



Submission

To the

Senate Community Affairs Committee

On the

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

From

The Australian Beverages Council Ltd

INTRODUCTION

The Australian Beverages Council Ltd is the peak association of bottlers of non-alcoholic water and juice based beverages in Australia. Our products include, *inter alia*:

- Sparkling sugar sweetened drinks
- Sparkling drinks sweetened with intense sweeteners or “diet drinks”
- Sports & Isotonic drinks
- Fruit juices & fruit drinks (still)
- Mineral, spring & bottled table waters
- Still drinks both diet and with low sugar content fortified with vitamins & minerals
- Iced RTD teas & coffees
- Energy drinks – both diet & sugar sweetened

Our membership extends from the largest multi-national company to small & medium sized bottlers operating in both metropolitan and regional Australia. A list of members is attached as Appendix A.

The Australian Beverages Council supports the broad thrust and intention of the proposed legislation and believes that the positive proposals contained therein are worthwhile and should be implemented.

We do have some concerns however with some aspects of the legislation and we respectfully suggest that these should be considered as possible amendments. We would be loath however to have the legislation rejected due to these concerns as we believe that the positive proposals contained in the legislation outweigh our concerns with the items listed below.

AREAS OF PRIMARY CONCERN

The Australian Beverages Council has two (2) primary areas of concern with the Bill, they relate specifically to:

- Editorial Notes contained in the Australia New Zealand Food Standards Code (FSC), their use, their potential for abuse and should they be retained in the FSC – methods and procedures for amending them.
- Proposed “stop-the-clock” provisions when the Food Regulations Ministerial Council (FRMC) decides that “new policy” needs to be developed.

EDITORIAL NOTES

The Australian Beverages Council has a strong concern with the use of “editorial notes” in the body of the FSC.

In order to clarify the legal effect of statements of purpose of editorial notes, it had been previously proposed that these be expressly excluded from the definition of a Standard and that a separate process be described for the amendment of such notes that do not involve public consultation or consideration by the Ministerial Council.

The Amendment Bill fails to remove such statements of purpose from the definition of a Standard. Statements of purpose describe the intent of a Standard and can influence interpretation of a Standard. It does however propose to exclude editorial notes from the definition of a Standard.

The Council is of the strong opinion that they should not be used at all within the written content of the FSC or any individual Standard as 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 FSC. 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. Regulations should in themselves be clear and unambiguous and not require “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 FSC. Each time an editorial note was drafted, it referred to a specific Clause, giving information on the use implementation of that Clause. More recently a number of editorial notes have been included in the FSC that do **not** relate to a Clause within the FSC. These editorial notes are entirely stand-alone information;

As an example: Standard 2.6.2 Non-Alcoholic Beverages has recently been amended to adopt provision for formulated beverages, Clause 9. This is followed by the following editorial note.

“Editorial note:

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 similar description.

In addition, from when the editorial notes were initially included in the FSC, FSANZ staff – including their legal officers – consistently advised that the editorial notes were **not** part of the FSC and hence were **not** legally enforceable.

The Australian Beverages Council has received independent legal advice that should the editorial note be ignored and a formulated beverage in concentrate form be produced, and subsequently challenged, that **NO** court would or could ignore the editorial note, nor could or would such a court ignore the intent of the Standard.

This, therefore, makes a mockery of the FSANZ claim that the editorial notes are not part of the FSC and are not legally enforceable.

Other examples of concerns can also be given, such as the editorial note contained in Standard 1.4.2 Maximum Residue Limits. Again the editorial note referring to packaged waters is a stand alone statement, with no reference to a Clause of the Standard. Further, this editorial note directs readers to an obsolete version of the Australian Drinking Water Guidelines as a reference document.

To add to the confusion, the Australian Drinking Water Guidelines specifically state in their introduction that they do not apply to bottled water.

The Australian Beverages Council is of the strong opinion that all editorial notes must be removed from the FSC. As noted above, historically the editorial notes were intended to provide assistance in interpreting the Standards. This is exactly the purpose of the User Guides and it would seem superfluous to include such interpretative assistance in the actual FSC when such information would be more appropriately located in the User Guides. This would also resolve the confusion as to their standing in law.

Recommendation 1

The Council suggests that the Bill be amended so that all editorial notes be removed from the body of the Food Standards Code.

The framers of the proposed legislation also considered unnecessary that a prescriptive process be described for the amendment of such editorial notes. The process adopted for the amendment of these “non-legally binding” notes is therefore to be left to be handled through an undefined administrative process by FSANZ.

The Council has serious concerns with this proposal. It could mean that FSANZ may change these editorial notes with their subsequent potential impact on court rulings without any consultation or any reference to the Minister, Ministerial Council or the Parliament. The potential for abuse is, we believe, obvious.

Recommendation 2

The Council suggests that if the Amendment Bill should continue to permit editorial notes to be retained within the body of the Food Standards Code, then the Bill should contain the detailed procedures, consultation and as a minimum Ministerial approval process, with the option of disallowance by the Senate as per other regulations.

Should the Parliament deem it that such consideration would delay the passage of the legislation, then we strongly recommend that the current procedures for amendment to the Food Standards Code apply to editorial notes, except to correct an error of fact.

“STOP-THE-CLOCK” PROVISIONS

Division 5 – Sets out the general rules in relation to the consideration of applications and proposals. The section in general retains current Division 6 provisions. The more noteworthy changes to the Division are:

The existing section 35 of the Act is replaced and sets out the timeframes for assessment and the circumstances in which the clock may be stopped.

The maximum period for assessment of applications is 12 months, but Regulations may prescribe a shorter period.

The Bill proposes that the timeframes for application in each of the processes will be prescribed in the ‘the Regulations’ as follows:

- A maximum of 9 months for the general procedure;
- A maximum of 3 months for minor variations of a food regulatory measure; and
- A maximum of 9 months for certain variations to the Nutrition, Health and Related Claims Standard.

The Authority may extend the assessment period by 6 months (consistent with current practice) in relation to Subdivision E if it is not practicable for the decision to be made within the 12 month period.

The 'consideration period' begins when the Authority begins its assessment or when the applicant pays the relevant fee.

The stop-the-clock provisions that are retained from the Act allow the Authority to stop the clock in a number of circumstances including:

- If the Authority is awaiting further information from an applicant (consistent with current practice);
- While awaiting payment of a fee (consistent with current practice); and
- While an application is being considered by the Administrative Appeals Tribunal.

The Council accepts all of the above, however it strongly objects to the new stop-the-clock provision which has been added. This proposes that:

- If the FRMC has notified the Authority that it is developing a policy guideline and an application relates to the subject matter of the policy guideline. In this case, consideration of an application can be suspended by the Authority for up to an additional 18 months.

FSANZ is required *inter alia* "to take into consideration" any written policy guidelines formulated by the FRMC. This requirement is listed at No. 8 of the eight items required by FSANZ to be taken into account in the development of a Standard. It is not required to implement such policy in each and every Standard as the FSANZ Act requires it to also take into account:

- The protection of public health and safety; and
- The provision of adequate information relating to food to enable consumers to make informed choices;
- The prevention of misleading or deceptive conduct.
- The need for standards to be based on risk analysis using the best available scientific evidence;
- The promotion of consistency between domestic and international food standards;
- The desirability of an efficient and internationally competitive food industry;
- The promotion of fair trading in food;

Given that Standards or variations to Standards developed and approved by the Authority are subject to review by the FRMC, and given that the Council has the power to amend or rewrite and proclaim a Standard which is at variance with the one proposed by FSANZ, we believe that the proposed "stop-the-clock" delay is unnecessary and will seriously inhibit innovation and the competitiveness of Australian industry.

Most of the Applications that are likely to require a "policy consideration" by the FRMC are likely to be aimed at the development of new products to service both domestic and overseas export opportunities. They are also invariably "paid Applications". We suggest that in these situations where the Applications are paid for, FSANZ should be able to continue its assessment work and Standard development at the same time as the FRMC develops its policy guideline. The two time frames are likely to be very similar and would allow FSANZ to "take into account" the policy guideline when making its final recommendation.

Recommendation 3

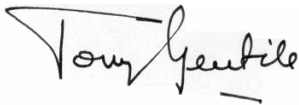
That the provision for an additional “stop-the-clock” provision of 18 months when the FRMC decides that a new policy guideline is needed should be excised from the Bill.

In the event that this is not acceptable, we strongly urge that FSANZ should then immediately refund any moneys paid by applicants for expediting their Applications until it is “capable” of recommencing work on the Application under consideration.

CONCLUSION

The Australian Beverages Council strongly supports any proposal that aims to achieve a more efficient and internationally competitive Food Regulatory development system. Many of the provisions of the proposed legislation aim to achieve just this objective and are therefore supported.

We urge the Committee to recommend appropriate amendments to the Bill be drafted to take into consideration the above recommendations and after adoption of such amendments that the Bill be passed by both houses of Parliament into law.



Tony Gentile
Chief Executive

Appendix A

MEMBER COMPANIES

ABN Amro Australia
AET Films Inc.
Air Liquide Australia Limited
Alchemy Cordial Company
Alpine Beverages Pty Ltd
Aluminium Can Group
AMCOR
AMEC Plastics
AQUA Cooler Pty Ltd
Aqua-Cool Limited
Aquafill Pty Ltd
Pty Ltd
Aquaqueen Australian Spring Water
Aquatek Products Pty Ltd
AgriQuality
ABECS Pty Ltd
Aygee Gippsland Pty. Ltd.
Beaudesert Soft Drinks
Bertshell Pty Ltd
Bevco Pty Ltd
BevTech Consulting
Big Springs Riverina
Big Wet Natural Spring Water
Black Hill Pty Ltd
Blue Mountains Natural Spring Water
Bickfords Australia Pty Ltd
BOC Limited
Brickwood Holdings Pty Ltd
Brooke-Taylor & Co.
Bundaberg Brewed Drinks Pty. Ltd.
Bundaberg Sugar Ltd
Byron Drinks
Cadbury Schweppes (Aust) Pty. Ltd.
Cantarella Bros. Pty Ltd
Cascade Beverage Company
CHR Hansen
Clearwater Filter Systems
Coastal Springs Pty Ltd
Coca-Cola Amatil Ltd
Coca-Cola South Pacific & Korea
Cooks Soft Drinks
Cooroy Mountain Spring Water Pty Ltd
Cormack Packaging Division
Crestbrook Mountain Springs
Crows Nest Cordials Pty Ltd
Crystal Springs Bottled Water
Cuno Pacific Pty Ltd
Domnick Hunter Pty Ltd
Eastcoast Beverages
Ecolab Pty Ltd
Ed Ten Water
Eden Heavenly Springs
Elkay Pacific Rim (M) Sdn Bhd
Firmenich Ltd
Fosters Australia
Fruco Beverages Ltd
Full View Plastics
Functional Packaging Solutions
Givaudan Australia Pty Ltd
Golden Circle Ltd
HBM Plastics & Technologies Pty Ltd
Hidell-Eyster International
Hopes Goulburn Cordials Pty Ltd
Huhtamaki Australia Ltd
International Flavours & Fragrances (Aust) Pty Ltd
IQ Beverages
Jalco Food & Beverages
Johnson & Johnson Pacific
Jolt Corporation Australia Pty Ltd
Juicy Isle Pty. Ltd.
Kerry Ingredients
KHS Pacific Pty. Ltd.
Larglen Pty Ltd
Lillyman Bros
Lithgow Valley Springs
Macca Industries
Macquarie Bank
Manildra Harwood Sugars
Mead International Ltd
Millipore Australia Pty Ltd
MeadWestvaco
ML McPherson's Consulting
Mountain Spring Water Co., Ltd
National Measurement Institute
NCS International
Neverfail Springwater Limited
New England Print Pty Ltd
NSF International
Nutrinova (Australasia) Pty Ltd
NZ Quality Waters Ltd
Occaso Australia
OI Plastics
Orford Refrigeration Pty. Ltd.
P & N Beverages Australia Pty Ltd
Pakval Pty. Ltd.
PepsiCo Australia Holdings Pty Ltd
PET Technologies Ltd
Pall Australia
Pall Food & Beverage
Pleass Beverages & Packaging
Portola Packaging (ANZ) Ltd
Puro Filter Company
Quality Assurance International, LLC
Quirks Australia
Red Bull Australia Pty Ltd
Stanwells Cordials & Confection
Sugar Australia Pty Ltd Symrise Pty Ltd
The Cape Grim Water Company Pty Ltd
The Dannon Company Inc.
The Spring Waterman
The Le Mac Australia Group
The NutraSweet Company Pty Ltd
The Product Makers (Australia) Pty. Ltd
T.W.T. Bottling Pty Ltd
Tasmanian Natural Water Pty Ltd
TCL Hofmann
Unilever Australasia
Visy Industries
Waterfarms Australia Pty Ltd
Waterwarriors International Pty Ltd
Waterworks Australia Pty Ltd
Wimmer Marketing
Wet Fix Pty Ltd
Willchris Pty Ltd
Woodbine Park (Operations) Pty Ltd
Yarra Valley Spring Water

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