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Our Ref: CF:220673

4 September 2023

Food Standards Australia New Zealand
PO Box 5423
KINGSTON ACT 2604

By email: submissions@foodstandards.gov.au

To Whom It May Concern,

SUBMISSION

Proposal P1049 – Carbohydrate and sugar claims on alcoholic beverages

We refer to the call for submissions to Proposal P1049 dated 24 July 2023 in relation to carbohydrate and sugar claims on alcoholic beverages.¹

We respectfully make this submission on behalf of KHQ Lawyers as a bona fide party with an interest in the efficient and fair management of food regulation in Australia. KHQ Lawyers is a top-tier boutique law firm with a dedicated Food & Beverage specialist practice. We have extensive experience in interpreting and advising on the *Australia New Zealand Food Standards Code (Code)*. We regularly advise on issues such as ingredient and product classification, composition and labelling compliance, review of claims, submissions to the Advisory Committee on Novel Foods, and applications to amend the Code. We hope to assist Food Standards Australia New Zealand (FSANZ) in its consideration of Proposal P1049 by offering an independent and balanced insight into industry interpretation of the Code.

We take this opportunity to support FSANZ's intention to provide stakeholders with greater clarity as to the intended application of section 1.2.7-4, as well as FSANZ's approach in expressly approving certain sugar claims on behalf of alcoholic beverages. This is a commonsense approach that will improve consumer choice without compromising on public health.

However, KHQ Lawyers makes this submission to seek further clarity on the potential application of the proposed amendments to the Code, in particular how the proposed amendments may or may not impact fibre claims. KHQ Lawyers is concerned that there is still scope for misinterpretation.

Where there is scope for misinterpretation, this may compromise enforcement and lead to similar circumstances that prompted Proposal P1049 in the first instance. To quote FSANZ:

*As the permission to make claims about carbohydrate content has been interpreted as a permission to also make claims about sugar, a component of carbohydrate, **there is a risk that the permission could also be interpreted as a permission to make nutrition content claims about other components of carbohydrate e.g. fibre.***²

¹ Food Standards Australia New Zealand, [Call for submissions – Proposal P1049, Carbohydrate and sugar claims on alcoholic beverages](#) (24 July 2023).

² Food Standards Australia New Zealand, [Call for submissions – Proposal P1049, Carbohydrate and sugar claims on alcoholic beverages](#) (24 July 2023), Page 22.

Summary of stakeholder questions in response to the call for submissions:

Subject to our detailed submissions below, we request clarification on the following questions:

- Question 1:** Can FSANZ please confirm that the listing of dietary fibre in the nutrition information panel or within provision of daily intake information will not be prohibited by the proposed amendment?
- Question 2:** Which definition of “carbohydrate” in the Code will apply to the new proposed section 1.2.7-4?
- Question 3:** If the definition of “carbohydrate” which applies are those which are listed in section 1.1.2-2, can FSANZ confirm that dietary fibre is **not** a “component of carbohydrate” as *legally* defined under the proposed amendment?
- Question 4:** If the definition of “carbohydrate” which applies are those which are listed in section 1.1.2-2, can FSANZ confirm that a product which contains no carbohydrate as calculated under schedule 11 but does contain dietary fibre ought to declare its carbohydrate content as “0 g” and will be eligible under the proposed amendment to be “Carbohydrate free”?

We now provide further detail and context for the above questions.

1. Support the need to clarify the meaning of “carbohydrate” in section 1.2.7–4

- 1.1 As noted by FSANZ in the call for submissions, the interpretation of section 1.2.7–4 of the Code has caused significant confusion for industry and enforcement agencies. In particular, it is unclear whether the permission to make nutrition content claims about “carbohydrate content” extends to claims about components of carbohydrates, such as sugar. In our view, this confusion is derived from a discrepancy between the apparent intention of this provision and its enforceable legal effect.
- 1.2 We understand that the broader prohibition under section 1.2.7–4 was derived from a policy position to limit nutrition and health claims on alcoholic beverages, so as to support public messages about limiting alcohol intake.³ The exception for carbohydrate claims in particular was largely driven by a desire to allow brands developed specifically around carbohydrate claims, such as “low carb” beers, to remain on the market.⁴ As was considered by FSANZ in 2018, it appears that the permission to make claims about carbohydrate content was *not* intended to permit claims in relation to other nutrients that meet the definition of being a “carbohydrate”, such as sugar.⁵
- 1.3 From the experience of KHQ Lawyers, it would be exceptionally difficult for an enforcement agency to convince a Court that permission to make claims in relation to “carbohydrate content” does not extend to discrete types of carbohydrates or components of carbohydrates, such as sugar. As FSANZ would be aware, enforcement of the Code and its broader utility relies on the clear and unambiguous meaning of how it applies in each relevant circumstance. The Code is inherently limited by virtue of the fact that it relies on the interpretation of regulators spanning across two countries, six states, two territories and hundreds of municipal governments, all of whom simply do not have the resources to enforce an interpretation of the Code that is not abundantly clear and unequivocal. As FSANZ itself has expressly noted, “*enforcement agencies are aware of claims about sugar content in relation to alcoholic beverages in the marketplace but consider that the Code does not provide enough clarity about whether these claims are permitted or not, to take enforcement action*”.⁶

³ FSANZ, [Call for submissions – Proposal P1049, Carbohydrate and sugar claims on alcoholic beverages](#) (24 July 2023) pages 8 and 9; [Policy Guideline on Nutrition, Health and Related Claims](#) (updated on 29 June 2018) page 6.

⁴ FSANZ, [P293 – Preliminary Final Assessment Report](#) (2007).

⁵ FSANZ, [Technical Assessment: Carbohydrate claims about food containing alcohol](#) (1 May 2018) page 3.

⁶ FSANZ, [Technical Assessment: Carbohydrate claims about food containing alcohol](#) (1 May 2018) page 9.

- 1.4 The amendments proposed by FSANZ do an excellent job of clarifying to industry how claims in relation to carbohydrate, sugar and sugars could be made in compliance with the Code.
- 1.5 However, KHQ Lawyers believe that the proposed amendments do not achieve the same clarity in relation to potential dietary fibre nutrition content claims which could be made on behalf of alcoholic beverages.

2. Clarifying the limitation of the proposed prohibition

- 2.1 From the call for submissions document, it appears that FSANZ's intention is to prohibit nutrition content claims in relation to dietary fibre on alcoholic beverages:

FSANZ has prepared a draft variation to: [...] prohibit nutrition content claims about other components of carbohydrate e.g. fibre.⁷

- 2.2 It is KHQ Lawyers' understanding that such a prohibition would be strictly limited to nutrition content claims, and not a prohibition on all references to dietary fibre on alcoholic beverages. We understand that the definition of "claim" in section 1.1.2-3 excludes any statement "which is not mandatory in this Code."⁸

- 2.3 While KHQ Lawyers understands that many alcoholic beverages are exempt from declaring nutrition information, we further understand that the exemption does not extend to products making a claim requiring nutrition information, such as claims in relation carbohydrate and sugar claims.⁹ Therefore, the mandatory requirement under Standard 1.2.8 for any product making a nutrition content claim about sugars or any other type of carbohydrate to both provide nutrition information and declare its dietary fibre content, ought **not** to constitute a "claim" and, by extension, not be prohibited under the proposed amendments.

- 2.4 However, subsection 1.2.8-8(2) states that:

*If information relating to percentage daily intake is included, the panel **may** include the percentage daily intake of *dietary fibre per serving.¹⁰*

Given use of the word "may" indicates a choice by the supplier, it would be hard to argue that declaring the percentage daily intake of dietary fibre per serving is "mandatory in this Code" and therefore potentially prohibited by FSANZ's proposed amendment.

- 2.5 Notwithstanding the above, in relation to presenting nutrition information outside of the nutrition information panel, section 1.2.8-10 states:

Information presented in accordance with this section does not constitute a nutrition content claim.

While this Section does not apply to food containing more than 1.15% alcohol by volume, the principles of statutory interpretation which must be applied by Courts in assessing compliance with the Code could lead a Court to find that, given information outside the nutrition is expressly stated to not be a nutrition content claim, *voluntary* information *within* the nutrition information panel would have to be considered a nutrition content claim.

⁷ FSANZ, [Call for submissions – Proposal P1049, Carbohydrate and sugar claims on alcoholic beverages](#) (24 July 2023) page 22.

⁸ Australia New Zealand Food Standards Code, [section 1.1.2](#)—2.

⁹ Australia New Zealand Food Standards Code, [section 1.2.8](#)—5(2)(a).

¹⁰ Australia New Zealand Food Standards Code, [section 1.2.8](#)—8(2).

- 2.6 As a result of the above scenarios where fibre declarations may or may not constitute a “claim”, KHQ Lawyers believes that industry would benefit from more clarity as to exactly what is intended to be permitted and prohibited by the proposed amendments to section 1.2.7-4.

Question 1: Can FSANZ please confirm that the listing of dietary fibre in the nutrition information panel or within provision of daily intake information will not be prohibited by the proposed amendment?

3. Confusion over the meaning of “carbohydrate”

- 3.1 The definitions of “carbohydrate” under Standard 1.1.2 of the Code which are potentially relevant to the proposed amendments to section 1.2.7-4 are as follows:

carbohydrate, other than in the definition of **beer** (section 1.1.2—3), means *available carbohydrate or *available carbohydrate by difference.

available carbohydrate means available carbohydrate calculated in accordance with section S11—3.

available carbohydrate by difference means available carbohydrate by difference calculated in accordance with section S11—3.¹¹

beer means:

- (a) the product, characterised by the presence of hops or preparations of hops, prepared by the yeast fermentation of an aqueous extract of malted or unmalted cereals, or both; or
- (b) such a product with any of the following added during production:
 - (i) cereal products or other sources of **carbohydrate** ...¹²

- 3.2 As can be seen, there are multiple definitions of carbohydrate, each with different components.
- 3.3 We are aware of circumstances where it has been argued that, as a result of this reference to “beer”, the methods of calculating available carbohydrates referred to in the definition of “carbohydrate” do *not* apply to a food classified as a “beer” under the Code. This argument has not only been made by food businesses themselves, but by experienced members of the legal profession with a background in food regulation. Although we do not agree with this interpretation ourselves, we submit that industry could benefit from clarification in this regard.

Question 2: Which definition of “carbohydrate” in the Code will apply to the new proposed Section 1.2.7-4?

- 3.4 By applying the principles of statutory interpretation, we assume that reference to “carbohydrate” in the proposed amendments to section 1.2.7-4 is either “available carbohydrate” or “available by difference”.
- 3.5 Under Schedule 11, neither of these definitions include dietary fibre.¹³ In addition, subsection 1.2.8-14(c)(i) states that any required declaration of *unavailable* carbohydrate must not include dietary fibre.¹⁴ The definition of “dietary fibre” itself makes **no** reference to it potentially being a component of carbohydrate whatsoever.
- 3.6 These references in the Code indicate that dietary fibre is **not** a component of either available or unavailable carbohydrate whatsoever (except potentially but not expressly in relation to ingredients which may be compliantly added to a “beer”).

¹¹ Australia New Zealand Food Standards Code, [section 1.1.2—2](#).

¹² Australia New Zealand Food Standards Code, [section 1.1.2—3](#).

¹³ Australia New Zealand Food Standards Code, [Schedule 11](#).

¹⁴ Australia New Zealand Food Standards Code, [section 1.2.8-14\(c\)\(i\)](#).

3.7 We note that FSANZ itself appears to have conflated the apparent legal meaning of “carbohydrate” in the call for submissions with a broader meaning of “carbohydrate” that includes both available and unavailable carbohydrates (whether unavailable carbohydrates includes dietary fibre or not). This is evidenced in the following two extracts:

- on page 3 – “*The draft variation also contains amendments, which if approved, would prohibit nutrition content claims about specifically named sugars (e.g., fructose) and about **components of carbohydrate other than sugar (e.g., fibre)** on food containing more than 1.15% ABV.*”; and
- on page 22 – “*As the permission to make claims about carbohydrate content has been interpreted as a permission to also make claims about sugar, a component of carbohydrate, there is a risk that the permission could also be interpreted as a permission to make nutrition content claims about **other components of carbohydrate e.g., fibre***”.¹⁵

Question 3: If the definition of “carbohydrate” which applies are those which are listed in section 1.1.2-2, can FSANZ confirm that dietary fibre is **not** a component of carbohydrate as legally defined under the proposed amendment?

3.8 Given that dietary fibre is expressly excluded by the calculation methods for carbohydrate content in schedule 11, it is perfectly conceivable that:

- A nutrition information panel for food product might declare that the dietary fibre content exceeds the carbohydrate content; and/or
- A product that contains dietary fibre might compliantly declare its carbohydrate content to be “0 g”.

3.9 Given that the proposed amendment to section 1.2.7-4 seeks to expressly permit nutrition content claims on behalf of carbohydrate in alcoholic beverages, this would appear to grant permission for alcoholic beverages which contain zero carbohydrate using the methods required in Schedule 11 to claim to be “carbohydrate free” or “zero carbohydrate” even if those beverages contain dietary fibre.

Question 4: If the definition of “carbohydrate” which applies are those which are listed in section 1.1.2-2, can FSANZ confirm that a product which contains no carbohydrate as calculated under Schedule 11 but does contain dietary fibre ought to declare its carbohydrate content as “0 g” and will be eligible under the proposed amendment to be “Carbohydrate Free”?

3.10 Given that much of the confusion that necessitated Proposal P1049 to begin with can largely be derived from a lack of clarity around the meaning of “carbohydrate”, Proposal P1049 presents a valuable opportunity to resolve this ongoing ambiguity and provide industry and enforcement agencies with much-needed clarity over the meaning of “carbohydrate” and its legal relationship within the Code to dietary fibre.

4. Outstanding ambiguity in the draft variation

4.1 While we agree with the intention behind the proposed draft variation, our primary concern is that - in light of the issues raised above - the proposed amendments fail to adequately define the meaning of “carbohydrate” in subsections 1.2.7-4(1)(c) and 1.2.7-4(3).

4.2 If dietary fibre cannot be legally defined under the Code as being a “component of carbohydrate”, then the proposed new section 1.2.7-4(3) would **not** expressly prohibit dietary fibre claims. This appears to be in contrast to the intentions expressed by FSANZ in the call for submissions:

¹⁵ FSANZ, [Call for submissions – Proposal P1049, Carbohydrate and sugar claims on alcoholic beverages](#) (24 July 2023) pages 3 and 22 [emphasis added].

As the permission to make claims about carbohydrate content has been interpreted as a permission to also make claims about sugar, a component of carbohydrate, there is a risk that the permission could also be interpreted as a permission to make nutrition content claims about other components of carbohydrate e.g., fibre.

FSANZ is therefore proposing to prohibit claims about components of carbohydrate other than 'sugar and sugars', to provide clarity that nutrition content claims about components of carbohydrate other than sugar are not permitted in relation to food that contains more than 1.15% ABV, including alcoholic beverages.¹⁶

- 4.3 In these comments, FSANZ appears to have adopted a meaning of "carbohydrate" that considers fibre to be a "component of carbohydrate". As mentioned above, such a meaning appears to clearly conflict with relevant definitions of "carbohydrate" under the Code, which expressly excludes dietary fibre.
- 4.4 Failing to distinguish between these two possible understandings of what constitutes a "carbohydrate" (and by extension what constitutes a "component of carbohydrate") risks creating further uncertainty for industry and regulators, in both this particular context as well as the Code more broadly. The implication that it is even possible to "*make a nutrition content claim about a component of carbohydrate e.g., fibre*" – when fibre is *not* a "carbohydrate" under the Code – may create confusion over the criteria for making a nutrition content claim about "carbohydrate" content.

Thank you for your consideration of our submission. If you have any questions about this submission, please feel free to contact us.

Yours faithfully,

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¹⁶ FSANZ, [Call for submissions – Proposal P1049, Carbohydrate and sugar claims on alcoholic beverages](#) (24 July 2023) page 22.