AUSTRALIAN
FOOD AND GROCERY
COUNCIL

SUBMISSION TO

Community Affairs Committee

IN RESPONSE TO

INQUIRY INTO FOOD STANDARDS AUSTRALIA NEW ZEALAND AMENDMENT BILL 2007

13 APRIL 2007

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PREFACE

The Australian Food and Grocery Council is the peak national organisation representing Australia's packaged food, drink and grocery products industry.

The membership of the AFGC comprises more than 150 companies, subsidiaries and associates which constitutes in the order of 80 per cent of the gross dollar value of the highly processed food, beverage and grocery products sectors. (A list of members is included as Appendix A.) The AFGC represents the nation's largest manufacturing sector. By any measure Australia's food, drink and grocery products industry is a substantial contributor to the economic and social welfare of all Australians. Effectively, the products of AFGC's member companies reach every Australian household.

The industry has an annual sales and service income in excess of $68 billion and employs 200 000 people – almost one in five of the nation's manufacturing workforce. Of all Australians working in the industry, half are based in rural and regional Australia, and the processed food sector sources more than 90 per cent of its ingredients from Australian agriculture.

The AFGC's agenda for business growth centres on public and industry policy for a socioeconomic environment conducive to international competitiveness, investment, innovation, employment growth and profitability.

The AFGC's mandate in representing member companies is to ensure a cohesive and credible voice for the industry, to advance policies and manage issues relevant to the industry and to promote the industry and the virtues of its products, enabling member companies to grow their businesses.

The Council advocates business matters, public policy and consumer-related issues on behalf of a dynamic and rapidly changing industry operating in an increasing globalised economy. As global economic and trade developments continue to test the competitiveness of Australian industry, transnational businesses are under increasing pressure to justify Australia as a strategic location for corporate production, irrespective of whether they are Australian or foreign owned. In an increasingly globalised economy, the ability of companies to internationalise their operations is as significant as their ability to trade globally.

Increased trade, rationalisation and consolidation of businesses, increased concentration of ownership among both manufacturers and retailers, intensified competition and dynamic, increasingly complex and demanding consumers are features of the industry across the globe. Moreover, the growing global middle class of consumers is more sophisticated and discerning, driving innovation and differentiation of products and services.

The AFGC is working with governments in taking a proactive, even tactical, approach to public policy to enable businesses to tackle the threats and grasp the dual opportunities of globalisation and changing consumer demands.

1 INTRODUCTION

The Australian Food and Grocery Council (AFGC) welcomes this opportunity to make a submission to the Community Affairs Committee in response to the *Inquiry into Food Standards Australia New Zealand Amendment Bill 2007*.

The first part of this submission provides a summary of the comments made by the AFGC in 2005 in response to

- a call for submissions on the review of the Food Standards Australia New Zealand (FSANZ) processes in developing standards and food regulations; and
- to the Banks Red tape Review,

while in the second part, comments are specific responses by the AFGC in response to the proposed amendments to the FSANZ Act.

2 IMPEDIMENTS TO INNOVATION IN THE NATIONAL FRAMEWORK FOR FOOD REGULATION

Although the original purpose of the Blair Review in 1998 was to simplify food regulation in Australia and New Zealand, the operation of the new system has accumulated excessive red tape and poor delivery in commercial time frames, disadvantaging industry without generating the benefits consumers and government(s) deserved from the reforms.

More and more, consumers are demanding benefits from the foods they purchase beyond that of simple nutrition. The health conscious consumer wishes to take control of their health and expects to take on some "do it yourself doctoring" for diet related chronic disease.

Health benefits of foods are a key driver for industry innovation and are a centrepiece of two national government initiatives under the $137m National Food Industry Strategy; the food innovation grants (FIG) scheme and the National Centre for Excellence in Functional Foods.

Benefits do not just accrue to consumers and industry from this form of innovation. The striving for "better for you" foods has an indirect impact on government(s) health care dollar by improving the health of the nation and contributing to reduced health care costs.

The Victorian Governments leadership in this endeavour was demonstrated in June 2006 at its Future Foods for Future Health Conference which was subtitled 'How Health Issues Will Redefine Food in Australia'.

The Australian Government(s) Better Health Initiative announced at COAG 10 February 2006 recognised the imperative to move more to prevention and early intervention rather than treatment.

It is unfortunate that the food regulatory system works against effective innovation in responding to this initiative (see graph below).

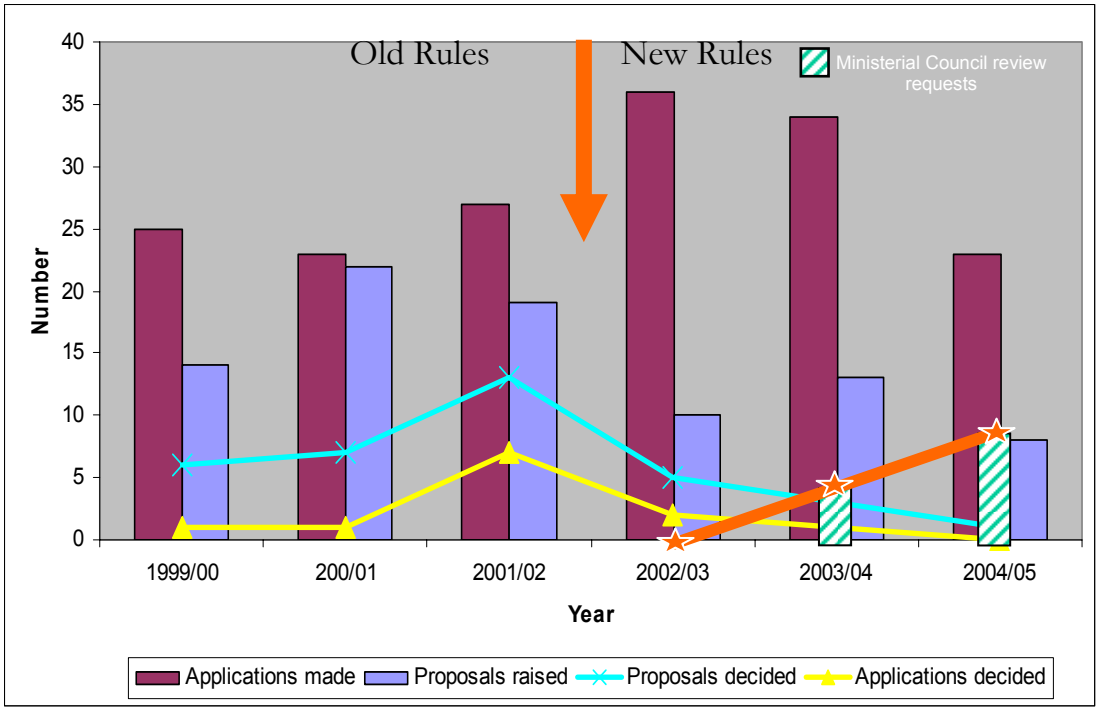
The weaknesses (Box – Examples of delays) of the existing system are in governance and regulation:

- the timeframe for decision making and the cumbersome legislative process for developing or amending a standard,
- the delays occurring as a result of FSANZ waiting for "policy guidance" from the Food Regulation Ministerial Council, and
- calls by the Food Regulation Ministerial Council for "review" when certain jurisdictions on Council have not used the opportunity to put in submissions during the FSANZ standard development process.

The Victorian government's leadership in the national reform agenda to build on competition reform by reducing the regulatory burden and developing human capital is also needed in improving the food regulatory system to get it back to the fundamentals of protecting public health and safety while removing unnecessary impediments to innovation and competitiveness.

The Banks Productivity Commission Red Tape Review highlighted the issues for attention, calling for a reconsideration of the Australian Government role in the food regulatory system, including aspects of enforcement, which are currently a States and Territories responsibility. The Commonwealth government's response was to endorse the recommendations and initiate a review to report to the next COAG meeting.

Efficiency of FSANZ operations pre and post changes to governance structure[1]



[1] Data compiled from FSANZ Annual reports

The current system must be fixed. The duplication of review responsibilities given to both FSANZ and the Ministerial Council creates inefficiencies and an additional cost burden. The veto powers of each member of the Ministerial Council, without regard to the constituents that that minister represents, allows Australia's smallest State to stand in the way of a proposal supported by its largest State.

3 GENERAL COMMENTS

The AFGC supports the major initiatives proposed in this Bill -

- to simply the general procedures for the assessment of food regulatory measure applications and proposals;
- subject to agreement from relevant governments, to simply the process used by the Australia New Zealand Food Standards Council to consider food regulatory measures;
- to introduce a new process for the consideration of food regulatory measures relating to the adoption of high level health claims; and
- to introduce limited external review of decisions relating to the assessment of proposals for food regulatory measures.

4 SPECIFIC COMMENTS AND CONCERNS

EDITORIAL NOTES AND EXAMPLES

The clear intent is that editorial notes and examples are not intended to be part of the Australia New Zealand Food Standards Code. The amendment to subsection 3(1) (page 6 lines 11 and 12) only deals with the situation where the editorial note or example is "boxed".

The word "boxed" should be omitted, as it does not matter whether or not the text is boxed: if the text is identified as an editorial note or example, that is enough for it not to form part of the Code.

It would also be useful to include, either in the amendment or as drafting note for inclusion in published versions of the Act, words like those used in clause 2(2) of this Amendment Bill, ie "Editorial notes and examples may be added to or edited in any published version of the Code".

DECISION TO REJECT AN APPLICATION FOR NON-COMPLIANCE WITH GUIDELINES

An application for a food regulatory measure may be rejected at its initial assessment ("Step 2",) for a number of reasons, including that the application fails to comply with guidelines for application established under section 23 of the Act.

In general, the applicant may appeal to the Administrative Appeals Tribunal for a review of a decision to reject the application, but this appeal right specifically excludes a rejection

that is based on non-compliance with application guidelines (the substituted s.63(1), p10 lines 29-31, and the new subparagraph 143(1)(a)(ii)), p85 lines 19-21).

This has the potential to allow abuse of process for trivial rejections of applications based on over-prescriptive guidelines, bearing in mind that while guidelines are legislative instruments they are NOT subject to disallowance or sunsetting (see s.23(4), page 25, lines 29-31). **There is no supervisory control exercised over the content of these guidelines.**

There is express allowance for an applicant to resubmit a corrected version of an application that has been previously rejected for non-compliance with guidelines, and Food Standards Australia New Zealand retains discretion to accept an application despite non-compliance with the guidelines.

While the potential for harm is recognised as being small, an external merits review process would provide the accountability to ensure that the agency's discretion is used appropriately and that applications are only rejected for non-compliance with guidelines where the non-compliance is of significance to the proper assessment of the application.

For this reason, the AFGC recommends that the words ", other than a decision to reject the application because it does not comply with subsection 22(2)" should be omitted from the proposed subsection 63(1).

REVIEW OF DECISIONS

The introduction of a right to seek external review of decisions to abandon proposals (page 11, lines 1-7) is welcomed. The proposals broadly reflect the equivalent appeal rights that apply in relation to the rejection of applications in subsection 63(1)(a).

However, because proposals are self-generated by FSANZ rather than as a result of any external application, it may be that more extensive appeal rights should be considered, and in particular whether the accountability that comes with external review should apply in relation to decisions to progress proposals, as well as decisions to abandon proposals.

The reason is that where an external applicant actually wants a change, it is the rejection of that change that gives rise to a grievance that external review can address. In the case of internally generated proposals, it is actually the opposite - it is the imposition of a new regulation, for which no external party has applied, that might give rise to a grievance that warrants external review.

On this basis, it is actually decisions to progress proposals (s.60(a), 63(1)(a)(i) and (ii), 69(2)(a)(i) and (ii)), as well as decisions to abandon them, that most merit external review, and the draft subsection 63(1)(b) (page 11, lines 1-7) should be amended accordingly.

There are two other matters of importance that are not subject to the accountability that comes with external review:

1. whether or not information is "confidential commercial information" for the purposes of s.39 the current Act, renumbered as s.114 by this Amendment Act; and

2. whether an application confers an "exclusive capturable commercial benefit" on an applicant for the purposes of fixing a charge (s.27(c), page 27, lines 29ff).

Under current arrangement, a person who provides information to FSANZ must make a claim that it is confidential commercial information. FSANZ then evaluates whether or not it accepts the claim, and if it does not, the provider is given the opportunity to withdraw the information (in which case it is not taken into account) or to leave it with FSANZ on the understanding that no confidentiality applies to the information.

The provider in such cases would generally choose to withdraw the material, which serves only to limit the information available to FSANZ in making its assessments.

Similarly, an applicant who is told by FSANZ that it considers the application to confer an "exclusive capturable commercial benefit" is faced with paying significant sums in order to have the application assessed, but the decision to fix the charge is not subject to any external review.

External review of such determinations to ensure accountability would improve decision making. The proposed subsection 63(1) should therefore be extended by inserting, after line 9 on page 11, two new provisions providing a right to seek AAT review of FSANZ decisions in these two regards.

ASSESSMENT OF COSTS AND BENEFITS

In section 29(2), express reference is made to "direct and indirect" benefits (page 29, line 34), but the same language is not used in relation to costs (page 29, line 32).

There should be equivalence in the terminology: the clause should read either "costs" and "benefits"; or "direct and indirect costs" and "direct and indirect benefits".

The current language suggests only direct costs are to be considered.

The same issue arises in relation to the assessment of proposals in section 59(2)(a) on page 41, lines 11 and 13.

CLAUSE HEADING TO SECTIONS 34 AND 64

These clauses relate to notifying the Council and the public about approved applications and proposals, but the clause heading only refers to the Council.

It would be more accurate in both cases to append the words "and the public" to both clause headings (page 32, line 18 and page 43, line 18 respectively).

APPLICATIONS AND PROPOSALS FOR MINOR VARIATIONS

The note appended to sections 36 and 66 includes reference to a variation whose only effect would be "to update a reference to another document" (page 34, line 13 and page 45, line 13).

This may cause confusion, because it is entirely possible that updating a reference might vary an obligation on a person (if, for example, the updated document included a revised specification for a food additive), in which case the measure would not qualify as "minor variation" eligible for the shortened process.

There is no concern about the provision itself, it is simply that the example is not a good one, and should be omitted.

COUNCIL CONSIDERATION OF FOOD REGULATORY MEASURES

The Council, under this Bill, retains the right to amend a draft food regulatory measure (after one or two review processes, depending on the operation of the commencement provisions) - see s.86(1)(d) (page 52 line 27), s.106(1)(b) (page 63, line 22) and s.88(1)(b) (page 89, line 17). This reflects the status quo.

However, it must be remembered that in making such amendment, the Council has undertaken no public consultation, made no scientific or policy assessment and is not subject to external review. The amendment option lacks transparency, accountability and even technical feasibility.

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.

NOTIFICATION OF REJECTION BY COUNCIL

Sections 86(5)(c) (page 53 lines 7-9), 106(2)(c) (page 63, lines 28-30) and 91 (page 90, line 11-13) require the Council to publish a notice "on the Internet" and in newspapers.

It would be more consistent with the remainder of the processes if FSANZ instead were required to give public notice and newspaper advertising of the rejection, together with how further information might be obtained.

This would ensure all food regulatory measure notices appear on the one internet site, rather than having this notice appear on some other site.

"STOP THE CLOCK" FOR POLICY GUIDELINES

Proposed section 109(9) (page 67, lines 10-16) provides that the time in which an application must be assessed is suspended, if the Council notifies FSANZ that it is formulating policy guidelines that might affect the application.

This has the potential for procedural abuse, even though the suspension in time is limited to a maximum of 18 months (see proposed paragraph 109(10)(c)), and recognising that the operative word "may" confers a discretion on FSANZ as to whether or not the "clock" should be "stopped".

While it is recognised that resources spent on the assessment of applications may be rendered ineffectual by the introduction of subsequent contrary policy, the provision could be used to halt consideration of an application, possibly nearing completion, upon the

speculative basis that a policy might be developed that might affect the outcome of the assessment.

The better approach in such an instance would be for the "stop the 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.

HIGH LEVEL HEALTH CLAIMS

The new procedures in Subdivision G of Part 3 (p.74ff) are intended to allow for the assessment of applications for new high level health claims, using limited consultation with an expert committee and with enforcement jurisdictions rather than wider public consultation.

The provisions, quite correctly, do not compel FSANZ to undertake public consultations except at the request and election of the applicant. However, FSANZ is not required to act in a formal manner, and:

> " may inform itself on any matter in such manner as it thinks fit and may consult with such persons as it thinks fit" (clause 107, p65).

While the new provisions do not compel FSANZ to undertake public consultations, they do not prohibit FSANZ from undertaking such consultations if it sees fit. This is not understood to be the intention of the new procedures, which is that no public consultation occur in relation to such applications.

A specific prohibition against public notification and consultation (except at the request or with the consent of the applicant) needs to be added.

The new procedure is limited to applications relating to high level health claims. While not proposed as part of this amending Bill, further consideration should be given to extending this process to other issues where the potential for advance disclosure of marketing plans or product development is impeding the development of food regulation and the food industry. The examples of novel foods and new food additive applications come immediately to mind.

Additionally, the proposed s.118(1B) (page 85, lines 4-7) creates a potential for abuse, in that the Authority could avoid dealing with a high level health claim application simply by failing to establish the relevant committee.

This is not intended, but the requirement to take into account the recommendations of the High Level Health Claims Committee (s.50(2)(b), p78, and s.76(2)(b), page 82) would appear to be adequate protection without the need for this provision, which only acts to the detriment of applicants.

This clause s.118(1B) (page 85, lines 4-7) could usefully be omitted.

5 CONCLUSION

The AFGC wishes to draw the committee's attention to the process and procedures for review of a regulatory measure set down by the Council of Australian Governments for Ministerial Councils. These matters have been highlighted in the Victorian Competition and Efficiency Commission draft report*: Simplifying the menu: Food Regulation in Victoria.*

It is the AFGC opinion that much of the delays observed under the current framework could have been reduced if these principles of cost and voting had been in place for the Food Regulation Ministerial Council.

Council of Australian Governments

Extract from Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standard-Setting Bodies

Endorsed by COAG April 1995, Amended by COAG November 1997, June 2004.

E. Assessment of National Standards Proposed to be adopted by a Ministerial Council or other Intergovernmental Standard-Setting Body

All national (intergovernmental) standards which require agreement by Ministerial Councils or standard-setting bodies (including standards developed by other bodies) should be subject to a nationally consistent assessment process. The process is set out below……

(2) Review

If, at the conclusion of the impact assessment process outlined above, there is some dissatisfaction with the process or adequacy of the analysis by which its conclusions were reached, **two or more jurisdictions may request a review of the proposed national standard**. The Ministerial Council or other intergovernmental standard-setting body must then defer its consideration of the standard and commission a review.

The process of independent review would be triggered if two Heads of Government write to the Chair of the Ministerial Council or standard-setting body requesting an independent review of the assessment process. Upon completion, the review body will report back to the relevant Ministerial Council or standard-setting body.

The Ministerial Council is to nominate an independent body to conduct the review. This might include a regulatory review body in any jurisdiction, an appropriate specialist body or a consultant. **Jurisdictions which request the review will meet its cost** and agree to make resources available for the conduct of the review if the Ministerial Council decides to use State or Territory Government regulatory review units to conduct the review

Written and Authorised by

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AUSTRALIAN FOOD AND GROCERY COUNCIL

AFGC MEMBERS AS AT 28 FEBRUARY 2007

AAB Holdings Pty Ltd
Arnott's Biscuits Ltd
- Snack Foods Ltd
- The Kettle Chip Company Pty Ltd

Asia-Pacific Blending Corporation Pty Ltd
Australia Meat Holdings Pty Ltd
Australian Pacific Paper Products
Barilla Australia Pty Ltd
Beak & Johnston Pty Ltd
BOC Gases Australia Ltd
Bronte Industries Pty Ltd
Bulla Dairy Foods
Bundaberg Brewed Drinks Pty Ltd
Bundaberg Sugar Ltd
Cadbury Schweppes Asia Pacific
Campbell's Soup Australia
Cantarella Bros Pty Ltd
Cerebos (Australia) Ltd
Christie Tea Pty Ltd
Clorox Australia Pty Ltd
Coca-Cola Amatil (Aust) Ltd
- SPC Ardmona Operations Ltd

Colgate-Palmolive Pty Ltd
Coopers Brewery Ltd
Dairy Farmers Group
Danisco Australia Pty Ltd
Devro Pty Ltd
Dole Australia Pty Ltd
DSM Food Specialties Australia Pty Ltd
DSM Nutritional Products
Fibrisol Services Australia Pty Ltd
Fonterra (Australia) Pty Ltd
Foster's Group Limited
Frucor Beverages (Australia)
General Mills Australia Pty Ltd
George Weston Foods Ltd
- AB Food and Beverages Australia
- AB Mauri
- Cereform/Serrol
- GWF Baking Division
- GWF Meat & Dairy Division
- George Weston Technologies
- Jasol
- Weston Cereal Industries

GlaxoSmithKline Consumer Healthcare
Golden Circle Ltd
Goodman Fielder Limited
- Meadow Lea Australia
- Quality Bakers Australia Pty Ltd

Green's Foods Ltd
H J Heinz Company Australia Ltd
Hans Continental Smallgoods Pty Ltd
Harvest FreshCuts Pty Ltd
Heimann Foodmaker Group
Hoyt Food Manufacturing Industries Pty Ltd
J Boag and Son Brewing Ltd
Johnson & Johnson Pacific Pty Ltd
- Kellogg (Australia) Pty Ltd
  - Day Dawn Pty Ltd
- Kimberly-Clark Australia Pty Ltd
- Pfizer Consumer Healthcare

Kerry Ingredients Australia Pty Ltd
Kraft Foods Asia Pacific
KR Castlemaine
Lion Nathan Limited
Madura Tea Estates
Manassen Foods Australia Pty Ltd
Manildra Harwood Sugars
MasterFoods Aust. NZ
- Food
- Petcare
- Snackfood

McCain Foods (Aust) Pty Ltd
McCormick Foods Australia Pty Ltd
Merino Pty Ltd
Merisant Manufacturing Aust. Pty Ltd
National Foods Ltd
Nerada Tea Pty Ltd
Nestlé Australia Ltd
- Nestlé Foods & Beverages
- Nestlé Confectionery
- Nestlé Ice Cream
- Nestlé Chilled Dairy
- Nestlé Nutrition
- Foodservice & Industrial Division

Novartis Consumer Health Australasia Pty Ltd
Nutricia Australia Pty Ltd
Nutrinova (Australasia) Pty Ltd
Ocean Spray International, Inc
Parmalat Australia Ltd
Patties Foods Pty Ltd
Peanut Company of Aust Ltd
Procter & Gamble Australia Pty Ltd
PZ Cussons Australia Pty Ltd
Quality Ingredients Ltd
- Prima Herbs and Spices

Reckitt Benckiser (Australia) Pty Ltd
Ridley Corporation Ltd
- Cheetham Salt Limited

Sanitarium Health Food Company
- Longa Life Vegetarian Products Pty Ltd

Sara Lee Australia
- Sara Lee Foodservice
- Sara Lee Food and Beverage

SCA Hygiene Australasia
Schwarzkopf and Henkel
Sensient Technologies
Simplot Australia Pty Ltd
Specialty Cereals Pty Ltd
Spicemasters of Australia Pty Ltd
Stuart Alexander & Co Pty Limited
Sugar Australia Pty Ltd
SunRice
Symrise Pty Ltd
Tetley Australia Pty Ltd
The Smith's Snackfood Co.
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Waters Trading Pty Ltd
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Sue Akeroyd & Associates
Supply Chain Consulting Pty Ltd
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Swisslog Australia Pty Limited
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Touchstone Consulting Australia Pty Ltd
Visy Pak
Wiley & Co Pty Ltd

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