Confectionery Manufacturers of Australasia Limited

31 July 2008

Regulatory Burdens: Manufacturing and Distributive Trades
Productivity Commission
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Canberra City ACT 2601
By email: regulatoryburdens@pc.gov.au

Dear Sir/Madam

Productivity Commission Annual Review of Regulatory Burdens on Business – *Manufacturing & Distributive Trades* – Draft Research Report

The Confectionery Manufacturers of Australasia Limited (CMA) welcomes the opportunity to comment on the Productivity Commission Draft Research Report on regulatory burdens on business in the manufacturing and distributive trades sector. The CMA also appreciated the opportunity to attend the Productivity Commission roundtable for the food manufacturing regulatory section held in Canberra on 16 July and looks forward to the regulatory reforms recommended by this process providing a less burdensome food regulatory environment in order to raise productivity. The challenge remains for this review process, as for others before it, that real and significant reductions in red tape are achieved.

Draft responses in the food manufacturing sector

The CMA is in general support of the five overarching concerns identified by the Productivity Commission as the areas to focus the regulatory reforms in the food manufacturing sector, resulting from this review:

- *Inconsistency in food regulation.*
- *Delays in implementing and amending food standards.*
- *Improving the operations of the Australia New Zealand Food Regulation Ministerial Council.*
- *Problems in the regulation making process.*
- *Food regulation and public health.*

Broadly, the CMA will leave these overarching recommendations to the Australian Food and Grocery Council (AFGC) to provide comment on and as such endorses their position.

Specifically, however the CMA supports the need for improving the operations of the Australia New Zealand Food Regulation Ministerial Council by requiring: (1) more than one jurisdictional vote to trigger a review of a draft amendment of the Food Standards Code prepared by Food Standards Australia New Zealand; and (2) explicit justification linked to the criteria specified in Part III of the Food Standards Agreement to initiate a review.

Jurisdictions should be encouraged to engage more fully in the review process from its inception. This practice would lead to more robust and fuller consultation, a greater level of confidence by jurisdictions in the process and ultimately should reduce the need to initiate reviews late in the process at the Ministerial Council stage unnecessarily delaying the process. Members of the Ministerial Council should also be required to provide an explicit justification linked to the criteria in the Food Standards Agreement to afford stakeholders with a greater level of transparency in the system. Currently the justifications are weakly articulated and there is a perception that political rationale may be disguised.

Other issues

There were a number of other issues raised by the Productivity Commission at the *Food Regulation* roundtable on 16 July, emanating from the review including: introduction of average quantity system measurement and omission of *sugarfree* claims. The CMA remains particularly interested in both issues and importantly achieving satisfactory outcomes.

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AQS

Whilst the COAG has charged the National Measurement Institute (NMI) with implementation of national trade measurement legislation by 1 July 2010 and this has been supported by the Victorian Competition and Efficiency Commission (VCEC) review, the question remains whether the implementation will be achieve or just completion of the regulatory process by the nominated date. The CMA is keen to ensure that the processes are complete that enable industry adoption by 1 July 2010, or earlier, as there has already been a long standing commitment to adopting AQS. AQS is not ground breaking legislation, in fact Australia lags most key trading partners in its uptake. The CMA strongly encourages Australia to align with New Zealand's AQS system, unless there is good reason for deviation. International regulatory alignment should be a focus for consistency and minimising regulatory barriers to trade.

Sugarfree

The CMA is encouraged by the Productivity Commission's interest in the confectionery industry's concerns with regard to retaining *free* terminology defined in food law, in particular in the Australia New Zealand Food Standards Code and the potential impact faced by the industry deviating from this course, as recommended by FSANZ's P293 Final Assessment Report on nutrition, health and related claims, will have, in particular *sugarfree* and *gluten free* (threshold discussed in length by the AFGC response).

Sugarfree is used to describe products in which the sugar has been totally replaced by sugar replacers (ie polyols) and intense sweeteners and comply with the Code of Practice on Nutrient Content Claims in Food Labels and in Advertisements (CoPoNC), developed in 1994, that sets a maximum level of 0.2g sugar(s) per 100g of solid food.

Throughout the protracted consultations P234 followed by P293, the CMA has consistently argued that *sugarfree* nutrient content claims be retained as per the CoPoNC in food law. P293, which is now the subject of a first review initiated by the Ministerial Council, recommends the omission of *free* claims (with the exception of a few), including *sugarfree*, from the proposed draft Standard 1.2.7 – Nutrition, health and related claims preferring such defer to consumer protection/fair trading legislation. Instead, FSANZ proposes the alternate *% sugarfree* claim (meets the conditions for a nutrient content claim about *low sugar*, ie contains no more sugars as standardised in clause 1 of Standard 1.2.8 than 5g per 100g for solid food) eg *99.8% sugarfree*.

Objection to the omission of *sugarfree* claims

The CMA maintains its **objection to the omission of *sugarfree* claims** in Standard 1.2.7 due to the negative impact on the confectionery industry, including:

1 Inconsistency with international food regulations – the current CoPoNC tolerance is more stringent than Codex at 0.5%, a position which was ratified by the international standard in 2004; in addition Canada, the UK and the US all allow tolerances for *sugarfree* – such tolerances are designed to accommodate trace levels of sugar caused as a bi-product of polyol manufacture/carry over

2 Inconsistent approach to regulating food laws – country of origin which is not a health and safety issue is regulated in food law, some sugar nutrient content claims are regulated in draft Standard 1.2.7, whilst FSANZ indiscriminately recommends *sugarfree* claims be hived off

3 Inconsistent approach to the inclusion of some *free* claims – FSANZ permits *free* claims with respect to gluten, lactose, cholesterol and some fatty acid claims and denies *sugarfree* claims – for the same reasons CMA seeks a tolerance for *sugarfree* claims the AFGC, and with the CMA's support, seeks a tolerance for *gluten free* refer point 10 below)

4 Inconsistent approach to pesticide residue provisions – consumer protection legislation doesn't require declaration, so is this not misleading

5 There is no physiological, nutritional or clinical impact, resulting from the trace quantity of sugars – this amount of sugar is universally considered to be insignificant, even the amount of 0.5% sugars is considered to be insignificant, as reflected by the Codex standard

6 *99.8% sugarfree* claims insinuate sugar content and positive addition, where in fact *sugarfree* confectionery is made from sugar replacers/polyols (bulking agents) and intense sweeteners – a positive claim about sugar content creates dissonance with consumers who do not subsequently understand the dental and other dietary benefits of products claiming *99.8% sugarfree*

7 *Sugarfree* claims are meaningful and easily understood by consumers – the average consumer regards sugar to be glucose – differentiating between products that are *x% sugarfree, no added sugar, low sugar*, etc will be confusing to a consumer seeking a nutritionally *sugarfree* or non-cariogenic product for oral health, reduced energy or low GI benefits

8 Enforcement of imports (made to the Codex standard) are likely to go uncheck by border controls, disadvantaging local producers (that have to meet higher hurdle rates to continue to claim *sugarfree*, have to change packaging to comply or cease to produce)

9 There has been no consumer complaint to date that industry is aware of and the VCEC acknowledged in its report the level of compliance with CoPoNC was reasonable, confirming industry adherence

10 ACCC's view that *free* claims are absolute ie 'not detectable' – will become a moving target as more sensitive methods of analysis are developed thereby providing uncertainty to industry, consumers and regulators

11 The CoPoNC and Codex tolerances permitting products to be labelled as *sugarfree* do not constitute a breach of consumer protection/fair trading legislation – the claim relates to a product that is produced by sugar substitution, the residual sugars are irrelevant and fall within the intent of the Trade Practices Act and a claim for *sugarfree* under this definition is not misleading or deceptive

12 Unnecessary obstacles to trade may result when a regulation is more trade restrictive as the case will be should *sugarfree* claims be regulated by fair trading laws – Australia's obligations to the World Trade Organisation (WTO) agreement requires that regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to trade. Where a relevant international standard exists, ie Codex, Australia's WTO obligations should also have regard for them

Lost opportunity costs

In the confectionery industry the lost opportunity costs, whilst difficult to quantify, involves investment to date as well as future costs associate complying with a new regulatory situation, encompassing:

1 Loss of the *sugarfree* confectionery segment and resultant benefits to the community (dental health benefits and sweet treat alternatives for those suffering obesity or diabetes) as consumers will not understand the benefits of a product labelled *99.8% sugar free*

2 Cost of relabelling

3 Cost of uncertainty in the regulatory environment as technology advances and the level of sensitivity of 'no detectable' sugar(s) becomes increasingly more minute

4 Risk of future litigation based on *free* representing no detectable sugars, cost of product recall and lost opportunity for consumers

5 Lost economies of scale for export markets – manufacturers will have to produce to a local and international standard or produce to the local standard at a higher cost for export markets – higher costs of compliance will be passed on to consumers disadvantaging them and disadvantage the manufacturers' ability to compete

6 Cost of re-educating consumers, when the product is unchanged, loss of reputation – more than a decade of investment has been made by the sugar replacer and sweetener ingredient suppliers and manufacturers

7 The confectionery industry has invested millions of dollars in developing, promoting and growing the *sugarfree* confectionery category in Australia, in addition to the extensive financial commitment to capital investment, educative campaign development, packaging, R&D and innovation

8 Potential for importers to withdraw from the Australian market is highly likely – international manufacturers will not re-label for the comparatively small Australian market, further disadvantaging consumers and reducing the product choice that offers dental and dietary benefits – the Australian non-chocolate *sugarfree* confectionery market (eg gum, mints, lozenges, jellies, etc) is in the vicinity of $270 million

9 Costs of compliance will escalate both from the manufacturers perspective and enforcement – raising further regulatory burdens

10 Sustainability of the Australian *sugarfree* confectionery market will be jeopardised as will Australian manufacturers' international competitiveness – *sugarfree* is a growing global sector of the confectionery industry – 10% of global confectionery sales (excluding chocolate and gum) are *sugarfree* and 50% of global chewing gum sales are *sugarfree*

11 Serve to stifle product R&D and innovation in Australia

Options

The CMA proposes the following options that would result in a satisfactory outcome and continue to let *sugarfree* claims to be made with confidence, in order of preference:

1 Adoption of current *sugarfree* terminology and criteria as in the CoPoNC, where *sugarfree* means no more than 0.2g sugar(s) per 100g food in the table to Clause 11 in Standard 1.2.7

2 Include the CoPoNC *sugarfree* terminology and conditions in an editorial note in Standard 1.2.7

3 Prescribe *sugarfree* in the table to Clause 11 in Standard 1.2.7 to be determined by a specified method of analysis that detects tolerances allowed under CoPoNC or Codex

This practical view recognises the limitations of technology, while at the same time keeps a reasonable perspective on what is physiologically, clinically and nutritionally insignificant. The CMA again commends the Productivity Commission for its interest in this matter and looks forward to continuing to work with it, for all intents and purpose, to retain the status quo for *sugarfree* nutrient content claims.

Yours sincerely

Jennifer Thompson
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