

REGULATION IMPACT STATEMENT

Exchange of Letters, done at Canberra on 27 September-25 October 2001, constituting an Agreement between the Government of Australia and the Government of New Zealand amending the Agreement between the Government of Australia and the Government of New Zealand Establishing a System for the Development of Joint Food Standards of 1995.

BACKGROUND

On 5 July 1996 an Agreement between the Government of Australia and the Government of New Zealand establishing a System for the Development of Joint Food Standards entered into force (the Agreement). The Agreement created a trans-Tasman market for food products based on mutual recognition, with the food standards of both countries to be harmonised over time and a common set of food standards to be developed.¹

Australia and New Zealand entered the Agreement as part of their commitment to a closer economic relationship, to:

- Reduce unnecessary barriers to trade;
- Adopt a joint system for the development and promulgation of food standards;
- Provide for the timely development and adoption of food standards appropriate for both Member States; and
- Facilitate the sharing of information on matters relating to food.

Since the commencement of the Agreement two events have occurred that necessitate changes to the Agreement. These are:

- the development by the Council of Australian Governments (COAG) Senior Officials Working Group on Food Regulation (SOWG) of a package of food regulatory reforms that were agreed to by all Australian States and Territories under the inter-governmental Food Regulation Agreement 2000 (FRA); and
- a review of the effectiveness of the Australia New Zealand Food Standards System established by the Agreement (the Review of the Agreement).

The amended Agreement will be known as the Agreement between the Government of Australia and the Government of New Zealand concerning a Joint Food Standards System.

The amendments do not go to the “scope” of the Agreement, that is, to the types of food standards that are to be jointly developed and adopted in accordance with the Australia New Zealand Food Standards System established by the Agreement.² They also do not affect the

¹ With an exception for New Zealand in the case of the Australian standards that specify maximum residue limits for agricultural and veterinary chemical residues present in food and that specify food hygiene requirements (the food safety standards).

² The proposed amendments will not impact upon the quarantine issue of ‘foot and mouth’ or upon the measures being taken to prevent bovine spongiform encephalopathy (BSE) within Australia (except to the extent that any amendment of the current food standard relating to BSE would be made in accordance with the new arrangements, like all food standards).

arrangement whereby Australia and New Zealand will each adopt the joint Food Standards Code, developed under the Australia New Zealand Food Standards System established by the Agreement, as the sole Code of each country.

COAG Reforms

In 1997, The Food Regulation Review (the Blair Review) was established by the Prime Minister to make recommendations to government on how to reduce the regulatory burden on the food sector and improve the clarity, certainty and efficiency of the current food regulatory arrangements while, at the same time, protecting public health and safety. The Blair Review found that, while the current system is effective at producing safe food, its efficiency could be improved.

Based on the recommendations of the Blair Review, the SOWG was asked to develop, for COAG Senior Officials, a proposal for a nationally coordinated approach to food regulation. The proposed food regulatory model developed by SOWG is outlined in its October 2000 report 'An Enhanced Food Regulatory System for Australia'.

SOWG was also directed to prepare an inter-governmental agreement to give effect to the new food regulatory model. On 3 November 2000 COAG members endorsed the new model as contained in the SOWG report and signed the Food Regulation Agreement 2000 (FRA). Part V of the FRA specifies that the new model cannot come into full effect until the new system is agreed to by New Zealand via amendments to the Agreement and until the Commonwealth legislation amending the *Australia New Zealand Food Authority Act 1991* (ANZFA Act) comes into force. The *Australia New Zealand Food Authority Amendment Act 2001* (ANZFA Amendment Act) received Royal Assent on 10 July 2001 and will commence when the amendments to the Agreement enter into force.

The ANZFA Amendment Act will give effect to the agreed reforms, by amending the ANZFA Act to implement aspects of the new national approach to food regulation that require legislative change. These aspects are:

- establishing a new statutory authority Food Standards Australia New Zealand (FSANZ) to replace the Australia New Zealand Food Authority (ANZFA); and
- establishing a new standards development process that reflects the agreed role of the future Australia New Zealand Food Regulation Ministerial Council (the new Council).

One of the tasks of the new Council will be to develop the process whereby FSANZ is to develop standards to be adopted nationally that relate to the composition and handling of primary products such as meat and dairy products in the earlier stages of the food supply chain. An example of such standards are the meat standards which were previously the responsibility of the Ministerial Council of Australian Agriculture Ministers, the Agriculture and Resource Management Council of Australia. Although it is possible that this process may require further legislative change, it will not warrant further amendments to the amended Agreement because New Zealand already has other systems in place for the national regulation of these matters.

New Zealand indicated that its acceptance of the final outcome of discussions regarding the amendment of the Agreement was conditional upon the governance changes not being a diminution of its influence in the current food regulation system. New Zealand is already participating in the model set out under the FRA to the extent that this is possible under the existing Agreement and legislation.

The Review of the Agreement

In accordance with Article 9 of the Agreement, it was a requirement that a review be undertaken no later than three years after the Agreement entered into force. The key objective of the Review of the Agreement was to examine the effectiveness of the Australia New Zealand Food Standards System that was established by the Agreement with a view to implementing any necessary improvements. The final report of the Review of the Agreement was released in November 1999 and recommended several amendments to the Agreement.

These recommendations related to the need for consultation to occur regarding relevant legislation, the recognition of codes of practice and guidelines to food standards as also being part of the Joint Food Standards System, and changes to the way in which the joint Food Standards Code is to commence in practice as the sole Code in both countries.

It was agreed in a letter from the New Zealand Minister of Health to the Managing Director of ANZFA that it would be preferable for these amendments to be undertaken in conjunction with any amendments required as a result of the COAG reforms.

The Australia New Zealand Food Standards Code

In December 2000 the development of the Australia New Zealand Food Standards Code (the joint Code) was completed and adopted by the Australian New Zealand Food Standards Council (ANZFSC). The Agreement provides for adoption of this Code by both Australia and New Zealand as the sole food standards code of both countries. This obligation is maintained in the amended Agreement under the Transitional Provisions (Annex E (3)).

PROBLEM

The Agreement establishes an “Australia New Zealand Food Standards System” that is “based on an extension of the existing Australian system to include New Zealand”. Under the Agreement both Australia and New Zealand are currently obliged to adopt food standards developed under the “Australia New Zealand Food Standards System”, that is, under the current Australian food regulatory arrangements as extended to include New Zealand.

COAG agreed that those aspects of the new food regulatory system to be implemented under Australian legislation cannot commence until the Agreement is amended.

To give full effect to the new food regulatory system agreed to by COAG, Government action is required in the form of amendments to the Agreement. Amending the Agreement will ensure the proposed new arrangements are accurately reflected and address the recommendations of the Review of the Agreement.

The Regulation Impact Statement (RIS) that was prepared for the Australia New Zealand Food Authority Amendment Bill 2001 outlines the major concerns highlighted by industry during the course of the Blair Review. In particular, it found that the food industry viewed the current food regulatory decision making arrangements as complex and fragmented, and that the general industry perception was that its views are not sufficiently represented in the decision making process. The RIS emphasises that the concerns noted result from inefficiencies in Government processes and structures related to the development, administration and enforcement of food laws, that is, institutional failure. That RIS recommended as its preferred option the implementation of the food regulatory model recommended by SOWG in its report to COAG, one aspect of which is the amendment of this Agreement.

OBJECTIVES

The objectives of amending the Agreement are to ensure that the benefits to Australia and New Zealand flowing from the Agreement are maximised and the costs minimised. In addition to those objectives identified in the Regulatory Impact Statement for the Australia New Zealand Food Authority Amendment Bill 2001, the Agreement needs to be amended to:

- update the Australia New Zealand Food Standards System established by the Agreement to reflect the new Australian food regulation arrangements agreed to by COAG members under the FRA;
- enable Australia and New Zealand to adopt the standards developed by FSANZ and the revised system;
- address the recommendations adopted as a result of the Review of the Agreement; and
- make some minor changes necessary to clarify the actual process whereby both countries will adopt the joint Code now that it has been developed and approved by ANZFSC.

OPTIONS

Three possible options have been identified:

Option 1 - No change – No amendments made to the Agreement

The costs and benefits of this Option are set out below under Impact Analysis.

Option 2 – Renegotiate the whole of the Agreement

Renegotiation of the whole of the Agreement would entail renegotiation of its scope. Considerable time would need to be spent determining whether the two countries can ‘opt out’ of developing and jointly adopting certain types of food standards in accordance with the Agreement. The costs and benefits of this Option are set out below under Impact Analysis.

The Australian and New Zealand Health Ministers agreed that the current Agreement only be amended at this stage to accommodate the food regulatory reforms agreed to by COAG. They have also agreed that there will be further negotiations to clarify the scope of the Agreement after it has been formally amended to accommodate the reforms. Whether this will be a formal review of the Agreement under Article 9 has yet to be determined.

Option 3 – Amend the Agreement

The amendments:

- Reflect the new method of development and approval of food standards to be adopted in Australia and New Zealand;
- Incorporate all changes to the Agreement that were recommended by the Review of the Agreement;
- specify some changes made at the request of New Zealand that ensure its role in the changed new food regulatory arrangements is not diminished; and
- make some minor changes that clarify the procedure whereby Australia and New Zealand will adopt the new joint Code that has now been approved by ANZFS.

The proposed amendments, among other things, explain how the New Zealand nominees to the new FSANZ Board will be appointed, and the role and functions of the new Australia New Zealand Food Regulation Ministerial Council. They also describe the role of some of the new Committees established under the new food regulatory reforms and New Zealand's representation on those committees.

Recommendations of the Review of the Agreement that will be implemented by amendments to the Agreement are:

- recognition of non-regulatory measures such as guidelines and codes of practice as part of the Australia New Zealand Food Standards System that is established by the Agreement;
- that Australia and New Zealand consult regarding future amendments to the ANZFA Act (or its successor) and the New Zealand Food Act; and
- that Australia and New Zealand need only adopt food standards developed under the Australia New Zealand Food Standards System “without undue delay” rather than “on the same date”.

IMPACT ANALYSIS

Impact group identification

The groups likely to be affected by amending the Agreement include:

- government – Commonwealth, State and Territory and the Government of New Zealand to the extent that they are meant to be consulted as recommended in the Review of the Agreement;
- food industry businesses and consumers / the general community are affected to the extent that they are involved in the new system. The new system sets out arrangements for stakeholder consultation in developing food standards.

Assessment of costs and benefits

Option 1 - No change

The assessment of the costs and benefits of Option 3 of the Regulation Impact Statement for the COAG food regulatory reforms that was included in the Explanatory Memorandum for the Australia New Zealand Food Authority Amendment Bill 2001 applies equally to this Option. A summary of these costs and benefits is set out below.

Benefits

Retaining the Agreement would result in the maintenance of current food standards setting arrangements.

Costs

Australian **government, business and the community** will continue to bear the costs of the current inefficiencies of the current Australian food regulatory system. This is because no change to the Agreement would mean the COAG reforms will not be able to be implemented as Australia would be in breach of the Agreement if it develops food standards in accordance with the new food regulatory arrangements agreed to by COAG.

If the Agreement is not amended:

- Australia cannot proceed to implement the new food regulatory arrangements that the Commonwealth has agreed with the Australian States and Territories will commence when these amendments to the Agreement commence, and that are reflected in amendments to the ANZFA Act;
- the Australian Government would not be meeting its obligation to New Zealand to enable New Zealand to adopt food standards developed in accordance with the new food regulatory system;
- the Commonwealth would not be acting in accordance with the wishes of the States and Territories that are of the understanding that New Zealand will adopt food standards developed jointly with Australia under the new food regulatory arrangements in order to maintain a trans-Tasman market for food products based on common standards; and
- the recommendations of the Review of the Agreement would not be addressed.

Option 2 – Renegotiate the whole of the Agreement

Benefits

The scope of the Agreement could be clarified and the arrangements for the development of joint food standards that Australia has with New Zealand could be considered as a whole.

Costs

Australia has just undergone a thorough review of its food regulatory system (the Blair Review) and COAG has agreed to implement the response to that review. New Zealand has already agreed to participate in this new system.

To open up the issue of the scope of the Agreement at this time would delay the commencement of the new food regulatory arrangements.

Section 2 of the *Australia New Zealand Food Authority Amendment Act 2001* also specifies that Part 1 of Schedule 1 of that Act, which sets out the amendments to the ANZFA Act that are necessary to implement the new food regulatory arrangements, will only commence when “an amendment” to the Agreement commences. This means that it would not be possible to revoke the Agreement and replace it with a whole new Agreement until an amendment has been made to the Agreement.

Option 3 – Amend the Agreement

Benefits

The Regulation Impact Statement for the COAG food regulatory reforms has already assessed the costs and benefits of implementing the food regulatory model agreed to by COAG. This RIS is included in the Explanatory Memorandum of the Australia New Zealand Food Authority Amendment Bill 2001. This Option reflects the COAG decision to agree to Option 2 in that RIS to “implement the food regulatory model recommended by the Senior Officials Working Group on Food Regulation in its report to COAG.” Only those costs and benefits that are additional to those that have already been assessed in that RIS are therefore specified below.

Government

No additional benefits that have not already been identified.

Business, consumers and the community in general

Benefits additional to those identified in the RIS for the COAG food regulatory reforms are:

- Procedural issues relating to the administration of the current Australian New Zealand Food Standards System as a result of the Review of the Agreement will be able to be addressed;
- Amendments to the Agreement that are necessary to reflect the amendments made to the Australia New Zealand Food Authority Amendment Bill by the Senate that affect how food standards will be developed under the new system (eg the power of the Australia New Zealand Food Regulation Ministerial Council to amend food standards) will be able to be made;
- Australia would not be in breach of the Agreement if it proceeded to implement the new food regulatory reforms as a national system without amending or renegotiating the Agreement; and
- The trans-Tasman market for food products based on common standards will be maintained.

Costs

Government, business, consumers and the community in general

Additional costs that have not been identified in the RIS for the COAG food regulatory reforms are the costs involved in having twelve members on the FSANZ Board instead of the ten members originally agreed to by the Commonwealth and States and Territories under the Food Regulation Agreement 2000. This increase in Board membership was a result of amendments to the Australia New Zealand Food Authority Amendment Bill 2001 in the Senate.

CONSULTATION

The model for the new food regulatory system was developed through a formal process established by COAG Senior Officials to develop a whole-of-government response to the Blair Report recommendations and involved consultation with all relevant Commonwealth and State/Territory Government Departments. The Food Regulation Review itself that resulted in the Blair Report was conducted by a Committee representing key government, consumer and industry stakeholders. It conducted significant consultation when preparing its report, receiving over 170 submissions, and conducting public hearing and workshops.

The Senior Officials Working Group established by COAG Senior Officials considered submissions received in response to the Blair Report from the Governments of all jurisdictions and the following Ministerial Councils: the Australia New Zealand Food Standards Council, the Agriculture and Resource Management Council of Australia and New Zealand, and the Ministerial Council of Forestry, Fisheries and Aquaculture. The New Zealand Government was consulted in relation to New Zealand involvement in the new food regulatory system, legislative changes and implications for the Agreement. Key food industry organisations, representing all parts of the food supply chain, were informally consulted during the process of developing the model.

Further consultation was undertaken by Australian and New Zealand officials in order to work through the policy and legal issues associated with the changes to the current arrangements.

The Australia New Zealand Food Authority Amendment Bill 2001, which sets out those of the new food regulatory reforms which needed to be reflected in the *Australia New Zealand Food Authority Act 1991*, was also considered by the Senate Community Affairs Legislation Committee which tabled its report in April 2001. Eleven submissions were received by that Committee, including from ANZFA, the Australian Food and Grocery Council (AFGC) and the Australian Consumers Association (ACA). The ACA, AFGC and the Public Health Association of Australia also appeared at the hearing, along with relevant government agencies. The food regulatory reforms have been thoroughly considered by the community in the course of preparation of the COAG FRA and the passage of the Bill through the Parliament.

CONCLUSION AND RECOMMENDED OPTION

Option 1

Option 1 would not change the Agreement. It would, therefore, not be consistent with the provision in the FRA that the Agreement is to be amended to ensure New Zealand's participation in the new food regulatory arrangements and its adoption, along with Australia, of food standards developed under the new system. It would not address the recommendations of the Review of the Agreement and would prevent the commencement of the amendments made by the *Australia New Zealand Food Authority Amendment Act 2001* to the ANZFA Act.

Option 2

Option 2 would take considerable time to finalise. Amendment of the Agreement is sufficient to deal with the food regulatory reforms agreed to by COAG and the recommendations of the Review of the Agreement.

Option 3

Option 3 is the preferred option.

It will:

- enable both Australia and New Zealand to implement food standards developed under the new food regulatory arrangements agreed to by COAG that have the in-principle approval of New Zealand;
- be the means whereby the Australian Government meets its obligation to New Zealand to enable New Zealand to adopt food standards developed in accordance with the new food regulatory system;
- mean that the Commonwealth will implement its obligation to the States and Territories to enable New Zealand to adopt food standards developed jointly with Australia under the new food regulatory arrangements in order to maintain a trans-Tasman market for food products based on common standards;
- address the recommendations of the Review of the Agreement; and
- enable the amendments made by the *Australia New Zealand Food Authority Amendment Act 2001* to the ANZFA Act to commence.

IMPLEMENTATION AND REVIEW

Option 3 will be implemented by amending the Agreement. The amended Agreement will be known as the Agreement between the Government of Australia and the Government of New Zealand concerning a Joint Food Standards System.

An exchange of letters forms the amended Agreement, and a second, separate exchange of notes will bring the amendments into force.

The amendments to the Agreement include a provision that Australia and New Zealand will conduct and conclude a review of the effectiveness of the Australia New Zealand Food Standards System at any time mutually agreed by an exchange of letters between Ministers, and that such a review shall be conducted and concluded before the conclusion of the review of the FRA. The FRA will be reviewed within five years of its commencement on 3 November 2001.

The Agreement has been listed on the Commonwealth-State-Territory Standing Committee on Treaties (SCOT) Schedule of Treaty Action since early in the treaty discussions. This mechanism ensures that State and Territory Governments are informed of the proposed treaty action and have the opportunity to seek further details, offer views and comments, and flag those matters on which they wish to be consulted. To date there has been one request for further information, and no comments received.