



16 November 2020

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Dear Ms Leemhuis

Attached are the comments that the New Zealand Food & Grocery Council wishes to present on the *Review of the Food Standards Australia New Zealand Act 1991: Scoping prepare for public consultation*.

Yours sincerely

Katherine Rich  
**Chief Executive**



**Review of the Food Standards Act 1991:  
Scoping paper for public consultation,  
2 October 2020**

**Submission by the New Zealand Food & Grocery  
Council**

**16 November 2020**

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## NEW ZEALAND FOOD & GROCERY COUNCIL

1. The New Zealand Food & Grocery Council (“NZFGC”) welcomes the opportunity to comment on the *Review of the Food Standards Act 1991: Scoping paper for public consultation, 2 October 2020* (the Scoping Paper).
2. NZFGC represents the major manufacturers and suppliers of food, beverage and grocery products in New Zealand. This sector generates over \$40 billion in the New Zealand domestic retail food, beverage and grocery products market, and over \$34 billion in export revenue from exports to 195 countries – representing 65% of total good and services exports. Food and beverage manufacturing is the largest manufacturing sector in New Zealand, representing 45% of total manufacturing income. Our members directly or indirectly employ more than 493,000 people – one in five of the workforce.

## EXECUTIVE SUMMARY

3. FSANZ and the broader food regulatory system have a reputation for being rigorous, evidence-based and trustworthy. As the Australia New Zealand Food Standards Code (the Food Standards Code) is the only shared legislation between Australia and New Zealand under the Closer Economic Relationship, it holds a very special position in the overall Australia-New Zealand relationship. However, we are painfully aware that the food regulatory system as it currently stands has not changed in any significant way since it was established in 2000. The last substantive review of the FSANZ Act was undertaken in 2007 but its focus at that time was quite specific.
4. By contrast, the food environment has changed in many fundamental ways in the past 20 years: locally, nationally, regionally and globally. If the Australasian region is to maintain its standing in a very competitive global food environment and deliver to our consumers’ needs domestically and overseas, then FSANZ and its underpinning legislation must be world-class. The current review is therefore critical to the ongoing success of the food and related industries in the future, both economically and socially.
5. The Forum on Food Regulation (the Forum) has set as a priority area of work “maintaining a strong, robust and agile Food Regulatory System” and it is with this in mind that NZFGC targets its comments. The health and vibrancy of the industry is heavily dependent on a strong, robust and agile Food Regulatory System and steps taken in this generation will need to sustain the System for the foreseeable future.
6. Of particular note is the interdependency of the reform ideas such that asking for change in one area would have resource implications (both positive and negative) in another. The relative merits of system changes are therefore a significant element in proposing one over another.
7. Overall, of the five broad areas of focus in the Scoping Paper, NZFGC’s most significant focus is on “Objectives” and “Legislative processes and decision-making”. In these two areas, we support in some shape (in principle, in part, to some extent or strongly) almost all the Reform ideas presented. This is not to say other Reform ideas might be valuable to other stakeholders, especially those in Australia, but we believe the Reform ideas in the above two areas have the potential to deliver the most far-reaching benefits over time for the joint Food Regulatory System.
8. Starting with “Objectives”, a top priority is to better target ‘Public Health’ as an objective. As used in the FSANZ Act, we believe it is far too broad and we point to the many public health activities that are inappropriate for FSANZ. ‘Public health’ needs to be replaced by

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a more defined and better targeted component of 'Public health' and we suggest the terms 'consumer health' or 'consumer dietary health' coupled with the existing safety objective.

9. The other top priorities in this area are our very strong support for trade and risk-based and evidence-based approach to working to be core goals. The first is reflective of the significance of the health and wellbeing of our communities on trade – domestic and international. The second is that risk analysis and evidence based approaches for a standards development agency is fundamental and internationally recognised as such world-wide. Risk analysis is core to the work of the food standards setting activities of Codex Alimentarius and to other agencies such as the WHO, FAO, EFSA, OIE etc.
10. In the 'Legislative and decision-making' area our top priorities that are very strongly supported are Reform ideas 8 – Reframe legislation to support more agile, risk-based processes; 9 – Redefine the decision-making arrangements to support timelier and more efficient sign-off of regulatory measures; and 10 – Provide for FSANZ to adopt or accept risk assessments from overseas jurisdictions. These three Reform ideas have huge potential to increase the efficiency and effectiveness of the regulatory system at large and FSANZ as an agency.
11. Finally in the top list of priorities is our strong support for review requests by the Forum to meet specified criteria in recognition that when the best scientific evidence is applied to a risk assessment by FSANZ, a review request must be based very strongly on new evidential data and not ideology.
12. We do not generally support an expansion of FSANZ's functions and certainly not without additional, commensurate and appropriately funded resources. However, we recognise there may be very real Australia-only functions that could enhance the food regulatory system for Australia. Nor do we support joint agenda setting between FSANZ and the Forum. While it would be advantageous for the political and scientific agendas to be broadly complementary or broadly aligned, and certainly collaboration and dialogue would be important features of agenda-setting, we do not believe that an independent statutory authority with a very talented Board and expert staff should be tied to political agendas.
13. In a broad-ranging review of this significance, we consider it inappropriate to focus on one standard such as health claims. Nonetheless, we appreciate this is an issue of consistency that will likely attract comment from other stakeholders.
14. We have no issues with the current operation of the FSANZ Board and generally do not support most of the Reform ideas in this area since they appear targeted at resourcing rather than effectiveness. Nor do we support expanding cost recovery. The bulk of FSANZ's work is 'public good' and this demands public funding which has been severely decreased in the past decade due to the sinking lid applied by successive Australian Governments on the FSANZ funding base, irrespective of the bi-national role it has. Resourcing is not within the scope of this consultation but it is an area of fundamental impact on the Food Regulatory System.
15. A summary table of NZFGC's position on each of the Reform ideas is at [Attachment A](#).

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## DETAILED COMMENTS

The following comments follow the approach taken in the Scoping Paper and address a number of policy questions posed and the Reform ideas presented.

### 1. Background and context to the Review

Question 1a. Is there still a case for regulating food?

16. NZFGC is firmly of the view that there is still a case for regulating food. Most importantly, this is to ensure the consistent safety of food to provide confidence that any food consumed has met appropriate standards. There is also a case for regulating food to provide consistent consumer information about certain aspects of food such as ingredients. These measures provide a 'level playing field' for all manufacturers of food and importantly, present as the platform for international trade.

Question 1b. What market failure(s) should governments seek to address through regulation of food?

17. The key market failure requiring regulation is ensuring a level playing field – food safety and hygiene practices are not just for some operators, they are fundamental expectations of the system and consumers. There is no case for free riders where safety is concerned.

18. Regulatory measures in the form of food standards result from the best available science and evidence identified, collected and analysed only once instead of by every operator in the market. This ensures consistent parameters and measures are set in the food environment for all.

19. Actions to address potential market failures should always be subject to rigorous cost-benefit analysis to ensure that what might be considered a market failure can be cost-effectively addressed by a proposed measure.

Question 2. Are there other significant focus areas that should be considered as part of the Review?

20. The following areas are covered in the Review but we believe it is important to emphasise their importance at the outset:

- Timeliness of completing applications and proposals to enhance opportunities for innovation and better meet consumer expectations
- Centrality of risk analysis and proportionality in decision-making
- Closer alignment with changes and developments in international food standards development.

21. We believe it will be vital to consider the recommendations contained in the *Review of COAG Councils and Ministerial Forums: Report to National Cabinet* (Conran P, October 2020). This specifically recommended a sunset within 12 months of the Australia and New Zealand Food Regulation Ministers' Meeting. While we recognise this would need to be negotiated under The Agreement between the Government of Australia and the Government of New Zealand concerning a joint food standards system, it warrants urgent consideration now.

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22. This will also impact the fundamental Food Regulation System including the Food Regulation Standing Committee and the role of FSANZ within a potentially very different environment.

23. It is also important to consider the interdependency of the policy settings and reform ideas such that asking for change in one area would have resource implications (both positive and negative) in another. The relative merits of system changes are therefore a significant element in proposing one over another.

## 2. Objectives

Question 3. To what degree are the current legislated objectives an issue for the system? What are the types of problems that different stakeholder groups face as a consequence?

24. NZFGC considers the objectives require a single but significant change relating to the term 'public health'. The term 'public health' covers an enormous spectrum of matters relating to health and wellbeing, and, in doing so, encapsulates a very broad scope. This includes (according variously to the American Public Health Association and the Australia New Zealand Public Health Association):

- Science and research
- Nutrition
- Epidemiology
- Toxicology
- Food operations and food service inspection
- Health education
- Social work
- Vaccination and sanitation
- Community planning
- Public health professions (physicians, nurses, specialists, occupational health and safety)
- Public policy and social policy.

25. Public health often operates at the population level to track disease outbreaks, prevent injuries and shed light on why some population groups are more likely to suffer from poor health than others. It also has a significant role in non-communicable disease of which food is just one factor.

26. The definition of public health by national and international agencies is necessarily broad, but the food system is not about tracking and managing the spread of infectious disease or environmental hazards (outside the food supply chain), and its role is not to help ensure access to safe and quality care to benefit the population. Rather its role is to protect consumer health not public health, managing food related safety, consumer understanding and consumer wellbeing.

27. The Objects would be sharper, and closer to the goals set down for achievement by FSANZ if the objectives referred to 'consumer health protection' or consumer dietary health protection. FSANZ is not undertaking the Ministry of Health or WHO role and its objects should reflect a carve out for its targeted role. NZFGC has no issue with food safety remaining as an objective. This term is well understood and well defined nationally and internationally.

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28. Currently, there is inadequate focus on supporting innovation and the competitiveness of the food industry within Australia and New Zealand under the Food Regulatory System. Many Australian jurisdictions have a very domestically focussed approach to the Food Regulatory System which possibly led to the relegation of “the desirability of an efficient and internationally competitive food industry” to a an objective that FSANZ must only have regard to in section 18(2) of the FSANZ Act. Having internationally competitive food industries in both countries is vital for the economic health and wellbeing of the countries. This is more particularly the case for New Zealand where the vast majority of the food produced is exported. NZFGC strongly believes “the desirability of an efficient and internationally competitive food industry” should be included as a core objective in Section 18(1).
29. The types of problems experienced by industry are increased time, and therefore cost, to launch new domestic and export products; loss of market share in export markets due to lagging regulatory standards and/or inability to capitalise on new export product opportunities. The economic impacts of these problems can be significant.
30. As well, NZFGC strongly supports the elevation of risk analysis and the best available evidence from Section 18(2)(a) a factor FSANZ must ‘have regard to’ to a key objective in Section 18(1). As noted at the outset, risk analysis is a fundamental tenet of international standards setting and should be given the recognition in the FSANZ Act that FSANZ gives it in practice.
31. Amendments to section 18 could be complemented by a change to the Object of the FSANZ Act through amendment to section 3(b) to provide for : “an effective, transparent and accountable regulatory framework within which the food industry can work efficiently and be internationally competitive.”

Question 4a. Reform idea 1 – What would be the impact of implementing "Reform idea 1 – Define ‘public health’ and ‘safety’ in legislation to affirm the inclusion of long-term health and nutrition as a core objective.

32. NZFGC supports in part Reform idea 1. As described in the response to Ques 3, the priority for NZFGC is around replacing ‘public health’. We do not consider that ‘safety’ requires definition. We support defining a replacement term for ‘public health’, the term ‘consumer health’. We are concerned with the inclusion of long-term health and nutrition as part of a core objective since evaluation of this is very difficult as are longitudinal studies of any sort.

Question 4b. Reform idea 2 – Recognise trade as a core goal and reframe consumer choice as a factor to which FSANZ ‘must have regard’.

33. NZFGC strongly supports part of Reform idea 2. While NZFGC is strongly supportive of recognising trade as a core goal, and seeing in section 18(1), we are realistic in recognising that many other stakeholders take a strongly domestic focus of food and that elevating trade whilst at the same time reframing consumer choice would not be palatable to many. In any case, the consumer is core to the food industry and informed choice is important for a multitude of health and wellbeing reasons. A variation of the Reform idea would be to elevate trade to section 18(1) but retain consumer choice so that these objectives are given ‘equal’ consideration.
34. Further to this, we propose that reference to the adequacy of information relating to food to enable consumer choice should be refined to avoid duplication with the many other

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consumer choices possible that impact on a food product – environmental concerns, fair trading interests etc.

Question 4c. Reform idea 3 – Establish criteria in the Act that the Forum must meet to request a review of a draft regulatory measure", and how could the outcome best be achieved?

35. NZFGC strongly supports Reform idea 3. In establishing criteria, these would need to be framed around the requirements already placed on FSANZ, that it must use the best available scientific evidence etc. Criteria should, for example, require new evidence to be provided to support requests. We also believe there is a mismatch between the role of Policy Guidelines as originally conceived and the reliance on Policy Guidelines to justify reviews. Criteria should clarify this tension or misalignment.

Question 5. Are there other potential issues or solutions relating to legislated objectives?

36. NZFGC strongly supports the elevation of Section 18(2)(a) relating to risk analysis and the best available evidence to Section 18(1). Risk analysis is the principle that underpins highly regarded international standard setting and research agencies such as the Joint FAO/WHO Expert Committee on Food Additives (JECFA) and European Food Safety Authority (EFSA) and is a fundamental tenet of Codex Standards' setting. It would confirm FSANZ's place very clearly on the international stage in the field of food safety and consumer health. It would also provide the means to better prioritise its work or give strength to current practices and would confirm approaches that aligned with international practice. We cannot identify any negative impacts of this approach.

### 3. Functions

Question 6. To what degree are FSANZ's functions (as currently stated in the Act) an issue for the system? What are the types of problems that different stakeholder groups face as a consequence?

37. NZFGC considers FSANZ's functions to be generally appropriate for a trans-Tasman agency and we do not favour the extensive expansion suggested by later Reform ideas. It is particularly important to recognise that responsibilities for functions such as enforcement rest constitutionally or sovereignly with other jurisdictions including New Zealand. In any event, the functions compare favourably with the European Food Safety Authority which has a similar role in the EU region and similarly involves sovereign countries.

38. If significantly changed functions were progressed, NZFGC would not support New Zealand's participation. New Zealand's focus on the food regulatory environment is considerably more global than Australian jurisdictions due to the heavier reliance of the nation on exporting the vast majority of the food it produces. It would make no sense to devolve New Zealand's sovereignty in many of the areas contemplated. The only area that could envisage benefit is in the area of dietary surveys. If these were undertaken by FSANZ for both countries, not just Australia, then this would address New Zealand's paucity of current dietary information.

Question 7a. What would be the impact of implementing "Reform idea 4 - Amend the Act to better reflect the functions FSANZ currently delivers, particularly as they relate to supporting long-term health and nutrition" and how could the outcome best be achieved?



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39. NZFGC mostly supports Reform idea 4. While NZFGC believes long term goals are good to include, we have reservations about singling out a particular set of goals such as long-term health and nutrition when short to medium term goals are more practical to assess. Our concern is that to measure the achievement of a long term goal is very difficult and for industry to meet or satisfy a long term goal in an application is almost an impossibility.
40. Nonetheless, NZFGC considers it appropriate for FSANZ's functions to reflect its current activities but does not support any broadening of functions without a commensurate increase in funding. We consider FSANZ's funding situation to be so critical that it cannot effectively undertake current activities within its current funding base. This is evidenced by not being able to reach even the first 'Call for Submissions' in a programme of work that has been conducted for almost a decade for a review of Standard 2.9.1 *Infant formula* products. This Standard addresses products for the most vulnerable sector of the population and yet it has had to be set aside on numerous occasions, most recently for the Review of Application A1155, simply because reviews are statutory processes and the human resources experts in the relevant FSANZ area are limited and must be diverted to meet statutory functions.
41. NZFGC strongly supports FSANZ continuing its international facing roles. In many cases this is undertaken on behalf of the Australian Government in parallel with New Zealand Government activities in these areas. While this should not be captured in activities funded by the New Zealand Government, we recognise the strong contribution this makes as an input to the development and amendment of standards for the Australia New Zealand Food Standards Code (the Food Standards Code) and the maintenance and enhancement of the international level expertise within FSANZ.
42. NZFGC supports a role for FSANZ to provide assistance to industry intending to make applications to create or vary for regulatory investigations. There is a beneficial impact of this is to both government (FSANZ) and industry by ensuring time is not wasted on aspects of application that could otherwise be clarified. It also ensures applications are not rejected on grounds that could have been addressed through early engagement and supportive commentary in identifying gaps and potential problems. A successful comparator is the investment by the New Zealand Government in the health and nutrition claims area of the Ministry for Primary Industries. With a small, expert team in Government, New Zealand companies have access to expert advice and support for the preparation of assessment dossiers to substantiate proposed health claims. Australia may support FSANZ taking on a similar role with appropriate funding for such an Australia-only activity.
43. Australian jurisdictions and stakeholders may also support FSANZ's involvement in critical food safety investigations but NZFGC does not consider it necessary for New Zealand to join with this function since this function is already conducted by the New Zealand Government. Again, if this pursued, it must be funded by Australia rather than diverting essential resources from other areas of jointly funded endeavour.
44. NZFGC does not believe FSANZ should be involved in general 'public health' promotion campaigns but should be able to initiate and support consumer health activities such as healthy eating and nutrition advice. This demonstrates the significance of a reframing of 'public' to 'consumer' health in its objectives. The impact of including a couple of fully funded nutritionists dedicated to this work would be considerable.

Question 7b. What would be the impact of implementing "Reform idea 5 – Amend s13 of the Act to reflect a broader range of functions that FSANZ could deliver now and in the future" and how could the outcome best be achieved?

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45. Apart from the clarity proposed in Reform Idea 4 above, NZFGC does not support any broadening of FSANZ's functions and does not support Reform idea 5.

46. Should Australian jurisdictions and stakeholders support such a move, then we believe they should be pursued as Australia-only functions. In fact, there would be logic in Australia supporting a single centralised 'voice of food safety' that States and Territories could complement. The NZFGC position however, remains opposed to New Zealand involvement and funding of any and all the 'expanded function ideas' presented including:

- A role in emerging issues such as food fraud and food crime
- Coordinating a centralised repository of information on food safety (being the Face of Food Safety)
- Coordinating food safety research in Australia (noting this is already occurring in New Zealand through the New Zealand Food Safety Science & Research Centre, NZFSSRC) although this should not preclude collaboration between NZFSSRC and a new FSANZ function in research in the future
- Undertaking education campaigns in alignment with other food regulation system priorities. An example of this happening separately in both countries relates to the Health Star Rating System promotion of which has been funded in the past separately by the New Zealand and Australian Governments supported by industry.

Question 8. Are there other potential solutions relating to FSANZ's statutory functions?

47. NZFGC has no further comments to make on FSANZ's functions.

#### 4. Legislative processes and decision-making arrangements

48. The Scoping Report includes, at Table 6, Examples of more strategic approaches to reviewing standards, both in the building industry. Funding of the Australian Building Codes Board is not clear and without this, the comparison with FSANZ cannot be made. It is interesting to note, however, that the Building Codes Board reports to a forum comprising 18 members including 7 industry members. This compares to the Forum on Food Regulation that comprise 10 members and no industry members.

Question 9. To what degree are the current processes for strategically reviewing standards an issue for the system? What are the types of problems that different stakeholder groups face as a consequence?

49. NZFGC acknowledges that a strategic approach to reviewing standards could be positive so we support this in principle, but we would not support this proceeding without separate funding and resources.

50. The development of the Food Standards Code began with the intention that as individual Standards were completed they would be commenced. This proved unworkable because of the interdependence of the Standards within the Food Standards Code and the need to make consequential changes to non-target standards as new Standards were developed. The same process applies to proposals and in part to applications, that amendments necessary to achieve one outcome can require consequential amendments to others.

51. It is also the case that proposals have the potential to achieve strategic reviewing but this has been severely limited in the past decade due to the shrinking of the FSANZ funding base. FSANZ is a part of the Australian public sector and the approaches to budgetary

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constraints applied across the board to Australian Government agencies apply equally to FSANZ irrespective of the bi-national role it has. This compares to EFSA which was set up by the EU under the General Food Law - Regulation 178/2002 and funded from the combined EU resources, not aligned to any particular jurisdiction.

52. The impact of the current approach appears less than strategic simply because the resources to do more than the basics are non-existent. The proposals to review have been driven by topical developments, albeit with stakeholder support, such as Plain English Allergen Labelling and the Review of Infant Formula Products.

Question 10a. What would be the impact of implementing "Reform idea 6 – Remove exemption of food standards from sunseting arrangements" and how could the outcome best be achieved?

53. NZFGC strongly opposes a sunseting arrangement for food standards. With the current resourcing, the statutory approach to applications and reviews, and constant requests from the Ministerial Forum for FSANZ to undertake additional work, there would be a very high risk of gaps being created, statutory timelines missed and Ministerial priorities being delayed. No stakeholder group would benefit this situation.
54. As well, this would not necessarily be the most strategic use of resources. The risks and costs of sunseting standards would far outweigh the benefits.
55. An alternative would be for an independent (funded and led) review of strategically prioritising standards for review that could identify the top three priority standards for review in each of a three to five-year period.
56. Such an approach could form the blueprint for an achievable, separately funded work programme that could still operate within the overall parameters of the FSANZ Act.

Question 10b. What would be the impact of implementing "Reform idea 7 – Resource FSANZ to undertake regular, more holistic reviews of food standards" and how could the outcome best be achieved?

57. NZFGC supports in principle Reform idea 7. As noted above, a review to prioritise standards for review could form the basis for a separately funded work programme. Not all standards need review to the same extent and some probably not at all. FSANZ should be funded to undertake a 'holistic review of food standards' and to deliver a review programme that reflects the needs of stakeholders: Government, industry and consumers. It should not have to divert resources from current high priority work that has been on the current programme for long periods of time.

Question 11. Are there other potential solutions relating to the timing of reviews of food standards?

58. As noted above, there is limited opportunity to secure a regularised programme of Standards Review without explicit and separate funding. NZFGC would not support the diversion of existing funds for such a purpose when current reviews, such as for *Proposal P1028 Standard 2.9.1 Infant Formula Products* and the proposal pending for *Standard 2.9.4 Sports foods*, are struggling to progress.
59. If FSANZ was resourced to undertake a programme of standards reviews, these could be triggered by the publication of standards reviewed by Codex Alimentarius. This would then

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also provide an ideal opportunity for alignment with international standards and the resultant benefit of facilitating export trade from both Australia and New Zealand.

Question 12. To what degree are the current statutory application and proposal processes an issue for the system? What are the types of problems that different stakeholder groups face as a consequence?

60. The FSANZ Act contains a single, 'one size fits all', rigid process for applications and proposals that takes no account of risk or proportionality. As the Scoping Paper states, around half of all applications made to FSANZ each year relate to low risk processing aids. These are low risk because, by definition, any remaining in the final food (and many do not) have no technological function in the final food and are generally in minute levels if at all. As well, all applications for processing aids to date have been approved for use in other jurisdictions such as Europe, the USA or Canada. Nonetheless, in the current, rigid environment, processing aids must be assessed and decisions on them taken in exactly the same way as a new food ingredient.

61. The waste of scarce resources is the result of rigid, pre-determined processes and decision-making.

Question 13a. What would be the impact of implementing "Reform idea 8 – Reframe legislation to support more agile, risk-based processes" and how could the outcome best be achieved?

62. NZFGC strongly supports Reform idea 8 as delivering the same outcome as the current arrangements (variations to food standards) but far more timely and cost-effectively. It has the potential to free up resources so that these could be dedicated to higher risk areas of work. As described, this would see much of the detail from the FSANZ Act removed entirely or moved to regulations.

63. In order to determine the best approach to any particular amendment of the standards in the Food Standards Code, a risk ranking framework might be established but this should be developed by FSANZ because it has the expertise for this purpose. Risk management, risk assessment and risk analysis are a composite scientific discipline across many industries such as food, building, transport/aviation etc and a framework for the Food Standards Code should be designed and conducted by FSANZ experts not by lawyers. It should not be legislated and while Table 8, Indicative risk framework is a starting point, further refinement might be applied to remove potential bases for challenge in its application in future.

Question 13b. What would be the impact of implementing "Reform idea 9 – Redefine the decision-making arrangements to support timelier and more efficient sign-off of regulatory measures" and how could the outcome best be achieved?

64. NZFGC strongly supports Reform idea 9 to redefine decision-making to support timelier and more efficient sign-off of regulatory measures. We are supportive of the Forum, the FSANZ Board and the FSANZ CE having decision-making powers about food standards determined on the basis of risk. By this, we would support the FSANZ Board or the FSANZ CE having decision-making powers in relation to, for example, Standards in the groups of 1.3 and 1.4 (food additives, vitamins and minerals, processing aids, contaminants, agvet chemicals and prohibited and restricted plants and fungi). The FSANZ CE should be able to approve variations to standards for a substance that has previously been approved as safe and where the new application is for a change in the production method. Neither should such amendments to standards need consultation.

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65. We restate our very strong opposition to the delegation of powers to the Food Regulation Standing Committee (FSRC). The reasons for this go to the heart of good regulatory practice since there is no transparency (as with the Forum, no Official Information or Freedom of Information requests can be sustained unless all jurisdictions agree and there is no publication of submissions made to FRSC consultation although the opportunity to do so has existed for over 15 years), there is no single point of accountability that is publicly available, and there is a history of dominance by public health officials over all.

Question 14. Are there other potential solutions relating to streamlining current legislative process to develop or vary regulatory measures?

66. NZFGC considers that the Policy Guidelines as issued by the Forum on Food Regulation should be developed and reviewed by a panel comprising government, industry and consumers and not exclusively by Government and they should be legislative instruments.

67. Our concerns are that the current process is totally opaque and decisions on content not apparent:

- the genesis or proposals for guidelines are not subject to consultation (for the *Policy Guideline on Food Labelling to Support Consumers to Make Informed Healthy Food Choices*, FRSC recommended the policy guideline with no input on that recommendation from industry or consumers).
- no supporting material provided to explain the rationale for the inclusion of provisions in Policy Guidelines (a *Policy Guideline on Food Labelling to Support Consumers to Make Informed Healthy Food Choices* emerged for public consultation in December 2019 with no accompanying explanatory material. This was explained to by the Australian Department of Health as it not being usual practice to release an explanatory document that provides the rationale behind clauses in a policy guideline. This is not regulatory best practice.
- consultation is ad hoc (no consultation on the last amendment of the *Policy Guideline on Health, Nutrition and Related Claims* which had significant impacts for industry)
- no visibility until the *Policy Guideline on Food Labelling to Support Consumers to Make Informed Healthy Food Choices*, of the decision making that has accepted or rejected comments made during any consultation
- no visibility of work including interregnum work (a *Policy Guideline on Food Labelling to Support Consumers to Make Informed Healthy Food Choices* formally commenced by Ministerial decision in August 2019, was consulted on in Dec 2019/Jan 2020 and emerged early November. There were no updates on progress provided between Jan and Nov 2020 other than a line in the FRSC Workplan).

68. If a Policy Guideline developed exclusively by Government can be interpreted only by Government with no recourse for other stakeholders, the imbalance of power in the decision-making process is absolute even though the impact on industry, trade or consumers may be profound. If a policy guideline was a legal instrument, recourse could be through the courts. The alternative is to include stakeholders in the genesis and development or amendment of Policy Guidelines to redress the imbalance.

Question 15. To what degree is the current approach to using only applications and proposals to develop or vary food standards an issue for the system? What are the types of problems that different stakeholder groups face as a consequence?

69. The current approach of using only applications or proposals to develop or vary food standards is not inherently an issue. It is the constraints of the process (one size fits all) and the application of parameters of the process that create the issues of a lack of risk

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prioritisation and resourcing, lack of agility and a general clogging up of the system. It is like having a legal system with no provision for mediation or arbitration as more cost-effective options to pursue.

Question 16a. What would be the impact of implementing "Reform idea 10 – Provide for FSANZ to adopt or accept risk assessments from overseas jurisdictions" and how could the outcome best be achieved?

70. NZFGC strongly supports Reform idea 10. Accommodation of risk assessments from internationally recognised overseas agencies in the assessment of applications and the conduct of proposals would free up resources and more importantly for industry, result in timelier application processing and to bringing new products to market. We do not see a need for these to be limited to specific international agencies but to include internationally recognised overseas agencies.
71. It would be important for FSANZ to incorporate dietary modelling into such assessments in order to tailor responses to the Australian and New Zealand dietary patterns. This can only be done effectively with current dietary information and this would be challenging for New Zealand since the New Zealand dietary information is seriously out-dated. This is particularly the case for children and young people (the data is based on dietary consumption collected before the turn of the 21<sup>st</sup> century and which is over 20 years old).
72. If this Reform idea was implemented, FSANZ resources could be applied in areas where no assessment has been conducted overseas such as for indigenous foods, where other regional factors impact or where the application for a substance has been rejected overseas but where factors for rejection do not have a dietary impact in Australasia.

Question 16b. What would be the impact of implementing "Reform idea 11 – Enable FSANZ to adopt international standards" and how could the outcome best be achieved?

73. NZFGC supports with qualification Reform idea 11. The proposal for FSANZ to adopt or adapt international standards is promising but might be limited to particular areas of technical exactitude. These might include relevant standards generated by Codex and other agencies in the area of methods of analysis and sampling, irradiation and microbiology. Public consultation should still be retained since international standards might be agreed that had not taken account of Australian or New Zealand views on them.
74. Alternatively, appropriate international standards could be adopted by reference. We are already seeing this under the Food Standards Code (permitted flavouring substances in Std 1.1.2, WHO guideline values for chemicals in drinking water in Std 2.6.2) and more recently under M1018 where consideration is being given to Codex.
75. NZFGC would want the coherence of the Food Standards Code to remain and this may require the 'adaptation' of international standards to conform to the general form of standards in the Food Standards Code, that is, the standards should be consistent. We do not consider mutual recognition to be appropriate since we envisage this being a one-way street of Australia and New Zealand leveraging the work of international agencies to benefit FSANZ resources.
76. Monitoring international developments would be necessary to implement if not already in place.

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Question 16c. What would be the impact of implementing "Reform idea 12 – Create industry-led pathways to expedite applications and bring new products to market" and how could the outcome best be achieved?

77. NZFGC supports in part Reform idea 12 and the creation of legal pathways for industry to utilise to expedite applications and bring new products to market. This support, however, varies across the suggested pathways.
78. We do not support the 'greater role for industry self-certification'. As described in the Scoping paper, this is based on the TGA model which is a high cost option requiring every product to be listed. The food system does not approve products but rather categories of substances. Even definitional standards cover a class of products. As well any variations to TGA listings cost including adding a full stop on a product, costs substantially to change. Food products are constantly changing.
79. We strongly support a streamlined applications pathway especially incorporating the proposals for low risk substances with sign-off at Board or CE level. This could extend to substances previously assessed as safe but for which a new method of production has been developed.
80. We do not support an initial safety assessment prior to market entry. The reason is that this would require post market monitoring and surveillance and since we do not want to see since any diversion of resources from core work undertaken by FSANZ, this should not be pursued. An alternative looking to the future might be a facility for it in the FSANZ Act but no expectation of implementation at this time.
81. The boost to innovation and research and development resulting from a streamlined risk-based applications pathway would have major benefits for Australia and New Zealand businesses and the economies of both countries.

Question 17. Are there other potential solutions relating to additional pathways to develop or vary food regulatory measures?

82. NZFGC has no further solutions to propose.

## 5. Partnerships

Question 18. To what degree is the current alignment between policy development and standards setting an issue for the system? What are the types of problems that different stakeholder groups face as a consequence?

83. As set out in the Scoping Paper, political agendas of Governments do not always align with the vision of statutory authorities. NZFGC considers this is not an inherently bad position but rather considers that it supports dialogue and discussion and at times compromise. Political agendas change over time and are more susceptible to populist interests. In a science-based authority, it is important for the independence of FSANZ to stand apart from political interference as does agencies like the Reserve Bank of the ACC/Commerce Commission. Clearly, these agencies do not operate in a vacuum and cognisance of the environment is the norm. Dialogue on priorities would be expected but the vision and work program should be owned by FSANZ with inputs from stakeholders not just Governments. There are examples in the COVID-19 environment where government and science organisations have aligned comfortably but there are also examples where they have not

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(in some overseas countries) and political agendas have quite disastrously impacted industries and the population at large.

84. FSANZ, as a scientific and evidence-based agency should not be subject to the desires of governments during the 3-4 year term of Government parties. Perverse directions and standards could result as can be seen in the Standard 2.6.4 Formulated caffeinated beverages. Appointing talented board members and senior staff provides the necessary expertise for statutory authorities such as FSANZ to set their vision and work programme.
85. Turning to policy development, it is vital that FSANZ plays an active role in the policy development process since it is imperative it understands the context of issues and the environment within which standards might eventuate or be amended.

Question 19a. What would be the impact of implementing "Reform idea 13 – Facilitate joint agenda setting between FSANZ and the Forum" and how could the outcome best be achieved?

86. NZFGC does not support Reform idea 13. There should be dialogue and collaboration on agenda setting between FSANZ and the Forum but the Forum should be at arms length and allow FSANZ the necessary independence to set and deliver its agenda. Ministers on the Forum can be influenced and biased by political party commitments. Compromises to satisfy these could result in a perverse collection of incoherent measures as one jurisdiction traded off its agenda with another.

Question 19b. What would be the impact of implementing "Reform idea 14 – Amend statutory timeframes to support more strategic prioritisation of work" and how could the outcome best be achieved?

87. NZFGC supports such an approach in principle but is concerned that a statutory maximum timeframe could divert resources from other areas that emerge during the conduct of the proposal. The Scoping Paper proposes that timeframes might be established for the completion of proposals on a case-by-case basis, that is, the application of a maximum timeframe. This is basically how Codex operates both in terms of general reviews of standards and task forces set up to consider particular issues such as the current Taskforce on Antimicrobial Resistance and the past Taskforces on Animal Feeding and Biotechnology. However, these are not statutory but rather expectations albeit firm expectations. In this context, as soon as there are statutory timeframes there is rigidity and inflexibility.
88. The Scoping Paper also suggests creating more flexibility around statutory timeframes for applications. NZFGC strongly opposes such an approach. It can take a longer period under current arrangements with time taken to accept an application and 'stop the clock' provisions. To add the ability for applications to be put on hold is proposing a solution without fixing the problem – resourcing.
89. An alternative is to consider having a tiered approach with set timeframes and processes specified for categories of applications e.g. low risk; medium risk; high risk or high complexity.

Question 20. Are there other potential solutions relating to agreeing system priorities between FSANZ and the Forum?



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90. NZFGC considers that collaboration, if not already in place, should be a feature of agreeing system priorities.

Question 21. To what degree does inconsistent interpretation of food standards present an issue for the system? What are the types of problems that different stakeholder groups face as a consequence?

91. Both government and industry are impacted by inconsistent interpretation of food standards. The issue for governments is that decisions in one jurisdiction could bring the system into disrepute if another jurisdiction takes a different position. This creates confusion and subsequently a loss of confidence by consumers in the system.

92. The Implementation Subcommittee for Food Regulation (ISFR) plays a significant role in addressing these differential interpretations but it has no statutory basis and there are times when its decisions are not in the public arena. ISFR has published guidance on a range of topic areas and these can assist with rationalising interpretations.

93. For industry, the impact is frustration and financial – frustration at differing interpretations and financial loss due to resource diversion to find solutions that satisfy differential interpretations. The Reform idea is particularly relevant for industry since interpretive advice is no longer offered as a service by the States and Territories, and therefore industry has no means to resolve grey areas in the Food Standards Code. Even when FSANZ has identified known areas, it has no resources to resolve or correct issues since this would require raising a proposal and adding to its already stretched work programme. Compounded by inconsistent interpretation, this is an area which needs a complete overhaul.

94. Consumers could well lose choice in this process since differential interpretations may prevent the introduction to market of new or enhanced products.

Question 22a. What would be the impact of implementing "Reform idea 15 – Enhance FSANZ's role in providing guidance about food standards within its current statutory remit" and how could the outcome best be achieved?

95. NZFGC supports Reform idea 15 but this would have to be resourced in order for the role to be undertaken effectively by FSANZ. NZFGC supports a statement of intent alongside food standards. Prior to the revision of the Food Standards Code in 2015-16, almost every standard in the Food Standards Code contained a 'Purpose' statement. Some were more fulsome than others eg

Standard 1.2.3 This standard sets out mandatory advisory and warning statements and declarations which must be made in relation to certain foods or foods containing certain substances”

Standard 1.3.1 Food Additives A food additive is any substance not normally consumed as a food itself and not normally used as an ingredient in food , but which is intentionally added to a food to achieve one or more of the technological functions specified in Schedule 5. Food additives are distinguishable from processing aids (see Standard 1.3.3) and vitamins and minerals added to food for nutritional purposes (see Standard 1.3.2). The Standard regulates the use of food additives in the production and processing of food. A food additive may only be added to food where expressly permitted in this standard. Additives can only be added to food in order to achieve an identified technological function according to Good Manufacturing Practice.”

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96. These statements provided clarity and intent that was not necessarily evident on the face of the Standard. In our view this has not been substituted by explanatory memoranda and statutory provision for FSANZ to provide guidance would be positive.

Question 22b. What would be the impact of implementing "Reform idea 16 – Provide for FSANZ to give binding interpretive advice on food standards" and how could the outcome best be achieved?

97. NZFGC strongly supports Reform idea 16, the provision for FSANZ to give binding interpretive advice on food standards. There are numerous examples in both Australia and New Zealand where this is successfully implemented at both departmental (Customs in both countries and the New Zealand Internal Revenue Department and the Australian Taxation Office) and authorities (censorship agencies, racing industry authorities, Reserve Banks, Accident Compensation Corporation, Commerce Commission, professional agencies such as engineering, nursing etc). This is not necessarily an indication of poor drafting of standards but provides a mechanism for clarification when the environment changes in ways not anticipated at the time of drafting.

98. NZFGC would want any binding interpretive advice on food standards to be applied judiciously, to be consulted on and delivered through a power in legislation for FSANZ to make such binding interpretations.

Question 22c. What would be the impact of implementing "Reform idea 17 – Enhance FSANZ's regulatory role by providing limited enforcement powers" and how could the outcome best be achieved?

99. NZFGC strongly opposes Reform idea 17 – Enhance FSANZ's regulatory role by providing limited enforcement powers. New Zealand is well served by the enforcement approach of the Ministry for Primary Industries.

100. NZFGC recognises that there are complexities faced by Australia due to the many food related enforcement agencies operating across the country and that some of this complexity could well be removed by specific enforcement functions being allocated to FSANZ. We consider, however, the better approach in the Australian context is for FSANZ to provide nationally consistent decisions or rulings and for these to be enforced by the various State and Territory agencies.

Question 23. Are there other potential issues or solutions relating to interpretation of food standards?

101. NZFGC has no further comments to make on interpretations.

Question 24a. To what degree is the food-medicine interface an issue for the system? What are the types of problems that different stakeholder groups face as a consequence?

102. For New Zealand, the food-medicine interface is between Medsafe, Ministry for Primary Industries and FSANZ. We have seen no specific evidence of issues with this interface since the development and publication of a decision tree approach to be applied for determining what category a product fits within: foods, dietary supplements and medicines.

103. NZFGC has no view on the TGA/FSANZ interface.

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Question 24b. To what degree is the oversight of health claims an issue for the system? What are the types of problems that different stakeholder groups face as a consequence?

104. For New Zealand, MPI provides very strong support for industry in the self-assessment of health claims. It has a small group within the Ministry dedicated to this work. A forward plan to undertake industry training in 2021 on health claims is in development. We are therefore well served in this area.

105. However, the trans-Tasman issue is that claims that might be advised to the manufacturer as not being supported by New Zealand, subsequently are notified under another jurisdiction's area of responsibility. This brings the whole system into disrepute

106. Harmonisation of notifications made under Australian jurisdictions would benefit the system as a whole but this should be an Australia-only activity or undertaking.

Question 25a. What would be the impact of implementing "Reform idea 18 – Focus efforts on improving the food-medicine interface through regulatory practice" and how could the outcome best be achieved?

107. NZFGC has no view on Reform idea 18.

Question 25b. What would be the impact of "Reform idea – 19 Broaden the role of FSANZ to assess general level health claims".

108. NZFGC considers that this is primarily an issue in the Australian environment although the impact for New Zealand goes to the reputation of the health claims system. The reputation is amplified through the notification of unsubstantiated or poorly substantiated health claims in Australia or notification of claims in Australia that have been rejected for notification by New Zealand. The impact of this goes to both Australian and New Zealand businesses selling products that must compete with products carrying spurious, unsubstantiated claims entering the market.

109. Reform idea 19 assumes that FSANZ must assess all general level health claims and that this would require application when, for low risk claims, industry self-substantiation could be undertaken and present as a more efficient option. This could also be safeguarded through a system of 'accreditation' for companies wanting to undertake self-substantiation based on criteria such as expertise and experience.

110. However, at some stage where resourcing permitted, there should be a program of examining the health claims approved by highly regarded overseas agencies, such as EFSA, since Standard 1.2.7 commenced, and for there to be an efficient mechanism to add such claims to the Food Standards Code. The current Standard 1.2.7 included a large number of claims that had been assessed and accepted by FSANZ prior to commencement but no follow up work has been conducted since.

Question 25c. What would be the impact of implementing "Reform idea 20 – Align definitions and powers in legislation between therapeutic goods and foods" and how could the outcome best be achieved?

111. NZFGC has no view on Reform idea 20 as we see this as being a primarily Australian issue. If progressed, however, it would need to ensure that current food definitions and powers relevant to joint standards were not affected.

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Question 26. Are there other potential solutions relating to improving the food-medicine interface?

112. NZFGC has no further comment on the food-medicine interface.

## 6. Operations

Question 27. To what degree are FSANZ's governance arrangements an issue for the system? What are the types of problems that different stakeholder groups face as a consequence?

113. NZFGC does not consider FSANZ's governance arrangements to be an issue for the system.

Question 28a. What would be the impact of implementing "Reform idea 21 – Streamline Board appointments and nominations" and how could the outcome best be achieved?

114. NZFGC does not consider the Board appointment and nomination process to be an impediment for the system in general. While we are not on the receiving end of the process, we understand the bureaucratic process to accept appointments is so longwinded as to see potential candidates move on due to the lengthy delays. It is also the case that seeking nominations from industry for a forward plan of years is totally impractical as people in the food industry move round constantly.

115. So, while we see no immediate value in, we would defer to others including FSANZ, to identify processes that deliver the best results for the agency. We also support the importance of Board chair (and CE) input as being important in relation to skills sought on the Board. As such we would support this idea in principle.

Question 28b. What would be the impact of implementing "Reform idea 22 – Establish minimum term length for Board members" and how could the outcome best be achieved?

116. The relevant departments involved in appointment processes can already propose periods of appointment to address continuity. There is no need for setting minimum terms. NZFGC therefore does not support Reform idea 22.

Question 28c. What would be the impact of implementing "Reform idea 23 – Reduce Board size" and how could the outcome best be achieved?

117. NZFGC continues to oppose a reduction in Board size and does not support Reform idea 23. We note the cost of resourcing of a large board but cutting board size should not be the solution if it results in sub-optimal skills availability or decision-making. We also note that while some might consider the ideal board size to be 8-9 members, larger boards do exist for particular reasons. The Australian Institute of Company Directors states that "there is no perfect size for any board and optimal board size is influenced by many factors including: • Size and complexity of the organisation and its business/ operations • The diversity of the business lines of the organisation (geographic and functional) • Cultural norms within the industry in which the organisation operates (for example, university boards tend to be larger)". In the case of FSANZ, reflecting the bi-national scope of FSANZ for composition and labelling and its involvement across the entire food chain in Australia, then 12 members is appropriate.

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118. Nonetheless, if this Reform idea was to proceed, we would want to see New Zealand's membership remain in the same proportion (currently three members of twelve).

Question 29. Are there other potential solutions relating to FSANZ's governance arrangements?

119. NZFGC has no further comments to make on FSANZ's governance arrangements.

Question 30. To what degree does FSANZ's approach to setting its own workplan and resourcing its work present an issue for the system? What are the types of problems that different stakeholder groups face as a consequence?

120. NZFGC does not consider FSANZ's approach to setting its own workplan presents an issue for the system. NZFGC considers that FSANZ's approach to resourcing its work within the continuing budgetary constraints of the Australian Government has been exemplary but it is at the limit of actions that might be taken and lack of resources presents a major and significant issue for the system. It impacts FSANZ's ability to undertake its current work programme in a timely manner, it hampers initiatives to be proactive and address prospective issues and it consigns FSANZ to being a largely reactive player to issues.

121. Increasing the FSANZ budget is the most efficient and effective solution.

Question 31a. What would be the impact of implementing "Reform idea 24 – Expand scope of applications for which FSANZ can recover costs" and how could the outcome best be achieved?

122. NZFGC does not support Reform idea 24. This is mere tinkering at the edges while the ship sinks.

123. As the Scoping Report notes, cost recovery only contributes around 3% to the overall budget now and even a doubling of that (which could not result from Reform idea 24) would not address the fundamental issue of the impact that a sinking lid has had over the past decade and the current dire budgetary position.

Question 31b. What would be the impact of implementing "Reform idea 25 – Provide for limited expansion of scope of activities for which FSANZ can recover costs" and how could the outcome best be achieved?

124. NZFGC does not support Reform idea 25. We consider this to be in the same category as Reform idea 24 and merely tinkering at the edges while the ship sinks. This does, however, have other negative impacts such as diverting scarce resources away from the food standards setting role to raise funds.

125. The application process is so expensive now as to be the preserve of the largest national companies or multinationals. Charging for pre-application advice merely aggravates an already skewed system that is out of reach for most, if not all, small to medium businesses. An analysis of the companies making applications now substantiates this view.

Question 32. Are there other potential solutions relating to FSANZ's operations?

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126. NZFGC has no further comments to make on FSANZ's operations.

## 7. Key reflections

Question 33. What are the top 2-3 most pressing issues to resolve through change to the Act and associated operations and responsibilities of FSANZ?

127. Objectives, Legislative processes, Decision-making and Resourcing.

Question 34. Are there key issues or challenges related to FSANZ and the Act that are not represented in this scoping paper?

128. NZFGC has not identified other key issues or challenges related to FSANZ and the Act that are not represented in this scoping paper.

Question 35. What other reform ideas should be considered to address the issues identified in the paper, assuming no resource constraints?

129. NZFGC has made suggestions on reform ideas in the response to preceding questions.

## Summary of NZFGC Position on Reform Ideas in FSANZ Act Review

Objectives			Functions	
1. Define 'public health' and 'safety' in legislation to affirm the inclusion of long-term health and nutrition as a core objective. SUPPORTS IN PART	2. Recognise trade as a core goal and reframe consumer choice as a factor to which FSANZ 'must have regard'. STRONGLY SUPPORTS IN PART	3. Establish criteria in the Act that the Forum must meet to request a review of a draft regulatory measure STRONGLY SUPPORTS	4. Amend the Act to better reflect the functions FSANZ currently delivers, particularly as they relate to supporting long-term health and nutrition SUPPORTS MOSTLY	5. Amend s13 of the Act to reflect a broader range of functions that FSANZ could deliver now and in the future NOT SUPPORT
Legislative processes and decision-making arrangements				
6. Remove exemption of food standards from sunseting arrangements NOT SUPPORT STRONGLY OPPOSES	7. Resource FSANZ to undertake regular, more holistic reviews of food standards SUPPORTS IN PRINCIPLE	8. Reframe legislation to support more agile, risk-based processes STRONGLY SUPPORTS	9. Redefine the decision-making arrangements to support timelier and more efficient sign-off of regulatory measures STRONGLY SUPPORTS	10. Provide for FSANZ to adopt or accept risk assessments from overseas jurisdictions STRONGLY SUPPORTS
Partnerships				
11. Enable FSANZ to adopt international standards SUPPORTS WITH QUALIFICATION	12. Create industry-led pathways to expedite applications and bring new products to market SUPPORTS IN PART	13. Facilitate joint agenda setting between FSANZ and the Forum NOT SUPPORT	14. Amend statutory timeframes to support more strategic prioritisation of work SUPPORTS IN PRINCIPLE	15. Enhance FSANZ's role in providing guidance about food standards within its current statutory remit SUPPORTS
16. Provide for FSANZ to give binding interpretive advice on food standards STRONGLY SUPPORTS	17. Enhance FSANZ's regulatory role by providing limited enforcement powers NOT SUPPORT STRONGLY OPPOSES	18. Focus efforts on improving the food-medicine interface through regulatory practice NOT RELEVANT FOR NEW ZEALAND	19. Broaden the role of FSANZ to assess general level health claims NOT SUPPORT FOR NEW ZEALAND	20. Align definitions and powers in legislation between therapeutic goods and foods NOT DIRECTLY RELEVANT FOR NEW ZEALAND
Operations				
21. Streamline Board appointments and nominations SUPPORT IN PRINCIPLE	22. Establish minimum term length for Board members NOT SUPPORT	23. Reduce Board size NOT SUPPORT	24. Expand scope of applications for which FSANZ can recover costs NOT SUPPORT	25. Provide for limited expansion of scope of activities for which FSANZ can recover costs NOT SUPPORT