



13 March 2023

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Dear Sir/Madam

Attached are the comments that the New Zealand Food & Grocery Council wishes to present on *Proposal P1010 – Formulated Supplementary Sports Foods Consultation Paper One: Regulatory Framework for Standard 2.9.4.*

Yours sincerely

A handwritten signature in blue ink, appearing to read "Raewyn Bleakley". The signature is stylized and fluid.

Raewyn Bleakley  
**Chief Executive**



# **P1010 – Formulated Supplementary Sports Foods Consultation Paper One: Regulatory Framework for Standard 2.9.4**

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

**13 March 2023**

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## NEW ZEALAND FOOD & GROCERY COUNCIL

1. The New Zealand Food & Grocery Council (**NZFGC**) welcomes the opportunity to comment on *Proposal P1010 – Formulated Supplementary Sports Foods Consultation Paper One: Regulatory Framework for Standard 2.9.4* (the **Consultation 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.

## OVERARCHING COMMENTS

3. NZFGC is strongly in favour of amendment to the current Standard 2.9.4 (the **Standard**) in the Australia New Zealand Food Standards Code (the **Food Standards Code**). The Standard has not been fully reviewed since it was developed in the late 1990s and is well out of date with the broader purpose, use and consumer population over the past quarter of a century. Review and revision is welcomed in order to address the imbalance we now have with an excessively restrictive composition and labelling regime where consumers bear the primary negative impact because:
  - industry is constrained in developing innovative ingredients that might better support sports-and health-minded consumer.
  - consumers are denied information that would otherwise contribute to their decision-making
  - the arrangements are significantly inconsistent with international standards for similar products
  - the Standard effectively prevents an efficient and competitive food industry developing this area of consumer demand.
4. Even though industry is familiar with the current definition of a formulated supplementary sports food (**FSSF**) and has been working with it for many years, it is an old definition that is not broad enough to capture the audience/consumer now demanding/using such products. The term 'sports people' should be removed to better reflect the actual and potential breadth of users of these health-focussed products for the active life-styler.
5. The current definitions and compositional and labelling requirements in the Food Standards Code relating to FSSF pose difficulties relating to currency and the significant constraints they impose. The compositional requirements are out-dated, not necessarily based on science, are difficult to meet and stifle innovation.
6. NZFGC considers that 'stacking' cannot and should not be resolved via food regulation/ food standards and is better addressed by ongoing consumer education just as there are other categories where consumers need to be aware of overall intakes eg alcohol and caffeine. Stacking is about educating the consumer.
7. NZFGC is concerned that a proposal for high, medium and low risk products could also be applied to the general food supply and lead to a complex web of regulation beyond that which is necessary for safety. NZFGC believes that the safety of a product be considered first and that maximum levels should continue to be used to manage the level of risk for consumption rather than any other imposed grouping.

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8. NZFGC is of the view that electrolyte drinks should not be transferred to a special purpose food standard because they serve a range of purposes for a range of age groups and persons. Rather, NZFGC considers that amendment should be made to accommodate those electrolyte drinks that might vary composition to deliver a specialised electrolyte drink to particular sub-populations.
  9. NZFGC considers the existing labelling requirements for sports foods are not meeting the needs of consumers due to the multiplicity and complexity of statements when consumers are looking for clearer labels and less clutter.

## DETAILED COMMENTS

### **Market Overview**

**Q1.** For industry or regulators, do you have market or product data or information that you would like to provide to update FSANZ's understanding of the current market in Australia, New Zealand or globally?

10. NZFGC does not hold market or product data related to the current market of supplementary sports foods. However, Euromonitor published a report *Sports Nutrition in New Zealand 2021* which includes an analysis of key supply-side and demand trends, detailed segmentation of international and local products, historic volume and value sizes, company and brand market shares and five-year forecasts of market trends and market growth. It professes to answer, for New Zealand, the market size of sports nutrition, the leading brands, how products are distributed, considerations such as how stress, self-medication and shifting consumer lifestyles are shaping demand, the significance of wider health concerns and consumer awareness in determining sales and where the future growth is expected.<sup>1</sup>
11. According to anecdotal information, the growth in sales of supplemented sports food is due to raised awareness of fitness and related activity, greater internet use and ease of online sales.
12. Relevant companies have been asked to consider providing data on the market which is different to the data on technical and safety matters sought in 2021.

### **Definitions**

**Q2.** As a consumer, regulator or industry stakeholder, have you identified any issues resulting from the definitions in the Code? If so, what are they and why are they an issue?

13. The current definition of a FSSF, as stated in Section 1.1.2—2 of the Food Standards Code, is "*a product that is specifically formulated to assist sports people in achieving specific nutritional or performance goals*". We agree with FSANZ (p17 Consultation Paper) that this is an old definition and is not broad enough to capture the audience/consumer now demanding/using such products. Not all people who consume these foods are 'sports people'. The term 'sports people' should be removed to better reflect the actual and potential breadth of users of these health focussed products for the active life-styler.
14. The purpose of the products covered by the Standard are no longer just sports people, a fact reflected in the EU with its description of the products as "*sports foods will be considered as 'foods for normal consumption' (as opposed to sports-specific foods) and thus regulated as either a food supplement or fortified food*".

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<sup>1</sup> <https://www.euromonitor.com/sports-nutrition-in-new-zealand/report>

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**Q3.** For industry and regulators, how should proprietary blends or stacks best be regulated and why?

15. The Australian Institute of Sport (“**the Institute**”) provides science-based resources for sports people on its website. Its position on supplements<sup>2</sup> is predicated on Guiding Principles that pose three questions that athletes and others should consider:

- Is it safe?
- Is it permitted in sport?
- Is there evidence that it “works”?

16. This is a useful starting point for a population that includes sports people. In our view, ‘stacking’ cannot be resolved via food regulation/food standards and is better addressed by ongoing consumer education just as there are other categories where consumers need to be aware of overall intakes eg alcohol and coffee. Stacking is about educating the consumer. NZFGC is also supportive of ‘one day quantities’ as this does not relate to the amount of all FSSF consumed in one day.

17. Proprietary blends and ingredients may not be disclosed in the Nutrition Information Panel for commercial-in-confidence reasons. This may be especially the case with imported products. Nonetheless, as with general foods, mandating ingredients be listed seems appropriate so long as this would not present as a barrier to import.

18. Athletes that are serious enough to be taking pre, during and post exercise supplements would generally be aware of ingredients that may create issues for them such as caffeine and would generally self-manage issues related to stacking. The education and information such as the Institute provides for sports people is a sufficient non-regulatory approach to managing stacks. It is not a role of standards or regulation to manage.

**Q4.** For all, should the Code retain the existing definitions in Standard 2.9.4? If so, why and if not, why not?

19. Even though industry is familiar with the current definition of a formulated supplementary sports food (**FSSF**) and has been working with it and related definitions for many years, NZFGC considers the existing definitions in Standard 2.9.4 should be reviewed and amended.

#### ***Current Compositional Permissions***

**Q5.** Would a tiered approach to regulation based on composition improve public health and safety for consumers, while allowing for innovation (e.g. provisions for ‘high risk’ substances, restriction on sale, differing labelling requirements or compositional deviation)? If so, how could it look? How could high, medium and low risk products be differentiated? What requirements could apply to each and why (e.g. pre-market assessment, compositional and labelling requirements)?

20. It is not clear to NZFGC that the absence of constraints in Standard 2.9.4 on the purchase of sports foods is impacting vulnerable sub-populations such as children and pregnant women. Access to supplemented sports foods is increasingly an online purchasing arrangement and therefore a very deliberative decision by the purchaser. The fact that FSANZ has been unable to gather data on the extent of this issue to date may indicate it is not an issue.

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<sup>2</sup> [Supplements | Australian Institute of Sport \(ais.gov.au\)](https://www.ais.gov.au/supplements)

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21. NZFGC is concerned that a proposal for high, medium and low risk products could also be applied to the general food supply and lead to a complex web of regulation beyond that which is necessary for safety.

22. Instead, NZFGC believes that the safety of a product be considered first and that maximum levels should continue to be used to manage the level of risk for consumption rather than any other imposed grouping. If NZFGC has not interpreted the proposal as intended then we recommend that workshops be conducted to better explore the intent of FSANZ in this area.

**Q6.** Is there any evidence that current practice in relation to analogues and derivatives pose a health concern or risk? If you consider that there is a health concern or risk, please provide relevant details and data, where available.

23. NZFGC has not been advised of any evidence that current practice in relation to analogues and derivatives pose a health concern or risk.

**Q7.** Is there any evidence in current research in relation to known analogues and derivatives that pose a health concern or risk? If you consider that there is a health concern or risk, please provide relevant details and data, where available.

24. NZFGC is unaware of evidence in current research in relation to known analogues and derivatives that pose a health concern or risk.

**Q8.** How could the Code assist in reducing the risk to consumers who are stacking sport food products and potentially consuming more than the maximum amount permitted by Standard 2.9.4 in the Code?

25. See response to Q3.

**Q9.** To what extent are vulnerable consumers regularly consuming sports foods? Please provide evidence.

26. As noted in response to Q3, NZFGC is not aware that vulnerable consumers regularly consume sports foods.

**Q10.** Do the current definitions and compositional and labelling requirements in the Code relating to sports foods pose any difficulties in compliance or enforcement? If yes, please provide reasons why and examples.

27. Difficulties relate to the currency of the compositional constraints (the limited range of vitamins and minerals that can be added as listed in Schedule S29—14) and the labelling constraints (see responses below). The compositional requirements are out-dated, not necessarily based on science and are difficult to meet. They stifle innovation and are not reflective of general foods. That is, the current standard notes that the for a “high carbohydrate supplement”, the food must be >90% energy content from carbohydrates, but when practically speaking about carbohydrates with consumers in whole food terms, foods categorised/educated as “high-carbohydrate” are often much lower than this. For example:

- rolled oats = ~59% carbohydrate
- potato = ~88% carbohydrate
- brown rice = ~74% carbohydrate

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28. A way is needed to communicate to sports and active-minded consumers the information necessary to choose the products they want to meet their particular needs. In the absence of such information, the only way to differentiate such products are through alternate sources of information that may lack scientific bases such as sports blogs, other social media platforms, and sports/personal trainers. The Food Standards Code is not serving these consumers well and a way to update and allow use of claims in Standard 1.2.7 would be one way to address this barrier.

### ***Electrolyte Drinks***

**Q11.** If the existing requirements for electrolyte drinks were transferred to a special purpose food standard (i.e. under Standard 2.9.4), what impacts (positive or negative) might this have on industry, regulators and/or consumers?

29. NZFGC is of the view that electrolyte drinks should not be transferred to a special purpose food standard. They serve a range of purposes for a range of age groups and persons and to apply mandatory warnings would be an unnecessary level of regulation. It is also the case that electrolyte drinks may be recommended by health professionals for any population group other than infants in cases where diarrhoea or vomiting rather than exercise has caused dehydration and warnings about appropriate age or status of the consumer would present a deterrent for such use that could otherwise be beneficial.

30. Rather, NZFGC considers that amendment should be made to accommodate those electrolyte drinks that might vary composition to deliver a specialised electrolyte drink to particular sub-populations.

**Q12.** If electrolyte drinks were to remain a general purpose food (i.e. under Standard 2.6.2) what impacts (positive or negative) would this have on industry, regulators and/or consumers?

31. See response to Q11.

**Q13.** How would transferring electrolyte drinks to Standard 2.9.4 impact consumer messaging around their purpose and use? Please provide reasons for your view.

32. See response to Q11. NZFGC is of the view that transferring electrolyte drinks to Standard 2.9.4 would negatively impact consumer messaging around their purpose and use because of the broad range of reasons for which they may be consumed.

### ***Labelling***

**Q14.** Are the existing labelling requirements in the Code for sports foods appropriate for managing potential risks to public health and safety? Please provide details on why or why not.

33. NZFGC considers the existing labelling requirements for sports foods are not meeting the needs of consumers as there are quite a number of them, they are overly long and they do not meet the needs of the consuming population. As well, they take up a lot of label space when consumers are looking for clearer labels and less clutter.

34. As stated in the Consultation Paper (p23) unlike the general food supply, sports foods for retail sale that are exempt from the requirement to bear a label are currently not required to declare the required statements in section 2.9.4—4, which are predominantly safety statements by any other means eg, displayed in connection with the food or provided to the purchaser on request. We note this is not consistent with the current approach for the provision of advisory and warning statements in Standard 1.2.1 but the consuming population is different to the general population. The Consultation Paper provides an example of a situation where a sports drink served in a cup at an event, in the presence of

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the purchaser. This is an unfortunate example because sports drinks in cups at events are generally free (sponsored) and often taken 'on the run'. So, notwithstanding this inconsistency, such a requirement would likely have no impact for the consuming population.

35. However, the labelling requirements are restrictive for manufacturers particularly in relation to claims. As the Consultation Paper states, the Food Standards Code currently permits sports foods to make only nutrition content claims in relation to vitamins and minerals and then only in certain circumstances (a normal serving contains at least 10% \*RDI or \*ESADDI for that vitamin or mineral and the amount claimed is no more than an amount specified in S29—16). Manufacturers cannot make any pre-approved claims linked with macro-nutrients (eg protein to support muscle development) either, and so cannot even provide the consumer with information related of the purpose of the product. These restrictions are inconsistent with the purpose of formulated sports foods which arguably are often very focussed on delivering the consumer a product specifically designed to deliver vitamins and minerals and other macronutrients to meet their specific needs compared to general foods.

36. There is also no permission to use any other descriptors (eg good source) even though the formulated supplementary food might well be of interest to the consumer in other areas eg low in gluten or low in lactose.

**Q15.** What are your views on the relevance to sports foods of the existing warning statement and advisory statements? Please provide reasons for your view.

37. NZFGC is not aware of any evaluation of the existing labelling requirements for sports food. However, in researching such work, it is clear that the warning statement and advisory statements were not features of regulatory regimes overseas. The multiplicity of these statements dilutes their impact and potentially 'overloads' the consumer to the extent that none have resonance. We should be more selective in the range of advisory statements in particular.

**Q16.** Please discuss whether you think the existing labelling requirements for sports foods enable consumers to make informed choices. Please provide reasons for your view.

38. The labelling requirements enable consumers to make partially informed choices in relation to age and pregnancy status, content and context. This could be enhanced by reviewing the multiplicity of these claims, simplifying text and reviewing other claims that might be made that could better assist consumers. For example, the existing labelling requirements do not permit manufacturers to communicate the efficacy and benefits of the products and hence fail to enable consumers to make informed choices.

**Q17.** What are your views on the usefulness of the labelling statements in Division 3 for particular sports foods (high carbohydrate supplement, protein energy supplement, energy supplement)? Please provide reasons for your view.

39. NZFGC is advised that not many products fit within the compositional criteria necessary to support the statements in Division 3 so the use of these are very limited and restrictive. The range of statements and claims should be expanded to allow manufacturers to communicate the purpose of the product and consuming population to better choose the product that will best serve their needs. Also, it appears that the science has moved on in these and other relevant area and these statements are outdated and should be reviewed with a view to reflecting the current environment and scientific knowledge.



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**Q18.** Have you identified issues on any other labelling aspects specific to sports foods? Please provide detail.

40. NZFGC has not been advised of issues on any other labelling aspects specific to sports foods and strongly opposes further restriction in the labelling of products that is already such a constraint on the consumer.

**Q19.** To inform the scope of the second consultation paper, do you have any views on how Standard 1.2.7 – Nutrition, health and related claims could apply to sports foods?

41. See the preceding comments. It is very clear that general claims in Schedule 29 are not permitted because of physiological effect yet, paradoxically, such effects are part of the utility of supplemented foods. In this situation, the consumer loses out through the absence of science-based information that might be communicated to them.