

# Chapter 2

## Key issues

2.1 A number of key issues relating to the Food Standards Australia New Zealand Amendment (Forum on Food Regulation and Other Measures) Bill 2015 were raised by submitters:

- composition of the Food Standards Australia New Zealand (FSANZ) Board;
- regulation of genetically modified organisms;
- public notification requirements;
- Regulation Impact Statements;
- Nutrition, Health and Related Claims Standard; and
- legislating changes to the Ministerial Council's name.

### Composition of the FSANZ Board

2.2 A review of the FSANZ Board appointment process was held in 2013. The review consulted widely with the food industry, consumer groups, scientists and public health groups. The review had nine recommendations, all of which were adopted by the Ministerial Forum.<sup>1</sup> The two recommendations relevant to this Bill, which relate to consumer rights, science, public health and food industry Board member positions, recommended amending:

1. the compositional requirements of the FSANZ Board to address the need for flexibility to accommodate FSANZ's future work requirements; and
2. in relation to certain categories of Board members, amend the nomination process to be an open market process by advertising for upcoming Board vacancies externally, as well as seeking nominations from identified organisations.<sup>2</sup>

Schedule 2 of this Bill implements these recommendations.

2.3 A number of concerns were raised with regard to changes to the composition of the FSANZ Board. The Public Health Association of Australia (PHAA) opposed the changes and argued that these changes may lead to a reduction in the number of public health and science representatives. The PHAA also opposed the omission of the National Health and Medical Research Council nominee on the Board.<sup>3</sup> Some submissions raised the prospect that food industry representatives may dominate the Board and that this may result in a more corporate focussed approach which, in turn, may diminish the importance of public health and scientific outcomes. Other concerns

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1 The Ministerial Forum has ministerial representatives from the Australian federal, state and territory governments, the Local Government Association, and the New Zealand Government.

2 Department of Health, *Submission 8*, pp 5–6.

3 Public Health Association of Australia, *Submission 1*, p. 7.

focussed on the perception that the Minister may be subject to undue influence in the exercise of her power to appoint nominees.<sup>4</sup> The Australian Food and Grocery Council (AFGC), whilst supportive of the proposed use of competitive selection processes, noted that the Board may have up to seven representatives from New Zealand.<sup>5</sup>

2.4 Currently, there are 7 positions on the Board reserved for consumer rights, science, public health and food industry representatives. The Bill retains these seven positions and prescribes that there must be at least two public health/science representatives whereas the food industry must have at least one. Further, the new appointment process allows for a competitive process to be undertaken in conjunction or separate to the current nomination process. The intention of these changes is to 'open up the pool of potential candidates' and 'to ensure that the FSANZ Board has the right mix of skills for FSANZ's future work requirements'. In its submission, the department noted that 'under the proposed amendments, the Commonwealth Minister for Health does not have unfettered power to appoint FSANZ Board members' as the ministerial 'forum needs to agree to the appointment' of any new Board member.<sup>6</sup>

### **Regulation of genetically modified organisms**

2.5 There is a perception held by some submitters that this Bill may result in a reduction in the regulation of genetically modified (GM) food or genetically modified organisms (GMO). These submissions highlighted concerns with two aspects of the Bill that relate to GM and GMOs. The first relates to the proposed removal of section 19 of the *Food Standards Australia New Zealand Act 1991* (Act) which specifies when the Office of the Gene Technology Regulator (OGTR) needs to be informed by FSANZ of any changes to food regulation. The second concerns the removal of definitions for 'gene technology regulator', 'GMO' and 'GM' from the Act.

2.6 Item 1 of the Bill streamlines the definition of 'appropriate government agency' to ensure that the appropriate government agency receives notice of any proposed changes to the food code rather than an exhaustive prescribed list as is currently the case. In its submission, the Department of Health (department) noted:

The current definition of "appropriate government agency" in subsection 4(1) of the FSANZ Act includes a list of specific Commonwealth, State, Territory and New Zealand Departments and authorities, *all* of whom FSANZ must notify about certain matters related to food standards irrespective of whether a particular agency has an interest in the matter.

This can create a situation where FSANZ is obliged to notify Departments and authorities with no interest in the relevant matter and those bodies having to receive and process communication about matters of no interest to them.

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4 Public Health Association of Australia, *Submission 1*, p. 8. See also: Friends of the Earth Australia, *Submission 6*, p. [3]; Gene Ethics, *Submission 5*, p. [4].

5 Australian Food and Grocery Council, *Submission 3*, p. 5.

6 Department of Health, *Submission 8*, pp 7–8.

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Having a prescriptive list in legislation also results in administrative difficulties associated with keeping the list current. An example is where machinery of government changes results in name changes of Departments and authorities, as well as existing bodies being restructured. Updating a list in legislation requires legislative amendment and the associated time delays.<sup>7</sup>

2.7 The committee is satisfied with the need to streamline the definition of 'appropriate government agency' as proposed in the Bill.

***Repealing section 19 of the Act***

2.8 As a result of the proposed change to the definition of "appropriate government agency" item 11 of the Bill repeals section 19 of the Act which states that FSANZ must inform OGTR of any food regulatory measure that relates to food 'that is or contains a GMO or GM product'. The result of removing section 19 would be that the terms "GM product" and "GMO" are not referenced in the Act, and by extension, are not required in the Act's definitions hence their removal under Item 4.<sup>8</sup> The Explanatory Memorandum notes the effect of these changes:

The effect of the new definition is that where the FSANZ Act requires FSANZ to notify an "appropriate government agency", FSANZ would only notify the Gene Technology Regulator (the Regulator) where FSANZ considers that the Regulator has a particular interest in the relevant matter.<sup>9</sup>

2.9 As noted in the submission from the OGTR, GMOs are primarily regulated by the OGTR under the authority of the Commonwealth *Gene Technology Act 2000* and subservient state and territory legislation. It is critical to note that the OGTR's role is to proactively work in concert with other relevant regulators and agencies such as FSANZ to ensure that any risks to human health and environment are appropriately managed.<sup>10</sup>

2.10 A number of submitters have raised concerns that by removing section 19 of the Act, there is a risk that the circumstances in which FSANZ should refer proposed changes to food regulation to the OGTR become less clear. The Sustainability Council of New Zealand pointed out that section 19 has served a purpose in helping to provide 'consistency in approvals for growing and labelling a GM food'. There is a concern that there is no good reason provided for the removal of this section.<sup>11</sup>

2.11 Friends of the Earth Australia (FOTEA) noted that 'communication across agencies is vital in ensuring an effective and consistent regulatory system for GMOs'

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7 Department of Health, *Submission 8*, p. 3.

8 EM, pp 5–6. See also: *Food Standards Australia New Zealand Act 1991*, s. 19.

9 EM, p. 6.

10 Office of the Gene Technology Regulator, *Submission 4*, pp [1–2].

11 Sustainability Council of New Zealand, *Submission 7*, p. 3.

and that 'FSANZ should be compelled to inform the OGTR if it makes a regulatory decision regarding GMOs'.<sup>12</sup>

2.12 In its submission, the OGTR noted that:

OGTR has a strong and cooperative relationship with FSANZ built on the connection between GMOs and genetically modified (GM) food. Integrated regulation in Australia is provided for by assessment and approval of commercial scale release of GM crops by the Gene Technology Regulator and corresponding assessment of GM food by FSANZ for inclusion in the Standard 1.5.2 (Food Produced Using Gene Technology) of the Australia New Zealand Food Code.

Interaction between OGTR and FSANZ is not limited to legislative requirements for request and provision of advice but includes a range of other activities. OGTR and FSANZ have a Memorandum of Understanding which recognises the importance of the relationship and exchange of advice and information between the two agencies. Senior officers of OGTR, FSANZ and other regulators engage at the strategic level as members of the Regulators' Forum (established following the 2006 review of [Gene Technology] Act to formalise information sharing between the OGTR and other regulatory agencies).<sup>13</sup>

2.13 The committee is satisfied that the new definition of "appropriate government agency" will ensure that a robust process continues to be applied to GM food products and that the repeal of section 19 of the Act will not adversely impact on the 'strong working relationship between OGTR and FSANZ'.<sup>14</sup>

### ***Repealing definitions for GM and GMO***

2.14 As stated in the previous section, in the event that this Bill is passed unamended with the removal of section 19 of the Act, the definitions for "GM product" and "GMO" are rendered superfluous as there will be no reference to these terms in the Act. Currently, these terms are defined using definitions found in the *Gene Technology Act 2000*. The *Gene Technology Act 2000* adopts a broad approach, defining GM technology (and subsequently "GM product" and "GMO") as 'any technique for the modification of genes or other genetic material'.<sup>15</sup>

2.15 Some concern has been raised in submissions that the repeal of the GM related definitions in the FSANZ Act would only leave gene technology defined in legislative instrument with respect to food regulation—specifically the Food Standards Code (Code) for *Food Produced Using Gene Technology*.<sup>16</sup> FOTEA argued that the current definition in the Code is 'not as broad and can be amended without

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12 Friends of the Earth Australia, *Submission 6*, p. [1]. See also: Gene Ethics, *Submission 5*, p. [2].

13 Office of the Gene Technology Regulator, *Submission 4*, p. [2].

14 Office of the Gene Technology Regulator, *Submission 4*, p. [2].

15 *Gene Technology Act 2000*, s. 10(1).

16 Australia New Zealand Food Standards Code—Standard 1.5.2—Food Produced Using Gene Technology, Division 1, Clause 1(1).

parliamentary debate'. The Sustainability Council of New Zealand highlighted its concern that by removing these definitions, a 'key reference for the interpretation of the Food Code' and hence provide 'discretion for FSANZ to depart from an OGTR position'.<sup>17</sup>

2.16 In contrast, CropLife was unequivocally supportive of these proposed changes and argued that:

It is clear that these changes will have no material impact on the administration of the Australia New Zealand Food Standards Code, nor the manner in which FSANZ undertakes pre-market safety assessments of GM foods and food ingredients.<sup>18</sup>

2.17 The department was more expansive in its submission and noted that the adequacy of these definitions in this instance are irrelevant and that removal of the GM related definitions will have no bearing outside the FSANZ Act:

"GMO" and "GM product" are terms defined in the [Gene Technology] (GT) Act and which have restricted application in the FSANZ Act. "GMO" and "GM product" are terms used *only* in relation to notices given to the [Gene Technology Regulator] (GTR) by FSANZ under section 19 of the FSANZ Act (mentioned above) concerning food regulatory measures for food that is or contains a GMO or GM product. These terms have no other operation in the FSANZ Act and are not used in Standard 1.5.2 (Food Produced Using Gene Technology).

The above amendments will have no effect on the Australia New Zealand Food Standards Code (the Code). Nor do they change the Code.

The above amendments will not affect regulation of GM food. They make no change to the definitions or to the labelling requirements for GM food of Standard 1.5.2.

The above amendments will not remove the requirement for FSANZ to notify bodies or officers of the Commonwealth, State, Territory or New Zealand with a particular interest in genetically modified food, including the GTR, of applications or proposals relating to such food.<sup>19</sup>

2.18 In evidence to the committee, the department also highlighted that 'FSANZ will still make public its evaluations and, therefore, will remain accountable for consulting with appropriate government agencies'.<sup>20</sup> Continuing transparency of FSANZ's activities will ensure that public scrutiny can continue to be applied to the regulation of food containing GM and non-GM ingredients.

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17 Sustainability Council of New Zealand, *Submission 7*, p. 3. The question of parliamentary review of legislative instruments such as the Code is raised. The committee notes that the Senate has the capacity to review and, if appropriate, disallow legislative instruments such as the Code. This power is described in section 42 of the *Legislative Instruments Act 2003*.

18 CropLife Australia, *Submission 2*, p. [1].

19 Department of Health, *Submission 8*, p. 4.

20 Department of Health, *Submission 8*, p. 5.

## Public notification requirements

2.19 This Bill will modernise the manner in which public notification of draft standards or variations of a draft standard occurs.

2.20 The PHAA expressed a range of concerns with the proposed changes to public notification requirements. These concerns centred around the complaint that these changes will shift responsibility for communicating and understanding any draft variations from FSANZ to the stakeholder. PHAA explained:

FSANZ has made efforts to establish circulation lists of interested parties who are notified about proposed changes to the Food Standards Code. However, withdrawing the requirement of notification in public newspapers and using only the Authority's website places the burden on the interested community, public health or food industry person to proactively seek the information. This requires the person to be aware of any proposed change and also the time frame involved so they can actively seek the information from the website. This may not be an issue for those who are in employed positions that support their time to monitor and seek such information on proposed changes, but disadvantages community members who lack such time and support. The result of the proposed change may skew the range of comments that are submitted and limit the effectiveness of the consultation process.<sup>21</sup>

2.21 FOTEA also opposed the changes and highlighted the important role that general circulation newspapers play for segments of the Australian and New Zealand population, in particular rural and regional audiences. Despite this, FOTEA acknowledged a need for FSANZ to become more sophisticated in how it communicates with its stakeholders especially in the current environment where newspaper notices are expensive and the audience reach of newspapers is declining. If the Bill is to proceed, FOTEA advocated for the addition of 'mandatory notification of subscribers to FSANZ email updates' to the Bill.<sup>22</sup>

2.22 Gene Ethics was conditionally supportive and noted that FSANZ's current public notification process was insufficient and that there is a need to ensure that any new process is effective in communicating changes relating to the regulation of food:

[W]e are not satisfied that FSANZ is sufficiently proactive in drawing attention to this information by notifying all relevant people in the food industry or the interested public of new proposals and decisions to amend or vary food standards and codes of practice. Relying solely on email to issue notices, newsletters, media releases and the like is insufficient to ensure that those who should be aware of proposed changes are fully apprised of FSANZ'[s] activities.<sup>23</sup>

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21 Public Health Association of Australia, *Submission 1*, p. 7.

22 Friends of the Earth Australia, *Submission 6*, p. [3].

23 Gene Ethics, *Submission 5*, p. [3].

2.23 Gene Ethics argued that the public notification requirements in the Bill should be augmented to include other forms of electronic media including, but not limited to, emails, short message service (SMS), and social media platforms.<sup>24</sup>

2.24 The AFGC was supportive of the changes and cited research indicating that 'smart phone penetration in the Australian market is now at 80% (4 out of 5), rising to 95% (19 out of 20) over the next 5 years'. With this in mind, the AFGC:

[S]upports the provisions that lift from FSANZ the obligation to publish notices relating to food regulatory measures in newspapers circulating in Australia and New Zealand. Such advertising is expensive and cumbersome in modern society when a web search would quickly direct interested parties to the FSANZ website. The AFGC further notes that FSANZ maintains a significant mailing list of interested stakeholders for providing notice of regulatory measures.<sup>25</sup>

2.25 FSANZ currently has an electronic subscription service that assists the public to keep up to date with the latest developments in food regulation. This service has a number of options that reflect the needs of different stakeholders.<sup>26</sup> The committee is confident that FSANZ will continue to offer this service, and that it will evolve and improve as technology and stakeholder requirements change.

### **Regulation Impact Statements**

2.26 Currently, sections 33, 63 and 101 of the Act require that reports lodged with FSANZ must contain a Regulation Impact Statement (RIS).<sup>27</sup> However, there are 'occasions when an exemption may be given from the requirement to prepare an [RIS]'.<sup>28</sup> Under proposed changes in this Bill, the requirement to provide an RIS as part of a report would only be 'if applicable'.<sup>29</sup>

2.27 A number of submitters raised some issues with these proposed changes. The PHAA noted that:

[T]he criteria to determine when "if applicable" applies is not clear and the absence of a RIS on a recommended amendment may provide grounds for

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24 Gene Ethics, *Submission 5*, p. [3].

25 Australian Food and Grocery Council, *Submission 3*, p. 3.

26 Food Standards Australia New Zealand, *Subscription Service*, <http://www.foodstandards.gov.au/media/pages/subscription-service.aspx> (accessed 18 November 2015).

27 *Food Standards Australia New Zealand Act 1991*, s. 33, 63 & 101. These reports are for the following purposes: 'Approving the draft standard or draft variation' (s. 33); 'Review of decisions' (s. 63); and 'Re-affirm[ing] the standard or variation or propose changes' (s. 101).

28 EM, pp 6–8.

29 Food Standards Australia New Zealand Amendment (Forum on Food Regulation and Other Measures) Bill 2015, Item 14.

the Ministerial Forum to reject a Board decision to amend the Food Standards Code.<sup>30</sup>

2.28 The AFGC agreed that more clarity about the criteria for when an RIS is required and argued that more transparency around the process that determines whether or not an RIS is required.<sup>31</sup>

2.29 The committee acknowledges the concerns of submitters; however, is cognisant that the change proposed in this Bill is largely administrative and simply recognises the fact that those reports currently not required to include a RIS should not be legislatively compelled to do so. Questions that go to the scope of a RIS and the process by which a RIS is determined as necessary are not part of this Bill and as such have not been considered by the committee.

### **Nutrition, Health and Related Claims Standard**

2.30 FSANZ currently has a food standard that regulates nutrition content claims and health claims on food labels and advertising—Standard 1.2.7. Item 23 and 41 of the Bill seek to remove a requirement whereby draft variations are assessed 'against the criteria set out in the Nutrition, Health and Related Claims Standard (the standard) in relation to high level health claims'.<sup>32</sup> This is primarily because Standard 1.2.7 does not contain such criteria. Again, these changes are largely administrative, with the committee noting that these requirements—to assess against the criteria in the standard—were added to the FSANZ Act in 2008, whereas the standard was only completed and commenced on 3 September 2015. In that time, another mechanism has evolved with regard to the assessment of high level health claims, with these claims now evaluated using '13 pre-approved food-health relationships'.<sup>33</sup>

2.31 FOTEA have expressed concern about these changes and stated that they 'do not believe a satisfactory reason for deleting these section[s] has been given'.<sup>34</sup> The committee is satisfied that these amendments are largely administrative as they will correct inconsistencies in the Act.

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30 Public Health Association of Australia, *Submission 1*, p. 7.

31 Australian Food and Grocery Council, *Submission 3*, p. 5. See also: Gene Ethics, *Submission 5*, p. [3].

32 High level health claims refers to a nutrient or substance in a food and its relationship to a serious disease or to a biomarker of a serious disease. For example: Diets high in calcium may reduce the risk of osteoporosis in people 65 years and over. An example of a biomarker health claim is: Phytosterols may reduce blood cholesterol.

33 EM, p. 6. See also: Food Standards Australia New Zealand, *Nutrition content claims and health claims*, January 2013, <http://www.foodstandards.gov.au/consumer/labelling/nutrition/Pages/default.aspx> (accessed 16 November 2015); Australian New Zealand Food Standards Code—Standard 1.2.7—Nutrition, Health and Related Claims; *Food Standards Australia New Zealand Amendment Act 2007*.

34 Friends of the Earth Australia, *Submission 6*, p. [3].

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## Legislating changes to the Ministerial Council's name

2.32 Many submissions were silent or ambivalent on the merits of legislating the name change of the Australia and New Zealand Food Regulation Ministerial Council to the Australia and New Zealand Ministerial Forum on Food Regulation. Of those submitters that did discuss the change, most were supportive, with CropLife noting that the 'changes are substantially administrative in nature and will improve the clarity and operation of the legislation'.<sup>35</sup>

2.33 The AFGC noted that it has no objections to the name change; however, also noted that 'names do come and go, and it is not clear why legislative change of such an extent is necessary when the same end might be achieved by a reference to the Council as established from time to time under any name'.<sup>36</sup>

2.34 Gene Ethics is 'substantially in agreement' with these provisions, raising a minor concern about the use of the term 'reasonable' to describe the type of information the Forum may require prior to deciding on any variations to a standard, guideline or code. This submission argued:

Who is empowered to exercise this discretion and what is reasonable in such circumstances are undefined. Removing the word 'reasonable' would ensure that the Forum has unfettered and unlimited access to the evidence it needs to make fully informed decisions, particularly when it decides to review, and perhaps reject or modify, FSANZ's recommendations and decisions.<sup>37</sup>

## Committee view

2.35 Changes to the composition of the FSANZ Board stem from recommendations in the 2013 review that were agreed to by the Ministerial Forum and the Board. It is the committee's view that this will lead to a more competitive selection process and ultimately a more dynamic FSANZ Board that will meet the future challenges of food regulation. The committee notes that the Ministerial Forum has already changed its name and that this Bill simply formalises this change in a legislative sense. Many of the consequential changes relating to the name change are administrative. The committee acknowledges that this change is supported by Ministers from all levels of government in Australia and New Zealand.

2.36 Amending the definition of "appropriate government agency" will streamline the notification process and ensure that the most relevant government agency is informed of any changes to the food regulation code. Importantly, this will ensure that the OGTR is informed of any changes that affect the regulation of GM foods. The committee is confident that the removal of section 19 of the Act and the GM related definitions will not compromise the regulation of GM foods.

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35 CropLife Australia, *Submission 2*, p. 1. See also: Public Health Association of Australia, *Submission 1*, p. 8.

36 Australian Food and Grocery Council, *Submission 3*, pp 3–4.

37 Gene Ethics, *Submission 5*, p. [4].

2.37 The committee agrees that this Bill represents an opportunity to make largely administrative amendments to the Act that modernise the manner in which public notification is undertaken, and accurately reflect the day-to-day operation and implementation of RIS and the Nutrition, Health and Related Claims Standard.

**Recommendation 1**

**2.38 The committee recommends that the Senate pass the Bill.**

**Senator Zed Seselja**

**Chair**