Proposal P1055

December3, 2021

[redacted]

This submission relates to the current labelling criteria described in S1.5.2-4 and S26-3 of the Food Standards Code, and the inconsistencies that currently exist in relation to the application of the Code.

A major problem with the application of the labelling section of the Code is that the Code itself is subjectively interpreted by FSANZ – criteria that are not described anywhere in the Code are created and applied by FSANZ rather than objectively assessing food products against the literal Code.

Consider an example of 3 products side by side on a supermarket shelf:

Product A inadvertently contains 0.9% of actual GM material. This product is exempt from labelling (S1.5.2-4d). The consumer is uninformed about the GM content of the product when it is purchased. It could be concluded that the labelling laws are designed for the convenience of the food manufacturer and disregard the charter, specifically that there would be consumers who want to know this information. FSANZ state that[1]:

Labelling exemptions for GM flavouring substances and the unintended presence of approved GM foods are pragmatic measures to reduce the cost burden on industry and enforcement agencies. The regulatory limit of 1% per ingredient for unintended presence of approved GM foods was put in place to acknowledge that trace amounts of GM material may be present due to the bulk handling and transport of food commodities. A similar tolerance level of 0.9% per ingredient for the presence of GM material applies in the European Union.

In other words pragmatism trumps the informed consumer in the above example. I agree that a pragmatic approach is required in this case.

In S1.5.2-4(1) of the Code includes
(a) the genetically modified food:
(i) has been highly refined where the effect of the refining process is to remove novel DNA or novel protein; and
(ii) is not listed in section S26—3 as subject to the condition that its labelling must comply with this section;

In the next example **Product B** contains no GM material but has been derived from a GMO that has unaltered characteristics – notwithstanding this term is in

[1] FSANZ, personal communication

the eye of the beholder – since the GM design was to produce other benefits, for example herbicide resistance. FSANZ (correctly) interprets S1.5.2-4(1)(a)(i) that since GM material (DNA and protein) has been removed no labelling is required – the consumer does not need to be informed. S1.5.2-4(1)(a)(ii) is apparently then applied, i.e. a subjective decision is made to exempt from labelling.

Under 1.5.2 whether or not labelling is required under the Code in this example depends on S26-3. S26-3 lists foods derived from GM plants approved by FSANZ. S26-3 also lists subsets of those foods that are exempt from labelling. Foods not explicitly listed as exempt are required under S26-3(2) to comply with S1.5.2-4. And S1.5.2-4 references back to S26-3, and S26-3 references S1.5.2-4, and so on. Thus we have circular Code but there is nothing in the Code that explains how and why a food qualifies as being exempt from labelling under S26-3.

Like the case of **product A**, this is a pragmatic approach – a product derived from a GMO is exempt from labelling.

Product C is an edible oil that contains no GM material but has been derived from a GMO and has an altered fatty acid profile. FSANZ requires this product to be labelled despite it satisfying S1.5.2-4(1)(a)(i). FSANZ introduces a criteria called “altered characteristics.” However S1.5.2 and S26 make no reference to "altered." Furthermore those sections could not be inferred as meaning "altered." In the explanatory notes accompanying the last revision of S1.5.2, the notes state that "altered characteristics" has been removed from the Code, yet this term is still cited by FSANZ. The intention of the removal appears to be that this criteria would be captured in S26-3, but as above, "altered characteristics" is not mentioned, let alone quantified in S26. The result is that what gets exempted from GM labelling in S26-3 is solely up to the bureaucratic whims rather than being benchmarked against codified criteria. That is an unsatisfactory application of the Food Standards Code.

Despite the “altered characteristics" criteria not existing in the Code, FSANZ states[2]

The Code does not define ‘altered characteristics’, however the matters we consider when determining whether a GM food has an altered characteristic that would require it to be labelled are described on our GM food labelling webpage: https://www.foodstandards.gov.au/consumer/gmfood/labelling/Pages/default.aspx .

If the Code not only does not define “altered characteristic”, but does not even mention the term why does FSANZ consider whether a food has (undefined) “altered characteristic.” Is the role of FSANZ to apply the Code or to introduce its own criteria if the Code does not produce a desired outcome in the opinion of a bureaucrat? This is a subjective criteria introduced by FSANZ, rather than legislated in the Code. Why?

[2] FSANZ personal communication

The relevant “altered characteristic” criteria on the FSANZ website (as opposed to being in the Code) are:

Labelling is also required for GM foods that have an altered characteristic (e.g. altered nutritional profile) when compared to a counterpart non-GM food (e.g. soy beans with increased oleic acid content). These GM foods are listed in subsection S26—3(2) of Schedule 26 of the Food Standards Code and must be labelled with the words ‘genetically modified’, as well as any additional labelling required by the Schedule, regardless of the presence of novel DNA or novel protein.

Labelling of altered characteristics
The following matters are considered when determining if a GM food has an altered characteristic which would require it to be labelled as ‘genetically modified’:
Whether the genetic modification has significantly altered the composition or nutritional qualities compared to the existing counterpart non-GM food.
Whether the intended use of the GM food is different to the existing counterpart non-GM food.

Bizarrely this subjective criteria is stated without any definition of what "altered" or "significantly altered" actually means quantitatively. This criteria/hurdle, not specified in S1.5.2 or S26, is introduced as a subjective criteria (apparently) to allow FSANZ to ultimately decide what foods require labelling, irrespective of how the food meets the remaining criteria in S1.5.2.

Though rarely mentioned in GM edible oil approvals note that S2.4.1-4c states that labelling is required if

the oil has undergone a process that has altered its fatty acid composition;

However this section is unrelated to GM technology, and the explanatory notes accompanying this section of the Code clearly state that it is intended for chemical modifications of the oil, e.g. hydrogenation. In other words this section of the Code cannot be used to justify the subjective introduction of an “altered characteristics” criteria.

Note that FSANZ created criteria listed on their website contains advice that is very similar to criteria that previously existed in an earlier version of S1.5.2, which was:

the genetic modification has resulted in one or more significant composition or nutritional parameters having values outside the normal range of values for existing counterpart food not produced using gene technology.

It is unclear why this wording was removed from the Code.

To summarize the treatment of **Product C**, it differs starkly from the other two cases. Reading how the Code is applied by FSANZ one could be rightly confused by the introduction is hurdles not actually in the Code, compared to the

pragmatism of cases **A** and **B**. The result is that if products **A**, **B**, and **C** were to exist in a supermarket, FSANZ application of the Code means that a food that actually contains GM material (**product A**) would not be labeled and the consumer would not be informed, whereas **product C**, with no GM material, would be labeled, therefore arguably misleading the consumer.

If S26-3 is to be a "catch all" section to mandate labelling, where S1.5.2 would otherwise exempt labelling, then there needs to be criteria described in the Code so that the public can see that the codified criteria is being applied objectively, impartially, and transparently. This is not currently the case. FSANZ operates subjectively, by applying criteria that is not codified and not even quantified internally.

Finally, while the lack of any quantifiable guide to what constitutes "altered characteristics" exists one can infer a qualitative guide from FSANZ approvals. For example while companies are exempt from labelling for actual (*unintentional*) presence of GM material in food, FSANZ cites *intentional* change to food profile, for example the changed fatty acid profile of an edible oil free of DNA or protein, as a reason to require labelling. This is a misapplication of the Code. Consideration of intentional/unintentional actions in the Code relates to the presence of GM material only, not to an intentional/unintentional change to a nutritional profile (in a product free of all GM material).

Recommendations

For consistency, all foods that contain no GM material should be exempt from labeling and S1.5.2-4(1)(a)(ii) should be removed.

Alternatively, if that change is not accepted, then S1.5.2 should revert to include an item previously in the Code:

the genetic modification has resulted in one or more significant composition or nutritional parameters having values outside the normal range of values for existing counterpart food not produced using gene technology.

This item should be reintroduced if FSANZ is seeking pragmatic consistency, rather than cherry picking situations in which to apply pragramatism. Importantly, (re)introducing this item into the Code would not be sufficient unless S26 was also rewritten to include transparent criteria under which foods were required to label or exempted from labelling. It beggars belief that S26 could have been written as it currently is, without such criteria. The public deserves objectivity, transparency, and impartiality.

The final recommendation is that FSANZ should apply the Code as written. Labelling criteria outside of anything described or inferred in the Code should not be created by FSANZ.