



FOOD STANDARDS
Australia New Zealand
Te Mana Kounga Kai – Ahitereiria me Aotearoa

4 June 2008
[9-08]

INITIAL ASSESSMENT REPORT

APPLICATION A601

DEFINITION OF ‘WINE BASED BEVERAGE’

DEADLINE FOR PUBLIC SUBMISSIONS: 6pm (Canberra time) 16 July 2008
SUBMISSIONS RECEIVED AFTER THIS DEADLINE
WILL NOT BE CONSIDERED

(See ‘Invitation for Public Submissions’ for details)

For Information on matters relating to this Assessment Report or the assessment process generally, please refer to <http://www.foodstandards.gov.au/standardsdevelopment/>

Executive Summary

This Application (A601) from the Winemakers' Federation of Australia (WFA) (the Applicant) seeks to amend Standard 2.7.4 – Wine and Wine Product of the *Australia New Zealand Food Standards Code* (the Code).

The Applicant is concerned that the current definition of 'wine product' can be misleading to consumers when used in combination with labelling the country of origin. The current definition is 'wine product means a food containing no less than 700 mL/L of wine as defined in this Standard, which has been formulated, processed, modified or mixed with other foods such that is not wine'. The WFA is therefore proposing that Food Standards Australia New Zealand (FSANZ) amend the Code to:

- define the term 'wine based beverage' as 'wine based beverage is an alcoholic drink, other than wine, where the contained alcohol derives predominantly from wine';
- declare 'wine based beverage' to be a prescribed name for all such products not meeting the definition of wine; and
- delete the current definition in Standard 2.7.4 of 'wine product'.

The purpose of this Initial Assessment Report is to provide relevant information, mainly supplied by the Applicant, to assist in identifying the affected parties and to outline the relevant issues necessary to complete assessment of the Application.

FSANZ has identified two options for addressing this Application:

1. Option 1 – reject the Application thus maintaining the *status quo*; or
2. Option 2 – amend Standard 2.7.4 as per the Application.

This Initial Assessment Report is not an assessment of the merits of the Application but rather is an assessment of whether the Application should be accepted for further consideration, according to criteria laid down in the *Food Standards Australia New Zealand Act 1991* (the FSANZ Act).

Purpose

The purpose of this Application is to define the term 'wine based beverage', to declare 'wine based beverage' as a prescribed name and to delete the current definition for wine product, in order to avoid the possibility of consumer confusion when purchasing wine products.

Reasons for Assessment

After considering the requirements for Initial Assessment as prescribed in section 13 of the FSANZ Act (as was in force prior to 1 July 2007), FSANZ has decided to accept the Application for the following reasons:

- the Application seeks to amend a regulatory measure and, if accepted, as such would warrant a variation to the Code;
- although this Application is similar to a previous application (Application A571, which was withdrawn in October 2006 because the Applicant was unable to provide evidence of consumer deception), the Applicant has undertaken to provide evidence regarding the nature and extent of consumer misunderstanding they are seeking to address via the Application.

At this stage no other relevant matters are apparent.

Consultation

The purpose of this Initial Assessment Report is to seek input from stakeholders in relation to the Application and to seek input on the likely regulatory impact at an early stage. FSANZ is seeking public comment to assist in assessing this Application and is particularly interested in receiving further information on the five questions asked in this report.

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INVITATION FOR PUBLIC SUBMISSIONS

FSANZ invites public comment on this Initial Assessment Report for the purpose of preparing an amendment to the Code for approval by the FSANZ Board.

Written submissions are invited from interested individuals and organisations to assist FSANZ in preparing the Draft Assessment of this Application. Submissions should, where possible, address the objectives of FSANZ as set out in section 18 of the FSANZ Act. Information providing details of potential costs and benefits of the proposed change to the Code from stakeholders is highly desirable. Claims made in submissions should be supported wherever possible by referencing or including relevant studies, research findings, trials, surveys etc. Technical information should be in sufficient detail to allow independent scientific assessment.

The processes of FSANZ are open to public scrutiny, and any submissions received will ordinarily be placed on the public register of FSANZ and made available for inspection. If you wish any information contained in a submission to remain confidential to FSANZ, you should clearly identify the sensitive information and provide justification for treating it as confidential commercial information. Section 114 of the FSANZ Act requires FSANZ to treat in-confidence, trade secrets relating to food and any other information relating to food, the commercial value of which would be, or could reasonably be expected to be, destroyed or diminished by disclosure.

Submissions must be made in writing and should clearly be marked with the word 'Submission' and quote the correct project number and name. Submissions may be sent to one of the following addresses:

Food Standards Australia New Zealand
PO Box 7186
Canberra BC ACT 2610
AUSTRALIA
Tel (02) 6271 2222
www.foodstandards.gov.au

Food Standards Australia New Zealand
PO Box 10559
The Terrace WELLINGTON 6036
NEW ZEALAND
Tel (04) 473 9942
www.foodstandards.govt.nz

Submissions need to be received by FSANZ by 6pm (Canberra time) 16 July 2008

Submissions received after this date will not be considered, unless agreement for an extension has been given prior to this closing date. Agreement to an extension of time will only be given if extraordinary circumstances warrant an extension to the submission period. Any agreed extension will be notified on the FSANZ website and will apply to all submitters.

While FSANZ accepts submissions in hard copy to our offices, it is more convenient and quicker to receive submissions electronically through the FSANZ website using the Standards Development tab and then through Documents for Public Comment. Questions relating to making submissions or the application process can be directed to the Standards Management Officer at the above address or by emailing standards.management@foodstandards.gov.au.

Assessment reports are available for viewing and downloading from the FSANZ website. Alternatively, requests for paper copies of reports or other general inquiries can be directed to FSANZ's Information Officer at either of the above addresses or by emailing info@foodstandards.gov.au.

INTRODUCTION

1. Background

FSANZ received an Application on 20 February 2007 from the Winemakers' Federation of Australia (WFA) to amend Standard 2.7.4 – Wine and Wine Product. The WFA is seeking to define the term 'wine based beverage', to declare 'wine based beverage' to be a prescribed name and to delete the current definition of 'wine product'. This Initial Assessment Report discusses the issues associated with this Application.

1.1 Current Standard

In the Code, Standard 1.2.2 – Food Identification Requirements requires the label on a package of food to include either:

- the prescribed name of the food, where the name of the food is declared by the Code to be a prescribed name; or
- in any other case, a name or description of the food sufficient to indicate the true nature of the food.

Standard 2.7.4 – Wine and Wine Product includes definitions for 'wine' and 'wine product':

- **'wine** means the product of the complete or partial fermentation of fresh grapes, or a mixture of that product and products derived solely from grapes.'
- **'wine product** means a food containing no less than 700 mL/L of wine as defined in this Standard, which has been formulated, processed, modified or mixed with other foods such that is not wine.'

These definitions are for the purpose of defining specific compositional requirements for wine and wine products and are not defined for the purpose of naming these products for consumers. The Code specifically states that definitions of certain foods (e.g. 'wine' and 'wine product') do not establish the name of the food. Accordingly the terms 'wine' or 'wine product' are not explicitly required to be used in the labelling or representation of these products. However, this does not prevent the voluntary use of these terms on labels, including where these terms would be an appropriate common name to describe the true nature of the product.

Standard 4.5.1 – Wine Production Requirements (Australia only) sets requirements for the production of wine in Australia. Products produced in Australia that do not meet this Standard cannot be represented as wine.

Standard 1.2.11 – Country of Origin Requirements (Australia only) sets out the requirements for country of origin labelling of packaged foods and certain unpackaged foods. The Standard requires most packaged foods to be labelled with a statement on the package that identifies:

- where the food was made or produced; or

- a statement on the package:
 - that identifies the country where the food was made, manufactured or packaged for retail sale; and
 - to the effect that the food is constituted from imported ingredients or from local and imported ingredients.

Standard 1.2.11 applies to Australia only. There is no requirement under the Code for country of origin declarations on foods sold in New Zealand.

The *Trade Practices Act 1974* provides the basis for the use of statements such as ‘product of’ and ‘made in’ for Australia and Standard 1.2.11 also provides guidance, in the form of an editorial note, on the use of these terms. Standard 1.2.11 does not actually prescribe the terminology to be used in the country of origin declaration.

1.2 Summary of Proposed Amendments

The Applicant has proposed that FSANZ:

- define the term ‘wine based beverage’ as ‘wine based beverage is an alcoholic drink, other than wine, where the contained alcohol derives predominantly from wine’;
- declare ‘wine based beverage’ to be a prescribed name for all such products not meeting the definition of wine; and
- delete the current definition of ‘wine product’ from Standard 2.7.4.

1.3 Scope of the Application

As outlined above, the Applicant seeks to amend Standard 2.7.4 in relation to ‘wine product’. Fortified wines such as port and sherry are captured by the definition of ‘wine’ rather than ‘wine products’ and hence are not affected by this Application.

Standard 2.7.3 – Fruit Wine and Vegetable Wine, includes definitions of ‘fruit wine and/or vegetable wine’ and ‘fruit wine and/or vegetable wine product’. The definition of ‘fruit wine and/or vegetable wine product’ is the same as that of a ‘wine product’ except that it refers to a fruit wine and/or vegetable wine rather than ‘wine’. The Applicant has not requested any amendments in relation to this definition or to Standard 2.7.3.

1.4 Historical Background

The WFA previously submitted a similar Application to Application A601, which was received by FSANZ in August 2005. An Initial Assessment Report for that Application – Application A571 – Prescribed Name for Wine Products, was released for consultation in August 2006. In response to the Initial Assessment Report for Application A571, a number of submitters commented that the WFA had not provided evidence or a history of consumer complaints to support their application. FSANZ therefore requested that the WFA provide supporting evidence, however it was unable to provide such evidence and thus withdrew the Application.

Following this, the Australian Wine and Brandy Corporation received a complaint about misleading behaviour and the WFA therefore resubmitted its Application to FSANZ.

1.5 Other legislation

The New Zealand *Wine Act 2003* includes a definition of ‘wine product’ which has been aligned with the definition of ‘wine product’ in the Code. If the definition of ‘wine product’ in the Code was amended, this may necessitate amendments to the definition of ‘wine product’ in the Wine Act.

2. The Issue / Problem

The Applicant is concerned that the product name ‘wine product’ can be misleading for consumers when used in combination with labelling the country of origin of the product, for example:

‘Wine. Product of Australia’ when labelling wine; and
‘Wine Product of Australia’ when labelling a wine product.

Its concern relates to confusion around the type of product that is being represented (wine or wine product) rather than whether the product is produced in Australia or not.

The Applicant provided information about a complaint received by the Australian Wine and Brandy Corporation. This complaint relates to a casked beverage labelled as a ‘wine product of Australia’. The product is described as a ‘crisp white wine’ and is labelled ‘sugar added’. The consumer complaint focuses on the quality of the contents of the cask and the addition of sugar to wine which the complainant states ‘is quite illegal in Australia’.

FSANZ has requested the Applicant provide evidence regarding the nature and extent of consumer misunderstanding they are seeking to address via the Application. This evidence may come from both quantitative and qualitative studies of consumer understanding of wine and wine product labels, and the importance of this labelling in purchase decisions and may include comparable international data, in addition to Australian and New Zealand studies. It has been suggested to the WFA that where this evidence is unavailable, the WFA may choose to conduct consumer studies to support their Application.

The WFA have agreed to design and carry out consumer research (likely to be restricted to Australia only) to support its Application. It is expected this information will be available to assist FSANZ to determine the most appropriate risk management approach (if considered necessary) for this Application, following the release of this Initial Assessment Report. The results of the research and the risk management approach determined by FSANZ (if any) will be described in the Draft Assessment Report.

3. Objectives

In developing or varying a food standard, FSANZ is required by its legislation to meet three primary objectives which are set out in section 18 of the FSANZ Act. These are:

- the protection of public health and safety;

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

In developing and varying standards, FSANZ must also have regard to:

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

The specific objective for the assessment of this Application is to prevent labelling that may result in consumers being misled or deceived.

4. Key Assessment Questions

The key questions at Initial Assessment are:

1. *Is the potential for consumer misunderstanding supported by research?*
2. *Is there any other legislation that may have implications on this Application?*
3. *Is the proposed amendment as requested by the Applicant the best and most appropriate solution to the Applicant's concern about consumer misunderstanding?*

RISK ASSESSMENT

5. Risk Assessment Summary

The Applicant has provided information about a consumer complaint regarding 'misleading behaviour' (see Section 2) relating to this Application. The Applicant states in the Application that there is 'potential' for consumers to be misled by the use of statements such as 'Wine Product of Australia'. FSANZ is not aware of any consumer research that would provide evidence of consumers being misled or confused by such statements. For this reason FSANZ has requested the Applicant provide evidence regarding the nature and extent of consumer misunderstanding they are seeking to address via the Application (see Section 2).

FSANZ notes that the use of the terms 'wine' and 'wine product' as product names or descriptions of the product is voluntary (however a name or description of the food sufficient to indicate the true nature of the food must be used on packaged products).

The placement of the name of such products and the placement of the country of origin declaration is at the discretion of the manufacturer, provided that the information is legible and prominent, and complies with relevant fair trading legislation, i.e. is not misleading or deceptive.

In terms of the declaration 'wine product of Australia' on the label of a wine product, FSANZ considers that this is potentially inconsistent with the requirements of the *Trade Practices Act 1974* and the New Zealand *Fair Trading Act 1986* and relevant food acts which prohibit behaviour which is misleading or deceptive or likely to mislead or deceive.

If the Code is amended as requested by the Applicant, this would not explicitly prohibit the use of the term 'wine product' on a beverage meeting the definition of a 'wine based beverage' in addition to the declaration of the product name 'wine based beverage'. However fair trading legislation could be relied upon to prevent misleading and deceptive behaviour.

Questions for submitters:

1. What evidence is there that consumers are being misled as proposed by the Applicant?
2. Do you agree that the declaration 'wine product of Australia' on the label of a wine product has the potential to mislead consumers as proposed by the Applicant?

RISK MANAGEMENT

6. Options

FSANZ is currently considering two options for addressing this Application:

6.1 Option 1 – Reject the Application thus maintaining the *status quo*

Maintain *status quo* by not amending the Code.

6.2 Option 2 – Amend Standard 2.7.4 as per the Application

Amend the Code by defining the term 'wine based beverage', declaring 'wine based beverage' as a prescribed name and deleting the current definition for wine product.

7. Impact Analysis

7.1 Affected Parties

The parties likely to be affected by this Application are:

1. suppliers of wine products, including manufacturers and importers (**industry**);
2. **consumers** of wine products; and
3. **government** agencies of Australia States and Territories and New Zealand.

7.2 Benefit Cost Analysis

In amending food standards for Australia and New Zealand, FSANZ is required to consider the impact of all options on all sectors of the community, including consumers, the food industry and governments in both countries. The regulatory impact assessment identifies and evaluates, though is not limited to, the costs and benefits of the proposed regulation, including likely health, economic and social impacts. A full benefit cost analysis will be undertaken at Draft Assessment. This analysis will include determination of the types of beverages currently available in Australia and New Zealand that will be impacted upon by this Application.

Questions for submitters:

To develop the analysis of the costs and benefits of the options proposed, FSANZ seeks comment on the following:

3. What is the likely impact (costs and benefits) on consumers, industry and government if Option 1 – Reject the Application thus maintaining the *Status quo* is maintained?
4. What is the likely impact (costs and benefits) on consumers, industry and government if Option 2 – Amend Standard 2.7.4 as per the Application, is adopted?

7.3 Comparison of Options

At this Initial Assessment stage, no comparison of the identified regulatory options can be undertaken. Further information on the risk assessment and risk management aspects of this Application is required before such a comparison can be made. A comparison will therefore be made in the Draft Assessment Report.

COMMUNICATION AND CONSULTATION STRATEGY

8. Communication

This Application is seeking to amend an existing Standard. The communication strategy for this Application will involve advertising the availability of assessment reports for public comment in the national press and making the reports available on the FSANZ website. FSANZ will issue a media release drawing journalists' attention to the public consultation for this Application.

9. Consultation

9.1 Public Consultation

The purpose of the Initial Assessment Report is to seek input from stakeholders in relation to the Application and to seek input on the likely regulatory impact at an early stage. FSANZ is seeking public comment to assist in assessing this Application and is particularly interested in receiving further information on the five questions asked in this Report.

The first public consultation period will be for six weeks. Comments made by submitters during this period will be reviewed and reported in the Draft Assessment Report. Stakeholders must observe the relevant due date for submissions.

All stakeholders that make a submission in relation to the Application will be included on a mailing list to receive further FSANZ documents in relation to the Application. If readers of this Initial Assessment Report are aware of others who might have an interest in this Application, they should bring this to their attention. Other interested parties, as they come to the attention of FSANZ, will also be added to the mailing list for public consultation.

9.2 World Trade Organization (WTO)

As members of the World Trade Organization (WTO), Australia and New Zealand are obligated to notify WTO member nations where proposed mandatory regulatory measures are inconsistent with any existing or imminent international standards and the proposed measure may have a significant effect on trade.

The extent of the impact of amending the Code regarding the definition of wine products on international trade has not been quantified at this stage. The extent of the impact on products imported into Australia and New Zealand will be fully considered at Draft Assessment and, if necessary, notification will be recommended to the agencies responsible in accordance with Australia's and New Zealand's obligations under the WTO Technical Barriers to Trade (TBT) or Sanitary and Phytosanitary Measures (SPS) Agreements. This will enable other WTO member countries to comment on proposed changes to standards where they may have a significant impact on them.

Questions for submitters:

5. What is the likely extent of the impact on products imported into Australia and New Zealand if Option 2 – Amend Standard 2.7.4 as per the Application, is adopted?

CONCLUSION

This Initial Assessment Report is based mainly on information provided by the Applicant and discusses relevant issues in relation to amending Standard 2.7.4. After giving consideration to the requirements for Initial Assessment as prescribed in section 13 of the FSANZ Act (as was in force prior to 1 July 2007), FSANZ has decided to accept the Application for Draft Assessment for the following reasons:

- the Application seeks to amend a regulatory measure and, if accepted, as such would warrant a variation to the Code;
- although this Application is similar to a previous application (Application A571, which was withdrawn in October 2006 because the Applicant was unable to provide evidence of consumer deception), the Applicant has undertaken to provide evidence regarding the nature and extent of consumer misunderstanding they are seeking to address via the Application.

At this stage no other relevant matters are apparent.

Responses to this Initial Assessment Report will be used in the preparation of a Draft Assessment Report.