



FOOD STANDARDS
Australia New Zealand
Te Mana Kounga Kai - Ahitereiria me Aotearoa

03/03

2 October 2002

INITIAL/DRAFT ASSESSMENT REPORT (s.36)

PROPOSAL P269

A TRANSITIONAL STANDARD FOR CAFFEINE IN ARTIFICIAL DRINKS (NEW ZEALAND ONLY)

DEADLINE FOR PUBLIC SUBMISSIONS to the Authority in relation to this matter:

16 October 2002

(See "Invitation for Public Submissions" for details)

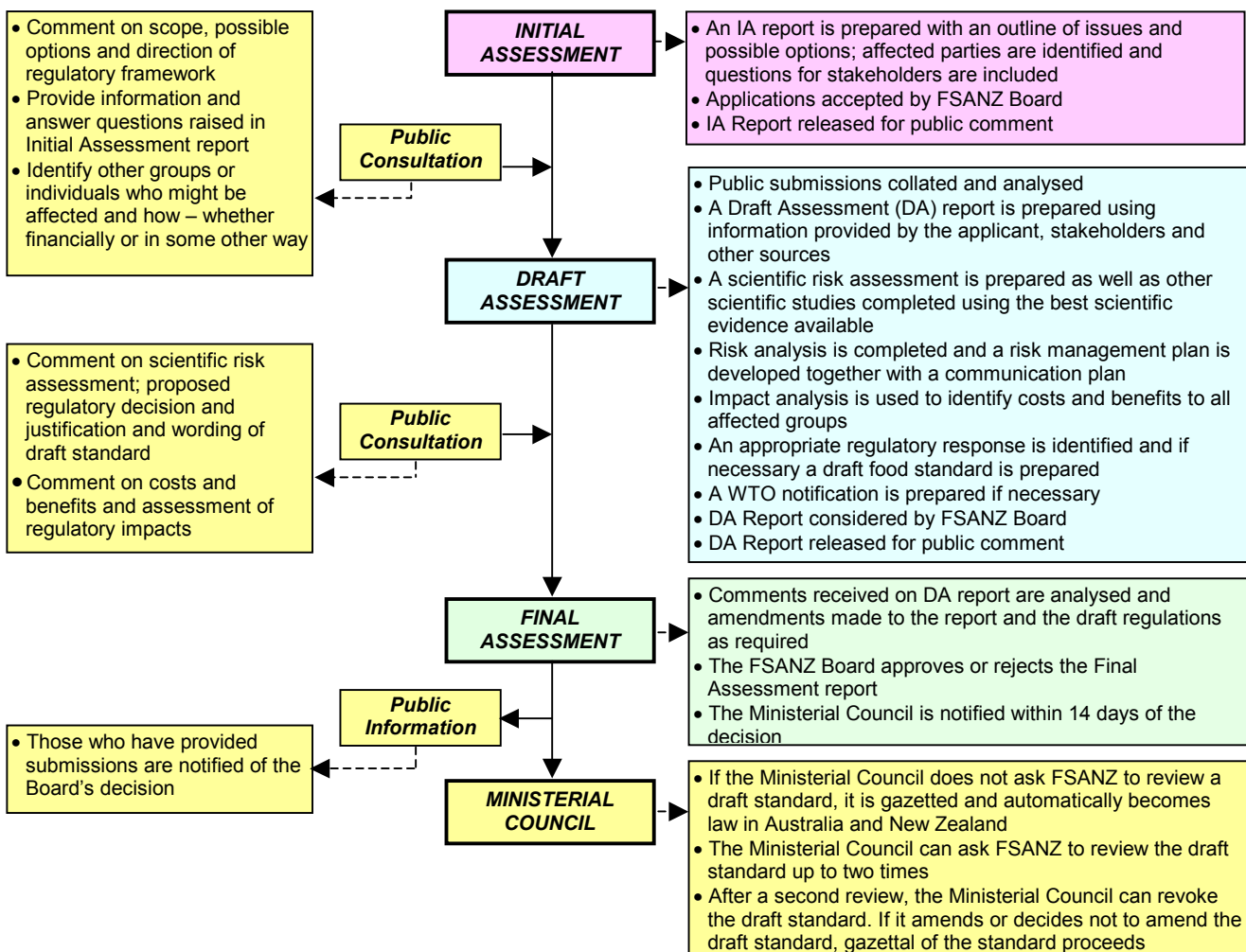
FOOD STANDARDS AUSTRALIA NEW ZEALAND (FSANZ)

FSANZ's role is to protect the health and safety of people in Australia and New Zealand through the maintenance of a safe food supply. FSANZ is a partnership between ten governments: the Commonwealth; Australian States and Territories; and New Zealand. It is a statutory authority under Commonwealth law and is an independent, expert body.

FSANZ is responsible for developing, varying and reviewing standards and for developing codes of conduct with industry for food available in Australia and New Zealand covering labelling, composition and contaminants. In Australia, FSANZ also develops food standards for food safety, maximum residue limits, primary production and processing and a range of other functions including the coordination of national food surveillance and recall systems, conducting research and assessing policies about imported food.

The FSANZ Board approves new standards or variations to food standards in accordance with policy guidelines set by the Australia New Zealand Food Regulation Ministerial Council (Ministerial Council) made up of Commonwealth, State and Territory and New Zealand Health Ministers as lead Ministers, with representation from other portfolios. Approved standards are then notified to the Ministerial Council. The Ministerial Council may then request that FSANZ review a proposed or existing standard. If the Ministerial Council does not request that FSANZ review the draft standard, or amends a draft standard, the standard is adopted by reference under the food laws of the Commonwealth, States, Territories and New Zealand. The Ministerial Council can, independently of a notification from FSANZ, request that FSANZ review a standard.

The process for amending the *Food Standards Code* is prescribed in the *Food Standards Australia New Zealand Act 1991* (FSANZ Act). The diagram below represents the different stages in the process including when periods of public consultation occur. This process varies for matters that are urgent or minor in significance or complexity.



INVITATION FOR PUBLIC SUBMISSIONS

The Authority has prepared an Initial/Draft Assessment Report of Proposal P269, which includes the identification and discussion of the key issues as well as a draft variation to Volume 2 of the *Food Standards Code*.

Under section 36 of the FSANZ Act, FSANZ opted to omit one round of public consultation prior to making a Draft Assessment as it was satisfied that the Proposal raises issues of minor significance and complexity only. Subject to the *Administrative Appeals Tribunal Act 1975*, application may be made to the Administrative Appeals Tribunal, for review of the decision (under s.36) by a person whose interests are affected by the decision.

FSANZ will conduct a single round of public consultation and now invites submissions on this Initial/Draft Assessment Report based on regulation impact principles and the draft variation to Volume 2 of the *Food Standards Code* for the purpose of preparing an amendment to the *Food Standards Code* for approval by the FSANZ Board.

Written submissions are invited from interested individuals and organisations to assist the Authority in preparing the Final Assessment for this proposal. Submissions should, where possible, address the objectives of the Authority as set out in Section 10 of the *Food Standards Australia New Zealand Act 1991* (FSANZ Act). Information providing details of potential costs and benefits of the proposed change to the *Food Standards Code* (Code) from stakeholders is highly desirable. Claims made in submissions should be supported wherever possible by referencing or including relevant studies, research findings, trials, surveys etc. Technical information should be in sufficient detail to allow independent scientific assessment.

The processes of the Authority are open to public scrutiny, and any submissions received will ordinarily be placed on the public register of the Authority and made available for inspection. If you wish any information contained in a submission to remain confidential to the Authority, you should clearly identify the sensitive information and provide justification for treating it as commercial-in-confidence. Section 39 of the FSANZ Act requires the Authority to treat in-confidence, trade secrets relating to food and any other information relating to food, the commercial value of which would be, or could reasonably be expected to be, destroyed or diminished by disclosure.

Submissions must be made in writing and should clearly be marked with the word "Submission" and quote the correct project number and name. Submissions may be sent to one of the following addresses:

Food Standards Australia New Zealand
PO Box 7186
Canberra BC ACT 2610
AUSTRALIA
Tel (02) 6271 2222
www.foodstandards.gov.au

Food Standards Australia New Zealand
PO Box 10559
The Terrace WELLINGTON 6036
NEW ZEALAND
Tel (04) 473 9942
www.foodstandards.govt.nz

Submissions should be received by the Authority by: **16 October 2002**.

Submissions received after this date may not be considered unless the Project Manager has given prior agreement for an extension. Submissions may also be sent electronically through the FSANZ website using the Standards Development tab and then through Documents for Public Comment. Questions relating to making submissions or the application process can be directed to the Standards Liaison Officer at the above address or by emailing slo@foodstandards.gov.au.

Assessment reports are available for viewing and downloading from the FSANZ website or alternatively paper copies of reports can be requested from the Authority's Information Officer at either of the above addresses or by emailing info@foodstandards.gov.au including other general enquiries and requests for information.

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EXECUTIVE SUMMARY AND STATEMENT OF REASONS

Regulatory Problem

On 20 December 2002, Volume 2 of the *Food Standards Code* (the Joint Code) will become the sole repository of food product standards in Australia and New Zealand. As a result, caffeinated non-kola soft drinks, which are currently permitted in New Zealand (but not Australia) under their domestic food regulations for artificial drinks, will no longer be permitted. Any such products on the market in New Zealand from 20 December 2002 will have to be withdrawn from sale.

In the interests of ensuring an orderly and efficient transition to a Joint Food Standard System, FSANZ has raised a Proposal to consider the temporary extension, in New Zealand only, of the New Zealand *Food Regulation 1984* permissions relating to caffeine in artificial drinks. It is proposed that the transitional standard remain in place for a period of 18 months.

Objective

The key objectives in assessing this Proposal relate to the desirability of an efficient and internationally competitive food industry, whilst having regard to the primary objective of protecting public health and safety.

Options

Two options have been considered – amend the Joint Code to establish a New Zealand only transitional standard permitting the addition of caffeine to artificial drinks (Option 1); or do not amend the Joint Code to establish transitional arrangements for these products (Option 2).

Impacts

Option 1 is the preferred option. This option will be cost effective and of net benefit to both the food industry and consumers in New Zealand, with little or no regulatory impact on Australian consumers or the Australian food industry.

Consultation

Under Section 36 of the *Food Standards Australia New Zealand Act 1991*, (FSANZ Act) the Authority has decided to omit one round of public consultation as it is satisfied that the Proposal raises issues of minor significance and complexity only.

Conclusion and Statement of Reasons

Adoption of the proposed amendment to the *Food Standards Code* to introduce a transitional New Zealand only standard for caffeine in artificial drinks is recommended for the following reasons:

- there is no evidence to indicate that allowing such drinks to remain on the market would endanger the public health and safety of New Zealand consumers;

- it will ensure an orderly and efficient transition to a single *Food Standards Code* in New Zealand, following the repeal of their domestic food regulations;
- the impact analysis has concluded that the proposed option is cost-effective and of net benefit to both consumers and the food industry in New Zealand, with little or no regulatory impact on Australian consumers or the Australian food industry.

It is proposed that the draft amendment come into effect on 20 December 2002 and that it cease to have effect on 20 June 2004.

1. Introduction

The purpose of this Proposal is to consider whether to establish a transitional New Zealand only standard to allow any caffeinated non-kola soft drinks currently on the market in New Zealand to continue being lawfully sold following repeal of the New Zealand *Food Regulations 1984* (NZFR) on 20 December 2002.

The Proposal has been developed according to the simplified procedures under s.36 of the FSANZ Act. Under these simplified procedures the Authority has omitted to invite public comment at the Initial Assessment stage because it is satisfied that the Proposal raises issues of minor significance and complexity only. The Initial and Draft Assessment has therefore been combined into a single report for public consultation.

2. Regulatory Problem

In Australia, under both Volume 1 and Volume 2 of the *Food Standards Code*, caffeine may only be added to kola type soft drinks, and only to a maximum level of 145 mg/L. In New Zealand, under the NZFR, caffeine may be added to all soft drinks (called artificial drinks) to a maximum level of 200 mg/kg.

From 20 December 2002, as part of the final transition to a Joint Food Standard System between Australia and New Zealand, both Volume 1 of the *Food Standards Code* and the NZFR will be repealed and Volume 2 (the Joint Code) will become the sole repository of food product standards in Australia and New Zealand.

From that date, caffeinated non-kola soft drinks will not be permitted in either country and any such products currently on the market in New Zealand will have to be withdrawn from sale. FSANZ has identified one product currently being sold in New Zealand that will be affected. This product, called *Mountain Dew*, contains caffeine at a level of 152 mg/L¹.

In the interests of ensuring an orderly and efficient transition to a Joint Food Standard System, FSANZ has raised a Proposal to consider the temporary extension, in New Zealand only, of the NZFR permissions relating to caffeine in artificial drinks. It is proposed that the transitional standard remain in place for a period of 18 months.

3. Objective

In developing or varying a food standard, FSANZ is required by its legislation to meet three primary objectives which are set out in Section 10 of the *Food Standards Australia New Zealand Act 1991*. These are:

- the protection of public health and safety;
- the provision of adequate information relating to food to enable consumers to make informed choices; and
- the prevention of misleading or deceptive conduct.

¹ *Mountain Dew* is also sold in Australia but does not contain any added caffeine.

In developing and varying standards, FSANZ must also have regard to:

- the need for standards to be based on risk analysis using the best available scientific evidence;
- the promotion of consistency between domestic and international food standards;
- the desirability of an efficient and internationally competitive food industry;
- the promotion of fair trading in food; and
- any written policy guidelines formulated by the Ministerial Council.

The key objectives in assessing this Proposal thus relate to the desirability of an efficient and internationally competitive food industry, whilst having regard to the primary objective of protecting public health and safety.

4. Relevant Issues

4.1 Health and safety considerations

The health and safety considerations relating to the addition of caffeine to non-kola soft drinks are being fully considered by the Authority under Application A427 Caffeine in Soft Drinks, and are not relevant to the assessment of this Proposal.

No such products will be permitted to be produced in, or imported into Australia under the transitional standard (although the Trans Tasman Mutual Recognition Arrangement will operate in relation to products imported from New Zealand). Only one product (*Mountain Dew*) in New Zealand is involved, and this product has a relatively small market share compared to the various kola soft drinks and other caffeinated beverages currently available in New Zealand. The Authority has no evidence to indicate that allowing this product to remain on the market would endanger the public health and safety of New Zealand consumers.

4.2 Application A427

The Authority's consideration of Application A427 is currently at the Draft Assessment stage and is being assessed according to the statutory objectives of FSANZ. This Proposal should in no way be construed as pre-empting a decision in relation to that application.

This Proposal has been raised specifically to ensure an orderly and efficient transition to a single *Food Standards Code* in New Zealand, following the repeal of their domestic food regulations. It would not be reasonable to require the removal of product lawfully manufactured and packaged in accordance with the requirements in place during the transition period in advance of a regulatory decision in relation to A427.

5. Options

The following regulatory options have been identified:

Option 1 – adopt the proposed draft amendment to Volume 2 of the *Food Standards Code*. This will establish a transitional New Zealand only standard, which will maintain the *status quo* and allow caffeinated non-kola soft drinks to continue being sold in New Zealand. It is proposed the transitional standard remain in place for a period of 18 months, after which it will cease to have effect.

Option 2 – reject the proposed draft amendment to Volume 2 of the *Food Standards Code*. Following transition to the Joint Code on 20 December 2002, non-kola caffeinated soft drinks will no longer be permitted in New Zealand and will have to be withdrawn from sale.

6. Impact Analysis

6.1 Affected parties

- **Consumers**, primarily those in New Zealand.
- **Food industry**, in particular those sectors of the food industry in New Zealand involved in the manufacture, marketing, import or export of soft drinks.
- **Governments** of New Zealand, the States and Territories and the Commonwealth of Australia.

6.2 Cost benefit analysis

6.2.1 Option 1

- | | | |
|----------------|---|---|
| Consumers: | ▪ | No direct impact as <i>status quo</i> maintained. |
| Food industry: | ▪ | No direct impact as <i>status quo</i> maintained. |
| Government | ▪ | No direct impact other than minor costs associated with amending the <i>Food Standards Code</i> . |

6.2.2 Option 2

- | | | |
|----------------|---|---|
| Consumers: | ▪ | Consumers in New Zealand will be denied access to caffeinated non-kola soft drinks, namely <i>Mountain Dew</i> . |
| Food industry: | ▪ | Would impact almost entirely on New Zealand food businesses in that it would disrupt trade in the soft drink <i>Mountain Dew</i> , which will have to be withdrawn from sale from 20 December 2002. |
| Government | ▪ | Enforcement agencies in New Zealand will have to undertake surveillance to ensure that <i>Mountain Dew</i> is withdrawn from sale in New Zealand and also to prevent any importation. |

The regulatory impact on all sectors of establishing a transitional New Zealand only standard for the addition of caffeine to non-kola soft drinks is minimal in that the proposed measure merely serves to maintain the *status quo* in the New Zealand market to ensure an orderly and efficient transition to a single *Food Standards Code*. There is little or no regulatory impact on Australian consumers or the Australian food industry arising from Option 1. The proposed amendment to the *Food Standards Code* is therefore cost effective and of net benefit to both the food industry and consumers.

7. Consultation

7.1 Public consultation

The Authority has decided, pursuant to s.36 of the FSANZ Act, to omit to invite public submissions in relation to the proposal prior to making a draft assessment. The Authority is satisfied that the Proposal raises issues of minor significance and complexity only.

Section 63 of the Act provides that, subject to the *Administrative Appeals Tribunal Act 1975*, a person whose interests are significantly affected by the decision to omit to invite public submissions in relation to the proposal may make an application for a review of the Authority's decision to the Administrative Appeals Tribunal.

7.2 World Trade Organization (WTO) Notification

As members of the WTO, Australia and New Zealand are signatories to the agreements on the Application of Sanitary and Phytosanitary Measures (SPS agreement) and on Technical Barriers to Trade (TBT Agreements). In some circumstances, Australia and New Zealand have an obligation to notify the WTO of changes to food standards to enable member countries of the WTO to make comment.

The proposed amendment to Volume 2 is minor and merely serves to maintain the *status quo* to ensure the smooth transition in New Zealand to a single *Food Standards Code* following the repeal of their domestic food regulations. The proposed amendment will therefore not raise any potential Sanitary/Phytosanitary matters or Technical Barriers to Trade, and consequently, it will not be necessary to notify the WTO.

8. Conclusion and Recommendation

Adoption of the proposed amendment to the *Food Standards Code* to introduce a transitional New Zealand only standard for caffeine in artificial drinks is recommended for the following reasons:

- there is no evidence to indicate that allowing such drinks to remain on the market would endanger the public health and safety of New Zealand consumers;
- it will ensure an orderly and efficient transition to a single *Food Standards Code* in New Zealand, following the repeal of their domestic food regulations;
- the impact analysis has concluded that the proposed option is cost-effective and of net benefit to both consumers and the food industry in New Zealand, with little or no regulatory impact on Australian consumers or the Australian food industry.

11. Implementation and Review

It is proposed that the draft amendment come into effect on 20 December 2002, which is the anticipated date of repeal of the NZFR. The transitional standard will operate for a period of 18 months, after which it will cease to have effect.

ATTACHMENT

1. Draft variation to Volume 2 the *Food Standards Code*.

DRAFT VARIATIONS TO *FOOD STANDARDS CODE*

To commence: 20 December 2002

[1] *The Food Standards Code is varied by inserting immediately following Standard 1.1A.6 -*

STANDARD 1.1A.7

**TRANSITIONAL STANDARD FOR CAFFEINE IN ARTIFICIAL DRINKS
(NEW ZEALAND ONLY)**

Purpose

This Standard incorporates paragraph 215(2)(e) of the former New Zealand *Food Regulations (1984)*, in so far as it permits the addition of caffeine to artificial drinks. This Standard operates as a transitional standard only and ceases to have effect on 20 June 2004.

Table of Provisions

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Clauses

1 Interpretation

In this Standard -

artificial drink means a non-alcoholic beverage that is an unfermented mixture of drinking water which may contain other foods.

2 Application

- (1) Subject to subclause (2), for the matters regulated in this Standard, food produced in or imported into New Zealand must comply with this Standard.
- (2) This Standard does not apply to food produced or imported into Australia.
- (3) This Standard ceases to have effect on 20 June 2004.

3 Composition

- (1) An artificial drink may contain no more than 200 mg/kg of caffeine.

