ABA Submission

Modernising the FSANZ Act: Draft Regulatory Impact Statement

May 2021

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Executive Summary

Alcohol Beverages Australia (ABA) welcomes the review into the Food Standards Australia New Zealand (FSANZ) Act, and its Terms of Reference (ToR) which explicitly recognised the importance of the food industry to regional communities and the broader economies of Australia and New Zealand.

There are elements of the Draft RIS proposed Option 2 and 3 that warrant inclusion in FSANZ reform, but other elements require such significant change or reflect missed opportunities that means ABA is not in a position to endorse any of the present Options. Instead, our submission focuses on amendments we can support in full or that require further fine tuning; amendments we reject; and additional amendments that we believe should be included to modify the FSANZ Act to make it agile, resilient and fit for purpose.

ABA believes there is scope for sensible, evidence-based changes to the FSANZ Act in order to modernise the Australian and New Zealand approach to food safety. In particular, creating an agile system that is responsive to industry and consumer needs in an ever innovative sector is crucial to protecting our enviable global reputation for food safety. There are, however, clearly elements in the draft RIS that represent an overreach as to the role, responsibility and functioning of a food safety authority such as FSANZ.

ABA submits that the three most pertinent areas that should be removed from the final RIS are:

1. FSANZ expansion into preventative and public health
2. FSANZ expansion into farm and food sustainability
3. Removal of Ministerial decision-making powers

ABA opposes the attempt in the RIS to redefine FSANZ's responsibilities away from its original intention of food safety to include both wide-raging preventative health as well as regulating matters of farm and food sustainability. The focus of FSANZ's work should remain on ensuring that all stakeholders have confidence in the safety and quality of food and the Australian and New Zealand food industry, and that a reputation is created that will translate into both domestic and export success.

1. <u>FSANZ expansion into preventative and public health</u>

The draft RIS proposes the following issue:

> "There is currently ambiguity around FSANZ's broader role in achieving public health, nutrition, and safety objectives beyond acute food safety issues, such as promoting

> healthy eating and protecting Australians and New Zealanders from diet-related diseases…."[1]

The draft RIS then goes on to propose the following definition of public health:

> "all those aspects of food consumption that could adversely affect the general population or a particular community's health either in the short term or long term, including preventable diet-related disease, illness and disability as well as acute food safety concerns."[2]

As such the draft RIS is proposing to expand FSANZ's role to that of a directive-setting preventative health agency. This expanded remit would give FSANZ power to - for example - impose mandatory reformulation of food composition or processing, not for reasons of preventing acute disease, but to address issues like obesity, chronic non-communicable disease. **This will only increase the regulatory burden for industry, while increasing cost and reducing choice for consumers, including in export markets.** It goes well beyond ensuring consumers can make informed choices for themselves about their diet and nutritional needs.

2. <u>FSANZ expansion into farm and food sustainability</u>

The draft RIS suggests a remit for FSANZ into sustainability so far reaching as to include:

> "agricultural practices, food processing, distribution, packaging, and other activities in the food supply […] on climate change, biodiversity, soils and waterways… [including] levels of greenhouse gas emissions from livestock, inappropriate aquaculture practices and excessive plastic packaging" [3]

As FSANZ is an agency with primary responsibility for food safety it is not appropriate for its remit to be expanded to areas that have not relevance to its core work such farm and food sustainability including climate change. This is particularly so given that the topics of climate change, biodiversity, greenhouse emissions etc are vigorously considered by a myriad of government agencies, such as the Climate Change Authority and the Australian Renewable Energy Agency.

The draft RIS attempts to justify this expanded role by relying on incorrect portrayal of industry's genuine commitments to sustainability and in particular states:

> *"…industry can make unregulated claims regarding the environmental sustainability of a product*".[4]

[1] Nous Group, 2021. Modernising the FSANZ Act. Pg 29.
[2] Nous Group, 2021. Modernising the FSANZ Act. Pg 52.
[3] Nous Group, 2021. Modernising the FSANZ Act. Pg 26.
[4] Nous Group, 2021. Modernising the FSANZ Act. Pg 27.

The draft RIS incorrectly suggests that food sustainability is an opportunity for the food industry to be deceptive and that the industry operates in a void of regulation, despite false and misleading claims regarding environmental sustainability being regulated by both federal, state and territory competition and fair trading agencies.

There is clearly no case or justification for FSANZ to expand its remit into either preventative health or farm and food sustainability. The only case for when the lens of public health and sustainability can be considered is after first satisfying that the issue relates to the primary purpose of FSANZ which is food safety. This will remove all ambiguity and ensure a meaningful and appropriate work load for FSANZ.

3. Removal of Ministerial decision-making powers

ABA also opposed any delegation of decision-making powers from Ministers to officials. Ministers are in a unique position to be able to make decision regarding policy positions that impact the lives of Australians. This is because Ministers have been elected by the Australian public for the purpose of representing their interests. Ministers are also able to bring a whole of government approach to policy decision making meaning they are best placed to make decisions that will minimise unintended consequences of policy implementations.

Given that the work of FSANZ focuses on the protection of Australians through food safety, it is clear that decision making relating to this work should remain with Ministers to ensure the highest consumer safety.

The Draft RIS portrays the inefficiencies of the food regulation system as being effectively addressed by the movement of decision-making powers away from Ministers to officials.

There is, however, no evidence to suggest that the inefficiencies within the FSANZ system come from Ministerial decision making. From industry experience the Ministerial decision-making aspect is least burdensome to both industry and internally to FSANZ. Instead, it is important to ensure that those elected to enact public policy are at the forefront of decision making related to those policies. In order to consider efficiencies in the FSANZ system, the focus should be made on those areas that represent actual inefficiencies within the food regulatory system.

4. Opportunities

ABA reiterates that we welcome the review of the FSANZ Act with the view of modernisation in a way that creates a sensible remit for FSANZ in producing an agile food safety agency.

To this regard, the Terms of Reference provide guidance for two additional amendments to the Act.

A focus on trade and international competitiveness is a key principle that should be enshrined in legislation and help guide FSANZ processes and decisions and align with Codex. Equally the draft RIS proposes a new s 18 factor FSANZ should have regard to in developing regulatory measures, i.e. "the regulatory impact on industry, particularly small business." A**BA believes this recommendation should go further, by adding that any new or amended regulatory measure should be the least burden for business necessary to achieve its objectives.**

We look forward to welcoming a final RIS that delivers on the Terms of Reference and addresses the serious concerns outlined in our submission.

ALCOHOL BEVERAGES AUSTRALIA

Supports

the modernisation of the food safety regulation system to be agile and responsive in protecting our reputation

Believes

food safety must remain the core of FSANZ's scope

Consumer Benefits

1. Agile food system means more innovation and consumer choice
2. Consumers can have a high level of confidence in food safety
3. Food and beverages remain affordable for consumers

ALCOHOL BEVERAGES AUSTRALIA

Does Not Support:

The expansion of FSANZ into **public or preventative health**

Delegation of Ministerial decision making to officials

The expansion of FSANZ into **farm and food sustainability**

Detrimental for Consumers

1. Flow on to consumers of increased costs to business
2. Bans or restrictions on food types, convenient packaging & retail displays
3. Sugar, fast food and other taxes / levies

Recommendations

Recommendation one: The only case for when the lens of public health can be considered is after first satisfying that the issue relates to the primary purpose of FSANZ which is food safety. This will remove all ambiguity and ensure a meaningful and appropriate work load for FSANZ officials. This should be achieved by amending section 18 to require *that the regulatory measure relates directly to a food safety issue.* See recommended wording of section 18(2) incorporated under recommendation six.

Recommendation two: That "an efficient and internationally competitive food industry" be included as a s 3 objective of the Authority.

Recommendation three: That an additional provision be included in s 18 (1) that FSANZ must have regard to in food regulation, namely that "the regulatory solution is of least burden to industry, particularly small business, needed to achieve regulatory objectives."

Recommendation four: There is no legislative amendment which will encumber the ability of the Food Ministers' Meeting to request a review of a FSANZ proposal, including the proposal to harmonise the criteria under the Food Regulation Agreement with s 18 of the FSANZ Act.

Recommendation five: There is no legislative amendment to include objectives of food sustainability.

Recommendation six: Recommendation six: The order of priorities for s 3 and s 18 of the Act be amended (as per underlined passages) to read:

S 3 | Object of Act

The object of this Act is to ensure a high standard of public health protection throughout Australia and New Zealand by means of the establishment and operation of a joint body to be known as Food Standards Australia New Zealand to achieve the following goals (in descending priority order):

a) *a high degree of consumer confidence in the quality and safety of food produced, processed, sold or exported from Australia and New Zealand*
b) *an efficient and internationally competitive food industry*
c) *an effective, transparent and accountable regulatory framework within which the food industry can work efficiently*
d) *the provision of adequate information relating to food to enable consumers to make informed choices*

e) *the establishment of common rules for both countries and the promotion of consistency between domestic and international food regulatory measures without reducing the safeguards applying to public health and consumer protection.*

S 18 | Objectives of the Authority in developing or reviewing food regulatory measures and variations of food regulatory measures

1. The objectives (in descending priority order) of the Authority in developing or reviewing food regulatory measures and variations of food regulatory measures are:

a) *The protection of human life through the provision of safe foods for consumption*
b) *the protection of public health and safety*
c) *the regulatory solution is of least burden to industry, particularly small business, needed to achieve regulatory objectives*
d) *the provision of adequate information relating to food to enable consumers to make informed choices*
e) *the prevention of misleading or deceptive conduct*

2. In developing or reviewing food regulatory measures and variations of food regulatory measures, the Authority must also have regard to the following:

a) *that the regulatory measure relates directly to a food safety issue*[5]
b) *the need for standards to be based on risk analysis using the best available scientific evidence*
c) *the promotion of consistency between domestic international food standards*
d) *the desirability of an efficient and internationally competitive food industry*
e) *the promotion of fair trading in food*
f) *any written policy guidelines formulated by the Forum on Food Regulation for the purposes of this paragraph and notified to the Authority.*

Recommendation seven: That the FSANZ Board engages process flow experts who in partnership with industry can make recommendations that improve the FSANZ application process to one that focuses on growth and continuous improvement through process optimisation.

Recommendation eight: FSANZ should better use other regulatory instruments, such as guidelines or non-binding codes of practice, where such instruments would achieve the Authority's objectives.

[5] The insertion of this section relates to recommendation one.

Recommendation nine: In consultation with stakeholders, FSANZ develops a risk framework that would allow low-risk applications and proposals to undertake an expedited process for approval.

Recommendation ten: That should FSANZ pursue an expedited process for the adoption of risk assessments or new or amended standards from international authorities or comparable food safety regulators, that such processes should only be used in an application instigated by industry or with the agreement of industry as the regulated entity, and with a mechanism that would allow a regulated entity to request ministerial review of a proposed amendment.

Recommendation eleven: The Administrative Orders are amended to move responsibility of the *Food Standards Australia and New Zealand Act* to the Minister for Agriculture.

Recommendation twelve: That the final composition of the FSANZ Board after any streamlining ensures that there is adequate representation of Board members with industry experience to ensure a detailed understanding of the costs and impact of regulatory solutions proposed.

Recommendation thirteen: That FSANZ's statutory functions be amended to allow FSANZ to coordinate action to respond to food incidents and food recalls on its own initiative.

Recommendation fourteen: There is no legislative amendment to give FSANZ an enforcement function.

Recommendation fifteen: That decisions of the Food Ministers' Meeting are taken through consensus, reflecting the reforms announced in the recent Review of COAG Councils and Ministerial Forums.

Recommendation sixteen: The role of the Food Regulation Standing Committee be reviewed in conjunction with the principles of the Review of COAG Councils and Ministerial Forums, with a view to re-assigning its functions and abolishing this layer of administration.

About Alcohol Beverages Australia

Alcohol Beverages Australia (ABA) is the pan-industry body representing the many award-winning beer, wine, and spirit producers, distributors and retailers that operate legally and responsibly across Australia. Our role is to ensure that regulations are balanced so there is stability and certainty in the market to drive investment, while acknowledging and working with all stakeholders to minimise the harms associated with alcohol misuse. ABA advocates for evidence-based regulation and policies which target specific at-risk groups as the most effective way of changing behaviour associated with alcohol harm.

The alcohol industry in Australia is a complete value chain encompassing farming, manufacturing, supply chain operators, wholesalers, tourism operators, retailers and food and beverage businesses. Australian produced alcoholic beverages are served across the world and are synonymous with high quality and safety. While serving 16 million adult consumers across Australia, the alcohol industry adds $52 billion in economic value[6]. This includes[7]:

- $9.3 billion in taxes (including excise, WET and GST)
- $3.6 billion in exports
- $465 million in capital expenditure
- $29.2 billion in tourist spend on food and drink

[6] Alcohol Beverages Australia, 2020. 2030 Vision for the alcohol Beverages Industry. Pg. 12
[7] Alcohol Beverages Australia, 2020. 2030 Vision for the alcohol Beverages Industry. Pg. 12

Introduction

The opening paragraph of the Executive Summary of the draft Regulatory Impact Statement (RIS) into Modernising the Food Safety Australia New Zealand (FSANZ) Act notes that Australians and New Zealanders have confidence in the quality and safety of the food they eat. It is important to recognise that consumers must also have confidence in the certainty of an affordable food supply – a certainty that has been challenged in other parts of the world due to COVID19, but one which has remained robust in both Australia and New Zealand. These elements – quality, safety, affordability and certainty – rely not just on a strong, efficient and agile food standards system, but on a profitable, innovative and consumer-centric food and beverage industry. Its success and financial sustainability are essential both to the supply of safe and affordable food, but also as a key economic driver for both countries.

To ensure that the food industry remains profitable, the food safety regulator, FSANZ, must be responsive to the changing needs of the industry as it in turn adapts and responds to the changing needs of its customers. The food industry is the regulated entity. We are all consumers, and everyone benefits from first-rate, affordable and safe food; but it is the industry which is ultimately responsible for delivering it. It is the reputation of the industry that FSANZ is designed to protect through efficient and targeted regulation. The reputation of the food industry is not only paramount domestically, but also internationally, given that according to the Australian Food and Grocery Council, food and beverage exports were valued at more than $38.3 billion in the last financial year[8].

The original Terms of Reference (ToRs) into the review of the FSANZ Act, while quite broad, did emphasise some key principles. Its opening paragraph mandated consideration of "the economic efficiency of regulation, recognising the importance of the food industry…". It included consideration of the FSANZ assessment process to ensure it is "fit for purpose and outcomes based and promotes an efficient and internationally competitive food industry." It also mandated that "any proposed changes to the regulatory system imposes the least burden on business to achieve the stated objectives of the regulation and specific consideration is given to the impact on small business." This includes ensuring both FSANZ operations and its substantive regulatory decisions impose the least burden on business to achieve objectives.

As such, FSANZ's structure, operations and governance should be designed to ensure it is equipped to undertake its statutory remit without compromising the ongoing development of a competitive, responsible and efficient food industry. Any changes proposed by the RIS should be looked through this lens: to ensure consumers are confident in the safety of the

[8] Australian Food and Grocery Council, 2019. State of the Industry 2019 Report.

food supply, have adequate information to make informed choices, while maintaining a profitable industry that can keep food affordable.

Among the proposals in the RIS, there are some measures to improve the efficiency of the interface between industry and FSANZ, and some to reduce administrative practices and improve the regulator's productivity by taking a risk-based approach to decision-making. We support these efforts, sometimes with adjustments, and note these efficiencies will benefit all stakeholders over time. However, we oppose many parts of the RIS which stray far away from the ToR, including the significant expansion of its remit away from its food safety focus. As such, we will not be supporting Option 1, 2 or 3 at this time, until we have a better understanding of the final draft and whether the recommendations in our submission are addressed.

The Objectives and Functions of FSANZ

The draft RIS states, "The objectives and current functions of FSANZ are not clear"[9], and there is consideration of proposals to amend the FSANZ Act at s 3 (Object of the Act) and s 18 (Objectives of the Authority in developing or reviewing food regulatory measures).

S 3 | Object of Act

The object of this Act is to ensure a high standard of public health protection throughout Australia and New Zealand by means of the establishment and operation of a joint body to be known as Food Standards Australia New Zealand to achieve the following goals:

a. *a high degree of consumer confidence in the quality and safety of food produced, processed, sold or exported from Australia and New Zealand*
b. *an effective, transparent and accountable regulatory framework within which the food industry can work efficiently*
c. *the provision of adequate information relating to food to enable consumers to make informed choices*
d. *the establishment of common rules for both countries and the promotion of consistency between domestic and international food regulatory measures without reducing the safeguards applying to public health and consumer protection.*

S 18 | Objectives of the Authority in developing or reviewing food regulatory measures and variations of food regulatory measures

[9] Nous Group, 2021. Modernising the FSANZ Act. Pg 25.

1. *The objectives (in descending priority order) of the Authority in developing or reviewing food regulatory measures and variations of food regulatory measures are:*

    a. *the protection of public health and safety*
    b. *the provision of adequate information relating to food to enable consumers to make informed choices*
    c. *the prevention of misleading or deceptive conduct.*

2. *In developing or reviewing food regulatory measures and variations of food regulatory measures, the Authority must also have regard to the following:*
    a. *the need for standards to be based on risk analysis using the best available scientific evidence*
    b. *the promotion of consistency between domestic international food standards*
    c. *the desirability of an efficient and internationally competitive food industry*
    d. *the promotion of fair trading in food*
    e. *any written policy guidelines formulated by the Forum on Food Regulation for the purposes of this paragraph and notified to the Authority.*

A number of proposals for changes to the objectives are made:

A. <u>Public Health Protection</u>

It is uncontroversial that FSANZ's primary responsibility is to protect consumer health through addressing food quality and safety in preventing food borne illness and acute disease. At the time the FSANZ Act was passed, it was considered appropriate for FSANZ to regulate the food industry in matters relating to public health as it was then understood, i.e. to promote population health as it related to the goals articulated in s 3 of the Act. An example of this would be its regulations around mandatory fortification, where food manufacturers are required to add certain vitamins or minerals to specified foods. For example, FSANZ has regulated that manufacturers must add vitamin D to edible oil spreads; and thiamine and folic acid to wheat flour used for making bread. FSANZ advises that folate is essential for healthy growth and development, and there is a benefit to population health in mandatory fortification regulations.

Mandatory fortification is not a food safety issue and is not related to acute, post-consumption harms, as the absence of the added vitamins or minerals in the food does not make the food unsafe for consumption. In Australia, this fortification decision was interpreted under the broader remit of public health and safety. It is worth noting that in New Zealand, these types of measures are the responsibility of the Ministry of Primary

Industry, not the Ministry of Health[10] and as such were interpreted with a narrower lens and not mandated but made voluntary.

This interpretation of the FSANZ Act in Australia is at its heart why the Draft RIS suggests FSANZ objectives are not clear. It creates an inherent conflict between competing Objectives on food safety and "public health". This conflict has only grown greater over the passage of time with the concept of public health evolving over the last 30 years. As FSANZ is administered under the Department of Health, some stakeholders now interpret this Objective with a wide preventive health perspective, rather than the original intention of being related directly to providing public health benefits from a safe food regulatory system that protects human life through the provision of safe foods for consumption.

We do not believe the legislation should be amended to ratify this expanded perspective of public health. An ordinary reading of public health and safety would be to interpret the remit as aligning to the goals currently articulated in s 3 of the Act, that is, around the quality and safety of food, and the provision of adequate information to enable consumers to make informed choices.

ABA believes the more expansive interpretation of public health as it relates to food safety, into contemporary approaches to preventive health in addressing issues such as diet and obesity creates a number of significant problems:

- it is inconsistent with the focus of FSANZ's responsibilities.
- it shifts resources away from industry priorities around innovation and assessing applications,
- it duplicates the work of other government agencies, including at the state and territory level.

Should FSANZ be empowered to consider all aspects of food consumption including that which could adversely affect long term health through diet-related non-communicable disease and chronic illness, it would move beyond its current remit of ensuring consumers have access to adequate information to make informed choices, and will have a new ability to regulate food that is otherwise safe for consumption and meeting the needs and expectations of consumers to also encompass its composition, processing, packaging, sale, marketing and distribution for the purpose of "shaping population dietary and consumption trends[11]."

One such example of these new powers would allow FSANZ to prescribe mandatory reformulation of food manufacture and the setting of nutrient reformulation targets,

[10] Ministry for Primary Industries (2020) *Food Safety Regulatory System* <https://www.mpi.govt.nz/dmsdocument/34731-Food-Safety-System-pdf-with-logos>
[11] Nous Group, 2021. Modernising the FSANZ Act. Pg3

irrespective of consumer demand. If the Government expands the scope of FSANZ's remit into preventive health and obesity, it will move the dial and have the regulator policing individual's food choices by reformulating its contents.

This is not a strategy that will lead to an internationally competitive food industry as it ignores consumer preferences and the concept of informed choice. Additionally, we note that food safety legislation of comparable countries, such as Canada, the United States, the United Kingdom and Japan, does not include objectives for their respective food safety standards systems around long-term public health or diet-related chronic disease. The focus of these countries' standards remains on the management and prevention of food borne illness and the prevention of acute harms.

ABA does not support changing the wording in s 3 or s 18 of the Act to broaden the scope of public health. FSANZ is already empowered under s 3(c) to ensure consumers have adequate information to make informed choices, including information about longer-term health and chronic illness as a result of diet, and this has led to the development of health star ratings, as an example.

"Public health" should be only interpreted under its original intention which is to first satisfy the primary objective of being related to food safety. Only when this threshold question has been adequately answered should FSANZ have consideration for matters of public health. The broader remit around the promotion of healthy eating, diet and exercise is already actioned by education, health departments and preventive health agencies, including at the state and territory level.

Instead of expanding the definition of public health as the draft RIS proposes, the final RIS should seek to tighten the definition and remove any ambiguity of FSANZ core role. This will create significant efficiencies as FSANZ will only be tasked to consider matters that must first pass a 'food safety' test.

Recommendation one: The only case for when the lens of public health can be considered is after first satisfying that the issue relates to the primary purpose of FSANZ which is food safety. This will remove all ambiguity and ensure a meaningful and appropriate work load for FSANZ officials. This should be achieved by amending section 18 to require *that the regulatory measure relates directly to a food safety issue.* See recommended wording of section 18(2) incorporated under recommendation six.

B. Trade and an efficient and internationally competitive food industry

Through the terms of reference the Government has clearly recognised the importance of an efficient and internationally competitive food industry, and its need to be export focused

as a key driver of the Australian economy. It makes sense for this objective to be explicitly articulated as a core goal for FSANZ in the legislation.

This would align the objectives of FSANZ with Codex. The Codex Alimentarius is the collection of internationally adopted food standards and related texts presented in a uniform manner. These standards aim at protecting consumers' health and ensuring fair practices in the food trade. The publication of the Codex Alimentarius is intended to guide and promote the elaboration and establishment of definitions and requirements for foods to assist in their harmonisation and in doing so to facilitate international trade. Given the draft RIS later considers whether FSANZ should have the power to automatically adopt or consider Codex standards, there is great logic in adding trade to the objectives of the Authority in the Act.

The draft RIS also proposes a new s 18 factor FSANZ should have regard to in developing regulatory measures, i.e. "the regulatory impact on industry, particularly small business." ABA believes this recommendation should go further, by adding that any new or amended regulatory measure should be the least burden for business necessary to achieve its objectives. This is consistent with the ToRs and with the aim of promoting an internationally competitive food industry. It would strengthen the relationship between FSANZ and industry with confidence that the costs of regulatory imposts have been fully considered, and alternatives calculated to ensure no excessive burden is necessary to ensure food safety or informed choice.

ABA notes that regulatory solutions proposed by FSANZ may reflect antiquated behaviours of either industry or consumers, and that the adoption of new technologies or practices may provide better alternatives for FSANZ to achieve its objectives. A clear example is around how consumers obtain information about food selection. When the FSANZ Act was passed, few consumers would have been aware of digital technology, with the internet still being used only by specialists, and the myriad of digital and social tools now used by consumers yet to become available. Imparting information to consumers was primarily done through the printed label, given the lack of alternatives outside of expensive advertising campaigns, which would have been impractical in all but the most exigent of circumstances.

Fast forward to 2021, and consumers have unlimited information about unlimited subject matter in the palm of their hands, usually via smart phones. Consumers use Siri, Alexa, or Google to ask questions and receive answers. There are apps about nutrition, diet, weight loss, healthy recipes and novel foods. Many of these apps have information about the energy content, nutritional information and ingredients of food already imbedded, allowing consumers to access them to make informed choices about their diet, instead of using

printed labels. The draft RIS noted that FSANZ could potentially consider the broader use of technology when stipulating labelling requirements in food standards[12].

Recommendation two: That "an efficient and internationally competitive food industry" be included as a s 3 objective of the Authority.

Recommendation three: That an additional provision be included in s 18 (1) that FSANZ must have regard to in food regulation, namely that "the regulatory solution is of least burden to industry, particularly small business, needed to achieve regulatory objectives."

C. Criteria for ministers to request a review of a draft regulatory measure

The draft RIS notes that under current practice, Food Ministers can reject a regulatory measure by registering their concerns, based on criteria (not in the Act, but in the Food Regulation Agreement) which is different to the criteria FSANZ must consider as contained in the Act. The draft RIS proposes amending the Act to legislate criteria that Food Ministers must meet to request a review, and that this criteria should be harmonised with the criteria set for FSANZ in s 18 of the Act. ABA does not support this proposal.

ABA notes that it is the role of Ministers to bring a whole of government perspective to decision-making, and that Ministers will and should have regard to the broader implications of regulatory proposals that are beyond the remit of FSANZ. The legislation should not encumber that ministerial perspective. Issues around bureaucratic bottlenecks, particularly for low-risk decisions, can be addressed elsewhere (see the section on Risk-based Decision-making), but we should not have a situation where Ministers are unable to request a review given they are ultimately accountable for the food standards system.

Recommendation four: There is no legislative amendment which will encumber the ability of the Food Ministers' Meeting to request a review of a FSANZ proposal, including the proposal to harmonise the criteria under the Food Regulation Agreement with s 18 of the FSANZ Act.

D. Food Sustainability

The draft RIS notes that food businesses must comply with multiple regulatory schemes, and that there is a web of interconnected agencies that have responsibility for food. The proposal to introduce a new objective around food sustainability into FSANZ's remit will further increase that complexity and increase duplication into the bureaucracy. The draft RIS proposes the inclusion of a new objective for FSANZ under the term food sustainability, with potentially quite an expansive interpretation to include environmental sustainability,

[12] Nous Group, 2021. Modernising the FSANZ Act. Pg 64.

agricultural practices, packaging, climate change, biodiversity, aquaculture, soils and waterways. This is *prima facie* not the role of a food agency responsibility for ensuring food safety and the prevention of acute food borne illness. The responsibilities fall largely under the administration of the Department of Agriculture, Water and the Environment (DAWE) and their State / Territory equivalents, and no evidence is provided to explain why these Departments are not carrying out these functions efficiently and effectively at present. The draft RIS is silent on removing these responsibilities from DAWE, so presumably such a proposal would further complicate the regulatory burden for industry by duplicating these responsibilities across multiple agencies and portfolios, and will significantly drive up costs. This would thoroughly undermine the objectives of the ToRs to ensure changes to the FSANZ Act would promote an efficient and internationally competitive food industry.

With the review finding that FSANZ already has challenges in resourcing to meet its core purpose, proposed changes to expand FSANZ into areas other than food safety must be excluded from the final RIS.

Recommendation five: There is no legislative amendment to include objectives of food sustainability.

E. Prioritisation of objectives under the Act

Under the current wording of the Act, the s 3 goals for FSANZ are noted, without any particular priority; in contrast, s 18(1) objectives that FSANZ uses to develop regulatory measures are listed in priority order, with additional measures list in s 18(2) in no particular order. ABA believes there are strong grounds for a common approach between the two sections, and recommends both reflect an order of priority. This would be consistent with current food standards operations, for example, as reflected in the Overarching Strategic Statement for the Food Regulatory System, which prioritises food safety and direct, acute and immediate threats to health about all else.

As our earlier submissions make clear, this would also remove the ambiguity and lack of role clarity concerning "public health" by having FSANZ first regard to food safety.

Recommendation six: The order of priorities for s 3 and s 18 of the Act be amended (as per underlined passages) to read:

S 3 | Object of Act

The object of this Act is to ensure a high standard of public health protection throughout Australia and New Zealand by means of the establishment and operation of a joint body to be known as Food Standards Australia New Zealand to achieve the following goals (in descending priority order):

a) a high degree of consumer confidence in the quality and safety of food produced, processed, sold or exported from Australia and New Zealand
b) an efficient and internationally competitive food industry
c) an effective, transparent and accountable regulatory framework within which the food industry can work efficiently
d) the provision of adequate information relating to food to enable consumers to make informed choices
e) the establishment of common rules for both countries and the promotion of consistency between domestic and international food regulatory measures without reducing the safeguards applying to public health and consumer protection.

S 18 | Objectives of the Authority in developing or reviewing food regulatory measures and variations of food regulatory measures

1. The objectives (in descending priority order) of the Authority in developing or reviewing food regulatory measures and variations of food regulatory measures are:

a) <u>The protection of human life through the provision of safe foods for consumption</u>
b) the protection of public health and safety
c) <u>the regulatory solution is of least burden to industry, particularly small business, needed to achieve regulatory objectives</u>
d) the provision of adequate information relating to food to enable consumers to make informed choices
e) the prevention of misleading or deceptive conduct.

2. In developing or reviewing food regulatory measures and variations of food regulatory measures, the Authority must also have regard to the following:

a) <u>that the regulatory measure relates directly to a food safety issue</u>[13]
b) the need for standards to be based on risk analysis using the best available scientific evidence
c) the promotion of consistency between domestic international food standards
d) the desirability of an efficient and internationally competitive food industry
e) the promotion of fair trading in food
f) any written policy guidelines formulated by the Forum on Food Regulation for the purposes of this paragraph and notified to the Authority.

[13] The insertion of this section relates to recommendation one.

Risk-based decision-making

The draft RIS proposes amendments to the FSANZ Act to support a more efficient and effective process to develop food regulatory measures, with risk being the key driver of process. In principle, ABA supports the use of risk-based approaches to determine the most appropriate pathways to a regulatory decision, in order to fast track low-risk, minor variations to food standards without compromising the objectives around food safety and an internationally competitive food industry.

We are, however, disappointed that much of the focus of the draft RIS has been on improving efficiency for the government, and a process to look at efficiency drivers through reform for the benefit of industry has been of secondary concern. For example, at p 30, the draft RIS considers the statutory process for creating and varying food regulatory measures via applications and proposals, and calculates the impact this has on FSANZ to process them. However, there is no calculation of timeframes or cost for industry in preparing applications, or in implementing changes.

The segmentation of FSANZ applications into ten stages application creates significant bottlenecks, increases costs to industry and taxpayers, and delays timely updates to the Food Standards Code to the detriment of consumers. While there are some welcome proposals around fast-tracking low risk changes, there has not been consideration of procedural improvements to major changes.

Business has a great deal of experience in improving process flows through methods such as Lean Six Sigma. It is disappointing that process flow subject matter experts were not brought in as part of the review. This reflects a missed opportunity to deliver against the Terms of Reference.

Recommendation seven: That the FSANZ Board engages process flow experts who in partnership with industry can make recommendations that improve the FSANZ application process to one that focuses on growth and continuous improvement through process optimisation.

ABA supports the use of other regulatory instruments to assist in meeting the objectives of the Authority, particularly around the provision to ensure adequate information to consumers to make informed choices. The use of non-binding guidelines to provide advice to industry on meeting obligations would be useful to both industry and enforcement agencies, and in particularly should be written with small business in mind who may not have the resources or expertise to interpret new or amended food standards or how best to implement them. Developing these guidelines as part of the process in ensuring that

regulatory solutions are of least impact to industry and small business, as per our recommendation four, could create useful synergies.

The existing user guides are rather simplistic and don't presently provide significant guidance to industry. A system similar to the ATO's Taxpayer Ruling system could be an option which if translated to food safety would ensure industry as the regulated entity is on safe ground and avoid prosecution from state authorities by relying on a 'ruling' for technical issues, but still have the ability to challenge the matter if they disagree with an interpretation. A similar system could be implemented, noting that FSANZ does not and should not have enforcement powers.

We also support FSANZ being able to recognise voluntary measures or codes of practice. Unlike legislative instruments, codes of practice should not be mandatory or enforceable, but can reflect an agreed approach that has the support or been adopted by the majority of industry including by market share. These codes can then serve as a demonstration of best-practice by businesses to the market, but also give flexibility to small business to adopt these initiatives over time as they grow into more profitable entities.

These codes of practice should not be around the prevention of acute food borne illness, which require binding and mandatory instruments, but in areas like the provision of general, non-essential information to consumers, where the information may already be available on the majority of the products in market, and/or where consumers would otherwise have access to it, or know how to find it, in any case. FSANZ's adoption or creation of these codes of practice would signal their importance to stakeholders and give impetus to industry stakeholders to adopt them, but allow flexibility for smaller businesses and new entrants to the market.

Recommendation eight: FSANZ should better use other regulatory instruments, such as guidelines or non-binding codes of practice, where such instruments would achieve the Authority's objectives.

ABA also supports, in principle, the proposal that a non-legislated risk framework could drive the process in relation to applications and proposals, noting that a provision for urgency should be retained. Such a framework should ensure that low-risk modifications or new standards should expedite processes and allow these products into the market in a timely manner. Should this proposal be accepted, stakeholders should be consulted separately on the creation of an agreed risk framework, including around criteria, thresholds and processes, and any approaches to cost recovery that might flow from the changes to process.

Recommendation nine: In consultation with stakeholders, FSANZ develops a risk framework that would allow low-risk applications and proposals to undertake an expedited process for approval.

The draft RIS asserts that another solution to minimise the administrative burden for industry to compile evidence to support a comprehensive risk assessment would be in FSANZ had a statutory ability to recognise and adopt international risk assessments. This could be either as part of an application or proposal process, and/or through the automatic adopting of new standards from selection international regulatory systems, or with minimal checks to expedite consideration of standards that have been approved in a comparable overseas regulator for lower-risk amendments.

In principle, ABA supports these proposals with one caveat: if their purpose is to alleviate the administrative burden for industry to compile evidence, then these processes should only be utilised at the request of or with the consent of industry as the regulated entity, and with a mechanism that would allow a regulated entity to seek ministerial review of an amendment. This would not remove the right of third parties to make an application under a non-expedited process, but it would prevent industry from being excluded through an expedited process when it hasn't been the instigator of the request for a regulatory amendment. This would ensure that industry is satisfied with the experience of a food standards in an overseas jurisdiction, that problems have not emerged as a result of its adoption overseas, and that any relevant experience by industry in that overseas jurisdiction was not excluded in any FSANZ determination.

Recommendation ten: That should FSANZ pursue an expedited process for the adoption of risk assessments or new or amended standards from international authorities or comparable food safety regulators, that such processes should only be used in an application instigated by industry or with the agreement of industry as the regulated entity, and with a mechanism that would allow a regulated entity to request ministerial review of a proposed amendment.

Governance

ABA notes that under the Government's current Administrative Orders, the Department of Agriculture, Water and the Environment is responsible for agricultural, pastoral, fishing, food and forest industries; primary industries research including economic research; administration of export controls on agricultural, fisheries and forestry industries products; and food security policy and programmes. It is the primary regulator of the food industry, and has the more complete understanding of food production, supply chain and food security issues of any portfolio in government. In Australia, FSANZ develop standards for primary production and processing and for food hygiene. It sets residue limits for

agricultural and veterinary products. FSANZ also supports the Department of Agriculture, Water and the Environment in its duty to inspect imported foods.

We note that in New Zealand, the primary responsibility of food safety and standards lies between FSANZ and the Ministry of Primary Industries, not the NZ Ministry of Health. It is clear that the day-to-day synergies are more significant between FSANZ and the Department of Agriculture, Water and the Environment rather than the Department of Health; and as such the Minister for Agriculture should hold primary responsibility for the FSANZ Act in Australia, with other jurisdictions having their Primary Industries / Agriculture Ministers holding the lead position on the Ministerial Food Forum.

Recommendation eleven: The Administrative Orders are amended to move responsibility of the *Food Standards Australia and New Zealand Act* to the Minister for Agriculture.

In order to make FSANZ more agile, resilient and fit-for-purpose, the draft RIS proposes streamlining FSANZ's governance and operations through amendments to the composition and selection of the FSANZ Board. We note the proposal to create a more skills-based Board, a consolidation of the Board to eight people, and a move to virtual Board meetings. ABA does not have a strong view on these proposals; however, in any recalibration of the FSANZ Board, ABA would like to see:

- An increase in representation in the Board of members with direct experience in the food industry. As industry is the regulated entity, we believe the Board should have a number of members (we suggest 50%) who can appreciate the time, cost and complexity of food safety regulation on business, including small business, and that this experience would help to ensure that regulatory decisions are focused on the least burden to industry required to achieve objectives;
- Ministers remain responsible for the final sign off on all Board appointments, as ministers have the duty to consider the necessary balance and skills-set of the Board necessary to ensure FSANZ's meets its objectives, taking into consideration whole-of-government perspectives.

We note that the draft RIS has elected not to make recommendations about new cost-recovery mechanisms for industry-initiated work, but that a separate targeted review on funding arrangements may be warranted, potentially to include whether a contribution by state and territory governments is justified.

Recommendation twelve: That the final composition of the FSANZ Board after any streamlining ensures that there is adequate representation of Board members with real-world industry experience to ensure a detailed understanding of the costs and impact of regulatory solutions proposed.

Other issues

There are a number of additional proposals raised by the draft RIS where ABA offers comment, as well as a couple of additional matters we raise that we note part of the draft RIS.

A. FSANZ's role in food incidents and recall

ABA supports the proposal that FSANZ has a statutory function to, either in consultation with states and territories, or on its own initiative, the ability to coordinate action and respond to food incidents and food recalls. We would support this as a shared power with states and territories, and not to be introduced to replace the power of states and territories.

Recommendation thirteen: That FSANZ's statutory functions be amended to allow FSANZ to coordinate action to respond to food incidents and food recalls on its own initiative.

B. Enforcement

ABA does not support FSANZ's remit to be expanded into the area of enforcement, either with specific enforcement functions for select food standards, or in the role as a single, bi-national regulator. We do not believe the draft RIS has demonstrated a problem with the current enforcement responsibility framework, either at the state and territory level, or the federal regulators, such as the ACCC, who enforce against deceptive and misleading claims by companies including on issues of food safety. We believe the proper role for FSANZ is to undertake more education for industry on how to adhere to new food standards through non-binding guidance notes or other advice, and that enforcement agencies could either contribute to these notes or use them as a basis for enforcement-related decisions.

Recommendation fourteen: There is no legislative amendment to give FSANZ an enforcement function.

C. Food Ministers' Meeting Decisions

ABA notes that under the FSANZ Act, decision making of the Food Ministers' Meeting is not prescribed, but it must be consistent with the Food Regulation Agreement (FRA). According to Part 3 – Administrative Arrangements – under the FRA, decisions are taken through simple majority voting by each jurisdiction. We believe that in light of the Review of COAG Councils and Ministerial Forums, which says that except where otherwise specified in legislation, decisions of ministerial forums should be done by consensus[14].

[14] Conran, P. 2020. *Review of COAG Councils and Ministerial Forums*

As FSANZ falls within the remit of the Review, it is incumbent on the current process to adopt this recommendation to ensure that best practice is being undertaken and that the Food Ministers' Meeting is adhering to recommendations endorsed by National Cabinet. We do not believe there are good reasons why this principle should not apply for decisions by the Food Ministers' Meeting and recommend the Food Regulation Agreement be amended to bring it into line with the COAG review outcomes.

Recommendation fifteen: That decisions of the Food Ministers' Meeting are taken through consensus, reflecting the reforms announced in the recent Review of COAG Councils and Ministerial Forums.

D. The role of the Food Regulation Standing Committee

ABA believes the role and Terms of Reference for the Food Regulation Standing Committee (FRSC) should also be reviewed and brought into line with the Review of COAG Councils and Ministerial Forums. Under the FRSC ToRs:

> *As part of its overarching purpose FRSC:*
>
> - *manages projects and resource to deliver on agreed Forum and FRSC priorities;*
> - *sets priorities and undertakes annual planning for the whole of System;*
> - *monitors and measures performance of the System;*
> - *conducts environmental scanning;*
> - *directs intelligence gathering; and*
> - *provides advice to inform strategic planning for the System.*

We believe the current operations of the FRSC simply create an additional layer of administration, and that these functions should be the responsibility either of the Food Ministers' Meeting, or of FSANZ itself. We believe the principles of the COAG review reflected a desire to abolish unnecessary administration, and that the Department can provide meeting support while Ministers set priorities (including the agenda, another COAG reform principle) and monitors performance, and FSANZ is responsible for the other functions.

Recommendation sixteen: The role of the Food Regulation Standing Committee be reviewed in conjunction with the principles of the Review of COAG Councils and Ministerial Forums, with a view to re-assigning its functions and abolishing this layer of administration.