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FGC
NEW ZEALAND FOOD & GROCERY COUNCIL

30 March 2012

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Dear Sir/Madam

Attached are the comments that the New Zealand Food & Grocery Council wishes to present on the Consultation Paper for **Proposal P293** *Nutrition, Health & Related Claims*.

Yours sincerely

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NEW ZEALAND FOOD & GROCERY COUNCIL

Food Standards Australia New Zealand

Proposal P293 – NUTRITION, HEALTH AND RELATED CLAIMS Consultation Paper

30 March 2012

1. The New Zealand Food & Grocery Council (the "NZFGC") welcomes the opportunity to make a submission on **Proposal P293** *Nutrition, Health & Related Claims* Consultation Paper.

2. The NZFGC represents the major manufacturers and suppliers of food, beverage and grocery products in New Zealand. A number of these manufacturers and suppliers are major importers and exporters in New Zealand. NZFGC member companies supply over 95 percent of the processed food and beverages to the New Zealand grocery retail industry and over 70 percent of supermarket packaged good sales including 'natural health products'.

3. The NZFGC understands that Food Standards Australia New Zealand (FSANZ) is seeking comments on:
   - the structure and regulatory clarity of draft Standard 1.2.7
   - fat-free and % fat-free claims.

4. The NZFGC appreciates that this consultation has been directed by Ministers and that the changes being consulted on are the result of Ministerial requests. The NZFGC appreciates the effort of Ministers to seek reaction to changes but notes that the bulk of changes over the past five – eight years have been Government driven. So while the NZFGC responds to the request for comments on particular issues, the following takes a broader view and considers the issue for industry which is whether the Nutrition, Health and Related Claims Standard is workable at all in the latest of its many iterations.

Overarching Comments

5. The NZFGC does not support Standard 1.2.7 in its current form.

6. In an environment where less and better regulation is a key objective of Government, this Standard appears to have gone in the opposite direction in its many iterations. At one stage we had more regulation in a more complex standard, but now we have less but worse regulation, in so far as the level of prescription now far exceeds the expectations of industry compared to that of just a few of years ago.

7. The 'less' regulation we have now is the result of the most recent iteration for which FSANZ is commended. The worse regulation is the result of responding to jurisdictional

demands for the whole claims area to be locked down and limited, resulting in substantially increased costs for industry in terms of time, loss of innovation and money.

8. The NZFGC strongly opposes the pre-assessment of general level claims and the removal of self-substantiation of general level health claims. We appreciate that FSANZ has attempted to graft a pre-approval process for general level claims onto what was only ever intended to be pre-approval of high-level claims and as part of that has provided a list of 115 food-health relationships. Neither satisfies the needs for general level claims.

9. There is no indication that substantiation for general level claims will be less than for high level claims as a risk based approach would demand. More significant by far is the loss of several longstanding claims on a significant number of foods, many of them iconic and important to the industry. This is because the preapproved claims fall far short of current market needs.

10. FSANZ has statutory time limits within which to deal with general applications and these will apply to applications for claims. However, we are concerned that there could be unintended market disruption because of potentially overlapping time periods. Applications for claims will compete with all the other work of FSANZ. As a result, industry will most likely have to remove products from the market or re-label in the currently proposed transition period while applications are processed and then re-label once applications have been dealt with. As well, such a cumbersome process is such significant barrier to innovation through cost and time impediments that this will stifle the leading edge that many products from New Zealand and Australia have been able to sustain. The list of food-health relationships is too limited for general level claims and the process for the future too lengthy and costly.

11. The problem we now face is an area of law that is potentially so over-regulated as to be unworkable.

12. **Reinsertion of self-substantiation**: The NZFGC strongly recommends reinsertion of self-substantiation whilst retaining the pre-approved food-health relationships and the pre-approval process. This would seem to deliver the best of both worlds:

    - Enforcement certainty for jurisdictions for the a large part of the claims in market
    - Low cost for small to medium sized businesses that can use the pre-approved food-health relationships
    - Mechanisms for FSANZ to supplement the pre-approved food-health relationships in the future
    - Opportunities for businesses that wish to go to market in a timely manner to self-substantiate to levels already drafted by FSANZ in 2008.

13. **Transition period extended and additional pre-approvals**: In any event, and in addition to the above, the NZFGC strongly recommends three actions are taken:

    i. Extend the transition period to 4 years to allow for food-health relationships that are not yet approved to be assessed by FSANZ for inclusion within the transition period; and

    ii. Require FSANZ to assess the health claims presently proceeding through the European Parliamentary system (and that have already been subject to rigorous assessment by the European Food Safety Authority) for inclusion in Standard 1.2.7 before the end of transition. Note that FSANZ need not wait until the political

decisions of the European Parliament are made since the substantiation assessment work has been completed.

iii. Require FSANZ to assess claims in-market now in order for them to be addressed and included in the pre-approved list prior to the conclusion of transition.

14. **Fat free and % fat free provisions opposed**: The inclusion of regulation around 'fat free' statements and definitions of '% fat free' are ill-founded and strongly opposed on the basis that they are duplicative of regulatory control given effect by consumer protection law in both New Zealand and Australia, costly for government and industry for no or little consumer benefit and not supported by sufficient evidence of harm.

Specific Comments

15. These specific comments follow the notation in the consultation paper and address the specific questions suggested by FSANZ as appropriate.

PART 1 – Draft Standard 1.2.7 – Nutrition, Health and Related Claims

Revised draft Standard 1.2.7
Pre-approval of general level health claims

16. As noted in the **Overarching Comments** above, the NZFGC continues to oppose pre-approval of general level claims as the only course available. The NZFGC recognises there is a legitimate place for pre-approved food-health relationships but not to the exclusion of all other alternatives. The measures put in place to address industry concerns still leave time and cost of the new claims approval process as major imposts on industry and will have implications for consumers by stifling innovation and potentially limiting consumer choice.

17. Self-substantiation needs to be included as an option along with application for pre-approval or prescribing claims from other acceptable sources. All these options have been canvassed in the past and are not mutually exclusive.

18. As noted in the Overarching Comments, this would deliver the best of both worlds for business and government:

- Government enforcement certainty for jurisdictions for a large proportion of claims in market
- Many businesses, particularly small to medium sized businesses, can use the pre-approved food-health relationships at no direct cost to them
- Mechanisms for FSANZ to supplement the pre-approved food-health relationships remain in place for the future
- Innovation opportunities continue for businesses that wish to go to market in a timely manner through self-substantiation to levels already drafted by FSANZ in 2008.

Transition period and substantiation

19. In any case, the NZFGC proposes there be an extended transition period of 4 years and in that time, requiring FSANZ to assess and include additional food-health relationships both currently and legitimately in the market and that have been assessed by other reputable agencies such as Health Canada and the EU. This would necessarily include work that FSANZ foreshadowed in 2008 concerning the need for existing claims to be assessed.

20. Extending the transition period would also address the following:

    - Appreciation of FSANZ's Heavy Workload: At no other time has FSANZ had the workload it is now facing with the many references from the Blewett Review. This will divert resources from consideration of application work and reduce the prospect that any unpaid applications will be completed before the end of the currently proposed 2 year transition period. This is particularly of concern to small to medium sized businesses making applications.

    - Industry needs time to compile the appropriate information dossiers where these do not already exist and that may need to accompany applications for the assessment of claims or be held for self-substantiation. In terms of pre-approval, when taken together with prioritisation of other unpaid applications, two years simply is not long enough for FSANZ to complete any unpaid applications.

21. The second reason for extending the transition period would allow FSANZ to assess the health claims presently proceeding through the European Parliamentary system (and that have already been subject to rigorous assessment by the European Food Safety Authority) and the health claims assessed by other reputable international agencies for inclusion in the Australia-New Zealand list before the end of the transition period.

22. Extensive scientific substantiation work has been conducted in the EU on health claims. If FSANZ awaits the EU Parliamentary process to conclude before assessing the EU proposed claims, industry could be waiting not months, but years. New Zealand and Australia should not wait on the EU Parliamentary process before having the EU proposed list assessed and included as appropriate in the Schedules of Standard 1.2.7. Together with FSANZ's other commitments, the process of assessment is expected to take longer than two years. A four year transition gives FSANZ time to undertake this work and amend the Schedules well in advance of the end of transition.

23. It is worth noting that no claims appear to have been added to the list of approved claims since the consultation in 2008. This may be an indication of the difficulty FSANZ faces in turning to these issues.

24. The NZFGC considers that other countries with world class assessment processes should be looked to for prescribed claims to avoid duplication. This might include Canada and the USA.

Confidentiality

25. The NZFGC is concerned about the water-tightness of confidentiality arrangements when an expert panel (from perhaps 5-8 organisations or agencies) and jurisdictions (10 departments across Australia and New Zealand) view and consider the applications.

26. Implementation of the confidentiality arrangements will be an important if not vital feature of the application process.

Level of substantiation

27. The Standard as drafted contains no indication of a differentiation between the level of substantiation for High Level claims and General Level claims.

28. This needs to be clear on the face of the law for ensuring that lower level claims are not required to meet the extensive substantiation that is expected of high level claims.

Operation of the Schedules and the Nutrient Profiling Scoring Criterion (NPSC)

29. There are still issues with the Standard for particular foods. Two examples are as follow:

1. Drinks under Standards in Part 2.6 Non-alcoholic Beverages

- Sports waters that are designed for hydration do not have pre-approved claims available to them even though they have been a feature in the market for many years
- Sports and energy drinks for energy replacement that are formulated and represented as suitable for the rapid replacement of fluid, carbohydrates, electrolytes and minerals are not be able to make claims under the proposed system. These products will no longer be able to make claims about assisting performance as they will not pass the NPSC due to their sugar content. Sugar is one of the critical ingredients in sports drinks to provide energy. This is because the NPSC has a 'one size fits all' approach that precludes more than 335kj of 'energy' to be sourced from sugar yet the threshold in Schedule 2 of the Standard for an Energy claim (p44) requires a minimum of 420kJ energy per serve. This is a nonsense.
- Vegetable juices cannot make general or high level health claims for heart health. Many of the biologically active substances in vegetables (excluding fibre) are present in substantially equivalent quantities in the juice. When we are trying to encourage the population to consume more fruit and vegetables explicit exclusion of vegetable juice from making health claims based on vegetable content is a backward step in encouraging a balanced diet. No substantive evidence has been presented to warrant this exclusion.

2. Dressings

- Dressings for salads etc that are liquid are required, under the New Zealand Measurements Act, to be measured in mLs. They are not drinks and are not generally consumed in a single serve. Yet they must meet half the threshold for solid food for fat per 100mL because they are liquid. The levels in Schedule 1 for solid food is 3g per 100g of fat to make a low fat claim but is 1.5g per 100mL for liquid food.

30. These and further selected examples are listed in the following table:

Food	Nutrient/ Formulation	Claim	Comment
Sports water	Hypotonic formulation	Faster absorption / Faster hydration	To substantiate the claim, company has undertaken two clinical trials with Auckland University of Technology & Massey sports scientists/physiologists. The studies have been peer reviewed and published. The company holds a scientific dossier for substantiating the claim and undertook to do this to counter challenges by competitors. This claim is not covered by the proposed standard and would require the company to seek pre-approval in the future. The company is unlikely to bother due to the high cost and draw on significant people resource to do this.

Food	Nutrient/ Formulation	Claim	Comment
Vegetable juice	Vegetable	Healthy heart	Excluded from making general and high level health claims for heart health based on vegetable content.
Dairy food – semi liquid	Calcium Vit D Vit A	Chock full of calcium for strong bones; and Source of Vit D to aid calcium absorption Source of Vit A	It is unclear whether this would be a beverage or a food. If a beverage, the product would not qualify because of the NPSC score. Has Heart Foundation tick
Yoghurt for children	Vit D	Vit D for calcium absorption	Provides one third ($^1/_3$) of a child's daily calcium and 20% less sugar than equivalent brands. NPSC score results in ineligibility
Dairy shots	Probiotics	Supports your immune system and aids digestion; digestion of food and release of energy - B1, B3, B5, B6, zinc; antioxidants that protect cells against free radical	Marketed as a dietary supplement/ supplemented food. Claim not provided for.
Cereal	Fibre	High fibre	Under the new standard the claims for 'good source of' level has been increased to 4g per serve. This well known iconic, New Zealand cereal being a low sugar, nutritious, wholegrain product, would only be able to meet the standard by increasing the suggested serve size (currently two biscuits).
Salad Dressing	Fat	Lite and free	The Standard differentiates between 'liquid food' and 'solid food' with the fat level for liquid food (defined by default as a product measured in mLs) set at half that for solid food (measured in g). Dressings are not drinks and are not consumed in one or two serves. The New Zealand Trade Measurement Act requires the product to be measured in mLs. As a result it will not qualify to carry a low fat claim but if it was solid food it could.
Spread	Vitamins		NPSC means this product, which has been in the market for 125 years, cannot carry any claims

Changes to the draft Standard since the 2009 consultation
Dietary information

31. It is of grave concern to the food industry that educational information on the diet is to now to be regulated. This is excessive and nonsensical.

32. The rationale is that the terminology of the previously proposed 'authoritative source' was too difficult to define and that it was much easier to regulate.

33. Appears that we now have the situation where 'eating a balanced diet' or 'eating more fruit and vegetables' are to be regulated. This is clearly a nonsense. The NZFGC considers that more effort needs to be applied to finding a non-regulatory solution to this new addition to the standard.

34. Prohibiting industry from participating in education about diets will potentially close off an enormous amount of donated, voluntary and 'good corporate citizen' work undertaken, often in low socio-economic areas. A number of NZFGC members have invested millions of dollars over the years funding school-based healthy eating education programmes, funding nutrition advisory services and other social good healthy eating campaigns.

Cause-related marketing

35. The NZFGC is pleased to see the removal of a disclaimer from cause-related marketing.

Questions to Submitters

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'.

36. Explanatory information about clauses in law should aid and ideally expand understanding rather than paraphrase clauses. The NZFGC appreciates having explanatory notes for this Standard but notes its limitations:
    - the explanatory notes do not set out the rationale for a clause; and
    - the explanatory notes do not substitute for a guide for application of the Standard.

37. Noting these limitations, on the whole the clauses and the explanatory notes concur. There are a few areas where the notes do not provide explanation. This occurs, for example in relation to clause 10 *Presentation of nutrition content claims*. The clause reads:
    "A nutrition content claim must be stated together with a statement about the form of the food to which the claim relates, unless the form of the food to which the claim relates is the food as sold."

38. Going to the explanatory notes for an explanation of this statement does not help, viz:
    "This clause requires that the nutrition content claim must be presented together with the form of the food to which the claim relates. However, if the claim relates to the food in the form in which it is sold, it is not necessary to mention the form of the food. This clause relates back to clause 6 which describes how the requirements of the Standard apply to different forms of food."

39. There are incorrect references in the explanatory note to clause 20.

40. In relation to specific clauses, the following concern is raised:

Clause 13 Nutrition content claims about folic acid

41. The Transitional Standard 1.1A.2 for Health Claims associated with folate and folic acid provided for claims for naturally occurring folate either in fresh or mixed foods. The heightened awareness of the folate in foods and folic acid supplementation programmes have had positive results.

42. The proposed Standard under clause 13**,** together with the provisions of the Schedules needs amending for two reasons:

- The clause mandates that a content claim for folic acid CANNOT be made unless accompanied by a specific health claim. This is excessively prescriptive and we should be taking every opportunity to promote folic acid.
- The clause and the schedules effectively prohibit a folate claim concerning Neural Tube Defects that was permitted for a range of fruits and vegetables under the Transitional Standard. Again, every opportunity should be taken to promote the consumption of folate by the target population.

PART II – Fat-free and % fat-free claims

43. The NZFGC opposes inclusion of 'fat-free' and '% fat-free' claims to be specifically regulated in Standard 1.2.7. The Standard in its current form proposes pre-assessment of general level and high level health claims. These will demand a comprehensive dossier of material and information to substantiate inclusion. This is not evident in the very late inclusion of 'fat-free' and '% fat-free' claims. In any event, these are content claims and pre-approval of content claims has, correctly, not been pursued since these are true or false statements.

44. As is noted in the consultation paper, 'free' claims are regulated under fair trading and consumer protection laws, which, in New Zealand, is the responsibility of the Commerce Commission. Duplicating regulation and regulatory oversight is to be avoided as it adds cost to government and industry for no additional benefit for consumers.

45. It is also noted that the draft Standard provides regulation around what might be 'low-fat' claims. Again, the matter is covered by consumer protection law.

46. The NZFGC considers the inclusion to be over-regulation and lacking in evidence of consumer misunderstanding to justify specific regulation.

Questions to Submitters

1. 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

47. The NZFGC has not collected information on consumer purchasing related to 'fat-free' or '% fat-free' claims.

2. 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

48. The NZFGC strongly supports the status quo in this area for reasons given above: over-regulation, lack of evidence, duplicative and costly for Government and industry with no consumer protection benefit.

3. Please comment on the possible options for additional regulatory requirements for fat-free and % fat-free claims (option 3) (refer section 8) as follows

49. The NZFGC opposes any additional regulatory requirements to an area that should rely on fact for verification. It opposes the application of the NPSC as a misuse of a tool that has already been subject to extensive criticism. It opposes 'disclosure statements' and categorisation for a negative list of foods as nanny-state and ineffective. It opposes sugar concentration thresholds as unnecessarily complex, wrought with difficulty (given the sugar concentration in many fruits) and could potentially be misleading.

Regulatory Impact – update

50. The NZFGC is concerned that that the revised Standard is not accompanied by a regulatory impact statement. There is therefore no evidence presented about the cost of regulating dietary information. The information foregone by the consumer as a result of regulation in the area is likely to be significant.

51. Similarly, the cost of re-regulating 'fat-free' and '% fat free' claims given they are already subject to consumer protection law would likely to be significant compared to any accrued benefit. Only a cost-benefit analysis of duplicative regulatory administration would provide the information on this point.

52. If self-substantiation was re-inserted, the benefits of this would have a very positive impact on the cost-benefit analysis especially when taken together with the existing and proposed pre-approved food-health relationships.

53. Information from one manufacturer in one sector suggests the following costs if the Standard proceeds in its current form:

- Applying the current format of the NPSC, and the new drafting of Standard 1.2.7, approximately 10% of [Company X] labels will require updating. This equates to approximately 250 SKU's requiring labels to be updated. The overall cost through label changes after gazettal of Standard 1.2.7 would cost [Company X] between $2 million to $2.5 million depending on the complexity of the packaging. Additional costs will be incurred for product and label write-offs if significantly extended stock-in-trade provisions are not provided.

- The costs will stifle innovation, productivity and have a negative impact on our [Company X's] ability to compete in our local market as well as internationally. It also places additional strain on an already struggling food manufacturing industry.

54. Information from another suggests label change costs could be as high as $15,000 per SKU.

Transitional Arrangements

55. Given the extent of impact of Standard 1.2.7 in its current form and the extent of pre-approval required beyond that where the Standard was placed in 2008, the transition period is clearly inadequate. The Standard now requires pre-approval of a

significantly expanded area of industry activity that has to date been subject to self-regulation yet no change in the transition period has been considered.

56. The NZFGC strongly recommends an extended transition period of four years to:

- Allow industry to compile dossiers for information either for self-substantiation or for applications for pre-assessment of food-health relationships before the conclusion of transition; and
- Allow FSANZ to assess and include any food-health relationships currently and legitimately in the market or as may have been assessed by reputable international agencies such the European Food Safety Authority (irrespective of the timing of the acceptance into law by the EU by way of the EC parliamentary process).

User Guide

57. The NZFGC considers that implementation of Standard 1.2.7 will be as significant as the Standard itself in terms of impact. It is therefore vital that a User Guide comparable to that prepared for GM Labelling be prepared BEFORE the Standard commences. This would require commencement after Gazettal by a period appropriate for the preparation of a guide.