

SUBMISSION ON FSANZ PROPOSAL P1025 – CODE REVISION

Submitted by: FoodLegal on behalf of Peters Ice Cream

RE: PROPOSED CHANGE IN REGULATION OF THE WORDS “ICE CREAM”

FoodLegal acts for The Australasian Food Group Pty Ltd which trades as Peters Ice Cream. We have been instructed to make this Submission.

This Submission is made in relation to the proposed revisions to Standard 2.5.6 of the *Australia New Zealand Food Standards Code* (the **Food Standards Code**) under Proposal P1025. In particular, this Submission addresses the potentially unintended reduction in products which can use the words “ice cream” in the name or descriptor of the product.

This Submission proposes an amendment to Proposal P1025 which would bring clarity to the Food Standards Code, satisfy consumer demand for healthier products, reflect current market practices and bring the Food Standards Code into harmony with international regulation of ice cream.

1. Legal Status Quo

1.1 Currently Standard 2.5.6 contains the following requirements for products to be legally defined under the Food Standards Code as ice cream:

- That the product be a “a sweet frozen food made from cream or milk products or both, and other foods, and is generally aerated”;
- That the product contain no less than 100g/kg of milk fat; and
- 168g/litre of food solid.

These compositional requirements must be met in order for any product to meet the legal definition of “ice cream”.

1.2 Arguably, there are **no** express marketing or labelling requirements in Standard 2.5.6 specific to ice cream.

Therefore, if a product were to be marketed as “ice cream” and not meet any or all of the above requirements, it would arguably not breach Standard 2.5.6 (or in fact any part of the Food Standards Code), as the requirements of Standard 2.5.6 are strictly compositional and not labelling or marketing related.

1.3 The lack of any labelling requirement in Standard 2.5.6 would not prevent a regulatory authority from taking action, as the marketing of such a product as “ice cream” could be misleading or deceptive in breach of *Food Acts* or the *Australian Consumer Law*.

- 1.4 As a result, it is currently permitted to market products as “low fat ice cream” or “reduced fat ice cream”, even those these products inherently would not meet the 10% milk fat requirement of Standard 2.5.6. This is because (a) there is arguably no breach of the Food Standards Code; and (b) consumers are not misled by such products as the very name of the products informs consumers that there is less or little fat content.

2. Proposed Change in P1025

- 2.1 The amendments to the Food Standards Code proposed by P1025 in the Draft released on 10 July 2014 include a new section entitled “1.1.1-13 Use of food with a specified name or nature”. This new section has the effect of taking many of the compositional requirements in the Food Standards Code and turning them into labelling requirements.
- 2.2 If the name of a specified food is used in connection with the sale of the product, under the proposed new Food Standards Code, that product must meet the relevant compositional criteria. “Ice cream” is one of the specified names.
- 2.3 A possibly unintended consequence of this proposed amendment is that if any product uses the word “ice cream” in the name (even in descriptors such as “low fat ice cream” and “reduced fat ice cream”), it would **have to** meet the minimum fat content requirements.
- 2.4 It could be argued that “reduced fat ice cream” and “low fat ice cream” are not being “sold as ‘ice cream’” and thus do not need to meet the compositional requirements. However, this interpretation and argument should not be left to the regulators and instead the position ought to be clearly stated in the Food Standards Code.
- 2.5 By way of contrast, ‘milk’ is also a specified name under the proposed new Food Standards Code. However, the standards for milk also expressly acknowledge and permit the existence of skim milk, modified milk and adjusted milk. No such express categories exist for ice cream.

3. Current Consumer Understanding and Demand

- 3.1 There are many “low fat ice cream” and “reduced fat ice cream” products currently on the market in Australia. These products do not meet the 10% milk fat requirement of Standard 2.5.6 as:
- Reduced fat products must contain 25% less fat than a reference food (as per Standard 1.2.7) and in this instance a reference food would be standard ice cream at the minimum 10% milk fat;
 - Low fat products must contain no more than 3% fat for solid food products (as per Standard 1.2.7).
- 3.2 There are even products being marketed as “non-dairy ice cream” which – as the name implies – contain no milk fat whatsoever. Again, these products do not breach the current Standard 2.5.6 and are not misleading or deceptive as it is clear to the consumer that there is no dairy in them.
- 3.3 The situation is further complicated when you get into different traditions of ice cream. For example, a product could be marketed as “gelato” instead of “ice cream”

and contain varying amounts of milkfat or none at all without misleading or deceiving the reasonable consumer of gelato.

3.4 We draw your attention to the website of Dairy Australia where it provides the following definitions of different categories of “ice cream”:

- Regular ice cream to have a minimum of 10% milk fat;
- Reduced-fat ice cream to contain approximately 7% milk fat; and
- Low fat ice cream to contain no more than 3% milk fat.

<http://www.legendairy.com.au/dairy-foods/dairy-products/ice-cream>

3.5 Additionally, consumer group CHOICE conducted a survey of ice cream in 2011 and considered 13 varieties of what CHOICE described as “reduced fat”, “low fat ice cream” or “light ice cream”. This suggests widespread acceptance of the same terminology by these consumers and that the usage of these expressions is not misleading or deceptive.

3.6 It is clear that there is a consumer market for ice cream products of varying fat levels and a clear consumer understanding of how such categories of product differ from one another. While the milk fat minimum requirement could be kept to protect the reputation of “*regular* ice cream” products, it is clear that consumers no longer define “ice cream” by its milk fat content.

4. NPSC possibly driving the creation of adjust fat ice cream products

4.1 It ought to be noted that part of the drive to produce lower fat alternatives to staple foods is the consumer desire for healthier products as well as the incentive provided by the Nutrient Profiling Scoring Criterion to reduce saturated fatty acid content of food products.

5. International Regulation of Ice Cream

5.1 Given that one of the functions of FSANZ is to harmonise Australia and New Zealand’s food laws with international laws, it is worth considering how the sale of ice cream is regulated in other jurisdictions.

Codex Alimentarius

5.2 Codex Alimentarius does **not** set any minimum fat content for ice cream products. Moreover, Section IV of Combined Nomenclature – Prepared Foodstuffs separates ice cream into three different categories depending on fat content:

- Ice cream with less than 3% milkfat
- Ice cream with 3 – 7% milkfat
- Ice cream with 7% of more milkfat.

English-speaking jurisdictions

- 5.3 In the UK, there is a 5% milkfat minimum requirement for all products that are called ice cream. However, there is pressure mounting on the UK regulations to conform to the EU regulations (more below).
- 5.4 In both the US and Canada, there are 10% milkfat requirements for ice cream as there are in Australia. However, in both of these jurisdictions, these apply solely to products sold as "regular" ice cream. Reduced fat and low fat ice cream are expressly permitted to be sold so long as the products contain no more than 7% and 3% fat respectively.

Europe

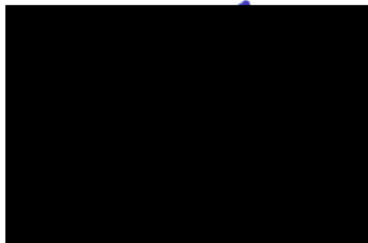
- 5.5 In EU regulations, given the many traditional ice cream products that have varying fat levels, the EU have declined to set any minimum fat level for ice cream whatsoever.

6. Recommended amendment to P1025

- 6.1 In order for industry to supply the consumer demand for healthier or non-dairy ice cream variants, we urge FSANZ to either:
- Remove ice cream as a specified name; or
 - Include a section in either the Standard 1.1.1 or Standard 2.5.6 of the Food Standards Code that acknowledges the existence of "modified" or "adjusted" or "fat reduced" or "non-dairy" ice cream products.

Please feel free to contact me to discuss any aspects of this Submission.

Yours sincerely,



Charles Fisher
Principal
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