

P293 – Nutrition, Health and Related Claims

**Submitter responses to questions 75-109
of the Initial Assessment Report**

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CHAPTER 1: IMPACT ANALYSIS - CONSUMERS AND THE COMMUNITY

1.1 REGULATORY OPTION 1

Question 75

Are consumers currently being presented with consistent messages regarding the role of individual foods in improving or maintaining health?

Out of 147 submitters, 59.2% (86 in total) directly responded to this question. The distribution of these responses was as follows:

Sector	Australia	New Zealand	Trans Tasman	International	Total
Industry	26	17	4	3	50
Government	5	1	-	-	6
Public health	10	3	-	-	13
Consumers	13	-	-	-	13
Other	5	-	-	-	5
Total	59	21	4	3	87

Overview

Sixty-two per cent of submitters (54) stated that consistent messages are not presented to consumers regarding the role of individual foods in improving or maintaining health. This was for a range of reasons. However, 17 submitters agreed that consumers do receive consistent messages, by means of compliant food labels or from government agencies and health and nutrition professionals. Eight submitters expressed both agreement and disagreement, depending on the source of the messages. Many different examples of regulatory breaches and confusing or contradictory messages were provided.

Agreed that consistent messages are currently being presented

Seventeen submitters agreed that consumers are currently presented with consistent messages by means of food labels that comply with the CoPoNC, or from government agencies and health and nutrition professionals (NZFGC, Nestle, Unilever Australasia, William Wrigley Junior, Dr R Stanton, Nutrition Aust, ABC, AFGC, Masterfoods Aust. NZ, F & B Importers Assoc, GW Foods, Goodman Fielder, National Foods, Tas DoH& HS, NSW DoH – N&PA Branch, SA DoH, Monash Uni – N&D Unit).

Submitters provided the following reasons:

- Messages conveyed by the Dietary Guidelines, the Australian Guide to Healthy Eating and Nutrition Australia's Food Pyramid are consistent (Dr R Stanton, Nutrition Aust, PHAA (supported by ACA), Tas DoH&HS, SA DoH, Monash Uni – N&D Unit), and emphasise total diet, lifestyle pattern and risk reduction, rather than individual foods, which do not prevent or cause a disease. They concluded

that any claims about individual foods should be made in the context of the total diet. These messages, however, are not supported by adequate funding for good education programs (Dr. R Stanton);

- Manufacturers produce products and product claims according to the FSC requirements and CoPoNC. The claims are used consistently to raise awareness amongst consumers and to market the benefits of their products (AFGC, Masterfoods Aust. NZ, Goodman Fielder, National Foods);
- The current prohibition of health claims protects consumers from misleading information in the absence of a regulatory system to substantiate claims and to enforce compliance (Tas DoH&HS); and
- Government agencies and health and nutrition professionals present consistent messages about the composition of a healthy diet, although advice on individual foods provided by others may not be so consistent (NSW DoH – N&PA Branch).

Eight submitters expressed both agreement and disagreement, depending on the source of the messages. Their reasons for disagreeing are shown below (William Wrigley Junior, Dr R Stanton, Nut Aust, PHAA (supported by ACA), NSW DoH – N&PA Branch, SA DoH, Monash Uni – N&D Unit).

Disagreed that consistent messages are currently being presented

Fifty-four submitters disagreed that consumers are currently presented with consistent messages for a range of reasons (SA DoH, Monash Uni – N&D Unit, Nutrition Aust, NSW DoH – N&PA Branch, Naturo Pharm Ltd, Nutra-Life H&F, CMA, Mandurah Aust, Palatinit GmbH, Kingfood Aust, CMA – NZ Branch, CMA – NSW Branch, CMA – Qld Branch, CMA – Vic Branch, ICA, CM of SA, Dr R. Stanton, CML, ASMI, TCCA, Auckland Reg. PHS, ASA, Cadbury Confectionery, NZTBC, NPANZ, Assoc. of NZ Advertisers, Naturo Pharm, NZ Magazines, Fonterra, Mainland Products, NZ Dairy Foods, NZJBA, Frucor, NZFSA, William Wrigley Junior, NCWA, DAA, NZDA, Dr C. Halais, GI Ltd, Diabetes Aust, Aussie Bodies, DSM Nut. Prod, NSW Food Authority, CSIRO HS&N, ANIC, Cadbury Schweppes, CHC, Dairy Aust, Horticulture Aust, National Starch, Solae Comp, Sanitarium Health Food Comp, TGACC)

The following reasons were given:

- Inconsistent messages being presented to consumers would be exacerbated by nutrition, health and related claims (Auckland Reg. PHS);
- The current ban on health claims has led to consumers receiving conflicting information from articles, rumour and hearsay. Currently the consumer is badly served (ASA, Cadbury Confectionery, NZTBC, NPANZ, Assoc. of NZ Advertisers, Naturo Pharm Ltd, NZ Magazines);
- The strict limitations imposed by the current food standards in relation to referencing diseases, biomarkers and the word health in connection with the name

of foods prevent consistent messages being presented. Consumers may read about the health benefits of foods through sources such as magazines and newspapers, the internet, etc however they are not able to have this information reinforced at point of sale (ANIC, Horticulture Aust);

- Because the food industry is currently prohibited from communicating truthful health messages about our food products (NZJBA, Frucor, Dairy Aust), Only nutrient content claims are permitted – which tell half the story: what the nutrient content is but not what benefits the nutrients may provide (Dairy Aust)'
- Standard 1.1A.2 prohibits the majority of health claims by foods, although this rule is flouted by industry (Natuoro Pharm);
- There is no consistent regulation across Australasia, and regulations that do exist can be highly restrictive and limit consumer information (Fonterra, Mainland Products);
- Many messages are confusing and contradictory (Nutra-Life H&F);
- As CoPoNC is not enforceable, many products carry the same claims but the defining criteria for the claim may vary (NZFSA);
- From an overall industry perspective, there are current breaches of CoPoNC (William Wrigley Junior);
- Concerned about the wide range of inconsistent messages, particularly with regard to content claims and implied claims currently in the market place. One contributor to these inconsistencies might be from confusion resulting from the ongoing reporting of legitimate (and otherwise) research when one study makes a link between a certain food or food group and a health outcome, which is reported in a way that implies a definitive association (TCCA);
- Considers that media messages by manufacturers of processed foods, fast foods and supplements give very different messages. (Dr R Stanton);
- Many products carry declaration or statements contrary to CoPoNC. There are also many foods currently not able to convey any messages, as a result of compositional issues, even though there are significant level of nutrient present (Cadbury Schweppes);
- Many products in the market that do not comply with CoPoNC. Branding and market forces are often driving different, non-health related messages (CML);
- There have been numerous incidents whereby the consumer has been given false and misleading health information on foods, which have been referred to the State health departments by various therapeutic complaints committees (CHC);
- Companies that misuse CoPoNC often make very strong health claims, while the ability of reputable firms to make health statements is limited. Thus, consumer

confusion as to the real connection between food and health is likely (National Starch, Solae Comp);

- Inconsistent messages might be a result of consumers being exposed to many sources of nutritional information (Sanitarium Health Food Comp);
- Foods making health claims have often stepped into the area of perceived therapeutic benefit, although it was noted that total dietary context has not been an integral part of the health message delivered (TGACC); and
- The dietary guidelines advise consumers to “Enjoy a wide variety of nutritious foods” and should not be used to assess the ‘healthiness’ of individual foods. In addition, “the guidelines are a distillation of current knowledge about the relationship between diet, growth and development and disease; the nutrients available in the Australian food supply; and the contribution diet can make to optimising quality of life and reducing the levels of morbidity and mortality among Australians” (NHMRC 2003, page ix). The Guidelines support the scientific understanding that reduction in disease risk is affected by total diet and lifestyle, and not by use of an individual food. Therefore any claims that are not made in the context of the total diet are inherently misleading (WA DoH, PHAA (supported by ACA)).

Examples of breaches with CoPoNC and examples of confusing and contradictory messages:

- Implied claims: ‘Healthy Choice’ or ‘Healthwise breakfast cereals’, which use the word ‘health’ in a tradename; and ‘Pro-active’ and ‘Logicol’ margarines that reference the physiological process of cholesterol absorption, but imply that they reduce cholesterol and therefore reduce risk of heart disease (SA DoH, Monash Uni – N&D Unit, PHAA (supported by ACA), Nutrition Aust, NSW DoH – N&PA Branch, WA DoH);
- ‘So Good *in 5 ways*’ claims: low glycaemic index (GI) for long-lasting energy; antioxidants to protect against the harmful effects of ‘free radicals’; carbohydrate for a clear and active mind; calcium, soy protein and isoflavones for strong bones; and no cholesterol, with the added benefit of soy protein, for a healthy heart (WA DoH);
- Kellogg’s ‘Body Smart’ Wheatbran “try it for 2 weeks and see if you glow from the inside out” (WA DoH);
- Product packaging examples: a muffin mix that states “may be suitable for the following ailments: diabetes, AD(H)D, high cholesterol, lactose intolerance” (Natro Pharm);
- Industry advertising example: the series of print adverts promoting the nutritional benefits of eggs for the New Zealand Olympic team (Natro Pharm);

- Although slim potato chips are proclaimed as being "healthy" but because of an increased surface area carry more fat per 100g than thicker sliced chips (Nutra-Life H&F);
- ‘Sugar free’ versus ‘sucrose free’ (CMA, Mandurah Aust, Palatinit GmbH, Kingfood Aust, CMA – NZ Branch, CMA – NSW Branch, CMA – Qld Branch, CMA – Vic Branch, ICA, CM of SA);
- Claims about 'cholesterol maintenance', as consumers do not discriminate between cholesterol maintenance and cholesterol lowering so these claims are, in effect, health claims which are illegal (Dr R Stanton);
- Claims about GI are also confusing (Dr R Stanton) and the term is misunderstood (CML);
- Between food type dietary supplement products, manufactured food and sports foods: an example is the promotion of ‘healthy’ fresh juice from the number of juice bar franchises, that add supplementary bioactive ingredients or herbs for added benefit under the aegis of being “Formulated Supplementary Sports Foods” (Standard 2.9.4). Under this standard these products are inappropriate for children under 15 years of age or pregnant women. Neither of these messages appears as a readily identifiable part of product point of sale promotion, nor does this appear to be monitored or enforced (ASMI);
- Compositional requirements prevent certain claims being made, despite meeting claimable nutritional levels (e.g. Formulated Supplementary Sports Foods may carry certain claims, however a confectionary product of similar composition may not due to general prohibition) (CMA, Mandurah Aust, Palatinit GmbH, Kingfood Aust, CMA – NZ Branch, CMA – NSW Branch, CMA – Qld Branch, CMA – Vic Branch, ICA, CM of SA);
- Food names, such as Kellogg’s ‘Body Smart’ cereal (TCCA);
- Prominent words on the front panel of the label, such as Lowan Oat & Wheat Honey O's feature the words ‘Let’s eat healthy’ in large font on the front panel and Kellogg’s Coco Pops feature the words ‘Tasty Nutrition’ in large font on the front panel (TCCA);
- Images on the food label, such as ‘Milo’ featuring images of Olympic swimmers – implying enhanced function/sports performance and Coco pops feature a cartoon image of the mascot, dressed as a child, standing at a height chart – implying function/enhanced function with respect to vertical growth (TCCA);
- Biscuits, dips labelled 93% fat free (CML);
- Negative claims, such as ‘no preservatives’, ‘no colours’, ‘no MSG’, on foods that would not ordinarily contain these anyway (CML);

- Misconceptions about the nutritional value of fresh, frozen & processed products (CML); and
- A lack of knowledge about GM issues (CML).

General comments and recommendations

Industry can more effectively communicate truthful health messages about food products if health claims are permitted (Nestle, AFGC, ABC, Masterfoods Aust. NZ, Goodman Fielder, National Foods, CMA, Mandurah Aust, Palatinit GmbH, Kingfood Aust, CMA – NZ Branch, CMA – NSW Branch, CMA – Qld Branch, CMA – Vic Branch, ICA, CM of SA).

Public Health South noted that State Public Health Services are currently working together to promote consistent messages from the NZ Food and Nutrition Guidelines. Inaccurate information on nutrition, fad diets and marketing by the industry are (continually) undermining this work. Public Health South believed that more money should be spent on promoting the NZ Food and Nutrition Guidelines so the public receives consistent and accurate information about nutrition. Allowing health claims on food will potentially add to the confusing and conflicting information about nutrition and make promoting healthy food choices much more difficult.

Consistency of message across food and dietary supplements is important to ensure consumers can make informed choices. Prohibition of health claims on food promotes the impression they have an inferior value to supplements. Current situation inhibits maximising of marketing opportunities and communication of valuable nutrition health information to consumers (Beef & Lamb Marketing Bureau).

As reading food labels is already a confusing process, consumers need to know information on a food label is easy to understand and truthful. It was recommended that before health/nutrition claims are allowed they must be tested with a range of consumers and consumer groups to ensure that the statements are not confusing or misleading (L Russell, A Neville, F Wright, K McConnell, G Austin, A Barnett & Family, J Gelman, S Ritson, A Swinburn, A Karolyi, D Dwyer).

NCEFF noted that consistency of information to consumers is not a feature of communication in society generally, let alone in areas in which most people hold opinions, such as religion, food and the weather.

ACDPA and Kidney Health Aust were concerned that new permissions for health claims on food labels may not produce public health benefits unless highly managed and regulated. If health claims mislead consumers towards unbalanced eating patterns, this has the potential to impact on the prevention of and incidence of diseases such as cancer, cardiovascular disease, diabetes and other conditions within the population. They supported initiatives to improve the nutritional intake and health of the Australian population. ACDPA and Kidney Health Aust stated that in the absence of current high quality information about the nutritional intake of Australians, it is virtually impossible to have a clear picture of eating patterns today. They noted that rates of overweight and obesity in Australia are at their highest level ever and rising, so caution is required. These submitters recommended that FSANZ consider a

Health Impact Assessment model which places health at the centre of decision-making process, rather than an economic 'cost benefit analysis' to under-pin the decision making process. They believed that if health claims are introduced, there should be strong safeguards such as mechanisms for rigorous substantiation, publicly accessible complaints processes, and proactive compliance monitoring and enhanced and properly resourced enforcement powers. Furthermore, ACDPA and Kidney Health Aust. were concerned that by a lack of evidence that nutrition, health, and related claims leads to behaviour change and improved public health, and believed that there is substantial risk that it could confuse or mislead the public. They seek commitment for the conduct of the National Nutrition and Physical Activity Survey, as Proposal P293 has the potential to influence dietary intakes. They believed it is essential to obtain an accurate picture of nutrition consumption as a baseline, so as to allow measurement of this and other influences.

Uni. of Adel. & Uni. of SA – Nutrition Physiology Research Grp believed that instead of consistent messages, consumers receive confusing, contradictory and often incorrect and misleading information on the potential benefits of foods. Consumers require reliable and simple information to make food choices that benefit health.

Griffins Foods was unsure that consumers are currently being presented consistent messages as there is inconsistency regarding adherence to the Code of Practice (Foods).

Other comments provided but not in direct response to the question

Flour Millers Council of Aust stated that there are limited opportunities available, and therefore this is not really an issue.

Parmalat Aust noted that messages could be truthful but not consistent in their interpretation by consumers.

Question 76

If not, what is the extent of any inconsistency and what is the impact on consumers?

Out of 147 submitters, 40.1 % (59 in total) directly responded to this question. The distribution of these responses was as follows:

Sector	Australia	New Zealand	Trans Tasman	International	Total
Industry	20	15	4	3	42
Government	2	1	-	-	3
Public health	6	2	-	-	8
Consumers	2	-	-	-	2
Other	4	-	-	-	4
Total	34	18	4	3	59

Overview

Of those submitters that commented on inconsistencies in nutrition-related messages, nine considered that the extent ranged from ‘minimal to widespread’ and one submitter believed that it is difficult to quantify. Seventy-six per cent of submitters (45) identified a number of impacts on consumers, which included: consumer confusion; poor ability to make informed healthy food choices due to a lack of nutrition knowledge or limited available nutrition information; possible health-related implications; the expense of some foods; and consumer cynicism and distrust about health/product claims and the food industry. Two submitters believed that the impacts on consumers are unknown. Many submitters provided examples of inconsistencies identified in nutrition-related messages (33).

Extent of inconsistency

Ten submitters commented on the extent of inconsistency in messages regarding the role of individual foods in improving and maintaining health (Dr R. Stanton, ASA, Cadbury Confectionery, NPANZ, Assoc. of NZ Advertisers, NZTBC, Naturo Pharm Ltd, NZ Magazines, Goodman Fielder, Nutra-Life H&F).

Dr R. Stanton considered that the extent is probably large, with consumers buying many products without being aware of how they fit into a balanced diet. ASA (supported by Cadbury Confectionery, NPANZ, Assoc. of NZ Advertisers, NZTBC, Naturo Pharm Ltd, NZ Magazines) believed that it is widespread. In contrast, Goodman Fielder thought that they would be minimal (Goodman Fielder). Nutra-Life H&F believed that the extent of inconsistency is difficult to quantify.

Impact on consumers

Forty-five submitters expressed what the impact of inconsistent messages would be on consumers (GW Foods, NZFGC, NZJBA, Frucor, Unilever Australasia, NZFSA, CMA, Mandurah Aust, Palatinit GmbH, Kingfood Aust, CMA – NZ Branch, CMA – NSW Branch, CMA – Qld Branch, CMA – Vic Branch, ICA, CM of SA, William Wrigley Junior, CML, Goodman Fielder, Parmalat Aust, Sanitarium Health Food Comp, Nestle, NSW Food Authority, Uni. of Adel. & Uni. of SA – Nutrition Physiology Research Grp, NZ Dairy Foods, WA DoH, PHAA (supported by ACA), Nutra-Life H&F, Aussie Bodies, Dairy Aust, Fonterra, Mainland Products, ASA, Cadbury Confectionery, NPANZ, Assoc. of NZ Advertisers, NZTBC, Naturo Pharm Ltd, NZ Magazines, TCCA, CSIRO HS&N, NCWA, Diabetes Aust, GI Ltd)

Consumer impacts that they identified included:

- Perceptions of current claims as being related to ‘maintaining good health’ rather than preventing disease (GW Foods)
- General confusion (NZFGC, NZJBA, Frucor, Unilever Australasia, NZFSA, CMA, Mandurah Aust, Palatinit GmbH, Kingfood Aust, CMA – NZ Branch, CMA – NSW Branch, CMA – Qld Branch, CMA – Vic Branch, ICA, CM of SA, William Wrigley Junior, CML, Sanitarium Health Food Comp, Nestle, NSW

Food Authority, Uni. of Adel. & Uni. of SA – Nutrition Physiology Research Grp, Goodman Fielder, NZ Dairy Foods).

Reasons for confusion:

- From receiving mixed messages, conflicting information and when presented with scientific data in a variety of contrived marketing messages (CML, Sanitarium Health Food Comp, Parmalat Aust);
- As a result of a general lack of information (CML);
- As a result of receiving information from a range of sources (Sanitarium Health Food Comp);
- As a result of nutrition education not being supported by similar messages on products (Nestle);
- Implied claims, which are obscure and potentially misleading (NSW Food Authority); and
- The food industry (Uni. of Adel. & Uni. of SA – Nutrition Physiology Research Grp).

Goodman Fielder noted that consumer confusion would result *if* there were inconsistencies. NZ Dairy Foods believed that conflicting messages could lead to confusion and potentially put consumers off foods.

- Consumers being misled by any claims that are not made in the context of the total diet (WA DoH, PHAA (supported by ACA)). Nutra-Life H&F noted that the FSANZ report within P293 indicated a level of misunderstanding amongst some sectors.
- Limited nutritional information available for consumers, or a lack of nutritional knowledge, and knowledge of what constitutes good nutritional values (Fonterra, Mainland Products, CML, William Wrigley Junior, Dairy Aust., Aussie Bodies), makes it difficult/prevents consumers from making informed food choices (CML, William Wrigley Junior). Dairy Aust. considered that consumers are unaware of the scientifically demonstrated health benefits of nutrients in foods. Aussie Bodies gave an example of their own research in which consumer focus group participants (who regarded themselves as informed) were asked, “What level constitutes ‘low’ in sugar”. A number of participants replied that “they didn’t really, know, so they looked at all the similar products on the shelf and the one with the lowest level on the NIP became their benchmark”. Aussie Bodies emphasised how misleading this could be if all the products purporting to be low sugar are in fact not.
- Possible health related implications:
 - If consumers are not making the necessary decisions to improve their health (CML, Dairy Aust);

- For consumers who are enticed to stop taking conventional medicine for ailments. high level claims such as treatments for cancer are the most worrying (ASA, Cadbury Confectionery, NPANZ, Assoc. of NZ Advertisers, NZTBC, Naturo Pharm Ltd, NZ Magazines); and
 - Long term consumption of ‘low carb’ foods that are high in fat may lead to health problems (Diabetes Aust, GI Ltd).
- Exposure to a range of foods with ‘low carb’ claims, such as foods specifically produced for the Atkins diet, are more expensive than their ‘normal’ counterparts (Diabetes Aust, GI Ltd, DAA, NZDA) despite there being no substantiation behind the claims and no guarantee of efficacy (DAA, NZDA).
 - Cynicism and distrust about health/product claims and the food industry, in addition to diminished faith in the current regulatory regime and a lack of confidence in labelling in general (TCCA, NZFSA, CSIRO HS&N, Uni. of Adel. & Uni. of SA – Nutrition Physiology Research Grp). CSIRO HS&N noted the exception of the Heart Foundation ‘Tick’, and also noted that in the US, Quaker Oats said that sales of oat bran rose with the health claim, which implied a degree of acceptance.

NCWA considered that the risk is not fully known or understood by many consumers, while TCCA believed that impact of misleading claims on consumer health remains unknown.

Inconsistencies identified in messages

Thirty-three submitters identified a range of inconsistent messages (Dairy Aust, National Foods, Parmalat Aust, Sanitarium Health Food Comp, NSW Food Authority, TGACC, ASMI, PHAA (supported by ACA), Fonterra, NZ Dairy Foods, NZFGC, NZJBA, Frucor, CMA, Mandurah Aust, Palatinit GmbH, Kingfood Aust, CMA – NZ Branch, CMA – NSW Branch, CMA – Qld Branch, CMA – Vic Branch, ICA, CM of SA, Nestle, Unilever Australasia, Diabetes Aust, DAA, NZDA, ANIC, ABC, AFGC, Masterfoods Aust. NZ).

These included:

- Specific claims: the Folate health claim and health claims permitted for dietary supplements (vitamins and minerals)(Dairy Aust).
- Mixed messages given by media: Atkins Diet – good or bad? Type and quantity of fat in the diet, carbohydrates – good or bad? Alcohol – good or bad? Red meat – good or bad? Chocolate – good or bad? (NZFGC).
- The current prohibition from communicating truthful health benefits is a regulatory and communication inconsistency (National Foods, NZJBA, Frucor, Nestle, ABC, AFGC, Masterfoods Aust. NZ, Diabetes Aust), which allows:
 - Manufacturers are forced into making implied claims (NSW Food Authority);
 - Manipulation of foods, in the context of existing Food Standards, in an attempt to market foods making or implying health benefits over and above nutrition (TGACC, ASMI);

- Marketers to describe claims in different ways as long as they are not misleading or untruthful (Parmalat Aust);
- Messages that are presented in isolation from an overall, total diet context (TGACC, ASMI, NSW Food Authority, PHAA (supported by ACA)) and are often hidden in the total ‘message’ delivered by the advertiser. (NSW Food Authority);
- Misleading advertising of foods that are not necessarily more healthy (NZ Dairy Foods)

Fonterra (supported by Mainland Products) noted that regulation across Australasia is not consistent.

- Inaccurate and inconsistent messages as a result of breaches in CoPoNC (CMA, Mandurah Aust, Palatinit GmbH, Kingfood Aust, CMA – NZ Branch, CMA – NSW Branch, CMA – Qld Branch, CMA – Vic Branch, ICA, CM of SA). These submitters provided examples of inconsistent messages in their response to the previous question.
- The wide range of sources from which consumers receive information, not all of which are scientifically substantiated which results in conflicting information (Sanitarium Health Food Comp).
- Inconsistencies in what is said about food by different companies (Unilever Australasia).

General comments and recommendations

CHC noted that many foods are currently making illegal therapeutic claims and the policing of the situation is extremely poor due to the lack of funding and resources within enforcement agencies.

WA DoH considered that food industry consistency in communicating nutrition messages might be improved by a voluntary Guideline or Code of Practice. The Guideline could set out preferred consumer education messages, in the interests of public health (e.g. always referencing the Australian Guide to Healthy Eating). They advised that the system used voluntarily by reputable companies in the UK food industry is the British Nutrition Foundation’s Nutrition Service that provides comment on diet, health and nutrition (refer www.nutrition.org.au).

TGACC and ASMI commented that as a result of manipulating foods in order to market foods making or implying health benefits, the foods may legally be compliant but their presentation is not consistent with the parts of the Food Standards Code with which they claim to comply. Alternatively, manufacturers use existing trade loopholes such as the Trans-Tasman Mutual Recognition Agreement in order to avoid compliance with the Food Standard Code. The result of this is that health messages being conveyed are in context of substances that have not had a history of food use in Australia, and the health messages are not in the context of a total diet.

Fonterra (supported by Mainland Products) considered that the status quo does not appear to cater to the demands of consumers or producers.

NZFSA believed that the impact of claims on the ‘general consumer’ could not be easily stated. They noted that this is similar to their concerns about ‘implied’ in that most consumers come with preconceived ideas, which will not be uniform. Although FSANZ is undertaking consumer research it is problematic, as it will be discussing hypothetical situations.

CMA (supported by Mandurah Aust, Palatinit GmbH, Kingfood Aust, CMA – NZ Branch, CMA – NSW Branch, CMA – Qld Branch, CMA – Vic Branch, ICA, CM of SA) considered that permitted health claims would enhance consumer education and their understanding of food nutrition which will enable improved food choices based on scientifically proven benefits.

ANIC highlighted nut industry research, which shows many consumers have misconceptions about the role of nuts in health. Due to current restrictions around communicating health and related information, ANIC noted that the industry is unable to adequately address these misconceptions.

Cadbury Schweppes stated that consumers must have information on foods to make their own decisions, which not only includes foods that are perceived to be ‘good’ but also those foods which are currently not able to make any claims.

Other comments provided but not in direct response to the question

NCEFF considered this to be a vexed question that begs an understanding of the cultural context and the extent in which the State may delimit communication within society, presumably in order to control behaviour of the individual.

NSF was concerned about the impact of health related claims on the overall nutrition and health of Australians in the context that they are often used as a marketing tool and may be misleading about the link between nutrition and health. They believed there is a lack of evidence that a system for nutrition, health and related claims leads to behaviour change and improved health. In addition, they noted there is substantial risk that nutrition and health claims can confuse or mislead the public.

Question 77

What is the impact of the general prohibition on health claims on the ability of consumers to make informed choices about foods?

Out of 147 submitters, 49.7% (73 in total) directly responded to this question. The distribution of these responses was as follows:

Sector	Australia	New Zealand	Trans Tasman	International	Total
Industry	28	16	4	3	51
Government	5	1	-	-	6
Public health	8	2	-	-	10
Consumers	1	-	-	-	1
Other	5	-	-	-	5
Total	47	19	4	3	73

Overview

Seventy-three per cent of submitters (53) agreed that the consumers are constrained from making informed food choices. Submitters provided a range of reasons for this impaired ability. The reasons included: not permitting the potential health benefits to be communicated; a lack of good, accurate information and an abundance of bad information; consumers left to obtain information from unregulated and unreliable sources; consumers increasingly exposed to diet fads; and the limited availability of choices. Six submitters believed that the general prohibition on health claims do not (or appear not) to have any impact, while three submitters believed that the impact is unknown.

Ability to make informed food choices

Fifty-three submitters agreed that the consumers are constrained from making informed food choices by the general prohibition on health claims (William Wrigley Junior, NZJBA, Frucor, ABC, AFGC, Masterfoods Aust NZ, Nestle, Parmalat Aust, NSW Food Authority, Wyeth Aust, NCEFF, National Starch, Solae Comp, ANIC, NZ Magazines, CMA, Mandurah Aust, Palatinit GmbH, Kingfood Aust, CMA – NZ Branch, CMA – NSW Branch, CMA – Qld Branch, CMA – Vic Branch, ICA, CM of SA, Griffins Foods, ASA, Cadbury Confectionery, NPANZ, Assoc. of NZ Advertisers, Naturo Pharm Ltd, NZTBC, Unilever Australasia, Fonterra, Dairy Aust, F & B Importers Assoc, GW Foods, Goodman Fielder, CSIRO – HS&N, PB Foods, Mainland Products, NZFGC, NZ Dairy Foods, National Foods, Sanitarium Health Food Comp., Coeliac Society of Aust, Flour Millers Council of Aust, Diabetes Aust., GI Ltd, Aussie Bodies, CHC, NZFSA, DAA).

Reasons for impaired choices were:

- That potential health benefits are not being communicated (NZJBA, Frucor, ABC, AFGC, Masterfoods Aust. NZ, Nestle, Parmalat Aust, NSW Food Authority, Wyeth Aust, National Starch, Solae Comp.);

- A lack of good, accurate information that is supported by substantiation and an abundance of bad information (NZ Magazines, CMA, Mandurah Aust, Palatinit GmbH, Kingfood Aust, CMA – NZ Branch, CMA – NSW Branch, CMA – Qld Branch, CMA – Vic Branch, ICA, CM of SA, Griffins Foods, ASA, Cadbury Confectionery, NPANZ, Assoc. of NZ Advertisers, Naturo Pharm Ltd, NZTBC, Unilever Australasia, F & B Importers Assoc, CSIRO - HS&N, Mainland Products, NZ Dairy Foods, Sanitarium Health Food Comp, ANIC);
- That food choices are limited (NZ Dairy Foods, Fonterra, PB Foods, Coeliac Society of Aust.), as a result of:
 - Market segmentation, which hinders transparency of the effects of food composition (Fonterra);
 - Limited opportunities to market innovative food products appropriately (e.g. an ice cream developed for diabetics could not be marketed as such and hence consumers were not aware of this product leading to a deletion of a great tasting product developed with high research and development input (PB Foods);
 - The fact that the word 'coeliac' is not allowed on food packages (Coeliac Society of Aust).
- Consumers must gain health and nutrition information about food from unregulated sources (e.g. the Internet, magazines, radio and television), and other sources that may be unreliable (Unilever Australasia, NZFSA, Aussie Bodies, CHC);
- Much is left to ability of consumers to understand, interpret and compare NIP information in relation to magazine articles or other general public information (Flour Millers Council of Aust); and
- Prohibition has forced manufacturers to rely on nutrition content claims to market their foods leaving interpretation of what is a healthy diet up to consumers. Consumers are exposed more to the latest diet fad than they are to the Dietary Guidelines (Diabetes Aust., GI Ltd). DAA stated that manufacturers respond to consumer demand and this demand is heavily influenced by fashionable dietary trends (e.g. low fat or low carbohydrate or high protein).

Nutrition Aust. believed that consumers have not been adequately protected from misleading and deceptive claims. The TPA in theory should act as protection against misleading and deceptive claims but the ACCC has not been particularly active in this regard.

Two submitters believed that hearsay rather than first hand information relating to specific products creates consumer confusion (Flour Millers Council of Aust, Dairy Aust). Uni. of Adel. & Uni of SA – Nutrition Research Physiology Research Grp considered that the impact on consumers would be confusion, scepticism and distrust of the food industry.

Two submitters noted an impact of general prohibition would be that messages of good nutrition are often put into the context of the desired health outcome or an

optimal state of health that can be achieved through nutrition intake and dietary intervention (TGACC, Cadbury Schweppes).

DSM Nut. Prod. noted that the outcome of consumers not being given the opportunity to manage their own health is their failure to remain healthy as they age negatively, and the subsequent impacts on public health expenditure.

Impacts on consumers unknown

Three submitters believed that the impact of the general prohibition on health claims on the ability of consumers to make informed food choices is unknown (Dr R. Stanton, NSW DoH – N&PA Branch, TCCA).

Dr R Stanton stated that prohibition on health claims has no known impact on consumers' ability to be informed to choose a healthy diet. The NIP and ingredient list help those consumers keen to make healthy choices. There is no evidence that health claims influence health, therefore not having health claims is not a problem.

NSW DoH – N&PA Branch noted that there is not enough good quality consumer research to know the answer to this question. Consumers obtain nutrition information from a range of sources. The research that does exist is equivocal as to the role nutrition and health claims plays in enhancing this knowledge.

TCCA noted that as the current general prohibition is sometimes in breach, it is hard to see what disadvantages exist, with the possible exception of the current prohibition against claiming health benefits for fruit and vegetables.

No impacts on consumers

Seven submitters believed that the general prohibition on health claims do not (or appear not) to have any impacts on consumers' ability to make informed choices about foods (Nutra-Life H&F, Tas DoH&HS, SA DoH, WA DoH, Monash Uni – N&D Unit, PHAA (supported by ACA)).

Nutra-Life H&F did not have any data on consumer impacts, although they stated that most consumers appear to know about reducing fat, cholesterol, and increasing fibre, and other public health nutrition messages.

Tas DoH&HS considered that the general prohibition on health claims does not impact significantly on consumers ability to make informed choices about foods as information is available on NIPS.

Five submitters believed that despite some breaches, the current regulatory system allows consumers to be informed about nutrition content claims, whilst being protected from unsubstantiated, vague and unhelpful health claims (SA DoH, WA DoH, Monash Uni – N&D Unit, PHAA (supported by ACA)). They believed that nutrition content and function claims (including 'reduced'/'increased') are supported by NIP information, which increases consumers' ability to make informed choices. Hence, these submitters considered that the current prohibition on health claims

protects consumers from misleading information in the absence of a regulatory system to substantiate claims and to enforce compliance.

General comments and recommendations

NCWA had anecdotal rather than scientific knowledge of the impact of the general prohibition on the ability of consumers to make informed choices about foods not carrying claims. The impact, however, was not defined further. They considered that consumers require a real understanding of nutrition to be able to interpret labels.

Two submitters noted that the imposed restraint on a consumers right to know information which may impact their own health cannot be maintained as science between foods/nutrition/bioactive compounds and health continue to develop (National Starch, Solae Comp).

Another two submitters believed that the ability to provide a more balanced message to consumers through a well-constructed health claim might help prevent the reliance on advice from fad diet proponents (Diabetes Aust, GI Ltd).

Public Health South considered that health claims are not an effective strategy for improving consumers' ability to make informed food choices. They noted that health claims might conflict with public health nutrition messages, which may lead consumers to make decisions that result in poor nutrition. Public Health South noted that the role of public health workers is to promote consistent messages about food and nutrition so consumers make healthy food choices. Therefore, this is not the responsibility of the food industry.

NZDA noted that manufacturers also imply a health claim with a food name (e.g. Kellogg's Body Smart, or an image on a food label such as Milo and sports performances). They preferred a tightly regulated environment whereby specified health claims are permitted on appropriate foods and strictly enforced, rather than the status quo of a loosely regulated environment with poor enforcement.

DAA noted that under the current system it is possible only to state the content without being able to put the content into the context of the whole diet. As a result, the food supply can become distorted (e.g. the focus on low fat foods resulted in a flooding of the market with low fat foods but many of these foods were high in carbohydrate). Health claims may be able to create a better balance by putting content claims into context, providing sensible and useful messages which consumers can use to logically assess fashionable or fad diets (DAA). Diabetes Aust. and GI Ltd supported this view, stating that a more balanced message through a well-constructed health claim might help prevent the reliance on advice from fad diet proponents.

Aussie Bodies stated that it is better that consumers have confidence in a system that has guideline on claims on products.

Fonterra stated that consumers should be able to access a range of information including the health benefits from marketers of products they find in the supermarket.

NZFGC considered that disseminating the message to the community of the link between diet and health is extremely difficult. They pointed out that the opportunity of using health claims provides another opportunity to make this link.

Wyeth Aust. considered that the proposed prohibition on making factual 'nutrient content' statements about infant formula prevents differentiation between formulas. As a result, there would be substantially reduced incentive to fund the research needed to substantiate claims. They considered that it is ironic that the prohibition is only against the infant formula manufacturers, given that they carry heavier burdens than other food manufacturers. Not only must the product, as a sole source of nutrition, meet all nutritional needs, but the quality assurances, regulatory requirements, and promotional limitations are unique. Wyeth Aus. noted that product differentiation is an important way for manufacturers to recover the research costs and other costs unique to the industry. They considered that infant formula labelling is an important source of nutrition information and education to parents, whereby factual statements such as 'calcium is needed to form bones' provide meaningful information about the role of nutrients in growth and development. Nutrient comparative claims inform a mother of nutrients in formula that are not present in cows' milk or other liquids. Wyeth Aust. recommended that other claims about the role of nutrients in physiology, growth and development be substantiated to ensure that factual scientific nutrition information is provided. Although the reasoning behind the restrictions placed on the marketing of infant formula products is understood and supported, Wyeth Australia believed that prohibiting any nutrient claims for infant formulas/other products for infants and young children would be disadvantageous to parents and should therefore be allowed.

Other comments provided but not in direct response to the question

Innovation within industry is being stifled by not being able to promote the real nutritional/health benefits of some products (CML).

Question 78

Are consumers' choices being distorted towards purchasing dietary supplements in preference to food not carrying health claims? If so, to what extent is this occurring?

Out of 147 submitters, 34.7 % (51 in total) directly responded to this question. The distribution of these responses was as follows:

Sector	Australia	New Zealand	Trans Tasman	International	Total
Industry	18	16	2	-	36
Government	2	1	-	-	3
Public health	3	3	-	-	3
Consumers	1	-	-	-	1
Other	4	1	-	-	5
Total	28	21	2	-	51

Overview

Some submitters believed that consumer choices are being distorted towards purchasing dietary supplements (11). Several submitters stated that distortion was likely or possible (5), and others suggested that although supplement use has increased, there is no evidence that this is occurring in relation to foods not carrying health claims (4). Of those who responded in relation to the extent of the distortion, most considered that it was either difficult to gauge or unknown (6), while one submitter suggested that it was occurring to some extent, and another believed that the extent was widespread. Nine submitters disagreed that consumer choices are being distorted, and a further 15 submitters could not provide figures or were unaware of any evidence to support or refute consumer choice distortion.

Agree that choices are being distorted

Eleven submitters believed that consumer choices are being distorted towards purchasing dietary supplements in preference to foods not carrying health claims (Mainland Products, NZ Dairy Foods, NZFGC, Crop & Food Research, Cadbury Schweppes, CML, DSM Nut. Prod, GW Foods, National Starch, Solae Comp. Uni. of Adel. & Uni. of SA – Nutritional Physiology Research Grp).

Mainland Products questioned whether consumers would look beyond their 'diet' if they perceived that foods would offer the same benefits as supplements.

CML noted that there is far more advertising on diet supplements than there is on health foods. They suggested that to overcome guilt associated with poor eating, consumers might use supplements (which is big business).

GW Foods considered there to be a massive growth in the market for dietary supplements in Australia and suspect that the reason for this growth varies across different consumer groups. They noted that claims allowable for supplements are far more direct and benefit focussed than those currently allowed for foods, which is one reason for their increased popularity. Lifestyle factors are also a cause of growth for the supplement industry. GW Foods noted that certain consumer groups seek 'insurance' that their diet is appropriate and they look to supplements to provide this.

Two submitters believed that that supplements purchase and consumption is encouraged, as much stronger claims are permissible in comparison for foods (National Starch, Solae Comp.). They noted that supplements are perceived as an 'easier option' than changing eating behaviour, as they can be easily integrated into a daily routine.

Five submitters stated that distortion was likely or possible (ANIC, Horticulture Aust, NZ V&PG Fed/NZFG Fed, Dr C. Halais, Dairy Aust):

- In relation to purchasing dietary supplements instead of whole foods due to the lack of ability by food marketers to communicate the health benefits of foods (ANIC, Horticulture Aust); and with regard to

- Vitamins and minerals, because health benefits of vitamins and minerals can be communicated. They noted that there is growth in dietary supplements market with specific formulations to meet different population groups (Dairy Aust)

NZ V&PG Fed/NZFG Fed believed that consideration should be given to consistency in messages across foods, and dietary supplements (and therapeutics where appropriate). The value of foods should be not presented as inferior to supplement type products due to the nature of labelling statements.

Four submitters suggested that although supplement use has increased (anecdotally or through surveys), there is no evidence that this is occurring in relation to foods not carrying health claims (NCEFF, NZDA, NCWA, Dr R. Stanton).

NCEFF was not aware of any scientific evidence to support this assumption that ‘consumers choices are being distorted’ especially with respect to the prohibition on health claims.

NZDA noted that there is a high prevalence of dietary supplement use in New Zealand (NZ Food: NZ People. Key results of the 1997 National Nutrition Survey. Wellington: Ministry of Health; 1999. P 79-87), but there is no evidence to suggest that this has any connection with foods not carrying health claims. It is more likely to be a response to the marketing practices of dietary supplements rather than an absence of a marketing practice with regard to food (i.e. use of health claims). They quoted a survey of the advertising of dietary supplements in Auckland that found that 68% of print media surveyed carried at least one advertisement for a dietary supplement (Journal of the New Zealand Dietetic Association, 2002; 56: 1).

Dr R. Stanton stated that although consumers do buy dietary supplements, there is no evidence they would not continue to do so if foods carried health claims. In the USA, supplement sales have continued to climb while health claims have been introduced.

NCWA did not have real evidence of consumers’ food choices being distorted towards purchasing of dietary supplements in preference to food not carrying health claims. However, there is anecdotal evidence from those working with young adults.

If so, to what extent is the distortion?

Six submitters considered that the extent of the distortion was either difficult to gauge or unknown (NZ Dairy Foods, Dr C. Halais, National Starch, Solae Comp, NZFGC, Crop & Food Research). One submitter suggested that the distortion was occurring to some extent (Cadbury Schweppes) and one submitter believed that the extent is widespread (Uni. of Adel. & Uni. of SA – Nutritional Physiology Research Grp).

NZ Dairy Foods did not have the information to quantify the extent. Dr C Halais believed that the extent is not known.

National Starch and Solae Comp. noted that although the extent of this distortion is difficult to gauge, the size of the supplements industry suggests that the current regulatory environment favours the use of supplements when there is consumer interest in a specific health issue.

NZFGC stated that it is difficult to say to what extent consumer choices are distorted towards purchasing dietary supplements in preference to food not carrying health claims. The dietary supplement industry is an important sector of the market worth \$200 million per annum, of which \$42 million is the value in the grocery channel, \$50 - \$80 into pharmacy and health food stores and the rest to mail order and direct selling. (Interestingly herbal teas are valued at \$10 million and sports supplements \$10 million).

Crop & Food Research suggested that it is hard to determine to what extent but get feedback because with regards to some of the components in supplements consumers don't understand that these are present in food and the comparative levels between the two

Disagree that choices are being distorted

Nine submitters did not agree that consumer choices are being distorted (Auckland Reg. PHS, Aussie Bodies, ABC, AFGC, Masterfoods Aust. NZ, Nestle, CHC, Goodman Fielder, WA DoH).

Aussie Bodies believed that although it is tempting to make this assumption, research (including FSANZ's) shows that consumers interested in health outcomes prefer to use a supplement, as they believe that a supplement has a greater efficacy.

AFGC (supported by Masterfoods Aust. NZ, Nestle) were aware that dietary supplements have been readily available in New Zealand for some years and stated that it is not apparent that the food supply in New Zealand has been distorted in any way as a result of this.

CHC noted that there is a very real and necessary place for dietary supplementation in the community. Therapeutic goods are strictly controlled dosage forms of vitamin, minerals and dietary supplements. They believed that consumers understand the value difference between fortified foods and therapeutic goods.

Unknown whether distortion is occurring

Fifteen submitters could not provide figures or were unaware of any evidence to support or refute this (ASMI, ASA, Cadbury Confectionery, NPANZ, Assoc. of NZ Advertisers, NZTBC, Griffins Foods, NZJBA, Frucor, NZFSA, National Foods, SA DoH, Monash Uni – N&D Unit, CSIRO – HS&N, NZ Magazines).

ASMI considered this question difficult to answer in the absence of research of consumer motivations for buying complementary medicines versus buying (fortified) foods with health claims, and in the absence of proposals regarding the FSANZ consultations for Food Type Dietary Supplements and Non-culinary Herbs in Food, which in themselves would influence consumer choice.

CSIRO – HS&N knows that supplement purchase is extensive but is unsure if this is because food does not make claims or is not allowed to contain ingredients or whether it is a factor of convenience (I.e. pills easier to take than foods.)

Parmalat Aust. noted their support for Dairy Aust. and AFGC, although Dairy Aust believed that a distortion towards dietary supplements was possible, while AFGC said that it is not apparent that the food supply in New Zealand has been distorted in any way as a result of dietary supplements being readily available.

General comments and recommendations

Public Health South stated that consumers buy dietary supplements instead of food because of a lack of understanding about what constitutes a healthy food choice and about the vitamin and mineral content of food, not due to the fact that health claims are prohibited. They noted that foods are currently allowed to make content claims about vitamins and minerals, which is all that supplements are allowed to do.

Fonterra considered that a dietary supplement containing a claim may be preferred by consumers to whom that claim is relevant, even though a comparable food has identical benefits.

Nutra-Life H&F believed that weight management diets are encouraging some consumers have turned to dietary supplements (especially multivitamins) to achieve their daily requirements.

TCCA stated that should this be proven to be the case, it might relate more to a problem of the presence of health claims on dietary supplements rather than being a problem of the absence of health claims on food products.

Dr R. Stanton stated that few consumers need supplements, nor is there any evidence they need supplemented processed foods with health claims. The public needs to consume more fruit and vegetables and less fat, salt and sugar. Foods bearing health claims have the potential to further reduce consumption of fresh foods.

Three submitters recommended harmonising regulations between Australia and NZ with respect to foods and medicines in order to reduce inequities in supply of products between countries to the benefit of consumers (ABC, AFGC, Masterfoods Aust. NZ).

Three submitters noted that NZFSA is consulting on Changes to the Dietary Supplements regulation 1985 to bring regulation into line with the TTMRA to regulation medicines in a way that is consistent with the TTMRA regarding the regulation of foods (AFGC, Masterfoods Aust. NZ, Nestle)

ASMI considered that there is justification for use of dietary supplements where dietary intake is inadequate. The health benefits conveyed by many dietary supplements and complementary medicines are increasingly for use within therapeutic context above that of standard nutrition, taking in quantities and concentrations of substances that would not typically be available through dietary intake.

MLA noted that consumers are currently exposed to a wide range of sometimes-questionable diet and health claims including from complementary medicines and journalists.

Question 79

What, if any, are the impacts on consumers of choosing to purchase dietary supplements over food?

Out of 147 submitters, 32.0 % (47 in total) directly responded to this question. The distribution of these responses was as follows:

Sector	Australia	New Zealand	Trans Tasman	International	Total
Industry	16	13	2	-	31
Government	1	1	-	-	2
Public health	7	4	-	-	11
Consumers	1	-	-	-	1
Other	1	1	-	-	2
Total	26	19	2	-	47

Overview

More than half of the submitters (28) provided a range of negative impacts on those consumers who choose to purchase dietary supplements over food. Negative impacts encompassed the cost to consumers, poor nutritional profiles and adverse health outcomes. Some submitters quoted research findings on the poor efficacy of supplements over food. Two submitters noted that consumer impacts would be dependent on reasons for supplement purchase or on individual circumstances, and 11 submitters were unaware of any evidence for consumer impacts, or believed that there were no impacts resulting from purchasing dietary supplements.

Negative impacts on consumers

Twenty-eight submitters highlighted a range of negative impacts on consumers that choose to purchase dietary supplements over food (Dr C. Halais, CML, Public Health South, CSIRO – HS&N, NZ Dairy Foods, Dairy Aust, National Starch, Solae Comp, GI Ltd, DSM Nut. Prod, Mainland Products, MLA, ASA, Cadbury Confectionery, Assoc. of NZ Advertisers, NPANZ, NZTBC, NZ Magazines, Diabetes Aust, ANIC, Horticulture Aust, Tomox, TCCA, Cadbury Schweppes, NCWA, Crop & Food Research, Northland Health Dietitians, NZDA).

Negative impacts that were identified included:

- Supplements are expensive (Dr C. Halais, CML, Public Health South). The biggest impact is the large waste of money as evidence that people who take them are the ones who need them the least (CSIRO – HS&N);
- Consumers increasingly perceive dietary supplements as ‘magic bullets/pills’ to counter unhealthy eating habits and poor lifestyle behaviours. They are more likely to address nutritional deficiencies through supplementation rather than the ‘whole of diet’ approach (NZ Dairy Foods, Dairy Aust, National Starch, Solae Comp, GI Ltd, DSM Nut. Prod, Mainland Products);

- Maintaining strict prohibition on communications from the food industry within this environment would risk consumer perceptions that food has little role to play in enhancing health (MLA);
- Use of dietary supplements does not encourage consumers to develop healthy eating habits, or take an interest in their overall diet (ASA, Cadbury Confectionery, Assoc. of NZ Advertisers, NPANZ, NZTBC, NZ Magazines);
- Consumers might become complaisant and lulled into a false sense of security when taking supplements, to the detriment of their overall nutritional status (Diabetes Aust, ANIC, Horticulture Aust, Tomox). There is a risk these consumers would believe their diets to be more nutritious than they actually are, consume fewer vegetables, fruits and other foods from the core food groups and thereby place themselves at more risk of developing diseases in later life (TCCA);
- There is a very real risk that consumers will select the supplement approach to health due to their ease of use and compelling (although potentially misleading) claims. Consequently, opportunities to genuinely improve health through foods choices might be missed (National Starch, Solae Comp, Cadbury Schweppes);
- Consuming dietary supplements over food does have the potential to skew nutrient intakes and lead to imbalanced diets (Dairy Aust, Dr C Halais, NCWA);
- By taking supplements, consumers are missing out on the array of biologically active substances present in foods and the interactions and food matrix effects that have benefits (e.g. increased bioavailability, antioxidants and fibre). This applies not only to whole food but also the need to be aware of whole diet effects (Crop & Food Research, NZ Dairy Foods, National Starch, Solae Comp, Tomox, ANIC, Horticulture Aust, Cadbury Schweppes, Diabetes Aust, GI Ltd, TCCA, Dairy Aust, Dr C. Halais, NCWA); and
- Some components react differently when in supplement form than they do in real food (CML).
- Lack of evidence for the efficacy dietary supplements, where:
 - The majority of research linking particular micronutrients to disease prevention is from epidemiological studies (Diabetes Aust, GI Ltd);
 - There are potential negative effects of supplementations, and many supplement trials have not shown the health benefits hypothesised from epidemiological studies (e.g. beta-carotene shown to have detrimental effects during supplement trials) (Crop & Food Research);
 - Many of the benefits of foods/food groups have not been replicated in supplement trials (Northland Health Dietitians);

- Discouraging results from randomised controlled trials may be because the particular micronutrient thought to be the causative agent is a marker for some as yet undiscovered biologically active compound (Diabetes Aust, GI Ltd);
- Recent evidence suggests that the use of supplements may well pose a risk to health (The Lancet 1/10/04) and a number of well-controlled studies have shown limited efficacy for supplement use in terms of specific disease endpoints (National Starch, Solae Comp);
- A recent Cochrane review of randomised trials comparing antioxidant supplements with placebo for prevention of gastrointestinal cancers found no evidence of prevention of gastrointestinal cancers, and in fact the supplement use appeared to increase mortality (Bjelakovic, Dimitrinka N, Simonetti, and Gluud: Antioxidant supplements for prevention of gastrointestinal cancers: a systematic review and meta-analysis. The Cochrane Library, Issue 2, 2004, Chichester UK: John Wiley & Sons Ltd) (NZDA).
- Excessive intakes of certain nutrients, or a combination of ingesting certain nutrients from food as well as from supplements, might be harmful. Research has shown that consuming excessive quantities of supplement vitamins such as vitamins A, E and C are not protective, and may actually be harmful (TCCA, CML, Public Health South).
- There may be some negative health effects that are as yet unknown (CML)

Impacts on consumers are dependent on other factors

Two submitters noted that consumer impacts would be dependent on reasons for supplement purchase or on individual circumstances (Aussie Bodies, NCEFF).

Aussie Bodies considered that if consumers are purchasing supplements to replace food then it is a problem, however if they are using supplements as they are intended for use (to supplement the diet), then they do not perceive supplement intake to be an issue. Aussie Bodies stated that although there are differing opinions about the value of supplements, consumers have right of choice.

NCEFF believed that the impacts on consumers would depend on the circumstances of individuals.

No evidence, impacts on consumers are unknown

Eleven submitters were unaware of any evidence for consumer impacts, or believed that there were no impacts resulting from purchasing dietary supplements (NZFGC, Nestle, ABC, AFGC, Masterfoods Aust. NZ, Auckland Reg. PHS, WA DoH, Dr R. Stanton, NZJBA, Frucor, NZFSA).

Five submitters stated that they were not aware of any evidence from the New Zealand Total Dietary Survey that demonstrates any distortions of the food supply as a result of dietary supplements being available (NZFGC, Nestle, ABC, AFGC, Masterfoods Aust. NZ).

Auckland Reg. PHS was not aware of any evidence for this happening and did not think that it is a real concern.

Two submitters believed that there are no known impacts on consumers of choosing to purchase dietary supplements over food (WA DoH, Dr R. Stanton).

Three submitters had no information on consumer impacts of choosing dietary supplements over food (NZJBA, Frucor, NZFSA).

General comments and recommendations

Dairy Aust. recommended that in Australia, a new National Nutrition Survey is needed in order to answer this question appropriately.

CSIRO – HS&N pointed out that supplements are essentially unregulated in their claims (i.e. never asked to show their evidence).

Six submitters noted that the playing field is currently tilted in favour of dietary supplements, so food is at a disadvantage (ASA, Cadbury Confectionery, Assoc. of NZ Advertisers, NPANZ, NZTBC, NZ Magazines).

TCCA noted that dietary supplements have been proposed as beneficial in reducing cancer risk; however the relationship between diet and cancer is complex and greatest efficacy for cancer prevention is achieved through decades of appropriate dietary practice, throughout life. They pointed out that there is little risk of excessive intake occurring through the consumption of whole foods. Identifying a single nutrient or food component in disease prevention is a simplistic approach and does not consider the complexity of foods (the variety of nutrients and non-nutrient components within food and their interactions) and their role in the body; and also doesn't allow consideration of the importance of the whole lifestyle – including diet and physical activity – in disease prevention.

In support of this view, several submitters believed that the whole-of-diet perspective should be encouraged (ASA, Cadbury Confectionery, Assoc. of NZ Advertisers, NPANZ, NZTBC, NZ Magazines). Public Health South suggested that there might be a shift away from a 'whole-of-diet' approach to good nutrition.

Northland Health Dietitians noted that that food and nutrition is still not fully understood.

National Starch noted that calcium, iron and folate are examples of some supplements that confer health benefits (particularly for at risk groups).

CHC noted that consumers do not purchase dietary supplements over foods. They believed that consumers do recognise that many foods lack nutritional value.

Goodman Fielder was not aware of any distortions in the food supply over dietary supplements being available for sale in NZ.

Nutra-Life H&F believed that it is not an ‘either/or’ situation as people still consume food as the mainstay of their diet. They believed that consumers use supplements because “with food you can be hopeful - with supplements you can be sure!” Nutra-Life H&F stated that people are aware that supplements are produced to special standards designed to ensure they meet label claim.

Other comments provided but not in direct response to the question

Parmalat Aust. noted their support for both Dairy Aust. and AFGC, although these submitters held different views. Dairy Aust. was concerned that consumption of dietary supplements over food has the potential to skew nutrient intakes and lead to imbalanced diets; whereas AFGC stated that they were unaware of any evidence from the New Zealand Dietary Survey that demonstrates any distortions in the food supply as a result of dietary supplements being available for sale in New Zealand.

Question 80

Are consumers in Australia confused or misled by current nutrition content claims? If so, to what extent is this occurring?

Out of 147 submitters, 34.7 % (51 in total) directly responded to this question. The distribution of these responses was as follows:

Sector	Australia	New Zealand	Trans Tasman	International	Total
Industry	26	2	4	2	34
Government	4	-	-	-	4
Public health	7	1	-	-	8
Consumers	2	-	-	-	2
Other	3	-	-	-	3
Total	42	3	4	2	51

Overview

Two-thirds of submitters (34) agreed that Australian consumers are confused or misled by current nutrition content claims. A range of reasons and some specific nutrition content claims and terms were given to illustrate the extent to which this is occurring. Thirteen submitters disagreed, were unaware, or had no evidence of consumer confusion.

Agreed that consumers are confused or misled

Thirty-four submitters agreed that Australian consumers are (or might be) confused or misled by current nutrition content claims (TCCA, Diabetes Aust, GI Ltd, DAA, NZDA, Dr R. Stanton, Aussie Bodies, ASMI, CML, CHC, Flour Millers Council of Aust, National Starch, Solae Comp, Wyeth Aust, Tas DoH&HS, Sa DoH, WA DoH, Monash Uni – N& D Unit, PHAA (supported by ACA), CMA, Mandurah Aust, Palatinit GmbH, Kingfood Aust, CMA – NZ Branch, CMA – NSW Branch, CMA –

Qld Branch, CMA – Vic Branch, ICA, CM of SA, ANIC, Horticulture Aust, Cadbury Schweppes, CSIRO – HS&N)

Reasons for consumer confusion

Misuse or lack of adherence to CoPoNC by food manufacturers was cited by 13 submitters as being confusing or misleading to consumers (CMA, Mandurah Aust, Palatinit GmbH, Kingfood Aust, CMA – NZ Branch, CMA – NSW Branch, CMA – Qld Branch, CMA – Vic Branch, ICA, CM of SA, Cadbury Schweppes, ANIC, Horticulture Aust, National Starch, Solae Comp). CMA (supported by Mandurah Aust, Palatinit GmbH, Kingfood Aust, CMA – NZ Branch, CMA – NSW Branch, CMA – Qld Branch, CMA – Vic Branch, ICA, CM of SA) noted that as CoPoNC is not a legally binding document, it does not apply in NZ and cannot be enforced with respect to imports; potentially it can lead to consumer confusion.

Five submitters believed that there is no consumer awareness or understanding that there are ‘rules’ around the use of claims, and that most claims do have meaning that is commonly understood by manufacturers (SA DoH, WA DoH, Monash Uni – N&D Unit, PHAA (supported by ACA)).

Aussie Bodies stated that consumers are very confused, and their research indicates that even those who believe themselves to be informed are either unsure, or simply believe misinformation spread by unreliable sources.

Flour Millers Council of Aust. noted some consumers’ poor ability to understand and interpret information available, especially how claims for particular foodstuffs impact across total diet.

Tas DoH&HS stated that consumer research indicates that consumers are confused by the current content claims (Paterson D. et al, 2003a, A qualitative consumer study related to nutrition content claims on food labels, FSANZ (CO3037): <http://www.foodstandards.gov.au/mediareleasespublications/publications/consumerstudyrelatedtonutritioncontentclaimsJuly2003/index.cfm>). They stated that more research is required to determine the extent to which this is occurring.

Although CSIRO – HS&N believed that it is highly likely that consumers are confused and misled by claims, they noted that there is not much research to prove this.

Specific nutrition content claims or terms highlighted by submitters:

Fat claims:

- Little consumer understanding of ‘reduced fat’ claims (Dr R. Stanton);
- Research into the beliefs and attitudes of Australian consumers to fat claims on packaged foods (Chan, Patch and Williams (2004) found that some consumers believed low fat claims encourage over-consumption of foods (TCCA);
- Saturated fat claims:
 - Little understanding of how much ‘saturated fat’ is appropriate (Dr R. Stanton);

- A ‘low saturated fat’ claim that is dependent on the food being low in total fat is inconsistent with current thinking in the area of cardiovascular health (Australian Journal of Nutrition and Dietetics; 1999; 56: s3-s4) (ANIC, Horticulture Aust);
- Percentage fat free claims:
 - Consumers might believe that a food declaring ‘ 90% fat free’ is low in fat whereas in fact the fat content is 10% (CMA, Mandurah Aust, Palatinit GmbH, Kingfood Aust, CMA – NZ Branch, CMA – NSW Branch, CMA – Qld Branch, CMA – Vic Branch, ICA, CM of SA, Cadbury Schweppes);
 - Consumers are confused or misled by percentage fat free claims, and could interpret 80% fat-free or 99% fat-free as a low fat food (ANIC, DAA, NZDA, Horticulture Aust);
 - In contrast, the research quoted by TCCA found that consumers’ preferred claim was ‘X% fat free’.
- Other findings quoted by TCCA from the study by Chan, Patch and Williams (2004) included:
 - A high consumer awareness of fat claims that influenced purchase decisions;
 - Claims on high fat foods were considered the most useful;
 - Considerable scepticism about all nutrient claims;
 - Consumers preferred to check the claim against the NIP;
 - Many claims were seen as advertising that could be misleading, deceptive or confusing.

Claims relating to sugar, carbohydrate and GI:

- Confusion over ‘no added sugar’ claims (ANIC, Horticulture Aust).
- Confusion over ‘sugar free’ claims (DAA, NZDA).
- Little understanding that there are many different types of sugars, not all of them bad (DAA, NZDA).
- Lack of consumer nutrition knowledge about the composition of low carbohydrate foods, in that the carbohydrate must be replaced with some other macronutrient such as fat (DAA, NZDA).
- Confusion for people with diabetes regarding the sugar content of foods, and misleading claims arising from the lack of provisions for claims relating to total carbohydrate or GI (Diabetes Aust, GI Ltd).

Salt/Sodium claims:

- Little understanding of how much salt is appropriate (Dr R. Stanton)

Biologically active substances:

- The selective declaration of the presence of biologically active substances for which there is no RDI (or other ingredient which implies a particular benefit), is often matched by an insufficient formulation of the biologically active substance within the product compared to a standard serving size as recommended (or not recommended)(ASMI).

Terms used in nutrition content claims:

- Five submitters noted FSANZ research (2003), which suggested that consumers are confused and frustrated because there is no common understanding of terms ‘high’, ‘low’, ‘reduced’, ‘source of’, and ‘light’ (SA DoH, WA DoH, Monash Uni – N&D Unit, PHAA (supported by ACA)).

Disagree or unaware that consumers are confused or misled

Thirteen submitters disagreed (Nestle, Unilever Australasia, ABC, AFGC, Masterfoods Aust. NZ, GW Foods, Goodman Fielder, Dairy Aust), were unaware (F & B Importers Assoc, Parmalat Aust, PB Foods), or had no evidence (NCEFF, National Foods) that Australian consumers are confused or misled by current nutrition content claims.

NCEFF is not aware of any substantive research on nutrient content claims, with a representative sample of Australian consumers, that measures “confusion” or “extent of being misled” as outcomes. NCEFF has studied consumer trust and understanding of health claims and found consumers were aware of nutrient content claims and made decisions based on a range of influencing factors. Appendix 3 in their submission provided a confidential summary to FSANZ of the preliminary findings from this research.

Dairy Aust. stated that on the whole, they did not believe consumers are confused or misled by current nutrient content claims. They quoted the ANZFPA Evaluation report (Dec 2001, page 37), “consumers generally liked the nutrition claims on packages...”. The presence of nutrition claims on the front of the package did influence their decision to purchase. Consumers reported that they “check the claims on the label”, to validate them. Dairy Aust noted that such views were validated by a FSANZ consumer survey in July 2003, in which ‘percent fat free claims’ were recognised as being more definitive and therefore viewed as more reliable. Consumer education was deemed essential.

General comments and recommendations

Wyeth Aust. agreed that consumers are confused and misled by current nutrition content claims and believed that an unfair playing field has resulted from some manufacturers disregarding current guidelines, and a lack of enforcement. In addition, they considered that the duration required developing a health claims standard has allowed this situation to continue. Wyeth Aust. believed that prompt finalisation and implementation of the Standard is vital to ensure more uniform compliance.

From the findings of research into the beliefs and attitudes of Australian consumers to fat claims on packaged foods (described earlier), it was concluded that changes to regulations should be made to enhance the credibility of claims and support their role in assisting consumers to make healthier food choices (TCCA). They also noted the results of study for FSANZ by Baines and Lata (2004).

Diabetes Aust. and GI Ltd. pointed out that the amount of total carbohydrate and the GI of foods are proven to be the two main determinants of a foods’ glycaemic impact.

The lack of provisions in CoPoNC or the FSC for such claims has led to a significant number of low-carbohydrate claims and a few false low GI claims, both which can potentially cause harm to people with diabetes.

Other comments provided but not in direct response to the question

Nutra-Life H&F believed that this question is best answered through consumer research. They did note that health food customers appear to be better informed than many supermarket shoppers.

Nutrition Aust. noted that a student's research report would be available in March 2005, which might provide additional information to complement the FSANZ baseline studies.

ACCC believed that consumer complaints reflect a level of confusion and those matters that have been pursued reflect claims that are considered misleading or deceptive under the TPA.

NCWA considered that evidence of consumer confusion over current nutrition content claims might be found in the current debates over obesity and osteoporosis. They agreed that many consumers have inadequate knowledge of nutrition.

Question 81

Are consumers in New Zealand confused or misled by current nutrition content claims? If so, to what extent is this occurring?

Out of 147 submitters, 25.2% (37 in total) directly responded to this question. The distribution of these responses was as follows:

Sector	Australia	New Zealand	Trans Tasman	International	Total
Industry	11	15	4	2	32
Government	-	-	-	-	-
Public health	-	3	-	-	3
Consumers	-	-	-	-	-
Other	1	-	-	-	1
Total	12	18	4	2	36

Overview

Two-thirds of submitters (24) agreed that New Zealand consumers are (or might be) confused or misled by current nutrition content claims. These submitters provided several reasons for consumer confusion and some specific nutrition content claims/terms to illustrate the extent of consumer confusion. Eleven submitters disagreed, were unaware, or had no evidence of consumer confusion.

Agreed that consumers are confused or misled

Twenty-four submitters agreed that New Zealand consumers are (or might be) confused or misled by current nutrition content claims (GW Foods, Auckland Reg. PHS, NZDA, ASA, Cadbury Confectionery, Assoc. of NZ Advertisers, NZTBC, Naturo Pharm, NPANZ, NZ Magazines, Mainland Products, NZ Dairy Foods, NZFSA, CMA, Mandurah Aust, Palatinit GmbH, Kingfood Aust, CMA – NZ Branch, CMA – NSW Branch, CMA – Qld Branch, CMA – Vic Branch, CM of SA, ICA, CSIRO – HS&N).

Reasons for consumer confusion

Six submitters believed that consumers are not making informed choices, because of the current legislation (ASA, Cadbury Confectionery, Assoc. of NZ Advertisers, NZTBC, Naturo Pharm, NZ Magazines).

CMA (supported by CMA, Mandurah Aust, Palatinit GmbH, Kingfood Aust, CMA – NZ Branch, CMA – NSW Branch, CMA – Qld Branch, CMA – Vic Branch, CM of SA, ICA) stated that in addition to compliance with fair trading provisions, industry has in some cases referred to CoPoNC for guidance, however this is not a legally binding document and deviation from it occurs both with domestically produced and imported products.

NZ Dairy Foods considered that it is hard to tell but there is abuse of the current legislation in that claims on some products are being made and there is little enforcement.

CSIRO – HS&N believed that it is highly likely that consumers are confused/misled by claims although there is not much research to prove this is the case.

Specific nutrition content claims or terms highlighted by submitters:

Fat claims:

- Low fat claims:
 - There is no consistency regarding what is ‘low in fat’ by manufacturers (GW Foods);
 - ‘Low fat’ products that have high sodium content (Auckland Reg. PHS).
- ‘Fat free’ claims made for high sugar foods (Auckland Reg. PHS).
- Percentage fat free claims:
 - ‘90% fat free’ claims might be confusing for consumers who believe these are low fat foods when in fact they are not (Mainland Products)

Fibre claims:

- There is no consistency regarding what is ‘high in fibre’ by manufacturers (GW Foods).

Foods with added nutrients/substances are classified as dietary supplements:

- Calcium added to fruit juice and caffeine in energy drinks are examples of where a health claim is stating the presence of the added substance, and New Zealand food

manufacturers circumvent the ban on content claims. Implications of healthfulness and nutrition superiority where none exists is misleading, and therefore creates confusion between bona fide nutrition messages and ‘pseudo’ messages (NZDA).

Terms used in nutrition content claims:

- NZFSA has received a number of consumer inquiries regarding the interpretation of content claims (e.g. 'lite').

Disagree or unaware that consumers are confused or misled

Eleven submitters disagreed (Fonterra, AFGC, Masterfoods Aust. NZ, Goodman Fielder, Unilever Australasia, Nestle), were unaware (Dairy Aust), or had no evidence (NZFGC, National Foods, NZJBA, Frucor) that New Zealand consumers are confused or misled by current nutrition content claims.

AFGC (supported by Masterfoods Aust. NZ) considered that CoPoNC Guidelines have provided, for a number of years, sufficient information on criteria for making content claims such that there was little confusion amongst consumers regarding nutrition content claims. Goodman Fielder believed that CoPoNC has been embraced by both Australia and New Zealand.

Nestle considered that New Zealand manufacturers have either retained criteria for making claims that were under the old system, or would have adopted the Australian requirements where foods are traded between both countries. They did not consider that the minor inconsistencies between these two regimes would cause confusion for consumers.

Fonterra noted that the Fair Trading Act effectively prohibits misleading claims from being made.

General comments and recommendations

Public Health South believed that content claims should be permitted but need to be much more tightly regulated and monitored. They recommended specified criteria for every content claim and that these should be placed in a Standard to ensure that content claims are legally enforceable.

Other comments provided but not in direct response to the question

Nutra-Life H&F believed that this question is best answered through consumer research. They noted, however, that health food customers appear to be better informed than many supermarket shoppers.

Question 82

To what extent has CoPoNC been effective in providing a framework to facilitate informed consumer choice?

Out of 147 submitters, 36.7% (54 in total) directly responded to this question. The distribution of these responses was as follows:

Sector	Australia	New Zealand	Trans Tasman	International	Total
Industry	23	8	5	3	39
Government	5	1	-	-	6
Public health	6	-	-	-	6
Consumers	2	-	-	-	2
Other	1	-	-	-	1
Total	37	9	5	3	54

Overview

Forty-six per cent of submitters (25) considered CoPoNC to be effective or very effective in facilitating informed consumer choice. Some submitters (4) believed that CoPoNC was effective, with the exception of percentage fat free claims; that effectiveness of CoPoNC was limited overall; or had less effect in New Zealand. Others believed that CoPoNC was unlikely to have been or was not effective (5). Most submitters provided arguments in support of their views. Several submitters (9) stated that there was no evidence or formal external review of the effectiveness of CoPoNC in providing such a framework.

Efficacy of CoPoNC in facilitating informed consumer choice

Of those submitters who responded, the extent to which CoPoNC has been effective in facilitating informed consumer choice ranged between very effective and not effective at all. The following submitters believed that CoPoNC has been:

- Very effective (Mainland Products, Unilever Australasia);
- Effective (NZFGC, CMA, Mandurah Aust, Palatinit GmbH, Kingfood Aust, CMA – NZ Branch, CMA – NSW Branch, CMA – Qld Branch, CMA – Vic Branch, CM of SA, ICA, William Wrigley Junior, AFGC, Masterfoods Aust. NZ, Parmalat Aust., Nestle, ABC, Dairy Aust, F & B Importers Assoc, GW Foods, Goodman Fielder, National Foods, PB Foods), because:
 - It allows for consistency in claims criteria (GW Foods, Dairy Aust, Parmalat Aust);
 - It applies to all claims in terms of packaging and advertising (GW Foods);
 - Conditions under which nutrient claims can be made are specified, in terms of preparation directions, foods naturally or intrinsically low in a nutrient, comparison statements to reference foods (GW Foods);
 - It provided certainty around nutrition content claims (CMA, Mandurah Aust, Palatinit GmbH, Kingfood Aust, CMA – NZ Branch, CMA – NSW Branch,

CMA – Qld Branch, CMA – Vic Branch, CM of SA, ICA, Goodman Fielder, AFGC, Masterfoods Aust. NZ, Parmalat Aust);

- Effective, with the exception of low compliance for limitation on "%fat free" claims, which demonstrates that the Guideline might be too restrictive and is not keeping pace with consumer information demands (Fonterra);
- Helpful, but over the years it has had less effect in New Zealand (NZFGC).
- Limited (Nutrition Aust, NCWA):
 - Because it does not cover the range of claims now being made (Nutrition Aust); and
- Unlikely to have been/not effective (NZFSA, CML, NZ Dairy Products, Diabetes Aust, GI Ltd), as:
 - Only some manufacturers may have used it as a guide (NZFSA);
 - Many (even major) companies have not adopted it. Consumers are now faced with confusing terms (e.g. 92% fat free). If it had regulatory backing it probably would have been effective (CML);
 - As many manufacturers do know about CoPoNC (NZ Dairy Aust);
 - FSANZ's evaluation report no. 4 on food labelling issues, which determined that while 70% of consumers were aware of nutrient claims, only 37% used them (Diabetes Aust., GI Ltd).

ACCC stated that since implementation, CoPoNC has been problematic for them, particularly with regard to absolute nutrient claims.

Eight submitters stated that although CoPoNC has provided an excellent framework, a lack of enforcement has left these guidelines open to abuse, and the Code was still able to be ignored or exploited (William Wrigley Junior, ASMI, Cadbury Schweppes, NSW Food Authority, National Starch, Solae Comp, CHC, TCCA). Some submitters have noted that it is difficult for a framework that is nearly 10 years old, in an environment of rapid change and intense consumer interest in foods that offer meaningful health benefits, to be effective (National Starch, Solae Comp, Fonterra, Aussie Bodies). However, NSW Food Authority believed that some concepts (e.g. "% free" claims) appear to have improved consumer awareness.

ASMI believed that questions should to be raised regarding the level of consumer awareness of the code and the ease of lodging complaints under the provisions of the Code.

TCCA noted research, which described the use of nutrition and related claims on packaged food for sale in Australia (Williams et al., 2003), found that many claims (12.9%) did not comply with current regulations, especially those in the voluntary CoPoNC.

National Foods quoted findings from the same study as evidence that most manufacturers abide by the criteria in CoPoNC, whereby 87% of label claims complied with CoPoNC or the (old) Food Standard Code. National Foods noted that the rate of non-compliance was similar between regulated claims (13.3%) and code of

practice claims (14.7%) indicating manufacturers comply similarly with both regulated and voluntary provisions. Dairy Aust. (supported by Parmalat Aust) also considered that consistency of claims criteria was validated by this study.

Even though food manufacturers are not being totally consistent in its use, and the fact that CoPoNC does not apply across all sources of food (e.g. imported food products), Flour Millers Council of Aust. considered that CoPoNC was better than having no guidelines.

No evidence of the effectiveness of CoPoNC

Nine submitters stated that there was not evidence or formal external review of the effectiveness of CoPoNC in facilitating informed consumer choice (Heinz Aust./Heinz Watties NZ, Dr R. Stanton, PHAA (supported by ACA), Nutrition Aust, NSW DoH – N&PA Branch, SA DoH, WA DoH, Monash Uni. – N&D Unit).

Heinz Aust./Heinz Watties NZ believed that CoPoNC has been used for industry, rather than for consumers. Although most of their labels make claims based on it, and they feel that it makes an impact on consumer choice, industry have not measured this impact.

Dr R. Stanton noted that CoPoNC has created cynicism in public health professionals who see it being flouted by sections of the food industry.

Nutrition Aust. noted that study by Williams et al. (2003) had investigated compliance with CoPoNC, rather than efficacy.

General comments and recommendations

Thirteen submitters (CMA, Mandurah Aust, Palatinit GmbH, Kingfood Aust, CMA – NZ Branch, CMA – NSW Branch, CMA – Qld Branch, CMA – Vic Branch, CM of SA, ICA, AFGC, Masterfoods Aust. NZ, Parmalat Aust.) noted that CoPoNC was an innovative solution established in 1995 with the support of ACCC, ACA and the food industry (including CMA and the [then] AFG), to provide certainty around nutrition content claims.

Furthermore, AFGC (supported by Masterfoods Aust. NZ, Parmalat Aust) stated that the agreement pre-dates mandated requirements for NIPs but recommended the use of NIPs to provide consumers with further information. These submitters noted there were aspects of CoPoNC that industry considered to be out-of-date and brought to the attention of the then ANZFA Board in 1998 for revision. Those recommendations were refused and FSANZ proceeded to develop a proposal to regulation nutrition content claims.

CMA (supported by Mandurah Aust, Palatinit GmbH, Kingfood Aust, CMA – NZ Branch, CMA – NSW Branch, CMA – Qld Branch, CMA – Vic Branch, CM of SA, ICA) recommended that 'free' claims (e.g. 'sugar free', 'fat free') should be retained as currently adopted in CoPoNC. With respect to confectionery, they stated that these claims have not raised consumer confusion or complaint over the decade of

CoPoNC’s operation, and remain as valid now as they did in 1995. William Wrigley Junior supported this view.

National Foods strongly supported the principle that consumers should be provided with clear and truthful information about the nutritional properties of food meaning nutrient claims should be reliable and substantiated. They supported a review of the regulatory compliance with the current provisions in the CoPoNC and submitted that CoPoNC is minimum effective legislation, which is working. National Foods did not support the statement (p.18, P293) that government agencies are unable to address products with non-compliant claims with CoPoNC given that fair trading laws permit and support enforcement action, as does the Trade Practices Act.

CHC supported maintaining CoPoNC as a co-regulatory industry standard provided that meaningful, enforceable and timely sanctions can be applied.

NZFGC noted that although CoPoNC is not binding in New Zealand, CoPoNC was drawn to the attention of New Zealand manufacturers when it became apparent harmonisation of food legislation between New Zealand and Australia was to become a reality. NZFGC recommended at that time that member companies comply with the Guidelines.

Griffins Foods questioned whether NZ consumers are aware of the Code of Practice.

NZJBA (supported by Frucor) believed that this question was not applicable to NZ.

1.2 REGULATORY OPTION 2

Question 83

In what circumstances would consumers be prepared to pay higher prices for foods carrying claims?

Out of 147 submitters, 41% (61 in total) directly responded to this question. The distribution of these responses was as follows:

Sector	Australia	New Zealand	Trans Tasman	International	Total
Industry	24	14	4	2	44
Government	4	1	-	-	5
Public health	4	3	-	-	7
Consumers	1	-	-	-	1
Other	4	-	-	-	4
Total	37	18	4	2	61

Overview

The majority of submitters noted circumstances in which consumers would be prepared to pay higher prices for foods carrying claims. These circumstances included perceived health benefits (28), the influence of market forces (17), specific products

(8), proven claims and scientific breakthroughs (5), affordability and perceptions about value for money (4) and health problems (3). Four submitters did not know or were unsure about the circumstances in which consumers would pay more. One-third of submitters did not agree that consumers would or should pay higher prices for foods with claims.

Discussion

Circumstances in which consumers would be prepared to pay higher prices for foods carrying claims included a number of areas as follows:

Perceived health benefits

- Where consumers can see a benefit they may be inclined to pay a higher price, but consumers may not necessarily pay more for such a benefit (Aussie Bodies, AFGC, Masterfoods Aust. NZ, Parmalat Aust);
- Consumers may be prepared to pay a premium for claimed products where they believe it provides them with some benefit such as improved health (Cadbury Schweppes);
- If consumers can afford it and/or if they perceive there to be a real health benefit then they are most likely to pay higher prices (i.e. margarines with plant sterols) (CML);
- Consumers may be prepared to pay a higher price for foods carrying claims if they believed they were beneficial to their health (GW Foods). For example - Flora Pro-Active commands a 400% premium (GW Foods);
- Even lower level 'nutritional claims' help command price premiums e.g.: Weight Watchers +20%, Burgen +50% (GW Foods);
- If consumers can see a benefit with a food carrying a health claim then they may be inclined to pay a higher price, but consumers may not necessarily pay more for such a benefit (Goodman Fielder);
- If there is a clear benefit, e.g. with the cholesterol lowering margarine (PB Foods);
- If they perceive a benefit of a particular product in comparison with others in its category (Wyeth Aust.);
- When the message they receive about the benefits of the product is unequivocal and well understood and the promised benefit is of an 'important' nature, e.g. margarines with plant sterols (NSW Food Authority);
- If foods were designed to provide enhanced health benefits and consumers were readily made aware of this through substantiated claims (Uni. of Adel. & Uni. of SA – Nutrition Physiology Research Grp.);

- Believe consumers will pay a higher price for foods with claims if they think the benefit is worth it (Griffins Foods);
- If the health benefit claimed offered greater value over any savings achieved from purchasing an alternative product (Mainland Products);
- If the food carrying a claim was significantly superior to another brand (Mainland Products);
- If consumers believe that the health claim is a benefit to them and their health (NZ Dairy Foods);
- Where consumers can see a benefit they may be inclined to pay a higher price, but may not necessarily pay more for such a benefit (NZJBA, Frucor);
- Where there is a perceived consumer benefit, consumers may be prepared to pay higher prices for foods carrying claims, but this will be specific to the situation. In many cases placing a nutrition, health or related claim on a product will not result in an additional benefit that consumers will be prepared to pay a higher price for (Unilever Australasia);
- Consumers may be prepared to pay higher prices for foods carrying claims (depending on the context, type of claim and target market) where a benefit is perceived by the consumer, thus influencing their choice, however market forces will naturally occur (CMA (supported by Mandurah Aust., Palatinit GmbH, Kingfood Aust., CMA-NZ Branch, CMA-NSW Branch, CMA-Qld Branch, ICA, CMA-Vic Branch and CM of SA); and
- Dairy Aust. (supported by Parmalat) stated that the dairy industry has proposed that consumers would be willing to pay more for foods carrying a claim:
 - 1 When there is an evident health benefit of a food, over and above its reference food (i.e. regular counterpart).
 - 2 When a consumer ‘perceives’ there to be a health benefit – e.g. consuming margarine containing sunflower oil versus canola margarine.
 - 3 Following advice from a health professional to adhere to a certain diet, e.g. high calcium, low fat, high protein.

Market forces

- Considers the ability to pass on some of the costs to consumers of making claims on a food label is driven by market forces (AFGC, Masterfoods Aust. NZ, Parmalat Aust., Aussie Bodies);
- Marketers will determine the price consumers will pay for particular foods. Foods with strong health claims will be able to attract high prices and consumers will be forced into paying for good health care (CHC);

- Market forces and consumer needs drive demand, as does the price (Dairy Aust., Parmalat Aust.);
- Consumer's preparedness to pay extra for a food carrying a health claim will depend on the context, type of claim and the target market (Goodman Fielder);
- This will be determined by the market (ASA, NPANZ, Assoc. of NZ Advertisers, NZTBC, Naturo Pharm, NZ Magazines, Cadbury Confectionery, NZTBC);
- Ability to pass on some of the costs of making claims on food labels to consumers is driven by market forces (NZJBA, Frucor);
- This will be determined by the market (NZ Magazines);
- Will depend on the context, type of claim and the target market. In many cases placing a health claim on a label will not result in an increase in the price of the food (Aussie Bodies, AFGC, Masterfoods Aust. NZ, Parmalat, NZJBA, Frucor);
- Consumers will pay higher prices for foods carrying claims depending on the context, type of claim and the target market (refer to p.52 of Submission for information relating to the nutritional food product life cycle as it moves from niche to mass market (National Foods); and
- Depends entirely on the particular claim and its attraction to the consumer (F&B Importers Assoc.).

Specific products

- Some consumers are already paying a lot for slimming products (protein drinks etc) (CML);
- Fortification and claims increase the value of the market by charging a premium for a product with claims and bioactive ingredients, vitamins and minerals. Examples in the current market place include still water, fruit juices and breads fortified with ingredients and carrying claims (ASMI);
- The issue is not so much about providing greater information on existing foods, but creating market differentiation on premium benefit foods with additional benefits (real or perceived) (ASMI);
- Believe higher prices would be accepted only if requirements for making health claims are too high and this leads to a narrow range of foods qualifying to carry such claims (DSM Nut. Prod.);
- A market has been found for effective function foods such as sterol containing margarines, which are sold at higher prices than conventional equivalents

demonstrating that consumers are prepared to pay more if the benefit is regarded worthwhile (reference 45 in submission) (NCEFF);

- Believes it is usually only foods with medical type functional benefits (e.g. sterol margarines), which contain higher cost ingredients and have a higher selling price (National Foods);
- Consumers appear willing to pay more for plant sterol enriched margarines or bread with added resistant starch (CSIRO- HS&N);
- Consumers will sometimes pay more for a product sold in a health food store or specialist outlet if it is recommended by the store staff; if it is 'organic', 'cold-pressed' or contains a specific ingredient, or has a benefit not seen in a supermarket equivalent (Nutra-Life H&F); and
- The cost of food prices is dependent on market forces and whether consumers see a benefit in the claim and accept higher prices. This has occurred to an extent with the table spreads containing phytosterols (Nestle).

Proven claims and scientific breakthroughs

- Foods carrying claims if the claims could be proven and wellbeing were to be increased (NCWA);
- Consumers may pay more for foods with claims if there was a definite substantiated personal benefit to well-being and health (CSIRO- HS&N);
- Consumers would be willing to pay a higher price for food carrying a claim especially if its proven and publicised (Public Health South);
- If the science behind the claim was truly breakthrough and highly significant in terms of efficacy for a particular consumer or at risk segment of the population, then there is every likelihood that higher prices would be paid (Solae Comp, National Starch); and
- Notes that Raisio, the company behind the development of the first cholesterol lowering margarine (using plant stanols) sold the product at a significant premium (Solae Comp. National Starch).

Affordability and perceptions about value for money

- If consumers could afford to pay higher prices (TCCA);
- Presence of a claim is only one component in an individuals overall decision making process, other things impact including perception of value for money, presence of other nutrients/anti-nutrients, taste, cultural, presence or absence of disease etc. (Diabetes Aust., GI Ltd);

- Foods carrying claims charge more (e.g. Logicol and ProActiv margarines) and both sell well. Food industry marketing seminars talk about the higher prices that can be charged for the health conscious market and this is a prime motivator for wanting health claims (Dr R. Stanton); and
- Raises issues in relation to equitable application of policy. Those on lower incomes have the greatest burden of diet related disease and yet if healthier food choices are more expensive because of claims, then they are less affordable to those who may need them the most. Also refer to comments by the NSW Food Authority (NSW DoH – N&PA Branch).

Health problems

- Where consumers are faced with a higher risk of a health problem (e.g. family history of a major illness or diagnosis of a high risk factor) (TCCA);
- Intuitively they assume that people with particular health problems may choose food with claims but are unaware of any research to prove this (Diabetes Aust., GI Ltd); and
- People with diabetes already register a substantial level of complaint about the cost of a healthy or 'diabetic' diet, which is largely due to misconceptions, but health claims may tend to promulgate such a view/misconception (Diabetes Aust.)

Some submitters did not know or were unsure as to the circumstances in which consumers would be prepared to pay higher prices for foods carrying claims.

- Do not know (Dr C. Halais);
- Currently unknown but is likely to depend on the value consumers place on nutrition and health claims. Consumer research will need to cover this question (NSW DoH – N&PA Branch);
- Unsure. However, this raises issues in relation to equitable application of policy, with those on lower incomes with greatest burden of diet related disease (AIHW, 2004) and yet if healthier food choices are more expensive because of claims, they are less affordable to those who may need them the most (Monash Uni-N&D Unit, SA DoH, WA DoH, NSW DoH – N&PA Branch);
- No information available (NZFSA);
- Food Commission research, in the UK, has indicated that prices for foods marketed as 'healthy' are about 50 per cent higher than for 'normal' products in the same category and some products were found to cost ten times the price of comparable food without the health claim (FSA, 2003). (WA DoH); and

- It can be expected that properly regulated nutrition, health and related claims would create a segmented market and products with approved claims will demand a premium price whilst the others will have to compare with other non-health related products. Without adequate regulations, products with unapproved health claims would also demand a premium price, thus inflating the cost to the consumer without recognised benefits (WA DoH).

Some submitters did not agree that consumers would pay higher prices for foods with claims.

- There is little evidence to support that foods with claims may be more expensive and therefore less affordable by those at greatest nutritional risk (provides a table in answer to this question which displays prices of fortified products carrying a nutrition content or function claim versus standard products)(NCEFF);
- Do not believe that allowing health claims on food will necessarily impact on pricing (ANIC);
- If a nuts and heart disease HC was allowed, there would be no cost increases to the industry that would need to be carried through to consumer pricing (ANIC);
- Many foods should not be any more expensive as a result of being able to carry claims (Cadbury Schweppes);
- The price of foods won't necessarily increase as a result of including a nutrition, health or related claim, e.g. Tip Top bread with omega 3 (no price increase), A2 milk (price premium), and Margarines with added plant sterols (price premium). (Dairy Aust., Parmalat Aust.);
- In many cases placing a health claim on a label will not result in an increase in the price of the food (Goodman Fielder, National Foods); and
- In many cases placing a HC on a food will not necessarily trigger higher priced product (CMA (supported by Mandurah Aust., Palatinit GmbH, Kingfood Aust., CMA-NZ Branch, CMA-NSW Branch, CMA-Qld Branch, ICA, CMA-Vic Branch and CM of SA).

Other submitters did not agree that consumers should pay higher prices for foods with claims.

- Premium pricing should be avoided as it can only lead to increased disparities in health (Auckland Reg. PHS);
- Believe consumers may be unaware that the cost of making claims would be passed onto them. Do not think consumers should be covering the costs of the claims (Public Health South);

- As a public health organisation, they would not like to see higher costs associated with healthier food choices (TCCA);
- Recommends that as a public health/food security measure, initiatives that increase the cost of healthy/beneficial foods should be resisted (Diabetes Aust.); and
- Considers that the higher prices for these products works against public health considerations since those who are most in need of healthier food products have the lowest incomes. (Dr R. Stanton).

Other comments

- Costs of using such premium-priced products are significantly less than other alternatives such as over the counter cholesterol-lowering complementary medicines (NCEFF);
- For high level claims manufactures may incur additional costs for conducting clinical studies and preparing and lodging submissions to FSANZ and this may be at considerable cost. Manufacturers will have to gauge as to whether or not they will increase the cost of their goods in order to recover these costs (Cadbury Schweppes);
- Hopefully as the consumption of products, like fruit & vegetables increases, prices should come down (CML);
- Notes that an increase in food prices raises concern that health claims could contribute to food insecurity and add to the problem of inequalities in health (Public Health South);
- Consumers are generally cynical and expect their foods to provide benefits without additional costs (CSIRO- HS&N);
- Considers price to be the main arbiter for products deemed to be "commodity" items (i.e. without distinct characteristics separating it from similar products) (Nutra-Life H&F); and
- Refer to National Heart Foundation of Australia (NHF NZ). (FSANZ noted that there was no response from the Australian foundation).

Question 84

Under Option 2, is there a risk of consumers losing a whole of diet perspective when choosing food?

Out of 147 submitters, 47.0% (69 in total) directly responded to this question. The distribution of these responses was as follows:

Sector	Australia	New Zealand	Trans Tasman	International	Total
Industry	26	13	4	2	45
Government	5	1	-	-	6
Public health	8	4	-	-	12
Consumers	2	-	-	-	2
Other	4	-	-	-	4
Total	45	18	4	2	69

Overview

Thirty-two percent of submitters (22) stated that under Option 2, there was a risk of consumers losing a whole of diet perspective when choosing food. However, similar numbers (17) disagreed, and stated there would be no risk. Four submitters indicated there was a ‘minimal’ risk and another 12 submitters implied there was no risk or that there was no evidence of risk. Some submitters were not aware of research demonstrating that consumers have a ‘whole of diet perspective’ when choosing foods.

Yes, a risk

Twenty-two submitters stated that under Option 2, there was a risk of consumers losing a whole of diet perspective when choosing food (NCWA, TCCA, Diabetes Aust., DAA, NZDA, Dr C. Halais, GI Ltd, PHAA (supported by ACA), ASMI, Aussie Bodies, Cadbury Schweppes, CML, CHC, Wyeth Aust., NSW DoH –N&PA Branch, NSW Food Authority, SA DoH, WA DoH, Monash Uni. – N&D Unit, Auckland Reg. PHS, Public Health South).

Reasons and/or further comments made by these submitters were as follows:

- Only if the changes are implemented without substantial and broad based education (Aussie Bodies);
- NCWA emphasised a ‘real’ risk. Public Health South emphasised a ‘substantial’ risk that health claims would lead consumers to focus on individual foods and therefore lose a whole of diet perspective when choosing food;
- An example is calcium-fortified foods as a preference to dairy, as opposed to examining other sources of naturally occurring calcium (ASMI);

- The ‘whole of diet’ perspective will be affected by not having a guideline only for all general level claims. The risk is that consumers will not be provided consistent information (by manufacturers not following the guideline) resulting in uninformed choices being made as to the foods they eat (Cadbury Schweppes);
- The risk would be greater under option 2 because general claims may not in fact be compliant or adequately enforced, if only covered by a guideline (CML);
- Marketers may create a situation whereby consumers are favouring a particular range of foods based on false assumption that they do not require whole-of -diet perspective when choosing their foods (CHC);
- There is a very real risk of consumers losing a ‘whole of diet’ perspective under both options two and three as it is inherently a risk of allowing nutrition and health claims per se (NSW DoH –N&PA Branch);
- While the evidence of this [risk] is scant, there are some studies that indicate this. It is difficult to know the likely impact or nutritional significance of these effects, but it may result in food choices that result in a diet that is inconsistent with dietary guidelines. Food choices can be strongly influenced by what consumers believe they are consuming (PHAA (supported by ACA), SA DoH, Monash Uni. – N&D Unit). The latter submitter also gave the example of a low fat diet, which may result in a diet higher in energy;
- Data from Caputo and Mattes (1993) suggests that consumers might select higher fat diets in conjunction with the belief that they are consuming reduced fat items. Use of ‘low’ and ‘reduced’ fat foods can result in lower fat intakes but not necessarily lower energy intakes because consumers either compensate for reduced energy density of fat modified foods (Gatenby et al 1995) or because the fat modified products themselves are no less energy dense than the regular fat product. (Crowe et al 2004);
- The ‘American Paradox’ whereby obesity rates are increasing despite the proliferation of reduced fat, sugar and energy products on the market, is testament to the likely effects of consumers acting on their beliefs about the composition of ‘modified’ foods (Allred, 1995);
- This is why any system to regulate nutrition, health and related claims must be evaluated for the potential for harm associated with changes in dietary choices (PHAA (supported by ACA), SA DoH); and
- Option 2 has a higher degree of risk in terms of the health outcomes for the Australian population. There is potential for voluntary guidelines for general level health claims to allow a large number of vague or misleading claims, which could lead to distortion in the national diet over time. More responsible claims would be diluted (WA DoH).

No risk

Seventeen submitters stated that under Option 2, there would be no risk of consumers losing a whole of diet perspective when choosing food (Bakewell Foods, DSM Nut. Prod., GW Foods, National Starch, Solae Comp., ASA, NPANZ, Assoc. of NZ Advertisers, NZTBC, Naturo Pharm, NZ Magazines, Cadbury Confectionery, Griffins Foods, NZFGC, NZFSA, Nestle, Unilever Australasia).

Reasons and/or further comments made by these submitters were as follows:

- No, if accompanied by a good education campaign (Bakewell Foods);
- As long as appropriate education is provided to enable them to make informed choices (Griffins Foods);
- Believe that a sufficient variety of foods within categories that consumers normally eat would ensure that normal eating habits are retained (DSM Nut. Prod.);
- All food producers can make claims, including those of fruit & vegetables and therefore it is a fair playing field that enables a whole diet approach. Most consumers would know that fruit & vegetables are good for them, just like they know too much fast food is not good for their health. Claims help guide the consumer when making food choices within a category (GW Foods);
- Claims will be couched in terms of the diet. In addition, claims will be presented within an environment that includes Dietary Guidelines as well as pre-approved claims, which are very much directed towards the whole diet. (Solae Comp, National Starch);
- Claims must be made within the context of a total balanced diet (ASA, NPANZ, Assoc. of NZ Advertisers, NZTBC, Naturo Pharm, NZ Magazines, Cadbury Confectionery) or within the context of a whole of diet perspective (NZFGC);
- The policy guideline provides that health claims are made in the context of the total diet whether these are general level or high level claims (Nestle); and
- Consumers choose particular types of food and claims may inform an individual choice of a particular type of food (Unilever Australasia).

Minimal risk

Four submitters indicated that under Option 2, there is minimal risk of consumers losing a whole of diet perspective when choosing food (F&B Importers Assoc., Dairy Aust., Parmalat Aust., PB Foods)

Specific comments were noted as follows:

- Very small risk, if at all (F&B Importers Assoc.);
- There would be minimal risk of consumers losing a ‘whole of diet’ perspective. General level claims regulated predominantly through a voluntary guideline have been in the market place for some time within Australia, without consequence of consumers losing a ‘whole of diet’ perspective. Internationally, health claims have also been implemented again without evidence of negative consequence on ‘whole of diet’ (Dairy Aust., Parmalat Aust.);
- The Policy Guidelines stipulate that health claims must be made in the context of the total diet. The Policy Principles support claims that promote healthy food choices by the population and that align with national policies and legislation relating to nutrition and health promotion (Dairy Aust., Parmalat Aust); and
- Low risks, as there are other more relevant factors influencing consumer choice, such as freshness, convenience, taste etc (PB Foods).

Some submitters implied that under Option 2, there was no risk (or no evidence of risk) of consumers losing a whole of diet perspective when choosing food.

These responses were as follows:

- No evidence to support that position (NZFSA);
- Unaware of any evidence to suggest consumers would lose a whole of diet perspective when choosing food under option 2. Instead, consumer research suggests there are many factors which impact on food choice, including social, psychological, cultural, financial, educational, personal requirements, accessibility etc. Impact of these factors will depend on an individuals personal circumstances and therefore it is not possible to predict how health claims would impact on food choice at a population level (MLA);
- Understands that health claims will be made in the context of the total diet, which should overcome the concerns of consumers losing sight of the whole-of-diet perspective when choosing food (CMA supported by Mandurah Aust., Palatinit GmbH, Kingfood Aust., CMA-NZ Branch, CMA-NSW Branch, CMA-Qld Branch, ICA, CMA-Vic Branch and CM of SA).

Some submitters were not aware of research demonstrating that consumers have a ‘whole of diet’ perspective when choosing foods.

- Consumers choose food principally on the basis of fat-reduced claims (from various market research papers, including good Business Sense) and much less consideration is given to sodium or kilojoule content (Dr R. Stanton);

- Not aware of any research demonstrating that consumers have a ‘whole of diet’ perspective when choosing foods (AFGC, Masterfoods Aust. NZ, Parmalat Aust., ABC);
- The Policy Guideline states that health claims be made in the context of the total diet, providing consumers with a whole of diet perspective when making the food selection (AFGC, Masterfoods Aust. NZ, Parmalat Aust., Goodman Fielder); and
- Consumers do not necessarily have a whole of diet perspective when choosing foods (Goodman Fielder).

Other submitter responses

- The risk is no more than under any other option (Mainland Products);
- The risk is a possibility but believes that this is already happening through the use of dietary supplements (NZ Dairy Foods);
- There is greater likelihood that consumers will have a better understanding of the whole diet perspective, because they appear to have a greater interest in the overall role of the diet (Nutra-Life H&F);
- This risk currently exists from health supplement use. Health claims will reduce this risk by enabling consumers to access more dietary information, and will aid instruction on the importance of using functional foods in a whole-of-diet perspective (Uni. of Adel. & Uni. of SA – Nutrition Physiology Research Grp.);
- A number of overseas experimental studies indicate that consumers do tend to rate products more favourably when health claims are present (see references 46-48). However this “halo” effect is tempered by consumers’ natural scepticism about all claims made by food manufacturers for their products. Furthermore when a NIP is present, consumers use this information and can correctly interpret the NIP even in the presence of contradictory health claims (See reference 49) (NCEFF);
- Two studies have concluded that consumers are unlikely to incorrectly believe that consumption of a product alone will reduce disease risk (see references 42, 50), so it seems that the whole of diet perspective is not necessarily lost in the presence of claims (NCEFF);
- It will be essential to collect information about this through the consumer surveys proposed by FSANZ as part of the ongoing monitoring process.
- It should also be addressed in ongoing National Nutrition Surveys needed to monitor the effects of changes in the food supply on dietary behaviour and intake (Nutrition Aust.);

- Not convinced consumers lose a ‘whole of diet’ perspective when choosing food as this doesn't appear to be the case internationally, where health claims have been implemented (National Foods);
- Recommends FSANZ support health professionals in educating individuals about health claims in relation to health messages and dietary advice. These health professionals to include those from food industry, service organisations e.g. Dairy Australia; State and Territory governments; non-government organisation such as the DAA, NHF, Diabetes Australia; and University Departments of Nutrition, Dietetics and Food Science (National Foods);
- Any system to regulate nutrition, health and related claims must be evaluated for the potential for harm associated with changes in dietary choices, as there is limited evidence available on the impact of health claims on food choices (Tas DoH & HS);
- As outlined throughout this submission, NSW Health has recommended rigorous substantiation and monitoring processes and the inclusion of measures to prevent deceptive conduct to ensure that pre-approved general and high level claims have the potential to provide a consumer benefit;
- It will be very important that the consumer education campaign that accompanies the introduction of health claims communicates the ‘whole of diet’ context of health claims very clearly (NSW DoH – N&PA Branch);
- 'Whole of diet perspective' is a meaningless phrase e.g. plant sterols and omega 3 fats will work whether the diet is high or low in fibre, fat, protein or salt. The global impact of the diet may be greater if it is a healthier diet (CSIRO-HS&N);
- Recommend any system to regulate health claims must be evaluated for potential for harm associated with changes in dietary choices (Monash Uni. – N&D Unit);
- As outlined throughout this submission, NSW Health has recommended rigorous substantiation and monitoring processes and the inclusion of measures to prevent deceptive conduct to ensure that pre-approved general and high level claims have the potential to provide a consumer benefit (NSW DoH –N&PA Branch);
- It will be very important that the consumer education campaign that accompanies the introduction of health claims communicates the ‘whole of diet’ context of health claims very clearly (NSW DoH –N&PA Branch); and
- NHF NZ referred to the submission by National Heart Foundation of Australia (NHF NZ). FSANZ noted that there was no response from the Australian foundation).

Question 85

To what extent could this risk be addressed through education and the efforts of health professionals?

Out of 147 submitters, 38.8% (57 in total) directly responded to this question. The distribution of these responses was as follows:

Sector	Australia	New Zealand	Trans Tasman	International	Total
Industry	22	11	3	2	38
Government	5	1	-	-	6
Public health	7	2	-	-	9
Consumers	2	-	-	-	2
Other	2	-	-	-	2
Total	38	14	3	2	57

Overview

Nearly 40 per cent of submitters (21) considered that the risk of consumers losing a whole of diet perspective when choosing food could be addressed, through education and the efforts of health professionals, to various extents including: 'mostly', 'highly', 'extensively', 'considerably', 'substantially', and 'greatly'. The issue of adequate funding in order to be able to do this was raised. Eleven submitters agreed or implied that this risk could be addressed to a 'limited' extent. Two submitters believed the extent to which this risk could be addressed was not possible to quantify. Seven submitters did not believe there is a risk of consumers losing a 'whole-of-diet' perspective when choosing food.

The risk could be addressed

Nineteen submitters considered that the risk of consumers losing a whole of diet perspective when choosing food could be addressed through education and the efforts of health professionals to the various extents as outlined in the comments below:

- Mostly (Aussie Bodies);
- Considers the extent to be high, so long as there are resources to fund a substantial education program. Notes that the term 'health professional' is commonly used in the therapeutic industry to represent a naturopath or somebody that has medical training. Referencing this term in foods will create confusion in the mind of the consumer and may lead to the risk of a consumer seeking the wrong advice on their therapeutic health care. The role of dietician needs to be clearly defined so that there is no confusion in the consumer's mind (CHC);
- Appropriate consumer communication and education strategies would work to help minimise this risk, carried out by health professionals, government, non-government organisations, and the food industry and enforcement agencies, service organisations such as Dairy Australia and the Meat and Livestock Australia. If these communication and education activities are prohibited or

restricted secondary to legislation by FSANZ (i.e. high level health claims), there is the possibility for the impact on ‘whole of diet’ to be extensive (Dairy Aust. supported by Parmalat Aust.);

- Consumer education would considerably minimise the risk of losing a whole-of-diet perspective (DSM Nut. Prod.);
- Education materials and dissemination of nutrition information will help provide a whole of diet context. Health professionals play an important role in providing guidance in food selection (MLA);
- Health professionals could substantially address this risk. There is already an extensive network of nutrition education in operation in Australia and New Zealand. The inclusion of health claims topics in curricula will also go a long way to addressing this issue (NCEFF);
- This would be minimised given an appropriate and effective education campaign, which should be conducted in conjunction with the introduction of this standard (NSW Food Authority);
- This would go a long way. It’s really back to basics for consumers who will need to get an appreciation of how the system will work for them, what they can expect to see, and how they can know that they can trust the claims. Over time the consumer will benefit (ASA, Cadbury Confectionery, NPANZ, Assoc. of NZ Advertisers, NZ Magazines, NZTBC, Naturo Pharm);
- Although educating health professionals is good, consumers are the ones who need education (Naturo Pharm);
- The risk could be addressed to a reasonable extent, depending on the resources allocated to such an effort (Mainland Products);
- It can and should be reduced. Whole of diet perspective is probably the most important health message that needs to be conveyed (NZ Dairy Foods);
- Greatly, education is vital to consumer understanding of health claims (NZFSA); and
- The risk could be addressed through education and the efforts of health professionals if adequate finance is provided for this to be done, and coordination could occur so that consistent public health messages are provided (NCWA).

Two submitters implied that education and the efforts of health professionals would minimise this risk:

- Ongoing education at both the Government and health professional level will be important as a means to address serious diet-related health issues in Australia and New Zealand. These efforts would ensure the entire diet and

lifestyle message is communicated, thus preventing a potential for skewing eating patterns in favour of foods with health claims (National Starch, Solae Comp.).

To a limited extent

Eleven submitters considered that the risk of consumers losing a whole of diet perspective when choosing food can be addressed through education and the efforts of health professionals to a limited extent (TCCA, CML, Wyeth Aust., PHAA (supported by ACA), SA DoH, WA DoH, Monash Uni – N&D Unit, Tas DoH&HS, NSW DoH – N&PA Branch). Auckland Reg. PHS also implied this. Dr C Halais considered the extent to which this could be addressed was poor.

Reasons and/or further comments made by these submitters were as follows:

- As previously mentioned, they would welcome a funding levy (e.g. the investment of 1% of the food industries substantial advertising budget) to conduct public education on nutrition and food. Believe that an ongoing, credible and well-resourced source of information on food, nutrition and health would be beneficial in ensuring informed food choices (refer also to their response to question 61 (TCCA));
- Education would only have limited effect and traditionally these government sectors only have very limited resources for these types of activities (CML);
- Although education programmes and communication through health professionals would be helpful as part of an overall communication strategy, they would not completely address the issue. Nutrient content and nutrient function messages should be allowed on packaging, as labelling is an important source of information for those consumers who prefer not to seek dietary advice from health professionals (Wyeth Aust.);
- The extent to which education and efforts of health professionals can assist in addressing inappropriate food choice behaviours is limited due to inadequate funding and workforce to support such efforts (Tas DoH&HS) and the inability to match advertising by food manufacturers, which equates to billions of dollars each year (Nestle 2002) and is likely to be the main source of information regarding nutrition, health and related claims (PHAA (supported by ACA), SA DoH, WA DoH, Monash Uni – N&D Unit);
- Education alone is inadequate as a health promotion strategy. Education approaches on their own can aggravate an already widening gap in health status between the advantaged and disadvantaged. Considers industry could contribute to an independent education fund for health claims and advertising to address concerns that public funded education efforts will not match the scale of funds contributed by industry to promote health claims. (Tas DoH&HS);
- Notes evidence from two large reviews of the literature indicates that nutrition education “works” but that it needs to be ongoing and multifaceted because

dietary behaviour change is not short term work and the forces that encourage people to adopt less healthy food choices do not stop (Contento 1995 and Health Education Authority 1997) (PHAA (supported by ACA), Tas DoH&HS, SA DoH, WA DoH, Monash Uni – N&D Unit);

- There is limited capacity for health professionals to address these risks through education. In NSW, the public health nutrition workforce is small and there are many competing priorities. Without an appropriately resourced education strategy by FSANZ, education efforts would likely be patchy and not reach a substantial portion of the population. Consumer education on the basic principles of the health claims system needs to be a nationally funded campaign rather than the responsibility of health professionals (NSW DoH – N&PA Branch); and
- There would be minimal benefit in addressing risks through education. What is the need to create a need for an education campaign to explain health claims when health claims are unlikely to sufficiently address important health issues? (Auckland Reg. PHS).

Not possible to quantify

Two submitters believed the extent to which this risk could be addressed was not possible to quantify (Diabetes Aust., GI Ltd). The inadequacy of the public health and primary care nutrition and workforce was also noted (Diabetes Aust.).

No risk of losing ‘whole of diet’ perspective

Seven submitters did not believe there is a risk of consumers losing a "whole-of-diet" perspective when choosing food (ABC, AFGC, Masterfoods Aust. NZ, Goodman Fielder, Parmalat Aust., Nestle, Nutra Life H&F).

Further comments made by these submitters were as follows:

- However health professional should play a role in educating individuals about health claims in relation to health messages and dietary advice (AFGC, Masterfoods Aust. NZ, Goodman Fielder, Parmalat Aust.);
- However, health professionals have and should continue to educate and promote dietary advice to consumers and especially have a role to play in continuing their promotion of the health benefits of different foods (Nestle);
- Don't believe risk will be a problem except in rare cases where the consumer has a fetish about food and behaves irrationally when selecting food (Nutra Life H&F); and
- Nestlé believes that education to consumers and their families that suffer from particular diseases should not be included in this legislation. In order for public health bodies, other health professionals and associations such as Diabetes Australia to provide consumers with information about particular foods and their role in the overall diet, it will be necessary for manufacturers

to provide information about those foods through to these groups. The information provided in this way should not be considered as subject to this standard.

Other responses

The remaining submitters did not specifically answer the question but raised issues in relation to the provision of education, as detailed in the comments below.

- There should be better communication links between food manufacturers, government, doctors and other health professionals. Government should facilitate this (PB Foods);
- It would be more beneficial to public health if money was spent promoting the NZ Food and Nutrition Guidelines rather than on educating the public about confusing and misleading health claims (Public Health South);
- The education process that will need to accompany the introduction of health claims will play a part in ensuring consumer understanding and confidence in the system. This will be an essential element and will be supported by non-government organisations and industry (CMA supported by Mandurah Aust., Palatinit GmbH, Kingfood Aust., CMA-NZ Branch, CMA-NSW Branch, CMA-Qld Branch, ICA, CMA-Vic Branch and CM of SA); and
- The risk may be overcome by education and health professionals but this will be reliant on consumer still being able to interpret information that manufacturers provide and being able to differentiate between a food that has complied with the guideline and one which does not. Consistent information to consumers greatly reduces the risk that information will be misinterpreted (Cadbury Schweppes).

Funding

- Health professionals have scant resources. Despite the efforts of many health professionals, the sales of low fat or fat reduced products where the fat has been replaced by some other source of kilojoules, has not been halted. Advice provided by Nestle is that the amount spent on advertising one candy bar or soft drink exceeds the entire year's educational budget for the National Cancer Council's program for '5 a day' (Dr R Stanton);
- Education and health professionals can assist in guiding appropriate food choices but unless these activities are adequately funded they cannot compete with industry advertising budget (Nutrition Aust.); and
- For the risk to be addressed through education and the efforts of health professionals would require dedicated commitment to funding such activities, particularly in context to National Health Priorities (ASMI).

Question 86

Under Option 2, what would be the impacts on consumers of including a greater range of claims in a Guideline, which is not legally enforceable?

Out of 147 submitters, 47.0% (69 in total) directly responded to this question. The distribution of these responses was as follows:

Sector	Australia	New Zealand	Trans Tasman	International	Total
Industry	25	15	3	3	46
Government	5	1	-	-	6
Public health	8	3	-	-	11
Consumers	2	-	-	-	2
Other	4	-	-	-	4
Total	44	19	3	3	69

Overview

Some submitters stated that the impacts on consumers of including a greater range of claims in a guideline, which is not legally enforceable, would be: confusion and/or lack of confidence; an increase in misleading claims (which might result in adverse health effects), financial implications or other associated risks to public health.

Twenty-two industry submitters rejected the assertion that guidelines are not legally enforceable. However, three submitters considered that the current lack of compliance with CoPoNC provides rationale as to why a legally enforceable standard is required. Other submitters considered that the situation under Option 2 would be very similar to the current position with CoPoNC. It was also noted that compared to a standard, a guideline could be updated more easily which would improve consumer choice.

Confusion and lack of confidence

A number of submitters responded that the impacts on consumers of including a greater range of claims in a Guideline, which is not legally enforceable, would result in confusion and/or lack of confidence to consumers, as outlined in the following comments.

- This would generate confusion and lack of confidence in an unenforceable regime (TCCA);
- Even worse confusion for the consumer (Dr C Halais);
- Without an education process, a greater range of claims may also confuse consumers, especially if manufacturers were able to make claims that previous they could not. Consumers may question what has changed in the food to enable the claim to be made. A greater range of claims may result of greater range of misinformation to consumer (Cadbury Schweppes);
- Risk of a proliferation of dubious and potentially confusing claims, which would in turn jeopardise the effectiveness of the whole standard and reduce

the potential of health and nutrition benefits arising out of claims (NSW Food Authority);

- Consumers would be suspicious if they know the Guideline was not enforceable and it would devalue claims (CSIRO - HS&N);
- Under Option 2, the impact would be less reliability and undermining consumer trust (Uni of Adel. & Uni of SA – Nutritional Physiology Research Group); and
- Potential for confusion and more disdain for a ‘mixed message’ environment (Auckland Reg. PHS).

Misleading claims and adverse health effects

Some submitters made comments relating to the use by manufacturers of misleading claims, resulting in adverse health effects or associated risks to consumers, if Regulatory Option 2 is implemented, as follows:

- It may have adverse health effects if misleading claims cause consumers to purchase and eat greater quantities of foods high in fat, sugar, energy and/or sodium (TCCA);
- Like the current situation, consumers will be exposed to a greater range of false or misleading claims, which may lead them to purchase foods, they otherwise wouldn't. This may be detrimental to consumers' health and may undermine their confidence in the regulatory system (Diabetes Aust., GI Ltd);
- Consumers are more likely to be exposed to false or misleading claims under Option 2 than under Option 3. Consumers would suffer financially through purchase of products that are likely to be more expensive but without added benefit (DAA, NZDA);
- There is even the possibility that consumers' health could be adversely affected (DAA, NZDA);
- Under Option 2, consumers would be subjected to even more misleading claims on products that did not follow the guideline (Dr R Stanton);
- If there is a greater range of claims included in a guideline, there is higher risk of non-compliance with the guideline (due to difficulty with enforcement), which could result in misleading, and deceptive claims (Tas DoH&HS, PHAA (supported by ACA), Monash Uni – N&D Unit, SA DoH), which could adversely affect dietary intake (WA DoH);
- Do not think health claims should be permitted but if they are, and were not legally enforceable it would pose a significant risk to consumers, as the food industry would have the opportunity to breach guidelines (Public Health South);

- If the claims are not legally enforceable then there will be some claims made that stretch credibility of the food or benefit, are not ethical or false claims (NZ Dairy Foods);
- Guidelines do not provide a level playing field therefore there is potential for consumers to be misled (NZFSA);
- Perhaps less protection against unsubstantiated claims and greater vulnerability to marketing/advertising (NCWA); and
- The negative impacts on consumers, noted by NSW DoH – N&PA Branch, are likely to be:
 - Flooding of the market place with products carrying general level claims due to the less rigorous procedure for making a claim;
 - Higher risk of many products carrying misleading claims;
 - Inability of enforcement agencies to have these claims removed;
 - Lack of consumer confidence in the truthfulness of claims;
 - Poor protection of public health and safety.

Inconsistency

- The main impact on consumers of including a greater range of claims that are not legally enforceable, is that it cannot guarantee that all claims are made under identical criteria and conditions, levels of substantiation etc (Griffins Foods).

Level of compliance/enforceability

Comments were made in response to this question regarding whether the Guideline would be legally enforceable or not.

Twenty-two submitters rejected the assertion that guidelines are not legally enforceable:

- In particular with reference to ACCC law (ABC);
- Guidelines are legally enforced through provisions of State and Territory food and fair trading acts and the Trade Practices Act (AFGC, Masterfoods Aust. NZ, National Foods, Parmalat Aust., Nestle, Goodman Fielder);
- A guideline is equally as enforceable as a standard (AFGC, Masterfoods Aust. NZ, Parmalat Aust.);
- Guidelines are legally enforceable through fair trading laws (NZJBA, Frucor, CMA supported by Mandurah Aust., Palatininit GmbH, Kingfood Aust., CMA-NZ Branch, CMA-NSW Branch, CMA-Qld Branch, ICA, CMA-Vic Branch and CM of SA);

- Claims must be substantiated and not misleading (Fonterra supported by Mainland Products); and
- All claims must be substantiated and there must be compliance with the Fair Trading Act and hence claims cannot be misleading or deceptive (NZFGC).

Other comments indicating that submitters considered the Guideline would have some degree of legal enforcement were:

- The ACCC provides an effective and powerful enforcement of the regulation of false, misleading or deceptive food labelling or advertising (National Foods);
- Guidelines provide strong evidence to the Courts of industry practice and a prima facie threshold as to what may be considered misleading, misleading/inaccurate claims are prohibited under the Fair Trading legislation (Fonterra supported by Mainland Products);
- Legislative remedies already exist for false, misleading or deceptive labelling or advertising of foods through the fair trading legislation and ACCC are a powerful enforcement body. Williams et al (2003) found that 87% of food labels have complied with either CoPoNC or the old FSC and the rate of non-compliance was similar amongst claims regulated by each one (Dairy Aust.);
- Although the Guidelines may be misused, there is the potential of developing a Standard that forces companies which make a claim to comply with the guidelines (as per the ATO approach). Additional consumer protection would exist in the form of a vigilant and proactive watchdog that deals with misleading behaviour, in addition to the potential for involvement of the ACCC and/or NZCC (National Starch, Solae Comp.);
- This might be an issue for enforcement by Environmental Health Officers but discussions with lawyers confirmed that guidelines are used to judge misleading and false statements when no standards are present (PB Foods);
- Guidelines must be supported by industry self-regulation and backed up by recourse to the regulator to deal with non-compliance (Naturio Pharm);
- By alignment of government agencies endorsing a guideline, this will act to reinforce compliance by manufacturers whilst at the same time retaining a degree of flexibility to meet changing consumer needs (William Wrigley Junior); and
- It provides a benchmark for their understanding, even if there is no enforcement. They will become the arbiters once they understand the guidelines (Aussie Bodies).

It was recommended that if compliance and enforcement of the Guideline proves to be ineffective (as with CoPoNC), there is an acknowledged commitment to reviewing

regulation of health claims with a view to moving general level claims to a Standard (CMA supported by Mandurah Aust., Palatinit GmbH, Kingfood Aust., CMA-NZ Branch, CMA-NSW Branch, CMA-Qld Branch, ICA, CMA-Vic Branch and CM of SA).

Non-compliance

Four submitters appeared to disagree with the above comments.

They stated that under Option 2, if the guideline is not legally enforceable, companies are unlikely to comply in order to maintain market share (ASMI, CHC, TGACC). This is already the case where the general prohibition on claims should be enforceable under State legislation, but is not (ASMI, TGACC). The current lack of compliance with CoPoNC provides rationale as to why a legally enforceable standard is required (ASMI, CHC, TGACC).

There is at least the same and probably higher risk of non-compliance with a Guideline because it will allow a wider range of claims than the current CoPoNC (Nutrition Aust.).

Similar position as to now

Other submitters considered that the situation under a Option 2 would be very similar to the position we are now with CoPoNC (CML, Dairy Aust., Parmalat Aust.). DSM Nut. Prod. considered that the impacts should be minimal.

Greater choice

A number of industry submitters considered that the use of a Guideline would facilitate improved choice for consumers, as follows:

- There would be improved consumer choice, as a guideline can be regularly reviewed and those claims which are no longer of benefit to consumers can be replaced with better guidance to assist consumers in making informed choices (AFGC, Masterfoods Aust. NZ, GW Foods, MLA, National Foods, Parmalat Aust., NZJBA, Frucor, Nestle);
- Including a wider range of claims would only improve consumer choice and the ability for manufacturers to market products according to the real health benefits (Goodman Fielder);
- Impact to consumer is improved flexibility, relevance and scope of claims, as a guideline may be more easily updated than a standard (Fonterra supported by Mainland Products);
- Providing consumers with greater range of claims may enable them to make informed choices about the foods they buy and eat (Cadbury Schweppes);
- The use of a Guideline will offer consumers a greater range of claims offering improved consumer choice (CMA supported by Mandurah Aust., Palatinit

GmbH, Kingfood Aust., CMA-NZ Branch, CMA-NSW Branch, CMA-Qld Branch, ICA, CMA-Vic Branch and CM of SA);

- Being a Guideline would allow for general level health claims to be updated regularly to ensure consumers were exposed to scientifically valid health claims – which may in turn improve consumer confidence. It would allow consumers increased food choice (more products bearing a health claim) and improve knowledge on which to base food selection (Dairy Aust., Parmalat Aust.);
- There should be no adverse impact on the consumer. The fact such criteria are in a Guideline means they are more responsive to being amended if new information as it comes to hand. This would have a beneficial impact on consumers (NZFGC);
- Provide more information to consumers (F&B Importers Assoc.);
- A Guideline would provide flexibility for manufacturers to inform consumers about product content. The wider variety of information about products would enable consumers to exercise greater informed choice about the foods they eat. A faster Guideline review process would enable consumers to receive important new information more quickly (Wyeth Aust.); and
- It may help a whole of diet perspective, but do not believe that it will be a problem (ASA, Cadbury Confectionery, NZ Magazines, NZTBC, NPANZ, Assoc. of NZ Advertisers).

Other comments provided but not in direct response to the question

A voluntary code of practice or guideline is not enforceable. It will be easier for manufacturers to breach the guidelines without having enforcement action taken against them. Therefore Option 2 does not adequately protect consumers from false and misleading health claims, which in turn will not sufficiently protect public health and safety (ACA).

Question 87

To what extent would consumers use additional information presented in health claims and in what circumstances would this be of benefit to them?

Out of 147 submitters, 40.1 % (59 in total) directly responded to this question. The distribution of these responses was as follows:

Sector	Australia	New Zealand	Trans Tasman	International	Total
Industry	25	12	4	2	43
Government	3	1	-	-	4
Public health	6	2	-	-	8
Consumers	2	-	-	-	2
Other	2	-	-	-	2
Total	38	15	4	2	59

Overview

A quarter of submitters (15) commented on how additional information would assist consumers in making informed food choices. Many submitters (22) considered that the extent of consumer use would be dependent on the relevance, accessibility and effectiveness of the additional information presented in health claims. Measures that would ensure health claims were effective were suggested. Fifteen submitters provided a range of comments about the circumstances in which additional information would be of benefit. Nine submitters stated that the extent to which additional information is used, and the circumstances in which consumers would benefit, are unknown.

Extent of consumer use of additional information

Fifteen submitters commented on how the additional information presented in health claims would assist consumers in making informed food choices (Fonterra, Mainland Products, Wyeth Aust, DAA, NZDA, Cadbury Schweppes, DSM Nut. Prod, ASA, Assoc. of NZ Advertisers, NPANZ, Cadbury Confectionery, NZTBC, NZ Magazines, National Starch, Solae Comp).

Consumers would be able to:

- Differentiate between products (Wyeth Aust);
- Select foods within food groups (DAA, NZDA);
- Make healthier food selections (Cadbury Schweppes);
- Choose foods that would meet their needs (DSM Nut. Prod.);
- Make decisions on how to adopt a ‘whole-of-diet’ perspective for their health (ASA, Assoc. of NZ Advertisers, NPANZ, Cadbury Confectionery, NZTBC, NZ Magazines); and

- Find additional information particularly valuable when a new health claim is made (National Starch, Solae Comp).

Twenty-two submitters considered that the extent of consumer use of additional information would be dependent on a range of factors (Unilever Australasia, MLA, CMA, Mandurah Aust, Kingfood Aust, Palatinit GmbH, CMA – NZ Branch, CMA – NSW Branch, CMA – Qld Branch, CMA – Vic Branch, ICA, CM of SA, ABC, AFGC, Masterfoods Aust. NZ, Parmalat Aust, GW Foods, Goodman Fielder, NZ Dairy Foods, F & B Importers Assoc, NZFGC, NCWA). These factors included:

- The individual situation (Unilever Australasia);
- If the information in health claims is relevant (MLA) and accessible, irrespective of whether or not it is contained in a Standard or Guideline (CMA, Mandurah Aust, Kingfood Aust, Palatinit GmbH, CMA – NZ Branch, CMA – NSW Branch, CMA – Qld Branch, CMA – Vic Branch, ICA, CM of SA, ABC, AFGC, Masterfoods Aust. NZ, Parmalat Aust, GW Foods, Goodman Fielder);
- If the information is accessible, irrespective of whether or not it is contained in a Standard or Guideline (CMA, Mandurah Aust, Kingfood Aust, Palatinit GmbH, CMA – NZ Branch, CMA – NSW Branch, CMA – Qld Branch, CMA – Vic Branch, ICA, CM of SA, ABC, AFGC, Masterfoods Aust. NZ, Parmalat Aust, GW Foods, Goodman Fielder);
- If the information is communicated in such a way as to satisfy a consumer need; for example, improved bone strength (NZ Dairy Foods); and
- The effectiveness and clarity of the communication and the medium in which it is presented (ABC, AFGC, Masterfoods Aust. NZ, Parmalat Aust, Dairy Aust, GW Foods, Goodman Fielder, NZFGC, F & B Importers Assoc, NZ Dairy Foods, CMA, Mandurah Aust, Kingfood Aust, Palatinit GmbH, CMA – NZ Branch, CMA – NSW Branch, CMA – Qld Branch, CMA – Vic Branch, ICA, CM of SA, NCWA).

For information in health claims to be effective, submitters made the following comments:

- The quality of the information is often more important than the quantity (ABC, AFGC, Masterfoods Aust. NZ, Parmalat Aust, GW Foods, Goodman Fielder);
- The message must be portrayed in a meaningful way that can be easily understood. Lengthy and complicated messages would not necessarily be of benefit to the consumer (Nestle);
- Positive messages tend to communicate the benefits more effectively, and in some cases further information can be available on request (ABC, AFGC, Masterfoods Aust. NZ, Parmalat Aust, Goodman Fielder, National Foods); and

- The ‘whole-of-diet’ message has to be strong to enable consumers to identify appropriate claims (NCWA).

Circumstances in which consumers would incur benefits

Fifteen submitters commented on the circumstances in which additional information from health claims would be of benefit to consumers (NZFGC, Diabetes Aust, GI Ltd, NZ Dairy Foods, Cadbury Schweppes, MLA, Fonterra, Mainland Products, PHAA (supported by ACA), Monash Uni – N&D Unit, WA DoH, SA DoH, NSW DoH – N&PA Branch, Auckland Reg. PHS)

Cadbury Schweppes noted that benefits might be incurred when consumers seek to increase certain nutrients in their diet, or reduce the intake of nutrients under medical advice.

MLA noted that ‘point of purchase’ messages could help to reinforce positive health messages and intentions.

NZFGC believed that all would benefit if health claims were permitted on food labels, promotional material and in advertising, as this would provide an invaluable opportunity to reinforce important messages about products. Diabetes Aust. and GI Ltd supported this view and believed that improved food choices might lead to improved health outcomes in the long run, although they were not aware of any published evidence to support this hypothesis.

NZ Dairy Foods considered that consumers must have a need to be fulfilled if health claims are to be of benefit.

Fonterra (supported by Mainland Products) noted that claims, which address ‘whole-of-diet’ needs or a specific risk to, are of increasing interest to consumers. They believed that the requirement that claims be accurate and not misleading, and be substantiated would serve to prevent any bias on the whole of a consumer's diet.

Six submitters considered that from the evidence available it can be surmised that consumers would benefit the most from having clear, unambiguous, well-regulated claims that reduced the potential for misleading and deceptive conduct (PHAA (supported by ACA), Monash Uni – N&D Unit, WA DoH, SA DoH, NSW DoH – N&PA Branch). Five of these submitters proposed that consumers would only benefit from a limited number of nutrition, health and related claims that support the national dietary guidelines and food selection guide (PHAA (supported by ACA), Monash Uni – N&D Unit, WA DoH, SA DoH).

Auckland Reg. PHS noted that whilst a few people could benefit it might detract a larger group from making more important dietary changes

Extent and circumstances are unknown

Nine submitters considered that the extent to which additional information is used, and the circumstances in which consumers would benefit, are unknown (TCCA,

ASMI, CHC, Dr R. Stanton, NZFSA, Monash Uni – N&D Unit, SA DoH, NSW DoH – N&PA Branch, Auckland Reg. PHS).

TCCA believed that this would be impossible to predict and would vary from case to case and product to product.

Dr R Stanton was not aware of any research on consumers using additional information presented in health claims.

Three submitters noted that there is limited evidence relating to consumer use of health claims, hence there is difficulty in determining if a benefit would arise from a broader range of claims (Monash Uni – N&D Unit, SA DoH, NSW DoH – N&PA Branch)

Others considered that further research is required (TCCA, ASMI), and only a large-scale consumer survey would answer this question (CHC).

General comments and recommendations

PHAA (supported by ACA) and SA DoH noted that the NHMRC National Dietary Guidelines are a summary of the current scientific evidence for healthy eating, and are recognised by experts in the field of public health and nutrition. SA DoH and WA DoH considered that a broader range of permitted claims would require more extensive consumer education.

National Starch and Solae Comp. stated that consumers are becoming increasingly “nutrition savvy” and take an increasing amount of interest in the health potential offered by food products. Aussie Bodies supported this view, and believed that consumers would be more confident in purchasing foods that provide clear explanations of their benefits.

ASA (supported by Assoc. of NZ Advertisers, NPANZ, Cadbury Confectionery, NZTBC, NZ Magazines) believed that additional information presented in health claims would empower consumers and enable them to make informed food choices, which would be good for their health.

GW Foods and Goodman Fielder believed that it is what is on pack that determines choice at the point of purchase.

CMA (supported by Mandurah Aust, Kingfood Aust, Palatinit GmbH, CMA – NZ Branch, CMA – NSW Branch, CMA – Qld Branch, CMA – Vic Branch, ICA, CM of SA) pointed out that health claims must be able to be substantiated (whether or not they are relevant and accessible to consumers in a guideline or a Standard) and any failing would be caused where enforcement is not carried out or is ineffective.

CML considered that consumers need simple messages; recognisable symbols and icons would make the purchase decision much quicker and easier.

NSW DoH – N&PA Branch noted that a survey conducted in 2002 in UK found that few participants mentioned claims when discussing labelling elements they looked for

on packaging, suggesting that they are not highly valued or useful to consumers. Other research indicated general distrust of claims and a view that they were largely viewed as advertising as opposed to nutrition education.

In relation to the extent to which consumers would use additional information, several submitters (Dairy Aust, Parmalat Aust, National Foods) noted that consumer research in the US and Canada found shorter claims were preferred and considered more effective than longer claims, as they were less likely to be misleading and communicate the disease relationship more effectively (see references at end of paragraph). These submitters recommended that the wording of claims should be simple, specific and flexible and that legislation should only determine the minimum wording elements for effective claims. In addition, they considered that testing of claims in consumer focus groups (and amongst food companies) would determine the minimum elements for effective nutrition, health and related claims. (Levy et al 1997 Consumer impacts of health claims: an experimental study, US Food and Drug Administration, Centre for Food Safety and Applied Nutrition (<http://www.cfsan.fda.gov/~dms/hclm-sum.html>); and Health Canada, <http://www.hc-sc.gc.ca/hppb/nutrition/pube/framework/index.html>).

NCEFF noted that caution is needed in extrapolating findings from experimental studies and surveys. They stated that only a few studies investigate the real world impact of health claims on consumer knowledge and behaviour. Findings from studies noted by NCEFF:

- At least one study has found what consumers say at interview is important to them does not always relate to their behaviour when shopping (J Nutr Ed 2001:33; 24-30). It is very likely that health claims may have an impact when they are first used on new products but, like most label elements, will be largely ignored after being read for the first time;
- However the impact of claims will be greatest on those who already tend to buy the type of product with the claim; people will probably be unlikely to buy a new type of product because of a claim alone (National Institute of Nutrition. Nutrition labelling: perceptions and preferences of Canadians. 1999, National Institute of Nutrition: Ottawa);
- In the USA, consumer acquisition and comprehension of nutrition information increased after the introduction of the Nutrition Labelling and Education Act (NLEA) (J Pub Pol Marketing 1996:15; 28-44), but most of this was probably due to the increased prevalence of Nutrition Facts Panels on food rather than health claims;
- There have been reported increased product sales after the introduction of health claims on at least three cereal products: Kellogg All-Bran (RAND J Econom 1990:21; 459-480), Quaker Oats (J Nutraceut Func Med Foods 1999:1; 5-32 (53), General Mills' Cheerios (Nutr Today 2001:36; 107-111), and Topicana Orange Juice with a potassium nutrition claim (personal communication), so presumably for a time at least claims can impact purchase behaviour; and

- Analysis of Healthy Eating Scores of respondents in two national consumption surveys suggest improvements in diets of those who used health claims (J Consum Aff 2001:35; 346-363), providing some indirect evidence of benefit. One interesting case study in Canada relates to the introduction of omega-3 enriched eggs (enriched through feeding) – carrying omega-3 content claims. This occurred after a period of long decline in egg sales through the 1980s. There was some increase from 1996 but with the launch of Omega eggs in 1999 there was a dramatic increase in sales of all egg categories – regular, as well as enriched. This was probably a result of the good news stories on the enriched eggs at the same time as changing advice from health professionals about the importance of dietary cholesterol. The marketing of the functional food version did not cannibalise the regular product – the consumer interest supported growth of both types of eggs.

Nestle suggested that any additional information should be in the form of advisory statements, with manufacturers complying with the intent of the statement rather than having the wording mandated.

Other comments provided but not in direct response to the question

PB Foods stated that these consumer impacts should be reviewed after implementation of health claims framework.

Question 88

In what circumstances would consumers be prepared to pay higher prices for foods carrying claims?

Out of 147 submitters, 38% (56 in total) directly responded to this question. The distribution of these responses was as follows:

Sector	Australia	New Zealand	Trans Tasman	International	Total
Industry	18	13	3	2	36
Government	5	1	-	-	6
Public health	6	4	-	-	10
Consumers	1	-	-	-	1
Other	3	-	-	-	3
Total	33	18	3	2	56

Overview

The majority of submitters noted circumstances in which consumers would be prepared to pay higher prices for foods carrying claims. These circumstances included consumers' perception that health benefits are associated with consumption of the food, the influence of market forces and when claims were considered substantiated or associated with breakthroughs in science. Other circumstances related to specific health problems, when consumers could afford to pay higher prices and perceptions about value for money. Some submitters did not agree that consumers would be

required to, or should have to, pay higher prices for foods with claims. The issue of equity of application of policy was also raised.

Circumstances in which submitters thought consumers would be prepared to pay higher prices for foods carrying claims included a number of areas as follows:

Perceived health benefits:

- Where consumers can see a benefit they may be inclined to pay a higher price, but consumers may not necessarily pay more for such a benefit (AFGC, Masterfoods Aust. NZ, Parmalat Aust);
- Consumers may be prepared to pay a premium for claimed products where they believe it provides them with some benefit. They are inclined to pay more if they believe that the claim is accurate and consistent across foods (Cadbury Schweppes);
- If consumers can afford it and/or if they perceive there to be a real health benefit then they are most likely to pay higher prices (i.e. margarines with plant sterols) (CML);
- If consumers can see a benefit with a food carrying a health claim then they may be inclined to pay a higher price, but consumers may not necessarily pay more for such a benefit (Goodman Fielder);
- Only where a clear benefit can be seen by the consumer to justify a premium (CHC);
- When the message they receive about the benefits of the product is unequivocal and well understood and the promised benefit is of an ‘important’ nature, e.g. margarines with plant sterols (NSW Food Authority);
- If foods were designed to provide enhanced health benefits and consumers were readily made aware of this through substantiated claims (Uni. of Adel. & Uni. of SA – Nutrition Physiology Research Grp.);
- If the product meets their needs at the time. (Griffins Foods);
- If consumers believe that the health claim is a benefit to them and their health (NZ Dairy Foods);
- If they believe they will receive benefit for themselves and their families by consuming the food (Tas DoH&HS);
- If they think the products are worth the premium being charged. Consumers purchasing decisions and habits are subject to irrational responses (Nutra Life H&F);

- Where a benefit is perceived by the consumer (depending on the context, type of claim and target market) thus influencing their choice, however market forces will naturally occur (CMA (supported by Mandurah Aust., Palatinit GmbH, Kingfood Aust., CMA-NZ Branch, CMA-NSW Branch, CMA-Qld Branch, ICA, CMA-Vic Branch and CM of SA));
- Dairy Aust. (supported by Parmalat Aust) stated that the dairy industry has proposed that consumers would be willing to pay more for foods carrying a claim:
 - 1 When there is an evident health benefit of a food, over and above its reference food (i.e. regular counterpart).
 - 2 When a consumer ‘perceives’ there to be a health benefit – e.g. consuming margarine containing sunflower oil versus canola margarine.
 - 3 Following advice from a health professional to adhere to a certain diet, e.g. high calcium, low fat, high protein.

Market forces:

- Considers the ability to pass on some of the costs to consumers of making claims on a food label is driven by market forces (AFGC, Masterfoods Aust. NZ, Parmalat Aust.);
- Marketers will determine the price consumers will pay for particular foods (CHC);
- This will be determined by the market (ASA, NPANZ, Assoc. of NZ Advertisers, NZTBC, Naturo Pharm, NZ Magazines, Cadbury Confectionery, Naturo Pharm, NZTBC); and
- The cost of food prices is dependent on market forces and whether consumers see a benefit in the claim and accept higher prices. This has occurred to an extent with the table spreads containing phytosterols (Nestle).

Specific products

- Some consumers are already paying a lot for slimming products (protein drinks etc) (CML); and
- Believes it is usually only foods with medical type functional benefits (e.g. sterol margarines), which contain higher cost ingredients and have a higher selling price (National Foods).

Substantiated claims and scientific breakthroughs:

- Consumers would be willing to pay a higher price for food carrying a claim especially if its proven and publicised (Public Health South);

- If the science behind the claim was truly breakthrough and highly significant in terms of efficacy for a particular consumer or at risk segment of the population, then there is every likelihood higher prices would be paid. Notes that Raisio, the company behind the development of the first cholesterol lowering margarine (using plant stanols) sold the product at a significant premium (Solae Comp, National Starch);
- Consumers may be inclined to pay higher prices when health claims are in a Standard rather than a Guideline, assuming the Standard has more credibility (CMA supported by Mandurah Aust., Palatinit GmbH, Kingfood Aust., CMA-NZ Branch, CMA-NSW Branch, CMA-Qld Branch, ICA, CMA-Vic Branch and CM of SA); and
- Believe consumers would only pay higher prices when assured that the authority has approved claims and it is exclusive to certain foods only (DSM Nut. Prod.).

Health problems

- Where consumers are faced with a higher risk of a health problem (e.g. family history of a major illness or diagnosis of a high risk factor) (TCCA);
- Intuitively they assume that people with particular health problems may choose food with claims but are unaware of any research to prove this (Diabetes Aust., GI Ltd);
- People with diabetes already register a substantial level of complaint about the cost of a healthy or 'diabetic' diet, which is largely due to misconceptions, but health claims may tend to promulgate such a view/misconception (Diabetes Aust.);
- If they suffered from a diet-related condition or knew they were at risk (NCWA); and
- If the claim relates to a nutrient, which the individual needs to increase or decrease as a result of their genetic background, the current state of their diet or a disease or medical condition from which they are currently suffering (DAA, NZDA).

Affordability and perceptions about value for money

- If consumers could afford to pay higher prices. They don't believe this would change if Guidelines or Standards were established (TCCA);
- Presence of a claim is only one component in an individuals overall decision making process, other things impact including perception of value for money, presence of other nutrients/anti-nutrients, taste, cultural, presence or absence of disease etc. (Diabetes Aust., GI Ltd);

- Market research indicated that consumers would pay a premium when they perceive the product to have a higher value (NCEFF);
- As long as their budget permits (Tas DoH&HS);
- Will depend on the context, type of claim and the target market (AFGC, Masterfoods Aust. NZ, Parmalat Aust., Goodman Fielder, National Foods); and
- Depends entirely on the particular claim and its attraction to the consumer (F&B Importers Assoc.).

Equitable application of policy

- This raises an equity issue where consumers from disadvantaged groups could be stigmatised or further disenfranchised by the inability to buy premium priced products with health claims for their families, exacerbating the already widening gap between the advantaged and the disadvantaged (Tas DoH&HS);
- This raises issues in relation to equitable application of policy, with those on lower incomes with greatest burden of diet related disease (AIHW, 2004) and yet if healthier food choices are more expensive because of claims, they are less affordable to those who may need them the most (Monash Uni-N&D Unit, SA DoH, NSW DoH – N&PA Branch, WA DoH);
- Food Commission (UK) research has indicated that 'healthy' foods are marketed at 50% higher than their 'normal' counterparts, while some products were found to cost 10 times the price of comparable food without the health claim (FSA, 2003) (SA DoH, WA DoH);
- A report of food purchase behaviour of low-income households in the US found low-income shoppers spend less on food purchases despite some evidence that they face generally higher purchase prices (Leibtag ES et al., 2003). It is therefore likely that the consumers most prepared to pay higher prices for foods carrying claims are the more affluent members of society who generally have a higher health status than lower socioeconomic groups – i.e. the “worried well”. The public health benefit from health claims in this scenario is therefore likely to be negligible (NZDA); and
- An increase in food prices raises concern that health claims could contribute to food insecurity and add to the problem of inequality in health (Public Health South).

Some submitters made comments as above but did not know or were unsure as to the circumstances in which consumers would be prepared to pay higher prices for foods carrying claims.

- Do not know (Dr C. Halais);

- Currently unknown but is likely to depend on the value consumers place on nutrition and health claims. Consumer research will need to cover this question (NSW DoH – N&PA Branch);
- Unsure (Monash Uni-N&D Unit, SA DoH, NSW DoH – N&PA Branch, WA DoH); and
- No information available (NZFSA).

Some of these submitters did not agree that consumers should pay higher prices for foods with claims, or that foods with claims should need to be more expensive.

- This should not be allowed to occur, as only the more affluent would benefit; reducing disparities is the basic intent of public health (Auckland Reg. PHS);
- Believe consumers may be unaware that the cost of making claims would be passed onto them. Do not think consumers should be covering the costs of the claims (Public Health South);
- As a public health organisation, they would not like to see higher costs associated with healthier food choices (TCCA);
- Recommends that as a public health/food security measure, initiatives that increase the cost of healthy/beneficial foods should be resisted (Diabetes Aust.);
- Questions why consumers have to pay more for healthier foods, the poor have worse health status and would be the least able to afford more expensive foods (Dr R. Stanton);
- Hopefully as the consumption of products, like fruit & vegetables increases, prices should come down (CML); and
- In many cases placing a health claim on a label will not result in an increase in the price of the food (Goodman Fielder, National Foods, Griffins Foods, Cadbury Schweppes, AFGC, Masterfoods Aust. NZ, Parmalat Aust., CMA supported by Mandurah Aust., Palatinit GmbH, Kingfood Aust., CMA-NZ Branch, CMA-NSW Branch, CMA-Qld Branch, ICA, CMA-Vic Branch and CM of SA).

Other comments

- For high level claims, manufacturers may incur additional costs for conducting clinical studies and preparing and lodging submissions to FSANZ and this may be at considerable cost. Manufacturers will have to gauge as to whether or not they will increase the cost of their goods in order to recover these costs (Cadbury Schweppes);

- It can be expected that properly regulated nutrition, health and related claims would create a segmented market and products with approved claims will demand a premium price whilst the others will have to compare with other non-health related products. Without adequate regulations, products with unapproved health claims would also demand a premium price, thus inflating the cost to the consumer without recognised benefits (WA DoH); and
- The impact on consumers of including the greater range of claims in a guideline would be to improve consumer choice (NZJBA supported by Frucor).

1.3 REGULATORY OPTION 3

Question 89

Under Option 3, is there a risk of consumers losing a whole of diet perspective when choosing food?

Out of 147 submitters, 41.5% (61 in total) directly responded to this question. The distribution of these responses was as follows:

Sector	Australia	New Zealand	Trans Tasman	International	Total
Industry	20	14	4	2	40
Government	5	1	-	-	6
Public health	8	3	-	-	11
Consumers	2	-	-	-	2
Other	2	-	-	-	2
Total	37	18	4	2	61

Overview

One-third of submitters (21) stated that under Option 3, there was a real risk or possible risk of consumers losing a whole of diet perspective when choosing food. However, 15 submitters disagreed, and stated there would be no risk and another 13 submitters implied there was no risk or that there was no evidence of this risk. Two submitters indicated there was a ‘minimal’ risk under Option 3 of consumers losing a whole of diet perspective when choosing food. Five submitters were not aware that consumers have a ‘whole of diet perspective’ when choosing foods or aware of any research indicating this perspective.

Agrees there is a risk

Nineteen submitters stated that under Option 3, there was a risk of consumers losing a whole of diet perspective when choosing food (TCCA, Diabetes Aust., GI Ltd, Dr C Halais, DAA, NZDA, Tas DoH&HS, NSW Food Authority, WA DoH, NCWA, Dr R Stanton, DSM Nut. Prod, NSW DoH –N&PA Branch, Auckland Reg. PHS, Public Health South, PHAA (supported by ACA), SA DoH, Monash Uni - N&D Unit). Two submitters thought that this is possibly a risk (NZ Dairy Foods, Auckland Reg. PHS).

Reasons and/or further comments made by these submitters were as follows:

- Yes a real risk (NCWA);
- There is a risk, whenever health claims are made (Dr R Stanton);
- The exclusivity of claims would limit choices to these foods at the expense of a wide variety of foods, especially when the approved general level claims are not sufficient to cover a wide variety of foods (DSM Nut. Prod.);
- Yes there is a substantial risk that health claims would lead consumers to focus on individual foods and therefore lose a whole of diet perspective when choosing food (Public Health South);
- This is already happening through the use of dietary supplements (NZ Dairy Foods);
- There is a possible risk but less than with Option 2 as there is more control over the claims (Auckland Reg. PHS);
- There is a very real risk of consumers losing a ‘whole of diet’ perspective under both options two and three as it is inherently a risk of allowing nutrition and health claims per se (NSW DoH –N&PA Branch);
- As outlined throughout this submission, NSW Health has recommended rigorous substantiation and monitoring processes and the inclusion of measures to prevent deceptive conduct to ensure that pre-approved general and high level claims have the potential to provide a consumer benefit (NSW DoH –N&PA Branch);
- It will be very important that the consumer education campaign that accompanies the introduction of health claims communicates the ‘whole of diet’ context of health claims very clearly (NSW DoH –N&PA Branch);
- While the evidence of this [risk] is scant, there are some studies that indicate this. It is difficult to know the likely impact or nutritional significance of these effects, but it may result in food choices that result in a diet that is inconsistent with dietary guidelines. Food choices can be strongly influenced by what consumers believe they are consuming (PHAA (supported by ACA), SA DoH, Monash Uni. – N&D Unit). The latter submitter also gave the example of a low fat diet, which may result in a diet higher in energy;
- Data from Caputo and Mattes (1993) suggests that consumers might select higher fat diets in conjunction with the belief that they are consuming reduced fat items. Use of ‘low’ and ‘reduced’ fat foods can result in lower fat intakes but not necessarily lower energy intakes because consumers either compensate for reduced energy density of fat modified foods (Gatenby et al 1995) or because the fat modified products themselves are no less energy dense than the

regular fat product. (Crowe et al 2004) (PHAA (supported by ACA), SA DoH);

- The ‘American Paradox’ whereby obesity rates are increasing despite the proliferation of reduced fat, sugar and energy products on the market, is testament to the likely effects of consumers acting on their beliefs about the composition of ‘modified’ foods. (Allred, 1995) (PHAA (supported by ACA), SA DoH);
- This is why any system to regulate nutrition, health and related claims must be evaluated for the potential for harm associated with changes in dietary choices (PHAA (supported by ACA), SA DoH); and
- Recommend any system to regulate health claims must be evaluated for potential for harm associated with changes in dietary choices (Monash Uni. – N&D Unit).

Two submitters indicated that under Option 3, there is minimal risk of consumers losing a whole of diet perspective when choosing food, however consumer research would be needed to answer this appropriately (Dairy Aust., Parmalat Aust.).

Their comments were:

- General level claims regulated predominantly through a voluntary guideline have been in the market place for some time within Australia, without consequence of consumers losing a ‘whole of diet’ perspective. Internationally, health claims have also been implemented again without evidence of negative consequence on ‘whole of diet’ (Dairy Aust., Parmalat Aust.); and
- The Policy Guidelines stipulate that health claims must be made in the context of the total diet. The Policy Principles support claims that promote healthy food choices by the population and that align with national policies and legislation relating to nutrition and health promotion (Dairy Aust., Parmalat).

No, no risk

Fifteen submitters stated that under Option 3, there would be no risk of consumers losing a whole of diet perspective when choosing food (F&B Importers Assoc., CML, Solae Comp, National Starch, ASA, NPANZ, Assoc. of NZ Advertisers, Cadbury Confectionery, NZ Magazines, NZTBC, Griffins Foods, NZFGC, Nutra Life H&F, Nestle, Unilever Australasia).

Reasons and/or further comments made by these submitters were as follows:

- Consumers will have all the necessary information provided or available on request (CML);
- Claims will be couched in terms of the diet. In addition, claims will be presented within an environment that includes Dietary Guidelines as well as

pre-approved claims, which are very much directed towards the whole diet. (Solae Comp, National Starch);

- No, as the claims would be substantiable. With Option 3 they can have the confidence in the foods they buy, and be better able to be educated into the perspective (ASA, NPANZ, Assoc. of NZ Advertisers, Cadbury Confectionery, NZ Magazines, NZTBC);
- As long as messages are appropriate and are provided in conjunction with education in the context of the whole diet (Griffins Foods);
- As claims must be made in the context of a whole of diet perspective (NZFGC);
- Don't believe this to be a likely issue (Nutra Life H&F);
- The policy guideline provides that health claims are made in the context of the total diet whether these are general level health claims or high level health claims (Nestle); and
- Consumers choose particular types of food and claims may inform an individual choice of a particular food (Unilever Australasia).

Another 13 submitters implied that they thought there would be no risk of consumers losing a whole of diet perspective when choosing food under Option 3 (Cadbury Schweppes, National Foods, NZFSA, CMA, Mandurah Aust., Palatinit GmbH, Kingfood Aust., CMA-NZ Branch, CMA-NSW Branch, CMA-Qld Branch, ICA, CMA-Vic Branch and CM of SA).

Further comments made by these submitters were as follows:

- The 'whole of diet' perspective will be enhanced by having a Standard that encompasses all claims (Cadbury Schweppes);
- Not convinced consumers lose a 'whole of diet' perspective when choosing food as this doesn't appear to be the case internationally, where health claims have been implemented (National Foods);
- Recommends FSANZ support health professionals in educating individuals about health claims in relation to health messages and dietary advice. These health professionals to include those from food industry, service organisations e.g. Dairy Australia; State and Territory governments; non-government organisation such as the DAA, NHF, Diabetes Australia; and University Departments of Nutrition, Dietetics and Food Science (National Foods);
- There is no evidence to support that this would happen (NZFSA);
- Understands that health claims will be made in the context of the total diet, which should overcome the concerns of consumers losing sight of the whole-

of-diet perspective when choosing food (CMA supported by Mandurah Aust., Palatinit GmbH, Kingfood Aust., CMA-NZ Branch, CMA-NSW Branch, CMA-Qld Branch, ICA, CMA-Vic Branch and CM of SA);

Five submitters were not aware that consumers have a ‘whole of diet’ perspective when choosing foods:

- Not aware of any research demonstrating that consumers have a ‘whole of diet’ perspective when choosing foods (AFGC, Masterfoods Aust. NZ, Parmalat Aust., ABC);
- The Policy Guideline states that health claims be made in the context of the total diet, providing consumers with a whole of diet perspective when making the food selection (AFGC, Masterfoods Aust. NZ, Parmalat Aust.); and
- Consumers do not have a whole of diet perspective but rather choose foods on a product-by-product basis (Goodman Fielder).

Other responses:

- The impact of choosing one food on the whole diet is an area of dietary methodology that would make a useful contribution to knowledge in the framework of substantiation research (NCEFF);
- It will be essential to collect information about this through the consumer surveys proposed by FSANZ as part of the ongoing monitoring process. It should also be addressed in ongoing National Nutrition Surveys needed to monitor the effects of changes in the food supply on dietary behaviour and intake (Nutrition Aust.);
- This question needs to be answered in the context of the communication vehicles to consumers that will influence choice, this being advertising and labelling (ASMI);
- This will be determined by the individual company's marketing strategies. The higher risk is that consumers will assume that they are receiving their health requirements by consuming certain foods that are delivering sub-optimal level of supplementation, e.g. folate and iron, consumer misled into believing they are receiving the RDI through a particular food and therefore at risk. Both these substances are heavily regulated as therapeutics to ensure consumers do not over-consume or not receive sub-therapeutic dosage. Quality, bioavailability and efficacy also closely monitored (refer attachment 12 of submissions - Buttercup Wondergold Bread + Iron & Folate) (CHC);
- Although the ASA response states that Option 3 will give consumers ‘confidence’ in the foods they buy, consumer confidence will only occur if the food contains the stated ingredients which are mixed consistently, are equally available in each portion and are bioavailable (Naturop Pharm);

- Guidelines are legally enforceable through fair trading laws and Trade Practices Act. Impact on consumer would therefore be to improve consumer choice, as a guideline can be regularly reviewed and those claims which are no longer of benefit to consumers can be replaced with better guidance to assist consumers in making informed choice (NZJBA, Frucor);

Question 90

To what extent could this risk be addressed through education and the efforts of health professionals?

Out of 147 submitters, 37.4% (55 in total) directly responded to this question. The distribution of these responses was as follows:

Sector	Australia	New Zealand	Trans Tasman	International	Total
Industry	18	11	3	2	34
Government	5	1	-	-	6
Public health	8	3	-	-	11
Consumers	2	-	-	-	2
Other	2	-	-	-	2
Total	35	15	3	2	55

Overview

Nearly 20 per cent of submitters (10) considered that the risk of consumers losing a whole of diet perspective when choosing food could be addressed through education and the efforts of health professionals, to various extents including ‘mostly’, ‘highly’, ‘extensively’, and ‘greatly’. The issue of adequate funding to achieve this was raised. Eight submitters agreed or implied that this risk could be addressed to a ‘limited’ extent. Two submitters believed the extent to which this risk could be addressed was not possible to quantify. Seven submitters did not believe there is a risk of consumers losing a ‘whole-of-diet’ perspective when choosing food.

The risk could be addressed

Eight submitters considered that the risk of consumers losing a whole of diet perspective when choosing food could be addressed through education and the efforts of health professionals to the various extents as outlined in the comments below:

- Mostly (Aussie Bodies);
- Considers the extent to be high, so long as there are resources and funding for a substantial education program (CHC);
- Appropriate consumer communication and education strategies would work to help minimise this risk, carried out by health professionals, government, non-government organisations, and the food industry and enforcement agencies, service organisations such as Dairy Australia and the Meat and Livestock

Australia. If these communication and education activities are prohibited or restricted secondary to legislation by FSANZ (i.e. high level health claims), there is the possibility for the impact on ‘whole of diet’ to be extensive (Dairy Aust. supported by Parmalat Aust.);

- This would be minimised given an appropriate and effective education campaign, which should be conducted in conjunction with the introduction of this standard (NSW Food Authority);
- It can and should be reduced. Whole of diet perspective is probably the most important health message that needs to be conveyed (NZ Dairy Foods);
- Greatly, education is vital to consumer understanding of health claims (NZFSA); and
- The risk could be addressed through education and the efforts of health professionals if adequate finance is provided for this to be done, and coordination could occur so that consistent public health messages are provided (NCWA).

Two submitters implied that education and the efforts of health professionals would minimise this risk:

- Ongoing education at both the Government and health professional level will be important as a means to address serious diet-related health issues in Australia and New Zealand. These efforts would ensure the entire diet and lifestyle message is communicated, thus preventing a potential for skewing eating patterns in favour of foods with health claims (National Starch, Solae Comp.).

To a limited extent

Eight submitters considered that the risk of consumers losing a whole of diet perspective when choosing food can be addressed through education and the efforts of health professionals to a limited extent (TCCA, PHAA (supported by ACA), SA DoH, WA DoH, Monash Uni – N&D Unit, Tas DoH&HS, NSW DoH – N&PA Branch). Dr C Halais considered the extent to which this could be addressed was poor.

Reasons and/or further comments made by these submitters were as follows:

- A well-funded long-term campaign informing members of the public about the importance of eating a balanced diet is needed, however it is unlikely that such campaigns and programs can compete with the effects of food advertising. To address this, the importance of eating a balanced diet must be included on the label of foods making a health claim. A ‘balanced diet’ could also be defined using The Australian Guide to Healthy Eating recommendations. Ideally this requirement will be included in the standard (refer also to their response to Q61 & 85) (TCCA);

- The extent to which education and efforts of health professionals can assist in addressing inappropriate food choice behaviours is limited due to inadequate funding and workforce to support such efforts (Tas DoH&HS) and the inability to match advertising by food manufacturers, which equates to billions of dollars each year (Nestle 2002) and is likely to be the main source of information regarding nutrition, health and related claims (PHAA (supported by ACA), SA DoH, WA DoH, Monash Uni – N&D Unit);
- Education alone is inadequate as a health promotion strategy. Education approaches on their own can aggravate an already widening gap in health status between the advantaged and disadvantaged. Considers industry could contribute to an independent education fund for health claims and advertising to address concerns that public funded education efforts will not match the scale of funds contributed by industry to promote health claims. (Tas DoH&HS);
- Notes evidence from two large reviews of the literature indicates that nutrition education “works” but that it needs to be ongoing and multifaceted because dietary behaviour change is not short term work and the forces that encourage people to adopt less healthy food choices do not stop (Contento 1995 and Health Education Authority 1997) (PHAA (supported by ACA), Tas DoH&HS, SA DoH, Monash Uni – N&D Unit); and
- There is limited capacity for health professionals to address these risks through education. In NSW, the public health nutrition workforce is small and there are many competing priorities. Without an appropriately resourced education strategy by FSANZ, education efforts would likely be patchy and not reach a substantial portion of the population. Consumer education on the basic principles of the health claims system needs to be a nationally funded campaign rather than the responsibility of health professionals (NSW DoH – N&PA Branch).

Not possible to quantify

Two submitters believed the extent to which this risk could be addressed was not possible to quantify (Diabetes Aust., GI Ltd). The inadequacy of the public health and primary care nutrition and workforce was also noted (Diabetes Aust.).

No risk of losing ‘whole of diet’ perspective

Seven submitters did not believe there is a risk of consumers losing a "whole-of-diet" perspective when choosing food (ABC, AFGC, Masterfoods Aust. NZ, Goodman Fielder, Parmalat Aust., Nestle).

Further comments made by these submitters were as follows:

- However health professional should play a role in educating individuals about health claims in relation to health messages and dietary advice (AFGC, Masterfoods Aust. NZ, Goodman Fielder, Parmalat Aust.);

- However, health professionals have and should continue to educate and promote dietary advice to consumers and especially have a role to play in continuing their promotion of the health benefits of different foods (Nestle).

Other responses

The remaining submitters did not specifically answer the question but raised issues in relation to the provision of education, as detailed in the comments below.

- It would be more beneficial to public health if money was spent promoting the NZ Food and Nutrition Guidelines rather than on educating the public about confusing and misleading health claims (Public Health South);
- The education process that will need to accompany the introduction of health claims will play a part in ensuring consumer understanding and confidence in the system. This will be an essential element and will be supported by non-government organisations and industry (CMA supported by Mandurah Aust., Palatinit GmbH, Kingfood Aust., CMA-NZ Branch, CMA-NSW Branch, CMA-Qld Branch, ICA, CMA-Vic Branch and CM of SA);
- Any education process, established as a result of this process, will be much easier if all claims are encompassed in a Standard. Messages provided to consumers will be consistent (Cadbury Schweppes);
- Education is extremely important but would only have a limited effect without legislation to fall back on in the event of industry non-compliance &/or consumer complaints (CML);
- There is evidence that nutrition communications e.g. TV advertisements, can be effective in influencing food preferences (Borzekowski DLG, Robinson TN., 2001; Kraak V, Pelletier DL, 1998). It would appear to be a retrograde step to implement an approach that could require valuable resources to reduce the risk (DAA);
- There is evidence that media literacy nutrition education is effective in influencing knowledge and understanding of television food advertising and food labels. However, intervention programmes with low literacy groups are difficult to stage and expensive to resource (Hindin TJ, Contento IR, 2004), so the extent this risk could be addressed through education and the efforts of health professionals are largely dependent on substantially increased financial resources (NZDA);
- Studies on the effects of education exist but are relatively short term. Longer large term studies in Australia and New Zealand are required (Dr R Stanton);
- Education programs and community nutrition programs may assist in putting individual foods into perspective in the whole diet, but health claims could also be worded in this fashion (NCEFF);

- The risk to consumers cannot be addressed through ‘education’ or ‘health professionals’ without realising that advertising and promotional campaigns would utilise both ‘educational’ and ‘health professional endorsement’ as marketing tools. Without an advertising code dictating the appropriate use of ‘educational material’ and ‘health professionals’ in context to promotion, considers there is no guarantee that the average consumer could readily differentiate impartial from paid information (ASMI);
- Do not consider that resources should be diverted to address confusion caused by claims but rather all claims permissible are meaningful to the consumer as well as meeting evidence requirements (Auckland Reg. PHS);
- Very important that health professionals are brought on board as part of the education process, and that they are brought up to speed with the range and type of product their patients are taking. This is part of the continuum of care (ASA, Cadbury Confectionery, NPANZ, Assoc. of NZ Advertisers, Naturo Pharm, NZ Magazines, NZTBC);
- Education and health professionals can assist in guiding appropriate food choices but unless these activities are adequately funded they cannot compete with industry advertising budget (Nutrition Aust.); and
- Guidelines are legally enforceable through fair trading laws and Trade Practices Act. The impact on the consumer would therefore be to improve consumer choice, as a guideline can be regularly reviewed and those claims which are no longer of benefit to consumers can be replaced with better guidance to assist consumers in making informed choice (NZJBA, Frucor).

Other comments provided but not in direct response to the question

Under Option 3 there is potential for health claims and associated marketing to distort consumers’ perceptions about a healthy balanced diet and the role of individual, processed products in achieving this (ACA).

Question 91

Does Option 3 provide greater benefits to consumers than Option 2 in relation to the reliability and validity of general level claims? If so, why?

Out of 147 submitters, 48.3% (71 in total) directly responded to this question. The distribution of these responses was as follows:

Sector	Australia	New Zealand	Trans Tasman	International	Total
Industry	24	16	4	3	47
Government	5	1	-	-	6
Public health	8	3	-	-	11
Consumers	2	-	-	-	2
Other	5	-	-	-	5
Total	44	20	4	3	71

Overview

Almost forty per cent of submitters (29) stated or implied that Option 3 provides greater benefits to consumers than Option 2 in relation to the reliability and validity of general level claims. Similar numbers disagreed (27), including 18 who considered the benefits to consumers would be much the same with both options. Reasons provided for Option 3 providing greater benefits mainly concerned the fact that the claims would be in a legally enforceable standard – which would provide more uniformity in claims and hence improve consumer confidence. The main reasons provided for disagreeing (that Option 3 provided greater benefit) were that the reliability and validity of claims comes from substantiation not regulation, and that a guideline can be more easily updated.

Agreed

There were 28 submitters who agreed that Option 3 provides greater benefits to consumers than Option 2 in relation to the reliability and validity of general level claims (Dr C Halais, CML, DSM Nut. Prod. NCWA, TCCA, TGACC, Diabetes Aust., GI Ltd, DAA, NZDA, Dr R Stanton, Nutrition Aust., PHAA (supported by ACA), Cadbury Schweppes, ASMI, Tas DoH&HS, SA DoH, Monash Uni – N&D Unit, NSW DoH – N&PA Branch, NSW Food Authority, CSIRO HS&N, WA DoH, Auckland Reg. PHS, Nutra Life H&F, Griffins, NZFSA, CHC).

Reasons provided for this agreement that Option 3 provides greater benefits to consumers were that:

- Option 3 is regulated and legally enforceable (NCWA);
- An enforced and enforceable standard is likely to achieve higher levels of consumer confidence to accept what is written on product labels. In the absence of an enforced Standard, product claims are likely to become meaningless (TCCA);

- Option 3 will provide a framework for general level claims that is enforceable for all suppliers of foods to Australians. Suppliers failing to comply with the FSC can be prosecuted and penalised, providing them with far greater incentive than an unenforceable Guideline (TGACC, Diabetes Aust., GI Ltd);
- Greater uniformity of claims will increase consumer trust and improve informed decision making (Diabetes Aust., GI Ltd);
- It is more likely that industry will comply with the framework for general level claims, particularly if soon after its introduction the enforcement agency reacts strongly and quickly to any breaches. A standard will ensure that the enforcement agency has the power to fulfil its duty in this regard. Consumers will benefit from increased confidence in the regulatory system (DAA, NZDA);
- Option 3 provides greater confidence that claims are more likely to be vetted (Dr R Stanton);
- Option 3 provides for enforcement of compliance with the Standard giving consumers more protection from misleading and deceptive claims (Nutrition Aust., PHAA (supported by ACA), Cadbury Schweppes, SA DoH, Monash Uni – N&D Unit, WA DoH) and giving them confidence in the process (NSW DoH – N&PA Branch);
- Option 3 provides more certainty in enforcement and compliance with the Standard than Option 2, so consumers are better protected from misleading and deceptive claims (Tas DoH&HS);
- Option 3 serves consumer interest more than option 2. Guidelines are appropriate where the regulatory environment is one that involves pre-market and post-market surveillance underpinned by controls over market entry. Where market entry is not controlled by the regulator and is reliant on adherence to a monograph or set of conditions than having these legislatively underpinned in a standard rather than a guideline ensures the consumer interest and a level commercial playing field (ASMI);
- The messages consumers receive regarding claims should be consistent and more accurate under Option 3 (Cadbury Schweppes);
- There would be a greater accountability of the claim itself and the substantiation behind the claim, because of a greater enforceability of these (NSW Food Authority);
- Option 3 is more trustworthy, with a perceived higher level of enforcement (CSIRO HS&N);
- Having claims in an enforceable standard protects consumers (Auckland Reg. PHS);

- Option 3 is enforceable, meaning there is a greater incentive for industry to consistently comply (Griffins Foods);
- Option 3 requires substantiation of claims (CHC); and
- It provides directly comparable claims (NZFSA).

Nutra Life H&F considered that Option 3 provides greater benefits to consumers in terms of reliability and validity of claims in theory because there will have been some level of external control to justify the claim. They questioned whether this would mean random testing to ensure product quality and to ensure nutrient levels are adequate to support the claim.

One submitter implied this agreement by stating that reliability and validity will be aided by more prescribed regulation (Uni of Adel. & Uni of SA – Nutrition and Physiology Research Group).

Disagreed that Option 3 provides greater benefits than Option 2

There were 16 submitters who disagreed that Option 3 provides greater benefits to consumers than Option 2 in relation to the reliability and validity of general level claims (F&B Importer Assoc., ABC, AFGC, Masterfoods Aust. NZ, GW Foods, National Foods, Parmalat Aust., NZJBA, Frucor, Nestle, Dairy Aust., PB Foods, Fonterra, Mainland Products, NZFGC, Nestle).

Reasons provided for disagreeing that Option 3 provides greater benefits to consumers were that:

- The reliability and validity of claims comes from substantiation not regulation (ABC, AFGC, Masterfoods Aust. NZ, Dairy Aust., GW Foods, National Foods, Parmalat Aust., NZJBA, Frucor, Nestle);
- Consumers would see a similar benefit whatever the regulatory framework. An additional benefit would flow to consumers with Option 2 as a guideline could be readily updated (ABC, AFGC, Masterfoods Aust. NZ, GW Foods, National Foods, Parmalat Aust., NZJBA, Frucor);
- Regulation in the Standard may improve consumers' confidence, but at the same time could delay the review process and therefore lose consumers' confidence (i.e. claims may not be reflective of the latest scientific evidence). Appropriate monitoring and enforcement should guard against manufactures not complying. Williams et al (2003), found that the rate of non-compliance was similar amongst claims regulated through either the 'voluntary' CoPoNC or the 'legislated' FSC (Dairy Aust.);
- All claims need to be substantiated, and cannot be misleading. On the other hand, standards tend to be prescriptive and bureaucratic/less flexible limiting food innovation and consumer education (PB Foods, Fonterra, Mainland Products);

- A guideline can be more easily updated to cater for changing conditions, advances in nutrition research and product development, and public health promotion (PB Foods, Fonterra, Mainland Products);
- Under both options substantiation is required and the Fair Trading legislation and the Food Act ensure that claims cannot be false or misleading. Option 2 provides a greater benefit to consumers in that a Guideline can be amended more readily than a standard (NZFGC); and
- Expect that reviews and updates to guidelines would be more simplistic and therefore remain more in line with consumer requirements for the types of claims that are included in them (Nestle).

Two other submitters did not really agree that Option 3 provides greater benefits to consumers (NCEFF, Aussie Bodies) if the Standards are well defined (NCEFF). Consumers are unlikely to understand the practical differences between a standard and a guideline (Aussie Bodies).

Provided an effective model for a guideline is used, Unilever Australasia did not see any greater benefits in Option 3 over option 2. Option 3 has less flexibility and would potentially delay the use of substantiated claims that could be used on food, as they have to be included in the standard prior to use.

Consumers would benefit with either

Another 18 submitters considered that consumers would benefit if either regulatory option 2 or 3 becomes the framework and the reliability and validity of general level claims would be the same or the differences marginal (Goodman Fielder, ASA, NPANZ, Assoc. of NZ Advertisers, Naturo Pharm, Cadbury Confectionery, NZ Magazines, NZTBC, CMA, Mandurah Aust., Palatinit GmbH, Kingfood Aust., CMA – NZ Branch, CMA-NSW Branch, CMA – Qld Branch, ICA, CMA-Vic Branch, CM of SA).

Further comments provided by these submitters were as follows:

- The benefit of the guideline approach rather than a standard is that it can be updated more easily and remain more relevant for both consumers and manufacturers (Goodman Fielder);
- Possibly in relation to reliability and validity because these claims would be in a standard rather than in a guideline. However, option 3 will reduce the consumers' food choices and information, as standards are slower to change than guidelines (NZ Dairy Foods); and
- Option 2 and Option 3 offer consumers similar benefits. In terms of reliability and validity of general level claims under Option 2, this will be dependent on the credibility of the substantiation (CMA supported by Mandurah Aust., Palatinit GmbH, Kingfood Aust., CMA – NZ Branch, CMA-NSW Branch, CMA – Qld Branch, ICA, CMA-Vic Branch, CM of SA).

Other comments

The remaining submitters did not clearly state whether they considered Option 3 provides greater benefits to consumers than Option 2 in relation to the reliability and validity of general level claims. Their comments are below.

- Although there may be an advantage to having general level claims in a Standard, for legal compliance this is a fairly blunt instrument. Guidelines should be closely monitored by the watchdog to ensure compliance (National Starch, Solae Comp.);
- Option 3 is a more regulated approach to general level claim and that it would be simpler to enforce than if the criteria and conditions for general level claim were a guideline only (Sanitarium Health Food Comp.);
- Do not agree with allowing health claims but if they were allowed it is vital they are in a standard so they can be legally enforced (Public Health South); and
- Option 3 provides greater reliability in codifying requirements within a standard as opposed to option 2, whereas Option 3 provides a degree of inflexibility in allowing changes to take place to meet consumer needs (William Wrigley Junior).

Other comments provided but not in direct response to the question

Option 3 will provide consistency of information for consumers, as all general level claims will have to comply with the Standard. Option 3 will ultimately also ensure greater consumer confidence as all claims will be regulated and enforced. This is the only option that will adequately protect consumers from false, misleading and unsubstantiated health claims. Such claims could encourage consumers to consume more processed foods rather than fresh foods, in the belief that these will be as nutritious and 'healthy'. This will potentially contradict the Australian Dietary Guidelines and undermine attempts by governments and health professionals to improve public health (ACA).

CHAPTER 2: IMPACT ANALYSIS – INDUSTRY

2.1 REGULATORY OPTION 1

Question 92

To what extent, if any, has your business been disadvantaged by the current ambiguities regarding the prohibition on health claims?

Out of 147 submitters, 33% (48 in total) directly responded to this question. The distribution of these responses was as follows:

Sector	Australia	New Zealand	Trans Tasman	International	Total
Industry	25	14	5	3	47
Government	-	1	-	-	1
Public health	-	-	-	-	-
Consumers	-	-	-	-	-
Other	-	-	-	-	-
Total	25	15	5	3	48

Overview

The majority of submitters stated that they had been disadvantaged to some extent by the current ambiguities regarding the prohibition on health claims, some of them ‘extensively’ or ‘significantly’. Some believed there was an uneven playing field between Australia and New Zealand with regard to dietary supplements and absence of CoPoNC in New Zealand (which had disadvantaged Australia). Others felt limited in their development of health products, by not being able to communicate the role of nutritious food types to consumers, some noting that the absence of health claims had also resulted in extra costs to relabel some imported foods. Some submitters stated that it was difficult to compete against unethical manufacturers that did not comply with legislation or guidelines.

Discussion of submitter responses

A number of industry groups stated they were extensively/significantly disadvantaged or were disadvantaged by the current ambiguities regarding the prohibition on health claims (Aussie Bodies, GW Foods, Horticulture Aust, ANIC, National Starch, Solae Comp, ASMI, CMA supported by Mandurah Aust., Palatinit GmbH, Kingfood Aust., CMA NZ Branch, CMA - NSW Branch, CMA - QLD Branch, ICA, CMA-Vic Branch, and CM of SA, Unilever Australasia). Unilever Australasia give an example of Flora Pro-active which in many parts of the world is allowed to use the claim “reduces cholesterol’ which has been fully substantiated, but are forced to use ‘reduces cholesterol absorption’ which is correct but the wording is not as strong and communication of this could be confusing for consumers.

Two companies from the food industry stated that the prohibition has limited their development of health products (Bakewell Foods, PB Foods). GW Foods stated that

many products that offer health benefits are more expensive to manufacture (circa 15 – 20% is average) and to make this kind of innovation possible, manufacturers need to be able to recover a price premium, and health claims are particularly beneficial to make such innovations commercially viable.

A number of industries also believed there is an uneven playing field between Australia and New Zealand in regard to dietary supplements, which has disadvantaged the Australian Industry (ABC, AFGC (supported by Masterfoods Aust. NZ), Parmalat Aust, Dairy Aust, MLA, National Foods, CMA supported by Mandurah Aust., Palatinit GmbH, Kingfood Aust., CMA NZ Branch, CMA - NSW Branch, CMA - QLD Branch, ICA, CMA-Vic Branch, and CM of SA).

It was noted by CMA that the absence of CoPoNC in NZ and its application to importers means they do not need to comply, which also results in an uneven playing field for Australian manufacturers. Mandurah Aust., Palatinit GmbH, Kingfood Aust., CMA NZ Branch, CMA -NSW Branch, CMA - QLD Branch, ICA, CMA-Vic Branch, and CM of SA supported this.

Regarding imported foods, it was noted that the absence of health claims has resulted in costs of relabelling some imported foods (ABC, AFGC (supported by Masterfoods Aust. NZ), Parmalat Aust, F&B Importers Assoc, Goodman Fielder, National Foods, Nestle), or an uneven playing field due to these products not being relabelled (Dairy Aust).

Some industries noted that being unable to communicate the role of their food types in health and disease reduction has disadvantaged them (ANIC, Horticulture Aust, MLA), and the NZFSA noted that some industries would have funded this research.

The advertising industry has been severely disadvantaged particularly in advertising nutritious foods, and feels the current law is pro obesity (ASA, NPANZ, Assoc. of NZ Advertisers, Naturo Pharm, NZTBC, Cadbury Confectionery, NZ Magazines).

Naturo Pharm added that they believed the standard of ethics that business people practice is poor and suggests that a regulator would encourage compliance and promote a level playing field. They recommend that the model behind the Trans Tasman Therapeutic Goods Advertising Code should be adopted, after which they suggest the establishment of a FAPSCCC similar to TAPSCCC to involve consumers/industry in ongoing review of the Food Code and its implementation.

The ASMI noted a lack of regulatory compliance and therefore uneven playing field with the medicines industry.

Some of the food industry felt that it was hard to compete against manufacturers that don't comply with legislation or guidelines (Code of Practice) (CML, Wyeth Aust., Griffins Foods, Nestle), and the current prohibition is open to abuse by less ethical companies (NZ Dairy Foods) or that ethical and law abiding companies are disadvantaged (Fonterra, supported by Mainland Products). CMA (supported by Mandurah Aust., Palatinit GmbH, Kingfood Aust., CMA NZ Branch, CMA - NSW Branch, CMA - QLD Branch, ICA, CMA-Vic Branch, and CM of SA) stated that

inconsistency of interpreting the standard in Australia and NZ has resulted in some manufacturers gaining market advantage over those that do not make claims.

Two food industry groups noted concern that foods carrying non-compliant claims have not been subjected to the relevant enforcement (Nestle, Nutra Life H&F) and no action is taken when the authorities are alerted (Nutra Life H&F).

Regarding the Food Standards Code, it was believed that current folate legislation is outdated and ambiguous (National Foods), and present standards, e.g. Formulated Sports Foods need amendment, especially if some of the ingredients in sports foods will be allowed in other foods, and that current warnings on sports foods are largely ignored and essentially irrelevant (Nutra-Life H&F).

William Wrigley Junior stated that they have constrained the types of claims which could justifiably be made and which are available to inform consumers overseas.

The CMA (supported by Mandurah Aust., Palatinit GmbH, Kingfood Aust., CMA NZ Branch, CMA - NSW Branch, CMA - QLD Branch, ICA, CMA-Vic Branch, and CM of SA) noted that there is currently a general prohibition on confectionery to use the GI symbol that disadvantages the industry. Recognising that some confectionary products would potentially meet existing criteria for snack bars etc, yet are classified as confectionary attracts a blanket prohibition.

Heinz Australia/Heinz Watties NZ has not identified any disadvantages of the current ambiguities.

Question 93

To what extent does the current prohibition on health claims prevent real marketing opportunities for your products or limit innovation?

Out of 147 submitters, 35% (52 in total) directly responded to this question. The distribution of these responses was as follows:

Sector	Australia	New Zealand	Trans Tasman	International	Total
Industry	25	18	5	3	51
Government	-	1	-	-	1
Public health	-	-	-	-	-
Consumers	-	-	-	-	-
Other	-	-	-	-	-
Total	25	19	5	3	52

Overview

The majority of submitters expressed that they were limited by the current prohibition on health claims in terms of preventing real marketing opportunities for their products or limiting innovation. More than half stated there was a ‘major’ constraint on innovation or new product development because they were prevented from telling

consumers about substantiated benefits. Others stated that the prohibition prevented communication of unique selling points and additional health benefits, limited the opportunity to gain market advantage, created a disincentive to investment and proved difficult to get a return on the more expensive ingredients for high level claims. One submitter considered the question irrelevant as the Ministerial Council has permitted health claims. NZFSA noted that the scope of advertising had not been made clear.

Discussion

The following companies stated that the current prohibition is a major constraint on innovation/new product development, with some stating this was because they are prevented from telling consumers about substantiated benefits (Aussie Bodies Ltd, ABC, AFGC (supported by Masterfoods Aust. NZ), Parmalat Aust, Bakewell Foods, F & B Importers Assoc, GW Foods, Goodman Fielder, National Foods, National Starch, The Solae Comp, Wyeth Aust., William Wrigley Junior, NZFGC, CMA supported by Mandurah Aust., Palatinit GmbH, Kingfood Aust., CMA NZ Branch, CMA - NSW Branch, CMA - QLD Branch, ICA, CMA-Vic Branch, and CM of SA).

Other reasons for a limit on product innovation by the current prohibition were:

- Being prevented from telling consumers about the unique selling points (Griffin's Foods);
- Product innovation relies on having a product that provides an advantage over similar types on the market (Cadbury Schweppes);
- Manufacturers cannot command a premium for additional health benefits through making claims (Sanitarium Health Food Comp);
- The inability to communicate benefits limits the opportunity to gain a market advantage, particularly where there is a cost involved in providing a benefit (NZJBA supported by Frucor);
- Innovation involves substantial resources and the inability to convey substantiated health messages to consumers is a disincentive to investment. There is little incentive to enhance a product if the benefits of the product cannot be promoted (NZFGC);
- Investment into research for product types with specific health benefits cannot be communicated, meaning there is less opportunity for business to grow through innovation (Nestle); and
- Generally the ingredients required to make high level claims are expensive and without being able to make these claims, it is difficult to promote the product and therefore get a return on the more expensive ingredients (NZ Dairy Foods).

ABC, AFGC (supported by Masterfoods Aust. NZ), Parmalat Aust, and National Foods commented that the prohibition results in a disincentive to invest in developing new products to promote good health on.

Nutra-Life H&F noted that it has meant they have not developed some specific food products, although such foods could play a role in health issues as “foods for a special purpose”.

Unilever Australasia noted that for sale in Australia and NZ, Flora Pro-active requires modification of specific packaging (labelling) that can be used elsewhere in the world.

Regarding prevention of real marketing opportunities, submitters made the following comments:

- It is difficult to communicate product-specific health benefits (Wyeth Aust.);
- The probation limits manufacturers being able to differentiate their product in the market place (Goodman Fielder, Wyeth Aust.);
- Significant opportunities have been missed as manufacturers have been unable to communicate substantiated health benefits to consumers (Dairy Australia, GW Foods, CMA supported by Mandurah Aust., Palatinit GmbH, Kingfood Aust., CMA NZ Branch, CMA - NSW Branch, CMA - QLD Branch, ICA, CMA-Vic Branch, and CM of SA);
- Nutritious products cannot be advertised in the usual way of advocating the benefits and consequently people’s diets are out of skew (ASA, NPANZ, Assoc. of NZ Advertisers, Naturo Pharm, Cadbury Confectionery, NZ Magazines, NZTBC);
- Disadvantaged by being unable to communicate the role of their food types in health and disease reduction (ANIC); and
- There have been marketing opportunities for foods that are able to carry health claims in other countries that cannot be sold in NZ or Australia (Nestle).

Other impacts of the current prohibition of health claims submitted were:

- Prevents the horticulture industry from being able to make the most of one of its single biggest strengths when competing against other less beneficial foods (Horticulture Aust.);
- Severely limits trans Tasman market opportunities (National Foods); and
- Stifled new product development impacts the domestic economy, limits potential overseas market development and limits clinical research and development in addition to restricting growth in the latter sections (National Starch, Solae Comp).

Fonterra (supported by Mainland Products) stated that the prohibition unjustifiably reduces the tools available to marketers of other health products and as a result it inhibits innovation and research into health promoting ingredients and foods.

Mainland Products stated that there has been a freeze on new product development, which has prevented them from utilising well-researched products that can carry claims and are marketed successfully by Fonterra in other markets. Unilever Australasia noted that for sale in Australia and NZ, Flora Pro-active requires modification of specific packaging that can be used elsewhere in the world.

NZ Dairy Foods noted that the current prohibition prevents real marketing opportunities in that milk is widely recognised as a healthy whole food yet they cannot easily promote it or the vital components such as calcium when competing against empty calorie products such as carbonated beverages.

The NZ V&PG Fed/NZFG Fed. state that treating health messages disseminated in education or social marketing strategies in the same manner as packaging can be restrictive, frustrating and not in the best interests of consumers who seek to be more informed. The two situations are very different and need to be allowed for.

CMA (supported by Mandurah Aust., Palatinit GmbH, Kingfood Aust., CMA NZ Branch, CMA - NSW Branch, CMA - QLD Branch, ICA, CMA-Vic Branch, and CM of SA) caution that the criteria and conditions could be made too rigid so that the scope of innovation becomes so narrow it precludes processed foods such as confectionary, from making health claims.

Heinz Australia/Heinz Watties NZ believes it is difficult to promote useful public health messages without being able to explain the benefits. They noted their consumer research project, which investigated where consumers can get nutrition information from and which found that consumers obtain nutrition information from other sources in addition to food labels and they question the suitability of these sources. They stated that health claims on labels would communicate the real benefits of foods so consumers can make informed choices.

CML stated they have been restricted in terms of health promotion/education and notes they would like to do more of this and have many opportunities available for marketing ranging from in-store marketing to magazine articles etc.

NZFSA are aware that the issue of advertising has been problematic as the scope of advertising has not been clear, and this has created frustration amongst companies who would like to communicate industry funded research etc.

PB Foods noted that they had to decline a request to target “Heart Plus” fortified milk at stroke patients because of the prohibition.

Dairy Aust. stated that they consider the question irrelevant as the Ministerial Council has permitted health claims.

Question 94

To what extent, if any, is the Australian food industry disadvantaged by being unable to make health claims on products that compete with imports?

Out of 147 submitters, 21% (31 in total) directly responded to this question. The distribution of these responses was as follows:

Sector	Australia	New Zealand	Trans Tasman	International	Total
Industry	21	3	4	2	30
Government	-	-	-	-	-
Public health	1	-	-	-	1
Consumers	-	-	-	-	-
Other	-	-	-	-	-
Total	22	3	4	2	31

Overview

One submitter quoted a ‘considerable’ disadvantage in the sports food and weight management sector. Another noted a disadvantage ‘in general’ concerning the competition with imports. It was stated that Australian manufacturers were unable to compete on a level playing field. More than one-third of the submitters specifically stated that the Australian food industry had been disadvantaged by the ability to import dietary supplements into Australia that are manufactured in New Zealand but could not be manufactured in Australia. Another one-third of submitters stated there was little incentive for Australian and New Zealand manufacturers to develop food products for health claims due to their prohibition on the domestic market whilst competing with other countries. A few submitters indicated they were not disadvantaged.

Discussion of submitter responses

A considerable disadvantage in the sports food and weight management sector (Aussie Bodies) or disadvantage in general by being unable to make health claims on products that compete with imports (Dairy Aust) was noted, with Griffins Foods stating that Australian manufacturers are disadvantaged as they are not able to compete on a level playing field.

A number of submitters commented that Australian companies have been disadvantaged by the ability to import dietary supplements into Australia that are manufactured in NZ but can’t be manufactured in Australia (ABC, AFGC (supported by Masterfoods Aust. NZ), Parmalat Aust, PB Foods, Cadbury Schweppes, Dairy Aust, Goodman Fielder, Nutra-life H&F, CMA, Nestle). Cadbury Schweppes commented that incorporating the Dietary Supplement Regulations into the Code under a Nutrition, Health and Related Claims Standard is a positive step.

The ASMI noted that a distinction must be made between imported foods that are making ‘legal’ health claims under the provisions of their country of origin, versus those foods making health claims where there is ambiguity in the regulatory

environment, which is taken advantage of. They have encountered this with NZ dietary supplements imported into Australia, which are not fully compliant with the NZ Dietary Supplement Regulations.

Regarding relabelling of imported foods, CML and Cadbury Schweppes noted that some imported foods may need relabelling, and Cadbury Schweppes also pointed out that most imported foods have had to be relabelled, as they don't comply with the Code anyway. It was felt by CML that if AQUIS is doing their job, there should be no competition with incorrectly labelled imports.

CML commented that if we were to follow claims already permitted overseas, this might help Australia and New Zealand products be more competitive overseas.

CMA (supported by Mandurah Aust., Palatinit GmbH, Kingfood Aust., CMA NZ Branch, CMA - NSW Branch, CMA - QLD Branch, ICA, CMA-Vic Branch, and CM of SA) stated there has been little incentive for Australian and NZ manufacturers to develop food products for health claims due to the prohibition on health claims on the domestic market, but they are competing with other countries who can make health claims.

National Starch stated that an equitable regulatory framework can be achieved if health claims are permitted.

Nutra-Life H&F felt that although therapeutic claims cannot be made, well informed consumers know of the benefits.

The F&B Importers Assoc. stated that there should be no disadvantage apart from imports from NZ, as imports are not permitted to make health claims.

Two of the Australian industries felt that their industries were not disadvantaged (ANIC, Horticulture Aust). Other submitters said that the number of imported foods making health claims is not extensive therefore this is not an issue (Cadbury Schweppes, Solae Comp. Dr R Stanton recommended that as food imports are not a major part of the Australian food supply, this question should not be given too much attention.

Question 95

In Australia, how effective is CoPoNC in providing guidance to industry on content claims and does the fact that it is not legally enforceable create compliance problems?

Out of 147 submitters, 24% (35 in total) directly responded to this question. The distribution of these responses was as follows:

Sector	Australia	New Zealand	Trans Tasman	International	Total
Industry	24	1	5	2	32
Government	-	-	-	-	-
Public health	2	-	-	-	2
Consumers	-	-	-	-	-
Other	1	-	-	-	1
Total	27	1	5	2	35

Overview

Almost half the submitters believed that, in Australia, CoPoNC had provided good guidance to industry on content claims. Another 25 per cent stated that CoPoNC needed updating and a few others considered it inadequate. With regard to compliance, over 40 per cent noted problems with companies who chose not to follow the guideline, as it was not legally enforceable. These problems led to inconsistent or misleading messages to consumers. However, 25 per cent of submitters believed there was general compliance with the Code and the lack of legal enforcement had not caused problems. It was also pointed out that CoPoNC was legally enforceable through State and Territory fair trading laws, the Commonwealth Trade Practices Act and Australian Competition and Consumer Commission.

Guidance to industry

A number of submitters believe the Code has provided good guidance to industry (Cadbury Schweppes, Dairy Aust, F & B Importers Assoc, GW Foods, Goodman Fielder, Sanitarium Health Food Comp, Nestle, Unilever Australasia) including marketing (ABC, AFGC (supported by Masterfoods Aust. NZ), Nestle, Parmalat Aust, PB Foods, MLA). CHC thought it is an excellent set of principles and Unilever Australasia felt it ensures consumers have all information relevant to the product to facilitate informed consumer choice.

A number of submitters felt the CoPoNC needs updating (ABC, AFGC (supported by Masterfoods Aust. NZ), Nestle, Parmalat Aust, PB Foods, CML). CML submitted that CoPoNC provides some guidance but is outdated and would need reviewing to be truly useful. Sanitarium Health Food Comp stated that with the wide range of claims being made, the claims covered in CoPoNC need to be expanded.

Dr R. Stanton stated that the CoPoNC has some relevance but many small companies are unaware it exists.

Goodman Fielder noted that it should have been updated years ago however this did not prevent its use and its relevance was maintained; however Unilever Australasia contradicted this by saying its lack of review to ensure it remains consistent with the Food Standard Code has resulted in it losing relevance.

National Starch and Solae Comp consider CoPoNC is inadequate for providing guidance on content claims to manufacturers. CML felt that there is no real advice/support mechanism available.

Compliance issues

A number of organisations commented on compliance issues, with some noting problems with some companies knowingly choosing not to follow the guideline as it is not legally enforced (Aussie Bodies, Cadbury Schweppes, Sanitarium Health Food Comp, Dr R. Stanton, ASMI, CML, CHC). This disadvantages companies who adhere to the CoPoNC (Wyeth Aust, CMA, National Starch, Solae Comp). The lack of enforcement leads to inconsistent consumer messages (National Starch, Solae Comp, GI Ltd), or allows consumers to be misled (CHC). Wyeth Aust. believed that CoPoNC has not been effectively monitored and enforced.

Heinz Australia/Heinz Watties NZ commented that they do experience issues with regards to the compliance to the guideline and that criteria in the guideline are consistently challenged both within their company and by competitors; the argument often being why should a company be placed at a marketing disadvantage by adhering to CoPoNC when competitors are ignoring it.

Dairy Aust. felt that it would be considered a manufacturers' cost or detriment not to adhere to CoPoNC.

TGACC and ASMI considered that total self-regulation is only as good as the compliance by signatories to the Code or by members of associations bound by a condition of membership.

On the other hand, Goodman Fielder stated there was only one area of non-compliance – ‘% fat free’ claims, however if a company wanted to take legal action it could with the CoPoNC management committee or under the State, Territory or Fair Trading Acts. Two industries felt there was general compliance with CoPoNC (F & B Importers Assoc, Unilever Australasia). Others noted that they do not believe the lack of legal enforceability of the code has caused problems (AFGC (supported by Masterfoods Aust. NZ), Parmalat Aust., PB Foods, Unilever Australasia) as ACCC regulations prevent false or misleading statements being made (ABC). Some quoted research from Williams et al (2003) indicating little difference in compliance between the FSC and CoPoNC (AFGC (supported by Masterfoods Aust. NZ), Parmalat Aust, PB Foods, Dairy Aust).

Dairy Aust. believes CoPoNC is legally enforceable through State and Territory fair trading laws, the Commonwealth Trade Practices Act and ACCC. PB Foods noted their previous experience in the orange juice industry, which showed that industry compliance was greatly improved through self-regulation using a “Code of Practice”. CMA (supported by Mandurah Aust, Palatininit GmbH, Kingfood Aust, CMA – NZ

Branch, CMA – NSW Branch, CMA – Qld Branch, CMA – Vic Branch, ICA, CM of SA) submitted that if Government endorse the new guideline then compliance would follow (so they support Option 2). CHC supports maintaining CoPoNC as a co-regulatory industry standard provided that meaningful, enforceable and timely sanctions can be applied.

Sanitarium Health Food Comp believed CoPoNC is useful to help guard against breaches of Trade Practice.

Heinz Australia/Heinz Watties NZ commented that they use CoPoNC as a guide for all claims (where relevant) including for in NZ. They believe the principles behind CoPoNC are critical to claim making practices; however they don't agree with some of the criteria in it. Goodman Fielder also noted CoPoNC has been used extensively in the New Zealand food industry.

Other comments provided but not in direct response to the question

Not all manufacturers have adhered to CoPoNC and imported products do not need to comply with CoPoNC. This has resulted in an uneven playing field for local manufacturers (ACA).

Question 96

In New Zealand, are there any costs to industry from a general reliance on fair trading provisions to manage content claims? If so, please identify these costs.

Out of 147 submitters, 18% (27 in total) directly responded to this question. The distribution of these responses was as follows:

Sector	Australia	New Zealand	Trans Tasman	International	Total
Industry	8	13	4	2	27
Government	-	-	-	-	-
Public health	-	-	-	-	-
Consumers	-	-	-	-	-
Other	-	-	-	-	-
Total	8	13	4	2	27

Overview

Some submitters stated there were media advertising costs to industry from a general reliance on fair trading provisions to manage content claims. It was also noted that many claims went unchallenged by industry because companies could not afford the time or money. It was suggested that the New Zealand Commerce Commission was in a position to provide information of costs involved to ensure compliance with the *Fair Trading Act (1986)*. Other submitters believed that Option 1 was not sustainable in a 'harmonised food regulatory environment' between Australia and New Zealand. Some did not believe that the New Zealand industry was incurring any or greater costs from relying on fair trading provisions to manage content claims in New Zealand.

Discussion

The ASA stated that there are costs for advertising in the media when the ad needs a TAPS pre-approval (small cost but ensures the advertising does not over promise or mislead) and suggested that if there is a pre-vetting system (as described in previous questions, for example question 73) for content claims then there will be a similar small cost. The additional costs of the complaints system will be minimal as the ASB and ASCB already operate (as described in question 40). NPANZ, Assoc. of NZ Advertisers, Cadbury Confectionery, Naturo Pharm, NZ Magazines, and NZTBC supported these views.

Griffins Foods commented that there is little enforcement unless industry pursues this themselves. However in many cases companies cannot afford the time or money to challenge inappropriate claims meaning many claims go unchallenged.

The NZFGC stated that the NZ Juice and Beverage Association has worked closely with the NZ Commerce Commission to institute the monitoring of certain claims for fruit juice to ensure compliance with the Fair Trading Act, and this Association should be in a position to provide information of the costs involved. Other sectors of the Industry have not identified any unreasonable costs involved in reliance on fair trading provisions to manage content claims.

The CMA (supported by Mandurah Aust., Palatinit GmbH, Kingfood Aust., CMA NZ Branch, CMA - NSW Branch, CMA - QLD Branch, ICA, CMA-Vic Branch, and CM of SA) stated that Option 1 is not sustainable in a harmonised food regulatory environment between Australia and NZ. They also recommended that regulatory requirements should be harmonised, and Heinz Australia/Heinz Watties NZ agreed by saying that they support unified standards across Australia and NZ.

The CMA (supported by Mandurah Aust., Palatinit GmbH, Kingfood Aust., CMA NZ Branch, CMA - NSW Branch, CMA - QLD Branch, ICA, CMA-Vic Branch, and CM of SA) noted that to date the confectionary industry has been reliant on guidance taken from CoPoNC with respect to managing nutrient content claims in NZ and Unilever Australasia also stated that as they manufacture products for both Australia and NZ they use CoPoNC for both countries.

NZ Dairy Foods believed that there shouldn't be any costs if companies obey the law; otherwise the costs are of seeking legal opinion if the claim or product is believed to be pushing the boundaries of the Fair Trading Act.

Dairy Aust and Fonterra (supported by Mainland Products) do not believe the NZ food industry is incurring any particular costs from the need to rely on fair trading provisions and National Foods said that they have not experienced greater costs from relying on fair trading provisions to manage content claims in NZ. Nestle also stated that they weren't aware of such costs.

Question 97

How effective is CoPoNC in providing guidance to industry in marketing current products and developing new products?

Out of 147 submitters, 25% (36 in total) directly responded to this question. The distribution of these responses was as follows:

Sector	Australia	New Zealand	Trans Tasman	International	Total
Industry	22	5	5	3	35
Government	-	1	-	-	1
Public health	-	-	-	-	-
Consumers	-	-	-	-	-
Other	-	-	-	-	-
Total	22	6	5	3	36

Overview

Over 30 per cent of submitters (13) believed that CoPoNC provides guidance to industry in marketing current products and developing new products. Some added that CoPoNC needed to be updated – to be consistent with the Food Standards Code, to reflect latest developments, consumer needs and trends, or to develop it into a guideline with legal status. One submitter specifically stated that CoPoNC had been ‘highly’ effective in establishing industry guidelines for nutrient claims. Four others affirmed its use as a reference framework. However, two submitters stated that CoPoNC was inadequate because newer health food claims lay outside its scope or it was not widely known and not policed. Another 25 per cent stated that although CoPoNC was an excellent set of principles, the numerous breaches had resulted in ‘ineffectual’ standardisation.

Discussion of submitter responses

A number of submitters felt that in its present form, CoPoNC provides and continues to provide guidance to industry in marketing current and new products (AFGC (supported by Masterfoods Aust. NZ), Dairy Aust, Goodman Fielder, National Foods, Griffins Foods, Mainland Product, Unilever Australasia). Sanitarium Health Foods Comp supported this and gave the reason that it provides guidance on how to make certain claims responsibly and gives a benchmark for certain nutritional characteristics required in a new product. Cadbury Schweppes felt that it provides guidelines for developing new products in so much that there is clear direction that has to be taken in order to make any content claims. Aussie Bodies and NZFSA felt that that in the absence of other guidelines it has been reasonably effective or a useful resource. NZFGC said that guidelines provide valuable assistance to companies and CoPoNC appears to have been a useful tool in Australia but to a lesser extent in NZ.

Some of these submitters added that they believe the CoPoNC needs updating (F & B Importers Assoc, Goodman Fielder, ABC, AFGC (supported by Masterfoods Aust. NZ), Dairy Aust, National Foods, Heinz Australia/Heinz Watties NZ, Nestle, Unilever Australasia), to be consistent with the FSC (Goodman Fielder, Dairy Aust,

National Foods, Nestle, Unilever Australasia) and ACCC requirements (ABC, AFGC (supported by Masterfoods Aust. NZ), or to reflect latest scientific developments and consumer needs and trends (Dairy Aust, National Foods). CMA (supported by Mandurah Aust., Palatinit GmbH, Kingfood Aust., CMA NZ Branch, CMA - NSW Branch, CMA - QLD Branch, ICA, CMA-Vic Branch, and CM of SA) supported retention of much of what is in CoPoNC in addition to updating it into a guideline that will bring legal status by way of its Government support to the requirements for all entities to operate in a fair and equitable manner.

Another comment was that continued high compliance to CoPoNC suggests that it has been highly effective in establishing industry guidelines for nutrient claims. Consequently marketers operate in an even playing field and consumer labelling and advertising information is consistent (Parmalat Aust).

Cadbury Schweppes noted that they follow CoPoNC and apply the principles when seeking to make claims on product labels and in any advertising. Heinz Australia/Heinz Watties NZ also commented that they follow CoPoNC when developing new products and this can lead to improved nutrient profiles. William Wrigley Junior stated that CoPoNC has provided a framework by which sugar free claims have been made and for this reason much of the content of CoPoNC should be retained.

Conversely ASMI considered that CoPoNC is probably inadequate in providing guidance to industry in marketing current products and developing new products because the nature of newer foods are such that claims with regard to health are outside the scope of CoPoNC. NZ Dairy Foods stated that CoPoNC is ineffective as it is not widely known and is not policed.

CHC stated that it is an excellent set of principles but numerous breaches due to its voluntary nature have resulted in ineffectual standardisation. As it is not subscribed to by all of industry and has no meaningful sanctions, this sends a very poor message to industry and allows consumers to be misled. CMA (supported by Mandurah Aust., Palatinit GmbH, Kingfood Aust., CMA NZ Branch, CMA - NSW Branch, CMA - QLD Branch, ICA, CMA-Vic Branch, and CM of SA) believed that CoPoNC has been effective in providing guidance but its shortcomings are that it is not legally binding and does not apply to imports or to New Zealand.

National Starch and Solae Comp. believed that since the application of the Code is so unclear, the mode for communicating the nutritional and health merits of products to the consumer is also unclear, and this acts as a disincentive for developments of new products that offer a health benefit.

GW Foods considered regulation does not drive innovation.

2.2 REGULATORY OPTION 2

Question 98

Can industry indicate the nature and extent of compliance costs that could be incurred under Option 2?

Out of 147 submitters, 25% (36 in total) directly responded to this question. The distribution of these responses was as follows:

Sector	Australia	New Zealand	Trans Tasman	International	Total
Industry	20	10	4	2	36
Government	-	-	-	-	-
Public health	-	-	-	-	-
Consumers	-	-	-	-	-
Other	-	-	-	-	-
Total	20	10	4	2	36

Overview

Around 20 per cent of industry submitters indicated the nature of compliance costs under Option 2. They ranged from gathering and storage of evidence, literary searches, consultants, research and development, product testing, labelling changes, substantiation, changing the standard and seeking legal advice, to lodging a submission with FSANZ. It was suggested that costs of compliance under Option 2 might be ‘extensive’ and the same as Option 3. Although nearly 40 per cent of submitters suggested that it was difficult to determine the costs at this stage, some provided estimates of \$2500 per label based on costs of changing from the old Food Standards Code to the current Food Standards Code. One-third stated that the proposed substantiation process would increase costs ‘significantly’. A few suggested ‘limited’ costs for general level claims.

Discussion of submitter responses

Submitters highlighted the nature of compliance costs as follows:

- Their costs are likely to be more related to the gathering and storage of evidence, which is mainly a human resource cost and would only have a small impact on end cost of product (because they are likely to be involved in general level claims) (Aussie Bodies);
- Costs will only be incurred if high level claims are made and a large amount of time and resources (i.e. a consultant) will need to be devoted to this task – probably weeks (CML);
- Compliance costs will relate directly to product development, labelling changes and the eventual complexity of the required substantiation (ABC);

- Testing the product, changing the standard, getting legal advice, cost of substantiation, research costs and product development costs are the costs listed by Bakewell Foods;
- Label changes involve substantial costs (AFGC supported by Masterfoods Aust. NZ);
- Costs are associated with the type and extent of clinical studies required to substantiate the claims, resources required to conduct a literary search, and the costs associated with lodging a submission with FSANZ. These costs may be extensive (Cadbury Schweppes); and
- Parmalat Aust. considered that major costs arise from changes to packaging and advertising material.

Some submitters felt that costs of compliance for option 2 and 3 will be the same (Unilever Australasia, Cadbury Schweppes, Parmalat Aust), as both options require the appropriate data to be collected and provided upon request (Cadbury Schweppes).

Some industry submitters indicated that it is difficult to determine the costs of compliance at this stage (AFGC (supported by Masterfoods Aust. NZ), Cadbury Schweppes (high level claims only), CMA supported by Mandurah Aust., Palatinit GmbH, Kingfood Aust., CMA NZ Branch, CMA - NSW Branch, CMA - QLD Branch, ICA, CMA-Vic Branch, and CM of SA; Unilever Australasia and Nestle). Some industries indicated that costs of the compliance for general level claims would be limited (Cadbury Schweppes, CML). Cadbury Schweppes added that they don't expect that compiling the dossier of evidence will be significant. CML gave the reason that any general level claims being made have already been substantiated, for companies that are already meeting the requirements of CoPoNC or other codes of practice, and for companies not complying with CoPoNC or other Codes of practice, it is likely there will be no change.

Cadbury Schweppes suggested that if general level claims are in a guideline, some manufacturers might choose not to collect the appropriate substantiation data because enforcement agency may not have the authority to request or approve this data.

ASMI commented that compliance costs to industry for compiling suitable substantiating information to support claims is not an unreasonable impost, and one that would already be required under trade practices legislation and they suggested that compliance costs should already be figured into the research and development costs in order to bring a product to market.

A number of industries suggested that as claims will be optional, costs incurred might be offset by the benefit the business making the claim (AFGC (supported by Masterfoods Aust. NZ), GW Foods, National Foods, NZFGC, CML); or the company will assess whether the benefits exceed the costs (F&B Importers Assoc.). GW Foods agreed by saying that they would only make a claim where there is a benefit to the business in terms of increased sales or market share.

It was pointed out that in the event that general level claims criteria and conditions change considerably from those listed in the CoPoNC, there will be costs associated with claims already in the market place (AFGC (supported by Masterfoods Aust. NZ), Dairy Aust, F&B Importers Assoc., Goodman Fielder, National Foods, Nestle). These costs include analytical costs for the NIP, label change costs and ongoing lab costs for nutrient claim compliance (Goodman Fielder). Some of the proposed changes may mean a total change to the branding and marketing of some products, e.g. diet products (Nestle).

Some estimates of the actual costs involved were provided:

- Costs incurred when changing from the old FSC to the current FSC were approximately \$2000 to \$3000 per label (Goodman Fielder);
- The costs that occurred as a result of changes to the FSC approximated \$2500 per label. These costs included analytical costs for the NIP and on-going lab costs to assist compliance with content claims (AFGC (supported by Masterfoods Aust. NZ & Dairy Aust));
- Current testing to verify nutritional content is approximately \$1000 per product but this is already included in standard R & D costs (PB Foods); and
- Dairy Aust. estimate that market research into new claims and new product brands could be in excess of \$200 000 and packaging redesign and production costs could equal approximately \$900 000, e.g. should the criteria and conditions for 'diet' change, the costs associated with repackaging a significant, well-established product could be in excess of \$43 million (sourced from Nestle). Potential impact from changes to the light/lite category is estimated at a revenue loss of \$12 million (referenced) and loss of approximately one-third of sales to Kraft cheese singles (sourced from Kraft 2004). Estimated difference in cost for a 'regular' product versus one containing an ingredient that supports a general level claim is \$5000 per year (sourced from Dairy Farmers 2004).

The proposed substantiation process would increase costs significantly (PB Foods, CMA supported by Mandurah Aust., Palatinit GmbH, Kingfood Aust., CMA NZ Branch, CMA - NSW Branch, CMA - QLD Branch, ICA, CMA-Vic Branch, and CM of SA). PB Foods recommended that substantiation of evidence for general level claims needs to be minimum cost.

CMA (supported by Mandurah Aust., Palatinit GmbH, Kingfood Aust., CMA NZ Branch, CMA - NSW Branch, CMA - QLD Branch, ICA, CMA-Vic Branch, and CM of SA) questioned how equitable it will be for industry seeking approval for high level claims that are not pre-approved and added that unless a patentable ingredient, a company applying for approval of a new high level claim will bear the costs whilst competitor companies will reap the benefits. They suggested that where there is industry wide benefit, consideration should be given to waiving application fees and that high application fees would be a deterrent to the development of health claims thereby stifling product innovation.

Nutra-life H&F believed that small food manufacturers would not be able to afford to install testing facilities to test the validity of their own products, making the exercise non profitable and meaning larger manufacturers would have a significant advantage.

ASMI expressed concern that the IAR states that the “criteria for making general level claims would not legally be enforceable” as this supposes a foregone conclusion on the legal underpinning for enforcement and the standard.

The ASA stated that there are costs for advertising in the media when the ad needs a TAPS pre-approval (small cost but ensures the advertising does not over promise or mislead) and suggested that if there is a pre-vetting system for content claims (as described in previous questions, eg73) then there will be a similar small cost. The additional costs of the complaints system (as described in Q40) will be minimal as the ASB and ASCB already operate. Cadbury Confectionery, Naturo Pharm, NZ Magazines, and NZTBC supported these views.

Other comments provided but not in direct response to the question

The DITR understands concern has been expressed in relation to compliance costs of monitoring labelling and advertising, which could be onerous. They recommend that whilst it is necessary to ensure public health and safety are protected, it is also important the cost to industry of complying with that regulation should be kept as minimum as possible and not impose an unduly onerous border, especially for small businesses. They also recommend that where companies would need to obtain regulatory approval from more than one agency, e.g. TGA, FSANZ, OGTR, application arrangements should be streamlined wherever possible.

Question 99

Can industry indicate the probable cost of complying with the need to develop systems to compile and assess evidence to substantiate general level claims?

Out of 147 submitters, 22% (32 in total) directly responded to this question. The distribution of these responses was as follows:

Sector	Australia	New Zealand	Trans Tasman	International	Total
Industry	19	6	5	2	32
Government	-	-	-	-	-
Public health	-	-	-	-	-
Consumers	-	-	-	-	-
Other	-	-	-	-	-
Total	19	6	5	2	32

Overview

The majority (20) of industry submitters indicated that at this stage it was difficult to determine the costs of complying with the need to develop systems to compile and assess evidence to substantiate general level claims. Some industries suggested that costs would be influenced by the complexity of the claim or factors relating to each company (e.g. data availability, company size and number of products). Other suggestions were that costs would be similar to what companies already incurred, related to the gathering and storage of evidence (mainly a human resource) and would not be unreasonable (given it was a regulatory requirement). However, others felt that costs might be extensive, including setting up a database. One submitter noted that industry compliance costs under Option 2 were not relevant.

Discussion

A number of submitters indicated that it is difficult to determine the costs of complying with the need to develop systems to compile and assess evidence to substantiate general level claims at this stage (Unilever Australasia, Cadbury Schweppes) with most giving the reason that more detail on the substantiation process is needed (ABC, AFGC (supported by Masterfoods Aust. NZ), Parmalat Aust, Dairy Aust, NZJBA (supported by Frucor), F & B Importers Assoc) or because it is without precedent (CMA supported by Mandurah Aust., Palatinit GmbH, Kingfood Aust., CMA NZ Branch, CMA - NSW Branch, CMA - QLD Branch, ICA, CMA-Vic Branch, and CM of SA).

Some industries commented on what they thought might influence these costs, such as:

- The complexity of the claim (Dairy Aust);
- Circumstances of each company, what is available, age and relevance of data etc (and costs could be highly variable) (Food Tech Assoc of Vic.); and
- The company's current systems, number of products, number of resources and company size (Goodman Fielder).

Some industries indicated that they thought these costs are likely to be similar to what they already incur (Tegel Foods, Heinz Aust./Heinz Watties NZ). Mainland Products and Nestle noted that in many cases these systems are already in place and they already hold evidence to substantiate the general level claims they currently make, and Nestle added that until the final requirements are detailed and the interpretive guides are developed, they do not know whether they will need to modify this system

Others indicated how substantial they thought these costs would be:

- Their costs are likely to be more related to the gathering and storage of evidence, which is mainly a human resource cost and would only have a small impact on end cost of product (because they are likely to be involved in general level claims) (Aussie Bodies);

- Considered that these costs would not be expected to be unreasonable given this is a regulatory requirement currently met by many small to medium business enterprises marketing complementary medicines (ASMI);
- This cost may be extensive depending on the nature of the claim and level of substantiation required (Cadbury Schweppes);
- There would be costs associated with setting up a database/file for storage of information, and even greater costs to develop an internal system for gathering and assessing evidence. It is highly probable that external consultants would be needed to do some or all of the work (CML); and
- Considerable costs would be incurred (Goodman Fielder).

AFGC, supported by Masterfoods Aust. NZ and Parmalat Aust, recommended developing an industry guideline similar to that for allergen management to assist industry in understanding the process and the requirements for substantiating general level claims.

GW Foods considered that industry compliance costs under option 2 are not relevant, as the costs involved in making the claim would be offset by cost recovered from the sale. They would only make a claim where there is a benefit to the business in terms of increased sales or market share for example.

National Foods stated that they believe failure to comply with the guideline, or indeed a standard, would lead to compliance costs for enforcement agencies, but these costs already occur now.

Nutra-life H&F commented that this would involve batch testing of ingredients and finished product for content and general health claims, which could cost thousands of dollars per batch. Proof of stability and bioavailability would be an additional cost (e.g. understands the cost for GI and GL analysis is A\$7 000 per product and requires human volunteers).

Question 100

What would be the impact on your business arising from a permission to use high level claims? In your response consider marketing opportunities and potential sales revenue.

Out of 147 submitters, 27% (40 in total) directly responded to this question. The distribution of these responses was as follows:

Sector	Australia	New Zealand	Trans Tasman	International	Total
Industry	23	11	4	2	40
Government	-	-	-	-	-
Public health	-	-	-	-	-
Consumers	-	-	-	-	-
Other	-	-	-	-	-
Total	23	11	4	2	40

Overview

Twenty-five percent of industry responses (10) suggested that it was difficult to estimate the impact on their business should permission be given for them to use high level claims. Some indicated there would be a positive impact with ‘significant’ opportunities arising such as increases in fresh food sales, ranges and types of private labels. Other opportunities included reformulated products, product differentiation, target marketing, promoting benefits and more pro-active education of consumers. There would also be a greater incentive to invest in research and development. Another 30 per cent stated that certain companies would be disadvantaged as the likely number of pre-approved high level claims might favour a few industries.

Discussion of submitter responses

Some submitters (Parmalat Aust and those listed below) felt it was difficult to give an estimate of the impact for the following reasons:

- Such claims have not previously been possible (ABC);
- It is unknown which high level claims will be allowed (GW Foods);
- This will depend on individual company decisions, however significant opportunities could arise in communicating truthful health benefits to consumers about food products (AFGC (supported by MasterFoods Aust. NZ), NZJBA (supported by Frucor); and
- Impact on revenue is unclear given the potential costs associated with making a submission, conducting research and compliance costs (National Starch, Solae Comp).

Consistent with this, Unilever Australasia noted the impact on the business would depend on the number of claims and how relevant these are to product range. For example, Unilever Australasia would be interested to use a claim that related to phytosterols and cholesterol lowering and therefore would take on the costs of complying.

Some submitters indicated that there would be a positive impact on their business or there would be significant opportunities arising (Goodman Fielder, National Foods, CML, Parmalat Aust). National Starch and Solae Comp supported this if high level claims using their ingredients were permitted. ASMI also agreed that there would be significant opportunities for the food industry, providing that there is an opportunity for suitable data protection and market exclusivity for new health claims. CML gave the reason that their sales of fresh foods should increase, as will the range and type of private label products on offer.

Cadbury Schweppes stated that a number of their products might be reformulated to take full advantage of the ability to make high level claims. Sanitarium Health Food Comp believed the permission of high level claims would provide opportunities for current products/formulations in terms of new avenues to promote benefits. Aussie Bodies said they would be more inclined to develop products targeted to specific markets and would be more pro-active in educating consumers on the benefits of the products/ingredients. These activities are currently held back as they cannot make claims.

Some industries indicated that there would be a positive impact for their customers in relation to health and nutrition. CML said this was because they will have access to accurate information and become better informed, and therefore assisted to make appropriate purchase decisions. Sanitarium Health Food Comp stated that health claims might significantly increase consumer interest and boost product relevance and appeal, thus encouraging consumers to purchase a product with a distinct health advantage. Parmalat Aust. suggested that high level claims will provide consumers with opportunities to improve eating behaviour through selecting foods that meet health needs. Goodman Fielder said it would allow manufacturers to make truthful health claims about the real benefits of their food products. Others stated that there would be huge opportunities to advertise the benefits of nutritional foods, which will ultimately lead to better diets and better health (ASA, NPANZ, Assoc. of NZ Advertisers, Cadbury Confectionery, NZTBC, NZ Magazines).

Naturo Pharm noted that the ASA response to this question states that advertising the benefits of nutritional foods will ultimately lead to better diets and health. However, this will only be achieved if the food contains the stated ingredients, which are mixed consistently and are equally available in each portion and are bioavailable. Their submission also discusses the primary role of FSANZ and the Therapeutic Foods Act/Medsafe and the possibility of moving towards similar standards for both (refer to submission for details).

Regarding the nut industry, ANIC believed that permission to use a high level claim regarding nuts will make a significant contribution to addressing consumer and health professional misconceptions about the role of nuts in health and disease prevention and will have a significant positive impact on public health in Australia and New

Zealand. There is likely to be an increase in the demand for nuts following the approval of a high level claim for nuts and heart health. Increased demand for nuts will be responded to by planting more nut trees and Australia is well positioned to grow certain nuts, which are extremely efficient uses of water on a gross margin per mega litre of water used basis. Expansion of nut plantings would significantly add to the diversity and strength of Australian agriculture. Currently Australian nut production has a farm gate value of a little over \$200 million per annum. If consumption increases as has occurred in the USA following the Food and Drug Administration permitted health claim, they would expect Australian nut production to more than double in the next decade and would expect trees planted to triple in the same time span.

Cadbury Schweppes would evaluate the impact on sales revenue on a case-by case basis as part of the company's strategic development programme.

Aussie Bodies estimated sales increment could be in the order of 5 per cent.

Some industries commented on research and innovation opportunities as follows:

- High level claims are likely to lead to an investment in innovation and research, both enhancing current products and developing new ones which have meaningful health benefits (also to produce evidence to support the high level claim) (Sanitarium Health Food Comp.);
- The proposed health claim framework will provide industry with the potential to communicate scientifically substantiated health benefits about their products, which will enable companies to focus on innovation and direct resources to take up the opportunity of promoting such claims (CMA supported by Mandurah Aust., Palatinit GmbH, Kingford Aust., CMA NZ Branch, CMA - NSW Branch, CMA - QLD Branch, ICA, CMA-Vic Branch, and CM of SA);
- Allowing health claims would provide a greater incentive to invest in research and development to produce healthful products for consumers. Marketing opportunities would allow product differentiation, and additional sales revenue could then reinvested in further research and development (Wyeth Aust.); and
- They would place greater emphasis on innovative product development with resulting product geared towards being able to optimise the scope of high level claims. They will take greater advantage of scientific research facilities that exist both within and external to the food company (Cadbury Schweppes).

CML suggested that it is likely that marketing will increase and become more specific (i.e. promotions targeted at special groups and greater advertising of healthy and functional foods).

Others indicated that high level claims would not have such a positive impact on all companies. CMA (supported by Mandurah Aust., Palatinit GmbH, Kingford Aust., CMA NZ Branch, CMA - NSW Branch, CMA - QLD Branch, ICA, CMA-Vic Branch, and CM of SA) stated that certain companies will be disadvantaged as the

likely number of pre-approved high level claims will be limited and may favour a few industries, with companies wishing to make additional claims having to enter the full FSANZ application process. GW Foods considered that if the high level claims that are approved do not apply to their products, they would be at a disadvantage against those manufacturers who are able to make claims. PB Foods stated that there is no real advantage if other companies can use the claims and they recommended an industry application with joint funding, or claims that can only be used by the company that applied for the claim.

Goodman Fielder recommended that the assessment of the claims currently permitted overseas will need to be fair and equitable across food categories otherwise some companies could be disadvantaged over others if certain prioritised health claims are listed in the standard over others claims where there is equally substantiated evidence available.

AFGC (supported by MasterFoods Aust. NZ) stated that there are fair trade implications with regard to FSANZ's decision to approve some 'prioritised high level claims' from those substantiated by other country's jurisdictions. Should those approved favour some categories of foods but omit other equally substantiated claim categories, then certain businesses may be disadvantaged by the necessity of making application to FSANZ for approval of such claims. Damage to public health priorities may also occur should the selection of high level claims for pre-approval favour one priority over another.

Some submitters indicated whether they would or wouldn't be likely to make high level claims as follows:

- NZ Dairy Foods are not likely to make high level claims, at least not initially;
- Nestle would consider using the high level pre-approved claims provided they are suitable for their products and relevant for the target group that consumes these products; and
- ABC believed their members may use high level claims.

Dairy Aust noted permission to use high level claims has already been granted through the decision made by the Ministerial Council. They assume which ones and how many will be used by industry will be dependent on current public health objectives, an evident benefit of a health claim to the consumer, and FSANZ's ability to process and approve appropriate high level claims. The recommended examples should be drawn from successful international regulations.

Nutra-Life H&F believed that high level claims would be regarded as therapeutic claims and outside the domain of foods except for "foods for a special medical purpose" or similar, which they expect would be covered by the Joint Therapeutic Agency.

Question 101

What would be the impact on your business arising from a permission to use a greater range of general level claims? In your response consider marketing opportunities and potential sales revenue.

Out of 147 submitters, 28.6% (42 in total) directly responded to this question. The distribution of these responses was as follows:

Sector	Australia	New Zealand	Trans Tasman	International	Total
Industry	23	12	4	3	42
Government	-	-	-	-	-
Public health	-	-	-	-	-
Consumers	-	-	-	-	-
Other	-	-	-	-	-
Total	23	12	4	3	42

Overview

The majority of submitters suggested that the impact on their business, arising from permission to use a greater range of general level claims, would be positive. More than half stated that the biggest impact would be allowing manufacturers to communicate truthful/scientifically substantiated or more information to consumers. It was suggested that more informed consumers created the opportunity for marketers to target them with increased promotions about healthy food and healthy eating. There would be an associated increased advertising of healthy food. Other submitters identified opportunities related to taking market share from competing products (e.g. carbonated beverages versus flavoured milk), increasing the sugar free market or not having to go through the lengthy and costly application process. A few submitters needed to consider reviews.

Discussion of submitter responses

Some industries commented on research and innovation opportunities arising from a permission to use a greater range of general level claims, as follows:

- This would give greater scope for innovation and ultimately assisting the wellbeing of Australians (Bakewell Foods);
- They would place greater emphasis on innovative product development and products may be reformulated (Cadbury Schweppes);
- They would take greater advantage of scientific research facilities that exist both within and external to their company (Cadbury Schweppes);
- The main impact would be increased innovation (Griffins Foods);

- Increases the scope for new products and markets (NZ Dairy Foods); and
- They would be more inclined to develop products targeted to specific markets and would be more pro-active in educating consumers on the benefits of the products/ingredients. These activities are currently held back as they can't make claims (Aussie Bodies).

CML said that the impact would be positive for both their company and their customers. Sales of fresh foods should increase, as will the range and type of private label products on offer. Consumers will have access to accurate information and become better informed, and therefore assisted to make appropriate purchase decisions.

Some industry groups indicated that the biggest impact of allowing a greater range of general level claims related to the ability of manufacturers to communicate truthful messages about their foods to their consumers (ABC, AFGC (supported by Masterfoods Aust. NZ), National Foods, NZJBA (supported by Frucor), Dairy Aust, Goodman Fielder); or the ability to convey more information about products (F & B Importers Association). This will enable differentiation of products in the market place (Goodman Fielder). ASA, supported by NPANZ, Assoc. of NZ Advertisers, Cadbury Confectionery, Naturo Pharm, NZTBC and NZ Magazines, submitted that the more information consumers can receive the more informed they become; and marketers can use the opportunity by promoting healthy food and healthy eating. NZ Magazines believed there will be increased advertising of healthy food.

Parmalat Aust. believes the impact would be minimal if claims are already being made, but the permission to use a greater range of general level claims would allow for benefits to arise from communication and education strategies.

National Starch and Solae Comp believed that general level claims will assist in communicating aspects of products' health benefits, although it is difficult to equate this to sales revenue.

The impact on the confectionery industry will be the ability of industry to communicate scientifically substantiated messages about foods to consumers, however ability to do this is very much unknown as criteria and conditions are yet to be determined. They reiterated that the confectionary industry should not be disenfranchised from these opportunities (CMA supported by Mandurah Aust., Palatinit GmbH, Kingfood Aust., CMA NZ Branch, CMA - NSW Branch, CMA - QLD Branch, ICA, CMA-Vic Branch, and CM of SA).

The nut industry would be able to communicate more effectively the nutritional aspects of nuts by referring to the health and wellbeing benefits of the nutrients and components found in nuts. This will assist in positioning nuts as a healthy snack, a strategy in line with public health recommendations such as those from the NHF of Australia (ANIC).

NZ Dairy Foods submitted that this would most likely have a positive impact although competitors are likely to make the same sort of claims. They noted that there are opportunities in marketing and to take market share from competing products such

as carbonated beverages versus flavoured milk. ASMI considered that providing there is an opportunity for suitable data protection and market exclusivity for new health claims, it would be expected that this would present many significant opportunities for the food industry. PB Foods commented that being first to market is a major advantage, which is not achieved by the proposed framework for high level claims. They noted that general level claims offer greater opportunities, as they do not need to go through the lengthy and costly application process (PB Foods).

GW Foods and Nestle would need to consider target markets and products to determine the impact on their business. There would need to be a defined need in the market place (GW Foods). The permission to use general level claims will provide marketing opportunities (Nestle). CML suggested that it is likely that marketing will increase and become more specific (i.e. promotions targeted at special groups and greater advertising of healthy and functional foods).

Unilever Australasia noted this is a significant opportunity but they will need to be reviewed for relevant products to carry the claims and measured against the substantiation requirements.

William Wrigley Junior stated that the sugar free market has grown consistently over the past 12 years, as consumers develop an understanding of the benefit of consuming these products and they anticipate that with the potential greater use of claims this trend will continue.

Aussie Bodies were the only submitter to give a sales increment for their business, which they estimated could be in the vicinity of 25 – 30 per cent.

Cadbury Schweppes stated that the ability to make any level of claim about any product is dependent on the category of product and where that product fits strategically within Cadbury's product portfolio. They will evaluate the impact on sales revenue on a case-by-case basis as part of the company's strategic development programme.

ANIC referred to their answer to question 52, which discusses the impact on public health of a health claim in relation to nuts and reduction of the risk of heart disease.

2.3 REGULATORY OPTION 3

Question 102

To what extent does option 3 provide greater benefits to your business than Option 2 in relation to general level claims?

Out of 147 submitters, 32.0% (47 in total) directly responded to this question. The distribution of these responses was as follows:

Sector	Australia	New Zealand	Trans Tasman	International	Total
Industry	22	17	5	2	46
Government	-	-	-	-	-
Public health	-	-	-	-	-
Consumers	-	-	-	-	-
Other	1	-	-	-	1
Total	23	17	5	2	47

Overview

More than 60 per cent of industry groups (30) did not agree that Option 3 provided greater benefits to their business than Option 2 in relation to general level claims. In contrast, Option 3 ‘significantly’ reduced business opportunities for some, by providing a less flexible approach, including the updates of general level claims. However, about 12 per cent believed that Option 3 provided a level playing field with regard to recourse in cases of non-compliance, medicines/therapeutic goods industry, providing a clearer legal position, more effective enforcement agencies, more consistent messages and more trusting consumers. Other submitters stated that Option 3’s impact on their business would be ‘minimal’ or provided general comment about Option 3.

Discussion of submitter responses

A number of industry groups that answered this question stated specifically that Option 3 does not provide greater benefits to their business/industry than Option 2, in relation to general level claims (Aussie Bodies, ABC, AFGC (supported by Masterfoods Aust. NZ), Bakewell Foods, Dairy Aust, F & B Importers Assoc. GW Foods, Goodman Fielder, National Foods, Fonterra, Mainland Products, NZFGC, NZJBA (supported by Frucor), Nestle, Unilever Australasia). Nestlé’s view is to comply with the requirements of general level claims whether they are in a guideline or a standard.

Some added that Option 3 significantly reduces opportunity for business by providing a less flexible approach to general level claims (ABC, AFGC (supported by Masterfoods Aust. NZ), GW Foods, National Foods, NZFGC, NZJBA (supported by Frucor), CMA supported by Mandurah Aust., Palatinit GmbH, Kingfood Aust., CMA NZ Branch, CMA - NSW Branch, CMA - QLD Branch, ICA, CMA-Vic Branch, and CM of SA). Nestle noted that option 2 will allow more flexibility and easily accommodate updates. National Starch and Solae Comp suggested that the

prescriptive nature of general level claims in Option 3 may limit manufacturers potential to use the claims, and is therefore less valuable commercially than option 2.

Dairy Aust. stated that Option 2 allows for general level health claims to be updated regularly to ensure consumers are exposed to scientifically valid health claims – which may in turn improve their product confidence. It would allow consumers increased food choice (more products bearing a health claim) and improve knowledge on which to base food selection.

Others noted that Option 3 provides a ‘level playing field’ (Griffins Foods, ASMI, TGACC, Cadbury Schweppes, CML) and added the following comments in relation to this:

- Option 3 provides greater benefit to our business than Option 2 in that it enables a level playing field and the opportunity for recourse in cases of non-compliance (Griffins Foods);
- Option 3 provides a better level playing field with the medicines/therapeutic goods industry and the opportunities for effective compliance mechanisms (ASMI and TGACC respectively);
- Provides a clearer legal position as all manufacturers will have to adhere to the standard, however reduces opportunities to make legitimate health claims that a guideline provides and potentially reduces the ability to make a health claim aimed at a specific consumer group or life stage (NZ Dairy Foods); and
- This means that enforcement agencies can do their job more effectively and consumers can then trust the information they are being given. Messages will be more consistent and there will be less confusion among manufacturers, retailers and consumers (CML).

Although it was not specifically stated that Option 3 did provide benefits over Option 2 with regard to general level claims, the following comments were made with regard to Option 3:

- Option 3 provides benefits only if the standard is clearly composed with little room for interpretation (ANIC);
- Option 3 will ensure that claims are comparable (Tegel Foods, Heinz Aust./Heinz Watties NZ);
- Option 3 will cause less confusion for consumers (Tegel Foods);
- Although possibly more restrictive, the claims will be more enforceable under (Heinz Aust./Heinz Watties NZ); and
- Where a manufacturer chooses not to comply with the standard, other manufacturers have the ability to request enforcement agencies to take appropriate actions (Cadbury Schweppes).

In addition to this Tegel Foods and Heinz Aust./Heinz Watties NZ commented that there might be some stifling of innovation with Option 3.

Other comments in answer to this question were that the impact on their business would be minimal (Parmalat Australia). The more information consumers can receive the more informed they become. Marketers can use the opportunity by promoting healthy food and healthy eating (ASA, NPANZ, Assoc. of NZ Advertisers, Cadbury Confectionery, Naturo Pharm, NZTBC, NZ Magazines).

Other comments provided but not in direct response to the question

Option 3 would provide greater clarity and consistency for manufacturers wishing to make health claims. It will also provide a level playing field for manufacturers, as imported foods will also have to comply with the standard for general level claims (ACA).

Masterfoods Aust. NZ are concerned that not all parties will interpret guidelines in a consistent manner, potentially leading to a loss of credibility and creation of an uneven playing field, disadvantaging more ethical operators. In addition, they consider that option 3 would provide greater confidence in the regulatory system but to be acceptable, option 3 will require a legislated commitment to and described process for timely review of new claims. Option 2 would also provide an effective and responsive system but a legislated process for review of potential new claims would be required.

CHAPTER 3: IMPACT ANALYSIS – GOVERNMENT

3.1 REGULATORY OPTION 1

Question 103

What are the impacts of the current regulatory arrangements on enforcement agencies? Please provide evidence of the level of resources involved.

Out of 147 submitters, 12% (17 in total) directly responded to this question. The distribution of these responses was as follows:

Sector	Australia	New Zealand	Trans Tasman	International	Total
Industry	4	8	-	-	12
Government	3	1	-	-	4
Public health	-	-	-	-	-
Consumers	-	-	-	-	-
Other	1	-	-	-	1
Total	8	9	-	-	17

Overview

Seven out of 17 submitters noted that difficulties with enforcement of the current regulatory arrangements related to prohibiting truthful claims beneficial to consumers. One New Zealand and two Australian governments also noted difficulties – relating to subjective judgements made on claims that are in the ‘grey’ areas of legislation, an unclear scope for advertising and a lack of sufficient resources. It was suggested that two full-time officers be appointed to complete initial tasks with further resources provided as needed. One submitter recommended enforcement should include assessments, mediations and training of the food industry by government on health and nutrition claims. Another stated there was no impact on enforcement agencies as very little enforcement was being done due to lack of resources.

Discussion of submitter responses

Some Australian Government submitters noted difficulties with enforcement of the current regulatory arrangements. NSW Food Authority (supported by NSW DoH – N&PA Branch) stated that enforcement is difficult unless the breaches are clear-cut. If they are not, considerable effort is required to follow-up the potential breach with the manufacturer/marketers. They also stated that subjective judgement needs to be made on claims that are in the ‘grey’ area of the legislation and consistency between jurisdictions is difficult.

NZFSA also noted difficulties and commented that it is the experience of the New Zealand Government that the issue of advertising has been problematic in the current transitional standard. The scope of what is deemed to be advertising is not clear and a number of Food Standard Code non-compliances have been because of lack of clarity as to what constitutes advertising. In particular the issue of non-point of sale material,

industry funded research and publications of the research, Internet material and general public education material. This has involved much time and resources in order to request legal opinions, meetings with businesses, and liaison with Health Protection Officers etc.

The NSW Food Authority (supported by NSW DoH – N&PA Branch) stated that it was difficult to provide evidence of the resources needed for enforcement because they have never had sufficient resources to do the job completely. They gave a rough estimate, that two full-time officers would be needed to identify and do the initial follow-up of the labelling and advertising issues, with further resources needed if prosecution is initiated. The resources for that are dependant on the difficulty of the case and the action of the defendants.

The WA DoH recommended that the scope of the term enforcement action should be expanded and should include assessments, mediations and training of the food industry by Government on health and nutrition claims; or alternatively, a separate category should be developed to capture these activities. They also recommended broadening the government consideration of impact to include the government role in promoting health through public health nutrition. They stated that a significant proportion of resources expended by the WA DoH are in these areas although the cost of these services has not been estimated.

Some industry submitters said that the impact on enforcement agencies should not change (Cadbury Schweppes) or costs currently associated with the status quo would continue (Nutra-Life H&F). As CoPoNC is not a legal document, it is a matter for the appropriate fair trading enforcement agencies to act if an issue arises relating to misleading or deceptive practise (Cadbury Schweppes).

The ASA (supported by NPANC, Assoc. of NZ Advertisers, NZ Magazines, Cadbury Confectionery, Naturo Pharm, NZTBC) stated that they (the ASA) and ASCB are called upon to enforce the current law. This brings problems as they prohibit truthful claims, which are of benefit to consumers.

CML stated that there is no impact of the current regulatory arrangements on enforcement agencies as there is very little enforcement being done. CHC also considered there is practically no enforcement due to lack of resources at State level.

ASMI and TGACC noted that they consider option 1 not to be feasible.

Other comments provided but not in direct response to the question

The ACA believe that the current standard creates difficulties for enforcement as enforcement agencies are unable to take action against manufacturers making claims that are not in the spirit of the regulation but are within the letter of the law. They considers that if Option 1 were adopted, and loopholes in the current Standard addressed, the cost to enforcement agencies would be minimal as manufacturers would be prohibited from making health claims.

The ACA claimed that there is a lack of enforcement action and loopholes in the transitional standard, resulting in many manufacturers pushing the boundaries and using a range of claims that they consider are health claims.

The PHAA also commented that this impact analysis only relates to the impact of enforcement role of government and not on the educational/functional role of government in promoting health through public health nutrition efforts, however there are likely to be impacts particularly in relation to resourcing of public health nutrition if efforts in relation to claim education must come from existing budgets. They recommend broadening the consideration of impact.

3.2 REGULATORY OPTION 3

Question 104

To what extent would Options 2 and 3, that permit a wider range of claims, require additional resources to enforce?

Out of 147 submitters, 14% (20 in total) directly responded to this question. The distribution of these responses was as follows:

Sector	Australia	New Zealand	Trans Tasman	International	Total
Industry	4	9	-	-	13
Government	4	1	-	-	5
Public health	1	-	-	-	1
Consumers	-	-	-	-	-
Other	1	-	-	-	1
Total	10	10	-	-	20

Overview

The majority of submitters (13) indicated that Options 2 and 3 would require additional resources to enforce. Four specified additional ‘government’ resources. Other comments included: ‘problematic’ without additional resources and considerable national assistance; a need to broaden the scope of enforcement action to include assessments, mediations and training of the food industry by government on health and nutrition claims or develop another category for them; the resources need to be inversely proportional to the level of compliance by industry with the proposed standards; and Option 3 requiring a commitment from State Health Authorities to adequately fund enforcement activities (including advertising). Seven submitters believed there would not be any ‘significant’ resources required.

Discussion of submitter responses

Tas DoH&HS stated that they considered enforcement of health claims will be problematic for enforcement agencies and without additional resources and considerable national assistance Tasmania will not be able to provide priority to this

area. Local government Environmental Health Officers revealed a significant reluctance across Tasmanian Councils to enforce health claims. The reasons include:

- A lack of resources at State and local government level to undertake these tasks;
- A lack of expertise to make judgements about compliance issues, particularly with regard to general level claims;
- Anticipated problems with timely access to company evidence;
- Competing and higher priority demands such as implementing new food safety programs, and auditing; and
- Concern about significant numbers of illegal claims already in the marketplace that require redress.

The NSW Food Authority (supported by NSW DoH – N&PA Branch) said that Option 2 would require far greater resources, as the enforceability is not guaranteed and the necessity of subjective judgement of individual claims would remain, with a far greater number of claims expected. They added that Option 3 is likely to require additional resources in the initial stages of the implementation of the new standard, with a likely decline as the requirements are better understood by both the marketers and the enforcers, and precedents are established and tested.

Tas DoH&HS and the WA DoH recommended broadening the consideration of the impact analysis for enforcement action because the impact on resources for public health nutrition has not been considered. This is especially so if public information on health claims must come from existing budgets (Tas DoH&HS). WA DoH recommended that the scope of the term enforcement action should include assessments, mediations and training of the food industry by Government on health and nutrition claims; or alternatively, a separate category should be developed to capture these activities. Tas DoH&HS noted that these questions relate to the impact on the enforcement role of government and not on educational/functional role of government in promoting health through public health nutrition efforts. Nutrition Australia also recommended the need to consider the resources required for an educational role as well as an enforcement role.

WA DoH stated that the need for resources is inversely proportional to the level of compliance by industry with the proposed standards. They currently have no proposal to increase the resource to enforce nutrition and health claims, however, this is subject to review through development of P293 and level of support provided by FSANZ, the Implementation Sub-Committee (ISC) and other working groups in developing guidance material and industry aids. WA DoH noted that there are likely to be impacts, particularly in relation to consumer education needed for nutrition, health and related claims.

NZFSA stated that additional resources are always required for any new substantial standard to be enforced.

ASMI stated that Option 3 requires a commitment from State Health Authorities to adequately fund such enforcement activities. They suggested that with advertising included as part of the regulatory compliance activities this could be monitored and regulated under a co-regulatory arrangement similar to that for therapeutic goods.

Cadbury Schweppes said that unless the Guideline under option 2 is enforceable by the appropriate enforcement agencies, Option 3 would require greater resources to enforce than Option 2. Under both options manufacturers will still be required to maintain a dossier of evidence for all claims made. Enforcement agencies should only be required to review the dossier if doubt exists within the scientific community as to the claims being made or if a complaint is received from a competitor / consumer.

Cadbury Schweppes also stated that under Option 3, there would be fewer issues for fair trading enforcement agencies to deal with. Option 3 provides a clear set of rules for all manufacturers to work within and complaints of misleading or deceptive practices will only arise if a manufacturer steps outside the Standard and this would be readily visible.

A number of industry submitters thought that additional Government resources would be required for enforcement purposes (CML, NZ Dairy Foods, Nutra-Life H&F, CHC). CML added that roles and responsibilities will be clearer, and claims will be able to be enforced. The CHC also added that the States would require up front commitment and technically trained personnel in addition to a major injection of funds. NZ Dairy Foods added that they contend that the enforcement side of the current policy is under resourced.

Nutra-Life H&F believed resources would be needed to review the proposed claim, consider the supporting evidence and confirm that ingredient requirements are met which would be followed by post market surveillance to confirm that the terms of permission to use the claim and advertise it were being met.

TGACC considers Option 2 & 3 to require commitment from State Health Authorities to adequately fund such activities. They suggested that with advertising included as part of the regulatory compliance activities it could be monitored and regulated under a co-regulatory arrangement similar to that for therapeutic goods.

NZ Magazines and ASA supported by NPANZ, Assoc. of NZ Advertisers, Cadbury Confectionery, Naturo Pharm, and NZTBC do not believe there would be any significant resource required. They recommend a pre-vetting system, which would sit along side a similar system for therapeutics and liquor advertising.

Other comments provided but not in direct response to the question

The ACA stated that if the requirements for general level claims are in a guideline, qualifying and disqualifying criteria will not be compulsory, therefore they will be open to a considerable level of interpretation by manufacturers, making adequate enforcement costly and laborious.

Question 105

Are there any additional benefits for government in proceeding with Option 3? If so, please identify.

Out of 147 submitters, 12% (17 in total) directly responded to this question. The distribution of these responses was as follows:

Sector	Australia	New Zealand	Trans Tasman	International	Total
Industry	4	9	-	-	13
Government	1	2	-	-	3
Public health	-	-	-	-	-
Consumers	-	-	-	-	-
Other	1	-	-	-	1
Total	6	11	-	-	17

Overview

All but one submitter (16) agreed that there were additional benefits for government in proceeding with Option 3. These benefits were identified as relating to consumer confidence, transparency, better harmonisation with other global regulatory arrangements, equity with the medicines industry, less opportunity for products to attempt to jump from the therapeutic regime to the food regime, valuable ‘before and after’ data to measure the effectiveness of the introduction of health and nutrition claims and a clearer legal position (than Option 2) so there would be less enforcement time and effort spent (e.g. on ambiguous claims). Eight submitters commented on long-term effects. These included better-informed and healthier consumers (another tool for reducing obesity) and reducing demand on healthcare services.

Discussion of submitter responses

ASMI and TGACC listed additional benefits for government in proceeding with Option 3 such as consumer confidence, transparency, and better harmonisation with other global regulatory arrangements, equity with medicines industry, less opportunity for products to attempt to jump from the therapeutic regime to the food regime because of the perception of less regulation.

Cadbury Schweppes noted that Option 3 would mean that enforcement agencies would not be required to resolve any ambiguities around claims as both high level and general level claims will be clearly defined.

CML suggested that Government could obtain valuable ‘before and after’ data to measure the effectiveness of the introduction of health & nutrition claims. This could assist health professionals in the management of diseases, and also help the federal & state governments in their management of public health costs.

The NZ government submitters said that a benefit with proceeding with Option 3 for Government is that it can be enforced (NZ MoH, NZFSA). NZFSA added that there would also be certainty around permissions.

NZ Dairy Foods noted that Option 3 has clearer legal position than Option 2 so could mean less enforcement time and effort, however this time could be taken up by reviewing the standard and adding new and changing existing claims.

ASA (supported by NPANZ, Assoc. of NZ Advertisers, NZ Magazines, Cadbury Confectionery, Naturo Pharm, NZTBC) submitted that in the long term there will be informed consumers and healthier consumers, and that it is another tool for reducing obesity.

Nutra-life H&F believed it could be argued that with greater interest in self-healthcare, there may be benefits in reduced demand on healthcare services although this would not be seen in the short or medium term as such benefits are generally slow to appear.

CHC believed there are no additional benefits.

WA DoH did not provide any additional information to that noted in questions 103 and 104, in their answer to this question.

(Dairy Aust. noted that these questions related to government so they have opted not to answer due to lack of knowledge and experience – they have not been included in the tally.)

Other comments provided but not in direct response to the question

ACA noted that option 3 complies with the Policy Guideline that the Standard should provide sufficient detail to enable enforcement action to be taken against all breaches for all levels of claims.

CHAPTER 4: PREFERRED REGULATORY OPTION

Question 106

What is your preferred regulatory option and why?

Out of 147 submitters, 77% (113 in total) directly responded to this question. The distribution of these responses was as follows:

Sector	Australia	New Zealand	Trans Tasman	International	Total
Industry	36	23	6	3	68
Government	7	2	-	-	9
Public health	13	13	-	-	26
Consumers	2	1	-	-	3
Other	5	2	-	-	7
Total	63	41	6	3	113

Overview

Fifty-one per cent of submitters (58) expressed their support for Option 2 (of which six submitters supported a modified version). Forty per cent of submitters (45) supported Option 3. Six per cent of submitters (7) selected Option 1 as their preferred regulatory option. Of those remaining, one submitter supported elements of Option 1 and 3, one preferred a combination of Options 2 and 3 and another opposed all regulatory options.

Regulatory Option 1 – Status Quo

Seven submitters chose Option 1 as their preferred option (Cancer Society NZ, Cancer Society NZ – Rotorua Branch, Cancer Society NZ – Waikato/Bay of Plenty Div., Auckland Cancer Society, Public Health South, Nutra-Life H&F, JS – PH Nut)

Reasons for supporting Option 1:

- Four submitters believed that Option 1 was the only evidence-based choice that would fulfil FSANZ’s purpose to protect public health (Cancer Society NZ, Cancer Society NZ – Rotorua Branch, Cancer Society NZ – Waikato/Bay of Plenty Div., Auckland Cancer Society);
- Nutrition, health and related claims on food should be prohibited and content claims should continue to be allowed but more tightly controlled (Public Health South); and
- It would maintain prohibition on health claims (JS – PH Nut).

Reasons for opposition to Option 1:

- It does not specify any kind of review of the present situation, which was believed necessary to make it work effectively (OAC NZ);
- It is not consistent with the policy guidelines (ACA, F & B Importers Assoc);
- In addition, lack of enforcement action and loopholes in the transitional standard have resulted in many manufacturers pushing the boundaries and already using a range of claims that ACA considers are health claims. The recent study by CHOICE magazine highlights this (ACA);
- Do not believe Option 1 will protect consumer or allow the food industry to grow through new product development and innovation (Med-Chem Ingredients); and
- The status quo in relation to claims is not working as it is inconsistent across Australasia and is restrictive, which limits consumer information, education and choice (NZ Dairy Foods, Fonterra, Mainland Products)

Regulatory Option 2 – Standard and Guideline

Fifty-eight submitters noted their support for Option 2 (ASA, NPANZ, NZTBC, Naturo Pharm, Cadbury Confectionery, Assoc. of NZ Advertisers, Fonterra, Mainland Products, Hansells NZ, NZ Dairy Foods, NZFGC, NZJBA, Frucor, NZ Magazines, NZ F&V Coalition, Hort & Food Research Instit. of NZ, CMA, Mandurah Aust., Palatinit GmbH, Kingfood Aust, CMA – NZ Branch, CMA – NSW, CMA – Qld, CMA – Vic, ICA, CM of SA, Nestle, Nutrinova (Australasia), William Wrigley Junior, NCEFF, Aussie Bodies, Bakewell Foods, Cadbury Schweppes, Dairy Aust, DSM Nut. Prod, Flour Millers Council of Aust, F & B Importers Assoc, GW Foods, Go Grains, Goodman Fielder, MLA, National Foods, National Starch, Parmalat Aust., Solae Comp, Wyeth Aust, Campbell Arnott’s Asia Pacific, Kellogg’s Aust, Langdon Ingredients, Med-Chem Ingredients, DAFF, Uni of Adel & Uni of SA – Nutrition Physiology Research Grp, and support for a modified option AFGC, Masterfoods Aust. NZ, PB Foods, Unilever Australasia, Food Tech Assoc. of WA, Beer Wine & Spirits Council of NZ).

Of these, five submitters did not justify their choice (Flour Millers Council of Aust, Parmalat Aust, Wyeth Aust, Campbell Arnott’s Asia Pacific, Uni of Adel & Uni of SA – Nutrition Physiology Research Grp).

Reasons for supporting Option 2:

- It is aligned with the principle of the type of regulation being consistent with the level of claim and the potential of the claim to pose a public health risk (Kellogg’s Aust);
- It meets the requirements of the Policy Principles of the Ministerial Council’s Policy Guideline (NZFGC);

- Compliance would be easier (NZ F&V Coalition); and compliance with a voluntary regulation has been shown to be as effective as one legislated. Compliance with CoPoNC in Australia was highly successful with the exception of % fat free claims. Independent research found the rate of non-compliance similar between regulated claims and Code of Practice claims (Kellogg's Aust, Fonterra, Mainland Products);
- Enforcement of general level claims under this option would be workable (Nestle, DAFF). It would provide a greater degree of confidence in the health claims framework, including content claims and general level claims, and enforcement agents would have clear direction (CMA, Mandurah Aust., Palatinit GmbH, Kingfood Aust, CMA – NZ Branch, CMA – NSW, CMA – QLD, CMA – VIC, ICA, CM of SA);
- A greater chance of successful implementation given the resource requirements; benefits to industry and government in terms of cost and simplicity; and increased ability of government to focus its resources in higher risk activities (NZ F&V Coalition, MLA, Fonterra, Mainland Products, NCEFF);
- It would allow conditions and to be adapted and updated, and new claims added, in line with changes and advances in nutrition science (NZ F & V Coalition, CMA, Mandurah Aust., Palatinit GmbH, Kingfood Aust, CMA – NZ Branch, CMA – NSW, CMA – QLD, CMA – VIC, ICA, CM of SA, Dairy Aust, Med-Chem Ingredients, Solae Comp, Fonterra, Mainland Products). If manufacturers were allowed to be more reactive to new scientific claims, this would translate into a reduced burden for industry (National Starch, Solae Comp). Kellogg's stated that in reference to a guideline, claim prerequisites could be easily updated. However, FSANZ note that in Option 2, claim prerequisites would be included a Standard;
- Scientifically substantiated health claims could be made, which would enable more meaningful health and nutrition information to be included on food labels (Go Grains, MLA, National Starch, Solae Comp);
- It would assist consumers to make informed food choices by: stimulating interest in nutrition; providing information about nutritional benefits of foods with appropriate substantiation; and providing a greater range of claims (NZ F&V Coalition, Hort & Food Research Instit. of NZ, (CMA, Mandurah Aust., Palatinit GmbH, Kingfood Aust, CMA – NZ Branch, CMA – NSW, CMA – Qld CMA – Vic, ICA, CM of SA, Nutrinova (Australasia), William Wrigley Junior);
- It would promote product development, innovation and marketing of healthy products, and would stimulate industry growth (Nutrinova (Australasia), Bakewell Foods, Cadbury Schweppes, DSM Nut. Prod, Go Grains, National Foods, Kingfood Aust, Mandurah Aust, Med-Chem Ingredients, CMA – NZ Branch, CMA – NSW, CMA – QLD, CMA – VIC, ICA, CM of SA, William Wrigley Junior);

- It would enable the Australian and New Zealand food industry to respond to market dynamics, and become more globally competitive with other markets where health claims are already permitted (CMA, Mandurah Aust., Palatinit GmbH, Kingfood Aust, CMA – NZ Branch, CMA – NSW, CMA – QLD, CMA – VIC, ICA, CM of SA, Nutrinova (Australasia), William Wrigley Junior, Kingfood Aust, Mandurah Aust, Med-Chem Ingredients), thereby creating more jobs in the confectionery industry (Kingfood Aust);
- It would provide a level playing field and protect commercial investment for companies wishing to develop health claims for their products (Hort & Food Research Instit. of NZ, Go Grains);
- Guidelines might be useful to help ascertain industry standards on interpretation of various claims (Fonterra, Mainland Products);
- Important to have a clear distinction between foods that reference a biomarker for specific, serious medical conditions and those that do not (Aussie Bodies);
- The benefits of permitting general level claims in Guidelines were seen to be: less regulation as Guideline would be regulated in context with the degree of risk for general level claims; increased flexibility during the initial implementation of the legislation; greater ease and speed in formulating and amending general level claims; enabling the Guideline to maintain its relevance through updates; and a greater ability to modify general level claim guidelines in line with current consumer purchase decisions (ASA, NPANZ, NZTBC, Naturo Pharm, Cadbury Confectionery, Assoc. of NZ Advertisers, NZ Magazines, Fonterra, Mainland Products, Hansells NZ, NZFGC, NZJBA, Frucor, NZ F&V Coalition, CMA, Mandurah Aust., Palatinit GmbH, Kingfood Aust, CMA – NZ Branch, CMA – NSW, CMA – Qld, CMA – Vic, ICA, CM of SA, Nestle, Bakewell Foods, Cadbury Schweppes, Dairy Aust, DSM Nut. Prod, F & B Importers Assoc, GW Foods, Goodman Fielder, Go Grains, National Foods, Nestle, Kellogg’s Aust, DAFF);
- A more relevant Guideline document would make more claims available for industry and consumers (Goodman Fielder);
- It would result in a content claim for ‘sugar free’ in the Guideline (Nutrinova (Australasia), Langdon Ingredients, CMA, Mandurah Aust., Palatinit GmbH, Kingfood Aust, CMA – NZ Branch, CMA – NSW, CMA – Qld, CMA – Vic, ICA, CM of SA);
- Greater control of high level claims: allowing high level claims to be adopted with appropriate levels of risk assessment and the requirement of a higher level of rigour when they are in a Standard. The risk of misleading consumers, by limiting communications that carry increased risk to public health, would be minimised. Misleading behaviour would also be limited under food and fair trading legislation (Hort & Food Research Instit. of NZ, CMA, Mandurah Aust., Palatinit GmbH, Kingfood Aust, CMA – NZ Branch, CMA – NSW, CMA – QLD, CMA – VIC, ICA, CM of SA, Go Grains, MLA, National Starch, Solae Comp, Fonterra, Mainland Products);

- Well-enforced provisions already exist within existing legal systems to prohibit communication of non-truthful and unsubstantiated claims (Dairy Aust); and
- It can always be reviewed after two years (Fonterra, Mainland Products).

The AFGC (supported by Masterfoods Aust. NZ, PB Foods, Nestle and Unilever Australasia) suggested a modified version of Option 2 for the management of general level claims. The modifications include the development of a new Standard and guidelines consisting of:

- A list of pre-approved high level claims including criteria and conditions regarding the application of the claim;
- Interpretive user guides to facilitate application for additional high level claims (other than those pre-approved);
- A commitment to continue to review for approval high level claims already approved in other recognised jurisdictions within 12 months;
- Inclusion of general level claim pre-requisites within the Standard;
- Criteria and condition included in a guideline document;
- A commitment, in line with Ministerial Council request to an initial review after 2 years, to ongoing review of the guideline every 2 years.

Unilever Australasia considered that this modified version would enable industry to apply for substantiated claims in a manner that respects commercial confidence and promotes innovation.

Beer Wine & Spirits Council of NZ supported having prerequisites in the Standard and a 'Code of Practice' to cover procedures, providing in the prerequisites there was no clause to the effect that if a manufacturer was to make a general level claim it is compulsory to use the Code of Practice.

Reasons for opposition to Option 2:

- It is a guideline for general level claims only and not mandatory (Sanitarium Health Food Comp);
- Guidelines suggested under Option 2 might be too general (MFD);
- Enforcement issues: Evidence of breaches in the Code of Practice for nutrient claims, which is not enforced. An Australian Consumers Association survey (Choice Magazine 2004) of one Sydney supermarket found 30 products that made health claims, although they are not permitted. It concluded that some food companies could not be trusted to abide by voluntary guidelines.

Additional FSANZ consumer surveys and a survey on compliance with CoPoNC (Williams et al., 2003) have showed that the co-regulatory approach for nutrition content claims appeared unsuccessful in enforcing a nutrition claims system. Nutrient and health claims must be enforceable to be effective (Nutrition Aust, Consumers' Instit. of NZ, ACDPA, Kidney Health Aust, ANA, Cancer Society NZ, Cancer Society NZ – Rotorua Branch, Cancer Society NZ – Waikato/Bay of Plenty Div., Auckland Cancer Society, SA DoH, WA DoH, Monash Uni – N&D Unit, NHF Aust, NHF NZ, Dr. R Stanton, NZ F&V Coalition);

- Public health messages: It would mean a system similar to the current one for nutrition content claims, which has created consumer confusion (FSANZ 2001; 2003). Option 2 may lead to confusing and inconsistent messages about nutrition and health being promoted. The large amount of inaccurate nutrition information currently being promoted contradicts the work being carried out by public health workers in New Zealand. Health claims might add to this problem and make the work of public health nutritionists/dietitians much more difficult (Nutrition Aust, Public Health South, Dr. R. Stanton);
- There is evidence that consumers treat content and high level claims equally and that such claims are seen as 'health information'. Evidence from Europe, Canada and the USA has shown that consumers do not differentiate between high level claims and general level claims and instead act on the 'feeling' of the claim (Cancer Society NZ, Cancer Society NZ – Rotorua Branch, Cancer Society NZ – Waikato/Bay of Plenty Div., Auckland Cancer Society);
- Placement of health claims in a guideline would pose a substantial risk to the health of populations through unbalanced nutrition messages; a guideline would not sufficiently protect public health and safety. There would be a higher degree of risk in terms of health outcomes if a multitude of meaningless and confusing claims are allowed (e.g. 'low fat', 'low salt', which are confusing to New Zealand consumers (Levy AS 1995)). Vague or misleading claims could lead to distortion in the national diet over time while more responsible claims would be diluted (e.g. benefits of a diet rich in fruit and vegetables) (SA DoH, Monash Uni – N&D Unit, Nutrition Aust, ACA, Public Health South);
- US research has shown that many foods making claims are packaged foods high in sugar, suggesting that health claims would disadvantage unpackaged foods, such as fruit and vegetables (Public Health South);
- It would give market advantage to larger (often international) food companies as they are better able to influence, monitor and respond to trends in consumer health concerns and resource the substantiation requirements (SA DoH, Monash Uni – N&D Unit); and
- The current Food Standard is extremely limited by a lack of resources, which suggests the capacity to regulate new Standards might also be limited. Furthermore, the large amount of funding and resources required to regulate and monitor health claims would be difficult to justify, given the potential risk

to public health and apparent lack of evidence to support health claims. This money would be better spent on promoting the New Zealand Food and Nutrition Guidelines (Public Health South).

Regulatory Option 3 – Standard

Forty-five submitters expressed support for Option 3 (NZDA, Northland Health Dietitians, Consumers’ Instit. of NZ, ANA, Auckland Reg. PHS, MFD, OAC NZ, Griffins Foods, Naturalac Nutrition, Nutra NZ, NZ King Salmon, Tegel Foods, NZ MoH, NZFSA, Crop & Food Research, NCWA, ACA, TCCA, Diabetes Aust., DAA, Dr. R. Stanton, GI Ltd, NHF Aust, NHF NZ, Nutrition Aust, PHAA, Tomox, ACDPA, Kidney Health Aust, ANIC, ASMI, CML, CHC, Food Tech Assoc of Vic, Horticulture Aust, Sanitarium Health Food Comp, Tas DoH&HS, NSW DoH - N&PA Branch, NSW Food Authority, SA DoH, WA DoH, Queensland Health – PHS, CSIRO – HS&N, Monash Uni- N&D Unit, TGACC).

Of these, four submitters did not justify their choice (Auckland Reg. PHS, ASMI, CHC, CSIRO – HS&N).

Reasons for supporting Option 3:

- A Standard would ensure all claims are fully regulated and would provide information to enable general level claims, and a set number of high level claims that would be pre-approved; all claims would be pre-approved by FSANZ; there would be definite boundaries for all claim types; claims would need to be considered individually; inclusion of claim prerequisites, conditions and criteria in a Standard would mean they would be more likely kept up to date, than if in a Guideline (Griffins Foods, Nutra NZ, Nutrition Aust, Sanitarium Health Food Comp, Consumers Instit. of NZ, MFD, Dr. R. Stanton);
- Option 3 would assist with overall industry compliance; such a significant change to labelling provisions should be enforceable at all levels; one Standard is likely to be more enforceable and would provide greater clarity and consistency to enforcement agencies; it would enable enforcement action by government bodies to be taken against breaches for all levels of claims (Griffins Foods, Naturalac Nutrition, NZ King Salmon, Tegel Foods, NZ MoH, NZFSA, Crop & Food Research, NCWA, ACA, Diabetes Aust, PHAA, ANIC, CML, Food Tech Assoc of Vic, Sanitarium Health Food Comp, Tas DoH&HS, NSW DoH - N&PA Branch, SA DoH, WA DoH, Queensland Health – PHS, Monash Uni – N&D Unit, DAA, NSW Food Authority, OAC NZ);
- Results of Folate-Neural Tube Defect Health Claim Pilot indicated that the best approach would be to include criteria and conditions for making claims within the Standard, as there was confusion regarding the roles of enforcement agencies in enforcing what was in the Food Standards Code and the Management Committee enforcing the Code of Practice (ANZFA 2000) (Nut Aust, Queensland Health - PHS);

- There will be a clearer complaint process for both consumers and industry; it would allow for complaints to be acted upon (CML, NSW DoH - N&PA Branch);
- It is the only option that would deliver a number of elements in the Ministerial Council Policy Guideline (i.e. to protect and improve public health; enable the responsible use of scientifically valid claims; support government, community and industry initiatives that promote healthy eating; be consistent with and complement Australian and New Zealand national policies relating to nutrition and health promotion; and allow for effective monitoring and enforcement) (Nutrition Aust, PHAA, SA DoH, Monash Uni – N&D Unit);
- It would provide the necessary legal underpinning to Standards to provide a level playing field for manufacturers, suppliers and retailers (in terms of compliance costs, and as a consequence of imported food products being required to comply with the Standard for general level claims). Under guidelines, ethical companies are at a disadvantage and in a dilemma as to how to approach a market that includes unscrupulous competitors (Naturalac Nutrition, NZ King Salmon, Tegel Foods, NZ MoH, NZFSA, Diabetes Aust, GI Ltd, Nutrition Aust, PHAA, CML, Food Tech Assoc of Vic, NSW DoH - N&PA Branch, SA DoH, WA DoH, Monash Uni – N&D Unit, TGACC, NHF Aust, NHF NZ);
- Tight controls on nutrition and health claims for permitted products would benefit small companies; a Standard would in particular assist smaller food companies to improve the quality and accuracy of the nutritional information they provide (Dr. R. Stanton, NHF Aust, NHF NZ);
- Due to the large increase in the number of food products provided by the food industry (from approximately 600-800 in the 1960's to approximately 30,000 today), it was thought that a Standard would not stifle innovation (Dr. R. Stanton);
- It would provide greater clarity and consistency for manufacturers, consumers and regulatory bodies. Less confusion and ambiguity would result by having all components of claims in the one document (ACA, Tomox, ANIC, Tas DoH&HS, NSW DoH - N&PA Branch, Queensland Health – PHS, DAA);
- Consumer confidence would be greater if all claims are: regulated and enforced by the government; established independently of industry interests; and that information is true and accurate (ACA, CML, NSW DoH - N&PA Branch, SA DoH, NZ King Salmon, Dr. R. Stanton);
- Option 3 would provide the highest degree of protection of public health and safety through the prevention of misleading and deceptive conduct and false, unsubstantiated or vague claims; it will protect vulnerable groups such as children; consumer health would improve as a result of easier and more informed purchase decisions; and a possible reduction in public health care costs and long-term benefits to consumers and industry was thought to outweigh the likely increase in government costs for education and

enforcement. There is evidence from the United Kingdom has shown that the public does not distinguish between types of claims (NZ MoH, ACA, Nutrition Aust, PHAA, CML, Tas DoH&HS, NSW DoH - N&PA Branch, SA DoH, WA DoH, Monash Uni – N&D Unit, TGACC, Sanitarium Health Food Comp, Dr. R. Stanton); and

- It is the only option by which FSANZ can deliver its three objectives established by the Food Standards Act 1991 (Section 10) to protect public health and safety; provide adequate information relating to food to enable consumers to make informed food choices and prevent misleading and deceptive conduct (SA DoH).

Reasons for opposition to Option 3:

- It would pose a substantial risk to the health of populations through unbalanced nutritional intake; it might lead to the promotion of confusing and inconsistent nutrition and health messages when there is already a great deal of inaccurate nutrition information. Health claims might add to this problem and make the work of public health workers much more difficult (Public Health South);
- US research has shown that many foods making claims are packaged foods high in sugar, suggesting that health claims would disadvantage food groups that are not packaged (e.g. fruit and vegetables) (Public Health South);
- The current Food Standard is extremely limited by a lack of resources, which suggests that the capacity to regulate new Standards might also be limited. Given the potential risk to public health and apparent lack of evidence to support health claims, Public Health South queried how a large amount of funding and resources required to regulate and monitor health claims could be justified. They suggested that this money would be better spent on promoting the New Zealand Food and Nutrition Guidelines;
- This option was believed to be contrary to the Policy guidance which proposes scientific substantiation of high risk claims, generic health claims for ease of use where evidence is clear and minimal regulation where there are no risks to public health (F & B Importers Assoc);
- The class of claims deemed high risk appear extremely broad; the result pre-approval process is onerous and likely to provide limited benefit to the entity undertaking the process (Fonterra, Mainland Products); and
- Standards tend to be prescriptive and bureaucratic and the rigidity of a Standard might limit food innovation and consumer education (Fonterra, Mainland Products).

General comments and recommendations

Four submitters who preferred Option 1 recommended that the status quo should be investigated further, so that loopholes are closed and a level playing field is provided for all stakeholders, rather than a move to health claims at the detriment to public health and health inequalities (Cancer Society NZ, Cancer Society NZ – Rotorua Branch, Cancer Society NZ – Waikato/Bay of Plenty Div., Auckland Cancer Society). They argued that the purpose of FSANZ is not to provide a marketing tool to the food industry to assist with increased sales, promote ‘innovation’ in the food industry or save money. The primary purpose of FSANZ is to promote and protect public health. Whilst the Society does not support the development of a Standard, they offer advice should a new regulatory Standard (Option 3) be introduced.

JS – PH Nut supported Option 1, although expressed concern at the limited range of options provided in the IAR. This submitter believed that from the comprehensive work done the proposed framework in the IAR, a decision to permit health claims within a regulatory framework has been made. This was considered to be disappointing given the lack of evidence to assure public health and safety, and assumed that the motivation is to promote food industry innovation and trade. In addition, this submitter was extremely disappointed that precious public health nutrition resources would be used to manage health claims at the expense of other important public health nutrition issues being inadequately addressed in Australia.

Nutra-Life H&F supported Option 1, but did not support the general fortification of foods except on specific application for an established health risk (e.g. iodisation of salt). They did not believe that high level claims are warranted for foods, and therapeutic claims should be confined to medicines and only permitted for foods with a specific medical purpose and controlled accordingly. They believed that general fortification would give food manufacturers an excuse to gain marketing advantage by fortifying everything, to the extent that excesses of nutrients may occur. However, they considered that there is justification to allow the restoration of nutrients removed from foods during processing. Nutra-Life H&F stated that there is evidence that sub-therapeutic levels of herbs (e.g. Echinacea) are being added to foods with health claims being made, not for the food but for the herb. Herbs with an established culinary use should be allowed in foods and no claim should be permitted for any established health benefits when used in therapeutic dosage.

William Wrigley Junior preferred Option 2 under the proviso that all government stakeholders endorse general level claim guidelines, particularly with respect to ‘free’ claims. They recommended that as a minimum these should reflect current CoPoNC conditions but alignment with international guidelines was preferable. Although they supported the development of a systematic approach to health claims, William Wrigley Junior considered that the proposed framework was confusing in terms of the discussion paper and desired outcomes. They suggested that the solutions should be simple, easily understood and cost effective.

National Foods supported Option 2 and strongly supported the Council of Australian Governments principle for minimum necessary regulation. They recommended that regulation should be commensurate with risk.

The Solae Comp. (in support of Option 2) noted that a more proactive and vigilant enforcement agency will be required to ensure compliance throughout the food industry, as well as in retail outlets such as Juice Bars, to ensure an even playing field for all.

Although they supported Option 2, Food Tech Assoc. of WA considered that further work on the definition of claims and the substantiation process was required, to ensure the Standard is easily understandable. They pointed out that many claims are determined by consumer acceptance and a flexible regulatory approach would allow for innovation and rapid changes in the food industry. A strict and bureaucratic regulatory approach would be unrealistic, unworkable and would lead to distrust by consumers and reduced industry compliance.

NZ Dairy Foods believed that risk and regulation should be correlated so that the higher the risk of the claim the higher the level of regulation. To this extent, they supported the overall concept and direction of Option 2.

Kellogg's Aust. supported a regulatory process that allows food manufacturers to make nutrition, health and related claims on food products (Option 2). They recommended that the proposed regulatory process should: complement existing legislation, rather than seeking to duplicate them and to impose more complex requirements; clearly define the level of claim and the appropriate substantiation requirements; should be transparent, expedient and well defined in terms of claim criteria; and should contain a clearly defined process for submission and approval of claims, in terms of who undertakes the review of the evidence and what constitutes the process for appeal of a decision on the evidence and thus use of the claim. Kellogg's Aust urged FSANZ consider the Government policy on regulation, which would require minimum effective regulating and requires that detailed standards only be imposed where necessary to correct market failure. They suggested a list of example general level claims be included to help provide clarity to manufacturers.

CMA (supported by Mandurah Aust., Palatinit GmbH, Kingfood Aust, CMA – NZ Branch, CMA – NSW, CMA – QLD, CMA – VIC, ICA, CM of SA) recommended that if Option 2 fails to deliver a robust credible system, particularly with respect to general level claims, that the guidelines be moved into the Standard when the review of the new system is performed in two years from time of implementation.

Cadbury Schweppes supported Option 2 and suggested that the scheduled two-year review should ensure that non-compliance to the guideline is taken seriously. They recommended that either the guideline be absorbed into the Standard or appropriate measures are established to permit easier enforcement, should the level of non-compliance be greater than 14.7 per cent as quoted in the IAR (Survey on CoPoNC, which revealed that non-compliance with the Code was at 13 per cent). Cadbury Schweppes stated that this should be zero and enforcement agencies must be given the appropriate authority to enforce compliance to any guideline.

Dairy Aust recommended that a management committee under government authority should accompany voluntary regulation under Option 2. Members would be drawn from FRSC to help support implementation of this option. Fonterra supported this recommendation.

Fonterra believed that the extent of regulation should be according to risk level of claims, both in terms of public health and safety and of the risk of misleading consumers. Claims on food must be accurate and truthful, not misleading. However, food was described as self-limiting in terms of quality, and adheres to strict safety regulations in manufacture and composition. As a result, Fonterra considered it unlikely that the risk to public health and safety of making substantiated claims would be high. Although it is possible that importers and companies less concerned about reputation might have less incentive to adhere to a guideline as opposed to a Standard, they noted that evidence indicates that industry will comply with a guideline as much as with a Standard. Fonterra believed that appropriate Government and industry guidelines are viewed by courts as bench markers for fair representation and might be used as evidence that a claim is misleading if it doesn't comply with the guideline. In that respect, they considered that relevant guidelines could still be enforced. Mainland Products supported these views.

Although they expressed support for Option 2, National Starch suggested the need for a proactive and vigilant enforcement regime to ensure compliance and a level playing field for industry.

Consumers' Instit. of NZ considered that none of the three options met all the criteria considered to be important in managing a health claims system. A combination of Options 1 and 3 were considered to be closest to an ideal model. Under Option 1, mandatory nutrition labelling would give consumers the tools to make food choices by providing factual information without any advertising hype and as it is on every packaged food, is useful for brand and product comparisons. Under Option 3, general level claims and high level claims would be fully regulated and not merely covered by an unenforceable guideline or Code of Practice. Given the inevitability of the introduction of health claims, they preferred Option 3.

Canterbury DHB supported Option 1 and strongly supported the inclusion of Standards for nutrient content claims as outlined in Option 3. They believed that all criteria developed for health or nutrient/content claims be covered by a Standard rather than guidelines or codes of practice. Health claims and nutrient/content claims should be considered separately at this stage, as health claims are not currently generally permitted. Canterbury DHB believed that both general level claims and high level claims require substantiation and general level claims should not be considered any less important or significant than high level claims. They believed that substantiation should be the responsibility of the manufacturer, not the enforcement agency, for all health claims. In addition, they believed that clear guidelines should be established for this, rather than a number of studies.

Heinz Aust/Heinz Watties NZ preferred a combination of Option 2 and 3 with the majority of claims in a Standard and minority in a guideline. They preferred to see most claims fixed in a Standard with some flexibility to allow for new trends, innovations and changes. They did not support nutrition claims placed in a guideline, while they did support the inclusion of biologically active substances in a guideline.

The NZFSA strongly supported Option 3, with the incorporation of conditions and criteria prerequisites for both high level claims and general level claims in a Standard.

They believed that this would greatly enhance the enforceability of the Standard. Moreover, they strongly supported development of user guides and guidelines to assist with interpretation and implementation of the Standard, although they did not agree that such guidelines should replace the inclusion of conditions and criteria in the Standard. Finally, they did not think that CoPoNC was ever shown to be effective.

SA DoH and Horticulture Aust. stated their support for Nutrition, health and related claims in a format similar to the transitional Standard 1.1A.2, and recommended general level claims and high level claims are pre-approved by FSANZ and listed in the Standard. SA DoH regarded the past experience with a combination of Standards and guidelines as an indication that conditions need to be in a Standard to ensure compliance. In their support of Option 3, SA DoH quoted from two sources: the first source was from Jones et al (2003) "it should be considered imperative for consumer confidence in health claims that only credible, legitimate, and well substantiated claims based on established scientific evidence be approved, in order to prevent the misleading or deceiving of consumers"; and the second source was from Katan et al (2003) "proper regulation of health claims might encourage industry to invest more money in nutrition research" but this will require a regulatory system in which all stakeholders have confidence.

TGACC supported Option 3 and strongly advocated the inclusion of an appropriate pre-approval system for any advertising on food health claims in context of diet that could be considered synonymous with therapeutic claims for medicines by way of the intended health outcomes. They believed that there should be appropriate processes set in place to monitor, enforce and apply penalties and sanctions. If conducted as part of a co-regulatory approach, such as for the therapeutic goods industries, they noted that there is tremendous potential to remove regulatory burden from the States and Territories, and allow a proper mechanism for addressing national advertising campaigns that transcend these jurisdictions.

Dr. R. Stanton preferred there to be no health claims and believed that CoPoNC should be changed to a Standard to ensure consumers are not misled into thinking processed foods with health claims are as good as, or preferable to fresh foods. This would also protect against misleading structure/function claims and other nutrition claims currently inadequately controlled under CoPoNC. Given that this is not a valid option, Option 3 would be the next preference. Dr. R. Stanton stated that if health claims are being introduced to benefit public health they should be proclaimed as widely as possible. To achieve this it was recommended that FSANZ assesses the evidence for the health claim, formulates what the claim can say and any related conditions and then permits the claim under a legally enforceable Standard. While this may result in fewer health claims, it would also preclude many spurious, trite, confusing or misleading claims.

Four submitters recommended that function, enhanced function and non-serious disease risk reduction claims be subject to pre-market assessment and approval by FSANZ, as for high level claims (ANA, TCCA, ACDPA, Kidney Health Aust). The ANA believed that general level claims do not have less significance and without the legally binding safeguard have the ability to confuse and mislead the consumers. They stated that the proposed substantiation for general level claims does not provide a sufficient level of rigour of scientific substantiation. The ANA recommended that

interpretive user guides would need to be developed to facilitate understanding of the requirements in the Standard and application of the substantiation framework.

Under different circumstances, the ANA would have preferred Option 1 with the proviso of some tightening up of legislation. Currently health claims cannot be conferred on fruit and vegetables and consumers may benefit from the health claims associated with fruit and vegetables as part of overall healthy eating messages.

The TCCA had sympathy for Option 1 but was realistic about the advent of health claims and understood that there is an existing push from the community for health claims. They supported the concept of consumers being more exposed to the dietary guideline messages, provided there was a rigorous system for approving health claims – although they believed that it was unlikely to prevail. The ACDPA and Kidney Health Aust supported this view. The TCCA suggested a slightly modified version of Option 3 where all criteria and conditions for general level claims and high level claims would be in a legally enforceable Standard, with the interpretive user guides developed to facilitate understanding of the requirements in the Standard and application of the substantiation framework. They noted that although there may be some potential benefit with well-founded and scientifically verifiable health claims regulated to food products, this option would still leave open a relatively unregulated infrastructure for general level claims.

Four submitters believed that there is insufficient evidence that health claims are successful in improving public health in terms of: the risk that consumers will be misled by health claims; overestimating the benefit of individual products; and a potential for harm (caused by skewed eating patterns arising from consumers selecting a diet based on claims on foods, most of which will be highly processed) (ACA, PHAA, OAC NZ, Monash Uni – N&D Unit).

The ACA preferred to maintain the status quo (Option 1), a ban on all health claims, while regulating nutrition claims in a standard rather than a voluntary code. However, if health claims were to be introduced, their preference would be Option 3. They noted that despite an increased level of government regulation under Option 3 there is still the potential for health claims and associated marketing to distort consumers' perceptions about a healthy balanced diet and the role of individual, processed products in achieving this.

Although they provided support for Option 3, PHAA preferred to maintain a prohibition on high level claims and include criteria and conditions regarding nutrient content claims in a Standard. Given the potential for harm, they considered that it is essential to have strong safeguards built into the system to regulate nutrition, health and related claims.

OAC NZ quoted the WHO document (2004) regarding health claims, which includes statements “to date there is insufficient evidence concerning their effect on diet and public health”, and the positive and negative effects of health claims are unclear. Furthermore, they noted that countries that presently allow health claims have not experienced a decrease in the incidence of obesity since their introduction (e.g. the United States has the worst obesity statistics in the world, despite health claims having been in common use for more than a decade). Given the seriousness of the

obesity problem in New Zealand and Australia and the economic and public health consequences, the OAC NZ believed FSANZ should establish with certainty that the introduction of health claims will not exacerbate the problem. OAC NZ supported Option 3 only in the absence of an option that would allow the loopholes and inconsistencies present in the status quo to be sorted out. Under Option 3, general level claims and high level claims should be legally enforceable while no claims should be left to guidelines.

Monash Uni – N&D Unit stated that their preferred option would be to maintain prohibition on high level claims but include criteria and conditions for nutrient content claims in a Standard. However, they believed that as health claims are proceeding and given the potential for harm, it is essential to have strong safeguards built into the system to regulate health claims. They recommended that general level claims and high level claims should be pre-approved by FSANZ and listed in the Standard.

The NZDA preferred Option 3 as long as there were sufficient resources to ensure enforcement of the Standards (NZDA). They expressed concern that the proposed general level claims regulations might be sufficiently open to interpretation as to allow claims, which are not in the spirit of the Policy Guidelines (i.e. do not protect or improve the health of the population, or promote healthy food choices by the population). Furthermore, NZDA members were concerned that the lack of evidence for disease end-points means any high level claim is flawed.

In their support of Option 3, NSW Food Authority noted that it appears to be in conflict with the policy option favoured by the Ministerial Council, which states in its Regulatory Model section “A guideline document would provide the majority of the detail surrounding general claims”. They believed that a Standard developed from this policy, could and should, deviate from the Policy Guideline where the result would be a stronger, more enforceable Standard, which would provide consumers with greater certainty and consistency in the messages they receive from health claims.

Despite providing support for Option 3, Tas DoH&HS considered that there has been no significant evidence presented to support benefits of the cost of the introduction of health claims. Therefore, they believed that continuation of the prohibition on health claims would be prudent. However, they recognised problems with regulation of current nutrient claims in CoPoNC including enforcement.

Northland Health Dietitians believed that permitting too many claims for a wide variety of issues would be self-defeating. They noted that the Folate Health Claim Pilot was highly regulated and coordinated, and suggested that FSANZ allows a small number of pre-approved high level claims relating to current public health issues where dietary modification might confer modest health benefits. Northland Health Dietitians preferred Option 3 if a cost benefit analysis/market research indicated that health claims would not increase the cost of healthy food and that health benefits are realised across all socio-economic groups.

The DAA remained concerned over the introduction of health, nutrition and related claims. They noted that overseas experience has highlighted problems associated

with consumer interpretation of health claims, and were concerned that these problems may be replicated in Australia if thorough consumer research is not conducted prior to the introduction of health claims. Given that the introduction of health claims into Australia and New Zealand is being justified on the basis of encouraging consumers to make better food choices, the DAA considered that more Australian and New Zealand research would be required to better understand how our consumers relate to health claims in terms of wording, context, length of health claim statements and, where appropriate, warnings to avoid harm. Similarly, Tomox believed that consumer research is needed to ensure that consumers do make healthier food choices as a result of the proposed changes. The NZDA strongly supported the DAA recommendation for further consumer research and expressed concern that consumers might interpret product names and trade marks as implying health benefits and noted that the definition of a 'claim' (pg 28 P293 IAR) is not clear on the position of product names with regard to health claims.

The NHF Aust (supported by NHF NZ) believed that that endorsement programs which rely on a Certification Trade Mark (CTM) already provided a high degree of assurance about the claim represented by the Trade Mark, and do not require further regulation or pre-approval by FSANZ. They considered that criteria and conditions for CTMs should be controlled by the endorsing organisation and not listed in either the new Standard or guideline. The Tick Program's experience has been that: many manufacturers will formulate and reformulate products in order to gain eligibility for a reputable nutrition program such as the Tick Program; and companies will comply with labelling requirements if these are enforced (e.g. the Tick Program requires compliance with the Code and CoPoNC and pre-approval of all artwork).

Queensland Health – PHS supported the development of interpretive guides for interpretation of the Standard.

Sanitarium Health Food Comp cautioned that health claims must be made in a responsible manner and be meaningful to the end user.

Dr. C. Halais did not prefer any of the regulatory options and noted that any health claims on food could lead to excessive consumption of that food, to the detriment of the consumer and community. Moreover, the approval process for a claim would require the manufacturer to present evidence only in support of that claim. The onus would then be on FSANZ to research possible adverse effects, which the submitter considered to be a difficult task because research with 'no effect' results is rarely published, whilst adverse results might be suppressed. Dr. C. Halais questioned who would be responsible for monitoring current research on each claim, and who would be liable for damage to the consumer in the period for which the claim was allowed.

Other comments provided but not in direct response to the question

Kidney Health Aust. stated that Option 2 is not suitable because changes to food regulation in the area of nutrient and health claims must be enforceable for it to be effective, and there are already breaches being seen with nutrient claims which are regulated with a Code of Practice and not enforced by a standard.

Judy Seal preferred Option 1, as it maintains prohibition on health claims. She noted concern at the limited range of options in the Initial Assessment Report. She added that from the comprehensive work done the proposed framework in the Initial Assessment Report, a decision to permit health claims within a regulatory framework has been made. Considers this disappointing given the lack of evidence to assure public health and safety, and assume that the motivation is to promote food industry innovation and trade. She was extremely disappointed that precious public health nutrition resources would be used to manage health claims at the expense of other important public health nutrition issues being inadequately addressed in Australia.

NSF preferred Option 3. Function, enhanced function and non-serious disease risk reduction claims should be subject to pre-market assessment, just like high level claims, therefore a legally enforceable standard is required. Under different circumstances they would prefer Option1, as the potential for population health gains from health claims on food appears to be quite low, however are realistic about the advent of health claims and understand that there is an existing push from the community for health claims and support the concept of consumers being more exposed to the dietary guideline messages, provided there is a rigorous system for approving health claims.

CHAPTER 5: TRANSITIONAL ISSUES

Question 107

Are there any reasons why the proposed transitional arrangements should be shortened, lengthened or otherwise changed?

Out of 147 submitters, 34.0 % (50 in total) directly responded to this question. The distribution of these responses was as follows:

Sector	Australia	New Zealand	Trans Tasman	International	Total
Industry	18	8	5	3	34
Government	7	1	-	-	8
Public health	5	-	-	-	5
Consumers	1	-	-	-	1
Other	2	-	-	-	2
Total	33	9	5	3	50

Overview

Nearly 30 percent of submitters (14) supported the uniform 12-month transitional period and one submitter supported shortened transitional arrangements. However, 65 percent of submitters (32) suggested longer transitional arrangements, of which six did not propose a specific duration. Three submitters did not directly respond to the question.

Submitters that agreed with the proposed uniform 12-month transition period

Fourteen submitters supported the proposed uniform 12-month transitional period applying to Standard 1.2.7 (Fonterra, Mainland Products, NZFSA, PHAA (supported by ACA), DAFF, Tas DoH&HS, SA DoH, WA DoH, Queensland Health – PHS, Monash Uni – N&D Unit, Nutra NZ, Nutra-Life H&F, CHC), because:

- It is a good solution (Nutra NZ);
- It is a voluntary Standard (DAFF);
- It would avoid potential for confusion amongst all stakeholders (PHAA (supported by ACA), Tas DoH&HS, SA DoH, WA DoH, Queensland Health – PHS, Monash Uni – N&D Unit);
- It would be adequate for manufacturers to gear up to meet the requirements, plus time to allow FSANZ to process applications (Nutra-Life H&F); and
- It would allow appropriate time for educational material to accompany the adoption of the Standard (Queensland Health – PHS).

Fonterra (supported by Mainland Products) considered that it is difficult to identify the extent of labelling changes that will be required at this stage, so at this stage they had no issues with the proposed transitional arrangements.

Submitters that supported shortened transitional arrangements

NZ Dairy Foods believed that transition should ideally be shortened to reduce the current ambiguity and abuse and to allow consumers greater choice and health benefits. They did not, however, recommend a specific duration for transitional arrangements.

Submitters that supported lengthened transitional arrangements

Thirty-two submitters supported lengthened transitional arrangements (NZFGC, Nestle, Unilever Australasia, ABC, F & B Importers Assoc., NZJBA, Frucor, CML, William Wrigley Junior, Dairy Aust, AFGC, Masterfoods Aust. NZ, GW Foods, National Foods, CMA, Mandurah Aust., Palatinit GmbH, Kingfood Aust., CMA - NZ Branch, CMA - NSW Branch, CMA - QLD Branch, ICA, CMA-Vic Branch, CM of SA, Cadbury Schweppes, NSW Food Authority, NSW DoH – N&PA Branch, TCCA, Dr. R. Stanton, Dr. C. Halais, Nutrition Aust, Heinz Aust/Heinz Watties NZ).

Of these, six submitters did not propose a specific duration (NSW Food Authority, NSW DoH – N&PA Branch, TCCA, Dr. R. Stanton, Dr. C. Halais, Nutrition Aust.).

Recommended a transitional period of:

- Two years (NZFGC, Nestle, Unilever Australasia, ABC, F & B Importers Assoc, NZJBA, Frucor, CML, William Wrigley Junior, Dairy Aust.), from the time of issue of the final user guides or gazettal, whichever is last (AFGC, Masterfoods Aust. NZ, GW Foods, National Foods, CMA, Mandurah Aust., Palatinit GmbH, Kingfood Aust., CMA - NZ Branch, CMA - NSW Branch, CMA - QLD Branch, ICA, CMA-Vic Branch, CM of SA); or
- One year, and two years stock-in trade, as shown below (Cadbury Schweppes).

Recommended provision for stock-in-trade of:

- Two years (NZFGC, Nestle, Unilever Australasia, ABC, AFGC, Masterfoods Aust. NZ, NZJBA, Frucor, GW Foods, National Foods, Cadbury Schweppes, Dairy Aust.), subject to significant labelling changes being required and for longer shelf-life foods, such as canned foods (Heinz Aust./Heinz Watties NZ);
- One year (CMA, Mandurah Aust., Palatinit GmbH, Kingfood Aust., CMA - NZ Branch, CMA - NSW Branch, CMA - QLD Branch, ICA, CMA-Vic Branch, CM of SA); or
- An unspecified duration (F & B Importers Assoc)

Reasons for longer transitional arrangements:

- To allow for stock in trade to clear the supply chain (NZFGC, Nestle, Unilever Australasia, ABC, NZJBA, Frucor);
- Permission to continue selling products which have been safely in the market place, but for which changes to general level claim criteria and conditions would require additional substantiation, would promote an orderly market place (GW Foods, National Foods);
- Allowances need to be considered for endorsements that then become high level claims which need pre-approval for their use (Nestle);
- Implied claims that are now on the market would have to be assessed and might require alterations or their removal. It was noted that this process is quite lengthy (NSW Food Authority, NSW DoH – N&PA Branch); and
- To ensure that changes to the regulation of nutrition and health claims are managed comprehensively and thereby ensure the statutory objectives (i.e. protecting public health and safety) of FSANZ are upheld (TCCA).

Dr. R. Stanton stated that there is no problem in lengthening the proposed transitional arrangements, as there is no evidence that health claims affect public health.

Cadbury Schweppes stated that where claims are currently permitted and it has been proposed that such claims be prohibited under the new regime (e.g. ‘sugar free’), at the DAR of P293 manufacturers would be able to determine any need to amend labels so that upon gazettal they will have any changes well planned. Allowing manufacturers to run out of existing packaging material 12 months from gazettal should be sufficient with a two-year stock-in-trade provision to follow.

Dairy Aust. believed that it is difficult to identify the extent of labelling changes that would be required as a result of changes to the regulation for nutrition, health and related claims. Consequently, they felt that at this stage the dairy industry did not identify any issues with the proposed transitional arrangements, as long as it is of adequate duration during which either the present or the new Standard may be complied with. However, they suggested that this question might need to be revisited pending decisions on the regulations for nutrition, health and related claims.

General comments and recommendations

NZFSA were happy with the proposed 12-month transitional period, however they believed that this period should also relate to all claims which will be covered by the new Standard – not just those that were covered by the transitional Standard. They noted that if this was not the case, general level claims that are currently in the market place but are not consistent with the new Standard would in theory need to be compliant with the new Standard from gazettal, and NZFSA see this as unrealistic. In their opinion, NZFSA believed that there should be a concerted effort by enforcement bodies to remove non-complying claims from the market place during the transition period.

Cadbury Schweppes considered a transitional period of two years to be excessive, especially in light of an additional two-year stock-in-trade provision. They noted that as health claims are currently not permitted and there is minimal change to proposed content claims, manufacturers are unlikely to have to make a large number of label changes. Manufacturers are likely to already have the appropriate evidence to substantiate a claim and so may well be able to implement any changes to labels so as to include any claims as soon as gazettal has happened. However, this will be at the manufacturers discretion rather than a forced change.

The CMA (supported by Mandurah Aust., Palatinit GmbH, Kingfood Aust., CMA - NZ Branch, CMA - NSW Branch, CMA - QLD Branch, ICA, CMA-Vic Branch, CM of SA) noted that a two-year transition period, followed by a further one-year stock-in-trade provision, specifically applies to claims currently permitted (i.e. those compliant with CoPoNC and the single permitted health claim, i.e. folate). They pointed out that for health claims (excluding nutrient content claims), regulation could be effective immediately. Therefore, a transition would be unnecessary as there would be new provisions that provided a new (formerly unavailable) opportunity. In addition, they noted that transition and stock-in-trade provisions should not be a mechanism for the continuance of non-compliant product in the marketplace. Transitional arrangements should instead be a vehicle to minimise the cost impact of existing claims, which would be prohibited through this process; or to provide time to comply with the substantiation requirements where these have become more onerous. For current health claims that would be permitted under the new system, there should be time for them to catch up with the regulatory developments in a similar manner to the introduction of genetically modified foods.

Nestle believed that consideration should also be given to a suitable transition time to allow for any changes that occur with the current usage of claims on products. They believed that a 12-month transition time would not be suitable, especially where there changes to branding are required. They also recommended a grandfathering of endorsements so that endorsements can be used when the assessment phase is longer than the transition phase.

AFGC, Masterfoods Aust.NZ recommended that products which have been safely in the market place but for which changes to the criteria and conditions for general level claims require additional substantiation, should be subject to a grandfathering clause permitting their continued sale for four years from gazettal of Standard.

Although Nutra-Life H&F believed that 12-month transition would be adequate, they also noted that in light of current experience where it may take up to two years to establish a new Food Standard, the transition period should be of a similar length. They also commented that while there was no mention of the involvement of consumer groups in regard to claims, Nutra-Life H&F believed that they will seek confirmation of the mechanism by which approval for claims will be given.

Three submitters recommended that timely completion of user guides would assist in the implementation of the Standard (NZJBA, Frucor, ABC).

Heinz Aust./Heinz Watties NZ believed that the reality of achieving the transitional arrangements depends on the outcome of the Standard.

Other comments provided but not in direct response to the question

Campbell Arnott's Asia Pacific recommended an appropriate transitional period of time during which both CoPoNC and health claims are allowed, for making costly label and formulation changes.

NCEFF noted that given global developments in trade and the need for Australia to utilise its capability in this area, the new Standard should be enacted as soon as possible. They stated that there would never be enough information to fully inform the process; it is simply a case of addressing the risk based on information available at the time and ensuring flexibility to enable new knowledge to be integrated into the system as it comes to hand.

Sanitarium Health Food Comp suggested that to assist transition, an implementation or advisory group be established that could act as a resource to assist industry, which could report to the ISC. They also suggested setting up an 1800 call line and workshops, as was in place for the 2002 FSC update.

National Foods supports estimated timelines of January 2006 for gazettal of the standard as stated at the FSANZ stakeholder briefing held in Melbourne August 2004.

NZ Dairy Foods suggested the legislation is enacted as soon as possible with the least restrictions and the system can be tightened as the whole business progresses. They envisaged serious problems with time delays if the system is complex and cumbersome.

CHAPTER 6: REVIEW

Question 108

While the Policy Guideline points to an assessment of the effectiveness of the 'watchdog' body, what aspects of the system for regulating nutrition, health and related claims should be a priority for review within two years of implementing the Standard?

Out of 147 submitters, 42.2% (62 in total) directly responded to this question. The distribution of these responses was as follows:

Sector	Australia	New Zealand	Trans Tasman	International	Total
Industry	20	12	5	3	40
Government	6	2	-	-	8
Public health	7	2	-	-	9
Consumers	1	1	-	-	2
Other	3	-	-	-	3
Total	37	17	5	3	62

Overview

Almost seventy per cent of submitters (43) considered a range of enforcement and compliance issues to be a review priority. Priorities included: the effectiveness of the proposed Monitoring and Evaluation phases (6), a range of issues relating to industry making health, nutrition and related claims (24), consumer research to assess awareness and understanding of health claims (10), and the need to monitor changes in food composition, food supply, food purchasing patterns, changes in food related behaviours and in nutrition related health (9).

Priorities regarding enforcement and compliance

Forty-three submitters considered a range of enforcement and compliance issues to be a review priority (ASA, Cadbury Confectionery, Naturo Pharm, NZTBC, NPANZ, Assoc. of NZ Advertisers, NZ Magazines, CMA, Mandurah Aust., Palatinit GmbH, Kingfood Aust, CMA – NZ Branch, CMA – NSW Branch, CMA – Qld Branch, CMA – Vic Branch, ICA, CM of SA, Diabetes Aust, GI Ltd, TCCA, Dr R. Stanton, DAA, NZDA, CHC, PHAA (supported by ACA), NCEFF, Tas DoH&HS, SA DoH, WA DoH, ASMI, TGACC, Dairy Aust, NSW Food Authority, NZ MoH, NZFSA, CML, Griffins Foods, Cadbury Schweppes, NZ Dairy Foods, Nutrition Aust, Nutra-Life H&F, Med-Chem Ingredients).

Specific themes arising from the issue of enforcement include:

- Consistency and effectiveness of enforcement agencies (DAA, NZDA, Diabetes Aust, GI Ltd., TCCA, ASA, Cadbury Confectionery, Naturo Pharm, NZTBC, NPANZ, Assoc. of NZ Advertisers, NZ Magazines, CMA, Palatinit GmbH, Mandurah Aust., Kingfood Aust, CMA – NZ Branch, CMA – NSW Branch, CMA – Qld Branch, CMA - Vic Branch, ICA, CM of SA);

- Effectiveness of jurisdictional units to monitor and enforce compliance (CHC);
- Resource and workload for regulators and enforcement agencies (NZFSA);
- The strength of sanctions (ASMI, TGACC);
- The ability of a Standard to be enforced adequately (NZ MoH, NSW Food Authority), and whether or not the Standard would facilitate easier enforcement (Nutrition Aust, CML); and
- Surveillance and enforcement of general level claims, that is, adherence to the voluntary CoPoNC (Dairy Aust).

Five submitters supported an assessment, as highlighted by the Policy Guideline, of the effectiveness of the ‘watchdog’ body, in conjunction with an assessment of the effectiveness of the Advisory Panel (PHAA (supported by ACA), Tas DoH&HS, SA DoH, WA DoH).

Specific themes arising from the issue of compliance include:

- Industry compliance with the regulations (TCCA, CML, CMA, Mandurah Aust., Palatinit GmbH, CMA – NSW Branch, CMA – Qld Branch, ICA, CM of SA, Diabetes Aust, GI Ltd., PHAA (supported by ACA), NCEFF, Tas DoH&HS, SA DoH, ASA, Cadbury Confectionery, Naturo Pharm, NZTBC, NPANZ, Assoc. of NZ Advertisers, NZ Magazines);
- The number of complaints (TCCA, Nutra-Life H&F), warnings and prosecutions (TCCA);
- The number of products that are investigated and prosecuted for breaching the Standard (NZ Dairy Foods);
- A market review of available food products carrying claims (ASMI, TGACC, CHC, Med-Chem Ingredients, Nutra-Life H&F);
- Compliance of the total Standard (Griffins Foods);
- The effectiveness of compliance to any guideline established under Option 2 (Cadbury Schweppes);
- Standards of advertising and breaches (CHC), and advertising activity (ASMI); and
- Timeliness of compliance action (ASMI, TGACC).

Priorities regarding the Monitoring and Evaluation phases

Six submitters believed that a review of the effectiveness of the proposed Monitoring and Evaluation phases, as outlined in the Initial Assessment Report, would help to ensure that the regulatory system is functioning as envisaged (PHAA (supported by ACA), Tas DoH&HS, NSW Food Authority, SA DoH, WA DoH). WA DoH noted that these phases would provide baseline data on consumers and the foods making claims and changes to these since implementation.

Priorities regarding claim requirements and processes

Twenty-four submitters identified a range of issues relating to industry making health, nutrition and related claims (NCEFF, F&B Importers Assoc., AFGC, National Foods, Griffins Foods, Nestle, GW Foods, Cadbury Schweppes, ASA, Cadbury Confectionery, Naturo Pharm, NZTBC, NPANZ, Assoc. of NZ Advertisers, NZ Magazines, Dairy Aust, National Starch, Solae Comp, NZFGC, DAA, NZDA, NZ Dairy Foods, Masterfoods Aust. NZ, NZFSA).

Specific concerns that industry has in relation to making claims include:

- The ease in meeting requirements for making general level claims and high level claims (National Starch);
- The burden associated with substantiation for high level claims (National Starch, Solae Comp);
- The length of time it takes to obtain approval for high level claims and general level claims (NZ Dairy Foods);
- The feasibility and effectiveness of the substantiation framework (NCEFF), and substantiation procedures (AFGC, Cadbury Schweppes, ASA, Cadbury Confectionery, Naturo Pharm, NZTBC, NPANZ, Assoc. of NZ Advertisers, NZ Magazines, Dairy Aust). This would include an assessment of whether or not high level claim and general level claim substantiation processes are effective, realistic and meet the needs of industry and enforcement agencies (NZFGC);
- The burden and costs industry has incurred in making claims to assess the need to streamline and improve the process (National Starch, Solae Comp);
- The use of high level claims in relation to manufacturers acceptance (Dairy Aust);
- A review of the high level claim process (F & B Importers Assoc., AFGC, National Foods, Griffins Foods, Nestle), before reviewing aspects that are new within general level claims (GW Foods);
- An evaluation of the types of claims being used (DAA, NZDA); and
- The usefulness of supporting guidelines and user guides (NZFSA).

Masterfoods Aust. NZ stated that there must be commitment to an ongoing system of review that enables new general level claims and high level claims to be reviewed and adopted, in a timely manner, based on consensus of science; and that confidence of consumers, health professionals and industry is retained.

Priorities regarding consumers

Ten submitters drew attention to consumer issues as being a priority for review (CML, Consumers Instit. of NZ, Diabetes Aust., GI Ltd, National Starch, Solae Comp, Dairy Aust., DAA, NZDA, ANA).

Several submitters noted that priorities should include consumer awareness, interest, attitudes and understanding of health claims (CML, Consumers Instit. of NZ, Diabetes Aust., GI Ltd, National Starch, Solae Comp.). Dairy Aust. considered that consumer understanding of the use of high level claims was a priority. Three submitters believed that an assessment of the impact of health claims on consumers was important (DAA, NZDA, ANA).

Priorities regarding health and nutrition related aspects

Ten submitters identified health and nutrition related aspects as important priorities for review (PHAA (supported by ACA), Tas DoH&HS, NSW DoH – N&PA Branch, SA DoH, WA DoH, Monash Uni – N&D Unit, Nutrition Aust, CML, ANA).

Nine submitters believed that review process would be limited unless the health and nutrition related impacts of the system are included, given that health claims are supported on the basis that they assist consumers to make healthier choices (PHAA (supported by ACA), Tas DoH&HS, NSW DoH – N&PA Branch, SA DoH, WA DoH, Monash Uni – N&D Unit, Nutrition Aust, CML). A comprehensive national monitoring and surveillance system was recommended to:

- Monitor changes in food composition, food supply, and food purchasing patterns (PHAA (supported by ACA), Tas DoH&HS, NSW DoH - N&PA Branch, SA DoH, WA DoH, Monash Uni – N&D Unit, Nut Aust); and
- Monitor changes in food related behaviours and in nutrition related health e.g. obesity, biomarkers (PHAA (supported by ACA), Tas DoH&HS, NSW DoH - N&PA Branch, SA DoH, WA DoH, Monash Uni – N&D Unit).

The ANA recommended that it is important regular National Nutrition Surveys continue to provide an accurate picture on nutrition consumption so as to allow measurement of health claims and other influences.

Other priorities

Five submitters noted other priorities for review (NZ Dairy Foods, Nutrition Aust., NSW Food Authority, NZ MoH, NZFSA), which include:

- An evaluation of the number of suppliers and/or products that implement new health claims and if there are new trends in terms of product sectors (NZ Dairy Foods);

- Assessment of whether or not the new Standard has achieved its intended objectives, such as:
 - A clarification of the use of claims and a reduction in the number of ambiguous claims (Nutrition Aust);
 - Effectively providing consumers with clear unambiguous messages which meet the intent of the Policy Guidelines (NSW Food Authority); and
- Addressing any area reported to be difficult to implement or problematic (NZFSA, NZ MoH), or where there needs to be added clarity in a Standard (NZ MoH).

General comments and recommendations

In the event that Option 2 is adopted, six submitters recommended that if the guideline proves to be ineffective, it should be moved to a regulated Standard (CMA – Vic Branch, Kingfood Aust., CMA – NZ Branch, ICA, Med-Chem Ingredients, William Wrigley Junior, Dairy Aust). In the interim, they noted that the guideline would need to have traction through effective and consistent enforcement and communication. Dairy Aust. suggested that once the threshold for non-compliance for a given claim is reached, the claim would be written into the Standard.

Med-Chem Ingredients recommended the framework proposed by P293 should be reviewed within one to two years after implementation.

Seven submitters recommended that Health claims (Standard 1.2.7) be a priority for review within 2 yrs of implementation, including assessment of the new system and compliance (CMA, Mandurah Aust., Palatinit GmbH, CMA – NSW Branch, CMA – Qld Branch, ICA, CM of SA). They recommended that enforcement and review process is ongoing from the commencement of the new approach.

Six submitters recommended that it would be important to undertake a process evaluation to ensure the system is operating as envisaged (PHAA (supported by ACA), SA DoH, NSW Food Authority, WA DoH, Monash Uni – N&D Unit).

Two submitters noted their support for an active ‘watchdog’ role (TCCA, Dr R. Stanton) that undertakes regular checks of the veracity and consumer interpretation of health claims (TCCA).

Four submitters recommended FSANZ establish a rolling label assessment program for general level claims to monitor compliance, and that enforcement agencies consider prioritising those aspects that are new within general level claim (AFGC, National Foods, Nestle, Unilever Australasia).

Consumers Instit. of NZ. considered that there needs to be both a regular rolling review and a regular watching brief for relevant, new or contrary evidence. They believed that there should be a defined process for withdrawing approval on health claims where new evidence has refuted the previous association, and noted that guidelines for the enforcement of withdrawn approval would be essential.

Three submitters considered that there is currently little evidence to show the effectiveness of nutrition, health and related claims or their potential for harm (Tas DoH&HS, SA DoH, WA DoH). They believed that therefore it is critical to inform future decisions regarding the Policy Guideline and the regulatory system, to take these issues into account.

DAFF believed that this is a question for Food Regulation Standing Committee (FRSC) to consider.

NZFGC recommended that further consideration is required on the substantiation framework.

Heinz Aust./Heinz Watties NZ believed that priorities for review should be considered at the draft assessment stage when more information is available.

Other comments provided but not in direct response to the question

Langdon Ingredients recommended that due to the complexity of P293, a third round of public consultation should be considered prior to FSANZ making its final recommendations to the Board and Ministerial Council. Med-Chem Ingredients stated that P293 is complex and involved and suggested a further round of input from stakeholders for it to be effective.

A number of Australian consumers requested that FSANZ develop procedures so that health claims are monitored and when an untrue claim is made, food manufacturers can be prosecuted (Lisa Russell, Annemarie Neville, Fiona Wright, Kathy McConnell, Glenn Austin, Amanda Barnett & Family, Julie Gelman, Sarah Ritson, Mrs Adriane Swinburn, Anna Karolyi, David Dwyer).

Question 109

Noting that the focus of the review is on implementation, compliance and enforcement under the health, nutrition and related claims system, who should be involved in conducting such a review and how might this be undertaken?

Out of 147 submitters, 43.5% (64 in total) directly responded to this question. The distribution of these responses was as follows:

Sector	Australia	New Zealand	Trans Tasman	International	Total
Industry	21	15	5	3	44
Government	5	2	-	-	7
Public health	7	1	-	-	8
Consumers	2	-	-	-	2
Other	3	-	-	-	3
Total	38	18	5	3	64

Overview

Several submitters believed that the working group, committee or body undertaking the review should be independent. However, 76 per cent of submitters (49) suggested either general stakeholder participation or specific stakeholders should be represented during the review process. Government, public health, industry, enforcement agencies and consumers were the stakeholders most commonly identified. Suggestions provided for how the review might be undertaken included interactive workshops, using different working groups, requiring FSANZ to repeat quantitative research on food labelling issues, industry to conduct product surveys, assessment of complaints and successful prosecutions, and a process to assess the impact of health claims on consumers.

Who should be involved in conducting the review

Eight submitters recommended that an *independent body* undertake the review (ASA, Cadbury Confectionery, Naturo Pharm, NZTBC, NZ Magazines, NPANZ, Assoc. of NZ Advertisers, NCEFF), while twelve submitters suggested that an *independent review committee or working group* is established under the Implementation Sub Committee (ISC) of the Food Regulatory Ministerial Council (NZFGC, NZ MoH, NZFSA, NSW Food Authority, NSW DoH – N&PA Branch, Dairy Aust), using the Food Policy Secretariat as the secretariat (Nestle, ABC, AFGC, Masterfoods Aust. NZ, Parmalat Aust, National Foods). National Foods noted that this independent review committee should be adequately resourced in order to conduct the review in a timely manner. In addition, TCCA noted that there should be strong protection for the independence of the review team.

Four submitters indicated that an appropriate high-level committee (PHAA (supported by ACA), SA DoH, Monash Uni – N&D Unit). Griffins Foods suggested a *review panel* that included all stakeholders.

Forty-nine submitters recommended either general stakeholder participation, or specific stakeholders to be represented during the review process (Griffins Foods, NZ Dairy Foods, NZFGC, Nutra-Life H&F, Tegel Foods, Heinz Aust./Heinz Watties NZ, Unilever Australasia, National Starch, Solae Comp, Goodman Fielder, CMA, Mandurah Aust, Palatinit GmbH, Kingfood Aust, CMA – NZ Branch, CMA – NSW Branch, CMA – Qld Branch, CMA – Vic Branch, ICA, CM of SA, Nestle, William Wrigley Junior, NCWA, TCCA, Diabetes Aust, GI Ltd, DAA, NZDA, Dr R. Stanton, PHAA (supported by ACA), Aussie Bodies, ABC, AFGC, Masterfoods Aust. NZ, Parmalat Aust, ASMI, Cadbury Schweppes, CML, CHC, Dairy Aust, F & B Importers Assoc, GW Foods, National Foods, NSW Food Authority, NSW DoH – N&PA Branch, SA DoH, WA DoH, Monash Uni – N&D Unit).

Suggested stakeholders included:

- Regulators (Nutra-Life H&F);
- FSANZ (NZ Dairy Foods, DAA, NZDA, Aussie Bodies, ASMI, CML, WA DoH, TGACC);

- Government, Ministers, government representatives, Food Authorities (NZFGC, CMA, Mandurah Aust, Palatinit GmbH, Kingfood Aust, CMA – NZ Branch, CMA – NSW Branch, CMA – Qld Branch, CMA – Vic Branch, ICA, CM of SA, William Wrigley Junior, NCWA);
- State monitoring bodies, State jurisdictions (Dr R. Stanton, ASMI, TGACC);
- Public health professionals with nutrition and public health monitoring and surveillance expertise, NZ MoH, Public Health Nutrition Departments, State Health Departments (TCCA, Dr R. Stanton, PHAA (supported by ACA), CHC, SA DoH, Monash Uni – N&D Unit, NZ Dairy Foods, NCWA);
- Enforcement agencies (Goodman Fielder, Nestle, Diabetes Aust, GI Ltd, Aussie Bodies, ABC, Parmalat Aust, Cadbury Schweppes, Dairy Aust, F & B Importers Assoc, GW Foods, National Foods, WA DoH);
- Industry and Industry representatives, peak industry bodies, and industry associations, manufacturers and retailers (NZFGC, Goodman Fielder, Nutra-Life H&F, CMA, Mandurah Aust, Palatinit GmbH, Kingfood Aust, CMA – NZ Branch, CMA – NSW Branch, CMA – Qld Branch, CMA – Vic Branch, ICA, CM of SA, William Wrigley Junior, Diabetes Aust, GI Ltd, DAA, NZDA, Aussie Bodies, Nestle, Dr R. Stanton, ABC, AFGC, Masterfoods Aust. NZ, Parmalat Aust, ASMI, Cadbury Schweppes, CHC, Dairy Aust, Parmalat Aust, F & B Importers Assoc, GW Foods, National Foods, WA DoH, TGACC);
- Consumers, consumer representatives and consumer bodies (NZ Dairy Foods, NZFGC, Goodman Fielder, CMA, Mandurah Aust, Palatinit GmbH, Kingfood Aust, CMA – NZ Branch, CMA – NSW Branch, CMA – Qld Branch, CMA – Vic Branch, ICA, CM of SA, Nestle, William Wrigley Junior, TCCA, Diabetes Aust, GI Ltd, DAA, NZDA, Dr R. Stanton, ABC, AFGC, Masterfoods Aust. NZ, Parmalat Aust, Cadbury Schweppes, Dairy Aust, F & B Importers Assoc, GW Foods, National Foods);
- Health professionals (NZFGC, William Wrigley Junior, DAA, NZDA, Dairy Aust, National Foods);
- TGA, TGACC and CHC (CHC); and
- And NZFGC (NZ Dairy Foods).

How the review might be undertaken

Seventeen submitters provided some suggestions as to how the review might be undertaken (CMA, Mandurah Aust, Palatinit GmbH, Kingfood Aust, CMA – NZ Branch, CMA – NSW Branch, CMA – Qld Branch, CMA – Vic Branch, ICA, CM of SA, Cadbury Schweppes, CML, Nutrition Aust, Diabetes Aust, GI Ltd, TCCA, NCEFF).

Eleven submitters suggested that the review could be accomplished by a series of interactive workshops in conjunction with a review paper (CMA, Mandurah Aust,

Palatinit GmbH, Kingfood Aust, CMA – NZ Branch, CMA – NSW Branch, CMA – Qld Branch, CMA – Vic Branch, ICA, CM of SA, Cadbury Schweppes). CML also suggested that workshops could be held.

Given the range of issues that the review will need to take account of, Nutrition Aust. noted that perhaps different working groups could be used for different parts of the review.

Diabetes Aust. and GI Ltd. recommended that for consumers, FSANZ repeat quantitative research on food labelling issues. TCCA supported ongoing monitoring on consumer confidence in food labelling and health claims, and believed the outcome of this monitoring system should be a major component of the review.

Diabetes Aust. and GI Ltd recommended that industry use their own product data and/or conduct a survey on a representative sample of foods sold in Australia/New Zealand, before the new system is implemented and then at the review. In addition, they suggested that enforcement agencies assess the number of complaints received and successful prosecutions before and two years after implementation.

NCEFF had suggested several measures for the review:

- Inclusion of a more thorough process to assess the impact on consumer awareness, understanding and use of claims, than that attempted in the other countries that have health claims, was considered useful. They noted that the theoretical approaches developed to estimate the impact of health claims on the eating habits of the Dutch population could be a fruitful starting point for planning (Eur J Public Health 1996:6; 281-287);
- A source of ongoing monitoring and assessment could be any regular national nutrition or health surveys that are conducted, with the addition of questions about the use and influence of nutrition and health claims; and
- FSANZ could develop a series of research questions and preferred research approaches which academics could adopt for small local student research projects, to provide results that could add to a national database.

NCEFF noted that establishing baseline information before the introduction of new regulations is important. Preliminary results from their own recent large survey (2003) of health claims used on food packages were provided in confidence to FSANZ.

General comments and recommendations

NCEFF suggested that the review process has negotiated terms of reference and results in detailed information on which decisions can be made on how the process may be improved. They noted that the social and cultural position of the reviewers should be declared in view of a very broad interpretation of ‘conflict of interest’ and the need to meet competency requirements.

WA DoH believed that the “Food Surveillance Network” should be an integral component of this review mechanism, as the means through which jurisdictional enforcement activities are coordinated. Public health professionals should be involved in evaluating the health and nutrition related impacts of the system (WA DoH).

ABC highlighted the importance of food industry stakeholders being "true" food industry representatives, rather than representatives of competing industries that are keen to hinder the food industry.

Dr R. Stanton recommended that provision should be made to pay sitting fees and expenses to those members of the review team who do not have a salary.

DAFF believed that this is a question for Food Regulations Standing Committee to consider.

Other comments provided but not in direct response to the question

Fonterra (supported by Mainland Products) noted that the appropriateness and relevance of guidelines, use of claims in the market would indicate how useful the system is perceived to be.