

**Comments from the Victorian Department of Health and the Victorian Department of Energy, Environment and Climate Action.**

**Due date of submission – extended to 16 March 2023**

The Victorian Departments of Health and Energy, Environment and Climate Action (the departments) welcome the opportunity to provide comments to Consultation Paper One (Regulatory Framework for Standards 2.9.4) of Proposal P1010 Formulated Supplementary Sports Foods. We note the sports food market has evolved significantly since Standard 2.9.4 was last substantially changed over 20 years ago and are pleased to see this review progressing.

The comments that follow are based on the departments' own experience with formulated supplementary sports foods (FSSFs) and the limited information provided in the consultation paper. We understand Food Standards Australia New Zealand (FSANZ) is gathering market data which will provide further insight to the sports food market and may alter the departments' views as the information comes to light.

**Questions posed to submitters:**

Market overview

- 1. For industry or regulators, do you have market or product data or information that you would like to provide to update FSANZ's understanding of the current market in Australia, New Zealand or globally?**

The departments have no information to provide.

Definitions

- 2. As a consumer, regulator or industry stakeholder, have you identified any issues resulting from the definitions in the Code? If so, what are they and why are they an issue?**

The departments have not identified any issues with the definitions of Standard 2.9.4 ('formulated supplementary sports food' and 'one-day quantity') beyond those already outlined in the consultation paper.

- 3. For industry and regulators, how should proprietary blends or stacks best be regulated and why?**

The departments consider the practice whereby manufacturers group substances under the banner of a 'proprietary blend' in the ingredient list and/or nutrition information panel limits consumer ability to make informed choices and is in opposition to the objectives of the *Food Standards Australia New Zealand Act 1991*. This practice also creates compliance and enforcement challenges where adherence to compositional limits cannot be determined if the substance is listed as part of a proprietary blend. On this basis, the departments' preferred approach is for all ingredients to be listed individually.

**4. For all, should the Code retain the existing definitions in Standard 2.9.4? If so, why and if not, why not?**

Product definitions can be beneficial in providing regulatory clarity, which for sports foods and supplements is important given they may fall under several different legislative frameworks. A FSSF definition should be clear, with appropriate boundaries to capture the intended use to support physical activity, to prevent regulatory uncertainty whilst allowing flexibility for future product innovation. Further, it should be developed in conjunction with the regulatory framework to ensure the Standard is cohesive and fit-for-purpose.

The departments are aware of limitations in the application of 'one-day quantity' as outlined in the consultation paper. We are particularly concerned that individuals consuming multiple sports food products ('stacking') are at risk of exceeding safe intake levels because compositional limits are set on a one-day quantity of an individual product only. On this basis, the departments support exploration of alternative approaches to ensure appropriate and safe consumption of FSSFs.

Current compositional requirements

**5. Would a tiered approach to regulation based on composition improve public health and safety for consumers, while allowing for innovation (e.g. provisions for 'high risk' substances, restriction on sale, differing labelling requirements or compositional deviation)? If so, how could it look? How could high, medium and low risk products be differentiated? What requirements could apply to each and why (e.g. pre-market assessment, compositional and labelling requirements)?**

The departments recognise the inherent risk varies widely across the sports food category, and on this basis, support further exploration of a risk-based tiered model for the regulation of FSSFs. The departments suggest that any risk-based segmentation should be based on composition/ingredients rather than product category to allow for market innovation of new product types.

Regarding provisions that may be considered under a tiered system, we note that restrictions on sale would need to include the full range of purchasing channels to be effective, which is likely to be challenging in some environments (e.g., online sales).

At this stage, we are unable to provide further comments based on the limited market data presented. However, we would welcome further discussions of potential regulatory framework options either through individual or collective jurisdictional conversations.

**6. Is there any evidence that current practice in relation to analogues and derivatives pose a health concern or risk? If you consider that there is a health concern or risk, please provide relevant details and data, where available.**

The departments do not have any evidence to provide in relation to analogues and derivatives.

**7. Is there any evidence in current research in relation to known analogues and derivatives that pose a health concern or risk? If you consider that there is a health concern or risk, please provide relevant details and data, where available.**

The departments do not have any data to provide regarding analogues and derivatives.

**8. How could the Code assist in reducing the risk to consumers who are stacking sport food products and potentially consuming more than the maximum amount permitted by Standard 2.9.4 in the Code?**

One potential option for reducing stacking-related risks could be a requirement for the warning statement to include words to the effect that individuals should consult an appropriate health professional before consuming multiple FSSFs. We note this strategy does not provide specific guidance to enable consumers to manage risks associated with the unique products they are consuming. Thus, it will be important that FSSF labels provide accessible and complete compositional information that enable consumers and medical professionals to manage individual dietary intake.

We also recommend any provisions introduced under the Code are supported by appropriate education material. These could leverage information sources known to be commonly utilised by sports food consumers, such as sports coaches and the internet<sup>1,2</sup>.

**9. To what extent are vulnerable consumers regularly consuming sports foods? Please provide evidence.**

Most of the evidence related to sports supplement consumption focuses on athletes, and therefore known consumption by vulnerable populations is limited. However, there is some evidence that FSSF consumption is becoming increasingly commonplace among adolescents. Adolescents are a vulnerable population in relation to sports supplements due to their lower body weight and nutrient requirements. As noted in our comments to Proposal P1056 Caffeine Review, an adolescent of average stature would exceed the recommended maximum acute caffeine intake of 3mg/kg bw based on the proposed 200mg one-day quantity. As a further example, an electrolyte drink containing 306mg per serve would provide a 14-18 year old with 44% of the mid-point of their daily adequate intake for sodium (460 – 920mg).

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<sup>1</sup> Catalani, V., Negri, A., Townshend, H., Simonato, P., Prilutskaya, M., Tippet, A. and Corazza, O., 2021. The market of sport supplement in the digital era: A netnographic analysis of perceived risks, side-effects and other safety issues. *Emerging Trends in Drugs, Addictions, and Health*, 1, p.100014.

<sup>2</sup> Whitehouse, G. and Lawlis, T., 2017. Protein supplements and adolescent athletes: A pilot study investigating the risk knowledge, motivations and prevalence of use. *Nutrition & dietetics*, 74(5), pp.509-515.

**10. Do the current definitions and compositional and labelling requirements in the Code relating to sports foods pose any difficulties in compliance or enforcement? If yes, please provide reasons why and examples.**

The departments do not have any information to provide.

Electrolyte drinks

Consistent with our comments to the Call for Submissions to P1030 Composition and labelling of electrolyte drinks, the departments support inclusion of electrolyte drinks in Standard 2.9.4. The positioning of electrolyte drinks under Standard 2.9.4 provides regulatory clarity that these products are specifically formulated to be used in association with strenuous physical activity, rather than as a lifestyle product. We also note the changes introduced under Proposal P1030, including the prescribed name and prohibition on nutrition content and health claims unless expressly permitted is more consistent with the regulatory approach for special purpose foods than for general beverages.

**11. If the existing requirements for electrolyte drinks were transferred to a special purpose food standard (i.e. under Standard 2.9.4), what impacts (positive or negative) might this have on industry, regulators and/or consumers?**

For consumers, there would be greater clarity through the labelling provisions of Standard 2.9.4 (specifically 2.9.4-4) that electrolyte drinks are special purpose products not intended for general consumption. While consumers would not have access to a Health Star Rating (HSR), given the voluntary nature of the system and the current limited use of HSR on electrolyte drinks, the practical impact is likely to be minimal. Additionally, the departments do not consider the HSR appropriate for use on electrolyte drinks given the calculator for beverages is based on only energy, sugar and fruit content and does not consider sodium content.

Industry would be impacted by the need to update labels to reflect warning and advisory labelling requirements under Standard 2.9.4-4.

**12. If electrolyte drinks were to remain a general purpose food (i.e. under Standard 2.6.2) what impacts (positive or negative) would this have on industry, regulators and/or consumers?**

The departments note that the electrolyte supplement market is moving beyond traditional electrolyte drinks and hybrid electrolyte sports foods are becoming more available (for example, Body Science BCAA Fuel, which is an 'amino acid hydration' formula). Retaining electrolyte drinks under Standard 2.6.2 may create compliance and enforcement challenges in relation to appropriate regulation of these hybrid products.

**13. How would transferring electrolyte drinks to Standard 2.9.4 impact consumer messaging around their purpose and use? Please provide reasons for your view.**

The transfer of electrolyte drinks to Standard 2.9.4 would introduce a number of labelling provisions not applicable under Standard 2.6.2 that are likely to influence consumer perceptions and understanding of the purpose and use of electrolyte drinks, including:

- A statement to the effect that the food should be consumed in conjunction with an appropriate physical training or exercise program.
- The warning statement 'Not suitable for children under 15 years of age or pregnant women: Should only be used under medical or dietetic supervision'
- Directions about the recommended amount and frequency of consumption

These statements would provide clarity to consumers about the appropriate use of electrolyte drinks, specifically that they should only be used in conjunction with strenuous physical activity. It would also make clear that these products are not intended for children and young people, and may reduce current inappropriate use by this population group.

Labelling

**14. Are the existing labelling requirements in the Code for sports foods appropriate for managing potential risks to public health and safety? Please provide details on why or why not.**

As noted in our earlier comments, the departments are concerned the current one-day quantity approach does not allow consumers to easily manage risks related to consumption above maximum tolerable quantities when consuming more than one sports food. Further, as labelling requirements related to the quantity of the food recommended to be consumed in one day are not prescribed, some manufacturers are using terminology that may undermine intake guidance or confuse consumers. For example, providing different consumption guidance for training and non-training days, or suggesting a starting intake that can be increased if tolerated. The departments also consider the use of the terms 'recommended' and 'suggested' in conjunction with the one-day quantity may diminish the importance of managing intake in accordance with directions to limit health and safety risks. The departments suggest alternative approaches to ensuring consumers do not exceed safe intake levels is required.

**15. What are your views on the relevance to sports foods of the existing warning statement and advisory statements? Please provide reasons for your view.**

The departments consider warning and advisory statements critical for FSSFs due to their specialised composition that includes ingredients and/or levels of substances not consumed in general purpose foods. The departments note consumer understanding and use of warning and advisory statements is not well understood and suggest consumer research would be valuable in ensuring labelling requirements are clear and effective in managing risks.

In relation to the warning statement 'Not suitable for children under 15 years of age or pregnant women: Should only be used under medical or dietetic supervision', the departments seek to clarify the evidence base used to identify these population groups, particularly the selected age cut-off point for adolescents. As outlined in our comments to Proposal P1056 Caffeine review, adolescents aged 15 years and older may still be at heightened risk. We suggest the target populations and the definitional bounds should be reviewed.

**16. Please discuss whether you think the existing labelling requirements for sports foods enable consumers to make informed choices. Please provide reasons for your view.**

As outlined in our comments to previous questions, there are several issues which currently limit consumers' ability to make informed choices. These include:

- The practice of listing information as proprietary blends.
- Difficulty in determining appropriate consumption quantities when consuming multiple sports foods.
- Unclear consumption instructions that may 'recommend' or 'suggest' dietary intake.

**17. What are your views on the usefulness of the labelling statements in Division 3 for particular sports foods (high carbohydrate supplement, protein energy supplement, energy supplement)? Please provide reasons for your view.**

The labelling provisions in Division 3 clearly outline the expected benefits and appropriate advisory information of particular sports foods, which is useful for informing consumers about intended and appropriate use. However, due to the expansion of the sports food category since Standard 2.9.4 was last significantly amended, the particular sports foods included in Division 3 only represent a small portion of the category. If the Division 3 labelling provisions are retained, consideration should be given to other relevant sports foods/nutrients that could be included, recognising the need to also future proof for category innovation.

**18. Have you identified issues on any other labelling aspects specific to sports foods? Please provide detail.**

Other than the general legibility requirements of Standard 1.2.1, which specify a minimum type size for warning statements, there are no conditions on the presentation of safety information on FSSFs. Due to the specialised role and marketing of these products, FSSF labels often contain large amounts of both mandatory and voluntary information. The departments are concerned that manufacturers predominantly allocate larger amounts of label space to voluntary marketing information, which reduces the size and prominence of warning and advisory information, as shown in figure 1. The departments suggest options for ensuring adequate visibility of warning and advisory information should be explored. This may include use of a larger type size or enclosing mandatory



information within a border. Both of these approaches are currently used by some manufacturers.



Figure 1 Example of a FSSF where the warning and advisory information is poorly visible

**19. To inform the scope of the second consultation paper, do you have any views on how Standard 1.2.7 – Nutrition, health and related claims could apply to sports foods?**

Nutrition content and health claims are a major component of sports food marketing. A 2021 survey of the Australian marketplace found of the products surveyed, 98.5% displayed a nutrition content claim, and 65.1% displayed a

general level health claim<sup>3</sup>. The survey also reported that it was commonplace for sports foods to carry multiple claims, with the mean number of claims ranging between 11 – 25, depending on the product type.

Based on the volume of claims on the market as well as the significant rate of category innovation, post-market management of claims in its current form is likely to be untenable for regulators. For this reason, the departments' preferred approach is for health claims on FSSFs to be limited to a list of pre-approved evidence-based claims. This approach is consistent with the European Commission's current model and would support international consistency. The claims already approved for use in Europe could be leveraged as a starting point for a pre-approved list under the Code.

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<sup>3</sup> Chapple, C.I., Russell, C.G., Burnett, A.J. and Woods, J.L., 2023. Sports foods are not all they shake up to be. An audit of formulated supplementary sports food products and packaging in Australian retail environments. *Frontiers in Nutrition*, 10.