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To whom it may concern

Kellogg (Aust.) Pty Ltd - Response to "Call for submissions – Proposal P293" (The Proposal)

Executive Summary

Kellogg supports appropriate regulation of nutrition, health and related claims aligned with the Policy Principles developed in 2002 by the Australia New Zealand Food Regulation Ministerial Council.

However, Kellogg does not support the proposed draft Standard 1.2.7 (**the Standard**) for the reasons set down below which include the fact that it:

- does not reflect the regulatory intent expressed by the Prime Minister's Office, the COAG Legislative and Governance Forum on Food Regulation (**FoFR**) or the Department of Health and Ageing;
- lacks clarity;
- lacks enforceability; and
- lacks user-friendliness as it:
    i. does not contain a "stock-in-trade" provision;
    ii. does not provide an explanation nor compelling evidence from Food Standards Australia New Zealand (**FSANZ**) as to why current claims should be prohibited;
    iii. provides only a limited number of pre-approved claims for manufacturers;
    iv. creates barriers to trade;
    v. increases costs to industry; and
    vi. will negatively impact speed to market for claims as a result of the need for pre-approval.

Furthermore, the Standard will significantly impact Kellogg's ability to promote its foods on the basis of their benefits to health.

Given the above issues, Kellogg's strongly recommends that the Standard be rejected.

On the issue of fat free and % fat-free claims, Kellogg does not support taking a different approach for the regulation of such claims compared to other nutrition content claims.

Accordingly, Kellogg supports Option 1: Status quo which is that fat free and % fat-free claims are nutrition content claims and should continue to be permitted on foods that contain less than or equal to 3g of fat per 100g.

Detailed Comments

Kellogg both welcomes the opportunity to respond to the Proposal and understands the scope of the response requested by FSANZ in the Proposal. In order that Kellogg provides FSANZ with a considered and meaningful response, Kellogg will provide feedback on the Standard as a whole along with the more specific elements as requested by FSANZ.

Part A: Section 1 – Standard 1.2.7

a) Does Standard 1.2.7 reflect regulatory intent?

The Standard does not reflect the regulatory intent of the Federal and State Governments in a number of areas including their respective stated aims relating to deregulation, minimum effective regulation, minimum cost impact to business and the Policy Guideline on Nutrition Health and Related Claims[1].

(i) The Standard does not align with Federal and State Governments' deregulation agenda

The express regulatory intent of the Federal Government is for deregulation as outlined in two recent communications from the Prime Minister of Australia.

a) Transcript of joint press conference, Canberra, 6 March 2012, Prime Minister of Australia

"The Australian economy is strong, but we know that some businesses are under intense pressure as a result of the high Australian dollar…We've also focused on driving up productivity by creating a seamless national economy so that our nation can have one set of rules and regulations for Australian businesses. Now, regulation is important and good regulation matters. It matters so that business knows what the rules are. It matters so we can get the kind of social and environmental outcomes we want in our nation. But poor regulation, too much red tape, holds business back."[2]

b) Business leaders to join new deregulation dialogue, 6 March, 2012, Prime Minister, Minister for Finance and Deregulation, Minister Assisting for Deregulation

"CEOs of the nation's biggest companies will join state and territory leaders on a new Business Advisory Forum being established to advise on deregulation. Cutting red tape is a key priority for the Gillard

1 http://www.health.gov.au/internet/main/publishing.nsf/Content/00E8A0712A1A5C3BCA2578A7007FBE77/$File/nutrition_guidelines.pdf accessed 12 March 2012

2 http://www.pm.gov.au/press-office/transcript-joint-press-conference-canberra-22 Accessed 12 March 2012.

Government as excessive regulation increases business costs and hinders productivity…The Forum will complement the existing work being undertaken by the Business Regulation and Competition Reform Working Group. Through the Forum, the Commonwealth looks forward to working with business and the states to advance a new deregulation agenda over the coming year."[3]

At a State level:

- The NSW Government has committed to a 'Red Tape Reduction Target'. The NSW Government has committed to reducing regulatory costs for business and the community by 20% by 30 June 2015. The Directors' General are required to report in writing annually to the Better Regulation Office on compliance with the "one on, two off" policy and be measured against the red tape reduction target.

- The Victorian Government has also committed to targets. Victorian Treasurer, Mr Wells states in a media release dated March 2012 that "This Government is committed to its strategy of reducing unnecessary costs imposed by regulation and meeting its target of cutting red tape by 25 % by 2014."[4]

- Other state governments, including the Western Australia Government and South Australia, also have similar commitments to reduce regulatory burden for business and the community.

(ii) <u>The Standard increases costs to food manufacturers</u>

Kellogg is concerned that this Standard will increase the regulatory burden on manufacturers with little demonstrated benefit or cost-offset by either the Federal or State Governments.

The cost burden to Kellogg and other food manufacturers will be significant and it is suggested that this would have been highlighted in any Regulation Impact Statement had one been prepared. One example of the increased cost burden is the cost associated with having claims pre-approved. Using the current Application Guide[5], the cost of applying to have a claim reviewed by FSANZ could be as much as $150,000 per claim. This cost is significant for Kellogg particularly since it is likely that it would need a number of claims to be pre-approved. This cost would even more significant (and likely prohibitive) for small businesses.

On this basis, it is highly likely innovation for healthy products will be significantly reduced given the lack of certainty and significant costs associated with pre-approval of health claims coupled with the uncertain timeframes for obtaining such approvals. In the face of this, businesses trying to assess the return on investment around new claims will be significantly challenged and may well decide the opportunity is not worth the investment.

3 http://www.pm.gov.au/press-office/business-leaders-join-new-deregulation-dialogue. accessed 12 March 2012

4 http://www.premier.vic.gov.au/media-centre/media-releases/3319-coalition-government-acts-to-reduce-regulatory-burden-.html accessed 15 March 2012

5 http://www.foodstandards.gov.au/foodstandards/changingthecode/applicationshandbook.cfm accessed 15 March 2012

(iii) The Standard does not reflect COAG's requirement for minimum effective regulation

The Standard does not meet COAG's principles for minimum effective regulation[6]. Indeed, it is a disproportionate response to the issue of nutrition and health claims and goes far beyond what is required for minimum effective regulation.

This is best illustrated by the need for pre-approval for all general level health claims (**GLHC**) which have a low level of promise to the consumer and low degree of risk to the consumer and public health in following the advice[7]. In this context, this Standard increases the regulatory burden on industry by moving away from substantiation of GLHC based on authoritative sources to the costly and time consuming processes of applications, with all claims to be substantiated and assessed as High Level Health Claims (**HLHC**).

This failure to differentiate between the two types of claims is an unequivocal example of regulation that is excessive and disproportionate to the actual risks.

(iv) The Standard does not reflect the ANZ Food Regulation Ministerial Councils Policy Guideline on Nutrition Health and related claims (**The Policy Guideline**)

The Policy Guideline was front and centre in the interim report on P293 in August 2004[8] whereas it is not mentioned in this Proposal.

The Policy Principles[9] in The Policy Guideline stated that any intervention by government should:

> *"5. be cost effective overall, not more trade restrictive than necessary…";*
> *"6. contain a process of substantiation which aligns levels of scientific evidence with the level of claims along the theoretical continuum of claims and at minimum cost to the community";*
> *"7 draw on the best elements of international regulatory systems for nutrient, health and related claims and be responsive to future trends and developments."*

It is submitted that the Standard does not achieve any of these aims. The Standard puts undue cost pressure on industry as mentioned above. It is trade-restrictive as products that are capable of being sold within the EU (and which contain claims approved by the European food regulators) will not be permitted in Australia unless FSANZ has raised has first made a proposal to have the EU pre-approved claim approved in ANZ and that proposal is accepted.

Effectively this means manufacturers may have to pay twice to use the same claim in different regions. We understand that FSANZ intends to review EU claims and decide which claims it will allow but there is a lack of clarity over how and when this will be affected.

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6 http://www.health.gov.au/internet/main/publishing.nsf/Content/ageing-iar-description-outcomes.htm~ageing-iar-description-outcomes-11.htm~ageing-iar-description-outcomes-11-att1.htm accessed 12 March 2012

7 http://www.health.gov.au/internet/main/publishing.nsf/Content/00E8A0712A1A5C3BCA2578A7007FBE77/$File/nutrition_guidelines.pdf accessed 15 March 2012

8 http://www.foodstandards.gov.au/_srcfiles/IAR%20Finalv1.doc accessed 16 March 2012

9 http://www.health.gov.au/internet/main/publishing.nsf/Content/00E8A0712A1A5C3BCA2578A7007FBE77/$File/nutrition_guidelines.pdf accessed 16 March 2012

In addition to "paying twice", manufacturers in ANZ may still be prevented from using EU approved claims in ANZ on the basis that the relevant product may not meet the additional regulatory burden of meeting the proposed Nutrition Profile Scoring Criteria (**NPSC**). Global companies like Kellogg will be forced to create different formulas and/or print new packaging for foods that are sold in the EU with claims that may be permissible in ANZ but are not permitted as the products do not meet the NPSC. This is an additional cost and will compound the issues already faced in today's challenging commercial landscape (exacerbated further in Australia by FX issues, significant increases in cost of goods and sustained price deflation).

Country specific packaging increases the likelihood of the import by third parties of parallel product which may not be labelled correctly. Consumers commonly perceive that we have put such products into the market ourselves and these activities can negatively impact the trust and confidence that consumers have in our products.

The Standard proposes a substantiation process which requires a level of scientific evidence that is disproportionate with the level of claim. The Policy Guideline gave direction that manufacturers could substantiate GLHCs based on the principles of 'consistently agreed' or 'weight of evidence', This was sensible, cost effective and reflective of the risk as it allowed the use of authoritative sources (often used as the basis for gaining University qualifications in Nutrition & Dietetics) to substantiate these low level claims.

The Standard now requires that GLHCs be approved using the highest level of substantiation that is required for HLHC. This "one-size-fits-all" approach is in direct contrast to the Policy Principles.

Furthermore, what is proposed by the Standard is not responsive to future trends and developments. This is simply due to the fact that new claims will take years to get approved. FSANZ has up to eighteen months to review and finalise its response to an application. If after that time, it supports the application, the FoFR must then review and approve or reject. This means that new claims will take, at a minimum, two years to approve during which time consumers may no longer be interested in the benefit. This will not allow food companies to be responsive to future trends and developments nor will consumers be able to enjoy the benefit of the most up to date science in relation to food.

Under Section 10(2) (e) of the Food Standards Australia New Zealand Act (**The Act**)[10], FSANZ must have regard to any written policy guidelines formulated by the Council (now the FoFR). It is not clear the extent to which FSANZ considered the Policy Guideline set in 2004 as the Standard does not adopt the key themes in those guidelines. In our view, this is a missed opportunity.

(v) <u>The Standard is not consistent with the requirements of the Act</u>

Section 10 of the Act sets out the objectives of FSANZ in developing or reviewing food regulatory measures (in descending priority order). They include:

a. the protection of public health and safety; and
b. the provision of adequate information relating to food to enable consumers to make informed choices.

10 http://www.acfs.go.th/km/download/FoodStandands_A_NZ_1991.pdf accessed March 12 2012

For the reasons set out, we would submit that neither of these aims would be achieved if the Standard were to be approved for the reasons we have already discussed relating to the disproportionate nature of the Standard in respect of GLHC and the potential consumer confusion which will likely occur when certain claims no longer appear on pack despite being used and referenced as being correct and valid by other credible regulators globally.

For reasons also related to the status of claims approved by other regulators globally, we would like to mention the obligations upon FSANZ itself under Section 8(2) to ensure:

a. the need for standards to be based on risk analysis using the best available scientific evidence;
b. the promotion of consistency between domestic and international food standards; and
c. the desirability of an efficient and internationally competitive food industry.

Again, we would suggest that insufficient regard has been had to these matters in formulating the Standard. Whilst we acknowledge that the absence of a Regulation Impact Statement does not preclude the Ministers from approving the Standard, we do consider it regrettable that such a document has not been produced and published as we consider that such a document would facilitate the necessary discussion about the genuine impact that this Standard will have on industry. This is particularly so in the situation where scope for comment is as narrowly defined as it is in the Proposal.

There also appears to be a disconnect between the Act and the Standard. The Standard states that any new claim added would be deemed a HLHC. This in turn is defined in the Act as those high level health claims set out in the Standard relating to Nutrition, Health & Related Claims. This may be confusing as there are no HLHC in the Standard as drafted nor is the concept of HLHC one that is dealt with elsewhere in the Standard. It is suggested that there may also be an issue relating to the fact that the Standard (by its failure to adopt the concept of general and high level claims generally) is an example of an instrument of subordinate legislation purporting to amend the empowering act.

As stressed above, Kellogg genuinely welcomes greater clarity on the laws relating to nutrition and health claims, however, we do so in the context of greater and more meaningful consultation, particularly given the nature and extent of the changes to the Standard since the prior 2009 version.

(vi) <u>The Standard is not consistent with recent direction from the COAG Legislative and FoFR</u>

In the response to Labelling Logic in December 2012, FoFR states that:

> *"proposed actions and implementation over the next decade endeavour to balance improving the information on foods labelling to meet consumer needs against maintaining marketing flexibility and minimising regulatory burden on industry and barriers to trade"*[11].

11http://www.foodlabellingreview.gov.au/internet/foodlabelling/publishing.nsf/Content/ADC308D3982EBB24CA2576D20078EB41/$File/FoFR%20response%20to%20the%20Food%20Labelling%20Law%20and%20Policy%20Review%209%20December%202011.pdf p. 3 accessed March 12 2012

Furthermore, FoFR states that:

> *"...that food labels could play an important role in supporting the longer term health of people in Australia and New Zealand and support our food industry and encourage it to play a greater role in promoting health eating, being mindful not to unduly increase the regulatory burden*[12]

Specifically on the issue of a profiling criteria, FoFR in its response to Recommendation 20(a) states:

> *"agreed nutrient profiling criteria may be one tool to enable manufacturers to show that foods upon which health claims are made are suitably nutritious, but other tools may also be appropriate for demonstrating compliance",*

thus leaving the door open as to whether the NSPC is the best approach and signalling that other tools require be explored rather than simply accepting the NPSC.

On the issue of Nutrition and Health Claims, FoFR states that it

> *"is supportive of a standard for nutrition, health and related claims being finalised in keeping with the principles of the Ministerial Policy Guideline on Nutrition, Health and Related claims which aims to ensure that the health and safety of the public is protected while still allowing for food industry innovation and trade".*

The Standard will significantly impact innovation in the food industry as costs (especially in respect of obtaining pre-approvals) will rise significantly, extending the time for a return on investment to be achieved. In smaller businesses that do not have the funds to meet the increased costs associated with claims' pre-approval, innovation will become prohibitive.

FoFR did not overtly support Recommendation 20 as presented in Labelling Logic but simply supported the finalisation of a health claims standard within two years. As this most recent guidance from FoFR was only provided in December 2012 and the Proposal was released 17 February 2012**,** it is suggested that there has been insufficient an opportunity for FSANZ to have full regard to this direction

b) Clarity

Without prejudice to our comments in the Executive Summary about, there are a number of areas we have identified where the Standard is ambiguous. We have set these out in detail in Annex One.

c) Enforceability

The enforceability of the Standard is closely related to its clarity. We have provided detailed comments on this in Annex One. In particular, we would draw your attention to our comments on the need for the variation process to be set down in the Standard and also the need for a separate Transitional Standard.

12http://www.foodlabellingreview.gov.au/internet/foodlabelling/publishing.nsf/Content/ADC308D3982EBB24CA2576D20078EB41/$File/FoFR%20response%20to%20the%20Food%20Labelling%20Law%20and%20Policy%20Review%209%20December%202011.pdf p. 5 accessed March 12 2012

d) User-friendliness

The Standard is not user- friendly because of the following:

(i) No Stock-in-trade provision.

A two year transition period with no "stock in trade" provisions will place undue burden on industry due to the large number of claims that will need to be removed from advertising and packaging. The last significant change made to the Food Standards in 2002 had a two year transition and a "stock in trade" provision. The net impact of this Standard on Kellogg, given that the majority of our products have a twelve-month shelf life, is that Kellogg will require to alter its packaging and marketing within twelve months of the Standard coming into force otherwise we may be at risk of having a significant number of products on shelf that would not be in compliance and the costs involved in any recall, repacking or destruction of food/packaging would be prohibitive.

Moreover, we have concerns that the two year transition period does not give FSANZ enough time to grandfather any relevant EU claims. This essentially adds further cost to industry to firstly remove claims (i.e. change packaging and advertising) similar to EU claims that have not yet been pre-approved by FSANZ and then re-instate those claims (changing packaging and advertising again) once the approval has been granted.

(ii) No explanation from FSANZ as to why current GLHC claims are now prohibited

The pre-approval regime and the requirement that the food meet the NPSC proposed in the Standard will mean that the large majority of claims currently made in the market will be prohibited regardless of the fact that these food and health relationships are recognised relationships in authoritative sources.

During the ten years of discussion around nutrition and health claims and the need to regulate these, there has never been any compelling nor persuasive evidence provided by FSANZ of market failure or any demonstrated negative impact on public health. This is especially concerning given that that the implementation of the Standard will incur additional costs for Government which in turn will be borne by the Australian taxpayer. We would envisage that a significant consumer education campaign may be required to explain to consumers that current claims are still true and valid. Explanation will need to be provided by the Government to consumers to also explain why claims (such as "prebiotics help improve digestive health" and "pysllium helps reduce cholesterol absorption") are prohibited particularly when these claims are allowed in other markets like the US[13] and Canada[14].

A Government education campaign, funded again by Australian taxpayers, will also be needed to let consumers know that the Government has changed the amount of fibre and protein needed to make fibre and protein claims. This will mean a number of breakfast cereals will no longer be able to tell consumers they are a "source of fibre"/"good source of fibre" as the qualifying amount for each claim has increased. For example, Kellogg's Sultana Bran becomes a "high fibre food" rather than a "very high fibre" food and Kellogg's Just Right will become a "source of fibre" food rather than a "high fibre" food. The qualifying level for the claim "high in protein" has also

13 http://www.fda.gov/Food/LabelingNutrition/LabelClaims/HealthClaimsMeetingSignificantScientificAgreementSSA/ucm074351.htm accessed March 15 2012

14 http://www.inspection.gc.ca/english/fssa/labeti/guide/ch8e.shtml accessed March 15 2012

increased. The Government will need to let consumers know that the foods have not changed but the levels have. Again there is no clear rationale as to why the thresholds have increased and it is suggested that the Standard may well undermine the overarching policy considerations around improving public health and further confuse consumers.

(iii) Limited number of claims available to manufacturers

The pre-approved list of claims is very narrow and provides very limited opportunities for the food industry. It is concerning that 85% of claims that are pre-approved are for vitamins and minerals. This, we suggest, will shift the public focus to single nutrients rather than on foods. This is at odds with the Draft Dietary Guidelines which looks to promote foods not nutrients. It is also concerning that only 15% of claims are for nutrients other than vitamins and only 1 claim (0.008%) is for Dietary Fibre and that this claim is "dietary fibre has a laxative effect" when there is a significant global body of evidence to suggest wider positive health relationships. This is concerning as more than seven out of ten adults in Australia fail to eat enough fibre with average intakes of just 20g/day for women and 26g/day for men.[15] The recommended fibre intake is for women to consume 25g per day, and men 30g per day[16]. Increasing fibre intake remains the core feature of lifestyle advice for individuals with symptoms of digestive discomfort[17].

Given that therapeutic goods such as vitamin supplements have more ability to market the health benefits of their product than food manufacturers, there is significant likelihood of consumers choosing "pills" over food to achieve a health benefit. The Standard may lead to limited foods being promoted on the basis of health benefits which may lead to narrow diets which is against the principles of the Dietary Guidelines which seeks to encourage the consumption of a wide variety of foods.

As mentioned above, there are no other claims from other jurisdictions, for example Canada, the EU or the United States. Our understanding is that rather than FSANZ grandfathering these claims (which would have a been cost effective way to ensure Australian consumers could benefit from the expertise amassed globally on health claims) that additional and arguably unnecessary cost will be borne by the Australian taxpayer as FSANZ repeats the work undertaken by other countries. Given the limited resources and capacity of FSANZ and the scale of the Government's ambitions in improving public health, it is suggested that implementing the Standard as is would be a huge missed opportunity.

On the issue of resources, Kellogg also has genuine concerns that FSANZ will not have the resources or budget to undertake the review of claims from other jurisdictions quickly and that the number of claims available will remain at 115 for the foreseeable future which will have the regrettable consequence that Australian consumers will not be getting prompt access to proven health information.

The Australian Governments has a very strong and commendable policy around Preventative Health[18] which includes a focus on food and how it can improve health.

15 http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/CA25687100069892CA25688900268A6D/$File/48050_1995.pdf

16 NHMRC (2006). Nutrient Reference Values for Australia and New Zealand. NHMRC Publications Australia accessed March 19 2012

17 Tursi A, Papagrigoriadis S (2009). Review article: the current and evolving treatment of diverticular disease. Alimentary Pharmacology and Therapeutics 30:532-546

18 http://www.health.gov.au/internet/main/publishing.nsf/Content/phd-prevention-np accessed March 24 2012

The claims that have been pre-approved will limit industry's ability to be part of the solution for Preventative Health.

(iv) Barrier to trade

As previously mentioned the Standard will create a barrier to trade. Food Products that will be able to be sold in the EU with health claims will not be able to be imported into Australia since the list of pre-approved claims does not include any of the soon to be approved EU food and health relationships. Taking this together with the additional requirements around NPSC even when the EU claims are grandfathered in this Standard will continue to act as a restraint to trade.

(v) Cost and timeliness of pre-approval for new claims proposed by Industry

At this stage, based on the current Application Handbook[19] an application by industry of FSANZ to review and progress an application for a new pre-approved claim could cost between $50,000-$150,000 per claim and that is only for FSANZ to review the claim. That does not include the costs of ensuring the substantiation dossier meets the proposed requirements nor the cost to Government in setting up the relevant committee to consider the application or proposal.

There is duplication of costs for manufacturers who sell products in a number of different markets. For example, Kellogg UK has put significant resources against developing and seeking pre-approval for claims in the EU. Having regard to the claims in the Standard, we would anticipate Kellogg Australia will be required to incur significant costs to enjoy the benefits of claims that have already been researched and substantiated here and elsewhere.

There is still considerable uncertainly for manufacturers as to whether the claim would ultimately be approved by the FoFR and also the timeframe for approval of the claim since time constraints only apply to FSANZ taking an application to the FoFR for consideration and not to how long FoFR takes to approve the claims. This lack of certainty is not ideal for Food Manufacturers due to the significant investment needed up front and the need to get a return on the investment as soon as possible.

The EU experience has shown that it has taken the EU at least 5 years[20] to get the list to a stage which the EU Parliament can approve. This timeframe is well outside the statutory timeframes of FSANZ for finalisation of proposals and approvals. In Australia we have similar examples of extended timeframes to gain approval for claims. For example, Application 433 (A433) was lodged by Goodman Fielder in 2001 and finally approved in November 2006 a period of some 5 years. This illustrates the length of time that applications may take and is not satisfactory from an Industry perspective, especially as claims that are currently made will require pre-approval which could take many years.

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19 http://www.foodstandards.gov.au/foodstandards/changingthecode/applicationshandbook.cfm accessed March 12 2012

20 http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1176&format=HTML&aged=0&language=EN&guiLanguage=fr accessed March 22 2012

Section 2 – Fat Free Claims

Kellogg supports treating fat free claims along the same lines as other nutrition content claims. This means that these claims should be able to be used to call out the fat content of the food, that a profile system should NOT be applied to the food and that the food should meet the requirements of being a low fat food (i.e. contain less than or equal to 3gms of total fat)

Concerns/Rationale

Kellogg's rationale is based on the fact that fat free claims are a statement of fact and we are not aware of any evidence from consumers that they are misled by these statements nor believe that the product has any other attributes apart from having less fat. Furthermore, the evidence provided is old and may no longer be relevant, in particular the market review of claims which was published in 1997, 2001, and 2005. Most importantly, Kellogg has a concern that this change to the Standard has been made at the last minute and due process has not been followed in developing this proposal to alter the regulation. It is our recommendation that this matter be treated as a separate matter and that a proposal be raised to explore the issue fully.

The introduction of fat free claims at this late stage of P293 is a deviation from FSANZ own processes coupled with the timeframe in which stakeholders have to consider and respond to the Proposal, means that the ability for meaningful consultation to take place is materially constrained. It is our firm recommendation that FSANZ should raise a separate proposal for this issue in order that the matter be properly considered and consulted upon.

Should you have any questions about the comments made in our submission, please do not hesitate to contact me on (02) 9384 5306.

Yours faithfully

Rebecca Boustead
Director, Corporate Communications and Regulatory Affairs
Kellogg (Aust.) Pty Ltd

Annex One

Specific comments on specific clauses in Standard 1.2.7

Submitter name: Kellogg Aust (Pty) Ltd	
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'. Please see commentary above in main submission.	
Clause number	**Comment**
Interpretation Section	
Approach to definitions/defined terms (e.g." average energy content", "biologically active substance")	In other standards, it is common to set out the defined terms in full in the interpretation section rather than cross refer to other standards; this approach aids 'user-friendliness' of standard and should be adopted here to increase ease of use.
Clause 7 – Therapeutic use	It is understood that the intention of this clause is to prohibit claims regarding therapeutic use (except to the extent that those claims may be made under other sections of the Standard). It is suggested that there is an issue with the drafting in that it does not align with the definitions used in the Therapeutic Goods Act 1989 (including, but not limited to, the definition of "Therapeutic Goods" or "Therapeutic use") nor it is clear how this clause would apply in New Zealand where different legislation is in effect.

Clause 16 – High level health claims	This clause states that a variation to add a health claim (other than those set out in Schedule 2) will be deemed to be a "high level health claim". This in turn is defined in the Food Standards Australia New Zealand Act as those high level health claims set out in the Standard relating to Nutrition, Health & Related Claims. This may be confusing as there are no high level health claims in the Standard as drafted nor is the concept of high level health claims one that is dealt with elsewhere in the Standard. It is suggested that there may also be an issue relating to the fact that the Standard (by its failure to adopt the concept of general and high level claims generally) is an example of an instrument of subordinate legislation purporting to amend the empowering act. It is vital that there is absolute clarity on how new claims will be added. Moreover, it is important to consider the proportionality and appropriateness of Sub-division G in respect of claims that would not be high level claims but for clause 16.
Clause 18 (3)(c)	This subsection is very vague and may prevent parties from applying this provision in any meaningful or consistent way. It is suggested that this sub-section be deleted.
Clause 19	This drafting is unclear. Attachment B makes clear that you may present statements about the property of a food and its health affects separately from the "complete statement". As drafted, however, it suggests that such elements would require to be duplicated (i.e. they would be set out in the complete statement and also elsewhere). It is suggested that the drafting does not reflect this intent.
Clause 21(1)(c)	This subsection is unclear and will be open to subjective interpretation. For example, on one view, the mere payment of a bona fide license fee to an endorsing body will to some extent have an influence upon that endorsing body. This subsection should be deleted.

Clause 23(1)(d)	From an enforceability stance, this clause is unhelpful as it is not clear how a supplier would evidence this. This subsection should be deleted.
Clause 24(5)	There is an incorrect reference; the reference requires to be to subsection 6.
Schedule 1 – Omega-3 fatty acids	The formatting may be incorrect in that the conditions set out in Column 3 and Column 4 may apply equally to (d). It is imperative that there is clarity on the applicable conditions and failure to address formatting issues such as this will impact how the claims need be applied.
Schedule 1 – Protein, Column 4(b)	There is typo.
Schedule 1 – Selenium	The formatting may be incorrect in that the conditions set out in Column 5 may apply equally to all claims for selenium. It is imperative that there is clarity on the applicable conditions and failure to address formatting issues such as this will impact how the claims need be applied.
Schedule 2, Part 2, Folate	The formatting may be incorrect in that the conditions set out in Column 5 may apply equally to all claims for folate. It is imperative that there is clarity on the applicable conditions and failure to address formatting issues such as this will impact how the claims need be applied.
Schedule 2- Part 2, Vitamin C	The formatting may be incorrect in that the conditions set out in Column 5 apply equally to all claims for vitamin C. It is imperative that there is clarity on the applicable conditions and failure to address formatting issues such as this will impact how the claims need be applied.
Schedule 2, Part 3, Beta-Glucan, Column 4	Semi-colon missing after (a) and either “and” or “or”.
Schedule 4 Clause 3(1)	This is an incorrect reference; reference requires to be to “30” not “10”
Consequential variations	**Comments**
General	It is not sufficient that the Standard and Variation be made; from an enforceability perspective, a Transitional Standard is required also.