

**FINAL ASSESSMENT REPORT FOR
PROPOSAL P293 – NUTRITION, HEALTH & RELATED
CLAIMS**

Conditions applying to Related Claims

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1. ENDORSEMENTS

1.1 Decision

FSANZ recommends the following approach to regulating *endorsements*:

- designs on food labels that are nutrition content claims or health claims and meet the definition of *endorsement* made by an *endorsing organisation* are not subject to the requirements of the draft Standard;
- designs on food labels that are nutrition content claims or health claims and do not meet the definition of an *endorsement* certified by an *endorsing organisation* are subject to the draft Standard;
- the supplier of the food is required to have records demonstrating that the organisation that certified an *endorsement* is an *endorsing organisation* as defined in the draft Standard;
- upon request, the supplier of the food must make these records available to the relevant authority.

The definitions for *endorsement* and *endorsing organisation* are provided in clause 1 of the draft Standard. Clause 10A of draft Standard prescribes the responsibilities of the supplier of a food carrying an *endorsement*.

1.2 Amendments to current standards/CoPoNC recommendations

During the development of the draft Standard, designs used to distinguish food in relation to its nutrition or health features from other foods were referred to as *endorsements*. At present, the Code does not specifically define or prescribe criteria for *endorsements*. However, designs (including *endorsements*) relating to a health claim need to comply with Standard 1.1A.2 Transitional Standard – Health claims. The draft Standard will define *endorsements* and *endorsing organisation*. All *endorsements* made by *endorsing organisations* as defined in the draft Standard are then exempted from the regulatory requirements of the draft Standard.

1.3 Draft Assessment Report – approach taken and submitter comments

In the Draft Assessment Report, FSANZ proposed to pre-approve a number of *endorsements* and to require subsequent *endorsements* to comply with the regulatory requirements for health claims. Submitters raised a number of issues in response to this approach:

- there was support for definitions of *endorsements* and *endorsing organisations*;
- the FSANZ approach seemed inconsistent, anti-competitive and trade restrictive;
- exemption should apply to the *endorsement* logo only and not the whole program;
- *endorsement* programs should be open to scrutiny and be transparent;
- *endorsements* should fall outside the draft Standard; and
- *endorsement* programs are contractual arrangements and should be regulated by trade mark legislation.

1.4 Preliminary Final Assessment Report – approach taken and submitter comments

On further evaluation of submitter comments and internal considerations FSANZ recognized there were major disadvantages to the approach taken in the Draft Assessment Report, including an inequitable situation between pre-existing and future endorsements, and legislative process issues to be considered when adding or removing endorsements from the list in the draft Standard. Therefore, FSANZ took a different approach in the Preliminary Final Assessment Report.

The approach outlined in the Preliminary Final Assessment Report was as follows:

- *endorsement* means a design used, or intended to be used, to distinguish food certified by an endorsing organisation in relation to its nutrition or health features from other foods not so certified, and includes a certification trade mark, but does not include –
 - (a) a design that distinguishes food in relation to ethical, religious or environmental features including vegetarian, halal, kosher or organic designs; or
 - (b) a design that includes a reference to a serious disease other than as part of the name of the endorsing organisation;
- *endorsing organisation* means an independent organisation, including a government organisation, formed for nutrition or health purposes, the name of which may include a serious disease, but does not include an organisation established or controlled by a supplier or their representatives of food or food ingredients; and
- designs on food labels that meet the definition of *endorsement* and are made by an *endorsing organisation* are excluded from the regulation of the draft Standard.

Many stakeholders from industry and the public health sector along with some government stakeholders agreed with the approach of excluding *endorsements* from the requirements for health claims. In addition, many submitters offered broad support to the suggested approach. However, a number of submitters were concerned about the regulatory approach. The major issues raised were:

- *endorsements* should be regulated as health claims;
- industry bodies should be able to establish and control *endorsement* programs;
- if *endorsements* are excluded from health claims criteria, there could potentially be inconsistent public health messages; and
- difficulties with enforcing the regulatory approach.

1.5 Key changes from proposed approach in the Preliminary Final Assessment Report

The final approach taken by FSANZ effectively excludes all *endorsements* made by *endorsing organisations* as defined in the draft Standard, from the regulatory requirements for health claims. In effect, designs that qualify as an *endorsement* administered by an independent organisation would be exempt from the draft Standard.

A design that is also classified as a nutrition or health claim and is established or controlled by the food supplier is not an *endorsement* for the purposes of the draft Standard and is subject to the health claims regime.

FSANZ has retained the general approach presented in the Preliminary Final Assessment Report, with minor changes:

- the reference to trade marks has been removed from the definition of *endorsement*; and
- responsibility is placed on the supplier of the food to demonstrate that the *endorsement* is made by an *endorsing organisation* and that:
 - the supplier of the food must have records demonstrating that the *endorsing organisation* that certified the *endorsement* is an *endorsing organisation* as defined in the draft Standard; and
 - upon request, the supplier of the food must make these records available to the relevant authority.

1.6 Rationale for final decision

Endorsements that are currently in the marketplace are thought to promote innovation in the development and marketing of more healthy foods (e.g. the National Heart Foundation ‘Pick the Tick’ program). They also are thought to provide consumers with additional information to facilitate informed choice (e.g. Celiac Society *endorsement*).

FSANZ recognises the role that both government and many non-government organisations have in educating the public about aspects of health and nutrition using a variety of approaches, including the use of *endorsements*. If the criteria for making health claims, such as the nutrient profiling scoring criteria, were to be applied to *endorsements* currently in existence, many *endorsing organisations* would not be able maintain their *endorsement* programs. However, *endorsing organisations* need to meet their own criteria thereby leading to an improvement of the ‘healthiness’ of the food supply, within their own context.

FSANZ’s final approach avoids the undesired consequence of restricting the use of many *endorsements* that are useful to consumers, but provides regulatory consistency and integrity by maintaining the requirements for making nutrition content and health claims for designs that do not qualify as *endorsements*. The definitions and clauses proposed to be included in the Standard provide the minimum effective regulation to align nutritional and health related *endorsements* with nutrition policy principles.

Under the proposed approach, an *endorsing organisation* has to be independent, formed for nutritional or health purposes, and structured in a way that guarantees that suppliers of foods carrying the *endorsement* cannot influence the criteria used by the *endorsement* program. This approach eliminates the need for defining nutritional or health criteria to distinguish designs which may be considered as *endorsements* and therefore avoids the dilemma of how to manage existing and future *endorsements* in an equitable way. FSANZ considers that establishing nutritional or health criteria to underpin the definition of *endorsing organisation* are problematic because of the diverse purposes of different *endorsement* programs and of the ongoing implications of managing such a system.

In the case of designs used by suppliers of food or their representatives to make nutrition or health claims on a product label (i.e. those which do not meet the definition of *endorsements* in the draft Standard) the regulatory approach taken is the same approach that applies to the corresponding content or health claim. A design which does not meet the criteria of an *endorsement* must have an accompanying nutrition or content claim, or must itself be compliant with the criteria and conditions of a nutrition or health claim.

The additional changes following the Preliminary Final Assessment Report make it the responsibility of the supplier of the food to ensure that any designs that are relevant to nutrition or health claims either meet the requirements of an *endorsement* or of the associated nutrition content claim or health claim. This reduces the burden of enforcement placed on the jurisdictions because the relevant agency does not have to approach the *endorsing organisation* to check compliance. When requested by the agency, this information must be provided by the supplier of the food.

Some stakeholders expressed concerns that the proposed approach may allow non-reputable organisations or individuals to provide *endorsements* which are not based on sound nutrition principles. FSANZ considers the likelihood of this to be low, given that foods are unlikely to carry *endorsements* that risk the reputation of the product, brand, or *endorsing organisation* and, furthermore, that misleading *endorsements* offend existing fair trading provisions. FSANZ also considers that *endorsing organisations*, as defined, will be professional and responsible in their approach and application, and that prescriptive requirements beyond defining the properties and role of *endorsing organisations* are not warranted. In addition, the prospect of the use of non-regulatory monitoring mechanisms (e.g. consumer advocates or media exposure) would further attenuate the likelihood that the scenario of concern to these stakeholders would occur.

The term ‘endorsement’ has been removed from the definitions of nutrition content claim and health claim. This change was made for technical drafting reasons and does not affect the operation of conditions for endorsements.

In summary the key issues which form the basis for FSANZ’s approach for the regulation of *endorsements* are:

- The criteria or basis upon which endorsements in the marketplace have been created and continue to be marketed, vary considerably in terms of their purpose and structure. These factors create significant complexity in attempting to bring such programs into the draft Standard. It is also noted that some endorsements have been in place for a considerable period of time and have provided the public with important guidance in relation to nutritional matters and food purchasing decisions.
- Some of the existing endorsements have been trade marked under New Zealand and Australian trade marks legislation which therefore raises issues concerning the treatment of the endorsement (trade mark) under the draft Standard.
- The definitions of *endorsement* and *endorsing organisation* are included in the draft Standard. The definition of *endorsing organisation* (including requirements for independence, nutritional purpose) should serve to ensure that the appropriate type of organisation is certifying the endorsement.

- FSANZ proposes that the type and extent of use of *endorsements* will be monitored as part of the review of the implementation of the draft Standard.

2. TRADE MARKS

2.1 Decision

FSANZ recommends that the draft Standard is silent on trade marks.
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2.2 Amendments to current standards/CoPoNC recommendations

Currently trade marks are not expressly mentioned in the Code and consequently no exemptions or provisions for trade marks are provided. These conditions will be maintained by the decision that the draft Standard will be silent on trade marks. The regulatory *status quo* leaves any issues or conflicts between the use of trade marks on food and the Code subject to existing legislation.

The *Trade Marks Act 1995* (Cth) provides for the registration of trade marks in Australia and the *Trade Marks Act 2002* (NZ) for the registration of trade marks in New Zealand. The rights which attach to registration in both countries include exclusive rights to use the trade mark, and to authorise other persons to use it in relation to the goods in respect of which it is registered. In both Australia and New Zealand the registration of a trade mark may be refused if the use of the trade mark in relation to the goods for which it is sought to be registered is contrary to law.

2.3 Draft Assessment Report – approach taken and submitter comments

The discussion on regulation of trade marks in the Draft Assessment Report was based on legal advice (refer to Chapter 4 of the Draft Assessment Report¹ which was subsequently reconsidered by FSANZ). Some submitters to the Draft Assessment Report expressed concerns about the potential use of trade marks to circumvent food legislation while others suggested that trade marks should be exempt from the draft Standard.

2.4 Preliminary Final Assessment Report – approach taken and submitter comments

In the Preliminary Final Assessment Report, FSANZ took the approach that trade marks would be exempt from the requirements of the draft Standard.

Submissions received in response to the Preliminary Final Assessment Report showed only a low level of support from submitters for exempting trade marks from the draft Standard. Some submitters opposed the exemption and argued that trade marks currently in the marketplace might be misleading to consumers.

¹<http://www.foodstandards.gov.au/standardsdevelopment/proposals/proposalp293nutritionhealthandrelatedclaims/p293draftassessmentr3501>

Some jurisdictions have objected to FSANZ's legal position and argued that registration of a word/symbol under the Trade Marks Acts does not give permission to use this word/symbol in a health claim. Their preferred approach was that the Code remains silent on trade marks.

2.5 Key changes from proposed approach in the Preliminary Final Assessment Report

FSANZ has changed the approach to recommend that the draft Standard be silent on trade marks.

2.6 Current conditions in Australia

When a trade mark is registered, section 20 of the *Trade Marks Act 1995* (Cth) confers on the registered owner a right to have exclusive use of that trade mark. It is arguable that the proposed health claims regime, if it applied to registered trade marks would have the effect of interfering with the owner's exclusive use of that trade mark.

It is noted that the current food regulatory arrangement requires State or Territory food laws to enforce the Code. It is a matter of Commonwealth constitutional interpretation whether the relevant State or Territory food legislation can regulate trade marks registered under the *Trade Marks Act 1995* (Cth), which is Commonwealth legislation. One of the constitutional legislative restraints that may be applied is that where there is any inconsistency between Commonwealth (i.e. *Trade Marks Act 1995* (Cth)) and State laws (i.e. food legislation), the Commonwealth law will prevail to the extent of the inconsistency.

FSANZ has sought independent legal advice and concluded that State or Territory food laws could not validly prevent the use of a trade mark, whether it is registered before or after the draft Standard is enforceable by the relevant State or Territory food laws.

Certain jurisdictions would prefer that the issue of the application and regulatory impact of the Food law regime upon Commonwealth legislation such as the *Trade Marks Act 1995* (Cth) be a matter for the courts to provide guidance about in the event that a jurisdiction decided to test the matter in court. By omitting reference to trade marks in the draft Standard there would be no obvious procedural obstruction to bringing an enforcement action to court regarding the application of the draft Standard to trade marks.

2.7 Rationale for final decision

The final approach taken is based on legal advice received by FSANZ and the concerns raised by submitters and other stakeholders. This is the regulatory *status quo*: no exemptions or provisions for trade marks are provided in the draft Standard and any issues or conflicts between the use of trade marks and the Code remains subject to existing legislation.

2.8 Current conditions in New Zealand

New Zealand does not have a Federal system of government and therefore does not have the constitutional limitations that apply in Australia.

In New Zealand, after a trade mark is registered under the *Trade Marks Act 2002* (NZ), there is potential for a registered trade mark that infringes a provision of the draft Standard to be challenged as part of the enforcement process of the *Food Act 1981*.

3. CAUSE-RELATED MARKETING

3.1 Decision

FSANZ recommends the following in relation to cause-related marketing statements:

The definition for cause-related marketing in the draft Standard is:

cause-related marketing statement for a food means a nutrition content claim or health claim that is presented as a statement that the sale of the food will contribute to fundraising for an organisation.

If the food carries a nutrition content claim or health claim that meets the conditions of the draft Standard, about the same property of the food or health effect as the cause-related marketing statement, a disclaimer is not required.

Cause-related marketing statements will also be exempt from the conditions of the draft Standard if accompanied by a disclaimer to the effect that the supplier makes no claims in relation to the food being beneficial for managing a health effect, or to the effect that the supplier makes no claims that the food contains the property of the food (as applicable to the cause-related marketing statement).

The definition of cause-related marketing statement is included in clause 1 of the draft Standard. Conditions for cause-related marketing statements are prescribed in clause 8 of the draft Standard.

Cause-related marketing is where a supplier donates a proportion of money from the sale of a product to an organisation. An example of a cause-related marketing statement for the purposes of the draft Standard is *Proceeds from the sale of this product will be donated to the Royal Society for Osteoporosis*.

3.2 Amendments to current standards/CoPoNC recommendations

Currently Transitional Standard 1.1A.2, clause 3 paragraph (d) prohibits food labels from mentioning the name of any disease or physiological condition (except in relation to maternal folate consumption and neural tube defects). Therefore cause-related marketing statements that reference a disease or physiological condition are currently prohibited by the Code.

The draft Standard proposes that cause-related marketing statements be permitted and exempt from the conditions of health claims if accompanied by a disclaimer. Such statements without a disclaimer will be required to meet all of the substantiation and wording conditions of other health claims. The potential for legal enforcement of these conditions will be new.

3.3 Draft Assessment Report – approach taken and submitter comments

In the Draft Assessment Report FSANZ included a definition of ‘cause-related marketing’ in the draft Standard. The purpose of this was to differentiate such statements from endorsements, health claims and nutrition content claims.

The following definition for cause-related marketing was proposed:

Cause-related marketing means a statement that the sale of the food will contribute to fundraising for an organisation, the name of which refers to a serious disease.

It was also proposed that there be a mandatory requirement for a disclaiming statement to be used in conjunction with a cause-related marketing statement. The wording of the disclaimer was not prescribed, but was to be to the effect that the supplier makes no claims in relation to the food/product being beneficial for managing the serious disease referenced in the statement.

Several submitters commented on the approach for cause-related marketing presented in the Draft Assessment Report. Clarity on the use of the disclaimer was sought, including in relation to which organisations were covered and how the definition of cause-related marketing might apply to an organisation whose mission but not name relates to a serious disease.

3.4 Preliminary Final Assessment Report – approach taken and submitter comments

Cause-related marketing was not included as a topic in the Preliminary Final Assessment Report. Nonetheless one non-government health organisation provided comment on this topic with the view that cause-related marketing statements should be prohibited. The submitter did not consider a disclaiming statement to be an adequate measure to prevent consumers from being misled and confused. This same submitter thought that, if cause-related marketing statements were permitted in the Standard, conditions should apply to all organisations making such a statement and not only those whose name refers to a serious disease.

3.5 Key changes from proposed approach in the Draft Assessment Report

Following the release of the Draft Assessment Report, FSANZ amended the wording of the draft Standard to capture cause-related marketing statements that meet the definition of a nutrition content claim or a health claim. Cause-related marketing statements are no longer specifically excluded from the definitions of health claim and nutrition content claim thus ensuring that the draft Standard captures any fundraising type statements that would also imply a health claim or nutrition content claim. A supplier wishing to make a cause-related marketing statement that references a health effect or property of the food on a food label must include the applicable proposed disclaimer in clause 8 of the draft Standard to become exempt from the other conditions in the draft Standard that relate to the nutrition content claim or health claim. If the disclaimer does not accompany the statement, the claim must meet all the relevant conditions for a nutrition content claim or health claim as applicable.

Furthermore, it is now proposed that a product carrying both a cause-related marketing statement and a separate, compliant nutrition content claim or health claim (about the same property of the food or health effect referred to in the cause-related marketing statement), is not required to include the disclaimer.

3.6 Rationale for final recommendation

In response to submitter comments FSANZ re-evaluated the consumer research that provided the underpinning evidence for the reference to ‘serious disease’ in the definition of cause-related marketing. Quantitative research was commissioned by FSANZ in 2005². In an online survey, 518 respondents were randomly selected to test whether a product carrying a cause-related marketing claim on its label was perceived to be providing more of a health effect than a product without a cause-related marketing statement. Results indicated that consumers attributed health-related meaning(s) to the cause-related marketing statement studied. However participants were only exposed to a cause-related marketing that referenced a serious disease (the statement tested was *Proceeds from this product will go to the Royal Society for Diabetes*). FSANZ considers that there would be similar outcome independent of the statement referring to a serious or non-serious disease. In response to these considerations and following consultation with the Standard Development Advisory Committee, FSANZ has amended the draft Standard such that the definition of cause-related marketing also captures non-serious conditions.

The Policy Guideline for Nutrition, Health and Related Claims stipulates that marketing activities that promote charities or non-profit organisations (that relate to disease or health) must have a disclaiming statement. The purpose of this disclaiming statement is to prevent consumers from being misled. FSANZ acknowledges the work of non-profit organisations and recognises that cause-related marketing statements provide a valued source of income to these charities and health related groups. For these reason FSANZ does not consider a prohibition on cause-related marketing statements (as defined in the draft Standard) to be justified.

The exemption from the disclaimer for products carrying a compliant nutrition content claim or health claim (as applicable to the cause-related marketing statement) will eliminate the potential for the disclaimer to undermine a substantiated nutrition content claim/health claim. It will also minimise the risk of consumer confusion by avoiding conflicting information on the label.

Further information around cause-related marketing statements will be provided in the User Guide for Nutrition, Health and Related Claims. This will include examples of cause-related marketing statements, detail around the use of the disclaimer statement, and examples of disclaimer statements.

² FSANZ. (2005). *Quantitative research on Consumer’s Perceptions and Use of Nutrition, Health and Related Claims on Packaged Foods*. Food Standards Australia New Zealand, Canberra, ACT.

4. DIETARY INFORMATION

4.1 Decision

FSANZ recommends the following for the regulation of dietary information:

1. The definition of dietary information is as follows:

Dietary information means general dietary information that –

- (a) *does not relate to a health effect; and*
- (b) *relates to food or a property of the food; and*
- (c) *is provided for educational purposes.*

Examples of general dietary information include information contained in national nutrition guidelines (that does not refer to a health effect).

2. Dietary information may only be provided in a label on food and in an advertisement for food:
 - (a) if the dietary information is about a property of the food and it is directly associated with a nutrition content claim or health claim. The dietary information should not imply benefits of the food beyond the level of the associated nutrition content claim or health claim; or
 - (b) where the dietary information directly relates to the food rather than a property of the food. In this case a related nutrition content claim or health claim is not required, but the dietary information must be directly relevant to the type of food with which it is associated.
3. Food labels or advertisements for food carrying moderation statements in relation to alcohol consumption are exempt from the requirement to make a related nutrition content claim or health claim.
4. Provisions around dietary information apply to *food for retail sale*, including all food sold to the public (including food sold in restaurants), and to food intended for retail sale which is not intended for further processing, packaging or labelling.
5. Conditions applying to the form of the food that the nutrition content claim or health claim is based on, would also apply to dietary information related to the associated nutrition content claim or health claim. The exception to this provision is where dietary information refers to a whole food.

Dietary information will be regulated in clause 9 of the draft Standard.

4.2 Amendments to current standards/CoPoNC recommendations

At present, dietary information on food labels or in advertisements for food is not specifically addressed by the Code. In addition, CoPoNC does not provide guidance to suppliers on the use of such information.

4.3 Draft Assessment Report – approach taken and submitter comments

The following approach for regulation of dietary information was proposed in the Draft Assessment Report:

- ‘dietary information’ – means general diet-related information that has broad application to the general population and does not relate a specific health effect to a specific food or property of a food;
- ‘whole of diet’ claims, which do not reference a specific and/or branded food/property, are dietary information; and should not be considered as a separate category for the purposes of the regulatory framework;
- dietary information should be expressly excluded from the definition of health claim;
- dietary information that is presented directly in association with a specific product must be supported by a nutrition or health claim (which will then be subject to the usual framework); and the claim should related to the dietary information. For example, dietary information around fibre may only be presented on a product which is making a nutrition content claim or health claim about fibre. The dietary information will then constitute part of the overall claim; and
- further explanation around dietary information should be included in an interpretive User Guide.

The following definition was proposed:

dietary information means general dietary information, and includes information from national nutrition guidelines, but does not include information that refers to a specific brand of food and a health effect.

Submitters to the Draft Assessment Report raised a number of issues for consideration. Some submitters held the view that the proposed definition was ambiguous and that it was too restrictive when compared to the definition of ‘claim’, which is very broad. It was also felt that the approach could hamper the provision of important information to consumers. Industry stakeholders were uncertain about the scope of the term ‘brand’ in relation to trade marked varieties of fruit and produce and whether or not corporate branding displayed on product labels and in food advertisements would be captured by this term. The intent of some aspects of clause 9 (conditions for dietary information) was also queried and there was concern that this clause would be ineffective.

It was also suggested that the requirement for dietary information to relate to the property of the food that is the subject of a claim should be broadened to permit the referencing of a complementary product on another product’s packaging, for example, a statement such as ‘use reduced fat milk’ on a cereal box.

4.4 Preliminary Final Assessment Report – approach taken and submitter comments

In response to submitter comments, the approach taken in the Preliminary Final Assessment Report was to amend the definition of dietary information and the corresponding conditions.

The definition was altered in three ways:

1. A greater emphasis was placed on the provision of dietary information for educational purposes (i.e. rather than for the purposes of advertising).
2. Removal of the reference to 'brand', as this was arguably not the key feature and was potentially confusing.
3. Clarification that any 'claim' which refers to a health effect should be regulated as a health claim and should not be considered dietary information.

The following amended definition was proposed:

***Dietary information** means general dietary information provided for educational purposes including information from national nutrition guidelines relating to food or properties of food but not including associated health effects.*

Clause 9 of the draft Standard was amended:

- to include a requirement that the dietary information must not exceed the information in the associated nutrition content claim or health claim;
- to clarify that the wording of the provision that whole foods which have dietary information are not required to carry an associated claim, but the dietary information must relate directly to the food carrying the claim;
- to clarify the intent that dietary information relating to moderating the consumption of food relates to alcohol only; and
- to delete the clause in which dietary information relating to moderation of food consumption was exempted.

Submitter comments about the amended approach for dietary information included:

- both support for and opposition to the proposed amended definition (e.g. it was too narrow), and requests for further clarification. Some amendments were also suggested (e.g. the explicit exclusion of 'advertising' from the definition);
- that the approach would be too restrictive for industry (e.g. smaller pack sizes mean that it is not always realistic to have a claim associated with dietary information);
- both support for and opposition to the requirement for dietary information to relate directly to the food (e.g. permit dietary information about foods that could be consumed with the product carrying the statement). There were also requests for more clarity about the relationship between the dietary information and the product;
- concern that dietary information would appear on inappropriate foods; and
- confusion around the application of dietary information in food advertisements and the extent of advertising that would be captured by the Standard.

Some submitters expressed overall support for the amended proposed approach. More comments which reflect an overlap between the application of the draft Standard and the issue of dietary information (particularly in relation to advertising) have been addressed in Chapter 1 of Attachment 4. A detailed summary of submitter comments can be found at Attachment 13.

4.5 Key changes from proposed approach in the Preliminary Final Assessment Report

The definition of dietary information has been simplified and clause 9 has been restructured to clarify how dietary information may be used on food labels and in advertisements for food. Reference to ‘whole food’ has been replaced with ‘food’, in order to clearly distinguish between dietary information about a ‘food’ from dietary information about a ‘property of the food’. The approach however, has not changed since the approach proposed in the Preliminary Final Assessment Report.

4.6 Rationale for final decision

FSANZ maintains that the promotion of healthier food choices from broad dietary information that appears on food labels or in advertisements for food is of benefit to consumers. The regulatory approach permits dietary information about a food (rather than a property of the food) that directly relates to the food carrying the dietary information. It also permits dietary information about a property of the food, if the dietary information is directly associated with a nutrition content claim or health claim. The intent of this approach is:

- to limit dietary information to that which is generic in nature by referring to broad statements derived for example, from national nutrition guidelines or similar sources;
- to limit dietary information to an educative role, rather than it being used to promote the sale of a particular food;
- to ensure that the dietary information is relevant to the food product on which it appears; and
- that dietary information should not exceed (that is, imply benefits beyond) the information in the associated nutrition content claim or health claim.

No major changes have been made to the approach that was proposed in the Preliminary Final Assessment Report. However, FSANZ notes that the regulatory approach proposed for dietary information was misunderstood by some submitters and that further clarification will be required in the User Guide to the draft Standard.

FSANZ maintains that the simplified definition is now sufficiently clear for the purposes of regulating dietary information. Information relating to health effects is excluded from the definition, to distinguish between broad dietary information (such as those relating to national nutrition guidelines) and more specific links between a food or property of the food and a health effect (which would constitute a health claim and should therefore be regulated as such). Although the definition does not prescribe national nutrition guidelines as the only basis of dietary information, it would be in the best interest of industry to rely on highly credible sources. Other recommended sources will be provided in the User Guide to the Standard.

Dietary information in advertisements for food could not be explicitly excluded from the definition, as it is intended that labelling requirements set out in clause 9 will encompass both labels on food and advertisements for food. Consideration as to the definition of ‘advertisement’, as provided in the Model Food Act, is beyond the scope of this Proposal.

The distinction between ‘advertisement’, with its broad application, and dietary information was an issue for many submitters. This is because ‘advertising’ is about promoting the sale of a particular food for financial gain, and implies the benefits are specifically attributable to that food, potentially to the exclusion of other similar foods. These types of claims are captured as nutrition content claims and health claims, whereas dietary information has a different intent, which is to promote the intake of food types generally (for example, fruit and vegetables).

Whilst restructuring and wording changes were made to clarify the conditions for dietary information in clause 9, the intent of this clause is unchanged. Conditions state that dietary information about a property of the food must be directly associated with a nutrition content claim or health claim. The intent is to ensure that the dietary information is relevant to the food product on which it appears, and that the food itself is an appropriate vehicle. For example, dietary information that refers to the consumption of a low salt diet should not be present on a food that is highly salted.

Conditions for nutrition content claims and health claims refer to the Table to clause 6, which describes how claims about foods consumed with other foods should be regulated. In summary, claims on foods should be about the food ‘as sold’, except when label directions clearly require the food to be prepared in a particular way prior to consumption (for example, custard powder). In this case all claims should relate to the product as consumed. With the exception of dietary information that refers to a food (in which case the dietary information must directly relate to the food), these claim conditions will also apply to dietary information accompanying a claim. This is because the dietary information is required to be directly associated with a claim.

Dietary information about another food that may be added prior to consumption will be prohibited from appearing on the actual food product. For example, dietary information on the label of a package of breakfast cereal might refer to national nutrition guideline recommendations to consume at least two serves of dairy products daily. Thus, the dietary information would relate to the milk, rather than the product being sold which is the cereal. In subclause 9(3) it states that dietary information may only be provided if it is about a property of the food and is directly associated with a nutrition content claim or health claim. This provision would prevent such statements being used to give an air of associated healthiness to less healthy products (for example, high sugar cereals).

Dietary information must not exceed the information in the claim statement. This is because detailed information about the nutritional properties or health benefits of the food would suggest benefits beyond basic dietary guidance, but would not be subject to the same requirements set for nutrition content claims or health claims. This avenue could effectively become a ‘back door’ for un-regulated claims.

In addition, dietary information and a nutrition content claim must be aligned. For example, on the label of a snack food product, the dietary information statement ‘Dietary Guidelines recommend that you choose foods low in salt’ may be accompanied by the associated nutrition content claim *low salt*. In this case, the former statement is advocating a particular dietary pattern (the consumption of less salt), when the latter statement promotes the consumption of a particular food as a means to assist consumers in achieving the recommendation.

Subclause 9(2) states that where dietary information refers to a food, rather than a property of the food (for example, *Dietary guidelines recommend that we eat plenty of fruit* in association with apples), there is no requirement for a related nutrition content claim or health claim. As dietary information must refer to the food itself, and the nutrition content claim would also be referring to the food itself, the claim would be repetitious and is therefore superfluous. FSANZ does not consider that labels or advertisements for a food itself carrying these statements would pose a risk to consumers. However, the dietary information must directly relate to the food in order to avoid such statements appearing on inappropriate foods or misleading consumers.

Minor edits to the subclause 9(3) for whole food were made to address submitter concerns about wording deemed as confusing, such as ‘food otherwise provided’, ‘relate to the associated food’ and ‘whole food’. This subclause has now become subclause 9(2) and has been amended to reflect the intent that the conditions set out in both subparagraphs relate to dietary information about the food itself and not to a property of the food. Amendments include the removal to the reference to whole food, as this term is not defined in the Code and its interpretation was queried by submitters. In addition, the subclause now clarifies that the dietary information must directly relate to the food carrying the dietary information. In response to submitter comments, reference to the word ‘associated’ was removed where it was used in relation to the word ‘food’.

Apart from minor grammatical edits and renumbering, subclause 9(5) is unchanged. The intention is for dietary information relating to moderating the consumption of alcohol to be exempt from the requirement to provide an associated nutrition content claim or health claim. For example, the statement *If choosing to drink alcohol, limit your intake* would be permitted on the label of an alcoholic beverage, and the label would not require an associated nutrition content claim or health claim.

FSANZ acknowledges the label constraints of small packages, however notes that provision of dietary information and indeed claims are voluntary and it is therefore at the discretion of the supplier as to whether to use label space for such purposes.

The term ‘dietary information’ has been removed from the definitions of nutrition content claim and health claim. Although this action was taken for technical drafting reasons, it does not affect the operation of conditions for dietary information.