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FED UP – A CALL FOR TOUGHER REGULATION TO FIGHT OBESITY AND DIET-RELATED NONCOMMUNICABLE DISEASES

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I INTRODUCTION .......................................................................................................................... 11
A The Aim of this Thesis ............................................................................................................. 11
B Scope and Limitations of this Research ................................................................................. 12
C An Overview of this Thesis .................................................................................................... 14
II PROBLEM DEFINITION .......................................................................................................... 16
A Introduction ............................................................................................................................ 16
B Definition of Obesity and Diet-Related NCDs .................................................................. 16
C Obesity and Diet-Related NCD Statistics ........................................................................... 17
D Understanding How Food Choices are Made ...................................................................... 19
E Causes Of Obesity ................................................................................................................. 22
1 Eating Behaviours .................................................................................................................. 22
2 Changes in our Society, our Food System and the Modern Food Environment .................. 25
3 The Relationship Between Trade Liberalisation and Obesity .............................................. 31
F Consequences of Obesity – The Economic Burden ............................................................. 33
G Similarities with Tobacco Use ............................................................................................. 33
H Conclusion ............................................................................................................................ 34
III PATERNALISM – THE RIGHT LEVEL OF CONSUMER PROTECTION TO REDUCE OBESITY AND DIET-RELATED NCDS ................................................................. 35
A Introduction ............................................................................................................................ 35
B Definition of Paternalism ...................................................................................................... 35
C Paternalistic Interventions ...................................................................................................... 36
1 Soft Paternalism ..................................................................................................................... 36
2 Soft Paternalism and Obesity ............................................................................................... 37
3 Arguments Against Soft Paternalism ..................................................................................... 38
4 Thaler and Sunstein’s Response ......................................................................................... 41
5 Hard Paternalism and Obesity ............................................................................................. 43
6 Arguments Against all uses of Paternalism ......................................................................... 45
B Why a New Proposal is Necessary ................................................................. 82

C Considerations Regarding the Design and Implementation of a Mandatory Health Star Rating System ................................................................. 83
  1 Addressing the Flaws of the Voluntary Health Star Rating System .................. 83
  2 Modifications to the Current Health Star Rating System ................................ 84
  3 The Joint Food System .............................................................................. 86
  4 Paternalism Considerations ...................................................................... 86
  5 Industry Objections .................................................................................. 86
  6 Views Against Labelling Interventions ....................................................... 87
  7 Unintended Consequences ....................................................................... 88
  8 Monitoring, Enforcement and Penalties ..................................................... 88
  9 Timing ...................................................................................................... 89
 10 Cost Considerations ................................................................................ 89
 11 Trade Considerations .............................................................................. 89

D An Alternative Approach – Warning Labels ................................................... 93

E Conclusion .................................................................................................. 95

VII FOOD ADVERTISING TOWARDS CHILDREN – CURRENT RESTRICTIONS .......... 97

A Introduction .................................................................................................. 97

B Advertising Standards Authority Codes ...................................................... 98
  1 Children and Young People’s Advertising Code ........................................ 100
  2 How Effective are the Advertising Standards Authority Codes at Restricting Unhealthy Food Advertising, Particularly Towards Children? ................................................. 103

C Commercials Approval Bureau Pre-Vetting of Television Advertisements .......... 107
  1 How Effective is the Commercials Approvals Bureau Pre-Vetting Service at Restricting Unhealthy Food Advertising, Particularly Towards Children? ..................................................... 108

D Association of New Zealand Advertisers Pre-Vetting Services ........................ 109
  1 How Effective is the Association of New Zealand Advertisers Pre-Vetting Service at Restricting Unhealthy Food Advertising, Particularly Towards Children? ..................................................... 110

E Broadcasting Standards .............................................................................. 110
  1 How Effective are the Broadcasting Standards at Restricting the Promotion of Unhealthy Food, Particularly Towards Children? ............................................................................. 112

F Out Of Home Media Association Aotearoa Placement Policy .......................... 114
  1 How Effective is the Out of Home Media Association Placement Policy at Restricting Unhealthy Food Advertising, Particularly Towards Children? ..................................................... 114
G  New Zealand Media Council Principles ................................................................. 115
  1  How Effective are the New Zealand Media Council Principles at Restricting the Promotion of
      Unhealthy Food, Particularly Towards Children? ........................................................ 116

H  The Food Act 2014 and Food Standards Code as it Relates to Advertising ........................ 116
  1  How Effective are the Food Standards Code and Food Act 2014 at Restricting Unhealthy Food
      Advertising, Particularly Towards Children? ................................................................. 118

I  Fair Trading Act 1986 as it Relates to Advertising .......................................................... 118
  1  How Effective is the Fair Trading Act 1986 at Restricting Unhealthy Food Advertising, Particularly
      Towards Children? ........................................................................................................ 118

J  Conclusion ................................................................................................................. 119

VIII  FOOD ADVERTISING – RECOMMENDATIONS FOR THE FUTURE ..................... 120

A  Introduction ............................................................................................................. 120

B  Why a New Approach is Needed ............................................................................. 120

C  Specific Considerations of the Proposal ..................................................................... 121
  1  Defining Key Terms ....................................................................................................... 121
  2  Forms of Unhealthy Food Advertising That Should be Regulated ............................... 127

D  Additional Considerations Regarding the Design and Implementation of Legislation Restricting
Unhealthy Food Advertising Towards Children ............................................................ 133
  1  The Joint Food System ................................................................................................. 133
  2  Trade Considerations ................................................................................................... 134
  3  Paternalism Considerations .......................................................................................... 135
  4  Parental Responsibility ................................................................................................. 137
  5  How Might Consumers React to Restrictions on Advertising Towards Children? ......... 137
  7  Implications of Advertising Restrictions – Freedom of Expression ............................ 138
  8  Children’s Rights .......................................................................................................... 139
  9  Monitoring .................................................................................................................... 140
 10  Enforcement and Penalties ......................................................................................... 140
 11  Costs ........................................................................................................................... 141

E  Conclusion ................................................................................................................. 142

IX  FOOD REFORMULATION – CURRENT TARGETS .................................................. 143

A  Introduction ............................................................................................................. 143
B What are Food Reformulation Targets .............................................................................. 143

C Current Food Reformulation Targets .............................................................................. 144
   1 Heart Foundation Food Reformulation Programme .................................................. 144
   2 How Effective is the Heart Foundation Reformulation Programme at Reducing Unhealthy Nutrients in Food? ......................................................................................................................... 144
   3 The Food Standards Code and Compositional Requirements ...................................... 146
   4 Internal Food Reformulation Programmes .................................................................. 146

D Conclusion .......................................................................................................................... 147

X FOOD REFORMULATION – RECOMMENDATIONS FOR THE FUTURE ...................... 148

A Introduction ......................................................................................................................... 148

B Why Target Sodium ........................................................................................................... 148

C Proposed Changes to Food Reformulation ...................................................................... 149
   1 Mandatory Nutrient Limits .......................................................................................... 150
   2 Voluntary Targets ......................................................................................................... 151

D Specific Considerations of the Proposal ........................................................................ 152
   1 What Food Categories Should be Targeted by a Reformulation Programme? .............. 152
   2 Setting Targets .............................................................................................................. 155
   3 Ethical Considerations – Arguments About Paternalism .............................................. 155
   4 How Might Consumers Respond to the Proposal to Implement a Government-led Reformulation Programme? ........................................................................................................................... 158
   5 How Might the Food Industry Respond to the Proposal to Implement a Government-led Reformulation Programme? ........................................................................................................................... 158
   6 The Joint Food System .................................................................................................. 159
   7 Trade Considerations ..................................................................................................... 160
   8 Monitoring, Enforcement and Penalties ...................................................................... 161
   9 Expanding the Reformulation Programme to Sugar and Trans Fats ............................ 162

E Conclusion .......................................................................................................................... 163

XI FOOD TAXES – RECOMMENDATIONS FOR THE FUTURE .................................... 165

A Introduction ......................................................................................................................... 165

B Current Approach to Food Taxes in New Zealand .......................................................... 165

C A New Proposal ................................................................................................................ 167
   1 Why Target Sugar-Sweetened Beverages? .................................................................... 168
2 How Effective are Sugar-Sweetened Beverage Taxes? ........................................ 169

D Specific Considerations of the Proposal to Implement Sugar-Sweetened Beverage Taxes ....... 172
1 What Beverages Should be Included in the Group of Taxed Products? ................................ 172
2 What Type of Tax Should be Used? ...................................................................................... 174
3 Who Should Pay the Tax? ..................................................................................................... 175
4 How High Should the Tax be? ................................................................................................ 175
5 Paternalism Considerations .................................................................................................. 176
6 How Might Consumers React to Sugar-Sweetened Beverage Taxes? ................................ 178
7 How Might Industry React to Sugar-Sweetened Beverage Taxes? ........................................ 179
8 Trade Considerations ........................................................................................................... 180
9 Revenue .................................................................................................................................. 180
10 Monitoring, Enforcement and Penalties .............................................................................. 181

E Conclusion .......................................................................................................................... 182

XII CONCLUSION .................................................................................................................... 183

A Identifying the Problem ........................................................................................................ 183

B The Role of Paternalism – Can Paternalistic Interventions be used to Address the Problem? ..... 183

C The Joint Food System ......................................................................................................... 184

D Summary of the Four Proposals .......................................................................................... 184
1 Food Labelling ......................................................................................................................... 185
2 Advertising Towards Children ............................................................................................... 185
3 Food Reformulation ............................................................................................................... 186
4 Food Taxes ............................................................................................................................... 187

E Concluding Remarks ............................................................................................................. 187

XIII BIBLIOGRAPHY .................................................................................................................. 189
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*It always seems impossible until it’s done*

~ Nelson Mandela ~
Abstract

Both globally and in New Zealand the prevalence of obesity and diet-related NCDs is unacceptably high. This research examines how the obesity problem came about, the flaws of the current legal and policy interventions, and appropriate regulatory changes that could be implemented to better address the problem. The causes of obesity and diet-related NCDs are complex and multifactorial. Regulations should focus on changing the modifiable factors that increase the risk of an individual developing one of these conditions.

Historically, it has been viewed as inappropriate to use paternalistic interventions to address consumer’s unhealthy eating habits. This view has begun to change. The harm caused to individuals and wider society by the high prevalence of obesity and diet-related NCDs means it is no longer appropriate to maintain a light regulatory touch. This thesis proposes that a combination of hard and soft paternalistic interventions should be implemented.

There is currently a lack of effective legal and policy interventions with an emphasis on reducing obesity and diet-related NCDs. The most recent intervention came into effect in 2014 and was the introduction of voluntary front-of-pack nutrition labelling. This illustrates the lack of regulatory action.

This thesis proposes four new interventions to address the high prevalence of obesity and diet-related NCDs. These interventions seek to address the failures of the current approach. The four proposed interventions are: a mandatory Health Star Rating system, legislation restricting unhealthy food advertising towards children, a sodium reformulation programme and taxes on sugar-sweetened beverages. The proposed legal interventions should be implemented as a package and monitored to assess consumers response. This will ultimately determine how effective the new interventions are at reducing obesity and diet-related NCDs.
Word length

The text of this paper (excluding abstract, table of contents, footnotes and bibliography) comprises approximately (not more than) 50,000 words.

Subjects and Topics

Obesity - Non-communicable diseases – Food law – Food Policy - Consumer law – Health
I Introduction

New Zealand has unacceptably high rates of obesity and diet-related non-communicable diseases (NCDs). In 2019-2020 an estimated 30.9 per cent of adults were classified as obese. In the same year, an estimated 9.4 per cent of children aged 2-14 years were found to be obese. Obesity trends in New Zealand have remained relatively stable showing that this problem is not going away.¹ An unhealthy diet is a modifiable behaviour and a well-known risk factor that contributes to the development of NCDs such as type 2 diabetes, cardiovascular diseases, common cancers, osteoarthritis, gout, sleep apnea, reproductive disorders, gallstones, mental health conditions and dementia.² This is all potentially avoidable health loss.

It has been estimated that dietary risks accounted for approximately 7.4 per cent of all health loss in New Zealand in 2019.³ Further, New Zealand has the third-highest prevalence of obesity in adults within countries that are part of the Organisation for Economic Co-operation and Development (OECD) and the second-highest prevalence of overweight children.⁴ Obesity and diet-related NCDs are very real issues for New Zealanders.

A The Aim of this Thesis

The objective of this thesis is to examine the legal and policy interventions that are currently in place to address obesity and diet-related NCDs among consumers in New Zealand and will go on to suggest how these can be changed to better address the problem.

¹ Ministry of Health “Key Indicators” <https://minhealthnz.shinyapps.io>.
³ “Health loss” means the gap between the state of health of the current population and that of an ideal population in which everyone experiences a long life free from illness or disability. At 39.
B Scope and Limitations of this Research

This section explores several preliminary matters regarding the scope and limitations of this thesis. As obesity is a multi-faceted issue, there are several possible strategies that could be employed to address the problem. This thesis will focus specifically on four areas of regulation namely, labelling, advertising towards children, food reformulation and taxes. The four areas of regulation have been chosen on the basis that the proposed suite of interventions are believed to be the most effective available mechanisms to achieve the greatest reduction in obesity and diet-related NCDs.

There are several limitations of this thesis that should be pointed out. Firstly, reducing the global burden of obesity and diet-related NCDs will never be as simple as implementing one new intervention. To bring about changes to public health outcomes, a suite of interventions tackling the problem from all angles will need to be introduced and monitored for effectiveness.

Secondly, the global burden cannot be fixed by government regulation alone. While this thesis will largely focus on the solutions that the law can provide, many parties have the power to take action to reduce obesity and diet-related NCDs. These parties include central and local government, schools, employers, charities, the food industry, communities, families and individuals themselves. It will be the collective action of all these parties that will bring about change to public health outcomes.

Further, government-led interventions can only reach so far, for example, a government intervention banning all unhealthy foods would be unthinkable in a democratic and free society. As a total ban is never likely to happen, unhealthy dietary options will always be available to the public in some shape or form, and it will be up to the consumer to resist temptation and maintain a healthy lifestyle. Some of the responsibility thus falls on the consumer to go about making conscious behavioural changes. Nevertheless, this is not to

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say that the law does not play an important role in reducing the burden of obesity and diet-related NCDs.

Finally, the world is facing several global pandemics. In 2019, the Lancet Commission reported that the world was amid three pandemics: obesity, undernutrition and climate change.⁶ Less than a year after the report was published the world was struck by the COVID-19 pandemic. Naturally, the causes and effects of these global issues are often intertwined. For example, there is evidence showing that excess weight is associated with an increased risk of testing positive, hospitalisation, needing advanced treatment, and death from COVID-19.⁷ Another example of the intertwined nature of global issues, is the relationship between food production and climate change. Food production is considered the largest cause of environmental change.⁸ Although poverty, climate change and COVID-19 are not the focus of this thesis, a decision-maker would be mistaken not to consider how new regulations on obesity and diet-related NCDs might interrelate with these other global issues or indeed whether these issues require prioritisation.

This thesis serves as a call to implement new regulatory interventions to address obesity and diet-related NCDs. However, it is not the first of its kind. Many reports have been published urging the government to urgently address obesity and diet-related NCDs in New Zealand through regulatory change. For example, in 2018 the Food Industry Taskforce was established and a report entitled Addressing Factors Contributing to Obesity and the Health and Disability System Review was published identifying many actions that the government and the food industry could take to address obesity in New Zealand.⁹ Although Ministers initially expressed a willingness to work with the food industry on these actions, there was no further engagement with the Taskforce and it has since disbanded.¹⁰ More recently, the

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¹⁰ Email from Hon Dr David Clark “Government response to the Food Industry Taskforce’s Report” (14 November 2019).
Health and Disability System Review was published which suggests there is an urgent need to introduce interventions to address risk factors of NCDs such as an unhealthy diet and obesity. The report suggests “comprehensive and sustained action is required across multiple levels and multiple sectors”.11

In addition, there have been many calls to action by the World Health Organization (WHO) asking members to implement policies in order to address obesity and diet-related NCDs. These include the Global Strategy on Diet, Physical Activity and Health, the Commission on Ending World Childhood Obesity and the Global Action Plan for the Prevention and Control of Noncommunicable Diseases 2013-2020.12 As New Zealand is a member of the WHO, this creates an expectation that New Zealand should be prioritising the implementation of interventions to reduce obesity and diet-related NCDs.

C An Overview of this Thesis

This thesis will examine the current regulatory approach to tackling obesity and diet-related NCDs in New Zealand and will propose appropriate future regulatory options. This will involve consideration of the role of the law in dictating a consumer’s eating habits.

The structure of this thesis will be as follows:

- Chapter two will examine the problem New Zealand faces with regards to obesity and NCDs.
- Chapter three will discuss paternalism and whether regulators are justified in using paternalistic interventions to address obesity and diet-related NCDs.
- Chapter four will explore the background of the Joint Australia and New Zealand Food Regulation System.

• Chapters five through to eleven will look at the current legal and policy interventions to address obesity and diet-related NCDs and will go on to suggest changes. The following four areas will be addressed in turn namely labelling, advertising towards children, food reformulation and taxes.

The outcome of this thesis will be a recommendation to implement four new legal interventions namely, mandatory Health Star Rating (HSR) on all packaged food products, legislation restricting unhealthy food advertising towards children, both mandatory and voluntary reformulation targets on sodium, and taxes on sugar-sweetened beverages. These interventions should be implemented as a package to have the greatest effect on obesity and diet-related NCDs.
II Problem Definition

A Introduction

The starting point for assessing potential regulatory interventions to reduce obesity and diet-related NCDs is to correctly identify the exact nature of the problem. The first part of this chapter examines the extent of the problem. The second part analyses the causes of the problem and draws attention to specific diet-related behaviours that increase the chances of a consumer becoming obese or developing a diet-related NCD. This chapter will assess how consumers make food choices, the changes in our food environment and food system that have occurred over the past decades, and the impact of trade liberalisation on the food system. Understanding these factors allows regulators to consider ways to potentially modify consumers’ behaviours using legal interventions. Subsequent chapters go on to consider the normative question of whether the law should be used to intervene in consumers’ dietary choices. At this stage of the thesis, it is appropriate to simply set the scene for assessing what kinds of behaviours are modifiable. Later on, this analysis will be used to assess what kinds of new targeted interventions should be considered.

B Definition of Obesity and Diet-Related NCDs

An unhealthy diet is a modifiable behaviour that increases the risk of developing obesity and diet-related NCDs. This section defines these two conditions. The WHO defines “overweight and obesity” as “abnormal or excessive fat accumulation that may impair health”. In terms of body mass index (BMI), being “overweight” is considered having a BMI greater than or equal to 25 and being “obese” is considered having a BMI greater than or equal to 30.\(^\text{13}\)

There are many different types of NCDs. These are non-transmissible long-term conditions. Examples of NCDs include cardiovascular disease, diabetes and cancer. There

\(^{13}\) World Health Organization “Obesity and overweight” <www.who.int>. 

are several modifiable behaviours that can increase the risk of an individual developing an NCD including tobacco use, physical inactivity, unhealthy diet and harmful alcohol use. This thesis will focus specifically on an unhealthy diet as a modifiable behaviour.

C Obesity and Diet-Related NCD Statistics

This section examines the statistics relevant to obesity and diet-related NCDs. The statistics put into perspective the extent to which obesity and diet-related NCDs continue to be a prevalent issue both globally and in New Zealand. These statistics highlight the need for targeted interventions to help reduce this issue.

(a) Global statistics

In 2016 it was recorded that 1.9 billion adults worldwide were overweight and of these, 650 million were obese. More recent statistics show that in 2019, 38 million children under the age of 5 were overweight or obese. The global prevalence of obesity continues to grow as numbers have tripled between 1975 and 2016. Globally, the main types of NCDs are cardiovascular diseases (17.9 million people annually), cancers (9 million), chronic respiratory diseases (3.9 million), and diabetes (1.6 million). It has been established that consuming an unhealthy diet is the most significant risk factor in the global burden of disease.

In 2017, global consumption of nearly all healthy foods was below the level of optimal intake. The greatest gap between current and optimal intake was observed for nuts, seeds, milk, and whole grains. Simultaneously, it was found that unhealthy foods exceeded the

15 World Health Organization, above n 13.
16 World Health Organization, above n 14.
17 Christophe Béné and others “Global drivers of food system (un)sustainability: A multi-country correlation analysis” (2020) 15 PLOS ONE at 2.
18 Optimal intake in this study is defined as the level of risk exposure that minimizes the risk from all causes of death.
optimal level of intake. Dietary risks were responsible for a total of 11 million deaths and 255 million disability-adjusted life years (DALYs) among adults in 2017. Cardiovascular disease was found to be the leading cause of diet-related deaths and DALYs followed by cancers and type 2 diabetes. In terms of individual food components, more than half of the diet-related deaths and two-thirds of diet-related DALYs were attributable to high intake of sodium, low intake of whole grains and low intake of fruits. Notably, high consumption of red meat, processed meat, trans fat and sugar-sweetened beverages were towards the bottom in ranking of dietary risks for deaths and DALYs for most high population countries.

(b) New Zealand Statistics

In 2019-2020, the prevalence of obesity amongst adults aged 15 and over was 30.9 per cent, or an estimated 1.24 million adults. Māori adults were found to be 1.8 times more likely to be obese than non-Māori. Pacific adults were 2.3 times more likely to be obese than non-Pacific adults. Furthermore, adults living in low socio-economically deprived neighbourhoods were 1.8 times more likely to be obese than those not living in these neighbourhoods.

Importantly, statistics were also collected for children. In 2019-2020, 9.4 per cent of children aged 2-14 years old were obese. Māori children were 1.6 times more likely to be obese than non-Māori children. Pacific children were 4.7 times more likely to be obese than non-Pacific children. Furthermore, children living in the most socio-economically deprived areas were 2.7 times more likely to be obese than those not. Overall, these statistics reveal that ethnicity and socioeconomic status are key factors in the prevalence of obesity.

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20 At 1963.
21 Ministry of Health, above n 1.
(c) New Zealand obesity trends

The 2019-2020 New Zealand Health Survey reported that the prevalence of obesity among adults has remained relatively stable since 2012-2013. The 2018-2019 New Zealand Health Survey reported the prevalence of obesity amongst children has also remained relatively stable since 2011-2012. The above results indicate that the current interventions are not generating any decline in the prevalence of obesity and diet-related NCDs in New Zealand.

\(D\) Understanding How Food Choices are Made

The next step in understanding the obesity and diet-related NCD problem is to understand how consumers make food choices. Food is a complex element of human existence and cannot be viewed as simplistically as a form of sustenance. At a closer look, consumers eating behaviour is affected by individual factors through to social, cultural, physical and macro-level environments. These factors are each able to be modified directly or indirectly to a varying extent. This is important when looking to regulate as modifiable factors should be targeted by regulations in order to reduce obesity and diet-related NCDs.

(a) Individual Factors

Individual factors that influence food choice include cognitions, behaviours, biological factors and demographic factors. Cognitions are considered the mental processes that consumers use to translate their food choices into how and what they eat. Cass and Sustein

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22 Ministry of Health, above n 1.
23 Neal Blewett and others Labelling Logic Review of Food Labelling Law and Policy (Commonwealth of Australia 2011 2011) at [1.2].
25 At 254.
highlighted many cognitive biases that affect consumers thought processes namely, rules of thumb, anchoring, availability, representativeness, optimism, overconfidence, gains and losses, status quo bias and framing. While these biases may influence consumers to make bad choices, they also show that cognitive choices can be “nudged” or modified. The focus of regulatory change should be to influence these cognitive biases in a way that makes consumers more likely to make healthier food choices.

Demographic factors also influence food choice and eating behaviour. Examples of demographic factors include income and ethnicity. Income impacts food choice as it can motivate consumers to pick cheaper food options to stay within their budget. It can also influence the way consumers balance other factors such as the healthiness of the food. Ethnicity is another relevant factor to consider. As mentioned earlier, statistically Māori and Pacific adults and children are more likely to be obese than non-Māori and Pacific. Research has shown there are several determinants of high Māori and Pacific obesity. This is a historically driven issue as inequalities date back to European settlement where Māori were excluded from things such as higher-level education and continue to suffer from high levels of unemployment and poverty. In light of these findings, later chapters will consider how current and possible future interventions specifically help Māori and Pacific consumers to reduce obesity and diet-related NCDs.

Biological factors such as genetics and age can also influence food choice and eating behaviour. Genetics can make individuals more susceptible to becoming obese. There is research to suggest genes can cause variability in an individual’s weight. Research

28 Story and others, above n 24, at 254.
29 Ministry of Health, above n 1.
31 Story and others, above n 24, at 254.
32 Shepherd and Raats, above n 26, at 378.
suggests that a key predictor of childhood obesity is whether the condition runs in the family. This may be due to shared genetics or a shared home environment. Based on these findings, changes to the food environment may have differing effects on individuals’ BMI depending on their genetic makeup. Genetic factors are not a modifiable risk factor when it comes to regulating an unhealthy diet. However, the food environment and how easy it is for consumers to make healthy choices are modifiable factors. As modifiable factors will be the key focus of this thesis, genetic factors are not discussed further.

Another biological factor relevant to food choice and eating behaviour is the age of the consumer. For example, the food choices of children will differ significantly from the choices of the elderly. Food products targeted toward children often attempt to exploit their naivety and vulnerability. This is why regulators often seek to give children extra protection. The discussion above illustrates that there are numerous individual factors that influence food choice and eating behaviour. Several of these factors are modifiable and could be targeted by regulators to reduce obesity and diet-related NCDs.

(b) Environmental Factors

Environmental factors that influence food choice include social, cultural, physical and macro-level environments. These have a much broader level of influence on food choice than individual factors. Social and cultural factors that influence food choice include interactions with family, friends, peers and the community. Both social and cultural factors can influence what consumers consider good and bad food choices. Further, food consumption is often linked with feelings of family and community belonging, beliefs about health and well-being, perceptions on the appropriate way to celebrate and reward, and as a means of coping with emotions such as stress or boredom.

33 At 378.
34 Nuffield Council on Bioethics, above n 5, at [5.6].
35 Sobal and others, above n 26, at 2.
36 Story and others, above n 24, at 254.
37 Blewett and others, above n 23, at [1.2].
The physical environment refers to the settings where people eat or obtain their food such as schools, restaurants and supermarkets.\textsuperscript{38} On the other hand, the macro-level environment goes even broader and includes factors such as food marketing, social norms, food production, distribution systems, food policies and food prices. Macro-level factors in particular have population-level impacts and the highest levels of influence.\textsuperscript{39} Government policies on agriculture, economics, trade, the environment and international development can either incentivise or disincentive the production of a particular food in our food system. Additionally, policies on rural development, urban planning and transport affect the types of food that reach consumers and at what price.\textsuperscript{40}

The discussion above confirms that there are numerous environmental factors that influence food choice. As a large proportion of these factors are not within a consumers control, the consumer cannot be solely to blame for their unhealthy food choices. Although it is not possible to stop consumers from eating unhealthy food entirely, it is clear that there are many modifiable factors that the government can influence to help tackle the obesity and diet-related NCD problem. The next section will examine the specific food categories and nutrients that are being over or under-consumed.

\textit{E  Causes Of Obesity}

\textit{1  Eating Behaviours}

To understand the obesity and diet-related NCD problem, it is important to understand the specific food categories and nutrients that are being over or under-consumed. Although it is not possible to narrow the problem down to one food category or nutrient, when over-consumed, some foods and nutrients place consumers at a higher risk of becoming obese.

\textsuperscript{38} Story and others, above n 24, at 254.
\textsuperscript{39} At 255.
\textsuperscript{40} Francesco Branca and others “Transforming the food system to fight non-communicable diseases” (2019) 364 BMJ at 24.
or developing a diet-related NCD than others. The research on New Zealanders eating behaviours will be analysed below.

(a) Food category

This section will focus specifically on food categories that are under or over-consumed. The Ministry of Health annually collects data on New Zealand children’s fruit and vegetable intake, fizzy drink consumption and fast-food consumption. The 2019-2020 survey data showed an estimated 71.4 per cent of children aged 2 to 14 years met the fruit intake guidelines (2 plus servings per day). Further, an estimated 45.6 per cent of children in the same age group met the vegetable intake guidelines (2-3 servings per day). The survey data showed an estimated 26 per cent of children had fizzy drink at least once a week while 8.9 per cent of children had fizzy drink at least three times a week. Finally, the data showed that an estimated 53 per cent of children had fast food once a week and 6.6 per cent had fast food three or more times a week. Generally, the Ministry of Health data indicates that New Zealand children have low vegetable intake and high fizzy drink and fast-food consumption. These findings form part of the picture that reveals why New Zealand child have a high prevalence of obesity and diet-related NCDs. This data is important because eating behaviours and preferences that develop during childhood influence adult diets.

The New Zealand Adult Nutrition Survey also reports on fast food and fizzy drink consumption. The survey reported that 27.8 per cent of respondents ate takeaways one or two times a week and 5.8 per cent ate takeaways more than three times a week. Further, adults aged 15 to 30 years were more likely than other age groups to report eating fast food or takeaways three or more times a week. With regards to fizzy drink, 23.7 per cent of survey respondents consumed these drinks three or more times a week, and 7 per cent

41 Ministry of Health “Explore Indicators” <https://minhealthnz.shinyapps.io>.
42 University of Otago and Ministry of Health A Focus on Nutrition: Key findings of the 2008/09 New Zealand Adult Nutrition Survey (2011) at 251.
consumed these drinks daily. Generally, the results of the New Zealand Adult Nutrition Survey convey that a significant proportion of New Zealand adults frequently consume fast food and fizzy drink. These findings form part of the picture that shows why New Zealand adults have a high prevalence of obesity and diet-related NCDs. However, the results are limited because the survey was last conducted in 2008-2009. Until the survey is conducted again, this is the most recent nutrition data New Zealand has to work with and draw conclusions upon. With regards to adult fruit and vegetable intake, the most recent Health and Independence Report 2019 found that only one-third of adults meet the recommendations for fruit and vegetable intake. This indicates that New Zealand adults may be under-consuming healthier food choices.

Overall, research shows that both children and adults are overconsuming fizzy drinks and takeaways while under consuming fruit and vegetables. These research findings can assist regulators understanding of what food categories may need to be targeted by regulatory interventions in order to address obesity and diet-related NCDs. Notably, a tax on fizzy drinks will be considered in later chapters.

(b) Nutrients

Fat, salt and sugar are key nutrients that, if over consumed, have been linked to a higher risk of developing obesity and diet-related NCDs. The New Zealand Adult Nutrition survey discussed above provides the most recent data on consumption of these nutrients. With regards to fat, survey results show the average daily intake of total fat for males was 95g and for females 67g. This is a 33.7 per cent average contribution to daily energy intake for males and a 33.8 per cent average contribution for females. Nutritionists recommend that total fat consumption is 20-35 per cent of an individual’s energy intake showing present consumption levels are in the upper range of the recommended total fat intake. Results

43 At 255.
44 At 1.
45 Ministry of Health, above n 2, at 39.
46 University of Otago and Ministry of Health, above n 42, at 37.
also found the average daily intake of saturated fat for males was 36.5g and 25.8g for females. This is a 13.1 per cent average contribution to daily energy intake for males and females.\textsuperscript{47} It is recommended that saturated and trans fats together be limited to no more than 10 per cent of energy intake showing this is in the upper range of intake. With regards to sugar, survey results found the average daily intake of total sugars for males was 120g and for females 96g.\textsuperscript{48} The major contributors to these total sugars were fruit (18 per cent), non-alcoholic beverages (17 per cent), sweets (15 per cent), and milk (10 per cent).\textsuperscript{49} The WHO recommends that both adults and children reduce sugar intake to less than 10 per cent of total energy intake.\textsuperscript{50} With regards to sodium, the \textit{Health and Independence Report 2019} provides the most recent data. The report found adults consume 3,000mg of sodium per day which is grossly above the WHO recommendation of 2,000 mg per day.\textsuperscript{51}

Overall, this research provides a helpful insight into consumers eating behaviours and shows that fat, sugar and sodium are good targets for regulators to consider when looking to address obesity and diet-related NCDs. Notably, a reformulation programme to reduce sodium intake will be considered in later chapters. The following section will consider in more detail how changes in our society, food system and food environment have led the high prevalence of obesity in New Zealand.

2 \textit{Changes in our Society, our Food System and the Modern Food Environment}

Changes in our society, food system and food environment have contributed to the global burden of obesity and diet-related NCDs. The collective decisions of private individuals, the food industry and the government over the past decades have greatly influenced

\textsuperscript{47} At 45–46.
\textsuperscript{48} At 76.
\textsuperscript{49} At 77.
\textsuperscript{51} Ministry of Health, above n 2, at 40.
consumers’ food choices and ability to live a healthy lifestyle with ease.\textsuperscript{52} This section will elaborate further on each of these changes.

(a) Changes in society

Consumers have become less engaged in the growing and preparing of their food. Consequently, they have become dependent on processed and pre-prepared convenience foods. Consumers’ dependence on these types of foods has been amplified by changes in social structures. In recent decades home life has changed, parents are working longer hours, there are fewer family meals and more meals are eaten away from home. Naturally, the food industry responded to this by developing processed and pre-prepared convenience foods.\textsuperscript{53} As will be discussed below, these food products are predominantly unhealthy.

(b) Larger portion sizes and the predominance of food high in unhealthy nutrients

Food available to consumers has increased in portion size. In the study \textit{Five-year trends in the serve size, energy, and sodium contents of New Zealand fast foods: 2012 to 2016} it was reported that there were moderate to large increases in the serving size, energy content and sodium content of food and beverages sold at major New Zealand fast-food chains between 2012 to 2016. Notably, it found that increases in energy and sodium per serve were attributable to the increase in serving size rather than actual increases in energy and sodium concentration.\textsuperscript{54} This highlights the problem with increased portion sizes.

Food available to consumers is highly processed and predominantly unhealthy. The HSR system is a front-of-pack nutrition labelling system used in Australia and New Zealand to

\textsuperscript{53} Blewett and others, above n 23, at [1.3].
\textsuperscript{54} Helen Eyles and others “Five year trends in the serve size, energy, and sodium contents of New Zealand fast foods: 2012 to 2016” (2018) 17 Nutr J 65 at 70.
indicate the overall healthiness of the product – the more stars the healthier the product.\textsuperscript{55} The \textit{State of the Food Supply Report 2019} analysed the HSR of over 13,000 packaged food and beverage products available in New Zealand. The results indicated that nearly three-fifths (59 per cent) of products had a HSR under 3.5, half of the products (52 per cent) were considered to be items that were not a necessary part of the diet, and over two-thirds (69 per cent) of products were considered ultra-processed.\textsuperscript{56} This report highlights the predominance of unhealthy processed food in the food supply.

\textbf{(c) Restaurants and eating out}

It has become increasingly popular for food to be consumed out of the home, such as in restaurants or fast-food outlets. In 2016, 25 per cent of food in New Zealand was consumed out of the home.\textsuperscript{57} This has contributed to the obesity and diet-related NCD problem because restaurant food tends to be of larger portion size, more calorie-dense and have poorer nutritional quality, particularly when compared to the food that is prepared at home.\textsuperscript{58}

\textbf{(d) Technology advances in the food industry}

Technological advances in the food industry have allowed food producers to increase yield, reduce costs, and make it easier to accommodate consumers’ changing preferences.\textsuperscript{59} Technological advances have been both beneficial and detrimental to the availability of healthy food in the food supply. An example of one of the beneficial impacts of technological advances is the use of canning technology. Out of season fruit and vegetables are able to be preserved in cans so that consumers have the ability to eat this produce all

Ultra-processed means “ready-to-eat or drink formulations based on refined substances with a careful combination of sugar, salt and fat plus additives”.
\textsuperscript{57} Eyles and others, above n 54, at 70.
\textsuperscript{58} Story and others, above n 24, at 260.
\textsuperscript{59} Blewett and others, above n 23, at [1.5].
year round. However, an example of a detrimental impact of technology is the use of industrially produced fats and sugars. Novel technologies have lowered the price of sugar syrups and oil extraction methods. While these technological advances may have lowered the price of ingredients for industry, the high amount of sugar and fat in food products has been severely detrimental to consumers’ health. Overall, these examples illustrate the various effects of technological advances on the availability of healthy food.

(e) Increased advertising of unhealthy food towards children

Advertising is a powerful means of influencing consumers to purchase unhealthy food products, particularly when used to target children who are more naïve and less critical towards the information they are viewing. Over the decades there have been many changes in the way food is advertised to consumers. Advertising now occurs through many different mediums including television (TV), radio, online, out of home, on the food packaging, at the point of sale in the supermarket, through print media and sponsorship of events. With respect to children's media use, the popularity of TV has largely been overtaken by online content. Further, Netflix (47 per cent) and YouTube (51 per cent) have the highest daily reach and children spend the longest time watching content on these platforms.

Exposure to unhealthy food advertising has been linked to the high prevalence of obesity in children. A systematic review and meta-analysis of 22 studies found evidence that acute exposure to unhealthy food advertisements increases food intake in children. Further, research has documented a cascade of effects of unhealthy food advertising including an increased positive attitude towards unhealthy foods, increased taste preference towards advertised products, increased preference for high salt, fat and sugar foods generally,

61 Colmar Brunton Childrens Media Use (2020) at 28.
62 Emma J Boyland and others “Advertising as a cue to consume: a systematic review and meta-analysis of the effects of acute exposure to unhealthy food and nonalcoholic beverage advertising on intake in children and adults”, (2016) 103 Am J Clin Nutr 519 at 532.
greater pressure on parents to purchase foods high in salt, fat and sugar, increased short
term intake, intake that is not compensated for later eating, increased consumption of
unhealthy foods generally and an increase in body weight.\textsuperscript{63} This highlights the detrimental
effects of unhealthy food advertising towards children.

(f) Increased availability of unhealthy food, particularly in low socio-economic areas

Unhealthy food has become cheap, readily available and accessible to consumers in
multiple settings throughout the day. This has made it easier for consumers to eat more
unhealthy food. Furthermore, there has been an influx of fast-food outlets in low
socioeconomic urban areas.\textsuperscript{64} This has contributed to the high prevalence of obesity and
diet-related NCDs, particularly in low socio-economic communities.

(g) Evolutionary factors

To an extent, consumers overeating calorie-dense foods is a result of evolutionary factors.
Historically humans had an insecure food supply and eating a high-calorie diet was
necessary for survival. Although humans have evolved, our brains are still programmed to
eat more food in times of abundance in preparation for times of famine. As calorie-dense
foods are much cheaper and more available, eating to build up stores for survival has
naturally led people to put on weight.\textsuperscript{65} Although evolutionary factors may be partially to
blame for obesity and diet-related NCDs, these are simply factors that cannot be changed.

\textsuperscript{63} World Health Organization for Europe Evaluating implementation of the WHO set of recommendations on
the marketing of foods and non-alcoholic beverages to children: Progress, challenges and guidance for next
steps in the WHO European Region (2018).
\textsuperscript{64} Story and others, above n 24, at 254.
\textsuperscript{65} Henry Dimbleby The National Food Strategy: Part One - July 2020 (2020) at 47.
(h) Cost of healthy food

It has become a common view that healthy food costs more than unhealthy food.\(^6\) This makes unhealthy food choices more appealing to those living under budget constraints. Furthermore, low-income consumers may purposefully be selecting energy-dense foods high in refined grains, added sugars, and fats as a way to save money. This is because fresh fruit and vegetables are more expensive on a per calorie basis than are fats and sugars.\(^7\)

(i) Decrease in physical activity

Over decades, patterns of physical inactivity have developed. Vehicles are used rather than walking or biking, manual labour jobs have largely been replaced with sedentary jobs, people use lifts rather than stairs and entertainment is mainly sedentary (TV and computers). The combined effect of these factors has resulted in less energy expenditure and has thus contributed to the obesity and diet-related NCD problem.\(^8\) As food choice is the primary focus of this thesis, physical inactivity will not be discussed further.

(j) Conclusion

There is an array of complex factors underpinning the problem of obesity and diet-related NCDs. If a government is to use regulation to change consumers unhealthy eating habits, it will be necessary to factor in the modifiable causes of obesity and diet-related NCDs. The next section will examine the relationship between trade liberalisation and obesity.

\(^6\) Simoes, above n 60, at 359.

\(^7\) Story and others, above n 24, at 263.

\(^8\) Public health: ethical issues (Nuffield Council on Bioethics 2007) at 84.
3 The Relationship Between Trade Liberalisation and Obesity

Trade liberalisation has had major effects on food systems by altering the availability, affordability and appeal of certain food products to consumers.\textsuperscript{69} Whether trade liberalisation had positive or negative impacts on human health remains heavily debated.\textsuperscript{70} The greatest benefit of trade liberalisation has been an increase in competition between food companies subsequently lowering food prices.\textsuperscript{71} Trade liberalisation has also increased income and employment opportunities.\textsuperscript{72} Further, trade liberalisation has increased food security and improved access to high nutritional value foods such as fruit and vegetables on a year-round basis.\textsuperscript{73}

On the other hand, trade liberalisation has facilitated a trend towards increased consumption of vegetable oils, meats and highly processed foods. These are foods commonly associated with a poor diet. On this basis, commentators have noted that it is possible to observe a link between trade liberalisation and the high prevalence of obesity.\textsuperscript{74} It may also be possible to draw a link between trade liberalisation and increased marketing of unhealthy food products, particularly targeting children.\textsuperscript{75}

Imports and exports into New Zealand have affected the type of food available for consumers to purchase. In New Zealand, large quantities of high-quality fruit, vegetables, protein sources and dairy products are shipped overseas to support trade. Imports, on the other hand, include a large proportion of nutrient-poor foods.\textsuperscript{76} It has been suggested by academics that while there remains a disconnect between the quantity and quality of food

\textsuperscript{69} Corinna Hawkes “Uneven dietary development: linking the policies and processes of globalization with the nutrition transition, obesity and diet related chronic diseases” [2006] Glob Health at 2.
\textsuperscript{70} Willett and others, above n 8, at 483.
\textsuperscript{71} Benn McGrady Trade and Public Health (Cambridge University Press, 2011) at 2.
\textsuperscript{72} Willett and others, above n 8, at 483.
\textsuperscript{73} McGrady, above n 71, at 6.
\textsuperscript{74} At 5.
\textsuperscript{75} At 6.
\textsuperscript{76} Elaine Rush and Obolonkin Vladimir “Food exports and imports of New Zealand in relation to the food-based dietary guidelines” (2020) 74 Eur J Clin Nutr Lond 307 at 311.
being exported and imported into New Zealand so too will the high prevalence of obesity and diet-related NCDs.\textsuperscript{77}

Samoa is a helpful example of a country whose imports and exports have had a substantial effect on consumers diets. Traditionally, the Samoan diet was based on root crops and starchy fruits, seafood, leafy greens, coconut products, and various other fruits and nuts. This has now transitioned into a diet high in refined cereals, animal products, oils and processed foods. Trade liberalisation has run in parallel to these changes in the Samoan diet, to the detriment of the health of the Samoan people.\textsuperscript{78} Although trade liberalisation has contributed to economic growth and development, it has also contributed to the poor health of the country which in turn has reduced the productivity of the workforce and increased health costs.\textsuperscript{79} This example illustrates the multitude of flow on effects from trade liberalisation.

Overall, there are obvious tensions between the need to introduce interventions to support public health goals and the need to support trade.\textsuperscript{80} As New Zealand is a member of the World Trade Organization (WTO), any domestic law that limits trade in favour of health should not do so in a way that breaches international obligations under agreements such as the Agreement on Technical Barriers to Trade (TBT) and the General Agreement on Tariffs on Trade (GATT).\textsuperscript{81} Before putting in place any new interventions to reduce obesity and diet-related NCDs, regulators will need to weigh the potential benefits to public health against the need to remove barriers to trade.

\textsuperscript{77} At 312.
\textsuperscript{78} Anne Marie Thow and others “Trade and the Nutrition Transition: Strengthening Policy for Health in the Pacific” (2011) 50 Ecol Food Nutr 18 at 19.
\textsuperscript{79} At 36.
\textsuperscript{80} McGrady, above n 71, at 2.

Consequences of Obesity – The Economic Burden

Beyond the health consequences, obesity and diet-related NCDs place an economic strain on the health system and result in lost productivity. In 2006 healthcare costs directly related to overweight and obesity were estimated to be $623.9 million, or 4.5 per cent of the total health care expenditure. In addition, $225 million was attributed to lost productivity. Of these costs, the largest were attributed to type 2 diabetes followed by hypertension. More recent research indicates that approximately two billion dollars per year in direct healthcare costs can be attributed to excess weight in New Zealand. A further seven billion can be attributed to indirect costs such as lost productivity. These estimates highlight the urgent need to address the obesity issue, particularly as this is all preventable health loss.

The health care costs associated with obesity and diet-related NCDs are largely paid for by individuals and taxpayer funds as opposed to the food industry. This reduces the food industries accountability as there is no consequence for their role in producing and selling unhealthy food to consumers. Implementing new interventions to reduce obesity and diet-related NCDs would not only alleviate the burden on the healthcare system, but allow for taxpayer funds to be spent elsewhere.

Similarities with Tobacco Use

Inevitably, an analogy can be drawn between the problems associated with tobacco use and the problem with obesity. Both have a range of complex motivations underlying the behaviour, and enjoyment of the activity appears to override the health, societal and

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82 Anita Lal and others “Health care and lost productivity costs of overweight and obesity in New Zealand” (2012) 36 Aust N Z J Public Health 550 at 553.
83 Ben Barton and Tom Love Economic impact of excess weight in Aotearoa (Sapere Research Group 2021) at 28.
84 Nick Wilson and others “Food taxes and subsidies to protect health: relevance to Aotearoa New Zealand” (2020) 133 NZ Med J 71 at 71.
financial cost.\textsuperscript{85} However, in the case of tobacco control, the aim of interventions is to stop consumers from using the product altogether. Food on the other hand, is essential to life and the aim is not to eliminate, but rather to reduce the consumption of particularly unhealthy food products.\textsuperscript{86}

Another differentiation between the problems with tobacco use and unhealthy food consumption is the link between the cause and effect. There is a clear link between tobacco use and negative health outcomes such as lung disease. The obesity problem on the other hand is multi-faceted. It is not possible to point to one food product or nutrient as the root cause of the problem. Some food products may be unhealthy, but in moderation are harmless.

For now, it is sufficient to note that the government has identified both tobacco and unhealthy diets as public health burdens requiring intervention. This is not to say that both will be addressed in the same way. As mentioned above, there are several challenges that are unique to the regulation of an unhealthy diet. Nevertheless, tobacco regulation will be drawn upon as an example throughout later chapters of how regulators can address public health issues through legal interventions.

\textit{Conclusion}

The high prevalence of obesity and diet-related NCDs is a wide-scale problem born from many interweaving factors. The legal interventions that are proposed in this thesis will focus on targeting modifiable consumer behaviours. The next chapter will discuss whether regulators are justified in using paternalistic interventions to modify consumers’ behaviour in order to reduce obesity and diet-related NCDs.

\textsuperscript{85} R West “What lessons can be learned from tobacco control for combating the growing prevalence of obesity?” (2007) 8 Obes Rev 145 at 145.

\textsuperscript{86} Shawna Mercer and others “Drawing possible lessons for obesity prevention and control from the tobacco-control experience” in David Crawford and others \textit{Obesity Epidemiology: From Aetiology to Public Health} (Oxford Scholarship Online, 2010) at 272.
III Paternalism – The Right Level of Consumer Protection to Reduce Obesity and Diet-Related NCDs

A Introduction

Debate focusing on personal freedom and the appropriate role of the government often lies at the center of regulations designed to confer a public health benefit. Traditionally, food choice was seen as an inappropriate subject for the government to intervene in as it was considered a private matter for individuals however, this view has begun to shift. Paternalistic interventions are used to “re-shape consumer behaviour in order to increase consumer welfare”. Interventions can range from hard to soft. This chapter will address the arguments in support of paternalistic interventions and will also consider arguments against paternalistic interventions such as those made by John Stuart Mill. Having outlined the problem in chapter two, this chapter will consider whether regulators are justified in using paternalistic interventions to reduce obesity and diet-related NCDs. This will set the scene for later chapters which analyse current interventions and recommend new ones.

B Definition of Paternalism

Before assessing the arguments for and against the use of paternalistic legal and policy interventions, it is first necessary to set out a definition of paternalism. There is no single agreed definition of “paternalism” for regulators to refer to. Scholars have grappled with the question of how to define paternalism and arrived at several different conclusions. Gerald Dworkin described paternalism as “the interference of a state or an individual with another person, against their will, and defended or motivated by a claim that the person

87 Simoes, above n 60, at 350.
interfered with will be better off or protected from harm”.90 Peter Suber preferred a more simplistic definition, stating that paternalism is to “act for the good of another person without that person’s consent, as parents do for children”. Suber considered that paternalism is particularly controversial because “paternalists advance peoples interests (such as life, health, or safety) at the expense of their liberty”.91 Both of these definitions clarify that in order for an intervention to be considered paternalistic there must be some intention for it to protect consumers from something that could otherwise cause them harm. Overall, while disagreement between scholars on the exact definition of paternalism exists, legal paternalism for the purposes of this discussion can be generalised as “any law that has the goal of re-shaping consumer behaviour in order to increase consumer welfare”.92

C Paternalistic Interventions

There are a range of interventions that are considered paternalistic. This section provides a discussion on those interventions at the lower end of the spectrum called soft paternalism, and those at the more extreme end of the spectrum called hard paternalism. The discussion will consider whether they are appropriate to be used to address obesity and diet-related NCDs.

1 Soft Paternalism

Soft paternalistic interventions, such as front-of-pack nutrition labelling, are designed as a method of encouraging or “nudging” consumers towards making better choices. It is at the least coercive end of the spectrum of paternalistic interventions as the consumer’s poor choice has not been banned or taken away.93 Scholars Richard Thaler and Cass Sunstein

92 Tokeley, above n 88 at 22.
93 Kate Tokeley Consumer Law in New Zealand (2nd ed, LexisNexis NZ Limited, 2014) at 25.
call this type of soft paternalism “libertarian paternalism” and argue that it is justifiable for the government to intervene in ways that preserve freedom of choice whilst also seeking to improve people’s lives. Thaler and Sunstein base their idea of libertarian paternalism on the findings of behavioural economics, which provides evidence that humans have limited cognitive abilities, use mental shortcuts and often succumb to their short term interests that are in conflict with their long term interests. The findings of behavioural economics disprove the assumption that people do a good job at making decisions or make choices that are in their best interests. Soft paternalistic interventions change the “choice architecture” or the environment in which decisions are made, to help consumers make better choices “as judged by themselves”. Thaler and Sunstein consider these interventions to be both paternalistic and liberty preserving. This is because a private individual or government official needs to design the environment that nudges the consumer to make a decision that is better for their welfare. However, this view is considered controversial among academics. Criticisms will be addressed later in the discussion.

2 Soft Paternalism and Obesity

This section more specifically considers whether it is appropriate for regulators to use soft paternalistic interventions as a means to reduce obesity and diet-related NCDs. Many countries around the world, including New Zealand, have already implemented soft paternalistic interventions such as front-of-pack nutrition labelling. As mentioned above, the findings of behavioural economics suggest that consumers have limited cognitive

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97 Thaler and Sunstein, above n 27, at 5–12.
98 At 5.
abilities. In more technical terms, human cognition can be divided into two systems; the reflective and the automatic. Food choices are typically made by the automatic system as these decisions are made in a fast and unconscious way, as opposed to those that are made in a slow, deliberate and conscious way. Soft paternalistic interventions help consumers make decisions as if they had put more time and effort into their food choice. Soft paternalistic interventions can be used to encourage consumers towards healthier food choices despite the presence of unhealthy ones. To illustrate this point, Thaler and Sunstein provide a hypothetical scenario of a woman named Carolyn re-arranging the way food is displayed in a school cafeteria to influence children’s food choices. By making changes to the “choice architecture”, such as placing the carrot sticks at eye level, Carolyn observes an increase in consumption just by making small changes to the context in which the decision is made.

3 Arguments Against Soft Paternalism

There are many scholars who, notwithstanding the findings of behavioural economics, remain opposed to soft paternalistic interventions. These criticisms are discussed below.

(a) Soft paternalism and liberty

Thaler and Sunstein maintain the position that soft paternalism is liberty preserving. There are, however, several academics that disagree with this view. Thaddeus Pope considered that although soft paternalism may protect consumers from decisions that are a product of “compulsion, misinformation, excitement or impetuosity, clouded judgement… or immature or defective faculties of reasoning” it is still a tangible

100 Jolls, Sunstein and Thaler, above n 95, at 1479.
102 At 9.
103 At 1–2.
104 At 5.
interference with a consumers freedom of liberty.\textsuperscript{105} Hansen and Jesperen argue that nudging only allows consumers to maintain their freedom of choice in principle and not in practice. For this reason, they cautioned that public policymakers need to take responsibility for the choices they are promoting.\textsuperscript{106} To illustrate this point, although taxation on unhealthy food products does not prohibit consumers from purchasing unhealthy products, it is still an interference with one's liberty as consumers may no longer have the financial means to afford the product. The intervention or “nudge” has thus placed an obstacle in the way of the consumer making a free choice. Although this concedes that soft paternalism may not be completely liberty preserving, some sacrifice of freedom of choice is necessary if progress is to be made towards reducing obesity and diet-related NCDs. The extent of the harm this problem causes justifies the sacrifice.

(b) Soft paternalism and freedom of choice

There are many academics who accept the findings of behavioural economics and yet still object to the use of paternalistic interventions. Milton Friedman, Robert Nozick and Joel Feinberg all based their philosophies on the idea that freedom of choice has intrinsic value.\textsuperscript{107} Gregory Mitchell points out that “one individual may rationally make choices that others would deem objectively bad”.\textsuperscript{108} In this sense, a consumer might not see it as a mistake to choose unhealthy food. Freedom of choice allows consumers to meet their own personal needs, whatever they might be.

This also means it may be near impossible for regulators to make judgments about consumers’ preferences because these are subjective decisions. Rizzo and Whitman argue that only “if well-meaning policymakers possess all the relevant information about individuals’ true preferences, their cognitive biases and the choice contexts in which they manifest themselves, then policymakers could potentially implement paternalist policies that improve the welfare of individual’s by their own standards”.109 Of course, policymakers do not have access to this information and are hence implementing policies based on what they think are the right preferences for consumers to have. Rizzo and Whitman go a step further to say just because “individuals sometimes have difficulty determining their own preferences does not mean outsiders will do any better; they could do worse”.110 Further, there is the potential for paternalistic policies to initiate a “slippery slope” towards even more intrusive policies.111 If Rizzo and Whitman’s argument is accepted, it is unlikely that a decision-maker will ever be able to put in place any measure that is not objectionable to some group of people. Although decision-makers can make mistakes about what they think are the right preferences for consumers to have, it is surely better to have a decision-makers trying to implement policies in consumers’ best interests than to not act at all.

Academics have also criticised soft paternalistic interventions as they presume government regulators can predict the future outcome of an individual’s choices. In reality, an individual’s choices are often made in circumstances where there is uncertainty of the future effects of the decision on the individual.112 Although there is no guarantee an unhealthy diet will cause a NCD, research clearly shows that consumers are at a much higher risk of developing an NCD if they consume an unhealthy diet.

110 At 924.
111 At 908–909.
112 Jayson L Lusk “Are you smart enough to know what to eat? A critique of behavioural economics as justification for regulation” (2014) 41 Eur Rev Agric Econ 355 at 368.
Overall, although soft paternalistic interventions may force consumers to concede some of their freedom of choice, the harm of obesity and diet-related NCDs outweighs any intrinsic value freedom of choice may have. Without any paternalistic interventions in place, consumers may think they have freedom of choice, but in fact food companies are well versed in the findings of behavioural economics and use these findings to market products towards consumers and exploit their known biases. Without the protection of paternalistic policies, the free market will not necessarily lead consumers down a path that promotes their health.

4 Thaler and Sunstein’s Response

Thaler and Sunstein foresaw that there would be objections to libertarian paternalism and provided responses to the objections they foresaw. The responses address several of the criticisms raised in the discussion above. The first foreseeable objection was that libertarian paternalism will start a “slippery slope” towards more intrusive interventions. Thaler and Sunstein respond by stating that this avoids the question of whether the proposal has merit in and of itself.\textsuperscript{113} Further, in some circumstances there will be no viable alternative to more intrusive interventions in which the “slippery slope” cannot be avoided.\textsuperscript{114} Thaler and Sunstein also predicted that skeptics might argue that consumers have the right to be wrong in a free and democratic society. Mistakes help consumers learn and can be good for people. Thaler and Sunstein respond by stating that there are some mistakes that are better to be protected from, such as falling in a pool. Further, for unsophisticated choosers there may be little harm in using a soft paternalistic intervention, such as putting up a warning sign.\textsuperscript{115}

Another objection Thaler and Sunstein foresaw was that public officials or decision makers can make mistakes when designing and implementing soft paternalistic interventions as they are subject to their own bounded rationality and biases. Thaler and Sunstein freely

\textsuperscript{113} Thaler and Sunstein, above n 27, at 235–237.

\textsuperscript{114} Sunstein and Thaler, above n 94, at 1199–1201.

\textsuperscript{115} Thaler and Sunstein, above n 27, at 240.
admit that the decision-maker is a human with bounded rationality and subject to the influence of objectionable pressures. They respond by commenting that it is surely better to have someone trying to improve welfare than the opposite. Additionally, the damage caused by a soft paternalistic intervention that is a mistake is likely to be less severe than if it were a mandate. Finally, Thaler and Sunstein foresaw a possible objection that the instruction to implement only soft paternalistic interventions is too limiting and that in certain circumstances freedom of choice should be taken away. Thaler and Sunstein responded that there is nothing in their theory that denies the possibility of removing freedom of choice entirely, in certain circumstances.

In *The Ethics of Influence*, Sunstein also acknowledged that there may be ethical objections to soft paternalistic interventions and suggested a test of whether the intervention promotes or undermines welfare, autonomy, dignity and self-government should be applied. Although this test should be applied on a case-by-case basis, Sunstein generally considered that because consumers are free to ignore soft paternalistic interventions, this preserves consumers’ autonomy and dignity. Sunstein concedes some soft paternalistic interventions will be unacceptable, such as those with illicit ends or those that favour particular groups over others.

Despite the objections raised in the discussion above, soft paternalistic interventions should still be considered an appropriate means to reduce the harm caused by obesity and diet-related NCDs. Soft paternalistic interventions allow consumers to pursue their own course of action, and when carefully designed, allow consumers to maintain their welfare, autonomy, dignity and self-government.

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117 At 1199–1201.
119 At 191.
120 At 12.
5 Hard Paternalism and Obesity

Hard paternalistic interventions force people to act (or refrain from acting) in certain ways.\textsuperscript{121} These types of interventions disregard or intentionally limit consumers’ voluntary conduct in the belief they will contribute to an individual’s welfare.\textsuperscript{122} An example of a hard paternalistic intervention in the context of obesity and diet-related NCDs is a ban on the use of a specific ingredient such as trans fats. The ban removes consumers’ freedom to purchase processed food products that contain trans fats.

The work of Sarah Conly, a key scholar in this area, will be drawn upon to provide a more detailed explanation of why regulators might be justified in using hard paternalistic interventions to address obesity and diet-related NCDs. Conly argues that consumers are irrational in their decision-making and soft paternalism fails to provide the desired results because consumers can still pursue the bad course of action.\textsuperscript{123} Conly states that food consumption is largely influenced by cravings, emotions and environmental conditions, hence making it appropriate to use hard paternalistic interventions to address consumers’ irrationality when making food choices.\textsuperscript{124}

Conly draws on several case studies to illustrate her argument including the New York City trans-fat ban. This is a present-day example of the use of hard paternalism to prevent New Yorkers from being exposed to high levels of trans-fat. In 2008, the use of added trans fats was made illegal in New York restaurants and cafeterias.\textsuperscript{125} This ban was introduced a year after attempting (and failing) to reduce trans fats through voluntarily measures.\textsuperscript{126} Conly considers the ban was justified although she goes further to state that a national ban would be even more effective at producing positive health outcomes.\textsuperscript{127}

\textsuperscript{121} Sarah Conly Against Autonomy (Cambridge University Press, 2013) at 45.
\textsuperscript{122} Pope, above n 106, at 683–684.
\textsuperscript{123} Conly, above n 122, at 7.
\textsuperscript{124} At 168.
\textsuperscript{125} At 152.
\textsuperscript{126} At 154.
\textsuperscript{127} At 155.
Conly’s support for hard paternalism does not come without criticism. According to Conly, health is universally shared but subjectively valued. Dieterle objects to this insofar as health is not a universally shared concept. For example, the idea that being overweight is undesirable is not a universally shared concept. Dieterle also argues that paternalistic policies are not helping all individuals reach their own goals, but rather they are helping a portion of the population reach theirs.\(^{128}\) It would be difficult to exclude from interventions consumers who voluntarily and knowingly embrace factors that put them at a higher risk of becoming obese and developing a diet-related NCD. Whilst it may be desirable for the government to intervene only against those who are mistakenly and involuntarily neglecting their health through consuming a poor diet, it would be overly difficult and onerous to separate those who voluntarily and knowingly accept this risk and those that do not. In light of this, universal interventions are preferred.\(^{129}\) Dieterle further argues for a shift away from an individual focus and towards the broader social and environmental factors that negatively affect health.\(^{130}\) These broader factors should be taken into consideration even when implementing hard paternalistic interventions.

Overall, Conly provides many convincing arguments in favour of implementing hard paternalistic interventions. Although these have never been used in New Zealand to reduce obesity and diet-related NCDs, this is not a reason to rule out hard paternalistic interventions altogether. Needless to say, hard paternalistic interventions remove consumers freedom of choice so should be used with caution. The distressing statistics revealing the high number of New Zealanders suffering from obesity and diet-related NCDs justifies the use of hard paternalistic interventions to address the problem. This thesis will later recommend implementing mandatory sodium limits on processed food products. Chapter ten will explore the details of how this hard paternalistic intervention should be cautiously designed and implemented.

\(^{128}\) JM Dieterle “Shifting the Focus: Food Choice, Paternalism and State Regulation” (2020) 5 Food Ethics at 4–5.


\(^{130}\) Dieterle, above n 129, at 9.
6 Arguments Against all uses of Paternalism

In addition to the arguments made in more recent literature against soft and hard paternalism that have been mentioned above, there are two traditional theories which oppose any form of paternalistic intervention. These theories are generally based on the belief that paternalistic interventions will create a nanny state and the government will take full control of consumers’ food choices. The first is the harm principle and the second is neoclassical economic theory. These are discussed below:

(a) The harm principle

The key scholar who argued against all forms of paternalism is John Stuart Mill. Mill’s harm principle states that law is only justified in interfering with a person’s liberty as a means to prevent harm to others.131 On this basis, the law should not interfere with consumers’ food choices, as any resulting poor health outcome is a harm to that individual alone.132 Despite Mill’s views, paternalism is arguably justified in the case of addressing obesity and diet-related NCDs because the level of harm that consumers have caused to themselves is so extreme. There is a role for the law to play in protecting consumers from this harm, especially if the laws are at the soft paternalistic end of the spectrum.

Inevitably, obesity and diet-related NCDs place a burden on the public healthcare system to treat patients with these conditions. Based on Mill’s harm principle, this is a harm to others and could justify intervention. The burden on the public healthcare system is one example of a non-paternalistic reason for intervening and will be subsequently discussed in further detail.

131 Mill, above n 89.
132 Simoes, above n 60, at 351.
(b) Neoclassical economic theory

Another traditional theory against paternalism is neoclassical economic theory.\(^{133}\) Neoclassical economic theory is based on the assumption that fully informed consumers in a free market will make rational choices in light of improving their own welfare.\(^{134}\) Neoclassical economists firmly reject paternalism on the basis that a free market gives consumers “what they want instead of what a particular group thinks they ought to want”.\(^{135}\) Epstein concedes that there are two limited circumstances when it may be acceptable to act against neoclassical theory and allow the government to intervene, namely private monopoly and imperfect information.\(^{136}\) However, in all other circumstances consumers should be free to make their own rational choices.

Concerning food choice, this theory supports the idea that consumers who eat unhealthy diets have rationally decided to do so. Neoclassical economic theory has been challenged by the more recent findings of behavioural economics, which point out that consumers are often irrational decision-makers and affected by cognitive biases when making food choices. Arguably, paternalistic interventions are justified as the burden of obesity and diet-related NCDs is much greater than the need to allow consumers to make their own “rational” yet unhealthy food choices.

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133 Friedman, above n 108.
135 Friedman, above n 108, at 15.
136 Epstein, above n 135, at 804–805.
D The Factors that Influence the Justifiability of Paternalism

There are many factors that will influence a regulators decision to implement a paternalistic intervention. Factors to consider when determining the legitimacy of paternalism include the: 137

(a) magnitude of the problem;
(b) probability and irreversibility of potential consumer harm;
(c) the degree to which addiction is affecting consumer choice;
(d) the degree to which consumers want to be protected;
(e) the degree to which the problem is affecting vulnerable persons; and
(f) whether there are any additional, non-paternalistic reasons for enacting the law.

In this instance, the magnitude of the problem has been outlined in chapter two. With regards to the probability and irreversibility of the harm, this assessment is particularly difficult as many factors go into determining the probability developing an NCD. For example, a person may consume an overall unhealthy diet but exercise to extreme levels. As mentioned in chapter two, diet-related NCDs such as heart disease and diabetes are irreversible. Although some consumers may choose to knowingly and willingly accept the consequences of eating an unhealthy diet, the vast majority of consumers mistakenly eat in a way that causes them to become obese or develop diet-related NCDs. Given the poor quality of life and health complications of obesity and diet-related NCDs, consumers should want to be protected from these potential outcomes. As mentioned in chapter two, children are greatly affected by obesity and diet-related NCDs. Further, they are often the target of unhealthy food advertising, being a naïve group of consumers that are less likely to be critical of the content they are viewing. This makes them a vulnerable group particularly in need of protection by the law.

137 Tokeley, above n 93, at [1.4.3].
As already discussed, there are additional non-paternalistic reasons for intervening to reduce obesity and diet-related NCDs. Although a consumer may think their poor food choices only affect themselves, the public health care system inevitably picks up the costs when the consumer become ill and requires treatment for obesity and diet-related NCDs.\(^\text{138}\) In addition to the financial burden on the public health care system, obesity and diet-related NCDs causes lost productivity and raised taxes to pay for health care.\(^\text{139}\) All of the aforementioned factors should be taken into consideration by decision-makers looking to implement new obesity and diet-related NCD interventions. The brief analysis that has been conducted above forms a strong argument for justifying the use of paternalistic interventions to reduce obesity and diet-related NCDs.

\[E \quad \text{Conclusion}\]

In light of the discussion above, it is appropriate to use soft paternalistic interventions, and in limited circumstances hard paternalistic interventions, to address obesity and diet-related NCDs in New Zealand. There will always be a tension that exists between freedom of choice and the need for the government to intervene. However, in this case, the extent of the problem justifies need for the government to intervene with regulation. Sunstein himself considered “no one should deny that in the end, mandates might turn out to be justified. But in a free society, it makes sense to give careful consideration to less intrusive, choice-preserving alternatives…”.\(^\text{140}\) This chapter will be used as background for the following chapters, which examine the current food regulations and later propose new paternalistic legal interventions to reduce obesity and diet-related NCDs.

\(^\text{138}\) Dimbleby, above n 65, at 49.
\(^\text{139}\) Simoes, above n 60, at 354.
\(^\text{140}\) Sunstein, above n 119, at 198.
IV The Joint Australia and New Zealand Food Regulation System

A Introduction

The preceding chapters have identified the obesity and diet-related NCD problem and explained the role of paternalistic interventions. This chapter will outline the current food regulatory environment in New Zealand, in particular the scope and operation of the joint Australia and New Zealand Food Regulation System (the Joint Food System). This sets the scene for a discussion in later chapters of what changes need to be made to better address obesity and diet-related NCDs.

This chapter considers the relevance of each of the documents that underpin the Joint Food System, including: the Australia New Zealand Closer Economic Relationship Free Trade (CER) Agreement, the Agreement Between the Government of Australia and the Government of New Zealand Concerning the Joint Food Standards System (the Food Treaty), the Food Regulation Agreement (FRA), the Food Standards Australia New Zealand (FSANZ) Act 1991 (Cth), the Australia and New Zealand Food Standards Code (the Food Standards Code), and the Trans-Tasman Mutual Recognition Act 1997 (TTMRA). This chapter considers how public health goals such as reducing obesity and diet-related NCDs are addressed within the Joint Food System. Further, it will discuss some of the challenges and limitations of the Joint Food System.

Food Standards Australia New Zealand Act 1991 (Cth).
Australia New Zealand Food Standards Code.
B  What is the Joint Food System?

In 1983, the Australian and New Zealand Governments signed the CER Free Trade Agreement. This was seen as an important step towards simplifying trade between the two countries. The CER Agreement underpins several subsequent economic arrangements in New Zealand including the Food Treaty and the TTMRA.

Prior to the signing of the Food Treaty, Australia had its own food standards system comprising of the FSANZ Act and FRA. In 1996, when Australia and New Zealand entered into the Food Treaty, both countries agreed to extend the existing Australian system to include New Zealand. The objectives of the Joint Food System, as set out in the Food Treaty, are to reduce unnecessary trade barriers, develop, adopt and review food standards, and facilitate the sharing of information on matters relating to food.

The Food Treaty committed both countries to the development and maintenance of a joint food standards system. New Zealand thus shares the Food Standards Code with Australia. Food Standards Australia New Zealand (FSANZ) is an independent statutory authority established by the FSANZ Act and is responsible for developing, reviewing, and varying standards in the Food Standards Code. Article three of the Food Treaty defines the scope of the joint food standards system and creates an expectation that the Food Standards Code will be used to regulate matters including “the composition of food” and “any information about food including labelling, promotion and advertising” amongst other

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142 CER Agreement, above n 141.
143 Ministry for Primary Industries “Introduction to Australia-New Zealand co-operation” <www.mpi.govt.nz>.
144 Food Standards Australia New Zealand Act 1991 (Cth).
145 Food Treaty, above n 141, annex B.
146 Food Treaty, above n 141, art 2.
147 Food Treaty, above n 141, art 3.
things.\textsuperscript{149} This is reiterated in section 16 of the FSANZ Act.\textsuperscript{150} These are areas of regulation commonly used to target obesity and diet-related NCDs.

To date, the HSR system is the only intervention that has been designed and implemented through the Joint Food System that specifically aims to reduce obesity and diet-related NCDs. The HSR system places a voluntary obligation on the food industry in Australia and New Zealand to label products with a star rating. The number of stars provides an indication to the consumer of the healthiness of the product.\textsuperscript{151} As the HSR system is only a voluntary intervention, it is not a joint food standard that appears in the Food Standards Code. Although the Food Standards Code \textit{could} be used to implement food standards to address obesity and diet-related NCDs, thus far no food standards have been implemented specifically to achieve such a goal.

Until 2011, the Joint Food System was overseen by the Australia and New Zealand Food Regulations Ministerial Council. The Council has subsequently been renamed many times and is now referred to as the Food Ministers’ Meeting.\textsuperscript{152} The Ministers that make up this group are responsible for decision making within the Joint Food System and sign off all food standards. Membership comprises of a Minister from New Zealand and Ministers from each of the Australian States and Territories.\textsuperscript{153} The FRA sets out the specifics of the voting arrangements and the considerations that need to be taken into account when approving or declining draft standards or variations of a standard.\textsuperscript{154}

The Food Ministers’ Meeting is supported by the Food Regulation Standing Committee (FRSC) which is considered a sub-committee responsible for coordinating policy advice

\textsuperscript{149} Food Treaty, above n 141, art 3.
\textsuperscript{150} Food Standards Australia New Zealand Act 1991 (Cth), s 16.
\textsuperscript{151} “Health Star Rating” <www.healthstarrating.gov.au>.
\textsuperscript{154} Food Regulation Agreement, above n 141.
and initiating policy projects. Examples of current activities include “supporting public health objectives to reduce chronic disease related to overweight and obesity.” These policy projects may result in changes to the Food Standards Code, if necessary.

C Food Standards

1 Joint Food Standards

In most cases, food standards will be joint with Australia. As explained above, FSANZ is responsible for developing, reviewing, and varying standards in the Food Standards Code. The principles underpinning the development of food standards are listed in Annex A of the Food Treaty. Notably, this includes “the protection of public health and safety”. Additionally, s 18 of the FSANZ Act lists the mandatory considerations that FSANZ must take into account when developing or reviewing standards and variations including (in descending order) the protection of public health and safety, the provision of adequate information enabling consumers to make informed decisions and the prevention of misleading and deceptive conduct. In addition, FSANZ must also consider the need for standards to be based on risk analysis, the promotion of consistency between domestic and international standards, a competitive food industry, fair trading and any written guidelines formulated by the Council (now known as the Food Ministers’ Meeting).

Once standards have been developed or reviewed by FSANZ, they may be adopted into New Zealand law by the Minister using the power in s 397 of the Food Act 2014. The Minister must take into account the matters listed in s 397(2) of the Food Act before

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157 Food Standards Australia New Zealand Act 1991 (Cth), s 13.
158 Food Treaty, above n 141, annex A.
159 Food Standards Australia New Zealand Act 1991 (Cth), s 18(1).
160 Section 18(2).
161 Food Act 2014, s397.
adopting a joint food standard. Namely the Minister must consider: the need to protect public health, the desirability of avoiding unnecessary barriers to trade, the desirability of maintaining consistency between joint food standards and standards that apply internationally, the need to give effect to international treaty, agreement, convention or protocol, and any other matters that the Minister considers relevant.162

Overall, this shows that public health is not the only consideration that FSANZ and the New Zealand Minister must take into consideration before adopting a joint food standard. By way of example, a joint food standard that avoids unnecessary barriers to trade and maintains a competitive food industry may not necessarily promote public health.

2 Domestic Food Standards

The Food Treaty provides for several “exceptional circumstances” where New Zealand is able to modify a food standard, create a separate standard or opt-out of a standard that would deviate from the general principle of harmonisation. These exceptions can only be relied upon when one or more of the “prescribed grounds” have been met, being: exceptional health, safety, third-country trade, environmental or cultural grounds.163 Section 404 of the Food Act specifically provides for the situation where New Zealand has chosen to opt out of a food standard on one or more of the prescribed grounds and wishes to issue a domestic food standard.164 Before issuing a domestic food standard, the Minister must take into account the matters listed in s 404(2), which are identical to those in s 397(2).165

Only in rare cases has New Zealand made the decision to opt out of a joint food standard. An example of which is when New Zealand chose to opt out of a joint food standard mandating folic acid fortification of all wheat flour used for bread making. New Zealand

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162 Food Act 2014, s 397(2).
163 Food Treaty, above n 141, annex D.
164 Food Act 2014, s 404.
165 Sections 397(2) and 404(2).
instead enacted its own domestic food standard under the Food Act 1981 permitting the voluntary addition of folic acid to bread.\textsuperscript{166} Recently, the New Zealand government made a decision to adopt mandatory folic acid fortification. The effect of this decision is to revoke the domestic food standard (taking effect in 2023) and opt back into the joint food standard with Australia.\textsuperscript{167}

A slightly more complicated example is country-of-origin labelling (CoOL). Initially, CoOL labelling requirements were stipulated in the Food Standards Code. The standard applied to “Australia only” as New Zealand chose to exercise the opt out provision. Subsequently, Australia made an application to FSANZ, which was accepted, to move CoOL requirements from the Food Standards Code into Australian consumer law.\textsuperscript{168}

This was a contentious decision at the time and stakeholders raised concerns that transferring CoOL requirements from the Food Standards Code to Australian consumer law was inconsistent with the requirements in article 5(3) of the Food Treaty.\textsuperscript{169} Furthermore, that the removal of a labelling measure from the Food Standards Code might create a precedent for unilateral action.\textsuperscript{170} Nevertheless, the decision was made to take CoOL out of the Food Standards Code and into Australian consumer law.\textsuperscript{171} In 2021, New Zealand followed suit and implemented its own CoOL requirements in domestic consumer law.\textsuperscript{172} A fulsome analysis on the precedent set by these actions will be conducted in chapter five.

\textsuperscript{166} Food Standard: New Zealand Permitted Fortification of Bread with Folic Acid, 2021.
\textsuperscript{167} Food Act 1981.
\textsuperscript{168} Ministry for Primary Industries “Fortification of flour with the B vitamin folic acid” <www.mpi.govt.nz>.
\textsuperscript{169} Food Standards Australia New Zealand “Country of origin labelling” <www.foodstandards.gov.au>.
\textsuperscript{170} Food Treaty, above n 141, art 5(3).
\textsuperscript{172} Country of Origin Food Labelling Information Standard 2016 (Cth).
\textsuperscript{172} Consumer Information Standards (Origin of Food) Regulations 2021.
D The Role of the Trans-Tasman Mutual Recognition Act 1997

As mentioned above, there are many instruments that underpin the Joint Food System including the TTMRA. The TTMRA complements the objective of the Food Treaty that is to remove barriers to the trade of food between Australia and New Zealand. The TTMRA applies to “goods of any kind”, not just food.\textsuperscript{173} The general principle of the TTMRA is that goods produced in New Zealand and imported into Australia can lawfully be sold in Australia without needing to comply with domestic Australian requirements. This applies vice versa allowing Australian products to be sold in New Zealand without complying with domestic New Zealand requirements.\textsuperscript{174} Whilst there are exceptions and exemptions, none of these currently apply to food products.\textsuperscript{175} This may be because Australia and New Zealand have chosen to prioritise the free trade of food. The role of the TTMRA and the importance of free trade with Australia will need to be taken into consideration by regulators looking to implement new interventions to address obesity and diet-related NCDs.

E Challenges and Limitations of the Joint Food System

Although New Zealand receives many benefits being party to the Joint Food System, such as reduced trade barriers and lower compliance costs, there are also numerous disadvantages. Both Australia and New Zealand are struggling to reduce obesity and diet-related NCDs amongst the population.\textsuperscript{176} Given that both countries share the same problem, implementing joint food standards would seem like a logical way to address the problem. However, there are several challenges and limitations of regulating in a Joint Food System. This section will address these in turn.

\textsuperscript{173} Trans-Tasman Mutual Recognition Act 1997, s 2.
\textsuperscript{174} Section 10.
\textsuperscript{175} Section 11 and schedules 1, 2, 3, 4.
\textsuperscript{176} OECD, above n 4.

Australia has the fifth highest proportion of obese adults in the OECD.
(a) Public health as a consideration within the Joint Food System

As mentioned above, the protection of public health is one of the many factors taken into consideration when adopting or amending food standards. However, as food is a commercial commodity and standards have the ability to influence both supply and demand of food products, the need to protect public health is often left competing against the need to facilitate a competitive food industry. These tensions make it difficult to agree on food standards to address obesity and diet-related NCDs.

Both Australian and New Zealand Ministers are likely to be under pressure from the food industry to support economic growth. Putting in place food standards that potentially reduce sales of food, despite being unhealthy food, are likely to be strongly opposed by industry and may affect political popularity.

(b) The process for change is slow

Decisions in the Joint Food System require the involvement and agreement of both Australian and New Zealand parties. The decision-making process is consequently slow and time consuming. By way of example, s 21 of the FSANZ Act prescribes a ten-step process to be followed when developing a new food standard. The final step requires the standard to be considered by the Food Ministers’ Meeting thus requiring agreement by the majority of Ministers in Australia and New Zealand.

177 A policy statement has been released regarding the interpretation of the term “public health” in the FSANZ Act. This states that “public health and safety in relation to food refers to all those aspects of food consumption that could adversely affect the general population or a particular community’s health either in the short term or long term, including preventable diet-related disease, illness and disability as well as acute food safety concerns”.
See Legislative and Governance Forum on Food Regulation Policy Statement—The Interpretation of Public Health and Safety in Developing, Reviewing and Varying Food Regulatory Measures (2013).
179 Food Standards Australia New Zealand Act 1991 (Cth), s 21.
Policy development also occurs within the Joint Food System.\textsuperscript{180} To date, the only intervention that has been implemented through the Joint Food System and seeks to reduce obesity and diet-related NCDs is the HSR system. This was implemented nearly a decade ago in 2014.\textsuperscript{181} This intervention will be discussed in further detail in the next chapter however, for now it is necessary to note there is a lack of any recent action in the Joint Food System to reduce obesity and diet-related NCDs. Overall, the slow rate at which the Joint Food System moves is not conducive to addressing the alarming prevalence of obesity in New Zealand.

(c) New Zealand can only issue domestic food standards in limited circumstances

Another challenge of operating within the Joint Food System is that New Zealand can only opt out of joint food standards and issue domestic food standards in very limited circumstances. The Food Treaty and the Food Act provide the criteria for when New Zealand can issue domestic food standards.\textsuperscript{182} If interventions to reduce obesity and diet-related NCDs do not meet this criteria, New Zealand is not able to issue a domestic food standard. As mentioned above, a standard needs to be under development or in place as a joint food standard, meet one or more of the “prescribed grounds”, and the Minister needs to be satisfied of the criteria in s 404(2).\textsuperscript{183} This is particularly onerous and may limit New Zealand’s ability to implement domestic food standards to address obesity and diet-related NCDs.

\textsuperscript{181} “Health Star Rating”, above n 151.  
\textsuperscript{182} Food Treaty, above n 141, annex D. Food Act 2014, s 404.  
\textsuperscript{183} Food Treaty, above n 141, annex D. Food Act 2014, s 404.
In light of the challenges and limitations of the Joint Food System mentioned above, consideration should be given to whether it is necessary to remove “the protection of public health” from Joint Food System. Allowing public health to be addressed domestically, as opposed to within the Joint Food System, could make it both easier and quicker to implement interventions addressing obesity and diet-related NCDs. Given the extent of the problem in New Zealand, putting in place interventions should be seen as a matter of urgency. This decision could have political backlash as it is a step away from having harmonised food standards with Australia. Further, industry could lose some of the financial benefits of having the same food standards as Australia. Despite these repercussions, it may be more effective and efficient to address the high prevalence of obesity and diet-related NCDs domestically.

With an appreciation of the Joint Food System, the next chapters focus on four specific areas of regulation, namely labelling, advertising, food reformulation and taxes. These chapters will include a more detailed discussion on the relevant standards in the Food Standards Code. Regulators will need to consider the role of the Joint Food System when looking to implement new legal interventions. In particular, the Food Treaty creates an expectation that new interventions on labelling, advertising, and composition will be implemented as joint food standards. This will be addressed in the following chapters.
V Food Labelling – Current Obligations

A Introduction

One of the main aims of consumer law is to address the information asymmetry that exists between a person selling a product and a person purchasing a product. In the context of food labelling, the law imposes a variety of disclosure requirements on producers of food. A typical food label will display information such as a statement of ingredients, an expiration date and allergen information. These product disclosures are intended to allow the less informed party (the consumer) to make better choices.184

In some countries, such as New Zealand, regulators have developed front-of-pack nutrition labelling schemes in an effort to help consumers identify healthy foods. These labels remove the burden of interpreting nutritional information panels and present consumers with information in a visual and easy-to-understand way. These labels are presumed to allow consumers to make a quick yet informed food choices.185

This chapter will look at whether the current labelling regulations and policies in New Zealand are an effective means of helping consumers make healthier food choices to reduce obesity and diet-related NCDs. It will particularly focus on the Food Act 2014, Food Standards Code, Fair Trading Act 1986 (FTA) and the HSR system.186

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185 At 1319.
186 Australia New Zealand Food Standards Code.
Food Act 2014.
“Health Star Rating”, above n 151.
B Food Act 2014

The fundamental objective of the Food Act 2014 is the promotion of food safety.187 Specifically, the purpose of the Food Act is to: 188

(a) restate and reform the law relating to how persons trade in food; and
(b) achieve the safety and suitability of food for sale; and
(c) maintain confidence in New Zealand’s food safety regime; and
(d) provide for risk-based measures that—
   (i) minimise and manage risks to public health; and
   (ii) protect and promote public health; and
(e) provide certainty for food businesses in relation to how the requirements of this Act will affect their activities; and
(f) require persons who trade in food to take responsibility for the safety and suitability of that food.

“Safety and suitability” are defined in s 12 of the Act. Notably, s 12(6) states that “consumption in inappropriate quantities that may damage a person’s health does not make a food unsafe or unsuitable”.189 This suggests that the term “safety and suitability”, used throughout the Act, is not intended to capture the regulation of products that may when overconsumed result in obesity or diet-related NCDs.

Although s 4 states that one of the purposes of the Food Act is “[to] provide for risk-based measures that minimise and manage risks to public health”, this is intended to capture the regulation of food businesses through food control plans, national programmes and monitoring programmes.190 These plans and programmes are used to ensure a food business

188 Food Act 2014, s 4.
189 Section 12.
190 Sections 4 and 8.
produces safe and suitable food. As mentioned above, this is unlikely to capture the overconsumption of food resulting in obesity or diet-related NCDs.

Section 383 of the Food Act empowers the Minister to “make regulations setting standards in relation to food that specify the criteria that all or any of the following must meet to ensure food is safe and suitable”. On the face of it, s 383 may appear to empower the Minister to create regulations on food labelling to address obesity and diet-related NCDs. However, this section is only intended to be used to ensure that food is safe and suitable. Based on the discussion of “safety and suitability” above, it would not be appropriate for the Minister to use this provision to enact regulations for the purpose of addressing obesity and diet-related NCDs. Section 383 would be more suited for use to regulate matters such as the safety and suitability of export food products.

It is not surprising that the Food Act does not set out any food labelling requirements to address obesity and diet-related NCDs. As mentioned in chapter four, labelling falls within scope of the Food Treaty, creating an expectation that it will be regulated in the Food Standards Code. The Food Standards Code as it relates to labelling will be discussed below. Overall, the Food Act has a clear focus on keeping consumers safe from food-borne illnesses. The Food Act was not drafted with the intention of being used as a means to address obesity and diet-related NCDs. This is not to say it is an unimportant piece of legislation, but rather it is used to ensure food businesses are producing safe and suitable food.

C The Food Standards Code as it Relates to Labelling

The Food Standards Code regulates certain product disclosures that must be made on a food label such as a date mark, ingredients list, allergens, storage, preparation and health

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191 Section 20.
192 Section 383.
193 Food Treaty, above n 141, article 3(2)(g).
194 Industries, above n 184.
claims amongst other things. This section will outline the food standards that are most relevant to obesity and diet-related NCDs and will go on to assess the effectiveness of these standards.

(a) Information requirements – statement of ingredients

Standard 1.2.4 requires that a statement of ingredients is provided on the label of food products. The requirement for a statement of ingredients does not apply to water that is packaged and labelled, standardised alcoholic beverages and food for sale that is contained in a small package. Generally, all ingredients must be listed however, there are exceptions for ingredients such as flavouring substances and volatile ingredients which are removed during processing. Ingredients should be specified according to their common, descriptive or generic name. Further, the ingredients should be listed in descending order according to their weight.

(b) Nutrition content and health claims

The Food Standards Code regulates the use of nutrition content and health claims on food product labels. Unlike ingredients lists and nutritional information panels, nutrition content and health claims are voluntary for all food companies. Nutrition content claims differ from health claims. Nutritional content claims refer to the nutritional content of food. For example, “low in cholesterol”, “low fat” and “no added sodium”. On the other hand, health claims make a statement about the relationship between the food or a property of the food and a health effect. For example, calcium is “necessary for normal

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195 Australia New Zealand Food Standards Code.
196 Australia New Zealand Food Standards Code, standard 1.2.4.
197 Standard 1.2.4.
198 Food Standards Australia New Zealand “Nutrition content claims and health claims” <www.foodstandards.govt.nz>.
199 Australia New Zealand Food Standards Code, standard 1.2.7.
200 Schedule 4.
201 Standard 1.2.7.
teeth and bone structure”. In addition, standard 1.2.7 prohibits therapeutic claims such as those that refer to the prevention, diagnosis, or alleviation of a disease or condition.

(c) Nutrition information panels

The Food Standards Code requires that most food products display a nutritional information panel. These panels include information relating to the number of servings per package, along with the energy, fat, sugar and sodium content of the product.

1 How Effective are the Current Food Standards as to Labelling at Addressing Obesity and Diet-Related NCDs?

There are no food standards with the express goal of providing information to nudge consumers towards healthier choices to reduce obesity and diet-related NCDs. However, indirectly, the ingredients list, nutritional information panel and health claims can be seen as tools for consumers to make their own assessment of the healthiness of their food choice or to compare products. This section will specifically look at how effective the current food standards are at achieving this.

(a) Consumers understanding of nutritional information panels and ingredients lists

Nutritional information panels and ingredient lists can be used by consumers to compare products and assess whether the product is a healthy or unhealthy food choice. However, this relies on the consumer being able to understand and interpret the nutritional information. Unfortunately, disclosures on the back of food products have been shown to

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202 Schedule 4.
203 Standard 1.2.7.
204 Standard 1.2.8.
be insufficient to prompt healthier food choices. In fact, research suggests that nutritional information panels remain poorly understood by New Zealanders.

The poor understanding is likely due to many consumers lacking the education and nutritional knowledge required to interpret the disclosures. This issue is particularly concerning for low socio-economic consumers who already have a high prevalence of obesity and diet-related NCDs. Other consumers may have the necessary knowledge to interpret nutritional information panels, but lack the time, motivation and patience to do so. The consumers who tend to take the time to read nutrition labels, already have prior information and tend to actively care about their diets.

With regards to ingredient listing, there are also certain ingredients that will not appear on food labels. For example, palm oil does not need to be specified in the ingredients list and can instead be labelled as a “vegetable oil”, making it indistinguishable from other plant oils. This makes it difficult for consumers to identify its presence. From a nutritional perspective, it is undesirable for consumers to have a high palm oil intake as this type of oil is high in saturated fat. Based on the discussion above, the disclosure of nutritional information panels and ingredients lists are unlikely to prompt most consumers to make healthier food choices.

(b) Nutrition content and health claims

Standard 1.2.7 was developed to “reduce misleading health claims on food products, increase consumer confidence in food labels, and give businesses a chance to innovate and promote new products with proven health benefits”. Standard 1.2.7 is therefore primarily

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205 Becher and others, above n 181, at 1313.
206 Haya H Al-Ani and others “Nutrition and health claims on healthy and less-healthy packaged food products in New Zealand” (2016) 116 Br J Nutr Camb 1087 at 1088.
207 Becher and others, above n 181, at 1314.
208 At 1318.
concerned with the truthfulness of the claim made on the product as opposed to nudging consumers towards healthy food choices. However, this is not to say consumers do not use these statements to inform their food choices. Nutrition content and health claims are often used as a marketing tool to entice consumers to buy a product. The claims focus on the positive features of the product as opposed to providing health warnings. For example, a consumer will see products labelled with “low sodium”, but will never see a product labelled with “warning high sodium”.

Research has been conducted on the influence that nutrition content and health claims have on consumers. Nutrition claims relating to fat, sugar and energy content were found to make a product perceivably healthier and less tasty for consumers. Further, appropriate portion sizes were considered larger as consumers exhibited a tendency to underestimate energy content. Other research found nutrition content and health claims tend to have a halo effect on consumers. For example, a product that makes a claim it contains “no cholesterol” leads consumers to infer that the product might also be low in fat or reduce their risk of heart disease. Consumers thus infer the product is healthier than it actually is.

Research has been conducted on the types of food that nutrition content and health claims tend to appear on. Although voluntary, health claims are only permitted on foods that meet the nutrient profiling scoring criterion and are not permitted on products that are high in saturated fat, sugar or salt. Nutrition content claims are however, not subject to these same restrictions. This is particularly concerning when nutrition content claims are used to promote unhealthy snack foods that are highly processed, energy-dense or marketed specifically towards children. ConsumerNZ research conducted in 2020 found nutrition

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211 Laura H Oostenbach and others “Systematic review of the impact of nutrition claims related to fat, sugar and energy content on food choices and energy intake” (2019) 19 BMC Public Health at 7.
213 Food Standards Australia New Zealand, above n 194.
214 Alexandra Mayhew and others “Nutrition labelling, marketing techniques, nutrition claims and health claims on chip and biscuit packages from sixteen countries” (2016) 19 Public Health Nutr 998 at 999.
content claims made on product labels have a tendency to distract consumers from “bad nutrients” the product contains. For example, Edmonds Vanilla Cake displays a nutrient content claim that it is 97 per cent fat-free. What the label does not promote is the 54.6 per cent sugar content. While the front-of-pack claim is not false, it does not speak to the overall healthiness of the product.\(^\text{215}\) Overall, standard 1.2.7 is primarily concerned with ensuring the truthfulness of product labelling. Although nutrient content and health claims may appear to point out healthier choices to consumers, there is some risk in relying on these labelling claims alone to make healthy food choices.

(c) Conclusion

Although there are no food standards with the express goal of nudging consumers towards healthier choices, indirectly, the ingredients list, nutritional information panel, and health claims can be used as tools for consumers to make their own assessment of the healthiness of their food choice or to compare products. Unfortunately, some consumers do not have the nutritional knowledge to make this assessment themselves or may incorrectly infer that a product is healthier than it actually is.

\[D\] Fair Trading Act 1986 as it Relates to Food Labelling

This section gives a brief overview of the FTA and consumer information standards.\(^\text{216}\) The discussion goes on to assess how effective the legislation is at addressing obesity and diet-related NCDs. The FTA is a general piece of consumer protection legislation and places a requirement on traders to ensure their product does not mislead or deceive consumers.

The purpose of the FTA is to contribute to a trading environment whereby:\(^\text{217}\)

\[^{216}\]Fair Trading Act 1986.
\[^{217}\]Section 1A.
(a) the interests of consumers are protected; and
(b) businesses compete effectively; and
(c) consumers and businesses participate confidently.

To this end, the Act,

(d) Prohibits certain unfair conduct and practices in relation to trade; and
(e) Promotes fair conduct and practices in relation to trade; and
(f) Provides for the disclosure of consumer information relating to the supply of goods and services; and
(g) Promotes safety in respect of goods and services.

The FTA recognises the unequal bargaining power that exists between consumers and businesses when in trade. This is because businesses will have greater knowledge about the product they are selling. If the company abides by the provisions of the FTA, the consumer should have enough information to make an informed purchasing decision.218

There are several specific provisions in the FTA that are worth highlighting as a food producer must label their products in a way that does not breach any of these provisions. Section 9 of the FTA places a general obligation on those in trade not to engage in conduct that is either misleading or deceptive or likely to mislead or deceive.219 Section 10 focuses on misleading conduct in relation to goods. Specifically, “conduct that is liable to mislead the public as to the nature, manufacturing process, characteristics, suitability for a purpose or quantity of goods”.220 Section 12A provides that a person in trade must not make an unsubstantiated representation. This means that the person in trade must have reasonable grounds for the representation they are making irrespective of whether it is false or misleading.221 Finally, s 13 seeks to prevent specific instances of false or misleading representations by persons in trade. This relates to aspects of the product such as kind,
standard, quality, grade, quantity, composition, style or model. Food companies must abide by all of these provisions when labelling their products.

There are various remedies available for breaches of the FTA. Remedies for breaches of s 9 of the FTA are civil in nature only. Meanwhile, remedies for breaches of ss 10, 12A and 13 can be civil or criminal. Allegations of breaches of the FTA are investigated by the Commerce Commission. There are several judgements specifically relating to breaches of the FTA for misleading food labelling. For example, in Commerce Commission v Farmlands Food Limited, the defendant made representations on the label of ham that the product was made from New Zealand reared pork. Two consumers made complaints to the Commerce Commission after discovering the pork was reared in Ireland and only the curing and packing took place in New Zealand. The District Court held that the conduct of Farmlands Food Limited was liable to mislead the public as to the nature or characteristics of goods and a breach of s 10 of the FTA was upheld. Although this is not an example of the FTA being used to address a labelling issue that relates to obesity, theoretically the FTA could be used to seek relief if a situation were to arise. For example, if a food product was labelled with a claim that it was a healthy choice and contained no sugar when in fact it contained high amounts of sugar.

The Food Act 2014 and the Food Standards Code compliment the general provisions of the FTA that restrict misleading and deceptive labelling. For example, ss 227 and 228 of the Food Act state that it is an offence to misrepresent food contrary to the applicable requirements of the Food Act. Further, food standards such as those relating to nutrition

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222 Section 13.
223 Sections 41, 42 and 43.
224 Sections 40, 41, 42 and 43.
227 At [12].
228 At [1].
229 Food Act 2014, ss 227 and 228.

The Food Act 2014 defines misrepresentation as follows “misrepresentation, in relation to food or a food-related accessory, includes both a graphic and verbal misrepresentation in all forms as to the source, consignment, characteristics, description, labelling, safety and suitability, intended use, composition,
content and health claims seek to reduce misleading labelling. In this sense, the different regulatory requirements complement each other. Within the FTA there are provisions that empower the Minister to make secondary legislation. The next section will discuss the scope of the Minister’s power to make consumer information standards.

(a) Consumer information standards

Section 27 of the FTA empowers the Minister to make regulations prescribing consumer information standards. A consumer information standard may require the disclosure of product information such as the kind, grade, quantity, origin, performance, care and composition of the product amongst other things. An example of the Minister using this regulation making power is the enactment of the Consumer Information Standards (Origin of Food) Regulations 2021. As mentioned in chapter four, CoOL requirements have been implemented in Australian and New Zealand domestic legislation, despite the Food Treaty. The question remains how far the precedent CoOL set extends and whether it is possible to regulate other matters using s 27 of the FTA.

Some may argue that the removal of CoOL from the Food Standards Code and into domestic law created a precedent that it is acceptable for Australia and New Zealand to each take unilateral action and move away from harmonised food labelling standards. On the other hand, article 5(3) of the Food Treaty stipulates that “subject to Annexes D and E of this Agreement, neither Member State shall by legislation or by other means establish or amend a food standard falling within the scope of this Agreement other than in accordance with this Agreement”. Although the removal of CoOL from the Food Standards Code into domestic law conflicts with this Treaty provision, arguably it made no difference to New Zealand’s obligations under the Food Treaty. This means there is still

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230 Australia New Zealand Food Standards Code, standard 1.2.7.
231 Fair Trading Act 1986, s 27.
233 Food Treaty, above n 141, art 5(3).
an expectation New Zealand will harmonise food labelling laws with Australia in the Food Standards Code in the future. 234

Although having the ability to implement domestic food labelling laws outside of the Food Standards Code would give New Zealand more autonomy, there are benefits to the Joint Food System, such as reduced barriers to trade and lower compliance costs. Repeated actions to unilaterally regulate matters that fall within scope of the Food Treaty would undermine the objectives of the Joint Food System and in fact the Food Treaty itself. This would put at risk the integrity of the food standards system and could be damaging to New Zealand’s international reputation. On this basis, it would be inappropriate for New Zealand to use s 27 to make another consumer information standard on food labelling.

1 How Effective is the Fair Trading Act 1986 at Addressing Obesity and Diet-Related NCDs?

As mentioned above, the FTA places an obligation on traders to ensure their product does not mislead or deceive consumers. Academics consider that interventions, such as the FTA, that seek to correct consumers’ lack of information or an imperfect source of information, are justified on non-paternalistic grounds. This is because there is not enough information for the consumer to make a proper judgment of their own interests if information is misleading or deceptive. 235 With regards to food labelling, the FTA ensures the truthfulness of the label so that consumers can make a judgment of their own interests. It is not intended as a substitute for the consumer making their own purchasing decision nor is it intended to nudge consumers towards making healthier food choices.

One of the limitations of the FTA is that although it provides general protection against misleading and deceptive conduct, it does not protect against food companies exploiting the findings of behavioural economics. Front-of-pack nutrition labelling is typically

234 Food Treaty, above n 141, art 2(c).
designed using behavioural economics so the product is as appealing as possible to the consumer. When consumers are left to make food choices in this type of environment, existing biases inevitably lead to unhealthy food choices.\footnote{Christina Roberto and Ichiro Kawachi “Use of Psychology and Behavioral Economics to Promote Healthy Eating” (2014) 47 Am J Prev Med 832 at 832.}

Another limitation of the FTA is that it relies on the Commerce Commission to actively identify and investigate an alleged breach. Alternatively, consumers or businesses in competition with each other can take it upon themselves to complain.\footnote{Commerce Commission New Zealand, above n 220.} As the Commerce Commission receives thousands of complaints each year, only issues that are widespread tend to be looked into.\footnote{Commerce Commission New Zealand “Complaint process” (3 April 2018) <https://comcom.govt.nz>}. A complaint about the labelling of a food product may not be deemed widespread enough to justify the Commerce Commission launching an investigation. This is also not to say consumers can always be bothered making a complaint as this can be a time-consuming and lengthy process. Consumers may not be motivated to make a complaint if they have only suffered a small amount of harm or they may not know they have been misled in the first place. Overall, the FTA is a useful piece of legislation for ensuring that food producers do not engage in misleading or deceptive conduct. It was however, not drafted with the intent of being used to address obesity and diet-related NCDs.

\textit{E Health Star Rating System}

This section gives a brief overview of front-of-pack nutrition labelling and the HSR system. It later goes on to assess how effective the HSR system is as a means of encouraging consumers to make healthier food choices to address obesity and diet-related NCDs.

Generally, front-of-pack nutrition labelling provides consumers with a simplified and visualised interpretation of nutritional information. This type of labelling is designed to help consumers quickly and easily determine the healthiness of a food product. Further, it
relieves consumers of the need to read and interpret the back-of-pack nutritional information.\textsuperscript{239}

In Australia and New Zealand, the governments implemented a front-of-pack nutrition label called the HSR system. The HSR system was developed in collaboration with government, industry, public health and consumer stakeholders.\textsuperscript{240} A key driver of the development of the HSR system was a report published in 2011 entitled \textit{Labelling Logic}. The report recommended that “an interpretive front-of-pack labelling scheme be developed that is reflective of a comprehensive Nutrition Policy and agreed public health priorities”.\textsuperscript{241} Subsequently, in 2014 the HSR system was introduced for food companies to adopt voluntarily.\textsuperscript{242} The key objective is “to provide convenient, relevant and readily understood nutrition information and/or guidance on food packs to assist consumers to make informed food purchases and healthier eating choices”.\textsuperscript{243} Additionally, the governments wanted the HSR to be easily understood by consumers across a range of socio-economic and cultural backgrounds with a particular focus on making this information clear to those with little numeracy or literacy skills.\textsuperscript{244}

The HSR system works by rating the overall nutritional profile of packaged foods and assigning a number of stars to the product - the higher the number of stars, the healthier the choice. This provides a means for consumers to compare the healthiness of products in the same food category. The algorithm behind the HSR system assesses the positive nutrients and risk nutrients in food to determine the star rating the product should be given.\textsuperscript{245} More specifically, the HSR system takes into account seven components: energy, sodium, saturated fat, total sugars, protein, fibre and fruit/vegetables/nuts/legumes ingredients.

\textsuperscript{240} Health, above n 55.
\textsuperscript{241} Blewett and others, above n 23, at 13.
\textsuperscript{242} mpcconsulting \textit{Health Star Rating System Five Year Review Report} (2019) at 11.
\textsuperscript{243} At 4.
\textsuperscript{244} “Australia’s Health Star Rating System” Obesity Evidence Hub <www.obesityevidencelhub.org.au>; Blewett and others, above n 23, at 120.
\textsuperscript{245} Health, above n 55.
These specific components are the basis of the dietary guidelines in Australia and New Zealand.\textsuperscript{246}

![Image of Health Star Rating System](image)

Figure 1: Food producers have several different options of displaying the HSR on the label. This image shows examples how the HSR might be displayed.

The HRS system is a form of soft paternalism. It is designed to encourage consumers away from poorer nutritional quality products whilst not taking food options away.\textsuperscript{247} Consumers are nudged towards products that display more stars, meanwhile the products that contain few or no stars are still available for purchase.

As discussed in chapter three, the findings of behavioural economics suggest that consumers tend to make food choices using their automatic system. This means consumers are likely to look at food packaging intuitively as opposed to picking up the packet and carefully reading all of the information provided. The HSR system leverages the findings of behavioural economics as it is designed in a way that allows consumers to continue using their automatic system to make food choices. By looking at the number of stars awarded to the product, consumers can get a quick indication of the healthiness of the product before making their final purchasing decision.\textsuperscript{248}

1 \textit{How Effective is the Health Star Rating System at Addressing Obesity and Diet-Related NCDs?}

\textsuperscript{246} mpconsulting, above n 237, at 4.
\textsuperscript{247} Scrinis and Parker, above n 99, at 241.
\textsuperscript{248} Lai and Becher, above n 234, at 8–12.
A five-year review of the HSR system was completed in 2019. The review considered how well the objectives of the HSR had been met as well as options for enhancing the HSR system.249 Australian and New Zealand Ministers who attended the Food Ministers’ Meeting concluded that the findings of the five-year review show “there is substantial evidence demonstrating that the System is working well”.250 Despite the Ministers drawing this conclusion, there are still several concerns from academics regarding how effective the HSR system is at reducing obesity and diet-related NCDs. These criticisms will be discussed below.

(b) The uptake of the HSR system remains low

The HSR system is currently voluntary in Australia and New Zealand, meaning that food companies can adopt the labelling system at their discretion. When the HSR system was first implemented no uptake targets were set making it hard to gauge whether the system was successful.251 The most recent data on the uptake of the HSR system shows that in 2017-2018, the HSR appeared on approximately 31 per cent of eligible products in Australia and 21 per cent of eligible products in New Zealand.252 This indicates that New Zealand has a relatively low uptake amongst eligible products. Product categories that had the highest uptake included packaged fruit and vegetables (15 per cent), cereals and cereal products (13 per cent), and non-alcoholic beverages (13 per cent).253 It is unsurprising that packaged fruit and vegetables had the highest uptake as these products are likely to receive a high number of stars simply based on the design of the HSR algorithm.

Additionally, the findings of the research revealed 77 per cent of the products that displayed a HSR label in 2018 had a 3.0 to 5.0 star rating.254 It is probable that producers of unhealthy

250 At 7.
251 mpconsulting, above n 237, at 80.
252 At 21.
253 At 24.
254 At 24.
food products intentionally decide not to adopt the HSR system because their products will receive a low rating which may discourage consumers from purchasing the product. Consumers do not necessarily perceive this missing information as a signal that the product is unhealthy, in fact most consumers are unresponsive to missing information.255

There are several other factors that may discourage food companies from using the HSR system. Smaller food businesses may choose not to use the labelling system to avoid costs. However, choosing not to use the HSR label may put their products at a disadvantage to competitors with the HSR label as they could appear as “less healthy”.256 HSR labels do not appear on foods that are not required to have a nutritional information panel or are not packaged. For example, HSR labels will not appear on unpackaged fresh fruit and vegetables.257 This could be a feature that is to the detriment of the promotion of healthy foods.

Following the five-year review of the HSR system in 2019, the Food Ministers’ Meeting decided that the system would remain voluntary.258 Several uptake targets were set as follows:259

- interim target 1 (at 3 years) – 50 per cent of intended products have applied the HSR
- interim target 2 (at 4 years) – 60 per cent of intended products have applied the HSR
- final target (at five years) – 70 per cent of intended products have applied the HSR

If the uptake targets have not been achieved by 14 November 2025, the Food Ministers’ Meeting has agreed to consider mandating the HSR system.260 The decision to wait until

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255 Lai and Becher, above n 234, at 18.
256 Becher and others, above n 181, at 1330.
258 Australia and New Zealand Ministerial Forum, above n 244, at 16.
260 Australia and New Zealand Ministerial Forum, above n 244, at 16.
2025 comes at the cost of the potential benefits of mandating the system. In the meantime, it is likely that obesity trends will continue to remain stable.

(c) The HSR system does not take into consideration recommended portion sizes or guide consumers towards an overall healthy diet.

The HSR system aims to provide consumers with information on the overall healthiness of food products. It is not an intended aim of the HSR system to guide the consumer on recommended portion sizes. While consumers may think a product with a high HSR is a healthy choice, if the product is consumed at more than the recommended portion size, consumers may still be eating an unhealthy diet.

Further, the HSR system does not guide the consumer on how to eat an overall healthy diet. For example, a consumer could look at a can of beans with a 4.5 star health rating and think the beans were appropriate to eat at every meal because of the high HSR, when in fact this would not be a balanced diet in view of the New Zealand Eating and Activity Guidelines.

(d) Consumer understanding of the HSR system and influence on consumers purchasing decisions

The success of the HSR system is largely determined by how well consumers understand the system and use it to make healthy food choices. The five-year review of the HSR system found that 28 per cent of surveyed consumers in New Zealand reported using the HSR to guide their food choice, with 88 per cent of consumers choosing the product with more stars. Further, three in five consumers who used the HSR said it encouraged them to buy a product they would not normally purchase. While these results may be encouraging, more research is needed to fully understand the influence of the HSR system on consumers.

261 mpconsulting, above n 237, at 10.
263 mpconsulting, above n 237, at 22.
264 At 28.
food choices.

As mentioned above, when the HSR system was designed it was done so with a focus on reaching those consumers who tend to ignore nutritional information or have trouble interpreting it. This group of consumers typically includes those who are of low socio-economic status, have a low level of education, low level of nutritional knowledge, members of ethnic groups and elderly. Notably, low socio-economic and ethnic consumers are statistically more likely to develop obesity or a diet-related NCD.265 Unfortunately, there is limited research on the effect of the HSR on the food choices of this group of consumers. In 2013 Colmar Brunton looked at whether front-of-pack labels have a positive effect on consumers ability to identify healthy food products. In particular, the research compared the Australian HSR system, star ratings only and star ratings with a daily intake guide. Participants for the survey were recruited from three groups: the general population, a Māori group and a Pacific group. The research found all three of the front-of-pack labelling systems had a positive effect on Māori and Pacific consumers ability to select healthy food products.266 As mentioned in chapter two, Māori and Pacific groups exhibit a higher prevalence of obesity. Consequently, it is important to consider how obesity interventions specifically help these groups of consumers.267

One of the barriers to consumers understanding of the HSR system is a lack of awareness that the system is only intended for comparison of the healthiness of products within the same food category.268 For example, the HSR of fizzy drinks cannot be used as a means to compare the healthiness of breakfast cereal. Another confusing aspect of food labelling is the sheer amount of information provided. A packet may well display an ingredients list, nutritional information panel, HSR and a health claim. This is in addition to advertising

265 Blewett and others, above n 23, at 120.
266 Colmar Brunton The ability of New Zealand consumers to use the Health Star Rating System (2013) at 3–5.
267 Ministry of Health, above n 1.
268 Becher and others, above n 181, at 1326.
and marketing on the packet. Providing consumers with too much information makes them more likely to ignore it all.

(e) Food quality and level of processing

The HSR system is a nutrient focussed labelling system. Consequently, consumers may forget to turn their mind to the type of ingredients, quality and level of processing that has gone into their food. Research has been conducted looking specifically at the level of processing that has gone into food products currently available on the market. The *State of the Food Supply Report 2019* found that products sold at Woolworths New Zealand and Foodstuffs both had a mean HSR of 3.0 stars. Simultaneously, approximately 60 per cent of products met the definition of being ultra-processed. These products are high in refined substances such as sugar, fat, salt and additives. The HSR does not point out that a product is ultra-processed and a 3.0 rating may not be enough to dissuade consumers from purchasing the product or alert them to the risks.

On the face of it, it may seem like a failure of the HSR system to distract consumers from thinking about the type of ingredients, quality and level of processing. However, if this information were added, it may defeat the purpose of the HSR system entirely, which is to be a quick guide on healthiness of the product. Most consumers are likely to ignore information that takes more than minimal cognitive processing as food choices are typically made using automatic or fast decision making processes.

(f) The design of the HSR calculator

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269 At 1355.
270 At 1319.
271 Scrinis and Parker, above n 99, at 242.
One of the features of the HSR system that may undermine consumer trust is that the system is compensatory. This means that bad nutrients, such as sugar can be balanced out by the addition of positive nutrients, such as fibre.\textsuperscript{274} An example of a product that has received a questionably high HSR is Mammoth chocolate milk. This product contains high protein and receives 5 health stars even though it also contains 43.9g of sugar per serving.\textsuperscript{275} Examples like this may lead consumers to question the accuracy of the algorithm and subsequently could lead to distrust in the system. Consumers might also be mistakenly be purchasing products such as Mammoth believing they are healthy meanwhile they are unknowingly consuming an unhealthy diet.

\textbf{(g) HSR and reformulation}

The HSR system may encourage food companies to reformulate their products on the premise that their product will receive a higher star rating. A higher HSR may improve the marketability of the product. In the \textit{Health Star Rating Five Year Review Report}, an analysis of 929 products displaying the HSR in New Zealand found that 79 per cent have been reformulated since 2014 to change at least one key nutrient (energy, saturated fat, sugar, protein or fibre) by a minimum of five per cent.\textsuperscript{276} Another study compared the nutritional composition of 431 products that displayed the HSR in 2016 and were also available in 2014 prior to the implementation of the HSR system. Similar results were reported as the findings revealed 83 per cent of these products had reformulated to reduce at least one key nutrient by a minimum of five per cent. The greatest compositional changes were seen in cereal products and sauces or spreads.\textsuperscript{277}

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{274}] Becher and others, above n 181, at 1325.
\item[\textsuperscript{275}] Stuff Limited “The top 10 bad foods that claim to be healthy but aren’t, according to Consumer NZ | Stuff.co.nz” Stuff <www.stuff.co.nz>.
\item[\textsuperscript{276}] mpconsulting, above n 237, at 29.
\item[\textsuperscript{277}] Cliona Ni Mhurchu, Helen Eyles and Yeun-Hyang Choi “Effects of a Voluntary Front-of-Pack Nutrition Labelling System on Packaged Food Reformulation: The Health Star Rating System in New Zealand” (2017) 9 Nutr Basel 918 at 8.
\end{itemize}
\end{footnotesize}
Although these findings are encouraging, a five per cent compositional change is not going to make a substantial difference to consumers' diets. Food producers are reformulating products continuously and there is a possibility these findings were a result of reformulation trends as opposed to the introduction of the HSR system. Nevertheless, the HSR incentivises reformulation and it is expected that greater of the uptake the HSR system will likely lead to more reformulation.278

(h) Consumer psychology insights

Consumer psychology research can be used to explain consumers’ behaviour in relation to the voluntary HSR system. In particular, when consumers are using the HSR system they may be affected by the halo effect, ostrich effect and confirmation bias. These will each be discussed in turn. The halo effect occurs when consumers see a particular product that displays a high HSR and assume other products sold by that brand will also be healthy. Food companies can take advantage of this by displaying the HSR label only on the healthiest foods in their product line, knowing that consumers are likely to assume this extends to the unhealthy and non-HSR labelled products. The ostrich effect causes people to avoid or ignore information, particularly information that is harmful or unpleasant. Consumers may choose to ignore products with a low HSR, particularly if the product is cheap and the consumer is budget constrained. Confirmation bias can also exist where consumers seek out products with a high HSR to confirm their own pre-existing beliefs rather than looking for new information. In this case, the HSR is not changing consumer behaviour because these consumers were going to eat healthily anyway.279

(i) Conclusion

As a result of the recent five-year review completed in November 2020, several changes to the HSR system have been implemented. These include a ban on the use of the energy icon

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278 At 13–14.
279 Becher and others, above n 181, at 1326–1328; Lai and Becher, above n 234, at 19.
only and changes to the algorithm used on non-dairy beverages amongst other things.\textsuperscript{280} However, based on the discussion above, there are still numerous flaws in the HSR system and further changes need to be implemented. The Food Ministers’ Meeting has agreed to consider mandating the HSR system in 2025, after again reviewing HSR uptake.\textsuperscript{281} This comes at the expense of the benefits mandating the HSR system could have to consumers health.

\textit{F Conclusion}

This chapter has outlined current food labelling regulations and policies in New Zealand. It has also examined how effective these are at addressing obesity and diet-related NCDs. The HSR system is the only intervention in place with the specific goal of nudging consumers to make healthier food choices however, it has been subject to much criticism. The next chapter will propose changes that need to be made so that food labelling regulations have a greater impact on obesity and diet-related NCDs.


\textsuperscript{281} Australia and New Zealand Ministerial Forum, above n 244, at 6.
VI Food Labelling – Recommendations for the Future

A Introduction

This chapter proposes the best way forward is to mandate the HSR on all food labels. It begins with a brief commentary explaining why this is the recommended course of action and how the criticisms raised in chapter five can be addressed. It then goes on to consider how the system should be designed and implemented, taking into consideration what can be learnt from overseas. If monitoring reveals that the mandatory HSR is not having the desired effect on consumers purchasing behaviours, this chapter recommends implementing warning labels as an alternative option.

B Why a New Proposal is Necessary

Based on the analysis of the HSR system in chapter five, the system is having a positive effect on consumers food choices however, not to the extent necessary to achieve a measurable reduction in obesity and diet-related NCDs. Chapter five pointed out several flaws that may be hindering progress towards achieving this goal. Accordingly, this chapter proposes that the appropriate way forward is to address the flaws in the system, then mandate the HSR on all food labels.

The objective of a mandatory HSR system should remain the same as the voluntary system. That is, to provide consumers with simple nutritional information that nudges them towards making healthier food choices and ultimately reduces obesity and diet-related NCDs. Furthermore, the HSR system should be used to encourage food producers to reformulate their products. The next section will take a closer look at how the criticisms in chapter five can be addressed and will go on to suggest modifications to the design of the HSR system.

282 mpconsulting, above n 237, at 4.
C  Considerations Regarding the Design and Implementation of a Mandatory Health Star Rating System

I  Addressing the Flaws of the Voluntary Health Star Rating System

It is essential to be realistic about what a mandatory HSR system can achieve. It will be possible to address some, but not all, of the flaws in the voluntary system identified in chapter five. However, no front-of-pack labelling system will ever be entirely perfect. This section will take a look closer at the issues a mandatory HSR system can and cannot solve.

Firstly, a mandatory HSR system will ensure there is 100 per cent uptake as it will be required by law to display the HSR label. Secondly, it will be crucial to the success of a mandatory HSR system that consumers are educated on how to use the label to assist them when making food choices. In particular, educational efforts should target Māori, Pacific and low socio-economic groups as these consumers are statistically more likely to become obese and develop diet-related NCDs.283

There are several criticisms identified in chapter five that a mandatory HSR simply cannot fix. Highly processed and poor-quality food options will still exist. A mandatory HSR system will not remove poor food choices from the market. Furthermore, a mandatory HSR system will not assist consumers that struggle with portion size control nor will it oblige consumers to follow the Eating and Activity Guidelines.284 Other interventions may be able to assist with these issues.

Naturally, by implementing a mandatory HSR system, consumers will be prevented from exhibiting the halo effect. Food producers will be required to display a HSR label on all products, even on unhealthy product lines. However, consumers may still ignore HSR labels (ostrich effect) or look for products with a HSR that confirms their pre-existing

283 Becher and others, above n 181, at 1350.
284 Ministry of Health, above n 257.
beliefs (confirmation bias). Mandating the HSR system will not stop consumers from exhibiting these behaviours.

Finally, technical experts should be used to assess whether changes to the HSR algorithm need to be implemented before it becomes mandatory. Products that result in absurd outcomes, such as Mammoth Chocolate Milk mentioned in the chapter five, should be reviewed carefully.

2 Modifications to the Current Health Star Rating System

This section will take a closer look at modifications that should be made to the design of the HSR system before it is implemented on a mandatory basis. Specifically, this section will examine the Multiple Traffic Light (MTL) system used in the United Kingdom and suggest New Zealand adopts a similar use of colour in the HSR system.

Briefly, the MTL system is designed to provide the consumer with a quick guide on the energy, fat, saturated fat, sugar and salt content in a packaged food product. The label colour codes each nutrient red, amber or green based on whether the product contains a healthy level of each nutrient. Similar to the current HSR system, the MTL system is implemented voluntarily and is designed to nudge consumers towards healthier choices. The more green on the label, the healthier the choice.

The United Kingdom has deemed its MTL system an overall success. Systematic review and meta-analysis of literature has been conducted comparing the effectiveness of traffic light labelling, Guideline Daily Amount (GDA) and other types of food labelling. This research found that of the labelling interventions analysed, traffic light labelling was the

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285 Lai and Becher, above n 234, at 21.
286 National Health Service “Food labels” (27 April 2018) nhs.uk <www.nhs.uk>.
287 Department of Health and Social Care and others Building on the success of front-of-pack nutrition labelling in the UK: a public consultation (2020) at 12.
most effective means of steering consumers towards healthier food choices.\textsuperscript{288} Research has also been conducted in New Zealand surveying the use and understanding of nutrition labels by Māori, Pacific, Asian and New Zealand European consumers. The research compared nutritional information panels, MTL labels, single traffic light (STL) labels and percentage of daily intake labels. Of the four labels presented, MTL labels were the most preferred format, although both MTL and STL labels were similarly successful at being well understood across all ethnic and income groups.\textsuperscript{289} This is an important finding as there is a statistically higher likelihood of Māori, Pacific and low socio-economic consumers becoming obese. These consumers thus stand to benefit the most from a labelling tool they are able to easily understand.

The HSR system should be modified to take advantage of these findings. Based on the success of the MTL system, the HSR system should employ the use of colour. To illustrate this, a product that receives 0.5 to 2.5 stars should be coloured red, 3-4 stars should be coloured amber and 4-5 stars should be coloured green.\textsuperscript{290} Adding colour to the HSR system also utilises the findings of behavioural economics. As mentioned in chapter three, the findings of behavioural economics suggest that consumers tend to make food choices in a fast and unconscious manner using their automatic system. In particular, consumers tend to assess food packaging intuitively rather than picking up the packet and reading all of the information provided. Consumers already strongly associate the colour red with a negative outcome. Adding colour coding to the HSR system will give consumers a quick indication of whether the product is healthy. Further, the red colour may encourage consumers to look for other nutritional information on the pack. Overall, adding colour to the HSR system utilises the findings of behavioural economics to help consumers make healthier food choices.\textsuperscript{291}

\textsuperscript{288} M Cecchini and L Warin “Impact of food labelling systems on food choices and eating behaviours: a systematic review and meta-analysis of randomized studies” (2016) 17 Obes Rev 201 at 202–206.
\textsuperscript{290} Becher and others, above n 181, at 1348.
\textsuperscript{291} Peggy Liu and others “Using Behavioral Economics to Design More Effective Food Policies to Address Obesity” (2014) 36 Appl Econ Perspect Policy 6 at 11.
3  The Joint Food System

As raised in chapter five, the HSR system was designed and implemented through the Joint Food System. Ideally, a mandatory HSR would become a joint food standard in the Food Standards Code to maintain a harmonised approach to front-of-pack food labelling in both Australia and New Zealand. Such an approach would be consistent with the objectives of the Food Treaty.292 However, if New Zealand was unsuccessful at gaining the support of Australia to mandate the HSR system, New Zealand would need to look at alternative options. This might mean implementing a domestic food labelling law. Although doing so would likely be inconsistent with the Food Treaty, it may be necessary to address the high prevalence of obesity and diet-related NCDs in New Zealand.

4  Paternalism Considerations

Enforcing a mandatory HSR system is a soft paternalistic intervention. It aims to nudge consumers into making healthier food choices. Consumers would however, not be forced to buy high HSR products nor would low HSR products be taken off the market. Consumers may be more accepting of soft paternalistic interventions for this reason. From a freedom of choice perspective, consumers would maintain their freedom to choose unhealthy or low star rating products. This would allow consumers to continue to make their own decisions about their own personal needs, however they perceive them. In fact, the provision of information may make consumers feel more in control with this additional information to help inform their food choices.

5  Industry Objections

The food industry is likely to oppose a mandatory HSR system. It is to be expected that the food industry will have concerns about who will pay for implementation and changing of

292 Food Treaty, above n 141, art 3.
product labels. To avoid food producers passing these costs onto the consumer, implementation costs should be paid by the government. There is the possibility a mandatory HSR system could cause a loss in product sales, particularly for unhealthy products carrying a low HSR. However, this should encourage food producers to reformulate so that their product is healthier and displays a higher number of stars. Overall, the food industry needs to balance their need for sales and profitability against their moral responsibilities towards consumers health.  

6 Views Against Labelling Interventions

There are several academics who argue that the provision of more nutritional information is the wrong way to go about encouraging consumers to make healthier food choices. Research on consumers food attitudes and behaviours in the United Kingdom has found that the majority of consumers know what a healthy diet looks like. The problem may thus not be a lack of information, but the ability to resist high fat, sugar and salt foods, especially when consumers find these particularly tasty. This research highlights the risk that a mandatory HSR label will have no effect on consumers who lack of motivation or willpower to consume a healthy diet. However, so long as the vast majority of consumers are influenced by a mandatory HSR label to make healthier food choices, it is worthwhile doing. Furthermore, other obesity interventions, such as taxes, may be more influential on these consumers who lack motivation to consume a healthy diet.

Moreover, implementing a mandatory HSR system as part of a package of reforms is more likely to have an effect on obesity and diet-related NCDs. Those consumers that choose to ignore the HSR label may be more influenced by taxes thus making a suite of interventions the most effective way to bring about meaningful change to consumers health.

293 Dimbleby, above n 65, at 40.
294 Gillian Prior and others Exploring Food Attitudes and Behaviours in the UK: Findings from the Food and You Survey 2010 (Social Science Research Unit and Food Standards Agency 2011) at 7.
7 Unintended Consequences

An important consideration before implementing a mandatory HSR system is to examine whether there may be any unintended consequences. Once the HSR label is mandated and appears on every food packet, consumers may feel confused or overwhelmed by the amount of information being presented to them. A product might easily display a nutritional information panel, an ingredients list, storage information, an expiry date, a HSR and promotional advertising. One way to overcome this is to limit the amount of promotional advertising permitted on food packaging so the consumer can focus on making an assessment of the healthiness of a product. This illustrates how multiple obesity interventions can be used to complement each other. Chapters seven and eight will address advertising restrictions in more detail.

8 Monitoring, Enforcement and Penalties

Monitoring the mandatory HSR system will be the only way to determine if it is having the desired impact on consumers food choices. Monitoring should particularly focus on the use and understanding of the system by Māori, Pacific and low socio-economic consumers as these groups have a statistically higher likelihood of becoming obese. Monitoring will also show if the mandatory system is having any unintended effects.

When interpreting the results of the HSR system, regulators should bear in mind that it will be difficult to draw a direct link between the mandatory HSR and a decrease in obesity. This is due to the nature of the problem as obesity is a multifaceted issue caused by many factors. Further, it will take time before any effects flowing from the implementation can be seen. As the HSR system will be mandatory, penalties should be imposed on food producers that do not display the label. Penalties will be helpful for encouraging compliance.

296 Ministry of Health, above n 1.
9 **Timing**

As discussed in chapter five, the Food Ministers’ Meeting agreed to consider mandating the HSR system in 2025. Regardless, there remains support from academics to mandate the HSR system as soon as possible.\(^{297}\) Given the overwhelming statistics showing the harm caused by obesity and diet-related NCDs, this justifies the urgent need to implement new interventions including a mandatory HSR system.

10 **Cost Considerations**

Mandating the HSR system will entail a variety of costs, such as legislation costs, educational costs, monitoring and enforcement costs.\(^{298}\) Ultimately, regulators will need to weigh the cost of mandating the HSR system against the potential benefits to consumers and the potential savings in public health care costs from the reduced number of people requiring care. As discussed earlier, if the cost of implementing the HSR system is imposed on the food industry, food producers may pass this cost onto the consumer. Consequently, consumers will be made to pay more for their food products.\(^{299}\) To avoid food producers raising the price of food, the mandatory HSR system should be funded by the government.

11 **Trade Considerations**

As New Zealand is a member of the WTO, this creates an obligation to abide by WTO law. This section will conduct a brief analysis of relevant WTO agreements, noting matters that should be taken into consideration by regulators before mandating the HSR system.

\(^{297}\) S Mackay and others *Benchmarking Food Environments 2020: Progress by the New Zealand Government on implementing recommended food environment policies & priority recommendations* (2020) at 21.

\(^{298}\) Becher and others, above n 181, at 1345.

\(^{299}\) At 1354.
(a) TBT Agreement

The TBT Agreement seeks to ensure that technical regulations, standards, and procedures for assessment of conformity do not create unnecessary obstacles to trade. Annex 1 of the TBT Agreement defines a “technical regulation” as a document which may “include or deal exclusively with terminology, symbols, packaging, marketing or labelling requirements as they apply to a product, process, or production method”. A front-of-pack nutrition labelling measure, such as the mandatory HSR labels proposed in this chapter, is thus likely to fall within the definition of a “technical regulation” subject to the TBT Agreement.

Article 2.1 of the TBT Agreement allows technical regulations on the condition that imported products are “accorded treatment no less favourable than that accorded to like products of national origin”. This is referred to as the national treatment principle. Further, imported products must be accorded treatment no less favourable that “to like products originating in any other country”. This is commonly referred to as the most-favoured-nation principle. These two principles form the basic rules of non-discrimination in WTO law. As a mandatory HSR label would apply to all products, domestic or imported, it is difficult to see how it could be accused of favouring one over the other.

Article 2.2 of the TBT Agreement specifies that “technical regulations shall not be more trade restrictive than necessary to fulfill a legitimate objective”. Objectives specified in the agreement include “national security requirements, the prevention of deceptive practices, protection of human health or safety, animal or plant life or health or the environment”. Front-of-pack nutrition labelling may fall under the objective of protecting public health.

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300 TBT Agreement, above n 81, annex 1.
301 “Nutrition labelling as a trade policy issue” Obesity Evidence Hub <www.obesityevidencehub.org.au>.
302 TBT Agreement, above n 81, art 2.1.
303 TBT Agreement, above n 81, art 2.1.
304 Lai and Becher, above n 234, at 29.
305 TBT Agreement, above n 81, art 2.2.
306 “Nutrition labelling as a trade policy issue”, above n 296.
Regulators should proactively collect evidence to show that the mandatory HSR label fulfils this objective. Further, evidence should be collected to show that the labelling system is no more trade restrictive than necessary to achieve its objective. For example, educational campaigns are likely to be suggested as a measure that is less trade-restrictive. However, it is questionable how effective education campaigns are at achieving the objective. This could be used to justify implementing the mandatory HSR label.

Further, article 2.4 specifies that “where relevant international standards exist or their completion is imminent Members shall use them or the relevant parts of them as a basis for their technical regulations” to fulfil the legitimate objective pursued. On this basis, any international standards on front-of-pack labelling would need to be taken into consideration when drafting any new labelling law. Codex Alimentarius (Codex) are currently in the process of drafting guidance specifically on front-of-pack labelling however, this has not been finalised. Regulators should engage with guidance from Codex once it is published to help in the development of the mandatory HSR label.

(b) TBT decisions

The compatibility of front-of-pack nutrition labelling with WTO law has been tested in the TBT Committee. Multiple concerns with labelling measures implemented in Chile, Peru, Ecuador, Thailand and Indonesia have been raised. In particular, the TBT Committee raised concerns that the warning labels implemented in Chile created unnecessary obstacles to trade and was more trade restrictive than necessary to fulfill the legitimate objective of public health. Further concerns were raised that the labelling measure deviated from Codex guidelines. Chile responded to the concerns raised in the TBT Committee by stating that the measure was evidence-based and designed to achieve the objective of addressing the

307 Lai and Becher, above n 234, at 30–33.
308 TBT Agreement, above n 81, art 2.4.
309 Anne Marie Thow and others “Increasing the public health voice in global decision-making on nutrition labelling” (2020) 16 Glob Health.
growing prevalence of childhood obesity and NCDs in the country.\textsuperscript{310} The measure in Chile has not been subject to a formal dispute in the WTO disputes tribunal. Front-of-pack labelling interventions have become common amongst overseas countries and are no longer seen as a novelty. As several countries overseas have implemented similar labelling interventions without disputes being raised, it is unlikely New Zealand would be subject to a trade dispute for implementing a mandatory HSR label.

(c) TTMRA and GATT

In accordance with the TTMRA, food products are able to be freely traded between Australia and New Zealand without needing to comply with the importing country’s requirements.\textsuperscript{311} As discussed earlier, Australia and New Zealand would ideally both implement a mandatory HSR system within the Food Standards Code. Imports from Australia would thus already comply with HSR labelling requirements before they arrive in New Zealand.

The situation becomes significantly more complicated if New Zealand were to implement a mandatory HSR system in domestic law. Allowing imports of Australian products without HSR labels under the TTMRA could potentially result in a breach of the GATT for not giving all imports most-favoured-nation treatment in accordance with Article I.\textsuperscript{312} Although Article XX provides an exception for measures necessary to protect human health, on the basis of the precedent set by Brazil – Retreaded Tyres, it is unlikely the exception would apply.\textsuperscript{313}

In Brazil – Retreaded Tyres, the European Communities raised a trade dispute with respect to a law Brazilian authorities implemented banning imported retreaded and used tyres. The

\textsuperscript{310} Minutes of the Meeting of 17, 19 and 20 June 2013 G/TBT/M/60, 23 September 2013 (Committee on Technical Barriers to Trade).

\textsuperscript{311} Trans-Tasman Mutual Recognition Act 1997.

\textsuperscript{312} GATT, above n 81, art I.

\textsuperscript{313} GATT, above n 81, art XX.

Brazil – Measures Affecting Imports of Retreaded Tyres, WT/DS332.
ban was implemented in light of mosquitoes breeding on the tyres, presenting a risk to human health. The ban was subject to an exemption for remolded tyres originating from Mercosur Member States under the Economic Complementation Agreement No.18.\(^\text{314}\) The Appellate Body was asked to consider whether the exception in Article XX of the GATT applied on the basis that the measure was necessary to protect human health. The Appellate Body firstly noted that the exception only applies when “such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination”. The Appellate Body went on to state that “the assessment of whether discrimination is arbitrary or unjustifiable should be made in light of the objective of the measure”.\(^\text{315}\) In this case, the exemption for Mercosur Member States undermined the objective of the import ban and Article XX failed to apply. In light of Brazil–Retreaded Tyres, imported food products from Australia should be subject to the same requirement to display a mandatory HSR label as all other countries. To allow otherwise would undermine the objective of the mandatory HSR system and could put New Zealand at risk of a GATT dispute.

(d) Conclusion

This brief analysis of the TBT and GATT indicates that implementing a mandatory HSR label is not likely to have a high risk of being subject to an international trade law dispute. Prudent regulators should conduct a more in-depth analysis of international law before implementing a mandatory HSR system.

\(D\) An Alternative Approach – Warning Labels

If monitoring reveals that the mandatory HSR system is not having the desired effect on obesity and diet-related NCDs, regulators have the option of switching to a different front-of-pack labelling system. Warning labels could be an appropriate alternative front-of-pack labelling system for New Zealand. The labels would provide consumers with a warning

\(^{314}\) Mercosur Member States are Argentina, Brazil, Paraguay and Uruguay.

\(^{315}\) Brazil – Measures Affecting Imports of Retreaded Tyres, above n 314, at [227].
about any health dangers associated with consuming a specific product. The discussion below is a case study on the success of warning labels that have been implemented in Chile.

In 2016, the Chilean Government implemented numerous legal interventions to reduce obesity. One of the interventions was a mandatory requirement that all pre-packaged foods display black front-of-pack warning labels shaped like stop signs if exceeding nutrient thresholds for total sugar, sodium, saturated fat or calories.\(^{316}\) Warning labels are not applied to natural or minimally processed foods such as fruits, vegetables, legumes or nuts that have high levels of naturally occurring fats and sugars as regulators did not want to discourage consumption of these foods.\(^{317}\) Initially, the suggested wording for the warning label was “excess in (nutrient)”. The wording was changed to ‘high in (nutrient)” due to concerns raised in stakeholder consultation about potentially misinterpreting the word “excess”.\(^{318}\) Similar to the HSR system, the Chilean warning labels are a soft paternalistic intervention as consumers can still choose to purchase and consume products that display warning labels.

Given that Chile implemented numerous legal interventions to reduce obesity at once it has been difficult for them to evaluate the success of any one intervention. Nevertheless, many research papers have been published. One particular research study was conducted using focus groups of mothers of young children to assess their perception and understanding of warning labels. The research demonstrated that this group of consumers had a high awareness of the warning labels and a good understanding that fewer warning labels meant the product was a healthier choice.\(^{319}\) In particular, the results are encouraging because parents determine what their children will eat. If parents provide healthy food for their children they are less likely to develop unhealthy eating habits that transfer into adulthood.


\(^{317}\) At 368.

\(^{318}\) At 369.

\(^{319}\) Teresa Correa and others “Responses to the Chilean law of food labeling and advertising: exploring knowledge, perceptions and behaviors of mothers of young children” 16 Int J Behav Nutr Phys Act at 7.
Positive research results on Chile’s intervention may encourage New Zealand regulators to consider implementing warning labels.

Unsurprisingly, the mandatory warning labels in Chile have been subject to criticism. Industry tried to oppose the use of front-of-pack warning labels by claiming that “high in” warning labels are perceived by consumers as harsh, and reduce consumers control over their food choices. Research has been conducted to assess whether these claims have any merit. The findings indicate that few respondents thought the warning labels were too harsh, and rather, most of them thought the labels were “about right” or “not harsh enough”. Further, 93 per cent of respondents indicated that the warning labels made them feel “more in control” or “neither less nor more in control”. The research suggests that there is no evidence to support the industry’s assumptions of consumer perceptions. Interestingly, the research also shows that consumers may consider warning labels an acceptable level of paternalistic intervention, particularly if they feel more in control of their food choices.

As discussed above, there have been several concerns raised in the TBT Committee regarding Chile’s warning labels however, none of the complaints resulted in a formal WTO dispute. Overall, based on the analysis above, warning labels could be a viable alternative if monitoring were to suggest that consumers were unresponsive to a mandatory HSR system.

E Conclusion

This chapter has proposed to mandate the HSR system with modifications to ensure it achieves the greatest reduction in obesity and diet-related NCDs. Monitoring will be essential to determine the effectiveness of the intervention, particularly focusing on changes in consumers food choices. If a mandatory HSR system does not achieve the

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320 Rachel B Acton and David Hammond “Do Consumers Think Front-of-Package ‘High in’ Warnings are Harsh or Reduce their Control? A Test of Food Industry Concerns” (2018) 26 Obesity 1687 at 1690.
desired outcome, warning labels should be considered as an alternative front-of-pack labelling system on the basis that they have shown considerable success in Chile.

It is important to be realistic about the results a front-of-pack labelling system is likely to achieve. The provision of information alone is unlikely to achieve a major reduction in obesity and diet-related NCDs as this is a multi-faceted issue. Therefore, a holistic approach should be taken to changing consumers food choices and a suite of interventions should be implemented. The next chapters will go on to propose new interventions for advertising, food reformulation and taxes.
VII Food Advertising Towards Children – Current Restrictions

A Introduction

This chapter delves into the regulation of unhealthy food advertising and focuses particularly on protections in place for children. Advertising contributes to the prevalence of obesity and diet-related NCDs by encouraging the purchase and consumption of unhealthy food. Advertising restrictions are used to limit this influence on consumers. Additionally, advertisers must ensure their advertisements are truthful and in no way misleading to the consumer.

Nowadays, there is a wide variety of media used to promote unhealthy food to children, including TV, radio, film, computer games, print media, social media, video platforms, outdoor billboards, posters, public transport, cinemas, product packaging and on-shelf displays in supermarkets. Traditional TV advertising is no longer the predominant means of promoting products to children. In fact, research shows that only 35 per cent of children are watching recorded free to air TV.

Currently, there are numerous legislative and self-regulatory mechanisms in place purporting to restrict the promotion of unhealthy food in New Zealand. These mechanisms are a mix of nudges and measures to ensure the truthfulness of advertising. A small number of restrictions focus specifically on protecting children. As discussed in chapter two, children are considered a vulnerable group of consumers who are naïve and easily influenced by the persuasive nature of advertising. This means they are in greater need of protection through regulation. Further, taking a preventative approach to obesity and diet-related NCDs for children will have greater long-term benefits.

323 Colmar Brunton, above n 61, at 17.
Study based on data from the parents and caregivers of children aged 6 to 14 years old.
This chapter will discuss the restrictions that appear in the:

(a) Advertising Standards Authority Codes;
(b) Commercial Approvals Bureau pre-vetting of television advertisements;
(c) Association of New Zealand Advertisers pre-vetting services;
(d) Broadcasting Act 1989 and Broadcasting Standards Authority;
(e) Out of Home Media Association Aotearoa Placement Policy;
(f) New Zealand Media Council principles;
(g) Fair Trading Act 1986;
(h) Food Standards Code; and
(i) Food Act 2014.

This chapter will assess how effective each of the current restrictions are at limiting the promotion of unhealthy food, particularly towards children.

B Advertising Standards Authority Codes

The Advertising Standards Authority (ASA) is the main body that regulates the advertisement of unhealthy food in New Zealand. The ASA has three core objectives, namely to:

(a) seek to maintain at all times and in media a proper and generally acceptable standard of advertising and to ensure that advertising is not misleading or deceptive, either by statement or by implication;

\[324\] Advertising Standards Code.
Children and Young People’s Advertising Code.
Australia New Zealand Food Standards Code.
Food Act 2014.

\[325\] “About us” ASA - Advertising Standards Authority <www.asa.co.nz>.
(b) establish and promote an effective system of voluntary self-regulation in respect to advertising standards; and
(c) establish and fund an Advertising Standards Complaints Board.

The ASA regulates “advertising and advertisements” which are defined as “any message, the content of which is controlled directly or indirectly by the advertiser, expressed in any language and communicated in any medium with the intent to influence choice, opinion or behaviour of those whom it is addressed”. The ASA has established the Advertising Standards Code and five sector Codes focussed on alcohol, children and young people, finance, therapeutics and health, and gambling. This section will focus on the Advertising Standards Code. The Children and Young People’s Advertising Code will be discussed in the next section.

The Advertising Standards Code, in part, is used to restrict the advertisement of unhealthy food and beverages. The rules state that advertisers must not undermine the New Zealand Eating and Activity Guidelines, encourage excessive consumption beyond the recommended portion size, promote an unhealthy lifestyle, or encourage excessive repeat purchases of food high in fat, salt or sugar. Further, food products high in fat, salt, and sugar are not to be portrayed as beneficial to health. The Advertising Standards Code does not provide a definition of the phrase “high fat, salt or sugar”.

The ASA is a self-regulatory body. This means the ASA draft their own Codes and enforce them. Unsurprisingly, the advertising industry is in favour of keeping the current self-regulatory approach. The ASA has stated that there are many benefits to self-regulation, namely:

326 Advertising Standards Code, definition of advertisement.
327 Advertising Standards Authority “Codes” <www.asa.co.nz>.
328 Advertising Standards Code, rule 1(h).
329 Rule 2(g).
(a) reduced costs;
(b) the sector has ownership of the rules;
(c) flexibility;
(d) an ability to deal with specific issues;
(e) an ability to use language that is suited to consumers and industry; and
(f) a focus on consumer needs.

The ASA places the onus on consumers to make complaints regarding breaches of the Codes. The ASA then investigates them and makes a ruling on the complaint.\(^{331}\) If an advertisement is found to be in breach of a Code, the advertiser may be asked to remove or amend the advertisement. However, compliance with the request is entirely voluntary as the ASA’s approach is to persuade, rather than punish with a sanction such as a fine.\(^{332}\) An evaluation of how effective the Advertising Standards Code is at restricting unhealthy food advertising will be discussed later.

1 Children and Young People’s Advertising Code

Children are a vulnerable group of the population that are often targeted by advertising. The ASA has established a Children and Young People’s Advertising Code to give children additional protection from the influence of advertising. Amongst other matters, the Children and Young People’s Advertising Code regulates the advertisement of food and beverage products. The Children and Young Peoples Advertising Code applies to all advertisements that target children (below the age of 14 years) and young people (14-18 years of age).\(^{333}\)

The Children and Young People’s Advertising Code uses the Food and Beverage Classification System to determine which foods are unhealthy and should be subject to

\(^{331}\) At 4.

\(^{332}\) Advertising Standards Authority “Frequently Asked Questions” <www.asa.co.nz>.

\(^{333}\) Children and Young People’s Advertising Code.
advertising restrictions. Products that are considered “occasional food and beverage products” according to the Classification System are subject to restrictions. Examples of occasional foods include confectionary, deep fried foods, full sugar and artificially sweetened energy drinks, full sugar drinks and foods, and beverages containing caffeine.

With respect to children below the age of 14 years, rule 1(i) places a general obligation on advertisers of occasional food and beverage products not to target children or place the advertisement in any media where children are likely to be a significant proportion of the audience. There are two separate criteria for determining whether an advertisement is “targeting children” and whether children are a “significant proportion” of the audience.

When determining whether advertising is “targeting children”, the Children and Young People’s Advertising Code requires that the ASA Complaints Board considers the relationship between the following factors:

1. Nature and intended purpose of the product or service being promoted is principally or generally appealing to children or young people.
2. Presentation of the advertisement content (e.g. theme, images, colours, wording, music and language used) is appealing to children or young people.
3. Expected average audience at the time or place the advertisement appears includes a significant proportion of children or young people.

When determining whether children are likely to be a “significant proportion” of the expected average audience, the Children and Young People’s Advertising Code requires that one or more of the following criteria is met:

1. Where accurate data exists, 25% or more of the expected audience will be children.

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334 Children and Young People’s Advertising Code, definitions for the purposes of this Code.
335 Ministry of Health and Ministry of Education Food and Beverage Classification System Nutrient Framework for Schools (2016).
336 Children and Young People’s Advertising Code, rule 1(i).
337 Children and Young People’s Advertising Code, definitions for the purposes of this Code.
338 Children and Young People’s Advertising Code, rule 1(i).
2. Child viewing time zones.
3. Content with significant appeal to children such as programmes, artists, playlists, videos, movies and magazines.
4. Locations where children gather (e.g. schools, school grounds, pre-school centres, playgrounds, family and child clinics and paediatric services and during any school children’s sporting and cultural events).

With respect to children aged 14 to 18 years, rule(j) states that a special duty of care applies when advertising occasional food and beverage products to “young people”. The guidelines accompanying this rule state that occasional food and beverage products must not be advertised towards young people in a way that implies they are suitable for frequent or daily consumption.

Furthermore, rules 1(k) and 1(l) place a general restriction on advertisers not to display a quantity of food being consumed that exceeds recommended portion sizes, and not make any promotional offers on occasional food and beverages to create a sense of urgency or encourage irresponsible consumption. These rules apply to advertising that targets both “children” and “young people”.

The restrictions on unhealthy food advertising in the Children and Young People’s Advertising Code are a soft paternalistic intervention. The rules are intended to limit advertising so parents and children are less inclined to purchase unhealthy food. Nevertheless, consumers maintain their freedom to choose unhealthy food as the rules do not affect the availability of these products to purchase.

339 Rule 1(j).
340 Rule 1(j).
341 Rules 1(k) and 1(l).
2 How Effective are the Advertising Standards Authority Codes at Restricting Unhealthy Food Advertising, Particularly Towards Children?

The ASA has provided the industry with a means to take ownership over the rules that govern their sector through self-regulation. The rules in the Advertising Standards Code and the Children and Young People’s Advertising Code recognise the need to place specific restrictions around the advertisement of unhealthy food and provide extra protections for children. However, many criticisms can be made of the Codes, particularly with regards to how effective they are. These will be addressed in turn below.

(a) Self-regulation is an ineffective means of regulating unhealthy food advertising

The ASA develop their own Codes and enforce compliance against them. This creates a lack of independence and an inherent conflict of interest.\(^\text{342}\) Research indicates that self-regulation is an ineffective means of protecting children from the influence of unhealthy food advertising. A New Zealand study using Kids’ Cam’s found children were exposed to an average of 27 advertisements for unhealthy food every day across all settings. The exposures occurred at home (33 per cent), in public spaces (30 per cent) and at school (19 per cent).\(^\text{343}\) These findings suggest that self-regulation is failing to adequately protect children from exposure to unhealthy food advertising.

(b) Few complaints are made

The ASA places the onus on consumers to uphold the system as it relies on consumers to place complaints.\(^\text{344}\) An analysis of complaints to the ASA that related to unhealthy food and beverage advertisements targeted towards children found that only sixteen complaints


\(^{343}\) Signal and others, above n 316, at 6.

\(^{344}\) Sing and others, above n 337, at 11.
were made between 2017-2019. One interpretation of these findings is that the low number of complaints suggests parents are happy with the content their children are viewing and do not have any objections. On the other hand, the low number of complaints may suggest parents do not have the knowledge or time to supervise all of their children’s viewing or place complaints about unhealthy food advertising. The latter hypothesis is the more likely.

(c) ASA Complaints Board decisions are rarely upheld

An analysis of complaints decisions between 2017-2019 indicates that complaints with regards to children’s food and beverage advertising are rarely upheld. Of the sixteen complaints that were made, two were upheld however, one was appealed and reversed. The most common reason for the ASA Complaints Board not upholding a complaint was that the intended audience was parents thus the advertisement was not “targeting” children. This raises concerns about the scope of the Children and Young People’s Advertising Code as the definition of an advertisement that “targets children” may be too narrow.

The analysis of complaints decisions also found that while the definition of an “advertisement” appears to be broad and cover a range of media, in practice only one complaint regarding outdoor advertising was upheld. This raises concerns that consumers may not understand the types of media they can make advertising complaints to the ASA about.

(d) There are no fines for non-compliance

The ASA does not have the authority to fine or prosecute for breaches of the Advertising Codes. In the event that an advertisement is found to be in breach of a Code, the ASA will

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342 At 5.
346 At 6.
347 At 7.
ask the advertiser to remove or amend the advertisement. If the ASA were able to use punitive measures, this may incentivise advertiser’s compliance.

(e) Advertising on social media platforms is regulated by internal policies and can be used to target children

The use of social media and video streaming platforms by children has grown rapidly and is being used to promote food products to children. Although the ASA can receive complaints about online advertising, platforms such as Facebook, Youtube and Instagram also have their own internal rules. An analysis of the advertising policies on 16 social media platforms including Facebook, Instagram, Reddit, Snapchat, Youtube, and Whatsapp found that these platforms do not have comprehensive policies in place to restrict the advertising of unhealthy food products towards children. Further, even though YouTube Kids has a policy prohibiting the marketing of food on their platform, children are still exposed to unhealthy food through product placement and promotional videos.

Although most major channels require users to be above 13 years old, there is a growing number of children owning accounts and using social media regardless of being underage. This means advertisers can easily circumvent the restrictions in the Children and Young People’s Advertising Code on the basis that children below the age of 13 should not have Facebook accounts. Children owning accounts without parental consent means that parents are oblivious to what advertisements their children are being exposed to. The ASA is also less likely to receive complaints without parents knowing what their children are watching.

348 Advertising Standards Authority, above n 327.
350 At 8.
351 At 7.
352 At 2.
(f) Lack of a meaningful definition of “unhealthy food”

The Children and Young People’s Advertising Code considers an unhealthy food to be an “occasional food and beverage product” as defined by the Food and Beverage Classification System. The ASA is currently the only agency that uses the Food and Beverage Classification System. The system was initially implemented in 2007 by the Ministry of Health and Ministry of Education to promote healthy eating in schools and early childhood education services. However, the system has not been updated since 2016. The ASA is therefore using an out-of-date classification system to judge what food advertisements should be restricted from children’s viewing. Research has found that this classification system still permits the advertisement of unhealthy food products including high sugar breakfast cereal products, fruit juices and ready meals. These findings illustrate the Food and Beverage Classification System is not an appropriate means of deciding what food products should be captured by children’s advertising restrictions.

Research has been undertaken using the United Kingdom Nutrient Profile model to identify “unhealthy” food advertisements on New Zealand TV. Using a 60-hour sample of weekday afternoon TV, it was found that 483 advertisements aired for food products or food retailers. According to the United Kingdom nutrient profiling model, 66 per cent of food advertisements in the sample were classified as advertising high fat, salt and sugar food products. This suggests that restrictions based on the Food and Beverage Classification System still allow advertisements for unhealthy food products to be aired. Chapter eight will consider whether a nutrient profile model is a more appropriate way to define an “unhealthy food” for the purpose of enforcing advertising restrictions.

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353 Children and Young People’s Advertising Code, definitions for the purposes of this Code.
354 Scoop News “Classification System Helps Schools With Nutrition” <www.scoop.co.nz>.
356 Sing and others, above n 337, at 7.
(g) The complaints process is time consuming

Most complaints take 2-3 weeks to be resolved through the ASA complaints process.358 During this time, the advertisement is likely to be well disseminated and any harm caused by viewing the advertisement is likely to have already been done, making it somewhat pointless removing it from air 2-3 weeks later.

(h) The ASA does not regulate advertising on front-of-pack labels

The ASA regulates all media types to the exclusion of “content not controlled by the advertiser, or to product labels or packaging”.359 Therefore, use of celebrities and cartoon characters on food packaging is not regulated by the Advertising Standards Codes. However, research indicates that this type of advertising is problematic. In 2014, a study of 247 breakfast cereals found 52 cereals (21 per cent) displayed promotional characters and of these 58 per cent of the products were considered “less healthy”.360 Further, 48 per cent of cereal for children featured promotional characters and of those, 69 per cent were considered “less healthy”. Overall, the “less healthy” cereal for children displayed a higher proportion of promotional characters on the packaging.361 In light of these findings, chapter eight will consider whether advertising restrictions should be expanded to include front-of-pack labels.

C Commercials Approval Bureau Pre-Vetting of Television Advertisements

The Commercials Approval Bureau (CAB) operates a pre-vetting service whereby the content of all advertisements must be approved before broadcast on TV. The purpose of

358 Advertising Standards Authority, above n 327.
359 Advertising Standards Code, application of the Code.
360 Breakfast cereals were considered “healthy” if they had a nutrient profile scoring criterion of less than 4 and “less healthy” if the nutrient profile scoring criterion above 4. The same scoring system is used by FSANZ to determine whether products are eligible to carry health claims under the Food Standards Code.
361 Anandita Devi and others “Nutritional quality, labelling and promotion of breakfast cereals on the New Zealand market” (2014) 81 Appetite 253 at 258.
the pre-vetting service is to “protect the reputation of broadcasters and minimise compliance risks for advertisers”.

The CAB checks advertisements of food and beverage products for compliance with the Children and Young People’s Advertising Code. Further, if an advertisement is intended to be broadcast during children’s programming hours it must first be awarded a “Children’s Food Classification”. To be awarded this classification, the food product must meet the minimum standards to be recognised as an “everyday” or “sometimes food” as defined by the Food and Beverage Classification System. Food classified as a “sometimes” food must undergo a further assessment by an independent nutritionist before it is awarded a children’s food classification.

The CAB does not allow any advertising of food or beverage products during pre-school TV programming and limits advertising during school-aged children’s TV programming. The CAB seeks to ensure advertising is recognisable and separate from the content of a programme. Further, that there is no excessive repetition of advertisements during children’s programming. These measures have been put in place in recognition that advertising towards children needs to be conducted in a socially responsible manner.

1 How Effective is the Commercials Approvals Bureau Pre-Vetting Service at Restricting Unhealthy Food Advertising, Particularly Towards Children?

Although the CAB pre-vetting service reduces the risk of TV advertisements airing that are non-compliant with the Children and Young People’s Advertising Code, many criticisms can still be made of this service. These will be addressed in turn below.

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362 Commercials Approval Bureau “More about CAB” <https://commercialapprovals.co.nz>.
363 Commercials Approval Bureau “Advertising to Children” <https://commercialapprovals.co.nz>.
364 Commercials Approval Bureau, above n 358.
(a) Pre-vetting is only compulsory for TV advertisements

Whilst it is promising that all TV advertisements are scrutinised by the CAB pre-vetting service, advertising that occurs on all other media platforms remains unchecked. As discussed earlier, this is problematic because advertisers use a multitude of media platforms to target children with unhealthy food advertising, not just TV.

(b) Only advertisements intended for children aged five to thirteen years old are given a Children’s Food Classification

The CAB only assesses advertisements broadcast during children’s programming hours against the criteria required to obtain a “Children’s Food Classification”. The CAB defines a “child” as someone between the ages of 5 to 13 years old.365 Young people over 13 years old thus remain vulnerable to the influence of advertising as they are not considered “children” and are not afforded this extra layer of protection.

(c) The Food and Beverage Classification System is out of date

The CAB uses the Food and Beverage Classification System which, as discussed earlier, is not used by the Ministry of Health or Ministry of Education and has not been updated since 2016. Consequently, advertisements are not being assessed against current nutritional guidance.

D Association of New Zealand Advertisers Pre-Vetting Services

In addition to the CAB pre-vetting service, the Association of New Zealand Advertisers (ANZA) provides a paid pre-vetting service for advertisers to use. There are three services available, namely the therapeutic advertising pre-vetting service (TAPS), the liquor

365 Commercials Approval Bureau “CAB Classifications” <https://commercialapprovals.co.nz>.
advertising and promotion pre-vetting service (LAPPS), and the children’s advertising code pre-vetting service (CAPS).\footnote{Association of New Zealand Advertisers “The voice of New Zealand Advertisers” <www.anza.co.nz>.
}

The CAPS pre-vetting service is used to assess the compliance of an advertisement against the ASA Children’s and Young People’s Advertising Code.\footnote{Association of New Zealand Advertisers “CAPS” ANZA <www.anza.co.nz>.
} Unlike the CAB pre-vetting service, the CAPS pre-vetting service is entirely voluntary and can be used to assess an advertisement in any media, not just TV.

1 How Effective is the Association of New Zealand Advertisers Pre-Vetting Service at Restricting Unhealthy Food Advertising, Particularly Towards Children?

The CAPS pre-vetting service is a useful tool for reducing the risk of airing advertising that does not comply with the Children and Young People’s Advertising Code. However, as discussed earlier, there are many flaws with the Children and Young People’s Advertising Code. Furthermore, the CAPS pre-vetting service is a paid service.\footnote{Association of New Zealand Advertisers, above n 362.
} Being a paid and voluntary service may dissuade advertisers from using the service. Data is not publicly available as to how many advertisers pay to use the CAPS pre-vetting service.

E Broadcasting Standards

The Broadcasting Act 1989 established the Broadcasting Standards Authority (BSA).\footnote{Section 20.
} The BSA has a plethora of functions including the development of Codes of Broadcasting Practice and determining consumer complaints.\footnote{Section 21.
} There are eleven broadcasting standards (the Standards) against which a programme must abide by, namely:\footnote{Broadcasting Standards Authority Broadcasting Standards in New Zealand Codebook (2020) at 3.
}
(a) good taste and decency;
(b) programme information;
(c) children’s interests;
(d) violence;
(e) law and order;
(f) discrimination and denigration;
(g) alcohol;
(h) balance;
(i) accuracy;
(j) privacy; and
(k) fairness.

Specifically, TV and radio broadcasters must abide by the Standards. The Standards extend to programmes that are viewed or listened to online however, the original broadcast must have aired on TV or radio. The BSA has created separate Codes of Broadcasting Practice for radio, paid TV and free-to-air TV. The Standards are applied according to how the different platforms carry out their broadcasting.

The BSA does not provide specific advice about whether programme content might breach a Standard as it is at the discretion of the BSA to determine complaints. Unlike the ASA, the BSA has the authority to make different types of orders for a failure to comply with the Standards. Orders can include broadcasting a statement about the decision or ordering a fine up to $5,000. Generally, the BSA will not stop a scheduled programme from airing however, in rare cases the BSA can order further programmes in a series not to be aired or stop a specific broadcaster from airing for a set period of time.

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372 At 4.
373 At 8.
374 Broadcasting Standards Authority “FAQs” <www.bsa.govt.nz>.
375 Broadcasting Act, ss 15 and 16.
376 Broadcasting Standards Authority, above n 369.
Although the BSA regulates the content of programmes, as opposed to advertising, one of the most popular forms of “non-advertising” is product placement in programmes. Product placement occurs when branded products are intentionally incorporated into programmes as a means of persuading the audience to purchase the product. Product placement is a substantial industry, and has grown from US$6.25 billion in 2009 to US$8.25 billion worldwide in 2012. This particular technique of promoting a product is common with unhealthy food and beverages. The BSA complaints process could be utilised to raise concerns about the product placement of unhealthy food and beverages in a programme if an allegation is made that one or more of the Standards has been breached.

1 How Effective are the Broadcasting Standards at Restricting the Promotion of Unhealthy Food, Particularly Towards Children?

The Standards are applied as broad and overarching principles. They are intended to be flexible so as to be adaptable to societal and technological changes. Despite this, many criticisms can be made of the Standards, particularly with regards to how effective they are at restricting the promotion of unhealthy food within programming content. These will be addressed in turn below.

(a) Few complaints and slow resolution process

Similar to the ASA, the BSA relies on consumers to place complaints. The BSA approximates that complaints can take approximately three months to be resolved. Based on a search of BSA decisions, scarcely any complaints have been made in relation to unhealthy food promotion during programming. One of the few examples of a BSA decision with regards to the portrayal of unhealthy food is in Grylls and Dietitians New Zealand v Mediaworks TV Ltd. The complainant alleged that a programme aired on TV3

379 Grylls and Dietitians New Zealand v Mediaworks TV Ltd [2014] NZBSA 076.
encouraging a high fat, low carbohydrate diet, and gave more air time to the advantages of following this diet. The complainant argued that the programme may “cause considerable harm to New Zealanders with its inaccurate and biased portrayal of established nutrition science”. The particular issue at hand was whether the programme breached standard 4 (balanced), standard 5 (accuracy) and standard 6 (fairness). The BSA declined to uphold the complaint stating that views on both diets were equally portrayed.

The low number of complaints regarding unhealthy food promotion during programming may come down to the fact that it is hard for the average consumer to spot. This is intentional, as product placement is a marketing technique that relies on subtle persuasion. Additionally, consumers may not have the time or knowledge to place a complaint to the BSA.

(b) The BSA does not regulate online content

Research has shown that children are primarily watching programmes through online providers such as Netflix and Youtube as opposed to traditional TV. However, the BSA does not oversee the programmes hosted on these platforms. This means alternative viewing platforms are largely left unregulated. As discussed earlier, advertisements circulated through online media are regulated by the ASA although few complaints have been upheld.

(c) Lack of definitions

As Standards are written as broad and over-arching principles, it difficult for consumers to understand when they apply, and when it is appropriate to place a complaint with the BSA. Conceivably, a complaint on the promotion of unhealthy food could breach standards such

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380 At [2].
381 At [13], [17], and [22].
383 Colmar Brunton, above n 61, at 28.
384 Broadcasting Standards Authority, above n 369.
as fairness, accuracy and the protection of children. However, there is no definition of who is considered a “child” or what is considered “children’s interests”. As a result, it is difficult to understand what protection the BSA offers in terms of safeguarding children from viewing programming content that encourages the purchase and consumption of unhealthy food.

F  Out Of Home Media Association Aotearoa Placement Policy

The Out of Home Media Association Aotearoa (OOHMAA) is a not-for-profit industry body that represents out of home media display companies. The purpose of OOHMAA is to encourage members to take into account relevant legislation and ASA Codes when conducting out of home advertising. OOHMAA has developed a placement policy for members in conjunction with the OOHMAA Code of Conduct and industry self-regulatory codes. In particular, the placement policy requires that OOHMAA members do not advertise “occasional food and beverage products” (as defined by the Food and Beverage Classification System) within a 300-metre sightline of the main entrance to a primary or intermediate school. The aim is to ensure that advertisements are not considered “targeting” children or young people according to the rules of the ASA’s Children and Young People’s Advertising Code. When a complaint is received by the ASA and a member is in breach of the placement policy, OOHMAA requires that immediate action is taken to remove the advertisement.385

1  How Effective is the Out of Home Media Association Placement Policy at Restricting Unhealthy Food Advertising, Particularly Towards Children?

The OOHMAA placement policy aims to ensure that out of home advertisers are compliant with the Children and Young People’s Advertising Code. However, as discussed earlier, there are several flaws with the Children and Young People’s Advertising Code, and the

Food and Beverage Classification System is out of date. Furthermore, the OOHMAA placement policy only applies to OOHMAA members. If an out of home advertiser is not a member, they are under no obligation to abide with their policies. Memberships to OOHMAA are paid and there are currently only 11 members, which are primarily companies that sell billboard products.\textsuperscript{386} Paid memberships may act as a disincentive for companies to become members.

Research shows children are still being exposed to unhealthy food advertising outdoors. In 2016, a study was conducted analysing food advertising around schools in New Zealand. Of the sample of 950 schools, approximately 60 per cent of foods advertised around the schools were in breach of the Children and Young People’s Advertising Code, averaging at 8.9 unhealthy food advertisements per km. Further, the research concluded that there was a median of 10 unhealthy food advertisements per km around the most socioeconomically deprived schools, this was much higher than areas with the least socioeconomically deprived schools.\textsuperscript{387} It can be concluded from this research that the OOHMAA placement policy is ineffective at protecting children from exposure to unhealthy food advertisements outdoors, particularly in low socio-economic schooling areas.

\textit{G New Zealand Media Council Principles}

The New Zealand Media Council is an independent forum for resolving complaints about the content of newspapers, magazines and websites displaying their affiliated online content. Industry members of the New Zealand Media Council are required to abide by 12 overarching principles (the Principles). The principles range from accuracy, fairness, and balance, to the protection of children and young people. Members of the New Zealand Media Council voluntarily agree to abide by the Principles when publishing content. The

\textsuperscript{386} Out Of Home Media Association Aotearoa “Our Members” <https://oohmaa.co.nz>.

New Zealand Media Council does not impose financial penalties for breaches of the Principles, rather their approach is to offer assistance to editors and publishers to address the complaint. In theory, it is possible for consumers to place complaints about the portrayal of unhealthy food in newspapers, magazines and websites to the New Zealand Media Council provided that the complainant sufficiently demonstrates the content breaches one or more of the Principles.

1 How Effective are the New Zealand Media Council Principles at Restricting the Promotion of Unhealthy Food, Particularly Towards Children?

The New Zealand Media Council set broad and overarching principles, as opposed to a more prescriptive regime. This allows discretion and flexibility in decision making, but also makes it difficult to pinpoint exactly what is and isn’t a breach of the Principles. Based on a search of the New Zealand Media Council website, there have not been any complaints centred around the portrayal of unhealthy food and beverages to date. Presumably this may be because consumers do not know of the existence of the New Zealand Media Council or may be confused about which body to make their complaint to. Limited awareness of who the New Zealand Media Council is and what their role entails, reduces the overall reach and effectiveness of the Council as a regulator.

H The Food Act 2014 and Food Standards Code as it Relates to Advertising

As discussed in chapter four, when Australia and New Zealand signed the Food Treaty this created an expectation that both countries will work together to maintain a harmonised food standards system. More specifically, article three of the Food Treaty creates an expectation that the Food Standards Code will be used to regulate certain matters, including food advertising. Currently, the Food Standards Code is used to regulate the advertisement of

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389 Food Treaty, above n 141, art 3.
nutrition content and health claims.\textsuperscript{390} The Food Standards Code does not define “advertising”, however, s 8(2) of the Food Act 2014 specifies that “terms and expressions used, but not defined, in the Australia and New Zealand Food Standards Code have the same meaning as in this Act”.\textsuperscript{391} On this basis, the definition of “advertise” provided in the Food Act applies to the Food Standards Code. “Advertise” is defined as a means: \textsuperscript{392}

> “to use any form of communication (including selling or giving away any goods or services for the purposes of any trade or business, but excluding selling or giving away any goods or services for any other purpose and excluding communications of personal opinion made by a natural person for no commercial gain) to the public or a section of the public in relation to any-
> a) goods or services; or
> b) brand of goods or services; or
> c) person who provides goods or services.”

This definition is broad and likely to capture most forms of advertising as it provides only two exceptions when a communication will not be considered advertising.

As discussed in chapter five with regards to food labelling, s 383 of the Food Act 2014 empowers the Minister to “make regulations setting standards in relation to food that specify the criteria that all or any of the following must meet to ensure that food is safe and suitable”.\textsuperscript{393} On the face of it, s 383 may appear to be an appropriate means for the Minister to create a regulation to address unhealthy food advertising targeted at children. However, as discussed with regards to food labelling, s 383 is intended to allow the Minister to create regulations that ensure food is safe and suitable as defined by s 12 of the Food Act. The need to regulate food advertising does not align with this definition.\textsuperscript{394}

\textsuperscript{390} Australia New Zealand Food Standards Code, standard 1.2.7.
\textsuperscript{391} Section 8(2).
\textsuperscript{392} Section 8.
\textsuperscript{393} Section 383.
\textsuperscript{394} Section 12.
1 How Effective are the Food Standards Code and Food Act 2014 at Restricting Unhealthy Food Advertising, Particularly Towards Children?

As discussed earlier, research has found advertising on front-of-pack labels is being used as means to promote unhealthy food towards children. There are currently no food standards that restrict the advertisement of unhealthy food to children. Hypothetically, the Food Standards Code could be used in the future as a means to restrict advertising on front-of-pack labels. This will be explored in the chapter eight.

1 Fair Trading Act 1986 as it Relates to Advertising

This section examines the FTA and how it applies to food advertising. Food advertisers are required to ensure their advertisements comply with the FTA. Advertisers are required not to engage in misleading or deceptive conduct generally, nor should advertisers engage in misleading conduct in relation to goods. Section 12A of the FTA prohibits unsubstantiated representations and s 13 prohibits false and misleading representations. A fuller discussion on the provisions of the FTA has already been provided in chapter five. Generally, the provisions of the FTA ensure the truthfulness of food advertisements.

1 How Effective is the Fair Trading Act 1986 at Restricting Unhealthy Food Advertising, Particularly Towards Children?

The FTA does not place any special restrictions on the advertisement of food as it was not drafted with this specific purpose in mind. However, it is not uncommon for food companies to be prosecuted for advertising that breaches the FTA. For example, in 2016 the Commerce Commission prosecuted Frozen Yoghurt Limited for breaches of s 10 of the

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395 see Devi and others, above n 356, at 258.
397 Sections 9 and 10.
398 Sections 12A and 13.
FTA. Frozen Yoghurt Limited claimed their product possessed certain health benefits, and that the product contained yoghurt. Neither statement was true. The misrepresentations were made in store and on their website. Hypothetically, a consumer may well have relied on the representations of Frozen Yoghurt Ltd to determine whether they were making a healthy food choice. This example illustrates use of the FTA to prosecute misleading food advertising. Several limitations of the FTA have already been discussed in chapter five so will not be repeated.

J Conclusion

This chapter has illustrated that the current advertising restrictions are ineffective at limiting the promotion of unhealthy food, particularly towards children. Furthermore, the array of voluntary, industry-led agencies forms a complex system for consumers to navigate. This is a particularly burdensome system on consumers as they are expected to uphold the system by placing complaints. The next chapter will utilise this analysis of the current advertising restrictions and will propose new restrictions are implemented in the form of legislation.

VIII  Food Advertising – Recommendations for the Future

A  Introduction

This chapter proposes that the appropriate way forward is to enact legislation to reduce children’s exposure to unhealthy food advertising. It begins with a discussion on why it is necessary to legislate and goes on to suggest how the legislation should be designed and implemented. The proposal utilises the discussion in chapter seven on the current advertising restrictions and will analyse advertising restrictions that have been implemented overseas. It should also be noted this proposal is intended to act as an overview, rather than comprehensively designing the legislation.

B  Why a New Approach is Needed

There is clear evidence that unhealthy food advertising influences what children buy or nag their parents to buy for them. Consequently, unhealthy food advertising contributes to the development of obesity and diet-related NCDs. Based on the analysis conducted in chapter seven, the current combination of advertising restrictions is ineffective at limiting children’s exposure to unhealthy food advertising. Research indicates that children are exposed to an average of 27 unhealthy food advertisements a day across all settings, regardless of the current restrictions in place. These findings indicate that a change in regulatory approach is needed.

This chapter sets out a proposal to implement legislation restricting all forms of unhealthy food advertising to children. Of particular importance, the legislation should:

   (a) abolish all of the voluntary, industry-led agencies;
   (b) address the lack of enforcement; and
   (c) remove the onus on consumers to place complaints.

400 Signal and others, above n 316, at 2.
401 At 6.
Many overseas jurisdictions have implemented restrictions on unhealthy food advertising. This chapter will reflect upon the approaches that have been taken in Chile, Quebec and the United Kingdom and, where appropriate, will suggest that New Zealand adopts a similar approach. The following sections will propose in more detail how the legislation should be designed and implemented.

C Specific Considerations of the Proposal

1 Defining Key Terms

In the legislation it will be necessary to carefully define key terms such as “unhealthy food”, “children” and what it means to “target children”. This section will discuss these terms.

(a) Unhealthy food

The definition of “unhealthy food” should be used as a means to identify energy-dense, nutrient-poor foods that should not be advertised towards children. As discussed in chapter seven, the ASA currently uses the Food and Beverage Classification System to identify unhealthy food. This system is considered out-of-date and not appropriate to be used.

In the United Kingdom, advertising restrictions apply to all high fat, salt and sugar (HFSS) products in broadcast and non-broadcast media. The Food Standards Agency developed a nutrient profiling model to identify HFSS foods. The model uses a scoring system to differentiate food based on nutritional composition. The scoring system awards points for energy, saturated fat, total sugar and sodium. Points are then deducted for fruit, vegetables, nut content, fibre and protein. If the overall score of the food product is higher than 4 points or the overall score of the beverage is greater than 1 point, the product is considered “less
healthy” and is subject to advertising restrictions.402 The United Kingdom nutrient profiling model is considered a scientifically robust tool that effectively differentiates food and beverage products based on nutritional composition in order to apply advertising restrictions.403

There are several existing nutrient profiling scoring systems already in use in New Zealand that could be incorporated into the definition of “unhealthy food” for the purposes of applying advertising restrictions. FSANZ has developed a nutrient profiling scoring criterion to assess whether food products are eligible to display health claims.404 The FSANZ model is similar to that of the United Kingdom model, and could be used to determine what is “unhealthy food” for the purposes of applying advertising restrictions.405 Alternatively, the HSR system uses a nutrient profiling model that could be used to identify “unhealthy food”.406 Overall, a nutrient profiling model is a simple and robust means of determining whether a food product is “unhealthy” and falls within the scope of advertising restrictions. To ensure the nutrient profiling model remains fit for purpose, it should be reviewed regularly to reflect the New Zealand Eating and Activity Guidelines.407

(b) Children

As the legislation is intended to restrict unhealthy food advertising towards children, it is appropriate to define who is considered a child. Currently, the restrictions imposed in the ASA’s Children and Young People’s Advertising Code apply to “children” below the age of 14 years and “young people” between 14 to 18 years old.408 In contrast, the restrictions

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407 Ministry of Health, above n 257.
408 Children and Young People’s Advertising Code.
on HFSS advertising in the United Kingdom apply to “children” under the age of 16 years.409

The approach taken in the United Kingdom should not necessarily be adopted in New Zealand as children aged 17 to 18 years old remain equally as vulnerable to the influence of unhealthy food advertising and have a high prevalence of obesity. Furthermore, older children may have the ability to make purchasing decisions without parental consent or oversight as they are likely to have their own money. On this basis, the definition of “children” should include children aged 17 to 18 years old. Furthermore, there is no need to maintain the distinction that the ASA makes between “children” and “young people” as both should be provided the same level of protection by the legislation. The definition of “children” should cover children under the age of 18 years.

(c) Targeting children

Advertisers use numerous different marketing strategies to target children, including celebrity endorsements, cartoons, licensed characters and free toys. The proposed legislation should define what is considered to be an advertisement that “targets children” in order to prevent advertisers using these marketing strategies to promote unhealthy food to children. This section will begin by discussing the various approaches that have been taken overseas and will consider how these might inform the approach that should be taken in New Zealand. It is also an opportunity to assess whether the current criteria used to determine if an advertisement is “targeting children” in the ASA’s Children and Young People’s Advertising Code should be converted into a definition in the legislation.

In the United Kingdom, the Code of Broadcast Advertising (BCAP Code) regulates advertising that appears on TV and radio. With regards to food and beverage advertising, the BCAP Code puts in place content restrictions and scheduling restrictions. Content restrictions include prohibitions on the use of licensed characters, celebrities and

409 The UK Code of Broadcasting Advertising.
The UK Code of Non-broadcast Advertising and Direct & Promotional Marketing.
promotional offers that directly target pre-school or primary school children.\textsuperscript{410} Scheduling restrictions prevent advertisers from promoting HFSS foods on TV channels that are devoted only to children’s programmes.\textsuperscript{411} Additionally, rule 32.5 restricts HFSS products from being advertised in, or adjacent to, programmes “commissioned for, principally directed at or likely to appeal particularly towards audiences below the age of 16”.\textsuperscript{412} Such restrictions have been relatively effective in the United Kingdom. Research has shown that between the period of 2007 to 2010 there was a 51 per cent reduction in children’s (aged 5 to 9 years) exposure to HFSS advertisements on TV. There was also a 23 per cent reduction in children’s (aged 10-15 years) exposure to HFSS advertisements on TV.\textsuperscript{413}

The United Kingdom also has a Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing (CAP Code) which regulates other forms of advertising such as newspapers, magazines, posters, online advertisements and promotions in non-broadcast media.\textsuperscript{414} The CAP Code contains similar restrictions to the BCAP Code around the use of promotional offers on HFSS products. Rule 15.14 states that “HFSS product advertisements that are targeted through their content directly at pre-school or primary school children must not include a promotional offer”.\textsuperscript{415} Additionally, the CAP Code regulates product advertising placement. Rule 15.18 states that “HFSS product advertisements must not be directed at people under 16 through the selection of media or the context in which they appear. No medium should be used to advertise HFSS products, if more than 25 per cent of its audience is under 16 years of age”.\textsuperscript{416} This approach has been criticised on the basis that it considers the proportion of the total audience that are children as opposed to the total number of children actually watching. The United Kingdom government is in the midst of considering ways to strengthen advertising restrictions that are already in place in order to make them more effective at restricting HFSS advertising.

\textsuperscript{410} The UK Code of Broadcasting Advertising, rules 13.9 and 13.10.
\textsuperscript{411} The UK Code of Broadcasting Advertising, children’s television channels.
\textsuperscript{412} The UK Code of Broadcasting Advertising, rule 32.5.
\textsuperscript{413} S Galbraith-Emami and T Lobstein “The impact of initiatives to limit the advertising of food and beverage products to children: a systematic review” (2013) 14 Obes Rev 960 at 970.
\textsuperscript{414} The UK Code of Non-broadcast Advertising and Direct & Promotional Marketing.
\textsuperscript{415} Rule 15.14.
\textsuperscript{416} Rule 15.18.
directed towards children. The proposed changes to the United Kingdom advertising restrictions will be discussed in more detail later in this chapter.

In Chile, restrictions on advertising unhealthy food products towards children have been implemented across all media types. The restrictions apply to advertising that targets children under 14 years old. This age was chosen as it aligns with other regulations already in force in Chile. There is an exposure-based definition and a power-based definition of “targeting children” which are used to determine if advertising restrictions apply. Firstly, the exposure-based definition states that an advertisement “targets children” if it uses mediums that are self-identified as targeted to children (such as children’s TV channels) or if 20 per cent of the audience is composed of children. Secondly, the power-based definition states that an advertisement “targets children” if it uses interactive applications, games or contents, offers free gifts such as toys, or use characters, figures, animations, cartoons, music, toys, people or animals that interest children. With these comprehensive restrictions in place, research indicates there has been a significant decrease in the prevalence of advertisements for high energy, saturated fat, sugar and sodium on TV. These findings suggest that children in Chile are less exposed to unhealthy food advertising.

In Quebec, the Consumer Protection Act RSQ 2020 c P-40.1 prohibits commercial advertising across all media directed at children under the age of 13 years. The Act, whilst not specifically focused on restricting unhealthy food, bans commercial advertisements “directed at children”. The Consumer Protection Act provides three criteria

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417 “Introducing further advertising restrictions on TV and online for products high in fat, salt and sugar: government response” GOVUK <www.gov.uk>.
418 Ley N 20.869 sobre Publicidad de los Alimentos 2015 (Chile) (translation: Law No. 20.896 on Food Advertising).
419 Corvalán and others, above n 311, at 368–371.
420 Teresa Correa and others “Food Advertising on Television before and after a National Unhealthy Food Marketing Regulation in Chile, 2016—2017” (2020) 110 Am J Public Health 1054 at 1058.
420 Consumer Protection Act RSQ 2020 c P-40.1.
to determine whether or not an advertisement is “directed to children”. Section 249 states:

“account must be taken of the context of its presentation, and in particular of
(a) the nature and intended purpose of the goods advertised;
(b) the manner of presenting such advertisement;
(c) the time and place it is shown.”

The Chile Consumer Protection Office has published guidance on the interpretation of s 249. The guidance states that advertisements broadcast on TV for products that are designed for, or have a strong appeal to children are likely prohibited when over 15 per cent of the viewership is composed of children. If viewership is less than 15 per cent, the advertisement may still be prohibited if the message is designed to arouse the interest of children.

The criteria in s 249 of the Consumer Protection Act has been criticised on the basis that it tends to be interpreted narrowly, thus if any element of the advertisement is considered to be directed to adults the ban will not apply. Advertisers can exploit this narrow interpretation using various advertising techniques. This has been observed in research comparing food advertising on TV in Ontario and Quebec (French and English advertising) where different regulatory environments exist. The results highlighted that while many advertisements were similar, the Quebec advertising ban appeared to influence the types of food categories advertised and the advertising techniques used. Regulators in New Zealand should be mindful of potential ways advertisers might try to exploit advertising restrictions and work around them.

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421 Consumer Protection Act RSQ 2020 c P-40.1, s 249.
Overall, the restrictions in place overseas to prevent advertisers targeting children with unhealthy food advertising are not substantially different from what is already in place in the ASA Children and Young People’s Advertising Code. There are however, several minor changes that should be made to the definition of “targeting children” in the Children and Young People’s Advertising Code before it is converted into legislation.

Firstly, the ASA Children and Young People’s Advertising Code has two separate criteria for determining if an advertisement is “targeting children” and if a “significant proportion” of the audience is children. Rather than having separate criteria for each of these terms, they should be simplified into one. This will make it easier for consumers to read and interpret the rules and is consistent with the approach taken overseas. Secondly, when a regulatory body is determining whether an advertisement is “targeting children”, a broad interpretation should be taken thus giving children the most protection. An advertisement should be considered to be “targeting children” even if the advertisement is directed in part at children and in part to parents. This prevents advertisers from circumventing advertising restrictions by arguing they are targeting parents. Although this section has not suggested any significant changes to the definition of “targeting children”, this may be because the issues are rooted in the current system being self-regulatory. The benefits of implementing a new government-led system will be discussed further in the monitoring section of this chapter.

2 Forms of Unhealthy Food Advertising That Should be Regulated

The legislation should be used to implement comprehensive restrictions that apply to all forms of unhealthy food advertising targeted towards children. This will be the most effective means of limiting children’s exposure. As discussed in chapter seven, the current advertising restrictions do not cover all forms of advertising. Many of the current restrictions are voluntary and membership based meaning an advertiser is under no strict obligation to restrict advertising. Furthermore, the ASA does not regulate product packaging.
A comprehensive approach that covers all forms of advertising will ensure there are no gaps whereby advertisers can still reach children with unhealthy food advertising. The proposed legislation should cover: free to air TV, radio, internet, subscription TV, print publications, email, direct mail, unsolicited documents, product placement, public placement, public places and transport, point-of-sale advertising, cinemas and theatres, children’s institutions and events, competitions, characters and personalities.425 Several of these will be drawn upon as examples and discussed below.

(a) TV and cinema

The proposed legislation should be used to place time-based restrictions on unhealthy food advertising. The time periods should cover times when children are a significant proportion of the audience and are likely to be watching or listening. Chile was the first country to implement time-based restrictions. Between the hours of 6 am and 10 pm, unhealthy food products are prohibited from being marketed on TV and the cinema.426 These restrictions have decreased the minutes of children’s exposure on TV to “high in” food advertising by an average of 44 per cent and 58 per cent for pre-school and adolescent aged children respectively.427

In the United Kingdom, regulators announced they are looking to follow suit and implement time-based prohibitions on the advertisement of HFSS food on TV and online before 9 pm. Specifically, the restrictions will include TV advertisements for HFSS products, paid-for HFSS advertising online and on-demand programme services under United Kingdom jurisdiction. Non-United Kingdom regulated on-demand programme

425 MacKay, Antonopoulos and Swinburn, above n 400, at 34.
426 Ley N 20.869 sobre Publicidad de los Alimentos 2015 (Chile) (translation: Law No. 20.896 on Food Advertising).
Corvalan and others, above n 311, at 368–371.
427 Francesca R Carpentier and others “Evaluating the impact of Chile’s marketing regulation of unhealthy foods and beverages: pre-school and adolescent children’s changes in exposure to food advertising on television” (2019) 23 Public Health Nutr 747 at 752.
services will only be included to the extent they use paid HFSS advertisements as they are otherwise outside the United Kingdom jurisdiction.428

One of the limitations of time-based prohibitions is that they can only apply to some types of media. In Chile, the time-based restrictions apply to TV and cinema, whereas in the United Kingdom the proposed restrictions will apply to TV and online content. New Zealand regulators should closely monitor the results of time-based prohibitions in the United Kingdom as online restrictions have never been implemented before in this manner. Regulating internet content will be discussed in more detail later on.

Based on the success of Chile’s time-based prohibitions on unhealthy food advertisements on TV and in cinema, New Zealand regulators should implement similar restrictions. The restricted periods should cover times when children are a significant proportion of the viewing audience. Research conducted by Colmar Brunton in 2020 reported that the most common time for children to watch TV programmes is between 6 pm and 8:30 pm.429 This research provides helpful data on the best time to put in place time-based restrictions on unhealthy food advertising on TV.

(b) Promotional offers

The proposed legislation should be used to restrict the use of promotional offers, such as free toys, which are used to entice children to buy or request unhealthy food from their parents. As discussed in chapter seven, the ASA Children and Young People’s Advertising Code restricts advertisers from using promotional offers that create a sense of urgency or encourage irresponsible consumption of unhealthy food. For example, an advertiser might offer free toy with a food product, but only for a limited time, to create a sense of urgency that the child needs the product before the free toy runs out.

428 “Introducing further advertising restrictions on TV and online for products high in fat, salt and sugar: government response”, above n 412.
429 Colmar Brunton, above n 61, at 14.
In the United Kingdom, the BCAP Code prohibits the use of all promotional offers used to advertise HFSS products targeted directly at pre-school or primary school children in broadcast media.\footnote{The UK Code of Broadcasting Advertising.} Similarly, rule 15.14 of the CAP Code restricts the use of promotional offers in non-broadcast media.\footnote{The UK Code of Non-broadcast Advertising and Direct & Promotional Marketing, rule 15.14.} Regulators in New Zealand should adopt an approach similar to the United Kingdom whereby all promotional offers are prohibited, regardless of whether they create a sense of urgency or encourage irresponsible consumption. This will reduce the attraction of unhealthy food products to children.

(c) Characters and personalities

The proposed legislation should be used to restrict the use of characters and personalities that are popular with, or likely to, appeal to children and are being used as a means to advertise unhealthy food. In the United Kingdom, advertising restrictions apply to the use of licensed characters and celebrities on HFSS foods. Rule 13.10 of the BCAP Code restricts the use of licensed characters and celebrities used in the advertisement of HFSS foods on TV to pre-school and primary school children.\footnote{The UK Code of Broadcasting Advertising, rule 13.10.} Similarly, rule 15.15 of the CAP Code restricts the use of licensed characters and celebrities popular with children for HFSS foods advertised on non-broadcast media.\footnote{The UK Code of Non-broadcast Advertising and Direct & Promotional Marketing, rule 15.15.} New Zealand regulators should adopt a similar approach to limit the use of licensed characters and celebrities that make unhealthy food particularly enticing to children.

(d) Internet

Given the increase in children using social media and online streaming platforms, it is imperative that the proposal to implement legislation should extend to online platforms. A major challenge of regulating online food advertising is the cross jurisdictional nature of the internet.
Advertising restrictions under New Zealand law will only apply to online content within New Zealand’s jurisdiction. Regulators cannot impose New Zealand law on foreign online content as this would be acting outside the New Zealand jurisdiction. However, it is possible to extend advertising restrictions to those “carrying on business in New Zealand”. The Fair Trading Act 1986 and Privacy Act 2020 are two examples of legislation that contain provisions to this effect.\textsuperscript{434} Section 3 of the FTA states:\textsuperscript{435}

“This Act extends to the engaging in conduct outside New Zealand by any person or resident carrying on business in New Zealand to the extent that such conduct relates to the supply of goods or services, or the granting of interests in land, within New Zealand.”

With regards to the interpretation of this provision, the Australian Federal Court in \textit{Valve Corp v Australian Competition and Consumer Commission} has provided guidance on what might be considered “carrying on business”.\textsuperscript{436} Although this is an Australian case, the particular provision in the Australian legislation is very similar to New Zealand. The appellant was a company based in the United States operating an online game streaming platform.\textsuperscript{437} The Australian Competition and Consumer Commission alleged that Valve Corp contravened Australian consumer law by engaging in conduct that was misleading or deceptive or likely to mislead or deceive in Australia.\textsuperscript{438} The Court established that Valve Corp was “carrying on business within Australia”. The Court assessed multiple factors to arrive at this decision, including Valve Corp’s significant number of Australian customers, content was deposited on servers in Australia, significant personal property in Australia, an Australian bank account, and contracts with third parties in Australia.\textsuperscript{439}

\textsuperscript{435} Fair Trading Act 1986, s 3.
\textsuperscript{437} At [14].
\textsuperscript{438} At [3].
\textsuperscript{439} At [150-151].
More recently, the Privacy Act 2020 was enacted. Section 4 places a requirement on those “carrying on business in New Zealand” to abide by the Act even if the business does not have a physical presence in New Zealand. Furthermore, the Privacy Act stipulates:440

an agency may be treated as carrying on business in New Zealand without necessarily—
(a) being a commercial operation; or
(b) having a place of business in New Zealand; or
(c) receiving any monetary payment for the supply of goods or services; or
(d) intending to make a profit from its business in New Zealand.

Adding a provision similar to s 3 of the FTA or s 4 of the Privacy Act into the proposed advertising legislation would be a way of making overseas businesses “carrying on business in New Zealand” subject to unhealthy food advertising restrictions.

Another approach to restricting unhealthy food advertising on the internet is to take coordinated action through the OECD or WHO. For example, with regards to tobacco advertising, members of the WHO including New Zealand signed the WHO Framework Convention on Tobacco Control which calls for parties to ban the advertisement of tobacco products.441 The coordinated action of member states has been an effective means of preventing tobacco advertising on the internet. Overall, this discussion has illustrated that there are several feasible ways for regulators to go about restricting unhealthy food advertising on the internet.

(e) Food outlets

Advertising restrictions in the proposed legislation should also be applied to food outlets. In Chile, advertising restrictions are inclusive of fast-food outlets, such as McDonald’s

440 Privacy Act 2020, s 4.
happy meals which can no longer include a free toy.\textsuperscript{442} New Zealand regulators should adopt a similar approach to ensure food outlets are not left un-regulated to target children.

(f) Product packaging

As discussed earlier, cartoon characters and animations are often displayed on food product labels to make them more appealing to towards children. Specifically, research has indicated the use of promotional characters are prominently featured on unhealthy children’s breakfast cereal packets.\textsuperscript{443} The proposed legislation should thus be used to restrict advertising on product packaging. With these advertising restrictions in place, consumers can focus on other information on the product package such as the HSR label.

(g) Out of home advertising

As discussed in chapter seven, children are being exposed to unhealthy food advertising outdoors. Research has found a high number of unhealthy food advertisements located in low socio-economic school areas.\textsuperscript{444} This is particularly concerning as low socio-economic children have a statistically higher chance of becoming obese. The proposed legislation should therefore be used to place more robust and effective restrictions around unhealthy food advertising outdoors.

\textit{D Additional Considerations Regarding the Design and Implementation of Legislation Restricting Unhealthy Food Advertising Towards Children}

\textit{1 The Joint Food System}

In order to meet New Zealand’s obligations under the Food Treaty, advertising restrictions should ideally be implemented as a joint food standard in the Food Standards Code. This

\textsuperscript{442} Corvalan and others, above n 311, at 368–371.
\textsuperscript{443} Devi and others, above n 356, at 258.
\textsuperscript{444} Vandevijvere and others, above n 382, at 26.
would maintain a harmonised approach to the regulation of food advertising with Australia.\textsuperscript{445} However, this chapter makes a proposal to implement legislation pre-empting the fact that Australia is unlikely to be willing to implement the same proposed advertising restrictions as New Zealand. Although implementing unilateral domestic legislation in New Zealand would likely be considered inconsistent with article 5(3) of the Food Treaty, the extent of the harm caused by unhealthy food advertising to children justifies the need to take regulatory action regardless of whether it may breach the Food Treaty.\textsuperscript{446}

2 Trade Considerations

Before implementing restrictions on advertising, decision-makers should consider New Zealand’s WTO obligations. This section conducts a brief analysis of the most relevant articles of the TBT Agreement and how they relate to the proposal to implement legislation restricting unhealthy food advertising towards children. The TBT Agreement seeks to ensure that technical regulations, standards and procedures for assessment of conformity do not create unnecessary obstacles to trade. Annex 1 of the TBT Agreement defines a “technical regulation” as a document which may “include or deal exclusively with terminology, symbols, packaging, marketing or labelling requirements as they apply to a product, process, or production method”.\textsuperscript{447} The proposed legislation is likely to be considered a technical regulation as it restricts the marketing of unhealthy food. As already discussed with regards to labelling in chapter six, technical regulations should abide by the national treatment principle and most-favoured-nation principle. The proposed advertising restrictions make no distinction between domestic and imported food products. It is therefore difficult to see how the legislation could be seen to favour any one nation over another.

\textsuperscript{445} Food Treaty, above n 141, art 3.
\textsuperscript{446} Food Treaty, above n 141, art 5(3).
\textsuperscript{447} TBT Agreement, above n 81, annex 1.
Furthermore, restrictions on advertising should not be “more trade restrictive than necessary to fulfill a legitimate objective”. Objectives specified in the TBT Agreement include “national security requirements, the prevention of deceptive practices, protection of human health or safety, animal or plant life or health or the environment”. Advertising restrictions on unhealthy food products may fall under the objective of protecting public health. Regulators should proactively collect evidence to demonstrate that the legislation fulfills this objective. Further, evidence should be collected to show that the legislation is not more trade restrictive than necessary to achieve the objective. For example, voluntary advertising restrictions are likely to be suggested as a measure that is less trade-restrictive. However, in light of the evidence already discussed, it is doubtful that voluntary measures are effective at protecting public health. Furthermore, legislation restricting unhealthy food advertising towards children does not affect the importation of food, or the availability of food in supermarkets and other retail outlets. Regulators could use this argument to support the conclusion that the legislation does not create an unnecessary obstacle to trade.

There have not been any trade disputes to date with regards to unhealthy food advertising restrictions that have already been implemented overseas. The lack of disputes may indicate that there is a low risk of one being raised in connection with New Zealand’s legislation. Notably, this section has only conducted a brief analysis of WTO requirements, a prudent regulator should do a thorough assessment before implementing the legislation.

3 Paternalism Considerations

This section will discuss why the proposed advertising restrictions should be considered a justified use of paternalism. Firstly, the proposed legislation is a soft paternalistic intervention and focuses on limiting the promotion of unhealthy food products as opposed to taking away the ability to purchase the products entirely. Although advertising may be restricted, children and parents can still freely purchase unhealthy products at the

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448 TBT Agreement, above n 81, art 2.2.
449 Simoes, above n 60, at 358–359.
supermarket. Secondly, children are considered in need of special protection because they are a particularly vulnerable group of the population, that are more naïve and less critical of any advertising they are viewing. Children cannot be treated as fully rational decision-makers and it cannot be assumed that they understand the long-term effects of their food choices on their health. Paternalistic interventions are thus “necessary to secure a child’s immediate and future interests”.450

Given this legislation is designed specifically to protect children, arguments against paternalism may be less persuasive. Even John Stuart Mill who argued against the use of paternalism wrote: 451

"It is, perhaps, hardly necessary to say that this doctrine is meant to apply only to human beings in the maturity of their faculties. We are not speaking of children, or of young persons below the age which the law may fix as that of manhood or womanhood. Those who are still in a state to require being taken care of by others, must be protected against their own actions as well as against external injury.”

This quote shows that JS Mill’s harm principle does not apply to children as he specifically identified children as a group of the population that it was justifiable to use paternalistic interventions to protect.

Arguments against the use of paternalism should not be dismissed entirely as it is likely the restrictions in the proposed legislation, such as the time-based restrictions on TV advertising, will have an effect on the viewing content of adults. Regardless, the proposed advertising restrictions should be considered justifiable on the basis the legislation would have little effect on product availability. Further, basic information about the food product such as the statement of ingredients, nutritional information panel, date mark, and price would still be available. Overall, it would be reasonable to expect that consumers would be

450 At 358–359.
Michael S Merry “Paternalism, obesity, and tolerable levels of risk” (2012) 20 Democr Educ at 2.
less likely to be opposed on paternalistic grounds to the proposed advertising restrictions, particularly as these restrictions are aimed at protecting children who are a vulnerable and more naïve group of the population.

4 Parental Responsibility

A common argument against the use of advertising restrictions is that children’s diets are a matter of parental responsibility. On this basis, advertising restrictions are not necessary as parents have a duty to set limits on what their children should be viewing and to ensure their children are eating a healthy diet. This argument is often used by industry to essentially blame parents for their child’s obesity on the basis they haven’t fulfilled their parenting duties.452

Importantly, advertising restrictions are not about compensating for a lack of parental responsibility. By removing advertising that targets children, such as promotions, characters and cartoons, unhealthy food is less likely to appeal to children and they are less likely to buy it themselves or nag their parents to buy it for them. The law is thus helping parents protect children as opposed to doing their job for them. Advertising restrictions do not remove unhealthy food products from the market. If parents still decide to buy unhealthy food for their children, this is where other obesity interventions, such as the HSR label, encourage parents make healthy food choices for their children.

5 How Might Consumers React to Restrictions on Advertising Towards Children?

An important consideration for regulators is how consumers will react to new legislation restricting advertising towards children. Research has been conducted in New Zealand surveying consumers’ acceptance of children’s advertising restrictions. Six out of ten survey participants said food marketing “really concerns me” and the majority (67 per cent)

452 Simoes, above n 60, at 358–359.
said they would support the regulation of food marketing. Of those in favour of regulating food marketing, 92 per cent favoured a ban on TV advertisements for unhealthy food and beverages when children watch TV. A further 45 per cent favoured a ban on unhealthy food and beverage companies sponsoring sports and other events. These results emphasise that consumers are likely to react positively towards the implementation of advertising restrictions to protect children.

6 How Might Industry React to Restrictions on Advertising Towards Children?

The food industry and advertising industry are likely to oppose the change from self-regulation to government administered legislation. As discussed above, industry often argue that advertising restrictions are unnecessary because children’s diets are a matter of parental responsibility. If the food industry is not able to advertise a proportion of their products, there is a possibility the restrictions may impact product sales and profitability. However, the food industry needs to balance their need for sales and profitability against their moral responsibilities towards consumers health. Furthermore, the food industry should not take advantage of children knowing they are more vulnerable and less likely to be critical of information they are viewing compared to adults.

7 Implications of Advertising Restrictions – Freedom of Expression

Before implementing any legislation, regulators must consider whether there could be any breach of the New Zealand Bill of Rights Act 1990 (NZBORA). The NZBORA applies to “acts done by the legislative, executive or judicial branches of the government”. As the advertising restrictions would be implemented and enforced by the government, NZBORA applies. Section 14 of the NZBORA states that “everyone has the right to freedom of
expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form”. On the face of it, advertising restrictions are inconsistent with s 14 of the NZBORA. However, they may still be considered reasonable and demonstrably justified under s 5 of the NZBORA. Section 5 states “subject to section 4, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits as prescribed by law as can be demonstrably justified in a free and democratic society”.

There is a strong argument to suggest the proposed advertising restrictions put in place reasonable limits and are demonstrably justified. Given the link between advertising and the overconsumption of unhealthy food, the sheer number of obese children justifies the need to intervene through legislation. Furthermore, the legislation should only place reasonable limits on advertising to the extent necessary to address obesity and diet-related NCDs in children.

8 Children’s Rights

In 1993, New Zealand signed the United Nations Convention on the Rights of a Child (the Convention). The Convention is a human rights treaty that sets out children’s rights in international law. Article 3 undertakes that “in all actions concerning children… the best interests of the child shall be a primary consideration”. Furthermore, article 13 states that children have the right to receive information. However, this is subject to restrictions that are necessary “for the protection of national security or of public order or of public health or morals”.

It is likely the food industry would argue that children have the “right to receive information”, regardless of whether the information is promoting unhealthy food.

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456 Section 14.
457 Section 5.
However, articles 3 and 13 read together place a clear obligation on New Zealand regulators to act in the best interest of the child and protect public health. The proposed legislation is thus the best way to give effect to the Convention as opposed to letting the food industry provide information to children without restriction.

9 Monitoring

The long-term goal of reducing children’s exposure to unhealthy food advertisements is to reduce obesity and diet-related NCDs. Achieving this goal will take time and the results will not be immediate. Monitoring the effects of the new legislation will be the only way to determine if it is achieving the desired outcome on children’s eating habits. A government department or regulatory agency that is independent of the advertising industry should be established to monitor compliance and report breaches of the advertising restrictions. This would take the onus off consumers to place complaints. It is also important to maintain realistic expectations of the results that monitoring might show. Drawing a direct link between advertising restrictions and a decrease in childhood obesity will be difficult. This is because obesity is a multi-faceted issue caused by many factors. Advertising restrictions should thus be implemented as part of a package alongside other interventions such as labelling and taxes. This approach stands the best chance at achieving a reduction in obesity.

10 Enforcement and Penalties

The new legislation should be enforced by an independent agency with a range of compliance powers. Many different approaches have been taken to enforcement of advertising restrictions overseas. In the United Kingdom, broadcasters who do not comply with the BCAP Code may be referred to their regulator, Ofcom, and can be fined or in rare cases have their broadcasting licence withdrawn. On the other hand, sanctions for non-

461 MacKay, Antonopoulos and Swinburn, above n 400, at 38.
compliance with the CAP Code do not include fines. An advertisement that is in breach of the CAP Code may be amended or withdrawn.\textsuperscript{462} In Quebec, breaches of the Consumer Protection Act can result in a fine of up to $100,000 for a company.\textsuperscript{463} As mentioned in the chapter seven, the current complaints process for the ASA is slow and can take up to two weeks to determine if an advertisement is in breach of the rules. During the time the ASA Complaints Board is making their decision, any harm caused by viewing the advertisement is already done. It is unlikely government processes would result in a faster determination of whether the advertisement has breached the legislation, particularly if a prosecution is involved. Fines should thus be relied upon to deter breaches of the legislation as they would create a strong financial disincentive not to engage in non-compliant advertising.

\textit{11 Costs}

Before implementing the legislation, regulators need to weigh up the cost of implementing legislation against the potential benefits and savings in public health care costs. The United Kingdom has released cost estimates for implementing time-based prohibitions on HFSS advertisements on TV. It has been estimated that the new law will save the United Kingdom economy 2.7 billion pounds in National Health Services, social care savings and increased economic output.\textsuperscript{464} This is a substantial saving in public health care costs. This data gives a rough estimation of what similar advertising restrictions might save the public health care system in New Zealand.

It is also relevant to consider how much revenue advertising companies might lose as a result of the restrictions. In the United Kingdom it has been estimated that the proposed new law implementing time-based prohibitions on HFSS advertisements on TV would cost TV companies a collective total of approximately 112 million pounds or 2.3 per cent of advertising revenue.\textsuperscript{465} On the basis of these estimates, TV companies would be

\textsuperscript{462} Advertising Standards Authority | Committee of Advertising Practice “Sanctions” <www.asa.org.uk>.
\textsuperscript{463} Office de la protection du consommateur, above n 417, at 18 (translation: Consumer Protection Office).
\textsuperscript{464} Dimbleby, above n 65, at 43.
\textsuperscript{465} At 41.
unsuccessful at arguing they would suffer any substantial financial setback as a result of the advertising restrictions.

On balance, the harm caused by obesity and diet-related NCDs justifies the money spent implementing the legislation. A preventative approach to obesity and diet-related NCDs will undoubtedly have greater long-term benefits given that the eating habits one develops as a child often carry on into adulthood.

E Conclusion

It is imperative to regulate unhealthy food advertising towards children. This chapter has proposed the implementation of a comprehensive restrictions to limit the influence unhealthy food advertising on children’s food choices. The proposed legislation is the best way to address the flaws in the current advertising restrictions and utilises the findings from advertising restrictions that have been implemented overseas.

In order to achieve the greatest reduction in obesity and diet-related NCDs, these advertising restrictions should be implemented as part of a package of interventions. To illustrate this point, advertising restrictions that remove cartoons and promotional characters on product labels allow parents to focus on nutritional information and possibly use the HSR to make healthier food choices for their child. This shows how one obesity intervention can complement another when implemented as a package.
IX Food Reformulation – Current Targets

A Introduction

This chapter begins with a brief commentary outlining the general purpose of food reformulation targets. It continues on to analyse the targets that are currently in place and how effective they are at reducing unhealthy nutrients in processed foods. This discussion will inform a proposal in chapter ten to implement a government-led food reformulation programme.

B What are Food Reformulation Targets

Food reformulation targets place an upper limit on the inclusion of nutrients such as salt, sugar or fat in processed food products.\(^{466}\) Reformulation targets can be in the form of voluntary programmes implemented by industry, mandatory programmes imposed by the government, or government-led voluntary targets run in partnership with industry. Although the majority of obesity and diet-related NCD interventions focus on changing consumers’ food choices, reformulation targets aim to alter the underlying food supply. As addressed in chapter two, many environmental factors influence food choice including the predominance of food high in unhealthy nutrients. Reformulation has the effect of putting a greater proportion of healthy food products on supermarket shelves. Unlike other obesity interventions, food reformulation involves a certain level of acceptance of modern dietary habits. By reformulating products, they become slightly healthier choices without requiring any behavioural change on the part of the consumer.\(^{467}\)


\(^{467}\) At 55.
C Current Food Reformulation Targets

The following section will outline current food reformulation targets and assess how effective they are at reducing unhealthy nutrients in processed food products.

1 Heart Foundation Food Reformulation Programme

The Heart Foundation operates a voluntary food reformulation programme in New Zealand (formerly known as Heartsafe).468 The programme is funded by the Ministry of Health and sets reformulation targets based on the food category. The targets and timeframes are set by the Ministry in partnership with the food industry. The initial objective of the programme was to reduce the level of sodium in packaged food products. More recently, work has expanded to include sugar reformulation targets.469 The programme sets 44 targets for sodium and sugar levels in food across 35 food categories or sub-categories.470

The Heart Foundation Food Reformulation Programme is a soft paternalistic intervention. Neither the Heart Foundation nor the Ministry of Health can enforce compliance with the targets. This means reformulation is at the discretion of the food producer and any products that do not meet the targets will remain on the market.

2 How Effective is the Heart Foundation Reformulation Programme at Reducing Unhealthy Nutrients in Food?

The Heart Foundation has published limited information on the effectiveness of their reformulation programme, making it difficult to assess whether the programme has been successful at reducing sodium and sugar levels in food. However, between 2007 and 2017 the Heart Foundation reported a 25 per cent reduction in sodium levels in bread.471 Several

468 Heart Foundation “Reducing sodium and sugar in processed foods” Heart Foundation NZ <www.heartfoundation.org.nz>.
469 Mackay and others, above n 267, at 25–26.
470 Mackay and others, above n 292, at 31.
471 “Celebrating 10 years of salt reduction” Heart Foundation NZ <www.heartfoundation.org.nz>.
independent studies have also been conducted that assessed the sodium content in New Zealand food products. A study comparing data between 2003 and 2013 found no significant difference in the overall sodium content of products that were able to be matched. Food groups with the largest reductions in sodium included breakfast cereals, canned spaghetti and bread.472 Another study conducted by the New Zealand Stroke Foundation comparing the sodium content of sausages between 2013 and 2019 found sausages contained an average of 801mg of sodium per 100g of sausage. Further, there were no significant changes found in the sodium content of sausages between 2013 and 2019.473 Products included in the study were compared against the Heart Foundation voluntary targets for sodium in sausages. Less than one-third of meat sausages (beef, chicken, lamb, pork, other) in 2019 met the Heart Foundation target of 650mg/100g.474 Ultimately, the findings of these independent studies suggest that the sodium content in food products has essentially remained unchanged since the implementation of the reformulation targets. Unfortunately, there is no publicly available data on the progress that industry has made towards achieving the sugar targets.

As discussed above, the Heart Foundation Food Reformulation Programme was designed in partnership with the food industry.475 Voluntary reformulation programmes designed in this way have been criticised on the basis that industry often has too great of a conflict to ever be a true partner in public health interventions.476 The food industry has a clear interest in maintaining profitability which does not always coincide with producing a healthy product. The food industry is unlikely to support the implementation of reformulation targets that affect consumer liking of their product.

474 At 4.
475 Mackay and others, above n 267, at 25–26.
476 Kaldor, above n 459, at 58.
3 The Food Standards Code and Compositional Requirements

Although the Food Standards Code does not include reformulation targets, it does set certain compositional requirements for products that voluntarily choose to display a nutrition content claim. If for example, a food company voluntarily chose to label their product with a “low sodium” claim, it must contain no more than 120g of sodium per 100g of product according to standard 1.2.7 and schedule 4 of the Food Standards Code.477 The compositional limits only apply to products that make nutrition content claims. The opportunity to use nutrition content claims may encourage food companies to reformulate, although there is requirement to do so.

4 Internal Food Reformulation Programmes

Numerous food companies have set their own internal food reformulation targets. For example, Coca Cola made its own commitment to reduce the calories in its sparkling soft drinks by 25 per cent by 2025.478 Although internal food reformulation programmes are undoubtedly used as a marketing tactic to promote sales, they are an encouraging step towards food companies taking responsibility for the healthiness of the product they are selling consumers. This is because it is an acknowledgement by the food company that they could improve the composition of their product. It is also a promise to consumers that the company is then expected to deliver on. However, without any oversight from an independent body, it is not possible to determine if the targets are set high enough or whether they are being achieved.

477 Australia and New Zealand Food Standards Code, standard 1.2.7 and schedule 4.
\textit{D Conclusion}

This chapter outlined the current food reformulation targets. Unfortunately, there is only a limited amount of research available on the Heart Foundation Food Reformulation Programme. Evidence from independent studies suggests that there has been little change in the amount of sodium in processed food products as a result of the programme. Although nutrition content claims may encourage reformulation, there is no requirement to do so nor is it the objective of standard 1.2.7 in the Food Standards Code. Internal food reformulation programmes are an encouraging step towards the food industry taking responsibility for the healthiness of their food however, there is no independent monitoring or oversight of these targets being achieved. Ultimately, the high prevalence of NCDs indicates the current food reformulation targets are not having the desired effect on consumers health. The following chapter proposes to replace the current food reformulation programme with a new programme that is a more effective means of improving the healthiness of consumers’ diets.
X Food Reformulation – Recommendations for the Future

A Introduction

This chapter proposes to replace the Heart Foundation Food Reformulation Programme with a government-led sodium reformulation programme. The proposal utilises the discussion in the preceding chapter on the current reformulation targets and on paternalism in chapter three. The chapter begins with a brief commentary about why sodium should be the target of the reformulation programme. It continues on to propose the implementation of both mandatory and voluntary sodium limits. The proposal is intended to act as an overview, as opposed to comprehensively designing the reformulation programme.

B Why Target Sodium

There are several reasons that the reformulation programme should specifically target sodium as a priority above sugar and fat. Whilst a diet high in sodium does not directly result in obesity, high sodium intake contributes to high blood pressure and an increased risk of developing diet-related NCDs, such as heart disease and stroke. As addressed in chapter two, the most recent data indicates that New Zealand adults are consuming an average of 3,000mg of sodium per day, which is grossly above the WHO recommendation of 2,000 mg per day. These findings, paired with the research in chapter nine on the current reformulation programme, suggest that change is required to address the overconsumption of sodium.

Furthermore, there is presently an international push occurring to implement reformulation programmes with the aim of reducing the sodium content of processed food. In 2013, the WHO released their report entitled Global Action Plan for the prevention and control of noncommunicable diseases 2013-2020 which sets nine voluntary global targets to reduce

480 Ministry of Health, above n 2, at 40.
the burden of NCDs. Of particular relevance, the WHO suggests that Member states implement policies to work towards “a 30 per cent relative reduction in mean population intake of salt/sodium”. If New Zealand is to meet this target, further significant steps must be taken towards reducing consumers’ sodium intake. For clarity, such a reformulation programme could be expanded to include other nutrients such as sugar and trans fats in the future. This will be discussed in more detail later in the chapter.

C Proposed Changes to Food Reformulation

This chapter proposes that regulators should implement a two-tier government-led reformulation programme. Mandatory sodium limits should be implemented requiring food companies to reformulate products within food categories identified as those that contain unnecessarily high amounts of sodium. To complement the mandatory sodium limits, a voluntary sodium reformulation programme should be implemented simultaneously to encourage food companies bring down the average sodium content in products in other designated food categories.

The voluntary reformulation programme will differ from what is currently in place because it will be wholly designed and administered by the government. It is helpful to observe reformulation programmes that have already been implemented overseas. Denmark, Argentina, South Africa and the United Kingdom will be used as examples throughout to inform the design of the reformulation programme in New Zealand. Although not all of these countries have implemented limits on sodium, it is still beneficial to use the design of these programmes as case studies.

481 World Health Organization, above n 12, at 5–6.
482 Mackay and others, above n 292, at 22.
1  **Mandatory Nutrient Limits**

The first part of this proposal is to implement mandatory nutrient limits on sodium. Mandatory nutrient limits can be implemented by way of legislation or regulations and specify the maximum permitted amount of a particular nutrient allowed in food. Mandatory nutrient limits force food producers to reformulate if they want to continue selling their product on the market.

This section will specifically examine Denmark, South Africa and Argentina as examples of countries that have already implemented mandatory nutrient limits. Denmark was the first country to place a mandatory 2g per 100g limit on the inclusion of industrially produced trans fats in food products. Furthermore, South Africa and Argentina have implemented mandatory limits on sodium in a range of food products. Although this proposal does not suggest implementing mandatory nutrient limits on trans fats, the reformulation programme in Denmark can still be drawn upon for the purposes of examining the results of the programme.

Generally, the results of the reformulation programmes in Denmark, South Africa and Argentinian show that the programmes have been successful at reducing target nutrients. Specifically, the ban on trans fats in Denmark has proven to be an effective means of reducing cardiovascular disease mortality rates. Before the implementation of the restrictions on trans fats, cardiovascular disease mortality rates in Denmark were similar to other OECD countries. In the three years after the mandatory limits on trans fats were implemented, there was an estimated reduction in cardiovascular disease mortality of 14.2 deaths per 100,000 people per year.

There is limited research available on the effectiveness of mandatory sodium limits implemented in South Africa and Argentina, given that the programmes have only

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483 Kaldor, above n 459, at 55.
relatively recently been implemented. Nevertheless, research conducted on the Argentinian mandatory sodium limits between 2011 and 2015 found the average daily salt intake fell by 2g per day. A reduction of 2g per day brought the average daily intake level down from 11.2g to 9g per day. Although further efforts are still needed to bring the average daily intake down to the 5g target, the progress made to date is encouraging. An analysis of the projected effects of the regulations in South Africa suggests successful implementation of the mandatory sodium limits will reduce sodium in household purchases by approximately 5.4 per cent from 2018. Overall, present findings suggest that mandatory nutrient limits can be an effective means of reducing the consumption of specific nutrients. Further, the results in Denmark demonstrate that it is possible to draw a link between the reformulation programme and a decrease in NCDs. These findings form the basis of the strong proposal to implement mandatory sodium limits in New Zealand.

2 Voluntary Targets

The second part of this proposal suggests the implementation of voluntary sodium targets. This section will discuss the approach taken to voluntary reformulation in the United Kingdom and will consider how it can be used to inform the design of the new voluntary sodium targets in New Zealand.

The voluntary sodium reformulation programme in the United Kingdom has been recognised globally as one of the most successful. Work on sodium reduction began in the United Kingdom in 2004 with the aim of gradually reducing the levels by targeting specific food groups that contribute most to consumers’ sodium intake. Retailers, manufacturers and the eating out of home sector are expected by the government to work

486 Rhoda N Ndanuko and others “Projected effects on salt purchases following implementation of a national salt reduction policy in South Africa” [2020] Public Health Nutr 1 at 3.
487 Monro and others, above n 465, at 4063.
towards the targets. The most recent targets are expected to be achieved by 2024.\textsuperscript{488} Public Health England continues to monitor the progress of the reformulation programme and has published a second progress report on the 2017 revised targets. Overall, the results convey a mixed picture in relation to the achievement of the targets. Just over half of the targets were met for food purchased for in-home consumption, although there was no change between 2017 and 2018. The report found that retailers met more reformulation targets than manufacturers. In 2018, 74 per cent of products purchased for the eating out of home were at or below the targets set, compared with 70 per cent in 2017. In 2018-2019 the average sodium consumption in the United Kingdom was reported at 8.4g per day in comparison with the recommended 6g per day. Given that sodium consumption in the United Kingdom remains well above recommended levels, sodium reduction remains a clear priority for the government. Public Health England has publicised that they remain committed to encouraging the industry to achieve the sodium reduction targets by 2024.\textsuperscript{489} Although further work is needed to reduce the United Kingdom population’s sodium intake to the desired 6g per day, steady progress has been made. The success observed in the United Kingdom lends strength to a proposal to implement a similar voluntary reformulation programme in New Zealand. Specific considerations of the proposal will be discussed below.

\textit{D Specific Considerations of the Proposal}

\textit{1 What Food Categories Should be Targeted by a Reformulation Programme?}

This section of the proposal will consider food categories that should be targeted by the reformulation programme. Currently, the Heart Foundation Food Reformulation Programme targets 35 food categories or sub-categories.\textsuperscript{490} This section will discuss the

\textsuperscript{488} Public Health England \textit{Salt reduction targets for 2024} (2020) at 4.
\textsuperscript{489} Public Health England \textit{Salt targets 2017: Second progress report A report on the food industry’s progress towards meeting the 2017 salt targets} (2020) at 29.
\textsuperscript{490} Mackay and others, above n 292, at 31.
various approaches taken overseas as these should be taken into consideration before deciding what changes are needed to the current food categories.

(a) Overseas approach

In Denmark, mandatory nutrient limits on trans fats permit a maximum of 2g per 100g across all food categories including imported and restaurant foods. Denmark’s approach ensures that there is a reduction in trans fats across the entire food supply. Conversely, Argentina and South Africa have selected specific food categories to target with mandatory nutrient limits on sodium. In Argentina, a law was enacted in 2014 setting maximum sodium levels in three processed food groups: meat products, starch products (bread and baked goods), and soups or broths. Sodium targets for meat products and soups have since been revised and lowered by approximately 5 per cent. Further, ketchup and mayonnaise have been added to the list of regulated food categories. South Africa has similarly implemented mandatory sodium limits on 13 food categories. The particular categories were selected on the basis they contain products with high levels of sodium and are regularly consumed by South Africans. The categories are: bread, breakfast cereals and porridges, fat and butter spreads, savoury snacks, salt and vinegar flavoured savoury snacks, flavoured potato crisps, processed meat, meat sausages, dry soup powders, dry gravy powders, instant savoury sauces and powders and stock cubes, powders and pastes.

492 Kaldor, above n 459, at 55.
495 Regulations relating to the Reduction of Sodium in certain foodstuffs and related matters R214 2013 (South Africa).
496 Ndanuko and others, above n 479, at 2.
With regards to voluntary reformulation programmes, the United Kingdom has taken a much broader approach with their sodium reformulation programme which covers 84 specific food groups on the basis that they contribute the most sodium to consumers diets.\textsuperscript{496} A unique aspect of the United Kingdom’s approach is that the programme covers the eating out, delivery and takeaway sector. Targets have been set for 11 food categories as they are considered the most popular food groups purchased by consumers. The targets include meal targets and dish targets.\textsuperscript{497}

(b) The approach that should be taken in New Zealand

Based on the observations above, mandatory sodium limits should be implemented on food categories that contain unnecessarily high amounts of sodium. For example, processed meats including sausages, may be an appropriate food category to target as they have been identified as a food category containing products with unnecessarily high sodium according to Stroke Foundation research. The voluntary targets should be used to bring down the average sodium content in products in all other designated food categories. New Zealand regulators should consider taking an approach similar to the United Kingdom whereby 84 food groups were identified as contributing the most sodium to United Kingdom consumers’ diets.

As discussed in chapter two, it has become increasingly popular for food to be consumed out of the home, such as in fast-food restaurants. Furthermore, food consumed out of the home tends to be of poorer nutritional quality compared to food that is prepared at home.\textsuperscript{498} On this basis, New Zealand should take an approach similar to the United Kingdom and look to include the eating out, delivery and take-away sector within the target food categories.

\textsuperscript{496} Public Health England, above n 481, at 6.
\textsuperscript{497} Meal targets are based on a specific dish and include sides and accompaniments, for example pasta and salad. Dish targets account for individual dishes served as part of a meal or on their own, for example pies. At 20.
\textsuperscript{498} Story and others, above n 24, at 260.
2 Setting Targets

An important consideration for regulators is setting the sodium targets. In the United Kingdom, evidence was gathered from various sources before setting the sodium targets. Evidence included the sodium content of foods from food label data, major contributors to sodium intake from dietary surveys and market share data, and estimates of dietary intake from urinary analysis. Additional considerations when setting the targets in the United Kingdom included the reductions in sodium achieved to date, the functionality of salt in some products (such as preservative functions), the timing of reformulation cycles and associated costs.\footnote{Public Health England, above n 482, at 4.} Public Health England stated that the intent of the targets is to be “stretching but achievable and to achieve incremental salt reduction without people being affected so that everyday foods remained acceptable”.\footnote{At 4.} Reformulation targets in New Zealand should be developed on the basis of similar evidential foundations. As this is only a proposal, exact targets shall not be suggested.

3 Ethical Considerations – Arguments About Paternalism

(a) Hard paternalism

Naturally, there are a number of ethical objections to mandatory nutrient limits. These arguments center around concerns that mandatory nutrient limits are a hard paternalistic intervention that limits consumers freedom of choice and interferes with free markets.\footnote{Kaldor, above n 459, at 56.} With mandatory nutrient limits in place, consumers are unable to legally purchase products that contain nutrients above the mandated levels. Resnik is one of the key academics who has addressed the ethics of mandatory nutrient limits specifically with regards to the ban on trans fats in Denmark. Although his arguments are based around trans fats, they apply equally to mandatory sodium limits. Resnik does not dispute that mandatory nutrient limits
have the potential to reduce diet-related NCDs; however, he sees the impact on freedom of choice too great. Resnik argues that there are other avenues for reducing unhealthy nutrients that should be explored before resorting to mandatory nutrient limits such as labelling and educational interventions. Further, he expressed concern that mandatory nutrient limits will start a slippery slope that could lead to other restrictions on food choice. While consumers may be comfortable that it is appropriate for the government to restrict the sale of food that is deemed to be a safety risk (such as food containing harmful microbes or glass), bans implemented for public health reasons are more controversial. Consumers may wish to willingly and knowingly consume unhealthy food that puts them at a higher risk of developing an NCD.502

Kaldor also considered the ethical objections to mandatory nutrient limits. She argues that when comparing mandatory and voluntary nutrient limits, the two interventions have similar impacts on freedom of choice. The ideal outcome of both types of interventions is to reduce diet-related NCDs by lowering the amount of unhealthy nutrients in food products. Kaldor considers that the impact on freedom of choice should be considered moot, paving the way for other considerations such as effectiveness and cost to be taken into account.503 However, it is unlikely all food producers will implement voluntary nutrient limits. Without complete implementation of the nutrient limits, old formulations of the product that are still high in undesirable nutrients will remain on the market. This means voluntary nutrient limits have a lesser impact on freedom of choice, despite having the same aim as mandatory nutrient limits.

As discussed in chapter three, Sarah Conly is a key scholar in the area of hard paternalism and provides many convincing arguments in favour of implementing hard paternalistic interventions. Conly uses the ban on trans fats in New York restaurants as an example of a justified use of hard paternalism to produce positive public health outcomes.504 Conly’s

503 Kaldor, above n 459, at 63.
504 Conly, above n 122, at 152–155.
arguments in support of a ban on trans fats extend to the proposed mandatory sodium limits as both have similar public health objectives.

Notwithstanding Resnik and Kaldor’s concerns, the proposed mandatory sodium limits are justified on the basis of the harm caused by excessive sodium intake. When mandatory nutrient limits are used with caution, they can be an effective tool requiring food producers to reformulate their products in an effort to ensure consumers eat healthier diets. Further, mandatory sodium limits may not be as paternalistic as they seem because consumers can proactively add table salt to their food if they wish to consume more than what is considered healthy.

(b) Soft paternalism

Typically, there are fewer ethical objections to voluntary reformulation programmes than there are to mandatory nutrient limits. Voluntary reformulation allows consumers to maintain the freedom to purchase products that do not meet reformulation targets. With a combination of pre-existing and reformulated products on the market, this may trigger a range of substitution behaviours in consumers’ food choices. Allowing pre-existing and reformulated products to co-exist may thus hinder progress to reduce sodium consumption and lessen public health benefits. This proposal seeks to mitigate such an effect by subjecting certain food categories to mandatory sodium limits. Once in place, original formulations of products in the relevant food categories would not be allowed to remain on the market.

4 How Might Consumers Respond to the Proposal to Implement a Government-led Reformulation Programme?

Consumer acceptance will be a key driver of the success of a reformulation programme. Education campaigns should be implemented to inform consumers of the purpose of the reformulation programme and to help overcome any scepticism. Furthermore, the government should be transparent about the targets industry are being asked to meet.

A key concern with reformulation programmes is the risk of unwanted product substitutions. To avoid this outcome, sodium should be reduced gradually to ensure that changes in composition are not perceived by consumers as altering the sensory characteristics of their food. Gradual reformulation will reduce consumers intake of unhealthy nutrients, without consumers feeling the need to change their food choices.506

5 How Might the Food Industry Respond to the Proposal to Implement a Government-led Reformulation Programme?

The food industry is likely to favour an entirely voluntary reformulation programme because it allows them to keep existing products on the market and add to their product range with the reformulated products if they wish to. As demonstrated in chapter nine, an entirely voluntary reformulation programme has not been an effective means of achieving a reduction in sodium in processed food products.

There is a risk that the food industry will respond to the proposed reformulation programme by making unhealthy ingredient substitutions. Unhealthy substitutions were a concern in Denmark after the implementation of the 2g per 100g limit on trans fats. Research on the composition of 60 paired products for sale in Denmark in 2002, 2004 and 2006 found that 68 per cent of the products had substituted trans fats with saturated fats, 22 per cent with

506 At 2.
mono-unsaturated fatty acids, and 10 per cent with poly-unsaturated fatty acids.\textsuperscript{507} Although the desired effect of the Danish legislation was achieved, as trans fats were reduced, it illustrates the risk of substitutions with equally as unhealthy ingredients such as saturated fats.

With respect to sodium, there is a risk that food producers in New Zealand will reduce sodium by substituting it with monosodium glutamate (MSG) or potassium chloride. The healthiness of these substitutes is considered controversial. Furthermore, there is a risk that food producers will increase the sugar or fat content of a product to compensate for the flavour lost from sodium. It may be possible to lessen these unintended effects with the use of other obesity interventions. For example, sugar can be targeted through taxes.

\section*{6 The Joint Food System}

As addressed in chapter four, the Food Treaty lists matters that fall within scope of being regulated by the Food Standards Code, including the composition of food.\textsuperscript{508} Ideally, the proposed mandatory sodium limits would be implemented as a joint food standard in the Food Standards Code to maintain a harmonised approach with Australia. However, if Australia and New Zealand could not reach agreement on the reformulation programme, New Zealand may need to consider alternative options. Implementing domestic legislation to mandate sodium limits would likely be considered inconsistent with New Zealand’s obligations under the Food Treaty and could put New Zealand’s international reputation at risk.\textsuperscript{509} Nevertheless, the extent of the harm caused by high sodium consumption in New Zealand may justify acting in this manner. As voluntary sodium limits would not be enforceable, there is no need for these targets to be written as a legal instrument.

\textsuperscript{508} Food Treaty, above n 141, art 3.
\textsuperscript{509} Food Treaty, above n 141, art 5(3).
7 Trade Considerations

Regulators should also consider the relevance of international trade agreements to which New Zealand is a party. In accordance with the TTMRA, food products are able to be freely traded between Australia and New Zealand without needing to comply with the importing country’s requirements.510 Ideally Australia and New Zealand would both implement the mandatory sodium limits in the Food Standards Code. Imports from Australia would thus already comply with New Zealand compositional requirements.

As discussed in chapter six with regards to food labelling, it is paramount that all importers are given most-favoured-nation treatment in accordance with Article I of the GATT.511 If New Zealand were to implement unilateral domestic legislation enforcing mandatory sodium limits, all imported food products including those from Australia should be subject to the same requirement to meet the sodium limits. To allow otherwise would undermine the objective of the mandatory sodium limits and would put New Zealand at risk of a trade dispute.

Mandatory nutrient limits have only once been challenged overseas on the basis of an alleged breach of the European Commission Treaty. The European Commission challenged the implementation of the law limiting industrial trans fats in Denmark on the grounds that it breached the European Commission Treaty on the free movement of goods. A case was set to go before the European Court of Justice but in 2007 the European Commission made the decision to drop the case, accepting that the measure was justified in the interests of public health.512 Meanwhile, many other countries have begun introducing similar bans on the use of industrially produced trans fats in food.

With regards to sodium, Argentina and South Africa have already implemented mandatory sodium limits. Given that no trade dispute has arisen in this respect to date, it may indicate

511 GATT, above n 81, art I.
512 World Health Organization “Denmark, trans fat ban pioneer: lessons for other countries” <www.who.int>.
a low risk of a trade dispute arising if similar legislation is implemented in New Zealand. Prudent regulators should conduct an in-depth analysis of international trade law and make an assessment of the risk of a trade dispute before implementing mandatory sodium limits in New Zealand.

8 Monitoring, Enforcement and Penalties

In chapter nine it was highlighted that there is currently a lack of publicly available data on the results of the Heart Foundation Food Reformulation Programme. Lacking this information has made it difficult to assess whether any progress has been made towards achieving the voluntary targets. Importantly, the new reformulation programme should implement transparent reporting and monitoring. The United Kingdom is a good example of a country that maintains transparent monitoring of its voluntary reformulation programme. Despite being voluntary, regular progress reports are published allowing the public to scrutinise how well food producers are progressing towards achieving the targets. Furthermore, the reformulation programme may feel less paternalistic if consumers can see the targets and the food categories that the government are asking the food industry to change. Monitoring should be used to inform subsequent changes that need to be made to the sodium targets and food categories subject to the programme. If food companies are not making satisfactory progress towards achieving the voluntary sodium targets, regulators should consider shifting them to mandatory limits.

It is also important to manage realistic expectations when it comes to results of the reformulation programme. Progress is likely to be slow. As suggested earlier, consumers should not notice a major change in the sensory characteristics of their food. Reformulation programmes along with other obesity interventions often face criticism because it is inherently difficult to directly link the intervention to any marked reduction in obesity or diet-related NCDs. This is simply due to the nature of the problem as a consumer’s diet is not considered healthy or unhealthy on the basis of the consumption of a single nutrient,
such as sodium.\textsuperscript{513} Denmark is one of the few countries that, after over a decade after implementation, is able to point to a direct link between their reformulation programme and a decrease in cardiovascular disease mortality.\textsuperscript{514} To achieve similar results in New Zealand, this would require a sustained commitment to the reformulation programme over decades. With regards to enforcement, it is only possible to enforce the mandatory nutrient limits. Breaches should result in fines and the legally non-compliant product taken off the market.

9 Expanding the Reformulation Programme to Sugar and Trans Fats

Although this proposal focuses on the development of a reformulation programme that targets sodium, there is scope to expand the reformulation programme to other nutrients such as sugar and trans fats in the future if there is evidence to justify doing so. Currently, the Heart Foundation Reformulation Programme includes targets to reduce sugar. However, there is no research available to suggest these targets are being achieved or that any sugar reformulation is taking place. It is therefore necessary to look whether any sugar reformulation programmes have successfully been implemented overseas.

The United Kingdom operates a voluntary sugar reduction programme to reduce “the amount of sugar in foods that contribute the most to the intakes of children by 20 per cent by 2020”.\textsuperscript{515} Public Health England published a report on the progress of the voluntary sugar reduction programme comparing the sugar content of products between 2015 and 2019. In retailers and manufacturer branded products, there was only a 3 per cent reduction in the total sugar per 100g. The greatest sugar reduction was observed in breakfast cereals and yoghurt products.\textsuperscript{516} In the eating out of home sector, there was hardly any change to the average sugar content. The largest reductions in sugar content were seen in breakfast

\textsuperscript{513} Gressier and others, above n 498, at 9.
\textsuperscript{514} Restrepo and Rieger, above n 477, at 70–71.
\textsuperscript{516} At 23.
cereals, cakes and biscuits however, there was an increase for chocolate confectionary.\textsuperscript{517} Overall, the United Kingdom’s voluntary sugar reformulation programme has shown little success. On this basis, the proposal does not include targets to reduce sugar because there is little evidence to suggest this would be an effective obesity intervention in New Zealand. However, if this situation changes and data becomes available to suggest that a reformulation programme for sugar is justified, the reformulation programme in New Zealand could be extended to include sugar reformulation targets.

Several countries overseas have used reformulation programmes to target and reduce trans fats. The WHO has asked that member states prioritise working towards the goal of eliminating industrially produced trans fats from the global food supply by 2023.\textsuperscript{518} In spite of this, the proposal in this chapter to implement a new reformulation programme does not extend to trans fats targets. The reason for this being that there is no current evidence to suggest intake of trans fats in New Zealand is above the WHO target (one per cent of total energy intake). Monitoring from 2009 suggests New Zealanders obtain an average of 0.6 per cent of their daily energy intake from trans fats.\textsuperscript{519} Research should be undertaken to update the data and, if trans fats intake is found to be above the WHO recommendation, regulators should consider extending the reformulation programme to include targets for trans fats. Importantly, reformulation programmes are not the only way to reduce unhealthy nutrients in the food supply. For example, sugar can be targeted through taxes as will be discussed in the next chapter.

\textit{E Conclusion}

This chapter has proposed to replace the Heart Foundation Food Reformulation Programme with a combination of mandatory sodium limits and voluntary reformulation targets by way of novel legislation. Mandatory sodium limits should be used to reduce sodium in food

\textsuperscript{517} At 48.
\textsuperscript{518} World Health Organization “REPLACE trans fat” <www.who.int>.
\textsuperscript{519} Food Standards Australia New Zealand “Trans Fatty acids” (May 2017) <www.foodstandards.gov.au>.
categories identified as those containing unnecessarily high amounts of sodium. Although mandatory nutrient limits are criticised as a highly paternalistic intervention, the harm to consumers' health caused by the overconsumption of sodium justifies the use of hard paternalism. Voluntary sodium targets should be used to encourage food companies to bring down the average sodium content in products in other designated food categories. The targets should be set at levels that are ambitious, but achievable. Importantly, the government should be transparent about the existence of the reformulation programme and consumers should have access to reports on the progress food companies are making towards achieving the targets. If monitoring indicates food companies are not making satisfactory progress towards achieving the voluntary sodium targets, regulators should consider shifting them to mandatory limits.

Although this chapter focuses on the implementation of a sodium reformulation programme, there is scope to expand the programme to sugar and trans fats in the future, if there is evidence to justify doing so. It is, however, important to maintain realistic expectations about what a reformulation programme can achieve. Reformulation alone is unlikely to lead to any quick or major reductions in diet-related NCDs. However, when implemented in conjunction with other initiatives such as front-of-pack labels and taxes there is more likely to be observable progress towards achieving this goal.
XI Food Taxes – Recommendations for the Future

A Introduction

This chapter proposes to implement sugar-sweetened beverage (SSB) taxes in New Zealand to reduce excess intake of sugar contributing to obesity and diet-related NCDs. It begins with a brief commentary on the current approach to food taxes in New Zealand and goes on to discuss why SSBs should be taxed. This chapter provides an overview of the design of the proposed taxes and provides examples from the United Kingdom, Chile and Mexico where SSB taxes have already been implemented.

B Current Approach to Food Taxes in New Zealand

The majority of consumer goods and services, including imports, are subject to a Goods and Services Tax (GST) of 15 per cent.\(^{520}\) GST is a means for the government to raise revenue in a fair and efficient manner. Given all products are subject to GST, there is minimal distortion in consumers purchasing behaviours. There are additional excise taxes on tobacco, fuel and alcohol products.\(^{521}\) This section will focus specifically on tobacco and alcohol taxes. It will explore the reasoning behind the implementation of such taxes and the effects on purchasing behaviours.

(a) Tobacco

Tobacco is an additive product which is known to cause lung cancer amongst a substantial number of other illnesses. It is harmful to the consumer and those who breathe the second-hand smoke.\(^ {522}\) Several legal interventions such as advertising restrictions and taxes have been introduced by the government to discourage the use and reduce harm caused by

\(^{520}\) Goods and Services Tax Act 1985, s 8.

\(^{521}\) Law Commission Alcohol in Our Lives: Curbing the Harm (114 2010) at 291.

tobacco products. With particular regard to taxes, the New Zealand government introduced an excise tax whereby the amount taxed is based on the amount of tobacco content in the product.\textsuperscript{523} The combination of interventions has achieved a reduction in the number of adult smokers. In 2011-2012, the Ministry of Health reported 18.4 per cent of adults were smokers. Subsequently, in 2020-2021 the same survey reported 10.9 per cent of adults were smokers.\textsuperscript{524} Although these results cannot be attributed to taxes alone, the combination of interventions has had marked effects.

(b) Alcohol

Excessive alcohol consumption can have a range of consequences such as liver disease, gastritis, increased assaults, sexual offending, family violence and road trauma. The harm caused by alcohol places a serious burden on the justice system, social services and public health services.\textsuperscript{525} Consequently, the New Zealand government introduced a levy on alcohol to discourage consumption and reduce alcohol-related harm. The amount of the levy is set in the New Zealand Public Health and Disability (Health Promotion Agency Levy) Order 2021 and is based on the percentage of alcohol content in a beverage.\textsuperscript{526} Alcohol products are thus subject to both GST and the levy. Consequently, there is effectively a “double tax” that is intended to discourage the purchase of alcohol. The levy is also a means of assisting the government to raise money to pay for the harm caused by excessive alcohol consumption.\textsuperscript{527} Although the levy has not brought about any significant reduction in hazardous drinking, this may be an indication that the levy needs to be increased or that additional interventions are required to reduce hazardous drinking in New Zealand.\textsuperscript{528}

\textsuperscript{523} Excise and Excise-equivalent Duties Table (Tobacco Products Indexation) Amendment Order 2020.
\textsuperscript{524} Ministry of Health, above n 1.
\textsuperscript{525} Ministry of Justice The Effectiveness of Alcohol Pricing Policies: Reducing harmful alcohol consumption and alcohol-related harm (2014) at 11.
\textsuperscript{526} New Zealand Public Health and Disability (Health Promotion Agency Levy) Order 2021, schedule.
\textsuperscript{527} Action Point “Alcohol excise taxes” Action Point <www.actionpoint.org.nz>.
\textsuperscript{528} Ministry of Health statistics indicate that in 2020-2021, 19.9 per cent of adults were considered hazardous drinkers. Further, there has been no significant change in the percentage of hazardous drinkers since 2015-2016.
(c) Conclusion

These two examples helpfully illustrate the use of taxes with the goal of reducing consumption of a product considered harmful to consumers well-being. Alcohol and tobacco taxes are both paternalistic interventions as the government have decided it is in consumers’ best interests to be protected from particular harms. As will be discussed below, this proposal suggests that SSBs also fall into this category of products and should be subject to additional taxes in New Zealand.

C  A New Proposal

There are several possible rationale for implementing taxes on unhealthy food products. The primary reason for implementing such taxes is to achieve a reduction in obesity and diet-related NCDs. Taxes can be used to discourage consumers from purchasing certain unhealthy food products, subsequently reducing obesity and diet-related NCDs. A further justification for implementing taxes is to correct the market failure that has occurred whereby industry has flooded the market with unhealthy products. Currently, the public health costs associated with obesity and diet-related NCDs are largely paid for by the taxpayer funded health system or the individual. This means the industry does not pay for the harm caused to consumers’ health by oversupplying unhealthy food. Taxing the industry attempts to correct this market failure and make the industry more accountable. In addition, taxes can create an incentive for food companies to reformulate their products. Excise taxes are particularly useful for encouraging reformulation and will be discussed in greater detail later in this chapter.

Ministry of Health, above n 1.

529 Wilson and others, above n 84, at 72.

530 At 72.
1 Why Target Sugar-Sweetened Beverages?

SSBs typically contain high levels of caloric sweeteners or free sugars such as sucrose, high-fructose corn syrup or fruit juice concentrate.\textsuperscript{531} Beverages can be carbonated such as lemonade or uncarbonated such as vitamin waters.\textsuperscript{532} Excess sugar intake from the consumption of products such as SSBs has been linked to unhealthy weight gain and an increased risk of developing obesity and diet-related NCDs.\textsuperscript{533}

SSBs are popular in New Zealand and patterns of consumption are high. As canvassed in chapter two, the Ministry of Health estimates that 26 per cent of children consume fizzy drinks at least once a week and 8.9 per cent consume fizzy drinks at least three times a week.\textsuperscript{534} Furthermore, the New Zealand Adult Nutrition Survey found 23.7 per cent of respondents consumed fizzy drinks three or more times a week and 7 per cent consumed fizzy drinks daily.\textsuperscript{535} As the survey was last conducted in 2008-2009, adult consumption patterns may have changed. However, based on the data at hand, results illustrate that SSB consumption is high for both adults and children in New Zealand, and contributes unnecessary sugar to the diet.

Public health professionals have expressed particular concern about high SSB consumption because these products are nutrient-poor and less satiating than other solid foods.\textsuperscript{536} Research indicates that energy consumed in SSBs is not well compensated, rather consumers tend to continue to eat the same quantity of food making their overall energy intake even higher.\textsuperscript{537} There is also evidence to suggest that sugar has addictive

\textsuperscript{531} Free sugars refer to monosaccharides (such as glucose or fructose) and disaccharides (such as sucrose or table sugar).
\textsuperscript{532} World Cancer Research Fund International \textit{Building momentum: lessons on implementing a robust sugar sweetened beverage tax} (2018) at 6.
\textsuperscript{533} At 4.
\textsuperscript{534} Ministry of Health, above n 41.
\textsuperscript{535} University of Otago and Ministry of Health, above n 42, at 255.
\textsuperscript{536} Cliona Ni Mhurchu and others “Twenty percent tax on fizzy drinks could save lives and generate millions in revenue for health programmes in New Zealand” (2014) 127 N Z Med J 92.
properties. The sugar in SSBs generally does not serve any functional purpose (such as preserving the food) rather it is only there for taste. For this reason alone, SSBs are a prime target for taxation as the removal of sugar will not create any food safety risk, yet will benefit consumers’ health.

Moreover, the WHO has recommended SSB taxation as an “effective intervention” to reduce unhealthy diets and address NCDs. As a member of the WHO, New Zealand should consider how it is going to meet its international obligations. Approximately 46 jurisdictions have already implemented taxes on SSBs. The various different approaches that have been taken to SSB taxes overseas can be used to inform the appropriate approach in New Zealand. Overall, SSBs are a logical target for the tax given their high consumption and contribution of unnecessary sugar to the diet.

2 How Effective are Sugar-Sweetened Beverage Taxes?

Generally, SSB taxes implemented overseas have been successful at reducing consumers purchases and encouraging industry to reformulate. The discussion below will look at the outcomes of studies conducted on SSB taxes in the United Kingdom, Chile and Mexico. In the United Kingdom, the Sugar Drinks Industry Levy (SDIL) was first implemented in 2018. Research conducted by Public Health England comparing data between 2015 and 2019 reported a decrease in the total sugar content of soft drinks from 5.8g per 100ml to 3.6g per 100ml. Another study reported that the sale of sugar to be used in soft drinks decreased by 30 per cent between 2015 and 2018. At the same time, the average sugar

\[\text{At 2.}\]

\[\text{Public Health England, above n 508, at 62.}\]

\[\text{World Health Organization “Best buys” and other recommended interventions for the prevention and control of noncommunicable diseases (2017) at 11.}\]

\[\text{Mackay and others, above n 292, at 21.}\]

\[\text{Soft Drinks Industry Levy Regulations 2018 (UK).}\]

\[\text{Public Health England, above n 508, at 75.}\]
content in soft drinks fell 34 per cent and there was a 50 per cent decrease in the volume sales of products subject to the SDIL.  

Sceptics of the sugar tax in the United Kingdom pointed out that there has been no measurable reduction in obesity. However, United Kingdom officials have responded confirming that the intervention has led food companies to reformulate their soft drink recipes effectively removing 45,000 tonnes of sugar from the annual consumption of soft drinks. Although the health benefits cannot be seen yet, this data shows that the SDIL has resulted in a significant reduction in sugar available to consumers in the food supply.

In Mexico, an evaluation of the tax on SSBs reported a 5.5 per cent decline in purchases in 2014 and a 9.7 per cent decline in purchases in 2015. Another research study observed a similar reduction in SSB purchases in 2014 and reported a 6.3 per cent reduction in purchases of SSBs in 2014 compared with expected purchases based on trends from 2008 to 2012. Interestingly, the research found a 16.2 per cent increase in purchases of bottled water after the tax was implemented. The observed behaviour was exhibited predominantly in low and middle-income households, urban areas and among households with adult residents only. Notably, there is relatively limited access to safe tap water in many areas of Mexico which may be reflected in the substitution of SSBs for bottled water. High-income countries, such as New Zealand, may see other product substitutions because water is free, clean and readily available.

544 LK Bandy and others “Reductions in sugar sales from soft drinks in the UK from 2015 to 2018” (2020) 18 BMC Med at 4.  
545 Dimbleby, above n 65, at 46.  
546 Lindsey Smith Taillie and others “Do high vs low purchases respond differently to a nonessential energy-dense food tax? Two-year evaluation of Mexico’s 8% nonessential food tax” (2017) 105 Prev Med 37 at 40.  
In Chile, research has been published showing somewhat contradictory results on the effectiveness of their two-tiered SSB tax. A study assessing the changes in household-level purchasing 12 months post-implementation of the SSB tax found a significant reduction (21.7 per cent) in the volume of high-taxed beverages. There was however, no significant increase in purchases of low-taxed beverages.\(^{549}\) The results are surprising because the aim of the two-tiered system is to encourage consumers to swap high-taxed beverages for low-taxed beverages.

An additional study was performed in Chile analysing household data collected between 2013 and 2015. The results observed a 3.4 per cent decline in household purchases of high-taxed beverages.\(^{550}\) Further, high socio-economic households were less inclined to purchase high-taxed beverages (6.4 per cent less purchases) than low socio-economic households (1.6 per cent less purchases).\(^{551}\) In contrast, there was a 10.7 per cent increase in purchases of low-taxed beverages.\(^{552}\) This research shows there have been relatively small changes in the purchases of high-taxed and low-taxed beverages. Curiously, the tax had a greater impact on high socio-economic households, despite lower socio-economic households having less financial means to spend on SSBs. The results of the SSB tax in Chile are very different to those of the United Kingdom and Mexico. The conflicting results may be a reflection of the differences in tax design. As will be discussed later, Chile implemented ad valorem tax as opposed to an excise tax and includes artificially sweetened beverages in the group of products subject to tax.

Modelling has been performed based on household food expenditure data and demand elasticity to predict the possible effect of a 20 per cent tax on carbonated drinks in New Zealand. The modelling estimates that the tax would reduce daily energy intake by 0.2 per cent or 20 KJ per day. Further, approximately 67 deaths per year from cardiovascular


\(^{550}\) Caro and others, above n 540, at 13.

\(^{551}\) At 14.

\(^{552}\) At 11.
disease, diabetes and diet-related cancer could potentially be postponed or averted.\textsuperscript{553} Generally, this analysis shows that SSB taxes, when implemented overseas, have been successful at altering consumers purchasing behaviours and encouraging industry to reformulate. This discussion provides a foundation to support the conclusion that SSB taxes should be implemented in New Zealand. Reduced purchasing and dietary intake of SSBs will help achieve the aim of reducing obesity and diet-related NCDs.

\textit{D Specific Considerations of the Proposal to Implement Sugar-Sweetened Beverage Taxes}

\textit{1 What Beverages Should be Included in the Group of Taxed Products?}

It is important to be transparent about what products are subject to the SSB tax. Overseas, various approaches have been taken. In Chile, SSB tax applies to all non-alcoholic beverages with added sweeteners including energy drinks and waters. Other beverages such as milk, flavoured milk, 100 per cent fruit juice, and unflavoured water remain untaxed.\textsuperscript{554} The Chilean tax is unique from other countries because it applies to beverages that contain artificial sweeteners. Chile has likely taken this approach because there is some evidence to suggest that artificially sweetened beverages are linked to negative health outcomes similar to those of consuming beverages containing caloric sweeteners.\textsuperscript{555} Consumers are less likely to swap SSBs for artificially sweetened beverages if both are subject to tax.

In the United Kingdom beverages containing more than 5g of sugar are subject to the SDIL.\textsuperscript{556} The SDIL does not apply to drinks that contain sugar replacements, milk and

\textsuperscript{553} Mhurchu and others, above n 529, at 93.
\textsuperscript{554} Ley N 20.780 Reforma tributaria que modifica el sistema de tributación de la renta e introduce diversos ajustes en el sistema tributario 2014 (Chile) (translation: Law No. 20.780 Tax reform that modifies the income tax system and introduces various adjustments to the tax system). World Cancer Research Fund International, above n 525, at 11.
\textsuperscript{555} See Susan E Swithers “Artificial sweeteners produce the counterintuitive effect of inducing metabolic derangements” (2013) 24 Trends Endocrinol Metab 431.
\textsuperscript{556} Soft Drinks Industry Levy Regulations 2018 (UK).
milk-based drinks, milk replacements, alcohol replacements, or 100 per cent fruit or vegetable juices.\textsuperscript{557} Similarly, in Mexico, the SSB tax applies to all non-dairy and non-alcoholic beverages that contain added sugar. It does not apply to beverages with no added sugar or those containing artificial sweeteners.\textsuperscript{558}

With regards to the approach that should be taken in New Zealand, the Eating and Activity Guidelines should be the touchstone for deciding what beverages are subject to taxes.\textsuperscript{559} The Guidelines state that “plain water is the best choice of drink, but diet drinks in moderation are a better option than sugary drinks”.\textsuperscript{560} Although there may be evidence to suggest that consuming artificially sweetened beverages is linked to negative outcomes, taxing artificially sweetened beverages would be contrary to the Guidelines that suggest diet drinks are a better option than sugary drinks. On this basis, artificially sweetened beverages should not be subject to the tax.

It may be considered contentious to include milk beverages and 100 per cent fruit juices in the group of products subject to the SSB tax because they are considered to have some nutritive value.\textsuperscript{561} However, 100 per cent fruit juice contains high amounts of naturally occurring sugars and the Guidelines recommend drinking plain water and eating fresh fruit as opposed to drinking fruit juice.\textsuperscript{562} In order to be consistent with the Guidelines, 100 per cent fruit juices should be included in the group of taxed products. This approach differs from what has been implemented in the United Kingdom, Chile and Mexico. Finally, the Guidelines encourage the consumption of low-fat milk as a second choice to water.\textsuperscript{563}

\textsuperscript{557} HM Revenue & Customs “Check if your drink is liable for the Soft Drinks Industry Levy” (2018) <www.gov.uk>.
\textsuperscript{558} Ley del Impuesto Especial sobre Producción y Servicios 2013 (Mexico) (translation: Excise Tax Law for Production and Services).
\textsuperscript{559} Caro and others, above n 540, at 4.
\textsuperscript{560} Ministry of Health, above n 257.
\textsuperscript{561} At 55.
\textsuperscript{562} World Cancer Research Fund International, above n 525, at 6.
\textsuperscript{563} Ministry of Health, above n 257, at 55.
\textsuperscript{564} At 62.
Therefore, milk products should not be included in the group of taxed products as consumers should not be dissuaded from consuming these products.

Overall, beverages with added sugar and fruit juice should be included in the group of taxed products, meanwhile milk products and artificially sweetened beverages should be excluded. It is to be expected that consumers will prefer un-taxed products therefore these products should have a superior nutritional profile than taxed products.

2 What Type of Tax Should be Used?

This section will assess what type of tax should be implemented on SSBs in New Zealand. Generally, there are two different types of taxes that have been used on SSBs overseas namely, excise tax and ad valorem tax. Excise taxes can be either content-based or volume-based. Excise taxes encourage the industry to reformulate because the amount of sugar in the product determines how much tax must be paid. Consequently, the tax will decrease in proportion with the sugar content of the beverage. By way of example, Mexico has in place a volume-based excise tax of one peso per litre. Further, the United Kingdom has in place a SDIL where the content of sugar in the beverage determines the amount of tax. Ad valorem tax is calculated on the basis of the value of the goods as opposed to the quantity of sugar in the product or the volume of the product. This type of tax has been applied to SSBs sold in countries such as Chile. The advantage of ad valorem taxes is that they can easily be adjusted for inflation and are an easy system to administer. However, there is less of an incentive for industry to reformulate their products as the tax is based on the price of the product as opposed to the amount of sugar in the product. Overall, excise taxes are the favourable approach to take in New Zealand as they provide SSB producers

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564 World Cancer Research Fund International, above n 525, at 11–12.
565 HM Revenue & Customs, above n 549.
566 World Cancer Research Fund International, above n 525, at 11–12.
greater incentive to reformulate. As addressed above, encouraging reformulation is one of the key objectives of implementing the tax.

3 Who Should Pay the Tax?

With regards to who should pay the tax, the United Kingdom has taken the approach of taxing all companies who produce, bottle and import SSBs. A similar approach should be adopted in New Zealand. Inevitably, these companies will pass the cost of the taxes onto consumers by increasing product prices. This should deter consumers from purchasing SSBs. Imposing the tax on producers will create an incentive to reformulate as lower sugar products will be subject to less tax. It is important to capture both domestically made and imported products to ensure that neither is being unfairly disadvantaged by the tax. If different rules were to apply to domestic and imported SSBs, there is a possibility of an international trade dispute arising. This will be discussed in more detail later in this chapter.

4 How High Should the Tax be?

Another consideration for regulators designing the SSB tax is how high the tax should be. The tax needs to be set high enough to have the desired impact on consumers purchasing behaviour. However, the taxes should not be set too high as this could be overly prohibitive of consumers purchasing SSBs or cause undesirable product substitution behaviour resulting in the consumption of more calories.

HM Revenue & Customs “Bringing drinks liable for the Soft Drinks Industry Levy into the UK” <www.gov.uk>.
SSB tax rates vary around the world. In the United Kingdom, the SDIL is applied to SSBs in multiple tiers. Products that contain 5 to 8 grams of sugar per 100mL are taxed 18 pence per litre. Products containing 8 grams or more of sugar per 100mL are taxed 24 pence per litre. If the product contains less than 5 grams of sugar per 100mL in its ready to drink form, it is not subject to taxes.\footnote{HM Revenue & Customs, above n 549.} In Chile ad valorem taxes are applied in a two-tiered manner. There is an 18 per cent tax on SSBs containing 6.25 grams of sugar per 100mL and a 10 per cent tax rate on SSBs containing less than 6.25 grams of sugar per 100mL.\footnote{World Cancer Research Fund International, above n 525, at 11.} Both Chile and the United Kingdom are considered unique in their approaches as the multi-tiered tax rate creates a clear price differentiation between high sugar and low sugar beverages. Meanwhile, Mexico applies a single tax rate of one peso per litre to all SSBs. This is equivalent to a 10 per cent excise tax.\footnote{At 11–12.} In light of the success of the SSB taxes that have been implemented in the United Kingdom and Chile, a multi-tiered tax should also be implemented in New Zealand to create a clear price differentiation between high and low sugar beverages.

The WHO has recommended SSB taxes raise the retail price of products by 20 per cent or more to have a meaningful health effect.\footnote{World Health Organization \textit{Fiscal Policies for Diet And Prevention of Noncommunicable Diseases technical meeting report} (2016) at 24.} Similarly, public health experts in New Zealand recommend a 20 per cent tax on SSBs to achieve the greatest population health benefit.\footnote{Vandevijvere and others, above n 382, at 15.} In light of the discussion above, “high sugar SSBs” should be subject to a 20 per cent excise tax and “low sugar SSBs” should be subject to a 10 per cent excise tax.

5 \textit{Paternalism Considerations}

SSB taxes are a soft paternalistic intervention. Although consumers are not banned from purchasing SSBs, the tax creates a financial disincentive for consumers looking to purchase
these products. At the risk of becoming a nanny state, anti-paternalists are likely to oppose such taxes as they interfere with a consumer’s liberty and freedom of choice.

As discussed above, there are already additional taxes placed on alcohol and tobacco in New Zealand. Although these taxes may interfere with a consumers’ freedom of choice, they are considered justified on the basis alcohol and tobacco products are known to be harmful to consumers’ health.\textsuperscript{576} Conceivably, a tax on SSBs can similarly be justified as excessive consumption of sugar can be harmful to consumers’ health and contribute to the development of obesity and diet-related NCDs.

Anti-paternalists are likely to oppose SSB taxes on the grounds that they unfairly disadvantage low socio-economic consumers. As noted in chapter three, taxation does not prohibit consumers from purchasing unhealthy food products however, it is an interference with a consumer’s liberty because the consumer may no longer have the financial means to afford the product. For this reason, academics such as Hansen and Jesperen argue that interventions, such as taxes, only maintain freedom of choice in principle, not in practice.\textsuperscript{577} By increasing the price of SSBs, low socio-economic consumers are forced to spend more of their limited income if they wish to keep consuming these products.

Before implementing the alcohol levy in New Zealand, regulators considered the risk that the levy could have the effect of unfairly disadvantaging low socio-economic consumers. However, regulators felt the levy was justified on the basis that low socio-economic consumers experience the greatest harm from alcohol, and hence had the greatest potential to benefit from the levy disincentivising their purchase.\textsuperscript{578} Similarly, low socio-economic groups are statistically more likely to become obese.\textsuperscript{579} If low-socio economic consumers were to purchase fewer taxed SSBs, the result would likely be a greater reduction in obesity and diet-related NCDs. Overall, although SSB taxes are a paternalistic intervention, they

\textsuperscript{577} Hansen and Jespersen, above n 107, at 13.
\textsuperscript{578} Action Point, above n 520.
\textsuperscript{579} Ministry of Health, above n 1.
can be justified on the basis of their use to reduce the harm that excessive sugar consumption causes to consumers health. No products will be explicitly removed from the market, meaning consumers still have the freedom to purchase high sugar beverages.

6 How Might Consumers React to Sugar-Sweetened Beverage Taxes?

One of the major challenges of implementing SSB taxes is predicting how consumers will respond. Traditional economic theory suggests that as the price of SSBs increases, consumption of taxed products will decrease, thus improving health outcomes for consumers.\(^{580}\) Research also suggests that there is strong consumer support for the implementation of taxes on SSBs in New Zealand, particularly if the funds raised are used to address childhood obesity.\(^{581}\)

Regardless, there may be concern about how different socio-economic groups will respond to the SSB tax. In the United Kingdom, Public Health England has examined the behaviours of different socio-economic groups in response to the SDIL. The research found that all socio-economic groups are purchasing fewer “high sugar” drinks and more “low sugar” drinks as a result of the multi-tier SDIL.\(^{582}\) Based on these findings, low-socio economic consumers may not behave any differently to the tax than high socio-economic consumers.

Another concern may be consumers substituting SSBs with products that are equally as unhealthy. There are several possible factors that could influence substitution behaviour such as, what products are included or excluded from the tax, how high the tax is, to what extent the food producer passes the cost on to consumers and what other obesity interventions are in place. As explained above, a 16.2 per cent increase in purchases of

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\(^{582}\) Public Health England, above n 508, at 62.
bottled water was observed in Mexico after the implementation of the tax.\textsuperscript{583} The substitution of SSBs with water is the most desirable outcome given that water is the healthiest available alternative. The least desirable substitution behaviour is consumers swapping SSBs for high sugar treats such as candy bars, offsetting any health benefits of the tax.\textsuperscript{584} Education campaigns should be used to explain to consumers the purpose of the tax. Further, campaigns should be used to encourage consumers towards choosing water as an alternative to SSBs. Monitoring mechanisms should be established to identify any unwanted product substitutions that occur.

7 \textit{How Might Industry React to Sugar-Sweetened Beverage Taxes?}

The SSB industry is likely to oppose the implementation of taxes.\textsuperscript{585} Industry often represents that SSBs can be enjoyed as part of a balanced diet and it is the individual’s responsibility to maintain a healthy lifestyle.\textsuperscript{586} However, as demonstrated earlier, SSBs are not being consumed as part of a balanced diet and whilst individuals have responsibility for their food choice, the industry should take some responsibility for the oversupply of unhealthy food.

As the aim of SSB taxes is to decrease consumer purchasing of certain products, the industry is likely to be concerned about a loss of profitability. However, the food industry is able to reformulate in order to pay less tax. The industry must thus balance their need for sales and profitability against their moral responsibilities towards consumers health.\textsuperscript{587}

\textsuperscript{583} Colchero, Molina and Guerrero-Lopez, above n 539, at 1554–1555.
\textsuperscript{584} Tony Blakely and others “The effect of food taxes and subsidies on population health and health costs: a modelling study” (2020) 5 Lancet Public Health 404 at 404.
\textsuperscript{585} Vandevijvere and others, above n 382, at 37.
\textsuperscript{586} Obesity Evidence Hub “Arguments against a sugar-sweetened beverage (SSB) tax in Australia” (14 May 2021) <www.obesityevidencehub.org.au>.
\textsuperscript{587} Dimbleby, above n 65, at 40.
8 Trade Considerations

Before implementing taxes on SSBs, regulators should consider the relevance of international trade law. SSB taxes may be subject to threats of a trade dispute if the tax applies to imported products and not to others.\(^{588}\) For example, the United States raised a trade dispute regarding Mexico’s regarding SSB tax.\(^{589}\) At the time, a 20 per cent tax was applied to all imported beverages that contained any sweetener other than cane sugar. In effect, the tax protected domestically produced cane sugar and discriminated against United States produced products containing sweeteners such as high-fructose corn syrup. The tax was found to be discriminatory and in violation of obligations under the GATT because taxes imposed on imported products were not equally imposed on domestic products.\(^{590}\) As discussed earlier, the tax in New Zealand should apply to all companies who produce, bottle and import SSBs. Such an approach does not discriminate between domestic and imported products (i.e. the tax applies to both).

9 Revenue

SSB taxes will naturally generate revenue. Although the exact amount generated will depend on the size of the tax and the number of SSBs on the market, it is possible to get a general indication of the revenue the government will generate by looking at the United Kingdom. In the 2018-2019 financial year, the United Kingdom Government collected a total revenue of 240 million pounds from the SDIL. For the 2019-2020 financial year, revenue increased to 360 million pounds.\(^{591}\) Modelling estimates revenue of up to 40 million per year might be collected in New Zealand if a 20 per cent tax on all carbonated

\(^{588}\) World Cancer Research Fund International, above n 525, at 20.
\(^{589}\) Mexico – Tax Measures on Soft Drinks and Other Beverages, WT/DS308.
\(^{590}\) GATT, above n 81.


drinks was implemented. If the tax was only applied to sugar-sweetened varieties of carbonated tax, modelling indicates the revenue would decrease to approximately 30 million per year.\textsuperscript{592}

The revenue generated from SSB taxes should be earmarked so that it can be used to fund additional obesity interventions. As indicated earlier, there is strong consumer support for SSB taxes particularly if the revenue is used to address childhood obesity. In the United Kingdom, a large proportion of the SDIL revenue generated has been spent on projects run by the Department of Education such as the Healthy Pupils Capital Fund, Primary PE and Sport Premium, Essential Life Skills, and the National Schools Breakfast Programme.\textsuperscript{593} A similar allocation of tax funds should be adopted in New Zealand and revenue used to support programmes that enhance consumers understanding of nutrition and positive food choices.

\textbf{10 Monitoring, Enforcement and Penalties}

Monitoring of the SSB tax will be essential for determining whether it is having the anticipated effects on consumers purchasing behaviours. It will also assist in determining when the tax needs to be adjusted for inflation and economic growth.\textsuperscript{594} There should be a level of independence in the monitoring that takes place. A degree of independence will mitigate potential conflicts of interest that could arise.\textsuperscript{595} Industry is unlikely to want a report published if it reflects poorly upon them; however, the results of the SSB tax should be presented regardless of whether they report positive or negative findings. Monitoring will also be useful for determining if the tax is having any unintended effects and how the tax interacts with other obesity interventions that are introduced. With respect to

\begin{itemize}
\item \textsuperscript{592} Mhurchu and others, above n 529, at 93.
\item \textsuperscript{593} UK Parliament “Soft Drinks: Taxation Question for Department for Education” (2019) <https://questions-statements.parliament.uk>.
\item \textsuperscript{594} World Cancer Research Fund International, above n 525, at 13.
\item \textsuperscript{595} At 10.
\end{itemize}
compliance, food producers or importers who fail to comply with the SSB taxes should face the appropriate penalties.

E Conclusion

This chapter has recommended implementing a multi-tiered excise tax whereby “high sugar SSBs” are subject to a 20 per cent tax and “low sugar SSBs” are subject to a 10 per cent tax. The tax should be used to simultaneously discourage consumers from purchasing SSBs and encourage food producers to reformulate their products. Generally, the tax should be modelled on the United Kingdom’s whereby the SDIL has successfully reduced consumers purchasing of SSBs containing high levels of sugar. The SSB tax should complement other interventions such as the mandatory HSR, advertising restrictions and reformulation programmes. For example, if a beverage company reformulates their product it will be subject to less tax and receive a higher HSR. The revenue generated from SSB taxes should be earmarked so that the funds can be applied to funding additional obesity interventions. Monitoring and evaluation will be critical to assist in the identification of any product substitutions, loopholes, inefficiencies, and when taxes require adjustment for inflation.
XII Conclusion

The aim of this thesis was to examine how the obesity problem came about, identify the flaws of the current legal and policy interventions, and propose appropriate regulatory changes that could be implemented to better address the problem. This chapter summarises the findings from each of the preceding chapters and restates the main findings. It culminates by questioning whether paternalistic legal interventions are an appropriate means to address obesity and diet-related NCDs in New Zealand and notes further research that should be carried out in this area.

A Identifying the Problem

Both globally and in New Zealand there is an unacceptably high prevalence of obesity and diet-related NCDs in adults and children. Furthermore, there is a higher likelihood of Māori, Pacific and low socio-economic consumers becoming obese. Trends have remained relatively stable indicating that current interventions are not having any measurable effect on the prevalence of obesity and diet-related NCDs. The next step was to narrow down how the problem came about. Over the past decades, significant changes have occurred in the food environment such as an increased availability of unhealthy food, increased advertising, larger portion sizes and trade liberalisation. This highlighted the multi-faceted nature of the obesity problem. What was extracted from this discussion was an understanding of the modifiable factors that contribute to obesity and diet-related NCDs. These factors can be targeted by regulators through legal interventions to change consumers’ behaviours.

B The Role of Paternalism – Can Paternalistic Interventions be used to Address the Problem?

Chapter three outlined the concept of paternalism and set the scene for the type of interventions that would be suggested in subsequent chapters. Despite criticism, neither
hard nor soft paternalistic interventions should be ruled out entirely as means to modify consumers’ unhealthy eating behaviours. The thesis proposes that the magnitude and the degree of irreversible harm caused by obesity and diet-related NCDs justifies the use of both types of paternalistic interventions.

C The Joint Food System

Chapter four explored the background of the current regulatory system. In 1996 New Zealand and Australia signed the Food Treaty, committing both countries to the development and implementation of a single set of food standards known as the Food Standards Code. Although the Joint Food System has numerous benefits such as reduced barriers to trade and lower compliance costs, it also presents its own unique challenges. When deciding whether to adopt a food standard, public health is often left to compete against the need to facilitate free trade. Furthermore, the Food Treaty only allows New Zealand to implement domestic food standards in exceedingly limited circumstances. Given the extent of obesity and diet-related NCDs in New Zealand, the need to put in place interventions should be viewed as a priority. If the Joint Food System cannot facilitate the necessary interventions, other options should be considered, even if it were to mean acting in a way that is inconsistent with New Zealand’s obligations under the Food Treaty. Unilateral legislation is not unheard of as CoOL requirements are found in domestic legislation in Australia and New Zealand respectively.

D Summary of the Four Proposals

The research focused on four areas: labelling, advertising towards children, food reformulation and taxes. A new legal intervention was proposed for each of these areas.
1 Food Labelling

Chapter five outlined current food labelling regulations and policies, and examined how effective they are at addressing obesity and diet-related NCDs. Although not a regulation, the voluntary HSR system is the only intervention in place with the specific goal of influencing consumers to make healthier choices. The analysis of the HSR system identified a wide array of flaws including low uptake and a lack of consumer understanding of how to use the system.

Chapter six proposed modifying the HSR system to address the criticisms in chapter five, and then mandating the rating be present on all food labels. Based on the analysis in chapter six, this approach will have the greatest impact on consumers’ purchasing behaviour. The second proposed option is to implement warning labels similar to that of Chile. This option should be considered as a back-up if the monitoring of the mandatory HSR system reveals it is not achieving the desired impact on consumers behaviour.

2 Advertising Towards Children

Advertising contributes to the prevalence of obesity and diet-related NCDs by encouraging the purchase and consumption of unhealthy food. Chapter seven set out the current restrictions on unhealthy food advertising and focused particularly on protections in place for children. Based on the analysis, current restrictions are ineffective on account the industry is self-regulatory, voluntary and the onus is placed on consumers to lodge complaints. Consequently, children are regularly being exposed to unhealthy food advertisements.

With chapter seven’s background in place, chapter eight proposed to replace the current system with comprehensive legislation extensively restricting advertising towards children. An overview of the legislation’s design was suggested including proposed definitions and types of media that should be covered. Chapter eight highlighted several challenges when
regulating advertising. In particular, there has been a rise in children using social media and online streaming platforms through which they are exposed to unhealthy food advertising. The cross-jurisdictional nature of the internet makes it a challenging form of media to regulate. Furthermore, children’s food consumption is often viewed as a matter of parental responsibility, posing the question of where the line should be drawn between parental responsibility and the role of the law. Although the proposed solution may seem somewhat heavy-handed, it is the best means to address the flaws in the current advertising restrictions and limit the influence of unhealthy food advertising on children’s food choices.

3 Food Reformulation

Chapter nine outlined current food reformulation targets, such as the Heart Foundation Food Reformulation Programme. Unfortunately, there is limited research on the results of the reformulation programme. Independent studies indicate there has been little change in the amount of sodium in processed food products as a result of the voluntary targets. Furthermore, there is no information on whether the sugar reformulation targets have been achieved.

Chapter ten proposed to implement mandatory sodium limits, requiring food companies to reformulate products within food categories identified as those that contain unnecessarily high amounts of sodium. A voluntary sodium reformulation programme was also proposed to encourage food companies to bring down the average sodium content in products in other designated food categories. If food companies are not making satisfactory progress towards achieving the voluntary sodium targets, regulators should consider shifting them to mandatory limits. Although mandatory sodium limits are likely to attract criticism as a hard paternalistic intervention, the harm caused by diet-related NCDs justifies such an approach. Crucially, the government should implement transparent monitoring and reporting.
4 Food Taxes

Excess sugar intake through products such as SSBs has been linked to an increased risk of developing obesity and diet-related NCDs. Chapter eleven proposed the implementation of excise taxes on SSBs to reduce consumption and encourage food producers to reformulate. Generally, taxes on SSBs that have been implemented overseas have been successful. In particular, the United Kingdom’s SDIL has led food companies to reformulate effectively removing 45,000 tonnes of sugar from the annual consumption of SSBs. Anti-paternalists are likely to oppose taxes on the grounds that low socio-economic consumers are unfairly disadvantaged given that they may no longer have the budget to afford SSBs at all. However, low socio-economic consumers are statistically more likely to develop obesity and thus stand to gain the greatest benefit from SSB taxes disincentivising their purchase. Notably, the revenue generated from SSB taxes should be earmarked and used to fund other obesity interventions.

E Concluding Remarks

This thesis set out to address the lack of effective legal and policy interventions that address obesity and diet-related NCDs in New Zealand. Four new interventions have been proposed. The proposed interventions should be implemented as a suite to achieve the greatest reduction in obesity and diet-related NCDs.

(a) Further research

Obesity interventions should be informed by up-to-date nutritional information. One of the limitations of this thesis was the lack of research in certain areas. For example, the New Zealand Adult Nutrition Survey has not been undertaken since 2008-2009. This particular data set should be updated so that regulators know exactly what foods and nutrients are being under or overconsumed.
(b) A return to a key question posed at the beginning

To revisit a key question posed at the beginning of the thesis; are regulators justified in using paternalistic interventions as an appropriate means to address the high prevalence of obesity and diet-related NCDs in New Zealand?

Given the extent of the harm caused by the high prevalence of obesity and diet-related NCDs, the implementation of both hard and soft paternalistic interventions is a justifiable course of action. Regulators should be transparent about the interventions they are putting in place so consumers can observe exactly what changes are being made. This is particularly important in the case of hard paternalistic interventions as they remove consumers' freedom to make certain choices. Additional measures such as education campaigns and school programmes should be used to supplement legal interventions. Without understanding why healthy food choices are important, it will be difficult for consumers to understand the benefits.

(c) What makes the proposed solution better than what is already in place?

Current legal and policy interventions are limited in scope and are almost entirely soft paternalistic interventions. This is not to say the solution is to switch entirely to hard paternalistic interventions. The proposed new interventions recommended by this thesis are, in the main, also soft paternalistic interventions. However, the proposed new interventions have several advantages. They are more broad ranging, they remove voluntary obligations in favour of mandatory ones, introduce deterrents such as fines, and implement more transparent, frequent, and effective monitoring and reporting. Monitoring the success of any new intervention will be critical. If monitoring were to later reveal that the recommended soft paternalistic interventions were ineffective at altering consumers’ unhealthy eating behaviours, regulators should take steps to modify the interventions or alternatively consider moving to hard paternalistic interventions in pursuit of reducing obesity and diet-related NCDs.
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