

**Submission to**

**Food Standards Australia New Zealand**

**on the**

**Initial Assessment Report**

**for Proposal P293**

**Nutrition, Health and Related Claims**

**October 2004**

**ACA**

**Australian Consumers' Association**  
**INDEPENDENT INFORMATION FOR SMART CONSUMERS**  
A non-profit company limited by guarantee – ACN 000 281 925

57 Carrington Rd  
Marrickville NSW 2204  
Phone 02 9577 3333 Fax 02 9577 3377  
[www.choice.com.au](http://www.choice.com.au)

## **About ACA**

The Australian Consumers' Association (ACA) is pleased to make this submission to Food Standards Australia New Zealand (FSANZ) on the Initial Assessment Report (IAR) on Proposal P293 – Nutrition, Health and Related Claims.

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

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

## **ACA's Position on Health Claims**

The apparent aim in permitting nutrient and health claims on foods is to produce health benefits, thereby improving public health. However, there is little evidence to suggest that in countries where health claims have been permitted for a number of years, they have been successful in changing behaviour and in turn, improving public health. If anything, conditions such as obesity appear to be on the increase.

We should not overestimate the capacity of health claims to improve public health, in which case it is the food industry that stands to benefit most from the use of health claims on food as it will create new product development and marketing opportunities. While the potential for a health benefit may be a sufficient incentive for consumers to purchase products carrying health claims this does not mean that the products will result in the claimed health benefit.

ACA does not support the use of health claims on foods for reasons outlined above. However, we accept that Ministers have advised that health claims will be permitted and have agreed on policy guidelines within which FSANZ is to develop a standard on nutrient, health and related claims.

Currently, only one health claim is permitted for use on food labels – the role of folate in the prevention on neural tube defects in unborn babies – yet there are many other claims on foods that ACA believes should be classified as health claims. Earlier this year CHOICE magazine looked at this issue and on a visit to one supermarket, we found 30 products carry claims about omega-3 fats and heart health, dietary fibre, and calcium for strong bones (CHOICE Magazine, June 2003).

ACA believes that the current standard has not served consumers well, primarily due to the difficulty of enforcing the current standard and the inability of enforcement agencies to take action against manufacturers making claims that are not in the spirit of the regulation but are within the letter of the law. Therefore, strict health claims standards must be in place to ensure that all health claims are truthful and can be substantiated and are only made on appropriate food products.

Consumer interests must be placed above the interests of the industry at all times, even if this means rejecting an application, banning a health claim or calling on manufacturers to remove claims, and investing in proactive enforcement.

## **Preferred Regulatory Option**

Ideally, ACA would prefer to maintain the status quo (Option 1), a ban on all health claims, while regulating nutrition claims in a standard rather than a voluntary code. ACA does not believe that there

is sufficient evidence that health claims are successful in improving public health. There is also the risk that consumers will be misled by health claims, overestimating the benefit of individual products.

However, Option 1 is not a valid option as it is not consistent with the policy guidelines. In addition, lack of enforcement action and loopholes in the transitional standard have resulted in many manufacturers pushing the boundaries and already using a range of claims that ACA considers are health claims. The recent study by CHOICE magazine highlights this.

However, if Option 1 were to be adopted and loopholes in the current standard are addressed, the cost of substantiating and enforcing health claims would be minimal as manufacturers would not be able to make any health claim. Provided, this Option 1 was adequately enforced, consumers would be protected from false and misleading health claims.

Unfortunately, not all manufacturers have adhered to the Code of Practice on Nutrition Claims, some making claims eg. “% fat free” claims, that do not comply with CoPoNC. Imported products do not need to comply with CoPoNC and this has resulted in an uneven playing field for local manufacturers.

A voluntary code of practice or a guideline is not enforceable; therefore it does not adequately protect consumers from false and misleading health claims, which in turn will not sufficiently protect public health and safety. If the requirements for general level claims are in a guideline, qualifying and disqualifying criteria will not be compulsory and it will become difficult to enforce general level claims, as they will be open to a considerable level of interpretation by manufacturers, making adequate enforcement costly and laborious.

For these reasons ACA does not support Option 2, to develop a new standard for Nutrition, Health and Related Claims with criteria and conditions for general level claims in a Guideline; high level claims in a Standard. This option will not sufficiently protect public health and safety. As a guideline is not enforceable it will be easier for manufacturers to breach the guidelines without having enforcement action taken against them.

Despite ACA’s opposition to the use of health claims on foods as outlined above, our preference is Option 3 – to develop a new standard for Nutrition, Health and Related Claims with criteria and conditions for both general and high level claims in the Standard. In ACA’s opinion this is the only option that will adequately protect consumers from false, misleading and unsubstantiated health claims, which could encourage consumers to consume more processed foods rather than fresh foods, as they believe these will be as ‘healthy’ and nutritious if they carry a health claims. This will potentially contradict the Australian Dietary Guidelines and undermine attempts by governments and health professionals to improve public health.

Option 3 would also provide greater clarity and consistency for the manufacturers wishing to make health claims, and the enforcement agencies required to ensure compliance. Option 3 will also provide a level playing field for manufacturers, as imported food products will also have to comply with the Standard for general level claims. This will also ensure consistency of information for consumers, as all general level claims will have to comply with the Standard.

Ultimately, Option 3 will also ensure greater consumer confidence, if all claims are regulated and enforced by the government rather than leaving some claims to voluntary, unenforceable guidelines. Option 3 also complies with the policy guidelines that the Standard should provide sufficient detail to enable enforcement action to be taken against all breaches for all level of claims. However, despite an increased level of government regulation under Option 3 there is still the potential for health claims and associated marketing to distort consumers’ perceptions about a healthy balanced diet and the role of individual, processed products in achieving this.

## **Substantiation Framework**

ACA chooses to leave a detailed critique of the proposed substantiation framework to those with academic expertise in the area of reviewing scientific evidence. However, ACA notes that the substantiation framework for general level claims is particularly complex and onerous. As it will fall to individual manufacturers to substantiate general level claims, ACA believes that substantiation will be burdensome and require specific expertise within the industry. Many small and medium-sized food companies will not have this expertise and therefore will be disadvantaged. Large companies that will have greater capacity, expertise and resources to complete the substantiation process, will benefit most.

This will then give products from large manufacturers a marketing advantage over smaller competitors. Consumers may be led to believe that only those products carrying a claim will provide the stated health benefit when in fact a product from a smaller manufacturer that doesn't make a claim may also provide the same health benefit.

Some manufacturers may not know the difference between various types of studies and levels of evidence. Where companies are going to develop studies in order to support claims they would be wise to seek the advice of FSANZ during the development of the study design in order to ensure that it is of the highest quality and will therefore be sufficient scientific evidence to support the use of a health claim.

The onerous requirements for manufacturers to substantiate general level claims could also result in "me-too" claims where a manufacturer will see a competitor making a particular health claim and assume that their own similar product will be eligible to carry the same claim. The manufacturer may make this claim without collecting the relevant substantiation information and wait until they are called to present the evidence before they collect it.

Valid health claims must be available to all companies selling a product. If there is a significant health concern that warrants the permission of a health claim, then consumers must have access to equal information.

## **Pre-approved Claims**

The prioritisation of pre-approved high level claims should be based, first and foremost, on the health problems that carry greatest public health significance. It should be the responsibility of a panel of independent health professionals to address the following questions in the given order.

1. What are the issues of greatest public health significance?
2. Could a health claim reverse or address this problem?
3. Is there significant scientific evidence support the claim?

The decision about the prioritisation of high level claims should rest with public health and nutrition experts and be based on the public health issues that are of greatest concern and the types of claims that will have the greatest impact on addressing these concerns. These claims must be consistent with national dietary guidelines. Prioritisation of high level claims for pre-approval should not be based on the priorities of food manufacturers. Nor should prioritisation of high level health claims be based on the claims that have been approved for use overseas. Certainly, the evidence used to support overseas claims should be used as a starting point, but FSANZ approval and substantiation processes will inevitably be different to those used overseas.

ACA also believes that FSANZ must pre-approve general level function, enhanced function and risk reduction claims as well as high level claims. In ACA's opinion many manufacturers will choose to make these types of claims rather than a high level claim if the FSANZ approval process is too long and onerous. This could also result in manufacturers making a general level claim while they are waiting for approval of a high level claim. Pre-approving these general level claims is particularly

important while there is insufficient evidence to determine whether consumers make a distinction between similar general and high-level claims.

ACA supports the inclusion of a list of serious diseases or conditions in order to avoid misinterpretation of the definition of serious diseases and conditions. The same should apply for non-serious diseases and biomarkers. Providing a list of model general level claims that are permitted based on Dietary Guidelines and Australian Guide to Healthy Eating would create a more level playing field for all manufacturers. Pre-approved general level claims will also be of benefit to large manufacturers, as they will not have to outlay money to gain approval of claims that are then used by their competitors. The claims currently being made by manufacturers could be used as a starting point for pre-approval of general level function, enhanced function and risk reduction claims. However, they must be substantiated by scientific evidence. If FSANZ does not pre-approve these general level claims then FSANZ should provide a list of authoritative texts and databases of reputable sources.

ACA supports a combination of the watching brief and regular review of pre-approved health claims. Both roles should be carried out by FSANZ, though stakeholders could assist by providing FSANZ with any new research of relevance. The regular review should also draw on outcomes of the regular reviews of NHMRC dietary guidelines and FSANZ reviews should be timed to coincide with or follow on from these reviews.

### **Enforcement and compliance**

ACA supports proactive enforcement of general and high level claims, not simply reactive enforcement based on complaints. Consumers need confidence that someone is looking after their interests and it shouldn't be the responsibility of consumers, consumer groups and public health groups to ensure enforcement through a complaints process. While a complaints process must be available it shouldn't be the only enforcement mechanism.

ACA was previously a member of the Complementary Healthcare Council Complaints Resolution Committee. While this initially was set up as a consumer complaints mechanism it became evident that the majority of complaints were not made by consumers as a) the majority of consumers were not aware of or did not understand the complaints mechanism and b) the complaints mechanism required some degree of understanding of the advertising code which the vast majority of consumers do not have. Therefore, it resulted in the vast majority of complaints coming from within the complementary medicines industry.

From this experience, ACA believes it is vital that a complaints mechanism does not place undue burden on the complainant, as this will discourage complaints. The complaints process should not require the complainant to have a detailed understanding of the nutrient and health claims standard. The process needs to be simple and accessible, and consumers need to be aware that a complaints mechanism exists and how they can access it. A successful complaints system also provides feedback to the complainant about the progress and outcome of their complaint.

In ACA's opinion it is irresponsible to put in place such a complex health claims system, only to sit back and let consumer complaints drive the enforcement process. If this standard is to be introduced, there must be a commitment to ongoing proactive enforcement to ensure that manufacturers are complying and to determine any flaws, inconsistencies or difficulties with the standard. This will benefit consumers, industry and enforcement agencies

The establishment of a pro-active watchdog will require funding commitment from the Commonwealth government. Naturally, the initial workload for FSANZ will increase, but if this standard is going to work for industry and consumers then there needs to be considerable investment. The hard work will not be over once the standard is developed. Equal effort needs to be made in enforcing, monitoring and evaluating the standard.

There also needs to be commitment from state and territory enforcement agencies to enforce the standard. ACA has on numerous occasions raised concerns about the capacity and willingness of these agencies to enforce food standards relating to labelling. The standard will not protect consumer interests without commitment from enforcement agencies to monitor compliance and enforce the standard. As some manufacturers are likely to push boundaries and stretch the limits of regulation, there needs to be penalties in place to discourage non-compliance.

## **Education**

There are many factors that influence health - diet, physical activity, pre-existing health conditions, family history, and so on. It is irresponsible to imply that individual food products can impact on health to such an extent that it brings about significant health benefits. Therefore, education campaigns must be in place to ensure that consumers are not misled by health claims, and to assist consumers to use these claims in the context of a healthy lifestyle. Consumer education should not only address health claims and their role in a healthy balanced diet, but it should also provide general nutrition and healthy eating messages.

Consumer education campaigns should be the responsibility of government agencies such as FSANZ, the Commonwealth Department of Health, NHMRC, and State and Territory government agencies. However, we should also not overestimate the role of consumer education in preventing consumers from being misled by persuasive claims about the potential health benefit of individual food products. FSANZ must first develop a standard that minimises the likelihood of consumers being misled.

Education campaigns should also target the food industry, advising them on the responsible use of health claims. Enforcement agencies may also benefit from consistent education on the interpretation and enforcement of the health claims standard.

## **Consumers' use of Health Claims**

Consumers will only benefit from the use of nutrient and health claims if there is confidence in the substantiation process and that the foods will have some significant health benefit. ACA does not dispute the fact that consumers do need more education about healthy eating and nutrition however, we question the role and capacity of the food industry to provide this information. Health claims on foods are marketing information made by an organisation with a vested interest in selling the product carrying the claim. There is no evidence to suggest that health claims are successful in improving health.

As outlined in the IAR, consumers use and interpret health claims in a number of ways. Some forego using 'back of pack' nutritional information panels when products carry a health claim. Some research suggested that claims appearing on the front of food packaging were seen as advertising. Other research referred to the 'halo effect' and 'magic bullet' effect of health claims, finding that some consumers attributed greater health benefits or inappropriate benefits above and beyond those claims stated on the label. Overall, the consumer research does not provide a convincing argument to support the use of health claims for providing consumers with information to enable them to make an informed choice, let alone improving public health and nutrition.

As highlighted in the evaluation of the pilot claim on folate the actual health claim was not as successful in bringing about dietary change, and education was deemed to be the more successful way of communicating information about the consumption of folate and its role in the prevention of neural tube defects.

## **Wellbeing and Performance Claims**

Wellbeing claims are vague and can be interpreted differently by different people. Well-being refers to overall state of health or wellness including mental and physiological. Well-being is also difficult to evaluate. However, there are many other claims that are also vague and are worded in such a way that they sound like they are promising a lot but in actual fact say very little.

ACA recently came across an imported breakfast cereal that claimed to help create a “Zen” moment – using phrases like “complete moments of mind, body and spirit”, “health mental balance, spiritual fulfilment” and “provides serenity and calm for your busy world”. It also states that Asian cultures have accepted the use of ginger because of its cleansing effect, it helps digestion and encourages inner harmony. ACA would like to see a standard that prohibits these types of meaningless claims and many others that may already be used.

Performance claims however, must refer to a specific benefit such as improving performance of a particular organ or physiological system. If a performance claims does not refer to a specific benefit then they should not be permitted. This is consistent with policy guidelines that say claims must refer to specific benefits rather than general benefits.

## **Slimming Claims**

Slimming claims or claims referring to a product’s weight reducing properties should not be permitted. Weight reduction is a result of a negative balance of energy input (i.e. food consumption) versus energy expenditure (i.e. exercise and physical activity). In the vast majority of cases it is highly unlikely that an individual product will lead to weight reduction.

Overweight and obesity continue to be a major health concern in Australia and internationally. With such a focus on addressing and preventing soaring obesity levels, slimming claims may create unrealistic expectations of the capacity of a single food to have a slimming effect, and play on some consumers vulnerability and desire for a ‘quick fix’ to their weight problems.

## **Endorsement campaigns**

Until there is a greater body of research looking at how consumers interpret endorsement campaigns in comparison to health claims, ACA believes all endorsement programs should fall under the relevant health claims to which they refer, as they imply some health benefit. The National Heart Foundation Heart Tick Program is a well-established and well-received endorsement program with set criteria about the foods that are eligible to carry the tick. However, these criteria may not be consistent with the eventual health claims standard. There is a need for consistency between the criteria required to carry the heart foundation tick and the requirements to carry a health claim about a healthy heart or heart disease.

ACA believes that there should be a process whereby FSANZ reviews the requirements of endorsement campaigns to determine whether or not the criteria are consistent with its own requirements for carrying health claims. All health-related endorsement campaigns must comply with the health claims standard. If current campaigns are not consistent then ACA believes that these campaigns should be revised to ensure that it meets the health claims standard. While this may be unfortunate for the established endorsement programs, it is necessary in the long-term to ensure consistency and that any future endorsement campaign does not undermine the health claims standard.

Difficulties would arise if endorsement programs were excluded from the health claims standard. A range of endorsement programs could evolve as a way of bypassing onerous requirements of the health claims standard, if the requirements to carry an endorsement were more relaxed than the requirements to make a health claim.

Therefore, ACA believes that endorsement campaigns should be approved by FSANZ to ensure that criteria are not inconsistent with health claims standard, and they must sit within the relevant level of the claims classification framework to which they refer.

### **Cause-related marketing**

Likewise, cause-related marketing may imply a health claim and we could see a range of new cause-related marketing campaigns evolve as manufacturers attempt to bypass health claims regulation. While ACA believes there is a need for further information on how consumers interpret cause-related marketing, we believe that cause-related marketing campaigns associated with specific nutrition or health related organisations should sit within the relevant level of health claims to which they refer.

A compromise could be that cause-related marketing campaigns could be associated with companies rather than individual products. This way a manufacturer could advertise the fact that a certain proportion of their sales will go to a particular charity rather than attributing it to the sale of a particular product and imply health claim.

At the very minimum any product-based cause-related marketing campaign must carry a disclaimer to say, for example:

“A proportion of the sale of this product will be donated the National Breast Cancer Council. This product will not treat, prevent or reduce the risk of developing breast cancer.”

### **Implied Claims**

As with endorsement campaigns and cause-related marketing, there is a need for greater consumer research in this area, to understand how consumers use and interpret implied claims. However, ACA believes FSANZ need to take a cautious approach to implied claims as claims can be interpreted in a number of ways and a single claims may imply different things to different people. If not strictly regulated there is the likelihood that manufacturers may use implied claims to avoid the requirements for making an explicit health claims. ACA believes that implied claims must be tested and subject to the relevant level of health claim to which they imply a health benefit.

ACA supports prescribed wording in order to prevent the use of implied claims. This would ensure that consumers receive consistent messages about individual food products and their associated health benefit, rather than leaving health claims up to food manufacturers that can engage the use of marketing experts to devise health claims that conveys the most persuasive health claim within the confines of the standard.

### **Whole of Diet and Dietary Guideline Claims**

ACA, as a member of the SDAC, agrees with the comments made on p43 about whole of diet claims. These arguments also apply to dietary guideline claims. Dietary guideline claims should only be allowed on appropriate foods that do not lead consumers to have unrealistic expectations of an individual product's ability to meet the dietary guideline in question.

The claim “The Australian Dietary Guidelines recommends a healthy diet containing at least five servings a day of vegetables” would be appropriate when made in relation to fresh fruit and vegetables, such as pumpkin. However, if this claim was to appear on a can of pumpkin soup, then it could imply that the product will significantly assist consumers in achieving this dietary guideline when the product may contain very little pumpkin, the pumpkin does not make a comparative nutritional contribution as fresh pumpkin and may be the product might be high in salt and/or fat.

## **Biologically active substances**

ACA believes that the health claims standard should apply to biologically active substances and that their placement within the statement should be dependent on the type of claims being made, and where it falls within the claims classification framework. It is likely that manufacturers will wish to make claims about the presence of biologically active substances as they would other nutrients. Therefore, the health claims standard must be applicable to biologically active substances. Conditions, criteria and substantiation requirements must be the same for nutrients and biologically active substances. If claims about biologically active substances cannot be substantiated then they should not be permitted.

## **OTHER ISSUES**

### **Prescribed wording**

In ACA's opinion the wording of pre-approved health claims, particularly high level claims must be prescribed to create a level playing field for manufacturers, and to improve ease of enforcement. If wording is prescribed then all manufacturers will have to use the same claim rather than individual manufacturers having the ability to determine their own wording. Marketing is highly sophisticated and effective in creating a consumer desire and preference for a particular product. Therefore, clever marketing will use creative wording to create a more persuasive claim. If all manufacturers are required to use the same prescribed wording then this will create a level playing field for all manufacturers, will create a consistent message for consumers and will improve enforcement for enforcement authorities as they will only have to enforce one standard health claims rather than a multitude of variations on a similar claim.

### **National Nutrition Survey**

Current consumption data dates back to 1995 when the most recent National Nutrition Survey was conducted. This information has not been updated, nor has there been any commitment to update this information by conducting another National Nutrition Survey. The nutrition and health claims standard will therefore be based on increasingly outdated information that will be at least 10 years old by the time the standard is completed. The food supply has changed considerably in this time.

There must be Commonwealth commitment to update the National Nutrition Survey, and an undertaking to collect this information on a regular basis in order to ensure that food policy and regulation is based on relevant, up-to-date consumption data.

### **Pictures and graphics**

Pictures and graphics must also be included in definition of a health claims as they can convey a health benefit as well as any written claim. This is consistent with other areas of the Food Standard Code that state that a label must not carry pictures or graphics that imply the presence of ingredients when there is none of that ingredient in the product.

### **Registered Trademarks**

Registered trademarks have the capacity to undermine health claims standards as manufacturers make the name of the product a registered trademark in order to avoid health claims regulation. An example of this is the McCain's Healthy Choice range. Some juice bars have also registered the name of a product to get around health claims legislation.

### **Infant foods**

Infant foods should not be permitted to carry health claims as they are targeted to some of the most vulnerable consumers and may take advantage of parents' desire to give their baby the most nutritious food possible.

### **Use of the word 'significantly'**

ACA agrees that the word 'significantly' should be included in the definition of relevant claims as it is not sufficient to state that there was a reduction if that reduction in risk was only minor. Generally speaking, scientific research determines whether a change or an association is significant. If a change is not significant then consumers will be misled, as a claim will overstate the ability of a product to bring about a health benefit. An insignificant association is not a sufficient basis for carrying a health claim and would not meet scientific substantiation criteria.

### **Qualifying and disqualifying criteria**

Disqualifying criteria should prohibit the use of health claims on inappropriate foods such as products high in fat, salt and sugar unless otherwise permitted, i.e. cholesterol claims on phytosterol spreads.