RESPONSE TO DRAFT ASSESSMENT REPORT

PROPOSAL P242

FOODS FOR SPECIAL MEDICAL PURPOSES

ON BEHALF OF

NU SKIN ENTERPRISES AUSTRALIA Inc.

BY

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1. INTRODUCTION

This submission is made on behalf of Nu Skin Enterprises Australia Inc. (Nu Skin) of 2 Eden Park Drive, North Ryde, NSW, 2113.

Nu Skin is the wholly-owned Australian subsidiary of Nu Skin Enterprises of Provo, Utah, USA. The corporation is a direct seller of personal care and nutritional products. Its dealerships donate varying percentages of their sales revenue to provide a food, Vita Meal, specially formulated for the treatment of the malnourished in third-world countries

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Nu-Skin's highly qualified team of nutritionists in the USA is providing a separate response to the discussion paper and draft standard.

This present response will focus mainly on the administrative problems traversed in the discussion paper but will also address problems potentially caused by Table 2 of the Appendix to Attachment 1 to P242 (Draft Standard 2.9.5). Unless otherwise stated, page references stated are references to page numbers in P242.

2. ADMINISTRATIVE PROBLEMS

2.1 Uncertainty and Irregularity

At least as far as Australia is concerned, there are no truer words in P242 than: "The regulation of FSMP in Australia and New Zealand is unclear" (p.5 and p.12)).

It is submitted that the root cause of that lack of clarity is the failure to recognise that FSMP are not foods for general consumption and therefore the application of the general food standards to FSMP is

inappropriate. P242 points out (p.12) that the Code does not explicitly recognise FSMP and *"therefore unlike other foods, FSMP are not given any permissions for composition or specific labelling requirements. Because of this, the regulation of FSMP continues to be uncertain …[for importers, local manufacturers, health professionals, consumers and government]*."

This chilling denunciation of the administrative state of play is amplified in paragraph 2.1.1 under the headings "Current Regulatory Framework-Australia" (p.9). It is pointed out (*loc. cit.)* that, as a result, most FSMP-type products are technically 'unlawful' at the point of sale.

According to P242 (p.10), the trade in Australia in FSMP amounts to an estimated $40 million per annum, 99 per cent of which is imported by the four multi-national firms involved.

The proposition that trade in such volume can proceed in such chaos without some systematic administrative indulgence is simply unbelievable. This respondent, for one, does not believe it.

Such indulgence is, of course, necessary to avoid the undesirable and unintended dislocation of the importation and sale of FSMP while exerting desirable control over the importation and sale of food. It does, however, have the consequence of introducing unreliability and uncertainty to the trade.

There is no telling how long it will take to adopt a standard for FSMP or, indeed, if one will ever be adopted. Option 1 (to maintain the status quo)[p.7] is no option at all. It leaves in place the very delays and "continuing negative impact on industry and government caused by the regulatory uncertainty of FSMP"(ibid).

There is a third option, which I shall call Option 3. It is an option not exclusive of Option 2, and one that, like Option 1, would have minimal impact on consumers. It is to make it clear that the general food standards do not apply to FSMP. This is already patently the case *de facto*; making it the case *de jure* would eliminate the vexatious uncertainty surrounding the importation and sale of FSMP.

Suggestion : That a simple amendment be made immediately to the relevant standards for food generally to make it clear that those standards do not apply to FSMP.

This is required as a matter of urgency to eliminate the current chaos in the importation and sale or re-export of FSMP.

2.2 Goods in Transit

Currently, there is an apparently unforeseen anomaly in the structure of the food standards legislation. It precludes the

importation for re-export of food not compliant with Australian compositional and labelling standards and, if FSMP is perceived to be subject to those standards, of FSMP. This has the effect of blocking the importation into Australia of FSMP for humanitarian re-export for the treatment of the malnourished in third-world countries.

Nu Skin dealerships donate part of their sales revenue for the purchase of the FSMP, "Vita Meal", specially formulated for the treatment of the malnourished. Nu Skin proposes to import the product for re-export to third-world countries by World Vision, a widely respected humanitarian organization.

Because, like most other FSMP, Vita Meal does not comply with the general food standards, it too would be technically 'unlawful', as P242 points out (p.9), were FSMP regarded as subject to the ordinary food standards.

Since sub-section 7(1) of the Imported Food Control Act exempts from compliance with Australia/New Zealand food standards only food imported for private consumption, ships stores, and trade samples, food imported for re-export is not exempt. If FSMP is regarded as subject to the ordinary food standards, this would have the crazy result of Vita Meal being a "failing food" as defined by sub-section 3(1) of the Act. Thus, it would be an offence under Section 8 of the Act to import Vita Meal, even for re-export.

Even if a separate standard for FSMP is adopted, FSMP imported for re-export would, as things stand, then have to comply with Australian compositional and labelling requirements for FSMP, despite the fact that they are not to be consumed in Australia. They would be subject to the labelling requirements of a country in which they will not be consumed, without regard to the requirements of the countries in which they will be consumed.

Plainly, the oversight of failing to provide for goods for re-export must be corrected.

Suggestion: That food standards, both general and special, be amended to make it clear that the standards apply to goods for consumption in Australia.

or

That sub-section 7(1) of *the Imported Foods Control Act, 1992* be amended to provide for the exemption of goods imported for re-export.

2.3 Flexibility

On the basis of thirty years public service, including many years' experience in administering, developing, and interpreting statutes, and a further twenty years' in consultancy, I respectfully submit that the Imported Food Control Act 1992, lacks the flexibility essential to smooth operation. Gradually expanding the list of exemptions in sub-section 7(1) of the Act as each fresh crisis is caused by the Act's inflexibility is not the best solution: the Act needs a safety valve.

For example, while an exemption for goods imported for re-export would remove the perceived impediment to the importation and re-export of Nu Skin's FSMP (and other imports for re-export) it would not help to avoid similar unintended and undesirable impediments in other unforeseen circumstances.

The suggested answer is a ministerial discretion which may be exercised under delegation in circumstances when it is determined that to require compliance with a standard would not advance the objects of the Food Standards Australia New Zealand Act 1991.

3. VITAMIN AND MINERAL LIMITS

As mentioned above, Nu Skin nutritionists will be responding separately to the Discussion Paper and Draft Standard. My response hereunder is confined to the issue of the appropriate measure to be used in Schedule 2 to the Draft Standard.

It is submitted that, as a measure of concentration of vitamins and minerals, the amount per 100 kilojoules is unsuitable.

My reason for that submission is that this measure depends as much upon the kilojoule value of the product as it does upon the amount of the vitamin or mineral.

It is of note that paragraph 7(3) (a) to 7(3)(d), inclusive, require the various amounts to be expressed per 100g or 100mL of the product. This approach is meaningful.

Among the amounts to be shown is the average energy content. The way Schedule 2 is drafted, FSMP high in kilojoules would appear low in minerals and vitamins. Similarly, FSMP which for good reason are low in kilojoules would appear to be high, perhaps too high, in minerals and vitamins. Such a result would be a nonsense.

Suggestion: **That Schedule 2 be amended so as to use Recommended Daily Intakes (RDI's) or Estimated Safe and Adequate Daily Dietary Intakes (ESADDI's) as the basis for the definition of the amounts of vitamins and minerals in FSMP.**