

DOCUMENTS TO BE TABLED ON 10 MARCH 2010:

- **National Interest Analysis [2010] ATNIA 6**
with attachment on consultation

- **Exchange of Letters amending the Agreement between the Government of Australia and the Government of New Zealand concerning a Joint Food Standards System, Canberra, 25 October 2001 [2002] ATS 13**
[2010] ATNIF 5

**NATIONAL INTEREST ANALYSIS: CATEGORY 2 TREATY
SUMMARY PAGE**

**Exchange of Letters amending the Agreement between the Government of Australia and the
Government of New Zealand concerning a Joint Food Standards System
[2010] ATNIF 5**

Nature and timing of proposed treaty action

1. It is proposed to amend the *Agreement between the Government of Australia and the Government of New Zealand Concerning a Joint Food Standards System* done at Wellington on 5 December 1995, as amended (the Agreement) through an Exchange of Letters.
2. This Exchange of Letters agreeing to the text of the proposed amendments to the Agreement was signed by New Zealand and Australia (the Exchange of Letters). The Exchange of Letters will enter into force on the date on which both Governments have notified each other through an exchange of notes that their respective domestic processes necessary for the entry into force of the Exchange of Letters have been completed. It is proposed that Australia notify New Zealand that Australia's necessary domestic processes have been completed as soon as practicable after the tabling period and consideration by the Joint Standing Committee on Treaties (JSCOT).

Overview and national interest summary

3. The Agreement established a joint Australia and New Zealand system for the development and promulgation of food standards. The Exchange of Letters will clarify, improve and update the joint Australia and New Zealand food standards system by addressing issues identified during the review of the Agreement that was undertaken in accordance with Article 9 of the Agreement and released in December 2006.
4. The proposed amendments to the Agreement will benefit Australia by ensuring that the joint Australia and New Zealand food standards system, in particular the development and promulgation of standards, is as effective and efficient as possible. It will also contribute to further strengthening the trans-Tasman relationship, by maintaining a trans-Tasman market for food products underpinned by common food standards, and reducing unnecessary barriers to trade. The protection of public health and safety will remain the primary objective of the joint Australia and New Zealand food standards system.

Reasons for Australia to take the proposed treaty action

5. The Australian and New Zealand Governments are strongly committed to the closer integration of their markets, including overcoming unnecessary regulatory impediments to trans-Tasman business. The joint Australia and New Zealand food standards system established under the Agreement contributes to effective market integration.

6. The Agreement includes New Zealand in a co-operative scheme for the regulation of food standards established between the Commonwealth and the States and Territories pursuant to an inter-governmental agreement (the *Food Regulation Agreement 2008*). Under the *Food Standards Australia New Zealand Act 1991* (the FSANZ Act), draft food standards (called 'approved food standards' in the Agreement) and variations of food standards are prepared and approved by Food Standards Australia New Zealand (the Authority) and submitted to the Ministerial Council (composed of Ministers from the Commonwealth, each Australian State and Territory and New Zealand), which may request the Authority to review the draft. Once accepted by the Council and published in accordance with the FSANZ Act, a standard or variation becomes part of the Food Standards Code, which is referenced by State, Territory and New Zealand legislation.

7. Article 9 of the Agreement provides for review of the effectiveness of the joint Australia and New Zealand food standards system. The report on the most recent review of the system was completed in October 2007. The proposed amendments address the issues raised by the review, and respond to practical difficulties that have arisen in the operation of the Agreement in situations where different standards for Australia and New Zealand have been considered appropriate. The proposed Exchange of Letters will also align certain provisions in the Agreement with amendments already made to the FSANZ Act by the *Food Standards Australia New Zealand Amendment Act 2007* (FSANZ Amendment Act 2007), allowing those amendments to commence.

8. In brief, the amendments contained in the proposed Exchange of Letters will improve the efficient and effective operation of the joint Australia and New Zealand food standards system by:

- a) streamlining the process for the adoption of food standards by removing the possibility for the Council to request a second review of a draft standard (Annex C);
- b) removing the provision that the Ministerial Council must request a review if any one jurisdiction considers a review is required (Annex C);
- c) revising the provisions allowing different standards to apply in Australia and New Zealand in exceptional circumstances, and setting out clearly the situations in which different standards can be adopted and the procedures to be followed (Annex D); and
- d) altering the process for the adoption of temporary standards by a jurisdiction in urgent situations affecting public health and safety or environmental conditions (Annex E).

Obligations

Amendments to Annex C

9. Annex C deals with requests by the Ministerial Council to the Authority for review of draft food standards and existing food standards. Currently the Ministerial Council has two opportunities to request the Authority to review a draft food standard or draft variation of a food standard before deciding whether to accept, amend or reject the draft standard or variation. The proposed amendments to paragraph 3 of Annex C will reduce this to a single review only. Once that review is completed, the Ministerial Council may accept, amend or reject the draft standard (proposed paragraph 3 of Annex C). Where the Authority has reviewed an existing standard under Annex C, the Ministerial Council may request the Authority to prepare a proposal for the development of a food standard to replace, amend or revoke the existing food standard, or advise the Authority that no further action is required (proposed paragraph 2 of Annex C).

10. The proposed amendments will enable the commencement of corresponding amendments to the FSANZ Act to be enacted as a part of the FSANZ Amendment Act 2007. The proposed amendments will remove from Annex C the current requirement that the Ministerial Council must request a review if any one jurisdiction considers a review is required (paragraph 1 of Annex C). Instead, the Ministerial Council will decide on the need for review according to the decision-making processes set out in the *Food Regulation Agreement 2008*, on the basis of the criteria set out in paragraph 1 of Annex C. The proposed amendments in Annex C paragraph 1(i) retain the criteria ‘exceptional environmental or cultural factors’, which may be considered by the Ministerial Council as a reason for review generally (as currently provided by paragraph 2 of Annex C).

Amendments to Annex D

11. Annex D to the Agreement currently provides for different standards to apply in Australia and New Zealand through the development of either: (i) ‘separate standards’ for New Zealand and Australia where required for exceptional health and safety or environmental reasons (Section I of Annex D); or (ii) New Zealand-only ‘variations’ from a food standard where required on the grounds of exceptional health, safety, ‘third country’ trade, environmental or cultural factors (Section II of Annex D). Where separate standards are developed, they are included in the Food Standards Code. By adopting a variation of a food standard, however, New Zealand in effect ‘opts out’ of the standard developed under the joint system, and any subsequent standard developed as a New Zealand-only variation is not incorporated in the Food Standards Code.

12. The proposed amendments replace these provisions with a new Annex D regarding ‘exceptional circumstances’. The proposed amendments to Annex D acknowledge that both countries share the objective of joint food standards applying in both countries wherever possible, and that the measures in Annex D will only apply in exceptional circumstances. Both countries also acknowledge that they will pursue all avenues to ensure a joint standard applies, before invoking a mechanism under Annex D to apply different food standards. The only grounds under which either country will be able to vary from a joint food standard are exceptional health, safety, ‘third country’ trade, environmental, or cultural grounds (the prescribed grounds).

13. The proposed amendments will establish three different mechanisms for variation which depart from the joint food standard by differing degrees, in order to enable the countries to use the mechanism most appropriate for the food standard in question. The mechanisms established by the proposed amendments to Annex D are:

- a) modification of a food standard for New Zealand only;
- b) development of a separate standard at the request of either country; and
- c) New Zealand ‘opt-out’.

These mechanisms are intended to promote consistency between food standards wherever possible, and avoid some of the difficulties and uncertainties which have been encountered in the operation of Annex D in the past.

14. Proposed Section I of Annex D provides for the **modification of a food standard** for New Zealand only where New Zealand considers that a part (or parts) of a food standard under development by the Authority would be inappropriate for New Zealand on prescribed grounds. Such a modification would be developed by the Authority as part of the joint food standard under development and would thus be included in the Food Standards Code once accepted by the Ministerial Council.

15. Proposed Section II of Annex D provides that a **separate food standard** may be developed where either country identifies, during the development of a joint food standard, that a separate food standard is needed for that country on prescribed grounds. The resulting separate food standard will be developed by the Authority and included in the Food Standards Code once accepted by the Ministerial Council.

16. Proposed Section III of Annex D provides for **New Zealand to opt out of a food standard** altogether (as permitted under current Section II of Annex D). New Zealand may ‘opt out’ of a food standard on prescribed grounds, in cases where the New Zealand Minister does not consider that a modification or separate food standard would adequately deal with the exceptional circumstances in the case. Where New Zealand opts out of a food standard, an annotation to the Food Standards Code will indicate that the food standard does not apply in New Zealand. This ability to ‘opt out’ recognises that, although New Zealand is a part of the joint Australia and New Zealand food standard system, it retains the right to make sovereign choices with respect to which food standards are appropriate for New Zealand.

17. Where a mechanism under Annex D is exercised by either country, the relevant Minister must notify the Ministerial Council (proposed paragraph 4 of Annex D). The notification must include the relevant prescribed ground(s) and a written explanation detailing why the modification, separate standard or ‘opt-out’ is needed. Where New Zealand requires a separate food standard or ‘opts out’, it must also explain why an approach with a lesser degree of variation would not be adequate. In all cases, the notification provided to the Ministerial Council will be made public (proposed paragraph 5 of Annex D).

New Annex E

18. Annex D also currently authorises the Australian jurisdictions (the Commonwealth, States and Territories) and New Zealand to adopt or amend food standards under their food laws on a temporary basis in circumstances affecting public health and safety or environmental conditions, where time will not allow the normal steps for the development or amendment of food standards to be taken. The proposed amendments move the provisions regarding temporary standards into a separate Annex E, where they will continue to be available in these circumstances. As in the current Annex D, the jurisdiction intending to apply the temporary standard must notify the Ministerial Council of its intention to do so.

19. However, the proposed amendments will also require the relevant jurisdiction to provide to the Ministerial Council the reasons and evidence upon which the decision is based (proposed paragraph 3 of Annex E). A jurisdiction that creates a temporary standard will be required to immediately request that the Authority raise a proposal relating to the matters covered by the temporary standard (proposed paragraph 4 of Annex E). The proposed amendments will ensure that a temporary standard applies only until a draft food standard developed as a result of that proposal is adopted, rejected, or abandoned by the Authority. This is a more practical timeframe than the present requirement. Currently, a temporary standard can apply for no longer than twelve months, and there is a six month time limit for the Authority to prepare a standard, regardless of the nature or complexity of the issues.

Amendments regarding the Food Regulation Agreement

20. The *Food Regulation Agreement 2008* has been amended since the Agreement was concluded, and may be further amended in the future. Accordingly, the proposed amendments make it clear that references in the Agreement to the ‘*Food Regulation Agreement 2008*’ mean that Agreement as it is amended from time to time. The proposed amendments are consistent with recent amendments to the FSANZ Act.

Implementation

21. The FSANZ Amendment Act 2007 amends Division 3 of Part 3 of the FSANZ Act to reduce from two to one the number of reviews of a draft food standard that can be requested by the Ministerial Council. This amendment to the FSANZ Act will commence on the day on which the Exchange of Letters enters into force. There is no need for any further legislative amendments to give effect to the proposed amendments.

22. There will be no change in administrative responsibility for, or Commonwealth, State and Territory roles under, the Agreement. It will continue to be administered in Australia by the Department of Health and Ageing and the Authority.

Costs

23. The Australia and New Zealand joint food standards system will continue to be funded jointly by Australia and New Zealand based on a share of the total agreed cost proportional as determined in writing (Article 6). The maintenance of a joint food standards system is budget neutral.

Regulation Impact Statement

24. The Office of Best Practice Regulation (Productivity Commission) has been consulted and confirms that a Regulation Impact Statement is not required.

Future treaty action

25. Article 10 of the Agreement, which is not affected by the proposed amendments, provides that either Australia or New Zealand may request consultations regarding amendments to the Agreement and that any amendments will be made by Exchange of Letters, which shall include a reference to the date on which the amendments shall come into force. Any future amendments to the Agreement would be subject to Australia's normal domestic treaty-making process, including tabling and consideration by JSCOT.

Withdrawal or denunciation

26. Article 12 of the Agreement provides that either Australia or New Zealand may at any time give notice to the other country in writing through diplomatic channels of its decision to terminate the Agreement. Termination would take effect twelve months after receipt of such notice. Article 12 remains unchanged by the proposed amendments.

Contact details

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CONSULTATION

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CONSULTATION

27. Consultation on the proposed amendments to the Agreement was undertaken after officials had reached in-principle agreement on the amendments. The consultation took place in both Australia and New Zealand between 8 October and 6 November 2009. Targeted consultation with key industry stakeholders was undertaken via a consultation document (jointly prepared by both countries) that explained the proposed amendments.

28. More than 20 Australian key stakeholders received the consultation document and were invited to make a submission and meet with the Australian head of negotiations to raise and discuss any issues. This list of stakeholders was developed by the Australian Reference Group and was based upon the consultations undertaken during the Treaty Review in 2006.

29. Three stakeholders took up the offer to meet with the Australian head of negotiations. The resulting meeting was a round table discussion with Coles Supermarkets, Confectionery Manufacturers of Australia and Dairy Australia in Melbourne on 27 October 2009.

30. Discussion at the round table was very positive. Attendees in general considered that the proposed changes would make the arrangement more transparent and therefore supported the approach that had been taken.

31. In addition, Coles, Heinz, Confectionery Manufacturers of Australia and the Australian Food and Grocery Council provided submissions on the proposed amendments which indicated support for the amendments.

32. The intention to negotiate with New Zealand regarding amendments to the Agreement was included on the agenda for the Commonwealth-State/Territory Standing Committee on Treaties (SCOT) in August 2007, and has been included on the SCOT Schedule of Treaties since that time.

33. States and Territories were consulted through the Food Regulation Standing Committee (FRSC), and were invited to provide a submission. A summary of the submissions received from States and Territories is provided below:

- **ACT Government** provided a formal submission which noted that a number of the proposed amendments had already been the subject of consultation arising from the review of the Agreement in 2006.
- **Victorian Government** provided a submission which supported all amendments as proposed in the consultation paper.
- **Queensland Government** provided a submission which expressed some concern about the ability for New Zealand to opt out of a standard, but noted that the proposed requirement for providing reasons for such is a step in the right direction. The submission also suggested that “exceptional environmental or cultural factors” in Annex C should be defined to provide the necessary clarity.

- **New South Wales Government** provided a submission indicating that the proposed amendments adequately address most of the issues identified in the review of the Agreement. However the submission also urged continued future work to harmonise such areas as the regulation of dietary supplements.

34. The feedback from consultations did not require any modification to the draft text, as there were no contentious issues identified. The suggestion by the Queensland Government to define the terms “exceptional environmental or cultural factors” was explored during negotiations, however no definition was found to be more appropriate than the ordinary meaning of the words, and therefore such a definition was not included.