

Australian Food and Grocery Council

# SUBMISSION

**27 SEPTEMBER 2013**

**TO:**

**FOOD STANDARDS AUSTRALIA NEW ZEALAND**

**IN RESPONSE TO:**

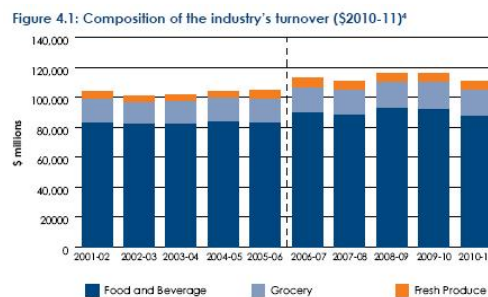
**PROPOSAL P1025: CODE REVIEW**



## PREFACE

The Australian Food and Grocery Council (AFGC) is the leading national organisation representing Australia's food, drink and grocery manufacturing industry.

The membership of AFGC comprises more than 150 companies, subsidiaries and associates which constitutes in the order of 80 per cent of the gross dollar value of the processed food, beverage and grocery products sectors.



With an annual turnover in the 2010-11 financial year of \$110 billion, Australia's food and grocery manufacturing industry makes a substantial contribution to the Australian economy and is vital to the nation's future prosperity.

Manufacturing of food, beverages and groceries in the fast moving consumer goods sector<sup>1</sup> is Australia's largest manufacturing industry. Representing 28 per cent of total manufacturing turnover, the sector accounts for over one quarter of the total manufacturing industry in Australia.

The diverse and sustainable industry is made up of over 22,600 businesses and accounts for over \$49 billion of the nation's international trade. These businesses range from some of the largest globally significant multinational companies to small and medium enterprises. Industry spends \$466.7 million a year on research and development.

The food and grocery manufacturing sector employs more than 296,300 Australians, representing about 3 per cent of all employed people in Australia, paying around \$11.3 billion a year in salaries and wages.

Many food manufacturing plants are located outside the metropolitan regions. The industry makes a large contribution to rural and regional Australia economies, with almost half of the total persons employed being in rural and regional Australia<sup>2</sup>. It is essential for the economic and social development of Australia, and particularly rural and regional Australia, that the magnitude, significance and contribution of this industry is recognised and factored into the Government's economic, industrial and trade policies.

Australians and our political leaders overwhelmingly want a local, value-adding food and grocery manufacturing sector.

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<sup>1</sup> Fast moving consumer goods includes all products bought almost daily by Australians through retail outlets including food, beverages, toiletries, cosmetics, household cleaning items etc.

<sup>2</sup> About Australia: [www.dfat.gov.au](http://www.dfat.gov.au)

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## 1. EXECUTIVE SUMMARY

[1.1] AFGC strongly supports the policies underlying Proposal P1025 Code Review (P1025), as published by Food Standards Australia New Zealand (FSANZ). The Food Standards Code (Code) is overdue for reform, and a clearer, more consistent and enforceable Food Standards Code is in the interest of all food system stakeholders.

[1.2] AFGC recommends the establishment of a joint FSANZ and stakeholder reference group to progress P1025 in terms of scope, structure, detail and implementation -

- (a) Scope: AFGC recommends that the scope of P1025 be extended to deliver, or at least identify, substantive reform of the Code, beyond just improving enforceability and drafting clarity and consistency, where the application of the Code remains ambiguous or difficult in operation or where the Code fails to reflect modern food production.
- (b) Structure: AFGC considers that the policy goals of P1025 can be achieved in a structure that more closely aligns with the existing Code and thus minimises the disruption and costs to Code users. AFGC does NOT support the proposals to consecutively renumber all provisions in each Chapter, nor the indiscriminate removal of schedules and tables to the end of the proposed Code. However, some of the proposed innovations are recognised as being useful developments, and AFGC supports the introduction of new interpretative provisions and the inclusion of a Code dictionary.
- (c) Detail: AFGC has identified many issues where the proposed Code has introduced changes to the current regulatory environment that may require change in labelling or composition. All such identified issues need to be resolved in advance of the next round of public submissions.
- (d) Commencement and Implementation: An implementation plan needs to be developed in consultation with stakeholders. AFGC recommends a two year commencement period for any resulting new Code from the date of its gazettal. This allows time for necessary training and documentation review and update. Other implementation issues that need to be resolved include the management of applications and proposals whose assessment is contemporaneous with the publication of any new Code.

[1.3] AFGC insists that both a regulatory impact assessment (RIA) and World Trade Organization (WTO) notifications are necessary in relation to P1025.

[1.4] AFGC acknowledges the significant contribution in time and resources from its members and from allied organisations in the preparation of this response, but is concerned about the significant costs incurred considering the limited nature and value of the reform outcomes.

## 2. LEGAL POLICY ISSUES

[2.1] AFGC strongly supports the principle of reviewing the Code. The Code in its current iteration is now over 10 years old, and the nature of the industry and its relationship with food regulation and regulators has changed over that time. Further, the processes of review and reform must necessarily be constant and evolving to preclude regulatory creep on the one hand (where new regulations are always introduced but old regulations never repealed) and regulatory inertia on the other (where out of date regulations impede new product development).

[2.2] AFGC strongly supports the goal of enforceability for the Code. Regulatory compliance cannot be optional; it must be an even playing field where all food importers, manufacturers, packers and retailers are bound by the same basic laws, consistently enforced.

[2.3] AFGC strongly supports the need for clarity in the drafting of the Code. In some respects, P1025 introduces some significant achievements in this regard, most notably in the concept of bringing definitions together at the start of the document, and also notably in the introduction and wide use of “signpost” provisions and notes. The use of more active language and the implementation of a more consistent drafting style also improve the clarity of the Code.

[2.4] AFGC strongly supports the need for usability of the Code. The principal users of the Code, in terms of wide compliance, are not judges, lawyers, or even regulators, but technical and regulatory compliance staff working in the food industry, tasked with specifying and formulating products and designing labels and packaging. The Code as proposed in P1025 does NOT, in AFGC’s view, properly recognise the need for the Code to be used efficiently and effectively by this key stakeholder group. The provisions relating to the information to be provided in relation to unpackaged food, for example, are likely to be confusing or even seen as contradictory to a reader unless trained in legal interpretation.

[2.5] However, AFGC considers that the concerns of its members in this regard can be significantly moderated by retaining the current structure of the Code without losing some of the important innovations proposed in P1025, and by working through the more complex areas of text with non-legal users to improve legibility and clarity of the requirements.

[2.6] AFGC strongly supports the need for uniformity in how the Code is interpreted and applied throughout Australia and New Zealand. The economic benefits derived from a single bilateral market are essential for the maintenance and development of the food industry. With that in mind, AFGC recognises that the Code is one of many documents regulating food, and that differences in the implementation of the Model Food Act, for example, are beyond the scope of P1025. However, it still must be understood that the benefits of the regulatory reforms proposed in P1025 might be devalued unless there is also a commitment to continue to enhance uniformity across all aspects of food regulation, particularly in the language of State and Territory food legislation.

[2.7] Finally, AFGC strongly supports best practice in regulatory processes. Many such best practices underlie P1025, such as the need for clarity and enforceability in regulatory requirements. However, the reforms in P1025 do not go to the merits or otherwise of current regulations. It is understood that wider regulatory reform is not within the scope of P1025, but this does beg the question as to what processes are proposed to re-examine the proper basis for food regulations, rather than simply to deal with the language and structure. Further, best practice requires an assessment of the benefits of regulatory measures and of the associated costs. The latter has been overlooked in the P1025 documentation provided to date. The cost impacts of P1025 are discussed further in section 4 below.

[2.8] AFGC is unaware of any pressing issue that requires P1025 to be assessed quickly within any set time frame. The imposition of artificial deadlines might have the effect of delivering sub-optimal reform. AFGC considers the development of a Code that delivers on the promised policy goals is the key issue, and that the timing of the reform is less important provided progress is being made.

### 3. CODE STRUCTURE

[3.1] P1025 proposes a significant restructuring of the Code. AFGC does NOT support the revised structure as set out on P1025, but considers some aspects of the proposed structure have merit that should be retained. Further, there is nothing in the policy goals underlying P1025 that dictates the proposed structure: these goals are attainable under many possible structures, including ones that largely retain the existing structure.

[3.2] In addition to the policy goals, the practicalities of Code amendment need to be considered when looking at possible structures. This affects everything from numbered alphabetically ordered lists through to the potential need to insert new Divisions (or Standards) between existing ones without having to resort to the clumsy device of multiple alphanumeric devices that, in the Competition and Consumer Act, have given us such delights as s.44AAEA (In subdivision C of Division 4 of Part IIIA). AFGC's view is that Commonwealth regulation drafting style is less appropriate when applied to a document that undergoes regular, and oft times significant, amendment compared to run-of-the-mill regulations that might only be amended once every two to three years. A further, practical example relates to the need to update loose-leaf hard copy versions of the Code: it is more practical to replace co-located pages than to replace multiple pages at various places: and hence co-locating schedules with their relevant operative provisions (rather than, as proposed, at the back of the Code) can have practical benefits.

[3.3] In terms of structures that should be retained from the current Code, bearing in mind BOTH possible use of the document in paper and electronic forms, –

- (a) Schedules, in AFGC's view, should remain integrated with their applicable standards, except in relation to schedules that have operation across the entire Code. This keeps

related and referenced information co-located. In paper document use, this minimises the “flipping” of multiple pages backwards and forwards, and in electronic documents prevents the continuous need to be scrolling backwards or forwards, or swapping between widows, each of which breaks the workflow of the Code user.

- (b) The breakdown of the Code into individual Standards dealing with specific topics (eg ingredient labelling), specific commodities (eg Egg and Egg Products) or specific purposes (eg Formulated Sports Foods) should be retained. The Code is a huge document that, in order to be used efficiently and effectively needs conceptually to be broken down into manageable segments. While P1025 does so by way of “Divisions”, individual clauses are numbered consecutively within each Chapter, which makes identifying the clauses associated with a particular Standard somewhat esoteric. Retaining Standards as distinct “segments” serves both to conceptually break down the Code and capitalises on the food industry’s investment in staff knowledge of the current Code.

[3.4] In terms of structures that AFGC considers are advanced by P1025, AFGC considers-

- (a) The inclusion of introductory provisions providing a legal basis for the Code is useful and should be implemented; and
- (b) The inclusion towards the start of the Code of a definitional section (a “dictionary” as it were), using signposts as required; is supported as a means to readily locate terms that perhaps extend beyond their ordinary meaning: however, it needs to be comprehensive, which at present it is not.

[3.5] Although not strictly a formal part of P1025, some comment needs to be made, while on the subject of useability, of the benefit of electronically searching the Code in its entirety. The current official publication of the Code on *the www.comlaw.gov.au* website is a vital resource for the industry and its advisers, and Australia is to be complimented on having such a degree of transparency and availability of its regulations. That said, there is no obvious mechanism within *comlaw* that enables searching the Code in its entirety. The Code, irrespective of structure must be adequately searchable (and ideally with related text hyperlinked) to reflect the needs of both regulators and the food industry in the 21<sup>st</sup> century.

## 4. IMPLEMENTATION ISSUES

[4.1] AFGC notes that the revised Code presented in P1025 and the two “comparison” documents are not entirely up to date. Clause 6A from Standard 2.9.3, for example has not been reflected in the P1025 draft. On the other hand, more recent amendments (Standards 1.2.7 and 2.9.5) have been incorporated, although imperfectly (for example, the omission from novel foods regulation of the provision dealing with the interaction with the regulation of foods for special medical purpose). AFGC cannot comment on how the “missing” amendments might be implemented in a revised Code, but this is not insurmountable as there will be a further



round of comment in relation to the Proposal. However, the issue highlights the perils of trying to revise the entire Code in the proposed manner; given the Code is (for a regulatory document) a highly changeable and evolving document. P1025 does not provide any indication as to how this issue will be managed in the future such that industry will be able to fully comment in the proposed Code, and an implementation plan should be developed in consultation with stakeholders.

[4.2] In particular, FSANZ must indicate how it proposes to manage applications and proposals to vary the Code that are being assessed at the time that any new Code might be introduced. FSANZ should also indicate how it proposes to enact any revised Code – while a transitional period may be unnecessary if the envisaged “no change” policy can be realised, it still may be useful to have a period of around 24 months from publication to the time a new Code enters into force so that users of the Code can regain the required proficiency under the new provisions.

[4.3] A further issue that needs to be managed is the transitional and sunset arrangements already in place in the Code. An example is the current Code’s regulation of tutin in honey (Standard 1.4.1, table to clause 5) which ceases to have effect on 31 March 2015. P1025 simply omits this provision from Schedule S19.06, possibly on the assumption that any new Code would not be in place by March 2015. FSANZ needs to provide specific indication as to how it intends to address each such provision.

[4.4] AFGC understands that the intention of P1025 is that no change be made that might require a product to be reformulated or relabelled, and that on this basis there is no need for any transitional, stock in trade or particular commencement provisions. As is shown in section 5 below, the intention is not yet matched with the reality of a Code drafted by persons who, while skilled in regulatory drafting, have no subject knowledge and therefore have not properly translated current provisions to the proposed Code. P1025 has, to this extent, progressed too far before the food industry has been afforded the opportunity to comment and be involved in the process, and as a result the industry has been required to invest significant resources to undertake a clause by clause, line by line review of the drafting of the proposed Code. Looking to the future, AFGC considers it necessary that FSANZ work collaboratively with Code stakeholders to rectify these anomalies. AFGC and the food industry are willing to participate and contribute in this work. AFGC expects that all identified issues can be rectified without prejudice to the policy intent of P1025.

[4.5] The documentation associated with P1025 does not appear to have appreciated that industry will face significant costs and regulatory burden even if no reformulation or relabelling is required. Industry (and indeed regulators) have a substantial investment in staff knowledge and documentation that is based on the current Code, and any significant changes in content or structure devalues this investment and requires further investment in retraining and amending documentation for no benefit or return to industry, and with dubious practical ability to pass on such costs through the supply chain. This is discussed further in Appendix 3. AFGC insists that these costs require evaluation in a Regulation Impact Assessment. AFGC acknowledges





that the quantum and variety of these costs will vary greatly depending upon the degree of change in structure of the Code and the location of provisions within it.

[4.6] Regulators including FSANZ will also face document revision costs. In FSANZ's case, it will need to promulgate changes to its Application Handbook, user guides, website and so on.

[4.7] Another key point is that Australia's export markets have a degree of familiarity with the existing Code structures. It is vital that FSANZ appreciates that changes in export documentation (even things such as the renumbering of regulatory provisions) can trigger delays and additional costs for Australia's exports, as foreign officials need to satisfy themselves that the new arrangements do not reflect any significant change in the status of the product. The recent problems arising from the move to electronic halal certification for exports (rejected by Saudi Arabia) serves as a salutary warning in this regard. FSANZ therefore needs to make WTO notifications so that Australia's export markets are prepared for any ensuing changes in documentation, or at least our exporters can refer overseas officials to the WTO notification by way of explaining such changes.

[4.8] As part of P1025, FSANZ published two cross-reference documents that provided links from the current Code to the proposed, and vice-versa. So far as they went, these have been invaluable and similar documents would be an essential part of future consultations. However, they have not proven to be entirely reliable, with errors and omissions being discovered during industry's review of the proposed Code (eg the link from Standard 1.2.5 clause 2(1)(c) to a non-existent subsection 1.65(3)). This may be simply an artefact due to the cross reference documents reflecting the Code as at November 2012 rather than the current Code. For future consultations, it would assist if there were available, in addition to the text of the proposed Code, a "mark up" version showing the changes from the current Code in addition to (up to date) cross reference documents.

[4.9] Finally, FSANZ needs to indicate how it intends to publish information regarding the amendment history of the proposed Code and its relationship with the Current Code. Amendment history is a vital legal tool for both regulators and legal advice providers, as well as an educational and interpretive tool for technical and compliance staff, and some indication of how this would carry forward under the proposed Code would be welcome.

## 5. SPECIFIC COMMENTS

[5.1] AFGC, through its members, has undertaken a review of the proposed Code to evaluate whether any significant changes exist. In broad terms, this process has shown that –

- (a) in some cases there is no change in the language;
- (b) in the majority of cases there is a change in the language, but no change in actual effect (in terms of labelling or composition) is anticipated;



- (c) in some cases, there are significant changes that appear to arise from the drafters not understanding the operation of the existing Code, one example being the calculation of the RDI for vitamin C;
- (d) in other cases the drafters appear to have made some “executive decision” to deliberately change the requirements of the Code to correct what they considered to be an anomaly: one example being the definition of “jam”;
- (e) new clauses have been introduced, especially at the start of Chapter 1 seeking to improve the clarity and legal effect of the Code, some of which appear not to understand the role of the Code as a subordinate regulatory instrument: subclauses (1) and (2) of clause 1.13 (Application of the Code) serve as the example; and
- (f) new definitions of “key concepts” have been introduced which AFGC considers to increase confusion and doubt, rather than serving to clarify: the proposed definition of “ingredient” is the archetypical example, which would include incidental dust and all cross contact allergens as ingredients requiring ingredient listing.

[5.2] It is accepted that the changes described in (c) to (f) above may have been well intentioned, or in some cases inadvertent, but the stated policy of P1025 was that no formulation or label should be required to change as a result P1025. Industry has been required to invest significant resources (See Attachment 3) to identify and catalogue the many changes where this is not the case, and the credibility of P1025 and FSANZ’s assurances of no change has suffered as a result.

[5.3] AFGC, as stated above, supports the policy goals of P1025, including improving the language of provisions where this improves enforceability or clarity. Further, AFGC believes that with further cooperative work, the anomalies categorised under (c) to (f) above can be rectified. In order to achieve this aim, AFGC recommends that FSANZ establish a joint stakeholder reference group to work through and resolve all identified issues ahead of the next round of public consultation. This group would also be able to consider those provisions in the Code that, due to timing, were not reflected in the draft published in the first round of consultations for P1025.

[5.4] Special mention is made in relation to a few issues –

- (a) More consideration is required in relation to the concepts of “ingredient”, “food additive”, “component”, “nutrient”, “processing aid” and “nutritive substance”. The relationship between these concepts is far from clear in the proposed Code, and “ingredient” in particular appears to be far too broad in scope and give rise to serious implications for composition and labelling.
- (b) There is unnecessary complexity introduced in the redrafting of some provisions, eg the table to clause 2 of Standard 1.2.3, and the duplicatory and somewhat turgid language around definitional standards (“food sold on the basis of a representation that the food is”). There are also many cases where a change in language seems to have been



made without truly considering whether the current language would serve equally well, and thereby avoiding change simply for its own sake.

- (c) Some of the newly introduced provisions appear to miscomprehend the role of the Code as a subordinate regulatory instrument, and others confuse the role of the standards with that of Gazette notices - the proposed repeal of standards and the adoption by reference of existing Standards provide examples.
- (d) In some cases, aspirational editorial notes have been made into substantive provisions. The principle of removing editorial notes is understood and supported, but one case where this has gone badly wrong relates to food for infants, where a requirement (in current clause 2(5)) that such foods “minimise the risk of choking” is changed to a requirement (previously an editorial note) that the food be “free from lumps”;
- (e) The replacement of “final food” with “food product” is another generic change whose implementation is incomplete or requires further thought - the two are not exactly synonymous, for example, when considering the use of substances such as Dimethyl dicarbonate (DMDC), and the current definition of “food product” would not encompass inter-company ingredient sales.

[5.5] On a positive note, the language relating to substances being “used as” additives, processing aids and nutritive substances takes a little getting used to, but seems generally to be accepted and viewed as a positive step in clarifying that ingredients, additives, processing aids and nutritive substances are not mutually exclusive categories.

[5.6] Detailed comments on the proposed Code can be found in Attachment 1. Comments specifically in relation to the definitions in the proposed Code can be found in Attachment 2.

## 6. OPPORTUNITY FOR WIDER REFORM

[6.1] AFGC can report a degree of frustration from the food industry that P1025 is being progressed in place of more significant reform measures when the resources of FSANZ, State and Territory agencies and the food industry could have been better utilised. Without derogating from the intended benefits of P1025, it is largely an exercise in rewording and restructuring the Code, with the main innovations of the “review” being delivered to lawyers and courts rather than industry or consumers.

[6.2] The Code itself largely reflects the technologies and concerns of the late 1990’s rather than those of the mid-2010’s. While AFGC appreciates that P1025 was not intended to deliver radical reform, AFGC considers that opportunities for reform should not be lost through over-rigorous adherence to 1990’s policy considerations, and that some more radical measures may be needed to deliver P1025’s intended benefits of enforceability and clarity. These issues may best be identified, considered and addressed by the proposed stakeholder reference group ahead of the next round of public consultations.



[6.3] The cost to industry of responding to P1025 has been significant, even in relation to this first round of consultation. It is likely that the costs of responding to substantial reform proposals would not have been that much less, but would have potentially delivered significant benefits (as distinct from P1025, where the costs have been largely directed to ensuring the stability of the status quo).

## 7. CONCLUSION

[7.1] AFGC strongly supports the policy goals of P1025, but considers that they can be achieved in a structure that more closely aligns with the existing Code and thus minimises the disruption to the key group of Code users.

[7.2] AFGC recommends that a joint FSANZ / stakeholder reference group be established to progress P1025 to consider-

- (a) the scope of P1025, and in particular the opportunities for substantial reform;
- (b) the structure of a revised Code;
- (c) the resolution of identified concerns; and
- (d) implementation issues including commencement provisions (AFGC proposes 2 years from gazettal) and the management of contemporaneous applications and proposals.

[7.3] AFGC insists that FSANZ undertake a Regulatory Impact Assessment in relation to P1025 so that the significant primary cost of reformulating and relabelling and secondary costs of retraining and redocumentation are formally recognised.

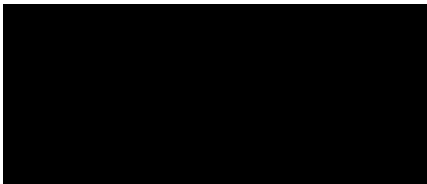
[7.4] AFGC insists the WTO must be notified of the proposed changes to minimise impacts on Australia's exports.

[7.5] AFGC thanks FSANZ for making its staff available for industry workshops and discussions, and for extending the time in which to respond to P1025. AFGC also thanks the following members who have been involved, and invested significant time and resources, in preparing this response –

Kim Staples	Australian Beverages Council
Lira Yoon	Aspen Nutritionals Australia Pty Ltd
Kira Goodall	Dairy Australia
Caroline Gray	Dupont
Carol Bate	Fonterra Australia Pty Ltd
Coral Colyer	Goodman Fielder Limited
Hayley Tatt	HJ Heinz Company Australia Ltd
Vicki Thorogood	HJ Heinz Company Australia Ltd
Lisa Warren	HJ Heinz Company Australia Ltd
Leanne Batchelor	Kellogg (Aust) Pty Ltd
Robyn Hodge	Kellogg (Aust) Pty Ltd
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Melissa Monks	King & Wood Mallesons
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Donald Nelson	Lion Dairy and Drinks Pty Ltd
Meaghan Hinksman	Mondelez International
Neil Smith	Mondelez International
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Carole Inkster	NZFGC
Catherine McVitty	Simplot Australia Pty Ltd
Philip Corbet	Simplot Australia Pty Ltd
Shankar Cumarasamy	SPC Ardmona
Ian Moore	Sugar Australia Pty Ltd
Lucy Briscoe	Unilever Australasia
Julie Newlands	Unilever Australasia
Jim Gruber	AFGC
Fiona Fleming	AFGC



Chris Preston  
Director, Regulatory and Legal, Australian Food and Grocery Council





## ATTACHMENT 1: COMMENTS ON SPECIFIC PROVISIONS

### Generic Comments

Throughout the proposed Code, genus names should be capitalised, species name should be lower case, and both should be italicised.

There remains confusion around the use of the word “or”. An explicit clause, or at least note, to the effect that “or” is used in a non-exclusive sense (ie it means “and/or”) would be useful for non-legal users.

### CHAPTER 1

#### Part 1 Preliminary

##### Division 1 Status of Code

Section 1.01: Notes 1 and 2 under Chapter 1 Division 2 provide a more comprehensive overview of the status of the Food Standards Code and should be relocated here. Current Note 1 should be retained, but Note 2 might be replaced or incorporated into the relocated notes.

Section 1.02: See above comments in relation to implementation. Given the time for national and international businesses to identify and resolve documentation issues, including with foreign regulators where necessary, commencement 2 years after gazettal is proposed.

Section 1.03: See above comments in relation to the Code structure. This provision will need to be amended to reflect any change to the structure of the proposed Code.

Paragraph (a) might better refer to –

- Interpretation and application provisions;
- food labelling requirements;
- substances that, either generally or in particular substances, can or cannot be added to or used as food; and
- specifications relating to identity, purity, microbiological status and other matters of general application.

Paragraph (e) should simply refer to transitional issues.

##### Division 2 Interpretation

Section 1.04: The AFGC view is that this clause should either be omitted or be replaced by a provision to the effect that the Code be interpreted according to the laws of the jurisdiction in which it is being applied. Either way, the effect would be that the Code would be interpreted in the same manner as any other statutory instrument, in accordance with the *Acts Interpretation* legislation of the relevant jurisdiction. This



outcome aligns with the *Nutricia* decision and reflects the NZ position as stated in the current clause.

AFGC appreciates that this raises some potential for inconsistency between jurisdictions due to minor differences in Interpretation legislation and in the various application Acts. Uniformity remains an important goal for food regulation, and the potential for inconsistencies are not treated lightly. However, legal certainty is more important, and seeking to apply Commonwealth interpretation legislation in a document that is adopted by reference as a statutory instrument under State and Territory law appears to take the Code into unexplored, and therefore unpredictable, legal realms. There is an open question whether a statutory instrument can dictate its own interpretation in such a manner.

While, arguably, it may be possible to for the Food Standards Code to provide for interpretation according to the Commonwealth *Acts Interpretation Act*, -

- such provision would be contrary to the normal rules of interpretation with which regulators, legal advisers and courts are most familiar;
- the application Acts themselves would be interpreted according to, and have been drafted in light of, each jurisdiction's interpretation legislation, and it would be problematic if terms used in the application Acts ended up having a different meaning when used in the Food Standards Code: again, that would be contrary to the normal rules of interpretation (see *Birch v Allen* (1942) 65 CLR 621); and
- it is far from legally certain that the provision would be valid as a subordinate instrument under State law: regulations are not contracts and do not enjoy the ability to choose their jurisdictional forum, and what is proposed goes beyond the incorporation by reference of some Commonwealth document (as permitted, for example, by s.32 of the *Victorian Interpretation of Legislation Act*), being a purported direction on the interpretation of a instrument adopted under State law.

For these reasons, better certainty results from the application of the normal rules of interpretation, which apply the relevant State or Territory interpretation legislation. As it is the normal rule, no provision in the Code is required to achieve this end, and omission of the provision may be the simplest solution. That said, Justice Simpson in *Nutricia* did identify the issue as being problematic – whether it remains so after her decision is another question – and an express provision applying the normal rules is an alternative, acceptable option.

Section 1.05: The language “For the Code” seems inconsistent with other usage, where “In this Code” is preferred.

Section 1.06: Subclause (1) seeks to apply FSANZ Act definitions to terms used in the Code. In fact, only 2 of the definitions in the FSANZ Act seem to have relevant use in the Code. “Agvet Code” is used once and “Authority” (as in FSANZ) is used twice in





relation to health claims self-substantiation. Both cases could be easily drafted in the Code itself without needing to use incorporation by reference. The remaining FSANZ Act definitions are more related to the process of developing standards rather than enforcing them.

There would be merit, though, in expressly incorporating application Act definitions. This again is no more than the application of normal rules of statutory interpretation, but given that the Code is drafted by a Commonwealth entity, an express adoption of application Act definitions may have merit. The current provisions relating to the definitions of “food” and “sell” could then be removed, with the relevant notes moved to this subclause. The definition of “advertisement” also could be usefully quoted.

In relation to the specific definitions in subclause (2), please refer to Attachment 2.

Section 1.07: Subclause (2)(a) and (d) might be better simply stating that vitamin A be calculated as retinol equivalents, and vitamin E be calculated as alpha-tocopheryl equivalents. Conversion factors are matters of scientific fact that do not require regulation (the urban legend is that Texan regulators tried to regulate pi as being 3). The problem otherwise is highlighted in Schedule S1.04 which, as a regulation, directs the reader to “see the Note” where notes are intended to NOT be legislative in character.

Subclause 2(b) should perhaps simply exclude niacin provided by the conversion of tryptophan. This avoids the undefined concept of “pre-formed” niacin.

Subclause 2(c) is incorrect. It should state that vitamin C is calculated as the sum of L-ascorbic acid and dehydroascorbic acid equivalents. As currently drafted, the provision might exclude vitamin C added in other permitted forms.

Section 1.08: This remains a bizarrely complicated and over regulated provision considering it exists as an exemption from labelling. This complexity and nano-regulation creates its own problems. For example, it is unclear whether, in the definition of “same day establishments for chemotherapy and renal dialysis services”, there has been a change to apply the words “that provides those services” in paragraph (d) of the current definition (the Table to clause 8 of Standard 1.2.1) to paragraphs (a)-(c) as well. If so, such a change may make sense, it is nonetheless a substantive change, but in a truer sense, why does it matter for the purposes of food labelling?

Section 1.10: While the proposed provisions mirror the current ones, the list in the Schedule could likely be pruned quite significantly, as some terms are specified in the National Measurement Act or as SI units, while others do not seem to be actually used in the Code. There are some (such as using “mcg” for micrograms) that will need to be retained.

Section 1.11: While the proposed provisions mirror the current ones, if read strictly it requires both food manufacturers and regulators to assess a food according to each one of the 3 methods set out in subclause (2), and then make a separate determination as to which of the three “best represents” the values in the food as conceived in subclause (1). This is a strange regulatory policy when any 1 of the three methods in subclause (2) should suffice, and for practical purposes it is unlikely that any stakeholder would actually calculate all 3 possibilities. Subclause (1) might refer to “... using any of the methods in subsection (2) taking into account: ...”.

Section 1.12: The title to this clause is not accurately descriptive of its contents. The provision allowing modification of (non-warning) statements is important (eg to overcome minor differences in the presentation of NIPs, such as including serving size and serves per pack on the one line), but it is not clear from the heading that the provision may be found in this clause. The title might better be along the lines “Modification of mandatory statements”.

Subclause (1) is a new provision that might change some labels. While AFGC supports it in principle, it is unable to state whether or not current labels make modifications to warning statements. This might be specifically drawn to stakeholders’ attention in the next round of consultations to determine whether this new provision in actual practice will require any label changes.

### Division 3 Application of Code and effect of variations

Section 1.13: Clauses (1) and (2) are not matters that can be included in a food standard. The apparent intent is to clarify the role of the various State and Territory and New Zealand *Foods Acts*, the *Imported Food Control Act* and equivalent NZ legislation. While such effect can usefully be described by way of a note, it is not for the Code to specify, as a subordinate instrument, its own scope of operations. In fact, it has none of its own: it has effect only insofar as enabling legislation grants it. To illustrate this, should *the Imported Food Control Act* be repealed, clause 1(b) would be incorrect and ultra vires: the Code would NOT, in fact, apply to imported food coming into Australia. These subclauses should be omitted and subclause (4) reworded to the effect “This Code does not apply ....”.

## Part 2 Basic concepts and basic requirements

### Division 1 Basic concepts

Section 1.15: This provision may be omitted if the suggestion at 1.06 above, to adopt the application Act definitions, is accepted. The note might be usefully retained and moved to 1.06(1).

Section 1.16: This is a new provision aimed, it is assumed, at clarifying the difference between “food” in a generic sense and an item of food that is actually supplied. Of itself, such a distinction is appreciated and raises no concerns, provided it is used consistently and correctly throughout the remainder of the Code.

Section 1.17: AFGC considers that the inclusion of basic concepts may be useful (especially in light of the struggles faced by the NSW Supreme Court in *Nutricia*), but such concepts must be clearly delineated and distinguished.

The definition of “ingredient” is incorrect as it includes substances that are not intentionally added to a food but which come into contact with the food as it is being processed. This includes dust, hairs, incidental allergens and all processing aids. Under no conception are processing aids considered to be ingredients of a food even though residues may remain. This definition makes every ingredient into a compound ingredient due to incidental presence, and again this is not a result that clarifies or improves the enforceability of the Code. The Allergen Bureau will make separate comment in relation to the problems of this definition for allergen labelling.

In its comments above, AFGC recommends the establishment of a group charged with resolving the concerns arising from the proposed draft Code in P1025. Coming to a correct definition of “ingredient” and “additive” and “processing aid” is probably one of the most important initial tasks for such a group.

Section 1.18: The concept of component stated here overlaps with that of “nutrient” and “biologically active substance”. It seems that “component” is also used elsewhere the Code refers to a sub ingredient (eg see clause 1.21(3)), which is confusing. AFGC view is that “component” should be omitted as a concept in the Code, and the terms sub ingredient or nutrient or biologically active substance used as appropriate.

Section 1.19: AFGC appreciates that issues with the meaning of “nutritive substance” lay at the heart of the *Nutricia* case: that said, there are serious questions whether the Court’s difficulties arose more from the failure of regulatory systems and supervision more than any failure of the Code itself.

The regulation of “nutritive substances” remains Luddite in philosophy and anti-innovative in operation. AFGC notes that FSANZ Proposal P1024 seeks to review the rationale and policy for regulating such substances, and will continue to make appropriate comment in that regard.

The omission of the word “intentionally” from the current definition is understood to be deliberate (intentional?) and given that other parts of the definition refer to the substance being added for a “nutritional purpose”, AFGC accepts that intention can be implied from purpose. That said, there is the problem of identifying the purpose for which a substance was added to a food, and so potential legal problems remain even with the definition as amended.

So far as P1025 is concerned, it is noteworthy that a lot of effort is taken to convert the regulation of vitamin and mineral addition to regulation concerning nutritive substances, as well as to convert other references to refer instead to “use as a nutritive substance”.



The concept of regulating “use” is an interesting development that certainly solves the problem of regulating substances that have more than one function in a food (eg tocopherols as both an antioxidant additive and as a vitamin). However, much of this effort may be rendered nugatory by the development in P1024. It may be better to allow the reform of nutritive substances to take place solely within the scope of P1024 rather than splitting the reform between the two proposals.

Section 1.20: This provision may be omitted if the suggestion at 1.06 above, to adopt the application Act definitions, is accepted. The note might be usefully retained and moved to 1.06(1).

## Division 2      Basic requirements

Section 1.21: Subclause (4) could usefully state that it does not prohibit foods used as processing aids.

Section 1.22: These provisions should be omitted, as they duplicate the requirements of the Imported Food Control Act. It is for that legislation to indicate which parts of the Code apply to imported food.

Section 1.23: This section might usefully be divided into two separate provisions: one of general application (subsections (3) to (5)) and one specifically related to the sale of a food product under a regulated name. Subsection (3) should not refer to “component”. The table to subsection (3) has an incorrect reference to irradiated foods, and the table to subsection (4) has a similar issue for vitamins and minerals used as a nutritive substance. In subsection (4), the words “not permitted” imply that there must be a positive permission. The wording “specifically prohibited” is preferable (eg there is a *specific prohibition* against adding a formulated caffeinated beverage to a non-alcoholic beverage).

Section 1.24: This provision does not seem to add any effect to the Code. At best, it introduces a form of double jeopardy: for example a failure to keep the records relating to a food safety plan would contravene BOTH Standard 3.2.1 clause 3(d) (referencing clause 5(f)) as well as this clause. This clause should be omitted.

### Schedule 3:

- There are a number of graphical layout issues in relation to endashes, plus / minus, greater than and less than signs that should be tidied up for readability.
- The microbiological assay terminology should be standardised: Item 25 refers to “Negative to test” while Item 26 refers simply to “Negative”.
- Item 27 should refer to “yeast selenium-enriched”.



## Part 3 Labelling and other information requirements

### Division 1 Requirements to have labels or otherwise provide information

#### Sections 1.26 – 1.46

These sections have the potential to improve the clarity of the Code by co-locating the labelling obligations that apply to retail, catering and other sales respectively. Further, it is accepted (other than as noted below) that the restructured and reworded provisions are to the same effect as Standard 1.1.1 of the existing Code.

However, the language remains strained due to two main factors: the concept of “label” is contorted to include, for example, information provided to consumers at point of purchase, and secondly there is a focus on whether “food” is for retail sale or catering when the touchstone is whether the packaging is a retail pack or for catering purposes.

The difficulties inherent in the first issue can be seen in the clause headings. Section 1.34 refers to information requirements for food product “that does not need to bear a label”, but then states certain information required to be displayed in connection with the product, information that must accompany the food product and information that can be provided upon request. The definition of “label” includes all of these information mechanisms, so section 1.34 appears to state the labelling obligations that apply to a food that is not required to bear a label. Similarly, clause 1.31 (1) states that unpackaged food is not required to bear a label when this is clearly not true if label carries the meaning in clause 1.27(1).

The new language also seeks to address the second issue when, in section 1.31(3), it effectively states that only one level of packaging (excluding multipacks) is required to be labelled. However, the related note directs the reader to the provisions around legibility and prominence. Consider a (fully labelled) packaged food for retail sale that is shipped to the retailer in a carton of, say, 24 retail packs. The food product is for retail sale but the outer carton is not a retail pack. The question is whether the shipper requires full retail labelling. On the one hand, the labelling of the actual retail pack would appear to satisfy section 1.31(3), but the reference to legibility and prominence then suggests that the outer shipping carton must be labelled because the information on the inner packs is not visible at the time of sale from the manufacturer / wholesaler to the retailer (see section 1.29(b)). The intention appears to be that such sales be caught by Subdivision D, but the current language does not achieve this.

Two comments are also necessary in relation to the co-location of labelling obligations. The first is that it does create something of a double offence system where the one labelling failure contravenes BOTH the provision here in Chapter 1 Part 3 AND in the actual labelling provision itself. The second is somewhat related in that any introduction of new labelling requires double enactment, once as a substantive provision and again as a signpost provision here in Chapter 1 Part 3.

It is unclear why country of origin labelling has been singled out from other labelling obligations in this new structure.

In terms of more substantive comments on individual sections –

Section 1.45(2)(c) : It would be clearer if clause 1.45(4) were combined with this paragraph.

Sections 1.42 and 1.46(1): These provisions are drafted more broadly than the current clause 4 and 6(4) of Standard 1.2.1, which limits the information that must be provided to “compositional requirements” and “labelling and other declaration requirements”. The proposed clauses might extend, for example, to information relating to food safety requirements that are not the responsibility of the supplier.

Section 1.50: Paragraph 1(a), (b) and (d) make distinct requirements that mandatory statements be ALL of “legible”, “prominent” and “contrast distinctly with the background”. The current language in Standard 1.2.9 subclause 2(1) is less clear: it refers to statements being written “legibly and prominently such as to afford a distinct contrast to the background”. While it is easy to banter semantics and grammar to debate the extent to which the proposed regulation matches the current language, in essence the concern is whether mandatory statements can still appear in areas such as the bottom of packs or (for small packages in particular) under product folds. It may be that this can be addressed by better definitions or explanation as to what is intended by the words “prominent” and “legible”, or given the uncertainties of the language and its application, it might simply be better to retain the current language and consult on the issue by way of a separate proposal.

Paragraph 1(c) is new. It is not clear in what way it is intended to add to the requirement in paragraph 1(a) relating to legibility. It should be omitted from P1025 and considered separately if there is some new requirement proposed.

## Division 2 Information requirements – food identification

Section 1.52: The concept of “prescribed name” is one that is tacitly understood, rather than explained in the current or proposed Code. The proposed Code also makes references to “specified name” and “trade name” without clarifying these concepts or their relationship to “prescribed name”. Subsection (2) is unclear as to its intention. If it relates to a definition not being a *prescribed* name, it should state so expressly. If it relates to the fact that a name used in a definition is not required to be used when selling a food, it is probably unnecessary. If it is intended to suggest that the definitional name is not exclusive to foods that meet the definition, it is probably ill-conceived and in conflict with other provisions in the Code.

Section 1.54: The intention is that the entity named as the supplier be responsible for the food in terms of regulatory compliance, recalls and regulatory or consumer contact.





This concept is not captured in the current or proposed Code and the link to the offence provisions in the application Acts is accordingly vulnerable. This should be clarified to meet the goal of enforceability.

#### Division 3 Information requirements – warning statements, advisory statements and declarations

Section 1.55: The application of advisory statements in the proposed Code is unclear in its application to food sold from vending machines. There seems no provision in the proposed Code that equates to clause 2(2)(c) of the current Code.

Section 1.56: It is unclear why the previously generic provision relating to warning statements has become a specific provision in relation to royal jelly only. The current structure would allow the ready addition of any other food that might require a warning statement, whereas such addition would be cumbersome under the proposed Code. The rewording of the application of section 1.56 in relation to situations such as vending machines needs careful review by enforcement agencies.

Section 1.57: The scope of the provisions regarding gluten has been reworded without any apparent rationale. Such change for its own sake is unnecessary and potentially problematic.

Schedule 9: The provisions around cereal based beverages have been redrafted in a way that does not match the current provisions, raising the potential for a mandatory change in product labelling. This contravenes the stated policy of P1025.

#### Division 4 Information requirements – statement of ingredients

Section 1.58: Subclause (1) appears tautologous. Subclause (2) is incorrect. Bread labelled as “bread” with no other ingredients still requires a statement of ingredients.

Section 1.59: See the above comments in relation to the definition of “ingredient”. Paragraph (e) seems to suggest that illegally used processing aids do not require ingredient listing.

Section 1.61: Subclause (4) could be better phrased as an exception for volatile ingredients to the general rule about listing in decreasing order by weight. The formula is an unnecessarily clumsy way of doing this.

Section 1.64: This appears to suggest that nutritive substances be declared as food additives. This confuses the two concepts when all that is required is to permit “vitamin(s)” and “mineral(s)” as class names.

Schedule S8.01 has a typographical error in relation to mixed tocopherol concentrates.





## Division 5 Date Marking of Food Products

For consistency, the division heading might be prefixed by “Information requirements”

The need for “baked on” and “baked for” dates might be explored with the baking industry to see if these remain in current practice.

Section 1.66(2)(a) has two issues: the first is that 2 years is not a “best before date”, it is a measure of durable life of the food product, and secondly, the exemption should apply to foods with a best before date that is at least 2 years from the date of first supply.

Section 1.68: consideration might be given to allowing other (European) forms of “best before”, and allowing abbreviations of “best before” such as “BB”. Further, although cited in the examples, the use of 2 digits for year declarations should be specifically authorised.

Subsection 1.68(6) might be better presented as a separate section as it does not relate to the presentation of date markings.

## Division 6 Directions for storage and use

For consistency, the division heading might be prefixed by “Information requirements”.

Section 1.69: It may be preferable to separate the clause in conditions for storage and conditions for use. The table format for the specific products (bamboo shoots and cassava) is likely to be more flexible and usable and should be retained from the current Code. Finally, paragraph (a) gets it the wrong way around: conditions for storage are not required simply to support a product’s durable life: they are there for health and safety. The durable life in fact depends on the storage conditions, not vice-versa. The current wording should be reinstated.

## Division 7 Nutrition, health and related claims

No comments at this time.

## Division 8 Nutrition information requirements

For consistency, the division heading might be prefixed by “Information requirements”.

Section 100 should also exempt foods that are used as processing aids. Vegetable oils sold and used as lubricants might otherwise require NIP labelling.

Section 104(2) states that the mandatory RDI declaration for vitamin and mineral claims MUST be in the NIP and section 105 states that it MAY appear elsewhere in the label. This structure is the opposite of the current regulation and may require some labels to



change. It may be open to a simple correction by making s.104(2) subject to section 1.105.

#### Division 9 Characterising ingredients and components of food

For consistency, the division heading might be prefixed by “Information requirements”.

Section 1.110: The elements of “likely to be associated with the name of the food by a consumer” in the definitions of characterising ingredient and characterising component are potentially unenforceable for uncertainty. It is uncertain exactly what these elements add to the definitions and they might be omitted without great impact on the application of the standard. The change in wording from “usually associated” to “likely to be associated” is also of concern as it may increase the number of ingredients / components required to have percentages declared.

See also the comments above on the definitions of ingredient and component.

Subsection 1.112 seems a clumsy way of saying that characterising ingredients must be declared as a percentage based on the weight / weight basis of ingoing ingredients in the food product. Note that the definition of “TW” in the proposed clause should specifically reference the “food product” to enhance clarity.

#### Division 10 Country of origin labelling requirements

For consistency, the division heading might be prefixed by “Information requirements”.

This Division as presented reflects Standard 1.2.11 prior to the amendments in July 2013. As the proposed draft reflects an out-of-date Standard, it has not been reviewed in detail. It will require detailed review in the next round of public comment.

### **Part 4 Substances added to or present in food**

#### Division 1 Outline of Part

Section 121: This provision could be more informative. Food additives are, for example, normally consumed (but perhaps not in their own right). Stating what each of the Divisions cover would improve useability and clarity.

#### Division 2 Food Additives

Section 1.122: This provision and its associated schedules need significant work. The Schedules contain definitions and substantive provisions that should be in the body of the Code, and in cases contain alternative definitions of the same terms as definitions in the body of the Code. There seems to have been little coordination of the drafting teams on this subject. Further, the term “additive used at GMP” is confusing because



there additives in Schedule 15 used at GMP that are not “additives used at GMP” as defined.

Importantly, s.1.122(2)(b) creates the possibility of allowing additives without pre-market clearance. This provision in the current Code relates only to flavourings (where pre-market clearance is not generally undertaken by FSANZ in any event, being largely adopted by reference from international approvals). In the proposed Code it has been given general application to all additive categories.

Section 1.124(5): This is an unnecessary rewording of clause 8 of Standard 1.3.1 which introduces ambiguity. It is not clear in the redrafted wording whether “a higher level than would otherwise be allowed” refers to the additive being allowed in the final food or in the ingredient. If the latter, this would be a new restriction of additive use in premixes that would be a significant change in the Code. Further, the specific reference to the “maximum permitted level in Schedule 16” appears to not capture the maximum levels for colours set out in subs.124(3).

Section 1.124(6)(e) wrongly applies the nitrate calculation for meats to all nitrate calculations. In other cases (eg cheese) nitrate salts are calculated as the nitrate ion. Section 124(6)(f) is probably unnecessary given these additives have just one permission (in relation to salt) and the unity sum rule would apply to the same effect.

Section 1.124(7): The actual steviol glycoside equivalent is the sum of the individual sources multiplied by their conversion factors. The sigma element of the equation has been omitted.

Section 1.125: The language of this provision requires further work. As drafted, it would potentially allow addition of intense sweeteners at levels exceeding the MPL specified in the Schedules. The reference to flavour enhancers (while in the current Code as well) is not helpful in this context as flavour enhancement is a separate technological function to sweetening. The provision is really directed to imposing a limit on the use of intense sweeteners that may be present at GMP, and might be better phrased along these lines.

Section 1.126: The unity sum rule for additives with the same function should be clarified in relation to additives permitted at GMP. No maximum level is specified for such additives for the term MPLi. The clause should specify that GMP additives score zero in the calculation.

Schedule 15 by executive decision renumbers all the additive categories and introduces new categories. This is a reaction to the current existence of a category “0” for food additive preparations, but fails to understand that the category system is internationally used and recognised and cannot simply be changed by Australian fiat without creating massive redocumentation costs as well as import and export problems.



In Schedule 15, there would be greater certainty and clarity by –

Replacing:	With:
Additives permitted at GMP	Additives in Schedule 16.01
Colours permitted at GMP	Colours in Schedule 16.02
Colours permitted to a maximum level	Colours in Schedule 16.03

Schedule 15 also has some typographical and other issues –

- Mozzarella cheese should be a sub item under 2.6.1, not a new item 2.6.2
- Under Item 5.3.5, the permitted sulphur dioxide level other than coconut should 3000, not 300
- There is a theoretical difference between “mixed foods” (current Item 20) and “foods not included in items 1 – 17” (proposed item 18) in that the latter would encompass single ingredient foods. Whether there is any practical difference is arguable, but the language of the item should reflect the actual policy intent.

### Division 3 Vitamins and minerals

Section 1.128: This provision (and others in the Code) is drafted on the predication that vitamins and minerals will remain regulated as nutritive substances. As discussed previously, this outcome is not certain and significant redrafting will be necessary should the concept of nutritive substance be altered or deleted.

Section 1.130: The calculation appears to contain a significant error in that there is no proportionality applied to the maximum level permitted in an ingredient, representing that amount of that ingredient in the food. The language also requires further work in that some references to “food” should refer to “ingredient”, and the overall clarity of the provision needs to be improved.

There are errors in Schedule S1.01 –

- The Column 3 RDI for niacin should be 10mg, not 1.1mg
- The chemical identifications have been removed from vitamins B6, B12, C, D and K and these should be reinstated
- The note to vitamin D from the current Code should be included in the proposed Code – the stated value for vitamin D is a recommended oral intake rather than an RDI.

There are errors in Schedule S17.01 and S17.02 –

- The heading of Schedules S17.01 and S17.02 make reference to clause 1.129, but that clause has no reference to permitted forms
- In Schedule S17.02, ferric sodium edentate has a superfluous “4” appended to it



There are errors in Schedule S17.03 –

- The folate level for wheat flour bread should be 100ug, not 200ug.
- While tomato is scientifically a fruit, the inclusion of tomato juice under fruit juices is not intuitive
- Item 6.4, the reference to vitamin B6 should refer to B12.

#### Division 4 Processing Aids

Section 1.131: While it is understood that the proposed Code does not need to authorise foods for use as processing aids, foods sold as and used as processing aids should not require any retail food labelling. As noted above in relation to s.100, this outcome has not been fully implemented.

Section 1.141: Subclause (2) should refer to “the food product”, not to “the food”. DMDC will of course be present in the food for a short time during its manufacture.

Schedule S18: AFGC’s view is that alphabetic listing of processing aids within their various categories is clear and usable, and that the addition of numbering is otiose and raises the potential for problems when new processing aids are inserted – either subsequent processing aids will need to be renumbered or we will end up with the numeroalpaic combinations beloved of Commonwealth drafters. Further, the schedules contain operative provisions that should be in the main body of the Code.

Schedule S18.03: “Annas” was a Biblical figure. It should read “Ananas”. At Item 3.21, *Bacillus subtilis* should be on a separate line.

Schedule S18.05: Item 6 (chlorine) should perhaps refer to available chlorine (cf Schedule S18.05 item 5). Item 50 (styrene-divinylbenzene cross linked co-polymer) should refer to “0.02” not “0.03”.

Schedule S18.08: The “approved food for use of phage” approach seems clumsy and could be improved. There is a typographical error in S18.08(2)(a). Cupric citrate is placed out of alphabetical order.

#### Division 5 Contaminants and Natural Toxicants

Clauses 1(1) and (2) of Standard 1.4.2 in the current Code have the effect of defining the commodity names used in the various MPC tables in Standard 1.4.1. This seems to have been omitted from the proposed Code. An equivalent to s.1.144(2) and (4) should be included for this Division.

Section 1.142: The calculation for mixed foods does not address the situation where just one ingredient has applicable MPCs nor when more than 2 ingredients have MPCs.

Schedule S19: There are a number of issues –

- Given that a goal of P1025 is clarity, there is greater precision of language if “level” in S19 were to be replaced by “concentration”.
- There is a great deal of substantive enactment in these Schedules that might better be placed in the body of the Code
- The definition of hydrocyanic acid in section S19.01 has expanded operation compared to the current Code, where it applies in relation to clause 5 of Standard 1.4.1 only (not to the whole of the Standard). This may have unintended compositional implications.
- Section S19.02(1)(a) might better refer to “that metal” rather than “the metal”.
- The entry for seaweed previously referred to “(edible kelp)”, and removing this in theory expands the operation of the MPC to products not previously regulated.
- In Schedule S19.04, “except packaged water” has been omitted from the vinyl chloride MPC
- Mercury has been omitted from the S19.03, and it may be easy to miss that requirements for Mercury are located elsewhere in the Schedule. There should be a signpost in S19.03 to where Mercury is located in S19.07, or the section for Mercury (S19.07) moved to appear directly after S19.03.
- The heading for Schedule S19.07 should refer also to crustacean and molluscs.
- The definition of “sample unit” should include the language from Standard 1.4.1 clause 6(2)(a), after “fish”, to the effect “fish product, crustacean or mollusc”

#### Division 6      Agvet Chemicals

The title to this Division does not reflect its contents. The Division does not regulate agricultural and veterinarian chemicals.

There does not seem to be any equivalent to current clause 1(7) of Standard 1.4.2, which may change the testing and reporting of MRLs.

Section 1.21, at item 1 of the table to subsection 3, should also refer to metabolites of agvet chemicals to truly reflect the operation of clause 2(3) of current Standard 1.4.2.

Section 1.143: Subclause (2) should at best be a note. It raises a potential for litigation should a MRL not have been determined under both (a) and (b).

Section 1.144: Subclause (1) may need amendment to specifically identify the AgVet Code, given the proposal above to adopt definitions from the applications Acts rather than the FSANZ Act.

Schedules 20, 21 and 22: Given the constant amendment of these schedules, no review has been undertaken to verify the entries in the proposed Schedules at this time.



However, the MRL values in Schedules 20 and 21 should be specifically noted as being milligrams per kilogram.

#### Division 7 Prohibited and restricted plants and fungi

The note to the title of the Division incorrectly refers to “cocoa” instead of “coca”.

Schedule S23: There are some editorial issues that need to be addressed in Schedule S23.01 –

- “Petasites” should be in italics
- On the final page of the Schedule, the line separating the column headings from the entries is missing

#### Division 8 Novel foods

P1025 does not clarify a key point from the *Nutricia* case, which is the interaction between novel foods regulation and nutritive substance regulation. This might perhaps be better considered as part of P1024, but as the draft stands, the lack of clarity remains of concern. The same issue arises in relation to GM foods, which may also be novel – do they require dual approvals?

The reference in the note to “retail sale” highlights the difficulties of “food product” previously discussed. Sale of novel ingredients to a manufacturer should be covered by this Division. It is unclear why novel food sales other than retail sales are excluded by s.21(3).

While again perhaps an issue for P1024, the definition of novel foods remains likely void for uncertainty around the words “require an assessment”.

The current provisions relating to exclusive use have not been properly implemented in this Division, especially cl.3(2)-(4) of current Standard 1.5.1.

The exclusion from “traditional use” relating to foods for special medical purpose has not been implemented in this Division.

#### Division 9 Foods produced using gene technology

Section 154: The reference to ethical, cultural and religious concerns has been removed from the definition of “altered characteristics”. While such a move is supported for certainty and to ensure regulations have a scientific base, it may be contentious to make such an amendment within the guise of P1025.





Section 156: This provision alters the requirements for GM labelling, which is contrary to the espoused intention of P1025-

- Subsection (2)(a)(ii) requires (complete) removal of novel DNA or protein, where the current provision requires only that the processing “have the effect of removing” novel DNA or protein.
- Subsection (2)(b)(ii) exempts “substances permitted to be used as a processing aid” – all foods are so permitted!
- The definition of novel protein has been significantly changed by limiting the exclusion of nature identical proteins to just those present in processing aids.

Schedule S26: Key definitions for GM regulation are specified in this Schedule. They should be in the main body of the regulations and signposted from clause 1.06. The purpose of the “altered characteristics” note in S26.02 is unclear. The separation of conditions (the current column 4) from the relevant permission decreases clarity and usability of the Table. The Table is also out of date, missing permissions for canola (item 1.4) and soybean (item 7.13).

#### Division 10 Microbiological limits for food

Section 157: The reference to “the microorganisms” in subsection (2) would be clearer if it referred to “those microorganisms”.

Section 158: The language “may contain a microorganism ... only if ...” is less clear than “may not contain a microorganism ... unless”. Further, paragraphs (a) and (b) must BOTH be met – the current wording presents them as alternatives.

Section 159: Subclause (3) fails to incorporate the ability, in food poisoning incidents, to take smaller samples, as well as fewer samples, than would otherwise be required. In paragraph (5)(b), subparagraphs (i) and (ii) should be reversed for “equivalent method” to make sense. Further, the standards referenced in these subparagraphs are incorrect: AS/NZS 4659 determines equivalence, whereas AS 5013 (which is NOT a New Zealand standard) sets the general standard. This is a critical error that would, if undetected, have rendered the entire Division unenforceable.

Schedule S27.01 has some problems –

- It refers to “pasteurised egg products”. The current provision refers to “processed egg products” where “processed” means pasteurised *or subjected to an equivalent treatment*.
- There are entries in column 4 that read “< 3”. As column 4 is a maximum number anyway, this should read just “3”.
- The columns in relation to lactic acid infant formula have gone astray in relation to coagulase positive *Staphylococcus*.



## Part 5 Processing requirements

### Division 1 Irradiation of food

It is agreed that this Division sits better within processing requirements than its current location in the existing Code.

Section 1.164: There is an opportunity to clarify the operation of paragraph (a) – does the 1kGray dose refer separately to each ingredient, or reflect a cumulative of the doses applied to all irradiated ingredients?

### Division 2 Processing requirements for meat

There is inconsistency in the placement of sectional definitions in this Division. In section 168, for example, they are at the front of the section, in section 169 (and in most other sections) they are at the end.

The definition of “dried meat” (Standard 2.6.2 clause 5) is an important term that should be retained. It is used in other Standards.

Section 168: Subsection (3) is clumsy (although it reflects the current provision) and could be written more clearly.

Section 170: Subclause (3) in the current Code applies to all fermented meat products, not just fermented comminuted processed meat products. The definition of “comminuted” has been wrongly omitted from subclause (4).

The editorial note in Standard 1.6.2, to the effect that the provisions apply irrespective of the names used to standardise meat products in Chapter 2, has been omitted. It should be retained at least as a note, and may in fact need to be an operative provision, for this Division to operate as intended.

### Division 3 Articles and materials in contact with food

Greater thought should be given to this Division. It is not referenced in the basic requirements of Chapter 1, Part 2, Division 2 and its provisions are vague to the point of uncertainty or else so broad as to have unintended consequences if literally enforced. As currently drafted, it adds very little to the definition of “unsuitable food” in the application Acts. Unless some substantive operation for the Division can be described, it should be omitted rather than retain the uncertainty or potential for perverse results that it entails (it prohibits, for example, the slightest cardboard flake from packaging that poses no choking, or any other health or safety, hazard). If retained, it must be



questioned whether this Standard is properly placed among processing standards. Its current location within residues and contaminant standards seems more appropriate.

## **CHAPTER 2**

### **Part 1 Cereals**

#### **Division 1 Bread and bread products**

Section 2.02(1) is a new provision that seeks to provide “enforceability” in relation to the current Code’s definitions of “wholegrain” and “wholemeal”. This is not a case where such enforceability is as easy as saying food “sold on the basis of a representation that it is” wholemeal or wholegrain must be wholemeal or wholegrain, even in relation to products that are entirely grain based. Wholemeal flour, for example, is not made entirely from wholemeal. This clause will require further work with cereal stakeholders.

The editorial note to Standard 2.1.1 clause 5 has been omitted. It is important to guide manufacturers towards mid-point fortification because this is the basis for dietary modelling of the iodine public health intervention. This might perhaps be an issue for section 2.162, but some guidance to industry would be worthwhile.

### **Part 2 Meat, eggs and fish**

#### **Division 1 Meat and meat products**

The draft Division includes composition requirements for meat pies and sausages. It should also do so for manufactured meat and processed meat to ensure the minimum meat requirements are met in both cases.

#### **Division 2 Eggs**

No concerns identified.

#### **Division 3 Fish and fish products**

Clause 2.19 Note 1: Seafood Services Australia has ceased trading.

### **Part 3 Fruit and vegetables**

#### **Division 1 Fruit and vegetables**

No concerns identified.



## Division 2 Jam

Section 2.23(1): As written, this section could be perversely understood to require manufacturers to dispose of up to 60% of their ingoing fruit! It highlights the need to be precise when stating ratios, for example in this case it might better refer to “400g fruit / kg jam”, or even better, “be made from at least 40% of those fruits by ingoing weight”.

Section 2.23(2): The definition of jam has significantly changed, in that it now must be prepared by processing fruit. Under the current Code, it may be made by processing a variety of fruit-derived ingredients. It is appreciated that the change is designed to overcome the drafting in the current Code that allows jam to be made by processing sugars or honey, but any such change is supposed to be outside the scope of P1025.

## Part 4 Edible Oils

### Division 1 Edible oils

No concerns identified.

### Division 2 Edible oil spreads

No concerns identified.

## Part 5 Dairy Products

The current dairy standards include a specific requirement to comply (in the case of Australia) with the production standard in Standard 4.2.4. This is now simply a note, which should be sufficient to draw readers’ attention to those production requirements. Care will need to be taken during transitional periods and during the review of the production standards to ensure the requirements of Standard 4.2.4 remain in place.

### Division 1 Milk

Section 2.28: The grammar seems wrong around colostrums – it should either be simply “excluding colostrums” or “but excludes colostrums” as in the current Code.

Section 2.29: The heading is inconsistent with others in this Division.

### Division 2 Cream

Section 2.31: Subclause (2) has an error in that “or” has been omitted after “milk” and prior to “products”.



## Division 3 Fermented milk products

Section 2.32: There are significant problems with the redrafting of these requirements, as 2.32(1)(b)-(d) only apply in the current Code to the fermented milk as defined in subsection 3, and not to the food consisting of fermented milk with other ingredients. The redraft suggests that the requirements apply to the fermented milk with other ingredients. This may be an area where better drafting could remove the necessity of referring to “other ingredients”.

Code Maintenance IX (Proposal P1013) removed the provision that the protein levels for fermented milk applied only to fermented cow’s milk. The P1025 draft reflects Standard 2.5.3 post-P1013, but was this change intentional?

## Division 4 Cheese

Section 2.35(b) reflects a provision that has been removed from the current Code. It should be deleted.

## Division 5 Butter

No concerns identified.

## Division 6 Ice cream

The signpost to the requirements around declaration of animal / vegetable fat sources (currently an editorial note) is considered useful by the industry and should be retained.

## Division 7 Dried milk, evaporated milk and condensed milk

No concerns identified. The change from plurals to singular is noted as part of the move to more consistent drafting styles, and of course under interpretation legislation the singular includes the plural. Codex, however, often uses plurals and does so in the case of dried milk(s), and it should be understood that consistent drafting comes at a small cost of reduced international consistency.

# Part 6 Non-alcoholic beverages

AFGC understands that the Australian Beverage Council is responding separately in relation to this Part. AFGC supports that Council’s submission.

# Part 7 Alcoholic beverages

## Division 1 Labelling of alcoholic beverages and food containing alcohol

Section 2.62: In general, the move to a consolidated dictionary for the Code is supported, and it is important that terms used across the Code carry a consistent



meaning. Some terms, though, do have only limited application. “Standard drink” is one such term – it has application only in Chapter 2, Part 7, Division 1. It could still be included in, and signposted from, s.1.06, but it should perhaps apply just “In this Division” rather than “In this Code”.

Section 2.63: The tabular format for the ABV content declarations in the existing Code is considered to be clearer and more usable than the proposed text-based version.

#### Division 2 Beer

Section 2.68: The wording of this, and similarly worded provisions elsewhere in the Code (eg fruit wine), lacks clarity. It seems to be saying that you can sell something as “beer” that consists of “beer” mixed with other foods (ie you can sell it as beer even though beer is just one ingredient in the food). The intent is, of course, that beer with the permitted ingredients is still “beer”. While this may seem an overtly technical point, NZ alcohol laws restrict supermarket sales based on the meaning of “beer” in the Food Standards Code, and the wording of these provisions may create confusion as to what is, or is not, permitted.

#### Division 3 Fruit wine and vegetable wine

No concerns identified. However, the differences between the sources of fruit wine and vegetable wine as defined in section 2.70 and the definitions in Part 3, Division 1 (Fruit and Vegetables) seems incongruous.

#### Division 4 Wine and wine product

No concerns identified.

#### Division 5 Spirit

No concerns identified.

### Part 8 Sugars and honey

#### Division 1 Sugars

Sections 2.75 and 2.78: It is odd to talk about the compositional standard for icing when there is in fact no actual standard for this food. Further, icing may be used as a filling as well as a coating.

Section 2.75: The definition of “sugars” reflects an out-of-date food technology. It should be updated in consultation with relevant stakeholders. Examples of issues that could be addressed in the definition include –

- The definition should encompass sugar, in which case icing sugar would be redundant;
- Making reference to galactose;
- Rewording the polyol exclusion more generally (eg “hydrogenated carbohydrates (polyols) including sorbitol ...”
- Excluding chlorinated carbohydrates;

Section 2.76: In a similar fashion, the definition of sugar should be made generic (eg “any purified sucrose product refined from sugar cane or sugar beet”) rather than seeking to list out the various forms. The difficulty with listing forms is that technology will always develop new ones, eg Demara sugar, Rapadura sugar, amorphous sugar, granulated sugar, golden syrup, invert sugar and molasses.

#### Division 2 Honey

No concerns identified.

### Part 9 Special purpose foods

#### Division 1 Infant formula products

AFGC understands that the Infant Nutrition Council is responding separately in relation to this Part. AFGC supports that Council’s specific submissions, including in relation to the key issue of L-amino acids.

#### Division 2 Food for infants

There is some confusion around whether honey is treated as a sugar by this Division. In s.2.106(e) reference is made simply to “total monosaccharide and disaccharide content” (seemingly excluding honey) whereas s.2.110(d) counts honey towards a food being “sweetened”. This reflects current provisions, but the policy could have been clarified in P1025.

Section 2.106(4)(b): The previous editorial note to the effect that infant foods should have a soft texture and be free from lumps has been wrongly incorporated as a mandatory requirement. This is a significant change imposing new obligations on infant food formulations, contrary to the espoused policy of P1025. The paragraph must be deleted.

Section 2.113: A signpost to Schedules 1.01 and 1.02 would be useful for subclauses (2) and (3).

Section 2.114(1): Paragraph 1.100(b) exempts small packages from the NIP labelling requirements, but excludes food for infants, in effect requiring NIPs on foods for infants even in small packs. This provision is not obvious to readers of Part 9 Division 2 and should have an explicit signpost in a note.





Section 2.116: The wording in P1025 is not clear as to whether or not post-opening storage instructions are mandatory. The current Code mandates such instructions. Many of these foods are shelf-stable and may not in fact require post-opening instructions, but given this is a change, it should be very clear that it is intentional. The signpost to Chapter 1 Part 3 Division 1 is fairly generic: in this instance it is possible to be much more specific.

Schedule 1.01 doubles the vitamin D RDI for children aged 1-3 years. This is likely an error, and “10ug” should revert to “5ug”.

### Division 3      Formulated meal replacements and formulated supplementary foods

The provision for the addition of lutein (clause 6A in the current Code) has not been incorporated in the P1025 draft, possibly due to timing issues.

Section 2.118: Meal replacements sold as a prepacked selection of foods should be reinstated into the definition (refer to current Code definition). Rather than regulating food on the basis of the manufacturer’s intention in formulating them, it may be clearer and more enforceable to capture foods that the labelled as being “Formulated Meal Replacements”.

Section 2.121: There are many foods that are sold as supplements that are not, and should not be, regulated under this Division (whey powder and fish oil provide two examples). Further, there are issues in regulating foods based on the intention of the manufacturer. The current practice is that manufacturers signal that the product has been formulated for this Division by using the name “Formulated Supplementary Food”, and this is likely the best way of identifying the subject of this Division.

Section 2.125: Subclause (2)(c)(ii) wrongly permits additional forms of vitamins and minerals in supplementary foods for young children (Schedule S30.16).

Schedule S30.12: Selenium is listed as %RDI but is listed in the Schedule relating to ESADDI. It should be moved to schedule S30.11.

### Division 4      Formulated supplementary sports foods

Section 2.127: Rather than regulating food on the basis of the manufacturer’s intention in formulating them, it may be clearer and more enforceable to capture foods that are labelled as being “Formulated Supplementary Sports Foods”.

Section 2.131: The threshold %RDI levels in the current Code state that the level is assessed against 'in relation to a food which requires dilution or preparation according to directions, the quantity of food which when diluted or prepared produces a normal



serving'. These words have been omitted from the proposed Code and should be reinstated in both subparagraphs of paragraph (2)(a).

Schedule S30.15: The maximum claimable quantity for zinc has been mistakenly located in the maximum amount column.

Schedule S30.16: A number of permitted forms seem to be missing –

- dexpanthenol
- d-sodium pantothenate
- calcium hydroxide
- calcium oxide
- calcium sulphate
- potassium phosphate, dibasic
- sodium phosphate, dibasic
- Selenium
  - inorganic forms
    - sodium selenate
    - sodium selenite
  - Organic Forms
    - selenomethionine

The intake amounts for biotin has changed from 100 mcg to 30 mcg

The intake amounts for pantothenic acid has changed from 7 mcg to 5 mcg

The intake amount for Selenium has been omitted and should be 70 mcg as per current regulations

Schedule S30.18: Amino acids are now specific as being the L-amino acid only. While this may not have any actual impact, it is a change that requires specific stakeholder consultation to ensure there are no unintended consequences.

## Division 5 Food for special medical purposes

Section 2.145(2): The references to the Table in Schedule 9 seem to have gone astray. Rather than advising in relation to aspartame, caffeine and propolis as per the current Code, the advisory statements seem to relate to phytosterols, quinine and unpasteurised milk.

Section 2.147: There is a small typographic error: “Division 5 or Part 3” should read “Division 5 of Part 3”.

Schedule S30.20: This schedule is missing the footnotes from the current Code and the extra permitted form of biotin.



## Division 6 Transitional standard for special purpose foods

This Division relates to New Zealand only provisions on which AFGC's sister organisation, the New Zealand Food and Grocery Council, will provide any necessary comment.

## Part 10 Standards for other foods

### Division 1 Vinegar and related products

No concerns identified.

### Division 2 Salt and salt products

No concerns identified.

### Division 3 Chewing gum

Section 2.164: The various references to "in g" might be clearer to state "in grams".

Section 2.166: Subclause (2) should refer to the "presence of calcium", not "releasable" calcium as the latter is a regulatory term, not a consumer term. The word "maximum" can be omitted from paragraph (2)(c).

Section 2.167: the attempt to combine both "normal" and small package declarations in the one clause creates odd drafting that does nothing for clarity – one paragraph saying information must be in a panel, and the next saying that it need not. Separate clauses for the two situations would be clearer. Subclause (3) and its referenced schedule are examples only and could be omitted (or include the example NIP as a note).

### Division 4 Miscellaneous standards for other foods

Standard 2.168: Tea has a new definition that requires the leaves to be dried or fermented. This change should not be made under the current policy of P1025, or at least should be specifically identified for consultation with affected stakeholders.



## CHAPTERS 3, 4 and 5

Chapters 3 and 4 each contain a single clause only that adopts by reference the current Standards in the equivalent Chapters of the existing Code. These clauses misconceive the separation between a standard and a Gazette notice that implements the standard. There will be a Gazette that “enacts” the new chapters 1 and 2 and repeals existing standards in those chapters. This enabling Gazette would then leave existing Chapters 3 and 4 of the Code untouched, and hence there is no requirement for any adoption by reference. These provisions can be safely omitted.

A similar issue arises in relation to Chapter 5. Clause 5.01 revokes the current standards in Chapters 1 and 2 of the existing Code. This revocation will be achieved in the enabling Gazette notice and there is no need for this “standard” to revoke other standards. It serves only to clutter the Code.

In relation to clause 5.02, further consultation is required in relation to the transitional and/or commencement arrangements to be put in place. As mentioned in AFGC’s main submission, commencement 2 years after gazettal would be appropriate. Again, this may perhaps be best left to the enabling Gazette notice, but no final view on this point can be taken until such provisions have been further developed.

What is clear from these Chapters is that it would be useful to include, in the next round of public consultation, a draft of the Gazette notice that would give effect to the reviewed Code so that these mechanisms are made transparent and open to discussion.



## ATTACHMENT 2: COMMENTS ON DEFINITIONS

### 1. INTRODUCTION

A document relating to the definitions proposed in the revised Code is provided separately. These detailed comments are intended to be incorporated as part of this Attachment.

To give some background to the document, the team began with the definitions in Clause 1.06, using the cross-referencing documents to compare the definition in the current standard and the proposed definition in P1025. A broader review of P1025 was then undertaken, greatly assisted by the document put together by the NZFGC, to add the definitions which have not been included in clause 1.06. For ease of reference these missing definitions have been shaded grey and it has been noted in the comments that they have not been included in clause 1.06. We have included all definitions that are in bold in P1025 - it is only the definition of 'peanut butter' which has been included in the table but is not bolded in P1025. The comments field features our view about the effect of the P1025 definition proposals, and also incorporates feedback about definitions that appear in the draft submission in a shortened form.

### 2. ADDITIONAL COMMENTS

In no particular order:

- In some instances a term has two or more different meanings, depending on the part of the Code in which it appears. This has been noted by listing all of the relevant parts and any Code notes about the differing meanings. This "double meanings" don't preclude having a central Dictionary in the Code, although it will be important that the Dictionary makes clear where multi-meanings may apply for a term. However, it should be avoided if at all possible.
- Consideration was given to adding the note for the definition for "food" to 1.06(1), and for similar notes. These notes add value to the Code and will likely be of assistance to users of the Code. That said, there is dubious value in including the Model Food Law provisions if it is the Application Act definitions that are to apply. There is neither need nor any likely legal basis for considering or having regard to the Model Food Law definitions and they only add unnecessary length to the Dictionary. We appreciate that there is a need for consistency amongst Application Acts and that this could be achieved by adoption of the Model Food Law definitions universally by States/Territories, however this is something that needs to be taken up separately.
- The definitions "low lactose formula" and "lactose free formula" are not included in P1025 despite being included in the cross-reference document. The terms are also used several times throughout P1025 but they are not defined. This has been noted in the table.
- Given that the document is a review of the P1025 proposed definitions (as compared to the current Code), no comment is made about the lack of definitions for certain key concepts currently defined, for example, 'genetically modified food'.



- AFGC continues to be of the view that a central Dictionary is a worthwhile tool to include in the Code, however it needs to be complete (that is, all or nothing). It is clear from the review of the definitions proposed in P1025 that the Dictionary is incomplete which presents real risk for users of the Code (business and regulators alike).
- No comment is made here on the utility of words like “a product sold on the basis or a representation” in each of the relevant definitions: comment instead is made in the main submission.
- A few definitions still contain substantive obligations by virtue of compositional standards that do more than define foods. We have not provided details of this as again it seems to be better as a more general comment than in each definition.
- There remain terms in the Code that are undefined, where a definition would clarify the intent and clarity of the Code. Two examples are –
  - the use of terms associated with sugar, such as sugar confectionary, total sugars, residual sugars and added sugars; and
  - the concept of “children”: Section 2.124 defines “young children as being aged 1-3 years, Schedule S1.02 refers to “children aged 1-3 years” (no mention of “young”), Schedule S4.03 makes various references to “children”, “young children aged 1-3 years” and “children aged 4 years and over”, section 2.61 refers to “children” and section 2.129 refers to “children under 15 years of age”.



## ATTACHMENT 3: SECONDARY COSTS

### 1. INTRODUCTION

AFGC Members have expressed concern in relation to the potential cost impact on industry resulting from the implementation of the draft of the Australia New Zealand Food Standards Code (the Code) as set out in P1025 arising from -

- Documentation – amendment and updating Code references in documentation relating to food safety and quality systems and supplier management;
- Training of staff within businesses in the revised Code; and
- Impact on other legislation or regulatory requirements.

### 2. AFGC INDUSTRY COST SURVEY

To get some quantitative assessment of the scale of these costs, AFGC initiated a short survey of those Member companies who have been involved in developing the response to P1025. A copy of the survey questions is provided below. 10 member companies completed the survey, with the results tabulated as shown below.

### 3. KEY FINDINGS

#### 3.1 Documentation

Key documents that would be affected by the revised Code include:

- **Product Information Forms (PIFs)** used by companies to collect and store information about ingredients and finished products used in their business; and
- **Food Safety and Quality System documents ('controlled documents')**, including documentation related to food policy and regulation..

Companies have between 100 and 1500 PIF documents which would be required to be updated to comply with the revised Code, and have been 100 – 1500 controlled documents within their Food Safety and Quality Systems which would be required to be updated to comply with the revised Code (the controlled document count is much higher, but not every controlled document makes reference to the Code).





### 3.2 Training

Training would be required on two levels:

- People who make decisions as part of their day to day work which require them to thoroughly understand the Code: and
- People who would need to be made aware that the Code has changed.

It is estimated that across the 10 companies that responded to the survey, there are 225 people (range 1-60, average 23) who fall into the first group and 800 (range 20-400, average 80) who fall into the second group. This represents a significant training cost, especially for the first group, where retraining costs including lost productivity can easily amount to over \$2000/day/person.

### 3.3 Impact on other legislation or regulatory requirements.

Member companies identified a range of other regulation and requirements that would be impacted by the revised Code as follows:

- Import Permits;
- Flavours, Nutritional claims;
- PNG Regulations a 'cut and paste' of the FSC;
- Australian Consumer Law (how this interacts with FSC - eg Country of Origin);
- Impact of international imported good suppliers meeting criteria and understanding the new Code;
- NZ Alcohol Reform Act which calls up Food Code provisions to permit the sale of beer, wine & fruit; and
- Import / Export documentation.

### 3.4 Review costs

In addition to the implementation costs outlined above, AFGC member companies have dedicated significant resources to the review of P1025. AFGC estimates that approximately 65 people from member companies have directly contributed approximately 1040 hours (in addition to their day jobs), at a conservative cost estimate of \$150,000.00.



## AFGC Industry Cost Survey Questions (P1025)

	<b>P1025 Code Review - Industry Cost Survey</b>	
<b>1</b>	<b>Name of Business</b>	
<b>2</b>	<b>Type of Business</b>	
	<b>Product Information Form</b>	
<b>3</b>	How many PIFs does your business currently have?	
<b>4</b>	What is the estimated time it would take to complete a PIF?	
	<b>Controlled documents (Food Safety and Quality System)</b>	
<b>5</b>	How many controlled documents does your business currently have which make reference to the Food Standards Code?	
	<b>Food Regulation training</b>	
<b>6</b>	How many people within your business make decisions as part of their day to day work which requires them to understand the Food Standards Code?	
	<b>Note:</b> it is assumed that these people would need to attend an external training course on the updated Code.	
<b>7</b>	How many people within your business would need to be made aware that the Food Standards Code has changed?	
	<b>Note:</b> it is assumed that these people could be retrained internally.	
	<b>Impact on other legislation</b>	
<b>8</b>	Are you aware of any other legislation or regulatory requirements that would be impacted by the change to the Food Standards Code?	
<b>9</b>	If yes, please list	
	<b>Time invested in the Code Review</b>	
	How much time would you estimate has been invested by your business in the current review of the Food Standards Code?	
<b>10</b>	Number of people involved	
<b>11</b>	Total hours	

## AFGC Industry Cost Survey Questions (P1025) – Summary of Responses

	<b>P1025 Code Review - Industry Cost Survey - SUMMARY</b>		
2	<b>Type of Business</b>	Food Manufacturing and Ingredient Supplier	
		<i>n = 10</i>	
	<b>Product Information Form</b>		
3	How many PIFs does your business currently have?	100 - 1500+	
4	What is the estimated time it would take to complete a PIF?	1-5hrs	
	<b>Controlled documents (Food Safety and Quality System)</b>		
5	How many controlled documents does your business currently have which make reference to the Food Standards Code?	100 - 1500+	
	<b>Food Regulation training</b>		
6	How many people within your business make decisions as part of their day to day work which requires them to understand the Food Standards Code?	Approx 225 in total (n=10)	Range = 1 - 60 per business
	<b>Note:</b> it is assumed that these people would need to attend an external training course on the updated Code.		
7	How many people within your business would need to be made aware that the Food Standards Code has changed?	Approx 800 (n=10)	Range = 20-400 per business
	<b>Note:</b> it is assumed that these people could be retrained internally.		
	<b>Impact on other legislation</b>		
8	Are you aware of any other legislation or regulatory requirements that would be impacted by the change to the Food Standards Code?		
9	If yes, please list		Import Permits; Flavours, Nutritional claims; PNG Regulations a 'cut and paste' of the FSC;



			<p>Australian Consumer Law (how this interacts with FSC - eg Country of Origin);</p> <p>Impact of international imported good suppliers meeting criteria and understanding the new Code.</p> <p>NZ Alcohol Reform Act which calls up Food Code provisions to permit the sale of beer, wine &amp; fruit;</p> <p>Import / Export documentation</p>
	<b>Time invested in the Code Review</b>		
	How much time would you estimate has been invested by your business in the current review of the Food Standards Code?		
10	Number of people involved	Approx 65 (incl AFGC staff)	1 -10 per business
11	Total hours	Approx 930 hrs	<p>Note: if this were an application it would attract a fee of \$115,000 as a general application up to 1000 hours (does not include FSANZ admin fee)</p>



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#### Full Members

- Arnott's Biscuits Ltd
- Aspen Nutritionals Australia Pty Ltd
- Australian Blending Company Pty Ltd
- Barilla Australia Pty Ltd
- Bayer Australia
- Beak and Johnston Pty Ltd
- Beechworth Honey Pty Ltd
- Beerenberg Pty Ltd
- Bickfords Australia Pty Ltd
- Biofarm Artel
- Birch and Waite Foods Pty Ltd
- Body Science International Pty Ltd
- Bronte Industries Pty Ltd
- Buderim Ginger Limited
- Bulla Dairy Foods
- Bundaberg Brewed Drinks Pty Ltd
- Bundaberg Sugar Ltd
- Byford Flour Mills/Millers Foods
- Byron Food Science
- Campbell's Soup Australia
- Canon Foods
- Cantarella Bros Pty Ltd
- Capilano Honey Limited
- Carman's Fine Foods
- Cerebos (Aust) Ltd
- Cheetham Salt Limited
- Christie Tea Pty Ltd
- Church & Dwight (Australia) Pty Ltd
- Clorox Australia Pty Ltd
- Coca-Cola Amatil Ltd
- Coca-Cola South Pacific Pty Ltd
- Colgate-Palmolive Pty Ltd
- Coopers Brewery Ltd
- D.E Coffee & Tea Retail Australia/Sara Lee Coffee & Tea Retail Australia
- Danisco Australia Pty Ltd
- Devro Pty Ltd
- DSM Food Specialties Australia
- Earlee Products Pty Ltd
- Epicurean Products Pty Ltd
- Ferrero Australia Pty Ltd
- Fibrisol Service Australia Pty Ltd
- Fonterra Australia Pty Ltd
- FPM Cereal Milling Systems Pty Ltd
- Freedom Foods Group
- Frucor Beverages (Australia) Pty Ltd
- General Mills Australia Pty Ltd
- George Weston Foods Ltd
- GlaxoSmithKline Consumer Healthcare
- Gloria Jean's Coffees
- Go Natural
- Goodman Fielder Limited
- H.J. Heinz Company Australia Limited
- Harvest FreshCuts Pty Ltd

- Hoyt Food Manufacturing Industries Pty Ltd
- Hungry Jack's Australia
- Jalna Dairy Foods Pty Ltd
- JBS Australia Pty Limited
- Johnson & Johnson Pacific Pty Ltd
- Kellogg (Aust) Pty Ltd
- Kerry Ingredients Australia Pty Ltd
- Kimberly-Clark Australia Pty Ltd
- Kitchens of Sara Lee
- Laucke Flour Mills Pty Ltd
- Lindt & Sprungli Australia
- Lion Dairy and Drinks Pty Ltd
- Madura Tea Estates
- Manildra Harwood Sugars
- Mars Chocolate
- McCain Foods (Aust) Pty Ltd
- McCormick Foods Australia Pty Ltd
- McDonald's Australia Ltd
- Mentholatum Australasia Pty Ltd
- Merisant Australia Pty Ltd
- Metarom Australia P/L
- Mondelez International
- Mrs Mac's Pty Ltd
- Murray Goulburn Co-operative Co Ltd
- Myosyn Industries Pty Ltd
- Neptune Bio-Innovations Pty Ltd
- Nerada Tea Pty Ltd
- Nestle Australia Ltd
- Nutricia Australia Pty Ltd
- Ocean Spray International, Inc
- Only Organic 2003 Pty Limited
- Parmalat Australia Ltd
- Patties Foods Ltd
- Peters Ice Cream
- Pfizer Consumer Healthcare
- Procter & Gamble Australia Pty Ltd
- QSR Holdings
- Queen Fine Foods Pty Ltd
- Reckitt Benckiser (Australia) Pty Ltd
- Red Bull Australia Pty Limited
- Sandhurst Fine Foods Australia
- Sanitarium Health and Wellbeing Company
- SC Johnson & Son Pty Ltd
- SCA Hygiene Australasia Pty Ltd
- Sensient Technologies (Australia) Pty Ltd
- Simplot Australia Pty Ltd
- Solaris Paper Pty Ltd
- Spicemasters Australia Pty Ltd
- Steric Pty Ltd
- Stuart Alexander & Co Pty Ltd
- Subway Franchisee Advertising Fund Australia/NZ
- Sugar Australia Pty Ltd
- SunRice
- Swisse Vitamins Pty Ltd
- Tasmanian Flour Mills Pty Ltd
- Tate & Lyle ANZ Pty Ltd

- The Smith's Snackfood Company
- The Vege Chip Company
- The Wrigley Company Pty Limited
- Tixana Pty Limited
- Unilever Australasia
- Vital Health Foods (Australia) Pty Ltd
- Ward McKenzie Pty Ltd
- Yakult Australia Pty Ltd
- Yum! Restaurants Australia Pty Ltd

#### Associate Members

- A.T. Kearney Pty Ltd
- ACI Operations Pty Ltd
- Addisons
- Amcor Australasia
- Australian Pork Limited
- Baker & McKenzie
- Bizcaps Pty Ltd
- Brisbane Marketing
- CHEP Asia - Pacific
- CROSSMARK Asia Pacific
- CSIRO Food and Nutritional Sciences
- Curtin University CESSH
- Dairy Australia
- Ebiquity
- Ettlin International Pty Ltd
- Food Allergen Control Training Analysis (FACTa)
- Food Liaison Pty Ltd
- Foodbank Australia Ltd
- Futureye Pty Ltd
- Grant Thornton
- GS1 Australia Ltd
- IBM Australia Ltd
- Industry Capability Network (NSW)
- Invest Queensland
- King & Wood Mallesons
- KPMG
- Landmark Nutrition Pty Ltd
- Linfox Australia Pty Ltd
- Logan City Council
- Loscam
- Meat and Livestock Australia
- Monsanto Australia Ltd
- MRI Group Pty Ltd
- New Zealand Trade and Enterprise
- Pacific Strategy Partners
- PINCHme Australia Pty Ltd
- Pitcher Partners
- Pitt and Sherry (Operations) Pty Ltd
- Red Rock Consulting
- Rentokil Initial Pty Ltd (Rentokil Pest Control)
- Scholle Industries Pty Ltd
- Simons Green Energy Pty Ltd
- Six Degrees Executive Pty Ltd
- SKUvantage
- StayinFront Group Australia
- Strikeforce Alliance Pty Ltd



## Australian Food and Grocery Council

- Swire Cold Storage
- Swisslog Australia Pty Ltd
- Tetra Pak Marketing Pty Ltd
- The Food Group Australia
- The Nielsen Company
- Touchstone Consulting Australia Pty Ltd
- TSF Engineering
- Visy Pak
- Wiley & Co Pty Ltd

### Affiliate Members

- Australian Self-Medication Industry
- Association of Sales and Marketing Companies Australasia
- CropLife Australia Limited
- Food & Beverage Importers Association
- Food Industry Association Qld Inc
- Food Q Inc
- Foodservice Suppliers Association of Australia
- Grains & Legumes Nutrition Council
- Private Label Manufacturers Association Australia/New Zealand



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