

# AUSTRALIA AND NEW ZEALAND FOOD REGULATION MINISTERIAL COUNCIL

20 JUNE 2008

## FOOD MINISTERS REQUEST A REVIEW OF DRAFT STANDARD – 1.2.7 – NUTRITION, HEALTH AND RELATED CLAIMS THAT HAS RESULTED FROM PROPOSAL 293 – NUTRITION HEALTH AND RELATED CLAIMS

The Australia and New Zealand Food Regulation Ministerial Council (Ministerial Council) has requested that Food Standards Australia New Zealand (FSANZ) review draft Standard 1.2.7 - Nutrition, Health and Related Claims – that has resulted from Proposal 293 – Nutrition, Health and Related Claims.

Proposal 293 aims to provide regulatory arrangements for nutrition, health and related claims, to expand the range of permitted claims, to ensure products carrying nutrition content and health claims provide adequate information for consumers and to prevent misleading or deceptive claims on food labels or in food advertising.

The Criteria/Ground/s for the review of draft Standard 1.2.7 – Nutrition, Health and Related Claims are that:

### **It is not consistent with existing policy guidelines set by the Ministerial Council:**

The standard is not consistent with certain principles in the Ministerial Policy Guideline for Nutrition, Health and Related Claims which states that:

- *any intervention by government should support government, community and industry initiatives that promote healthy food choices by the population” (Policy Principle 3);*
- *any intervention by government should be consistent with and complement Australian and New Zealand national policies and legislation including those relating to nutrition and health promotion, fair trading, industry growth and international trade and innovation” (Policy Principle 4);*
- *any intervention by government should contain a process of substantiation which aligns levels of scientific evidence with the level of claims along the theoretical continuum of claims, and at minimum costs to the community ((Policy Principle 6);*
- *any intervention by government should allow for effective monitoring and enforcement (Policy Principle 9);*
- *the system should favour pre-market approval rather than post-market reaction (Policy Principle 10);*
- *claims can be made providing the claim is socially responsible and does not promote irresponsible food consumption patterns (Claims pre-requisites); and*
- *claims can be made providing the eligibility criteria, including qualifying and/or disqualifying criteria (and any excluded categories of foods, such as alcohol and infant foods), are complied with (Claims pre-requisites).*

**It does not protect public health and safety**

The draft standard exempts Nutrient Content Claims (NCC) from being subject to the Nutrient Profiling Scoring Criteria (NPSC), which determine the type of food products that are eligible to carry a claim.

Endorsements are generally exempt from the operation of the draft Standard without an approval process.

**It places an unreasonable cost burden on industry or consumers**

The standard as a whole is highly complex. It will be extremely difficult and resource intensive for industry to comply with, and for regulators to monitor and enforce.

It is considered that compliance with the draft standard would place an unreasonable cost burden on industry and, potentially, on consumers. Any costs incurred by industry are likely to be passed onto consumers in the form of higher food prices.

**It is difficult to enforce (and/or) comply with in both practical or resource terms**

Enforcement of the draft standard in relation to general level claims (other than pre-approved statements) will require substantial resources. Unless claims can be verified quickly and simply with unequivocal evidence that will, if necessary, meet the test required by the courts, assessment of the truth of claims and gaining compliance will be an unnecessary burden for enforcement agencies and it will reduce consumer confidence and certainty, not provide a level playing field for industry and also reduce industry certainty. This will result in a lack of confidence in the food regulation system.

**It is not consistent with the objectives of the legislation which establishes FSANZ**

Any standard where enforcement difficulties are anticipated, provide opportunity for industry to mislead consumers. Subjectivity in the weight of evidence to substantiate a food-health relationship and the onus on regulators with limited capacity to adequately assess claims provides an environment for food companies to market food products in a way that contradicts public health messages.

Misleading or deceptive conduct leads consumers to hold false beliefs or draw the wrong conclusions. The onus is on the Government to ensure that the standard limits the opportunity for consumers to be misled.

**Subsection 84 (5) of the *Food Standards Australia New Zealand Act 1991* states that:**

- ‘If the Council requests the Authority to review a draft standard or variation, the Authority must complete that review, and make a decision under subsection (6):**
- (a) within 3 months after the request was made; or**
  - (b) if the Council allows a longer period – within that longer period.’**

**On 4 September 2008 the Ministerial Council agreed, to a request from FSANZ, to extend the review period for Proposal P293 – Nutrition, Health and Related Claims until 8 April 2009.**

## The process for requesting a review

After Food Standards Australia New Zealand (FSANZ) notifies the Australia and New Zealand Food Regulation Ministerial Council (the Council) of a draft standard or variation the Council may request a review if any jurisdiction believes that one or more of the Criteria/Ground/s<sup>1</sup> set out in the Food Regulation Agreement 2000 (as amended in 2002) (the Agreement) or the Agreement between the Government of Australia and the Government of New Zealand concerning a Joint Food Standards System (the Treaty) applies. The Criteria / Ground/s set out in the Agreement and in the Treaty are:

- (i) it is not consistent with existing policy guidelines set by the Ministerial Council;
- (ii) it is not consistent with the objectives of the legislation which establishes FSANZ;
- (iii) it does not protect public health and safety;
- (iv) it does not promote consistency between domestic and international food standards where these are at variance;
- (v) it does not provide adequate information to enable informed choice;
- (vi) it is difficult to enforce or comply with in both practical or resource terms; and / or
- (vii) it places an unreasonable cost burden on industry or consumers.

In exercising this power the Council must comply with the Agreement and the Treaty. Under the Agreement the Council will request a review if any jurisdiction considers that one or more of the Criteria applies. The Council would also, at this point in the process, request a review if New Zealand notifies the Council of concerns that the standard would be inappropriate for New Zealand (Annex C(2) of the Treaty).

If such a review is undertaken and the Council receives notice from FSANZ that the draft standard or variation has been reaffirmed (either entirely or subject to amendments) the Council may request a second<sup>1</sup> review. In exercising this power the Council must comply with the Agreement. Under the Agreement the Ministerial Council will request FSANZ to review the draft standard or variation a second time if it is agreed, by a majority vote, that one or more of the Criteria applies.

<sup>1</sup> This part of the protocol will have to be updated once the 'Agreement between the Government of Australia and the Government of New Zealand Establishing a System for the Development of Joint Food Standards' (the Treaty) has been amended to reduce from two to one the number of occasions on which the Council may request the Authority to review a draft or a variation to a standard. This will harmonize it with the Food Standards Australia New Zealand Amendment Act 2007.