

Submission to the

**Commonwealth Department of
Health and Ageing**

on the

**Consultation Paper: Proposed Legislative
Changes to the *Food Standards Australia
New Zealand Act 1991***

April 2006

ACA

**Australian Consumers' Association
INDEPENDENT INFORMATION FOR SMART CONSUMERS**

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About ACA

ACA is an independent, not-for-profit, non-party-political organization established in 1959 to provide consumers with information and advice on goods and services, health and personal finances, and to help maintain and enhance the quality of life for consumers. ACA provides consumer education, conducts surveys into consumer attitudes, lobbies for improved conditions for consumers and distributes unbiased consumer advice.

Independent from government and industry, it lobbies and campaigns on behalf of consumers to advance their interests. ACA is primarily funded through subscriptions to its consumer publications including CHOICE Magazine and CHOICE Online, fee-for-service testing and other related expert services. ACA does not receive government funding for normal running expenses of ACA, nor does it accept commercial sponsorship or advertising.

Introduction

ACA appreciates the opportunity to provide these comments on the proposed legislative changes to the *Food Standards Australia New Zealand Act 1991*. While a number of proposed changes are relatively minor administrative changes, others have significant implications for the FSANZ assessment and approval processes and the level of public consultation FSANZ will be required to undertake.

On a number of occasions during the review of the FSANZ assessment and approval processes ACA has provided comment to the Food Regulation Standing Committee on its concerns about such changes. We see no evidence that these issues have been addressed or even acknowledged.

ACA believes the level of consultation on such significant changes is inadequate and fails to protect the interests of consumers. ACA has raised this concern with the Department of Health and Ageing and a copy of the letter sent to members of the Australian New Zealand Ministerial Council accompanies this submission.

FSANZ assessment and public consultation processes

ACA agrees that there is some scope to streamline the FSANZ assessment and approval process. However, one of the major strengths of the current process is its openness and transparency, and the consistency of consultation processes for all applications and proposals.

In previous submissions and consultation meetings on the review of the FSANZ assessment and approval processes ACA gave in-principle support for changes to streamline the process. That said, we have repeatedly asked for examples of how previous applications and proposals would have been assessed under the proposed streamlined processes. Despite numerous requests for this information has not been provided.

ACA agrees that typographical errors and other changes that will not undermine the interpretation or intent of a Standard can be made without full consultation.

ACA does not support changes that will extend the application of urgency provisions to avoid 'unintended negative impact on trade'. Such a change would place issues of trade above issues of consumer information and misleading and deceptive conduct. While FSANZ must *have regard to* trade issues, legislation provides that its primary objectives are the:

- a. protection of public health and safety;

- b. provision of adequate information relating to food to enable consumers to make informed choices; and
- c. prevention of misleading and deceptive conduct.

To allow urgency provisions to be applied to protect public health and safety *and* address unintended negative impacts on trade is contrary to these objectives. A representative of the Commonwealth Department of Health and Ageing suggested that any such amendment might include a caveat that urgency provisions should not be applied to address unintended negative impacts on trade if it would contradict FSANZ objectives relating to consumer information and misleading and deceptive conduct. This would not satisfy ACA's concerns about the elevation of trade issues to parallel matters of public health and safety.

The Food Regulation Standing Committee and this current consultation paper have failed to provide sufficient detail in relation to the types of applications and proposals that would be subject to only one round of public consultation, rather than the two rounds of consultation that are currently required. The consultation paper cites the addition of vitamins and minerals to food as an example of an application that would require only one round of public consultation because it would merely be a change to an existing table. Such a suggestion fails to acknowledge the level of debate among industry, public health and medical professionals about the fortification of food with vitamins and minerals. Such changes should be subject to full public consultation because they have potentially significant implications for public health and because marketing of these products may result in misleading and deceptive conduct.

The consultation paper also suggests that 'minor' labelling changes may be subject to only one round of public consultation. Yet FSANZ's interpretation of a 'minor' change may be quite different to that of a public health professional, consumer or even industry representative. Such subjective terms should not be used in the amendments and it should not be left to FSANZ to judge how 'minor' a change might be.

During previous consultation on the review of the FSANZ assessment and approval processes it was proposed that an early bird notification could be introduced where applications will only be subject to one round of public consultation. This would ensure that stakeholders are forewarned that FSANZ would be seeking public comment on a particular issue in the near future and stakeholders could prepare for this. The consultation paper on legislative changes to the FSANZ Act fails to address this issue.

ACA cannot support proposed changes to the FSANZ assessment and approval process without further consultation on precise changes to the legislation.

Protection of commercially valuable information - Health claims

ACA does not support the proposed changes to the FSANZ assessment and approval processes for health claims. As we have previously stated, we believe such a proposal is not in the best interest of consumers and public health, instead placing industry interests ahead of the three primary objectives of FSANZ. The suggestion that there should be some protection around applications and commercial information relating to health claims only confirms ACA's concerns that changes to the FSANZ processes are designed to benefit industry, sacrificing openness and transparency and the inhibiting the capacity of public health and consumer organisations to engage in consultation.

ACA appreciates that data protection may be of concern to the food industry, because disclosure may prevent any market advantage that may be gained from product innovation. However, the current processes are designed to protect public health and safety and consumer

interests, and to do this there must be openness and transparency. ACA is also concerned that if information is kept confidential then it will not have been subject to peer-review – an important part of the process for establishing the strength of any scientific information.

The establishment of an expert panel to advise FSANZ on applications to amend the health claims standard does not go far enough to address ACA's concerns. In order to provide adequate protection of consumer and public health interests, applications to amend the health claims standard must be subject to public consultation to enable all public health and consumer stakeholders to comment on the implications of and strength of evidence supporting the proposed changes. This also places unreasonable onus on State and Territory health departments and food authorities to ensure that public health and consumer issues are addressed. However, many departments already struggle to address all the food regulatory issues that they are asked to comment on.

In previous consultation papers on the review of the FSANZ assessment and approval processes, and at the stakeholder meeting in Sydney on 30 March 2006, the elimination of public consultation on future health claims applications was justified on the grounds that health claims are not about public health and safety per se but are about marketing of foods. ACA rejects the assertion for two reasons.

Firstly, ACA believes that there may be considerable negative public health implications if unhealthy foods are able to make claims about the presence of positive nutrients and potential health benefit of consuming a particular food. The draft health claims standard released for consultation in November 2005 would allow Kellogg's Coco Pops – a product that is 33% sugar – to make a claim about being a good source of calcium for bone development. A serve of milk could not claim the same benefit. This notion is inconsistent with public health messages about choosing mainly wholegrain cereal products and consuming moderate amounts of sugar.

Secondly, ACA rejects the implication that only those applications relating to public health and safety should require public consultation. As ACA has previously outlined, FSANZ has three objectives, not only to protect public health and safety but to provide adequate consumer information and prevent misleading and deceptive conduct. These objectives should take precedence over industry interests.

Protection of commercially valuable information – novel foods

We Note that the proposed amendments in relation to novel foods include some level of public consultation. It is however difficult to be sure that these proposals will comply with the FSANZ objectives without sighting draft legislation.

National food recall power

ACA notes that the report of the Food Regulation Review (1998) proposed that the Commonwealth Minister for Health should have the power to order a mandatory recall of food. ACA supported a national protocol for food recalls including the provision of powers to the Commonwealth Minister for Health.

ACA continues to support the inclusion of a provision granting food recall powers to the Commonwealth Minister for Health. We acknowledge that provisions exist within the Trade Practices Act for the Treasurer to issue a recall, however we believe that the FSANZ Act should be amended to specifically provide the Minister for Health with the power to issue a food recall.

ACA is not suggesting that a national recall protocol would eliminate the capacity of individual states and territories to issue a food recall. However, in a case where food safety risks pose an imminent threat to the health and safety of consumers in a number of States and Territories there needs to be a protocol for issuing a food recall that would be consistent across the states and territories, coordinated at the Commonwealth level.

Coordination of policy development and FSANZ processes, and the need to have regard to similar proposals

ACA supports the proposal to allow FSANZ to stop the clock on applications when the Ministerial Council is considering policy that will have implications for those applications. It would be illogical for FSANZ to consider an application when Ministerial Council has not finalised policy guidelines. It could result in a situation where manufacturers intentionally make applications before policy has been finalised because they believe they will achieve a more favourable outcome if no clear policy guidelines exist.

However, ACA believes that it may be beneficial not only to allow FSANZ to stop the clock while policy guidelines are finalised but also while FSANZ finalises work on proposals that are relevant to individual applications. For example, in its submission to FSANZ on Application A470 – Formulated Beverages, ACA suggested that FSANZ should not permit addition of iodine and folate to formulated beverages as FSANZ was in the processes of considering proposals on mandatory fortification of foods with these nutrients. It seems illogical that FSANZ would allow further voluntary fortification of these nutrients when it had not reached a conclusion as to how these nutrients should be added to the food supply in order to address health problems associated with dietary deficiencies in these nutrients.

ACA is concerned about setting a specific timeframe for the clock stop. The consultation paper proposes a maximum of 18 months. It was suggested at the Sydney consultation forum that if policy has not been finalised in the 18-month period, FSANZ should proceed with the assessment process and Ministers would have the capacity to request a review if the FSANZ final assessment is not consistent with Ministerial Council views.

While ACA acknowledges that the 18-month time limit will provide some degree of certainty for applicants we do not believe that it is the best way of co-ordinating policy development and FSANZ processes. A situation may result where Ministerial Council has not finalised policy guidelines in the 18-month period yet FSANZ proceeds with an application. ACA believes it would be better to amend legislation so that FSANZ cannot make a draft assessment until policy guidelines have been finalised. More specifically, FSANZ could carry out an initial assessment and release an initial assessment report for public consultation but should not finalise its draft assessment or release a draft assessment report for consultation, without policy guidelines. This would allow FSANZ to commence its assessment but not proceed too far without Ministerial Council guidance.

ACA acknowledges that other changes to the FSANZ Act may result in a streamlined process that does not involve both initial and draft assessment reports. If applications for which FSANZ will stop the clock are subject to only one round of public consultation ACA believes that FSANZ should not finalise its consultation paper until Ministerial Council has finalised the relevant policy guidelines.

ACA believes that if Ministerial Council has not finalised policy guidelines in 18 months and is not close to finalising policy guidelines after 18 months then this is an indication that the policy may be particularly contentious and it would be unwise for FSANZ to proceed with

assessment of and consultation on such a contentious issue in the absence of a final decision by the Ministerial Council.

The consultation paper also proposes amendments to the FSANZ Act that would require FSANZ to have regard to similar proposals *and applications*. ACA agrees that FSANZ must have regard to similar proposals as well as applications. For example, FSANZ considered three separate applications to add phytosterols to a number of foods. It is important that in the future, similar applications can be processed concurrently as far as practicable. This is particularly important in applications that will require dietary modelling. For example if more than one applicant seeks to amend permissions for the addition of a particular vitamin to different food vehicles FSANZ should not base its determination on which application was received first but on the most appropriate food vehicles for delivering that vitamin.

ACA acknowledges that under current legislation FSANZ must ‘have regard’ to similar proposals but this is very different to allowing FSANZ to ‘stop the clock’ while it finalises a particular proposal. ACA believes that FSANZ must have the capacity to stop the clock on an application until it has finalised work on any proposals that underpin that application.

Other proposed changes

- ACA agrees in principle with streamlining the processes by which FSANZ and the Australian Pesticides and Veterinary Medicines Authority sets maximum residue limits (MRL) to avoid unnecessary delays in the process or duplication of work. However, we are unable to give support for the proposed changes without further detail on the draft legislation.
- ACA supports amending the FSANZ Act to allow FSANZ to approve or reject parts of an application.
- ACA supports amending the FSANZ Act to reflect the important role FSANZ plays in providing information on the Food Standards Code.
- ACA supports extending the “Exemption from Suit” provisions to enable FSANZ to act in good faith to protect the health and safety of consumers, without the threat of legal action.
- ACA supports amendments that would formalise the requirement of FSANZ to provide a final assessment.
- ACA supports amending the FSANZ Act to clarify the effect of editorial notes and statements of purpose and eliminate the requirement for full consultation on elements of the Food Standards Code that are not legally binding. Further ACA supports the requirement for Ministerial Council to give approval for such changes.
- While ACA sees merit in setting minimum application requirements we believe that this will favour those companies that have sufficient resources and expertise to prepare such a detailed application, i.e. larger manufacturers. It also makes it difficult for an individual consumer to make an application that would be of a standard that FSANZ would consider. FSANZ should still provide advice and assistance to individual applicants who are not skilled in the FSANZ application requirements.
- ACA supports the proposal that the Ministerial Council should have the power to establish policy principles that FSANZ must observe, in addition to policy guidelines that FSANZ need only have regard to. This will ensure that FSANZ observes those

aspects of food policy that Ministers agree are vital to the protection of public health and safety and consumer interests.

- While we understand that a second review has only been requested on a small number of occasions ACA does not support the proposal to amend the FSANZ Act to eliminate the capacity for Ministers to request a second review. ACA suggests that it would be more appropriate to amend the conditions under which Ministers can request a review and the need for FSANZ to consult directly with jurisdictions, thereby retaining the opportunity for a second review should the majority of Ministers feel it is warranted.

Closing remarks

ACA welcomes the opportunity to provide these comments on the proposed legislative amendments to the *Food Standards Australia New Zealand Act 1991*. We hope that the issues raised in this submission will be given due consideration.

Some of the proposed legislative amendments have considerable implications for the way in which FSANZ conducts its assessment and approval processes and the level of consultation FSANZ will be required to undertake. This will have significant implications for ACA and its capacity to advocate on behalf of consumers.

Given the magnitude of these legislative changes ACA believes that the current consultation process is inadequate and that all stakeholders must have the opportunity to comment on the draft legislation. As noted above we urge the Department of Health and Ageing to reconsider its decision not to consult further on the proposed changes. Delaying the process to allow for further consultation will not result in any consumer or public health detriment; and it is public health and consumer interests that should be the focus of food regulation.

Should you wish to discuss this further, please do not hesitate to contact Clare Hughes, Senior Food Policy Officer on (02) 9577 3375.