

## **POLICY OPTIONS FOR THE REGULATION OF SPECIAL PURPOSE FOODS**

The Consultation Paper sought comment on the intent of Part 2.9 – Special Purpose Foods, and specifically, on the working definition of special purpose foods, and to consider options for the development of a policy guideline.

The review of the current intent of Part 2.9 – Special Purpose Foods is required to ensure that all three High Order Policy Principles are met: (a) the protection of public health and safety; (b) the provision of adequate information relating to food to enable consumers to make informed choices; and (c) the prevention of misleading or deceptive conduct.

### **1. What is your understanding of the current intent of Part 2.9 – Special Purpose Foods?**

The Public Health Association of Australia's (PHAA) understanding of the current intent of Part 2.9 'Special Purpose Foods' is that it is to protect public health and safety through the regulating of foods that are designed to assist specific individuals in meeting their dietary requirements, where these cannot be met by consuming general purpose foods. While this is the intent of the current standard, there is a mismatch with how this intent is actually represented in the market place. For example, Milo, sports drinks and foods and toddler formulas are widely marketed to the general population.

### **2. Please comment on the adequacy of the current Australian and New Zealand regulatory system to identify and appropriately regulate special purpose foods.**

The current Australian and New Zealand regulatory system is not adequate to fully and appropriately regulate special purpose foods. One major reason for this is the undermining of the system in Australia by the Trans Tasman Mutual Recognition Arrangement (TTMRA) which effectively allows for a range of these special purpose foods to be introduced and marketed to the general public.

Another major factor is the lack of regulation relating to the marketing of these foods which effectively allows them to be promoted as general purpose foods. The one exception to this relates to Standard 2.9.1 Infant Formula Products, where there are strict regulations for the representation of these products. However there are no such restrictions for all other special purpose foods currently covered by Part 2.9.

Likewise there is no regulation prohibiting the mixing of these special purpose foods with general purpose foods. Hence we have seen the development and marketing of a

range of foods which are mixtures and thereby the overall intent of this part of the FSC is weakened.

Additionally there are loopholes in the current system which allow for foods to be classified as special purpose foods even though in their manufactured form they do not meet the literal requirement of the standard, eg Milo in its purchased form (as a powder) does not meet the protein or energy specifications of standard 2.9.3 and only does so when the product is made with milk according to the directions.

**3. Is the proposed definition of Special Purpose Foods adequate to capture those foods or groups of foods you consider to be special purpose foods? Why or why not? What refinement, if any, would you suggest?**

The proposed definition provides a succinct and relatively clear outline of what is actually being proposed, however, the PHAA has some concerns that the definition is still open to interpretation and hence will still allow for breaches to occur.

It is necessary to further clarify what is meant by vulnerable groups. For instance, pregnant and lactating women and infants 1-3yrs have additional nutritional requirements, but in general cases these can be met by the consumption of a healthy diet comprised of general purpose foods. It is only when there is a condition that restricts normal food consumption (eg swallowing difficulties, absorption abnormalities etc) that a special purpose food may be required.

There is also a need to ensure that special purpose foods are used where there is genuine “need” rather than to satisfy the requirements of those who “choose” not to eat (for reasons of time or lack of interest) a nutritionally adequate diet.

Additionally, as in the case of the European Community definition, there should be reference to the need for special purpose food to be clearly distinguishable from general foods.

Also see point 11 re health claims.

**4. Should the policy guidance require the special purpose of the food to be stated and articulated clearly by the manufacturer including reasons why the particular dietary requirement cannot be met by the normal diet?**

Yes. This is essential to ensure that there is adequate information to enable consumers to make informed food choices and for regulators to adequately enforce. The PHAA would therefore strongly encourage specific labeling identifying the target group and the specific need that is being met and that this statement be prominent on the label in large enough font size to be clearly read. Such labeling would also signal to general consumers that these foods are not appropriate substitutes for general foods. This would assist nutrition educators in dealing with some of the confusion that currently exists in relation to food choices.

**5. Are you aware of any specific trans-Tasman requirements or current provisions that impact on the intent of Part 2.9 - Special Purpose Foods.**

As mentioned previously, TTMRA combined with the NZ Dietary Supplement regulations allow a number of foods and drinks into Australia that should be regulated as special purpose foods but are currently not. This is particularly relevant to Sports Foods and these should be regulated under Standard 2.9.4 in order to ensure their appropriate use.

Additionally as previously mentioned there is no prohibition on the mixing of foods covered by the FSC and this needs to be addressed to ensure that general and special purpose foods are not combined in any way.

**6. Please comment on the impact of international regulatory approaches on the regulation of Special Purpose Foods under the Code.**

The objectives of food standards are firstly the protection of public health and safety. Good nutrition is fundamental to public health and as such foods that are required for a special purpose by specific population subgroups should be adequately implemented by the Code. Australia takes pride in the wide range of nutritious foods available and needs to protect optimum dietary habits, at times this will mean not harmonizing with international regulatory approaches that are less stringent than those in Australia.

**7. Are you aware of any particular issues with the current labelling of special purpose foods? How could these be addressed?**

Some formulated supplementary foods are currently using health claims. One example is Milo with added iron, iodine, and Protomalt™ which is not only labelled as B-Smart™ but claims that the iodine and iron are for “mental development, focus and concentration”. Standard 2.9.3 permits the addition of iodine to formulated supplementary foods whilst there are only limited permissions for iodine in general purpose foods.

Current labelling of infant formula, follow-on formula and toddler formula are presented as Stage 1, 2 and 3 with words and pictures so that parents perceive a natural progression from one to the other. These products are also placed in the same area in the supermarkets and pharmacies shelves to promote this stage relationship.

There are examples of where special purpose foods are in a segregated section of the supermarket (eg weight control meal replacements) and this provides a better signal to consumers that these are not general purpose foods.

**8. Can you identify any instances where access to special purpose foods should be considered? If so, how? Why?**

Yes, in all instances. Special purpose foods are developed for a specific need with a specific target audience, it is not appropriate that the general population has unlimited and uncontrolled access to these foods. This is particularly the case for foods which will be regulated under the new Standard 2.9.5 Foods for Special Medical Purposes,

and an appropriate availability control would be limiting them to hospitals and pharmacies.

**9. If you believe there should be access controls, what sort of controls should these be and at what point should these controls be applied?**

As indicated above.

**10. Can you identify any particular issues with the advertising/marketing of special purpose foods? Can you suggest any approaches to address these issues?**

In many cases, special purpose foods which are advertised and marketed to the general population have an unfair marketing advantage over similar foods which are not positioned as special purpose foods. For example, Milo® is targeted at children and marketed as ‘nutritious’ energy when most nutritionists would challenge that claim.

Weight control foods are heavily advertised. The Biggest Loser program has developed its own brand of weight loss products which are heavily advertised during the program. This is also inappropriate marketing to an audience where many are teenagers and adolescents. These products are marketed on the website for the program as being suitable when people ‘find making healthy choices stressful or overwhelming’ or ‘don’t have time to cook or prepare healthy food’. This does not help to promote the development of healthy eating habits that would sustain long term weight loss or maintenance. It is also not in keeping with the intent of the standard for special purpose foods.

There are many other examples of products being inappropriately marketed and no doubt these will be identified in many other submissions.

**11. Please comment on any issues in relation to the intent of Part 2.9 - Special Purpose Foods and any relevant policy guidance.**

The ability of food manufacturers to develop special purpose foods with higher than permitted general food nutrient fortification has the potential to undermine the integrity and intent of the policy guidance and regulation of fortification of foods with Vitamins and Minerals. We are aware of instances where manufacturers will deliberately attempt to alter nutritional profiles to meet protein and energy criteria for special purpose foods with the intent of then being able to fortify these foods more generously than if they were to manufacture a general purpose food. The resulting food would then be marketed as a general purpose food (eg, highly fortified yoghurt).

The draft nutrition, health and related claims standard (P293) is applicable to both general and special purpose foods. Currently the only special purpose foods not permitted to carry health claims are infant formula products. Unlike general purpose foods, special purpose foods do not have to meet the proposed nutrient profiling scoring criteria to carry a health claim. This means the current and future use of health claims on formulated supplementary foods high in sugar (eg Milo), fat and/or sodium which are marketed as general purpose foods can mislead consumers in relation to

their nutrient quality and can also disadvantage other food manufacturers who endeavour to abide by the food code.

In addition, there is potential for special purpose foods to be misconstrued as foods which help to alleviate or treat a medical condition. It is therefore important then to ensure:

1. that the definition of special purpose foods make it explicit that these foods are not therapeutic foods; and
2. that health claims are not used to imply the use of these foods for this reason.

**12. Please comment on any issues in relation to maintaining clarity and consistent risk-based regulatory decisions at the food-medicine interface.**

It is important to ensure that it is well understood that these foods are for the purpose of providing nutrition rather than being to treat a disease or disorder.

**13. Are there any foods currently regulated under Part 2.9 that you think should not be considered as Special Purpose Foods? If so, why?**

We have previously given example of foods such as Milo, sports drinks and toddler milks which are marketed to the general population to counter poor eating habits or as a nutritious snack. Therefore they can no longer be considered special purpose foods.

**14. Can you identify any additional issues for public health, consumers, industry and government relating to Special Purpose Foods?**

Many of the current examples undermine current recommendations and guidance on healthy eating eg the Australian Guide to Healthy Eating and the Australian Dietary Guidelines, they add to consumer confusion and they waste precious time and resources in community and public health nutrition efforts.

An additional aspect to consider is enforcement of the regulations. It is apparent that there is currently limited enforcement which may be the result of time limitations or general confusion as to what is or is not a special purpose food. It will be essential to ensure that enforcement agencies have clear guidance to assist with their deliberations.

There may be negative public health impacts of the over-consumption of highly fortified foods by the general population. At a time when there is an increasing number and amount of vitamins and minerals and other substances being added to the general food supply, there is need to monitor the intake of both special purpose foods and fortified general purpose foods. This is to ensure that the potential negative cumulative effects of repeated consumption of these substances can be determined.

Because of potential costs to industry it is important not to 'grandfather' generally promoted special purpose foods and continue the unfair market advantage that these foods have enjoyed for too long. Resistance due to costs associated with new labelling should not be entertained as this could easily be incorporated with the many self applied label changes that are apparent on a regular basis.

**15. Which policy option do you prefer and what are your reasons for this preference?**

The preferred is Option 2, as long as the above points are given due consideration.

**16. Please provide any examples, and data if available, of the risks, benefits and costs that might arise as a consequence of the policy options explored in this paper.**

The cost to non-target population of purchasing unnecessary special purpose foods marketed to the general population and the potential health cost of inappropriate dietary intake. This would include the potential for increasing energy intake (because of their nature, special purpose foods are high in energy) in an already obese society.

**17. Are there any other comments you would like to make about the issues discussed in this paper? Please describe your reasons for raising them and offer solutions where possible.**

To set the context for determining the intent of the Policy it would be useful to understand the extent of the current and future need for special purpose foods. This would require effective monitoring so that future reviews would be more evidence based.

In the proposed draft policy principles, under the definition of special purpose foods, there are a number of key elements for the proposed definition of special purpose foods. The second point of these key elements raises the issue of nutritional vulnerability which claims to arise from situations where people are *unable* to meet their normal dietary requirements. Unable is an inappropriate word in this context as it would include issues of food security and instances where people are disinclined to eat a healthy diet. It is important to then clarify what the actual inability stems from.

Also in the proposed draft policy principles, the second point under higher order principles makes reference to any written policy guidelines formulated by the food regulation council. The PHAA believes that any relevant food and nutrition policy eg Dietary Guidelines, should also be included as a matter of course.