

Supporting document 5

Consideration of additional regulatory provisions for fat-free and % fat-free claims

P293 – Nutrition, Health & Related Claims

Executive summary

At its meeting in December 2011, the COAG Legislative and Governance Forum on Food Regulation (Forum) asked FSANZ to further consider the regulation of fat-free and % fat-free claims due to a concern about the potential for consumers to be misled by these types of claims.

In response to this request, FSANZ released a consultation paper in February 2012 seeking comments on three options: status quo (regulation of % fat-free claims as proposed in the Final Assessment Report), voluntary action through a code of practice, and additional regulation (approaches presented included prohibition of fat-free and % fat-free claims via the application of the nutrition profiling scoring criteria, a sugar concentration threshold or definition of specific food categories, or the use of a disclaimer on foods above a sugar concentration threshold).

Many submitters supported status quo (industry and some jurisdictions), a similar number supported additional regulation (public health stakeholders, consumers and some jurisdictions) and some submitters supported voluntary action through a code of practice (industry).

Key reasons given by submitters for supporting status quo included the lack of evidence of a problem, possible inconsistency with considering fat-free and % fat-free claims and not other fat-related claims such as 'low-fat', a voluntary action by confectionery manufacturers to remove fat-free claims from over 80% of the confectionery market, and that front-of-pack labelling currently under development may affect industry use and consumer understanding of the claims. In contrast, key reasons provided by submitters for supporting additional regulation included reference to evidence that suggests 'fat-free' claims on 'less healthy' foods are misleading and a general desire for additional regulation of all foods carrying nutrition content claims.

FSANZ commissioned a literature review on consumer use and understanding of fat-free claims on 'less healthy' foods. This review of the peer-reviewed literature revealed very few studies directly relevant to any of the research questions.

While the review indicates that % fat-free claims are capable of influencing consumer perception of the healthiness or energy content of foods, there is very little evidence of consumers being misled by fat-free claims on foods of lower nutritional quality. There are no reported studies investigating the impact of fat-free claims on consumer purchase behaviour in relation to high sugar foods or on whether fat-free claims cause substitution behaviour whereby consumers may purchase foods of lower nutritional quality in place of foods of higher nutritional quality.

FSANZ also commissioned a report on the impact of possible additional regulation of fat-free claims on the cost-benefit analysis prepared in 2008 at final assessment. It was found that the impact is dependent on the approach taken. If a 30% sugar concentration threshold was applied to require a disclosure statement, it was estimated that the net benefit of Standard 1.2.7 would decline by A\$5 million. If claims on foods above the 30% sugar concentration were prohibited costs could rise to around A\$52 million should industry make changes other than label changes, such as reformulation or product deletion. If foods not meeting the nutrient profiling scoring criterion were prohibited from carrying the fat-free claims, it was estimated that costs to industry would be around A\$126 million, resulting in an overall net loss on implementation of the Standard.

Following the evaluation of all available information and submissions received, FSANZ concludes that there be no additional regulatory provisions for 'fat-free' and '% fat-free' claims at this time for the following reasons:

- There is a lack of evidence that consumers are misled as few studies about the impact of fat-free claims on consumer purchase decisions have been reported. This is further supported by the findings from the literature review on nutrition content claims (section 5.10 in the review report) which found that the weight of evidence indicates consumers are unlikely to be misled by nutrition content claims.
- Consideration of additional regulation for only selected fat-related claims could result in an inconsistent approach to the regulation of nutrition content claims.
- All proposed regulatory approaches present technical implementation difficulties and unintended consequences for certain products.
- CIE's evaluation of the impact of additional regulation using 2012 industry data, on the cost-benefit analysis prepared in 2008 indicates that the regulatory approach most favoured by those who supported additional regulation, the application of the nutrient profiling scoring criterion, would result in significant costs for industry that would lead to an overall net loss on implementation of Standard 1.2.7.
- A front-of-pack labelling scheme is currently being developed as part of the government's response to the independent review of food labelling law and policy (Blewett et al. 2011). If a decision is made to proceed with such a scheme it may have an impact on industry use and consumer understanding of claims, and address the concern that has been raised.
- As of October 2012, the Australian Industry Group (AIG) for the confectionery sector advised FSANZ that the industry's major players have agreed to implementation of voluntary action to remove fat-free and %-fat free claims from high sugar, high energy confectionery products that do not normally contain significant levels of fat, in early 2014. AIG noted that labelling changes have already commenced and will gradually filter into the marketplace. A delay in considering further regulation will allow industry time to implement this voluntary initiative and for government to then evaluate whether further regulatory action is warranted.

In summary, FSANZ has considered the issue of 'fat-free' and '% fat-free' claims and concludes that there is not sufficient cause, at this time, to further regulate these claims. Given the forthcoming industry voluntary action, front-of-pack labelling and implementation of Standard 1.2.7 as a whole, FSANZ proposes that the regulation of fat-free and % fat-free claims should be included in the post-implementation review of the nutrition, health and related claims system that is foreshadowed in the Policy Guideline.

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1 Introduction

1.1 Additional request for consideration of additional regulatory provisions for fat-free and % fat-free claims

At its meeting in December 2011, the COAG Legislative and Governance Forum on Food Regulation (Forum) asked FSANZ to further consider the matter of fat-free and % fat-free claims due to a concern about the potential for consumers to be misled by these types of claims. It is suggested that confusion may arise from consumers believing that products carrying such claims are inherently 'healthier' due to the low fat content, but that they may not recognise that some products may be high in sugar thereby contributing to increased energy intake.

There was also concern that fat-free claims, particularly on foods high in sugar and energy that do not normally contain fat e.g. confectionery, may be inconsistent with public health messages. The current dietary guidelines of both Australia and New Zealand, in addition to recommending a reduction in total fat intake, recommend limiting intake of sugars and foods containing added sugars (Ministry of Health 2003; NHMRC 2003).

The main issue is whether there is evidence that consumers are currently, or are likely to be in the future, misled by fat-free and % fat-free claims, thereby warranting the application of additional regulatory measures.

2 Background

2.1 Regulatory requirements for fat-free claims at final assessment

Fat-free and % fat-free claims are nutrition content claims which FSANZ has considered in the context of both *free* and fat claims as part of P293. Details of FSANZ's consideration of *free* and fat claims are in Attachment 5 to the Final Assessment Report.

Currently, the Code does not contain provisions for the use of *free* claims, except for claims about gluten and lactose¹.

Fat-free claims are not specifically addressed by Standard 1.2.7, rather, the deceptive and misleading provisions under the respective consumer protection laws, as regulated by the Australian Competition and Consumer Commission and the New Zealand Commerce Commission, are relied upon to ensure appropriate use of fat-free claims.

In relation to % fat-free claims, draft Standard 1.2.7 at final assessment set out the following conditions that have been maintained: *The food meets the conditions for a nutrition content claim about low fat*, which is, the food contains no more fat than – (a) 1.5 g per 100 mL for liquid food; or (b) 3 g per 100 g for solid food².

2.2 Overseas regulation

FSANZ's overall regulatory approach for nutrition content claims is similar to provisions in the EU. In Canada and the USA, only those claims listed in their regulations are permitted.

¹ The voluntary *Code of Practice on Nutrient Claims in Food Labels and in Advertisements* (CoPoNC) includes conditions for free claims in relation to fat (including % fat-free), cholesterol, sodium and sugar

² This approach reflects the conditions which are currently in place voluntarily under CoPoNC.

There is a range of approaches in relation to the application of disqualifying criteria or a generic nutrient profiling system to products with nutrition content claims. While Standard 1.2.7 includes disqualifying criteria for specific claims, Canada has no such provisions, while the USA requires a disclosure statement in some situations (see below), and the EU is proposing to use a nutrient profiling system although the details are yet to be determined.

In the USA, a disclosure statement ('See nutrition information for --- content') is required next to a nutrition content claim where the food contains one or more of specified nutrients at levels that exceed set quantities per serve. The specified nutrients are fat, saturated fat, cholesterol, sodium.

The regulation of fat-free and % fat-free claims in the USA and Canada is similar to that in Standard 1.2.7. However, in the EU, while fat-free claims are permitted, % fat-free claims are not allowed irrespective of the composition of the food.

2.3 Current market practice

As of February 2012, fat-free and % fat-free claims were on the following products (as determined by an initial supermarket scan by FSANZ):

- breakfast cereals
- confectionery
- snack foods (e.g. oven baked bars)
- bread – wraps
- dairy products and dairy desserts (milk, yoghurt, custard, gelato, frozen yoghurt)
- simmer sauces
- soups (canned and packet mixes)
- crackers biscuits (rice/corn thins (non-flavoured))
- certain canned foods (e.g. spaghetti, baked beans, fish)
- salad dressings (e.g. mayonnaise) and sauces
- processed meats.

Products with fat-free claims, to be factually correct and compliant with consumer law, must be 'free' of fat, which limits the number of products which can carry this claim, whereas more products are eligible to make % fat-free claims.

A 2011 study carried out in Australia examined the labels of 2560 foods in 46 food categories for nutrition, health and related claims. Fat-related claims were found on 13.1% of the 2560 foods surveyed (Lee, 2011).

A 2001 labelling survey of 6662 products across 40 food categories, sold in New South Wales, found that 51% of the products had at least one nutrient claim (Williams et al 2003). The most common nutrient claims related to fat; 18% of the foods carried some type of fat-related claim, with '% fat-free' being used almost twice as frequently as 'low fat'.

3 Regulatory options

In considering possible approaches for this issue, FSANZ is required to look at a range of options including status quo, non-regulatory and regulatory options. In February 2012, FSANZ released a consultation paper seeking public comment on three options as follows:

- *Option 1* – status quo (no additional regulation, consumer education)
Adopting a status quo position would result in the regulation of fat-free and % fat-free claims as proposed at final assessment.

- *Option 2* – voluntary action through a code of practice
Where it is apparent that there is a risk to be managed, that is, further action is required, FSANZ is required to consider non-regulatory options such as industry codes of practice (CoP) to address issues or residual risks. In this case, an industry CoP might act to limit the use of fat-free and % fat-free claims on foods or a range of foods or establish additional conditions for making claims of this type, and may also include assistance in consumer education.
- *Option 3* – additional regulation for fat-free and % fat-free claims. Four possible approaches for additional regulation were presented:
 - *Option 3(a)* Only permit claims on foods meeting the nutrient profiling scoring criterion
 - *Option 3(b)* Require a disclosure statement on foods above a sugar concentration threshold. Examples of statements: *see nutrition information panel; see nutrition information panel for sugar content; this food is high in sugar; this food contains x % sugar*
 - *Option 3(c)* Not permit claims on foods in specified food category(ies)
 - *Option 3(d)* Not permit claims on foods above a sugar concentration threshold

4 Submitter response

Of the 83 submissions received in response to the consultation paper, 62 included comments on the ‘fat-free’ issue. Table 1 shows submitter responses in relation to the three options presented in the consultation paper.

Table 1: Number of submitters supporting each regulatory option for fat-free and % fat-free claims, by stakeholder group

Option	Government	Industry	Public Health	Consumer	Other ²	Total submitters
Option 1 – Status Quo	4	24	1		1	30
Option 2 - Voluntary		4			4	8
Option 3 – Additional Regulation ¹	3	2	15	3	1	24
No comment or unclear		14	4		3	21
Total submitters	7	44	20	3	9	83

¹includes submitters wanting the nutrient profiling scoring criterion applied to all nutrition content claims

²includes private, academic, therapeutic, media

Industry submitters tended to support option 1, while public health/consumer submitters supported option 3. Some jurisdictions supported option 1 while other jurisdictions supported option 3.

Reasons provided for supporting status quo included:

- lack of evidence of a problem
- supports innovation
- ‘fat-free’ claims are statements of fact
- difficulty in providing comment when not all information presented for consultation (e.g. review of consumer research, Regulation Impact Statement)

- possible inconsistency with considering fat-free and % fat-free claims and not other fat-related claims such as 'low-fat'
- additional regulation would not be minimum effective regulation
- additional regulation provides no consumer benefit
- front-of-pack labelling, currently under development, may impact on industry use of 'fat-free' claims and also consumer understanding on such claims
- proposed voluntary action by the Australian Industry Group Confectionery Sector where over 80% of the confectionery market will remove fat-free claims from high energy confectionery that do not normally contain fat.

Reasons provided for supporting additional regulation included:

- 'fat-free' claims on less healthy foods are misleading
- presence of 'fat-free' claims may not support healthy food choices
- general desire for additional regulation of all foods carrying nutrition content claims (however many submitters noted the inconsistency in only considering two types of fat-free claims).

Of the 24 submitters who commented on the approaches presented for additional regulation, 23 supported the application on the nutrient profiling scoring criterion to restrict the use of fat-free and % fat-free claims (Option 3a). However, many submitters acknowledged the significant implementation issues associated with all four approaches for additional regulation.

Other options for the regulation of fat-free and % fat-free claims proposed by submitters included:

- limit the 'fat-free' claims to products for which other products in the range are not low in fat e.g. contain more than 3% fat. The claim then describes the distinction, unlike for confectionery, where some products carry the claim but most or all products meet the criteria. Approach may require declaration of reference food
- prominent display of energy per serve (depending on the problem to be addressed)
- traffic lights to help identify if the fat-free claim was on a product high in sugar/salt
- co-regulation
- prohibition of claims above an energy threshold
- prohibit % fat-free claims as in the EU
- restrict claim to 99% fat-free.

5 Consumer understanding and use of fat-free claims

FSANZ commissioned a literature review on consumer use and understanding of fat-free claims on 'less healthy' foods (Attachment 5.1 to SD5). Due to the lack of studies in this area, the review included low-fat claims and any food types.

The main conclusions of the literature review are that:

- there are very few peer-reviewed studies directly relevant to any of the research questions
- % fat-free claims may be capable of influencing consumer perception of the healthiness or energy content of foods, however there is very little evidence of consumers being misled from fat-free claims on foods of lower nutritional quality
- no studies have been reported investigating the impact of fat-free claims on consumer purchase behaviour in relation to high sugar foods
- a 'low-fat' claim on a high sugar confectionery product may result in increased consumption of the 'low-fat' labelled product compared with the same product labelled 'regular'. However, this finding was from one study only (Wansink and Chandon 2006).

FSANZ research carried out in 2003 and 2005 suggests:

- many consumers are generally interested in the fat content of products
- fat-free claims are likely to have the most influence at time of first purchase
- many consumers are sceptical about fat-free claims, particularly on foods of lower nutritional quality.

No studies have been reported that investigate whether fat-free claims cause substitution behaviour, in particular, if these claims are causing consumers to purchase foods of lower nutritional quality in place of foods of higher nutritional quality.

6 Impact of additional regulation of fat-free and % fat-free claims on the cost-benefit analysis

FSANZ commissioned The Centre for International Economics (CIE), (who completed the original cost-benefit analysis (CBA) in 2008) to investigate the impact of additional regulation of fat-free claims on the 2008 CBA (Attachment 6.3 at SD6).

The following regulatory approaches for additional regulation of fat-free and % fat-free claims were investigated (as presented in the February 2012 consultation paper):

- Option 3(a): Only permit claims on foods meeting the nutrient profiling scoring criterion
- Option 3(b): Require a disclosure statement (such as 'this food contains x% sugar') on foods above a sugar concentration threshold of 30%
- Option 3(c): Prohibition of claims on foods in specific food categories
- Option 3(d): Not permit claims on foods above a sugar concentration threshold of 30%.

A sugar threshold of 30% was chosen for this investigation since at this level most high sugar foods such as confectionery would be prohibited from using the claims, while minimising the impact on other foods.

Where the 30% sugar content threshold was applied and a disclosure statement required (option 3(b)), approximately 1.2% of all foods by value, mainly confectionery, ice creams, jams, spreads and dried fruit were affected. The cost to industry in the form of labelling changes for products affected using a 30% sugar content threshold was estimated at A\$5 million. This would still result in a net benefit of around A\$79 million, at net present value, on implementation of Standard 1.2.7 compared with A\$84 million if this additional regulation was not applied.

Option 3(d) captures the same proportion of products as option 3(b), but it was expected that the market response could be more dramatic. Although industry stakeholders indicated they would have to undertake label changes and acknowledged that other responses would be likely, no other information was obtained on market responses. Using data collected for the evaluation of option 3(a), it was estimated that the cost of option 3(d) could be as high as A\$52 million should manufacturers consider action other than labelling change, such as reformulation or product deletion. However if only label changes were to occur, the cost would be minimal at around A\$5 million.

Option 3(c) would capture more stock keeping units (SKUs) per food category selected that either a sugar threshold or the application of the nutrient profiling scoring criteria. Per category of food it is therefore the most expensive option. The total cost would depend on how many product categories were selected. If all categories were selected, the cost could rise to A\$242 million.

Failure to meet the nutrient profiling scoring criterion (option 3(a)) affected about 4.7% of products by value. However the impact on industry would be disproportionately higher, because these products which included meat products and cereals come in smaller stock keeping units. CIE estimated that the costs imposed by this option would be around A\$126 million, resulting in an overall net loss should the standard be introduced. Should restrictions on the use of claims create opportunities for others to use claims on new products, it was estimated that the net costs of option 3(a) could decline to around A\$104 million.

7 FSNZ response

Following the evaluation of all available information and submissions received, and after consideration of matters required by the Act, FSNZ concludes that there be no additional regulatory provisions for 'fat-free' and '% fat-free' claims at this time for the following reasons:

- There is a lack of evidence that consumers are misled as few studies about the impact of fat-free claims on consumer purchase decisions have been reported. This is further supported by the findings from the literature review on nutrition content claims (section 5.10 in the review report) which found that the weight of evidence indicates consumers are unlikely to be misled by nutrition content claims.
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In summary, FSNZ has considered the issue of 'fat-free' and '% fat-free' claims and concludes that there is not sufficient cause, at this time, to further regulate these claims. Given the forthcoming industry voluntary action, front-of-pack labelling and implementation of Standard 1.2.7 as a whole, FSNZ proposes that the regulation of fat-free and % fat-free claims should be included in the post-implementation review of the nutrition, health and related claims system that is foreshadowed in the Policy Guideline.

References

Blewett N, Goddard N, Pettigrew S, Reynolds C, Yeatman H (2011) Labelling logic. A review of food labelling law and policy (2011). Canberra: Commonwealth of Australia.

Lee B. Label Matters: Assessing Nutrition Claims on Australian Foods. Masters of Nutrition and Dietetics research project. University of Sydney, 2011.

Ministry of Health (2003) Food and Nutrition Guidelines for Healthy Adults: A Background Paper. Ministry of Health, Wellington.

NHMRC (2003) Dietary Guidelines for Australian Adults. NHMRC, Commonwealth Of Australia.

Wansink B, Chandon P (2006) Can 'low-fat' nutrition labels lead to obesity? *Journal of Marketing Research* 43(4): 605-617.

Williams P, Yeatman H, Zakrzewski S, Aboozaid B, Henshaw S, Ingram K, Rankine A, Walcott S, Ghani F (2003) Nutrition and related claims used on packaged Australian foods – implications for regulation. *Asia Pacific Journal of Clinical Nutrition* 12(2): 138-150.

Attachments

1. Rapid evidence assessment of fat-free nutrition content claims on high sugar foods