Ministry for Primary Industries
Manatū Ahu Matua

29 September 2014

Food Standards Australia New Zealand
PO Box 10559
The Terrace
WELLINGTON 6036

[redacted]

Dear Sir/Madam

Consultation Paper: Health Claims – Formulated Supplementary Sports Foods and Electrolyte Drinks

Thank you for the opportunity to comment on this consultation paper and for the work undertaken to support the paper.

The Ministry for Primary Industries (MPI) supports the transfer of the Standard for Electrolyte Drinks (EDs) to the Australia New Zealand Food Standards Code (the Code), Standard 2.9.4, as the purpose of these drinks best fits within the scope of Standard 2.9.4.

With regard to the proposed changes to the text of the proposed Standard 2.9.4, MPI has the following comments to make:

1. The ability to include the claim 'the product is designed to promote the availability of energy and to prevent or treat mild dehydration that may occur as a result of sustained strenuous exercise' on a product label should be based on scientific evidence to support this food-health relationship and the compositional requirements. For transparency, we suggest the basis of the statement and composition are made available.

2. It is understood that many consumers of EDs are not using them after sustained strenuous exercise. To facilitate improved informed consumer choices it is suggested that; a) a dietary context statement is required to inform consumers on the correct use of the product (e.g. This product is formulated to replace electrolytes following 60 minutes (or more) of strenuous exercise). The period of exercise should be supported by evidence (as noted in point 1 above) and b) Standard 1.2.7 is amended to include a pre-approved General Level Health Claim in Schedule 3 to facilitate the use the use of hydration claims on water products.

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3. The suggested restriction on the scope of health claims to be made on electrolyte drinks is not supported by MPI. We believe that this will unnecessarily restrict innovation in terms of future product/ ingredient development and the growth of scientific evidence regarding the application of EDs in sports performance. It is suggested that this restriction is removed. The requirements of Standard 1.2.7 will facilitate evidence based claims.

4. The transfer of EDs to Standard 2.9.4 will remove the ability for these products to make vitamin and mineral Nutrition Content Claims under Standard 1.2.7. It is unclear if this is intentional or an oversight, but this issue should be discussed in the proposal.

5. Clause 13.5 lists the additives proposed to be included as permitted in electrolyte drinks. This list is a compilation of the permissions for water based beverages in general and for electrolyte drinks specifically from Standard 1.3.1. However, we note that the current permission for cyclamates has not been transferred. This may simply be an omission. However, if this is intended we suggest some analysis and explanation is required. It is important any use of this sweetener in EDs is considered before such permission is removed.

6. MPI agrees that the reference to minerals from the definition is removed. Given this, MPI also suggests that minerals is removed from Clause 15 (2)(b).

A number of questions have been identified which continue to arise in association with electrolyte drinks. These are outlined as follows, as it may be appropriate to clarify the answers in the revised Standard 2.9.4, elsewhere in the Code or associated user guides.

7. Currently there are a number of drinks with no or low carbohydrates on the market. We understand that these products are not able to be called EDs as they do not meet the compositional requirements in the definition (in particular in relation to the replacement of carbohydrate). MPI understands that despite not containing carbohydrates, these drinks are recommended for athletes who do not need the additional carbohydrates or choose to use other sources of carbohydrate as part of their individual dietary plan. It is suggested that once the evidence for the allowed statement (as noted in point 1 above) is made available, the following position is considered: If the evidence clarifies that carbohydrate is essential in electrolyte replacement, the proposed Standard should include a note to clarify that drinks with no or low carbohydrate cannot be EDs, and clarify how such products should be classified under the Code. If the evidence suggests that carbohydrate is not essential, two product formulations and proposed product names (ED's and no sugar EDs) will be required in the proposed Standard.

8. A definition of 'electrolytes' is required to better understand and implement the proposed Standard.

9. There is also a need to clarify whether the term 'electrolyte' can be used on other foods and drinks. As you may be aware there are several food products claiming the presence of electrolytes. MPI suggests that Standard 1.2.7 be amended to include a pre-approved Nutrition Content Claim in Schedule 1 and a General Level Health Claim in Schedule 3 for "electrolytes" to proactively clarify the use of the term electrolyte on product and set appropriate conditions.

10. Clarity is required on whether caffeine can be added to EDs. Currently under Clause 9 (2) of Standard 2.6.2, it is clear that formulated beverages are not permitted to contain caffeine. A similar provision is not provided for EDs, making it unclear as to whether caffeine can be added as an ingredient or not.MPI was involved in a High Court judgement regarding the sale of an isotonic sports drink containing caffeine. Although MPI and the Judge considered that caffeine could not be added to EDs, this case highlighted the lack of clarity for industry and government in terms of compliance with and enforcement of this standard. Based on this, MPI seeks clarification in this standard as to whether caffeine is permitted to be added as an ingredient to EDs or not. Attached is a copy of the related case 'Sanson *v The Attorney-General 9 October 2012"* for your information.

Finally, for consistency and clarity in the proposed Standard, the following suggestions are made:

11. The executive summary, section 2.1 and the definition of EDs discusses 'rapid replacement of fluid, carbohydrates and electrolytes...' while the proposed claim in Division 4, Clause 17 does not suggest that 'rapid' can be used. There is a need to determine if 'rapid' is allowable, based on the evidence available (as per point 1).

12. Under the purpose of the proposed Standard, 'and electrolyte drinks' should be removed from the end of the first sentence. The first part of the sentence includes EDs (i.e. they are foods specifically formulated to assist sports people in achieving specific nutritional or performance goals), therefore 'and electrolyte drinks' is not required. For clarity the words 'and drinks' could be added after the word 'foods'.

13. In paragraph two of the purpose statement we suggest that "such products" is replaced with "formulated supplementary sports foods" for clarity, as electrolyte drinks are not unsuitable for children undertaking at least 60-90 minutes of strenuous exercise.

14. For consistency, Division 2, Clause 6 should read '6 Health Claims about Formulated Supplementary Sports Foods'.

15. The list in Division 4, Clause 14 (3) should be clarified that the minerals in the list are indeed all electrolytes. MPI considers that for clarity, Clause 14(3) be reworded to state that an electrolyte drink may contain the electrolytes: calcium, potassium, sodium and magnesium, in the following permitted forms (and then refer to the list in subclause 3). This could link to the proposed definition outlined in point 8 above.

16. It is noted that the use of the claim detailed in Division 4, Clause 17 does not require the inclusion of a dietary context statement. This is inconsistent with health claims facilitated by Division 2, Clause 6 and Division 4, Clause 16. We suggest that this needs to be consistent across the Standard and that a dietary context statement should be required as per point 2 above.

17. MPI is in agreement that the nutrient profiling scoring criterion should not apply for the reasons outlined in the paper.

Thank you again for the opportunity to comment. Please let me know if you have any questions associated with this submission.

[redacted]

Manager Food Science and Risk Assessment

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2011-485-2386
[2012] NZHC 2627

UNDER	Part I of the Judicature Amendment Act 1972
IN THE MATTER OF	an application for judicial review
BETWEEN	CHRIS ALEXANDER SANSON Applicant
AND	THE ATTORNEY-GENERAL Respondent

Hearing: 14 May 2012

Appearances: The applicant in person
R Chan and S Ritchie for the respondent
I Hikaaka for Coca-Cola Amatil (NZ) Limited, an interested party

Judgment: 9 October 2012

JUDGMENT OF CLIFFORD J

Introduction

[1] The applicant, Mr Sanson, manufactures *Loaded Punch*, an energy drink. In March and August 2011 Mr Sanson made separate complaints to the Ministry of Agriculture and Fisheries ("the Ministry")[1] about drinks produced by competitors.

[1] Mr Sanson sues the Attorney-General "on behalf of the Minister for Food Safety acting through the Director-General and the New Zealand Food Safety Authority under and by virtue of the provisions of the Food Act 1981". In his statement of claim and affidavits, Mr Sanson refers to having made his complaints to the New Zealand Food Safety Authority. On 1 July 2010 the New Zealand Food Safety Authority was amalgamated back into the Ministry of Agriculture and Fisheries. On 30 April 2012 that Ministry was merged into the Ministry for Primary Industries. I therefore write this judgment on the basis that Mr Sanson made his complaint to the Ministry, that being a reference – as provided in the Food Act 1981 itself – to the Ministry which administers that Act.

Although Mr Sanson expressed his complaints in different ways at different times, by my assessment in essence he said:

(a) in his March complaint, that *Loaded Energy Sports Assassin* ("*Loaded Energy*") manufactured by South Pacific Brands Ltd,[2] a self described "Isotonic Sports Drink", unlawfully contained caffeine; and

(b) in his August complaint, that *Powerade Fuel+*, a self described "Sports Energy Drink", manufactured and marketed by Coca-Cola Amatil (NZ) Ltd ("Coca-Cola"),[3] unlawfully contained the minerals tri-potassium citrate and tri-potassium phosphate.

[2] The gist of Mr Sanson's complaints was and is that what he describes generally as energy drinks and sports drinks are required to be separate categories of product under food standards administered by the Ministry. They may not be mixed together. More specifically, Mr Sanson argues:

(a) that isotonic sports drinks, or electrolyte drinks as they are technically known, are not allowed to contain caffeine (the key ingredient in energy drinks); and

(b) that energy drinks, or formulated caffeinated beverages ("FCBs") as they are technically known, are not allowed to contain the minerals (also known as electrolytes) which give sports drinks their particular functional qualities, including that of aiding "rapid rehydration".

[3] In response to Mr Sanson's complaints the Ministry determined:

(a) that *Loaded Energy* was what is known as a "supplemented food" and therefore could lawfully contain caffeine; and

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2 Formerly Demon Drinks Ltd.

3 Two other Coca-Cola entities, Coca-Cola South Pacific Pty Ltd and Coca-Cola Oceania Ltd, are involved in the manufacture and marketing of the Coca-Cola Company's beverages in New Zealand. I refer to all these entities as, simply, Coca-Cola.

(b) that *Powerade Fuel+* was an FCB and the minerals in question – tri-potassium citrate and tri-potassium phosphate – were lawful additives.

[4] The Ministry did find, however, that claims made on the labels of each of the drinks breached the relevant Food Standards.

[5] The single issue I must determine by way of judicial review of the Ministry's decisions is whether the Ministry was right as a matter of law in the way it interpreted applicable Food Standards in making its decisions on Mr Sanson's complaints regarding *Loaded Energy* and *Powerade Fuel+*. It is not, as I emphasised to Mr Sanson, whether those Standards should provide that energy drinks and sports drinks are required to be separate categories of product.

Energy drinks and sports drinks

[6] Although not the subject of formal affidavit evidence, it was accepted at the hearing of Mr Sanson's application that, from a lay or public perspective, there are indeed the two types of drinks at issue here that Mr Sanson referred to.

[7] **Energy drinks**, of which *Red Bull* was the first, or a very early, example, are caffeine based and marketed in 250 – 500 ml cans. I was provided with a range of samples which I list by product name, description (as that description typically appears on the can in close proximity to the product's name), and can size:

- "*Red Bull Energy Drink*": 250 ml can;
- "*V Guarana Energy Drink*": 250 ml can;
- "*Pure Energy*": 355 ml can;
- "*Monster Energy*": 500 ml can;
- "*Miss Helen's Massive Melons High Strength Energy Drink*": 500 ml can; and
- "*Rockstar Energy Drink*": 500 ml can.

[8] The *Monster* and *Rockstar* cans also refer prominently to ingredients: guarana, taurine, ginseng and inositol in the case of *Monster*; and caffeine, guarana, ginseng, B-vitamins and taurine in the case of *Rockstar*. The text on all of these cans

makes broadly similar claims that the energy drink enhances energy levels. That claim is made in a variety of styles, from *Red Bull's* relatively traditional "Specifically developed for periods of increased mental and physical exertion" to *Monster's* more "hip" "MONSTER® packs a powerful punch but has a smooth flavour you can really pound down". The claims made by the *Miss Helen's Massive Melons*' product do not bear repeating.

[9] **Sports drinks** contain ingredients designed to aid rehydration during physical exercise and are packaged and presented differently to energy drinks. As described to me, and as I acknowledge I know from my own experience, sports drinks – often garishly coloured – are typically bottled in larger, "sip top" polystyrene bottles of 750 ml or 1 litre size. I was provided with samples of two *Powerade* products, both labelled "*Powerade Isotonic*". Beyond the reference to Isotonic, no ingredients were prominently referred to, nor were the words "sports drink" used. The *Powerade* label shows a stylised person running, and contains the following text:

> Powerade Isotonic is scientifically proven to help you perform at your peak longer. The special blend of carbohydrates and electrolytes is in balance with your body's fluid to provide fast and effective hydration.

[10] This identification of energy drinks and sports drinks as comprising separate product categories was reflected in an affidavit sworn by Ms Delina Shields, the Marketing Manager for Coca-Cola. Coca-Cola markets products under the *Powerade* brand. In that affidavit Ms Shields distinguished between *Powerade Fuel+*, which she described as an energy drink, and *Powerade Isotonic*, which at various places in her affidavit she referred to as *Powerade Isotonic* "sports drink" and *Powerade Isotonic* "sports". Ms Shields drew attention to the following statements on the *Powerade Isotonic* bottle:

> The special blend of carbohydrates and electrolytes is in balance with your body's fluid to provide fast and effective hydration.

And:

> To help prevent and treat mild dehydration drink 250mls every 15 minutes during sustained strenuous exercise.

[11] By reference to those two categories, *Loaded Energy* and *Powerade Fuel+* appear to occupy something of a middle ground.

[12] *Loaded Energy* is marketed in a one litre sip top polystyrene bottle and therefore "looks like" a sports drink. Like the *Powerade Isotonic* sports drinks, its label includes a stylised representation of sports activities. However, in contrast to the two *Powerade Isotonic* sports drinks, it includes "Energy" in its name. Its label bears the following phrase "Energy + Guarana + Taurine Isotonic Sports Drink". The following text appears on its label:

> Loaded has been specifically engineered by leading beverage technologists to contain over 50% more electrolytes (per 100ml) than New Zealand's best selling Isotonic Sports Drink.
>
> Loaded Sports Assassin has also been supercharged with more Taurine and Caffeine than any Isotonic Sports Drink in New Zealand. This massive Energy Boost is designed to enhance output when competing in high performance sports.

[13] It is clear to me that – in the common parlance that I have adopted – *Loaded Energy* is a sports *and* energy drink. As noted, the Ministry considered *Loaded Energy* to be a supplemented food.

[14] *Powerade Fuel+* appears similar to the energy drinks previously described. It comes in a 300 ml can. At the same time, its label also reflects a hybrid product. Most obviously it calls itself a "Sports Energy Drink". It refers, under the *Powerade Fuel+* name, to "Caffeine and Electrolytes". It carries the following product claim:

> Scientifically Formulated Energy For Sport. Caffeine Energy + Carb Fuel + Electrolytes. This product is intended for high intensity sports and recreational activities. It is not intended to be consumed in high quantities for rehydration during such activities. For optimum hydration we recommend consuming POWERADE® Isotonic Sports Drinks. For best results consume 1 can of POWERADE FUEL + before sport or exercise. Maximum two cans per day.

[15] By its own description, *Powerade Fuel+* is also an energy *and* sports drink, although with qualified rehydration claims. As noted, the Ministry considered *Powerade Fuel+* to be an FCB.

[16] The issue before me is whether the Ministry was correct in its interpretation of relevant standards when it classified *Loaded Energy* as a supplemented food and *Powerade Fuel+* as an FCB. To resolve that issue, it is necessary to determine how sports and energy type drinks are properly categorised under those standards, as the terms "energy" and "sports" drinks are not used in those standards. I comment at once that the standards involved are both detailed and confusing.

The regulatory framework – an overview

[17] The manufacture, sale and advertising of food, ie "anything that is used or represented for use as food or drink for human beings",[4] is currently regulated by the Food Act 1981. A Food Bill, containing extensive reforms, is currently under consideration.

[18] The Food Act is divided into six parts:

(a) Part 1 contains provisions relating to the application and administration of the Food Act. As relevant, s 4 defines what constitutes the "sale" of food.

(b) Part 1A provides for a voluntary transmission from compliance with the Food Hygiene Regulations 1974 to the adoption, by the food industry, of food safety programmes. The provisions of Part 1A are not relevant here.

(c) Part 2 contains general provisions regulating the sale and advertisement of food. As relevant here, s 9(4) contains a general prohibition on the sale of food that is unsound, unfit for human consumption, contaminated or in some other ways injurious to health. More specifically s 9 contains a number of provisions regulating the sale of food by reference to food standards, requiring such food to comply with the reference standard. Part 2 is not directly relevant to the matters under consideration here.

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[4] Food Act 1981, s 2.

(d) Part 2A provides for the issue of food standards, and creates the regime for compliance with food standards. Section 11C gives the Minister the power to issue food standards relating, amongst other things, to food safety, to the composition of food and to other matters relating to food as may affect public health. Section 11O requires persons who produce, manufacture and sell (etc) food to comply with all relevant food standards. Section 11Q makes the contravention of s 11O an offence and establishes penalties. The provisions of Part 2A, and of food standards made under that Part, are at issue here.

(e) Part 3 of the Food Act contains enforcement provisions and Part 4 contains a range of miscellaneous provisions. To the extent that, in his statement of claim, Mr Sanson asked the Court to direct the Ministry to take certain enforcement actions, he can be seen as bringing Part 3 into play as well. The Ministry has the ability to institute enforcement action in the courts against suppliers of food it believes to be contravening food standards.

Food Standards

[19] In November 2002 the Minister issued the New Zealand (Australia New Zealand Food Standards Code) Food Standard 2002 ("the Code"). In that way Standards prepared under the Australia/New Zealand Food Standards System by the Australian legal entity "Food Standards Australia New Zealand",[5] were promulgated as New Zealand Food Standards ("Standards"). The Standards of particular relevance to this case are:

(a) Standard 1.1.1, containing Preliminary Provisions – Application, Interpretation and General prohibitions ("the Preliminary Provisions Standard");

(b) Standard 1.3.1, dealing with Food Additives ("the Additives Standard");

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[5] New Zealand is a member of that entity, along with the Federal Government of Australia and the Australian states and territories.

(c) Standard 1.3.2, dealing with Vitamins and Minerals ("the V and M Standard");

(d) Standard 2.6.2, dealing with Non-Alcoholic Beverages and Brewed Soft Drinks ("the Non-Alcoholic Beverages Standard"); and

(e) Standard 2.6.4, dealing with Formulated Caffeinated Beverages ("the FCB Standard");

[20] A further, and New Zealand specific, Standard is also relevant. This is the New Zealand Food (Supplemented Food) Standard 2010 ("the Supplemented Food Standard"). The purpose of the Supplemented Food Standard is to:

(a) provide an interim regulatory arrangement for supplemented food until there are appropriate permissions in the Code; and

(b) regulate "food-type" dietary supplements that were formerly regulated under the Dietary Supplements Regulations 1985.

[21] A supplemented food is defined as a product that is represented as a food that has a substance or substances added to it or that has been modified in some way to perform a physiological role beyond the provision of a simple nutritive requirement.

[22] This definition raises issues of overlap with other standards, and introduces more confusion.

[23] Clause 7 of the Supplemented Food Standard provides that specified standards in the Code also apply to this Standard, with necessary modification.

[24] The Standards govern the addition of substances, other than ingredients, to food. An important general proposition is found in clause 9 of the Preliminary Provisions Standard. Clause 9 reads:

> **Prohibition on addition of nutritive substances to food**
>
> Nutritive substances must not be added to food unless expressly permitted in this Code.

The term "nutritive substance" is defined in the following way:

> **Nutritive substance** means a substance not normally consumed as a food in itself and not normally used as an ingredient of food, but which, after extraction and/or refinement, or synthesis, is intentionally added to a food to achieve a nutritional purpose, and includes vitamins, minerals, amino acids, electrolytes and nucleotides.

[25] More specific prohibitions relevant to the issues Mr Sanson raises are found in the Additives and V and M Standards:

(a) Clause 2 of the Additives Standard reads:

> Unless expressly permitted in this Standard, food additives must not be added to food.

The term "food additive" is defined in the following way:

> A food additive is any substance not normally consumed as a food in itself and not normally used as an ingredient of food, but which is intentionally added to a food to achieve one or more technological functions specified in Schedule 5 of Standard 1.3.1. It or its by-products may remain in the food. Food additives are distinguishable from processing aids (see Standard 1.3.3) and vitamins and minerals added to food for nutritional purposes (see Standard 1.3.2).

Even where expressly permitted, the proportion of an additive is to be no more than the maximum level necessary to achieve one or more technological functions under the conditions of Good Manufacturing Practice (GMP).

Caffeine, tri-potassium citrate and tri-potassium phosphate are all additives.[6]

(b) Clause 2 of the V and M Standard reads:

> **Prohibition on adding vitamins and minerals to food**
>
> A vitamin or mineral must not be added to food unless the–
>
> (a) addition of that vitamin or mineral is specifically permitted in this Code; and

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[6] Caffeine's role as a food additive is as a flavouring agent. Tri-potassium citrate and tri-potassium phosphate are used as food additives to regulate acidity and act as stabilisers and also as flavouring agents.

(b) vitamin or mineral is in a permitted form specified in the Schedule to Standard 1.1.1, unless stated otherwise in this Code.

[26] A similar specific prohibition, helpful in understanding the overall scheme of the Standards though not directly relevant to the issues Mr Sanson raises, is found in Standard 1.3.3 on Processing Aids. Clause 2 of that Standard reads:

> **General prohibition on the use of processing aids**
>
> Unless expressly permitted in this Standard, processing aids must not be added to food.

[27] The term "processing aid" is defined in the following way:

> **processing aid** means a substance listed in clauses 3 to 19, where–
>
> (a) The substance is used in the processing of raw materials, foods or ingredients, to fulfil a technological purpose relating to treatment or processing, but does not perform a technological function in the final food; and
>
> (b) The proportion of the processing aid is no more than the maximum level necessary to achieve one or more technological functions under conditions of Good Manufacturing Practice (GMP).

[28] The difference between a food additive and a processing aid is that a food additive performs a technological function in the final food, whereas the processing aid performs such a function at the process or treatment stage.

[29] The term "ingredient", used in the definitions of nutritive substance, and food additive in an exclusionary way, and also referred to in the definition of processing aid, is not itself, at least as best as I can tell, defined or otherwise explained in the Standards. My understanding is that ingredients, for example raisins in scones, do not require any permission to be used as such, although their use will give rise to labelling requirements.

[30] Thus nutritive substances, processing aids and food additives are distinguished from ingredients. They are used – where permitted – for nutritional purposes or to achieve technological functions respectively. Moreover, and at least as defined, it would appear a substance could be both a nutritive substance and a food additive.

The Non-alcoholic Beverages Standard and sports drinks

[31] The Non-Alcoholic Beverages Standard introduces some of the confusion I have referred to.

[32] On the one hand that Standard in clause 1 defines the term non-alcoholic beverage as meaning:

> (a) packaged water; or
>
> (b) a water-based beverage which may or may not contain other foods, except for alcoholic beverages; or
>
> (c) electrolyte drinks.

[33] On the other hand clause 1 of that Standard further lists brewed soft drinks, electrolyte drinks, formulated beverages, fruit drinks and mineral or spring water as separate types of beverages subject to its terms. The relationship between the defined categories of non-alcoholic beverage and those separately listed beverages is not clear.

[34] It is reasonably clear, however, that sports drinks – as they are commonly known – that contain electrolytes fall into the category of electrolyte drinks. The term electrolyte drink is defined to mean a drink formulated and represented as suitable for the rapid replacement of fluid, carbohydrates, electrolytes and minerals. Clause 6 provides that electrolyte drinks must contain certain amounts of sodium and various sugars (dextrose, fructose, glucose syrup etc). It also provides that electrolyte drinks may contain a range of what I understand are salts, namely calcium phosphate (etc).

[35] The term formulated beverage is defined to mean a non-carbonated, ready to drink, water-based flavoured beverage that contains added vitamins or minerals or both vitamins and minerals prepared from one or more of the following – water, fruit juice, fruit puree (etc) and mineral water and sugars. Clause 9(1) provides that formulated beverages must not contain more than certain amounts of fruit derived

from sources other than fruit juice, and sugars. In terms of clause 9(2), a formulated beverage must not contain carbon dioxide or caffeine. Nor, in terms of clause 9(3) may a formulated beverage be "mixed with other beverages".

[36] Electrolyte drinks and formulated beverages are therefore distinguished because of their different compositional allowances and requirements.

[37] The Non-Alcoholic Beverages Standard does not, in and of itself, prohibit the addition of caffeine to electrolyte drinks as it does in the case of formulated beverages.

The FCB Standard and energy drinks

[38] Clause 2 of the FCB Standard defines an FCB as meaning:

> A non-alcoholic water-based flavoured beverage, which contains caffeine and may contain carbohydrates, amino acids, vitamins and other substances, including foods, for the purpose of enhancing mental performance.

[39] The FCB Standard also sets compositional rules. These include:

(a) a minimum and maximum caffeine level (clause 2(1));

(b) additional substances that may be included and maximum amounts (clause 2(2)); and

(c) a prohibition on mixing an FCB with "a non-alcoholic beverage as standardised under Standard 2.6.2" (ie the Non-Alcoholic Beverages Standard) (clause 2(3)).

[40] The FCB Standard was, as I understand it, developed to allow for energy drinks containing higher quantities of caffeine than are permitted to be added as an additive. It is clear that energy drinks are regulated under the FCB Standard. The definition of FCB also introduces something of a subjective element, namely that of requiring a determination as to whether the purpose of the inclusion of caffeine is "enhancing mental performance".

Mr Sanson's complaints and the Ministry's response

The Loaded Energy complaint

[41] In a 29 March 2011 email to the Ministry, Mr Sanson explained that his complaint was that there was "a formulated beverage named "LOADED" illegally containing substantial quantities of caffeine". Mr Sanson pointed to the prohibition, in clause 9(2) of the Non-Alcoholic Beverages Standard, on formulated beverages containing carbon dioxide or caffeine. On 26 April 2011 Mr Sanson "updated" his complaint. As relevant, he now also pointed to the fact that *Loaded Energy* was improperly labelled as a "supplemented food".

[42] Mr Sanson's Loaded Energy complaint was considered by a number of officials within the Ministry. Notes prepared by a Ms Edmonds reflected concerns amongst officials that *Loaded Energy* was either an electrolyte drink, that was non-compliant with the Non-Alcoholic Beverages Standard because of the addition of caffeine and taurine, or an FCB, but again outside the normal composition of such a product because of the inclusion of electrolytes. Officials were also initially concerned, by reference to clause 9 of the Non-Alcoholic Beverages Standard and clause 2(3) of the FCB Standard, that "the fact that it presents both as an electrolyte drink and an FCB is not permitted".

[43] After further consideration, the view was reached however that *Loaded Energy* was best considered as a supplemented food and that, as a supplemented food, it complied with the regulatory requirements, including as regards its caffeine content, pursuant to clause 14 of the Supplemented Food Standard.

[44] However the Ministry also concluded that *Loaded Energy* offended against clause 10(2)(d) of the Supplemented Food Standard due to the labelling on the bottle which states that the drink is "designed to enhance output when competing in high performance sports". Clause 10(2)(d) provides:

> An item listed in subclause (1) must not claim or make a statement, express or implied, relating to any of the following matters – that the supplemented food prevents the normal operations of a physiological function (whether

> permanently, temporarily or by way of terminating, reducing postponing, increasing or accelerating the operation of that function or in any other way).

[45] After some discussions with the manufacturer of *Loaded Energy* the following position was reached:

(a) *Loaded Energy* was not an FCB because it had been manufactured for the purpose of enhancing sports performance and not mental performance.

(b) *Loaded Energy* was a non-compliant electrolyte drink as defined in Standard 2.6.2 but could be a supplemented food as defined in clause 6 of the Supplemented Food Standard, due primarily to the addition of caffeine.

[46] That decision was conveyed to Mr Sanson on 23 August 2011. The Ministry advised:

> In reference to the above complaint laid with MAF on 29 March 2011, the investigation into this complaint has now been completed.
>
> MAF determined that this product meets the definition of a supplemented food as defined in clause 6 of the New Zealand Food (Supplemented Food) Standard 2010. Non-compliances with the New Zealand Food (Supplemented Food) Standard 2010 and the Australia New Zealand Food Standards Code have been identified and brought to the attention of the manufacturer.
>
> Actions to correct the non-compliances have been proposed by MAF and as a result no further action will be taken on this matter.

The Powerade Fuel+ complaint

[47] In a 26 August 2011 email to the Ministry Mr Sanson advised that he had recently seen a woman buying a 300 ml *Powerade Fuel+* product for her seven year old child. Mr Sanson was concerned that the mother had no idea that that product contained caffeine. Rather she thought it was the same product as the *Powerade* her son drank playing soccer. Mr Sanson alleged that the *Powerade Fuel+* product was illegal because it was a self claimed FCB and, as such, was not allowed to contain minerals. The product was advertised on the bottle as containing electrolytes – namely the mineral tri-potassium citrate. Therefore the *Powerade Fuel+* product was illegal. Mr Sanson subsequently updated his complaint. In an email of

15 September 2011 he advised he had been in dialogue with the manufacturer, Coca-Cola. He accepted Coca-Cola's categorisation of the minerals in question (in which he now included tri-potassium phosphate) as food additives. Mr Sanson now asserted that when considered as food additives (INS Nos. 332 and 340 respectively) these minerals were unlawful additives to an FCB such as *Powerade Fuel+*.

[48] After consideration of the issues, internal discussion and liaison with Coca-Cola, the Ministry concluded that the formulation of *Powerade Fuel+* complied with requirements for FCBs, which *Powerade Fuel+* was. The minerals in question were allowed as additives in *Powerade Fuel+* pursuant to the Additives Standard. That Standard did, however, restrict claims being made as regards the nutritional attributes of some substances. Moreover, as an FCB, claims could not be made about the electrolytic properties of *Powerade Fuel+*. The Ministry advised Mr Sanson that it was raising those issues with Coca-Cola and giving it notification of the corrective action required.

Analysis – Complaint One: Was the Ministry correct in law to conclude that *Loaded Energy* was a compliant supplemented food?

[49] By my assessment, analysing Mr Sanson's challenge to the lawfulness of the Ministry's response to his complaint regarding *Loaded Energy* first involves the question of whether, as Mr Sanson claims, *Loaded Energy* is a formulated beverage? I conclude that it is not, but that it is an electrolyte drink. Two further questions then arise:

(a) Is *Loaded Energy's* caffeine content a lawful addition to an electrolyte drink?

(b) Can *Loaded Energy* be considered as a supplemented food and does that render its caffeine content lawful?

[50] I address each question in turn.

Is Loaded Energy a formulated beverage?

[51] Mr Sanson's complaint regarding Loaded Energy is, as I understand it, based on his categorisation of that product as a formulated beverage. If that categorisation is correct, then Mr Sanson's complaint would have had to be upheld. Clause 9(2) of the Non-Alcoholic Beverages Standard is clear: a formulated beverage must not contain caffeine. Reference to or reliance on the Supplemented Food Standard could not, in my view, have changed that outcome. This specific prohibition in clause 9(2) would prevail even if, absent that prohibition, a formulated beverage containing caffeine might otherwise have been regarded as a supplemented food.

[52] In my view, however, that categorisation is not correct. The Non-Alcoholic Beverages Standard differentiates between formulated beverages and electrolyte drinks. This is reflected not only in the separate identification of those two categories but also in the definition of non-alcoholic beverage itself, where water-based beverages which may or may not contain other foods (which I tentatively interpret as including formulated beverages) are differentiated from electrolyte drinks. For the Attorney, Ms Chan identified a number of other points of differentiation:

(a) A formulated beverage has permission to add vitamins where as an electrolyte drink does not: (The V and M Standard, Table to clause 3).

(b) An electrolyte drink has a higher sugar range than that permitted for a formulated beverage: (The Non-Alcoholic Beverages Standard, clauses 6(2) and 9(1)(b)).

(c) An electrolyte drink may add various ingredients that supply the electrolytes. These permissions do not exist for a formulated beverage (other than as additives): (The Non-Alcoholic Beverages Standard, clause 6(3)).

[53] Moreover, by my assessment the presentation of *Loaded Energy* makes it clear that it is an electrolyte drink. I say that because of the get-up of the label and the presence of the words:

> *Loaded* has been specifically engineered by leading beverage technologists to contain over 50% more electrolytes (per 100 ml) than New Zealand's best selling Isotonic Sports Drink.

[54] I conclude that Ms Shields' affidavit,[7] together with the text found on the *Powerade Isotonic* product bottles,[8] make it reasonably clear that the use of the word "isotonic" would be associated with blends of carbohydrates and electrolytes designed to improve rehydration.

[55] I therefore conclude that *Loaded Energy* is not a formulated beverage so as to render its caffeine content unlawful.[9]

Is Loaded Energy's caffeine content a lawful addition to an electrolyte drink?

[56] The question therefore becomes whether caffeine may be lawfully added to an electrolyte drink under the Non-Alcoholic Beverages Standard as, unlike with formulated beverages, there is no express prohibition on the addition of caffeine to an electrolyte drink. In general terms – as already analysed – substances, other than ingredients, may be added as vitamins and minerals, as nutritive substances for nutritional purposes, as additives to achieve technological functions in foods, or as processing aids to achieve technological functions in the processing or treatment of food, but – in each case – only where expressly permitted.

[57] Clause 6 of the Non-Alcoholic Beverages Standard, which deals with the composition of electrolyte drinks, does not refer to caffeine at all.

[58] Therefore the Non-Alcoholic Beverages Standard does not authorise the specific inclusion of caffeine in electrolyte drinks.

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7 See above at [10].

8 The following text appears on each of the *Powerade Isotonic* bottles produced in evidence:

> Powerade Isotonic is scientifically proven to help you perform at your peak longer. The special blend of carbohydrates and electrolytes is in balance with your body's fluid to provide fast and effective hydration. For more information go to www.powerade.co nz REHYDRATING ELECTROLYTES – When you sweat you lose essential electrolytes like sodium and potassium that your body needs to work at peak performance. The electrolytes in Powerade help you hydrate effectively.

9 At the same time, and notwithstanding that it contains levels of caffeine complying with the FCB Standard's requirements, because *Loaded Energy* is not produced or marketed as a product "for the purpose of enhancing mental performance" it is not an FCB so as to render its caffeine content lawful.

[59] As previously mentioned, caffeine is a food additive. In terms of clause 2 of the Additives Standard, caffeine may not be added to electrolyte drinks as a food additive as there is no express provision in that Standard to that effect. Under the Additives Standard, caffeine may be added to kola drinks,[10] but no other food product.[11]

[60] I therefore conclude – as did the Ministry as I understand it – that caffeine may not be added to an electrolyte drink like *Loaded Energy*, when considered as such.

Can Loaded Energy be considered a supplemented food and does that render its caffeine content lawful?

[61] The Ministry's ultimate position in response to Mr Sanson's complaint was that *Loaded Energy* was a supplemented food, and that accordingly the addition of caffeine was lawful. That position was based on clause 14 of the Supplemented Food Standard which, as relevant, provides:

> **14 Substances that may be added to supplemented food subject to restrictions**
>
> The substances listed in column 1 of Table 1 may only be added to supplemented food if there is compliance with the applicable restriction specified in column 2.
>
> **Table 1**

Substance – Column 1	**Restrictions Column 2**
...	**...**
Caffeine	If the supplemented food contains a greater level of caffeine than is required to achieve a technological function under conditions of Good Manufacturing Practice the label on the package of supplemented food must include: (a) An advisory statement to the effect that the food contains caffeine, and is not recommended for children, pregnant or lactating women, or individuals sensitive to caffeine; and (b) The following details in the nutrition information panel: (i) The average quantity of caffeine per serve; and (ii) The average quantity of caffeine per 100ml or 100gm.

[10] A kola drink is a flavoured carbonated beverage containing added caffeine. Caffeine can be added in kola drinks to a maximum level of 145 mg/l.

[11] See clause 14.1.3 of Schedule 1 and clause 2 of the Additives Standard.

Guarana	The label on the package of a supplemented food containing guarana must include an advisory statement to the effect that the supplemented food contains caffeine.

[62] What, in effect, the Ministry is saying is that because *Loaded Energy* contains a greater level of caffeine than is required to achieve a technological function (which it would not be allowed to contain under the Non-Alcoholic Beverages Standard) it becomes a supplemented food because it contains that caffeine. In turn, in terms of clause 14 of the Standard, provided that the label discloses it, the caffeine content is lawful. That proposition only has to be stated to reveal its somewhat Kafkaesque quality.

[63] So the question is whether *Loaded Energy*, being an electrolyte drink but for the addition of caffeine, can also properly be categorised as a supplemented food and, if so, whether that makes the otherwise unlawful addition of caffeine lawful.

[64] Just what is a supplemented food is, unfortunately, not particularly clear.

[65] As noted, clause 3 of the Supplemented Food Standard provides that its purpose is to:

> (a) provide an interim regulatory arrangement for supplemented food until there are appropriate permissions in the Code; and
>
> (b) regulate "food-type" dietary supplements that were formerly regulated under the Dietary Supplements Regulations 1985.

[66] It would appear clear from that purpose statement that supplemented foods and "food-type" dietary supplements are conceptually different. Having said that, there is no subsequent reference at all in the Standard to "food-type" dietary supplements. The Explanatory Note to the Standard, however, would appear to explain the position:

> The Dietary Supplements Regulations 1985 previously regulated "therapeutic-type" dietary supplements and "food-type" dietary supplements. "Food-type" dietary supplements have now been excluded from the ambit of the Dietary Supplements Regulations 1985 and are not regulated by this

> standard. "Food-type" dietary supplements fall within the definition of "supplemented food" in this standard.

[67] So supplemented foods include "food-type" dietary supplements.

[68] Some further help – at least to the extent of understanding what "food-type" dietary supplements are, can be found in the definition of those type of supplements previously found in the Dietary Supplement Regulations 1985:

> ...any amino acids, edible substances, foodstuffs, herbs, minerals, synthetic nutrients, and vitamins sold singly or in mixtures in controlled dosage forms as cachets, capsules, liquids, lozenges, pastilles, powders, or tablets, which are intended to supplement the intake of those substances normally derived from food:

The reference to "controlled dosage form" suggests something other than a one litre bottle of sports drink.

[69] It appears the Ministry itself has previously taken a similar view to that I have just expressed as to what a caffeine-based "dietary supplement" might be. In 2009 Mr Sanson brought interim injunction proceedings against Demon Drinks Ltd,[12] but regarding a different drink – called *NOS*.[13] *NOS* contained 480 mg/l of caffeine, an amount higher than the FCB Standard's maximum caffeine content.

[70] In his judgment, Wylie J set out the Ministry's view:

> In a letter dated 2 October 2009 to Mr Sanson, it advised that it considers that liquid food or products that are presented in rip top cans of large volumes (such as 500 mls) containing caffeine at levels greater than 320mg/l (eg NOS 500ml), do not fall within the definition of dietary supplements under the Dietary Supplements Regulations 1985. Rather it considers that products which contain caffeine in excess of that level are non compliant formulated caffeine beverages. The NZFSA advised that it considered that products containing caffeine marketed as liquid energy shots in very small volumes (around 60 mls) do appear to meet the criteria for categorisation as dietary supplements.

[71] Whilst I acknowledge this view of *NOS* was based on the Dietary Supplement Regulations 1985, rather than the new Supplemented Food Standard, it

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12 Demon Drinks Ltd is the former name of South Pacific Brands Ltd.

13 *Sanson v Energy Products Limited and Demon Drinks Limited* HC Auckland CIV-2009-404-005464, 4 December 2009.

appears the Ministry was at that time of the view that larger drinks did not fall within the definition of dietary supplement, but smaller volumed energy shots might.

[72] More generally clause 6 of the Supplemented Food Standard reads as follows:

> (1) A supplemented food is a product that is represented as a food that has a substance or substances added to it or that has been modified in some way to perform a physiological role beyond the provision of a simple nutritive requirement.
>
> (2) A product is not a supplemented food if it is–
>
> (a) a dietary supplement (as defined in the Dietary Supplement Regulations 1985); or
>
> (b) a medicine (as defined in the Medicines Act 1981); or
>
> (c) a controlled drug or restricted substance (as defined in the Misuse of Drugs Act 1975); or
>
> (d) a formulated meal replacement or a formulated supplementary food (as defined in standard 2.9.3 of the Code); or
>
> (e) a formulated caffeinated beverage (as defined in standard 2.6.4 of the Code).
>
> (3) For the avoidance of doubt subclause (2) does not contain an exhaustive list of products that are not supplemented food.

[73] Subclause (1) of clause 6, at least as I read it, suggests that in a supplemented food product substances are added, or the product is modified in some way to – in both cases – perform a physiological role beyond the provision of a simple nutritive requirement. But, at the same time, clause 10(2)(d) of the Supplemented Food Standard provides that the container (etc) in which a supplemented food is sold must not make a claim or statement, express or implied, related to the following matters:

> ...
>
> (d) the supplemented food prevents the normal operation of a physiological function (whether permanently, temporarily, or by way of terminating, reducing, postponing, increasing or accelerating the operation of that function or any other way).

[74] The definitional element of a supplemented food performing a physiological role beyond the provision of a simple nutritive requirement, and the prohibition

found in clause 10(2)(d) on claiming the "prevention" – as defined – of physiological functions, seem more than a little at odds with each other.

[75] The meaning of clause 6(3) is more than a little vague. But what can perhaps be taken from it is an indication that the definition of supplemented food contained in clause 6(1) was not intended to be as general as perhaps it appears to be. There is no guidance, however, as to products that are not supplemented foods beyond those listed in clause 6(2).

[76] My attention was also drawn to a document produced by the Minister called "New Zealand Supplemented Food User Guide: Version 2". Under the heading "What is a supplemented food?", the Guide repeats the definition provisions from the Standard itself and goes on to comment:

> Since the definition of supplemented food is broad, the Supplemented Food Standard makes it clear that several types of products are not supplemented foods. The Supplemented Food Standard notes that this list of products is not exhaustive.
>
> ...
>
> If a food meets the appropriate permissions for a particular type of product as defined in the Food Standards Code, it cannot be sold as a supplemented food. Where there are not appropriate permissions in the Food Standards Code, it is possible that the food may meet the supplemented food standard requirements.
>
> Examples of how the Supplemented Food Standard may be applied are provided below:
>
> 1. An orange drink with a level of added vitamin C that is at or below the maximum level permitted by the Food Standards Code is not a supplemented food. If the level added is greater than that permitted in the Food Standards Code then the drink could be a supplemented food.
>
> 2. A milk or yoghurt product with added folic acid could be considered a supplemented food. The Food Standards code does not permit the addition of folic acid to milk or yoghurt, where as the supplemented food standard does (at restricted levels).
>
> 3. A caffeinated beverage with a level of caffeine that is higher than the level of caffeine permitted in Standard 2.6.4 of the Food Standards Code for a formulated caffeinated beverage would not be considered a supplemented food. The Standard makes it clear that several types of products, including formulated caffeinated beverages are not supplemented foods. Instead it would be considered non-compliant with Standard 2.6.4 and require reformulation to comply with Standard 2.6.4.

[77] It is to be noted – at this point – that there is an important difference between the foods listed in Examples 1 and 2, and *Loaded Energy.* That difference is that the standards within the Code that apply to those foods do not apply to the Supplemented Food Standard.

[78] Clause 7 of the Supplemented Food Standard provides that specified standards in the Code apply, with the necessary modification. The Additives Standard, which provides that caffeine can only be added to food where expressly permitted by the Code, is so specified.

[79] By contrast, the Standard which regulates the amount of vitamin C that can be added to an orange drink (the V and M Standard) and the Standard which does not permit folic acid in milk and yoghurt products (clause 9 of the Preliminary Provisions Standard which provides that nutritive substances – of which folic acid is one – can only be added when expressly provided in the Code) are Standards which are not specified, and therefore do not apply.

[80] But, on the basis of the explanation provided in that User Guide, there would appear to be a clear acknowledgement that some products which do not conform to the Code as regards a specific category of product may nevertheless meet the requirements of the Supplemented Food Standard where those Standards in the Code are not specified as applying, and may therefore be marketed as a supplemented food. That was, as I understood it, the Ministry's position on *Loaded Energy.* As will become apparent, it is that particular position which I am not persuaded by.

[81] Against this less than helpful background, I analyse Mr Sanson's challenge to the Ministry's position and the Attorney's arguments in its support.

[82] Mr Sanson's position was essentially a straightforward one: *Loaded Energy* was not a supplemented food. The Ministry misapplied the Supplemented Food Standard when it regarded as lawful the inclusion of caffeine in an electrolyte drink, where inclusion was expressly not otherwise authorised by the Food Standards and, in particular, was expressly not allowed by the Additives Standard.

[83] The Attorney's argument to the contrary reflected the proposition, found at paragraph 57.7 of Ms Chan's written submissions for the Attorney, that caffeine may be both an additive *and* an ingredient in its own right. As an additive it could not be added to an electrolyte drink. But, Ms Chan argued at 57.10:

> There is however no prohibition on the addition of caffeine *as an ingredient* to an electrolyte drink. It may therefore also be added *as an ingredient* to Loaded, a supplemented food. (Emphasis in original)

[84] Thus, whilst the Supplementary Food Standard could not legalise the addition of caffeine as an additive to electrolyte drinks, there was no prohibition on caffeine being added to electrolyte drinks as an ingredient where they were characterised as supplemented foods.

[85] I have more than a little difficulty with the logic of that argument, at least as I understand the Food Standards. If, as Ms Chan would have it "there is no prohibition on the addition of caffeine as an ingredient to an electrolyte drink", then there is no need to refer to the Supplemented Food Standard. That proposition cannot, however, be correct.

[86] Ms Chan did not point to any specific provision which provides that caffeine may be added as an ingredient in its own right to supplemented foods, or any other type of food. Indeed, I was not shown any provision of the Standards that expressly allowed the inclusion of particular ingredients as such. If my understanding of the concept of ingredients is correct,[14] that is understandable. But at the same time, I do not understand caffeine to be an ingredient. Put very simply, my understanding of the scheme of the Food Standards is that substances like caffeine, which are additives, are, by definition, not ingredients. In general terms and, as already analysed, additives (along with vitamins, minerals, nutritive substances and processing aids) may only be added to foods where expressly permitted. Caffeine may be added as an additive to kola drinks, as provided in the Additive Standards, and must be included in FCBs as provided by the FCB Standard. But otherwise no express provision is made for its addition. I am therefore not persuaded by the Attorney's "ingredient" argument.

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[14] Discussed at [24] - [30].

[87] Nor do I think the provisions in column 2 of Table 1 of clause 14 of the Supplemented Food Standard constitute an express provision allowing for the addition of caffeine to any product. Column 2, alongside the entry "caffeine", simply appears to be the imposition of a labelling requirement where a greater level of caffeine is contained than is required to achieve a technological function. I do not see that as constituting an express provision allowing for the addition of caffeine in circumstances where – by reference to the rest of the Food Standards – its addition is simply not allowed. If that was the intention of the Supplemented Food Standard, then in my view that would need to be made clearer, particularly given the prohibition on the addition of additives except where expressly permitted, which, as I have noted, applies to the Supplemented Food Standard.

[88] The oddity, for want of a better word, of the interpretation taken by the Ministry is reflected in the steps taken by the Ministry as regards the labelling of *Loaded Energy*. On 23 April 2011 the Ministry wrote to the manufacturer of *Loaded Energy*, Demon Drinks Limited, advising in the following terms:

> An 'increased physiological function' is implied with the statement "This massive energy boost is designed to **enhance output** when competing in high performance sports" [a phrase that appears on the *Loaded Energy* label – see [12] above]. Clause 10(2)(d) of the Supplemented Food Standard prohibits claims or statements, express or implied, "that the supplemented food prevents the normal operation of a physiological function (whether permanently, temporarily, or by way of terminating, reducing, postponing, increasing or accelerating the operation of that function or in any other)."

[89] There has been recent commentary on the need to preserve an element of commonsense in the law.[15] I do not think it accords with basic commonsense for a drink which has clearly been produced to achieve enhanced rehydration to be regarded as a supplemented food to provide for otherwise unlawful quantities of caffeine, but only on the basis that it can no longer point to its rehydrational purpose.

[90] I therefore find that the Ministry erred in law in concluding, in response to Mr Sanson's *Loaded Energy* complaint, that *Loaded Energy* was a compliant supplemented food due to an incorrect application of the Code and Supplemented Food Standard. In my view it is an electrolyte drink which unlawfully contains caffeine.

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[15] Matthew Smith "The law of common sense" NZ Lawyer (Issue 172), 4 November 2011.

Analysis – Complaint Two: Was the Ministry correct in law to conclude that Powerade Fuel+ is a formulated caffeinated beverage?

[91] In his *Powerade Fuel+* complaint Mr Sanson focussed on the presence of electrolytic potassium compounds in an FCB, which he acknowledged *Powerade Fuel+* was. He later accepted that small amounts of potassium for non-nutritional technological purposes could, subject to good manufacturing practices, be used in FCBs as additives pursuant to the Additives Standard. But he argued that the use of electrolytes in *Powerade Fuel+* went beyond that. This was shown by the reference on the can to electrolytes, which are commonly understood as having the function of aiding rehydration and the, albeit qualified, claims for rehydration made on the label (see [14] above). In his view, this was also reflected in Coca-Cola's resistance to the Ministry's request to remove the references on the *Powerade Fuel+* can to electrolytes and hydration. The clear implication was therefore that those potassium compounds had not been added pursuant to the Additive Standard for technical reasons, but rather because of their rehydrational functionality.

[92] The Ministry agreed that *Powerade Fuel+* was an FCB. As such, the potassium salts complained of could be added as additives pursuant to the Additive Standard. In this case they were, the Ministry would appear to have accepted, being used to perform the technological function of acidity regulators. The Ministry explained its position thus:

> The additives tripotassium citrate and tripotassium phosphate are permitted to be added to an FCB in terms of clause 3(1) of the Additives Standard (Schedule 1 clause 14.1.3).

[93] Because, however, those mineral salts had been added as additives, and because an FCB was not a claimable food, the claims made regarding electrolytic properties were unlawful and, as such, the Ministry required that those claims be removed.

[94] Coca-Cola appeared as an interested party. Coca-Cola's submissions were in line with those of the Ministry. *Powerade Fuel+* was an FCB and the salts in question were permitted to be added pursuant to the clause 14.1.4 of the Additives Standard. *Powerade Fuel+* contained no greater levels of electrolytic salts than found in other FCBs, such as *V, Pure Energy, Miss Helen's Massive Melons* and

Monster. Coca-Cola's position was, in essence, that no claims were made as regards *Powerade Fuel+* for "rapid" rehydration. Therefore *Powerade Fuel+* did not come within the definition of the term electrolyte drink found in the Non-Alcoholic Beverages Standard. As regards the Ministry's position that the use of the word "electrolytes" on the tin were unlawful, that use was justified because sodium chloride was added to *Powerade Fuel+* as a food, "for the purpose of enhancing mental performance". Sodium chloride was an electrolytic salt, and therefore was able to be identified on the *Powerade Fuel+* label as such.

[95] The Additives Standard does allow potassium citrates (INS No. 332) and potassium phosphates (INS No. 340) to be added to FCBs. Those additions are permitted by clause 14.1.3 of Schedule 1 of the Additives Standards if FCBs fall into the category water-based flavoured drinks. At this point, however, I note that the Standards do not make it entirely clear that the specified category in Schedule 1 of the Additives Standard – water-based flavoured drinks – extends to FCBs, as no definition is provided. Nevertheless, the FCB Standard describes an FCB as a water-based flavoured beverage and, as such, I proceed on the basis that FCBs can thus contain the additives provided for in clause 14.1.3. These additives are not however permitted by clause 14.1.4 of Schedule 1, as was submitted by Coca-Cola. That clause applies specifically to formulated beverages, which are clearly a separate category of drink within the Standards from FCBs.

[96] The question as to whether or not those substances have in fact been added, as Coca-Cola says and the Ministry accepted, to perform technological functions according to GMP, as required by the Additives Standard, is very much a matter of technical assessment by the Ministry. In my view that is a matter which falls particularly within the Ministry's area of competence. I do not consider I have any basis upon which to question that conclusion in these judicial review proceedings.

[97] I therefore conclude that Mr Sanson has not established his claim that the Ministry made an error of law in the way it responded to his complaint as regards *Powerade Fuel+*.

[98] The issue of the correctness or otherwise (a matter in dispute between the Ministry and Coca-Cola) of the Ministry's view as to the way the term "electrolyte"

appears on the *Powerade Fuel+* can, and Coca-Cola's justification of that by reference to the inclusion of sodium chloride in *Powerade Fuel+*, was not a matter before me because Mr Sanson's original complaints focused on the legality of the addition of these minerals to *Powerade Fuel+* and not on the labelling of that product. That matter is therefore outside the scope of these judicial review proceedings.

[99] On the basis argued before me, it was – generally speaking – common ground that *Powerade Fuel+* was an FCB. That issue was, therefore, not contested. For my part, I was not necessarily persuaded by that proposition. Essential to the characterisation of a product as an FCB is that it is a non alcoholic water-based flavoured beverage containing caffeine and other substances "for the purpose of enhancing mental performance".

[100] *Powerade Fuel+* makes no such claim and would not appear therefore to have any such purpose. Rather, and as already set out but repeated here as particularly relevant, the narrative on the *Powerade Fuel+* can reads as follows:

> SCIENTIFICALLY FORMULATED
> ENERGY FOR SPORT
> Caffeine Energy + Carb Fuel + Electrolytes
>
> This product is intended for high intensity sports and recreational activities. It is not intended to be consumed in high quantities for rehydration during such activity. For optimum hydration we recommend consuming POWERADE® Isotonic Sports Drink. For best results consume one can of POWERADE FUEL+ before sport or exercise. Maximum 2 cans per day.

[101] The emphasis is therefore all on physical performance.

[102] Moreover, the general description of the product as a "sports energy drink", and the stylised logo of a running person on the can, carry no reference or inference of the impact on the product as "enhancing mental performance". In addition, the sodium and potassium, which are claimed to be food additives, appear on the nutritional panel on the can. Such labelling is required by the Standard for electrolyte drinks (clause 7 of 2.6.2) and not the FCB Standard (2.6.4). It is for those reasons that I have considerable reservations that *Powerade Fuel+* should be characterised as an FCB.

[103] But, as I have said, the matter was not argued that way and in the absence of my reservations having been exposed to the parties, I am reluctant to take them further.

Result

[104] Mr Sanson therefore succeeds, in terms of his challenge to the Ministry's response to his *Loaded Energy* complaint, but fails as regards the Ministry's response to his *Powerade Fuel+* complaint.

[105] As is obvious, the Standards in question are complex and, in many areas, uncertain. In particular I think the relationship between the Supplemented Food Standard and the Code is particularly difficult – as Ministry staff themselves acknowledge. It needs clarification.

Relief

[106] I therefore order by way of declaration that the classification by the Ministry of *Loaded Energy* as a supplemented food was unlawful.

[107] Mr Sanson also sought orders requiring the Ministry to take certain enforcement action. More particularly, as now relevant, he asked that this Court direct the Ministry to require the manufacturer of *Loaded Energy* to "immediately cease production of any drink titled "*Loaded*" containing caffeine". I do not think it is the role of this Court here to direct the Ministry on appropriate enforcement action. That will be a matter for it, once it has considered this decision and its implications.

Costs

[108] The question of costs is reserved. If required, and I comment on that briefly, submissions may be made within one month of the date of this decision. Given that in this difficult area Mr Sanson has succeeded on one of his complaints suggests to me that this may be an appropriate case for costs to lie where they fall. I leave that,

very preliminary, observation with each of Mr Sanson, the Ministry and Coca-Cola for their consideration.

“Clifford J”

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