



27 September 2013

Project Officer Proposal P1025
Food Standards Australia New Zealand
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Dear Sir/Madam

Proposal P1025 Code Revision – Call for Submissions dated 23 May 2013

Thank you for the opportunity to comment on this proposal. The Ministry for Primary Industries (MPI) has the following comments to make.

General Comments

MPI welcomes this proposal, and appreciates the resource that has been associated with this work so far. As the enforcement authority for New Zealand, we agree that the Australia New Zealand Food Standards Code (the Code) needs a clearer presentation of requirements, to better meet the needs of all stakeholders. Many of our comments are made with a view to achieving a balance between the objectives of a new legal instrument that meets legislative requirements, and a Code that is understood by stakeholders. In our view, if the Code is not understood by those who use it, the Code Review proposal (P1025) will not achieve the second key purpose outlined by FSANZ in the Executive Summary, i.e. *clearer presentation of the requirements that impose an obligation in relation to the conduct of a food business or the sale of food, or relating to the composition of food or labelling.*

In some aspects of the Code Revision, MPI has identified areas that require further discussion with FSANZ, as while progress has been made to provide greater clarity, there is still some uncertainty as to the regulatory requirements. These details are provided in the submission. MPI would welcome the opportunity to talk about the various options for progressing these issues, prior to the next public consultation. These discussions could involve other jurisdictions and stakeholders.

In this submission, we have focused on the more important principles and concepts, recognising that we can provide detail on some of the finer points at the next stage of public consultation. If the next version of the Code could be provided as a marked up/track change document (as well as a clean copy), this would enable easy comparison between the drafts.

We use the term 'draft Code' in this submission, to refer to the 'draft food regulatory measure' associated with this stage of the consultation process.

Comments on issues identified in the covering paper 'Call for Submissions – Proposal P1025'

2.1 – As FSANZ will be aware, the list of matters to be considered in other reviews can be updated (for example, health claims can now be deleted from the list of bullet points).

3.2 – We note that a Regulatory Impact Statement is noted as not required. This is dependent however on the nature of the final legislative instrument, and therefore this view may need reconsideration.

3.21 – MPI supports option (a).

3.2.2 – MPI supports option (a).

3.2.3 – The 7th paragraph starting '*Provisions of the Code...*' might contain an incorrect reference to Parts 1, 2, 3, and 4. We think this should refer to Chapters 1, 2, 3 and 4.

3.2.5 – We agree with the new approach regarding the separation of the definition from the compositional requirements. The definition identifies the characteristics of the food, and the compositional requirements state the substantive material that provides the obligation/requirement. The separation of requirements removes the regulatory loophole where products were potentially unregulated if they were outside the limits provided in the definitions.

The last sentence of this paragraph introduces the concept of 'representation', and this term is used throughout the draft Code. We understand the intent behind this concept, however in our view this term needs to be defined. It is our understanding that FSANZ intends that for a food to be represented as a particular type of food, the term 'representation' means that the food must be **named** as such. We have provided more detailed comments on this issue in our section 1.23 comments.

3.2.6 – MPI welcomes this expanded section on the relationship between permissions and general prohibitions. We can understand the approach that FSANZ is taking. However the translation of this approach into the drafting is at times ambiguous. We have provided more detailed comments on this aspect in our submission.

Food additives – As FSANZ notes, the lack of a definition for food additives creates ambiguity. The proposal work leading to the development of the food additive standard might provide policy guidance, and a definition of a food additive might be able to be achieved in the Code Revision. The concept of 'used as a food additive' does get cumbersome and at times confusing, however we agree that this approach appears to meet the objectives of correctly regulating the use of food additives (we have provided more detailed comments in our section 1.21 comments).

The paragraph on processing aids concludes with the sentence 'in other words, rather than regulating substances the proposed provisions regulate use'. MPI suggests that this statement could be revised in the

next Call for Submissions paper, to reflect that while the proposed provisions regulate substances used as processing aids, there is still, in the main, a well defined list of approved substances that are processing aids.

As noted by FSANZ in paragraph 3.2.11 (Nutritive Substances), the definition has been amended. The new definition is in section 1.19. Our comments on the proposed definition are included in this submission, under our section 1.19 comments. The upcoming review of *Novel foods and Nutritive Substances* will address the uncertainties with the definition.

3.2.8 – MPI agrees that a single legislative instrument could be the preferred option.

However, further consideration needs to be given to the implications of having a single legislative instrument:

- The mechanism for amendment and any associated costs
- Any other issues under the Legislative Instruments Act 2003 (Cth), such as formatting and publication
- As former individual standards will become simply part of the one standard, there may be implications around the power to deal with *part* of an instrument rather than the whole instrument
- Having a single instrument may blur the line between new standards and variations; i.e. technically any new standards will be simply variations of the new single standard
- The FSANZ Act 1991 (Cth) and the Food Treaty and the application Acts are worded in the context of the Code being a collection of standards rather than a single standard; this might create inconsistencies or ambiguities or even *vires* issues (e.g. FSANZ Act s 16(1)(n) provides that standards and variations may relate to ‘the interpretation of other standards’).

Clause numbering – as a general comment, the approach is supported but we note that this system could present challenges when the Code is amended. Code users will become familiar with clause numbers, so the way in which new clauses are added, or clauses deleted, will need consideration. The numbering system appears similar to that used for Rules-type legislative instruments; it would be helpful if FSANZ could indicate how future amendments will be numbered and give actual examples. While the removal of much material into schedules will facilitate easy amendment, the substantive provisions are still likely to require frequent amendment.

Search function – As noted above, MPI supports a Code that is searchable. Ideally this would be across the complete document, but if this is not possible, at least each chapter. Hyperlinks are also suggested, so that users can go directly to referenced schedules. An example would be a hyperlink from Section 1.71 to Schedule 11. Increasing use of the online version of the Code warrants consideration of this change.

3.2.20 – Possibly a typographical error in the 5th paragraph – Division 1 of Part 3 of Chapter 1

3.2.21 – MPI agrees with the approach to defining ‘food’, i.e. option 2 (on page 16). It is worth noting, however, that there is potential for a very wide definition of food to apply in the jurisdictions. The model food provisions and the current Food Act 1981(NZ) refer to ‘used and represented as being for use’ for human consumption; the FSANZ Act 1991 (Cth) and the Food Bill (NZ) both have a wider definition which includes ‘capable of being used’. A wide definition results in regulation of a greater sphere of activity, but also means that care is required when ‘food’ is used in a permissive sense, for example section 1.21(2) ‘...food product may consist of, or have as an ingredient, any food’. This means that the permission is wide, so the prohibitions and restrictions need to be accurately and carefully prescribed.

Our comments on the introduced concepts of 'food product' and 'ingredient' are provided in our comments on sections 1.16 and 1.17 in this submission.

Comments on Attachment A1 - Draft Variation to the *Australia New Zealand Food Standards Code* (Volume 1, Chapters 1 to 5) – Proposal P1025

The comments in this submission are provided in section/subsection order for ease of reference, even if they are minor drafting/editorial/typographical points. The numbers referred to below are the section numbers as in Attachment A1.

Title - it would be helpful if the next consultation draft stated the amendment number that the draft Code is current to (e.g. up to and including amendment 138, as the case may be).

Chapter headings and how they are referenced in the Schedules. The order in the heading is Chapter, Part, Division, and Section. However in the text, any reference to another draft Code provision is written in reverse order, i.e. Division, Part, Chapter. While this may be consistent with legal drafting practice, it appears less user-friendly. It is suggested that the provisions be described in the order of 'largest-to-smallest', in order to help Code users find the requirements.

Chapter 1

1.06 Definitions

MPI supports the approach to have definitions that apply throughout the Code, listed in one place.

Agvet chemical – We note that this abbreviation is not necessarily familiar to Code users in New Zealand. We query whether the full term should be spelt out or noted in 1.06. While this does not affect New Zealand, any references in the Code other than the Australia-only provision (Ch 1 Part 4 Div 6) will be problematic, and this is discussed under 1.21.

Application Act – There is a typographical error, the word 'Act' is missing.

Bulk cargo container - Reformat so that (a)(vi) becomes (b), and (b) becomes (c); the present (vi) is not a 'qualifier', such as (i)- (v), but an 'includes', such as the present (b).

Business address – The current Code refers to a postal address in Standard 1.1.1, which is ambiguous. Given the number enquiries relating to this issue, it is suggested that the following additional text is included: *A post office box is not sufficient.*

Catering sale – Although this term is defined as being sale **to** a caterer, rather than **from** a caterer, the term itself could tend to suggest the latter type of sale, unless readers are careful to keep in mind the defined meaning. The wording in the current Code, i.e. 'food for catering purposes' tends to avoid that ambiguity.

Chocolate - This definition includes compositional requirements. It is inconsistent with the draft Code's intentional separation of compositional requirements from definitions. It is suggested that the compositional requirements be located in Chapter 2 Part 10 Div 4, consistent with other miscellaneous standards.

Fund raising event – The definition may not be aligned to the definitions in the Application Acts. Further consideration will need to be given to any implications of this.

GMP – An 'and' is needed between (b) (ii) and (c), consistent with the current Code,

The definition in the current Code for GMP is clearer than the proposed revision. Paragraph (b) of both GMP definitions refers to the situation where there is carryover of a food additive or processing aid, into a 'final food'. This is not clear in the proposed revision, and a reference to 'carryover' and 'final food/food product' could be considered to make this clearer.

Lot identification – The meaning has changed, due to the introduction in this definition of 'food product'. Lot identification also needs to relate to ingredients and raw materials used to make 'food products', for trace back purposes. All foods should be subject to this provision (food, food products, ingredients, components, etc). See the discussion about 'food product'.

Sweet cassava – The definition includes a compositional requirement. It might at face value suggest that cassava with excessive levels of hydrogen cyanide is left unregulated. The prohibition on other varieties of cassava could be referenced in the existing Note – i.e. a reference to schedule 23.01.

Tea and coffee – 'Tea', 'coffee', 'instant tea' and 'instant coffee' are defined by describing a food, so the definitions are appropriately placed in section 1.06. However, 'decaffeinated tea' and 'decaffeinated coffee' have specific compositional requirements. It may be more logical, and consistent with the aim of removing compositional requirements from definitions, to place these definitions in section 2.168, signposted in section 1.06.

Wholegrain and wholemeal – The terms 'wholegrain' and 'wholemeal' are descriptors, rather than names of food, per se (e.g. wholegrain bread). We suggest that in both of these definitions, the (a) paragraph is unnecessary and does not add anything to what is in paragraph (b).

1.12 – The title refers to 'warning statements', but the requirements of subsection 1.12 (2) are for other than warning statements. We suggest that the title to 1.12 is amended.

1.13 (2) – Section 1.13(2) lists all the provisions which do not apply in New Zealand. We have the following minor comments:

- In 1.13(2)(f), both the subsections referred to are not applicable in New Zealand; is this captured by 'or' or should it be 'and'?
- We suggest that 1.13(2)(f) should come after (g), as it relates to a later part of Chapter 2;
- We support the omission of Standard 2.5.1 clause 4 (milk processing requirements). Any reinsertion of this provision into Chapter 2 of the new Code will need to be referred to in section 1.13(2);

1.14 – This clause relates to stock in trade – it would be helpful to have this phrase in the title or in brackets after the title, to aid stakeholders understanding of the Code.

This section refers to ‘food product’, but in our view should refer to ‘food’, or be drafted in such a way as to capture ‘food products’ and ‘ingredients’. Suppliers of certain ingredients (manufactured prior to a variation commencing) should also be able to use this provision (e.g. a food additive might be compliant prior to a variation commencing, but not after, but the ingredient containing that food additive should still be able to be legally sold for the 12 month stock in trade period). The ingredient is not a ‘food product’, as the sale is probably to a food manufacturer, not to a consumer. Further comments on this aspect are provided later in our submission.

Chapter 1, Part 2 – Basic concepts and basic requirements

1.15 Basic concepts - *Food*

See our comments above in relation to the Call for Submissions paper, paragraph 3.2.21, about the potential breadth of this definition.

1.16 Basic concepts – *Food Product*.

The draft Code distinguishes between food, food product, ingredient (and also other substances such as food additives, nutritive substances, etc).

‘Food product’ is food that is sold to a consumer, or is intended to be sold to a consumer. It is also used in the labelling section in the context of sales to caterers, etc.

In many cases, the term ‘food product’ has replaced the word ‘food’ or ‘ingredient’ in the current Code. Consideration will need to be given to the situation where food products can be either ‘final foods’ as ready to eat by the consumer, or foods that can be used to manufacture other foods (i.e. ingredients/raw materials). Most food products can also be ingredients, as they can be used to make other ‘final foods’ or ‘food products’. Food products that are ingredients still need to comply with some requirements, however as currently drafted, this is not always clear. It is suggested that a cross check of requirements is undertaken, to ensure that the correct requirements apply to ‘food’, ‘food product’, and ‘ingredient’, etc. For example, the lot identification requirements should apply to both ingredients and food products, and section 1.21 has requirements for food products ‘on sale’, but no similar requirements appear for ingredients ‘on sale’. There will be many other requirements to cross check, to ensure food products and ingredients are correctly regulated.

Raw materials used to make processed foods (or food products) are not covered by the definition of food product as drafted (and nor should it be), but in the draft Code, some of the sections that use the term ‘food product’ appear to be designed to regulate the raw material as well as the food product.

Further points to note are as follows:

- The section refers to 'basic or traditional processes'. Neither of these processes has been defined; and it is noted that this phrase may have been left in from earlier drafts. It may be enough to simply state 'after preparation'.
- The concept of 'food product' is used to replace 'final food' (most of the time). The term 'product' is however still used extensively in the draft Code, in addition to 'food product'. In the term 'food product', 'product' is being used in a different sense from 'product' as it is used in the rest of the Code. In 'food product', 'product' is being used in the sense of food for sale, whereas other expressions use 'product' to convey the idea of a new product consisting of one main ingredient mixed with others. One example of the other use is 'wine product', another example is just the use of the term 'product', e.g. in section 2.160 (3) – definition of *reduced sodium salt mixture*: We are familiar with the concept of 'wine product', however the introduction of the term 'food product' may create ambiguity or uncertainty for other Code users.
- Examples of where the draft Code contains references to 'final food' are as follows: –1.23 (5), 1.101, 1.124 (5) , 2.111. Consideration needs to be given to replacing these references with 'food product', or introducing a new definition for 'final food'. For example, the use of the term 'final food' in 1.124 (5) relates to food additive permissions for the foods listed in S15. The foods listed in S15 may be 'food products' for sale to a consumer, or may be ingredients used in other foods. In this case, it may be too limiting to use the term 'food product'.
- We note that Attachment C (issue number 83) provides some clarity on the compositional requirements in the Code, but we are of the view that more clarity is needed.
- The draft Code contains a reference to 'retail sales' – see S 2.28 (cow's milk). Could the term 'food product' be used here instead, or is there is an intended difference between the terms? .
- 'Retail sales' is also used in the subheadings in section 1.33, however retail sale is not defined.

The concept of 'Food product' may need further discussion with FSANZ and jurisdictions.

1.17 Basic concepts – *ingredient and compound ingredient*

(1) (a) (i) - Ingredient. The proposed definition is intended to apply across the draft Code. The wording and examples capture the fact that food additives and processing aids are included in the definition, but we query whether the wording covers the most common meaning of 'ingredient' – i.e. the use of one ingredient to make another food, e.g. flour used to make bread, apples used to make juice, etc. While it's possible to describe flour as being 'processed into' bread, or apples being 'processed into' juice, the introductory phrase of 1.17(1) tends to suggest that the ingredient and the second food are two distinct physical entities existing at the same time.

A cross check of the use of the term 'ingredient' is suggested by MPI to ensure that it is being consistently used. We can point out three examples of the use of the term ingredient, which highlight that different interpretations may apply:

1. Section 1.123 heading – food additives are described as ‘ingredients’
2. Section 1.123 (2) – the phrase ‘.....carry-over from a raw material or an ingredient’ is used. If raw material and ingredient mean the same thing in this section, it could be clearer in this respect.
3. Section 1.130 (1) is clearly referring to ingredients that are raw materials/foods, and it is probably not intended that one of the ‘ingredients’ was a processing aid or a food additive

1.18 – Basic concepts – *component*

The definition needs greater clarity around its scope. For example, does it capture all ingredients, food additives, etc that are added to food, or only substances arising from the addition of an ingredient, food additive, processing aid, etc (such as the starch in a cereal, or the milk fat in milk)? An example of where the former may apply is subsection 1.21 (4). For this reason, we think that another example should be provided, in addition to the example already included.

It is important also that this term is not confused with ‘characterising component’, and that the term ‘component’ is consistent between these definitions.

1.19 - Basic concepts – *used as a nutritive substance*. We note that the definition has been restructured. MPI has the following comments:

- The use of the term ‘and’ between subsection (2) (a), 2 (b) and 2 (c) creates some ambiguity. We agree that the use of ‘and’ is legally correct, but Code users may understand this to mean that all requirements must be met, when in fact it is ‘or’. To address any ambiguity, the word ‘and’ could be removed at the end of each of 2 (a) and 2 (b).
- Subsection (2) (c) has introduced concepts in relation to consumers buying of a food product and the use of the substance by consumers. This may have taken on a different meaning, compared to the definition in the Standard 1.1.1 of the Code.
- In our view, it is the nature of the substance that needs clear specification. For example, could complex mixtures (that do not have a fixed chemical composition) be regarded as nutritive substances? An example is bovine colostrum, which in MPI’s view may possibly meet the definition of a nutritive substance (under both the current Code definition of a nutritive substance, and the proposed definition). This is because complex mixtures such as colostrum contain a number of bioactive substances that on their own could meet the definition of a nutritive substance, and it is these substances within the complex mixture that are emphasised when they are used in foods.
- Paragraph 3.2.11 of the Call for Submission paper states that the revised definition addresses two concerns identified in the *Nutricia* decision, and goes on to refer to the phrase ‘not normally consumed as a food’, and the operation of the provision in relation to a nutritive substance that is naturally occurring in food. We note that clause 6 (1) (b) of Standard 2.9.1 is removed from the draft Code. This clause has proved problematic, as it can be viewed as ambiguous. We agree that removal of this clause is removing the ambiguity, as section 1.19 states that the substance is ‘*used as a nutritive substance*’ and subsection 1.21 (5) states that the prohibitions do not apply if the nutritive substance (etc) is naturally occurring. There is now no scope to interpret the Code as permitting substances that

are naturally occurring in food ingredients to be selectively added as nutritive substances (unless there is explicit permission). However, in order to definitively provide the clarity needed, we suggest that subsection 1.21 (5) also makes it clear that: *If the levels of naturally occurring substances are selectively enhanced in a food, or extracted from a food, this exemption no longer applies.*

- The comments above highlight that some amendments could still be made to the definition to improve clarity, however the nature of these amendments are dependent on other definitions, such as 'food product'.
- Attachment C (Response to the Code Review Report) notes under Issue No. 1 that the definition for nutritive substances is revised to limit its application to the addition of nutritive substances in special purpose foods. This statement needs updating to reflect the way nutritive substances are now proposed to be regulated. Vitamins and minerals continue to be defined as nutritive substances, and can of course be added to general purpose foods, as well as special purpose foods.

1.20 – Basic concepts – Sell

It should be noted that the definition of 'sell' or 'sale' for New Zealand will change upon enactment of the Food Bill (currently being considered by a parliamentary committee). The Food Bill as currently drafted will cover exported food more explicitly than the current Food Act.

Division 2 - Basic Requirements – Note 2. It would be preferable if the New Zealand requirements were referred to using the exact text of the statute.

We suggest that Note 2 read:

In New Zealand, the *Food Act 1981*(NZ) section 110 provides:

110 Contravention of food standards

No person shall—

- produce any food unless that person and that food complies with all applicable food standards relating to the production of that food; or
- manufacture, prepare for sale, or sell any food in New Zealand, or import any food into New Zealand, unless that person and that food complies with all applicable food standards relating to—
 - food safety; and
 - the composition of food; and
 - the manufacture of food or, as the case may be, the preparation of food for sale; or
- sell or import any food that does not comply with all applicable food standards relating to the labelling of food; or
- advertise or promote any food unless that person complies with all applicable food standards relating to the advertising or promotion of food; or

(e) sell, or import into New Zealand, any material, container, appliance, or utensil used, or designed for use, in relation to food, unless the material, container, appliance, or utensil complies with all applicable food standards; or

(f) otherwise act in contravention of, or fail to comply with, any food standards relating to food manufactured or prepared for sale or sold in New Zealand, or imported into New Zealand.

1.21 Requirements relating to food product on sale.

MPI supports section 1.21, which lists all prohibitions together. The title to section 1.21 refers to food products; does 'on sale' convey any additional meaning? 'On sale' appears to correspond to 'on importation' in section 1.22, but perhaps 'on' is used in a different sense there, such as 'upon importation'.

Section 1.21 applies to 'food products' on sale, but once again, we question what provisions apply to ingredients that are sold (to food manufacturers for use as an ingredient in food product). It needs to be clearer that the prohibitions on certain substances (e.g. food additives) apply to ingredients as well. We suggest amending subsection 1.21 (3) to make it clearer that the ingredient itself is also subject to the requirements in the table.

This is another example of where the term 'food product' may be too limiting.

Table to subsection (3) - The table to subsection (3) lists 'agvet chemical', but this does not work when the Code is applied in New Zealand because:

- The term 'agvet chemical' is not commonplace in New Zealand
- The term 'agvet chemical' in the Code has no legal meaning for New Zealand, as it is defined in terms of an Australian statute
- Agricultural compounds and veterinary medicines are restricted in food in New Zealand, by an extra-Code mechanism.

MPI suggests this is prefaced with 'For Australia, an agvet chemical'. Additionally, a note to the New Zealand Maximum Residue Limit requirements, as in Chapter 1, Part 4, Div 6, would be helpful clarification.

1.21 (3) - Column 1 lists types of food and substances, rather than foods and substances. Should the introductory wording in 1.21 (3) say 'any foods or substances of the types listed...'?

1.21 (4) – The difficulty in regulating the food additives and processing aids is that the Code regulates both the substances and the purpose for which they are used, i.e. a 'thing' and 'an activity'. The draft does this by prohibiting substances used for any purposes listed in a table, unless expressly permitted. It then effectively defines 'used as a food additive' etc.

It is possible that the draft achieves this regulatory aim. However, careful legal analysis is required to avoid any reasonable risk that there is a circularity in this particular drafting technique. The following argument may be possible:

Section 1.122 defines 'used as a food additive', i.e. if a substance complies with this section, it is by definition 'used as a food additive'. If it is already by definition 'used as a food additive', does it make sense to then impose the additional requirement in section 1.123 as to the circumstances in which it may or may not be permitted to be 'used as a food additive'? There is circularity if the definition is both defining and regulating, i.e. it's performing two functions, much like the objectionable circular definitions in the present Code.

There is an added feature in relation to processing aids, in that there is no reference to any substance that has been extracted, refined, or synthesised. If a substance is not one of the listed substances referred to in section 1.131(3), then it simply does not fall into the definition of 'used as a processing aid'. If it cannot by definition be 'used as a processing aid', does section 1.132 in any sense effectively regulate its use?

Is there a fundamental gap, if someone says they are not using the substances for one of those purposes?

1.21 (5) – For comments on this subsection relating to naturally occurring levels of substances (including nutritive substances), please see our earlier comments in the submission on section 1.19. Consideration may also need to be given to the scope of this section – should it relate only to nutritive substances or to food additives and processing aids as well?

1.22 Requirements relating to food product on importation

Does this allow for importers to re-label imported product, prior to sale? We need to ensure that new labels can be applied, if necessary, to meet New Zealand requirements (e.g. the addition of a NZ address).

1.23 Operation of compositional requirements

The Call for Submissions paper notes in paragraph 3.2.5 that:

Compositional provisions provide that if a good is represented as being for sale as a food or a type of food for which there is a standard, i.e. a food for which there is a definition, the food must comply with the compositional requirements.

MPI finds operation of compositional requirements problematic with the current Code, and welcomes this work within the scope of the Code Revision. We appreciate that compositional requirements will continue for the so called 'icon foods' in the Code Revision.

Section 1.23 relates to compositional requirements imposed in Chapter 2. We have the following comments and questions:

- The chapter 2 provisions introduce the complex notion of two different definitions, one of which applies in a specific section while the other applies to the rest of the Code; this may be quite difficult for Code users.
- This structure also introduces a heavy reliance on the concept of representation; this may unintentionally import legal concepts and precedents around the meaning of 'representation'
- This structure has presumably been introduced to separate out the compositional requirements from the definitions; is there a simpler way of achieving that?
- Section 1.23(2) deals with use of the specified name in connection with the sale of a food; is 'in connection with' wider than a name on a label?

- Section 1.23(2) refers to one type of action which constitutes a representation; there is no indication that this is exhaustive; does it leave wide open the other ways in which a representation might be made, e.g. by 'get-up' (the presentation of the label and/or the packaging), etc?
- Is the policy essentially that the representation relates simply and directly to the name of a food on a label (or other labelling requirements)? If so, that should be spelt out.
- Is it the case that products which do not have the name indicated by quotation marks are covered via the 'specified nature' limb of section 1.23(1)?
- In relation to representations that a food is food of a specified nature, section 1.23 does not appear to provide any further guidance as to what might constitute such a representation; does this leave room for ambiguity and argument?
- In section 1.23(2), is there scope for too much argument about whether the context makes it clear that no such representation is intended? The examples give some idea, but something like 'low fat' ice cream might be quite ambiguous, and might well fall on the other side of the line.

Chapter 1, Part 3 – Labelling and other information requirements

1.26 Outline of Division, and 1.35 When this Subdivision applies refer to 'food products that are sold to caterers'. We question if this is the correct usage of the term 'food product', as it is our understanding that the draft Code defines food product as a sale in a form suitable for use by consumers. This will be the case some of the time in sales to caterers, but not all of the time, as some ingredients will not be in the form of a food product. In other words, foods which are not in a form for use by consumers do not appear to be captured. We have discussed this point earlier under our section 1.16 comments.

1.28 Meaning of catering sale. Please refer to our comments on this, under section 1.06.

1.31 When the food product must bear a label

1.31 (2) – For clarity, 'made' should be defined, or this statement could read 'is made or prepared, and packaged on the premises from which it is sold'.

The current use of 'made' does not clarify how this applies to a butcher who does not make meat, but prepares it. Another example is a shellfish seller who does not make mussels, but does remove the shells before sale. The User Guide makes it clear that the intent of this provision is to apply to butchers and bakeries etc.

Subsection 1.31(3) provides for food products with more than one layer of packaging. The Note to 'See also section 1.50' is helpful and should be retained, as it signals that the label must be legible. It is our interpretation that this offers flexibility to marketers of food, allowing the labelling information to be on the inner or the outer label, so long as it is legible. An example where it would not be legible and therefore non-compliant would be a clear bag with loose but labelled packs inside, but the labels not visible at all times. To emphasise this requirement, we suggest that the editorial note from current standard 1.2.9 clause 2 is reinstated in section 1.50, to make it clear that the information must be readily accessible by a consumer prior to purchase and must not be obscured. The current wording in section 1.50 is not this explicit.

Subsection 1.31 (4) – This requires an individual portion pack with a surface area greater than 30 cm² (not designed for individual sale) to bear a label, and a signpost/note is then provided to ‘see subsection 1.33 (3...’ (advisory and warning statements). We have two questions in relation to this subsection:

1. Are the advisory and warning statements all that are required on the individual portion packs, or is this simply a signpost to the advisory and warning statements? Subsection 1.31(4) (b) does say that these packs need to bear a label, so this could be interpreted as a full label.
2. If only the advisory and warning statements are required (in answer to question 1), but further information is provided **voluntarily** on the individual portion pack labels (i.e. fully labelling), does it need to be compliant?

1.33 (1) (e) – Should ‘sections’ be singular?

1.33 (1) (x) – Should it be ‘and’ and not ‘or’ between (i) and (ii)?

1.33(1) (y) – The term ‘special purpose foods’ in this subclause relates to a specific definition in section 2.153(1). The use of this term outside Chapter 2, Part 9, Division 6 is undefined, and it could be interpreted as the broader meaning, i.e. infant formula or anything else in Chapter 2, Part 9. It would be helpful therefore to reference section 2.153(1).

1.34 (5) – The ‘...in connection with the display of the food..’ is consistent with the current Code, but could the scope of this be clarified in this draft Code? For example, is food ordered at the express order of the purchaser (e.g. take away food, that is not on display) captured by this subclause?

1.35 – This refers to ‘...catering sale of a food product’. This is potentially confusing, if what is meant is the sale **to** a caterer, not **from** a caterer. The title to this subdivision is clear, which states ‘Sales of food products to caterers’.

1.41 Other information that must be provided (in Sales of food products to caterers)

1.41 (2) - This section states that the name and address of supplier **must** be in documentation accompanying the food product. 1.40 (1) does not require this information to be on the label. In the current Code if the information is not on the label it must be provided in accompanying documentation, but if it is on the label there is no requirement for it to be in accompanying documentation. The draft Code appears to require documentation, even if the information also is already on the label. Possibly it should say ‘In the case of the information referred to in paragraph 1.33(1) (c) (name and address of the supplier) which is provided in documentation, the documentation must accompany the food product’.

1.41 (3)(b) - In the draft Code, the information on characterising ingredients and components that would normally be required on the label of a food for retail sale is excluded from the information that must be provided in documentation for catering foods (if not on the label). No such exception exists in the current Code, so we question if this change is intentional. This information could still be requested by the purchaser or relevant authority under 1.42.

1.46 When information can be requested (Other sales of food products)

(1) The wording in the current Code is perhaps clearer. In our view this clause should impose a requirement for suppliers of ingredients to provide the information to purchasers of their ingredient /raw material, without the

purchaser having to ask for this information. It is difficult to see how manufacturers of food products could comply with the Food Code requirement (labelling and composition) without this information.

As a second point, the term 'food product' is used in the first line in this subsection. However at this point in time, the food is an 'ingredient' or a raw material, it is not a 'food product' as currently defined in the draft Code (as it is not sold to a consumer).

This is another example of where the term food product needs checking.

1.47 Prohibition on altering labels.

1.47 (2) - We think that this clarifies that re-labelling may occur without permission from the relevant authority if the re-labelling is correcting an incorrect label. If this interpretation is not correct, then this subclause needs further consideration.

1.55 Mandatory advisory statements and Schedule 9

We note in Schedule 9 that the current soy and cereal milks statement (milk or an analogue) has been usefully grouped with the other beverage statements and the new layout is easier to follow than the current drafting.

However, to be consistent with the current Code (under standard 1.2.3, clause 2), the 'under 2 years' statement in column 2 needs to be moved down from clause 3(a) to clause 3(c), so that it applies to 3(c) and 3(d). The 'under 5 years' statement in clause 2 will then correctly also apply to 3(a) and 3 (b). A further point is that the 'under 2 years' and 'under 5 years' statements should be aligned. One uses the term 'complete milk **replacement**' while the other uses 'complete milk **food**'. Our preference is that both statements use the term 'milk replacement'.

1.57 Mandatory declaration of certain substances in foods

1.57 (1) - Uses the word 'foods', but sulphites are not foods. The term 'substance' is used in the current Code (Standard 1.2.3, clause 4). We suggest that the phrase 'substances or foods' is used here instead.

1.57 (2) (b) - Defines the term 'food' used in 1.57 (1), so helps to address the notion that added sulphites are foods. In our view, this subsection should be retained, but it would be clearer drafting if 1.57 (1) referred to 'substances and foods'.

1.57 (1) (b) - Sets out the mandatory declaration of certain cereals and their products, which in the current Code is regardless of gluten content.

The difference is subtle, but the new wording could have the effect of no longer requiring the declaration of products of gluten-containing cereals, where they have been processed to a point where they no longer contain gluten. We understand the intent of the current Code to require labelling, regardless of any processing that might remove gluten.

As a further point, we are unclear why 'and' is used between the various cereal grains, rather than the term 'or' (as in the current Code). It is not a requirement that they all apply, it could be any one of the grains.

Please refer to our earlier comment on usage of 'and' and 'or', in section 1.19.

1.60 Ingredients to be listed by common descriptive or generic name

1.60 (b) – Suggest that ‘permitted form name’ is also provided as an option.

Another option is to amend (iii) - i.e. ‘permitted form name’ could be included in 1.60(b)(iii) i.e.: ‘ a name that describes the true name of the ingredient or the permitted name form.

1.61 Ingredients to be listed in descending order of ingoing weight

1.61 (6) - Use of the word ‘if’ in (a) and (b) makes this wording difficult.

1.63 Declaration of substances used as food additives

1.63 (2) - ‘1 class’ could be ‘one class’

1.63 (6) – This section would be clearer if the following underlined words were included, and flavouring substance replaced by food additive (as this is not necessarily the technological function of caffeine in kola drinks):

If caffeine is added to a food product or included in an ingredient used to make a food product (whether as a permitted food additive, ~~a flavouring substance~~ or otherwise as permitted elsewhere in the Code), it must be listed in the statement of ingredients as caffeine.

In our view, these underlined words are important, and the current standard 1.2.4 clause 8(9) refers to ‘food’ not food product.

1.68 Required wording and form for dates for labels

1.68 (6) – This clause clarifies that other date marks are permitted on the pack in addition to the prescribed date mark. It is not clear whether this allows only the ‘*packed on date or a manufacturer’s or packer’s code*’ to be used in addition, or whether any other date mark could be used (in addition).

Division 6 – Directions for use and storage

1.69 Directions for use, statement of storage conditions

This statement applies to ‘food products’, but this is an example of a provision that should also apply to ingredients. A purchaser of an ingredient for use in a food product should be supplied with this information, in order to ensure food safety.

Division 7 – Nutrition, health and related claims

1.71 General definitions that apply to this Division and Division 8

It is not clear why the definition for ‘Meaning of nutrition content claim’ is not part of Section 1.71 but is contained in a separate section 1.72.

It is noted that the definitions for monounsaturated, polyunsaturated fatty acids, saturated fatty acids and trans fatty acids no longer retain the statement '...and declared as (*name of the substance*)' as per the current Code. Consideration of the implication of this change should be considered.

Special purpose foods are defined for the purposes of this Division, but a reference is not provided to Chapter 2, Part 9, where various types of special purpose foods are defined. The link is important, and may not be obvious to Food Code users. For example, without the link, 'food for infants' could be interpreted as any food an infant might consume, when in fact there is a prescribed standard in Chapter 2 Part 9.

1.79 - This section replaces Standard 1.2.7 subclause 9(1). The Explanatory Statement states that Standard 1.2.7 subclause 9(2) is now covered by subsection 1.12(2). MPI considers that this detracts from the understanding of this recently introduced wording in Standard 1.2.7 and suggests the text '*Any statement or information required by this Standard (replaced with Division in Code revision) may be modified if the modification does not alter or contradict the effect of the required statement or information*'.

Note - this change is not stated in Attachment E.

1.100 When a nutrition information panel is not required

(a)(x) - A comma is needed between ice and water

1.101 What must be on nutrition information panel

The ordering is not ideal in this section. It may be better to have sections on cholesterol / types of fat follow on from each other and sections on fibre, sugars or carbohydrate / declarations about carbohydrates after each other. We suggest reordering as follows: (1) (2) (3) (6) (4) (5) (7)

1.101(6) - The wording of this subclause could be read to mean it is optional whether the declaration of subclasses of fat are declared. We believe the intent is that the declaration **must** be included but what is optional is whether the declaration is given as an average amount or as a minimum or maximum level.

1.102 How to express particular matters in nutrition information panel (5)(c), and 1.103 (Percentage daily intake information (3)(a) - where the term 'fatty acids' is used this should be replaced with the term 'fat' in line with the requirements in sub clause 1.102(8).

1.104 Percentage recommended dietary intake information

It may be helpful here to refer to section 1.07 for the meaning of RDI and where to find these.

1.105 Information referred to in sections 1.103 and 1.1.04 may be presented outside nutrition information panel

1.105 (3) - Should be 'constitute'.

1.111 Requirement to declare characterising ingredients and components

1.111 (3) (g) - The clause should refer to (f) not (e)

Chapter 1, Part 4 – Substances added to or present in food

As noted earlier, the concept of 'used as a food additive' does get cumbersome and at times confusing, however we agree that this approach appears to meet the objectives of correctly regulating the use of food additives. Please refer to our comments in relation to section 1.21(4).

1.121 – Outline - After 'normally consumed', should '*as a food*' be added? The wording in the subsections 1.121 (a) and (b) is confusing as written, as vitamins and minerals **are** normally consumed (via foods), but they are not normally consumed on their own.

1.122 Interpretation

1.122 (1) (a) - Should it say 'in relation to **a** food'? Note that (b) says 'added to **the** food'. Note that 1.131(1) refers to '**a** food.'

(in our view, the word '**a**' is needed as its status as a food additive depends on use, i.e. use in a particular food).

1.122 (2) - This section is helpful in that it clearly excludes foods that may perform a food additive function, such as flour used to thicken a sauce. Subsection 1.122 (2) (b) clearly excludes 'foods' of this nature.

1.123 When food additives may be used as ingredients in foods

The use of the following bolded words in the section title: 'When food additives may be **used as ingredients in foods**' might create confusion, but we think this is the correct term to use (food additives are ingredients and must be listed as such in the ingredient list). If this phrase proves problematic, with respect to the definition in section 1.17, it could be replaced with '*When food additives may be added to foods*' or words of similar effect. Please refer also to our earlier comments on the definition of ingredient.

Code users might refer to section 1.17, which defines ingredient. It is not immediately obvious that food additives are considered ingredients, in this context.

Subclause 2 relating to carry over of food additives seems out of place in this section. It could form a new section 1.127, or form part of 1.124.

1.124 – Maximum permitted levels of food additives in foods - This section is helpful and sets out the requirements in a clear manner.

The steviol calculation appears to need correcting, to include the Σ sign. It may need to read:

$$[SE] = \Sigma (CF \times [SG])$$

Division 3 – Vitamins and Minerals

Note 2 under the Division heading does not clearly state that this Division relates to claim conditions for added vitamins and minerals. The Note should refer Code users to claims that can be made for naturally occurring levels of vitamins and minerals, i.e. to Division 7 and schedule 4.01.

1.130 Calculation of maximum quantity of a vitamin or mineral which may be claimed in a reference quantity of food - It is not clear if the amended calculation is correct, as Q1 and Q2 are no longer defined.

Division 4 – Processing Aids

1.131 Meaning of used as a processing aid

1.131 – The drafting is complex and at times confusing. Clearer wording that is easily understood by Code users is preferred. For example, it is not clear why section 1.131(2) is necessary, given that section 1.21(2) permits food to be an ingredient, which would include as a processing aid, and that section 1.21(4) refers to substances rather than foods. If the main purpose of section 1.131(2) is to deal with the issue of the quantity needed to fulfil the technological purpose, could this be done in a simpler way? In other words, if the Code does not have anything specific to say about foods used as processing aids, it may be unhelpful to complicate the processing aid provisions by including section 1.31(2).

1.131(1) (b) – Is it clear that the term ‘food’ encompasses raw material and ingredients, used to make food?

1.131 (1) (c) and 2 (a)(iii) refers to ‘**processed food**’, and this term is not used to any extent elsewhere in the Code, as the newly introduced concepts of ‘ingredient’ and ‘food product’ are used instead. This might be an example of where the term ‘final food’ is needed, or ‘food product’?

The Note at the beginning of Division 4 refers to ‘food product’. Consistent terminology is needed, but this can be resolved when the concepts around food, food product, final food and ingredient are clearer.

1.131 (2) – The requirements around foods used as processing aids are potentially confusing to Code users, and plainer language is preferred, if possible.

1.131(2) - Note 1 states that the Code does not regulate the use of foods as processing aids. The word ‘specify’ might be a clearer term than ‘regulate’.

1.133 Generally permitted processing aids for all foods

1.133 (2) - this section could be rephrased as set out below, so long as it is clear what the limitations are around the permitted foods. At present, there does not appear to be a permission to use foods as processing aids, as they are not captured by subclause 1.133 (2). The drafting in current Standard 1.3.3, clause 3 (a) to (c) is clear.

For subsection (1), the substances are:

- (a) an additive permitted at GMP; or*
- (b) any substance listed in section S18.01 of schedule 18; or*
- (c) foods, including water*

1.134 – Processing aids for certain purposes for all foods. With regards to the Note in this section, we suggest that it should state ‘The technological purposes...’

The language is not consistent in the last bullet point. Perhaps insert the following underlined word in the last bullet point 'and the purpose of a carrier, solvent or diluent'.

Division 9 – Food produced using gene technology

1.156 – Requirement to label food as 'genetically modified for all foods' - In the title, are the quotation marks needed around all of 'genetically modified food', when the only prescribed words are 'genetically modified'?

Division 10 – Microbiological limits for food

Section 1.158 Maximum microbiological levels in foods - MPI does not agree with the change in emphasis, where it is stated that '*A food listed in the table to Schedule 27 may contain a microorganism....*'. The current purpose of the standard is to identify levels of microorganism that must not be exceeded. The change of wording implies that the criteria are performance criteria to be adopted by industry, which they are not. Criteria set by a food operator may be stricter than the criteria used for regulatory purposes (Codex CAC/GL 21 - 1997 Principle for the Establishment and Application of Microbiological Criteria for Foods).

Section 1.159 Assessment of microbiological levels, and Schedule 27 – The naming conventions associated with microbiological criteria such as the n, c, m and M, have been removed from the column headings in the schedule. MPI requests that the n,c,m and M feature is reinstated, as this is an agreed international convention (i.e. by ICMSF - *The International Commission on Microbiological Specifications for Foods*). MPI objects strongly to moving away from the ICMSF (and also Codex) agreed convention for presenting the microbiological criteria in the Food Standards Code.

Further comments

Following the completion of the FSANZ proposal P1017 Criteria for *Listeria monocytogenes* – Microbiological Limits for Foods, MPI asks that FSANZ reviews the remaining microbiological limits in the Standard following the establishment of the principles for the development and application of microbiological limits (criteria). One of the key principles should be to adopt the principles established by the Codex Alimentarius Commission in the draft revised 'Principles and Guidelines for the Establishment and Application of Microbiological Criteria for Foodstuffs'. The microbiological limits should be periodically reviewed for their continued applicability and relevance to current foods, food production systems, emerging hazards, etc. A number of the limits in the current Standard do not reflect food safety concerns, coliforms, SPC, coagulase positive staphylococci, which are related to the function of the food production and processing system. A review of the Standard should review and harmonise the limits and focus on those that are food safety concerns based on scientific evidence. The microbiological limits should be used by food operators in the context of their food safety programme based on Hazard Analysis and Critical Control Point (HACCP) principles and as such the point where the microbiological limit applies should be provided. This latter point will be important when the revised microbiological limits for *L. monocytogenes* are included in the Standard.

Part 5 – Processing Requirements

Division 1 – Irradiation of food

1.165 What sources of radiation may be used? - The title of this is a question, which is unusual in the Food Code. Possible revised wording could be as follows: *1.165 Permitted sources of radiation*.

Division 3 – Articles and materials in contact with food

1.171 Restriction on things in contact with food products - This is an accurate redraft of Standard 1.4.3, but we query the policy and find it possibly *ultra vires*. We think the drafting could be improved, to better reflect the intent, and examples could be provided that better reflect the purpose of the provision. If this leads to the absurd result that most food products would breach this provision, perhaps it should be omitted from the Food Standards Code.

Chapter 2 – Food Standards

The title could be amended for example: 'food standards that apply to specific foods'.

2.05 Requirement for iodised salt in bread. Standard 2.1.1, clause 5 in the current Code contains editorial notes (at the end of clause 5), and these have been omitted from the draft Code. The first section of this editorial note contains an exemption from the requirement for bread exported from New Zealand. MPI wishes to retain the policy intent behind this editorial note, and we are thinking about a mechanism to achieve this.

Secondly, the editorial note indicating the target range for iodine in salt used for bread making of 45mg/kg has been removed. We think this is an important note that should be retained.

2.06 Definitions - Offal (a) - The current wording is 'those parts of the carcass such as...'. For clarity, we suggest that the current wording is retained but amended as set out below (i.e. the word 'those' is not retained from the current Code, but is otherwise replicated):

(a) Means parts of the carcass which includes blood, brain.....and tripe; and

2.19 Meaning of fish –

Note 3 needs to be updated to refer to the Ministry for Primary Industries.

MPI notes that the '*fish*' definition is wider than the definition in the New Zealand Animal Products Act (APA). The Code definition includes all aquatic invertebrates, whereas in the APA some invertebrates are not captured by the definition of fish. They do, however, come under the general animals definition in the APA. Examples are *bryozoans, brachiopods, and polychaetes (sea worms)*. This is not a matter for the Code Review, but one that MPI will give some further consideration to, outside of the Code Review process.

2.28 Compositional requirements for cow's milk - The term 'altered' has replace 'adjusted' with respect to milk composition. In our view, the term does not need to be changed as we are unaware of any problems with the use of the term 'adjusted', and intuitively it more clearly articulates the nature of the changes in composition permitted. Furthermore, the term 'adjusted' is consistent with Codex.

2.32 Compositional requirements for fermented milk and yoghurt

2.32 (1) (c) - Suggest that the underlined words are inserted: *'have no less than 10⁶ cfu/g of the microorganisms used in the fermentation; and'*

This is to make it clear that this level of microorganisms must be in the final product (not the number used to make the food product). There may be clearer ways to specify this (as its not entirely clear in the current Code).

2.37 Compositional requirements for ice cream

As we have noted earlier, one aspect of the new Code that needs clarity is the permission (or otherwise) to qualify the names of food products that have names in quotation marks. For example, is it acceptable to qualify the name 'ice cream', for example to 'low fat ice cream' (subject to any other provisions, for example the criteria for low fat claims set out in schedule 4)? This is an example of a lack of clarity in the Code that has proved problematic.

Part 6 – Non-alcoholic beverages

Division 1 – Fruit juice and vegetable juice

2.42 Compositional requirements for fruit juice and vegetable juice

2.42 (1) and (2) - The word 'additional' has replaced 'added'. In our view, the term 'added' is clearer than additional, and is more user friendly for those manufacturing these drinks.

Division 2 – Non-alcoholic beverages and brewed soft drinks

2.44 – 2.54 - As a general comment, this Division contains various standards which have proved problematic from an enforcement point of view. MPI would welcome a review by FSANZ of these standards, in due course. To some extent, the problems we have encountered with the Standards relate to representation issues, and these issues are addressed elsewhere in this submission.

The definitions that were contained in clause 1 of Standard 2.6.2 are now spread throughout Division 2. To a lay reader, it may not be clear why the draft Food Code refers to definitions in some places as 'in this Code', and in other places to 'in this section'. We understand that this is because the 'in this section' definitions are used to set the compositional requirements. For example, the definitions for a 'fruit drink' and 'electrolyte drink' are specified as *'in this Section'*, because a fruit drink (and an electrolyte drink) is itself a specific mix, not a basic product to which other things may be added.

We note that the Purpose Statement has been removed, which refers to 'water based beverages'. Was it the original intent that all the products in standard 2.6.2 are water based? In the Standards themselves, it is not always stated that the products are water based – see for example our comments on electrolyte drinks. Could they be milk based? Similar comments apply to 'brewed soft drinks' - are they considered to be a 'water based beverage'? The exact words 'water based beverage' is not used in the definition of 'brewed soft drink' (but they are produced from water and sugar).

On the other hand, it is clear that 'formulated beverages' must be water based. This is clearly stated.

As a further point, under new Schedule 15 (15.3), water based flavoured drinks are implied to include: Electrolyte drinks, Kola type drinks, and brewed soft drinks, but not fruit drinks.

This repeats the intent from the current Code (Food Additives Standard), which has 'electrolyte drinks and bases' within the category of 'Water based flavoured drinks'. This appears to be in intention (but this is not replicated in definitions in the compositional standards).

2.51 Compositional requirement for electrolyte drinks and electrolyte drink bases

Subsection 2.51(1) contains the reference to 'represented as' and as noted earlier in this submission, this is a key concept and needs clearer definition. If it means that the name 'electrolyte drink' must be on the label or the food is described as such, then this would provide regulatory clarity that is lacking in the current Code, and should be more expressly stated. However, if this is not the intention, 'represented as' could be open to wide interpretation. If for example a product is *labelled as* a Formulated Caffeinated Beverage (FCB) but *looks like and has claims consistent with* an electrolyte drink, is that product 'represented as' an FCB or an electrolyte drink? What a food is 'represented as' determines the compositional (and labelling) requirements it must meet, therefore clarity on what this means is crucial both for industry to be able to comply with the requirements and for jurisdictions to be able to enforce the Code.

2.51 (2) - This section lists certain electrolytes that can be added to electrolyte drinks. The statement does not refer to the fact that these are the permitted electrolytes (which fall under the definition of nutritive substances, which require an express permission to be added). It could be interpreted as meaning that this list (of electrolytes) are the only other substances (over and above the carbohydrates listed in 2.51 (1) (b)) that can be added to electrolyte drinks.

In our view, this subclause needs to more clearly state that these are the permitted electrolytes, and that other foods are permitted (if this is the intention).

As noted above, the current Purpose Statement refers to water based beverages, but the standards (Standard 2.6.2 clause 1 and 6) do not appear to require these products to be water based.

A further question remains regarding the composition of electrolyte drinks – what is the intent of the original Code with respect to foods containing caffeine (such as guarana), or caffeine itself? One view is that electrolyte drinks can contain caffeine, as it is explicit that 'formulated beverages' cannot contain caffeine, but this prohibition is not stated for electrolyte drinks.

Another view is that caffeine needs express permission for use in most water-based beverages, as it is given specific permission in the case of Kola type drinks. While not specifically defined, Kola drinks are listed as a subheading in Schedule 1 of Standard 1.3.1 – i.e. the Food Additive standard. It is not entirely clear why caffeine is listed as a food additive in this case, as it is not clear what technological function, if any, it is performing.

When caffeine is added to FCBs, it is not regulated as a food additive, but as a substance/ingredient with explicit permission.

The regulation of substances containing caffeine, or caffeine itself, may be an issue that is outside the scope of this review. It could be addressed by FSANZ once the policy guideline work on caffeine is completed.

Division 4 – Formulated caffeinated beverages

2.60 Composition of Formulated caffeinated beverages

The legal ambiguity with the current standard arises from the conflict between Standard 2.6.4 clause 1 and 2 (2). Subclause 2 (2) could be interpreted as meaning that only those substances may be added to an FCB, but it is our view that if these substances are added, the limits stated apply.

The revised Code clarifies this intent more clearly, as section 2.58 (1) refers to 'other foods', and section 2.60 (2) states that *'if a formulated beverage contains....'*

New section 2.61 addresses the labelling requirements when the permitted substances are added voluntarily.

We note that the present Standard 2.6.4, clause 3 (7) has been omitted, and that the prohibition from using the %RDI or %ESADDI for vitamins and minerals is no longer stated in the new draft Code, as it is achieved through the nutrient content claim provisions in schedule 4 (S4-01). We agree with the new placement of this restriction; however it is not obvious to Code users (who may not think to look in Schedule 4 for this restriction). A cross reference is suggested (as is done for other labelling requirements). Another place to highlight this restriction is in the example Nutrition Information Panel (NIP), in S12.04.

Another requirement has also been moved – i.e. if an FCB is not required to bear a label the advisory statements are still required to be displayed or provided to the purchaser on request. This is now part of the general labelling provisions in Division 1 Part 3 of Chapter 1 (i.e. section 1.34 (8) (g)).

It would be easier for Code users if all requirements specific to FCB labelling were either in section 2.60, or cross referenced. As drafted, it is not clear.

2.60 (3) - Suggest to include note/signpost to refer to 2.44 for definition of a non-alcoholic beverage

2.61 Labelling requirements – formulated caffeinated beverage - Under 2.61(1), (3) and (4) the note includes Division 1. We suggest this is removed and 'Part 3 of Chapter 1' is referred to only.

Regarding unlabelled FCBs - a signpost to 1.34 (7) and (8)(g) could be provided, to retain current clause (3) 5 of Standard 2.6.4.

Part 7 – Alcoholic beverages

Division 3 - Fruit wine and Vegetable wine

2.69 – Meaning of *fruit wine product* and *vegetable wine product* and 2.70 Compositional requirement for cider, mead, perry, fruit wine and vegetable wine

Comments on the intent of Standard 2.7.3 in the current Code

Enforcement of Standard 2.7.3 in the Code has proved problematic for MPI, with respect to the definitions of cider and perry. While the original intent of Standard 2.7.3 (as developed under FSANZ Proposal P204) is in our view

fairly clear, the wording in Standard 2.7.3 is open to interpretation. The particular concerns we have are with the definitions for cider and perry, and the ingredients they can be made from, and can contain.

In our view, Standard, 2.7.3 (1) defines cider as being a particular subset of fruit wine, but that it must only be made from the juice of apples or pears. Another interpretation is that that cider and perry are fruit wines (as the definition refers to 'fruit wine'), which allows foods in clause 2 to be added (which includes fruit that is not apples and pears). In our view, this latter interpretation was not intended by FSANZ when standard 2.7.3 was drafted, and this view is borne out by earlier drafts of the standard within the P204 papers.

In our view (and some New Zealand cider makers are also of this view), the new section 2.70 needs to clearly state that cider and perry can only be made from apples and pears and not other fruits (with the current percentage restrictions retained). This means the clause needs to be clear that any of the following can be added during cider or perry making:

- Apple and/or pear juice and or apple and/or pear juice products
- Sugars
- Alcohol
- Water

What is needed is clear drafting that can be enforced and fulfils the original intent of the standard and is in line with current industry practices. We note that FSANZ refers to the intent of standards by referencing earlier Proposals (for example Proposal work on P141 is referenced to in Attachment C, for the work on alternation of labels)

In recent years cider has enjoyed a surge in popularity and industry innovation has resulted in products appearing on the market that consist of a cider base, with the addition of other foods including juices that are not apple or pear. These are perhaps more correctly defined as 'fruit wine' or a fruit wine product.

We note that the terms cider and perry are examples of foods in the draft Code with quotation marks, so the comments we have made earlier in this submission on representation issues and the ability to qualify these names, applies here. For example, if the cider was made from apples, but with added fruit such as strawberry juice, the beverage would be a 'fruit wine' and would need to be appropriately qualified (e.g. cider with strawberry juice), and is otherwise consistent with fair trading law.

In summary, MPI considers that taking P204 into account, together with the way the new draft Code handles compositional and 'represented as' concepts, should enable the redrafting of the fruit wine, cider and mead standard to allow for consistent interpretation by industry and enforcement by jurisdictions. We consider that this is within the scope of the Code Review.

Comments on other drafting aspects of standards 2.69 and 2.70

Division 3 could be renamed to cover the products within the scope of the Division. We suggest this is amended to read 'Cider, mead, perry, fruit wine and vegetable wine'. This would be consistent with the proposed headings for 2.69 and 2.70.

We note that the words 'during production' have been removed to simplify the wording. We support the removal of these words.

'Pear cider' is an alternative name for 'perry' and is commonly used by industry, while the term perry is not. We suggest that the term 'pear cider' accompanies all references to perry, or is put in brackets after the term 'perry' in section 2.70 (3). This also conforms to international cider standards, including the United Kingdom.

2.73 Compositional requirements for brandy, liqueur and spirit

2.73 (4) – Spirit – the words '*unless otherwise required by this standard*' are missing i.e. insert these words after 'which' (because 2.74 (2) (a) allows the derogation).

Should the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPs agreement) note be added (as it is included in the Purpose statement of current Standard 2.7.5)?

Part 9 – Special purpose foods

Division 1 – Infant formula products

2.82 Definitions - The definitions are now in alphabetical order, and the editorial note from Standard 2.9.1, clause 1 (2) has been removed. In the case of infant formula products, the order in 2.9.1 should be retained, as it is important to state that 'infant formula products' is the overarching name, and the other products fall within this phrase. It is confusing and not helpful to change the order to alphabetical.

2.84 Use of substances as nutritive substances - Subdivision B sets out the compositional requirements, but does not reference some of the more basic requirements such as the food additive permissions, or the microbiological limits. Even though these are elsewhere in the Code, they should be referenced.

2.84 (1) - This is a key clause in terms of stating what nutritive substances are permitted. Listing the permitted substances in the schedule achieves this purpose, to some extent. However, it is not clear from the table to s30.04 that the maximum limits only apply when the nutritive substances are added. The limits do not apply if these substances are naturally occurring in the ingredients used to make infant formula. This was recommended by the Supplementary Final Assessment Report (Inquiry - s.24) 13 March: '*It is not the intent of the standard to regulate the maximum nutritive substance level of formula in the case when the nutritive substance is not added as an ingredient to the formula*'.

We suggest adding an editorial note to clarify that the levels which appear in the table to S30.04 only relate to added nutritive substances.

2.84 (2) is problematic and potentially confusing. It should be removed completely from this section, as it relates to labelling. As currently worded, it might imply to Code users that labels can make reference to nutritive substances, when the only reference permitted is in the NIP (as per Standard 2.9.1 clause 20 (f)). The heading '*when labelling may refer to presence of nutritive substances*' is suggestive of a permission. We strongly suggest the wording is aligned more closely with the original, i.e. standard 2.9.1, 7 (2) and that this provision is moved to the section on labelling (i.e. subdivision E).

2.87 Restriction on levels of other substances in infant formula product

The title is confusing. This clause only concerns gluten, nucleotides and aluminium. It does not address all other restrictions on substances used in infant formula products (food additives, for example). There are many other restrictions, which are not listed in this section. Suggest the title is amended to reflect its limited content.

2.87 (a) - It is possibly clearer to state that a product 'must contain no detectable gluten', instead of 'must not contain detectable gluten',

2.87 (b) - It is very confusing to separate this maximum requirement for nucleotides from the schedule (S30.04). Suggest this requirement is moved to schedule 30.04.

2.88 Infant formula and follow-on formula – composition, and 2.89 Infant formula and follow-on formula - protein .

2.88 is set out well, however as 2.89 covers more specific protein requirements than set out in 2.88 (which also sets requirements for protein and fat), the title could for 2.89 could refer to 'protein – further requirements'. A similar comment applies to 2.90 – 'fat – further requirements'.

2.89 - It is confusing to separate out the amino acid requirements into s30.05, but then include some minimum amounts in clause 2.89. Suggest they are all in one place or the other, not a mixture. This is the same comment as above for nucleotides.

S30.05 (for section 2.89) - The schedule heading and table heading states 'may' but these are 'must' as they are minimum requirements, see clause 22 (1) of Standard 2.9.1. Section 2.89 (3) also notes that these are minimum requirements. 'May' should be replaced by 'must'.

S30.07 (for section 2.90) - Standard 2.9.1 clause 23(c) is interpreted that the values only apply to added fats/oils used to make formula, not to inherent fat in for example milk powder or soybeans. But the S30.07 table infers that these values relate to the final infant formula product, and not to the added fats/oils (because of the word 'presence'). It doesn't make sense to say in 2.90 (e) 'for a fat that is listed...', when in fact it is the fatty acids that are listed.

The table in the Code (clause 23) is more clearly set out than the new table in s30.07 (with only 2 columns now). 3 columns are preferable.

2.90 Infant formula and follow-on formula – fat - The reference to medium chain triglycerides (MCTs) is now positive, whereas the intent is to restrict the presence of MCTs, apart from the two noted exceptions. It would be clearer to present this the way it is presented in the current Code, as medium chain triglycerides are not desirable (as per Standard 2.9.1 clause 23).

2.91 Infant formula and follow-on formula – vitamins, minerals and electrolytes

2.91 (3) - Could preface this sentence with 'In addition, infant formula.....vitamin E/g.....' (as the previous subclause relates to vitamins and minerals, and this is a more specific requirement)

2.94 Products for special dietary use based on a protein substitute

2.94 (3) – section 2.89 is referred to, but we think it might be 2.91 instead?

2.98 Requirement for warning statements and directions

2.98 (1) (a) - 'powdered' not 'powered'

2.100 - Declaration of nutrition information – 1 (a) (iii) states 'the average amount, *whether added or naturally occurring*, of each vitamin, mineral and any other substance *used* as a nutritive substance permitted by the Division..'. The above text in italics is not in the current Code (Standard 2.9.1, clause 16), or the guideline. We agree that the current Code might require this for vitamins and minerals (as there are minimum levels to be met), however this is not logical for naturally occurring nutritive substances (which should not need to be declared in the NIP, if naturally occurring). The question remains though, can they be declared *if* they are naturally occurring? One example would be L-carnitine, which is naturally occurring in milk, so may not need to be added to meet minimum levels.

2.103 Prohibited representations

2.103 (1) (f), and (2) - This restates the current Code requirement (Standard 2.9.1, clause 20 (f)) that prohibits nutrients or nutritive substances, and also inulin-derived substances (IDS) and galacto-oligosaccharides (GOS), from being listed anywhere on the label, apart from the ingredient list and the NIP.

As noted above, the text in clause 2.84 (2) could be seen as a permission, when these clauses provide the prohibition.

Division 2 – Foods for Infants

2.105 Definitions (b) (iii) – For added clarity, the following underlined words could be added 'formulated supplementary foods (including formulated supplementary foods for young children)'

2.106 Food for infants – general compositional requirements

The specific compositional requirements are over and above the requirements set out in section 1.21. It would be helpful to add in a Note, reminding Code users of the generic requirements for added substances (i.e. food additives, etc). Such 'Notes' are already in this draft, for example as a signpost to/reminder of, the generic labelling requirements.

2.106 (2) – The way this clause is written for IDSs (etc), it is not necessarily clear that this is a very specific permission that has gone through an assessment process by FSANZ. It should be phrased so that it is clear that these substances have a specific permission. As written, it could be inferred that other 'nutritive-type' substances of a similar nature are permitted, when in fact they are not, unless specially permitted.

2.107 Additional compositional requirements for cereal-based food for infants over the age of 6 months, and

2.108 Additional compositional requirements for cereal-based food for infants over the age of 4 months –

The order should be switched, as the current order does not seem logical.

Division 3 – Formulated meal replacements and formulated supplementary foods

It would be helpful if the title of this Division, and the heading to Subdivision C, had the following additional underlined words: Formulated meal replacements and formulated supplementary foods (including formulated supplementary foods for young children).

Formulated supplementary foods for young children (FSFYC) are a subset of Formulated supplementary foods, as currently drafted. It might be even clearer if they became a third and separate category in the Division, as this is how the Division is drafted.

2.122 Compositional requirements for formulated supplementary foods

2.122 (1) – We note that subsection (c) has been amended, to remove some of the text from the current Code. This has changed the meaning. The current Code wording in Standard 2.9.3 (4) (1) (c) means that even naturally occurring vitamins and minerals (contributed from ingredients) cannot exceed the maximum levels. The revised drafting in the Draft Code means that the limits only apply to the combined value of added and natural occurring levels (and so if no additions are made, the maximum limits do not apply) We do not know if this is an intentional change, or if our interpretation of the current Code is incorrect.

2.125 Compositional requirements for formulated supplementary foods for young children

2.125 (1) (c) – Same comments as above.

2.125 (3) - As noted for our comments on section 2.106 (2), the way this clause is written for IDSs (etc), it is not necessarily clear that this is a very specific permission that has gone through an assessment process by FSANZ. It should be phrased so that it is clear that these substances have a specific permission. As written, it could be inferred that other 'nutritive-type' substances of a similar nature are permitted, when in fact they are not, unless specially permitted. For example, in our view, it is not permissible to add other specifically identified substances listed in Standard 2.9.1 (such as probiotics) to FSFYC, as in the current Code these substances are not given specific permission.

2.126 Labelling of formulated supplementary foods for young children

2.126 (2) and (3) –For added clarity, the following subheadings could be inserted:

- Before 2.126 (1) : *Mandatory nutrition labelling of added vitamins and minerals*
- Before 2.126 (2) and (3): *Voluntary nutrition claims of naturally occurring or added vitamins and minerals*

These requirements are confusing, and the suggested subheading would aid stakeholders.

Division 4 – Formulated supplementary sports foods (FSSF)

2.127 Definitions - The definition of a FSSF has changed from '*means a food or mixture of foods*' to '*means a product...*'. The word 'food' could be inserted before 'product'.

The table in Schedule 30 - S30.15 contains an error - the value of 12mg recorded for zinc in column 2 (maximum amount) should be sitting in column 3 – (maximum claimed amount).

2.129 Labelling information – With regards to the Note '*The labelling provisions are set out in Division 1 of Part 3 of Chapter 1*', it would be more appropriate to refer to all Divisions, as Division 1 is only one of the relevant Divisions

The same comment also applies to Notes under 2.133, 2.134, and 2.135.

2.130 Nutritive substance claims – We note that the term ‘ingredient claims’ has been replaced with ‘nutritive substance claims’ in the heading and the term ‘ingredients’ has been replaced by ‘nutritive substance’. This term does help address the ambiguity with the term ‘ingredient’, as the substances listed in Standard 2.9.4, clause 2 (c) are clearly not ingredients (they are ‘substances’). It might be clearer to refer to ‘substances’, rather than ‘nutritive substances’ or ‘ingredients’, for the following reasons:

- Defining nutritive substances is problematic and is under review, so introducing the term, when it is not needed, may increase uncertainty and not be helpful to Code users.
- By definition, amino acids are nutritive substance, so the revised drafting looks inconsistent with the definition (as they are listed in 2.128 (1) (b)).
- The term ‘ingredient’ is currently problematic, as certain ingredients added to FSSF’s (such as guarana) are ingredients, not substances or nutritive substances.

Division 5 – Food for Special Medical Purposes (FSMP)

2.143 Labelling and related requirements

2.143 (1) – The section implements Standard 2.9.5, clause 8 (1). The revised drafting looks a bit unusual, as the scenario that a FSMP is not in a package does not really exist. However we can see how the drafters have got to the new subsection 2.143 (1) (b), it is just unlikely to take effect.

2.144 Mandatory labelling information

2.144 (1) (c) – This is an example of a drafting where it would be easier to locate the provision if it was listed in the reverse order i.e. as; Chapter 1, part, 3, etc.

2.145 Advisory and warning statements – food for special medical purposes

2.145(2) - There appear to be some omissions, and a cross check against Standard 2.9.5 is suggested.

2.146 Information relating to ingredients – food for special medical purposes

2.146 (a) – Is this too narrow now? Standard 2.9.5 refers to all of standard 1.2.4.

2.147 Date marking information – food for special medical purposes

2.147 (1) – It is suggested that ‘of’ not ‘or’ is used in the second line.

2.148 Nutrition information – food for special medical purposes

2.148 (a) (ii) – The term ‘*used as a nutritive substance*’ is questioned. The term already in the Code (Standard 2.9.5, clause 9 (e) is preferred, i.e. ‘the substance *has been added...*’.

It is not clear if the introduction of the term ‘nutritive substance’ is helpful in this section. We note that the earlier section 2.141 does not use the term ‘nutritive substance’, and simply refers to ‘particular substances’

2.151 Labelling requirement – food for special medical purposes in inner package

2.151 (2) – This is one example of where it could be helpful to state in general terms what the requirement relates to, which in this case is the legibility requirements. This comment applies throughout the draft Code.

2.158 Compositional requirement for vinegar and imitation vinegar

2.158 (2) Vinegar – the term ‘foodstuff’ is used in the vinegar definition (consistent with the current Code), however with the change to the new concepts of food and food product, should ‘foodstuff’ be replaced by ‘food’?

2.159 Compositional requirement for salt

2.159 (1)(b) – This clause states ‘...*exclusive of permitted additives*’. Should this refer to the new terminology, i.e. ‘substances that may be used as food additives’?

2.161 Compositional requirements for salt substitute

2.161 (1)(a) – There may need to be a possible change from ‘*consist of salt substitute...*’ to ‘*consist of a salt substitute...*’?

2.163 Labelling requirement for reduced sodium salt mixtures and salt substitutes

Reference to Division 1 in the note should be removed, as Part 3, Chapter 1 more generally applies.

Attachment A2 – schedules

S1 – RDIs and ESADDIs – It would be helpful to give the full names of these abbreviations in this schedule. While they are contained in section 1.06, the full names could be repeated here in a footnote or Note.

S4.03 Conditions for permitted general level health claims

The layout of the tables in the Schedules relating to the restated schedules contained in Standard 1.2.7 has been altered. As a consequence there is the potential for more than one interpretation as to the relationships between the various columns in the table e.g. in S4.03 it is not obvious whether the conditions in column 5 relates to all entries in column 2 or only one entry (for a given entry in column 1). However the entry in Column 3 only applies to one specific entry in column 2. The tables could be redrafted to remove this ambiguity.

Note - The confusion can be clearly seen comparing entries for Vitamin B₁₂ in Part 2 and Vitamins and Protein in Part 3 – Others.

S4.04 Nutrient profiling scoring criterion - There appears to be a typographical error in this table, '26' should read '28' in Column 2, for category 3.

S5.02 Baseline points (Table 1 and 2) – The draft Code has used per unit quantity, instead of the current per 100g or 100mL. This will require Code users to refer to the definition of unit quantity. For ease of use and to prevent confusion, we would suggest that it would be beneficial to add 100g or 100mL in brackets.

S15 Substances that may be used as food additives

The current formatting using a note incorrectly allows 160b Annatto extracts, 234 nisin and nitrites for sausages containing raw meat. To correct this, the note needs to be applied to these lines. The note itself needs to be moved to the bottom of category 9.3. When this is done the current category 9.3.2 can be deleted as the two permissions listed are already listed under 9.3 and apply to these products.

The suggested changes are shown on the following page of this submission.

S25 – Permitted novel foods – 'relatr' should read 'relate'.

Attachment A2 Schedule 15 corrections

The current formatting using a note incorrectly allows 160b Annatto extracts, 234 nisin and nitrites for sausages containing raw meat. To correct this the note needs to be applied to these lines. The note itself needs to be moved to the bottom of category 9.3. When this is done the current category 9.3.2 can be deleted as the two permissions listed are already listed under 9.3 and apply to these products.

9.3 Processed comminuted meat, poultry and game products

	additives permitted at GMP		
	colourings permitted at GMP		See Note
	colourings permitted to a maximum level		See Note
Note: Not for sausage or sausage meat containing raw, unprocessed meat			
160b	Annatto extracts	100	<u>See Note</u>
220 221 222 223 224 225 228	Sulphur dioxide and sodium and potassium sulphites	500	
234	Nisin	12.5	<u>See Note</u>
243	Ethyl lauroyl arginate	315	
249 250	Nitrites (potassium and sodium salts	125	<u>See Note</u>
Note: Not for sausage or sausage meat containing raw, unprocessed			

9.3.2 Sausage and sausage meat containing raw, unprocessed meat (This category can be deleted as the permissions listed already apply to these products under category 9.3)

Other comments:

- The note about the deletion of 306 by 11 October 2014 is missing. While not too important, the note could be reinserted.
- Category 5.3.6 needs to be corrected (b) should read 3000 and not 300
- Category 13.1 Salt the entries for 535 and 536 are missing a note referring total sodium and potassium ferrocyanide.

Other miscellaneous comments –

Use of 'etc' in headers – is this good drafting practice? See for example, 1.101 (3), 2.22

Standard 1.1A.2 not revoked - Standard 1.1A.2 – Transitional Standard for Health Claims is the only Standard currently within Chapters 1 and 2 that is not being proposed to be revoked by this proposal.

- The details of how this will appear in the redrafted Code and the transitional arrangements for health claims as currently provided in Std 1.2.7 (operational until 18 January 2016) will need to be considered in the next Code Revision document.

Attachment E - There are errors in the alignment. Present Code versus Draft food regulatory measure for Standard 1.2.7. There are gaps in the column 'Subject of provision' relating to Standard 1.2.7.

Yours sincerely