'RED BULL GIVES YOU WIINGS': PATROLLING THE BOUNDARIES OF DRUG FOODS

Rocque Reynolds[*]

Drug foods are part of every food culture, so Sidney Mintz has argued,[1] and the energy drink, Red Bull, might be understood as one of our latest drug foods. Drug foods pose a challenge from a regulatory point of view for they bring into focus two of the great food debates – the impact of food regulation on food innovation and the role of food regulators in regard to public health. In so far as drug foods have traditionally formed a part of every diet, any attempt to ban or limit new or novel drug foods opens the food regulator to 'endless charges of hypocrisy and irrationality',[2] 'paternalistic' behaviour[3] and standing in the way of food innovation. On the other hand, if the food regulator does allow new drug foods to be manufactured and sold it is accused of failing in its duty to protect public health or of being 'amoral' in this regard. [4]

In this article I examine the regulation of Red Bull by Food Standards Australia New Zealand ('FSANZ') and argue that, whilst FSANZ's regulatory approach does indeed favour traditional foods over novel foods, naturally occurring substances over food additives, and nutritious foods over non-nutritious foods FSANZ still makes

---

* Professor and Dean of Law, School of Law and Justice, Southern Cross University, rocque.reynolds@scu.edu.au.

1 Sidney W Mintz, *Sweetness and Power: The Place of Sugar in Modern History* (Viking, 1985).

2 David T Courtwright, *The Forces of Habit: Drugs and the Making of the Modern World*, (Harvard University Press, 2001) 190. This is similar to the problem faced by food and drug regulators in drawing the line between licit and illicit drugs. As David Courtwright points out, the fact that psychoactive substances such as coffee, tea, cocoa, alcohol and tobacco are lawful whilst opium, cannabis and coca are not has prompted an 'entire genre of drug literature…[which] assesses the relative harms of different drugs and then professes dismay at their misalignment with policy. Alcohol and tobacco are exhibits A and B.' Courtwright suggests that Edward M Brecher's *Licit and Illicit Drugs: the Consumers Union Report on Narcotics, Stimulants, Depressants, Inhalants, Hallucinogens, and Marijuana – including Caffeine, Nicotine and Alcohol* (Little, Brown, 1972) was the progenitor of this genre of literature.

3 Steven B Steinborn and Kyra A Todd, 'The End of Paternalism: A New Approach to Food Labelling' (1999) 54 *Food and Drug Law Journal* 401.

4 Dov Fox, 'Ethics and Law in FDA Decisionmaking' (2005) *Michigan State Law Review* 1135; Katherine A Van Tassel, 'Slaying the Hydra: The History of Quack Medicine, the Obesity Epidemic and the FDA's Battle to Regulate Dietary Supplements' (2009) 6 *Indiana Health Law Journal* 203.

room for all of these food products within a 'total diet' — so long as they are not confused. I call this the total diet approach to food regulation and it encompasses three aspects. The total diet is the sum of its disparate parts and includes both 'healthy' and 'unhealthy' foods; each food category has a different role to play in the total diet, and it is the role of the food regulator to ensure that these food categories are not confused. Within this regulatory framework food labelling plays a significant role. Rather than simply representing a return to neo-liberal ideals of consumer choice, food labelling is the primary tool through which the food regulator patrols the boundaries between food categories and manages consumer perception of food products. When using this tool the food regulator is as likely to limit consumer information as it is to promote it.

Such a regulatory approach is contentious for it rejects both the ideal of a 'healthy' diet and the ideal of an open market in food commodities. The divisiveness of the issue is evidenced by the fact that, as this article goes to print, the Australia New Zealand Food Regulation Ministerial Council has announced that it will conduct a full review of the standard developed by FZANZ in response to the emergence of Red Bull and other caffeinated energy drinks.[5]

RED BULL: DRUG, FOOD, DRUG FOOD

The slogan 'Red Bull gives you wiings…' gave a flying start to one of the most successful food marketing campaigns of modern times. Red Bull was first released in 1987 and by 1999 had become the biggest selling soft drink in Britain, knocking Coca Cola from its traditional spot. By 2004 Red Bull commanded 70% of the €2.5 billion worldwide energy drink market, was being sold in 100 markets and was the market leader in the United States as well as twelve of the thirteen West European markets where it was sold.[6] In 2008 and 2009, when sales of both Pepsi and Coca Cola fell in the wake of the global financial crises, Red Bull was one of only four soft drink companies to increase its sales.[7]

Red Bull markets itself as a pleasure drug for 'non-stop party-animals' as well as a functional food for working folk. It claims to 'vitalize body and mind'; 'increase performance'; 'increase concentration and reaction speed', 'improve vigilance', and 'stimulate metabolism'.[8] One of its famous early advertisements even seemed to suggest that Red Bull would enhance sexual performance. The advertisement is set at a nudist camp. A Red Bull cartoon character, in this case a nude man whose genitals

---

5 Food Standards Australia New Zealand, *Australia and New Zealand Food Regulation Ministerial Council Communiqué* (Media Release, 6 May 2011) < http://www.foodstandards.gov.au/scienceandeducation/mediacentre/mediareleases/mediareleases2011/australiaandnewzeala5154.cfm >.

6 Zenith International (2004) *West Europe Energy Drinks Market Races Towards €2500 million*, Press Release, 6 January 2004 cited in Nirmalya Kumar, Sophie Linguri and Nader Tavassoli (2004) 'Red Bull: the anti-brand brand', London Business School.

7 Jessica Wohl, 'Soft Drinks Hit as Americans Cut Back on Treats', *Reuters,* 30 March 2009 <http://www.reuters.com/article/idUSTRE52T61520090330>.

8 Red Bull, *Red Bull Australia* (2011) <http://www.redbull.com.au>. This is from the Australian website although the Red Bull websites from China to Estonia have almost identical wording. The differences between the websites from country to country arise from the different sporting events being promoted and the health claims allowed in different jurisdictions.

have been obscured by a black bar, approaches a nude woman on the beach. She offers him a can of Red Bull. As he drinks the Red Bull his black bar rises. He gets embarrassed, the lady laughs, he grows wings and flies off. 'Oh', sighs the woman 'Red Bull really *does* give you wiings'.[9]

Red Bull's success led to the creation of a new market in psychoactive beverages.[10] Competitor energy drinks including 'Monster', 'Pimp Juice' and Coca Cola's 'Mother' were joined by 'anti-competitors' such as 'Mary Jane Relaxing Soda', 'Slow Cow' and 'Ex Chill'.[11] These 'slow-down' or 'anti-energy' drinks were marketed as direct alternatives to Red Bull.[12] Red Bull itself has produced new products since its initial launch including Red Bull Cola and Red Bull shots — that is, tiny cans of Red Bull containing 50–200 mg of caffeine in a 25–75 ml can. The fact that Red Bull shots are sold at room temperature, displayed on shop counter tops (rather than near refrigerators) and are advertised as being suitable for your handbag, glove box, pocket or desk adds to the Red Bull image. This is a drink which is strong, and effective in small doses.[13]

---

9 See *Red Bull Nudist Camp Commercial* (28 February 2009) Youtube <http://www.youtube.com/watch?v=t5DndA40wHs>.

10 Brad Tuttle, 'What You Might Soon Be Tempted to Buy: Marijuana-chic "Relaxing soda", $6 Donuts', *Time* 12 January 2010 <http://money.blogs.time.com/2010/01/12/what-you-might-soon-be-tempted-to-buy-marijuana-chic-relaxing-soda-6-donuts/>.

11 Jerry Hirsch, 'Kava "Anti-energy" Drink Takes Root in the Southland', *LA Times* (online), 29 December 2009 <http://articles.latimes.com/2009/dec/29/business/la-fi-kava29-2009dec29>.

12 'Mary Jane', to those in the know, is a slang term for marijuana and Mary Jane Relaxing Soda is advertised as delivering 'euphoric relaxation' and effects 'similar to marijuana' but without the marijuana side-effects such as 'laziness, 2 am pizza runs, black light posters, or handcuffs.' It is also compared to alcohol but without the alcohol side effects of 'drowsiness, "beer-goggles", tough-guy syndrome, or hangovers': Tuttle, above n 10. See also: The Relaxing Company, *Mary Jane's Relaxing Soda* (2011) <http://www.relaxingsoda.com/#/mary-jane-s-relaxing-soda>.

13 When Red Bull energy shots were introduced the German Federal Institute for Health Assessment reportedly issued a warning against over-consumption of energy drinks: Shane Starling, *Germans Call* for *Energy Shot Ban* (4 February 2010) Nutra Ingredients <http://www.nutraingredients.com/Regulation/Germans-call-for-energy-shot-ban>. See also, *Red Bull Reacts to German Opinion* on *Energy Shots* (9 February 2010) Beverage Daily.com <http://www.beveragedaily.com/Regulation-Safety/Red-Bull-reacts-to-German-opinion-on-energy-shots>.

Almost immediately, Red Bull became the subject of complaints, the locus of fear and the object of urban myths. Thus, Red Bull is said to encourage English binge drinking by masking the effects of drunkenness when mixed with alcohol;[14] it has been linked to psychosis and other mental health problems.[15] It has been banned on the basis that it contains taurine[16] and on the basis that it contains too much caffeine.[17] In Germany, Denmark, Norway, China, and Taiwan small traces of cocaine (from decocainised extract of cocoa leaf) were found in Red Bull Cola[18] and, in a model of private regulation, two Swedish retail chains placed a ban on the sale of Red Bull to young people.[19] Red Bull has also been attacked on the basis that it is *ineffective*, that it does not give you wings,[20] and that it does not give you energy.[21] Its television advertisements have been criticised as too sexually suggestive[22] and on the basis that

14 *Red Bull Masks Alcoholic Effect* (26 March 2006) BBC News <http://news.bbc.co.uk /2/hi/uk_news/4826920.stm>.

15 W P Tormey and A Bruzzi, 'Acute Psychosis due to the Interaction of Legal Compounds--Ephedra Alkaloids in "Vigueur Fit" Tablets, Caffeine in "Red Bull" and Alcohol' (2001) 41(4) *Medicine Science and Law* 331.

16 France successfully banned a taurine based Red Bull for twelve years on the basis that the effects of taurine were insufficiently known: Christian Nordqvist, 'French Ban on Red Bull (Drink) Upheld by European Court' (8 February 2004) *Medical News Today* < http://www.medicalnewstoday.com/releases/5753.php>. This was upheld by the European Court of Justice in *Commission of the European Communities v French Republic* (European Court of Justice, C-24/00, 5 February 2004). During this time a modified taurine-free version of Red Bull was sold in France. See also Joseph Tandy, 'France Ends Twelve Year Ban on Energy Drink Red Bull', *Reuters*, 15 July 2008 <http://www.reuters.com/article/idUSL1576964720080715>.

17 *Red Bull Lobbies Turkey over Energy Drink Ban* (9 May 2009) Beverage Daily.com <http://www.beveragedaily.com/Markets/Red-Bull-lobbies-Turkey-over-energy-drink-ban>. As we shall see, in Australia a special food standard had to be passed to allow the manufacture of Red Bull.

18 'Red Bull Cola Could Be Banned in Germany After Traces of Cocaine Found in It', *MailOnline*, 25 May 2009 <http://www.dailymail.co.uk/news/worldnews/article-1187275/Red-Bull-Cola-banned-Germany--traces-cocaine-it.html>. See also 'Red Bull's New Cola: A Kick from Cocaine?' *Time.com*, 25 May 2009 <http://www.time.com/time/world/article/0,8599,1900849,00.html>; Red Bull: *More Cocaine Traces, Countries Ban Energy Drinks* (2 June 2009) Examiner.com <http://www.examiner.com/health-news-in-san-francisco/red-bull-more-cocaine-traces-countries-ban-energy-drinks>.

19 Alan Hall, 'Swedish ban on sale of Red Bull to young', *News.scotsman.com,* 16 September 2009 <http://news.scotsman.com/world/Swedish-ban-on-sale-of.5649614.jp>.

20 See *Red Bull* [2009] Advertising Standards Bureau Complaint 477/09 (Wednesday 11 November 2009) < http://122.99.94.111/cases/477-09.pdf>.

21 In Britain the Advertising Standards Authority upheld complaints that Red Bull did not enhance performance as claimed by the manufacturers unless one drank four cans of the drink. Despite the fact that Red Bull submitted twenty reports to substantiate its claims that the level of caffeine in Red Bull did enhance performance these were rejected by the British ASA. In Australia, on the other hand, the complaint was not upheld see *Red Bull* [2009] Advertising Standards Bureau Complaint 477/09 (Wednesday 11 November 2009) <http://122.99.94.111/cases/477-09.pdf>.

22 See *Red Bull Aust Pty Ltd* [2008] Advertising Standards Bureau Complaint 61/08 (Wednesday 13 February 2008) < http://122.99.94.111/cases/61-08.pdf>; *Red Bull Aust Pty*

'Red Bull gives you wiings' is too suggestive of illegal drug use.[23] One of Red Bull's ingredients is taurine which, according to urban myth, is made from bulls' testicles. In India the Maharashtra Food and Drug Administration prohibited the sale of Red Bull on this basis.[24] Another of Red Bull's ingredients is said to be an 'artificially manufactured stimulant' developed in the 1960's by the American Government to help boost the morale of Vietnam troops and subsequently banned in the United States following deaths and 'hundreds of cases' related to migraine or brain tumors. These claims have been declared untrue by the urban legends reference page, *Snopes.com*[25] and by Red Bull itself.[26]

From a food marketing point of view Red Bull can be characterised as a 'recombinant' food — that is, one which combines the new and the old in one product.[27] On the one hand Red Bull presents itself as a sign of things to come — a

Ltd [2008] Advertising Standards Bureau Complaint 16/08 (Wednesday 13 February 2008) <http://122.99.94.111/cases/16-08.pdf>; *Red Bull Aust Pty Ltd* [2009] Advertising Standards Bureau Complaint 75/09 (Wednesday 25 February 2009) <http://122.99.94.111/cases/75-09.pdf>; *Red Bull Aust Pty Ltd* [2009] Advertising Standards Bureau Complaint 341/09 (Wednesday 12 August 2009) <http://122.99.94.111/cases/341-09.pdf>; *Red Bull Aust Pty Ltd* [2009] Advertising Standards Bureau Complaint 523/09 (Wednesday 25 November 2009) <http://122.99.94.111/cases/523-09.pdf>;, *Red Bull Aust Pty Ltd* [2010] Advertising Standards Bureau Complaint 123/10 (Wednesday 24 March 2010) <http://122.99.94.111/cases/123-10.pdf>.

23 *Red Bull Aust Pty Ltd* [2001] Advertising Standards Bureau Complaint 285/01 (Tuesday 13 November 2001).

24 'FDA Cracks Down on Energy Drink "Red Bull"', *Express India.com*, 13 July 2005. <http://www.expressindia.com/news/fullstory.php?newsid=50588>.

25 Barbara and David P Mikkelson, *Bull Marketed*, (31 December 2005) Snopes.com <http://www.snopes.com/medical/potables/redbull.asp>.

26 *Red Bull Australia Products: FAQ* (2011) Red Bull Australia < http://www.redbull.com.au/cs/Satellite/en_AU/Red-Bull-Australia/Products/011242758640967#/product-FAQs>. Although taurine is naturally produced in the testicles of some mammals the taurine used commercially in Red Bull and other products is probably exclusively synthetically produced. See Woojae Kim 'Debunking the Effects of Taurine in Red Bull Energy Drink' (2003) 9(1) *Nutrition Bytes.* The response of the Red Bull company to this barrage of criticism, innuendo, gossip and attack is predictably sanguine. 'We do not force volumes of scientific evidence down the consumers [sic] throat', said Harry Drnec, the Managing Director of Red Bull UK, 'The consumer...makes up their own mind if it works'. '*Energy Drink Claims Rejected*' (24 January 2001) BBC News <http://news.bbc.co.uk/2/hi/health/1133348.stm>.

27 Todd Gitlin originally used the genetic engineering term 'recombinant' to describe a television culture which panders to a consumer demand for entertainment which is both new and nostalgic: Todd Gitlin, *Inside Prime Time* (Pantheon Books, 1983) 63–85. The food historian Warren Belasco adopted the term 'recombinant' to describe a contemporary food culture which rejects the rationalising dreams of food modernism — space food, Tang, the kitchenless home and the meal in a pill — in favour of a form of 'new traditionalism' in food which promises the convenience and science of modernist food fantasies but in a familiar, even nostalgic, form. The functional food products of a recombinant food culture — health bars, sports drinks, vitamin water, low fat milk, 'healthy bacon' and iodised bread — do not promise a modernist 'meal in a pill' but rather a pill in a meal: Warren Belasco, *Meals to Come. A History of the Future of Food* (University of California Press, 2006) 219–61.

functional beverage which ignores the traditional limitations of the body by allowing one to work all day and party all night. It presages a world where the 'pharmaceuticalisation of everyday life'[28] moves out of the private spaces of the bedroom into the public spaces of clubs, sport and work; a world where the pleasures of drugs move into the mainstream. Instead of the private medicalised world of Viagra and Horny Goat Weed it promises aphrodisiac soft drinks. Instead of the illicit pleasures of e tabs it promises a legal high in a can.[29] On the other hand there is something very old fashioned about Red Bull. Its claims are almost identical to vintage Coca Cola ads and there is an air of patent medicines and quackery about its promises. There is little difference between Red Bull's claims to vitalise mind and body and early Coca Cola advertisements aimed (complete with recipere symbol ℞) at students, workers and shoppers:[30]

> ℞ For Students and Brain Workers
> Take one glass of Coca-Cola at night to keep
> The brain clear and the mind active until eleven.
> or
> ℞ Take one glass of Coca Cola
> when weary with shopping
> It imparts energy and vigor.

---

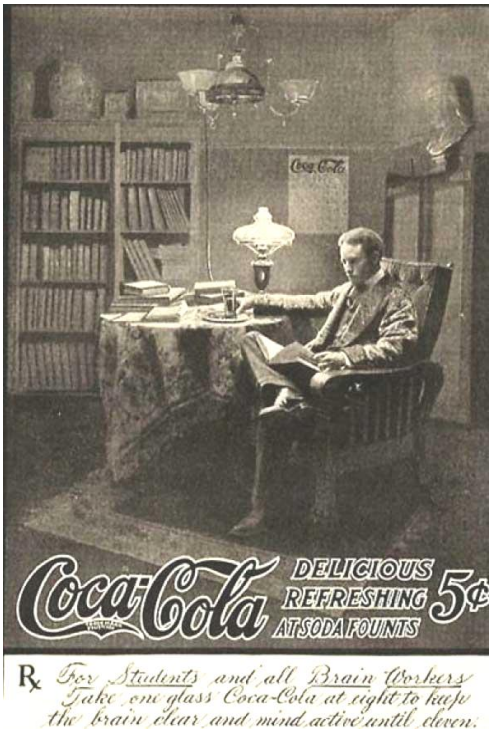
28 Nick J Fox and Katie Ward, 'Pharma in the bedroom…and the kitchen…The pharmaceuticalisation of daily life' in Simon J Williams, Jonathon Gabe and Peter Davis (eds), *Pharmaceuticals and Society. Critical Discourses and Debates* (Wiley-Blackwell, 2009) 41.

29 Red Bull's reference to illegal drugs was no accident — Red Bull's marketing campaign mimicked the marketing and distribution of illicit psychoactive drugs: 'Word of mouth — the hushed advice in the tavern, the graffiti in the *pissoir* — is … ancient and fundamental. Drugs and their affiliated pleasures are self-advertising, especially within deviant hedonic subcultures': David T Courtwright, *The Forces of Habit: Drugs and the Making of the Modern World* (Harvard University Press, 2001) 104. Instead of media advertising, Red Bull relied on 'seeding' and word of mouth whereby cans of Red Bull were originally released only in select venues and to select celebrities, trendsetters and early adopters. Red Bull was sold in a smaller can than other soft drinks and was considerably more expensive thus signalling the idea that Red Bull was strong and that even a small amount would have a significant effect. For many people between the ages of seventeen and seventy the connection between Red Bull and illicit psychoactive drugs seemed clear. Red Bull didn't promise to make you healthy, Red Bull promised to get you high: 'Red Bull gives you wiings' or 'Red Bull verleiht Flüüügel' in the original German. See Richard R Johnson, *Red Bull* (Darden Business Publishing, 2002) as one of the many analyses of Red Bull's marketing campaign.

30 Coca-Cola's own rumour website has this 'response' regarding the alleged aphrodisiac qualities of Coca-Cola:

> 'Some people have been led to believe that combining Coca-Cola with MSG (monosodium glutamate, a flavor enhancer) creates an aphrodisiac. Our Response: MSG is a flavor enhancer used in many foods, but is not an ingredient in Coca-Cola. There is no factual or scientific basis for concluding that Coca-Cola is an aphrodisiac — whether or not it is combined with MSG.'

See *Products and Packaging Rumours* (2011) Coca-Cola <http://www.thecoca-colacompany.com/contactus/myths_rumors/packaging.html>.



Vintage Coca Cola Advertisements
http://www.google.com.au/imgres?imgurl=http://funnytogo.com/pictures/cocacola/coca-cola-vintage-ads1.jpg&imgrefurl=http://funnytogo.com/pictures/cocacola/retro-ads.htm&h=821&w=590&sz=71&tbnid=8BF8udfAU3AJGM:&tbnh=144&tbnw=103&prev=/images%3Fq%3Dold%2Bcoca%2Bcola%2Bads&hl=en&usg=__4T12HAkiu0

Like Coca Cola, Red Bull and its competitors might also be understood as the newest addition to a special category of foods known as 'drug foods' which exist across all food cultures. The term 'drug food' was coined by Sidney Mintz in his seminal work, *Sweetness and Power: The Place of Sugar in Modern History*[31] to refer to products such as sugar, tea, coffee and cocoa. These foods had previously been known as 'dessert crops' and in a later work Mintz commented that '(a) more misleading misnomer is hard to imagine, for these were among the most important commodities of the eighteenth and nineteenth-century world.'[32] Today drug foods would include

31 Mintz, above n 1.

32 Sidney W Mintz originally referred to these foods with the 'somewhat nastier' term, 'proletarian hunger-killers' in 1966, a term which unsurprisingly did not survive the later general turn from Marx. See Sidney W Mintz, 'Time Sugar and Sweetness' in Carole Counihan and Penny Van Esterik (eds), *Food and Culture. A Reader* (Routledge, 1977, 359–60

Red Bull, Coca Cola and Slow Cow, sugar treats such as Big Macs and lollies, as well as the Cold Stone PB and C Shake (that is, peanut butter and chocolate shake) which contains 2000 calories and 68 grams of saturated fat. 'Drug food' has become part of the language of food precisely because it simultaneously draws attention to and destabilises the idea of nutrition and health in the discourse of food by symbolically putting dessert and its pleasures back on the menu.

The term drug food is inherently ambiguous and it is no accident that all drug foods, from sugar to tobacco, from Coca Cola to Red Bull have traditionally made health claims. Even the Baskin Robbin's Shake which contains 2310 calories and 64 grams of saturated fat is marketed as a 'Health Bar'. In his 1961 essay, 'Toward a Psychosociology of Contemporary Food Consumption', Roland Barthes argued that health was food's 'alibi', it is health which gives food meaning. In Barthes' words, 'the energy furnished by a consciously worked out diet is mythically directed … toward an adaptation of man to the modern world.'[33] It might be thought that drug foods have no place in this modern diet because they work towards no end but are an end in themselves - empty calories, pure pleasure, dessert for dessert's sake. The pleasures of drug foods might be thought to lead one astray because the drug food user/consumer becomes too stoned, too hyper, too anxious, too drunk, or too fat for the proper work of meaning. But this ignores the ambivalence of drug foods: drug foods can at any moment, as drug or as food, be sublimated to the work of meaning. To give an example taken from Barthes, the qualities of energy, alertness or relaxation associated with Coca-Cola, coffee and chocolate may at any moment be 'sublimated' to the ends of food and its functions — they provide the energy to face the battles of modern life, and relax you from its stresses.[34]

Drug foods such as Red Bull are therefore complex products — at once familiar and novel, drugs and food, nutrition and empty calories. By destabilising the boundaries between health and harm, drugs and food, drug foods subvert food's alibi of health and pose a significant challenge to food regulation.[35]

NOT 'JUST LIKE COFFEE' — THE PRIVILEGE OF TRADITIONAL FOODS

So what is Red Bull? Red Bull is a carbonated soft drink containing caffeine. Worldwide the amount of caffeine in Red Bull varies but is generally between 145 and 320 mgs/l which is about the same amount as an instant or percolated coffee (240–320 mg/l) but less than in a strong espresso (420 mg/l).[36] When Red Bull was released

---

citing his own work, Sidney W Mintz, 'The Carribbean as a Socio-cultural area' (1966) *Cahiers d'Histoire Mondiale* IX.

33 Roland Barthes, 'Toward a Psychosociology of Contemporary Food Consumption' in Carole Counihan and Penny Van Esterik (eds), *Food and Culture. A Reader* (Routledge, 1997, [trans] 24-25.

34 Ibid.

35 The drug/food interface debate considers the broader regulatory debate as to which regulatory agency should regulate the product in question. This is not my question in this article.

36 *Consumer Information: Caffeine* (August 2011) Food Standards Australia New Zealand <http://www.foodstandards.gov.au/consumerinformation/caffeine/>; Expert Working Group on Caffeine, *Safety Aspects of Dietary Caffeine – Report from the Expert Working Group*

in Australia in 1997 there was no Australian limit on the amount of caffeine allowed in tea, coffee, cocoa or chocolate nor were these products required to carry warning or advisory labels in regard to their caffeine content. Caffeine was allowed in kola drinks to the level of 145 mg/l[37] although most kola drinks contained less than this. Coca Cola, for example, contained only 130 mg/l.[38] Caffeine was not permitted in other drinks.[39]

By comparison, in New Zealand caffeinated beverages such as Red Bull were regulated under the Dietary Supplements Regulations 1985 made under the *Food Act 1981* (NZ) which provided that caffeine could be added to certain non-alcoholic beverages as a dietary supplement to the level of 200 mg/l.[40] The only reason Red Bull was sold in Australia at that time was because the 1996 Trans Tasman Mutual Recognition Arrangement between Australia and New Zealand was interpreted as allowing products that could legally be sold in one country to be legally sold in the other regardless of differences in standards or other sale-related regulatory requirements between the two countries.[41] Red Bull could therefore be sold but not manufactured in Australia. In 1999 Red Bull applied under s 22 of the *Food Standards Australia New Zealand Act 1991* (Cth) to amend the *Australia New Zealand Food Standards Code* to allow the addition of caffeine to carbonated drinks in Australia.[42]

The *Food Standards Australia New Zealand Act* (Cth) 1991 s 3 provides that the object of the Act is to ensure the 'highest standard of public health protection' by establishing Food Standards Australia New Zealand (FSANZ) which has responsibility for developing and varying food standards (s 13) relating to the composition, production, handling, selling, labelling and advertising of food (s 16).[43] Together these standards

---

(June 2000) Food Standards Australia New Zealand <http://www.foodstandards.gov.au/_srcfiles/EWG_Dietary_caffeine.pdf >; Caitlin Reid, *Truth about Coffee* (August 2009) Coffee Wellbeing <http://coffeewellbeing.com.au/truth-about-coffee/>; NUTTAB *2010* (2010) Food Standards Australia New Zealand <http://www.foodstandards.gov.au/consumerinformation/nuttab2010/>.

37 Volume 1, *Food Standards Code* Standard A6, Standard 04, Standard 01.

38 Today Food Standard 1.3.1 'Food Additives' provides that caffeine may be added to kola drinks to the level of 145 mg/l but explicitly excludes its addition to infant food, vinegar, beer and related products.

39 Volume 1, *Food Standards Code* Standard A6, Standard 04, Standard 01.

40 The Codex Alimentarius does not contain any prescribed level for caffeine and the international range of permitted caffeine was about 150 to 300 mg/l.

41 The *Trans-Tasman Mutual Recognition Act 1997* (Cth), which gave effect to this agreement is arguably narrower and provides that 'goods produced in or imported into New Zealand, that may lawfully be sold in New Zealand… may…be sold in an Australian jurisdiction': s 10. In 2011 the Administrative Appeals Tribunal determined that the transitory unloading of Red Bull cans in New Zealand did not amount to ' importation' and therefore Red Bull cans transmitted through New Zealand were not protected under the agreement: *Red Bull (Australia) Pty Ltd and Secretary, Department of Agriculture, Fisheries and Forestry* [2011] AATA 157 (10 March 2011).

42 Red Bull (Australia) Pty Ltd, 'Application A394 – Formulated Caffeinated Beverages (Energy Drinks)', application to *Food Standards Australia New Zealand*, 13 May 1999.

43 The enforcement of food standards is the responsibility of State based organisations rather than Food Standards Australia New Zealand.

form the *Australia New Zealand Food Standards Code*.[44] The regulatory demands on FSANZ are mixed and go well beyond a narrow requirement to protect public health. Under the Act, FSANZ's goal is to promote a 'high degree of consumer confidence in the quality and safety of food; an effective, transparent and accountable regulatory system; the provision of adequate information relating to food to enable consumers to make informed choices and establishing domestic and international regulatory consistency' (s 3). In developing food standards the objectives of FSANZ are (in descending order) to protect public health and safety, provide adequate consumer information and prevent misleading and deceptive conduct. In developing and varying food regulatory measures FSANZ must use a risk analysis based on the 'best scientific evidence available' whilst also having regard to the promotion of an international and nationally competitive food industry as well as fair trading in food (s 18). FSANZ's standards are also explicitly politically informed — under s 18 FSANZ is required to have regard to the written policies of the Australia and New Zealand Food Regulation Ministerial Council (the Ministerial Council) which comprises the Health Ministers of Australia, its states and territories and of New Zealand. The Ministerial Council is said to be 'primarily responsible for the development of domestic food regulatory policy and the development of policy guidelines for setting domestic food standards'.[45]

The original standard, initiated by Red Bull, took two years to develop, was the subject of an Expert Working Group report on the safety aspects of dietary caffeine[46] and was the object of public consultation. As developed, the original Standard 2.6.4 'Formulated Caffeinated Beverages' allowed the manufacture and sale of a special category of beverages known as 'formulated caffeinated beverages' which were to contain no less than 145 mg/l of caffeine and no more than 320 mg/l of caffeine. The drinks were required to carry detailed labelling and warning requirements which did not apply to traditional caffeinated beverages such as coffee, tea and cocoa.

The fact that these caffeinated beverages and Red Bull attract such different regulatory responses is an enigma if one only considers their caffeine content. Those who favour a broad public health role for FSANZ might argue that, logically, all of these beverages should be subject to the same regulatory controls as Red Bull. Those who favour a less interventionist role for the food regulator might argue that the different regulatory response is in itself a sign of creeping paternalism — that what was once acceptable is now subject to regulation in the 'nanny state'.

However, FSANZ looks at more than the ingredients of a food product. In determining its regulatory response FSANZ looks at the way the food product is

---

44 *Food Standards Australia New Zealand Act 1991* (Cth) s 4 defines the *Australia New Zealand Food Standards Code* as:

> the code published under the name *Food Standards Code* in the *Gazette* on 27 August 1987 together with any amendments of the standards in that code: (a) approved by a former Council before this Act commenced and published in the *Gazette* as forming part of that code; or (b) made under this Act.

45 Australian Government Department of Health and Ageing, *The Australian and New Zealand Food Regulation Ministerial Council* <http://www.health.gov.au/internet/main/publishing.nsf/Content/foodsecretariat-anz.htm>.

46 Expert Working Group, *The Safety Aspects of Dietary Caffeine*, above n 36.

situated in a food culture, and consumer perceptions and familiarity with the food product. In particular, FSANZ draws a distinction between what it characterises as 'traditional' and 'non-traditional foods' and between naturally occurring ingredients and food additives.[47] For FSANZ, therefore, there is little similarity at all between coffee and Red Bull. For FSANZ, coffee is a traditional food containing naturally occurring caffeine whilst Red Bull is a non-traditional food containing food additives including caffeine…and FSANZ treats each of these categories differently.[48]

Although FSANZ has power to make standards in relation to both traditional and non-traditional foods, the risk analysis framework used to develop these standards varies according to whether the food is characterised as traditional or non-traditional. This difference is based on FSANZ's assessment of consumer perception of traditional foods. In particular, FSANZ accepts that there is a 'high level of public confidence' in traditional foods based on a long 'history of use':

> The views of the community, and of individuals within the community, as to whether these foods are 'safe' is influenced by many factors, such as the nature of the food, its history of use, its acceptance by others, its method of production, and whether its safety has been adequately established using formal tests…Generally, foods that have a history of safe consumption provide the highest level of public confidence. [49]

Significantly, this approach is based on consumer perception of traditional foods rather than on an assumption that traditional foods are in fact 'safe'. The risk analysis framework recognises that some traditional foods, such as red kidney beans and potatoes, carry an inherent safety risk. However, FSANZ and the public are said to accept this risk on the basis that the food industry and the community know how to mitigate it:

> Foods such as meat and fish, commonly used cereals, dairy products, tinned foods, and conventionally produced fruit and vegetables, are generally considered safe as long as well-established manufacturing practices are followed. Some traditionally-consumed foods, such as red kidney beans and even potatoes, can carry an inherent health risk, but such risks are accepted because the food industry and the community know how to mitigate this risk through appropriate food preparation.[50]

Apart from the obvious difficulty of determining whose traditions should be considered in a multicultural society one might also question the level of consumer knowledge assumed by FSANZ. Research has shown that Australia men spend only 3 hours and 23 minutes per week preparing and cleaning up food and women spend only 8 hours and 3 minutes in the same period.[51] Watching 'Masterchef' whilst eating a

---

47 See Food Standards Australia New Zealand, *The Analysis of Food-Related Health Risks* (February 2009) <http://www.foodstandards.gov.au/_srcfiles/Food%20Related%20Health%20Risks%20WEB_FA.pdf>.

48 It could even be argued that the fact that the code allowed caffeine to be added to kola drinks but not to non-kola drinks was a reflection of the traditional place of Coca Cola, Pepsi and other caffeinated kola drinks in the food culture of the time.

49 Food Standards Australia New Zealand, above n 47, 8.

50 Ibid.

51 Australian Bureau of Statistics, 'Trends in Household Work' (2009) *Australian Social Trends 4102.0*. The British figures are possibly worse with the Department of Health quoted as saying that 20 minutes per day was spent on food preparation (compared to two hours per day in 1980): Jeremy Laurance, 'Exposed: myth that convenience food is unhealthy', *The*

Thai takeaway may not provide the type of food preparation and risk mitigation knowledge which FSANZ assumes the modern consumer to have regarding traditional foods. Certainly, FSANZ does not make these assumptions in relation to non-traditional foods:

> Under the current food regulations, where there is no history of human use by a broad sector of the community, there is no presumption of safety for a food, food ingredient, or substance added to food. In this case it is reasonable that some level of assessment of the safety of the food or ingredient is performed.[52]

The privilege for traditional foods extends beyond the assessment of risk to the management of risk. In the case of foods containing caffeine the 'Ministerial Council Policy Guideline on the Addition of Caffeine to Foods' explicitly distinguishes between traditional foods containing caffeine such as coffee, tea and cocoa and 'non-traditional foods' containing caffeine, and between naturally occurring caffeine and non-naturally occurring caffeine. The policy provides that traditional foods containing caffeine and foods containing natural sources of caffeine do not have to be labelled and their addition to food products cannot be restricted. The rational for this distinction is said to be partly history, partly familiarity:

> Foods, which naturally contain caffeine and have a long history of use and consumer awareness/association with caffeine, such as tea, coffee and cocoa, are to be exempt from the labelling provisions and the use of these foods naturally containing caffeine to be added to other foods will continue to be allowed.[53]

The policy does not assume that caffeine is 'safe' but that its risk should be managed differently depending on its source. Despite the fact that caffeine is present in tea, coffee, cocoa and chocolate, therefore, these products do not require advisory or warning labels and have no limits on the amount of caffeine in them because they are naturally occurring sources of caffeine which have a long history of use. Furthermore, because they are forms of naturally occurring caffeine with a long history of use they may be added to other foods without labelling or advisory warnings. This privilege for naturally occurring caffeine is not a privilege of nature over the products of technology but rather is inextricably tied to the familiarity of these traditional sources of caffeine.

Under this policy guideline, there is no limit to how much caffeine can be added to a bottle of milk, for example, if that caffeine comes in the form of coffee or cocoa; nor will the milk need to carry a warning label, no matter how much of this naturally sourced caffeine it contains. If the caffeine is added other than through a naturally occurring source, not only would its amount be limited but a warning label would be required. There is a limit to this privilege for natural sources of caffeine however. If the natural source of caffeine is itself a non-traditional food in Australia or New Zealand then the exemption does not apply. Guarana, for example, is a natural source of

---

Independent (online), 2 February 2008 <http://www.independent.co.uk/life-style/health-and-families/health-news/exposed-myth-that-convenience-food-is-unhealthy-777191.html>.

52 Food Standards Australia New Zealand, above n 47, 9.

53 Developed by the Australia and New Zealand Food Regulation Ministerial Council established under the Food Regulation Agreement between the Commonwealth, the States, Territories and New Zealand, in April 2003 for the purpose of 'limit[ing] the exposure of vulnerable individuals to foods containing caffeine.'

caffeine but does not have a long history of use in Australia or New Zealand and therefore must be labelled and is subject to limitations under the *Australia New Zealand Food Standards Code* in respect to additives.[54] Similarly, if the current fad for caffeinated products led to the introduction of super caffeinated teas or coffees it is unlikely that the privilege would apply.

The privilege which FSANZ grants to traditional and naturally occurring substances would appear to justify the accusations that it stands in the way of food innovation; however, this is not strictly correct. As we shall see in the next section, once a non traditional food or food additive is subjected to risk assessment it is more than likely to be found to carry an acceptable risk because of the toxicological principles employed by FSANZ in its risk assessment.

NOT 'JUST CAFFEINE' — FROM POISON TO REMEDY

The risk analysis framework used by FSANZ is set out in FSANZ, *The Analysis of Food-Related Health Risks*.[55] Risk analysis frameworks (RAF) are traditionally divided into three steps — risk assessment (what is the risk and its likelihood), risk management (what should be done about the risk) and risk communication (letting the public know about the risk and its management). However, how these steps are interpreted and practiced varies between agencies. In the risk analysis framework of the Codex Alimentarius Commission, for example, risk assessment is based on a scientific analysis whilst risk management — that is, what should be done about the risk — is based primarily on policy issues. The risk analysis framework of FSANZ is a little different. Unlike the Codex RAF, the FSANZ framework extends science-based decision making to the risk management part of risk framework.[56] This does not mean that policy issues are ignored by FSANZ for, as we have seen, s 18 explicitly requires FSANZ to take Ministerial policies into account in developing and varying food standards.

Just as it is meaningless within FSANZ's overall RAF to say something is 'just like coffee', so it is impossible at the risk assessment stage of the RAF to say that something is 'just caffeine'. In saying this I am not seeking to step into the ongoing debate as to whether or not caffeine is 'safe'.[57] Most experts agree that there may be some withdrawal effects and physical dependence resulting from habitual caffeine use. What they disagree on is the severity of this dependence and whether habitual use of

---

54 Ibid.

55 This difference is acknowledged by FSANZ:

> 'The Codex framework is essentially a decision-making framework that allows separation of the scientific aspects of risk analysis from the broad range of factors which impact on the ultimate risk management decisions. While the Codex defines the risk management process as primarily policy-based, within FSANZ it is recognised that scientific approaches may also be used to inform the selection of risk management options': Food Standards Australia New Zealand, above n 47, 14.

56 Ibid.

57 It is interesting to note that the factual question of whether the caffeine in Coca-Cola was harmful was not determined by the court in the famous case of *United States v Forty Barrels and Twenty Kegs of Coca Cola* 241 US 265 (1916) although, as a result of the case, the Coca-Cola company did agree to reduce the caffeine content in Coke.

caffeine can have a beneficial effect. Whilst one side argues that caffeine can enhance mental performance, the other side argues that any reported mental enhancement is simply the relief caused by the lifting of withdrawal symptoms such as headaches. The majority in the Expert Working Party set up by FSANZ supported the idea that caffeine was not too addictive and that it did enhance mental performance.[58] The minority report by Professor Jack James took the opposing view on both the safety and efficacy of dietary caffeine.[59]

My point is different. Within risk assessment we cannot say 'just caffeine' because caffeine itself straddles the boundary between chemical poison and remedy.[60] The risk assessment of chemicals is based on the maxim passed down as part of the tradition of pharmacology and toxicology and normally attributed to Paracelsus (1493–1541): 'All substances are poisons; there is none that is not a poison. The right dose differentiates a poison and a remedy.' Or more simply 'Dosis sola facit venenum'.[61] As social and medical reformers have found over the years, in the world of toxicology it is as meaningless to say that an ingredient is 'just a vitamin' or 'just a nutrient' as it is to say it is 'just caffeine' or 'just nicotine'. The dosage level needed to provide health benefits for one group suffering the adverse health effects of nutrient deficiency may be toxic for another suffering the adverse health effects of excess. Furthermore, the nutrient intake variable between population groups is, in itself, highly variable and there are significant ethical and practical limits to being able to determine the effect on these different groups. This toxicological principle is embedded in the risk assessment strategies of the Codex Alimentarius Commission (Codex) and FSANZ, and informs the standard procedures for determining toxicity.[62] FSANZ uses a more refined model but it is based on the same principle.

A refinement of the toxicological principle states that, although all chemicals are potentially poison, for most chemicals there will be a threshold of exposure below which adverse health effects will not occur. This 'threshold of toxicological concern' has been used by the Joint (FAO/WHO) Expert Committee on Food Additives for flavouring agents and by the US Food and Drug Administration for packaging chemicals but has not been formally accepted by FSANZ as part of its risk analysis

---

58 Although they did note that there was insufficient evidence to make this judgement in relation to children. Expert Working Group above n 36, B4.0 'Overall conclusion'.

59 Jack E James, *Safety Aspects of Dietary Caffeine: A Commentary on the Final Report of the ANZFA Expert Working Group on Caffeine* (22 June 2000) Food Standards Australia New Zealand <http://www.foodstandards.gov.au/_srcfiles/EWG_Dietary_caffeine.pdf>.

60 Different principles apply for microbiological hazards (such as salmonella) and nutrient hazards (such as the risk of excessive or deficient intakes of nutrients if foods are supplemented).

61 See Walter Pagel, *Paracelsus: An Introduction to Philosophical Medicine in the Era of the Renaissance* (Karger, 2nd ed, 1982); Chapter One, 'Mind and Molecule: Neurotransmission in Context', in Daniel M Perrine, The Chemistry of Mind-Altering Drugs: History, Pharmacology and Cultural Context, (American Chemical Society, 1996), 27–29 and n 53 for a discussion of toxicity and Paracelsus.

62 Daniel Perrine gives a simple example of toxicity testing in practice based on what is called the LD_{50} or the lethal dose for 50% of the population in which one seeks to calculate the dosage at which 50% of the population will die: Above n 61, 27-29.

framework.[63] Although FSANZ has expressed the view that toxicity thresholds 'are likely to exist for all chemicals given the efficient mechanisms in place to maintain cellular homeostatis' it has also acknowledged that the threshold may be too low in some cases to be practically measured or simply not determinable by available evidence.[64]

The fact that under the RAF novel foods are subjected to a risk assessment which does not apply to traditional foods and non-regulated products (such as tobacco) has contradictory effects. On the one hand, just because a high level of risk is accepted in a traditional or non-regulated product does not mean it will be accepted in a novel food. FSANZ, for example, had no problem prohibiting the addition of nicotine to any food products even though nicotine itself is a legal ingredient in tobacco and a naturally occurring ingredient of many common vegetables such as potatoes, tomatoes and capsicums.[65] On the other hand, under the risk assessment most novel foods will eventually be assessed as having an acceptable level of risk once a threshold of toxicological concern can be established, even though they do not have the presumption of risk acceptance afforded to traditional foods.

The application of the toxicological principle means that any food manufacturer who is prepared to subject a new product to FSANZ's risk assessment is likely to meet the requirements of the risk assessment at some level except in the case of the most poisonous chemicals such as nicotine. Such an approach, however, leaves FSANZ open to the charge of failing to protect public health or at least of protecting public health only at the level of the most acute safety risks. This criticism however, ignores the second step of the RAF which is risk management.

PATROLLING THE BOUNDARIES, MANAGING PERCEPTIONS

Risk management is the second step in the Risk Analysis Framework used by FSANZ and, unlike risk assessment, does not simply consider the possible hazards of the food in question but also possible health benefits, economic issues and the behaviour of consumers.[66] Under the *Food Standards Australia New Zealand Act 1991* (Cth), FSANZ can take a regulatory or non-regulatory approach in formulating a risk management response. Its regulatory approaches include developing new food standards and varying existing food standards. Its non-regulatory approaches include developing codes of practice and engaging in consumer education programs. The matters which may be dealt with under a standard or code are broad and include matters relating to the composition of food such as the maximum and minimum levels of additives; prohibiting the sale of the food generally or in specific circumstances; labelling, promotion and advertising; restrictions on the premises at which, and the persons by

63 FSANZ, above n 47, 34.

64 Ibid 33.

65 See Food Standards Australia New Zealand, *Final Assessment Report, Proposal P278: Use of Nicotine and Nicotiana species in food* (4 August 2004) <http://www.foodstandards.gov.au/_srcfiles/P278_Nicotine_FAR_Final.pdf.> The proposal was developed in the face of international attempts to deliver nicotine in foods such as bottled water and lollipops.

66 Food Standards Australia New Zealand, *The Analysis of Food-Related Health Risks* (February 2009), p 12 <http://www.foodstandards.gov.au/_srcfiles/Food%20Related%20Health%20Risks%20WEB_FA.pdf>.

whom, particular food may be sold or otherwise supplied; and restrictions on the publications that may contain advertisements for particular food (s 16 in relation to standards, s 17 in relation to codes of practice).

In managing risk, as we have seen, FSANZ is required to ensure a 'high standard of public health protection'.[67] As Mark Lawrence has argued, however, there is no agreed definition of what the protection of public health means in relation to food regulation. In particular, there is considerable disagreement as to whether it is the role of food regulators to protect the consumer from 'heavily marketed and highly processed, expensive foods with high fat, sugar and salt content' such as drug foods[68] or whether food regulators should simply protect the public from acute health risks associated with food safety. These might be called the broad and narrow public health objectives.

There is also disagreement as to the appropriate regulatory strategies for achieving any agreed objective. Bans and limitations have traditionally been associated with the ideal of a 'healthy' diet, which assumes that drug foods should or could be excluded from the diet, or at least subjected to limitations in time and space in the same way as alcohol or tobacco. A regulatory approach based on consumer information and labelling, on the other hand, has traditionally been associated with the neo-liberal ideal of consumer choice which assumes a rational consumer who makes more or less informed choices between different food commodities at the point of sale. Neither approach is sufficient by itself, and this reductive treatment of food labelling, in particular, has been subjected to some criticism.

Caswell and Padberg, for example, argue that besides providing information to potential consumers, food labels can play an important third party role by encouraging food manufacturers to shape product design to meet desired regulatory outcomes: a food manufacturer may reduce saturated fat in order to achieve a heart 'tick' or add a 'lite' claim, for example.[69] Debra Jones Ringold warns that food labels may have a psychological reactance or 'boomerang' effect which might lead potential customers to consume foods precisely because they have been advised not to.[70] Food Authorities themselves have recognised that many food labels are misunderstood, under-utilised, and in some cases, may lead to perverse food choices.[71] Lang and Heasman take the critique of food labelling further and argue that, rather than being a resolution to battles over food, food labelling itself is a battlefield.[72] A careful consideration of

---

67 *Food Standards Australia New Zealand Act 1991* (Cth) s 3.

68 Mark Lawrence, 'Reflections on Public Health Policy in the Food Regulatory System: Challenges, and Opportunities for Nutrition and Food Law Experts to Collaborate' (2009) 14(2) *Deakin Law Review* 298, 405.

69 Julie A Caswell and Daniel I Padberg, 'Toward a More Comprehensive Theory of Food Labels' (1992) 74(2) *American Journal of Agricultural Economics* 460.

70 See Debra Jones Ringold, 'Boomerang Effects in Response to Public Health Interventions: Some Unintended Consequences in the Alcoholic Beverage Market' (2002) 25 *Journal of Consumer Policy* 27. See also S Brehm and J W Brehm, *Psychological reactance: a theory of freedom and control* (Academic Press, 1981).

71 Delvina Gorton *Nutrition labelling: Update of scientific evidence on consumer use and understanding of nutrition labels and claims* (Report prepared for New Zealand Food Safety Authority and the Ministry of Health 2007).

72 Michael Heasman and Tim Lang, *Food Wars: The Global Battle for Mouths, Minds and Markets* (Earthscan, 2004) 202.

FSANZ's risk management response to Red Bull allows us to situate FSANZ within this regulatory (battle) field.

A careful examination of the regulatory approach taken by FSANZ in the case of Red Bull suggests that FSANZ's RAF promotes a broad, rather than narrow, public health approach but that FSANZ does not use its broad regulatory powers to impose either an idealised 'healthy' diet or an open market in food commodities. Rather, FSANZ appears to favour a 'total diet' approach to food regulation. A total diet includes 'healthy' and 'unhealthy' foods, traditional and novel foods, naturally occurring substances and food additives, each of which has a different role to play within the total diet – so long as these roles are not confused. In support of this total diet approach FSANZ uses its powers to patrol the boundaries between different food categories and to actively manage consumer perceptions of food products. FSANZ therefore does not simply determine what can be sold, but by whom, where and when it might be sold; it is not simply concerned with *providing* consumer information but in *limiting* what information may be given and how that information is presented. In patrolling the boundaries between different food categories and managing consumer perceptions of food products FSANZ is engaged in what Donella Meadows might characterise as a mid-level regulatory intervention which is actively shaping a food future.[73]

In the case of Red Bull the issues considered in the risk assessment and applied as part of the risk management strategy extended well beyond the obvious limitation on the maximum amount of caffeine permitted in energy drinks.[74] Instead, FSANZ's approach was characterised by an almost obsessive concern with ensuring that the role of energy drinks within the total diet was understood and that it was not confused with other food products such as illegal drugs, health foods, sports drinks, other kola drinks or traditional caffeinated beverages such as coffee. This concern began with the name of the product itself. FSANZ considered a range of names for this new food product and determined that it could not be called a 'stimulant' because this was too suggestive of illegal drug use, nor could it be called an 'energy drink' because this was too new and unfamiliar. Rather, FSANZ determined that the new product represented by Red Bull should be known by the rather unattractive name of 'formulated caffeinated beverage' (FCB) which, although also new and unfamiliar, was at least descriptive of the product.

Secondly, Standard 2.6.4 defined FCBs by reference to their content and function — that is FCB's were defined as 'non-alcoholic water-based flavoured formulated caffeinated beverages that are manufactured for the purpose of enhancing mental performance'. Within the ideal of a 'healthy diet' such a definition verges on the scandalous — within the ideal of a 'healthy diet' there would be no room for psychoactive beverages at all. Within FSANZ's RAF, however, this definition represents both an acceptance of the place of psychoactive beverages in the total diet and a desire to limit this place by defining the beverage in a very limited manner. The limited nature of the definition can be seen when one compares it to the originally

73 Donella Meadows, *Leverage Points: Places to Intervene in a System* (1999) The Sustainability Institute <http://www.sustainabilityinstitute.org/pubs/Leverage_Points.pdf>.

74 Food Standards Australia New Zealand, 'Application A394: Formulated Caffeinated Beverages' (Inquiry Report 22/02, 8 August 2001).

proposed definition. The original definition defined a FCB as a beverage which contained vitamins and amino acids as well as caffeine for the purpose of providing 'real or perceived enhanced physiological and/or performance effects.' This definition was rejected on the basis that it did not adequately distinguish FCBs from sports and electrolyte drinks whose function is related to physical, as opposed to mental performance; that it did not adequately distinguish FCBs by reference to their caffeine content; and that, in so far as it referred to 'perceived effects' it was incompatible with FSANZ's scientific approach.[75]

Thirdly, over the objections of some members of the public, the final FSANZ standard set a *minimum* level of caffeine for FCBs as well as a maximum content. This ensures that FCBs are distinguished from other soft drinks containing caffeine such as Coca-Cola and that they are 'effective'. The standard also provided that FCBs could not be mixed with other non-alcoholic beverages such as electrolyte and sports drinks thereby further delineating the boundaries of this new drug food.

Fourthly, the Ministerial Council's *Policy Guideline for the Fortification of Food with Vitamins and Minerals* (2009) which FSANZ is required to consider under s 18 provides that 'permission to fortify should not promote increased consumption of foods high in salt, sugar or fat, or foods with little or no nutritional value that have no other demonstrated health benefit'.[76] Standard 1.3.2 'Vitamins and Minerals' provides that a vitamin or mineral must not be added to a food unless it is explicitly permitted under the Code to a prescribed limit. However, only foods classified as 'claimable foods' can make claims in relation to vitamin and mineral content. 'Claimable foods' are defined as primary foods (that is fruit, vegetables, grains, legumes, meat, milk, eggs, nuts, seeds and fish) and certain other listed foods such as bread, cereals, dairy products, fruit juices and pasta. In line with the *Policy Guideline for the Fortification of Food with Vitamins and Minerals* (2009) and after some disagreement as to how it should be applied, FSANZ's Standard 2.6.4 provided that FCBs *could* contain vitamins and minerals and *could* list these in the nutrient panel but that the product could not declare these vitamins and minerals to be a percentage of the daily recommended intake (even if the statement were actually true). Furthermore, FCBs were explicitly excluded from the category of claimable foods. Again, the strategy adopted by FSANZ seeks to patrol the border between 'healthy' and 'unhealthy' foods even whilst possibly exacerbating this confusion by allowing vitamins and minerals to be added to the product.[77]

Fifthly, the FSANZ standard contained extremely detailed provisions relating to labelling and warnings. These too demonstrate the difficulty of delineating a boundary between 'healthy' and 'unhealthy' foods. Thus, FSANZ determined that FCBs must carry a nutrient label (even though this *might* suggest a health effect) but that the nutrient label must *not* refer to intakes as a percentage of daily requirements (because

---

75 Ibid 11.

76 The Australia and New Zealand Food Regulation Ministerial Council, *Policy Guideline: Fortification of Food with Vitamins and Minerals* (2009) <http://www.health.gov.au/internet/main/publishing.nsf/Content/00E8A0712A1A5C3BCA2578A7007FBE77/$File/Policy-Guideline-for-the-fortification-of-food-with-vitamins-and-minerals%20-%20amended-Oct-2009.pdf>

77 Ibid 21.

this *would* suggest a health effect). The standard determined that the caffeine content of the product must be declared but that it could not be represented by pictograms of coffee cups (because this might suggest a connection between traditional coffee and energy drinks). The standard provided that the product must include an advisory label that no more than a certain amount of FCBs should be consumed each day as well as a warning label that the product was not recommended for children, lactating and pregnant women and people sensitive to caffeine. However FSANZ determined that the age of a child should not be defined on the warning label because this would make FCBs more attractive to children under that age. FSANZ also recognised that warning labels themselves may encourage consumption through a 'boomerang effect':

> It was noted that despite (or even because of) the advisory statements regarding non-suitability for children, marketing of and ready access to these products encourages consumption by some children and adolescents.'[78]

FSANZ did not prescribe the font and wording of warning labels. Coca Cola's 'Mother' energy drink therefore carries the prescribed warning in the following terms:

> Best drunk freeze your balls off cold.
>
> Warning! Contains high caffeine content…OK, we know that's why you're drinking it but our legal guys made us warn you not to feed this to kids, women with a bun in the oven or the weak who just can't tolerate it.

Rather than being a problem, this rather cheeky warning supports FSANZ's aim of maintaining a distinction between FCBs, health products and traditional caffeine products such as coffee. More effectively than any 'straight' warning, this warning places energy drinks, or FCBs, in a special category of food requiring special consideration.

Finally, the difficulty of patrolling the boundary between 'healthy' and 'unhealthy' foods is highlighted by the fact that FSANZ did not limit Red Bull's claims to 'vitalize body and mind', 'increase performance', 'increase concentration and reaction speed', 'improve vigilance', and 'stimulate metabolism' but instead partly supported these claims by defining the product by reference to these effects.[79] This remains one of the more contentious aspects of the Red Bull regulation and is likely to be addressed in the upcoming review.

At the time the original standard was made it might have been argued that these claims were 'therapeutic' and therefore in breach of FSANZ Standard 1.1A.2 *Transitional Standard for Health Claims* but this is not a strong argument. The transitional standard provides that the word 'health' cannot be used in conjunction with the name of the food; prohibits the provision of medical advice on food labels; prohibits any reference to disease or physiological conditions; regulates claims relating to weight loss and folate content; and provides that therapeutic or prophylactic claims cannot be made in relation to food. Although the dictionary definition of therapeutic is quite narrow and would exclude the Red Bull claims the *Therapeutic Goods Act* 1989 (Cth) implies a broader definition. Under s 3 of the *Therapeutic Goods Act* 1989 (Cth)

---

78 Food Standards Australia New Zealand, above n 74, 22. See also Debra Jones Ringold, above n 70, 27.

79 There were a number of submissions regarding Red Bull's claims. These did not challenge the claims on the basis that they were untrue but on the basis that they made the product more attractive to children.

'therapeutic goods' are defined as goods represented to be for 'therapeutic use' where 'therapeutic use' means, inter alia, something which is used for preventing, diagnosing, curing or alleviating a disease, ailment or injury, *or something which influences, inhibits or modifies a 'physiological process'* (emphasis added). Under this definition any food would be a therapeutic good in so far as it has an effect on a physiological process.[80] However, the definition of 'therapeutic good' under the *Therapeutic Goods Act* expressly excludes any goods which, 'in Australia or New Zealand, have a tradition of use as foods for humans in the form in which they are presented' or goods for which there is a prescribed *standard* in the *Australia New Zealand Food Standards Code*.[81] Although it is arguable that at the time the standard was developed Red Bull was not something which had a traditional use as a food for humans, it is possible to argue that the definition of 'therapeutic use' in the *Therapeutic Goods Act* should be read narrowly to exclude physiological effects normally attributable to food. This is not a live issue any longer for today Red Bull is covered by a prescribed standard.

Of more significance, today, is FSANZ's proposed new standard P293 *Nutrition, Health and Related Claims* which goes much further than the transitional standard and only allows health claims to be made in relation to foods which meet a minimum nutrition requirement.[82] The proposed standard reflects the principle that there is a place for both 'healthy' and 'unhealthy' foods within a total diet but seeks to overcome the inherent instability of the boundary between them by defining a 'healthy' food. The proposed standard allows only certain pre-approved, listed health claims to be made in relation to these foods and these claims must be supported by appropriate evidence. The standard also implements the Australia and New Zealand Food Regulation Ministerial Council Policy Guideline on Nutrition, Health and Related Claims which provides that health claims can only be made within the context of an 'appropriate

---

80 A 'physiological effect' was interpreted broadly in *Re Johnson and Johnson Australia Pty Ltd and Minister of Aged, Family and Health Services* [1992] AATA 297 where it was held that tampons are therapeutic goods on the basis that they 'influence, inhibit and modify a physiological process in persons'.

81 Red Bull, as we have seen, is not a traditional food in Australia or New Zealand but is a good for which there is now a prescribed standard. Food is defined broadly and inclusively in *Food Standards Australia New Zealand Act 1991* (Cth) s 5 to include:

> (a) any substance or thing of a kind used, capable of being used, or represented as being for use, for human consumption (whether it is live, raw, *prepared* or partly prepared); and (b) any substance or thing of a kind used, capable of being used, or represented as being for use, as an ingredient or additive in a substance or thing referred to in paragraph (a); and (c) any substance used in preparing a substance or thing referred to in paragraph (a); and (d) chewing gum or an ingredient or additive in chewing gum, or any substance used in preparing chewing gum; and (e) any substance or thing declared to be a *food* under a declaration in force under *section 6*. (It does not matter whether the substance, thing or chewing gum is in a condition fit for human consumption.) (2) However, *food* does not include a therapeutic good within the meaning of the *Therapeutic Goods Act 1989*. (3) To avoid doubt, *food* may include live animals and plants.

82 I will use the generic term 'health claim' to refer to health claims and nutrition content claims. The standard also covers endorsements of foods.

total diet' which 'must be described'.[83] Under the proposed standard, Red Bull's claims to 'vitalize body and mind', 'increase performance', 'increase concentration and reaction speed', 'improve vigilance', and 'stimulate metabolism' would almost certainly be prohibited on the basis that Red Bull does not have the requisite nutrition content – despite the fact that the claims may be true.[84]

Such a regulatory response may have unintended consequences. For the past thirty years food manufacturers have accepted, even promoted, food's alibi of health in the marketing of functional and 'health' foods. Even drug foods such as Red Bull have emphasised their health effects over their pleasures. If new regulatory measures render it more difficult for food products to portray themselves as healthy we may see the beginnings of an alternative food future which rejects the alibi of health, no longer privileges the health effects of food, but instead promotes its pleasures — empty calories, pure pleasure, food for food's sake. Instead of encouraging food manufacturers to meet the requirements of the new standard it may instead drive them to abandon the health claims of a recombinant food culture altogether.

CONCLUSION

Red Bull is a complex food product which crosses the boundary between traditional and novel foods, between health and harm, between drugs and food. In responding to this new drug food, FSANZ has crafted a sophisticated regulatory response which promotes broad public health aims but does not rely on an idealised 'healthy' diet; and promotes consumer choice but not an open market in commodified food products. Instead, the FSANZ approach recognises a place for traditional and novel foods, for naturally occurring substances and food additives; and for nutritious and non-nutritious foods within a total diet – so long as they are not confused. This strategy relies on a complex set of regulatory measures including food labels and warnings which are used to patrol and delineate the boundary between different food categories and manage consumer perceptions of these food products. The almost obsessive and detailed nature of this regulatory response however, bears witness to the inherent instability of these categories as well as the perversity of consumer choice.

The upcoming review of Standard 2.6.4, *Formulated Caffeinated Beverages*, announced by the Australia New Zealand Food Regulation Ministerial Council will almost

---

83 The Policy gives the following two examples. 'This food is high in S that may help reduce your risk of G disease. People with G disease should eat a varied diet low in A and B and high in S, X and Y.' and 'This food contains X which may improve Y when eaten as part of a varied diet low in A and B and high in X and C.' See 'Claim Pre-requisites', Australia and New Zealand Food Regulation Ministerial Council, *Policy Guideline on Nutrition, Health and Related Claims* (2 July 2004) Food Standards Australia New Zealand <http://www.foodstandards.gov.au/_srcfiles/Revised%20Health%20Claims%20Policy%20Guideline%201%20July%2004.pdf.> .

84 Alternatively, if the nutrition content is defined to allow energy drinks to carry health claims the wording of the claims would simply be changed to refer to the place of energy drinks within the total diet, assuming that the expert committee's finding on caffeine's efficacy is accepted. However, given that FCBs are already excluded from the definition of 'claimable foods' it is unlikely that either FSANZ or the Ministerial Council would favour this approach in a new health claims standard.

certainly mirror this approach.[85] Food cultures, and the culture of drug foods in particular, are too complex, too rich, to be managed by simple slogans. Instead, the battle will continue over the details. We can expect further debate on whether caffeinated beverages can be added to alcohol, whether they can be sold to children, or are available in hotels. We can expect some changes to the claims which may be made. What we cannot expect is that, with a simple regulatory gesture, a whole food culture will be changed in the name of either a 'healthy' diet, or even consumer choice.

85 *Australia and New Zealand Food Regulation Ministerial Council Communiqué*, 11 May 2011, <http://www.foodstandards.gov.au/scienceandeducation/newsroom/mediareleases/mediareleases2011/australiaandnewzeala5154.cfm>.