BENEFIT COST ANALYSIS

FULL REPORT
by
ALLENS CONSULTING

The Allen Consulting Group

Benefit-Cost Analysis of Proposal P293 — Nutrition, Health and Related Claims

Draft Report

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Report to Food Standards Australia New Zealand

Appendix D

Abbreviations

FSANZ	Food Standards and New Zealand
IAR	Initial Assessment Report
MCA	Multi-Criteria Analysis
CoPoNC	Code of Practice on Nutrient Claims in food labels
NCP	National Competition Policy
ACCC	Australian Competition and Consumer Commission
NLEA	Nutrition Labelling and Education Act
NIP	Nutrition Information Panel

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Chapter 1

Introduction

The Allen Consulting Group has been engaged by Food Standards Australia New Zealand (FSANZ) to conduct a benefit–cost analysis of the regulatory options under *Proposal P293 — Nutrition, Health and Related Claims*. The *Initial Assessment Report (IAR) of Proposal P293*, which FSANZ released for public comment in August 2004, sets out the proposed options to be assessed in this study. Since that time, FSANZ has further developed these options. At the time of writing all of the major elements of the options have been decided. The analysis in this report is based primarily on the specifications for the options set out in the IAR, though it also incorporates additional information on, or clarification of, the options, where provided by FSANZ.

1.1 The objective of this study

The objective of this study is to:

- provide a benefit–cost analysis of each option specified in the P293 Initial Assessment Report (including the status quo option); and
- evaluate these options and recommend a preferred option.

It is important to note that the aim of this study is to compare the three options proposed by FSANZ in the IAR for Proposal P293. It does not make any judgement of alternative arrangements outside of these options. It cannot, therefore, be assumed that the preferred option identified in this analysis is necessarily the most beneficial of all potential options, because this assessment does not involve an unconstrained analysis of all possible regulatory approaches. This was a point made strongly by some stakeholders in consultations for this study, who wanted a clear recognition that this comparison is being made within the constraints of the options provided by FSANZ. The analysis will, nevertheless, provide further clarity for government, industry and consumer stakeholders in relation to their assessment of those options that are currently 'on the table'.

1.2 Methodology – Multi-Criteria Analysis

This report applies a technique for assessing costs and benefits called Multi-Criteria Analysis (MCA). MCA, also referred to as the 'balanced scorecard' approach, is a useful analytical tool for undertaking a comparative assessment of alternative policies against a range of criteria. It is particularly useful when some impacts cannot be quantified, because it allows for a numerical score to be given for all impacts. The scores against each criterion can be summed to obtain an overall score enabling different options to be ranked against each other.

The value of such an approach was highlighted in a Senate Select Committee report in 2000 on the socio-economic consequences of National Competition Policy (NCP):

> The Committee continues to be concerned about the application of 'public interest' given the confusion that exists over what the term means or allows under NCP. The confusion, when combined with the administrative ease of simply seeking to measure outcomes in terms of price changes, encourages the application of a narrow, restrictive, definition. *The Committee considers that it is important to devise a method of assessment of the policy which attributes a numerical weighting to environmental and social factors to avoid the over-emphasis on dollars merely because they are easy to measure.*[1]

The MCA approach enables a numerical score to be given to all the criteria relevant to an assessment of policy proposals, regardless of whether the impacts of particular criterion can be quantified or not. A common scale of measurement for all criteria allows policy makers to make an overall assessment of the wider economic, social and environmental costs and benefits associated with alternative policy options. A strength of the MCA approach is that the judgements used to give each option a score against various criteria are transparent and open to scrutiny.

The decision to use MCA for this particular study was based on initial assessment of the likely mix of both quantifiable and non-quantifiable costs and benefits for the regulatory options. In this case, comparison on the basis of numbers alone would place undue importance on those impacts that can be quantified, and would not account for the range of impacts of the options. It is important to recognise that this analysis has been provided to FSANZ to enable more informed decision making. It therefore focuses on making a comparative analysis of the options, rather than providing an overall estimate of the net cost or net benefit of the regulatory change.

1.3 This report

This draft report is structured in the following way:

- *Part A* sets out the background and context for the analysis, including a description of the FSANZ regulatory options;
- *Part B* provides an analysis of the major issues and impacts across three broad stakeholder groups — consumers, the food industry and government; and
- *Part C* sets out the assessment criteria and provides a comparison of the regulatory options against these criteria.

[1] Senate Select Committee of the 39th Parliament of Australia on the Socio-Economic Consequences of the National Competition Policy, *Riding the Waves of Change*, Canberra, 2000, p.35. Emphasis added.

Part A

Background and context

Chapter 2

Current regulatory arrangements

Currently in Australia and New Zealand regulation of claims on food labels (encompassing content and health claims) occur across several mechanisms. Some claims are not permitted under the Food Standards Code, others are permitted but regulated under the Food Standards Code, while others still are permitted with guidance for industry on their use set out in and industry code of practice (in Australia). Some types of claims are not directly regulated under any of the above mechanisms (such as, function claims), but are also not explicit prohibited. These, like all claims made on food labels, must abide by fair trading legislation in relation to make false or misleading statements.

This Chapter provides information on the various components of the current regulatory approach.

2.1 Regulation of nutrition claims in the Standard

There are two elements of the Food Standards Code that regulate nutrition and health claims on food labels — Standard 1.1A.2 Transitional Standard for health claims, and Standard 1.2.8 which sets requirements for a number of nutrition content claims. These are discussed in this section.

Standard 1.1A.2 Transitional Standard — Health Claims

In Australia and New Zealand, health claims are prohibited by Standard 1.1A.2, with the exception of the permitted claim regarding maternal folate consumption and reduced risk of fetal neural tube defects

Standard 1.1A.2 sets out the following restrictions on the use of health claims in food labels or in advertising:

- the label on or attached to a package containing or an advertisement for food shall not contain a claim or statement that the food is a slimming food or has intrinsic weight reducing properties;
- any label on or attached to a package containing or any advertisement for food shall not include a claim for therapeutic or prophylactic action or a claim described by words of similar import;
- any label on or attached to a package containing or an advertisement for a food shall not include the word ‘health’ or any word or words of similar import as a part of or in conjunction with the name of the food;
- any label on or attached to a package containing or any advertisement for food shall not contain any word, statement, claim, express or implied, or design that directly or by implication could be interpreted as advice of a medical nature from any person; and

- the label on or attached to a package containing or any advertisement for food shall not contain the name of or a reference to any disease or physiological condition.[2]

Standard 1.2.8

Standard 1.2.8 of the Food Standards Code sets out nutrition information requirements for labels, including nutrition information panels and nutrition claims.

The Standard requires that the majority of packaged food sold in Australia and New Zealand have a nutrition information panel on its label providing information on:

- energy content (kilojoules);
- protein;
- fat and saturated fat;
- carbohydrate and sugars;
- sodium; and
- any other nutrient or biologically active substance for which a nutrition claim has been made.

Standard 1.2.8 also regulates the use of nutrition claims, both by prescribing the type of claims that can be used, and the characteristics of those foods for which the claims can be used (for example, the Standard prescribes that a claim for 'low sodium' can only be used for foods which contain no more than 120mg of sodium per 100g of food). The Standard regulates the use of claims in relation to:

- polyunsaturated and monounsaturated fatty acid content;
- lactose;
- gluten content;
- salt, sodium or potassium content;
- omega fatty acid content; and
- low joule.

2.2 The Code of Practice on nutrient claims in food labels and in advertisements (CoPoNC)

The CoPoNC is administered by the Australian Food and Grocery Council and applies to all Australian food industry firms who are signatories. The Code was established in January 1995, and was prepared by the Australian New Zealand Food Authority (now FSANZ) following consultation with industry and consumer organisations, State and Territory food authorities and other interested parties. The objective of the Code is to provide a basis for voluntary self-regulation of nutrient claims by the food industry.

[2] Food Standards Code Standard 1.1A.2 Transitional Standard – Health Claims

The Code of Practice sets out the conditions under which certain claims may be made on the labels of food packages, on labels associated with unpackaged foods and in the advertising of foods.

The Code establishes the conditions under which the following types of claims can be made, as listed in table 2.1.

Table 2.1

TYPES OF CLAIMS COVERED BY THE COPONC

	Examples of claims
Content or comparative claims for fat or saturated fat	'low fat', 'lower fat', 'less fat', 'fat free' and 'x% fat free'.
Content or comparative claims for sugar	'reduced sugar', 'lower sugar', 'less sugar', 'low sugar', 'low in sugar', 'sugar free', 'free of sugar', 'no sugar', 'no added sugar' and 'unsweetened'
Content or comparative claims for fibre	'source of fibre', 'contain fibre', 'high fibre', 'high in fibre', 'good source of fibre', 'very high fibre', 'excellent source of fibre', 'increased fibre', 'fibre enriched', 'more fibre' and 'added fibre'
Content or comparative claims for cholesterol	'reduced cholesterol', 'lower cholesterol', 'less cholesterol', 'low cholesterol', 'low in cholesterol', 'cholesterol free' and 'no cholesterol'
Content or comparative claims for salt	'low in salt/sodium', 'very low in salt/sodium', 'reduced salt/sodium', 'salt/sodium reduced' 'lightly salted', 'salt free', 'no salt', 'no salt', and 'no sodium'.
Content or comparative claims for energy	'low energy', 'low joule', 'low calorie', 'low in energy/joules/calories', 'reduced energy', 'reduced calorie', 'reduced joule', 'reduced in energy/joules/calories', 'lower in energy/joules/calories', 'fewer joules/calories'.

Source: CoPoNC

The CoPoNC also prescribes the use of the terms 'light', 'lite' and 'diet'.

The CoPoNC directs parties with allegations or complaints to, in the first instance, to pursue their complaint with the company or person making the claim. Companies against which breaches of the Code are alleged should formally reply to the complaint with 14 days from the receipt of the written complaint with a detailed response. In the event that the complaint remains unresolved, the complainant may then lodge the complaint with the Food Industry Code Management Committee.

2.3 New Zealand fair trading legislation

In New Zealand, in addition to the Food Standards Code, and the New Zealand Food Act, the New Zealand Fair Trading Act regulates the use of claims on food labels to ensure that the information provided to consumers is not deceptive or misleading. The Act prescribes that claims should be restricted to those that are based on facts. Where appropriate, accompanying information should be provided to show consumers that the claims are justified and substantiated.

2.4 Australian fair trading legislation

In Australia, in addition to regulation under the Food Standards Code, all information on food labels must comply with Section 52 of the Trade Practice Act. This Section prohibits a corporation in a commercial transaction from engaging in conduct which is 'misleading or deceptive or is likely to mislead or deceive'. The Trade Practices Act is enforced by the Australian Competition and Consumer Commission and relevant State and Territory bodies.

2.5 The Policy Guideline on Nutrition, Health and Related Claims

The options set out in the IAR for Proposal P293 follow the Policy Guideline on Nutrition, Health and Related Claims (the Policy Guideline). In December 2003, the Australia and New Zealand Food Regulation Ministerial Council (the Ministerial Council) agreed to the Policy Guideline, which provides the policy principles to underpin the regulation of nutrition, health and related claims including the elements of a regulatory system. The Ministerial Council agreed on those elements of the Policy Guideline that relate to the management of biomarker maintenance claims in May 2004. It aims to ensure that the health and safety of the public is protected, while allowing for food industry innovation and trade. It does this by incorporating a number of elements designed to ensure claims made on food or in advertising are true, scientifically substantiated and not misleading.

The Policy Guideline includes:

- the policy principles that should underpin any regulation of nutrition, health and related claims for foods as well as the features of any regulatory system that is developed;
- the prerequisites with which any health claims must comply;
- the criteria for the classification of health claims;
- an outline of the recommended regulatory system; and
- the broad requirements for substantiation of any claims made under the proposed regulatory framework.

The Policy Guideline describes nutrition, health and related claims as 'all claims referring to nutrient content, nutrient function, enhanced function, reduction of disease risk or maintenance of normal health'. It outlines a claims classification framework, which distinguishes between two broad categories of claim: general level claims and high level claims. The classification of a claim is based on the degree to which the potential health benefits arising from the use of nutrition, health and related claims are balanced against the potential risks of an adverse outcome arising from the misinterpretation of the claim or an inappropriate use of the claim.

The Policy Guideline states that the level of the claim, as determined by the Claims Classification Framework, will determine the degree to which the claim is regulated.

Principles to guide the development of regulation for nutrition, health and related claims

The policy principles outlined in the Policy Guideline provide that any intervention by government should:

1. give priority to protecting and improving the health of the population;
2. enable the responsible use of scientifically valid nutrient, health and related claims;
3. support government, community and industry initiatives that promote healthy food choices by the population;
4. be consistent with and complement Australian and New Zealand national policies and legislation including those relating to nutrition and health promotion, fair trading, industry growth and international trade and innovation;
5. be cost effective overall, not more trade restrictive than necessary and comply with Australia's and New Zealand's obligations under the WTO Agreements;
6. contain a process of substantiation which aligns levels of scientific evidence with the level of claims along the theoretical continuum of claims, and at minimum costs to the community;
7. draw on the best elements of international regulatory systems for nutrient, health and related claims and be responsive to future trends and developments;
8. provide for collaborative action among enforcement agencies, industry and consumers to optimise educational resources; and
9. allow for effective monitoring and appropriate enforcement.

The Policy Guideline also lists the following as desirable features of any regulatory system for health, nutrition and related claims. The system should:

10. favour pre-market approval rather than post-market reaction;
11. enable better engagement of sectors other than government in providing nutritional advice and information;
12. promote a partnership between consumers, governments and industry in the delivery and responsible use of nutrition, health and related claims which protects consumers from false and misleading information that may result in distorted diets which harm health and increase health inequalities; and
13. allow for all transition issues to be clearly identified and steps taken to justify and to minimise costs of change and transition.

Proposed regulatory model

The Policy Guideline recommends that the following arrangements apply to the regulation and monitoring of nutrition, health and related claims:

- the Australia New Zealand Food Standards Code would set out the high order principles of the health claims system, the definitions of general and high level claims, and provide prescriptive, individual detail for high level claims. The standard may also set out qualifying and disqualifying criteria for certain types

of claims (eg. nutrient content claims) and categories of foods which may be excluded from making claims (eg. Alcohol and baby foods)

- a guideline document would provide the majority of the detail surrounding general level claims. This guideline will be designed to assist industry in utilising the system correctly;
- a 'watchdog' body would serve as the public face of the health claims system, and undertake a number of key tasks.
- Jurisdictions would be responsible for receiving complaints in the usual way. Enforcement of the Health Claims Standard, including assessing possible breaches and undertaking prosecutions, would be the responsibility of the State/Territory and New Zealand enforcement agencies. Enforcement agencies would be responsible for coordinating action across jurisdictions, and informing the 'watchdog' body of complaints received and actions taken, and providing feedback on any perceived problems with the regulation of health claims.

The 'watchdog' would:

- assist FSANZ in the creation and maintenance of the guideline document (in consultation with stakeholders);
- provide recommendations to FRSC regarding proposed amendments to the Standard or the guideline document;
- receive complaints via a mailbox and refer any complaint to the relevant jurisdiction(s) for analysis and enforcement action;
- record complaints received (either directly by the watchdog or jurisdictions), and monitor enforcement actions undertaken by jurisdictions in response to those complaints; and
- provide periodic reports to FRSC.

The newly established Implementation Sub-Committee (ISC) will act as the Health Claims 'watchdog'. ISC consists of an official from the Australian, the New Zealand and each State and Territory Government. ISC will report to FRSC on enforcement and implementation issues and will also require a secretariat.

Consideration needs to be given as to whether these duties should be dealt with as a standing agenda item, or whether special, dedicated meetings should be convened to deal with Health Claims watchdog functions.

It is recommended that the "watchdog" function be funded by jurisdictions on a pro-rata to population basis, similar to the AHMAC model. This would be re-assessed in a review to be undertaken two years after implementation of the standard.

Advisory Panel

The proposed Advisory Panel is a register of independent experts set up under an administrative arrangement. The Advisory Panel would be available to jurisdictions on a cost-recovery basis.

Individual members from this panel would be available to assist enforcement agencies by providing their expert opinions on potential breaches, if requested. This could include advice on the adequacy of supporting evidence that food companies are holding to support their claims. The panel member would provide advice only, as opposed to an enforceable ruling, however they could be asked to assist in prosecution actions if required.

The Advisory Panel would also assist jurisdictions to build an enforcement capacity with regard to health claims during a fixed implementation period.

Chapter 3

FSANZ regulatory options for nutrition, health and related claims

The IAR for Proposal P293 sets out three regulatory options for further consideration by stakeholders. Since the release of the IAR, FSANZ has worked to further develop these options, and some aspects of the options are still being developed. This chapter sets out the main elements of each of the regulatory options, based on information provided by FSANZ. Further detail on the options is provided in appendix A.

3.1 Option 1: The *status quo*

Regulatory option 1 is the *status quo* — the current regulatory arrangements. As described in the previous chapter, the status quo option involves:

- retaining the prohibition on health claims, as set out in Standard 1.1A.2;
- retaining the voluntary Code of Practice on Nutrient Claims (CoPoNC) in Australia; and
- retaining the regulation of some nutrition claims in Standard 1.2.8.

Regulatory option 1 is not consistent with the approach outlined in the Policy Guideline, as it does not provide a framework whereby health claims would be permitted. For this reason, in submissions and consultations for this study, many stakeholders did not believe that this option is to be considered to the same degree as the other options (which do allow health claims). It is important to note that in this study, the status quo options is to be fully assessed in line with the analysis of options 2 and 3.

3.2 Option 2: New standard and Guideline

Option 2 involves a number of changes in the current regulatory approach, based on FSANZ's proposed regulatory model for the regulation of nutrition, health and related claims, consistent with the Policy Guideline. Table 3.1 details the approach for different classifications of nutrition and health claims. Under this framework, 'health claims' are defined as:

> a claim, other than a therapeutic claim, that describes or indicates [explicitly or implicitly] that a relationship exists between the consumption of a food, a category of food or one of its constituents and health.[3]

The regulatory model set out a number of components for the regulation of nutrition, health and related claims — claim prerequisites, claim criteria and claim conditions. These are discussed further in this section.

[3] Food Standards Australia New Zealand 2004, *Proposal P293 Nutrition, Health and Related Claims: Initial Assessment Report*, p. 36.

Table 3.1

FSANZ CLAIMS CLASSIFICATION FRAMEWORK

General level claims		High level claims
Content claims	**Other general level claims**	
Statement about the presence of a nutrient, energy or biologically active substance		Reference a biomarker or serious disease /condition
Absolute content claim: describes or indicates the presence or absence of a component in the food — 'this food is high in calcium'	*Function claim*: refers to the maintenance of good health or normal functions of the body — 'calcium is good for strong bones and teeth'	*Biomarker maintenance claim* — for example, 'this food is high in Omega-6 fatty acids which may help to maintain normal blood cholesterol'.
Comparative content claim: describes or indicates the presence of a component in a food in comparison to other similar foods — 'reduced fat'	*Enhanced function claim:* describes how a diet, food or component can modify a function or body structure beyond its role in the normal development and maintenance functions of the human body — 'exercise and diet high in calcium and calcium containing foods like this product may help give you stronger bones'	*Biomarker enhancement claim* — For example, 'This food is high in Omegag-6 fatty acids which may help to reduce blood cholesterol levels'.
	Risk reduction (ref to non-serious disease) claim — refers to the potential for a food or food component to assist in reducing the risk of or helping to control a non-serious disease or condition — 'yoghurt high in acidophilous as part of a health diet may reduce your risk of stomach upsets'	*Risk reduction (ref a serious disease) claim* — for example 'this food is high in Omega-6 fatty acids, which as part of a diet low in saturated fat and high in soluble fibre may reduce the risk of developing heart disease.

Source: Food Standards Australia New Zealand, 2004, *Initial Assessment Report Proposal P293, Nutrition Health and Related Claims.*

Claim prerequisites

Claim prerequisites are preconditions that must be met before a claim can be considered an eligible nutrition, health or related claims. Claims prerequisites apply to all claims irrespective of whether they are a general level claim or a high level claim. There are three claims prerequisites: all claims must be scientifically substantiated; the claims must relate to a specific component and they must convey a specific benefit. Since these prerequisites apply to both general level and high level claims, they will be specified in the standard or both options 2 and 3.

Claim criteria

FSANZ considered that 'claim criteria' are specific requirements regarding the food or its composition that must be met before a claim can be made. This would also include criteria around the eligibility of a food.

There are two types of 'claim criteria':

- **Qualifying criteria** — those that relate to the levels of the component that is the subject of a claim that must be met before the claim can be made, e.g. a claim of a good source of fibre must contain >3g dietary fibre per serve; and
- **Disqualifying criteria** — those that relate to the upper levels of risk increasing nutrients in food. A food must not contain more than the specified amount of one or more these nutrients in order to make a claim. For example, foods must

contain less than defined less of salt, sugar and fat before they may make a general level claim.

Disqualifying criteria restrict the use of claims on food that, though they pass the qualifying criteria, have other attributes which make them undesirable. For example, a low fat, high sugar food.

Under option 2, it is proposed that the criteria for general level claims are given in a guideline.

Conditions

A condition applies specifically to the representation of the claim. FSANZ considers that conditions are additional mandatory statements, required to clarify the context of the claim, in order to protect public health and safety and/or prevent misleading and deceptive conduct. All conditions relating to health claims, whether they are general level or high level claims, will be in the standard.

Management of high level claims

Consistent with the Policy Guideline, under option 2 all high level claims will be subject to pre-market assessment and approval by FSANZ. Unless specified in the Standard, high level claims will be prohibited. As part of the pre-market assessment and approval process, criteria and conditions regarding application of the claim will be determined and included in the Standard. Under this process, applicants must submit to FSANZ the relevant information in order to meet the requirements of the high level claims substantiation framework.

FSANZ will develop an interpretive user guide to facilitate understanding of the requirements specified in the Standard for high level claims.

At this stage, there is no intention to prescribe the exact wording of claims (such as is the case in the United States), although specific elements of claims will be prescribed. An interpretive user guide will include information and examples to industry on how claims can be worded.

Management of general level claims

Under option 2, the criteria for some general level claims, other than certain claims specified in the Code (for example, gluten and lactose claims in Standard 1.2.8), would be set out in a Guideline. The Guideline will not include an exhaustive list of general level content claims — those selected to have defined criteria have been identified on the basis of an evaluation of whether there is a public health benefit ensuing from providing defined criteria and on the basis of providing consumers with information to enable selection of healthy foods. Other content claims would be permitted if not misleading. The generic criteria for general level health claims will be set out in the Guideline. There will not be a pre-approved list of claims although a model list of claims that can be used by industry without the need for them to hold substantiation evidence will be included.

The Guideline will not be a legally enforceable document. It is intended that FSANZ would write the Guideline that would be consulted on as part of the Draft Assessment Report. When implemented, the Guideline would be managed by a management committee, consisting of representation from: the food industry; jurisdictions; consumer groups; public health groups; and FSANZ. The committee

would monitor the use of claims under the Guideline, though it would not have any legal enforcement power. At this stage, FSANZ has not further developed this option in relation to how changes to the Guideline would be made, though there is an expectation that any applicant would be required to provide information and evidence similar to that required for an application to change the Standard and there would be a similar consultation process for any proposed changes and the scientific rigour underpinning any change in criteria would be similar to that for changing a standard. It is intended that the management committee would evaluate the performance of the guideline annually and its report would be available to each of its constituent members.

An interpretive user guide will be prepared under both Options 2 and 3. This will provide advice to manufacturers in relation to many aspects of the standard or guideline. For example, it will provide detail around the substantiation requirements for high and general level claims, examples of implied claims, appropriate wording of disclosure statements etc.

3.3 Option 3: New standard for all claims

Option 3 differs from option 2 only in its management of general level claims. Under this option, high level claims would be managed under a Standard, which is legally enforceable, as described above for option 2. Unlike option 2, this option would involved general level claims also being managed under a Standard, whereby the qualifying criteria for some general level claims and disqualifying criteria for all general level claims will be specified in the Standard. Since the release of the IAR, FSANZ has further developed the specifications of this option, including determining that for general level claims the Standard would:

- reference a list of nutrients for which the qualifying criteria would be specified;
- require the food proposed for a general level claim to comply with applicable criteria in the Standard; and
- require the food manufacturer or importer to substantiate the general level claim (unless the claim is included in a FSANZ model claim list of general level claims).

Under this option, industry would be able to develop claims for those nutrients listed in the Code without applying to change the Standard. Claims for other nutrients would also be allowed providing they were not misleading. For all general level health claims disqualifying criteria relating to the nutrient profile of the food would also need to be met. An application would also be required to change specific criteria in the Standard. For those nutrients where there are no criteria in a Standard, claims would be permitted unless they breach Fair Trading laws.

Part B

Analysis of issues and research across stakeholders

Chapter 4

Food industry issues

This chapter provides a discussion and analysis of the issues for food manufacturers in Australia and New Zealand of a change in the regulation of nutrition and health claims on food labels. This includes consideration of:

- the current arrangements for regulation of nutrition and health claims, and how they impact on food manufacturers;
- the impact of a change the regulation of claims that industry currently makes, with the potential that industry will have to adjust products or product labels;
- the impact of a change in regulation on compliance; and
- the extent to which a change in regulation will provide new opportunities for industry.

4.1 Current arrangements for food manufacturers

Food manufacturers currently make nutrition and health claims on food labels in the regulatory environment described in chapter 2. Under the current regulatory framework, industry has invested heavily in nutrition labelling, with around 42 per cent of labels in Australia and New Zealand carrying a nutrition or health claim or both.[4] Almost all of these carry a nutrition claim and approximately 11 per cent of all labels carry a health claim (including endorsements).

In submissions to Proposal P293, stakeholders commonly noted the following difficulties for industry of the current system.

- There are a number of mechanisms at work in regulating claims leading to inconsistencies and uncertainties for industry, as one manufacturer noted:

  > The present system of having the regulation of nutrient content and other claims in a number of different places (*Food Standards Code* and the *Code of Practice on Nutrient Claims in Food Labels and in Advertisements* ["CoPoNC"] and no guidelines in New Zealand) is confusing and does not sit well with the harmonisation of food law in the Joint Code. Manufacturers not only need to look at (the) number of different sources referred to above, but need to consider other pieces of legislation such as the *Trade Practices Act 1974 (Cth)* and the *New Zealand Fair Trading Act 1991* (which can result in a number of inconsistencies).

- The CoPoNC has become out of date, leading to concerns about areas of non-compliance by Australian signatory firms, as was noted in one submission:

  > The Voluntary Code creates a barrier for honest companies and makes competition with dishonest companies unfair. The consumers cannot have absolute confidence that the products meet the standard… there is no regulatory or self regulatory check to ensure consistency.

- There is no equivalent industry code of practice in New Zealand, with industry relying on guidance from the former Food Regulations 1984 (which were

[4] FSANZ estimate based on the FSANZ label monitoring survey (unpublished).

revoked in December 2002 though are still being used to guide industry on making certain types of claims).

- There is a set of claims that are prohibited under the Standard (most importantly, those claims referencing a serious disease) therefore limiting innovation and marketing opportunities for industry. This was a point raised by several firms in submissions, including the following comments:

> The inability to tell the truth about a substantiated benefit of a food in the Australian market places severe limits on innovation. In developing new products to promote good health, the inability currently to inform consumers of that benefit is a disincentive to invest in developing such products.
>
> The prohibition unjustifiably reduces the tools available to marketers of other health products. As a result, it inhibits innovation and research into health-promoting ingredients and foods.

Given these factors, industry stakeholders have expressed strong support for a change in the current regulatory approach.

4.2 Impacts on claims currently being made

It is clear from the sample of comments noted above, and many others like them received from industry in submissions, that there is strong support for a change in the current arrangements for regulating nutrition and health claims. Options 2 and 3 both propose a change in the current approach, and will likely result in both costs and benefits for industry.

In considering how a potential change in the regulation of nutrition and health claims on labels may impact on industry, a first step is to discuss the impact on current practices. In benefit–cost analysis of this type it is important to recognise where regulatory change will lead to adjustment costs for stakeholders — where government's decision to make a change in regulation forces an individual or firm to make an adjustment. These areas need to be identified in order to have a clear understanding of the impact of regulation.

Much of the attention of stakeholders of the regulatory options in Proposal P293 has been on the proposed change allowing new types of claims that are currently prohibited. Regulatory options 2 and 3 do, however, also involve changes to the regulation of claims that are currently permitted in Australia and New Zealand.

The IAR provided some preliminary suggestions for changes to the regulation of claims that are currently permitted under CoPoNC. Since the release of the IAR, FSANZ has further developed its position on specifications for currently permitted claims. Table B.1 in appendix B provides a full list of types of claims where there will be, or there is likely to be changes to the specifications. In summary, this table proposes the following changes (or potential changes).

- A minor change in the provisions for making cholesterol claims, with the introduction of disqualifying criteria requiring the foods making a cholesterol claim to also be low in saturated fat. This differs from the proposal in the IAR to prohibit all content claims relating to cholesterol (all claims regarding cholesterol would, therefore, be high level claims).

- A change in the criteria for products carrying diet claims, where diet claims will have to meet new disqualifying criteria. This will reduce (marginally) the proportion of products that will qualify to make this claim.
- A new requirement that all nutrition, health and related claims will require declaration of percentage of daily intake (%DI) for energy in the nutrition information panel (NIP). All nutrition, health and related claims that relate to micronutrients and sodium will also require declaration of the %DI for the claimed nutrient in the NIP.
- A change in the regulation of claims for nutrients that are not specified in the Code. The change will remove the ability of products carrying 'source' and 'good source' claims in relation to nutrients not specified in the Standard or biologically active substances to make the claim. They may, however, make 'contains X' claims.
- New criteria for protein claims, where there are currently no provisions set by FSANZ.

The potential impact of these changes is discussed in the following section.

Potential costs to industry

Food manufacturers can incur costs due to the proposed changes above under the following four scenarios:

- Where they are required to change largely technical information on the label that requires redesign of those labels that carry claims. An example of such a change is the need to include percentage daily recommended intake information on the Nutrition Information Panel (as described above). Such a change does not alter the ability of a consumer to recognise a brand or a claim made on a label (but does provide more information to consumers).
- Where they are required to remove a claim that they have been making on a label, as the claim is no longer permitted. This involves the cost of changing the label, but also means that the products will no longer carry the claim, and therefore the manufacturer will no longer receive the benefits that the claim generated (such as sales due to a consumer's recognition of the information on the claim).
- Where they are required to remove a claim on the label of a product because the product no longer qualifies to make the claim (though the claim itself is still permitted). Alternatively, the manufacturer has the choice to reformulate the product to make the product compliant with the criteria. This is the case for those products carrying a diet claim that do not meet the disqualifying criteria.
- Finally, manufacturers may be required to change labels, or reformulate foods where they are using claims for which there were no previous criteria for their use. In this case, manufacturers were not making non-compliant claims, but were operating in an area where there was no guidance from regulators. Under the new specifications, there will be products that are currently making that claim that do not qualify. Manufacturers will have the choice of either changing their product to become compliant, or removing the claim from the product — therefore incurring the cost of changing the label, or forgoing the benefits that come from making the claim.

For each of the above scenarios, it is assumed that manufacturers will change in order to be compliant with the regulations. In reality, manufacturers also have the choice of being non-compliant, therefore risking the costs of being found non-compliant. The issue of compliance is discussed more explicitly in the next section.

To what extent do the above scenarios apply to the changes proposed by FSANZ? It is difficult to make a conclusive estimate of the impact on industry because:

- there is insufficient available data on the proportion of products affected by the different changes specified; and
- in the face of the changes, firms have more than one option for change (for instance, they could decide to change a label or reformulate). In each case, the firm will make this decision based on the relative cost of the choices they have. Therefore, it is not possible to make a conclusive judgement as to the actual cost incurred by industry as a whole, as the variability between firms is likely to be considerable.

These difficulties aside, it is possible to make some judgements on the impact of the changes proposed by FSANZ. Table 4.1 sets out the extent of the impact of each of the proposed changes to regulation.

Table 4.1

TYPES OF CLAIMS COVERED BY THE COPONC

Proposed or potential change	Extent of impact
New disqualifying criteria for making cholesterol content claims	This will impact only a small proportion of products currently making cholesterol claims as the majority are expected to comply with the disqualifying criteria.
Change to disqualifying criteria for diet claims	This change is likely to only impact a very small number of products on the market, the majority of products currently making diet claims will still qualify to make the claim.
Percentage daily intake requirement	Will require the re-labelling of approximately 40% of products on the market within the transition period (the length of which is still to be determined).
Changes to claims for 'source' and 'good source' not specified in the Code.	Only likely to apply to a small proportion of claims
New provisions for protein claims	Only a small proportion of claims currently carry protein claims. New criteria are likely to only have a marginal impact.

The following conclusions can be made about the impact of the above changes:

- Regardless of the other changes, approximately 40 per cent of products that make claims will have to have their labels changed with the requirement for including percentage daily intake information in the Nutrition Information Panel. FSANZ will provide a transition period of two years of these changes,

which will reduce the costs to firms as the change can be incorporated into the normal cycle of label redesign. A study of the costs of complying with food regulation in 2000 estimated a cost of between $1500 and $2000 to change a label for a food product.[5] Estimates provided by firms in submissions to the IAR suggested costs of between $2000 and $3000 per label to become compliant with changes to the Food Standards Code. These costs include analytical costs for making changes to the NIP.

- Consideration of all other changes is therefore in relation to those cost other than labelling costs. These include potential loss of product recognition or market share where products are no longer able to make claims. These are likely to apply to:
  - a small number of products carrying diet claims;
  - a very small number of products carrying protein claims; and
  - the small number of products that may not qualify to make a claim after the introduction of new disqualifying criteria for cholesterol claims only.

  While there is currently insufficient information to make a judgement on these costs, it is important to note that such costs will apply to options 2 and 3, that do not apply to option 1 (the *status quo*).

The treatment of 'free claims'

'Free' claims are those that state that a food is free of a particular nutrient or substance. The most common examples currently in use include 'fat free' and 'sugar free'. CoPoNC provides guidelines on the use of 'free' claims for fat, sugar, cholesterol and salt. Under CoPoNC, manufacturers are allowed to use a free claim if no amount, or only trace amounts, of the substance are present. For example, for a fat free claim CoPoNC states 'the food must not contain more than 0.15g total fat per 100g of food'.

These provisions are, however, inconsistent with fair trading legislation. Both the Australian Competition and Consumer Commission (ACCC) and the New Zealand Commerce Commission consider that the term 'free' means 'nil'. That is, where a food is labelled as being 'fat free', it should contain no fat whatsoever.

In the IAR, FSANZ established the following position on free claims:

> FSANZ has met with the Australian Competition and Consumer Commission and the New Zealand Commerce Commission on several occasions in relation to the issue of 'free' claims. The purpose of the most recent meeting on 10 May 2004 was to develop a preferred approach for use of the term 'free' as it relates to content claims. The agreed position was to not stipulate criteria for 'free'; that is, to remain silent in respect of unqualified 'free' claims. Claims will therefore be regulated through fair trading laws, and manufacturers will be able to use 'free' claims provided they are consistent with these requirements.

In practice, this involves replacing CoPoNC with a Guideline (for option 2) or into a Standard (for option 3) will effectively remove these provisions for making 'free claims'.

In submissions many industry respondents interpreted this change as a removal of the right to make free claims, and therefore a cost to firms. For this analysis, this

[5] The Allen Consulting Group 2000, *Costs and Benefits of Proposed Food Labelling Changes.*

issue is relevant in determining whether industry has been impacted by a change in the types of claims that they are allowed to make.

Those manufacturers currently making free claims using the provisions under CoPoNC are doing so in conflict with current fair trading legislation in Australia and New Zealand. There could be an argument for adjustment costs for industry if there was uncertainty over whether the CoPoNC provisions could over-ride fair trading legislation. This is not the case, however, given the following statement in CoPoNC (where the Authority is the Australia New Zealand Food Authority, now FSANZ):

> This Code of Practice includes conditions under which claims may be made that a food is free of certain nutrients, namely fat, cholesterol, sodium or sugar. In each case, a small but finite limit is specified below which the claim may be made.
>
> The Authority has included finite limits for these claims on the basis that:
>
> - the levels specified represent nutritionally insignificant quantities of the nutrients in the food; and
> - the specification of such limits is consistent with international practice.
>
> The Authority recognises that such claims are also subject to the provisions of general legislation such as the Trade Practices Act, State fair trading laws and State and Territory food laws, which prohibit information which is false, misleading or deceptive. The Authority considers it unlikely that government authorities administering these laws would take action against suppliers making 'free' claims in accordance with the conditions in this Code of Practice, but can give no immunity from such action under general Commonwealth, State or Territory legislation.[6]

This statement in CoPoNC clearly states that the provisions for free claims in the code are not consistent with fair trading legislation, and that firms need to be aware of the risks associated with being non-compliant with these requirements. Removing such provisions for making free claims therefore does not remove any form of protection for firms from fair trading legislation. On this basis, it is clear that this change does not result in a cost to firms — just as this analysis will not factor in costs of firms changing non-compliant claims to be compliant under new regulation.

4.3 Impact on compliance

As noted earlier, there are several inconsistencies between regulatory measures in the current regulatory system for nutrition content claims, and, for some types of claims, a lack of any guidance on the use of claims (for example, carbohydrate claims). In Australia, this is in part due to the CoPoNC not being kept up to date with changes in food innovation and dietary trends. In New Zealand, this problem is more significant, with no specific regulation of nutrition claims outside of that in the Food Standard Code.

Such a regulatory environment impacts on compliance. Lower regulatory compliance has two important impacts:

- competitive impacts between compliant firms and non-compliant firms; and
- a weakening of the consistency of claims being made, with the potential to lower the credibility of claims.

[6] Australia New Zealand Food Authority 1995, *Code of Practice Nutrient Claims in food Labels and in Advertising*.

In considering the issue of compliance, and how compliance levels may change, it is necessary to:

- assess current compliance levels under option 1;
- determine the potential impact on compliance from implementation of option 2; and
- determine the potential impact on compliance from implementation of option 3.

Compliance with the current regulatory arrangements

In submissions to the IAR many stakeholders raised concerns about the level of compliance with the CoPoNC. While there is no on-going, large scale monitoring of food labels, there are two recent studies which have assessed compliance with both CoPoNC and the Food Standards Code by taking a sample of food labels.

An independent study of compliance with the Code of Practice and the Food Standards Code found that, in a sample of 6662 products, for the 3194 claims covered by the CoPoNC, the level of non-compliance was 14.8 per cent. This result is only marginally different from the reported level of non-compliance with the Code (13.3 per cent of 811 claims), and would therefore suggest the CoPoNC is comparatively effective.[7] FSANZ label monitoring data on a total sample of 1262 labels suggests a higher overall level of non-compliance with CoPoNC, finding only six non-compliant claims in a sample of 169.

The Williams study did find, however, that, at a more disaggregated level, there are specific types of claims where the level of non-compliance was high, including:

- light or lite claims without a statement specifying the characteristic that is light (68.5 per cent);
- low or reduced saturated fat claims without a declaration of the content in the Nutrition Information Panel (59.2 per cent);
- claims for reduced levels of a nutrient without a comparative statement of the reference food and percentage reduction (25 per cent); and
- '% fat free' claims which did not include a statement in close proximity giving the percentage fat in the product (14.4 per cent).[8]

In addition, there was a concentration of non-compliant claims for food that did not meet the criteria for the type of claim made. For example, 17.9 per cent of products that carried a claim of 'cholesterol free' where neither low in fat or low in saturated fat (a requirement under the CoPoNC). Many of these difficulties with compliance in certain areas appear to be the result of a lack of regular updating of criteria in CoPoNC. Submissions by industry stakeholders suggest that CoPoNC has not been updated due to awareness of changes being made by FSANZ to regulation of nutrition claims.

[7] Williams, P et al 2003, 'Nutrition and Related Claims used on Packaged Australian Foods – Implications for Regulation', Asia Pacific Journal of Clinical Nutrition 12(2): 138–150.

[8] Ibid.

Data from the above studies does indicate that, overall, the level of compliance with CoPoNC is reasonable, and similar to that for the Food Standards Code.

A further consideration of current compliance is the extent to which the transitional health standard is being complied with. FSANZ reports that assessment of consistency with the transitional health standard is difficult because of vagueness in its wording. A recent assessment of a sample of claims made found that the majority of labels referring to general health were considered to be compliant. Many of the products carry implied claims that could arguably be considered to be non-compliant with the transitional standard (e.g. statements such as 'a bonus for your bones' or carrying endorsements or referring to the word health) but were not considered so because of the interpretation difficulties. Thus only blatantly inconsistent labels were considered non-compliant (of which there were six out of a sample of 1262 labels). This experience highlights the difficulties in capturing implied claims under the current framework.

Potential compliance under option 2

Option 2 involves the removal of CoPoNC and the management of the criteria for general level claims under a Guideline, with pre-requisites and conditions managed under the Standard. The Guideline would not be legally enforceable. High level claims would be managed under the Standard.

It can be assumed that the level of compliance for high level claims under the Standard would be similar to the current compliance level for content claims with the Standard (around 87 per cent from the Williams study), assuming that enforcement agencies allocated similar levels of resources for enforcement activities. Compliance with the Guideline for general level claims is less certain. The Guideline will not be legally enforceable, and therefore will carry similar weight as an industry code of practice. It is important to note here that comments from some industry stakeholders that the Guideline would be enforceable because it could be used under fair trading legislation has little foundation. Legal advice suggests that it is extremely unlikely that the Guideline would be used in this manner, and even if it were, this would not be to directly enforce the provisions in the Guideline (but rather as information in any assessment of whether a claim is misleading).

While the level of compliance by industry with the proposed Guideline is difficult to predict, there are some potential drivers to increased compliance for the Guideline over the current approach:

- under this option, many of the elements of making a general level claim (such as conditions and substantiation requirements) will be under the Standard and therefore enforceable;
- moving to a framework which manages the regulation of claims under the framework of the Food Standards Code (though not explicitly in the Standard) may provide the Guideline with a greater perceived authority. Management of the Guideline will also involve a wider set of stakeholder than just industry;
- annual review of the Guideline will help to reduce problems of the document becoming out of date;

- increased consistency in the approach may reduce uncertainty about the types of claims that are allowed, and therefore reduce the ability of firms to take advantage of this uncertainty by not complying with requirements; and
- the Guideline would apply to all firms in Australia and New Zealand, rather than just signatory firms in Australia, therefore having a boarder coverage across more claims.

Given that the reported level of compliance with CoPoNC is similar to that of the Standard, and that the Guideline has a number of benefits for compliance over CoPoNC, it is considered that the level of compliance with the Guideline is likely to be strong, and only marginally less than that of the Standard.

Potential compliance under option 3

With all types of claims being managed under the Standard, it can be assumed that compliance will be in line with current compliance levels under the Standard, around 87 per cent.

It is important to note in this analysis that the expected level of compliance is also impacted by the investment by enforcement agencies. The issue of enforcement is discussed further in chapter six.

4.4 Administrative and compliance costs

While the previous section analysed the potential level of compliance, it is also important to consider the impact on firms of becoming compliant, and maintaining compliance, with any regulatory change. Potential impacts include:

- costs of collecting and holding evidence that their products for which claims are being made, qualify to make the claim under the criteria;
- costs of collecting and hold substantiation evidence for claims not on the Model claims list; and
- costs of applying for a new type of claim to be made.

For general level claims, all firms currently using claims will incur a one-off cost of ensuring that they comply with the new arrangements, which will primarily be ensuring that they hold evidence that those products that have claims on their labels qualify to make the claim under the criteria. Such costs are considered to be very minor as they will only arise in those few but are in addition to the current requirements under CoPoNC. Costs of holding evidence to substantiate a claim that is not on the model claims list released by FSANZ are considered to be higher.

The second area of costs for firms is more complex — the costs of applying to make new claims. In this case, time costs and opportunity costs are important to consider as much as financial costs. This relates to the flexibility and responsiveness of the regulatory system, and the extent to which it does not impose excessive administrative costs on industry.

For the three options assessed, the following comparison can be made:

- Option 1 involves management of claims in the Standard and CoPoNC. In theory it is relatively low cost for new provisions under CoPoNC, though such

updates have not generally been made in CoPoNC. As option 1 does not allow health claims, a comparison of management of these claims cannot be made.

- Assessing the flexibility of Option 2 is more problematic, as the parameters around how any stakeholder may seek a change to the Guideline have not been established by FSANZ. The current FSANZ advice on this option, is that qualifying criteria for making some specific claims together with some specific disqualifying criteria for content claims and generic disqualifying criteria for general level claims are to be included in the Guideline, with all other elements of managing claims to be included in the Standard. This approach differs from that specified in the IAR, where conditions were also to be included in the Guideline. Under this option, there would not be a requirement for pre-market approval of general level claims. It is intended that the Guideline would be reviewed annually, with an expectation that this would assist in keeping the criteria up-to-date and providing avenues to include criteria for new types of claims which were previously not specified. While not as yet decided, it is anticipated that if any stakeholder wishes to have the criteria in the Guideline changed, they would be required to provide scientific evidence to support the change, though would not have to comply with other statutory requirements (such as mandatory public consultation periods).
- Option 3 is marginally different from option 2 by including all aspects of the management of general level claims in the Standard. As with option 2, there would not a requirement for pre-market approval of general level claims, with firms required to hold information on the claims that they make in the event that enforcement agencies wish to investigate the claims. As with option 2, under this option if a firm, or any other stakeholder, is seeking a change to the criteria for making a claim they would have to submit an application. Under this option, however, the process for making this change is through the statutory process for changing the Standard.

4.5 Opportunities for new claims and product innovation

An area of significant interest in Proposal P293 is the opportunity for firms to make health claims previously prohibited under the Standard.

In a regulatory environment in which health claims are permitted, industry can react in a number of ways. It can:

- use voluntary labelling to promote the nutritional content and health benefits of their existing products;
- fortify or alter existing products, or produce brand extensions of existing products (such as low fat or low calorie varieties of an existing product); or
- develop new products on the basis of market opportunities that arise through the ability to actively promote the health benefits of consuming the product.

Alternatively, if industry perceives that the costs of using a claim (including regulatory burden) outweigh the benefits of using a claim (including the perceived gain in market share), it may choose to not participate in using voluntary claims.

As the only major country that has long term experience in allowing both nutrition content and health claims, research from the United States provides some evidence of how industry reacts in this environment.

The United States introduced significant changes in the regulation of nutrient and health claims in 1991, which were fully implemented by 1994 (the Nutrition Labelling and Education Act [NLEA]). These changes tightened the requirements for making claims, where the previous environment was relatively unregulated. This is, therefore, a reversal of the proposed change in Australian and New Zealand (where the proposal is to move to an environment where more claims are permitted). This experience is, however, interesting to see the extent to which firms take opportunities to make health claims in a regulated environment.

In the period after the announcement of the NLEA, but prior to its introduction, the number of health claims used fell dramatically. This is likely due to industry anticipating a far tighter regulatory arrangement for health claims, and therefore choosing to move away from this type of marketing for its products. Indeed, many of the health claims made in the period prior to 1990 were unlikely to have been compliant with the NLEA. At the very end of this period (1997), there was some indication of industry adjusting to the new regulations.

A survey of the use of voluntary nutritional claims, comparing the use of voluntary nutritional content and health claims between 1992 and 1999, found an initial fall in the use of voluntary claims by industry (table 4.2). For nutrition content claims, the use of claims fell in the period immediately after the introduction of the NLEA, though recovered slightly by 1999. The reduction in nutrition content claims between 1992 and 1999 may indicate the extent to which claims made prior to the NLEA were not compliant with the new regulation. The trend in health claims was somewhat different, with claims already at low level in 1992. Interestingly, there was strong growth in health claims from 1995 to 1999, indicating that industry responded to opportunities to make claims under the new regulatory arrangements.

Table 4.2

TRENDS IN NUTRITION AND HEALTH CLAIMS IN THE UNITED STATES (1992 TO 1999), PERCENTAGE OF LABELS IN SAMPLE

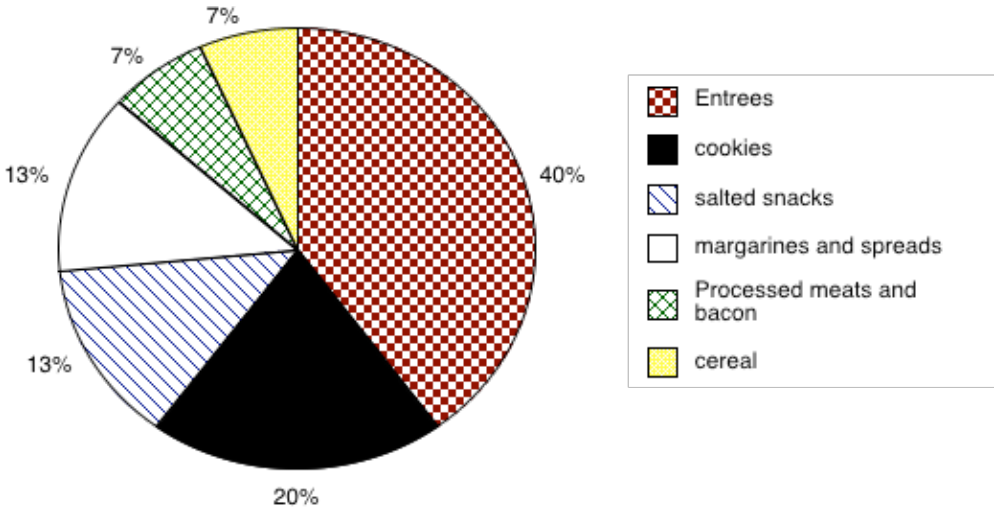
	1992	1995	1999
Nutrition content claims	49.4	43.9	44.4
Health claims	1.5	2.1	6.3

Source: J Caswell et al, The impact of new labelling regulations on use of voluntary nutrient-content and health claims by food manufacturers, Journal of Public Policy and Marketing, Vol, 22(2) Fall 2003, pp147-158.

This study also documented the types of food carrying claims on their packaging, which provides an interesting insight into how this has changed over time. For health claims, the categories of products which had health claims adjusted considerably. As shown in figures 4.1 to 4.3, the trend has been a change in the types of foods that use claims. For example, while in 1992 cookies constituted 20 per cent of claims, in the post NLEA periods no claims were made on this product. Another notable trend is the growth in claims for cereals, which by 1999 dominated all health claims made.

Figure 4.1

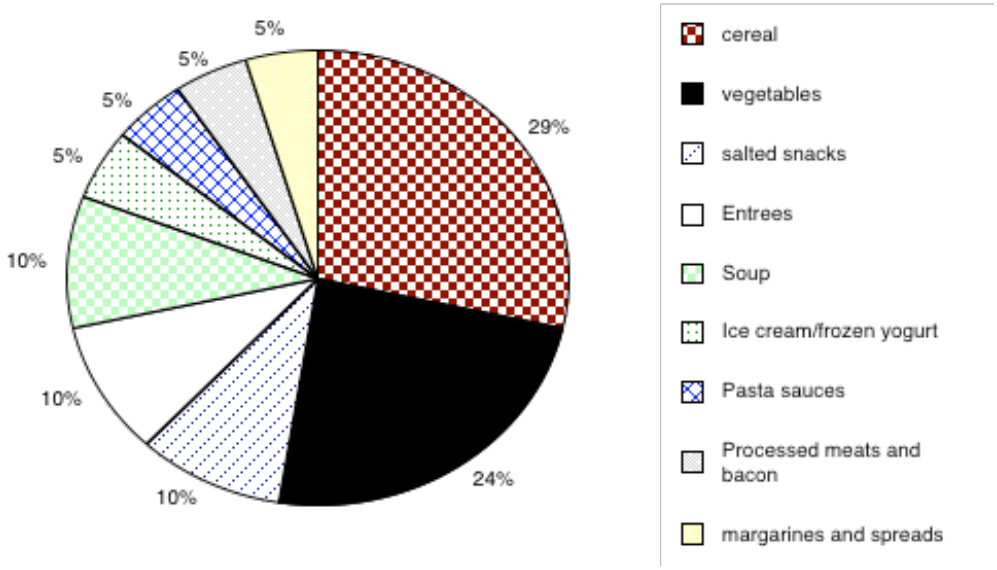
PROPORTION OF TOTAL HEALTH CLAIMS ACROSS PRODUCT TYPES (1992)



Source: J Caswell et al, The impact of new labelling regulations on use of voluntary nutrient-content and health claims by food manufacturers, Journal of Public Policy and Marketing, Vol, 22(2) Fall 2003, pp147-158.

Figure 4.2

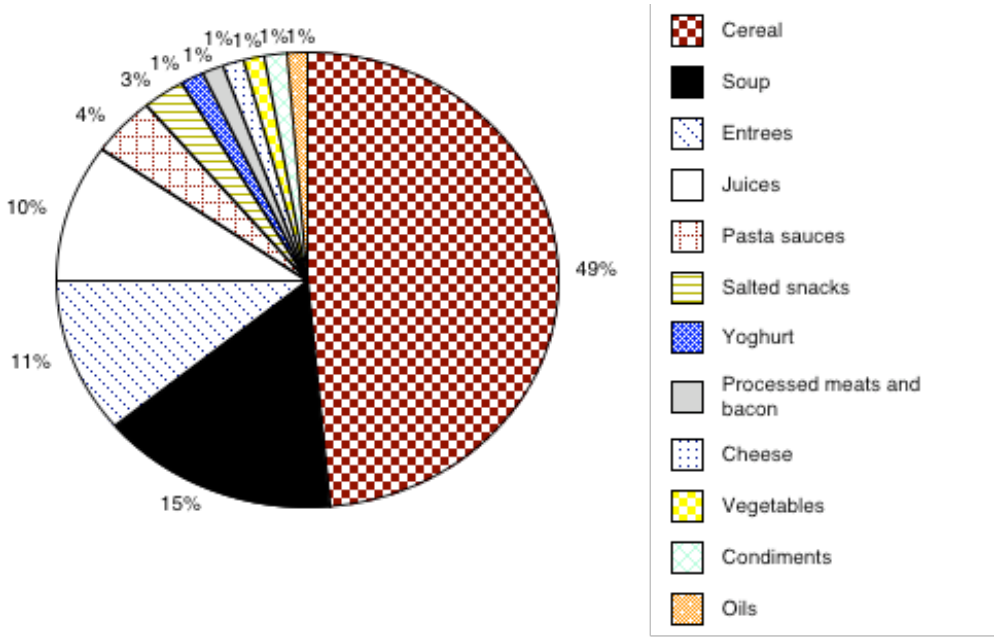
PROPORTION OF TOTAL HEALTH CLAIMS ACROSS PRODUCT TYPES (1995)



Source: J Caswell et al, The impact of new labelling regulations on use of voluntary nutrient-content and health claims by food manufacturers, Journal of Public Policy and Marketing, Vol, 22(2) Fall 2003, pp147-158.

Figure 4.3

PROPORTION OF TOTAL HEALTH CLAIMS ACROSS PRODUCT TYPES (1999)

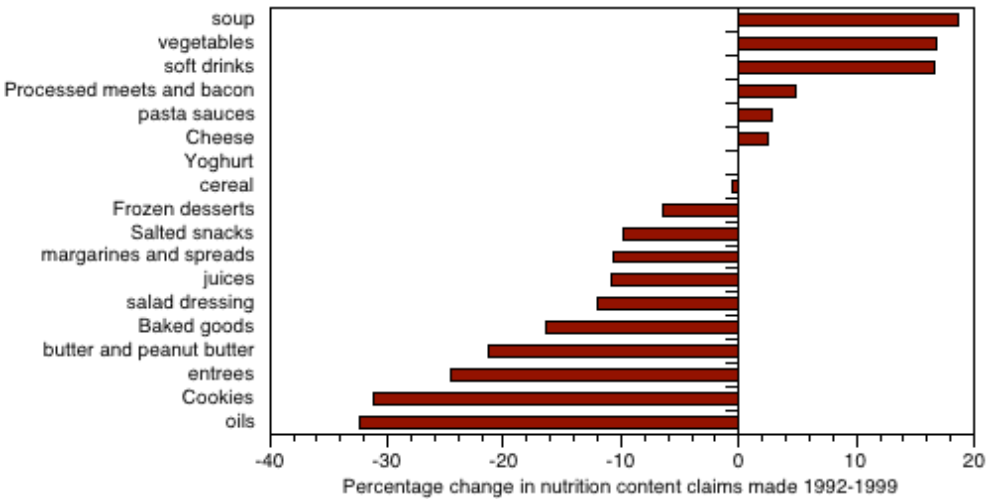


Source: J Caswell et al, The impact of new labelling regulations on use of voluntary nutrient-content and health claims by food manufacturers, Journal of Public Policy and Marketing, Vol, 22(2) Fall 2003, pp147-158.

For nutritional content claims, there have been similar trends. Figure 4.4 provides the percentage change in nutrition content claims between 1992 and 1999. As for health claims, several categories experienced significant reduction in claims, particular those such as baked goods and cookies, which are unlikely to meet the criteria under the NLEA, since it prescribes maximum fat and calorie levels for foods with nutrition claims.

Figure 4.4

CHANGE IN NUTRITION CONTENT CLAIMS (1992 TO 1999)



Source: J Caswell et al, The impact of new labelling regulations on use of voluntary nutrient-content and health claims by food manufacturers, Journal of Public Policy and Marketing, Vol, 22(2) Fall 2003, pp147-158.

Potential impact of opportunities for new claims

The experience in the United States indicates that, while a transition period of slower growth should be expected, industry will take up new opportunities to make claims that they previously could not. This is consistent with comments from firms in submissions. As these claims are voluntary, it can be assumed that firms will only use these claims where there is a benefit for them in doing so, such as increasing market share, or protecting their current market share (which are costs forgone).

In the context of the FSANZ options, it is clear that options 2 and 3 provide the greater opportunity for industry to make new types of claims that were previously prohibited.

Chapter 5

Consumer issues

Under the current regulatory framework for nutrition and health claims in Australia and New Zealand, consumers currently have access to nutritional information on food labels through:

- mandatory nutrition information panels (the NIP);
- nutrition and health claims currently allowed under the Food Standards Code, CoPoNC and fair trading laws; and
- claims being made that do not comply with the current regulations.

Given that consumers are already exposed to a number of different types of claims, the role of this analysis is to consider a *marginal* change in the type and volume of nutritional information that consumers are exposed to, rather than to determine the impact of all claims on consumers. This is essentially an exercise in assessing the net impact on consumers of the change — not a simple task for a number of reasons:

- how consumers use information is a complex issue. It is not sufficient to assume that more information in a market will always lead to benefits for consumers; it may in some cases, but it may not if consumers do not know how to apply the information appropriately; and
- attributing the use of nutrition information to broader benefits such as health benefits is problematic. There are many factors that contribute to health outcomes. Further, the health impact of a marginal change in diet, which is itself one of many factors influencing health, is very difficult to estimate with any reasonable certainty.

These difficulties aside, it is reasonable to assume that there are consumers in the marketplace that value nutrition information, and would benefit from more of this information in the public domain. This chapter provides a framework for considering the potential for such benefits, against the potential costs for consumers associated with inappropriate use of nutritional information. It is within this framework that the FSANZ regulatory options can be assessed.

5.1 A framework for analysing consumer impacts

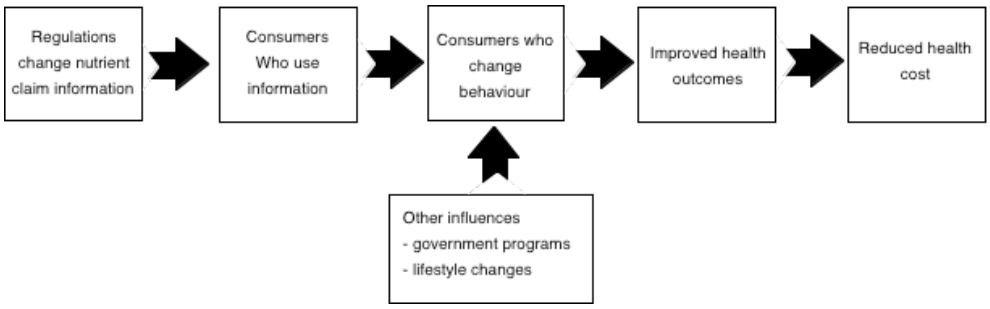
Nutrition labelling is a form of information exchange between a firm and a consumer. Where firms are voluntarily providing such information through nutrition or health claims, they are doing so on the assumption that consumers value the information and use it to inform their purchasing decisions. From the firm's point of view, providing this information may make consumers more attracted to their product over those of their competitors.

As noted above, the impact of nutritional information on food labels on consumer welfare is difficult to clearly identify. It is useful for this analysis to consider the process by which consumers are exposed to, react to and apply nutrition information, and how this process can be linked to broader consumer benefits.

As figure 5.1 shows, the first key indicator is whether consumers use information in claims (or choose to ignore it or do not notice it). Of those who use it, some may change their behaviour as a reaction to the information (also taking into account other information sources). This behaviour may or may not lead to improved health outcomes. Breaking down this process in these stages, it is possible to assess the potential for benefits by assessing the extent to which consumers use and understand nutrition information on food labels (even in the absence of strong evidence of health outcomes).

Figure 5.1

THE LINK BETWEEN NUTRIENT CLAIMS AND HEALTH OUTCOMES



A heterogeneous consumer set

The above description of how information in nutrition and health claims can lead to consumer benefits provides a stylised process relevant for what would be considered as 'rational' consumer behaviour. In practice, however, the way consumers interact and apply nutrition information is significantly more complex.

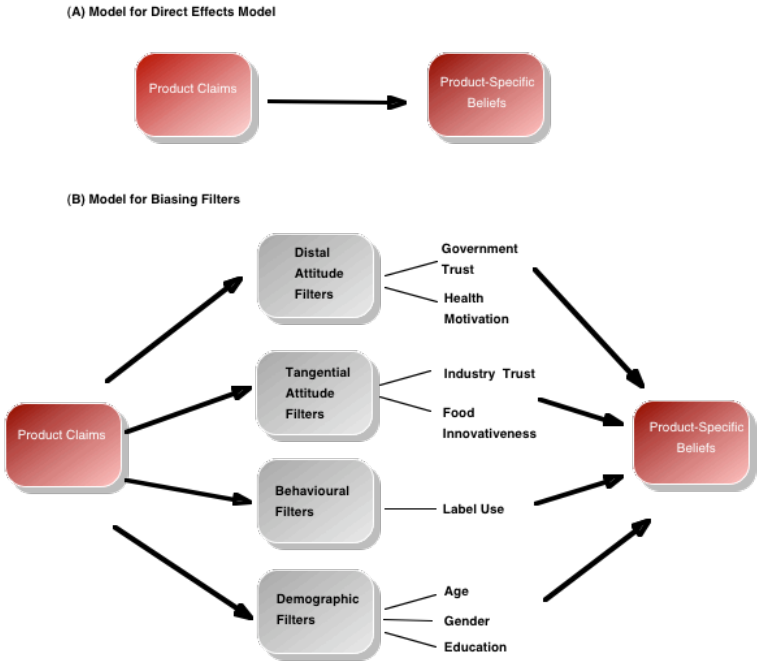
Figure 5.2 illustrates two models for considering how consumers comprehend information in claims:

- Model A is a 'direct effects' model which assumes that there is a direct linkage between the information on the claim and the belief that the consumer holds about the product — effectively assuming that all consumers will react to information in the same way.
- Model B allows for filtering of information by consumers, due to the beliefs that the individual currently holds, and other behavioural and demographic factors. This model assumes that an individual's beliefs about a product are influenced by their existing beliefs, what is termed as 'conformity bias'.[9] In this context, once a consumer has developed a belief, incoming information is interpreted in a manner that confirms that belief. This model therefore suggests that when consumers read nutritional information on food labels they consider it along with their existing knowledge and beliefs about nutrition and food more generally. Different consumers will therefore react differently, even when presented with the same information. Therefore, the extent to which they will change their behaviour (and potentially benefit from the information) will vary also.

[9] K. Russo France and P. Fitzgerald Bone 2005, 'Policy makers' paradigms and evidence from consumer interpretations of dietary supplement labels', *Journal of Consumer Affairs*, Vol. 39, No.1, pp. 27–35.

Figure 5.2

HOW CONSUMERS FILTER INFORMATION IN PRODUCT CLAIMS



Source: K. Russo France and P. Fitzgerald Bone 2005, 'Policy makers' paradigms and evidence from consumer interpretations of dietary supplement labels', *Journal of Consumer Affairs*, Vol. 39, No.1, pp. 27–35.

This analysis highlights the need to consider consumers as a heterogeneous set. Within this set, there will be some consumers who will be able to use and benefit from information in nutrition and health claims, others who will not use information at all, and others still who may use information inappropriately.

When considering these ideas in the context of an impact analysis, it is useful to consider the consumer 'set' along a net benefit to net cost continuum, based on the impact on consumers of an increase in the number of claims, as well as a change in the type of claims that consumers are exposed to. Figure 5.3 provides a stylised example of such a model, using a normal distribution as a proxy for the distribution of consumers along the continuum for illustrative purposes. In reality, this distribution of consumers along this continuum may be skewed to the left or right.

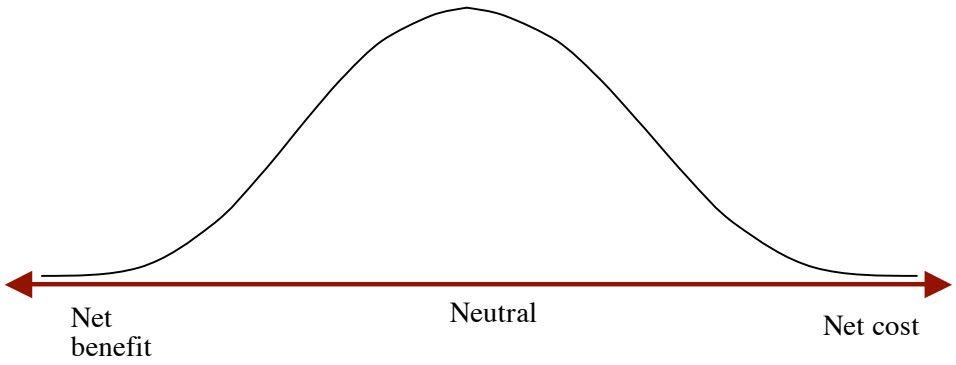
What characteristics would determine where consumers would sit along this continuum? At the one extreme, consumers can derive a net benefit from being exposed to nutrition information in food labels where:

- they read nutrition and health claims on labels, and use the information in the claim in making their food purchase (perhaps in conjunction with other available information on the label); and
- the change in their food purchasing leads to a benefit to the individual, perhaps due to a specific health condition that they have (for example, an individual at risk of developing osteoporosis consuming products high in calcium), or from a less specific benefit of improving the overall quality of their diets. Consumers can also derive benefits from the knowledge that they are making more informed food choices.

Conversely, consumers at the net cost end of the continuum will incur a cost if they use information on a food claim and apply it incorrectly, to the extent that it leads to a cost to them. Examples of this occurring may be where an individual consumes a particular food to excess on the assumption that it is 'good for them' because of a claim on a label, or where an individual lets other aspects of their diet or lifestyle deteriorate because they believe other foods (with claims) are providing them with significant health benefits. Some stakeholders in submissions believed that these problems could be exacerbated when consumers are exposed to a large volume of information on nutrition and diet that they have difficulty in applying appropriately.

Figure 5.3

ILLUSTRATIVE EXAMPLE OF DISTRIBUTION OF CONSUMERS ALONG A NET BENEFIT — NET COST CONTINUUM



5.2 Research and evidence on consumer impacts

To what extent can the above theoretical model be applied to this analysis of the FSANZ regulatory proposals? This assessment requires review of the current evidence and research into how consumers use nutrition and health claims, and whether consumers are able to effectively comprehend this information. The following sections provide an analysis of the recent research into these issues, including quantitative research commissioned by FSANZ.

Do consumers seek nutrition information from food labels?

The first element in analysing the impact for consumers of nutrition and health claims on food labels is to identify the extent to which consumers are aware of, and make use of, nutrition and health claims.

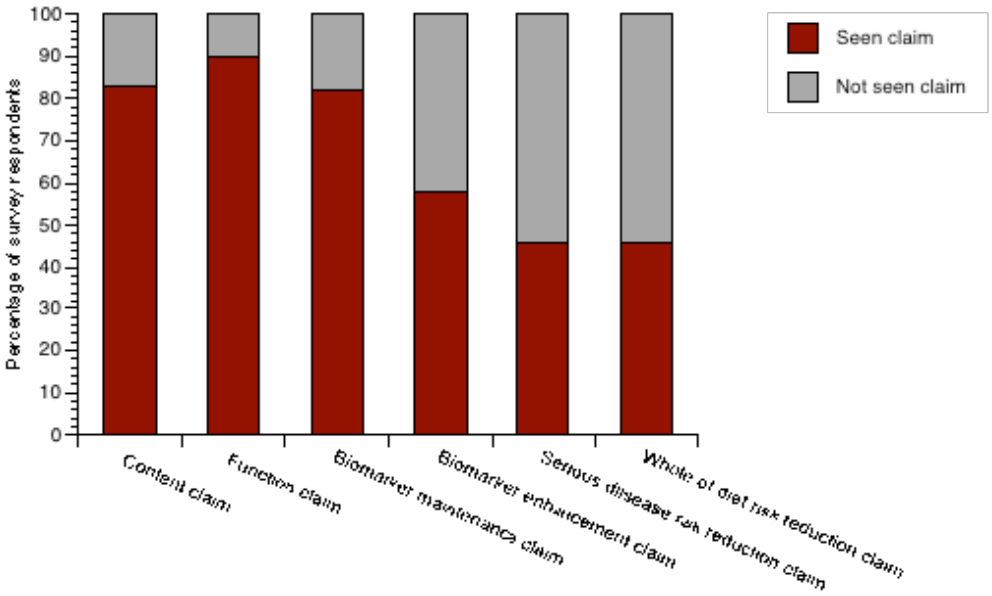
Recently commissioned research by FSANZ surveyed over 1000 individuals from Australia and New Zealand, testing the extent to which consumers are aware of and use information in nutrition and health claims on food labels. This study is valuable also in that it assessed the awareness and use of claims by consumers with varying degrees of health awareness.

As shown in figure 5.4, for all individuals surveyed, awareness of content and function claims is very high (84 and 90 per cent respectively). Interestingly, a comparatively high proportion (82 per cent) also claimed to have seen the

biomarker maintenance claim (a claim on margarine 'This food is low in saturated fat. A diet low in saturated fat helps to maintain healthy blood cholesterol levels'), even though this claim is actually currently not permitted in Australia or New Zealand. This result may be due to the use of a similar claim on some current margarine brands relating to 'cholesterol absorption'. Similarly, 46 per cent consumers reported being aware of the whole of diet claim (a claim on packaged vegetables 'a diet high in fruits and vegetables helps reduce the risk of heart disease') this claim is also not currently permitted. It is unclear from the research whether consumers have been exposed to claims which are currently not permitted, or whether they are confusing one type of claim with another (recognising that consumers do not differentiate the types of the claims in the manner in which they are classified in regulations).

Figure 5.4

AWARENESS OF CLAIMS ON FOOD LABELS

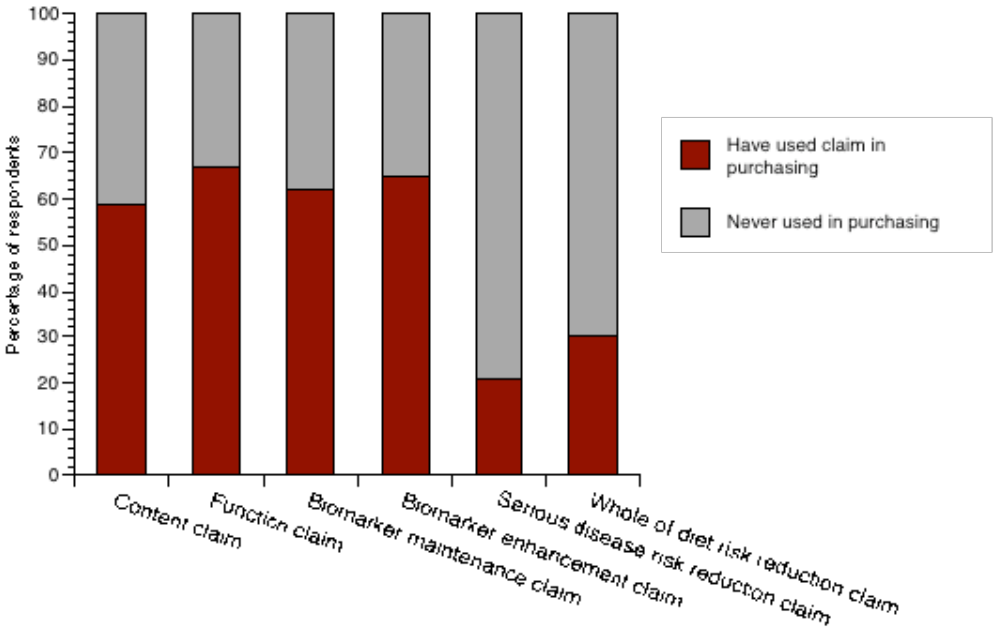


Source: TNS Social Research 2005 *Research on consumers' perceptions and use of nutrition, health and related claims on packaged foods and associated advertising material,* Prepared for Food Standards Australia New Zealand.

While a majority of individuals were aware of at least one of the claims used in the study, a smaller proportion reported using the information in claims in their purchasing decisions. As shown in figure 5.5, the use of claims by consumers is highest for function claims (67 per cent). Interestingly, around two-thirds of consumers reported using biomarker enhancement and biomarker maintenance claims, even though these are not permitted under the current arrangements.

Figure 5.5

USE OF CLAIMS WHEN BUYING PRODUCTS

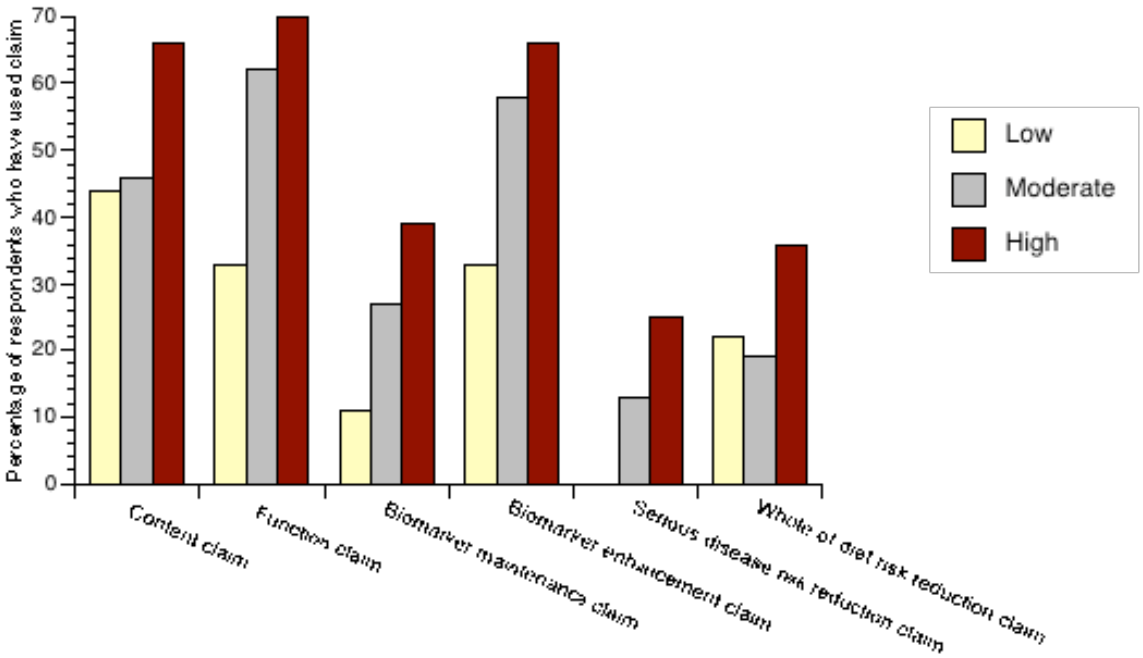


Source: TNS Social Research 2005 *Research on consumers' perceptions and use of nutrition, health and related claims on packaged foods and associated advertising material,* Prepared for Food Standards Australia New Zealand.

When considering the sample in the survey by level of health consciousness, there is a clear difference in use patterns for claims. As shown in figure 5.6, individuals who report that they have a high level of health consciousness (those who report that they regularly or always choose the healthy or nutritious alternative) also had the highest level of claim use. This result makes intuitive sense, and emphasises the role that existing interest in or knowledge of health and diet linkages are a major driver of claim use.

Figure 5.6

USE OF CLAIMS WHEN BUYING PRODUCTS BY LEVEL OF HEALTH CONSCIOUSNESS



Source: TNS Social Research 2005 *Research on consumers' perceptions and use of nutrition, health and related claims on packaged foods and associated advertising material*, Prepared for Food Standards Australia New Zealand.

There are a number of other studies, particularly from the United States, that have examined whether consumers use information provided in claims on food labels. A recent paper by Cowburn and Stockley surveyed over 100 research papers on how consumers use and understand claims in nutrition labels.[10] This review found that, in a majority of studies, consumer use of nutrition information on food labels was high — with most using it often or at least sometimes. Reasons for not reading nutrition levels included lack of time, size of print on packages, lack of understanding of terms and concerns about the accuracy of the information.

How do consumers interpret and apply information in claims?

There are a number of factors that will impact how consumers use nutrition information:

- The extent to which consumers are able to translate the information provided on a label to a positive change in their diet. This is particularly the case for content claims that do not make a direct link to a health outcome. For instance, if consumers are not aware of the role of Omega-3 fatty acids in their diet, a claim that a product contains Omega-3 fatty acids may not be sufficient information for the consumer to act on.
- The willingness of consumers to make changes to their diet even with a high level of information about diet-disease relationships. Consumers take a number of factors into consideration when choosing the food that they eat, with nutrition and health factors only one of several factors, such as price, taste and

[10] G. Cowburn and L. Stockley 2005, *Consumer understanding and use of nutrition labelling: a systematic review,* Public Health Nutrition, Vol 8 (1), pp. 21-28.

quality.[11] Consumers often purchase foods that they know are not necessarily healthy for them due to their preference for better taste, or because of budget constraints.

- Consumers make their own assessment of their risk exposure to diet related diseases. There is evidence to suggest that those consumers who are most attentive to nutrition information on labels are those that already have health conditions for which diet is a contributing factor.[12] Other consumers, particularly younger consumers, may not consider themselves at immediate risk, and therefore may not feel compelled to change their eating habits. This issue of the perception of long term risk is a factor in other harmful habits such as tobacco smoking and alcohol consumption.

A study of consumers in the United States provides a good example of how a range of factors can impact on an individual's diet.[13] This study tested how consumers develop knowledge of nutrition, and how that information impacts on diet. The study found that there are two types of nutrition related knowledge — general knowledge of the importance of a healthy diet, and specific knowledge of diet-disease relationships. Specific knowledge had a much larger effect on reducing intake of fat and cholesterol, indicating that providing consumers with more detailed information on diet-disease risks can improve diet outcomes. There are, however, countervailing factors. Individuals with higher incomes and higher education levels (which are correlated) had a higher level of nutrition specific knowledge. However, higher incomes increased average fat intake and offset gains from knowledge. This trend is likely to be, in part, driven by higher rates of eating away from home at higher incomes. The results of this research highlight the complex factors that impact on a consumer's choice of diet.

Other research of consumers in Australia found strong consumer awareness and use of the Nutrition Information Panel (NIP), finding that the NIP was the preferred component of nutrition information on foods.[14] Despite this preference, there is conflicting evidence on how consumers use claims and information on the NIP in making their purchasing decisions. Two studies from the United States found different results in this area:

- One study found that when a NIP is readily available, claims did not have a significant impact on consumer's beliefs about the product, except in the case where consumers found that the claim was not consistent with the information panel. Claims not consistent with information in the nutrition information panel resulted in lower evaluations of manufacturer credibility.[15] The authors did also note:

[11] C. Chan et al. 2003 *Australian consumers are sceptical about but influenced by claims about fat on food labels,* European Journal of Clinical Nutrition (accepted December 2003).

[12] Food Standards Australia New Zealand, 2003 *Food Labelling Issues: Quantitative Research with Consumers,* Evaluation Report Series No. 4.

[13] L. Aldrich 1999, *Consumer Use of Information: Implications for Food Policy,* Economic Research Service, US Department of Agriculture.

[14] Chan. C et al. 2003 *Australian consumers are sceptical about but influenced by claims about fat on food labels,* European Journal of Clinical Nutrition (accepted December 2003).

[15] S. Keller, M. Landry, J.Olsen, A.M. Velliquette, S. Burton and J.C. Andrews, 1997, 'The effects of nutrition package claims, nutrition facts panels and motivation to process nutrition information on consumer product evaluations'. *Journal of Public Policy and Marketing*. Vol. 16 (2), pp. 256–69.

> However, conclusions regarding the (lack of) influence for claims certainly may not hold for all consumers or all claims that are allowed. Some consumers may lack sufficient desire or ability to process detailed nutrition information and may be influenced significantly by claims on the front of the package.[16]

These findings were consistent with an earlier study by Ford, which found that, in the presence of other available nutrition information, claims did not affect overall product nutrition beliefs.[17]

- Conversely, another study in the US found that, using a sample of consumers and presenting them with packaging with nutrition and health claims, consumers were more likely to 'truncate' their search in the presence of a health claim — that is, they were less likely to refer to the NIP.[18] This same study found that consumers' attitudes towards health claims were not consistent across all products, and were influenced by the plausibility of the claim and their existing knowledge. In the study:
  - a claim that provided information that the respondent did not already know about the product seemed to have a positive effect on attitudes towards that product;
  - a claim that provided no new information, but seemed plausible for the product, seemed to have no effect; and
  - a claim that provided no new information, but which seemed implausible, produced negative reactions toward the product.

The second component of assessing how consumers use information on nutrition and health labels is considering how consumers apply nutrition information to make adjustments to their diet. This relates not only to the consumer purchasing a product because they believe that it is better than alternative products, but how this information is applied more broadly to the consumer's other diet choices.

Recent research commissioned by FSANZ provides valuable insights in this regard. This study tested a series of statements on individuals surveyed in relation to how consuming products with different types of claims impacted on their views on the benefits of the products and other lifestyle decisions. As shown in figure 5.7, when asked whether they believed that consuming the product would mean that they would not have to watch other things that they ate, the majority of respondents disagreed with the statement (therefore acknowledging that they still needed to be mindful of their overall diet). Interestingly, the presence of a claim did not make consumers more likely to agree with the statement, with the converse being true (consumers were less certain about the statement where there was no claim on the label).

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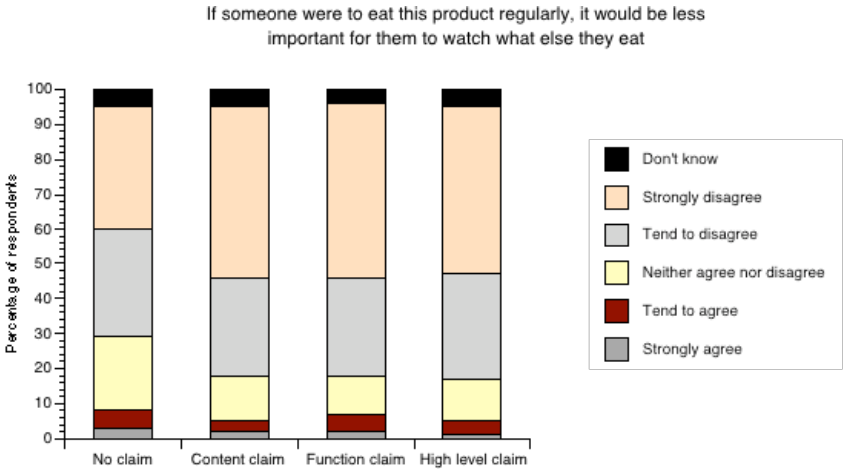
16 ibid. p. 265.

17 G. Ford, T. Manoj Hastak, A. Mitra, and D. Jones Ringwood 1996, 'Can consumers interpret nutrition information in the presence of a health claim? A laboratory investigation', *Journal of Public Policy and Marketing,* vol. 15, pp.16–27.

18 Roe et al. 1999, The Impact of Health Claims on Consumer Search and Product Evaluation Outcomes: Results from FDA experimental Data, *Journal of Public Policy and Marketing*, 18 (Spring), 89-105.

Figure 5.7

VIEWS ON THE IMPACT OF PRODUCTS WITH CLAIMS ON OTHER DIET CHOICES

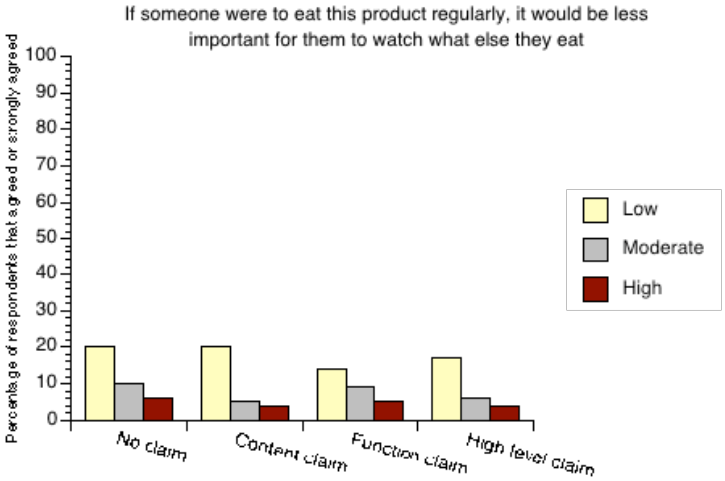


Source: TNS Social Research 2005 *Research on consumers' perceptions and use of nutrition, health and related claims on packaged foods and associated advertising material*, Prepared for Food Standards Australia New Zealand.

These results can be further assessed on the basis of the level of health consciousness of the individual. As shown in figure 5.8, individuals with a low level of health consciousness were significantly more likely to believe that consuming the product would mean that it was less important for them to watch what else they ate. This result highlights how, within the sample, there are important differences in individual's belief and reactions to food levels. It is important to note, however, that the presence of a claim did not impact on consumer's beliefs in this regard.

Figure 5.8

PROPORTION OF SAMPLE AGREEING WITH STATEMENT, BY LEVEL OF HEALTH CONSCIOUSNESS (HIGH, MODERATE OR LOW)

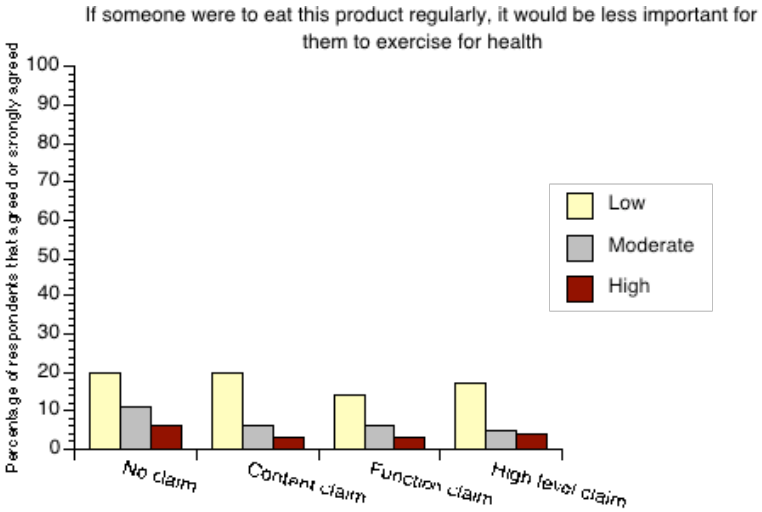


Source: TNS Social Research 2005 *Research on consumers' perceptions and use of nutrition, health and related claims on packaged foods and associated advertising material*, Prepared for Food Standards Australia New Zealand.

In the survey, individuals were also asked whether consuming the product would mean that it was less important to exercise. As with the previous results, across the whole sample consumers did not consider the statement to be true. However, those individuals with low levels of health consciousness were more likely to agree with the statement. Again, the presence of a claim did not have a significant impact on whether individuals agreed with the statement or not (figure 5.9).

Figure 5.9

PROPORTION OF SAMPLE AGREEING WITH STATEMENT, BY LEVEL OF HEALTH CONSCIOUSNESS (HIGH, MODERATE OR LOW)



Source: TNS Social Research 2005 *Research on consumers' perceptions and use of nutrition, health and related claims on packaged foods and associated advertising material*, Prepared for Food Standards Australia New Zealand.

On the basis of these results, it could not be concluded that consumers were more likely to be misled by the presence of a claim, although there is a segment of consumers who have misguided views about the potential benefits of consuming certain types of food.

5.3 The balance between informing and protecting consumers

The preceding discussion highlights the complexities of considering how consumers react to and use nutrition information on food labels. In terms of the three options being assessed for this study, the key issue is the balance between informing and protecting consumers.

In submissions to Proposal P293 a major concern of some stakeholders (primarily consumer groups and nutritionists) was that nutrition and health claims on food products would have a detrimental effect on consumers' overall diets due to:

- consumers over-consuming products with claims due to a belief that these foods have implicit health characteristics, and therefore can be consumed in high quantities;
- consumers losing a 'whole of diet' perceptive in making their food choices by focusing on consuming or avoiding particular components of food rather than

trying to eat a balanced diet (for example, consumers focusing on fat or carbohydrate consumption); and

- a shift towards those foods that have claims and away from those products that don't, which could result in a move towards packaged foods and away from fresh foods.

These concerns are based on the premise that consumers do not have sufficient ability, or knowledge, to properly assess and apply the information provided on food labels. There were also concerns that greater opportunities for labels on products would lead to inappropriate fortification of foods, or to claims being made on food with limited nutritional value. Stakeholders with these views typically supported the maintaining of the status quo (option 1) because it maintains the prohibition on health claims. Noting that this option is not consistent with the policy guideline, these stakeholders noted that if health claims where to be permitted, then the option which provides the greater protection for consumers should be implemented, which they consider to be option 3.

The alternative view (held by other stakeholders) is that consumers will benefit from more information, and that the current system, where the prohibition on claims has led to many implied claims and patchy information, is not effective in providing consumers with sufficient information to make purchasing decisions. The following observations support this view:

- There are ambiguities in the current system. There is evidence that uncertainty surrounding what industry can and cannot claim on food labels is impacting on consumer confidence. A recent study on consumer attitudes towards food labelling in Australia found that a majority of individuals surveyed did not believe that fat claims are always truthful, and recognised that foods labelled as low in fat were likely to be high in sugar.[19]
- The focus of the current system on content claims limits the flow of information on the linkages between consumption of particular nutrients and health outcomes. Assuming that a proportion of consumers value this information and would act to alter their diets in light of this information, a restriction on the information imposes a cost on consumers. For instance, consumers may be more responsive to information about the linkage between osteoporosis and calcium than to a claim about the calcium content of food with no other information.

In assessing these opposing views, it is necessary to understand that the main issue is one of a trade-off. As already identified, in practice, is not accurate to consider that all consumers will be misled, or that all consumers will be able to use the information correctly. Rather, the issue is to balance the potential benefits against the potential costs.

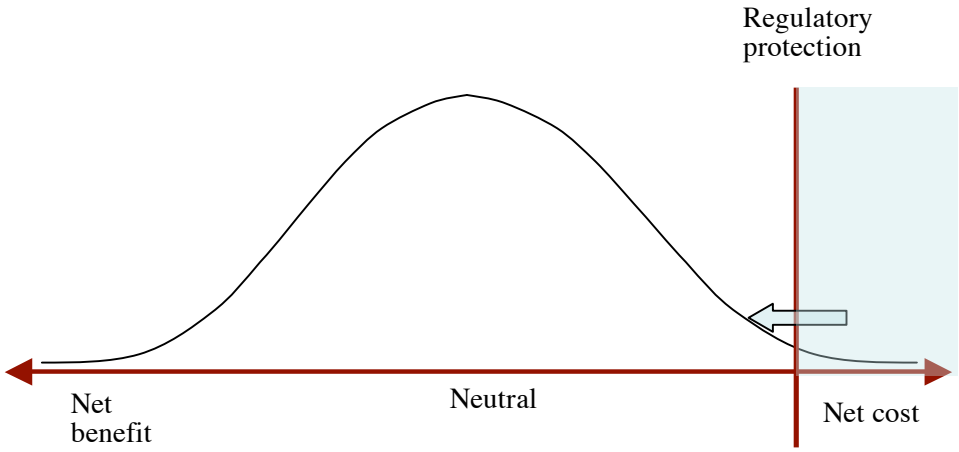
Results of FSANZ research indicate that consumers are already exposed to claims on food labels, and many already use them in their food purchases. This research also found that most people could use the information in the claims correctly, though there was a small group in the sample that was more likely to hold incorrect views on the benefits of foods (both with and without labels). In this context, it is

[19] Chan. C et al. 2003 *Australian consumers are sceptical about but influenced by claims about fat on food labels,* European Journal of Clinical Nutrition (accepted December 2003).

useful to revisit the diagram below (figure 5.10). This analysis brings in the question of the appropriate level of regulatory protection. There are trade-offs in this decision — a higher degree of regulatory protection provides greater protection for consumers who may potentially be misled by claims, but restricts the information to those consumers who benefit from claims.

Figure 5.10

ILLUSTRATIVE EXAMPLE OF DISTRIBUTION OF CONSUMERS ALONG A NET BENEFIT — NET COST CONTINUUM



Assessment of options

The analysis in this chapter has provided a framework within which to consider the three FSANZ options for regulation of nutrition and health claims. In relation to the specifications of the options the following observations can be made:

Option 1 provides the greatest restriction on the types of claims that can be made. It therefore, to some extent, protects those consumers that may incur a cost from being exposed to these claims. A limitation of this option is, however, that this restriction has led to a number of implied claims in the market, which causes consumer confusion and mitigates the potential benefits of protecting consumers. This restriction also impacts those consumers who would benefit from the claims prohibited.

Option 2 and option 3 are very similar in their approach, with the only difference between the two options being the management of criteria for general level claims in a Guideline under option 2. Both of these options, by allowing a greater range of claims than under option 1, benefit those consumers at the net benefit end of the spectrum. Both options also provide a degree of regulatory protection by regulating all aspects of high level claims in a Standard (including requiring pre-market approval). The extent of any difference between the options is, therefore, based on whether the management of the criteria for general level claims in a Guideline or a Standard has a discernable impact on consumer welfare.

This assessment is related to two earlier assessments of the options made in chapter 3 — how flexible the options are to allow for innovation in food products through

claims, and the degree to which the options provide for consistency and credibility in claims. As already established, there is only a marginal difference in the two options in relation to the above points. Option 2 provides a small degree of flexibility for innovation over option 3. Option 3 may lead to high compliance, though option 2 is also likely to have a strong compliance level given the similarities in the management of the Guideline to that of the Standard.

On this basis, and given the available evidence, the options can be assessed as having equivalent levels of benefit to consumer welfare.

Chapter 6

Enforcement issues for government

This chapter provides a discussion of the potential impact on government of the proposed FSANZ regulatory options.

Compared with the complex and multifaceted issues surrounding industry and consumers in this area, the issues for government are relatively limited. The main issue to consider is how the options will impact on enforcement and administration costs for government.

Under the current arrangements, enforcement of the Food Standards Code is the responsibility of state, territory and local governments. While FSANZ sets the regulations in the Food Standards Code, it does not perform any enforcement functions. FSANZ reports that they do not anticipate any significant cost impact to themselves from a change in the regulation of nutrition and health claims. In this section, therefore, only the impact on enforcement agencies needs to be considered.

Enforcement agencies face three potential areas of increased costs with a change in regulation:

- costs of becoming familiar with the new regulations, including for staff investigating complaints to understand the new compliance requirements;
- costs of informing the public of changes to the regulations, which is likely to be an on-going cost (particularly if further changes and updates are made); and
- costs of managing a greater number of complaints because of the increased number and type of claims in the market.

The current practice for enforcement agencies is to manage compliance on a complaints basis, rather than monitoring labels directly, although some enforcement agencies take a more pro-active approach. The major source of complaints is competitors, although complaints are also received from consumers. This therefore relies on industry and consumers being aware of the regulation and taking the time and effort to make a formal complaint about a claim.

In considering the options, feedback from a sample of enforcement agencies suggests that, at the present time, there are no established plans to increase enforcement resources as a direct result of the regulatory changes proposed. There is no evidence to suggest that the current complaints based system of enforcement will change under any of the proposed options — that is, enforcement agencies will continue to manage this role by assessing complaints against the appropriate regulations. It is likely, however, that an increase in the number of claims in the market, and a greater breadth of claims, will increase complaints made and lead to greater enforcement costs for government agencies.

On the basis of the options, the following assessments can be made.

- Under option 1, government agencies must currently manage the use of claims under the Food Standards Code, and the current transitional standard for health claims.

- Under option 2, government agencies are likely to incur higher costs (than option 1) of managing the use of health claims, including high level claims, that will be allowed under the specifications in the Standard. Government agencies will not be required to enforce the criteria under the Guideline, which will be managed by FSANZ in conjunction with industry and consumer stakeholders. The Guideline will, however, involve costs in providing information on the role of the Guideline and providing information on any updates to the Guideline. These costs will be borne as administrative costs of the Guideline Management Committee.
- Under option 3, as with option 2, enforcement agencies will incur costs of enforcing the use of health claims, including high level claims, that will be allowed under the specifications in the Standard. Such agencies will also be responsible for enforcing the criteria for general level claims as they will be specified in the Standard.

Part C

Comparison of regulatory options

Chapter 7

Assessment of options against criteria

The previous sections have provided a broad discussion of the major issues for stakeholders for the regulation of nutrition and health claims, and outlined the main areas where the impact of the options would be assessed. This chapter provides an assessment of each option against a set of criteria, in order to decide on a preferred option.

7.1 Assessment criteria

In multi-criteria analysis the criteria used to assess and compare each option need to reflect the broad range of impacts across stakeholders. Some impacts can be quantified, while others only lend themselves to a qualitative assessment. For each option, its impact in relation to each criterion is given a score based on whether the impact of the option is positive, negative or neutral. The scores for each option are summed to obtain an overall net score. These scores can then be compared to come to a conclusion as to the preferred option.

The following five criteria are being used to assess each regulatory option.

1. Impact on adjustment costs for industry

This criterion assesses the extent to which the regulatory option imposes adjustment costs on firms in relation to claims they are currently making. As discussed in chapter 3, options 2 and 3 will involve costs for industry in changing labels, as well as potential costs through loss where firms must remove claims from products (where these claims provided benefits to firms).

Based on the available information, options 2 and 3 will impose the same adjustment costs for industry, which will be higher than those for option 1.

2. Impact on opportunity for industry innovation

This criterion assesses the extent to which the options provide opportunities for firms to innovate in developing new products and improving existing products. For each option being assessed the follow two points need to be considered:

- the extent to which the option allows firms to make a broad range of different types of claims; and
- the flexibility and responsiveness of the regulatory system, to the extent that it allows firms to introduce new claims in a timely manner (in line with competitive considerations).

On this basis, options 2 and 3 clearly provide an advantage over option 1 because they allow a greater range of claims to be made.

Between options 2 and 3, there is a small point of difference in the management of the criteria for general level claims. The current range of general level claims allowed under each option is the same, though option 2, using a guideline, should provide a more flexible approach to changing criteria. Due to the similarities in the

specifications of the Guideline to that of a Standard, it is considered that there is a relatively small benefit from the Guideline for industry through the flexibility of the Guideline, though this will also depend to some extent on how aspects of the Guideline are implemented (which have not as yet been decided on by FSANZ).

3. Impact on consistency and credibility of claims made in the marketplace

This criterion assesses each option against how it impacts on the consistency and credibility of claims made in the marketplace. Consistency and credibility of claims is going to be highest in an environment with highest compliance with regulations.

Under option 1 there are a number of gaps in the regulation that allow inconsistent claims and implied claims to be made.

Of options 2 and 3, given that option 3 had the highest level of enforceability, and it is therefore expected to have the highest level of compliance. However, given that that Guideline will take on many of the management features of a Standard, and that the current level of compliance with non-regulatory mechanisms by the industry is relatively highly, it is considered that the level of consistency and credibility in claims will only be marginally weaker in option 2.

4. Impact on consumer welfare

This broad criterion encompasses the net welfare that consumers derive from using claims.

As discussed in chapter 4, this assessment requires a trade-off between the potential costs to consumers of being mislead by claims, and the benefits of the additional information available from a wider range of claims. Chapter 4 established that:

- Option 1 provides consumer protection by restricting the types of claims that can be made, but has led to a number of implied claims in the market, which causes greater consumer confusion and mitigates the potential benefits of protecting consumers. This restriction also negatively impacts those consumers who would benefit from using the prohibited claims.
- Options 2 and 3 can be considered as having an equivalent positive impact on consumer welfare, given the similarities in the options and considering the balance the impact of various factors on consumer welfare. Both options, by allowing a greater range of claims than under option 1, benefit those consumers at the net benefit end of the spectrum. Both options also provide a degree of regulatory protection by regulating all aspects of high level claims in a Standard (including requiring pre-market approval). Option 2 provides a slightly higher degree of flexibility for change over option 3, which is valuable given the difficulty in predicting where changes may need to occur in the future. Option 3 may lead to higher compliance, though option 2 is also likely to have a strong compliance level given the similarities in the management of the Guideline to that of the Standard (and the fact that only the criteria will be managed under the Guideline). On this basis, and given the available evidence, the options can be assessed as having equivalent levels of benefit to consumer welfare.

5. Impact on enforcement and administration costs for government

While there is limited information on the expected impact on enforcement costs from a change in regulation, it is expected that enforcement in this area will continue to be driven by complaints. Options 2 and 3 will involve greater cost for government enforcement agencies because they allow a greater range of claims to be made, and therefore agencies must become familiar with the new regulations, and investigate potential breaches of the new regulations.

In assessing the difference between options 2 and 3, it can be considered that:

- There will be costs for government, industry and consumer groups in managing a Guideline, including administrative costs for the Management Committee. These costs will not be directly incurred by enforcement agencies, as the criteria under the Guideline are not enforceable. There will also be costs associated with providing information to industry and consumers on how the Guideline is managed and the criteria in the Guideline.
- For option 3, the criteria for general level claims will be in the Standard, which therefore means that enforcement agencies will have responsibility for assessing complaints and investigating potential non-compliance with these criteria. There will also be information costs for government with option 3, with a change in regulations, though these costs are likely to be less than those for a Guideline.

This assessment suggests that there are sufficient offsetting factors between option 2 and option 3, and uncertainty surrounding the future actions of enforcement agencies that no clear distinction can be made between options 2 and 3 for this criterion.

7.2 Weighting of options

In Multi-criteria Analysis, setting weights for criteria allows the analysis to recognise that some criteria may hold greater importance for the overall objective of the analysis than others. Weighting is therefore an inherently subjective exercise where judgements of impact and importance are applied. It is for this reason that weighting in MCDA analysis is often the subject of considerable stakeholder debate — as different groups often do not share views on the importance of a particular impact. That said, it is important to note that such analysis without weights applied does not imply that no judgement of the importance of the criteria have been made, but rather that all criteria are considered to be equally important — an outcome which may not be optimal for the analysis depending on the criteria specified.

The criteria in this analysis have been chosen on the basis that they are factors that are important in assessing regulatory proposals for nutrition and health claims on food labels, and they are assessable using available evidence. It is then necessary to consider these criteria on the basis of their importance to the analysis — essentially the extent to which the criteria is sufficiently important to the overall objective of the analysis.

The analysis in this study has considered the regulatory options on the basis of three broad stakeholder groups: industry, consumers and government. The shaping of the analysis in this fashion recognises the distinctly different perspectives of stakeholders in these three broad groups, and the different considerations that such

stakeholders have taken in account in providing their comments on the options to date. As already alluded to earlier in this report, there are clear trade-offs between consumer and industry costs and benefits on this issue. In assessing the criteria considered, criteria 1 and 2 relate to those impacts on the food industry, the first recognising any one-off adjustment costs of a change in the regulation, and the second recognising the value to industry of flexibility of regulations to changes through innovation. Criterion 3 involves the credibility and consistency of claims made, which is an objective of any regulation of claims on food labels, and has an impact on both industry and consumer stakeholders. Criterion 4 represents that welfare of consumers, which incorporates factors such as how consumers use information on claims, this risk to consumers of being misled and the benefits of the information provided. Criterion 5 considers the impacts on government agencies.

Looking at the criteria used in this analysis, it is evident that not setting weights for criteria would significantly under value criteria 2 and 4, and significantly over-value the other criteria. Feedback from stakeholders from this analysis highlighted the importance of consumer welfare in relation to regulating claims, and as such this criteria has been provided with the highest weight (40 out of 100). Criteria relating to industry impacts have been set a collective weight of 40, with a larger eight on the longer term impacts of criterion 2, and a lower weight on the one-off impacts of criterion 1. The remaining criteria have been set a weighting of 10 each.

7.3 Scoring of options

Table 7.1 provides a scoring of each option against the criteria, with each criterion provided a weight.

The scores provided in the table are on a scale of zero (0) to 5, where 0 is considered to be no impact, and 5 the highest impact. The scores provided are based on the above discussion of each criterion. In order for a comparison to be made across positive and negative criteria, for negative criteria where the option has the lowest impact, it is given the highest score of 5.

Box 7.1

ASSESSMENT OF OPTIONS AGAINST CRITERIA

Criteria	Weight	Option 1	Option 2	Option 3
1. Adjustment costs for industry (high score = lower impact)	10	5	4	4
2. Impact on opportunities for industry innovation	30	1	4	3
3. Impact on consistency and credibility of claims made in the marketplace	10	1	3	4
4. Impact on consumer welfare	40	2	4	4
5. Impact on enforcement costs for government (high score = low cost)	10	4	3	3
Total score		210	380	360

On the basis of the scores in table 7.1, option 2 is the preferred option by a small margin. It is important to note here that the similarities of the two options, particularly given how the options have been specified further since the release of the IAR, mean that there is, in reality, only a small degree of difference between these options that can be assessed in this framework. In particular, as noted in the earlier discussion, it is considered that there is only a small difference between the options for criteria 2 and 3. The final result is therefore highly sensitive to small changes in the underlying judgement of these criteria or to the weights for criteria. Given these sensitivities in the final results, it should be considered that there is no significant difference in the impact of options 2 and 3.

This assessment highlights the value in moving from the current framework to one that allows health claims. It is clear that in this case such a change leads to benefits for all stakeholders. Between options 2 and 3, the only discernible difference is a marginal difference in the management of the criteria for general level claims. While it appears that the intention of developing an option with a Guideline for general level claims was to provide a more flexible non-regulatory option, the design features of the Guideline as currently set out by FSANZ only provide the Guideline with limited functions, and incorporate many aspects of the management of a Standard into the Guideline. These similarities have resulted in the results impact assessment above.

As noted in the first chapter of this report, it is the role of this analysis to assess the impact of the options as specified by FSANZ (including those specifications made after the release of the IAR). It is therefore not within the scope of this analysis to provide advice on the impact of an alternative option. The review team would note, however, that the similarities of the options provided by FSANZ has not allowed a broader analysis of an option that provides a quasi-regulatory or co-regulatory option (as is typically valuable in such regulatory analysis within a RIS framework). Such analysis would have been valuable given the relatively weak evidence of major problems relating to non-compliance by firms and the potential for consumers to be misled by general level claims. There appears to be little evidence to support a more stringent regulatory approach to managing general level claims than the current use of an industry code of practice, assuming that any new mechanism would be kept relevant and up-to-date (which has not been the case with the current code of practice). The review team therefore considers there to be merit in providing a more flexible mechanism for guiding industry in using general level claims than has been provided with the current options under consideration.

Appendix B

FSANZ regulatory options

Table B.1

ELEMENTS AND THEIR TREATMENT UNDER EACH REGULATORY OPTION

Element	Option 1 – Status Quo	Op. 2 – HLC + guideline GLC	Op. 3 - HLC + standard GLC
Nutrition content claims	Current food standards regulate "source" claims and the NIP. Industry also follows a voluntary code of practice in Au and abides by fair trade laws in NZ.	Permitted under standard subject to substantiation requirements, other prerequisites and conditions. The criteria for some GLCs specified in the guideline.	Permitted under standard subject to substantiation requirements, other prerequisites and conditions, as well as meeting criteria for GLC.
Function claims (a class of general level claims)	Not specifically permitted in the Code. These claims are not specifically addressed in the Code. On one interpretation, the lack of an explicit prohibition creates some ambiguity as to whether these claims might be able to be made after all.	Permitted under standard subject to substantiation requirements, other prerequisites and conditions. The generic criteria for GLCs specified in guideline.	Permitted under standard subject to substantiation requirements, other prerequisites and conditions, as well as meeting generic criteria for GLC.
Enhanced function claims (a class of general level claims)	Not specifically permitted in the Code. Not specifically addressed or differentiated in the Code.	Permitted under standard subject to substantiation requirements, other prerequisites and conditions. The criteria for generic GLCs specified in the guideline.	Permitted under standard subject to substantiation requirements, other prerequisites and conditions, as well as meeting generic criteria for GLCs.
Risk reduction claims (non-serious disease) (a class of general level claims)	Not permitted in the Code.	Permitted under standard subject to substantiation requirements, other prerequisites and conditions. The generic criteria for GLC claims specified in the guideline.	Permitted under standard subject to substantiation requirements, other prerequisites and conditions, as well as meeting generic criteria for GLCs.
Biomarker claims (non-serious disease) (a class of general level claims)	Not specifically permitted in the Code. Not specifically addressed; no specific prohibition.	Permitted as a GLC.	Permitted as a GLC.
Biomarker	Not specifically	Permitted, subject to	Permitted, subject to

claims (serious disease)	permitted in the Code.	meeting the HLC requirements specified in the standard.	meeting the HLC requirements specified in the standard.
(a class of high level claims)	Not specifically addressed or differentiated in the Code; no specific prohibition.		
High level health claims (HLC)	Not permitted.	Permitted, subject to meeting the HLC requirements.	Permitted, subject to meeting the HLC requirements.
		Initial list of pre-approved HLC included in Standard.	Initial list of pre-approved HLC included in Standard.
"Free" claims	An ACCC matter; not specifically regulated under the Food Standards Code.	An ACCC matter; not specifically regulated under the Food Standards Code.	An ACCC matter; not specifically regulated under the Food Standards Code.
"Slimming" claims	Not permitted.	Claims in relation to weight reduction / management subject to meeting the requirements of HLC or GLC as appropriate.	Claims in relation to weight reduction / management subject to meeting the requirements of HLC or GLC as appropriate.
		The word "slimming" is not permitted.	The word "slimming" is not permitted.
Endorsements	Not specifically regulated under the Food Standards Code.	Permitted subject to meeting the requirements for HLC or GLC, as appropriate.	Permitted subject to meeting the requirements for HLC or GLC, as appropriate.
		Some current endorsement programs will be pre-approved.	Some current endorsement programs will be pre-approved.
Cause-related marketing	Not regulated under the Food Standards Code.	Standard includes a mandatory condition that a disclaimer be used.	Standard includes a mandatory condition that a disclaimer be used.
Advertisements	In principle, should be consistent with general provisions of the Food Standards Code. Difficult to implement.	In principle, should be consistent with general provisions of the Food Standards Code. Difficult to implement.	In principle, should be consistent with general provisions of the Food Standards Code. Difficult to implement.
Advice of a medical nature	Not permitted.	Not permitted.	Not permitted.
The word "health" as part of or in conjunction with name of food	Not permitted.	May be used providing claims pre-requisites are complied with.	May be used providing claims pre-requisites are complied with.

Source: Food Standards Australia New Zealand

Appendix C

Variations on current content claims and associated impacts

Table C.1

VARIATIONS ON CURRENT CLAIMS THAT WILL BE IMPLEMENTED UNDER OPTIONS 2 AND 3

Claims	Status Quo	Proposed change	Potential impacts
Cholesterol	Provisions currently provided for making cholesterol claims in CoPoNC.	Minor change to make disqualifying criteria more stringent	Approximately 3% of packaged grocery products carry cholesterol claims. Impacted products predicted to be low, but not quantifiable.
Carbohydrate	There are currently no provisions for making carbohydrate claims.	No intent to develop criteria for low carbohydrate claims. High claims still undecided.	There are products on the market (~2-3%) with carbohydrate claims that may require re-labelling if criteria are specified.
Diet	Currently regulated in CoPoNC. CoPoNC allows 'diet' claims for products which either meet a defined 'low energy' content or which are 'lower in energy' compared to a similar reference food.	'Diet' claims will be permitted. Foods must meet the GLHC disqualifying criteria and have a statement on the label relating to the diet claim.	Those foods that currently make 'diet' claims will have to meet disqualifying criteria. A few products on the Australian market will no longer be able to be marketed as 'diet' and will therefore require re-branding or reformulation. Some of the remaining Diet products may require re-labelling. Alternative claims such as 'reduced energy' and 'light' are available for foods that may no longer be able to carry the 'diet' claim.
All nutrition and health claims	Std 1.2.8 permits information relating to the %DI of nutrients in the NIP, provided certain specifications are met. There is currently a mandatory requirement in Std 1.3.2 to either declare %RDI or the average quantity of the vit/min for which an ESADDI has been prescribed, where content claims are made in relation to the vits/mins.	To introduce a new requirement that all nutrition, health and related claims that relate to macronutrients and sodium must include in the NIP, %DI information for the claimed nutrient and for energy.	Approximately 40% of products carry content claims and all except those which relate only to minerals and vitamins or those few products already carrying %DI on a voluntary basis would require relabelling. Useful for consumers in terms of providing a benchmark on how relatively 'healthful' an individual product is.
Claims in relation to nutrients and biologically active substances that do not have a reference value specified in the code.	If a nutrition content claim is not specified in any of the current provisions, then manufacturers can currently make a claim, provided the name and the average quantity of any nutrient or biologically active substance in respect of which the nutrition claim is made, is included in the NIP in accordance with Std 1.2.8.	If there is no reference value specified in the code then only 'contains' claims can be made (i.e. 'source' and 'good source' claims will not be permitted).	Those products currently carrying 'source' and 'good source' claims that do not have reference values will need to be relabelled. the number of products affected is not quantifiable. Such an approach will provide greater clarity for enforcement officers, consumers less likely to be confused and there will be less need for consumer education.

Protein	Currently there are no criteria for protein claims	A 'source of protein' and a 'good source of protein' claim will be specified	Products that do not make protein claims may wish to do this given the development of criteria. Other products that currently make claims may have to be re-labelled. Approximately 1.8% of products carry protein claims. Most of these will comply.
No added sugar; unsweetened	Currently not regulated but referenced in CoPoNC to vol 1 of the code which has been repealed,	Removal of allowance to make claim for added concentrated fruit concentrate or deionized fruit juice. Introducing requirement for Disclosure statement	Some products won't be able to claim. The number affected can not be quantified. All products with this claim will need re-labelling.
% sugar free	Not permitted in CoPoNC	Will be permitted	To address presently labelled 'sugar-free products' which can no longer make claims
Lite or light	Permitted, and don't need to state characteristic if it is not a nutrient or energy and given in the name of the food or used in the label to describe the food	Need to state characteristic to which claim refers	Need to relabel all such products
Dietary fibre	Permitted in CoPoNC	Considering removing provisions for meal type products and very high fibre claims and increasing the qualifying criteria for source and good source and related claims	Number of products affected hasn't been quantified
Wholegrain	No criteria currently specified.	Criteria will be specified	More products will be able to make this claim because of change in definition

Source: Food Standards Australia New Zealand