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To whom it may concern

Thank you for the opportunity to provide feedback on the Exposure Draft Information Standard (the Information Standard) and the Exposure Draft Explanatory Statement (the Explanatory Draft) regarding *Country-of-Origin Information for Seafood for Immediate Consumption*.

The Commission has previously contributed submissions in response to both the Consultation Regulation Impact Statement (CRIS) and the corresponding Discussion Paper. In these submissions, the Commission raised its concerns regarding regulatory burden and the practicality of the proposal. The Commission remains concerned about the requirements set out in the draft Information Standard, as well as the prospect of penalties of up to \$50,000 for conduct where there is no compelling evidence of consumer detriment.

The explanatory statement raises questions about how suppliers can reasonably be expected to comply with the information standard given the modern practicalities of running a small hospitality business:

*“A restaurant runs out of squid during the dinner service and the chef decides to purchase more squid from the local fish wholesaler. At the time of purchase, the chef did not check whether the squid was Australian or imported. Later, the chef contacts the wholesaler to request the information. When making the request to the wholesaler, the chef states when the squid was purchased. The wholesaler locates details of the sale and checks where the squid was harvested from. The wholesaler provides the requested information to the chef in written form (such as email). The wholesaler has met its obligations under section 6 and the restaurant can use the information to meet its obligations under section 5.”*

Explanatory statement, page 9.

In the above example, it should also be considered how a small hospitality business would comply with the information standard where it seeks to restock supplies to maintain continuity of service within the same day or at short notice. Should sourcing arrangements change, it would be required to update its printed menu, online ordering/menu systems and other sources of information, in real time, all while serving customers in order to comply with requirements of the information standard. The draft information standard has insufficient flexibility for businesses that do not have consistent sourcing arrangements, including due to temporary supply shortages.

Examples such as these underscore the need to take a flexible approach and ensure aspirations to provide consumers with additional information are balanced with the practical realities and costs for small businesses.

The Commission also notes contemporary challenges faced by the hospitality sector, which was severely impacted by the COVID-19 pandemic and one that continues to face persistent challenges,

including labour shortages and escalating input costs and increasing concerns about regulatory burden. Company insolvencies for the Accommodation and Food Services industry reached a record high in 2023-24, increasing by 50 per cent compared to the previous year and operators within the sector are likely to face challenges adjusting to changing regulatory requirements at this time.<sup>1</sup>

Through its Business Insights Initiative, the Commission has consistently heard from small businesses that excessive government regulation is impeding their ability to recover effectively. The proposed Country of Origin Labelling (CoOL) requirements risk imposing an additional burden that may cause unnecessary harm to an already struggling sector.

### **Previous concerns identified by the Commission**

The Commission has consistently expressed concern about the disproportionate impact of the proposed CoOL scheme on small businesses. While the goal of improving consumer information is understood, we remain concerned the compliance costs and operational burdens may outweigh the benefits, particularly for small operators.

We remain concerned that the proposed AIM model offers limited clarity for consumers and imposes disproportionate compliance burdens. Categories such as "Australian", "imported", and "mixed" may oversimplify or confuse rather than inform, particularly in a dynamic and varied supply environment. Most perniciously, the AIM model may have unintended consequences if it incentivises demand for foreign seafood, particularly if the "imported" or "mixed" label is perceived as being easier to comply with due to the potential for inconsistencies in the supply of Australian seafood (whereas "imported" seafood can be sourced from a range of alternative foreign markets and updates to menus would be less frequent).

As previously submitted, the requirement to frequently update menus due to changing seafood supply has the potential to create significant ongoing costs for small businesses. Data from our 2023 Small Business Survey estimated an average cost of \$2,820 to make substantial menu changes, with six per cent of businesses estimating costs above \$10,000.<sup>2</sup> The Commission understands the cost benefit assessment's base scenario considered four changes per year with ongoing costs of only \$165 annually with limited sensitivity analysis to explore circumstances where the costs are significantly greater than expected. Given the discrepancy between feedback on costs from hospitality providers to the Commission, and those assumed in the base scenario, it is reasonable to expect sensitivity analysis to examine scenarios where those ongoing compliance costs are much greater than \$165 each year.

It is noted the Office of Impact Assessment recommend use of a default work-related labour cost rate of \$85.17,<sup>3</sup> meaning the estimate of \$165 is only sufficient to account for less than two hours of labour time, not including expenses related to the menus themselves. The plausibility of this estimate should be further examined.

The analysis also assumes that consumers would be willing to pay the equivalent of more than three quarters of a billion dollars over 10 years, despite already being able to request the information. It is unclear whether this remains a plausible assumption given the evolving nature of household's cost of living challenges. Even under what are arguably generous assumptions, the BCR is less than one in circumstances where consumers have a willingness to pay of five per cent rather than six percent, and businesses are required to make 6 or more updates per year.

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<sup>1</sup>ASIC insolvency statistics.

<sup>2</sup> [NSBC submission to Department of Industry, Science and Resources – Country of origin labelling for seafood in hospitality](#) (March, 2023); [NSBC submission to Department of Industry, Science and Resources – Country of origin labelling for seafood in hospitality](#) (August, 2023).

<sup>3</sup> <https://oia.pmc.gov.au/sites/default/files/2024-02/regulatory-burden-measurement-framework.pdf>.

## Flexibility for inconsistent supply arrangements

A significant area of concern is that the draft information standard appears to be drafted on the basis that supply arrangements are consistent, stable and do not vary according to market availability. There is no flexibility to accommodate circumstances where menu items are consistent, but the sourcing arrangements for their ingredients may vary. For example, if there were shortages of a particular type of Australian harvested seafood then there may be no choice but to substitute it with imported seafood.

At present, hospitality businesses are able to remain silent about the country-of-origin of ingredients where they are uncertain about supply arrangements. However, they will not be able to do so once the standard is introduced. This will give rise to circumstances where overly frequent changes to menus and other information may be required, including in circumstances where supply changes are temporary and outside of the control of the business.

The information standard should accommodate this need for flexibility and contain an exemption for temporary supply changes.

**Recommendation 1:** A new section 5(3) should be included to provide that the information provided is taken to comply with the requirements of 5(2) in circumstances where a temporary sourcing exemption applies. A temporary sourcing exemption should be defined to include:

- (a) where a temporary supply arrangement was required at short notice due to factors outside of the control of the business, and
- (b) where the temporary supply arrangement is for a period of less than 21 calendar days.

## Interaction with non-seafood ingredients

If there are net benefits from a CoOL obligation, they are likely to be maximised in circumstances where consumers most value the information rather than in settings where seafood is not the most significant ingredient in the product.

The Commission understands the labelling obligation applies to the seafood product as a whole rather than each specific ingredient. For example, if a menu item at a restaurant contained Australian harvested prawns then the labelling obligation would apply to the menu item as a whole, with the supplier compelled to label the menu item as 'Australian'.<sup>4</sup>

In some circumstances, this would require hospitality businesses to present information that could mislead customers as to the country-of-origin of their menu items. For example, a restaurant serving a dish containing both beef and prawns (e.g. a 'Surf and Turf') would be required to indicate the country of origin of the prawns but not the beef. In this example, the information standard, as drafted, would compel the restaurant to indicate the menu item as being 'Australian', even if the seafood ingredients are only a minor part of the dish.

**Recommendation 2:** The Commission recommends amending the definition of 'seafood product' to exempt items where seafood does not constitute the most significant part of the food item (taking into account the cost, weight, volume or other attributes of the food item as a whole). The effect of this amended definition should be to ensure the information standard only applies to seafood products where a seafood ingredient is the most important or defining feature of a menu

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<sup>4</sup> The Commission notes the alternative labelling options of 'A', 'I' or 'M' as well as the ability to label specific seafood as 'Australian' or 'imported' (instead of 'mixed') in the event a seafood product contains seafood harvested in and outside of Australia.

item, but not those where consumers are unlikely to place a high value on country-of-origin information.

### **Suppliers should be protected under Section 255 of the Australian Consumer Law**

Section 255 of the Australian Consumer Law (ACL) provides safe harbours for suppliers meeting certain conditions, including when making country of origin claims. It is unclear whether the existing Section 255 can protect suppliers from claims or misleading and deceptive conduct (or other contraventions) when complying with the information standard. The Commission's strong view is that hospitality providers that are compelled to comply with the standard should have confidence in their legal position.

**Recommendation 3:** The Commission recommends amendment to Section 255 of the ACL to confirm the safe harbour protections apply to businesses making representations under the proposed information standard (or to issue clarifying guidance to confirm that it applies).

### **Record keeping requirements**

The record keeping obligations of the proposed information standard will be difficult to meet for small hospitality businesses that often rely on informal or ad hoc sourcing arrangements. For example, a small café might send a staff member to the local supermarket to obtain seafood products for use in menu items. In settings such as these, the country of origin of seafood ingredients is not always indicated on receipts, invoices or other documentation. It may be unreasonable or impractical to expect small hospitality businesses to rely on Section 6 of the standard to obtain the required information from the supplier given the time it takes to do so and the impost this would have on the supplier.

Ad-hoc and informal arrangements reflect the commercial needs of these businesses and should not be impacted by the information standard, particularly where they are necessary to ensure continuity of service of key menu items throughout the day (such as when an ingredient runs out).

**Recommendation 4:** The Commission recommends applying a small business exemption to any record-keeping requirements. In cases of suspected contravention, the regulator would retain the ability to take enforcement action in a manner consistent with how false, misleading or deceptive representations are addressed in most other contexts where businesses are not required to maintain records about product or service attributes. Small businesses should be exempt from this requirement if they have fewer than 20 employees or have a turnover of less than \$10 million.

### **Making representations**

The Commission does not support any requirement that would require small businesses to regularly update their main menus (including printed menus and menu boards) when their sourcing arrangements change. This comes with significant practical challenges and unjustifiable cost.

Small businesses should be able to comply with the information standard by making available the required information in a manner that meets their operational needs while ensuring the information is readily available to customers should they wish to view the information.

In practice, this could include formats that are easily amended (such as paper pamphlets separate to their main menus) or a website that can be easily updated. The Commission is concerned the requirements of the information standard under 5(2) would not accommodate sufficient flexibility and could be interpreted in different ways. Note 1 in the table under 5(2) appears to imply the statement may be in a digital or physical form, but 5(2)(b) requires the statement to be clearly visible, prominent and legible. It is unclear whether a business would satisfy 5(2)(b) if the information was provided in circumstances such as the following:

- on a separate pamphlet available at the point of sale or made available upon request (such as is common practice for restaurants supplying nutritional information)
- in a digital format made available to customers when visiting a physical location (such as by using a QR code to link to the information)
- on a separate board next to the point of sale which is less prominent than the main menu board, but contains both nutritional and country of origin information.

If there is no intention for the above circumstances to satisfy the requirements of the information standard, then additional cost-benefit assessment should be undertaken to compare the current preferred option to one where this flexibility is afforded prior to proceeding. The Commission's view is that more flexible options are likely to have a significantly higher BCR as it would provide consumers with country-of-origin information at significantly lower cost.

***Recommendation 5:*** The Commission recommends for 5(2)(b) to be amended to clarify that the information must be clearly visible, prominent and legible but only within the context of the format the information it is provided. Specifically, it should clarify, in the context of Note 1, that the requirements can be satisfied even if the information is not made available on all menus or menu boards used within the hospitality setting. The Commission would welcome an additional clarifying note to confirm legislative intent and reduce ambiguity.

## **Education and awareness**

In the absence of exemptions for small business operators, the Commission recommends compliance initiatives focus on education and awareness. The Explanatory Statement presently references the potential for civil and criminal prosecution in cases of non-compliance with seafood CoOL obligations. In practice, enforcement action of this nature should be extremely rare and limited to deliberate misrepresentations and particularly egregious or malicious conduct.

Future guidance material should provide more practical examples to help businesses understand how to comply with the labelling requirements. It should also clarify whether using QR codes, allowing customers to scan and view seafood CoOL information, would be accepted under the scheme. Importantly, the material should clearly identify which government agency impacted businesses can contact for advice or questions about what is considered compliant.

The Commission recommends that businesses be given an extended transition period before the requirements are enforced.

## **Post-implementation review**

Given the potential for significant compliance challenges, the Commission strongly recommends a mandatory post-implementation review be undertaken within 24 months of commencement.

A post-implementation review would be useful to validate benefits given there is considerable uncertainty around cost–benefit assumptions, including the risk that projected consumer benefits do not materialise to the extent expected. A structured review would allow for additional, meaningful engagement with affected stakeholders once the scheme has been in operation long enough for its effects to be observed.

A requirement for a review should be included within the information standard itself and the review should provide an opportunity for the information standard to be repealed if there is insufficient evidence that the benefits outweigh costs.

Thank you for the opportunity to make a submission. If you require further information, please contact Megan Bennett at either [commission@smallbusiness.nsw.gov.au](mailto:commission@smallbusiness.nsw.gov.au) or (02) 9372 8767.

Yours sincerely

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