

DAIRY COMPANIES ASSOCIATION OF NEW ZEALAND
SUBMISSION TO: FOOD STANDARDS AUSTRALIA NEW ZEALAND
(FSANZ)

ON

Proposal P1028 Review of Infant Formula: Second Call for
Submissions

7th July 2023

1. Introduction

- 1.1. The Dairy Companies Association of New Zealand (DCANZ) appreciates the opportunity to consider and provide comment on the issues and proposals raised Proposal P1028, Second Call for Submissions, in light of its relevance and importance to our member companies. DCANZ member companies collectively account for more than 98% of the milk processed in New Zealand and the vast majority of New Zealand's dairy exports. In the year to the end of March 2023, the value of Infant Formula (HS code 1901.10) exports from New Zealand was NZ\$1.93 billion.
- 1.2. The FSANZ review of the Infant Formula Standard has been formally underway for more than ten years and we would like to acknowledge the significant work undertaken by FSANZ staff during this period.
- 1.3. Breast feeding is acknowledged as the normal and preferred way to feed infants. However, when breastmilk is not available for an infant, the only suitable and safe alternative is a scientifically developed infant formula.
- 1.4. To ensure the best possible nutrition for non-breastfed infants, policy and regulatory instruments must ensure a balance between:
 - a. regulatory guidance on product use and regulatory requirements regarding product composition in order to protect infant health and support normal growth,
 - b. providing flexibility and incentive for innovation to enable continuous improvement of infant formulas; and
 - c. providing adequate information on product labels and from other sources relating to infant formula composition and purpose to enable carers to make informed choices.
- 1.5. DCANZ is generally supportive of the points and comments contained in the Infant Nutrition Council's (INC) submission on this P1028 Consultation Paper.
- 1.6. The dairy sector is one of the biggest contributors to the achievement of New Zealand economic/export growth goals under the Fit for a Better World Strategy. This Strategy aims to add \$44 billion in New Zealand export earnings over the 2020 to 2030 decade through a focus on creating value. New prohibitions on labelling, particularly around provenance statements on the major value-add product Infant Formula, has a considerable potential impact on New Zealand export earnings.
- 1.7. This submission focuses on the specific and significant concern that the proposed revision of the Infant Formula standard, as currently drafted, would prohibit statements such as "made with New Zealand milk" or "made with A2 milk (protein)" on pack. We consider that this restriction overreaches in terms of FSANZ objectives as it does not materially add to food safety outcomes,

restricts consumer information, and at the same time results in significant commercial costs and barriers to competitive trade in export markets for the New Zealand dairy industry.

- 1.8. We are also extremely concerned at the contradictory information around the use of pictures and images contained in the P1028 Discussion Document compared to the information contained in the draft variation for the Infant Formula Standard. It is our strong contention that in the interests of informed choice, images and pictures relating to information such as ingredients and protein sources, (e.g., images of cows, goats and sheep) should not be prohibited.

The contact for this submission is:

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2. General Comment

- 2.1. As stated previously, DCANZ generally supports the comments and concerns raised in the INC submission on this consultation paper.

3. Specific Comment

- 3.1. DCANZ has a specific and significant concern regarding the following new provisions in 2.9.1-29 (j) and (k) which specifically state:

2.9.1—29 Prohibited representations.

(1) The label on a package of infant formula or follow-on formula must not contain: {...}

(j) information relating to ingredients, except for a reference in:

(i) a statement of ingredients; or

(ii) a declaration or statement expressly permitted or required by this Code; or

(k) information relating to the animal or plant source or sources of protein in the infant formula or follow-on formula, except:

(i) in a statement of ingredients; or

(ii) where required by subsection 2.9.1—20(1);

- 3.2. This proposed new prohibition on ingredient statements and restriction of source of protein statements to front of pack only is not internationally aligned with the Codex, the WHO code, the EU or the US.
- 3.3.
 - Codex STAN CXS 72-1981 restricts only nutrition and health claims (this is not a restriction on ingredient statements) for foods for infants, except where specifically provided for in relevant Codex Standards or national legislation.
 - WHA58.32 resolutions adopted subsequent to the WHO Code only reference restrictions on nutrition and health claims for breastmilk substitutes, unless national/regional legislation permits such claims.

- EU 2016/127 restricts nutrition and health claims on infant formula but allows them on follow-on formula products.
- The US FDA allows nutrition and health claims to be displayed on infant formula products that are specifically provided for under the *Code of Federal Regulations. Labelling of Infant Formula: Guidance for Industry*.

As indicated above, the proposal is inconsistent with FSANZ's stated P1028 objective of assisting international trade by harmonising with international standards.

- 3.4. In the 2016 FSANZ consultation paper, "*FSANZ noted it had observed claims about specific ingredients (for example, 'fish oil', 'unique prebiotics', 'fish oil to help support brain and eye development'), or specific health effects (for example, 'unique ingredients to help promote comfortable digestion') on IFP labels. FSANZ suggested there may be confusion about how nutrition content and health claim definitions and provisions contained in Standard 1.2.7 apply to claims about ingredients made on IFP labels*" (FSANZ 1CFS SD3). At the time this was interpreted to indicate that provenance statements were not the intended target of the proposed regulation, rather it was implied nutrient and health claims. However, the current draft variation wording suggests that FSANZ is using a generic clause to address more specific concerns. This approach is inconsistent with other international standards, where ingredient statements are generally not prohibited on infant formula products.
- 3.5. We see that FSANZ are proposing to include a new note to clarify requirements around nutrition and health claims: "*Note Standard 1.2.7 prescribes requirements for making health claims and nutrition content claims, including in relation to infant formula products. Section 1.2.7—4 provides that a nutrition content claim or *health claim must not be made about an infant formula product. Section 1.2.7—8 provides that a claim – including a claim about an infant formula product - must not be therapeutic in nature.*" We consider such a statement in this note would address FSANZ's concern around health claims, without the need for a prohibition on ingredient statements.
- 3.6. Discussions with FSANZ staff during the current consultation period indicate that the implementation of this proposed new provision would prohibit statements such as "made with New Zealand milk" or "made with A2 milk (protein)" on pack, as such statements would constitute ingredient statements.
- 3.7. It is our contention that there is also no justifiable reason for prohibiting such statements elsewhere on pack. If statements such as protein source are permitted on front of pack, they should be permitted to be repeated elsewhere. This assists in the communication of important information to consumers.
- 3.8. Additionally, the final row, Table 8.1 of the Discussion Document, indicates that a new prohibition concerning the use of images and pictures applies **only** to information relating to "another product". This appears to be in conflict with the proposed draft variation of Standard 2.9.1-29 (1) and (2) where there appears to be new prohibitions for the use of images and pictures in **all** labelling 'information' referred to in 2.9.1-29 (1).
- 3.9. We are concerned that the current draft standard would prohibit images and pictures of information relating to milk sources (cows, goats, sheep) which assist in enabling informed decision making by carers. We seek clarification from FSANZ as to whether this is intentional; and if it is, we strongly submit that FSANZ should reconsider such prohibitions on information pictures and imagery (particularly relating to ingredients and protein source) other than the proposed prohibition relating to 'other products'.
- 3.10. Our assessment of the impact of these requirements (which would not materially advance FSANZ objectives) on the New Zealand dairy industry is that it would significantly negatively impact the current NZ\$1.93 billion New Zealand annual export sales of infant formula. It is our contention that caregivers, having made the decision to purchase infant formula, seek to make an informed decision around the provenance of key ingredients in infant formula products.
- 3.11. In the current New Zealand situation, export product must meet FSANZ requirements unless each variation is specifically exempt though parliamentary gazetting of each variation. If the proposed FSANZ prohibitions of ingredient information are progressed, New Zealand products sold both via Cross Border E-Commerce (CBEC) channels and conventional supply chain channels are likely to be

significantly impeded. This proposed prohibition will further exacerbate the current uneven international trading field and put NZ exporters at a significant disadvantage to exporters from other countries (including Australia).

3.12. These proposed labelling provisions are not consistent with FSANZ principles (objectives and considerations) including:

- *“the provision of adequate information relating to food to enable consumers to make informed choices”*; Section 18(1) (b) of the FSANZ Act 1991
- *“the promotion of consistency between domestic and international food standards;”* 18(2) (b) of the FSANZ Act 1991
- *“the desirability of an efficient and internationally competitive food industry”*; Section 18(2) c) of the FSANZ Act 1991
- *“the promotion of fair trading in food”* Section 18(2) (d) of the FSANZ Act 1991

3.13. It is our strong contention that the inclusion of these requirements, which prohibits representations made on infant formula or follow-on formula about ingredients, particularly for the key ingredient(s) of the infant formula, are not consistent with the stated objectives of FSANZ. This is because:

- a. The use of label statements relating to ingredient statements such as “made with milk” or “made with New Zealand milk” which do not infer specific nutritional benefit should not be prohibited.
- a. Such statements which ensure adequate information about protein sources and protein fractions on the product label such as “made with A2 milk (protein)” provide useful and necessary information to enable carers to make informed choices. Prohibiting these statements is totally contrary to Section 18(1) (b) of the FSANZ Act 1991.
- b. It is a NZ regulatory requirement for information on a product label to adequately describe the true, complete, and accurate nature of the product enabling consumers to make informed, safe, and suitable purchasing decisions. Limiting necessary and useful information such as A2 milk would not make this possible.
- c. If manufacturers are unable to inform both domestic and overseas carers and healthcare professionals of this type of information, which is a key differentiator of NZ manufactured products, then several unintended consequences would result; firstly a reduction in the ability of the carer to make an informed choice and secondly New Zealand manufacturers would not be able advise carers of the inclusion of New Zealand milk or other characteristic(s) of ingredients with a resultant loss of market share.
- d. The proposed prohibition of such label statements as described in a) is extremely detrimental in ensuring that New Zealand maintains an efficient and internationally competitive food industry, as such a prohibition disadvantages New Zealand manufacturers in overseas markets where such restrictions are not placed on our in-market competitors who manufacture in other jurisdictions. This is particularly of concern for New Zealand CBEC exporters who compete in overseas markets where regulation of labelling ingredients is not so restrictive. The NZ provenance position is closely linked with communicating consumer trust and is one way in which we can inform consumers on the differences of our products compared to others on the market.
- e. Such a prohibition would not be consistent with the promotion of fair international trading in food.

3.14. We strongly advocate for the removal or amendment of both clause 2.9.1-29 (j) to ensure infant formula products can continue to make statements, including provenance, on key ingredients (E.g., made with New Zealand milk) and clause (k).

3.15. We support the amendment of clause 2.9.1-29(2) to ensure the standard reflects the intent of the discussion paper. We support INC’s draft text proposal: *“2.9.1-29(2) For the purposes of subsection*

(1)(c), 'information relating to another product' includes a reference by means of a name, a number, a picture, an image, a word or words."

- 3.16. The removal or amendment of the prohibitions as outlined above would ensure that the revised Standard 2.9.1 is consistent with FSANZ stated objectives, is not inconsistent with other international, regional and national standards such as Codex, the WHO code, the EU and the US, would not contribute to less informed choice by carers or result in a less competitive New Zealand food industry.
- 3.17. New Zealand and its dairy industry enjoy an exceptional international reputation for high quality dairy products and ingredients across a wide range of food categories. It is of significant concern to DCANZ that a revised FSANZ Infant Formula Standard could prevent New Zealand infant formula and potentially follow-on formula manufacturers from being able to advise purchasers of the provenance and significant information relating to key infant formula ingredients.