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## SENATE

STANDING COMMITTEE ON COMMUNITY AFFAIRS

**Reference: Food Standards Australia New Zealand Amendment Bill 2007**

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**SENATE STANDING COMMITTEE ON  
COMMUNITY AFFAIRS  
Monday, 23 April 2007**

**Members:** Senator Humphries (*Chair*), Senator Moore (*Deputy Chair*), Senators Adams, Allison, Carol Brown, Fierravanti-Wells, Patterson and Polley

**Participating members:** Senators Barnett, Bartlett, Bernardi, Mark Bishop, Boswell, Bob Brown, George Campbell, Carr, Chapman, Crossin, Eggleston, Chris Evans, Faulkner, Ferguson, Ferris, Fielding, Forshaw, Heffernan, Hogg, Hurley, Hutchins, Joyce, Kemp, Kirk, Lightfoot, Ludwig, Lundy, Marshall, McEwen, McGauran, McLucas, Milne, Nash, Nettle, O'Brien, Parry, Payne, Robert Ray, Siewert, Stephens, Stott Despoja, Watson, Webber, Wong and Wortley

**Senators in attendance:** Senators Adams, Humphries, Moore and Siewert

**Terms of reference for the inquiry:**

To inquire into and report on: Food Standards Australia New Zealand Amendment Bill 2007

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**Committee met at 9.05 am****GENTILE, Mr Anthony Joseph, Chief Executive, Australian Beverages Council**

**CHAIR (Senator Humphries)**—I declare open this public hearing of the Senate Standing Committee on Community Affairs into the Food Standards Australia New Zealand Amendment Bill 2007. I welcome Mr Tony Gentile from the Australian Beverages Council and invite him to come to the table. While he is settling in, I remind senators that mobile phones should be switched off or switched to silent. As senators will be aware, we have a one-day hearing today into both the Food Standards Australia New Zealand Amendment Bill 2007 and the Gene Technology Amendment Bill 2007. I obviously will be seeking some cooperation in being able to move fairly quickly through the witnesses, since we have a fairly tight schedule, but we will of course give each issue and each witness the due consideration that they deserve. Mr Gentile, information on parliamentary privilege and the protection of witnesses and evidence has been provided to you, I understand?

**Mr Gentile**—Yes.

**CHAIR**—We have the submission from the Australian Beverages Council in front of us. Thank you for making that available. We have questions to ask you about that, but would you like to start with an opening statement about your submission before we do that?

**Mr Gentile**—Certainly; thank you, Mr Chairman. The Australian Beverages Council is the peak association of bottlers of non-alcoholic water and juice based beverages in Australia. Our products can be defined as water and juice based beverages, covering soft drinks, fruit juices, bottled waters and anything else of that nature. We exclude milk, powdered coffee and tea. Membership extends from the largest national company to small and medium sized bottlers operating in both metropolitan and regional Australia and we have provided a list of our members at attachment A in our submission.

Before I raise areas of concern, I would like to state that we support the broad thrust and intention of the proposed legislation and believe that the positive proposals contained therein are worth while and should be implemented. As stated, we have some concerns with the legislation or the amendment bill. Having said that, we would be loathe, however, to have the amendment rejected, due to these concerns, as we believe the positive proposals contained in the bill outweigh our concerns.

Areas of primary concern with the bill are two. The first is with the use of editorial notes in the food standards code. Editorial notes have the potential for abuse. The bill recommends that they should be retained in the food standards code; originally, it was intended that they should be removed. Although the bill recommends that they should be retained, no methods or procedures for amending them is provided within the bill. The other area of concern that we have is with a proposed stop the clock provision within the food regulations, whenever the food regulation ministerial council decides that they need to develop a policy in that area.

I will first of all address editorial notes. The council is of the strong opinion that editorial notes should not be used at all within the written content of the food standards code or any individual standard as, in our view, they represent a lazy form of regulation. Even though the act may state that editorial notes are not regulations, no court of law would fail to take note of

them. We therefore strongly suggest that such editorial notes be removed from the body of the food standards code.

FSANZ, as has been current practice with a number of other matters, can and does publish separate user guides for the advice and direction of its stakeholders. This is where editorial notes belong. Regulations should in themselves be clear and unambiguous and not require in our view editorials that are claimed not to be regulations.

Historically, editorial notes were intended to provide advice and assistance to manufacturers and other stakeholders when interpreting the food standards code. Each time an editorial note was drafted, it referred to a specific clause, giving information on the use and implementation of that clause. However, more recently a number of editorial notes have been included in the food standards code that do not relate to a clause within the food standards. These editorial notes are entirely stand-alone information.

I will give a couple of examples. The first one, standard 2.6.2, non-alcoholic beverages, has recently been amended to adopt provisions for formulated beverages—that is, beverages that are usually bottled waters that might of vitamins and minerals added to them. This standard is followed by an editorial note—and I will quote:

Formulated beverages are liquid products which are sold in a form designed to be consumed as is, that is, without the need to reconstitute or add further ingredients.

Nowhere in the actual standard is there any reference to ready-to-drink beverages or a similar description.

In addition, from when the editorial notes were initially included, we have been consistently told that they are not regulation and not legally enforceable. We have received independent legal advice from two sources that, should a member produce a beverage in, say, powdered form to be diluted at home, even though this editorial note is not a regulation, certainly the states would prosecute food officers and the odds are that any court of law would regard that as the intention of the legislation. We suggest simply that either it is included in there and ready-to-drink beverages are defined properly or it should be removed. As an aside, I cannot see the difference between a manufacturer adding water in the plant or a consumer adding water at home and diluting a beverage to their particular preference. But that is another matter. I believe this makes a mockery of the claim that editorial notes are not part of the food standards code and are not legally enforceable.

The other example I would like to give you is standard 1.4.2, maximum residue limits. This relates to bottled water. Again the editorial note referring to packaged waters is a stand-alone statement with no reference to a clause within the standard. Further, the editorial note directs readers to an obsolete version of the National Health and Medical Research Council's Australian drinking water guidelines as a reference document. To add to the confusion, the Australian drinking water guidelines produced by the NHMRC for use by councils specifically states in its introduction that they do not apply to bottled water. So here we have use of an editorial note which does nothing else but confuse bottlers, consumers and anybody else who would care to read it.

The Australian Beverages Council, I reiterate, is of the strong opinion that these editorial notes should be removed and Food Standards Australia New Zealand be asked to produce user guides for assisting the public, industry and anybody else who wants to understand the code.

The framers of the legislation also appear to consider it unnecessary that a prescriptive process be described for the amendment of editorial notes. We have been told in general briefings: 'Do not worry about it; a process will be developed and FSANZ will be required to seek opinions before editorial notes are altered.' However, the legislation provides no system and no proposal for amending these editorial notes. Those editorial notes could end up having the power of law and whilst I have the greatest admiration and faith in Food Standards Australia and New Zealand and its current officers, I do not necessarily have that faith for eternity. I would like to think that if the Senate Community Affairs Committee recommends to the Senate that editorial notes be retained then some system will be also provided for commentary and for legislative scrutiny by the minister, the ministerial council or the Senate, as per other regulations—they have to sit in front of the Senate for 14 days. That would be the sort of thing we would look for should you decide to retain them in there. But for the life of me I cannot see why decent, clear regulations cannot be written and user guides provided for other purposes.

So, there are two issues with editorial notes: one, we do not want them in there and, two, if the parliament should decide to retain them then we need a clear statement as to how they are to be amended because, whether the legislation states so or not, the courts will regard them as part of the legislation.

The other concern we have is with stop-the-clock provisions. Division 5 sets out the general rules in relation to the consideration of applications and proposals. I will not read them all. There are a number of noteworthy changes to that division, and we support those because they help expedite consideration of standards.

Where we do have concern is with the provision in the amendment bill that where the Food Regulations Ministerial Council decide that they need to develop a policy, an automatic 18-months stop the clock occurs. This is of concern to us because, taking into consideration Food Regulations Ministerial Council policy, which can be arrived at by a majority of the ministers, we could have a ministerial policy which has been developed on the basis of—and I am not being derogatory to any of these jurisdictions—a majority consisting of the Northern Territory, the ACT, Queensland, South Australia, Western Australia and Tasmania with New South Wales, Victoria, the Commonwealth government and the New Zealand government opposing it. That ministerial policy has to be taken into account by FSANZ. But it is the eighth of eight items that the legislation says FSANZ has to take into account. It does not state that they have to implement that ministerial policy because FSANZ's No. 1 priorities are public health and safety and the use and application of science in the development of standards.

I would suggest that, given that the food regulation ministerial council, when they get a standard from FSANZ, have the power to amend it as they please or reject it—or, in theory, reject it and promulgate a totally different standard—the 18-month stop-the-clock provision is really quite unnecessary. This is especially so when industry or community groups, I suppose, are asked to pay for the expediting of a standard. We could be paying anything up to \$150,000, plus additional money that we have to spend getting legal opinions, scientific research and so

forth in putting in an application, trying to remain competitive with the rest of the world and, because a group of jurisdictions say, 'Look, we really do need to develop a policy in this area,' everything is stopped for 18 months. We believe it is unnecessary because FSANZ can keep on working. We have paid them to keep on working. They can develop the standard and when the ministerial council arrives at its policy; they can take that into account and put the final standard in there. There is no need for an 18-month stop.

We put in an application on formulated beverages which took four years after we paid the money up-front. If this provision is to be retained in there, I would suggest that FSANZ should be required to immediately refund any moneys paid, at the very least. I do not think that they should sit on our money and earn interest on it while they take extended leave to consider an application.

So these are the two areas. I think the legislation aims to shorten the time span that it takes to arrive at food standards and this particular stop-the-clock provision will mean that, in any area where a group of states, not necessarily for reasons of public health and safety but for philosophical ones or policy ones, decides that something should be delayed or not considered further, FSANZ then can stop work completely. They are the two issues. I would certainly ask the committee to consider amending the legislation to reflect these views.

**CHAIR**—Thank you very much for that opening statement. Could I kick off by just clarifying what you are saying to us about editorial notes. You do not doubt that they are useful but that they should not be in the act itself. They should be somewhere where a person wanting more depth of knowledge can go such as the—what do you call them?

**Mr Gentile**—User guides.

**CHAIR**—They should go and find those notes in the user guides. Is it the case that Food Standards Australia New Zealand in the past has consulted on the wording of those editorial notes, with its usual consultation processes?

**Mr Gentile**—Food Standards Australia New Zealand to date has been a fairly open and transparent organisation. We do not have any philosophical problems with the way Food Standards Australia New Zealand operates. Yes, they have consulted. But consultation is one thing; putting things in a document is another. Once those things are included in the document—just because they have consulted does not mean that we have agreed to them being included. Once they are put in a document, if a court of law regards those editorial notes as legislation then we have a concern.

**CHAIR**—On that point, as a lawyer I would have thought that courts probably would not be entitled to take notice of those notes if the legislation expressly made it clear that they were not to be construed as part of the act. I wonder whether those legal advices you have referred to could be made available to the committee to consider that question.

**Mr Gentile**—I could certainly make one of them available to the committee. In fact, the person who gave the advice is going to appear before you next.

**CHAIR**—Okay.

**Mr Gentile**—That is Mr Chris Preston from Legal Finesse.

**CHAIR**—We might ask him the question.

**Mr Gentile**—He was chief legal officer of Food Standards Australia New Zealand. I do not have a problem with that; you can certainly ask him that. The other one was a verbal advice. I am happy to get it to you in writing. But the view is that, yes, courts can choose not to consider those editorial notes, but they would be unlikely to do so because it would provide them with guidance as to the intention of the legislation. We do not have a problem in principle with a bill or an act stating at the outset what its intentions are, what it tries to achieve and so forth. But we do have a problem with items being included in regulations which in theory can simply be amended, as the bill now stands, by Food Standards Australia New Zealand without reference to anybody.

**CHAIR**—Do you think that the courts at the moment are using the user guides to interpret the legislation?

**Mr Gentile**—I have no idea whether the user guides are used by the courts or not. My understanding is that they probably would refer to them—this has been suggested to me—but, to a court, they would not carry as much weight as a statement made within the actual body of a regulation, which is of course legislation. So, yes, a judge may choose not to take any note of those. But we are of the opinion that, if we were to produce a concentrate in either powdered form or another form for, say, formulated beverages, first of all, the states would initiate prosecution and, secondly, a court of law would take that into account. I have no issue with whether that particular standard should include a regulation that says ‘these are to be only for ready-to-drink beverages’. I am talking here about the principle that, if that is the case, the regulators should spell out the regulation and define what a ready-to-drink beverage is.

**CHAIR**—On the stop-the-clock provisions, you say that this 18-month hold or stopping of the clock should not occur when a ministerial council exercise is being undertaken that might affect the particular application that is before FSANZ. If there is a link between these two things then, supposing FSANZ had already approved the application and then the guidelines changed, initiated by the food regulation ministerial council, would that affect that existing approved application in any way?

**Mr Gentile**—If I may explain, FSANZ can only recommend a standard to the ministerial council. Usually there is a minimum of 12 months to develop that standard. I am talking about anything that would require ministerial council policy is usually something that is complicated, that is new, so the full 12 months would apply. They have the ability to seek a further six months immediately, now, and this is provided within the bill. We are not opposing that. So that brings it to 18 months. They have also the ability to seek stop-the-clocks on a number of occasions when they want additional information.

**CHAIR**—I understand that, but—

**Mr Gentile**—So, by the time they have considered all of that, invariably more than 18 months have elapsed.

**CHAIR**—There could be another 18 months, couldn't there, if this provision went ahead; that is what you are saying, isn't it?

**Mr Gentile**—That is right. The way it stands we could end up with it taking 36 months, as it did with our application on formulated beverages, where it took over four years—and that was over and above a previous year of our application, when FSANZ had begun a proposal of

its own to consider that issue. So we actually spent five years in Australia competing with not only New Zealand products—I have nothing against our New Zealand cousins; I love them dearly—but products imported from Europe and North America and some South-East Asian countries via New Zealand that met with New Zealand regulations that were imported into Australia. We could not compete with them. Theoretically we could manufacture them for export but we could not manufacture them in Australia for sale in Australia.

So we had this crazy situation where a product could legally be sold—and this lasted for five years—to the consumer, but we kept on having delay after delay after delay. Most of the delays were because the ministerial council had decided that they needed to develop a policy and there were some issues. I do not want to go into those issues; I do not think they are relevant to this legislation.

When FSANZ finish their work on a standard, if they take their 12 months—or usually more; by the time they ask for market research, scientific back-up and so forth, they can take 18 months—I think that the food regulation ministerial council in that time should be able to arrive at a policy. And at that point FSANZ can take into account that policy before finalising the standard, without the need for another 18 months.

The purpose of this amendment bill as I understood at the beginning was to allow FSANZ to expedite matters to allow Australians to compete and for product development to occur in a more efficient manner. Providing this 18-month stop-the-clock ability in these areas—and this would happen in the areas that are new, where new product development occurs—will simply mean that the Australian beverage industry and, I suppose, the food industry as a whole will be just that little bit less competitive on world markets.

**CHAIR**—Okay. Senator Moore?

**Senator MOORE**—I have a question about the editorial comment because your comments have been reflected in a couple of the other submissions we have received. Whilst the department's submission has not reflected that issue specifically, we will ask them when they appear later about it. Much has been made of the fact that there has been years and years of consultation around these processes. You have concentrated on two major issues in your submission. What was the response during the consultation process to those two issues when you raised them?

**Mr Gentile**—We had an initial consultation process when we were advised that the editorial notes would be removed. These were the only two consultation processes that I participated in. There might have been others. Then we had a final one just before the legislation was put in, it was given over to be introduced, where we were told of the decisions to keep them in there.

**Senator MOORE**—What was the rationale for that, as given to you?

**Mr Gentile**—We had a couple of brief telephone discussions over it and we were told that it would be too difficult. We were told that if those two items, which I mentioned as examples, were the only things that we were concerned about, then they could be addressed. I give those as examples. Our concerns are more fundamental. It is an issue of writing a regulation properly and well in the first place to make it clear for everybody. Then a user guide can be

made available as a totally separate document at a later date. But do not put statements in a regulation and tell us that they are not regulation.

**Senator MOORE**—So there was no legal argument as to why that should be there—it was more a systemic argument?

**Mr Gentile**—Yes.

**Senator MOORE**—We will raise that with the department. I was keen to hear that because in the information we have received in the explanatory memorandum, much is made of the consultation and there is a statement that the vast majority of people supported what was going on, which is probably right. Just off the top of my head, I cannot remember, but there is another submission that particularly raises those two issues as well. The other point is that, for organisations like yours, do you have any comments on the future and about how the process should operate from now on with discussion and consultation?

**Mr Gentile**—Yes, we do have a concern if we go back to the Blair review. The Blair review provided for a standing consultative committee that would consist of a representative of the big end of town, if you wish, in the food industry, a representative of the small end of town and a representative of consumers and maybe health professionals, dietetics. We always strongly supported the idea of the standing committee which would provide advice to the ministerial council.

The actual legislation that was enacted after the Blair review provided that this could be set up. They decided after that that it was all too difficult and that they would not set up this standing committee, something that we, and the Australian Chamber of Commerce and Industry and, I believe, my friends at the Australian Food and Grocery Council all objected to because the only advice available to the Food Regulation Ministerial Council is that provided by the Food Regulation Standing Committee, which is a committee of senior public servants or delegated down from the heads of department. What that means is that once FSANZ has finished its consultations, there is no other input into the ministerial council except that provided by the bureaucracy in each state.

We felt that the Blair recommendation of the standing committee to provide advice to the ministers that included industry, consumers and health professionals was a good one; it had a lot of value. So, yes, consultations are funny things. I have noticed that recently both in health and FSANZ, when they have consultation processes, the number of so-called stakeholders keeps increasing and what happens is that every time you increase the number of stakeholders coming to these things, you have to reinvent the wheel for them because they do not have a clue about how the system works. What that means is that the day ends up being wasted. Consultation can be a lot of window-dressing as well.

**Senator MOORE**—You have raised these issues with the department?

**Mr Gentile**—Yes.

**Senator MOORE**—And with the minister?

**Mr Gentile**—I have raised the issue with the secretary of the department of health. I do not know whether I raised it with the minister for health. I did raise it with the previous parliamentary secretary the then later assistant minister for health, the honourable Christopher

Pyne. It has been raised with those people, but I do not believe I have ever raised it with the minister for health.

**Senator MOORE**—Is it possible to get something in writing from you to this committee with respect to those concerns? Whilst your submission reflects the two particular points we have already discussed with the chair, there is that issue about the consultative process, which I think is really important in terms of the aims of the legislation and the future; it would be useful to have something from you on those points.

**Mr Gentile**—I would be happy to supply a copy of the submission that we did put in. I can ask the Australian Chamber of Commerce and Industry if they would be happy to also supply me with their submission on the standing committee, which has been an ongoing request by both organisations, and also I believe by the Australian Food and Grocery Council.

**Senator SIEWERT**—I wanted to go back to the editorial notes and be very clear about this issue. You are not saying that you do not want this type of supporting documentation for the standards. What you are saying is that you want something that is official and formal that requires parliamentary scrutiny and enables scrutiny by the community and stakeholders.

**Mr Gentile**—That is right.

**Senator SIEWERT**—Therefore, it is better to have regulation than anything else?

**Mr Gentile**—Yes, you are right. I am not arguing with, say, the drinking water guidelines. They have a list of maximum residue limits that they recommend. They are guidelines; they are not law. They recommend to council reticulated water suppliers that their water should not contain more than those limits. Personally, I would be happy to include those maximum residue limits in the regulation because bottled water companies always aim to exceed the standards if possible, not lower the standards. So I would be more than happy to include a set of maximum residue limits in the standard. In fact, we have an application in there at the moment, which was initially resisted, which seeks to do that. We believe that is a proper way to protect consumers. By protecting consumers, may I add, we also protect the ethical manufacturer. So our argument is not with trying to skirt regulation. Our argument is that regulation should be clear and unambiguous and should not be left to an editorial note which can be changed at any time without proper scrutiny.

**Senator SIEWERT**—I am new to this whole issue. Editorial notes came in. Was the idea that they could be used quickly where there was an absence of regulation—that they could be used quickly to get a point across that these are the guidelines? Was that why they came in in the first place? I am finding it quite remarkable that, rather than going for regulation, there is a series of editorial notes with which to interpret legislation.

**Mr Gentile**—As I mentioned in my statement earlier, when they were originally introduced the editorial notes actually referred to a clause and they aim to explain how that clause should be interpreted. In those days we did not really have a problem with them. It was early days in the development of the food standards code. We have moved away from that. Also, at the moment the only way to change an editorial note is to go through a normal application process. You put in an application and you say, ‘You should change that.’ It goes through the normal process of changing a standard. What is being proposed here is that the bureaucracy—and, as I said, I am an ex-bureaucrat; I have nothing against bureaucracies—should be able to

simply change its editorial notes after some non-described form of consultation. That is my concern, because invariably the courts will deem those editorial notes to be of value in their understanding of the legislation. So the issue here today is not one of arguing that there should be no regulations or less regulation. In fact, there should possibly be more regulation, better regulation, because food and beverages are important products. They can easily affect the health of all consumers. I like to know that bottlers and food manufacturers, when they produce products, do so with confidence, according to clear regulations. That is the issue with me. It is not an issue of being for or against regulation.

**Senator ADAMS**—There is a comment by the Australian Food and Grocery Council regarding the editorial notes and the examples. They state that the clear intent is that editorial notes and examples are not intended to be part of the Australian and New Zealand Food Standards Code. They have an amendment in subsection 3.1, page 6, lines 11 and 12. It only deals with the situation where the editorial note or example is boxed. They are suggesting that the word ‘box’ be omitted. Could you comment on that? Are they two different groups?

**Mr Gentile**—If you remove the boxing, they become regulations, I suppose. I do not understand. I have not seen the application, so it is difficult for me to comment on their submission. My view is, if what is in the editorial note is meant to be part of the regulation, put it in there. If it is not meant to be part of the regulation, take it out and put it in another document as a user guide. Do not muddy the waters. It is really as simple as that. I do not want to get into ‘box’ or ‘nonbox’ argument. I think the AFGC can best answer what they mean by that—I believe they are appearing after me—but I cannot comment. At the moment they are boxed. I suppose that is done so that they are seen to be different from the regulation. I believe that they do not have a place in there. Food regulation should be clear and unambiguous, not based on points of view, editorials or whatever that can be changed at will.

**CHAIR**—Thank you very much for all your evidence today and for the submission that you provided to the committee. That has been very useful.

**Mr Gentile**—I appreciate the opportunity.

[9.46 am]

**LEIGHTON, Mr Kim Howard, Assistant Director, Scientific and Technical, Australian Food and Grocery Council**

**PRESTON, Mr Christopher Paul, Consultant, Australian Food and Grocery Council**

**CHAIR**—Welcome. I think information on parliamentary privilege and the protection of witnesses has been provided to you. The committee has your submission before it, submission No. 7. Thank you very much for that. It is a comprehensive one. We are going to ask some questions about that, but would you like to start with a short opening statement?

**Mr Leighton**—I am very pleased to have an opportunity to provide an introduction and an overview not only of the submission we have made at this point but also to cover some of the points that we have previously raised. As you are aware, this is an amendment bill that is the result of fairly extensive consultation over a period of several years. First and foremost, the Australian Food and Grocery Council is concerned about the process, the efficiency of the process and the delays in being able to proceed with amendments and proposals, and a number of the amendments address that issue.

The AFGC supports the major initiatives proposed in the bill to simplify the general procedures for the assessment of food regulatory measures based on the merit of those applications and the technical difficulties that may be present. It supports, subjected to the agreement of the relevant governments, the initiative to simplify the process used by the Australian New Zealand Food Standards Council to consider the food regulatory measures and to introduce new processes for the consideration of food regulatory measures, including the adoption of the high-level health claims if and when they come through.

The AFGC supports the amendments on the basis that there is a demonstrated need to improve the assessment process by FSANZ and that the current one-size-fits-all process is inadequate. The AFGC is concerned about the time frames that have been demonstrated to consider an ever-increasing workload under the current system, not only from the applications made by the industry and the community, but also from the demands of review by the ministerial council. This is obviously putting pressure on FSANZ and the need to improve that efficiency.

The AFGC is also concerned that the essential requirements for checks and balances, the opportunity to provide for appeal against decisions to the Administrative Appeals Tribunal, do not go far enough. There are a number of areas highlighted in our submission where the bill can be improved in this regard. Similarly, the AFGC suggests that providing the ministerial council with the responsibility of developing or amending food law lacks transparency, accountability and even technical feasibility. It is the view of the AFGC that the ministerial council should be provided with the right of veto for legislation rather than with the opportunity to amend legislation presented to them by FSANZ.

The AFGC also wishes to raise concerns with the proposal on the stop-clock processes for paid applications. The better approach in such instances would be for the stop clock to only occur with the consent of the applicant, or at least to afford the applicant the opportunity for

external review through the AAT of any determination by FSANZ to stop the clock for this reason. The proposed amendments give FSANZ the option to progress part of an application and the applicant should be given the option of choosing to progress a paid application in the knowledge that the outcome of the application may change with the development of ministerial policy guidelines in the future.

Where a company submits an application and has a reasonable expectation that the application will be approved within 12 months, the company will start to program and budget for production, supply, distribution and the intended use of that product that they are making an application to for the market. It takes time to bring new products online. It takes investment and it takes program budgeting. It is critical that the new products are ready to be released as soon as the code is amended, otherwise the company is not able to take advantage of the market opportunity provided.

The AFGC supports the proposed changes concerning both the consideration of high-level claims and the application for novel foods. Under the current system, there is a certain ability to maintain confidentiality of data and submissions provided to FSANZ before consultation documents are made publicly available and the impact this has on intellectual property and the opportunity for companies to get a return on investment.

Where an amendment is made to the code that has an impact on industry, there is a need for in-confidence and fully-protected consultation on how to facilitate the process with an appreciation of the need to minimise cost to industry, particularly where the changes are not of an immediate public health and safety concern. These changes are all reflected in the proposed amendments to the bill, the expedition process and the intended process for looking at high-level health claims. It is not an intention of avoiding scrutiny or in fact avoiding any need for meeting public health and safety. You may be aware of a very extensive application guideline that FSANZ has developed which details, very thoroughly, an extensive range of criteria that industry must submit. They are my introductory comments.

**CHAIR**—Thank you very much. Mr Preston, do you wish to make any opening statement?

**Mr Preston**—Just to reiterate, the bill is largely supported by the AFGC. It does a lot of things which need to be done. The processes are grinding to a halt slowly and they need to be fixed and expedited. The bill does a lot towards that, but it is still a form of incremental change. The work does not finish with this bill. There are still issues that need to be addressed. The bill is good—it could be better, but, by and large, it is moving in the right direction. We support it for that reason.

**CHAIR**—Thank you both very much for those opening statements.

**Senator MOORE**—I want to ask the same question that I asked the previous witness about consultation; the issues that you raised, particularly in your submission; and the response you got when you raised these as issues to be considered in the consultative process, which has been much lauded in the explanatory memorandum. What was the response you got back on the issues you raised? I have a particular question about your proposal to veto. I did not understand it. I want to get some detail about that. Yours is the only submission that raises that particular point. So the things I am asking about are consultative processes, the issues you

raised in your submission to us, the response from the department and also your views about future consultation.

**Mr Leighton**—The opportunity for FSANZ and for the Department of Health and Ageing—or, in fact, even under the Food Regulation Standing Committee—to undertake consultation is extensive. The opportunity is there to use a variety of different instruments and that extends to forums and written submissions. The process of assessing an application or proposal by FSANZ under the current requirement requires a formal process for consultation with the opportunity for written submission, but it is not limited to those.

I am aware of the comments that were made by the previous presenter to you that there are concerns about the process of consultation beyond FSANZ; that once the FSANZ final assessment report has been written and is considered by the FSANZ board, to be presented to the ministerial council, there is no opportunity for consultation. The consultation process appears prior to the completion of the final assessment report.

**Senator MOORE**—So if I was looking at a whiteboard with the boxes and arrows that go around—that visual of how processes are done—the circle involving consultation goes to FSANZ, but once it goes to the ministerial council there is no arrow. Is that accurate?

**Mr Leighton**—That is correct, yes. There is a limited opportunity for consultation if the ministerial council considers that the recommendations of FSANZ require review. The ministerial council may request that a review be undertaken. But it is not a given that, in conducting that review, FSANZ must undertake broad and extensive consultation. They may undertake a targeted consultation. The consultation process back from the ministerial council on request of a review even there is limited.

**Senator MOORE**—The previous witness made a point about a committee similar to that which operates in other areas with consumers, producers and all of those things which would be linked to the process. Do you have a comment on that?

**Mr Leighton**—This is an issue that has been raised over a number of years with FSANZ and the food regulation standards committee. There are concerns about the efficiency of the approach that could be developed. There are certainly concerns about the cost of that sort of approach. I am aware that FSANZ has undertaken a broader consultation program, but I am not sure that it is meeting the objectives of being able to take those comments into account. It is more about consultation of the program as a whole rather than consultation of a specific application.

**Senator MOORE**—Certainly, yes.

**Mr Leighton**—There have been attempts to provide that input, both from community and industry, so it is not that it doesn't occur, it is that there is no formal process for it to occur.

**Senator MOORE**—I asked the previous witness whether he would be prepared to put something on that particular issue for the community. Is that something that your organisation would be prepared to provide to us?

**Mr Leighton**—I am certainly happy to do so.

**Senator MOORE**—The explanatory memorandum talks about the history of the legislation. It talks about widespread community consultation over many years and then

finishes with this piece of legislation. I am interested in what goes on in the future. A point has been raised not about the idea of the process of an individual application for a product but about how the ongoing work with the community, the producers and the consumers will operate—and I am interested in that. I am interested in the point you raised in your submission, and mentioned in your statement, about a preferred option of the Ministerial Council having the ability to veto a process. I did not understand that point. Would you be able to give a little bit more information about why your organisation thinks a veto power would be a useful process? I have to admit that I automatically cringe at the concept of a veto power.

**Mr Preston**—As you would probably understand, the process at the moment that FSANZ makes a recommendation to the council. The council considers it for the first time. At that point they have the opportunity to agree to it or, if they do not agree to it, send it back; that is the first review. Under the current system, FSANZ then undertakes its review. It then goes back to the council and the council considers it a second time. They have under the current law—one of the things this bill proposes to change—an opportunity to send it back again and there is another round of recommendation. Eventually it comes to a point where a decision needs to be made on it—and this is section 86 of the bill, on page 52. The options that the council has, under the bill, at that point of time, when all of the reviews have gone and it is time to decide one way or another, are to accept, to amend or to reject—in essence, to veto. So we are not proposing some new power, it already existed. It is the power to say no, and that is entirely appropriate. If, after all of this, the people who are elected to look after own interests think it is not right, then they should have the power to say no.

**Senator MOORE**—They cannot do that now?

**Mr Preston**—They can do that now; it has always been the case. So this is not new. Our concern is more with the power to amend. We would like for them to be able to say at that point either yes, at long last, after all the to-ing and fro-ing, the right standard has been produced, or no, despite all of our to-ing and fro-ing, it is still not right and we need to go back. The problem we have with the power to amend it that it does not tend to work for good. The ministers, whatever their skills are, are not parliamentary drafters. On the very few occasions when the council has actually sought to amend something at this point in time, it generally has had a lot of unintended consequences and has required further amendment down the track. It is also not consultative. For all of the processes up to this point, at least when the first recommendation was made to the council, there has been some public scrutiny about what has been proposed. Under this arrangement the council can push all that aside and bring out its own standard—which has never been out for public comment and has never had any input from other people. It is not something that should just come in at the end of a very long and extensive process—that at least has had some external scrutiny, some transparency and all of these things. It should not just happen at a ministerial meeting when somebody tables a document. So our proposal is not so much for a new power of veto; it is to restrict the power from acceptance, veto or amendment to just acceptance and veto.

**Senator MOORE**—Based on the skills levels. What was the response when you raised that with the department during the consultation?

**Mr Preston**—I am not sure of that.

**Senator MOORE**—Would you mind having a look back and seeing whether you have got anything in writing on that? When we get to this stage—we have in front of us a bill, an explanatory memorandum, a statement about what went beforehand and we have had people come to us with particular concerns—I am always interested to know what response people got when they raised those concerns with the department. So it would be very useful if you have got anything on that.

**Mr Preston**—In broad terms the response has been to the effect that the system is a cooperative one with the states and territories and that the states and territories want to retain the powers to act according to how they see their constituencies working—that would include, in their view, a power to amend, almost as a matter of sovereignty—and that it is difficult for a Commonwealth bill to impinge on those rights.

**CHAIR**—That situation could lead to a stalemate where FSANZ wants one thing and the Ministerial Council or the governments concerned want another thing. They cannot force FSANZ to give them what they want; they will simply have to wait until it comes up. But if FSANZ does not give them what they want, they will keep rejecting what comes up. It is a bit unsatisfactory, isn't it?

**Mr Preston**—I suspect that the bureaucracy would be more willing than that to respond to ministerial guidelines and guidance. Yes, the theory is there, but the potential danger of that has to be weighed against the potential damage of the situation I have outlined—where a new amendment is made that has never gone out for consultation, has never been publicly exposed and has not been drafted by the people with expertise in drafting food standards. To be honest, it has happened very rarely, but, when it has happened, the experience has not been very good.

**Senator SIEWERT**—Excuse my naivety, but what happens in that instance if the industry is unhappy with the standard and is merely lobbying because they did not get what they want from FSANZ? I presume that the people within FSANZ have a lot of expertise—that is what people are employed for. It is fairly intense industry and, with all due respect, they are known for their lobbying abilities. They lobby the Ministerial Council because they are not getting what they want.

**Mr Preston**—The potential always exists for people to lobby. Sometimes we in the industry are amazed at the ability of community groups to gain access to ministers' offices as well. The lobbying can work both ways—but your point is taken. The point is that food regulation and food standards should not be drafted by ministers on the basis of lobbying, be it from the industry or from any other body. By removing from ministers the power to amend, we are reducing the potential impact of that lobbying, rather than increasing it. By reducing the ministerial council's ability to amend the standards, we are saying, 'If you don't like the standard, you can no longer go to all the state and territory health ministers, the Commonwealth minister and the New Zealand minister and barge their offices until they agree to take a piece of paper off to the council with them.' There is no longer going to be an opportunity to just fiddle around the edges and get some minor thing that was considered but knocked out by FSANZ slipped back in at the Ministerial Council. And let me say that that has happened on both sides of the divide in terms of lobbying; it is certainly not industry-only access there. So, yes, it is potentially, in my view, likely to lessen the effect of lobbying rather than increase it.

**Senator ADAMS**—I have a question on the editorial notes and examples that I read out to the last witness. You have the clear intent that editorial notes and examples are not intended to be part of the Australian New Zealand food standards code, and then you talk about the word ‘boxed’. Could you expand on that?

**Mr Preston**—Editorial notes can be a useful thing, in our view. Food regulation is inherently technical; it can get very complicated. Sometimes there are fairly complicated and obtuse formulae that you need to calculate in order to work out, for example, whether you can make a vitamin claim. An editorial note that actually shows a worked example of how this complicated formula applies in practice can be a useful thing. There is an appropriate use of this sort of thing in a food standard. We certainly agree with the previous witness that, where the editorial note is used as a substitute for regulation, that is inappropriate. There needs to be a clear division between what is legally binding law and what is not. That said, we generally support this idea in the bill that it should be clearly stated that editorial notes not be part of the standard and are therefore able to be changed fairly easily. Our only concern is a technical one. The amendment refers to legislation that is identified by boxed text as being an editorial note or an example. If, by some technical error, the box gets left out, does that mean the editorial note suddenly becomes part of the standard? It is just a minor technical thing. If the text is identified as an editorial note, whether or not it is in a box it is an editorial note and therefore is not part of the regulation.

So I suppose that where we are coming from is that the editorial note is not a bad concept in this sort of regulation where you are dealing with technical concepts. It has a legitimate and good and beneficial use when used appropriately but there has been a tendency—forgive the pun—to editorialise the editorial note and to try and go further than giving examples or explaining terms or cross-referencing terms to actually try and introduce concepts that are not reflected in the law. That is a bad use of the editorial note; that is not appropriate.

One recent example is the editorial note on the country of origin standard, which editorialises and maybe goes beyond what the standard actually says. So there are good and bad examples, but for the purposes of this bill we are simply seeking a small technical change to it that gets rid of the word ‘boxed’ so, if the text is identified as an editorial note or as an example, then that is all that needs to happen for that to not be part of the of the law.

**CHAIR**—Could I come back to the question that Senator Adams has just raised. You are saying in the submission that the editorial notes are not intended to be part of the code. That is made clear in the legislation itself, isn’t it?

**Mr Preston**—Yes.

**CHAIR**—But is it your experience that the courts will still take into account what is in the editorial notes and refer to them in judgements?

**Mr Preston**—The courts generally do not deal with food standards matters at any high level. The nature of our business is that these things tend to be enforced more by goodwill and the desire of our food industry to comply than by dragging people off to courts. On the few occasions where people have been dragged off to courts, and there are examples, they have generally been on fairly clear-cut matters, where no reference has been made. I am not aware of any judicial precedent that gives any statement, authoritative or otherwise, to editorial notes.

In broad terms, editorial notes fall within, as you would be aware, the class of extrinsic materials. There are rules about when courts can look at extrinsic materials. We would have no problems in general with the courts doing that with editorial notes, provided they are being used in an appropriate manner. Is the potential there? Yes. If the court finds some ambiguity or feels that the policy that the standard is directed at is not entirely clear, then it indeed chooses to look at the editorial note. This amendment says that it cannot, if you like, rely on that editorial note as a substitution for what the standard is actually saying, and ultimately the decision must relate to that. So it can be an aid rather than forming part of the law.

**CHAIR**—The point that the Beverages Council was making is: if it is an aid to interpretation it should be treated like a regulation and be subject to parliamentary scrutiny, and it should be changed by virtue of a process that allows parliamentary overrule, disallowance or whatever. Do you share that view? If that is the case, then presumably the editorial notes should be in the legislation and be subject to the same process of amendment that the legislation itself is subject to. If it is entirely external and cannot be used for interpretation, then presumably the argument of the Beverages Council is that it should be outside the act and in the user guides.

**Mr Preston**—There are hierarchies of material. In any matter that is before a court they are going to look at the primary instrument—in this case, the food standard. Ultimately, that is what they have to apply. They cannot rely on the editorial note in substitution of the standard. In the case that I quoted earlier about the country of origin, for example, they would not apply the standard—it is not what the law says. I think we are confident that that is the way it would run in a court if a court were called upon to look at this. We are comfortable enough that editorial notes can appear but not be part of the standard. As a said, in a technical document like the food standards code there is a very useful role for things like examples. I think the previous witness alluded to the use of editorial notes in the early days of food standards when, by and large, that was what they were used for. The difficulty really only arises when they start to editorialise, and I think that the courts are fairly attuned to that sort of work. I suppose we would disagree with the previous witness to that extent. We do not see them as being potentially huge bugbears in courts. That said, we are concerned that there is a trend towards editorialising in these notes.

**Mr Leighton**—The other point worth consideration is the ability to appeal against a FSANZ decision to change an editorial note without consultation and without reference to any other body. If it is going to expedite the process of changing editorial notes then it must be balanced by the ability to appeal that decision.

**CHAIR**—Okay. Can I move onto another matter. You suggest that when FSANZ makes a decision to reject an application for noncompliance with the guidelines that can be a potentially dangerous power and could disadvantage applicants unreasonably where the noncompliance has been minor or technical. You say for that reason that the words ‘other than a decision to reject the application because it does not comply with subsection 22(2)’ should be omitted from proposed section 63(1), but you say in the previous paragraph that the agency’s discretion should only be used for applications which are rejected for noncompliance with guidelines where the noncompliance is of significance to the proper assessment of the application—in other words, where it is a significant breach or it bears on the nature of the

application that it has not complied with the guidelines. Does that amendment you have suggested actually achieve that or is that a different suggestion?

**Mr Preston**—The amendment achieves that. The idea is that if an application is rejected simply because it does not cross the Ts and dot the Is according to the guidelines there be some form of external scrutiny available. If that decision is a reasonable one because the application really has a significant shortfall, no applicant is going to waste their time or money going off to the AAT over a matter like that. Indeed, the bill also allows for FSANZ to accept a replacement application down the line. That is good. What we are looking for with this amendment is simply a little bit more accountability and transparency in the decision making by making available an avenue for external merits review where an application is rejected simply because an I was not dotted or a T was not crossed. If there is a standard reason why it was rejected then the AAT would no have problems upholding the decision to reject.

**CHAIR**—Your amendment achieves that. It means that a inconsequential breach does not allow rejection but a more substantial one does.

**Mr Preston**—It means that, if it is rejected for an inconsequential reason, there is an external merits review process available.

**CHAIR**—But there would be a right to external review even if the reason was substantial, wouldn't there?

**Mr Preston**—Correct, yes.

**CHAIR**—Just turning to the question of the stop clock. If there is an application that is in train before FSANZ and a ministerial guideline suddenly appears on the horizon that has been developed by the ministerial council, wouldn't the application that would be held up by the stop clock arrangement be a dead letter anyway if the eventual council guideline contradicted it or made it unsustainable? If that were the case, why shouldn't the clock be stopped for that application?

**Mr Leighton**—It is a long process getting an application through FSANZ. In the first instance, as you identified, there are guidelines. The guidelines currently in draft are something close to 100 pages on how to put an application together. They require substantial technical support depending on what the application is. The applicant in the first instance has made a significant investment in putting an application together and then there is also presumably investment in the context of developing product for market or something similar. So there is quite a lot of investment, as I mentioned in my opening statement. Then, on top of that, the applicant needs to budget and develop the strategies for getting that product to market. There is a reasonable expectation that, if you put an application to FSANZ and you have crossed the Ts, dotted the Is and everything is there, it should be able to be progressed within a 12-month period.

As I mentioned in my opening statement, the opportunity should be provided to the applicant to decide whether to proceed with their application, on the assumption that it is a paid application and all of these investments have been made. Being aware that the ministerial council is in the process of considering or developing a new policy, which may or may not affect their application, the applicant can make an informed decision as to whether there are, firstly, reasonable grounds to believe that their application would progress and the ministerial

council would accept it. It is a waste of time if, on advice, the ministerial council is going to ask for a review and everything will get stalled anyway. But if, on balance, all technical merit is in that application and their application could get through the system, and could be in place even for a period of six months—

**CHAIR**—So the final ministerial process might eventually—

**Mr Leighton**—Eventually.

**CHAIR**—cancel out the benefit of that application, but the applicant should still have the right to progress the application and have it operate even for a period of time if that is what they choose to do. That is what you are saying.

**Mr Leighton**—Exactly. The point I am trying to make is that industry has invested a lot to get to that point and, if it is likely to succeed and get into law so that at least for a limited period of time they can recoup some of that investment, the product is in the marketplace, and they have first right or first access to market, then that is a commercial decision for the applicant. But at the moment the stop-clock provision takes that opportunity away. The applicant has no opportunity to say, ‘I understand all the risks inherent with proceeding with this; go ahead,’ or not. The applicant can still say: ‘All right, policy is in process. We understand the political environment; we are prepared to wait.’ But it is their decision.

**CHAIR**—Fair enough. Okay. I am happy. Any other questions?

**Senator MOORE**—I presume, gentlemen, that you have read some of the other submissions that we have had or, if you have not read them, that you are aware of the arguments after that mammoth consultation. We have had a number of submissions that talk about concerns about the reduction in community consultation that is in this particular legislation and also concern just generally about the safeguards that our food standards are famous for. I know, Mr Leighton, that in your opening statement you talked about the balance that this legislation would bring. As you represent one of the larger industry groups that we have in the country, I want to hear any comment you would like to put on the record about those concerns that have been raised, mainly by consumer groups—that the changes in this legislation will weaken the role of community scrutiny of standards in our country. Would you be prepared to put something on the record about that argument?

**Mr Preston**—Absolutely. In broad terms I think my response is that you have to look at the process and what information is available to the community at various stages under the existing law and under what is proposed. The step that is being removed in all cases except for major policy initiatives is, if you will, what was previously and is currently the first round of public consultation. At that point in time, an application has been made or a proposal has been raised, and really that first round of consultation can simply say, ‘Entity A has applied for this change to the food standards code; what do you think?’ There is no detail. There is no amendment that you can have a look at to judge whether or not you are going to be affected. Again, with food standards being somewhat technical food documents, the devil tends to be in the detail of these things. So, to be honest, there is not really a lot to comment on. You can come with, if you like, a pre-packaged opinion about this sort of application—good, bad or indifferent. But that is not particularly helpful in determining an application. You will get those pre-packaged opinions on matters at the later stage as well. So really I think the question is

whether it is worth having that round of public consultation in the ordinary scheme of things—there is no argument about it being necessary for the major things.

There certainly is a process, time and administrative saving if it is omitted and that has to be balanced against whether there is a significant detriment to the community by removing it, and that is appreciated and understood. But the reality is that the best comment is made once you know what the proposed standard change is going to be. That is when you know really whether this is something that is of a high concern or no concern, whether it is good, bad or indifferent. Until that point, really you are just guessing; you are dealing with what might be rather than what is actually substantially proposed.

So in that circumstance, for the vast majority of applications we would actually agree with this bill—that that first round of consultation is not especially productive. In fact the vast majority of applications—I could not give you a number off the top of my head, but it would be 99 point pick some nines—go ahead with what the application or the proposal asks for. It is only really once you have the proposed change before you that you get serious debate and informed discussion happening. So if it really serves no functional purpose or does not add any value to the process then even though it is taking away one round of public comment it is nonetheless a good move in terms of the regulatory system in this country. You can have as many rounds of public consultation as you want in a process, the question is: are they adding value? Are you getting meaningful information that can help you work out your decision? I think the experience generally is that you do not get that. You get nothing in that first round of public comment, for most cases, that you do not get—and you get better quality and more—in the second round.

**Senator MOORE**—You do not see a message there to the wider community in cutting one round?

**Mr Leighton**—The question is whether providing FSANZ with the flexibility to consider the technical merits of an application, its complexity and the significance that it would have in amending the food standards code would require one or two rounds of public consultation. That is the opportunity for FSANZ in an administrative capacity to assess the application and say, ‘This is one the community will have concerns about and it requires greater input. Therefore, we need two rounds of consultation.’ That is their decision. If it is a matter of relatively minor significance, or an administrative issue to do with a typographical error in the editorial notes if that were to go—

**Senator MOORE**—Does that happen often? I notice that a couple of submissions talked about the need for something in terms of typography. Is there a history of typographical errors in this legislation?

**Mr Leighton**—Yes, FSANZ has raised a number of omnibus proposals. They are not so much an application as FSANZ recognising their own error and putting it forward as a proposal.

**Senator MOORE**—Thank you. I just wanted to get on record a response to that other point of view.

**CHAIR**—I have one last question I need to ask you. You say that FSANZ should not be able to engage in public notification or consultation on high-level health claims. Why?

**Mr Preston**—The process that is new in this bill for these sorts of proposals is that, rather than going through a process of public consultation, there be a limited form of consultation that involves an expert committee and the other regulatory agencies. It is not like there is no consultation for these things. There is a process. It is just a different one and it is not public. The reason why it is not public is that—as Mr Leighton has said—industry invests a lot of money putting these applications together and under the current system there is a very significant free-rider effect, as it is called, where the process publicises what is going to happen and competitors become aware somewhere between 12 to 18 months ahead of time as to what is going to happen. That investment in research and development then is not properly reflected in the regulatory outcome where anyone can jump on board. This is a different process rather than a non-consultative process that seeks in part to address that for high-level health claims. Do you want to add anything more?

**Mr Leighton**—As I mentioned in my opening statement, there are two issues. One is the application for a novel food and the other is the application for a high-level health claim. The issues go behind the protection of the applicant's rights and their expectations of being able to recoup on that investment. The food standards code differs significantly to therapeutic goods legislation, for example, where you have priority rights over a pharmaceutical compound. A claim over a food—and industry recognises this—is not something you seek proprietary rights over, with the exception of novel foods, where there is certainly the potential there for copyright and trade legislation.

But, coming to the point about high-level health claims, the issue here is not about restricting the access of the community or other industry groups to use a high-level health claim; it is about providing the applicant the first to market opportunity to get their product into the marketplace. By putting an application forward that is considered by an expert panel and considered in confidence, it is simply not raising a flag that says to the broader industry, 'We've put an application in. We've funded it. We've paid for everything to get up. When it gets through you can just jump on board and take advantage of that.' You can once it is in the public domain.

**CHAIR**—I understand. Thank you very much, gentlemen, for your evidence today. We appreciate the submission and the evidence you have given.

**Proceedings suspended from 10.31 am to 10.41 am**

**HUGHES, Ms Clare, Policy Officer, Choice**

**CHAIR**—Welcome. Are there any additional comments you would like to make?

**Ms Hughes**—I am speaking today as the Senior Food Policy Officer for Choice, which was previously called the Australian Consumers Association.

**CHAIR**—I think you have had information provided to you on parliamentary privilege and the protection of witnesses.

**Ms Hughes**—Yes, that is right.

**CHAIR**—We have the submission in front of us which you have provided. Thank you very much for that. We will ask you some questions in a moment about your submission. Would you like to start with an opening statement about the position that Choice has on this legislation?

**Ms Hughes**—Yes. Thank you very much. We appreciate the opportunity to provide further comment on our submission in relation to the Food Standards Australia New Zealand Amendment Bill 2007. Since the start of this process, we have provided comments on a number of occasions through various submission processes, public health and consumer consultation meetings and also two general stakeholder meetings.

Today I was hoping to reiterate the concerns that were outlined in our submission in relation to the proposed health claims processes, the removal of the opportunity for a second review and the extent to which—I guess this is a more general concern—the interests of the food industry are being prioritised above public health and consumer interests, which are actually the primary objectives, as we understand them, of the FSANZ Act.

Our comments and my responses to your questions today will be based on the fact that we support the primary objectives of FSANZ, which are outlined in section 10 of the Food Standards Australia New Zealand Act 1991 as prevention, public health and safety, the provision of adequate information relating to food to enable consumers to make informed choices and the prevention of misleading and deceptive conduct. We certainly support these objectives because they make public health and consumer protection the primary goals of food regulation in Australia. But, despite this, we are concerned that a number of the decisions and other reviews are prioritising the interests of the food industry in relation to competition and product innovation above the public health and consumer objectives.

We have been involved in the process of not just this amendment bill but food regulatory and food policy development processes over many years. Through this long involvement, we have come to know the system and how it operates. We feel that the most positive attribute of the current FSANZ process is its openness and transparency. While we acknowledge that streamlining the current system could provide some benefit for consumers, particularly in relation to changing minor issues such as typographical errors or editorial notes, we are concerned that a number of the proposed changes will inhibit not only our capacity to represent the interests of consumers but also the capacity of ministers to represent the interests of consumers.

We are also concerned that there is not enough information about the types of applications and proposals that will be subject to only one round of public consultation. Previously, something that had been presented as an example was the addition of vitamins and minerals to food. That would suggest that it was merely changing an existing table and therefore would only require one round of public consultation. But I think you only have to look at the debate about folate fortification among industry, public health and medical professionals to realise that changing vitamin and mineral additions is more than changing a table; it is actually changing, I guess, the diets of all Australians.

The explanatory memorandum says that issues and applications that involve scientific and technical complexity will be subject to the full process, but it is not clear what 'sufficiently complex' actually means. That is one area of concern to us. We actually are not sure what applications and proposals will be required to have only one round of public consultation.

In relation to the proposed changes to the health claims process, we do not support the changes that will limit or basically remove public consultation processes for changes to health claim decisions and the claims that can be made on products. This was a view that was expressed on a number of occasions by not just Choice but also a number of public health groups. We are concerned that these issues have not been addressed, despite the fact that we have raised them on a number of occasions. We certainly believe that, in sacrificing the openness and transparency and limiting the capacity of public health and consumer organisations to actually engage in consultation, this is actually undermining the primary objectives of FSANZ, which relate to protection of public health and safety and the two consumer objectives.

We do not believe that the establishment of the expert panel to advise FSANZ on those applications will be sufficient to address our concerns. The confidential information that is presented to this committee will obviously not be open to peer review, and that is obviously an important part of the process for establishing the strength of any scientific evidence to support any health claim about a particular food. It also limits the capacity of many interested parties, many of whom will be experts as well, from participating in the consultation process and commenting on the strength of the evidence and the implications of any potential changes. We also think it places unreasonable onus not only on the committee members but also on state and territory health departments to ensure that public health and consumer issues are adequately addressed.

What concerns us most in relation to the proposed changes to the health claims process is that it was justified on the basis that the use of health claims on food labels did not relate to public health and safety; they were about marketing food and therefore they did not require the full consultation process. Firstly, we think they are about public health and safety because there could be potentially negative health impacts if unhealthy foods are presented as healthy foods because of the presence of some positive nutrient. But, I guess more importantly, the suggestion that only applications that relate to public health and safety or perhaps food safety in many cases should be subject to full FSANZ processes is actually going to set an alarming precedent for the future of food regulation in Australia because, as you are well aware, there are three objectives of FSANZ relating to public health and safety and also the provision of adequate consumer information and the prevention of misleading and deceptive conduct.

Also, the impact analysis suggested that proposed changes to the health claims process will have no impact on health and safety. In fact, it was suggested that providing a greater range of products carrying health claims could have public health benefits. I think you could argue the case in the other direction as well—that, certainly, if more highly processed foods are carrying health claims about one aspect of the product, this could actually encourage consumers to eat more highly processed food and direct them away from perhaps the general sort of healthy eating and nutrition messages about consuming wholegrain foods, fruit and vegetables and that sort of thing.

In relation to the ministerial reviews, we are well aware that on a number of occasions there has been frustration expressed by food industry representatives that the statutory obligation to allow ministers to have two opportunities to request a review is actually unnecessarily prolonging the process and inhibiting their ability to produce innovative products and to develop new products. The applications relating to phytosterols and calcium additions were cited as examples of this.

We are not aware of any case where consumers have actually been disadvantaged by the processes when ministers are requesting these reviews. Actually, we think that perhaps, if anything, ministers' capacity to request reviews in those cases was protecting the consumer's interests because in many cases they were asking FSANZ to further investigate the public health impact of those applications. So we would certainly be concerned if that capacity were taken away from ministers to request the second review.

We suggest that perhaps more could be done to ensure that FSANZ engages with the ministers or the jurisdictions that are requesting the initial review to ensure that they are addressing the concerns so that it does not prevent any second review from happening. But certainly we believe that there needs to be the capacity for the second review for ministers who feel that this has not been adequately addressed in the first FSANZ review.

More generally, you will see in our submission that we raise concerns about the general approach to protecting public health. We are concerned, partly because there is no definition of 'public health' that applies in this case and it is open to interpretation. In some cases, the term 'public health' is taken to mean that it is more about food safety and immediate food-borne illness. Such a limited view of public health and safety will only address the short-term impacts of regulation rather than the long-term impacts of health and nutrition on individuals and also population. While it may not be directly relevant to the terms of reference of the committee today, it is certainly something that we believe is a problem that inhibits the capacity of the FSANZ process to truly address public health and also consumer issues.

I have cited examples in our submission, but I will not go into detail right now. I am certainly happy to elaborate on that in further discussions and in questions. I will conclude my formal presentation there so that we can discuss anything and I can elaborate on anything that members would like me to discuss further.

**CHAIR**—Thank you very much for that comprehensive opening statement. I might lead off by indicating that you raise a number of fairly pertinent points about your perspective on the problems with the thrust of the legislation. You do not include any recommendations. Would I

take it that Choice's position is that we should reject this legislation altogether or do you have views about which areas of the legislation should be amended?

**Ms Hughes**—In our submission on the amendment bill, given the time frame, I must admit, we were addressing the issues that were of greatest concern to us. In our previous submission on the amendments to the FSANZ Act there were a number of things that we were happy to support. Obviously, we have said that we certainly support an amendment to processes that are simply changing typographical errors or editorial notes. We also supported allowing FSANZ to approve or reject parts of an application and also that the FSANZ Act be amended to reflect the important role that FSANZ plays in providing information on the Food Standards Code. We supported the previous proposal that would formalise the requirement of FSANZ to provide a final assessment report. So there are a number of things that we have previously supported. But, given the time frame for the current comments to the committee, we chose in our submission to focus only on the issues that were of greatest concern to us.

**CHAIR**—I understand what are you saying there but, without pre-empting what the committee will do, I dare say that the committee will recommend that there should be amendments to the legislation to reflect the concerns that have been raised by a number of witnesses. I do not know if in your earlier submissions, you detailed areas where you feel amendments should occur. But, if you have made such recommendations before, it might be useful if you were to provide those suggestions or proposed amendments to the committee now. In some cases, I probably discern what are you suggesting we should do to change the bill, but it might be more useful to have a written version of what you feel should change about the legislation.

**Ms Hughes**—I can certainly provide the committee with that. Obviously I cannot do that now in writing, but I can endeavour to do that.

**CHAIR**—I appreciate this is a short time frame but, if you could have something to the committee, say by the end of the week, that would be very useful, if that is possible. Thank you. You suggest that there should be a definition of public health or public health and safety. You are not alone in making that recommendation. Is there a danger, in pinning down what that means, that you might actually end up with some issues or applications of the legislation being outside the scope of the bill? In other words, isn't it best to leave that phrase 'public health' as broad and undefined as possible in order to widen the possible capture of the legislation with respect to any issues given rise to by applications to the two FSANZ?

**Ms Hughes**—I think the fact that it is sufficiently broad—essentially there are many aspects. There is the issue of obesity. One of the points we made in our submission was that obesity is one of the most significant public health conditions facing Australia today, yet we believe that some of the decisions that are made actually are not consistent with the Commonwealth government's approach to preventing obesity. For example, previously FSANZ proposed under the draft assessment report for the nutrition, health and related claims standards—to put it simply, Coco Pops would be able to make a claim about being a good source of calcium for strong bones, but a dairy farmer could not make the same claim about a glass of full cream milk. That was because of some criteria that were applied—and I do acknowledge that those criteria have since changed. I think there is the capacity at this time for better consideration of public health issues, but I do not think that capacity is being utilised.

We certainly would feel that better defining public health guides FSANZ as to what public health means in terms of food regulation and that it outlines what they need to be looking at.

**CHAIR**—Yes. I suppose I start with the viewpoint that, if you try to define what public health means, you necessarily narrow the definition because you are listing what has to be included in that concept and there is bound to be something that falls outside of it at some point. But you feel that there would be greater use in itemising what should be covered in that concept.

**Ms Hughes**—Not necessarily itemising, but I think the danger is at this point that that sort of objective, the protection of public health and safety, is in some cases being interpreted to mean food safety and the immediate food safety risks, where we would see that it has broader connotations. It is about the long-term protection of health and obesity. Obviously that is one example that we certainly believe should be given better consideration.

**CHAIR**—Could that lead to a situation where, for argument's sake, FSANZ would feel it might be its role to reject an application for, say, a novel food which was extremely unhealthy on the basis that it could contribute to a decline in public health?

**Ms Hughes**—We certainly believe that that should be part of the consideration. If a novel food or a novel component of a food is being presented in an otherwise unhealthy food or drink, we certainly believe that there would be justification for FSANZ to reject that application and suggest that it should be added to a different type of food that is not going to conflict with general public health and healthy eating messages.

**CHAIR**—I have to confess that I am an avid consumer of Coco Pops. I am very distressed to hear what you say about it. I will put that to one side and pass on now to Senator Moore. I am sure that she does not touch Coco Pops.

**Senator MOORE**—I am fascinated to have that openly on the record, Chair. I am interested that in your submission there is a quote which talks about the fact that you believe that the views of the public have been ignored and undervalued. It is a comment of that kind. What I have been trying to ask all of the witnesses about is the process of consultation. As you are aware, in the explanatory memoranda the history of widespread and effective consultation is mentioned by the government. There are quite specific points you have put before us in your submission. As to the responses you had when you were raising those issues through the period of consultation surrounding this legislation, what did they say back to you?

**Ms Hughes**—I think you are referring to the point where I said that we raised a number of concerns on a number of occasions and it appeared that the concerns that were raised by public health and consumer groups—

**Senator MOORE**—Yes. You said:

It appears that the views expressed by public health and consumer groups have largely been ignored. That is on page 4 of your submission.

**Ms Hughes**—Yes. Are you asking what the reaction was when we raised those concerns?

**Senator MOORE**—Yes.

**Ms Hughes**—There was not a lot of reaction. It was not a negative or positive reaction. From memory, they were simply saying, ‘Okay, we acknowledge your point.’ There was never any indication that they would reflect that in the proposal to ministers. But if you use the example of the health claims process, we have raised that concern on a number of occasions, yet it did not appear to have been taken on board and acknowledged that there were a number of public health and consumer groups who were not happy with the process for the health claims assessment being not open to any public consultation.

**Senator MOORE**—It is very difficult to define what is effective consultation, because there will be differing views. But, in terms of your concerns about the openness of scrutiny, ministerial review and also the process—you have raised reviews and the actual processes—did you get an actual response back at any time saying, ‘We’re doing it this way because’?

**Ms Hughes**—Not to my memory, no. I think that, in relation to that health claims example, we are well aware of why it is being done that way. There is the concern about the protection of data that industry might supply and giving a heads-up to competitors about what they plan to do. We acknowledge that that is the reason, but we do not believe that is adequate enough to dispense with the current processes, which are put in place to protect public health and consumers. We are very concerned about the precedent that this will set for future processes and future changes to the processes.

**Senator MOORE**—Another point is what happens next? Whatever the future of the consultative processes around food standards in the country, do you have any views about how that should operate and what should be put in place to make sure there is involvement of consumers?

**Ms Hughes**—As I pointed out in the opening statement, we believe that the current process does allow for adequate consultation as far as the consumer groups—consumer group I should say; there are not too many consumer groups that deal with food—and public health groups, which are in many cases by default representing some consumer interests because they are interested in the health of consumers, are concerned. Certainly, we acknowledge that FSANZ has invested more in consumer research, particularly by employing a social researcher. They have also established a consumer liaison committee. I am a member of that consumer liaison committee but it is not a 100 per cent clear to me how FSANZ actually incorporates the views expressed by this committee. Given the average consumer does not write a submission, the best way of engaging consumers in FSANZ’s decision is through consumer research. We support greater investment in consumer research to inform FSANZ’s decision early in the process, not when it becomes a contentious issue at the draft final assessment stages.

**Senator MOORE**—I asked the previous witnesses, who were from the Australian Food and Grocery Council, about their view specifically on the legislation, and they felt—and you will probably have a look at the *Hansard*—that the current legislation does provide an adequate balance of the various claims and that the new assessment process, which is not one-size-fits-all actually will allow a more streamlined approach to assessment processes. You do not exactly respond to that directly in your submission, but do you have a view on that?

**Ms Hughes**—We certainly agree that there are some minor changes that do not require the full process.

**Senator MOORE**—We keep hearing about the typographical things. We are all in agreement that if things are spelt wrongly we do not need a full review, but is there anything else that you think could be streamlined?

**Ms Hughes**—I cannot think of examples off the top of my head. The issue of changes to editorial notes was presented as something. If something does not change the intent of the standard then we certainly do not believe there would need to be the full process. A part of our concern is that it is still unclear to us which process, if we were to sit down with a list of the assessments and proposals that have happened in, say, the last five years, would have been subject to only one round of consultation and which would have been subject to the full consultation? We are still a little in the dark about that and that is why we are reluctant to say these are the types of things where only one round of public consultation or no public consultation would be required.

**Senator MOORE**—Yes—exactly how to make that definition. We will be asking the department that: if there is going to be a varying approach, who is going to determine what is varied?

**Ms Hughes**—Even that point would be something that there would need to be consultation about. Think of the examples of vitamins and minerals: changing the amount of a vitamin that you can add to a particular food or changing the list of foods that you can add that vitamin to really does change the food supply and it can potentially change consumers' diets. That is something where we believe there needs to be the full process so we can debate those issues.

**Senator MOORE**—Thank you.

**Senator SIEWERT**—Carrying on from where we just left off, the previous witness from the Australian Food and Grocery Council said that they found the first round of public consultation was not very helpful because there was not a lot of information on the particular changes that were being made; people did not have access to the detailed information so the first round was not that useful. What has been your experience with that first round of consultation?

**Ms Hughes**—I would actually disagree with that because I think the initial assessment stage is where FSANZ tries to get all the views of organisations such as ours. It is once they have those views and they are aware of the concerns of various parties and potential implications that they can then say, 'How do we want to draft?' and go to the next stage of drafting the proposed standards. I think there is certainly merit in having the two rounds of public consultation. It is not the only reason why we would support continuing with two rounds of public consultation, but currently it can be quite onerous. To provide a submission a fair amount of work obviously needs to be done and, as far as our organisation is concerned, we have very limited capacity. So sometimes we may miss out on providing comment at the initial stage and we really need to provide comment at the draft assessment stage. So I think that is sort of a reality unfortunately as well, that often groups that have limited capacity but a real interest in involving themselves in these processes and in consultation sometimes just do not have the time to get involved in both stages. That is probably an argument for why you would remove one round, but I think—as I previously said—the first round is for getting the breadth issues on the table. The second round is for getting greater precision in what the new

standard will look like and making sure that you have taken into consideration all those views that were expressed in the initial stages, rather than getting to the draft assessment stage and having the groups express their concerns and then a lot more work has to be done between the draft and final assessment stage.

**Senator SIEWERT**—A previous witness of the Australian Beverages Council and then subsequently the Food and Grocery Council have also made some comment on editorial notes. In particular, the Beverages Council suggested that they are not very happy with the way editorial notes are at the moment and they would be better dealt with as regulations. What is your feeling on that?

**Ms Hughes**—I think if the editorial note is setting out something that is key to how the standard is to be enforced or interpreted, then yes, I would agree. If it is that important, elevate it to become part of the regulation. It may differ depending on the specific editorial note that you are looking at. Some may simply be a note to people as to how it should be interpreted.

**Senator SIEWERT**—I have one last question. The grocery council suggested that the ministerial council only have power of veto, not the power to amend. What would be your comments on that proposal?

**Ms Hughes**—Sorry, the power of veto to?

**Senator SIEWERT**—I am trying to find the specific recommendation. I had already put that submission away. What they were suggesting was that ministerial council only have the power of veto on a standard. They say:

The better solution is for the Council, after such rounds of review as apply, to exercise a power of veto only, not one of amendment.

So they are saying if the standard goes up and there are some amendments suggested, that the council not have the power to amend but only to veto something; to send it back basically.

**Ms Hughes**—Yes, I would agree that most of the decisions about the specifics of regulation should be FSANZ's responsibility because they obviously go through the legal processes of drafting the wording of those particular regulations. I am not aware of an example where ministers have actually amended the regulations or suggested amendments. I am sure there are some, but if it is a decision about accepting or not accepting, then we could accommodate that.

**CHAIR**—Thank you very much, Ms Hughes, for the evidence you have given today and for your patience in hanging on the line while we have given you questions over the phone. We appreciate that. If you could have that extra information to us particularly about the recommendations in the next few days that would be much appreciated.

**Ms Hughes**—I will do that and thank you again for the opportunity to address you.

[11.15 am]

**CHIRGWIN, Dr Margaret Elizabeth, Director, Public Health and Ethics, Australian Medical Association**

**ROBINSON, Ms Rowena, Policy Advisor, Australian Medical Association**

**YONG, Dr Choong-Siew, Vice President, Australian Medical Association**

**CHAIR**—Welcome. Thank you for being here today to help us with this inquiry. I understand information on the protection of witnesses and parliamentary privilege has been provided to you. We have the submission you have made to us in front of us, No. 5—thank you for that. We have questions to ask you but we might kick off with an opening statement if you wish to make a short one of no more than 10 minutes. If you could keep it to within that time it would be appreciated. Dr Yong, do you wish to lead off?

**Dr Yong**—Firstly, the AMA appreciates the opportunity to comment on the proposed amendment bill and to be able to present evidence for the committee today. We appreciate the intention of the bill is to streamline process and balance the needs of industry in the public, but from the AMA's point of view, our major concern around food regulation is about public safety. We view the function of FSANZ in terms of food regulation as an essential public health activity and, from that basis, we will make some comment.

In looking at the amendment bill, we support the alignment of the policy setting process of the ministerial council and the standard development and approval process of FSANZ. The bringing together of that we feel will help to streamline the process. We also support the ability for the council to request a second review while maintaining appropriate oversight standards by the council. In looking at these things we were guided by our current policies on public health and health protection and the fact that we feel that needs to be paramount and enshrined in any bills governing food regulations in this country. As part of that, we would support the precautionary principle as we outlined in our submission to the committee being enshrined in any such legislation.

We were mostly guided by the existing Food Standards Australia New Zealand Act 1991 which has as its principles: the protection of public health and safety; the provision of adequate information relating to food to enable consumers to make informed choices; and the prevention of misleading and deceptive conduct. As we said in our submission, we were somewhat disappointed that perhaps those particular principles appear to have taken somewhat of a step backwards in preference to improving processes for industry and looking at innovation and food.

We think that the new legislation will be strengthened by having some definition of public health in it which would serve to emphasise the needs for the safety of the public being a primary consideration. What we would like to do is send you some information about the precautionary principle and our position statement of public health which outline the need for a considered approach when undertaking any activity, and food regulation will be one that affects the health of the public.

We would also like to emphasise that from the precautionary principle we believe this is a principle that would help to emphasise some of the concerns around new activities or inactivity even which has potential for harm to the environment and human health. Clearly food regulation falls into this sort of category. We only need to see the effect of the increases in obesity in Australia and the long-term health and economic consequences of that, the relationship of what is available in terms of food and food advertising and information to the public, and the public making those sorts of wise choices about the food they will eat.

The precautionary principle allows for these sorts of relationships to be examined even when the evidence—as is often the case in terms of food regulation—is not fully established. I will explain that a little bit. The precautionary principle really tries to ensure that all planning decisions that may impact on the environment or human health are transparent, participatory, democratic and informed by the best available independent science. Where the risk cannot be determined with sufficient certainty, it tries to emphasise proper precautions, to ensure that the full range of alternatives to the proposed action are identified and examined and that the alternative with the least potential impact on human health is the one chosen.

It is also to ensure that full and accurate information, the risks and benefits, on potential human and environmental impacts is provided to all parties, including the community, before a decision is taken. Important information must not be withheld using a commercial-in-confidence argument. The examination of these alternatives should include the costs in the assessment process. Things like manufacturing, transportation, clean-up and disposal costs should be included in health and environmental costs. They need to be reflected, obviously, in the retail price of new products.

Also, there should be a regular review of new evidence as it comes to hand—particularly where the evidence initially is somewhat weak—to ensure that, if new evidence comes to show that new decisions can be made regarding an activity or food process, this is incorporated so that innovation is not stifled. This would ensure that the precautionary principle did not stymie progress but was in fact a guide to risk assessment. Where risk is unknown or limited information is available, data should be collected as the action proceeds so that later review can be made available. As you can see, what we would like to see in a food regulation regime is something approaching this sort of precautionary principle. Certainly in other jurisdictions we are seeing, in terms of regulation of environmental hazards and of food processes, these principles are starting to be adopted.

I have some other, smaller points. In looking at this amendment bill, we have some concerns regarding the negative impact on trade being a reason to develop an urgent standard. We would like to see health placed before trade in looking at food regulation. We would also like to see any sort of food innovation aimed at having a beneficial impact on public health and food consumption patterns so that we would be making some efforts in this instance to combat the problems of being overweight and obesity. While some food innovations can have a positive impact on food supply and health, this is not necessarily guaranteed. We will need some examination. We want to make sure that Food Standards Australia New Zealand is strengthened to be able to undertake that role.

**Dr Chirgwin**—We had a specific issue with the proposal which I heard Clare talking about before of having three different processes and which of those three would be used for a

particular proposal. We had severe concerns that things that really should have public consultation might end up without public consultation.

**CHAIR**—Thank you very much for that opening statement.

**Senator MOORE**—I am trying to look at the consultation process around this piece of legislation because we are being told how good it is and that always raises bells for me. When someone tells me how good a process is, I always like to find out about it. I would like to know what the AMA involvement was in that in terms of the years of consultation around these changes. Also, do you have any views about what should happen next in the consultative process? Whatever happens through this round of legislative change, there still seems to be some uncertainty about what the ongoing process will be—not about the consultation around a specific application, I think that is quite firmly regulated, but about how the departments will interrelate with everyone who has an interest in this area.

**Dr Yong**—I will get Dr Chirgwin to comment on that.

**Dr Chirgwin**—We met recently with the public health doctor from New Zealand who works with FSANZ. He was very much inviting a stronger role for public health in FSANZ and setting up a network of people with specific knowledge in the relevant areas. That seems a new possibility and certainly the AMA welcomes that possibility very strongly. On the more general interaction with FSANZ, the AMA until recently has had almost no interaction with FSANZ. This has been, I would say, mainly because we have not had particular resources to put into it, but also the documents that have come to us have been, on the whole, extremely technical and the AMA's interest is in a broader area of protection of public health and implementation of the precautionary principle. Somehow there did not seem to be a way we could interact in that more global fashion. We would be keen to have a relationship with the department which is not so much at the level of individual applications but more at a general level. How are we protecting the public? Are we protecting it in the right way? Are we protecting it sufficiently? How are we monitoring the impact? Again, we understand that the issues of the role of the states and territories versus the role of the federal legislation is, as always, complex. The responsibility to ensure that what has been legislated, what has been agreed, and the standards are actually met is mostly held at the level of state and territory. We would be very keen on also being more involved in how that functions in a protective sense for the general public. We are not sure how that will progress.

**Senator MOORE**—Has that been part of any discussion you have already had with governments?

**Dr Chirgwin**—Only recently with the doctor from New Zealand.

**Senator MOORE**—Not with the Australian side?

**Dr Chirgwin**—No.

**Senator MOORE**—The AMA has strong consultative links with the government at so many levels. I was wondering whether this was one to be added to the list some time down the track.

**Dr Yong**—It will probably have to be. We have had a greater interest within the AMA in this area because of the links between metabolic diseases such as diabetes and so on and diet.

The increasing scientific evidence is that regulation aspects around food, such as advertising, do have an impact, as do what information is available to the public and the public message coming out from government about what is healthy to eat, what kind of diets are healthy and so on. We can see huge public interest. For the first time we have clear evidence about the links between the impacts of regulation and advertising on food choices people make and their eventual health.

**Senator MOORE**—My other question—I am sure Senator Humphries will follow up on this—is about the definitional aspect. A number of submissions have suggested that the term ‘public health’ could benefit from some form of definition, particularly when legislation is defined to be looking at it. The aims of this legislation include the term ‘public health’ a lot. I did read with interest the AMA definition, and it is long.

**Dr Chirgwin**—It is one of the problems. If you want to make it clear, it tends to get long.

**Senator MOORE**—Do you see that as a problem in itself? There is the need to clarify exactly what we are seeking but these things just grow when you actually do it. You have obviously looked at it within the AMA because you have come up with the AMA definition, but do you see that as an issue for legislation? With most legislation the definition of terms takes quite a long chunk of the process. If we were to include a definition along the lines of the AMA, that would take a few more pages in terms of process. I would like to get some general discussion on record about that. Your submission to this group spent a considerable amount of time talking about the public health implications. You attached your definition and you also attached the wider recommendation in terms of ministerial responsibility, which is part of another debate. This legislation defines that two of its aims are to protect the public and to raise awareness of public health. What are the issues you see as an organisation in trying to grapple with that?

**Dr Chirgwin**—That is a big one.

**Senator MOORE**—Yes, it is a biggie.

**Dr Chirgwin**—If you actually read our document you see there is a two-line definition initially.

**Senator MOORE**—Yes, I saw that. I like that one.

**Dr Chirgwin**—One might feel that within the context of legislation you could use a fairly general short definition. I would be keen that the precautionary principle should also be defined. Again, that can get very long, but there are some short ones that would be appropriate for legislation.

**Senator MOORE**—Do you see this as the short version: ‘Public health is the organised response by society to minimise, illness, injury and disability and to protect and promote health’? That is in terms of a short catchy one.

**Dr Yong**—That is our short definition and that implies things that go beyond some of the other definitions of public health which have been around surveillance of illness and disease. This is more about saying there is a very clear responsibility upon government to ensure that kind of health outcome through regulatory processes and other things. It is much wider in many ways than some other more traditional definitions of public health, but I think it is in

keeping with what we know about the impacts of what happens in the environment on people's health generally.

**Senator MOORE**—And that could translate across the various pieces of legislation that we have in looking at a wide range of issues.

**Dr Yong**—We are using this as a guiding principle on when the AMA should comment on public and government activities.

**Senator SIEWERT**—I want to go back to the question that I asked of Choice. It concerns this issue around editorial notes. I do not know if you heard some of the evidence earlier, but the Australian Beverages Council was suggesting that editorial notes be included as regulation rather than as editorial notes. Do you have an opinion on that?

**Dr Chirgwin**—I heard what Clare was saying. I think if they are important then putting them higher up—with them probably having a higher status—would be something that we would support.

**Senator SIEWERT**—I want to go to your submission where you were talking about the fact that the consultation process has not properly finished on—

**Dr Chirgwin**—the health claims.

**Senator SIEWERT**—Yes, and the fact that we are considering legislation and the consultation has not properly finished.

**Dr Chirgwin**—Yes.

**Senator SIEWERT**—Your recommendation is that that needs to be completed before the legislative changes are made.

**Dr Chirgwin**—It does seem somewhat presumptuous to legislate for something that is not yet agreed.

**Senator SIEWERT**—Yes. When are they likely to be finished?

**Dr Chirgwin**—You would have to ask FSANZ that one. It has been a long process. I would say that process has been over three or four years.

**Senator SIEWERT**—Okay, I will follow that up with the department.

**Senator ADAMS**—On page 2 of your submission you are suggesting that the Senate Standing Committee on Community Affairs 'carefully considers the balance between public health and safety and the need for industry innovation' and saying that is a 'glaring omission in the bill'. Would you like to expand on that? I know you did so in your brief statement earlier, but I seek just a little bit more so we can have some more evidence.

**Dr Yong**—I will get Margaret to comment further, but, for an overview, what we are concerned about I suppose is that there may be a rebalancing at the moment whereby industry innovation is seen as the driving principle rather than public safety. Our championing of the precautionary principle, we believe, is a way of balancing that, so whilst we can embrace innovation it has to be compared to the evidence available on what other options or alternatives there are for that particular food process or that particular additive. The one that has, on the balance, the least dangerous outcome should be the one that is adopted.

That should have a review built in so that if there is more evidence that a new innovation can produce a safer, better process or food than that can be adopted later on. So it is a dynamic process rather than something that involves a once-only examination and then it is passed. There should be an opportunity for people to come up with the evidence that their innovations will in fact improve the safety and health aspects. If that is the case then they certainly should be adopted. I will let Margaret add to that.

**Dr Chirgwin**—I think we have significant concerns that there is a sort of an assumption that innovation in food is good and that because the public wants their bread to stay soft for three weeks we should allow chemicals to be added to that food so that is the case. We do know that there is something going wrong with the nutrition of the general public. We are getting the end result, which is far too many people obese and overweight. At the moment I think it isn't obvious to anyone what it is. We all debate if it is about exercise and whether it is just that they are grazing, but it might even be something that we are doing in the food chain, something that is in food that could be having some of these impacts. We simply do not know at the moment.

I think over the next few years we will begin to have more data in this area because people are collecting it. We know there are more oestrogens in the environment. We know that for quite a lot of these chemicals that are around the minimum residue limits may well mean that people are getting exposed to chemicals that additively are doing something to their control of their appetite. We do not really know. Our feeling after reading this bill is that it is encouraging innovation whereas at this point in time I do not know that I would be encouraging innovation, because we do not actually know that it is safe in the long run for the public. So it is a general sense that we are thinking innovation is good when I would say we have had quite a lot of innovation and it has not done the right thing. It is more that we think precaution is not strong enough here. We would suggest something is going wrong—we do not quite know what and it may not be the food chain—so let us be careful at this point as our role is to protect the public.

**CHAIR**—Can I follow that question up. You raise a reasonable point about the need for there to be a broader whole of population health perspective with respect to the foods that are brought onto the market, and, on the face of it, the idea of a definition of public health which embraces the health of everybody, not just in a sense as to whether a particular product is healthy, safe and properly labelled, is a reasonable concept. I am struggling with the concept of how it would actually work as to the public if it were part of the process that FSANZ had to consider. Take for example a manufacturer who develops a novel food which is high in sugar, high in fat, and has lots of salt—in all respects very unhealthy. It sounds like the sort of thing I would go for! It is something which is properly labelled, its additives are safe and in other respects conforms with the guidelines. You are saying that FSANZ ought to have that broader public health brief in front of it when it considers the manufacturer's application. Should it say to the applicant, 'Sorry, this meets our requirements but it is unhealthy. It is going to contribute to the obesity of the Australian community so we are going to say no.' How does that principle work in those circumstances?

**Dr Chirgwin**—There has to have been something novel in it, because if it is just high in salt, high in sugar or high in whatever they do not have to come to you.

**CHAIR**—Let us assume there is something novel about it.

**Dr Yong**—I think the issue would be something around the novel aspect of it. It would be around a novel ingredient and the manufacturer having to say, ‘We have all this evidence to show that it is safe, that it has been examined in other ways and that it is safe. We have also looked at the alternatives.’ I think part of that will also be adequate public consultation so that other groups can put in the results of research or studies that they have done to confirm that particular claim or otherwise. It is not about the existing sort of unhealthiness of that food, be it high in salt or sugar. I do not think we are suggesting that FSANZ should be looking into those aspects of it, because those are established risks. I think that it will be more a case of adequate labelling and information for consumers so that they are able to make that choice.

At another level—not quite at the FSANZ level but, I guess, at another government level—it is about having agreement on what we tell the public they should be looking for in terms of nutritious food choices. So, from the precautionary principle point of view, it is more about the novel aspect of the food—whether there is a novel ingredient or a novel process with which they are making the food—and saying, ‘If you want this to be approved, you need to show that it is safe and that other alternatives are not as safe as this one,’ so that there is some improvement in health from this process.

**Dr Chirgwin**—We have some concerns about nanotechnology. You can have a food of a different colour and a different temperature because of a nanoparticle you have put in it. Isn’t that nice? You have ice-cream that changes colour or something or it might melt in the freezer, and therefore you should not eat it because it has changed colour. But you have put a chemical in it, and we really do not know at the moment what impact that might have on health. We might see that Australia could have a huge market for that product because it is the new thing, but we would expect a strong amount of research into what that nanotechnology might do to the human body. We do know that a food colouring is coming in that is in the nanotechnology area. We simply do not know what nanotechnology will do in the long run to people, and we suggest precaution be very strong in thinking about it.

**CHAIR**—Are you suggesting that the present arrangements or the proposals in this bill do not give FSANZ the brief to consider those sorts of issues? Surely it would have to consider whether the nanoparticles in the ice-cream would be harmful to health. That would be part of its brief at the moment and under the new legislation as well.

**Dr Chirgwin**—It would. Within the context of this bill we do not think you strongly state the fact that the role of FSANZ is about protecting the public. It seems that a lot of the language is about encouraging innovation. ‘Encouraging innovation’ are words that are used in every other phrase in one section of the bill but there are no words about the protection of the general public and the population.

**CHAIR**—I am trying to pin down a practical example of the point you are making in the paragraph that Senator Adams quoted. Your submission says:

The AMA suggests that the Senate Community Affairs Standing committee carefully considers the balance between public health and safety and the need for industry innovation.

Can you point to an example where you think that, at the moment, a certain outcome would result, whereas if the balance were better, as you suggested, a different outcome would come about?

**Dr Chirgwin**—The comment I have heard is that we often accept the data provided by industry, who wish that the safety of the product be accepted. It is quite costly for FSANZ to go off and get any of its own data. But we would suggest very strongly, particularly in novel food areas where new chemicals might be used inside the veterinary industry which will end up as maximum residue levels, that more than industry based data needs to be used to make the decision as to whether or not a product will be safe. We also feel there is not very much strength in the other issue I talked about, which is to follow-up when we have introduced something novel. How do we collect the data to know whether that is having a long-term impact on the population's health? The front end and the back end perhaps need some strengthening to emphasise the public good.

**Dr Yong**—The analogy might be in pharmaceutical regulations, where evidence from the drug manufacturers is not accepted on face value without some independent examination of data or looking for other results. I am sure you are aware that there have been more and more calls for that to be strengthened even in the drug regulation area. We are calling for a similar aspect to that. I think that FSANZ are very aware that rather than the main emphasis of their functioning being about streamlining innovation it should be about preserving health, so there needs to be a very high bar for novel foods to come in if they can provide that sort of information.

**Senator SIEWERT**—It seems to me that GMOs would fall into that category, because as I understand it GMOs rely, essentially, on industry based information. Would they fall into that category?

**Dr Chirgwin**—Yes.

**Dr Yong**—For instance, FSANZ ought to weigh up a claim that a new GMO keeps the food fresher for longer. You could argue that that is beneficial to health, but that has to be weighed up with the other unseen or unknown or unanticipated consequences from genetic manipulation in terms of the appearance of disease further along or having some influence in, say, increasing the rates of cancer and so on. They are the sorts of things the public worries about. I guess it would add to public confidence in FSANZ if they knew that was how FSANZ was weighing up these sorts of considerations.

**CHAIR**—But do you think that FSANZ gets that balance wrong at the moment? Are there any examples of foods that have been approved where you feel the analysis has not been rigorous enough on those questions at this stage?

**Ms Robinson**—With the GMOs, when FSANZ looks at safety, it is all very short-term stuff in terms of toxicity and allergic reactions, because that is all they have the capacity for. The information is provided by the manufacturers, as with the pharmaceutical situation. We would be keen on mechanisms that look at the long-term monitoring of the health effects, because we do not have that data. You were asking whether there are any examples. There was one a few weeks ago in the paper, relating to a cornmeal type that was done by Monsanto. It was allowed in America, and FSANZ was saying that we did not get any of that brand in Australia. But what they found in America was that some additional independent research had been done in looking at rats. Something had been done to the gut and intestines of the rats when they were fed just on this corn for a period of six weeks. A German court, I think, commanded that

Monsanto got their research reviewed by French independent researchers, and they found some problems with the research. So there are some examples out there, but they are not coming to light particularly clearly. They are based on the problem of having manufacturer-only information.

**CHAIR**—They are overseas examples, though. Are there any examples in Australia of a food that you feel has been approved without that rigorous examination?

**Ms Robinson**—No, but I think there is potential there. Part of that comes down to the labelling of foods, because the Australian labelling system is fairly rigorous—much more so than America and Canada, which I think are both voluntary—but, when you compare it with European labelling, European labelling is much more stringent. They argue for labelling around—

**CHAIR**—So European labelling is more stringent than ours.

**Ms Robinson**—Yes. Around GMOs, the Europeans argue for labelling that also includes genetically modified elements that occur during the production. So they are there at the beginning but not at the end; whereas Australia has labelling only when they are still in the end product. Again, this is all stuff we do not know much about. We do not know the potential health impacts of something that has got lost in the processing. A few years ago the UK did quite a thorough look at mechanisms for monitoring of GMO problems down the track, and they found that at the time there were no systems to allow that. But we need to try to find those mechanisms, even if it takes time and effort.

**CHAIR**—Let me be clear about this: the AMA is arguing that the processes at the moment, particularly for innovative products like those using GMOs, need to slow down and that the examination processes need to have more evidence in general on the table about the long-term health impacts than is currently being required.

**Dr Yong**—Sometimes that may mean continual monitoring after you introduce a novel food. So I think that is where the balance has to be. It should not be a somewhat luddite philosophy of saying that anything new cannot come in, but sometimes the technology and the research methods that bring to light unseen consequences of novel foods may not come further down the track. I think our concern is that there is no regime at the moment to monitor the impact further down, even after approval of a food.

We suggest that is something that could be examined or encompassed within the bill which would make sure that new information that comes to light is actually considered in light of that particular food.

**Dr Chirgwin**—Trans fats would be an example. They have been approved for being in the diet here, but now we would suggest that the scientific evidence is pretty overwhelming that, really, we should not have the manufactured, man-made added trans fats. We do not mean the ones that turn up in meat and in ruminant products which we have eaten for a long time—and some seem beneficial—but those manufactured by mankind that need to be out of the food chain. It was not necessarily wrong that they were approved on the basis of the evidence that we had at the time, but we needed the monitoring and we now need a process to get them out. We are just keen on the kind of process that says that sometimes we do not know how safe something is when we let it into the food chain but we are going to keep a tight eye on it.

**CHAIR**—You used the example before about the nanoparticles in ice-cream. I assume those sorts of things, because they are a new sort of product and not just a new food, would need to be approved usually through a TGA type process. Have I understood that correctly?

**Dr Chirgwin**—FSANZ have a watching brief on it at the moment; we do not think they even have a process yet.

**Dr Yong**—I think it only comes under the TGA if there is a particular claim about it being therapeutic or if there is a health claim. I do not think it has to go to TGA if it is merely a food additive.

**Dr Chirgwin**—It will come through FSANZ.

**Ms Robinson**—My understanding is that, at least up until February, FSANZ only had a watching brief on the nanotechnology side; that it recognised that it was happening and being used in places like the UK but that it was not yet an issue here. Our argument is that we need those processes set up to be able to address it.

**CHAIR**—Thank you very much for the evidence you have given today. It has been very useful and we can take up some of those issues with the department and FSANZ in a moment. I thank the three of you for appearing and for the submission you made to the committee.

[11.53 am]

**BRYANT, Ms Jennifer, First Assistant Secretary, Population Health Division, Department of Health and Ageing**

**GAY, Ms Catherine, Senior Advisor, Food Regulation Policy, Department of Health and Ageing**

**LEARMONTH, Mr David, Deputy Secretary, Department of Health and Ageing**

**McDONALD, Ms Jennifer Lynne, Assistant Director, Food and Healthy Living Branch, Department of Health and Ageing**

**FLADUN, Mr John, General Counsel, Food Standards Australia New Zealand**

**HUMPHRIES, Mrs Cathie, Standards Management Officer and Manager, FSANZ Act Implementation Unit, Food Standards Australia New Zealand**

**CHAIR**—I welcome officers of the Department of Health and Ageing and Food Standards Australia New Zealand. I think all of you will understand that, as departmental officers, you shall not be asked to give opinions on matters of policy, although that does not preclude questions asking for explanations of policy or factual questions about when and how policies were developed. You have information provided to you about protection of witnesses and parliamentary privilege. I think you are all familiar with that.

We do not have a submission from the department but we do have the information which has been provided in the explanatory memorandum and of course in the bill itself. There are a number of issues which have been raised by other witnesses in the course of today's proceedings which we would like to ask you about. Before we move on to that phase, would any of you like to make an opening statement to the committee?

**Mr Learmonth**—We did not make a submission. As you said, there was some substantial material there by way of the explanatory memorandum and so on and we thought it was probably a bit unclear as to how we might further help the committee in the absence of any particular issues, but in light of the issues that have arisen in the hearing we would obviously be very happy to provide a submission covering those if that would assist.

If I could just make a couple of brief remarks: this exercise essentially grew out of a review of the experience and operations of the act in an administrative sense and it seeks to improve the administration and efficiency of how standards are developed and decisions made. It does not actually go to the science at all behind that, and we believe it does not impact on the robustness or otherwise of the science, and people have different views on what that is, but we did see this as an exercise in improving the administration of the act per se.

The only other comment I would make is that there has been perhaps a suggestion or two that FSANZ simply accepts industry data in coming to a view about the appropriateness of a standard and its decision making, and I guess I could not let that pass without refuting it. In a manner similar to that of the Pharmaceutical Benefits Advisory Committee, FSANZ does very much seek independent, expert, peer-reviewed advice. It does have a quite scientific and robust assessment of what is presented to it. It does not merely accept what it is given by

proponents of any particular view. I am sure FSANZ might speak to that. It may be one of the issues that you wish to raise, but I could not let that one pass. Thank you.

**CHAIR**—Does anyone from FSANZ wish to make an opening statement at this point?

**Mr Fladun**—We would not be proposing to make any opening statement.

**CHAIR**—I might ask a couple of questions about a few issues that have been raised today. I think some of you may have been here to listen to some of those points, so I will not need to explain them in detail. A point has been raised about editorial notes in the bill, and the suggestion is that these notes do not form part of the bill. The suggestion from the Beverages Council was that they therefore should not actually be included, that they will tend to be viewed as legislation or regulation if they are included in the text of the bill and that they should be removed and put in the user guides. Can you clarify for us what the status of the editorial notes is? Are they legislation or subordinate legislation or whatever, or are they simply to assist the reader to understand what the legislation is about?

**Mr Fladun**—Editorial notes have been used by FSANZ in the code since the code's inception back in 1991. As a matter of law we have seen them as being purely interpretive and as an aid to interpret the actual legal parts of the Food Standards Code, which are the substantive clauses within each standard. Each of those clauses can be easily identified, and that is why for editorial notes we have used a device by boxing them or putting them in boxes to clearly differentiate between the editorial note component or the note component of the standard and the actual legally binding parts of the standard, which are the clauses.

I think there is precedent for using these kinds of notes. We draft food standards using contemporary Commonwealth drafting practice, and I think you would see in the bill before you that notes are used as well. There is no debate in pieces of statute about the status of notes. We have always had the view that they should not create legally binding requirements.

I note in Mr Tony Gentile's submission that in one particular case the editorial note does seem to try to define a particular product. Our view is that that is an aberration. It is not an example that is commonplace within the food standards code.

**CHAIR**—Is it your understanding that, if a court were interpreting the code and it wished for further clarification, it could use the editorial notes for that purpose?

**Mr Fladun**—I would agree with Mr Gentile's submission that that is the case, but it is not necessarily binding. In my view, from a legal perspective, the provision that is being proposed for insertion would take away that court's entitlement to do so because in the statute it says that these particular editorial notes are not part of the standard. So I think a safeguard is actually being included.

**CHAIR**—Is it your understanding that courts presently use the user guides in interpreting the code?

**Mr Fladun**—To be honest with you, I do not think there has been an occasion where a food standard has been interpreted in such a way—not that I am aware of, anyway.

**CHAIR**—Would you take the view that, as long as it is made clear in the legislation that the editorial notes were not to be used as part of the code but were merely an illustration of the code, that would be sufficient safeguard against the misuse of those notes?

**Mr Fladun**—In my view, that would be a sufficient safeguard and the court would be invited to have regard to the particular provision of the FSANZ Act rather than merely to some nebulous argument about whether it should be included as a legal requirement or not.

**CHAIR**—I do not know whether FSANZ proposes to go back and clarify the issues that the Australian Beverages Council considered to be confusing.

**Mr Fladun**—We were a little surprised by that example. We would be proposing to fix the particular issue in an omnibus amendment, which we run frequently throughout the year.

**CHAIR**—Some of you would have heard the food and beverage council argue that the 18-month extension to the time to consider an application—the stop-clock provisions—were inappropriate in that they deprived an applicant of the investment that they had made in that particular application. Their submission was that, if there were some looming ministerial guideline that might change or might have a bearing on that application in the future, the applicant should nonetheless be able to have their application considered and approved or not under the present arrangements and to take the risk that those arrangements might be overturned by a subsequent ministerial guideline. That makes some sense. If they have made that investment and they want to take the risk that the guidelines will be overturned, that is not unreasonable, is it? That is the way it would work in the general legislation. If an amendment is passing through parliament to change some provision in the law, you are still entitled to take advantage of the law as it stands, notwithstanding that the law might change depending on what parliament does?

**Mr Fladun**—That might be an issue for the department.

**Ms McDonald**—The proposal to put an 18-month time frame on a stop the clock came out of a need to clarify stop-the-clock time. Ministerial council had been frustrated in the past by applications that were proceeding through when there was concern expressed on the part of ministerial council around its view about particular developments within food supply.

The intent of this amendment is to put a boundary around that consideration time and ensure that there is a finalisation of policy within an appropriate time line. Whether or not the imminent finding around a policy guideline would sway the ministerial council in how it considered an approval agreed by FSANZ once it came to ministerial council I think is one of the things that we weighed up in trying to put a boundary around the time limit. Further consideration of the proposal by the AFGC would probably need to be made, but it was not an issue that had been considered in the drafting of the legislation.

**CHAIR**—I can see how the ministerial council might be aware of an application being made that it is concerned about and thinking, ‘Actually, we don’t really like the idea of that; we might want to stop that.’ But why shouldn’t the applicant be entitled to take advantage of the law as it stands at the time that they make the application? Why shouldn’t they be able to see their process completed, notwithstanding that they understand that another level of the process is looking to change that in the longer term?

**Ms McDonald**—I would have to say that I do not know whether that proposal was actually considered in the drafting of the legislation, and we would need to take further consideration of that as an alternative way to address this issue.

**CHAIR**—You might take that on notice and give us a view about that. To take a parallel situation: if I am entitled at law to, say, take advantage of a program that government runs and I am in the process of doing that and I suddenly hear there is legislation being moved to bring that to an end, the law does not require my application to be stalled because it might be about to end. I am entitled to proceed to have it seen through and maybe to get the benefit of that application until such time as the law changes. So, in principle, I think they have a reasonable point there. I would be interested in your response to that particular issue.

Could I come back to the general point that was being made by Choice and by the AMA about the broader brief of FSANZ in terms of health policy. They seemed to be arguing that there was a need for FSANZ to have a wider remit than simply deciding whether a particular product or application would lead to a safe, properly labelled food being available on the market. They seemed to say that there was a broader perspective of public safety that was being not adequately reckoned with at the moment, under the present arrangements. I think you might have heard the examples they were giving, such as adding nanoparticles to ice-cream so that it would change colour if it had melted and therefore you would not eat the ice-cream that had melted. What is the reaction of FSANZ or the department to that suggestion? Is it the case, in your view, that more evidence could be collected about products that are being applied to be approved at the moment that would raise the level of safety available to the Australian public?

**Mr Fladun**—The bill does not actually disturb section 10 as it currently is within the FSANZ Act. Section 10 sets out FSANZ priorities, and the No. 1 priority of course is public health and safety. But section 10 also stipulates that any assessment that we do has to be based on the best scientific evidence available and based on a risk analysis.

I am at a bit of a disadvantage because FSANZ representatives here are not scientists and we do not have our chief scientist or acting chief scientist here today. But, from a lay point of view, I think FSANZ would be in a position to say that no change really has occurred in terms of the statutory regime and that what is section 10 now—and I am not aware of the new section—will stay within the current legislative scheme, and that provides those kinds of protections that have been discussed.

**CHAIR**—This amendment does not propose to dislodge that recommendation, but there is a suggestion—this is the nature of an amendment bill; it is usually a vehicle for which any suggested changes to the legislation might be entertained—and that suggestion is that public health needs to be defined. There is simply a broad-brush description that FSANZ would have regard to public health in the way it assesses applications, and that is not defined. Can you comment on whether there are potential shortcomings in FSANZ's work if it does not have that broader brief for public health as opposed to the health implications of a particular product which is being considered?

**Mr Fladun**—I think I would need to take that on notice and confer with our chief scientist or our acting chief scientist, because it does raise issues that go to their expertise, not mine.

**CHAIR**—I suppose you might it is a philosophical question of whether FSANZ should, for example, approve products to go into the marketplace which meet its requirement but which are evidently unhealthy and will contribute, say, to the problem of obesity in the Australian

community. We might be better off not having such products available in the marketplace. I think that is the thrust of what some of the submissions has been.

**Ms McDonald**—I think that public health appears in the objectives of the act already. I would have thought, over recent years in particular, that has had an increasing role in the assessments that FSANZ has considered. I would have thought that around the ministerial council table there is a consistent push to ensure that all aspects of public health in its broadest sense are considered. The issue about whether we need to define that further may very well put boundaries around it as opposed to allowing us to interpret public health in its broader sense.

**CHAIR**—Could you just clarify for us the status, to give a more specific example, of the ice-cream with the nano particles added to it? Would it be your understanding that that kind of additive to a food would need to be approved by the Therapeutic Goods Administration or whatever it is called these days or would it be a matter that would only come to the attention of FSANZ in the process of adding it to our food chain or our food products?

**Mr Fladun**—I suppose that is a technical issue and I would be best placed to answer it. My understanding would be that that particular product is a food and not a therapeutic, so I cannot see how the TGA would have any particular role.

**CHAIR**—I am probably asking for too much detail here on this particular idea. Actually, I will not pursue that because it is probably not appropriate for this stage. The food and grocery council has argued that, with the consideration of high-level health claims, it is unreasonable to expect there to be a process of public notification and consultation on those claims—and that is possible under the drafting of clause 107, they say, of the bill—because that would throw their particular innovation out into the public domain and assist their competitors. Can you indicate to us, first of all, whether it is the intention of clause 107 to allow FSANZ to go out and conduct further public notification and consultation or is that an unintended consequence, as the Food and Grocery Council argues? Secondly, if it is intended, what do you say to their claim that this would disadvantage applicants?

**Ms McDonald**—The intent is that, when the applicant chooses for consultation to occur, they would be able to nominate that that might happen. It might be a bit difficult to consider when that might happen, but there could be reasons for that to happen. It would not be up to FSANZ to determine that public consultation would actually occur.

**CHAIR**—But they say that the words ‘FSANZ may inform itself on any matter in such manner as it thinks fit and may consult with such persons as it thinks fit’ is broad enough to allow them to go out and conduct a further round of public consultation. On the face of it, that would support that interpretation, wouldn’t it?

**Ms McDonald**—I would have to take advice on that. I am not sure that there is anyone here who—

**Mr Fladun**—I would disagree with the interpretation that the provision that is being cited is one of general application. The subdivision and the provisions relating to high-level health claims are of specific import. It is statutory interpretation 101 that the ones of specific import would prevail over that generic one. So I think the upshot of that is that FSANZ would not be entitled to consult, irrespective of what the applicant’s wishes were.

**Senator MOORE**—I have been asking questions around the consultative process because the explanatory memorandum and some of the submissions have taken great effort to tell us how long this has been consulted on. What I was trying to find out from the previous witnesses—and I know that people were watching—was people who have given submissions to us raising particular points and what information they had in response to those points before today. On the premise of consultation, not necessarily meaning agreement but at least understanding where it has come from and the process—and when you have a look at the *Hansard* you will see—the people who gave evidence this morning, the Beverages Council, the Food and Grocery Council, Choice and the AMA, all expressed that the issues they had raised, and there were a bulk of them, had not received detailed response in the consultation. I am not going to go through all of them, but in terms of a general principle that is significant in a process which is based on that area. To begin with, concerning the editorial comments that the Chair has raised, I take it, Mr Fladun, that you said and I would understand that you would use the drafting principles and the people who supply that help in developing these things of course. But the comment about the role of editorial comment and also whether they could be better served in hand books and guidelines or regulations was raised by a number of the submissions. It was not a one-off complaint. When I asked the Beverages Council what response they got when they raised that through the various consultations, the response was that they were told it would be too difficult.

I am just quoting what we had in evidence this morning. We do not have the drafting experts here in front of us. I do not have experience of legislation that has editorial comment. My own experience of legislation tends to be more in social security areas. It just seems to me that there was considerable comment made in submissions about a lack of clarity in people's minds about the use of editorial comment in legislation, that perhaps it would be good to have a quite clear response to that that all the people who raised the issue would have.

**Mr Fladun**—I think our decision back in 1991 to call them 'editorial notes' was perhaps a bit mistaken.

**Senator MOORE**—A definitional thing, yes.

**Mr Fladun**—I think we should have called them simply 'notes', which is the formula that most statutes use today. So 'editorial' tends to give a feeling that it is almost a bit of a chat and clearly it is not that. But we have always been clear. One of the standards that commences the Food Standards Code, standard 1.1.1—I think it is clause 5—specifically says that editorial notes do not create the law. They are there to assist in interpreting and cross-referencing. What is being proposed I suppose is that FSANZ excises all of those editorial notes out of the Food Standards Code and places them in—

**Senator MOORE**—And puts them in another format, yes.

**Mr Fladun**—a different document, perhaps an interpretive guide, which is something that FSANZ creates from time to time on particular standards. That would be a very lengthy and time-consuming process because the Food Standards Code does contain a lot of editorial notes. The difficulty with putting them, say, in the user guideline is that these user guidelines do not have any force of law and they are not prepared through any kind of structured consultation.

User guidelines per se are not consulted on. So we would end up being at the same starting point that the Australian Beverages Council has pointed out.

**Senator MOORE**—Among others. It is not just the Australian Beverages Council that raised this issue in their submission. If I understand that logically, the concern from the answer you gave earlier, when the chair was asking the question, was that it was very clear that they did not have legal status and that they are there as interpretive only. If they were to be removed and put into a guideline or a user guide, they would not be consulted on. Are they consulted on now if they are only as an interpretive guide rather than as a core element?

**Mr Fladun**—The editorial notes under the current act are consulted on in terms of the broader package of consulting on a standard; because they are included in the standard they are also consulted on. That is under the current regime.

**Senator MOORE**—But not specifically; they are only consulted on as part of the legislation that is in front of you.

**Mr Fladun**—That is right.

**Senator MOORE**—They are not consulted on separately.

**Mr Fladun**—No, that is correct.

**Ms McDonald**—Perhaps I could just make some additional comments there. I guess we were at pains to explain—and I think we have responded to the people who had brought this issue up, including the Beverages Council, in the past—that we have not changed the status here but merely explained the understood status of those words within the code as they stood previously. The issue, I understand, is that even if those words were removed and put into a guideline, their status in use as evidence in a court situation would probably be the same. They can be argued against and could successfully be argued against, but they along with guidelines that might also be produced with FSANZ would have the same status. I think it would be appropriate to say that that conversation was had fairly directly with at least the Beverages Council if not the other people who have brought that issue up.

**Senator MOORE**—Was that a verbal response or a written response?

**Ms McDonald**—Personally I have had conversations with; I have not participated in the writing of any formal response to anyone on that, but there have definitely been conversations about that.

**Senator MOORE**—Can we just find out whether any written response has been given on that issue? The issue has been raised with us in writing, which actually gives it a status, I believe, whether it can be used in law or not. But just in terms of process, with a number of people looking at this piece of legislation, the core element is its transparency and the way that people have security in understanding it. It is just important that if there is a point that people have some sensitivities about, as opposed to whether one side is right or wrong, that is actually clearly defined in writing somewhere. I could not see it in the explanatory memoranda. That would be useful.

**Mr Learmonth**—There would be no reason why we could not go back to them in writing to confirm the conversations about this and any other point about which they raise doubt.

**Senator MOORE**—That is what I am trying to get.

**Mr Learmonth**—I am very happy to do that.

**Senator MOORE**—People have actually come here, at this stage, and in talking to us they have said that they have raised these things before and they expressed some concern that they still were not absolutely happy with it. Even if disagreement continues—and that is possible—at least it is written so that everyone can actually access what the process is. Then when you get to the next one, from the Australian Food and Grocery Council, they even went further in terms of talking about which ones were boxed and which were not. That indicates a degree of concern about legislation on which they would be relying. I am sure you have seen that as well in terms of process. So could we just get somewhere clearly—on the website, somewhere that is public—a definition, because I have to admit I have never seen a discussion in legislation around editorial comments or notes before.

**Mr Learmonth**—I think maybe the best thing to do would be to provide a written statement back to the committee as part of a submission we might make but also go back in writing to the organisations with whom we consulted and reflect the discussions that we have had with them in a more formal way; we would be happy to do that.

**Senator MOORE**—That would be useful. The other process that was raised—and it is really about the future process—is the community and/or industry consultative mechanisms that will be in place as this legislation continues. I have asked for some more comment from people who made these points to come forward. On the website of FSANZ, it talks about the various bodies that exist. The one that seems to have the industry and group appointments is the board. Is that right? Is that the only kind of industry formal involvement?

**Ms Humphries**—That would be my understanding.

**Senator MOORE**—Once again, it is difficult because people have given evidence and then we wait and ask you the questions after. I asked a couple of the people this morning about where they saw the future in that there are the two different processes of consultation. There is the process around a particular application and how that is actually worked through—and we have the issue about whether in fact there is going to be less public consultation around that. That is one area. But it is more just how people widely are involved in ongoing discussions around the legislation. I think it is relevant to this legislation because the intent of this was to fix things up administratively and also to just make sure that people are being responded to in going forward. So I am interested in, from your understanding, the consultative mechanisms with consumers, with industry groups such as the mobs who gave evidence this morning—how you see that working into the future.

**Ms Humphries**—We also have committees called standards development advisory committees and, for our primary production and processing standards, we have committees formed under the current section 43 of our act. They do have industry representation as well as consumer and jurisdictional representation. They are there though for a specific application or proposal.

**Senator MOORE**—So that would be if something comes in wanting to have something looked at informally around. They do not exist in their own right.

**Ms Humphries**—No, they do not. We also have a consumer liaison committee just specifically for consumer involvement. That was set up last year and it is operating mainly through teleconferences, but they also meet a couple of times per year face to face and they do have regular email traffic. They discuss specific applications, proposals or just general issues around our standards development process. They certainly would continue into the future.

As far as industry goes, we also have quite a large stakeholder database too so that, whenever we have consultation happening on any application or proposal or related matter, we have several thousand people on that list—including perhaps some of the senators here who are also on that as part of that process. They are not a formal committee as such, but they are certainly kept fully informed as a general group. Does that—

**Senator MOORE**—Yes, that is exactly the kind of thing in terms of process. If groups do respond with more specific suggestions or concerns after today, certainly they will be forwarded to the department so that they can see whether there is anything in particular. That is the kind of process—the people who have expressed concern about these changes have looked at public consultation as one of the issues they are most concerned about. So whatever elements are in place in whatever way is important to have tied down.

**Ms Humphries**—That is right. Certainly the intent of the legislation is to actually even make our processes more accountable and open to the public, as you will see with some of the notifications and such that we do now and there will be additional ones that we do informally with the process; but they will be in the legislation for the future.

**Ms McDonald**—Perhaps I could just add to that as well, because I think your point is going beyond the standards setting process. There has been reference a number of times in both the submissions and this morning to a recommendation that there be a consultative council appointed not in relation to FSANZ but in relation to the ministerial council and the policy-setting process. The original recommendation from the Blair review was a bit more general than a consultative process.

The government response to Blair's recommendation did have some suggestions around the establishment of a standing consultative committee and, in the food regulation agreement, which is the agreement that actually binds all of the Australian jurisdictions into this system, there is reference to setting up a consultative council or similar process. The ministerial council considered that after it was established. It was considered that the sorts of consultation and issues that the ministerial council considered over time may not be served best by a standing committee with a set of appointed representatives that would sit over time. It was suggested that a more flexible approach be taken and that when, for instance, policy guideline was being developed, there would be a requirement for consultation appropriate to the policy guideline that was being developed. I think there has always been a recognition that consultation was critical in the development of policy but that a standing committee may not be the best way forward.

What has been agreed as an ongoing process is that, on I think a biennial basis, an open public forum be held at which the public and as many stakeholders as we could get in touch with would be invited to participate in relation to the actual system—not just the standards setting process but the whole of the food regulatory system. There have been two of those

forums held, one last year and one two years before that. It is intended that that sort of process would continue.

I think that the outcome of the second consultative forum indicated that there was a great improvement in how the consultation with the general public in relation to the broader system was happening at that point in time than there had been at the first forum a couple of years before that. I think it is intended that consultation around policy and the operation of the system continue in a more flexible way than might be afforded by a standing committee, which of course would then have a limited membership.

**Senator MOORE**—That was all part of the process, but inevitably gets caught up in these discussions when there is a bill before us which is talking about it. But that is really useful because we do not have any of that in front of us. I have one last question before I hand over. Everybody else talked about typographical errors in the legislation. Every single witness has said—except for you so far—that there needed to be an easier way to fix up typographical errors in the drafting. Are there more typographical errors in the drafting in your legislation than elsewhere? It interests me because I have not seen that before. Have there been questions around this? I know it is a wide question, but it has been raised consistently?

**Mr Learmonth**—I am struggling with the notion that any typographical errors are normal.

**Senator MOORE**—I am sorry, Mr Learmonth, those are not my words; that is what people have said. When they have talked about the need to have a simpler process it has actually been used as an argument to support it. I will ask the drafting people about the editorial comment as well. It just struck me as odd because I have never, in looking at legislation before, heard such a major concern with typographical maintenance. You can check the *Hansard* and see that it has been a comment statement from the witnesses.

**Mr Learmonth**—I will sharpen my blue pencil.

**CHAIR**—I think there is a power for the Clerk of the Senate or the Clerk of the House of Representatives, depending on which chamber it passes through, to make typographical amendments to legislation.

**Senator MOORE**—Yes, without going through the whole process.

**CHAIR**—It probably depends on that happening before the legislation actually gets through parliament.

**Ms McDonald**—Perhaps I can clarify that I think what is being referred to is not errors in the legislation itself but issues with amendments to the food standards code and the process for fixing up unintended wording or typographical errors in a standard as opposed to issues with the actual legislation.

**Senator MOORE**—My understanding is that the standard actually has legal status. My point remains that I have never seen in any other piece of information, which has come to me in this life or my previous one, such concern about having to fix up the typographical errors. That is fine. It could well be the code because the code is what we are talking about.

**Senator SIEWERT**—First of all I want to go back to this issue around public health and the question of Coco Pops. The example that is put in a couple of the submissions is around Coco Pops and the issue of minerals and nutrients. I want to clear this up: is it possible under

the amendments being proposed or the existing act that the product manufacturers could now put out something saying, 'This product contains minerals and nutrients that are beneficial for your health,' and advertise that, therefore, as a healthy product when it contains 35 per cent fat?

**CHAIR**—It is 33 per cent.

**Senator SIEWERT**—Sorry, it is sugar.

**Ms McDonald**—I could make a couple of comments. One is that I do not believe that the wording that would be allowed to be used would, under the proposed health claims standard, allow it to say: 'This is a healthy product.' A product would need to make a specific claim that was able to be supported by evidence around the connection between either the absolute nutrient content of the product or its relationship to an illness or disease. The question about whether the final standard would allow Coco Pops or any other product with 33 per cent sugar in it to carry a health claim related to some other nutrient quality of the product has still not been finalised. I am unclear about what is proposed, but it has been proposed that products that are high in sugar, fat and salt should not be able to carry claims about other nutrients. At this point in time, I am not able to comment on where we are actually going to draw a line or where FSANZ is going to propose that the standards say, 'This is the line above which a claim will not be able to be made,' because the standard is still in development. As to whether we think 20 per cent or 33 per cent is where the line should be is still under debate.

**Senator SIEWERT**—That brings me to the next question. I think many of you were here when the AMA were here. I have no doubt that you have read their submission. They asked the question about why these amendments are going ahead now to implement this standard when the standard has not been completed. Their submission states:

We have a question mark over the stated aim of the Food Standards Australia and New Zealand Amendment Bill 2007 to encompass aspects of the Health Claims on Food Standard, which is not yet finalised.

**Ms McDonald**—The amendment which is contained within this bill is specifically designed to accommodate the process that is being proposed about the evaluation of the scientific evidence supporting a claim. I believe the amendment is drafted in such a way that, if high-level health claims and the assessment of the evidence of it is not part of the final standard, the amendment would not come into play. I guess it was just assumed that, given the policy guideline indicates that that should be the way the regulatory mechanism will work, it was appropriate for the amendment to be drafted at this point in time and for it to go through, so that once the standard is finalised it will be able to come into play immediately rather than having to wait for a further amendment to the act, if that is how the standard in fact eventuates.

**Senator SIEWERT**—Thank you for that. I want to go back to Coco Pops again. It is a very good example of why consumer organisations are concerned. They are not clear and I am not clear from your answer. A much more holistic approach to public health is being taken. Is there still the potential that a product that has 33 per cent sugar—and I have not heard anybody say that that could, in any way, be classed as healthy—could possibly have something on the labelling that could mislead? This is where people say it goes to misleading people into thinking that it could be healthy. That is the argument around public health.

**Ms McDonald**—What consumers are misled by is a very vexed question. Some people claim that purely stating the nutrient content of a product is enough to entice people to buy it, on the basis that, if it has vitamin X in it, it must be good for you. The intent of the development of the health claims standard is to identify where the points might be that would disqualify a particular product, such as its total value as a nutrient of any kind. It is to identify where that line should be in relation to the ability for that product to carry a claim. It may very well still be valid to claim that Coco Pops are good for vitamin D—if that is the vitamin that is in them—as opposed to them being a generally healthy product overall. We have completely the opposite problem when it comes to something like orange juice. We might be wanting to promote the consumption of the vitamins that are contained in orange juice, but we know that it has a very high sugar content.

It is very difficult to construct the disqualifying criteria in a way that will not create some issues. However, FSANZ have recently released a further discussion paper to explore how those structures might be developed further. I think that, when we come to the end point, we will not be able to be completely black and white about products that can have claims on them about having certain health benefits but might overall be seen as unhealthy products. Of course, consumption data is a really critical part in determining those positions and will be taken into account when considering individual claims.

**Senator SIEWERT**—You probably heard the evidence that Choice gave and that I was following up in terms of this first round of consultation and the issue around the decision on complexity of an issue—which issues will be going for the fuller rounds of consultation and which will not. Choice's response to the question of whether they find that first round useful was that, yes, they do. One of the reasons Choice said it was useful was that it helps to clarify the issues around which to do further consultations on. My question to FSANZ is: were Choice right when they said the first round of consultation is not only useful for them but also useful for FSANZ in terms of helping to clarify what the issue are? The second question is: how do you decide the issue around complexity?

**Ms McDonald**—Before FSANZ answers that, I want to make a clarifying point. It is proposed that the issue on which this is decided is more than complexity. Complexity is not necessarily the thing that would be assisted by public consultation. It is more about what the issues are around the product. We can have very highly and technically complex issues for which public consultation may provide no extra insight at all.

**Senator SIEWERT**—Point taken.

**Ms Humphries**—I back what Ms McDonald said then. For a number of the matters that we would probably consider under the one round of public comment, having two rounds of public comment is really not going to add anything to our consultation process. In many cases it is about the drafting. I think it is when we come to an agreement about what the changes to the code should look like that we get the most valuable input from our public consultation—when people get a picture of what we are going to proceed with. Two rounds of consultation is probably more appropriate with much more difficult and complex matters where we are not totally sure which direction we are going to take. For many of the things we do, the changes we are making are fairly obvious and two rounds would not really add anything to the approach that our board and our science staff are going to come up with.

**Senator SIEWERT**—So the issue there is around the length of time it takes for two rounds or the broader range of consultation processes that you use. It is around efficiency and the time it takes to do a second round of consultation.

**Ms Humphries**—Yes. The reasoning behind how the amendment bill is proceeding is that many of the things we do, two rounds of public consultation at the moment, are not adding anything. They are delaying us getting things done more quickly because the two rounds of public consultation do not give us anything further. They do not bring out anything new. One round is more than sufficient for us to cover all the public concerns. Is that what you mean?

**Senator SIEWERT**—Bearing in mind what Ms McDonald said—that is, it is not just about complexity—what criteria will you use to determine the consultation process?

**Ms Humphries**—I will probably defer to Mr Fladun because those issues will be covered off in a general sense under our regulations—we will give some examples.

**Mr Fladun**—There are some examples already in the bill, particularly for the general procedure. I think the general procedures are described as the default and then you have the minor matters and then the two-round procedure, which is for matters of such a scientific complexity or technical complexity as to warrant two rounds. However, those matters will be, I suspect, extrapolated in our regulations, which we are in the process of starting to develop now, particularly to give guidance as to what kind of fee structures will be applicable to the different kinds of procedures. There will be further guidance that will emanate from FSANZ within the regulations in due course.

**Senator SIEWERT**—That is the point that is being made in the submissions. CHOICE are saying, for example, that there is not enough detail in the bill to give them guidance as to what is going to be treated as complex issues or what will be the determining factors to determine if something is complex.

**Ms McDonald**—I will clarify that: I think the important thing is that when this is a new standard or when it is a review of an existing standard, it will be intended—and I think the amendment explicitly says—that it will go to the longer process with further opportunity. Many of the amendments to standards, which are primarily what is dealt with, are adding new products—products is the wrong word but new types of food or giving permission for the addition of new additives et cetera. Those things are assumed to have parameters which are already set in the standard, so the scientific process of adding them is the important thing, not the conceptual idea of how the standard needs to be constructed. I think in most cases where people are concerned is when it is a new standard addressing a new issue—a new concept in the food supply. The critical element is that it will be required to go through that two-stage process and there is the opportunity when it is an amendment to a standard that, if there are sufficient issues around it, we are aware of that FSANZ could nominate that there would be benefit in addressing those issues twice during the process.

**Senator MOORE**—And they can do that at any time during the process—and I have read the legislation but I did not pick up that degree of detail.

**Ms McDonald**—There are two things. One is initially FSANZ will be required to advise how this will be treated but, as we referred to earlier, FSANZ are actually able to consult as widely as they can on any of the issues that are unclear during the process. The health claim

standard that we have already referred to has seen the release of a number of discussion papers for which consultation has been sought. So the process that is in the legislation is the bare minimum but there is quite often more extensive consultation that occurs particularly where it is a new standard such as the health claim standard. I think we are up to about four rounds for health claims at the moment.

**Senator MOORE**—It is just that in the Choice submission they particularly related the adding of an extra vitamin as a potential one. They said they were unclear. I am interested if FSANZ determined that, because of the nature of the particular change that is being envisaged, they were going to use the single consultation method and advise everybody of that. During that single method of consultation, is FSANZ then able to make a determination which they would then be able to publicise—I forget the actual vitamin they mentioned in their submission as a potential difficulty—and you could then go back, and you can do that at any time?

**Mr Fladun**—That is our interpretation, yes.

**CHAIR**—Thank you. Senator Adams?

**Senator ADAMS**—The AMA—I did ask this before, and you possibly heard it—are very concerned that the balance between public health and safety and the need for industry innovation is not being looked at carefully enough; they are saying this is a glaring omission in the bill. Could I have some comment on that?

**Ms McDonald**—These amendments have emanated primarily from two different sources: one is the establishment of FSANZ as a slightly different entity to its predecessor and the implementation of amended legislation and how that is actually bedded down in an administrative and process sense. The other bulk of the amendments, and the ones that we have probably been more focussed on, which amend the process, come out of a specific review of FSANZ's assessment process undertaken with a specific objective in mind to look at the time frames and workloads of FSANZ. On that basis, the driver for these amendments sits fairly and squarely with providing a streamlined process which is more useful both to industry innovation and to those of us who are part of working with the standard-setting process on a daily basis.

The issue around how FSANZ weighs up the balance of the things that it looks at in its process was not an issue that came out of either of those pieces of work and it was not seen that, in proposing these amendments, we would be in any way suggesting that the balance should change. That is why the amendments talk about timeliness and usefulness to industry in terms of the way that the process works as opposed to the content of FSANZ's scientific assessment, because that was always assumed to continue to be as previously required.

**CHAIR**—Following on from that question, if FSANZ did have a broader brief on public health and it were given a preventative health role as well as the processing of application kind of role, presumably it would have a whole new focus: it would need a whole new set of skills to provide that kind of work, it would need a population health kind of focus and it would significantly change the nature of the work it performed, wouldn't it?

**Mr Learmonth**—I am not sure philosophically that a regulatory agency is the right place to fulfil public health aims of that sort. What we are essentially talking about are public health

guidelines as to what is an appropriate dietary intake under different circumstances, what more broadly a healthier lifestyle constitutes—in other words, exercise et cetera. I think there are other and better ways in which those particular aspirations are pursued other than through what is essentially a regulatory agency looking at safety of food.

**Senator MOORE**—I think that is a threshold, except when there are claims made by the product that they are aiding that. It seems to me that it is a complementary function rather than a separate one.

**Mr Learmonth**—That would be the interface—you are right, yes.

**Senator MOORE**—That would be in the threshold area where the submissions have been raising these points. I do not think that anyone actually suggested that FSANZ or the ministerial council should have full ownership of public health. That was not there at all. But where Food Standards are actually proclaiming that the food is not just safe but actually aids health, that is where it crosses over.

**Mr Learmonth**—Yes, in terms of the claims that may be made. As we have heard, that is an issue still under consideration.

**Senator MOORE**—That is where it needs to have if not ownership at least awareness, because I think a number of the submissions—I think the submission from the Australian Food and Grocery Council was one—talked about the community now having this responsibility to look after their own health, but using the claims made by products to help them in that way. It is not either/or; it is complementary.

**CHAIR**—I thank officers of the department and FSANZ for outstanding evidence given today to the committee on these subjects. That completes our inquiry into the Food Standards Australia New Zealand Amendment Bill 2007. I thank those who have been involved in this morning's hearings.

**Committee adjourned at 12.55 pm**