



**Nestlé**

Nestlé Submission

Nutrition Health & Related Claims

(P 293)

17 February 2012

## **Nestlé Submission**

### **Proposal 293 Nutrition Health and Related Claims Consultation**

#### **Executive Summary**

This submission is made on behalf of Nestlé Australia Ltd and Nestlé New Zealand Ltd.

Nestlé welcomes the opportunity to provide comments in response to Food Standards Australia New Zealand (FSANZ) Proposal P293 Nutrition, Health and Related Claims.

Nestlé considers that the consultation document presented as Part 1 of the paper should not be limited in scope to very specific components of the draft Standard. FSANZ should consider the overarching concerns raised by industry as well as the specific issues raised across the proposed draft Standard as a whole.

Nestlé considers that the consultation proposed in Part 11 of the paper 'Fat Free & % Fat Free' should not be included as part of this overall public consultation. It is stated in the paper that FSANZ has only undertaken a preliminary review of the evidence of consumer perceptions relating to 'fat free and % fat free'. No evidence relating to the fact that consumers have been misled has been indicated or included in the paper. If FSANZ considers this issue warrants investigation then a separate formal process or proposal should be raised otherwise submitters are proposing regulatory options via this consultation without the entirety of the work being appropriately considered or evidence of demonstrated market failure presented.

Nestlé supports a Health and Related claims Standard which is efficient, transparent, and proportionate enabling industry to continue investment in research promoting innovative and globally competitive food products. Nestlé considers that any food should be able to carry a nutrition or health claim provided that the claim is scientifically substantiated. The basic principle being that a claim is lawful provided that it can be substantiated, that the substantiation should be in proportion with the claimed benefit and that the claimed benefit should be appropriately communicated so as to be meaningful to the consumer and be placed in the context of the total diet.

Nestlé considers that the proposed Health and Related Claims Standard;

- Does not adopt the requirements of the Ministerial Council Policy Guideline on Nutrition, Health And Related Claims;
- Is overly restrictive and will result in a less innovative food industry;
- Is not a simple and straightforward framework for industry to make factual and truthful claims about products;
- Does not support an innovative environment for growth in local R&D investment;
- Does not meet FSANZ requirements to ensure minimum effective regulation as the Standard adds further regulatory burden to the industry by moving away from self substantiation of claims to the costly and time consuming processes of applications with all claims to be assessed as high level.

Nestlé considers that the consultation should have included;

- The substantiation framework, we consider this is crucial to understanding the impact this regulation will have on industry. The expectations appear to have changed;
- All aspects/processes (scientific evidence requirements, process for compiling, assessment and approval of a health claim) that need to be understood to be able to comment on the true impact of the introduction of the Health & Related Claims Standard.

The potential impact of the draft health claims Standard on true innovation in Australia and New Zealand will be great and our need to remain globally relevant will continue to be challenging. The impetus for investing in local R&D to substantiate as well as support health claim communication is seriously under threat.

## **Nestlé Submission**

### **Proposal 293 Nutrition Health and Related Claims Consultation**

#### **Response to Revised Draft Standard 1.2.7**

**1. Does the revised drafting accurately capture the regulatory intent as provided in Attachment B? Please consider the clarity of drafting, any enforceability issues and the level of 'user-friendliness'.**

There have been significant changes to the draft standard since the last consultation in 2009. In some areas this has assisted in addressing issues of clarity with a shorter and more concise standard however there are areas within the draft Standard that continue to be unclear, and some that are now less clear and we have highlighted throughout this document the areas of concern.

Nestlé previously elaborated and supported a co-regulatory approach that would see a framework in place that would be of the highest benefit to consumers and will assist in reducing regulatory and enforcement burden.

This type of approach is also consistent with the Policy Guidance provided by:

- enabling responsible use of scientifically valid nutrient, health and related claims;
- supporting government, community and industry initiatives that promote healthy food choices by the population;
- being cost effective overall, and not more trade restrictive than necessary;
- containing a process for substantiation which better aligns to a hierarchy of claims, with minimum costs to the community;
- providing for collaborative action among enforcement agencies, industry and consumers which optimises potential to educate consumers on a balanced diet; and
- enables effective monitoring and enforcement, proportionate to the hierarchy of claims.

Nestlé considers that industry Codes of Practice can be a powerful and useful framework that is beneficial to consumers and supports innovation in the food manufacturing industry. Co-regulation will also assist in reducing the burden of enforcement for jurisdictions. Nestlé suggests that the benefits of a co-regulatory approach should have been explored in greater depth as an alternative to the proposed Standard for Health and Related Claims.

#### **Part 1 Purpose & Interpretation - Editorial Note**

Nestlé considers that a 2 year transition time is not adequate and that 4 years would be more appropriate. This will ensure that consumer education and information activities can be undertaken where claims will no longer be represented on food products. An extended transition period of 4 years will allow for food health relationships that are not yet approved to be assessed by FSANZ for inclusion within the transition period. If applications (unpaid) go onto the work plan then it is unlikely they will be assessed within a 2 year transition time.

The extra time also allows re-formulation to be addressed for those products that are impacted by the changes to nutrient content criteria such as the increase to levels of fibre required to make a claim.

## **Clause 2 Interpretation Nutrition Content Claim definition**

The definition of nutrition content claim should be expanded to include the words 'certain substances' thus a 'claim about the presence or absence of certain substances'. This wording would be more consistent with the wording of a nutrition content claim as outlined in the explanatory information (p65). It states that a claim is only a nutrition content claim if it refers to the presence or absence of certain substances, as listed in the definition (a) (i) to (xii).

## **Division 1, Clause 12**

Nestlé recommends that the reference to 'a property of food' be replaced with the term 'certain substances' as previously outlined it will be consistent with the explanatory information document.

## **Division 1, Clause 14, Nutrition content claims must not imply slimming effects**

Sub clause (b) prohibits energy claims that suggest the food has weight loss or weight maintenance properties. Nestlé considers that 'weight maintenance' does not have the same meaning as weight loss. Following a portion controlled, balanced diet helps to maintain one's weight, it does not imply slimming properties or weight loss. Not permitting portion controlled snacks to communicate about these benefits restricts the ability for consumers to receive this type of information and a greater understanding of energy balance and 'weight maintenance'.

Nestlé requests FSANZ clarify the intent of this wording restriction in this Clause, and remove the words 'weight maintenance' from the prohibition in this clause.

## **Division 1, Clause 15 – Comparative Claims**

Nestlé considers that this clause is unclear - extremely confusing and difficult to understand.

In particular, sub clause (3) (b) which states that 'A comparative claim about the food must include together with the claim - ...the difference between the amount of the property of food (component, ingredient, constituent or other feature of the food) in the claimed food and the reference food '

The definition of 'food group' within the reference food definition is contradictory & unclear.

A reference food is

- (a) Of the same type as the food for which a claim is made and that has not been further processed, formulated, reformulated or modified to increase or decrease the energy value of the amount of the nutrient for which the claim is made' or
- (b) A dietary substitute for the food in the same food group as the food for which a claim is made.

Food Group:

- (a) Bread, grains, rice, pasta & noodles
- (b) Fruit, vegetables, herbs, spices & fungi
- (c) Milk & milk products
- (d) Meat, fish, eggs, legumes
- (e) Fats (incl. butter, oils & spreads)

The dietary substitutes for the food in the food groups specified do not seem to encompass processed food that would not fit into groups (a) to (e).

The example given for (a) is reduced fat v whole milk. However, reduced fat milk is whole milk that has been further processed / modified to decrease the fat content!

Manufacturers may wish to highlight a reduction or increase of a particular property of food in a variety of processed foods. For example, snacks or confectionery with a reduced sugar content – compared to previous formulation, or compared to competitors in the market. In this case, the manufacturer would have formulated to decrease the sugar content.

Or a manufacturer may wish to highlight the fact that they have increased the wholegrain content of a product, the new product would have been reformulated to increase the wholegrain content, and would not seem to be permitted by the comparative claim definition.

Nestlé requests that FSANZ clarify the meaning of clause (a) of the reference food definition and consider if the intent was to capture these types of claims.

Nestlé considers that the wording in the current industry Code of Practice (CoPoNC) on comparative claims should be incorporated by FSANZ ie. Such claims can only be made between foods of the same food group or foods which may substitute for one another in the diet. This is clear, and easy to understand, and has been in place for many years.

### **Part 3 Division 2 - Health Claims**

Nestlé considers that innovation will be stifled by the restrictive nature of the current nutrition and health claims draft standard.

Seeking Pre-approval to have new health claims (lower promise claims that do not refer to a disease) added to schedule 2 is a costly, resource intensive and a potentially slow process. This will discourage R & D investment and potentially deny consumers within the Community beneficial products, nutrition information and education. It is unlikely that small to medium size businesses will be able to engage easily in seeking health claim pre-approval as there would be a significant business burden imposed. The responsibility to grow schedule 2 falls back to larger organizations who while able to take advantage of the positive confidential aspects of a health claim application by being first to market, the resource investment incentive is low as the advantages longer term may not be realised as other competitors enter the market with the same claim proposition (see below).

### **Missing Supporting Detail - Process of Standards amendment**

Nestlé considers that there is little clarity around the process of applying for approval of a new food health relationship.

Aspects that are unclear are;

- The type of communication that will be made by FSANZ if an application is rejected.
- Can the timing of notification to an applicant of approval of a food health relationship that is the subject of a paid application designed to confer an exclusive capturable commercial benefit, be agreed in partnership with the applicant with FSANZ?
- It is the intention to ensure that the applicant gains a 'first to market' advantage from approval of a paid application. However, if the approval timing is such that this benefit cannot be utilised, for example, the approval is communicated outside of the major retailers 'range review' window, then that would remove the first to market advantage.

- Nestlé would like some clarity as to whether the communications of timings can be agreed with FSANZ to optimize this advantage for the applicant to enable coordination with retailer range reviews, packaging design and production as well as media bookings to be optimized. If timings cannot be agreed, it is highly likely that the approved claim will be used by competitors at the same time as the applicant despite the fact that the applicant may have invested heavily in the research & development of such a claim, not to mention have borne the cost of the application itself, for no exclusive benefit.
- This is an important practical consideration which Nestlé considers has not been thoroughly considered in enough detail, although it is highly important to an applicant who has paid for that application. Ultimately, this will impact innovation, as an applicant may not see the value in applying for a new claim, which will reduce competitiveness and access to the consumers to innovative products.

### **Part 3, Division 2, Clause 16 (1 & 2), New Claims deemed to be high level health claims**

If additional health claims are to be considered high level health claims they must undergo pre-approval via an application, and following this process, the level of scientific substantiation required is the same despite the level of promise communicated via the claim statement. To make this clear, previous to this last round of consultation, general level health claims could be supported by probable or convincing level of evidence while high level claims (because they referenced a serious disease or biomarker of a serious disease) had to meet a convincing level of evidence. This principle of matching level of evidence to risk of the claimed message seems to have been lost and this concerns us greatly as no explanation has been provided to support this change.

Nestlé considers that it is difficult to grasp what the true expectation will be of the scope and depth of scientific evidence required to substantiate new claims previously categorised as general level claims.

There needs to be further consultation with regard to the levels of scientific evidence appropriate to support food health relationship/claims. Our concern is that additional substantiation burden will now be placed on industry if the expectation of what constitutes sufficient scientific evidence has changed. We consider this to be the implied situation with all new health claims now being considered 'high level'.

Nestlé considers that the following steps of health claims approval process are currently not clear and need to be transparent and available for thorough review and consultation.

- the process of submitting an application;
- the process of review with submitting scientific evidence;
- how that evidence will be considered, and who will do this;
- the FSANZ process around feedback to applicants;
- the details required of application dossiers;

### **Part 3, Division 2 Health Claims – Schedule 2**

Nestlé supports the inclusion of international claims currently being considered however further details are required around the process of adoption of these claims. We presume that FSANZ is considering applying their own process of review and consultation (assumed it will be a shortened review and consult) of these claims however it will inevitably delay the application of these claims in Australia and New Zealand for an

unknown and possibly significant amount of time.

Nestlé considers that FSANZ need to remain truly open to global movement in this area by considering other jurisdictions not only Europe as indicated in this consultation document. In the 2009 review consultation FSANZ acknowledged that the list in schedule 2 was not exhaustive and referred to many other Authoritative sources for health claims. FSANZ indicated a willingness to consider additional claims/relationship statements that are currently in use and appropriately substantiated.

During previous P293 briefing presentations by FSANZ, it was specified that internationally approved claims from bodies such as EFSA, FDA and Health Canada would be considered appropriate for inclusion in Standard 1.2.7. Since the last draft of P293 was issued in 2009 with the same 115 pre-approved health claims as in the current 2012 draft, many new food health relationships have been approved by EFSA and the FDA. It would be prudent for FSANZ to include these already internationally approved claims in Schedule 2 of Std 1.2.7 to enable the standard to catch up with the latest science.

As mentioned above, it is not clear how quickly FSANZ will be able to start assessing the already approved claims, and this is likely to further delay the ability of Australian and New Zealand food manufacturer's to take advantage of these claims on suitable products. It also reduces innovation investment and improvement of the food supply accordingly.

### **Division 3, Clause 22 – Criteria for Endorsements**

Nestlé is unclear as to why FSANZ have treated Low GI claims inconsistently within the draft standard. Under Criteria for Endorsements, a 'low GI' claim using the 'Glycaemic Index' endorsing logo does not need to meet NPSC. However, the table in Schedule 1 requires a 'Low GI' claim to meet NPSC.

Not only is this confusing and unclear, Nestlé questions the regulatory intent of these requirements. If a food is Low GI (and has been validated as such using the approved analysis), why is food containing the Low GI logo exempt from NPSC?

### **Division 4 – Nutrient Profiling Scoring Criteria (NPSC)**

Many food claims will disappear from products due to the restrictions on the use of claims based on the nutrient profiles, which foods will need to respect in order to bear health claims and this raises a strong concern. Nestlé suggests that *'the concept of prohibiting the use of claims on certain foods on the basis of their nutritional profile is contrary to the basic principle in nutrition that there are no 'good' and 'bad' foods but rather 'good' and 'bad' diets.*

Many companies apply their own form of discretion to ensure consistent, application and appropriateness of claims across categories. This type of process is already widely practiced and applied in industry. Why then does a restrictive and highly discriminating system need to be applied through the heavy hand of regulation?

Nestlé does not agree with the concept of undesirable nutrient profiles and the consequent prohibition of any health claim on those foods. The selection of a balanced diet should be a matter of choice based on the judicious and preferential selection of foods by consumers. The food industry needs to be able to communicate or claim the benefits of food to provide consumers with information to make appropriate food choices for their particular lifestyle.

NPSC will ultimately undermine the competitiveness of the Australian & New Zealand food manufacturers, thereby affecting their longer term viability.

It is also highly likely that jurisdictions will not be able to sufficiently control claims on



imported food products that do not meet NPSC, thereby creating unfair competitive issues for Australian and New Zealand manufacturers.

### **Baseline points for Category 2 Foods**

The last draft standard issued as part of the Consultation Paper in March 2009, stated;

#### **5 Protein points (P points)**

(1) *Use Table 4 to determine the 'P points' scored, depending on the amount of protein in the food product. A maximum of five points can be awarded.*

(2) *Food products that score >13 baseline points are not permitted to score points for protein unless they score five or more points for fvnL.*

The latest draft released gives the baseline points as

#### **5 Protein points (P points)**

(1) *Use Table 4 to determine the 'P points' scored, depending on the amount of protein in the food product. A maximum of five points can be awarded.*

(2) *Food products that score  $\geq 13$  baseline points are not permitted to score points for protein unless they score five or more points for fvnL.*

This small change makes a significant impact to products that were previously assessed as meeting NPSC (> 13 baseline points) and those that now do not meet NPSC ( $\geq 13$  baseline points).

Nestlé is unclear as to which criteria applies and requests clarification.

### **Fat-free and % fat-free claims**

**2. What evidence can you provide that shows consumers are purchasing foods of lower nutritional quality because they are being misled by fat-free or % fat-free claims? FSANZ is primarily interested in the substitution of foods of higher nutritional quality with foods of lower nutritional quality which have fat-free claims. Substitution within a general food group (e.g. choosing a different confectionery product) is of lesser importance.**

No evidence available

**3. Do you support option 1 (status quo), option 2 (voluntary action through a code of practice), or option 3 (regulate with additional regulatory requirements for fat-free and % fat-free claims)? Please give your reasons.**

**Option 1 'Status Quo'** - there is no evidence presented in this consultation paper to support the notion that consumers are being misled by 'fat free and % fat free' claims. Nestlé considers that it is not appropriate to include 'fat free and % Fat Free' in this public consultation document.

'Fat free and % fat free' claims are nutrition content claims. No other similar nutrition content claims have additional qualifying or disqualifying nutrient criteria applied.

Nestlé does not support a form of Nutrient Profiling Scoring criteria (NPSC) being applied to any nutrient content claims – or more specifically to % fat free and fat free claims. The claims need to be true and correct, monitored and validated.

The consultation paper indicated the possibility of a sub-option 'status quo plus education'. Nestlé considers that the education element is already being addressed through the industry developed % Daily Intake Guide (DIG) front of pack nutrition communication. The program has been in place for several years with the industry uptake continually growing. The next evolution of the DIG along with the wider government and industry collaboration to support the scheme will ensure that the program infiltrates further capturing a wider consumer base and helping them to remain informed about their food choices. In addition, the status quo is actually a voluntary industry code of practice - Code of Practice Nutrient Claims in food labels and in Advertisements (1995) – CoPoNC. This seems to have been overlooked when listing the possible regulatory options, since a voluntary code of practice is listed as an option, but not recognised as being the current status quo.

**4. Please comment on the possible options for additional regulatory requirements for fat-free and % fat-free claims (option 3) (refer section 8) as follows:**

- a. Which option do you support and why?**
- b. What is an appropriate sugar concentration threshold for options 3(b) and 3(d)? Where possible, provide information and evidence to support your suggested threshold value.**
- c. Are there other suitable options for additional regulatory requirements for fat-free and % fat-free claims? Please describe.**

Nestlé would support Option 2 - a voluntary industry Code of Practice in relation to high sugar, high energy confectionery products (only) that do not normally contain significant levels of fat.

Such products in the Nestlé retail portfolio, for example, under the ALLENS Brand name are already in the process of removing % fat free claims, and this will be completed by Q2, 2013. Whilst these claims are true and not misleading, these claims have been found to not provide any extra information to consumers, and are not driving consumer choice. The business has decided to focus on enjoyment of these 'sometimes' treat products in the context of an overall balanced diet.