Food Standards Australia and New Zealand (FSANZ)
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This submission supports **Application A1039** in seeking changes to F.S.A.N.Z regulations for low THC hemp food products. This submission also supports F.S.A.N.Z. position in recommending approval of application A1039. It further proposes that the Commonwealth and all States enact the Industrial Hemp Industries Act and remove low THC *Cannabis* from its non-evidence based classification as a Narcotic.

The Hemp Industry has the potential to be one of Australia's major agricultural and secondary industries. Low THC *Cannabis* has many health and environmental benefits, all empirical information evidences that low THC hemp is not a narcotic. This paper outlines the legislative position of the Commonwealth and States regarding the classification of all species of *Cannabis* as a Narcotic, contrary to the Single Convention on Narcotics 1961, Article 28.2.
This Convention shall not apply to the cultivation of the Cannabis plant exclusively for industrial purposes (fibre and seed) or horticultural purposes.

All laws should be based on common sense, verifiable scientific information, an educated understanding and debate of the facts. They should in no way be based on emotive, unscientific nor easily contradictable arguments or contrary legislative intent.

The Commonwealth and States classification of low THC *Cannabis* as a narcotic is contrary to the Commonwealths ratification of ***the Single Convention on Narcotic Drugs 1961.*** That, sections of the ***Narcotics Drugs Act(Cth) 1967, the Custom's Act (Cth) 1901*** *and the* ***Criminal Code (Cth) 1995***, if challenged in the High Court of Australia could be found ultra vires of the Parliaments legislative authority as contravening multilateral and international Agreements.

Hemp and Marijuana
Myths & Realities[1]

"Surely no member of the vegetable kingdom has ever been more misunderstood than hemp. For too many years, emotion-not reason-has guided our policy toward this crop. And nowhere have emotions run hotter than in the debate over the distinction between industrial hemp and marijuana.
This paper is intended to inform that debate by offering scientific evidence, so that farmers, policymakers, manufacturers, and the general public can distinguish between myth and reality.

Botanically, the genus *Cannabis* is composed of several variants.
Although there has been a long-standing debate among taxonomists about how to classify these variants into species, applied plant breeders generally embrace a biochemical method to classify variants along utilitarian lines.
Cannabis is the only plant genus that contains the unique class of molecular compounds called cannabinoids. Many cannabinoids have been identified, but two

[1] David P. West. PhD. Plant Breeding, University of Minnesota. North American Industrial Hemp Council. http://www.naihc.org

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preponderate, THC which is the psychoactive ingredient of *Cannabis,* and CBD which is an anti-psychoactive ingredient.

One type of *Cannabis* is high in the psychoactive cannabinoid, THC**,** and low in the anti-psychoactive cannabinoid**,** CBD. This type is popularly known as marijuana. (***Article 28.1 Single Convention on Narcotics***)
Another type is high in CBD and low in THC. Variants of this type are called industrial hemp." (***Article 28.2 Single Convention on Narcotics***)
Research paper is available from the North American Industrial Hemp Council, Inc.

International Conventions, Commonwealth and State Legislation: *Cannabis* species.

The Commonwealth of Australia ratified and incorporated ***the Single Convention on Narcotics 1961***, as the Schedule to ***the Narcotics Drugs Act (Cth) 1967***.
The ***1972 Protocol Amending the Single Convention on Narcotic Drugs 1961*** and the ***Convention on Illicit Traffic in Narcotic and Psychotropic Substances 1988,*** confirm ***the 1961 Single Convention and Articles therein contained.***
However, the ***Narcotic Drugs Act (Cth) 1967, the Custom's Act (Cth) 1901 and the Criminal Code (Cth) 1995 have similar definitions and classify*** all forms of *Cannabis* as a narcotic, contrary to the Single Convention Article 28.2.

Article 28: of the Single Convention deals specifically with Cannabis.

Control of Cannabis

1. If a Party permits the cultivation of the Cannabis plant for the production of Cannabis or Cannabis resin, it shall apply thereto the system of controls as provided in article 23 respecting the control of the opium poppy.

2. This Convention ***shall not apply to the cultivation*** *of the Cannabis plant exclusively* ***for industrial purposes (fibre and seed)*** *or horticultural purposes.*

3. The Parties shall adopt such measures as may be necessary to prevent the misuse of, and illicit traffic in, the leaves of the Cannabis plant.

In reading down Article 28.2, it is apparent that low T.H.C. *Cannabis* (Industrial Hemp) is not classified as a Narcotic. It states quite clearly the convention does not apply to low THC *Cannabis* (*fibre and seed*).

In NSW, *Cannabis* is controlled under the ***Drugs Misuse and Trafficking Act 1985***
Licensed growers of low THC *Cannabis* for fibre are permitted to cultivate Cannabis under the ***Hemp Industries Act 2008, (NSW)*** however this is currently regulated using the same controls as those for Opium, under the ***Single Convention Article 23.***
Other States and Territories have similar legislation

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The High Court of Australia

The High Court has given a series of explanations of the relationship between the Australian legal system and international law.[2] With respect to international agreements to which Australia is a party, the Court has generally insisted that, for a treaty or convention to have any direct domestic effect, the agreement must have been adopted into Australian law through legislation. This is often described as the 'transformation' approach to international law.

> Australia's signature of an international convention/ agreement does not, of course, have effect within Australian domestic law without ratification.[3] The provisions of an international treaty require statutory implementation before the treaty is to form part of Australian law.[4]

Australian jurisprudence[5], consistently with *Polites*, embodies a clear cut dualism in relation to the incorporation of treaty or convention obligations into domestic law.
As that case made clear however, it does not exclude the application of rules of customary international law and of unincorporated treaty obligations to the interpretation of domestic statutes. The application of the latter to the exercise of discretionary powers under statute is still a matter of debate. Six propositions going to the extent and limits of dualism in Australia were set out by;

Gummow J in 1992 in *Minister for Foreign Affairs and Trade v Magno*[6]

> 3. Absent parliamentary incorporation by legislation of a convention which has been ratified by Australia, the terms of the convention may still be used in interpreting domestic legislation.
> **The underlying principle is that parliament should be presumed as intending to legislate in accordance with, and not in conflict with, international law.**

I have used Chief Justice French, to show the position of the Court in interpreting the situation when international agreements are not incorporated in legislation. However in the case of low THC *Cannabis* the obligation has been incorporated and that has been conflicted by the sections of domestic legislation identified and the current FSANZ guidelines.
There is little doubt the Court must uphold the higher law under the Convention and find all conflicting legislation as ultra vires.

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[2] Ian Brownlie, *Principles of Public International Law* (6th ed, 2003) 42.
[3] *Koowarta v. Bjelke-Petersen:* (1982) 153 CLR 168 at 193 per Gibbs J, at 212 per Stephen J, and 224 per Mason J.
[4] 11. *Victoria v. Commonwealth* (1996) 187 CLR 416 at 481 per Brennan C J, Gaudron, McHugh and Gummow J.

[5] SUPREME COURT OF NEW SOUTH WALES ANNUAL CONFERENCE
International Law and Australian Domestic Law*
Chief Justice Robert French
21 August 2009, Hunter Valley, Pokolbin
[6] H.C.A. (1992) 112 ALR 529 at 534-535.

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Related Matters from Common Law Countries.

Hemp Industries Association v Drug Enforcement Administration: 2004.[7]

IV. CONCLUSION

[9] The DEA's Final Rules purport to regulate foodstuffs containing "natural and Synthetic, THC." And so they can: in keeping with the definitions of drugs controlled under Schedule I of the CSA, the Final Rules can regulate foodstuffs containing natural THC if it is contained within marijuana, and can regulate synthetic THC of any kind. **But they cannot regulate *naturally-occurring* THC *not* contained within or derived from marijuana—i.e., non-psychoactive hemp products—because non-psychoactive hemp is not included in Schedule I.**

The DEA has no authority to regulate drugs that are not scheduled, and it has not followed procedures required to schedule a substance.

[10] The DEA's definition of "THC" contravenes the unambiguously expressed intent of Congress in the CSA and cannot be upheld. DEA-205F and DEA-206F are thus scheduling actions that would place non-psychoactive hemp in Schedule I for the first time. In promulgating the Final Rules, the DEA did not follow the procedures in §§ 811(a) and 812(b) of the CSA required for scheduling. The amendments to 21 C.F.R. § 1308.11(d) (27) that make THC applicable to all parts of the *Cannabis sativa* plant are there fore void. We grant Appellants' petition and permanently enjoin enforcement of the Final Rules with respect to non-psychoactive hemp or products containing it.

The Court found that the DEA had added Industrial Hemp (low THC Cannabis sativa) to ***Schedule 1 of the Controlled Substances Act,*** without going through the correct procedures to do so. The Court found that it was the unambiguous intention of Congress via ***the Marijuana Act 1937***, not to include Industrial Hemp on the Schedule to the CSA. If the DEA wanted to add a substance or a plant to the Schedule it must go through the correct procedures. The Court stated it was not up to them to determine, whether or not the DEA had the power to Schedule a substance or plant but to determine if the superior Law (Congress) unambiguously defined Industrial Hemp as non-scheduled.

The relevance of that case to Australia is this, under international law, low THC *Cannabis* is exempt from classification as a narcotic. As such if the Commonwealth or State parliaments wanted to initiate legislation contrary to our international obligations then there is a certain scheduling they would need to prove to the UN that the said plant was a narcotic. This is what the DEA failed to do

[7]UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
HEMP INDUSTRIES ASSOCIATION &Ors: *Petitioners,* v.
DRUG ENFORCEMENT ADMINISTRATION: *Respondent.*

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Ministerial Council Response to previous Application A360

> However, in May 2002, the Australia and New Zealand Food Regulation Ministerial Council (Ministerial Council) rejected the FSANZ recommendation for Application A360. The Ministerial Council was concerned that the use of hemp in food may **send a confused message** to consumers about the acceptability and safety of *Cannabis*. The Ministerial Council also highlighted concerns about law enforcement, particularly potential issues relating to distinguishing between high and low THC varieties of *Cannabis*. The Ministerial Council considered that the total prohibition on all *Cannabis* species in the Code should remain.

Application A1039 must be judged on scientific, botanic, nutritional and empirical facts not with the same emotive, un-substantiated claims made by the Ministerial Council in 2002.
Public health issues should be based on facts and as the Single Convention on Narcotics 1961, which is binding in Australia confirms, low THC *Cannabis* is not a narcotic and has no psycho-active properties. It is therefore a matter of public and administrative education about the public health benefits and the differences between the species.

The Ministerial Council and other agencies are in fact "sending a confused message" in not understanding the differences between *cannabis sp* and by enforcing regulations which are ultra vires of our international obligations.

There are two quite separate issues here and they must not be confused, and once again I draw your attention to the Single Convention and Australia's obligation under it.
I am advised that if this application is refused on the same or similar grounds as the previous Application 360, then we would have no choice than to take the matter to the High Court of Australia

I propose the **Industrial Hemp Industries (2011) Bill be enacted** and the current classification of low THC *Cannabis* as a narcotic, under the *Narcotics Drugs Act (Cth) 1967* and all other Commonwealth and State legislation be amended.
This is a holistic solution for all parties to this debate, it is relevant to and would support CSIRO investigation's into biofuels.
The Murray Darling could also benefit as hemp uses 40% less water than cotton.
Industrial hemp as a carbon sequester of 1.8 kg/kg of fibre.
Hemp is superior to all other bio-mass.
Nutritionally well the facts speak for themselves.

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References:

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About the Author: Dr. West holds a Ph.D. in Plant Breeding from the University of Minnesota and has spent 18 years as a commercial corn breeder. Since 1993 he has served as an advisor to the emerging hemp industry regarding industrial hemp germplasm. His work, "Fibre Wars: the Extinction of Kentucky Hemp" (1994), a pioneering discussion of the functional difference between hemp and marijuana, and his other writings on hemp and agriculture are available online: www.naihc.org

Hilary Charlesworth: "The High Court on Constitutional Law: The 2004 Term" [2005] UNSW Law Jl 2; (2005) 28(1) University of New South Wales Law Journal

North America Industrial Hemp Council: http://www.naihc

Ian Brownlie: *Principles of Public International Law* (6th ed. 2003).

The High Court of Australia, Canberra: http://www.hca.gov.au

SUPREME COURT OF NEW SOUTH WALES ANNUAL CONFERENCE
International Law and Australian Domestic Law*
Chief Justice Robert French
21 August 2009, Hunter Valley, Pokolbin

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
HEMP INDUSTRIES ASSOCIATION; ALL-ONE-GOD-FAITH, INC. dba Dr. Bronner's Magic Soaps; ATLAS CORPORATION; NATURE'S PATH FOODS USA INC.; HEMP OIL CANADA, INC.; HEMPZELS, INC.; No. 03-71366 KENEX LTD.; TIERRA MADRE, LLC; DEA No. RUTH'S HEMP FOODS, INC.; ORGANIC Fed. Reg. DEACONSUMERS
ASSOCIATION, 205F
Petitioners
v. DRUG ENFORCEMENT ADMINISTRATION:
Respondent