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Legislative solutions to unhealthy eating and obesity in Australia

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SUMMARY

This paper discusses legislative interventions that have potential to address factors in the food environment that contribute to unhealthy eating patterns and increasing obesity rates in the Australian population, and political barriers to the implementation of these interventions. The paper devotes particular attention to legislative interventions to require disclosure of nutrition information about food and beverage products, which would help to inform consumer choices, and are, therefore, difficult to object to on personal responsibility or 'nanny state' grounds. It is suggested that these interventions seem to be gaining political acceptance in Australia, and may provide a starting point for incremental progress.

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Introduction

In Australia, as in many other developed countries, overweight and obesity rates have increased rapidly over the past two decades.^{1,2} According to the most recent national data, nearly two-thirds of adults and one-quarter of children are now overweight or obese.¹ It is well established that these conditions are risk factors for type 2 diabetes, heart disease and stroke,³ but it seems less understood that they are also risk factors for a range of cancers, including cancers of the oesophagus, pancreas, colorectum, endometrium, kidney and breast (in postmenopausal women).⁴

High body mass was estimated to account for 3.9% of the total cancer burden and 7.5% of the total disease and injury burden in Australia in 2003.⁵ If proportional increases in the prevalence of overweight and obesity in Australian children

(from 1985 to 1995) were taken into adulthood, it has been projected that life expectancy at 20 years of age would fall by 1.7 years for males and 2.2 years for females (back to 2001 and 1997 levels, respectively).⁶

Despite these grim projections, and repeated calls from public health advocates for government action to address factors contributing to increasing overweight and obesity rates,^{7–13} the response from Australian governments has been limited to date. Government activities have largely been confined to funding social marketing campaigns, new sport and recreation infrastructure, and healthy eating and physical activity programmes in schools and workplaces.^{8,14} Meanwhile, the food industry has mainly been left to self-regulate its practices.

There is wide agreement among public health experts that these types of strategies, although important, will not be

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effective to reduce the prevalence of obesity in the absence of structural interventions to change the food and physical activity environments.^{7,8,15–20} In particular, experts point to the crucial role that law must play in addressing environmental factors contributing to unhealthy eating, as part of a comprehensive approach to the obesity problem.^{16,18,21–24} This view is informed by the historical success of legislation and other legal tools in helping to address public health problems, such as road accidents and smoking rates.^{8,16,25}

However, the role of the law and governments in addressing unhealthy eating and obesity is highly contentious, and has become a battleground for political and ideological arguments about individual autonomy and free markets vs public health and the collective benefit.^{18,25–27} A major barrier to the pursuit of legislative solutions in Australia has been the framing of the obesity problem (by the media, politicians and industry) as the result of the failures of individuals to exercise personal responsibility or, in the case of childhood obesity, parental responsibility.²⁸ Proposed legislative interventions, such as restricting the marketing of junk food to children, are met with strong resistance from the food industry, and derided as ‘nanny state’ interference with individuals’ rights to choose what they eat.^{29–31}

This paper discusses legislative interventions with the potential to help bring about healthier patterns of eating in the Australian population, and some of the political barriers to enactment of these interventions. In particular, the paper discusses interventions to require disclosure of nutrition information about food products, which Australian governments are showing greater readiness to implement than other interventions, and which may provide a way forward by helping to build acceptance for further interventions.

Influences on eating patterns and obesity rates: the unhealthy food environment

Although each individual’s body weight is determined by a complex interaction of different factors, including biology, it is widely recognized that the increase in overweight and obesity rates at the population level has been the inevitable consequence of changes in the social, economic and physical environment.^{8,15,32–36} These changes have created potent influences to over-consume high-energy, processed food at the expense of fresh, nutritious food. They have also resulted in the displacement of opportunities and imperatives for physical activity in transport, work and recreation with incentives and imperatives for sedentary behaviour.^{8,16}

Arguably, the key factor contributing to rising obesity rates in Australia is increasing consumption of energy-dense, processed foods.⁸ The population is subject to strong environmental pressures to consume these foods, particularly food industry practices designed to maximize product sales.^{8,15,37} The industry creates new, highly palatable products, and promotes them aggressively in a range of media. These products are inexpensive relative to healthy foods, served or packaged in large, ready-to-eat portions, and widely available in convenient locations such as 24-h convenience stores, fast-food outlets, drive-throughs and vending machines.^{8,15,27}

The population’s natural response to this food environment is to adopt unhealthy patterns of eating.^{27,37} The environment works against individual efforts to make healthy choices, and undermines strategies, such as social marketing campaigns, to encourage healthier eating habits across the population. Changes to this food environment are therefore needed to bring about changes in population eating patterns.

Legislative interventions to address unhealthy eating and obesity

The potential for law to address factors contributing to unhealthy eating and obesity has been a subject of recent discussion in public health literature,^{8,16,18,21–23,25,38–40} and a subject of increasing international attention.^{25,41,42} Following the successful use of legal tools in helping to combat other public health problems, particularly tobacco use, obesity has been described as ‘the new frontier of public health law’.²⁵

In relation to unhealthy eating, the main role for law lies in its capacity to modify the social, economic and physical environment in which people make decisions about what they eat.^{8,18,40} Law can be used to counter, alter or remove deleterious environmental influences on food choices, and to create new influences to encourage healthier patterns of eating. Unlike in other public health areas, such as road safety, alcohol and tobacco use, legal interventions that directly regulate the behaviour of consumers are unlikely to have a role in addressing unhealthy eating due to political and social resistance to interference with individual food choices, which are regarded as fundamentally private. However, there is much potential for indirect regulation of behaviour (also important in road safety, alcohol and tobacco control) to help shift unhealthy eating patterns.

Law could be used to create incentives and disincentives that indirectly shape consumer behaviour through tools such as taxes and subsidies.²⁵ Law could also be used to facilitate behaviour change, such as by requiring disclosure of clear nutrition information (e.g. on the front-of-food packages, on fast-food menus and in advertising), and by ensuring healthier food is sold or provided in particular settings (e.g. schools, hospitals and workplaces). In particular, legal interventions could regulate food industry practices that influence and constrain consumer behaviour, including by restricting promotion of unhealthy products, preventing misleading claims about health or nutritional benefits of foods, controlling where and how unhealthy food may be sold (e.g. through planning controls on fast-food outlets and vending machine restrictions), and regulating the composition of products (e.g. by imposing limits on detrimental nutrients or ingredients, such as trans fats).

Internationally, governments are starting to recognize the capacity of law to assist in addressing unhealthy eating and obesity. In the USA, there has been a spate of federal and state legislation, and local regulations with nutrition and obesity-prevention aims. These have mainly focused on increasing physical activity and improving the nutritional content of food sold or provided in schools, imposing snack and soda taxes,^{25,43,44} and, more recently, on requiring disclosure of nutrition information on fast-food menus.^{45–47} There has also been some progress in other jurisdictions. Restrictions on

television advertising of foods high in fat, sugar or salt have recently been introduced in the UK and South Korea. The UK restrictions apply during programmes of ‘particular appeal’ to children under 16 years of age,⁴⁸ and the South Korean restrictions apply from 5 to 7 pm and during children’s programmes.⁴⁹ In France, legislation requires junk food advertisers to choose between paying a levy and broadcasting a health message,⁵¹ and prohibits food-vending machines in schools.^{50,51} In Latvia, the sale of unhealthy food in nurseries and schools is prohibited entirely.⁵²

In Australia, governments have been slow to consider legislative solutions to unhealthy eating and obesity. The only Australian legislation enacted with specific obesity-prevention objectives has been a recent act amending the New South Wales Food Act to require fast-food outlets to display the kilojoule content of products on menu and menu boards.⁵³ Other state governments have also recently expressed interest in introducing similar requirements, as well as restrictions on the advertising of junk food to children.^{54–58} However, the Federal Government has resisted calls for legislative intervention, and did not agree to recommendations of the National Preventative Health Taskforce (established by the Federal Government in 2009) for a review of economic tools, such as taxation, to encourage healthier eating, and the phasing out (over 4 years) of marketing unhealthy foods to children.¹⁴ Neither major political party engaged with the issue of obesity in the lead up to the 2010 Australian federal election.

Political barriers: personal and parental responsibility framing

One of the main barriers to political acceptance of legislative approaches to unhealthy eating and obesity in Australia, as in other countries, is the framing of these issues as individual problems; the consequences of poor choices and failures of self-restraint by individuals.^{19,27} To address the obesity problem, the food industry, and politicians and commentators who are opposed to regulatory intervention, exhort people to exercise greater personal responsibility in their food choices and exercise habits.⁵⁹

In relation to childhood obesity, the framing of the problem by industry and other opponents of intervention shifts from ‘personal responsibility’ to ‘parental responsibility’. Childhood obesity is described as the consequence of parents’ failures to make responsible decisions for their children, and the recommended solution is for parents to say no to children’s demands for unhealthy food, turn off the television and tell children to play outside.⁶⁰

Closely linked to these frames is the labelling of proposed governmental interventions to address factors contributing to obesity as interference by the ‘nanny state’ in the private lives of citizens.^{19,27} Interventions are disparaged by opponents as paternalistic intrusions on individual autonomy and free markets, which undermine the role of individuals and parents in assuming responsibility for their own or their children’s diets.^{19,25}

Personal responsibility framing is a central strategy of the food industry in resisting regulation that may impede its commercial objectives.^{26,27} To deflect scrutiny of its role in

manufacturing and marketing unhealthy products, industry assigns responsibility for regulating consumption of products to consumers^{16,26,27,61} by denying the existence of ‘good’ and ‘bad’ foods, and emphasizing the importance of regular physical activity, and dietary moderation and balance. Australian confectionery manufacturers, for example, have established a ‘Treatwise’ website which encourages consumers to consume chocolate and lollies ‘in moderation and balance so [they] can enjoy a healthy life’.⁶² Soft drink manufacturers assure consumers that ‘[a]s long as individuals vary their choices and obtain appropriate exercise, any food or drink, including soft drinks, can be part of a healthy, enjoyable diet’.⁶³ However, the food industry’s messages of moderation are at odds with its relentless marketing, the overwhelming proportion of which is for unhealthy products.^{64–69} They are also contrary to the industry’s commercial imperatives, which, at least for manufacturers of unhealthy products, are for current patterns of consumption to continue.

Personal and parental responsibility framing has also been taken up by some politicians, including the Leader of the Federal Opposition, Tony Abbott, who, when Federal Health Minister, said (in response to calls for restrictions on food advertising to children), ‘the only person responsible for what goes into my mouth is me and the only people who are responsible for what goes into kids’ mouths are parents’.⁷⁰ Politicians’ reliance on these frames may reflect beliefs about the importance of preserving individual autonomy and free markets, but the frames may also provide a useful pretext for rejecting politically difficult policies that would be contrary to the commercial interests of the food industry, and that may be criticized as paternalistic.

Personal and parental responsibility pleas and ‘nanny state’ accusations are by no means peculiar to the issues of unhealthy eating and obesity; their deployment has also been a political obstacle in other public health areas, including tobacco and alcohol control, where regulation has been criticized as intruding on individual freedoms to smoke and drink.^{26,71} However, they seem particularly fervent in relation to unhealthy eating and obesity, where legal interventions aim to shield people from the consequences of their own behaviour, and can be portrayed as interference by government with deeply personal choices.^{19,26,39}

Overcoming personal responsibility framing

Despite the primacy of personal and parental responsibility frames in political discourse about obesity,^{18,28,59} and their apparent success in deterring government action, they do not seem to reflect popular opinion on the role of government in addressing obesity. A recent national survey reported very high levels of support for a number of possible government interventions to address obesity, including stronger regulation of unhealthy food advertising to children and nutrition labelling (on food packaging and fast-food menus), regulation of the nutritional composition of products, and unhealthy food taxes.⁷²

Nor do these frames provide sensible explanations for, or solutions to, levels of unhealthy eating and obesity in the population. It is highly unlikely that the recent increase in

obesity prevalence is solely attributable to population-wide declines in dietary restraint and/or motivation to exercise,²⁷ and appeals for people to exercise greater personal responsibility will not bring about population-level shifts in eating and activity patterns, particularly in an environment that actively reinforces the opposite responses.¹⁹

As a number of public health commentators have convincingly argued, personal responsibility and individual liberty approaches fail to give appropriate recognition to the role of the environment in influencing and constricting individual behaviour.^{16,19,27,73} Lifestyle decisions, especially decisions about food, cannot be seen as completely free and autonomous. Food choices are constrained by a range of situational and environmental factors, and subject to enormous pressure from the food industry.

The conflict between preserving individual autonomy and upholding personal responsibility on the one hand, and protecting public health through government intervention on the other, is often presented as inherent and inescapable.⁷³ However, some commentators point out that the two approaches need not always be mutually exclusive; interventions that seek to protect public health by modifying or removing environmental influences and constraints on health-affecting behaviour may, in fact, facilitate the exercise of free choice and personal responsibility.^{16,19,27} As Parmet argues, the public health approach seeks to change the environment in which choices are made rather than restrict individual liberty.⁷³ Hoek takes this a step further, arguing that 'intervention may be the means through which individual freedom of choice may be achieved'.¹⁹

Particularly in relation to unhealthy eating and obesity, few of the most often discussed potential legal interventions would directly interfere with individual liberty or constrict food choices; instead, most would help to reduce deleterious influences or restrictions on those choices, and enhance individuals' capacity to adopt healthier eating patterns. For example, interventions to restrict food advertising and promotion seek to ensure that food choices are not misinformed or misled, and to reduce commercial pressures to consume unhealthy products; interventions to require disclosure of nutrition information about food (such as restaurant menu and front-of-pack labelling requirements) would help people who wish to identify and select healthier products to do so; and interventions to control the types of food sold in certain settings (such as schools, hospitals and workplaces), and the positioning of fast-food outlets in certain areas, seek to expand the range of food choices available and improve consumers' access to healthier products.

Information disclosure

Political acceptance for information disclosure interventions

In particular, commentators point to interventions requiring disclosure of information about food products as being consistent with libertarian values, and allowing reconciliation of personal responsibility and environmental approaches to unhealthy eating and obesity.^{25,27,39} Framing these interventions as seeking to inform and empower consumers, rather

than restrict choices, helps overcome personal responsibility objections.³⁹ It is difficult to contest the proposition that consumers need clear and accurate information about the nutritional content of products in order to make responsible food choices. For this reason, some commentators have predicted that interventions to require disclosure of this information are most likely to gain political acceptance in the short-term.^{25,39}

Australian developments

This appears to be the case in Australia where, as noted, legislative requirements for fast-food kilojoule information disclosure have recently been enacted in New South Wales, and other state governments have announced plans to introduce or consider similar legislation. The announcements of these policies were all framed in terms of the need to inform and empower consumers to enable them to make healthier food choices.^{54–56,74}

A comprehensive review of Australian and New Zealand food labelling law and policy has recently been undertaken, which considered, among other things, the role of food labelling in meeting public health objectives. An independent panel headed by former Australian Health Minister, Dr. Neil Blewett AC, was appointed to undertake the review by the Australia and New Zealand Food Regulation Ministerial Council (comprising Australian and New Zealand ministers from health and other relevant portfolios), at the request of the Council of Australian Governments. The review panel recommended a range of food labelling reforms to facilitate healthier food choices; in particular, the development of a 'multiple traffic light' (MTL) labelling scheme for the front of processed food packages, and the introduction of national requirements for disclosure of nutrition information on fast-food menus and vending machines.⁷⁵

Front-of-pack nutrition labelling

In Australia and New Zealand, food labelling is jointly regulated by the Australian Commonwealth and States and Territories, and the New Zealand Government, under the Australia New Zealand Food Standards Code – a set of national standards given effect in Australia under food acts in each state and territory. The Food Standards Code requires packaged food products to bear a panel setting out the nutritional contents (energy, protein, fat, saturated fat, sugar and sodium) of products per serving size and 100 g/ml.⁷⁶ Research suggests that these nutritional information panels are not widely used or well understood by consumers,⁷⁷ and consumer and public health advocates have called for simplified nutritional information with interpretative guidance on the front-of-food packages as a strategy to improve understanding of the nutritional value of products, and encourage healthier choices.^{78–83}

Most advocates have called specifically for introduction of the MTL scheme, developed by the UK Food Standards Agency, under which MTL-coloured signposts are used to indicate whether levels of total fat, saturated fat, sugar and sodium in products are low, medium or high. Advocates argue that the scheme's presentation of nutrition information in a conspicuous and simple format, and its use of colour-coded

ranges to aid interpretation of this information, would enable consumers to quickly and effectively assess and compare the nutritional value of products.^{78–83} The scheme would also help prevent consumers from being confused or misled by manufacturers' promotional claims about nutritional and health (by alerting consumers, through red signposts, to nutrition information at odds with these claims), and would influence manufacturers to improve the nutritional content of products to avoid red and orange ratings.

In response to these calls, and recognizing the need for a nutrition-labelling scheme that can be understood by consumers with low literacy, numeracy or nutrition knowledge, the Blewett review recommended the development of an MTL scheme in Australia. The review recommended that implementation of the scheme by processed food manufacturers should initially be voluntary, but mandatory where a health claim (about the benefits of the product or an ingredient for health or disease prevention) appears on a food label.⁷⁵ The review panel considered that this approach would ensure that consumers receive balanced product information when a health claim is made, while enabling healthy food manufacturers to use the scheme to promote the nutritional value of products, and encouraging other manufacturers to improve the nutritional content of products in order to benefit from the scheme.⁷⁵

Already, Australian health food company Sanitarium has developed a variation of the MTL scheme.⁸⁴ However, the Australian Food and Grocery Council (AFGC), which represents Australian food and beverage manufacturers, is strongly resisting the MTL scheme, and launched a television advertising campaign to promote its 'Daily Intake Guide' (DIG) labelling scheme 3 days after the recommendations of the Blewett review were released.⁸⁵

The AFGC developed the DIG scheme in 2006 to forestall mandatory introduction of the MTL scheme, and it has been adopted by a number of major Australian food manufacturers. The scheme, which is based on the European food industry's 'Guideline Daily Amount' system, uses front-of-pack signposts to indicate the proportion of an average adult's daily nutrition requirements provided by a serving of the product.⁸⁶ The AFGC claims that the DIG scheme is superior to the MTL scheme, which it criticizes as being too simplistic and failing to convey the importance of dietary balance and moderation.⁸⁷ However, a recent Australian study found that consumers were five times more likely to identify healthier products using MTL labels than the DIG scheme,⁸⁸ and research in the UK and New Zealand comparing variations of the MTL and European Guideline Daily Amount schemes has also found that consumers are better able to identify healthier products using labels with traffic light colours than labels that only include monochrome daily intake information.^{89–91}

Despite this research, the European Parliament recently voted to adopt draft legislation imposing requirements for Guideline Daily Amount labels on processed food packages, and to reject legislation requiring MTL labels, following a lobbying campaign by the European food industry on which it reportedly spent more than €1 billion.⁹² If the draft legislation is approved by the European Council, or survives a second reading in Parliament, it will prevent European Union countries from adopting their own MTL schemes, as

food labelling is within the jurisdiction of the European Parliament. Before the recommendations of the Blewett review were released, the AFGC urged the review panel to take note of the European Parliament's decision.⁹³ It is likely that the AFGC's lobbying will intensify in the lead up to the government response to the Blewett review's recommendations (due by December 2011).

Fast-food menu disclosure

Take-away food and food served in restaurants or fast-food outlets is generally exempt from the nutrition-labelling requirements in the Food Standards Code, unless a promotional claim about the nutritional content of a product is made.⁹⁴ This exemption is difficult to rationalize given research findings that people tend to significantly underestimate the energy content of restaurant food,^{95–97} and the increasing amount of meals that are eaten out in Australia, particularly in fast-food outlets.⁹⁸ In 2007, nearly 17,000 fast-food and take-away outlets served around 1.64 billion meals to Australians, amounting to 44% of meals served outside the home by the food industry.⁹⁸ Moreover, fast-food is usually higher in saturated fat, sodium and energy than other food,^{99,100} and US studies have linked fast-food consumption with increased energy intake, weight gain, insulin resistance, and higher risks of obesity and type 2 diabetes.^{99,101–103} Arguments that requiring provision of nutrition information would impose an unreasonable burden on food businesses have little application to large fast-food chains, which have standardized products and menus, and many of which already publish nutrition information on company websites or in brochures.

In 2007, New York City became the first jurisdiction internationally to require disclosure of calorie information on menus and menu boards in fast-food chains. The requirements, imposed under a board of health regulation, initially applied to outlets that already voluntarily disclosed calorie information (e.g. in brochures or on websites). The regulation was revised to apply to menus, menu boards and food display tags in local chain outlets with 15 or more outlets nationally, after the Federal District Court upheld a claim by the New York State Restaurant Association that the regulation in its original form pre-empted the federal Nutrition Labelling and Education Act 1990, which regulates the use of voluntary nutrition and health claims on food labels and packaging.^{46,104} The New York City regulation was quickly followed by ordinances in a number of US cities and counties, and state legislation in California, requiring disclosure of calorie and other nutrition information on fast-food menus.⁴⁵ In March 2010, federal legislation was enacted, requiring calorie labelling of standard items on menus, menu boards, drive-through menu boards and on signs next to self-service or displayed foods in chains with 20 or more outlets nationally, and disclosure of additional nutrition information on request.⁴⁷ The legislation also requires calorie labelling of vending machines.⁴⁷

In Australia, the Blewett review recommended the introduction of national requirements for declaration of the kilojoule content of standard products on food chain menus and menu boards, and on vending machines,⁷⁵ and some action has already been taken at the state level. In New South Wales,

the Food Act 2003 has been amended to require food outlets to display the kilojoule content of each standard menu item on menus, drive-through menu boards, and product tags and labels that display the name or price of products.⁵³ The requirements, which came into effect in February 2011, apply to food chains selling standard menu items with 20 or more outlets in New South Wales or 50 or more outlets nationally.¹⁰⁵ These thresholds seem high in comparison with the US cut-off of 20 outlets nationally, but capture all major chains, including McDonald's, Hungry Jack's, KFC and Pizza Hut. The Victorian and South Australian Governments have announced plans to introduce similar legislation by 2012,^{54,56} and the Tasmanian Health Minister has promised to investigate the feasibility of legislation in Tasmania.⁵⁵

It is likely that these requirements will encourage fast-food consumers to choose lower-kilojoule products, as studies have found that consumers tend to order lower-energy fast-food products when nutritional information is displayed.^{97,106,107} This may equate to a substantial reduction in energy consumption across the population. Making the kilojoule content of products visible to consumers may also prompt fast-food chains to reformulate products or reduce serving sizes. At the least, it is clear that kilojoule disclosure would help to better inform consumers about their fast-food choices.

Conclusion

Legislative interventions to require disclosure of nutrition information, including front-of-pack and fast-food menu labelling requirements, would assist people to identify, and may prompt them to consume, healthier packaged and fast-food options. However, it would be unrealistic to expect these interventions, on their own, to bring about major shifts in eating patterns or reductions in obesity rates. Unhealthy eating habits are encouraged and reinforced by a range of influences in the food environment, and merely providing information will not be sufficient to encourage a population-wide change in eating behaviour in the face of all these influences. Governments must also intervene to address environmental factors, such as unhealthy food promotion, and the relative prices, availability and accessibility of unhealthy and healthy food, if such change is to be a realistic possibility.

Nevertheless, nutrition information disclosure requirements would be important components of a broader strategy to bring about such change, as people need to be properly informed about the nutritional value of food products to be able to choose healthier options. Moreover, in Australia, they seem to be the only interventions with any short-term likelihood of national adoption. Potential interventions to address unhealthy eating need to be considered, not only in terms of what would be most effective to change behaviour, but also what is most likely (now or in time) to be acceptable to society and governments.^{17,25} In the current political environment, the only realistic way forward may be incremental, beginning with interventions such as disclosure requirements which are most likely to gain acceptance, and which may help to build gradual support for a wider range of reforms.

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