

Exchange of Letters amending the Agreement between the Government of Australia and the Government of New Zealand concerning a Joint Food Standards System

Background

- 3.1 The *Exchange of Letters amending the Agreement between the Government of Australia and the Government of New Zealand concerning a Joint Food Standards System* (the Exchange of Letters) seeks to amend the *Agreement between the Government of Australia and the Government of New Zealand concerning a Joint Food Standards System* (the Agreement), first made in 1995.¹
- 3.2 The Agreement established the joint food standards system. The food standards system is a cooperative bilateral arrangement involving the Australian and New Zealand governments and the governments of the Australian States and Territories.²
- 3.3 The system comprises the Australian and New Zealand Food Regulation Ministerial Council, which is a deliberative body comprising relevant ministers from all the jurisdictions, and Food Standards Australia and

1 *Exchange of Letters Concerning a Joint Food Standards System National Interest Analysis (NIA)*, para 1.

2 Ms Kylie Jonasson, *Transcript of Evidence*, 10 May 2010, p. 2.

New Zealand (FSANZ), a bilateral statutory authority that administers the food standards system.³

3.4 Through the Agreement, the parties sought to:

- reduce unnecessary trade barriers;
- adopt a joint system for developing food standards; and
- provide for the timely development and review of food standards appropriate to both Australia and New Zealand.⁴

3.5 The Exchange of Letters implements the recommendations of a review of the Agreement completed in 2007.⁵ Article 9 of the Agreement requires regular reviews of its effectiveness, and the 2007 review was one of these.⁶

3.6 The amendments to the Agreement recommended in the 2007 review were first agreed by the Australian Government and the State and Territory Governments before being negotiated with the Government of New Zealand.⁷

Food standards

3.7 A food standard is a legally enforceable document that prescribes the nature, substance, composition, strength, weight, volume, quantity, purity or quality of any food, article, ingredient or component of a food.⁸

3.8 The impetus for developing a food standard usually originates in the Ministerial Council. The Ministerial Council will direct FSANZ to develop a draft food standard in accordance with policy guidelines delimited by the Council. Development of the draft standard will involve a public consultation process and the preparation of a Regulation Impact Statement, both of which provide interested parties with an opportunity to comment on the proposed standard.⁹

3.9 The draft standards or amendments are presented to the Ministerial Council, which must make a decision whether or not to adopt the draft

3 Ms Kylie Jonasson, *Transcript of Evidence*, 10 May 2010, p. 2.

4 Ms Kylie Jonasson, *Transcript of Evidence*, 10 May 2010, p. 2.

5 NIA, para 7.

6 NIA, para 3.

7 NIA, para 6.

8 FSANZ, *Australia New Zealand Food Standards Code, Issue 88*, p. 6.

9 Ms Kylie Jonasson, *Transcript of Evidence*, 10 May 2010, p. 5.

standard or amendment. The Ministerial Council may make two requests for the draft standard or amendment to be reviewed by FSANZ, after which the Ministerial Council must make a decision either to adopt or reject the draft standard or amendment. Once a standard or amendment has been adopted by the Ministerial Council, it becomes part of the Food Standards Code.¹⁰

3.10 The primary objectives of the food standards system are, in the following order:

- the protection of public health and safety;
- the provision of adequate information relating to food to enable consumers to make informed choices; and
- the prevention of misleading or deceptive conduct.¹¹

3.11 However, FSANZ must also have regard to the following when drafting standards:

- the need for standards to be based on risk analysis using the best available scientific evidence;
- the promotion of consistency between domestic and international food standards;
- the desirability of an efficient and internationally competitive food industry;
- the promotion of fair trading in food; and
- any written policy guidelines formulated by the Council for the purposes of this paragraph and notified to the Authority.¹²

The Exchange of Letters

3.12 The Exchange of Letters will:

- remove the ability for the Ministerial Council to request a second review of a draft standard or amendment;

10 NIA, para 6.

11 FSANZ, *Australia New Zealand Food Standards Code, Issue 88*, p. 2.

12 FSANZ, *Australia New Zealand Food Standards Code, Issue 88*, p. 2.

- remove the requirement that the Ministerial Council must request a review of the draft standard or amendment if one of the jurisdictions considers that a review is required;
- revise the circumstances under which a different standard can apply in Australia and New Zealand; and
- amend the process for adopting of temporary standards in urgent situations affecting public health and safety or environmental conditions.¹³

One review

- 3.13 As indicated above, when a draft standard or amendment is presented to the Ministerial Council, the Agreement permits it to request two reviews of the draft standard or amendment.¹⁴
- 3.14 The Exchange of Letters will amend the Agreement to limit the Ministerial Council to a single review request for a draft standard or amendment, after which the Council must accept, amend or reject the standard or amendment.¹⁵
- 3.15 The Amendment will bring into effect amendments made to the *Food Standards Australia New Zealand Act 1992* in 2007.¹⁶ The amendment responded to complaints from interested parties about the time taken to develop standards predating the review of the Agreement completed in 2007.¹⁷
- 3.16 The Department of Health and Ageing (DHA) advised the Committee that the reason for this change was that it was seen as:
- ...one of the quick wins, one of the easy ways to reduce the timeframes quite significantly.¹⁸
- 3.17 A second review can add some months to the time it takes to develop a standard.¹⁹
- 3.18 The Ministerial Council has requested a second review of a draft standard or amendment on five occasions since 2002. Three of these related to a

13 NIA, paras 10-13.

14 NIA, para 10.

15 NIA, para 9.

16 Ms Kylie Jonasson, *Transcript of Evidence*, 10 May 2010, p. 3.

17 Ms Kylie Jonasson, *Transcript of Evidence*, 10 May 2010, p. 3.

18 Ms Kylie Jonasson, *Transcript of Evidence*, 10 May 2010, p. 6.

19 Ms Kylie Jonasson, *Transcript of Evidence*, 10 May 2010, p. 6.

group of draft standards on the use of a new ingredient in a number of different food groups. In effect, this group constituted a single request for a second review, as the draft standards were considered together. In that time, the Ministerial Council has made decisions on 229 draft standards or amendments.²⁰

Changing the circumstances under which a review can be called

- 3.19 The Agreement currently requires the Ministerial Council to request a review of a draft standard or amendment when one of the jurisdictions believes a review is necessary.²¹
- 3.20 Under this mechanism, 39 reviews have been requested of the 229 draft standards or amendments that have been considered by the Ministerial Council since 2002.²²
- 3.21 The Exchange of Letters will remove this trigger for review and replace it with a deliberative process where the Ministerial Council can request a review where it considers that:
- it is not consistent with existing policy guidelines set by the Council;
 - it is not consistent with the objectives of the legislation which establishes FSANZ;
 - it does not protect public health and safety;
 - it does not promote consistency between domestic and international food standards where these are at variance;
 - it does not provide adequate information to enable informed choice;
 - it is difficult to enforce and/or comply with in both practical or resource terms;
 - it places an unreasonable cost burden on industry or consumers;
 - it is not consistent with the principles for the establishment of food standards set down in this Agreement, including consistency with both countries' World Trade Organization obligations and consistency with the domestic laws and regulations of both countries; and/or
 - it is inappropriate on the grounds of exceptional environmental or cultural factors.²³

20 Department of Health and Ageing, *Submission No. 3*, pp. 1-3.

21 NIA, para 10.

22 Department of Health and Ageing, *Submission No. 3*, p. 1.

Separate standards for Australia and New Zealand

- 3.22 Australia and New Zealand are permitted to apply separate standards in the following circumstances:
- where there is an exceptional health and safety or environmental reason; and
 - where New Zealand develops a standard that applies only in that country because of exceptional health and safety, environmental, third country trade, or cultural reason.
- 3.23 The Exchange of Letters will replace these provisions with a single exceptional circumstance mechanism for applying separate standards. Jurisdictions will only be able to vary from a standard for the following reasons: exceptional health and safety risk; third country trade; environmental risk; or cultural risk.²⁴
- 3.24 These terms are not defined in the Exchange of Letters or the relevant legislation.²⁵ In the absence of a definition, the Committee anticipates that the meaning of these terms will be contested by those who participate in developing food standards.
- 3.25 When pressed, the DHA indicated that the Maori tradition of eating mutton bird might be an example of a cultural reason for an exceptional circumstance; and arrangements contained in a free trade agreement could result in an exceptional circumstance related to third country trade.²⁶

Temporary standards

- 3.26 Jurisdictions are permitted to adopt temporary standards when an issue of public health, safety or environmental conditions means there is no time for the normal development of a standard.²⁷
- 3.27 Currently, a jurisdiction that makes a temporary standard is required to notify the Ministerial Council that it is doing so. The Agreement contains no provision for what is to be done after a temporary standard has been made. Under normal circumstances, the temporary standard is either withdrawn after the relevant issue has been resolved, or the process for

23 *Exchange of Letters Amending the Agreement between the Government of Australia and the Government of New Zealand Concerning a Joint Food Standards System*, para 9.

24 NIA, para 12.

25 NIA, para 12.

26 Ms Kylie Jonasson, *Transcript of Evidence*, 10 May 2010, p. 4; and Mr Ian Turland, *Transcript of Evidence*, 10 May 2010, p. 5.

27 Ms Kylie Jonasson, *Transcript of Evidence*, 10 May 2010, p. 3.

developing a permanent standard is put in place. However, temporary standards have on occasion remained in place for a considerable period of time.²⁸

- 3.28 The Exchange of Letters will amend this provision to require the jurisdiction to provide reasons and evidence supporting the temporary standard. To prevent temporary standards from applying for longer than is necessary, the jurisdiction that implements a temporary standard will be required to request the creation of a standard to cover the matters that prompted the adoption of the temporary standard. The temporary standard will cease to exist after consideration of the new standard by the Ministerial Council.²⁹

Food Labelling Law and Policy Review

- 3.29 As indicated above, one of the objectives of the food standards system is the provision of adequate information relating to food to enable consumers to make informed choices.³⁰
- 3.30 In response to ongoing concerns about food labelling by industry, consumers and governments, the Council of Australian Governments tasked FSANZ to undertake a thorough Food Labelling Law and Policy Review. To undertake the review, FSANZ appointed an independent review panel chaired by Dr Neal Blewett AC. The review commenced in October 2009 and is expected to deliver its final report in early 2011.³¹
- 3.31 The terms of reference for the review require the review panel to:
- examine the policy drivers impacting on demands for food labelling;
 - consider what should be the role for government in the regulation of food labelling. What principles should guide decisions about government regulatory intervention?
 - consider what policies and mechanisms are needed to ensure that government plays its optimum role;

28 Ms Kylie Jonasson, *Transcript of Evidence*, 10 May 2010, p. 3.

29 NIA, para 13.

30 FSANZ, *Australia New Zealand Food Standards Code*, Issue 88, p. 2.

31 Food Labelling Law and Policy Review, *Issues Consultation Paper: Food Labelling Law and Policy Review*, 2010, p. 1.

- consider principles and approaches to achieve compliance with labelling requirements, and appropriate and consistent enforcement;
 - evaluate current policies, standards and laws relevant to food labelling and existing work on health claims and front of pack labelling against terms of reference 1-4 above; and
 - make recommendations to improve food labelling law and policy.³²
- 3.32 DHA argued that the changes contained in the Exchange of Letters relate to the administration and operation of the food standards system, and are unlikely to undermine the outcome of the Food Labelling Law and Policy Review.
- 3.33 Given the terms of reference of the Food Labelling Law and Policy Review, it is possible that further changes to the administration and operation of the food standards system will be required in the near future.
- 3.34 An argument could be made that it would be more efficient and less disruptive to the food standards system to delay the changes contained in the Exchange of Letters and implement any changes resulting from the Food Labelling Law and Policy Review at the same time. However, the Committee has been assured by the DHA that:
- We certainly recommend you sign off on these amendments that will improve the operation of the treaty...³³
- 3.35 Consequently, the Committee supports the Exchange of Letters.

Recommendation 6

The Committee supports the *Exchange of Letters amending the Agreement between the Government of Australia and the Government of New Zealand concerning a Joint Food Standards System* and recommends that binding treaty action be taken.

32 Food Labelling Law and Policy Review, *Terms of Reference*, <<http://www.foodlabellingreview.gov.au/internet/foodlabelling/publishing.nsf/Content/terms>>, viewed 14 May 2010.

33 Ms Kylie Jonasson, *Transcript of Evidence*, 10 May 2010, p 4.