise harm, the existing evidence on alcohol warning labels is not compelling. There is 'non-existent' or 'minimal'¹¹⁴ evidence that warnings on alcoholic beverages change drinking behaviour, although there is some limited evidence that warnings have effects on knowledge and attitudes.¹¹⁵ There is also evidence that 'intervening variables'¹¹⁶ are affected, such as intention to change drinking habits, having discussions about drinking, and being willing to intervene in relation to hazardous drinking in others.¹¹⁷

The alcohol industry uses the shortcomings in the evidence as the basis for an argument against warning labels per se or against labels which would link alcohol with specific types of harm (except for pregnancy-related harms).¹¹⁸ Alcohol policy researchers and advocates also acknowledge the lack of existing evidence to show that labels will change behaviour, but argue that this evidence should not be determinative of whether warning labels should be introduced in Australia. They offer three reasons for this position.

Firstly, alcohol policy researchers and advocates point to the fact that the current evidence about labels relates to the alcohol warning regime introduced in the United States in 1989,¹¹⁹ which has serious limitations in terms of its content, form and implementation.¹²⁰ In other words, if an alcohol labelling regime were properly designed and implemented, the warnings may be more effective in changing behaviour and preventing harm than has been seen in studies to date.

111 Claire Wilkinson and Robin Room, 'Warnings on Alcohol Containers and Advertisements: International Experience and Evidence on Effects' (2009) 28 *Drug and Alcohol Review* 426, 427.

112 Edwards et al, above n 110, 180.

113 Christopher M Doran et al, 'Alcohol Policy Reform in Australia: What Can We Learn from the Evidence?' (2010) 192 *Medical Journal of Australia* 468; Babor et al, above n 8, chs 8–9.

114 Stockwell, *A Review of Research into the Impacts of Alcohol Warning Labels*, above n 97, 7.

115 Babor et al, above n 8, 202; Wilkinson and Room, above n 111, 427.

116 Babor et al, above n 8, 203.

117 Ibid.

118 Australian Alcoholic Beverage Industries, above n 22, 9–10.

119 Other countries have introduced alcohol warnings but these have not been the subjects of study. For a list of the alcohol warnings used in other countries, see Stockwell, *A Review of Research into the Impacts of Alcohol Warning Labels*, above n 97, 3.

120 Thomas K Greenfield, 'Warning Labels: Evidence on Harm Reduction from Long-Term American Surveys' in Martin Plant, Eric Single and Tim Stockwell (eds), *Alcohol: Minimising the Harm: What Works?* (Free Association Books, 1997) 105; Babor et al, above n 8, 202. An analysis of the primary studies and alcohol policy reviews of the primary studies can be found in Stockwell, *A Review of Research into the Impacts of Alcohol Warning Labels*, above n 97.

FARE's proposed warning label system is markedly different to the United States warning labels. The flaws in the United States system are said to be that it consists of a single warning which has not been changed since its introduction in 1989:

GOVERNMENT WARNING:

- (1) According to the Surgeon-General, women should not drink alcoholic beverages during pregnancy because of the risks of birth defects.
- (2) Consumption of alcoholic beverages impairs your ability to drive a car or operate machinery, and may cause health problems.¹²¹

Furthermore, in the US, there are only the barest requirements for the presentation of this warning: the phrase, 'government warning' must be in capital and bold letters and there is a minimum font size and spacing for the rest of the warning text.¹²² There are no requirements regarding the direction of the text, the font style, the contrast between text and background, or the position of the warning on the label. This has meant that some producers have been able to 'blend' the warning into the rest of the label.¹²³

Secondly, and in support of the first argument, advocates point to the evidence of the success of warning labels on tobacco and to the graphic content and strict formatting requirements for those warnings, compared with alcohol.¹²⁴ The experience with tobacco is said to be an indicator of what could possibly be achieved with alcohol if a similar labelling approach were taken. Good quality studies report that tobacco warnings have an effect on behaviour, including quitting smoking, attempting to quit or reducing smoking.¹²⁵ With tobacco, pictorial warnings seem to have greater impact than text-only warnings.¹²⁶ Text warnings were introduced on tobacco products in Australia in 1995, followed by graphic warnings in 2006.¹²⁷ They must be 75 per cent of the front surface and 90 per cent of the back surface of a packet of cigarettes. There are mandatory fonts and formats.¹²⁸

Although there is acknowledgment that warnings for tobacco and alcohol might not operate in exactly the same way,¹²⁹ the drawing on the tobacco evidence base does offer some rational, *science-based* support for the warnings. It is the use of the tobacco model in relation to alcohol which seems to trouble the alcohol industry. A representative from the Distilled Spirits Industry Council of Australia recently articulated the concern very plainly:

121 Stockwell, *A Review of Research into the Impacts of Alcohol Warning Labels*, above n 97, 3.

122 Greenfield, above n 120, 106–7.

123 Ibid 107. See also AERF, above n 99, 16.

124 AERF, above n 99, 9.

125 Shelley Beatty and Steve Allsop, *Reducing Drug-Related Harm: What the Evidence Tells Us* (IP Communications, 2009) 44.

126 Wilkinson and Room, above n 111, 432.

127 Ibid; Beatty and Allsop, above n 125, 43.

128 Department of Health and Ageing (Cth), *Tobacco Health Warnings* (4 December 2012). <<http://www.health.gov.au/internet/main/publishing.nsf/content/tobacco-warn>>.

129 See, eg, Wilkinson and Room, above n 111, 426.

The labelling areas on alcoholic beverages are rather restricted and obviously precious to those people who devised and designed them. We are concerned that, if there were to be mandatory labelling, those people who oppose the industry would want to go down the tobacco road. The lettering would not be big enough; ... the pictures would not be horrific enough; and before we know it we would have our labels looking like ... a page out of the white telephone book.¹³⁰

Thirdly, the alcohol policy community suggests that labels should be introduced as part of a comprehensive suite of measures to address harms from alcohol.¹³¹ This approach changes the discussion about warnings, making it less significant that there is no evidence that warnings *themselves* produce behavioural change, and reducing the need to demonstrate that 'warnings equal less harm'. For example, FARE emphasises that warnings need to be used with pricing, availability and promotion controls as population-wide strategies to prevent harm from alcohol.¹³²

3 The Ineffectiveness of Industry Self-Regulation

Central to the FARE proposal is that the government mandate that the industry add warnings to alcoholic beverages. The call for strict governmental regulation of the warnings seems to be based on concerns that the industry is not fit to regulate itself because of the industry's major conflict of interest. Its commercial concern is to 'increas[e] its sales and profits'¹³³ which is seen as incompatible with the task of introducing a form of warnings which are effective at reducing harms from alcohol.

The conflict is arguably magnified if the goal of the warnings is to reduce *all alcohol consumption* and not just *harmful alcohol consumption*. On the one side of the alcohol policy debates are those who argue that all alcohol consumption has the potential to cause harm, with alcohol being linked to alcohol dependence, intoxication and toxicity (as a class I carcinogen).¹³⁴ This side also includes those who advocate that the way to reduce *harm* from alcohol is to reduce *population-level consumption* of alcohol.¹³⁵ On the opposing side are those who say that alcohol is a food and a pleasure and that as long as it is not misused, it does no harm and may, in moderation, do good.¹³⁶ This group, which includes alcohol

130 Evidence to House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, Canberra, 24 May 2012, 3 (Gordon Broderick, Distilled Spirits Industry Council of Australia).

131 AERF, above n 99, 2.

132 Ibid.

133 AMA, 'AMA Urges Government to Introduce Mandatory Alcohol Health Warning Labels', above n 101.

134 See Babor et al, above n 8, 5. See also Cancer Council Australia, *Position Statement: Alcohol and Cancer Risk* (July 2011, updated October 2012) <http://wiki.cancer.org.au/prevention/Position_statement_-_Alcohol_and_cancer>.

135 See Babor et al, above n 8, 5.

136 This is seen in the 'Action for Industry Profitability' released by the Winemakers Federation of Australia, which includes work 'to develop a consumer-facing education campaign that confirms moderate drinking can be a part of a healthy Australian diet and lifestyle, and can lead to a happier and longer life.' Winemakers' Federation of Australia, *Actions for Industry Profitability 2014–2016* (December 2013) 14.

producers and retailers, tends to argue that most people drink responsibly and that public health advocates over-state the prevalence of harmful drinking. What follows is opposition to a strategy of reducing population-level consumption and insistence that the best approach is to target specific ‘problem’ sub-populations, especially through individual-level interventions, such as treatment programs.¹³⁷ They draw strength for their position from the decision of the WHO to focus only on ‘harmful’ alcohol in its *Global Strategy on Alcohol*.¹³⁸

The alcohol industry’s recent alcohol labelling scheme is said to be evidence of the industry’s inability to regulate itself with regard to labels. In July 2011, the organisation, DrinkWise Australia (‘DrinkWise’), launched a new ‘consumer information messages’ campaign.¹³⁹ DrinkWise is an independent, not-for-profit organisation, funded predominantly by the alcohol industry.¹⁴⁰ It claims that its ‘members’ represent 80 per cent of the alcohol sold (by volume) in Australia.¹⁴¹ The DrinkWise labelling scheme includes four messages, with the primary one being ‘[g]et the facts’ and the DrinkWise website address. This message can be used alone or together with one of the other DrinkWise messages: ‘[k]ids and alcohol don’t mix’, ‘[i]s your drinking harming yourself or others?’ or ‘[i]t is safest not to drink while pregnant’.¹⁴² The pregnancy warning has a pictogram option as well.¹⁴³ It seems that DrinkWise members are not obliged, as a condition of membership, to add the warnings to their products. Of those DrinkWise members who committed to introduce the DrinkWise labels, only a few set a start date for the roll-out and none set a completion date.¹⁴⁴ Most agreed to introduce the information ‘when labelling changes can be implemented’.¹⁴⁵ However, a two year period ending July 2013 was the timeframe committed to by the Chair of the DrinkWise Board.¹⁴⁶

The DrinkWise approach is seen as ‘soft’.¹⁴⁷ Apart from applying to only 80 per cent of the alcohol industry, a key criticism is that the content of the messages will not be effective in terms of harm minimisation. The fact that the

137 Australian Alcoholic Beverage Industries, above n 22, 7, 17–18, 26–9.

138 WHA63/2010/REC/1. This aspect of the *WHO Global Strategy on Alcohol* was referred to by the alcohol industry in its submission in response to the report by the Labelling Logic Panel: Australian Alcoholic Beverage Industries, above n 22, 18.

139 DrinkWise, ‘New Consumer Messages on Alcohol Products Latest Initiative in Ongoing Community Education and Awareness Campaign’ (Media Release, 11 July 2011).

140 DrinkWise, *About* <<http://www.drinkwise.org.au/about/>>. DrinkWise appears to be an incorporated entity ‘DrinkWise Ltd’ and has a board of directors. Its website shows that it has a Constitution, but there is no copy of the Constitution available on its website as at 12 July 2014.

141 DrinkWise, above n 139.

142 Ibid.

143 Ibid.

144 Ibid.

145 Ibid.

146 DrinkWise, *DrinkWise Welcomes Government Response on Labelling Law and Policy* (10 November 2011) <<http://www.drinkwise.org.au/drinkwise-welcomes-government-response-on-labelling-law-and-policy-2/>>.

147 AMA, ‘AMA Urges Government to Introduce Mandatory Alcohol Health Warning Labels’, above n 101.

principal label, 'Get the Facts' does not provide information, advice or a warning about alcohol is a major concern. The message raises the question, get the facts *about what?* Research commissioned by FARE and conducted by Galaxy Research found that 89 per cent of those surveyed believed that the FARE proposed labels were more likely to raise awareness of alcohol-related harms than the DrinkWise labels.¹⁴⁸

Another part of the concern about the DrinkWise labels is that there are no presentation requirements as to the size, format or placement of the message. By June 2013, one month off the final implementation date set by DrinkWise, the take-up of the DrinkWise voluntary labels was poor. Of the 251 products included in an audit commissioned by FARE, only 37 per cent of items carried a DrinkWise message.¹⁴⁹ The most common message was the 'get the facts' message combined with the pregnancy graphic.¹⁵⁰ Most products (86 per cent) used less than 5 per cent of the label for the message.¹⁵¹ Close to three in five products (59 per cent) had the message on the back of the product. The message was on the side of the product in 29 per cent of cases. The fact that 4 per cent of products put the message on the bottom of the product, 2 per cent on the top, and only 5 per cent on the front of the product¹⁵² led to the comment in the report that 'DrinkWise messages appeared to be most commonly located on the edges of product labels and rarely featured in central or prominent positions.'¹⁵³

4 Burdens

The argument is generally made by policy advocates that introducing warning labels on alcohol would not be a major burden. In 2008, PricewaterhouseCoopers ('PWC'), in a report for FSANZ, costed the making of a medium or major label change per stock keeping unit (ie, each product line) as between \$4000 and \$13 000, depending on whether the changes were minor, medium or major.¹⁵⁴ The alcohol industry argues that there would be significant trade impacts and productivity losses from the introduction of warnings (and other information). In its joint submission to government, the representative

148 FARE, *Alcohol Health Labelling: Community Perceptions of the FARE and DrinkWise Model Alcohol Labels* (2011) 3.

149 Ipsos Social Research Institute ('ISRI'), *Alcohol Label Audit: Prepared for the Foundation for Alcohol Research and Education* (2013) 16 ('2013 FARE Labelling Audit'). The same audit was conducted in 2012, halfway through the implementation period, with the take-up of the labels being only 16 per cent at that time: ISRI, *Alcohol Label Audit: Prepared for Foundation for Alcohol Research and Education* (2012) 11 ('2012 FARE Labelling Audit').

150 ISRI, *2013 FARE Labelling Audit*, above n 149, 22.

151 Ibid 29.

152 Ibid.

153 Ibid 30.

154 PricewaterhouseCoopers, *Food Standards Australia New Zealand Cost Schedule for Food Labelling Changes Final Report* (7 March 2008) 2–6.

bodies for producers and retailers of alcohol refer to the PWC costs estimate, but do not challenge it.¹⁵⁵

There will also be some burdens on government in terms of administration and enforcement of a new labelling regime. As noted above, the Commonwealth has responsibility for ensuring that imported alcohol complies with labelling standards, and the states and territories have the same responsibility in relation to all other packaged alcohol. The industry seeks to magnify the burdens which warning labels would place on all levels of government in Australia.¹⁵⁶ In the context of the United States labels, Greenfield writes that the cost to government (and industry) of the new regime was low.¹⁵⁷

Greenfield also suggests that warnings impose little burden on individual consumers of alcohol products.¹⁵⁸ Depending on whether the industry passes on costs of labelling changes to the consumer, there may be no change in the price of the alcoholic beverage to the consumer. However, the alcohol industry has suggested that the FARE proposal would impose a range of burdens on the public. One of the burdens is said to be health related. This argument obviously seeks to turn on its head the claim that bringing in warnings would improve health. The FARE-proposed labels could purportedly do ‘harm’ to the majority of Australian who ‘drink in moderation’, by not giving drinkers the full story about the harms *and benefits* of alcohol.¹⁵⁹ The industry also claims that pregnant women could be moved to terminate their pregnancies if they read the FARE pregnancy warning, which states ‘Drinking any alcohol can harm your unborn baby’.¹⁶⁰ This claim has been heatedly contested by the alcohol policy community¹⁶¹ and rejected by a Commonwealth parliamentary committee as ‘wild claims ... [with there being] no credible evidence to support such claims.’¹⁶²

5 Community Support

Those advocating for warning labels point to the considerable community support for labelling. A research report commissioned by FARE found that, in 2013, 61 per cent of Australians surveyed believed that health information should

155 Australian Alcoholic Beverage Industries, above n 22, 22.

156 Ibid 22–3.

157 Greenfield, above n 120, 105.

158 Ibid.

159 Australian Alcoholic Beverage Industries, above n 22, 12–13, 17–19.

160 Ibid 20.

161 FARE, *Booze Before Babies: Analysis of Alcohol Industry Submissions to the FASD Inquiry* (2012) 10.

162 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *FASD: The Hidden Harm – Inquiry into the Prevention, Diagnosis and Management of Fetal Alcohol Spectrum Disorders* (2012) 87 [3.203] (‘*FASD Inquiry*’). A recent study seems to support the Committee’s view: Sarah C M Roberts et al, ‘Alcohol, Tobacco and Drug Use as Reasons for Abortion’ (2012) 47 *Alcohol and Alcoholism* 640.

be placed on alcohol products.¹⁶³ This recent survey data fits with the results of a review by Tobin of studies on public opinion about alcohol controls which found very high levels of support for including health warnings on alcohol containers.¹⁶⁴ Against this clear base of support for alcohol warning labels, the disputed question seems to be *which* labels are supported by the public. The FARE research discussed in the section above suggests a very strong preference for the FARE labels over the DrinkWise labels.

C Proposals in Relation to Ingredient Lists, Nutrition Information Panels, and Health and Nutrition Claims

Those working from a harm minimisation perspective have also expressed concern that alcoholic beverages are treated more beneficially than other foods in terms of their labelling. FARE claims that an ingredient list and NIP should be included on all alcoholic beverages, as is required for nearly all other foods.¹⁶⁵ It suggests that people desire information about the nutritional content of their foods, especially given the problems with overweight and obesity in Australia, and the amount of energy intake that comes from the consumption of alcoholic beverages.¹⁶⁶ This change would overcome the odd situation described above whereby bottles of soda must carry nutritional information, but mixes of soda and alcohol are exempt. FARE further suggests that there should be restrictions such that nutrition claims cannot be made at all in relation to alcoholic beverages. For example, beers should not be labelled 'low carb'. FARE cites evidence which suggests that people are confused about what such claims really mean. In the study, a proportion of people believed that low carb beer is healthier than full strength beer (71 per cent) and light beer (38 per cent) and is less fattening (44 per cent).¹⁶⁷

IV LAW REFORM PROPOSALS IN RELATION TO ALCOHOL BEVERAGE LABELLING

Since the mid-1990s, there have been several attempts to change the law relating to alcohol beverage labelling, along with multiple recommendations to the same effect from executive and parliamentary inquiries. The processes for changing the laws relating to alcohol beverage labelling are unusual, as they involve a strict cooperative arrangement between all levels of Australian

163 Foundation for Alcohol Research and Education, *Annual Alcohol Poll: Attitudes and Behaviours* (2013) 14.

164 Claire Tobin, A Rob Moodie and Charles Livingstone, 'A Review of Public Opinion Towards Alcohol Controls in Australia' (2011) 11 *BMC Public Health* <<http://www.biomedcentral.com/1471-2458/11/58>>.

165 AERF, above n 99, 13.

166 Ibid.

167 Ibid.

government and the New Zealand government. The powers and processes for setting food standards are analysed in Part IV(A). Against this background, the attempts at, and recommendations for, law reform from 1996 to 2013 are reviewed, along with the reasons (if any) which have been offered for not proceeding with the reforms or recommendations: see Parts IV(B)–(E). What emerges from this review is that whilst there remain intense disputes about aspects of the labelling debate, in particular the effectiveness of warning labels, developments in the evidence base about risks associated with alcohol consumption during pregnancy have spurred interest in changes to labelling to deal with this risk. However, coinciding with this development has been a shift away from the established processes for setting food standards in Australia and a new preference for industry self-regulation, which has meant that no law reform proposal between 1996 and 2013 has met with success.

A Legal Powers and Processes for Changing Australia's Alcohol Beverage Labelling

In Part II(A) above, the distinctive lawmaking arrangements which apply to Australian food standards were introduced. Although the Commonwealth and the states and territories each have the constitutional power to legislate in relation to alcohol warning labels,¹⁶⁸ the intergovernmental arrangements between Australia, New Zealand, and the states and territories establish a strict, cooperative process which involves all jurisdictions in setting and maintaining food standards which then apply throughout Australia and New Zealand. This has the effect of largely restricting any one jurisdiction from introducing alcohol warning labels on its own.

Under the *ANZ Food Standards Treaty*, Australia and New Zealand established an 'Australia New Zealand Food Standards System' ('ANZ Food Standards System')¹⁶⁹ which is responsible for the 'development and maintenance of joint food standards' for the two countries.¹⁷⁰ The *ANZ Food Standards Treaty* accepts that the joint food standards will be set in accordance with the *FSANZ Act* and the *Food Regulation Agreement*.¹⁷¹ Under the *FSANZ Act*, the Commonwealth statutory agency, FSANZ, is empowered to consider applications

168 The most appropriate power for the Commonwealth to use would be the corporations power in s 51(xx) of the *Australian Constitution*, which would enable the Commonwealth parliament to legislate with respect to 'constitutional corporations': *New South Wales v Commonwealth* (2006) 229 CLR 1. The corporations power allows the making of laws which regulate constitutional corporations in their activities, functions, relationships and their business as a corporation. The activities of manufacturers, importers and some wholesalers of alcohol (or foods containing alcohol) include labelling and packaging of alcohol products. The corporations power would extend to making laws which regulate these core activities. There may be other heads of power that could be used in conjunction with this power, including the territories power in s 122. The states have plenary legislative power, such as, in Victoria, the power to make laws 'in and for Victoria in all cases whatsoever': *Constitution Act 1975* (Vic) s 16.

169 *ANZ Food Standards Treaty* art 3(1).

170 *Ibid* art 3(2).

171 *Ibid* art 4(3), annex B(I).

for the development of new food standards or the variation of existing food standards in the *Code*.¹⁷² In exercising this power, FSANZ must observe (in this order) the objectives of protecting public health and safety, providing adequate information to consumers, and preventing misleading or deceptive conduct.¹⁷³ There is a staged process for FSANZ considering applications, which differs slightly depending on the nature of the application.¹⁷⁴ The key steps are initial acceptance or rejection of the application by FSANZ;¹⁷⁵ an assessment of an accepted application (with a cost-benefit analysis and consideration of any more cost-effective alternative measures),¹⁷⁶ one or more rounds of mandatory public consultation;¹⁷⁷ and the preparation of a draft version of a new or varied food standard.¹⁷⁸ FSANZ has the power to approve or finally reject an application for a new or varied food standard.¹⁷⁹ If it approves an application, a draft of the new or varied food standard is sent to the Australia and New Zealand Food Regulation Ministerial Council ('Council') for its consideration.¹⁸⁰ The Council is established under the *Food Regulation Agreement* between the Commonwealth and the states and territories, and consists of the Health Minister of each of the parties and the government of New Zealand.¹⁸¹ When the Council receives a draft standard from FSANZ, it must accept the draft standard or request FSANZ to review it, outlining its concerns with the draft standard.¹⁸² If FSANZ chooses to submit the same or a revised draft standard to the Council, the Council must accept it, accept it with amendments, or reject it.¹⁸³ If the standard is accepted by the Council, the

172 *FSANZ Act* s 13(1)(a). FSANZ also has the power to develop, on its own initiative, 'proposals' which follow a similar procedure to applications: s 55(1) and generally pt 3 div 2.

173 *FSANZ Act* s 18(1). Other matters to which FSANZ must have regard are listed in s 18(2).

174 *FSANZ Act* s 25. There is a general procedure for assessing applications (pt 3 div 1, sub-div D), but there are modified procedures for assessing applications for minor variations to existing food standards (pt 3 div 1 sub-div E), major variations to existing food standards (pt 3 div 1 sub-div F), new food standards (pt 3 div 1 sub-div F), and for variations to certain nutrition, health and related claims (pt 3 div 1 sub-div G).

175 See, eg, *FSANZ Act* s 26 in relation to the general procedure for applications.

176 See, eg, *FSANZ Act* s 29(1)–(2) in relation to the general procedure for applications.

177 See, eg, *FSANZ Act* s 31 in relation to the general procedure for applications.

178 See, eg, *FSANZ Act* s 30 in relation to the general procedure for applications.

179 See, eg, *FSANZ Act* s 33 in relation to the general procedure for applications.

180 See, eg, *FSANZ Act* s 34 in relation to the general procedure for applications.

181 The Australia and New Zealand Food Regulation Ministerial Council ('Council') is established under the Food Regulation Agreement, above n 29, cl 3. On 13 September 2011, the Council appears to have been renamed as part of the reform of the Council of Australian Governments and is now called the Legislative and Governance Forum on Food Regulation. That said, the *FSANZ Act* continues to refer to the Council and the Department of Health and Ageing website refers to 'Legislative and Governance Forum on Food Regulation (convening as the Australia and New Zealand Food Regulation Ministerial Council)': Department of Health and Ageing, Government of Australia, *Legislative and Governance Forum on Food Regulation* (1 November 2013) <<https://www.health.gov.au/internet/main/publishing.nsf/Content/foodsecretariat-anz.htm>>. For the sake of consistency, this article will use the original name 'Food Regulation Ministerial Council' and the shortened form 'Council' rather than 'Legislative and Governance Forum on Food Regulation'.

182 *FSANZ Act* ss 84(1), 86(1).

183 *FSANZ Act* s 88(1).

standard must be published and gazetted.¹⁸⁴ At that point, the standard becomes a Commonwealth legislative instrument and part of the *Code*.¹⁸⁵

Under the *ANZ Food Standards Treaty*, Australia and New Zealand each agree to incorporate into their domestic law the food standards in the *Code*.¹⁸⁶ They also agree not to amend the food standards set down in the *Code*, other than in accordance with the variation processes described above involving FSANZ and the Council.¹⁸⁷ Further, they agree not to make standards about matters which ‘fal[l] within the scope of this Agreement’ other than in accordance with the processes involving FSANZ and the Council.¹⁸⁸ Australia then commits to meeting its obligations under the *ANZ Food Standards Treaty* in accordance with the *Food Regulation Agreement*.¹⁸⁹ Under the *Food Regulation Agreement*, it is the states and territories which are handed primary responsibility for administering and enforcing the food standards in the *Code* within Australia.¹⁹⁰ This occurs by way of the food standards in the *Code* being incorporated into the state and territory food legislation.¹⁹¹ Under the *Food Regulation Agreement*, the states and territories also agree not to amend any food standard other than in accordance with the *Food Regulation Agreement*.¹⁹²

Together, these provisions in the *ANZ Food Standards Treaty* and the *Food Regulation Agreement* tie the Commonwealth, the Australian states and territories, and New Zealand to a cooperative process for making food standards through FSANZ and the Council. At the same time, they prohibit any jurisdiction from having differing food standards from any other jurisdiction (except where a narrow set of exceptions apply).¹⁹³ The existence of these particular lawmaking processes in relation to food standards have shaped the way in which law reform proposals regarding alcohol beverage labelling have been crafted and treated in Australia over the period from 1996 to 2013.

184 *FSANZ Act* s 92.

185 *FSANZ Act* s 94.

186 *ANZ Food Standards Treaty* art 5(1).

187 *Ibid* art 5(2).

188 *Ibid* art 5(3).

189 *Ibid* art 5(4).

190 *Food Regulation Agreement*, above n 29, cls 10, 19.

191 See discussion in Part II(D) above.

192 *Food Regulation Agreement*, above n 29, cls 21, 22.

193 The *ANZ Food Standards Treaty* contains processes for the setting of separate standards for Australia and New Zealand in the ‘exceptional circumstances’ listed in Annex D: at cl 4. The *Food Regulation Agreement*, above n 29, cl 23 also allows for a food standard to have a state or territory specific component ‘where the Ministerial Council is satisfied that the provision is necessary because of exceptional conditions in that State or Territory and that the provision would not present a risk to public health or safety or contravene Australia’s international treaty obligations.’

B Applications to Food Standards Australia New Zealand

Since 1996, FSANZ (and its predecessor organisations) has received three separate applications seeking various alcohol-related warnings on labels, none of which has resulted in a change to the *Code*.

1 Application A306 by Australian National Council of Women

The first application was made, and withdrawn, in 1996.¹⁹⁴ The Australian National Council of Women applied to the Australian New Zealand Food Authority ('ANZFA') (the predecessor of the FSANZ) for an amendment to the *Code* to include a warning about the risk of birth defects from alcohol consumption during pregnancy.¹⁹⁵ The withdrawal of the application seems to be related to the fact that the Australian alcohol drinking guidelines were being reviewed at about that time and a desire to avoid inconsistency between a warning under the *Code* and the new guidelines.¹⁹⁶

2 Application A359 by Society without Alcoholic Trauma

In 1998, the New Zealand organisation, Society Without Alcoholic Trauma, applied to ANZFA to amend the *Code* to include the following statement on the label of alcohol beverages: 'This product contains alcohol. Alcohol is a dangerous drug.' ANZFA made an assessment of the application and rejected it in July 2000.¹⁹⁷ The reasons for rejection are particularly revealing of ANZFA's then muted view of the risks associated with consumption of alcohol. ANZFA emphasised that the evidence at the time suggested there were good protective effects from moderate alcohol consumption. There was also said to be no evidence to suggest that light drinking harms the foetus.¹⁹⁸ ANZFA also claimed that harms from alcohol were decreasing in both Australia and New Zealand. In any event, ANZFA found that labels were not an appropriate means for averting any such risk because it was too difficult to devise an accurate but simple warning message for a label; there was no evidence that labels would change behaviour; there was evidence that labels cause at-risk groups to drink more; and the government already had alcohol harm minimisation measures in place.¹⁹⁹ There was also concern expressed that the introduction of the labels might open

194 FSANZ, *Finalised Applications to 30 June 2012* (2 July 2012) <<http://www.foodstandards.gov.au/code/applications/pages/completedapplication5509.aspx>>

195 See FSANZ, *Initial Assessment Report Application A576 Labelling of Alcoholic Beverages with Pregnancy Health Advisory Label* (2007) 6.

196 Ibid.

197 ANZFA, *Full Assessment Report and Regulation Impact Assessment Subject: A359 – Labelling of Alcoholic Beverages with a Warning Statement* (July 2000) ('*Full Assessment Report A359*'); Australia New Zealand Food Authority, *Statement of Reasons Rejection of Application A359 – Requiring Labelling of Alcoholic Beverages with a Warning Statement* (5 July 2000).

198 ANZFA, *Full Assessment Report A359*, above n 197, 2.

199 Ibid 1–3.

Australia to a challenge before the WTO, although no detail was provided about the basis for this concern.²⁰⁰

3 *Application 576 by Alcohol Advisory Group of New Zealand*

In 2006, an application for a more tempered warning was made to FSANZ by the Alcohol Advisory Group of New Zealand. This was an application, made with the support of the then New Zealand Government, to vary *Alcohol Labelling Standard 2.7.1* of the *Code* to mandate the inclusion of information on alcoholic beverage labels about ‘the risks of consuming alcohol when planning to become pregnant and during pregnancy’.²⁰¹ FSANZ made an initial assessment of Application A576 and accepted it on 12 December 2007.²⁰² Public consultation followed and, by the deadline of February 2008, FSANZ had received approximately 100 submissions on the application. FSANZ has not yet taken the next step which is to make a determination whether to (a) prepare a draft amendment to *Alcohol Labelling Standard 2.7.1*, or (b) reject the application. As at 18 June 2014, this application remains on foot, but ‘undecided’ because FSANZ has ‘delayed’ further assessment given the governmental decision, discussed below in Part IV(D)(2), to allow the alcohol industry two years from December 2011 to introduce pregnancy related warnings through a voluntary scheme.²⁰³

4 *Request from Council*

In addition to these three applications, it is noteworthy that, on 2 May 2008 (just a few months after the closing date for submissions on Application A576), FSANZ also received a request from the Council to give consideration to mandatory health warnings on packaged alcohol.²⁰⁴ This request went beyond health warnings relating to pregnancy and potentially encompasses health warnings about other types of harms. The request was put in terms of ‘facilitat[ing] the Council of Australian Government[’s]’ concerted approach to curb alcohol misuse and binge drinking among young people’.²⁰⁵ No proposals for changes to the *Code* appear to have resulted from this request.

FSANZ commissioned several expert reports to assist with the consideration of Application A576 relating to pregnancy warnings and the Council’s request about alcohol health warnings. In February 2009, FSANZ received a report on the evidence of effectiveness of alcohol warning labels on risky alcohol

200 Ibid 3.

201 Alcohol Advisory Council of New Zealand, *Application to Amend the Australian New Zealand Food Standards Code – General* (17 February 2006) 1.

202 FSANZ, *Initial Assessment Report Application A576*, above n 195, ii.

203 FSANZ, *Food Standards Development Work Plan* (18 June 2014) <<http://www.foodstandards.gov.au/code/changes/workplan/pages/default.aspx>>.

204 Australia and New Zealand Food Regulation Ministerial Council, ‘Food Ministers Agree to a Strategic Vision for Australian and New Zealand Food Regulation System’ (Joint Communiqué, 2 May 2008).

205 Ibid.

consumption and short-term outcomes ('*Expert Report 1*').²⁰⁶ In May 2009, it then received a second report related to the evidence of the impact of warning labels on alcohol consumption amongst women of child-bearing age ('*Expert Report 2*').²⁰⁷ It seems that at least Expert Report 1 was passed by FSANZ to the Council in May 2009, and subsequently to the Ministerial Council on Drug Strategy and the Council of Australian Governments.²⁰⁸ The views of FSANZ and the Council towards the Expert Reports are not known.

There are several points of note about the contents of the two *Expert Reports*, which put forward views which challenge some of the thinking seen in FSANZ's reasons for rejecting Application A359 in 2000. Both reports emphasise that there has been a 'paucity of opportunities for investigation and evaluation' of alcohol warnings, as opposed to there being 'no evidence' of impact. They seem also to be suggesting to government that it should consider recasting its expectations as to the outcomes which can be achieved from introducing warnings. Rather than aiming to change behaviour, warnings may be seen as being about giving information about risks. They also suggest that lessons from tobacco are probably generalisable to alcohol, such that impactful warning labels would be 'prominent, graphic and should incorporate images as well as text'.²⁰⁹ In this regard, they recommend that warnings be mandatory and rotated regularly, and be linked to other alcohol control strategies with consistent messages across all strategies.

C Bills before the Commonwealth Parliament

In September 2007, rather than applying to FSANZ to develop a new food standard in relation to alcohol warnings, Senator Steve Fielding from the Family First Party introduced a private member's bill, the Alcohol Toll Reduction Bill 2007, to the Senate.²¹⁰ The Alcohol Toll Reduction Bill, if passed, would have amended the *FSANZ Act* (Cth) to require FSANZ to make a new food standard on the labelling of alcohol products and food with information about the NHMRC guidelines, the unsafe use of alcohol, the impact of drinking on vulnerable populations, and health advice about the medical side effects of alcohol.²¹¹ In February 2008, the Bill was referred to the Senate Standing Committee on Community Affairs.

206 Celia Wilkinson et al, *Report 1: Alcohol Warning Labels: Evidence of Effectiveness on Risky Alcohol Consumption and Short Term Outcomes* (12 February 2009).

207 Celia Wilkinson et al, *Report 2: Alcohol Warning Labels: Evidence of Impact on Alcohol Consumption Amongst Women of Childbearing Age* (12 May 2009).

208 Health and Ageing Portfolio (Cth), 'Alcohol Advisory Statement Report' (Supplementary Budget Estimates: Answers to Estimates Questions on Notice, E11-279, 19 October 2011) <http://www.aph.gov.au/~media/Estimates/Live/clac_ctte/estimates/sup_1112/DoHA/Answers/279.ashx>.

209 Wilkinson et al, *Expert Report 1*, above n 206, xv; Wilkinson et al, *Expert Report 2*, above n 207, xiv–xv.

210 Alcohol Toll Reduction Bill 2007 (Cth).

211 Alcohol Toll Reduction Bill 2007 (Cth) sch 1, cl 9.

In its report in June 2008, the majority of the Committee recommended that the Bill not be passed.²¹² The Committee agreed with the purposes of the Alcohol Toll Reduction Bill (Cth) but not its methods. It did not support the amendment of the *FSANZ Act* to require the making of a standard relating to alcohol labelling. Such a change to the *FSANZ Act*, without the consent of New Zealand and the states and territories, would go against the arrangements set out in the *ANZ Food Standards Treaty* and the *Food Regulation Agreement* discussed above in Part IV(A). At that time, the Committee seemed satisfied with the approach being taken in relation to progressing alcohol labelling, especially the referral of the matter by the Council to FSANZ as discussed above.²¹³ Of note is the minority report by the Greens Senator Rachel Siewert who recommended that alcohol warning labels be introduced into the *Trade Practices Act 1974* (Cth) (as it then was), which was the legislative source of the tobacco health warnings.²¹⁴ Taking such an approach would be within the constitutional power of the Commonwealth but, like with the approach proposed in the Alcohol Toll Reduction Bill, outside the scope of the arrangements between the Commonwealth, the states, the territories and New Zealand for making food standards. The Alcohol Toll Reduction Bill lapsed at the end of the Commonwealth Parliament on 28 September 2010.²¹⁵

D Recommendations for Law Reform from Government Advisory Bodies

Running in parallel to FSANZ's review of Application A576 and its consideration of the request from the Council to consider alcohol health warnings were two inquiries, initiated by the Commonwealth Government, which encompassed the question of alcohol beverage labelling. Both made recommendations in favour of reforming the current system of alcohol labelling to include warnings.

1 National Preventative Health Taskforce

In April 2008, the Minister for Health and Ageing established the National Preventative Health Taskforce ('Preventative Health Taskforce') to 'provide evidence-based advice to government and health providers – both public and private – on preventative health programs and strategies'.²¹⁶ In June 2009, the Preventive Health taskforce recommended that the Commonwealth Government 'require health advisory information labelling on containers and packaging of all alcohol products to communicate key information that promotes

212 Senate Standing Committee on Community Affairs, Parliament of Australia, *Alcohol Toll Reduction Bill 2007* (2008) 31–3 [1.121], [1.130]. A dissenting report was written by Family First: at 35–48.

213 Ibid 33.

214 Ibid 52.

215 Alcohol Toll Reduction Bill 2007 (Cth).

216 Preventative Health Taskforce, *Terms of Reference* (6 September 2008) <<http://www.preventativehealth.org.au/internet/preventativehealth/publishing.nsf/Content/terms-of-reference-11p>>.

safer consumption of alcohol'.²¹⁷ The recommended health advisory information included the current NHMRC guidelines on drinking alcohol, text and graphic warnings about health and safety risks from alcohol, and standard drinks and alcohol by volume information. It also recommended the inclusion of ingredient lists and nutrition labelling on alcoholic beverages.²¹⁸ In its May 2010 response to the Preventative Health Taskforce's report, the Commonwealth Government 'note[d]' the recommendation and indicated it was giving it further consideration.

2 Labelling Panel

Not long after receiving the recommendation from the Preventative Health Taskforce, in January 2010, the Council established an independent panel ('Labelling Panel') to undertake 'a comprehensive review of food labelling law and policy using an evidence based approach and without compromising public health and safety'.²¹⁹ In the Labelling Panel's January 2011 report, *Labelling Logic*, two of the key recommendations were that 'generic alcohol warning messages be placed on alcohol labels but only as an element of a comprehensive multifaceted national campaign targeting the public health problems of alcohol in society'²²⁰ and that a specific 'warning message about the risks of consuming alcohol while pregnant be *mandated* on individual containers of alcoholic beverages and at the point of sale for unpackaged alcoholic beverages, as support for ongoing broader community education'.²²¹ It refused to recommend the inclusion of an ingredient list or a nutrition panel on all alcoholic beverages. The transformation of the ingredients in the process of making alcohol means that the list does not 'accurately represent the components of the food as purchased'.²²² The Panel was also concerned that the inclusion of nutrition information panels could misleadingly convey a positive message about alcohol, which contains very few nutrients. 'Indeed, they could imply that it is a healthy product'.²²³ But it did recommend the provision of *energy* information on the labels of all alcoholic beverages.²²⁴ This would assist people wanting to manage their weight gain. The Labelling Panel also recommended that drinks which are mixtures of alcohol and

217 Preventative Health Taskforce, Department of Health and Ageing (Cth), *Australia: The Healthiest Country by 2020: National Preventative Health Strategy – The Roadmap for Action* (30 June 2009) 252.

218 Ibid 273.

219 Review of Food Labelling Law and Policy, *Terms of Reference* (15 January 2010) <<http://www.foodlabellingreview.gov.au/internet/foodlabelling/publishing.nsf/Content/terms>>.

220 Blewett et al, above n 1, 80. With generic warnings, the nature of the risk is not particularised. Examples of such warnings are: 'Drinking to excess is a danger to yourself and those around you' and 'Alcohol can damage your health'. See Blewett et al, above n 1, 80.

221 Ibid 82 (Recommendation 25) (emphasis added).

222 Ibid.

223 Ibid. Note this view is contrary to that maintained by the alcohol industry about the health benefits of alcohol: see text accompanying n 136.

224 Ibid 83 (Recommendation 26).

other beverages (such as soft drink) should comply with all of the general nutrition labelling requirements.²²⁵

In December 2011, the Council's position on the Labelling Panel's recommendations was announced. Firstly, in relation to *generic warnings* on alcoholic beverages, the Council would be seeking the advice of the Standing Council on Health ('SCOH'), who, in turn, would ask for advice from the Australian Health Ministers Advisory Council ('AHMAC') about 'the efficacy of generic alcohol warnings in [the context of] a national campaign on the public health problems of alcohol'.²²⁶ In making this decision, the Council acknowledged the recent industry efforts to implement voluntary labelling. Secondly, in relation to *pregnancy-related* warnings, the alcohol industry would be permitted two years – until December 2013 – to introduce such warnings on alcoholic beverages labels, before regulating. This reflected the advice from SCOH that the giving warnings was 'prudent', but given that voluntary efforts were already been undertaken by the industry, there should be two years for the industry to implement this initiative.²²⁷ Thirdly, the Council requested that FSANZ investigate the recommendation regarding energy content appearing on alcohol.²²⁸ Fourthly, it rejected the recommendation that there be NIPs on mixed alcoholic drinks.²²⁹ The concern with this recommendation was that it created inconsistency between different alcoholic beverages, with only some requiring nutrition labelling. There was also concern expressed that manufacturers might produce low fat or low sugar alcoholic beverages and highlight those qualities in the marketing which might mean that alcoholic products are presented in a 'more positive nutritional light'.²³⁰ International trade considerations and costs to the industry were also mentioned, in passing and without any detail, as reasons for this decision about NIPs.²³¹

Since December 2011, no further information has been made public about any advice which has been given by SCOH or AHMAC or any decision which has been taken on the basis of the advice in relation to generic warnings. In respect of pregnancy-related warnings, in June 2013, the Council announced a project to evaluate the voluntary labelling efforts by the industry in relation to pregnancy warnings.²³² There was some delay because of the federal election in

225 Ibid (Recommendation 27).

226 Legislative and Governance Forum on Food Regulation (convening as the Australia and New Zealand Food Regulation Ministerial Council) ('Legislative and Governance Forum'), *Response to the Recommendation of Labelling Logic: Review of Food Labelling Law and Policy* (2011) 29; see also Nicola Roxon and Catherine King, 'Next Steps to Help Consumers Make Healthy Choices' (Joint Media Release, 30 November 2011).

227 Ibid 30–1.

228 Ibid 31.

229 Ibid 32.

230 Ibid.

231 Ibid.

232 Legislative and Governance Forum, 'Final Communiqué' (Communiqué, 14 June 2013).

September 2013, but the evaluation reports are due in March and June 2014.²³³ In relation to the energy labelling of alcoholic beverages, FSANZ has been asked to provide 'technical advice' to the Council.²³⁴ To this end, in October 2013, FSANZ sought a consultant to prepare a report which would be a 'comprehensive and appropriate evidence base on the impact of energy content (kilojoules) labelling on alcohol on the community, including any impacts on dietary energy intake'.²³⁵ The final report was due in May 2014.

E Recommendations for Law Reform from the Commonwealth Parliament

In December 2012, the Commonwealth House of Representatives Standing Committee on Social Policy and Legal Affairs released the report from its inquiry into the prevention, diagnosis and management of foetal alcohol spectrum disorders.²³⁶ In making its findings and recommendations, the Committee stated, 'we owe it to ...every child and every woman and every family in Australia, to bring to light the risk of FASD. We cannot keep hidden the devastating harms being caused by prenatal alcohol exposure.'²³⁷ A major finding from the Committee was that voluntary alcohol labelling efforts 'are not functioning effectively and are unlikely to ever do so given the commercial realities of the alcohol industry'.²³⁸ Therefore, despite acknowledging that the government had given the industry until December 2013 to implement pregnancy warning labels on a voluntary basis, the Committee recommended that the Commonwealth 'mandate greater controls to ensure responsible attitudes to alcohol labelling'²³⁹ including 'a comprehensive warning [sic] label regime' that reflects the range of harms from alcohol and not just those associated with drinking during pregnancy.²⁴⁰ The Committee recommended that, by 1 March 2013, the Commonwealth Government determine the appropriate format and design for the labels 'to assist the alcohol industry in adopting best practice principles and preparing for mandatory implementation'²⁴¹ and that mandatory warnings be in place by 1 January 2014.²⁴² The Committee stated that the warnings should consist of text and pictures, of a standardised size, position and content, and be accompanied by a public awareness campaign.

233 Legislative and Governance Forum, 'Final Communiqué' (Communiqué, 13 December 2013).

234 FSANZ, *Labelling Review* (February 2014)

<<http://www.foodstandards.gov.au/consumer/labelling/review/Pages/default.aspx>>.

235 FSANZ, *Request for Tender for the Provision of a Cost Benefit Analysis on the Impact of Mandatory Labelling of Energy Levels in Alcohol: RFT 2013/14-01* (2013) 12 <http://www.foodstandards.gov.au/about/Documents/RFT%202013_14-01%20Alcohol%20energy%20labelling%20CBA.pdf>.

236 House of Representatives Standing Committee on Social Policy and Legal Affairs, above n 162.

237 Ibid viii.

238 Ibid 86 [3.196].

239 Ibid 86 [3.197].

240 Ibid 87.

241 Ibid.

242 Ibid 88.

None of the recommended labelling actions was taken by the Commonwealth. Instead, the Commonwealth responded by launching the 'FASD Action Plan for 2013–2014 – 2016–2017' in August 2013.²⁴³ The Commonwealth referred to its evaluation of the industry's voluntary efforts in relation to pregnancy warning labels and stated that it is committed to '[m]onitor the voluntary labelling initiative currently being implemented by the alcohol industry, including the uptake of the measure, and the consistency of messaging with NHMRC Guidelines'.²⁴⁴

F The State of the Alcohol Labelling Debate

Despite the fact that, on one or more occasions from 1996 to 2013, five changes to alcohol beverage labelling were considered by, or recommended to, government, not one of these proposals has become law and only two remain under active consideration.

In relation to warning labels, the major proposal to require health warnings (other than pregnancy warnings) on alcoholic beverages seems to have *stalled* and may, in effect, have been *rejected* by the Council. The request from the Council to FSANZ in 2009 to investigate these warnings has not been progressed and there is no evidence that the Council is acting on the recommendations of the Preventative Health Taskforce, the Labelling Panel or the FASD Inquiry that these warnings be introduced. However, the proposal for mandatory pregnancy-related warnings, which remains before FSANZ and was recommended by the Preventative Health Taskforce, the Labelling Panel and the FASD Inquiry, could be said to still be *under consideration*. Until the evaluation of the industry's voluntary labelling efforts is completed, the government's approach to this form of labelling will not be known.

In relation to nutrition and ingredient labelling, the recommendation from the Labelling Panel to apply NIPs and ingredient labelling to beverages which are mixes of alcohol and another drink (such as soda) was *rejected*. Further, the recommendation by the Preventative Health Taskforce to require NIPs and ingredient labelling on *all* alcohol beverages was said by the then government to be under consideration but seems to have also been *rejected*. It is only the recommendation from the Labelling Panel about energy content labelling for alcoholic drinks which remains under active consideration, with FSANZ providing technical advice to the Council on the matter.

Although this review covers the period from 1996 to 2013, since 2006, the calls on government to reform alcohol beverage labelling have intensified. Those for and against alcohol warning labels and nutritional information continue to debate the merits of the proposals, with competing bodies of evidence – or at least conflicting interpretations of the evidence – being a major part of these

243 Department of Health (Cth), Australian Government, *Responding to the Impact of Fetal Alcohol Spectrum Disorders in Australia: A Commonwealth Action Plan* (2014).

244 *Ibid* 1.

policy discussions. There have been developments in some aspects of the evidence, but matters which remain in dispute include whether drinking alcohol has health benefits, the true prevalence of harmful drinking in the population or particular subgroups, whether 'problem drinking' is best addressed through population-level measures, targeted measures (or both), and the effectiveness of labels in dealing with alcohol-related harms.²⁴⁵ Versions of these issues arise in many of the alcohol control debates, such as in relation to minimum pricing of alcohol²⁴⁶ and alcohol advertising²⁴⁷ in Australia.

However, over the period 1996 to 2013, a notable shift occurred in the understanding of the risks of drinking during pregnancy. This shift is reflected in differences between the 2001 and 2009 versions of the NHMRC guidelines on alcohol consumption. In the 2001 guidelines, the advice was for pregnant women or those who 'might soon become pregnant' to consider not drinking at all, to never become intoxicated, and to have less than seven standard drinks a week and not more than two standard drinks on any one day (and then spread over at least two hours).²⁴⁸ In 2009, this guideline changed to read that it was safest for women, who are pregnant or planning to become pregnant, not to drink.²⁴⁹ The new knowledge contained in the guideline has also been accompanied by fresh research demonstrating the gravity of the harm associated with FASD. The FASD Inquiry exposed the terrible difficulties faced by children born with FASD. Although industry claims are made that the prevalence of FASD is low,²⁵⁰ the more recent understandings about the seriousness of the harms associated with FASD have assisted in the law reform proposals for pregnancy-related warnings gaining acceptance at the same time that the proposals for more general health warnings seem to have fallen by the wayside.

Whilst the new evidence about harms from drinking during pregnancy has been an impetus for the introduction of warning labels, the most significant change in the debate has been the embrace of self-regulation as a model for implementing labelling reforms. The Commonwealth Government has had a

245 See discussion in Part III(B) above.

246 Australian National Preventive Health Agency, *Exploring the Public Interest Case for a Minimum (Floor) Price for Alcohol* (21 November 2012). See also Jenny Chalmers et al, 'Real or Perceived Impediments to Minimum Pricing of Alcohol in Australia: Public Opinion, the Industry and the Law' (2013) 24 *International Journal of Drug Policy* 517.

247 See, eg, Winemakers Federation of Australia, Submission No 3 to Australian National Preventive Health Agency, *Alcohol Advertising: The Effectiveness of Current Regulatory Codes in Addressing Community Concerns – Issues Paper* (February 2013) 6–8; Brewers Association of Australia and New Zealand Inc, Submission No 13 to Australian National Preventive Health Agency, *Alcohol Advertising: The Effectiveness of Current Regulatory Codes in Addressing Community Concerns – Issues Paper* (28 February 2013) 13–23; Distilled Spirits Industry Council of Australia, Submission No 33 to the Australian National Preventive Health Agency, *Alcohol Advertising: The Effectiveness of Current Regulatory Codes in Addressing Community Concerns – Issues Paper* (December 2012 to March 2013) 5–7.

248 NHMRC, *Australian Alcohol Guidelines: Health Risks and Benefits* (October 2001) 16.

249 NHMRC, *Guidelines to Reduce Health Risks*, above n 96, 67.

250 FARE, above n 161, 6.

commitment to self-regulation as a preferred form of regulatory intervention since at least the late 1990s,²⁵¹ but it is only in the last few years that the alcohol industry has started to advocate for self-regulation of alcohol labelling in Australia.²⁵² The industry appears to have first called for self-regulation of alcohol labelling around mid-2011.²⁵³ As noted above, it was in late 2011 that the Council then agreed to give industry two years to self-regulate on pregnancy warnings, rather than using the well-established law reform processes in the *FSANZ Act* to introduce pregnancy warning labels.²⁵⁴ Prior to this call for, and the Council's acceptance of, a self-regulatory approach to alcohol warning labels, the industry's resistance to labelling had focussed on the evidentiary issues outlined in the previous paragraphs. Since 2011, the industry has maintained these lines of arguments, but added that its 'consumer messages' through DrinkWise are the 'most suitable future option, as an evidence-based policy response and in line with Government best practice regulation'.²⁵⁵ There is a contradiction here: on the one hand, the industry maintains that warning labels are not needed and will not work and, on the other hand, the industry insists that it can introduce a more effective scheme of warnings than the government. But it seems that at least with pregnancy warning labels, the industry has seen the writing on the wall. With the risks of drinking during pregnancy being undeniable and the consequences of drinking during pregnancy being so devastating, it is likely only a matter of time before the government intervenes – unless the industry can show that government regulation is not necessary because the industry is able to regulate itself in a responsible and productive manner. Although the industry might continue to make arguments about the evidence base, it now seems that its main aim with pregnancy warning labels is to stave off government intervention.

However, the Council's decision to give the industry two years to implement a pregnancy labelling regime on a voluntary basis and not clearly committing to regulatory intervention went against the views expressed in the *Expert Reports* and the recommendations of the Labelling Panel, the Preventative Health Taskforce, and FASD Inquiry that the warnings need to be mandatory.²⁵⁶ It also seems to be contrary to the Commonwealth's own guidelines on self-regulation

251 Office of Regulation Review, Productivity Commission (Cth), *A Guide to Regulation (second edition)* (1998) D4 ('*A Guide to Regulation*'); Australian Government, *Best Practice Regulation Handbook* (2013) 55–6; Department of the Prime Minister and Cabinet (Cth), *The Australian Government Guide to Regulation* (2014) 28.

252 The alcohol industry has always self-regulated in relation to alcohol advertising and vehemently resists any suggestion that self-regulation is not working and government should intervene. See, eg, the submissions by parts of the alcohol industry to the Australian National Preventive Health Agency inquiry into alcohol advertising: Winemakers Federation of Australia, above n 247, 2; Brewers Association of Australia and New Zealand Inc, above n 247, 24–31; Distilled Spirits Industry Council of Australia, above n 247, 11–14.

253 See Part III(B)(3).

254 See Part IV(D)(2).

255 Australian Alcoholic Beverage Industries, above n 22, 7.

256 See above Parts IV(B)–(E).

which suggest that self-regulation is only a 'viable option' where: (1) there is no strong public interest concern and in particular no public health and safety concern; (2) the problem is a low risk event or is low significance; and (3) the problem can be fixed by the market itself.²⁵⁷ Criteria 1 and 2 are certainly not met in relation to drinking during pregnancy. There must at least be serious doubt about criterion 3.

The Council appears committed to industry self-regulation in the fullest sense. There is no indication that, even if the current evaluation shows poor progress by the industry in voluntarily implementing pregnancy warning labels, the Council will definitely move to mandate such warnings through the *Code*. Further, the Council has not (publicly at least) given any indication of the expected content, size, form or placement of the pregnancy warning labels being voluntarily introduced by the industry. It seems to have left matters entirely in the industry's hands. Yet, the industry's choice of labelling design and format – as shown in the *2013 FARE Labelling Audit*²⁵⁸ – is not compliant with the evidence about the features which labels must have in order to be effective. The Council is aware of this evidence from the Expert Reports which it has had since 2009.²⁵⁹ Even if the Council prefers not to mandate the labels and to rely on the power of industry self-regulation, the Council could have set down some parameters about the format for the warning labels. It has taken this approach in relation to front-of-pack labelling, which consists of a voluntary industry code of practice, the details of which have been developed through, and been endorsed by, the Council.²⁶⁰ Because the Council has allowed the industry to go to the effort and expense of introducing labels in whatever form it wants, it may be much more difficult for the Council to require the industry to use a different set of labelling standards after the evaluation is completed.

V CONCLUSION

The alcoholic beverage label is not a space which has been much used for harm minimisation purposes in Australia. The labels must bear standard drinks information and alcohol content but there is no mandatory requirement for warnings, information or advice about the harms of alcohol consumption. Alcoholic beverages are also exempt from some of the labelling requirements which apply to other foods, such as ingredient lists and, in most instances, nutrition information panels.

257 *A Guide to Regulation*, above n 251, D4.

258 ISRI, *2012 FARE Labelling Audit*, above n 149, 16, 22, 29–30; ISRI, *2013 FARE Labelling Audit*, above n 149.

259 See Part IV(B)(3)–(4).

260 Department of Health (Cth), *Front-of-Pack Labelling Updates* (24 February 2014) <<http://www.health.gov.au/internet/main/publishing.nsf/Content/foodsecretariat-front-of-pack-labelling-1>>.

There are many alcohol policy organisations who are mounting strong arguments for the inclusion of warnings on alcoholic beverages as a new type of alcohol control measure, but the industry is determined to protect the commercial value of its labels against ‘anti-alcohol activists’.²⁶¹ The debate about alcohol labelling is intense, but it is also tapping into major disputes about alcohol control more generally, including the harms and benefits associated with the product, the evidentiary threshold which must be met to introduce new alcohol intervention, and the role of government regulation. From 1996 to 2013, all attempts at law reform of alcohol labelling in Australia were unsuccessful. Although the developments in the evidence base about drinking during pregnancy have provided strong impetus for changes to alcohol labelling, the ongoing clashes about the evidence for labelling, as well as the government and the industry’s more recent relentless insistence on self-regulation as ‘best practice’, has made law reform very difficult. Even if the current evaluation of the industry’s efforts at voluntarily introducing pregnancy-related warnings shows poor industry performance, it is by no means certain that the Australian, state and territory governments will take steps, through the Council and FSANZ, to introduce mandatory warnings. The industry’s ‘valuable label real estate’ may yet be protected from labelling reforms which would benefit the public’s health.

261 Evidence to House of Representatives Standing Committee on Social Policy and Legal Affairs: Foetal Alcohol Spectrum Disorder, Parliament of Australia, Canberra, 24 May 2012, 1 (Andrew Wilmshire, Winemakers’ Federation of Australia).