



Submission to

Food Standards Australia New Zealand

on the

Consultation Paper

for Proposal P293

Nutrition, Health and Related Claims

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57 Carrington Road Marrickville NSW 2204
Phone 02 9577 3333 Fax 02 9577 3377 Email ausconsumer@choice.com.au
www.choice.com.au
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ABN 35 799 246 568 ACN 000 281 925

1. CHOICE

CHOICE is pleased to make this submission to Food Standards Australia New Zealand (FSANZ) on the latest consultation paper on Proposal P293 - Nutrition, Health and Related Claims.

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

Independent from government and industry, it lobbies and campaigns on behalf of consumers to advance their interests. CHOICE is primarily funded through subscriptions to its magazines, fee-for-service testing and other related expert services. There is no government funding for normal running expenses of CHOICE, and no commercial sponsorship or advertising.

2. Introduction

This submission will provide comments on the three areas on which FSANZ specifically seeks comments. These are:

1. the eligibility criteria for nutrition content claims and general level health claims;
2. the Scientific Substantiation Framework; and
3. criteria for nutrition content claims about saturated fatty acids as a low proportion of total fatty acid content and 'free' of trans fatty acid claims.

This submission will also outline a number of areas that CHOICE feels haven't been adequately addressed to date. These are:

- claims about biologically active substances;
- health endorsements;
- enforcement of the new standard; and
- consumer education.

Should you wish to discuss any of the issues raised in this submission, please do not hesitate to contact CHOICE's senior food policy officer, Clare Hughes at chughes@choice.com.au or on (02) 9577 3375.

3. The eligibility criteria for nutrition content claims and general level health claims

Nutrition content claims

In our previous submissions to FSANZ, and through our involvement in the FSANZ Standard Development Advisory Committee (SDAC) on Nutrition, Health and Related Claims, CHOICE has called for nutrition content claims to be subject to the Nutrient Profiling Scoring Criteria (NPSC). The rationale for this position is that it

would prevent consumers being misled about the overall nutritional value of unhealthy foods carrying nutrition content claims e.g. 99% fat free claims on confectionery or potato chips claiming to be a good source of vitamins C.

A number of public health and nutrition organisations and experts have also supported the application of the NPSC to products carrying nutrition content claims. Despite this, FSANZ continues to dismiss these calls on the basis that there is no evidence that consumers are misled by nutrition content claims on unhealthy foods.

CHOICE is aware that FSANZ recently conducted consumer research into the use and interpretation of some nutrition content claims on foods, and participants' intent to purchase products carrying nutrition content claims. A summary of this research and its findings was presented at the SDAC meeting on 31st October 2007.

A number of SDAC members raised concerns about the validity of the research particularly as the findings appeared to suggest that consumers would be less likely to purchase a product carrying a nutrition content claim over a product that did not carry a claim. This is at odds with the current industry practice, not to mention logic and commonsense. Based on this research, the use of nutrition content claims would be a bad business decision, yet in reality nutrition content claims are used widely on food labels and in marketing.

At the time, FSANZ reported that the research was undergoing peer review by behavioural scientists from the US Food and Drug Administration and CSIRO-Human Nutrition, as well as a statistician. To the best of CHOICE's knowledge this research has not been released to the public. Until such time as this research is released to the public, following peer review, we question the extent to which FSANZ can rely on this research to inform its decision not to apply the NPSC to foods carrying nutrition content claims.

Vitamin and mineral claims

FSANZ is currently seeking comment on the application of claimable food criteria and/or NPSC to products carrying claims about vitamins and minerals. In the current consultation paper, FSANZ states that the rationale for the development of the claimable food approach that is currently applied to vitamin and mineral claims was to ensure that *"claims made in relation to vitamins and minerals were placed only on foods consistent with healthy eating guidelines"*. CHOICE supports this rationale and the claimable food concept because we believe it is consistent with FSANZ's primary objective - to protect public health and safety.

There is already precedence for disqualifying products from carrying nutrition content claims when they are not consistent with healthy eating guidelines. CHOICE believes that FSANZ should extend this rationale to all products making a nutrition content claim.

CHOICE appreciates the need for consistency in food regulation and agrees that maintaining the existing claimable food criteria after the introduction of the NPSC will create confusion for food manufacturers, resulting in potentially misleading claims and consumer confusion. While the NPSC is not perfect, it is an effective tool that can be used to prevent the use of vitamin and mineral content claims on foods that are not consistent with healthy eating guidelines

Preferred regulatory approach

CHOICE's preferred regulatory approach is to replace the claimable food approach currently used for vitamin and mineral claims with the NPSC and extend its application to all nutrition content claims as well as general level claims. CHOICE believes that the rationale for the development of the current claimable food concept - that claims made in relation to vitamins and minerals are used only on foods that are consistent with healthy eating guidelines - justifies this approach. It is vital that in creating an approach that is acceptable to the food industry we do not create a situation where consumers are led to believe that otherwise unhealthy foods are healthy because they contain some vitamins and minerals.

Failing that, CHOICE's second preference would be to apply the NPSC to nutrition content and general level health claims about vitamins and minerals. This maintains the existing rationale that claims made in relation to vitamins and minerals are used only on foods that are consistent with healthy eating guidelines, but prevents any confusion and inconsistencies that may arise if the claimable food criteria and NPSC exist concurrently.

CHOICE believes that, because vitamin and minerals are essential in the diet, consumers will view products making claims about vitamin and mineral content favourably. Therefore, CHOICE does not support proposed Option 3 (FSANZ's preferred regulatory approach) to apply the NPSC to general level health claims about vitamin and mineral and apply neither NSPC nor claimable food criteria, or any other disqualifying criteria, to nutrition content claims about vitamins and minerals. Any product would then be able to make claims about vitamin and/or mineral content, regardless of how healthy or unhealthy it was.

This approach ignores the existing rationale that claims made in relation to vitamins and minerals should only be used on foods that are consistent with healthy eating guidelines. CHOICE believes that this principle should underpin the entire nutrition, health and related claims standard and justifies the application of the NPSC to foods carrying nutrition content claims.

CHOICE would not support any regulatory option that eliminates the need for products making such claims to satisfy either claimable food criteria or NPSC. We believe it is more important to retain the current claimable food approach than to remove it for the sake of consistency. The interests and health of consumers should be paramount.

4. The Scientific Substantiation Framework

The same level of evidence should be required for general level and high level health claims. The difference is that high level health claims must be pre-approved by the FSANZ expert advisory committee while the onus is on the manufacturer to assess and hold the evidence to support a general level health claim and to provide this evidence to relevant authorities upon request.

Any general level or high level claim must be based on an assessment of the total body of evidence rather than that a selection of studies that support a claim. Emerging studies should not be sufficient to support a general level or high level health claim.

Preferred regulatory approach

Method 1 - CHOICE suggests that a list of pre-approved nutrition function statements be included in or accompany the nutrition, health and related claims standard.

Method 2 - CHOICE supports the provision of a list of pre-approved high-level health claims in the nutrition, health and related claims standard.

Method 3 - The findings of the studies or sources selected to support a general level health claim must be consistent with the overall weight of evidence. The balance of evidence should not contradict the two or more selected corroborating sources, nor should evidence be inconclusive. The selected sources should not be published by the same author(s), institution or organisation or be funded from the same source. The research must be published in reputable peer-reviewed journals or otherwise subject to peer review.

CHOICE is concerned that the use of specialist human nutrition textbooks as supporting sources could allow general level health claims to be based on dubious, insufficient or outdated evidence. Some books available on the topic of nutrition are based on highly dubious research or theories. These would not necessarily stand up to a peer-review process. CHOICE believes that scientific textbooks in human nutrition should be removed from the list of authoritative sources.

Method 4 - CHOICE agrees that a systematic review of emerging food-health relationships would be sufficient to substantiate a general level health claim, provided that the review is conducted appropriately by a suitably qualified or experienced reviewer. CHOICE believes that FSANZ must give clear guidelines on how a systematic review should be conducted, including the types of studies that must be included, appropriate sources and acceptable authors.

5. Nutrition content claims about saturated fatty acids as a low proportion of total fatty acid content

CHOICE appreciates that the intent in creating the proportional fatty acid claim is to address concerns that some otherwise nutritious foods such as nuts and healthier fats and oils may be disadvantaged by existing provisions. CHOICE believes that the decision on the most appropriate way to regulate proportionally fatty acid claims should be based on whether consumers can actually understand proportion claims.

While a proportional fatty acid claim may be technically correct, it can still be misleading to suggest that a food has proportionally low saturated fatty acid content when it still may be high in fat. CHOICE believes it is important to prevent the use of potentially misleading claims about fat content on fatty foods. Rather than confuse consumers with proportional fatty acid claims, healthy eating guidelines and nutrition education messages should be used to inform consumers about healthy oils and the benefit of eating a small amount of nuts.

Preferred regulatory approach

CHOICE supports regulatory option 1 to maintain the status quo, but encourages the use of healthy eating messages to highlight the benefits of healthy oils and

nuts. We believe that proportional fatty acid claims may be too complex and mislead consumers about the overall nutritional content. They may not be used widely by food manufacturers because the claims themselves will be too wordy. Fair trading laws could be used to regulate misleading claims about fatty acid content.

Should FSANZ deem it necessary to develop specific regulation for proportional fatty acid claims CHOICE prefers proposed option 2. Manufacturers should not make a proportional fatty acid claim unless a monounsaturated or polyunsaturated fatty acid claim is made. The regulation should prohibit the splitting of fatty acid claims.

CHOICE does not support option 3 and 4 as the criteria would allow unhealthy foods, such as chocolate hazelnut spread, potato crisps, jam cookies to carry proportional fatty acid claims.

6. Trans fatty acid claims

An April 2005 CHOICE magazine investigation found high levels of trans fats in a range of foods including pastry, cakes, biscuits, crackers, spreads and fast foods. More than half of the products tested contained 2% trans fatty acids as a proportion of the total fatty acid content. As a result CHOICE called for the removal of artificial trans fat from the food supply and the listing of trans fat in the nutrition information panel on all foods so that consumers can make an informed choice and avoid products that contained harmful trans fat.

While there has been no commitment to label trans fats on nutrition information panels of all products, CHOICE understands that many manufacturers and retailers are attempting to reduce trans fat levels on foods and remove it completely where possible. CHOICE commends these efforts. Concerns have been raised that in removing trans fats from food, manufacturers may increase the level of unhealthy saturated fat in these products. CHOICE agrees that saturated fats are not a suitable alternative to trans fat. Similarly, we do not support the use of 'trans fat free' claims on products high in saturated fat.

Preferred regulatory approach

CHOICE supports proposed Option 2 which will establish maximum saturated fatty acid content for products carrying a trans fat claim.

7. Other issues not addressed in the consultation paper

Nutrition content claims about biologically active substances

As we stated in previous submissions, CHOICE believes that the proposed regulatory approach for products containing biologically active substances (such as non-culinary herbs or lycopene) will not adequately protect consumers. They may still be exposed to misleading claims about the potential or implied health benefit of consuming a product containing these substances. Until such time as policy guidelines and corresponding standards have been developed for the addition of substances other than vitamins and mineral, and/or safe and appropriate levels of individual biologically active substances have been established, CHOICE supports

the prohibition of all claims about biologically active substances or regulation of these claims as high-level health claims.

First, CHOICE is concerned that it will be the responsibility of manufacturers to determine an efficacious level of that substance. Research supporting the health benefit of biologically active substances may not be advanced and manufacturers may not have the expertise to assess the available evidence and determine an efficacious amount. CHOICE believes that manufacturers that choose to make a nutrition content or general level health claim about biologically active substances should meet the substantiation requirements outlined on Method 3 and Method 4 or the Scientific Substantiation Framework.

Second, while products carrying a general level claim about a biologically active substance have to meet qualifying criteria and the NPSC, a product carrying a content claim about a biologically active substance need only have a trace amount of the claimed substance. This is inconsistent with the regulation of products carrying vitamin and mineral claims. These products must contain at least 10% of the recommended dietary intake (RDI) of the claimed vitamin or mineral. While there are no RDIs for biologically active substances, for the sake of consistency and to avoid misleading claims, CHOICE believes that content claims about biologically active substances should also be required to meet the 10% qualifying criteria, by requiring these products to contain 10% of the efficacious amount.

Endorsements

CHOICE believes that FSANZ has not adequately addressed the issue of product endorsements and how these would be regulated under the new standard. In particular, if endorsement programs are not regulated appropriately under this standard, products that are ineligible to carry health claims because they fail to meet the NPSC may be marketed with a health endorsement if the endorsement scheme establishes less stringent nutrition criteria.

This could create consumer confusion as consumers may believe a product marketed with a health endorsement may be as healthy, if not healthier than a product carrying a corresponding health claim when this may not be correct. This is particularly concerning given that in 2005 FSANZ's own research found that consumers attributed a higher degree of promise to products carrying endorsements, compared to other high level health claim, general level health claim or nutrition content claim. Allowing health endorsements on food labels to escape regulation will also lead to difficulties for State and Territory food and health agencies that are required to enforce the Food Standards Code and the new nutrition, health and related claims standard.

Products that are deemed by the NPSC to be ineligible to carry health claims should not be able to carry a health-related endorsement, unless the claim relates to an allergy or intolerance.

Enforcement

CHOICE is concerned that the proposed enforcement system for the new standard will not be sufficient to deter food manufacturers from intentionally breaching the standard. Strict enforcement is vital to protect consumers against misleading

claims and advertisements that contravene the health claims standard and overstate the health benefit of individual food products.

A health claims watchdog has been established to oversee the enforcement of the health claims standard but this watchdog is nothing more than a secretariat, receiving complaints and relaying them to the relevant State agency, and compiling reports on complaints and enforcement action. The proposed approach is primarily complaints based, when instead a proactive approach to compliance monitoring and enforcement is needed at the Commonwealth level.

Reliance on a reactive, complaints-driven process means an advertising campaign contravening the health claims standard could be over by the time enforcement action is completed. The marketing objective of the campaign would have been achieved, yet the message sent to consumers may be misleading.

Education

The new standard should be accompanied by a well funded, far reaching and nationally consistent public education campaign that promotes healthy eating messages consistent with the Australian Guide to Healthy Eating and the Australian Dietary Guidelines. It should also improve consumer understanding about how to interpret food labels, as well as address consumer understanding of nutrition and health claims and the role of individual foods in a healthy diet.

8. Summary of Recommendations

- a. All nutrition content claims should be subject to the Nutrient Profiling Scoring Criteria.
- b. At minimum, the Nutrient Profiling Scoring Criteria should be applied to vitamin and mineral content claims, to ensure that claims made in relation to vitamins and minerals are only used on foods that are consistent with healthy eating guidelines.
- c. CHOICE does not support any approach that eliminates the requirement for vitamin and mineral content claims to subject to the claimable food criteria or the Nutrient Profiling Scoring Criteria.
- d. All health claims should require similar levels of substantiation. The difference would be that high level health claims are assessed and pre-approved by the FSANZ expert advisory committee while general level health claims need only be substantiated by manufacturers.
- e. A list of pre-approved nutrient function statements should be included in or accompany the nutrition, health and related claims standard.
- f. The sources selected by manufacturers to substantiate general level health claims must be consistent with the totality of evidence.
- g. The sources selected by manufacturers to substantiate general level health claims must not be published by the same author(s), institution or organisation

and must be published in reputable, peer-reviewed journals or otherwise subject to peer review.

- h. Scientific textbooks on human nutrition are not appropriate sources for substantiating general level health claims.
- i. Healthy eating messages should be used to educate consumers on the benefits of consuming healthy oils and nuts rather than specifically permitting proportional saturated fatty acid claims which may confuse consumers about the nutritional value of a product. Fair trading regulation could be used to police misleading claims about fatty acid content.
- j. Should the ACCC advise that the Trade Practices Act would not adequately regulate misleading claims about fatty acids, FSANZ should establish specific regulation on proportional saturated fatty acid claim as an extension of the proposed provisions for polyunsaturated or monounsaturated fatty acid claim. The regulation should prohibit the splitting of fatty acid claims. Healthy eating messages should also be used to educate consumers on the benefits of consuming healthy oils and nuts.
- k. Claims about biologically active substances should be prohibited or regulated as high-level health claims until such time as policy guidelines and corresponding standards have been developed for the addition of substances other than vitamins and mineral, and/or safe and appropriate levels of individual biologically active substances have been established.
- l. At minimum, nutrition content or general level health claim about biologically active substances should be substantiated according to the requirements outlined in Method 3 or Method 4 of the Scientific Substantiation Framework.
- m. Products carrying any type of claim about biologically active substances should contain a minimum of 10% of the efficacious amount of that substance as determined by the manufacturer following assessment of all available scientific research.
- n. Products that are deemed by the NPSC to be ineligible to carry health claims should not be able to carry a health-related endorsement, unless the claim relates to an allergy or intolerance.
- o. The health claims watchdog should be established as the primary health claims enforcement body. The health claims watchdog should be given powers to undertake compliance monitoring and enforcement activities. The enforcement system should involve proactive monitoring and substantial penalties to deter intentional non-compliance.
- p. Introduction of the new standard should be accompanied by a public education campaign that promotes healthy eating messages consistent with the Australian Guide to Healthy Eating and the Australian Dietary Guidelines. The campaign should be well-funded, far reaching and consistent across all States and Territories.