



AUSTRALIAN
**FOOD &
GROCERY**
COUNCIL

AFGC SUBMISSION

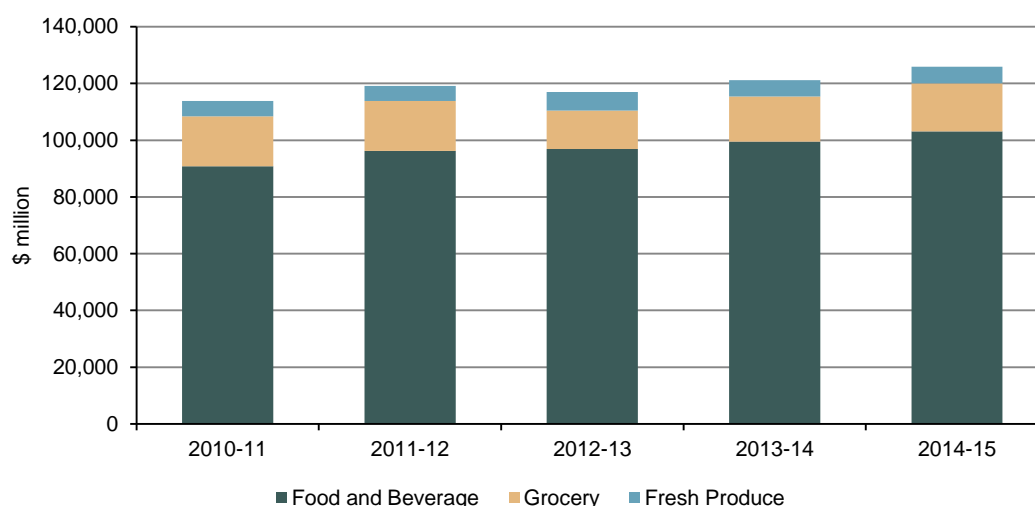
FSANZ CONSULTATION PAPER
PROPOSAL P1024 –NUTRITIVE
SUBSTANCES AND NOVEL FOODS

Sustaining Australia

PREFACE

The Australian Food and Grocery Council (AFGC) is the leading national organisation representing Australia's food, drink and grocery manufacturing industry. The membership of AFGC comprises more than 180 companies, subsidiaries and associates which constitutes in the order of 80 per cent of the gross dollar value of the processed food, beverage and grocery products sectors.

Composition of the defined industry's turnover (\$2014-15)



With an annual turnover in the 2014-15 financial year of \$125.9 billion, Australia's food and grocery manufacturing industry makes a substantial contribution to the Australian economy and is vital to the nation's future prosperity.

Manufacturing of food, beverages and groceries in the fast moving consumer goods sector is Australia's largest manufacturing industry. Representing 33.3 per cent of total manufacturing turnover, the sector accounts for over one quarter of the total manufacturing industry in Australia. The diverse and sustainable industry is made up of over 27,745 businesses and accounts for over \$66.6 billion of the nation's international trade in 2015-16. These businesses range from some of the largest globally significant multinational companies to small and medium enterprises. Industry spends \$541.8 million in 2011-12 on research and development.

The food and grocery manufacturing sector employs more than 307,000 Australians, representing about 3 per cent of all employed people in Australia, paying around \$16 billion a year in salaries and wages. Many food manufacturing plants are located outside the metropolitan regions. The industry makes a large contribution to rural and regional Australia economies, with almost half of the total persons employed being in rural and regional Australia. It is essential for the economic and social development of Australia, and particularly rural and regional Australia, that the magnitude, significance and contribution of this industry is recognised and factored into the Government's economic, industrial and trade policies.

SUMMARY

The AFGC provides this submission in response to the FSANZ call for submissions of 16 June 2017 “*Consultation Paper – Proposal P1024 Revision of the Regulation of Nutritive Substances and Novel Foods*” (the Consultation Paper).

Aside from some specific issues, the principal change proposed in the Consultation Paper is that, compared to previous consultations, the foreshadowed structure involves two paths to market rather than three, with the proposed industry self-assessment route being dropped.

In summary, the AFGC –

- (a) defers its position on the omission of an ‘industry self-assessment’ path to market until more detail on the ‘eligible foods’ path to market has been developed;
- (b) emphasises the need for novel food regulation to recognise international advances in food technology so as to not disadvantage Australian consumers;
- (c) considers regulation of nutritive substances should be abandoned in the absence for a clear policy rationale for such a generic prohibition;
- (d) proposes a ‘prohibited and restricted ingredients’ standard as an alternative to nutritive substance regulation;
- (e) considers that the use of nutritive substances in special purpose foods (regulated in Part 2.9 of the ANZ Food Standards Code) should be considered within the scope of Proposal P1024 rather than left to infant formula and related reviews; and
- (f) recommends a ‘clean slate’ approach to novel foods, such that it is not necessary to consider grandfathering existing novel food permissions.

INDUSTRY SELF ASSESSMENT

As noted above, the Consultation Paper is notable for the absence of any scheme for industry self-assessment as a path to market for foods caught within a definition of novelty.

The Consultation Paper seems to suggest that this omission is the result of opposition to such a path to market by governmental stakeholders, the implication being that such opposition would lead to any proposed novel food standard being rejected by the Ministerial Forum on Food Regulation. The AFGC acknowledges that FSANZ resources are best expended on proposals that are likely to prove acceptable to Ministers and to jurisdictions, but cautions that Ministerial vote counting before a proposal is finalised is a fraught exercise. The jurisdictions that point to their experience with self-assessed health claims would do well to remember that it was the Ministerial Council itself that directed FSANZ to include a self-assessment path for general-level health claims.

The AFGC considers the better argument lies in the simplicity of the ‘two path to market’ approach where the considerations that would have been prescribed to be considered in a self-assessment path to market become, in the new proposal, considerations that open up

the 'eligible foods' path to market, rendering self-assessment unnecessary. However, this argument is predicated on the development of appropriate 'eligible food' criteria, and the development of 'eligible food' criteria is a matter that FSANZ has deferred for future consideration.

The AFGC considers that the omission of a self-assessment path to market and the development of the 'eligible food' path to market need to go hand-in-hand. The AFGC considers a structure for a new novel food standard that omits a 'self-assessment' path to market to be *potentially* workable, but reserves its position on the issue until the 'eligible food' criteria are more developed.

The AFGC does not consider it appropriate or necessary at this time to 'lock in' a structure for the standard, but that work on the standard should continue for the time being on the basis of the 'two path to market' proposals set out in the Consultation Paper. The need for an industry self-assessment path can then be reconsidered in light of more developed proposals for the 'eligible foods' path.

In particular, the AFGC considers that the recognition of food safety approvals by comparable economy governments, and the acceptance of food that has a history of human consumption outside Australia and New Zealand, are key triggers for an eligible food path to market. If these two measures are in place, an industry self-assessment option may indeed be superfluous.

NUTRITIVE SUBSTANCES

The AFGC is unaware of any proper statement of the problem intended to be corrected by the prohibition on nutritive substances. The prohibition has ever been problematic as to its intended scope and its crossover with other provisions in the ANZ Food Standards Code.

In the nearly two decades of its operation, these problems have only worsened as practice delivered confusion rather than clarity. The lack of a clear policy objective for the prohibition was most evident in the disparity of jurisdictional views during the Nutricia FOS and GOS matter.

The AFGC therefore considers that best practice regulation would be to repeal the prohibition, at least unless and until a proper regulatory policy and outcome for the prohibition can be provided. The AFGC notes in particular that vitamins and minerals are already addressed elsewhere in the Code, as would be novel extracts and so forth. The 2015 amendment of the Code to reframe additive permissions according to when substances are 'used as' an additive reinforces the idea that such substances might legitimately be used for functional or nutritive purposes, and this should not be undermined by the continuation of a nutritive substances prohibition that serves no identifiable purpose.

That said, the AFGC recognises that there are substances that regulators might consider inappropriate for unrestricted use as food or as a food ingredient. For example, the AFGC

is conscious of previous legitimate regulatory concerns in relation to certain substances added to body building protein supplements that function as steroids. The AFGC considers that the appropriate model to regulate such concerns is through specific targeted regulation rather than by attempting to draft a catch-all provision that is as likely to impede innovation as it is to solve issues pro-actively – if indeed specific regulation is in fact needed given the Model Food Act prohibitions against the sale of food that is unsafe.

The AFGC draws attention to Standard 1.4.4, which regulates prohibited and restricted botanicals. The Standard does not require pre-approval of any botanical used in or as food, but rather targets those with identified safety risks. The AFGC considers expanding the scope of Standard 1.4.4 to address other prohibited or restricted foods would be a better means of regulating those substances of actual concern, in place the current ill-considered regulation of nutritive substances.

Such a repeal of nutritive substance regulation would not be especially burdensome to achieve, as the number of consequential amendments (where the Code makes allowance for 'nutritive substances' is very small.

A question raised in the Consultation Paper is whether the scope of this Proposal should be extended to cover nutritive substances used in special purpose foods regulated by Part 2.9 of the ANZ Food Standards Code. The AFGC considers that any review of nutritive substances that does not extend to Part 2.9 foods would fail address the most significant issues of concern – and therefore recommends that the scope be extended. The AFGC is aware that this approach would create an overlap with the current review of infant formula products and that FSANZ will need to manage the interrelationship between the two. However, if FSANZ were to adopt the AFGC's recommendation and repeal nutritive substance regulation in its entirety, this overlap effectively disappears and it is then just an issue for consideration in the infant formula review how substances currently identified as being regulated nutritional substances should be treated. Consequential amendments to other standards in relation to the treatment of amino acids should not prove too onerous.

TRANSITIONAL MEASURES

The Consultation Paper notes that the review of novel food regulation raises a number of transitional issues, including –

- how to deal with foods that are already approved as being 'novel';
- whether foods lose their 'novelty' after some period of time;
- how to deal with existing specifications for foods approved as being novel foods;
- how to deal with specific restrictions and/or labelling requirements currently imposes under novel food regulations;
- how to deal with foods assessed under the various advisory committee processes that may or may not have been considered to be novel;
- how to address foods introduced to the market that should in fact have undergone a novel food assessment; and
- how to deal with exclusive permissions given in relation to novel foods.

The AFGC notes the Consultation Paper begins the process of consideration on these issues, but considers that many do not need to be resolved at this point in time until the structure and detail of the new Standard has been more developed.

That said, the AFGC in broad terms recommends that the new structure for novel foods commence with a 'blank slate' approach. The adoption of a 'prohibited foods' standard for specific foods that either have been introduced to market without assessment or were assessed as not having sufficient safety evidence may have a significant impact on the need for novel food transitional periods.

The issues around specifications and specific usage restrictions and labelling are, in the AFGC's view, similarly unlikely to prove overly problematic should a 'restricted foods' regulation be developed along the same lines as currently exists for botanicals.

Finally, the AFGC supports the need for companies that invest in food innovation to be appropriately rewarded for their efforts. Whether food standards is an appropriate mechanism to deliver such rewards is a separate question legitimately raised in the Consultation Paper. However, some of the language in the Consultation Paper perhaps fails to recognise that governments do have a role in protecting commercial intellectual property – for example copyright laws are enforceable by customs and other officials, who have a direct role and responsibility for detecting and seizing everything from pirated DVDs through to fake Cartier watches. This is because there is a public interest and economic benefit derived from a nation's investment in innovation, and it is a legitimate role of government to protect that investment in order to promote national economic goals.

What is perhaps more relevant is to explore the overlap between food regulation and other forms of IP protection, and determine whether novel food exclusivity is the most effective regulatory mechanism to protect innovation in any particular instances. The view of IP Australia on this question would be informative to respondents.