AUSTRALIAN FOOD & GROCERY COUNCIL

AFGC
Level 2, 2–4 Brisbane Ave
Barton ACT 2600
P 02 6273 1466
F 02 6273 1477
AFGC.ORG.AU

Food Standards Australia New Zealand
PO Box 7186
CANBERRA BC ACT 2610

Dear FSANZ

P1030: Health Claims – Formulated Supplementary Sports Foods and Electrolyte Drinks

The Australian Food and Grocery Council makes the following submission in relation to FSANZ Proposal P1030, relating to the application of health claims regulation to formulated supplementary sports food (currently regulated in Standard 2.9.4) and to electrolyte drinks (currently regulated in Standard 2.6.2), and the associated placement of electrolyte drink regulation within the framework of Standard 2.9.4 (hereafter "P1030").

OVERVIEW

The AFGC supports the premise of P1030 both in clarifying the operation of health claims regulation to these special purpose foods, and in placing electrolyte drinks within the sports food regulatory umbrella.

The AFGC further supports the proposed transitional measures which see the provisions enter into force on the same day that Standard 1.2.7 takes final effect, but with the proviso of allowing a further 12 month stock-in-trade for products affected by this measure.

The AFGC's concerns lie in the detail of the proposal, rather than its objects.

CONCERNS

[1] The proposed definition of electrolyte drink changes from a drink "*formulated and represented as suitable for*" the rapid replacement of fluids and electrolytes to a drink "*formulated for*" that effect. The AFGC foresees a significant enforcement issue if regulators must prove that a specific function was the basis for the formulation of the drink. It is far easier to prove (from product labelling and advertising) the purpose for which the drink is represented as being suitable.

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Further, the regulation should apply to products represented to consumers as being suitable for electrolyte and fluid replenishment irrespective of the basis of their formulation. The AFGC therefore recommends that the definition of electrolyte drink be simplified by removing the 'formulation' element rather than the 'representation' element.

[2] The AFGC is concerned that 'electrolyte drink' is proposed to become a prescribed name. The rationale provided for this new regulation seems to be no more than that 'formulated supplementary sports food' is a prescribed name. While the AFGC considers it likely that its members could implement the proposal within the implementation period, this does not mean that the regulation meets the criteria for minimum effective regulation or best regulatory practice. If this measure is to be retained, FSANZ must demonstrate that there is an existing market failure (ie that consumers are being misled as to the nature of these drinks) and that the new regulatory measure would be the only effective way (ie discounting industry self-regulation) to address this problem (ie that any misconception would be rectified by the prescribed name). There is nothing in the assessment report to demonstrate the need for a prescribed name, and the argument based on supposed consistency fails to meet required best regulatory practice.

[3] In a similar vein, the nutrient declarations relating to energy, electrolytes and carbohydrates under current regulation must appear in the label but are NOT required to be present in a Nutrition Information Panel (NIP). The proposal would see declarations being required to appear in an NIP, with NIPs being mandated for these drinks. Again, the AFGC understands that its members could likely comply with the proposed measure, but that does not excuse FSANZ from the requirement to justify the additional regulatory control under best practice requirements. AFGC appreciates the logic in the information being provided in the NIP, but considers that the positioning does not require specific regulatory intervention. The issue may be especially problematic for small imported electrolyte drink bases which currently qualify as small packages – the requirement to include an NIP may be highly onerous, and would need to be fully costed and assessed against the (currently unstated) benefit in a mandatory NIP presentation.

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[4] The central purpose of P1030 is to be to allow Standard 1.2.7 claims, plus category specific claims, to be made by sports foods and electrolyte drinks, without the need to satisfy the nutrient profiling score criteria in Standard 1.2.7. This purposes is supported by the AFGC. However, the draft variation lacks clarity in that it appears to require full compliance with Standard 1.2.7, including the NPSC (see clauses 6(2)(a) and 16(a)) and seems internally conflicted (compare clause 16, which states that electrolyte drink health claims must only relate to the "*rapid replacement of fluid, carbohydrates and electrolytes lost as a result of sustained strenuous physical activity*", with clause 17, that allows claims relating to the availability of energy). The draft variation should be worded to specifically permit the category claims and specifically exempt sports foods and electrolyte drinks from the requirement to meet the NPSC.

[5] The Purpose statement, in the AFGC's view, could be improved so that the inclusion of electrolyte drinks reads less like an after-thought. It might read, for example, to the effect "This standard defines and regulates the composition and labelling of foods and electrolyte drinks specially formulated to assist sports people in achieving specific nutritional or performance goals. Such foods and electrolyte drinks are intended ….".

[6] The AFGC considers that the mandating of a prescribed name and the mandating of NIPs warrants specific WTO notification of these measures. Overseas manufacturers exporting products to Australia or New Zealand should be notified of these measures and provided opportunity to oppose them if they consider them to be unnecessary barriers to trade.

Please contact me should you require any further information regarding this submission.

Director, Legal and Regulatory