

Proposal P293 – Nutrition, Health & Related Claims

Table 1: Revised draft Standard 1.2.7

Submitter name: Dr Allan Poynton, Food Industry Consultant	
<p>1. Does the revised drafting accurately capture the regulatory intent as provided in Attachment B? Please consider the clarity of drafting, any enforceability issues and the level of ‘user-friendliness’.</p> <p>If not, please provide specific details in the table below. Ensure that the relevant clause number, schedule number or consequential variation item number that you are commenting on is clearly identified in the left column. Lines may be added if necessary.</p>	
Clause number	Comment
2	<p>Nutrition content claim means - (a)</p> <p>It should be noted that potassium, salt, sodium are all minerals and to refer to them separately without explanation is misleading. I suggest that this list should read (iv) minerals (for example sodium, potassium, salt, calcium, etc).</p>
2	<p>Nutrition content claim means - (b) a claim about glycaemic index or glycaemic load.</p> <p>Glycaemic index and glycaemic load are <u>attributes</u> of a food and not nutrition <u>content</u> of a food, and to describe them as nutrition content is misleading. I could suggest the term “nutrition attributes claim” as an alternative. This allows all the nutrition content information to be included in the Nutrition Information Panel, whereas Glycaemic index and glycaemic load do not appropriately fit in that space and need to be referred to separately.</p>
10	<p>There has been debate in the past as to whether information provided in a Nutrition Information Panel constitutes a nutrition content claim. It would be helpful if this was specifically clarified. (It is implied the updated Standard 1.2.7, 7B). If it does constitute a claim, then if the amount of folate is declared it must necessarily provide the regulatory statements. If it is not declared, then it is not providing the consumer with information the consumer may wish to know. It is therefore recommended that information in the Nutrition Information Panel not be considered as a claim, and that this should be specifically stated in the Standard, and Clause 10 seems the appropriate place to do it.</p>

11	<p>According to Attachment C, paragraph 11(8) should clarify the intent of this clause, however reading through the proposed Standard without reading Attachment C provides for confusion.</p> <p>Reading the proposed standard alone, paragraphs (5) and (7) appear to be redundant given the previous clauses in this section, especially paragraph (1), but what appears to be the general intent from these paragraphs is then contradicted by what is in paragraph (8) especially when read with the explanatory information in Attachment B. The impression I obtained from this clause is that the general intent is that <u>any</u> “contains” claim must meet any criteria in Column 2 of Schedule 1, and that any further descriptor can <u>only</u> be one of those in Column 3 <u>relating to that property</u> provided it meets the conditions in Column 4. If this is the case, then paragraph (5) is merely repeating this, and paragraph (7) is describing a situation which is not permitted seeing “high” is not one of the descriptors used in Schedule 1 against gluten. “High” is only mentioned as a valid descriptor for Glycaemic Index.</p> <p>However, reading paragraph (8) suggests that the “high” descriptor <u>can</u> be used as it is not mentioned in Column 3 against Gluten, and therefore it is necessary to have paragraph (7). By the same logic, any other parameter can use the term “high” without constraint. Is this really the intent? If I take the example of Polyunsaturated Fatty Acids mentioned in the explanatory information in Attachment B, a claim of “good source of polyunsaturated fatty acids” can be made no matter how much or how little polyunsaturated fatty acids are in the product as “good source” is not mentioned in Column 3 for polyunsaturated fatty acids, and there is no minimum requirement mentioned in Column 2 for this property. I am sure this is not what is intended. A further example is Dietary Fibre which in Column 2 includes ‘... unless the claim is about low or reduced dietary fibre’ for which there is no mention in Column 3.</p> <p>Attachment C seems to indicate that any content claims not mentioned in the table have no specific requirements. If this is the case, then Dietary Fibre <u>should</u> have a definition for ‘reduced’ as 25% less than reference for consistency with other ‘reduced’ claims, but there is no definition for it. There is no guidance as to what ‘low’ means in this case.</p> <p>With this amount of confusion, some work is still required to ensure the expected outcome is clear.</p>

Schedule	Comments
1	<p>In section 7.1 of the presented document it states that 'Fat-Free claims are not specifically addressed by draft 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.' If this is the case, then it is inconsistent not to invoke the same authorities with respect to <u>lactose</u>, <u>saturated fatty acids</u> and <u>trans fatty acids</u> however these are included in Schedule 1. Concerns have been raised about the necessity or validity of the other criteria used in the requirements for saturated fatty acid-free and trans fatty acid-free in Schedule 1, but this review is not to revisit them and therefore they are not being questioned here. All that is being questioned is the consistency with the decision on fat-free.</p>
Consequential variations	Comments
	No comments provided

Table 2: Fat-free and % fat-free claims

Submitter name: Dr Allan Poynton, Food Industry Consultant	
Question	Comment
<p>2. What evidence can you provide that shows consumers are purchasing foods of lower nutritional quality because they are being misled by fat-free or % fat-free claims?</p> <p>FSANZ is primarily interested in the substitution of foods of higher nutritional quality with foods of lower nutritional quality which have fat-free claims. Substitution within a general food group (e.g. choosing a different confectionery product) is of lesser importance.</p> <p><i>(Note: Please provide documented or validated evidence where possible)</i></p>	<p>If I interpret the intent of this question correctly, FSANZ wants to know whether consumers are switching to fat-free or % fat-free foods assuming that such fat-free or % fat-free foods are of lower nutritional quality than the foods from which they are switching.</p> <p>There are a number of factors in this question and to answer it requires an understanding of the component parts. The questions to be asked <u>in order</u> are:</p> <ol style="list-style-type: none"> 1. Are foods carrying fat-free or % fat-free claims of lower nutritional quality? 2. What is meant by being misled by fat-free or % fat-free claims? 3. Given this definition, are consumers actually misled by fat-free or % fat-free claims? 4. Are consumers switching to fat-free foods because of these claims? 5. Are consumers switching from a different food group to fat-free foods because of these claims? 6. What food groups are they switching from and what is the relative change in nutrition? <p>Depending on the answers to these questions, there may be others to answer. For instance, do consumers believe fat-free foods are healthy or healthier, and again we need to ask the question as to what they mean by 'healthier'? If by 'healthier' we only mean lower in energy (and no other parameters such as content of vitamins, minerals, appropriate proteins, etc), then we need to understand how these lower fat foods may be made:</p> <p>Case 1: Consider a regular food and a fat-free version of the same product in which the fat has been merely replaced with sugar. The only difference is therefore the health benefit of the fat vs that of the sugar which cannot be answered as we do not know the nutritional needs of the consumer. What we can measure is the difference in energy</p>

	<p>between the two products. As fat contributes 37 kJ/g and sugar only 17 kJ/g, with a 1:1 replacement the fat-free product must, by definition, be lower in energy.</p> <p>Case 2: Consider a regular product and a fat-free version of the same product in which the fat has been replaced by a variety of ingredients other than sugar. This is the usual case as the product developer not only has to replace the fat, but they have to replace the texture and/or flavour and/or preservation modifying characteristics of the fat. The types of materials may be a mixture of water/gums/starches/proteins/fibre/salts etc., all of which have a lower energy contribution than fat. (Note that depending on the nature of the original food, some of these options are not technologically feasible or appropriate.) Again the fat-free product by calculation must be lower in energy because none of these ingredients contribute as much energy as fat.</p> <p>Case 3: This situation is similar to Case 2, except that some of the other ingredients with low energy in the regular product may have to be replaced with higher energy ingredients to compensate for the other properties of the fat. For instance, some of the water may need to be replaced by sugar or gums to preserve the viscosity. In this case it cannot be predicted which product will have the lower overall energy, but experience in the industry shows that the fat-free product is rarely if ever higher in energy than the regular product.</p> <p>Case 4: The consumer chooses a fat-free food instead of another product altogether. This appears to be the case the Forum is most concerned about. Given that there are so many foods available, this case can only be addressed on an individual by individual basis. This is also the case which can only be addressed on a case by case basis.</p> <p>If by 'healthier' we refer to some parameters other than energy, then these need to be defined and agreed to.</p> <p>Consequently, the question cannot be answered</p>
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	<p>without a lot more information, and consequently no data will be relevant without this clarification.</p> <p>Responses purporting to provide appropriate data need to be scrutinised against the questions provided above.</p> <p>If we are concerned that consumers are consuming food of higher energy as a result of these claims, then these cases demonstrate that this is most unlikely and that the concerns expressed by the Forum are not founded on facts. While consumers may not adequately understand the consequence of decisions they make, foods with fat-free or % fat-free are predominantly lower in energy.</p>
<p>3. Do you support option 1 (status quo), option 2 (voluntary action through a code of practice), or option 3 (regulate with additional regulatory requirements for fat-free and % fat-free claims)? Please give your reasons.</p>	<p>Options 1 or 2 are supported, with preference for Option 2.</p> <p>Option 1 Supported</p> <p>Fat-free claims are regulated by Australian and New Zealand consumer law and the proposed regulated % fat-free claims are no different to those in the industry Code of Practice which consumers are currently exposed to. While concerns have been raised about people being misled, given the information provided in Question 2, there is no clear case that there is a real issue which would require change with the consequent confusion it could generate. These claims, even if they do not cause a consumer to purchase the foods, increase consumer awareness of issues such as obesity. If they result in consumers reading more Nutrition Information Panels, then consumers will be better informed.</p> <p>This option results in no change from what consumers currently experience and therefore there is no chance of further confusion. These are the parameters that major companies (at least) currently work to. As it requires no change from current practice, there is no financial impact on industry and therefore no financial impact on consumers. It merely will allow a few smaller businesses to be brought into line.</p> <p>Given that this Option provides the same outcome as what is currently in practice, there appears to be no good argument to regulate it.</p> <p>Option 2</p>

	<p>Supported and preferred</p> <p>Similar arguments apply to this Option as to Option 1. Other than the causes of concern about consumers being misled, which as discussed in response to Question 2 on the basis of energy appears to be largely unfounded, and a few smaller businesses which have not known or understood the requirements of the Code of Practice, this approach is currently in action and seems to have been adequate. This is what the consumers currently see and what they are used to, even if they do not fully understand.</p> <p>It has been implied in some quarters that the Code of Practice has been set up by industry and therefore is suspect, but it must be understood that at least the larger companies know that any communication with customers is impossible without the credibility of consistent and reasonable claims. It should also be acknowledged that industry has worked to put together with regulators to put the Code of Practice into place, and has worked with representatives of allergy sufferers to propose requirements for giving information about potential allergens to consumers (and which has been well received overseas as well) in order to improve, the knowledge of the consumer and the awareness of industry as well as general education of the community. A Code of Practice is therefore a viable alternative.</p> <p>Option 3</p> <p>Not supported</p> <p>This option would provide a nutrition content claim with a requirement to meet NPSC which would not be in line with all the other nutrition content claims proposed for the standard and therefore complicates rather than simplifies the Standard. It is an additional requirement which may not add any additional benefit. It may reduce the number of products which are able to make the claim. But as noted above, claims of this type raise the awareness of the issue of obesity even if the consumers do not respond to the claim by purchasing the product.</p> <p>The research done for FSANZ (FSANZ (2003a) Food Labelling Issues: A Qualitative Consumer Study Related to Nutrient Content Claims on Food Labels, FSANZ (2003b) Food Labelling Issues: Quantitative Research with Consumers, FSANZ (2008) Consumer Attitudes Survey 2007: A Benchmark Survey of Consumers' Attitudes to Food Issues) suggests that there is a lot of scepticism amongst consumer and therefore extra measures such as are proposed are</p>
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	<p>neither warranted nor commensurate with 'a light touch' of regulation.</p> <p>It is interesting to note all the examples provided of foods which would fail if the NPSC were to be applied. With the exception of breakfast foods, all the other products are either occasional foods or are consumed as minor adjuncts to other foods being prepared for a meal. In other words, other than breakfast cereals they are highly unlikely to contribute significantly to any balanced diet. Further, most are consumed in well less than the 100g basis on which the NPSC is calculated. While these foods contribute relatively little to the overall diet and are therefore likely to have little impact, by carrying the claim they are keeping the concern about weight management in the mind of the consumer.</p> <p>Removal of claims currently permitted, either for this purpose or any other, is likely to cause a lot of confusion amongst consumers. If they see a claim removed, they then ask why, and if the reason does not match with their reason for consuming the food in the first place, then the credibility of the regulatory authority is questioned to the detriment of all involved.</p> <p>FSANZ is concerned that in the production of low-fat foods the fat has been replaced by sugar and the effect this will have on public health. It would be interesting to see how many foods might be able to be manipulated to meet the NPSC and just what is done to them in order to achieve it. If something has to be removed, then something else must take its place, and that replacement material might eventually become a public health issue to deal with. As stated in the response to Question 2, most such foods are lower in energy anyway.</p>
<p>4. Please comment on the possible options for additional regulatory requirements for fat-free and % fat-free claims (option 3) (refer section 8) as follows:</p> <p>a. Which option do you support and why?</p> <p>b. What is an appropriate sugar concentration threshold for options 3(b) and 3(d)? Where possible, provide information and evidence to support your suggested threshold value.</p> <p>c. Are there other suitable options for additional regulatory requirements for fat-free and % fat-free claims? Please describe.</p>	<p>4.a None of the additional regulatory requirements for fat-free and % fat-free claims provided are supported. They invoke parameters other than fat and so can mislead by not permitting a factual comment on the lack of fat in the product in a context which may be important to a consumer with particular nutritional requirements. All proposals necessarily would be basing judgement on current foods in the marketplace and current understanding of nutrition which may give rise to inappropriate categorisation or nutrition messages in the future, hence parameters based on fat levels in related products (or the related energy provision) are more robust.</p> <p>4.b No recommendations.</p> <p>4.c (i) Where fat-free and % fat-free claims can be misleading is in categories where the products are essentially free of fat anyway as is used in the argument for Option 3(c). A better approach would be to limit the claims to products for which other products</p>

	<p>in the range are not low in fat, ie contain more than 3% fat. This claim then describes a distinction unlike, for example, in sugar confectionery where some products may carry the claim but most or all products meet the criteria but only some choose to use the claim. Thus they become more like a relative claim rather than an absolute claim. This approach may require declaration of the reference food containing fat where this is not immediately obvious.</p> <p>4.c (ii) As the concern of the Forum appears to be about these foods not being lower in energy than foods they are being substituted for, then the logical approach would be to require the prominent display of the energy per serve to allow ready comparison with alternative foods.</p>
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