Supporting document 1

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Code Revision

Food Standards Code audit report

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FOOD STANDARDS CODE AUDIT REPORT

Problem

1. The NSW Supreme Court judgement in *Christine Tumney (NSW Food Authority) v Nutricia Australia Pty Ltd* [13660/08] (***Nutricia***) highlighted problems in the *Food Standards Code* (the ***Code***) related to the enforceability of the Code and the consistency of its application across the jurisdictions. The judgement has implications for the food regulatory system. As the judgement deals with a uniform scheme, it is persuasive in courts of the other jurisdictions. The judgement also brought to light problems with the existing drafting of the Code.

Summary of recommendations

2. A summary of the recommendations made in this report about the drafting of the Code is as follows:

a) provide for the *Acts Interpretation Act 1901* (Cth) to apply to the interpretation of the Code

b) provide for words that have been defined in the model provisions (Annex A of the Food Regulation Agreement 2008) and the Food Acts in the States and Territories to apply for the Standards

c) examine the provisions in the Code that impose requirements to determine whether, for each provision, it is properly integrated with the relevant model offence provision. In order to be effective, a requirement that is enforced under model offence provision 17 (1) must identify the person responsible for the requirement.

d) examine provisions in the Code that impose requirements to ensure the language has certainty of meaning and operation that is needed for them to operate with the offence provisions

e) list all defined terms in a single place. This should include full definitions where appropriate, and signposts where it's more appropriate to provide the definition elsewhere

f) make sure that terms have a single meaning in the Code unless this is unavoidable. If terms are defined to have a different meaning for different places, provide signposts in the general definitions clause (eg, ***process***, for Part X, has the meaning given by ....; for Part Y, has the meaning given by...)

g) redraft definitions that include compositional requirements to take the requirement out of the definition and draft compositional requirements separately

h) the Code has general prohibitions that are supplemented by permissions that qualify the prohibitions. The permissions are scattered around the Code. The recommendation is to, as far as is possible, remove the permissions and recast general prohibitions so that they express a rule fully (eg, the rule is X, unless Y, Z and A)

i) amend the Code to keep references to incorporated material up to date

j) restructure the Code by consolidating the Standards so that they form a single Standard, or, by consolidating smaller portions of the Code, eg the Chapters, so that the Code is made up of fewer discrete documents

k) consider how information in the Code may be restructured for better readability, including ways of grouping the requirements

l) in the consolidated Code, place Schedules either at the back of the Code or at the back of smaller consolidated divisions (eg, Chapters)

m) redesign the information in tables and Schedules to make them easier to understand, and (for Schedules) to clearly relate them to empowering provisions in clauses

n) recast purpose statements to distinguish properly between purposes and outlines

o) use OLDP templates so that the appearance of the Code is consistent with other legislation on the statute book

Reasons

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Applying interpretation laws to the interpretation of the Code

3. In the judgement the court did not apply either the definitions in the *Food Standards Australia New Zealand* ***Act 1991*** **(Cth) or the definitions in the *Food Act 2003* (NSW) to terms existing in the Standards. One of the** issues this raises is that the Code fell to be interpreted under the interpretation legislation of New South Wales and the common law, whichever was available. This has the potential to lead to a less harmonised and consistent Code. The interpretation Acts of the jurisdictions sometimes apply in relation to the Code (as adopted or incorporated material into the State or Territory food Acts), and sometimes don't. [See Attachment A] Where the interpretation laws do apply, their application would lead to inconsistent results given that the laws are not identical.

4. It raises uncertainties that should be dealt with. There are a number of options that could be considered that would lead to a consistent interpretation of the Code across the jurisdictions:

a) Option 1 is to make provision in the Code that the *Acts Interpretation Act 1901* (Cth) applies to the interpretation of the Code.

b) Option 2 is to make provision in the adopting legislation that the *Acts Interpretation Act 1901* (Cth) applies to the interpretation of the Code. The disadvantage of this approach is that each of the State and Territory food Acts would need to be amended, and the modification of the Food Acts would need to comply with the Food Regulation Agreement 2008.

c) Option 3 is to reproduce provisions of the *Acts Interpretation Act 1901* (Cth) in the Code. In a sense, this means putting a mini interpretation Act in the Code itself. The disadvantage of this approach is that it adds a lot of provisions to the Code. The advantage of the approach is that interpretation provisions that are relevant and that do not conflict with other laws of the jurisdictions can be chosen.

Applying the definitions in the model provisions to the Code

5. A related issue is how to apply the definitions of words defined in the model provisions (Annex A to the Food Regulation Agreement 2008) to the Code. The options seem to be as follows:

a) Option 1 is to provide in the Code that the words have the meaning they have in 'the Act' (ie, the adopting Act). This should be located in a general definitions clause (eg, in Standard 1.1.1) [See paragraphs 21 to 25]

food has the meaning it has in the Act.

food business has the meaning it has in the Act. [*and so on*]

b) Option 2 is to provide for this in the adopting Act. It is a matter of policy whether this would be preferred to option 1.

c) Option 3 is to reproduce the definitions in the Code. This has been done for some defined terms already. The advantage of this is that the definitions will appear in the text so that the reader does not have to go elsewhere to read the definition. Also, some definitions as reproduced in the adopting legislation differ slightly between the jurisdictions. If definitions are reproduced in the Code (and removed from the adopting Act) this would ensure consistency for definitions used in the scheme.

Interpretation of provisions that relate to offences

6. The judgement in *Nutricia* demonstrates that there are drafting shortcomings in the Code that should be addressed. How this is best done is a matter for the agency. It was noted by many of the stakeholders that modern drafting principles should be applied to the drafting of the Code. Rewriting the Code would involve the scrutiny and the testing of policy, that is, it would require that instructions are given about the policy intention of provisions.

7. In *Nutricia* the court found a number of provisions which it either thought led to a different meaning from that intended by FSANZ, or where the meaning was unclear or ambiguous. In general, for provisions relating to an offence, any ambiguity in the text of the law is to be resolved in favour of the defendant. There is a well established approach that penal legislation should receive a strict construction. The position today may be described as it was in *R v Adams* (1935) 53 CLR 563 at 567-8 by the High Court:

in determining whether an offence has been created or enlarged, the Court must be guided, as in other questions of interpretation, by the fair meaning of the language of the enactment, but when that language is capable of more than one meaning, or is vague or cloudy so that its denotation is uncertain and no sure conclusion can be reached by a consideration of the provisions and subject matter of the legislation, then it ought not to be construed as extending any penal category1

McHugh J in *Krakouer v R* (1998) 194 CLR 202 at 223 said:

> Still less should a court ignore the clear words of a provision so as to give it a meaning that would or might make it easier to convict an accused if the intention of the legislature is at best a matter of contestable opinion.2

8. This should be considered in the context of the general rules of construction applied by courts to the text of the law. At common law, the purposive approach may be applied where an ambiguity is found or the result is repugnant or absurd. Section 15AA of the AIA and its equivalents provide that a purposive approach can be applied without the presence of an ambiguity and, if there are two alternative constructions of a provision, the construction that is consistent with the purpose of the Act is to be preferred. It assumes that the purpose is discoverable (it may not be).

9. Interpreting the law is the constitutional function of a court which 'compels it to use its own unfettered decision'3. This explains why the court is not bound to look at extrinsic policy material provided by the regulator. The court goes to extrinsic material, at common law or under a statutory provision, to confirm the ordinary meaning of the text if the meaning is ambiguous or obscure etc. If the meaning of the text is clear on its face the court may see no need.

[1] DC Pearce and RC Geddes, *Statutory Interpretation in Australia*, 6th ed, Lexis Nexis Australia, at paragraph [9.9]

[2] Pearce and Geddes, at paragraph [2.10]

[3] Pearce and Geddes, at paragraph [1.4]

[4] Pearce and Geddes, at paragraph [2.9]

[5] Pearce and Geddes, at paragraph [2.9]

[6] See Pearce and Geddes, at paragraph [2.14].

10. Despite a purposive approach to construction, it is important to note that, although it is possible that a court will add, substitute or delete words in the text of the law (eg, 'modify' the text, or 'read in' words) to give effect to the purpose, that is a large step for the court to take. In the words of Dawson J in the High Court in *Mills v Meeking* (1990) 169 CLR 214 at 235[4]:

> the modification must be precisely identifiable as that which is necessary to effectuate the purposes and it must be consistent with the wording otherwise adopted by the draftsman. [the equivalent of section 15AA] requires a court to construe an Act, not to rewrite it, in light of its purposes.

11. Pearce and Geddes also say 'section 15AA and equivalent provisions do not permit the courts to ignore the actual words of a statute'.[5] The point here is that, for a legislator, a great deal of attention should be paid to the words used in the Code, with the expectation that the meaning should, as far as possible, be identifiable using a literal interpretation. It is only where the drafter fails that the purposive approach enters the equation.[6]

Drafting the requirements for the offence provisions

12. The model offence provisions that relate to the Code are general in the sense that they refer to the contravention of a requirement imposed by a provision of the Food Standards Code, or the contravention of a provision of the Code. In effect, the content of offence provisions has been delegated to the Standards.

13. This means that the provisions in the Code that impose requirements should be drafted with the same care usually afforded to offence provisions. Given the stricter rules of construction that apply, they need to have certainty of meaning and operation.

14. The recommendation is to examine the provisions in the Code that impose requirements to determine, for each provision, whether it is properly integrated with the model offence provision that applies to it, and whether the drafting of the requirement is sufficient to give it certainty of meaning and operation. For instance, an offence provision must not use any vague and indeterminate language, it should clearly identify the elements of the offence, and it should be examined to determine whether it is necessary to more clearly identify the person that is subject to an obligation. It should be clear to a person that reads the Code what is required of him or her in order to avoid committing an offence.

15. The model offence provisions at subsections 17 (2), (3) and (4) are phrased to apply to a person who sells, or who sells or advertises, food as follows:

(2) A person must not sell any food that does not comply with any requirement of the food standards that applies to the food.

(3) A person must not sell or advertise any food that is packaged or labelled in a manner that contravenes a provision of the food Standards Code.

(4) A person must not sell or advertise any food in a manner that contravenes a provision of the Food Standards Code.

Requirements about a) the composition of food, b) the packaging or labelling of food or c) the way in which food is sold or advertised, are enforceable even if the provision in the Code does not identify a person that is responsible for doing or not doing a particular thing. The Code does not need to identify the person because the person is already identified by the offence provisions.

This works in tandem with the defence of due diligence (in model provision section 22) so that the actual person responsible for a contravention (eg, the manufacturer rather than the retailer) is charged.

16. However, it is possible to provide with greater particularity for who is subject to a requirement, if that would make enforcement of the Code easier, under model offence provision 17 (1):

> (1) A person must comply with any requirement imposed on the person by a provision of the Food Standards Code.

17. There are other matters in the Code that are not dealt with specifically by model offence provisions 17 (2), (3) and (4), for example, the conduct of a business or the skills of food handlers. In order to bring these requirements under subsection 17 (1) and make an effective offence, they must identify the person responsible.

18. A requirement that identifies an entity, eg 'seafood business' as the bearer of the obligation will only be applicable to corporate entities. Corporate liability is provided for in the criminal law as it applies in the jurisdictions. If the intention is that natural persons are liable (outside of any relevant law that relates to the agents of an entity), this should be provided for in the provision.

19. Note that the Commonwealth Acts Interpretation Act provides that 'person' will refer to a body politic or corporation as well as a natural person (as do the State interpretation Acts), so that the model offence provisions catch both.

20. The model offence provisions that relate to the false description of food (subsections 11 (1) and (2), 14 (2) and (3)) require that food 'complies' with its prescribed Standard. No further issue arises here outside of the need to have clear drafting of clauses relating to the composition of food.

Drafting and location of definitions

21. The judgement in *Nutricia* raised issues about the structure of the Code, the drafting of definitions, and the drafting of prohibitions and permissions in the Code. A significant point is that an Act or instrument is read as a whole (another general principle of statutory construction). This led to what appeared to be unexpected results about the effect of the definitions in Standard 1.1.1 (which is expressed to apply generally to the Code) and the way provisions that are drafted as general prohibitions (together with the permissions that qualify the prohibition) operate in the Code.

Definitions

22. As acknowledged by most stakeholders, there needs to be a consistent and logical treatment of definitions in the Code. Commonwealth drafting practice is to apply the rule that an expression in an instrument have the same meaning throughout the instrument ('one expression, one meaning'[7]). Giving an expression a different meaning for different parts of an instrument makes it more possible to confuse or mislead a reader and results in a more complex instrument.

23. The general rule is to place definitions that apply to the whole instrument in a general definitions section.

24. There has been a suggestion that definitions for foods remain in Chapter 2. These are known as 'just in time' definitions, that is, an expression is defined in the section/part of the instrument to which it is most relevant (still avoided, if possible, because of the plain English benefit of putting all the definitions into the one place). 'Just in time' definitions should still follow the principle of 'one expression, one meaning' (that is, the meaning applies *throughout* the Code), and be signposted in the general definitions section as follows:

milk has the meaning give by clause 1 in Standard 2.5.1.

So, if a definition is *not* placed in the general definitions section, the signpost definition makes it clear to the reader that there are other terms defined for the Code and tells the reader where they can be found.

25. The recommendation is for definitions to be collected in the one place in the Code. We think that:

a) All definitions that are relied on in more than one standard or clause should go into a general definitions section. As Standard 1.1.1 already exists as a repository for definitions that apply generally to the Code, it would seem to be the most appropriate place for this. If necessary, editorial notes throughout the Code can identify for the reader when an expression is defined in Standard 1.1.1.

This involves ensuring that:

 the terms that are placed in the general definitions section do apply across the Code

 if there are terms that are expressed to apply to a single Standard or Part the terms do only apply to that Standard or Part.

b) If you do allow for 'just in time' definitions (for example, keeping the food definitions in Part 2 and the primary production and processing definitions in Part 4) we think that 'signposts' for those definitions should go into Standard 1.1.1.

[7] See Drafting Direction 1.5, *Office of Parliamentary Counsel*, available at http://www.opc.gov.au

c) It is undesirable to have terms defined differently for different parts of the Code. If it is unavoidable, however, the definitions can be signposted in the following way to show that the term has those different meanings:

process, for Part 6, has the meaning given in clause ....

process, for Parts 1 to 5, has the meaning given in clause ....

This involves ensuring that definitions that are expressed to apply to a smaller part of the Code (rather than the whole thing) don't apply across the Code.

26. It is currently unclear in many cases throughout the Code whether an expression is intended to have one meaning throughout. It is also the case that defined terms are not used consistently in the Code. For example, names of foods in Schedule 1 to Standard 1.3.1 may not be consistent with definitions for the food in Chapter 2. [See Attachment B for examples]

27. The recommendation at paragraph [25] requires that definitions be examined to determine their scope, and the Code examined to ensure that it uses the same term for the same concept throughout.

28. The approach to definitions in the Code needs to be considered in tandem with the approach that is to be taken for dealing with the structure of the Code. For example, if you prefer to keep food definitions in Part 2, it would be consistent with plain English principles and contemporary drafting practice if those definitions, currently scattered throughout individual standards, were to be consolidated into a single place (eg, a clause or a Standard). [See paragraph 53 about options for restructuring the Code]

Drafting of definitions

29. There are many definitions in the Standards that are complex or that include material that could be regarded as substantive, or both.

30. The general drafting rule is that definitions should not include substantive material. Their purpose is to explain the meaning of words or of a concept. Powers or functions should not be conferred by a definition. Definitions have been used in the Standards to establish 'prescribed names' for foods. That kind of definition could do all of the following things:

a) delimit what is included as a particular food

b) impose requirements on the food

c) require that only foods that comply be labelled with the name

and it may have the effect that the Standard only applies to a food that fits the description in the definition.

31. This gives a definition a lot to do and leads to complexity. It may also lead to some legal uncertainty. Note the comments at paragraphs 12 to 20 about the careful drafting that is required for requirements in the Code. Those comments apply to provisions about the composition of food (and to those definitions that currently impose composition requirements on food). As stakeholders have pointed out, a definition that describes a food as one that complies has the curious effect (or may have the effect) of excluding a non-compliant food from the operation of the standards. As well, placing composition requirements and labelling requirements in definitions is a very indirect method of imposing them as requirements on persons.

32. The recommendation is that any such definition be redrafted, and requirements drafted as separate clauses. Attachment B sets out OLDP's comments in detail, and provides examples of how redrafting could be approached.

33. Each of the definitions that occur in the Code might be examined to consider whether it is needed and if so, whether the drafting could be improved. Best drafting practice is:

a) to include a definition if it is necessary because the meaning of a term goes beyond the dictionary definition, or the dictionary definition is affected because the term is to be more limited, will become exhaustive or is to be expanded

b) to include a definition if defining a concept or phrase would reduce repetition in the text of the instrument (ie, as a plain English measure)

c) for an existing definition, to examine whether it can be simplified using plain English principles, whether the text is uncertain, whether the text gives rise to ambiguity.

Need for more definitions

34. The *Nutricia* judgement noted there was a lack of definitions. Aside from ensuring that definitions in the model provisions are used in the interpretation of the Code [see paragraph 5], the need for more definitions is something that can only be examined on a case by case basis, and to a great extent would involve questions of policy. See Attachment B for a discussion of examples provided by stakeholders.

Revising the general prohibitions model

35. General prohibitions in the Code are drafted so that there is a global general prohibition that applies 'unless expressly permitted'. Provisions that expressly permit certain things are then located in other places in the Code. This model caused difficulties for the interpretation of the Code in Nutricia. The general prohibitions model does not make clear the relationship between provisions. It leads to the situation where it is difficult to see how the parts of the Code operate together; it results in a less integrated product; and is much more likely to lead to conflicting provisions. Such a scheme is hard to understand and requires a lot of effort from the reader. The example of the prohibition of 'nutritive substances' in *Nutricia* demonstrated overlapping and repetition between provisions dealing with the same subject matter.

36. The recommendation is to examine each general prohibition in the Code and attempt to rationalise how a rule about a prohibition operates in its entirety (eg, the rule is X, unless Y, Z and A).

It is a drafting principle that provisions to which the relevant provision is subject should always be identified or the provisions recast to make it clear which provisions are the dominant ones. The general prohibitions should be recast to remove the expression 'unless expressly prescribed/permitted' and to do what is necessary to fully express the rule.

37. Any further proposed amendments of the Code should then be examined to see if they require consequential amendments to be made to existing provisions.

Other drafting issues

Incorporating material into the Code by reference

38. Stakeholders are concerned that there are out of date references to material (eg, other Standards, methods of food analysis) in provisions that require compliance with the material. The Standards are made under the *Food Standards Australia New Zealand Act 1991*(Cth) (the ***FSANZ Act***) and are subject to the rules in the *Legislative Instruments Act 2003* (Cth) (the ***LIA***). Unless provided otherwise by the delegating Act (the FSANZ Act), legislative instruments are subject to section 14 of the LIA which allows them to incorporate such material as it is in force at the time of incorporation (but not as it is in force from time to time).

39. There are 2 reasonable options to address out of date material incorporated in the Code:

a) Option 1 is to amend the Code from time to time to keep the references up to date. This would be considered as ongoing maintenance of the Code. The advantage of this approach is that it is simple and it maintains consistency.

b) Option 2 is to amend the FSANZ Act to provide that the Standards may incorporate material as it is in force from time to time. This involves questions of policy as to whether Parliament is willing to allow subdelegation in this way.

Drafting in plain English

40. There are examples of provisions in the Code that are long, have a convoluted grammatical structure, and pack in a lot of information. The recommendation is to draft in plain English, the essence of which is to make the legislation as easy to understand as possible. This includes drafting in short sentences, using positives rather than negatives, using the active rather than passive voice, and avoiding complicated or unusual grammatical constructions (to name only a very few features). See Attachment B for examples of some recasting of provisions that demonstrates plain English drafting. Many of the drafting suggestions in this report, for example concerning the drafting of definitions, revising the general prohibitions and 'prescribed names' models, and restructuring the Code, are plain English measures.

The 'prescribed names' model

41. Clause 3 of Standard 1.1.1 provides that:

A reference in this Code to the nature, substance, composition, strength, weight, volume, purity or quality of any food, article, ingredient or component is the prescribed standard for that food, article, ingredient or component.

This is confusing. It doesn't seem that every reference to the nature or substance etc., of food will be a reference to the prescribed standard.

42. The recommendation is to draft the relevant provisions so that clause 3 above is not necessary. This may also be assisted by redrafting the definitions in the Code that have the compositional requirements built into them. It is better to move away from the 'is a prescribed standard' model. It is more direct to make rules about food, and require compliance with the rules.

Drafting exceptions to a rule — the use of 'subject to'

43. The expression ‘subject to’ means there is an exception to the rule in another provision. There are usually better ways to express this (eg, it can often be avoided by using an application provision, or by setting up provisions to have different consequences for different circumstances). The recommendation is to avoid the phrase in redrafting. It is not necessary to provide expressly that a provision is subject to another provision if this appears unambiguously from the provisions themselves.

Drafting purpose statements

44. The recommendation is that the purpose statements are examined to determine the extent to which they are necessary, at least in their current form. Often they only summarise or give an outline of what the Standard is doing (rather than expressing a purpose) and this simply repeats the clauses.

45. If outline provisions remain for the purpose of aiding readability, it is better that they are headed ‘Outline’. An outline clause is likely to be more useful if it covers a larger portion of the Code (a whole Part, or a Chapter) rather than a single Standard as currently. Outline clauses can be of assistance to readers. They could also be in the form of a flow chart.

46. Any definitions currently in a purpose statement (for example, ‘food additive’ in Standard 1.3.1) should be removed and put into a definitions clause [see paragraphs 22 to 29]. Definitions in the ‘purpose’ may not be considered to be part of the Standard, as it is only the clauses that are enforceable.

47. Provisions that are drafted to express the purpose (and nothing else) can aid readability and can help ensure that a court applies a purposive interpretation to the Code. If a purpose is included, it is preferable to put it into a clause to ensure it is regarded as part of the instrument (and not as extrinsic to it).

Drafting of Schedules and tables of information in the Code

48. The way that information is organised in tables (whether or not in Schedules) can be significantly improved. Sometimes the connection between a Schedule and its empowering provision is not clear. Sometimes operative rules are placed obscurely within tables, or they are expressed to apply to text that is formatted in a particular way, eg ‘bolded’.

49. The recommendation is to correct this. Restructuring the information would considerably aid the reader. Operative rules should be easy to find. Attachment B includes several examples of how the internal structure of Schedules and tables of information can be improved.

The editorial notes

50. Editorial notes can be greatly simplified and reduced. As there is a statutory function for FSANZ to provide guidance material there is much scope for material currently in editorial notes to be moved to the guidelines. Also, there is no reason why previous versions of clauses should be placed in editorial notes in the Code. These are confusing and add complexity. The general rule is that previous versions of clauses can be easily found by readers in previous consolidations of the Standards. At most a note could refer to the previous version and its significance.

51. Editorial notes are not legally binding for the Code (see definition of ***standard*** in section 4 of the Act and clause 5 (1) in Standard 1.1.1). They should therefore not contain any substantive material. Attachment B contains some discussion and examples.

Restructuring the Code

52. For a number of years there has been ongoing dialogue between FSANZ and OLDP as to the most appropriate structure the Code should take: whether the standards ought to be consolidated into a single instrument, kept separately as currently or structured in some other way.

In the establishment stage of the Federal Register of Legislative Instruments (the ***FRLI***) there may have been an issue relating to the difficulties of storing very large documents on the database. This is a minor issue now given the FRLI's present capabilities. There is no problem storing text files on the database, no matter how large. As such, it is appropriate to re-examine the issue of what form Standards made under the FSANZ Act should take.

53. We think the options are as follows:

a) Option 1 is to consolidate all of the Standards into a single instrument, called 'Standards'. This could be effected by simply registering a consolidation and repealing all the other standards. Our view is that this is permitted under the enabling Act. This has the advantage of being easily achieved, and of allowing the greatest flexibility in terms of organising the contents of the Standards. OLDP is happy to discuss how this may be done.

b) Option 2 is to consolidate *some* of the Standards, so that there are fewer discrete instruments making up the Code. For example, consolidating each of the standards belonging in a Part or in a Chapter, into a single Standard. This would provide some of the benefits of the Option 1 approach. The Parts and Chapters are organised in subject areas in a way that already suggests a logical sequence. This approach is preferable to leaving the Code as it is.

It would still be possible to 'reserve' Divisions for particular topics and to signal this with a note. (what are currently reserved places for new Standards)

54. The current structure of the Standards means that the substantive text is significantly broken up by tables of content, purpose statements, Schedules and editorial notes (some of which are very lengthy, some of which actually reproduce previous versions of clauses). As well, the need to handle a large number of separate documents presents difficulties to a reader: a reader is less likely to understand how the Code operates as a whole.

Restructuring the content

55. It is envisaged that consolidating the Code will assist the rational restructuring of information in the Code. Consideration should be given to how best to set out the information in the Code so that it is rational and easy for readers to comprehend. Options for organising definitions have already been discussed [see paragraphs 21 to 28]. Provisions that are common to more than one food or for more than one requirement can be located in one place, to reduce repetition in the Code and to help make the scheme clearer to the reader. OLDP is happy to advise how this may be done.

Rationalising major concepts

56. It is sometimes not clear how fundamental concepts (such as substance, biologically active substance, nutritive substance, vitamins and minerals, component) relate to each other. Any redrafting of the Code should examine and test the major concepts.

Location of Schedules

57. Consolidating the Standards in the Code in some form would reduce the extent to which the Schedules break up the flow of provisions. There are several options available for the structuring of the Schedules:

a) Option 1 is to put all of the Schedules at the back of the entire consolidated Standards (Option 1 at paragraph 53). The advantage of this approach is that it is consistent with other legislation on the statute book. It also leaves the substantive provisions uninterrupted and gives the reader a better sense of how the whole scheme hangs together.

b) Option 2 is to put the Schedules at the back of other divisions of the Code, for example, at the back of Parts or Chapters. The disadvantage of this approach is that it is unusual, and there will be interruption of the substantive text by long Schedules. The advantage is that it puts relevant information closer to the operative provisions. It is also something that the readers are used to.

Use of OLDP templates

58. The recommendation is to use OLDP templates for the Code so that its appearance becomes consistent with other legislation on the statute book.

59. Using the templates would bring some improved design features, developed to aid the reader, for example:

a) the consistent appearance of provisions, tables and Schedules

b) standardised fonts and styles for headings and consistent formatting

c) amending forms that are consistent with other legislation

d) smaller text used for notes so that they do not break up the flow of the text as much

e) more space around the text

Examples in Attachment B

60. Attachment B contains OLDP's response to issues raised by stakeholders. OLDP's comments may include examples of drafting. The examples demonstrate approaches that could be taken to deal with particular issues, or to simplify or improve the drafting of clauses. The comments sometimes include questions drafters would put to an instructor about the intention of a clause before further development of the drafting would be possible. The drafting shouldn't be taken to be resolved because it has not been developed with instructions (to the extent necessary) or in consultation with instructors.

Drafting protocols

61. OLDP recommends that:

a) it provide comments on proposed drafts developed by FSANZ, particularly concerning drafting principles and proposed solutions discussed in this audit report

b) it do what it can under its responsibilities under section 16 of the LIA to assist FSANZ (section 16 is about measures to encourage high drafting standards)

c) drafting is aimed at achieving legal certainty as far as possible

d) FSANZ maintain a process for ensuring drafting principles discussed in this report are applied to drafts produced in FSANZ, and the drafts settled by a second lawyer (the 'second counsel' rule)

e) FSANZ use OLDP templates

ATTACHMENT A **Item**	**Jurisdiction**	**Interpretation Act**	**whether it applies to the food standards as adopted into food Acts**
1	NSW	*Interpretation Act 1987* (NSW)	Does not apply. ***instrument*** (s 3) means 'made under an Act'. Act is not defined but means state Act as s 31 provides that Acts and instruments are to be construed so as not to exceed the legislative power of Parliament
2	Queensland	*Acts Interpretation Act 1954* (Qld); and *Statutory Instruments Act 1992* (Qld)	It probably does not apply. ***statutory instrument***, defined in s 7 of the *Statutory Instruments Act 1992* (Qld), includes an instrument 'made under' an Act, another statutory instrument or 'power conferred by an Act or statutory instrument and also under power conferred otherwise by law'. section 14 H
3	Victoria	**Interpretation of Legislation Act 1984** (Vic); and **Statutory Legislation Act 1994** (Vic)	Does or is likely to apply. Section 38 definition of ***subordinate instrument*** includes an instrument that is not a statutory rule within the meaning of the but is 'of a legislative character'
4	South Australia	*Acts Interpretation Act 1915* (SA)	Does or is likely to apply. Definition of ***statutory instrument*** in section 4 includes 'a code or standards made, approved or adopted under an Act' as well as 'any other instrument of a legislative character made or in force under an Act'

5	Western Australia	*Interpretation Act 1984* (WA)	Does not apply. ***subsidiary legislation*** in section 6 includes an 'instrument, made under any written law and having legislative effect'. ***written law*** means all Acts and subsidiary legislation in force. ***Act*** means Acts of Western Australia. The Standards are not 'made' under a WA Act.
6	Tasmania	*Acts Interpretation Act 1931* (Tas); and *Rules Publication Act 1953* (Tas)	It probably does not apply. It's not clear whether the expression 'under an Act' includes incorporated material.(eg, s 29) The adopted standards are unlikely to be included under the expression 'where an Act confers a power to make, grant, or issue any regulation or other instrument' (s 19) There don't appear to be any provisions relating to incorporating material by reference.

Table 1: Issues arising from Nutricia judgement			
Item	**Issue**	**Intructions/Rule**	**OLDP comments/questions**
	nutritive substance		
1	'nutritive substance'	The definition failed. The expressions 'normally consumed' and 'normally used' are too imprecise.	Option to attempt to define 'nutritive substance' to have a more certain meaning. It is possible to add a reference to the relevant population base for the food. However, we think that 'normally' (together with words such as 'usually', 'typically') are too vague for legislation. They don't indicate when a thing either falls into a particular category or doesn't. Make clear that a nutritive substance is an 'additive' to food.
2	narrower meaning of 'nutritive substance' in Standard 2.9.2	Simpson J rejected the proposition that the term could be read to have a different (narrower) meaning in 2.9.2. That would require reading words into the definition, which is not permissible. The court's view was that the definition in 1.1.1 could not be read to have a meaning that confines 'normal use' to the population base relevant to the food regulated by Standard 2.9.2 (formula for infants)	Option to define 'nutritive substance' in Standard 2.9.2 to have a meaning that overrides the meaning in Standard 1.1.1 to confine 'normal use' to the intended relevant population that would consume the food. This would involve checking how the concept of 'nutritive substance' operates across the whole of the Code.
3	threshold question of whether FOS or GOS are nutritive substances	The court found it was not possible to prove that FOS is a nutritive substance or that GOS is a nutritive substance. The substances do occur naturally in the food, so they fail the test in the definition in Standard 1.1.1: that the food is not normally consumed, or not normally used in an ingredient of the food. Even if this *were* able to be proved, the next step would be to also prove that: a) the substances are not permitted elsewhere in the Code; or b) the substances do not occur naturally in an ingredient of the food As the court found that the substances do occur naturally in the food, they would fail the test in Standard 2.9.2, clause (6) (1), in any case. (FOS, which is also known as 'inulin', is permitted in food; GOS is found in traces in whey which occurs in infant formula)	Option to clearly provide in the Standards relating to infant formula what things may be included in the food, and what may not be included in the food.
4	Standard 1.1.1, clause 9A	Note also clause 9A in Standard 1.1.1 'Inulin-derived substances are taken not to be nutritive substances'. That seems to mean they can be added to food	Is this still correct.

Table 1: Issues arising from Nutricia judgement			
Item	**Issue**	**Intructions/Rule**	**OLDP comments/questions**
5	Standard 2.9.2, clause (6)	The clause does not operate to prevent manufacturers adding a substance that is naturally occurring in the food. If FOS occurs naturally, the provision does not operate to prevent the addition of more FOS to the food.	Option to amend (6) (1) to have this effect. This argument seems circular from the viewpoint of the present definition of 'nutritive substance' and infant formula product. However, the provision also fails to have the intended effect for vitamins, minerals and food additives. (so, if it was naturally present in the food, (6)(1)(b) does not prevent the manufacturer adding more)
6	Para 88 of judgement-overlapping of general prohibition provisions	Clause (9) in Standard 1.1.1 and clause (6)(1)(a) of Standard 2.9.1 overlap in respect of providing for a general prohibition. Subclause 6(1) contains references to other substances and provides for 2 exceptions to the general prohibition.	Consider redrafting to remove overlapping provisions.
7	Standard 2.9.1, clause (6) and (24); (para 118 of judgement)	The Court found that clause (24) is subject to clause (6)(1), and there is no inconsistency between them.	Consider how clause (24) is intended to operate. Consider restructuring provisions so that the intended relationship between (6)(1) and (24) is made clear.
8	Para 112 of judgement	synthetic (or 'manufactured') and naturally occurring GOS	Is there a need to distinguish between these 2 forms in the Code?
9	Para 105 of judgement	'dietary fibre' is food or a food ingredient	Is there anything you need to change in the Code as a result of this finding?
10	Para 125 to 127 of judgement Clause (3) of Standard 1.1A.2	'therapeutic or prophylactic claims' Simpson J recommended the phrase change to 'therapeutic change or prophylactic change'.	The dictionary definitions of 'therapeutic' and 'prophylactic' seem sufficient (they were in this instance, at least). Do you agree or do you think you need something more? Are you happy to change the drafting to 'therapeutic <u>change</u> or prophylactic change'. We agree the composite phrase is disjunctive, in any case. What was the reason for the argument put by FSANZ/the prosecution that it was 'critical' the words be read as forming 'part of a phrase'?
	Health claims (paras 128-136 of judgement)		

Table 1: Issues arising from Nutricia judgement			
Item	**Issue**	**Intructions/Rule**	**OLDP comments/questions**
11	Standard 1.1A.2, clause (3)	Simpson J did not find any problem with the structure of this clause. I am not clear on how the interpretation put by Nutricia differs from the interpretation given by Simpson J (unless it is that (3)(f) operates only in relation to (3)(e)(Nutricia argument), whereas Simpson J expressed the view that (3)(f) is a prohibition generally.	If you agree the meaning is clear, it can be left as it is. However, the Standard could be redrafted to remove the words 'Subject to' and 'save where expressly permitted in this Code', with the provisions in clause (3) restructured to make their intended operation clearer (and to be clearer about how the provisions operate in relation to each other). - this suggestion is relevant to provisions in the Code generally.
12	Standard 1.2.8	'nutrition claim'	Assume this is a different concept from 'health claim' (that this has to do with foods that give you adequate nutrition whereas a health claim relates to being better for your health)
13	Definition of 'health claim'?		Consider the need for a definition of 'health claim'
14	Standard 1.2.8 definitions, see para 142 of judgement	Clause (3) of Standard 2.9.1 incorporates the meaning of 'energy factors' as it exists in Standard 1.2.8 for the purposes of that Standard but does not incorporate the meaning of 'carbohydrate' which is also needed.	Consider the definitions in Standard 1.2.8 (food additives). Should they be moved into Standard 1.1.1 so that they operate across the Code. Are the definitions relevant to other Standards? As an aside, I don't think that 'energy factors' is very clear. This definition can be improved.

Table 4: Issues raised by the States and Territories and New Zealand			
Item	**Agency**	**Issue**	**OLDP comments/questions**
1	[redacted]	'methods' in the Code for 'any measure that has analysis as a compliance measure'. -methods are 'out of date, out of print and no longer used by laboratories' -incorporation by reference should be possible from time to time	This is a policy matter. The incorporation of material (into the Standards) by reference as in force from time to time requires amendment of the Act to override the operation of section 14 of the LIA.
	[redacted]		
2	[redacted]	Develop a 'cross reference system' to increase user friendliness	It's hard to know what is meant by 'cross reference system'. This may be addressed by rationalising the definitions and overall structure of the Code.
3	[redacted]	Provide a picture or diagram of how the Code is set out	It is possible to construct a flowchart (there are examples in legislation)
4	[redacted]	Definitions in one section	we generally agree
5	[redacted]	Remove editorial notes	Agree with the proposition that clauses should be clearly written so that editorial notes are not required. This should be the case as far as is possible. Substantive matter should not go into an editorial note. Otherwise, there is nothing wrong with the notes providing information helpful to readers and this is common in legislation. We suggest: • improving drafting of notes, by simplifying them for example • taking out anything substantive and drafting it into text of clauses
6	[redacted]	Remove definitions from notes	Cross references to existing definitions are okay. It is certainly not valid to have definitions in the notes and they should go into a clause
	[redacted]		
7	[redacted]	Issues about definitions may be addressed in the form of a general dictionary	Agree it is important that the definitions (or signposts to definitions) are all located in the one place.

Table 4: Issues raised by the States and Territories and New Zealand			
Item	**Agency**	**Issue**	**OLDP comments/questions**
8	[redacted]	A court may decide to ignore editorial notes in favour of the ordinary meaning of the words	This refers to the principle that extrinsic material is only addressed to confirm the ordinary meaning, if there is ambiguity or if the result is absurd or unreasonable. Our recommendation is that notes or other extrinsic material should not be relied upon. The better approach is that the drafting of the provisions is sufficient to express the policy intention Information in notes should not be included to promote the purpose or intent — that is substantive and should go in clauses
9	[redacted]	Restructure to take out editorial notes and put them somewhere else	Removing the notes does not address the issue that notes should not be relied upon. However, we agree the Code should be structured to enable an unhindered read through of the substantive provisions. We suggest simplifying and shortening the notes. We have also suggested consolidating Standards which would have the effect of removing some of the TOCs, purpose statements and Schedules .
10	**Purpose statements** [redacted]	The purpose statements sometimes include definitions Are they treated similarly to 'objectives' clauses in Acts (eg, do they assist in interpretation, or are they ignored altogether)	1. Because of the uncertainty surrounding whether the purpose is legitimately a 'clause' the definitions should come out. 2. You could treat purpose statements as 'objectives' sections in Acts, but you should put them in clauses so that you put beyond doubt that they are 'provisions'. It is the provisions of the Standards that are enforceable. 3. A lot of them simply summarise or give an outline of what the Standard is doing. I don't think there is anything wrong with that – though they should then be called 'Outline'.
11	**Interoper-ability with [redacted] Food Act**	There is conflict between State and Federal legislation Is there a possibility that food Standards may override State law	Our preliminary view is that we don't think that a provision in the Food Standards could be found to be inconsistent with a law in a Food Act of a State or Territory. Food Acts mirror the model provisions attached to the Intergovernmental Agreement made in 2008. The Code is adopted and enforced by provisions in the Food Acts. It is enforced in the Cth sphere for the purposes of the *Imported Food Control Act 1991* and the *Export Control Act 1982*. If you are concerned about this, you should get AGS advice.

Table 4: Issues raised by the States and Territories and New Zealand			
Item	**Agency**	**Issue**	**OLDP comments/questions**
12	**Conflict with regulation 4 (1)(d) *Food Regulation 2004* (NSW)**	Reg 4 (1) (d) of the *Food Regulation 2004* (NSW) provides that 'to demonstrate is to be read as a reference to demonstrate to the satisfaction of the Director-General'. Clause 25 of Standard 3.2.2 provides that: Without limiting the ways in which a food business can demonstrate that the temperature and any heating or cooling process it uses will not adversely affect the microbiological safety of food, a food business satisfies this requirement by complying with – (a) a food safety program that meets the requirements for food safety programs in the Act, regulations under the Act, or a food safety standard other than this Standard; (b) if no such requirements apply to the food business, a 'food safety program' as defined in this Standard; (c) a process that according to documented sound scientific evidence is a process that will not adversely affect the microbiological safety of the food; or (d) a process set out in written guidelines based on sound scientific evidence that are recognised by the relevant food industry.	You may like to get AGS advice about whether clause 25 conflicts with the modification in 4(1)(d) of the Food Regulations. 'demonstrate' means demonstrate to the satisfaction of the Director General. On one interpretation it may mean that each of the methods in (a), (b), (c) or (d) needs to be demonstrated to the satisfaction of the Director General in order to satisfy the requirement. The requirement may be to demonstrate that the temperature and any heating or cooling process it uses will not adversely affect the microbiological safety of food. Or, it might be that the requirement is that the temperature and heating or cooling the food business uses will not adversely affect the microbiological safety of food. We would suggest that the *modifying* provision be amended to make it clear that clause 25 operates so as to require the Director-General to be satisfied that the methods in (a), (b), (c) or (d), and any other methods, are demonstrated to the satisfaction of the Director General (if that is the policy).

Table 4: Issues raised by the States and Territories and New Zealand			
Item	**Agency**	**Issue**	**OLDP comments/questions**
13	**equivalence?** [redacted]	NSW notes that other provisions in the Code refer to alternative means of compliance by use of the word 'equivalent'. For example, Standard 2.2.2 (2) (1) provides that 'egg products must be pasteurised or undergo an equivalent treatment so that the egg product meets the microbiological criteria specified in Standard 1.6.1' Other examples given by NSW occur in Standard 1.6.2 (8) (2) and Standard 4.2.4 (15) (1) (c)	The use of the word 'equivalence' in provisions in the Code does not pick up the meaning of regulation 4 (1) (d), so the requirement for it to satisfy the Director general is not read in, in my view. It is, at best, risky to assume that the words 'to demonstrate' in regulation 4 would pick up references to equivalence, and alternative compliance methods. Resolving this issue is a policy matter. The drafting issue is that concepts should be expressed using the same language and grouped appropriately.
14	[redacted]	NSW suggests 'demonstrate' and 'equivalence' could be defined.	Providing definitions may not be the best way of dealing with the issue (see above). In the context of the Code provisions, it is evident what the words mean. The issue may be that different ways have evolved of expressing the same concept. If redrafting, consideration should be given to using consistent terms and phrases for the same concept.
15	[redacted] **on the occurrence of 'and/or'**	The use of 'and/or' is a way of giving 3 alternatives by only mentioning 2, ie, A and/or B means A alone, B alone or both A and B. It is avoided in drafting in this Office as it requires too much work from the reader and can be interpreted in different ways.	Consider clarifying any 'and/or's' that occur and redrafting to remove the expression. 'A and/or B' can be recast as 'A or B or both'. Quite often all that is really meant is 'A *or* B'.
16	**Standard 1.6.1** [redacted]	Standard 1.6.1, clause 4 – prescribed methods of analysis – 'any equivalent method ...as determined by the provisions of AS/NZS 4659 ...is permitted to be used'	We note that the modifying provision in paragraph 4 (1) (d) of the Food Regulation does *not* apply in relation to clause 4.
17	**Standard 1.6.2** [redacted]	First editorial note below clause Standard 1.6.2 (3) about egg products being subject to control measures	Is this material dealt with in provisions? (it sounds substantive). As editorial notes are not legislative, if there is material there you wish to rely on, OLDP's view is that it should be drafted into the provision. To whom would measures be shown? *What* is the 'appropriate level of public health protection'?

Table 4: Issues raised by the States and Territories and New Zealand			
Item	**Agency**	**Issue**	**OLDP comments/questions**
18	**solutions proposed by [redacted] to solve interoperability problem**	clause 25 provides alternative means of compliance NSW asks whether it can be deleted so that NSW modified legislation works	The request involves the policy issue of what is an acceptable means of compliance for the uniform operation of the scheme. OLDP does not have a view as to whether 25 should be deleted. Drafting issue related to clause 25: For better clarity the provision should cross refer to the following provisions in the Standard, either in the text of the provision or in a note: • defn of 'temperature control' which refers to 'demonstrates' • (5)(3) which refers to 'demonstrates' • (7)(3) refers to 'demonstrates' • (7)(4) refers to 'demonstrates'
19	**Part 1.6** [redacted]	structure	OLDP's view is that standards Standard 1.6.1 and Standard 1.6.2 can effectively be combined.
20	**Standard 2.2.2** [redacted]	defines eggs and egg products in the form of definitions	The requirement for eggs should be drafted in a provision. Eg, ***egg*** means the reproductive body in a shell obtained from an avian species. Example of how the requirement could be drafted: A person must not sell an egg that has a visible crack or that has faecal matter, soil or other foreign matter on its surface. I note also that there are other requirements for cracked eggs. They must not be for retail sale or for catering. This can be made clearer.
21	**Standard 3.1.1** [redacted]	Definitions apply to the Chapter. (include 'food business', 'food handler', 'proprietor of a food business'	

Table 4: Issues raised by the States and Territories and New Zealand			
Item	**Agency**	**Issue**	**OLDP comments/questions**
22	**Standard 3.2.1** [redacted]	Applies to all food businesses in Aus, in accordance with Standard 3.1.1 and clause (5) definitions expressed to apply 'in this Standard' Defines food safety program to mean one that satisfies the requirements in clause (5).	How does it work with food safety program in Standard 3.2.2?
23	**Standard 3.2.2**	Applies to all food businesses and food handlers in Aus, in accordance with Standard 3.1.1 Defines food safety program by repeating the requirements in Standard 3.2.1 clause (5). Editorial note to clause (2) about when a food business has to comply – 'substantial transformation of food' that seems substantive. Where does it come from. it is not evident from the definition of 'food business'.	consider 'a food business must' for the requirements in Standard 3.2.2
24	[redacted]		For Part 3.2: consider whether it would be easier to read and manage the information if it was all put into the 1 standard. I can't see why all of the Standards in Parts 3.1, 3.2 and 3.3 could not be put together into a single Standard. As part of its internal structure it could have 'Divisions' within it. (eg, 'food safety programs' could go into its own Division . This also gets rid some of the contents lists . The contents lists interrupt the flow of provisions and make it harder for the reader to grasp the overall picture of the scheme.

Table 4: Issues raised by the States and Territories and New Zealand			
Item	**Agency**	**Issue**	**OLDP comments/questions**
25	**Standard 4.2.4** [redacted]	Standard 4.2.4, clause 15 (1)(c) 'milk must be pasteurised by...using any other process that provides an equivalent or greater lethal effect on any pathogenic micro-organisms' See also (15)(3)(c).	the modifying power in the Regulation will not work as the provision in the Standard does not use the word 'demonstrate'. However, this clause provides as follows: 'unless an applicable law of a State or Territory expressly provides' and so it is open to NSW to provide expressly for its requirements.
26	**Standard 4.2.3** [redacted]	Standard 4.2.3, clause 4, tables	The information in the tables should be drafted into the provision (they are *lists* of requirements)
27	[redacted]**-meals on wheels**	Standard 1.2.1 (2)	OLDP agrees it is quite unclear what clause 2 (1)(f) 'packaged and ready for consumption at the express order of the purchaser' means. We agree with [redacted] comments about the definition 'food for retail sale'. What are the situations in which food is for 'sale to the public'? I'm not sure whether the recipients in NSW's example are a charity organisation or an individual receiving the meal, but it seems to me NSW is referring to organisations that distribute the meals. Is an organisation 'the public'? [eg, charity that distributes food. airline food. hospital food. I would assume that an individual ordering catering for a party is the public.] We don't know what situations the term 'express order' is intended to cover and agree that it needs to be clarified. As such, we agree with [redacted] that it is likely that meals on wheels: • may not be 'food for retail sale'; and • if they are – may be covered by 2 (1)(f) (and therefore not require a label) or may not be. The effect of 2 (1)(f) is unclear. [and the circumstances here are not clear to me] The issue of whether meals on wheels should be labelled is a matter of policy.
28	**meals on wheels** [redacted]	Standard 1.2.1 (3) and (4) (I am not entirely sure what NSW is saying is the problem: it may be about the policy)	As already mentioned we think the drafting of this clause can be significantly improved. We think [redacted]'s point goes to the policy.
29	**OLDP on the labelling provisions**	Clause 2	We think there are many problems with the drafting of this clause. Subclause (1) is expressed to be 'subject to' subclause (2). Subclause (2) then goes on to say 'Despite subclause (1)'. That isn't logically possible: the clauses appear to cancel each other out. Subclause (1) is expressed in negative terms. It tells the reader when labelling requirements *don't*

Table 4: Issues raised by the States and Territories and New Zealand			
Item	**Agency**	**Issue**	**OLDP comments/questions**
			need to be complied with. We think it is better to express legislative statements in the positive. You could do this by having an application clause (example below). Subclause (2) is a set of cross references. This is very difficult for the reader. I don't think it is clear exactly what subclause (2) is doing. You should provide instructions about what the intention is for subclause (2). The current (1)(b) is unsatisfactory. There should not be second sentences present within a paragraph (the whole clause itself is technically a single sentence that has been paragraphed out). Also, the second sentence sets out a rule that contradicts the first sentence. Or, you might want to define the foods listed in (2)(1) so that you can easily refer to them in the Code (For ex, 'Category X foods'). This is because it is a category that does have its own rules Eg, those in (2)(2). Subclauses (4)(b) and (c) use the expression 'setting out the information prescribed in this Code'. The better approach is to state where the information is kept, or what the information is. The information in the editorial note to (4)(c) explains where the information can be put. This appears to be substantive and should go into the clause itself. We also question whether it is at all necessary to 'prescribe' information. (Similarly, as we have said before, we don't think it is necessary to 'prescribe' names.) There is no need for it to be 'prescribed information': there is simply a requirement to provide certain types of information and to put it on a label. We think it is clearer to draft the requirement to provide information and to put it on a label, rather than to draft what is prescribed information and then refer throughout the code to 'prescribed information' or to 'information prescribed in this Code'. With foods: there is no need to prescribe a name. The actual intention is to prescribe requirements in relation to the food. [So, not 'Orange means an orange with no mould on it', but, 'A person must not sell an orange that has mould on it']. This is a simpler approach because it cuts out an artificial step in the process. It also gets rid of the ambiguity that arises when the code refers to a food that has a name that has been 'prescribed', and that cannot be that food unless it already complies with the requirements that attach to the prescription of the name, eg, a mouldy orange is not an orange.

Table 4: Issues raised by the States and Territories and New Zealand			
Item	**Agency**	**Issue**	**OLDP comments/questions**
			If you then don't want retailers etc. using the word 'orange' to describe the product if they don't comply with requirements, you can more directly provide as follows: A [person/retailer/food business] must not use the word 'XXXXX' to describe a food that is subject to this [Standard/clause], on a label or in an advertisement for the food, unless the food has been manufactured in compliance with the requirement in ... ...unless the food is presented to the public in compliance with the requirements in this clause. Drafting practice is that 'prescribe' is reserved for things that regulations can do, and appears in the regulation making power of an Act; eg "The fee for a licence is as prescribed by the regulations'. We don't use 'prescribe' in other contexts. We would delete clause 3 of Standard 1.1.1. See paragraphs 41 and 42 of the report. Given our comments about the use of 'prescribe' above, we think it is desirable to move away from the 'is a prescribed standard' model. It would be preferable to have an application provision instead of clause 2(1) along the following lines: (1) This clause applies only to food that is for retail sale. (2) However, this clause does not apply to the food if it: (a) is not packaged; or (b) is in an inner package that: (i) is 30 cm2 or smaller; and (ii) is not intended for individual sale; or (c) is made and packaged on the premises from which it is sold; or (d) is packaged in the presence of the purchaser; or (e) is whole, or cut, fruit or vegetables that are packaged so that the nature or quality of the fruit or vegetables is not obscured; or (f) is delivered packaged, and ready for consumption, at the express order of the purchaser; or [we need to be clear what this means, before being able to develop the draft further]

Table 4: Issues raised by the States and Territories and New Zealand			
Item	**Agency**	**Issue**	**OLDP comments/questions**
			(g) is [intended for and?] sold at a fund raising event; or (h) is packaged and displayed in an assisted service display cabinet [we need to be clear what this means] (3) In this clause ***fruit and vegetables*** does not include sprouting seeds or similar products. (4) [A person must not] sell the food unless it is labelled. (5) The label must set out the information in....? The clause applies to a person who prepares food for retail sale or a person who sells food to the public. Is that correct? The existing clause 2 (1) is expressed as follows: 'food for retail sale must bear a label setting out all the information prescribed in this Code'. You should consider using words such as 'information required by this Code to be set out in the label for the food' As it is, the clause doesn't confine the information to that relevant to the particular food. Where are the information requirements set out? The relationship between 2 (1) and (2) is convoluted and confusing. The provisions should be recast: • to make clear what they mean; and • to group the requirements in the one place. (6) Subclause (7) applies to a person who sells food that is not required to be labelled under subclause (2). (7) The name of the food or a description of the food that is sufficient to indicate the true nature of the food must: (a) be displayed [by the person] on the food, or in connection with the display of the food; or (b) be provided by the person to the purchaser upon request.

Table 4: Issues raised by the States and Territories and New Zealand			
Item	**Agency**	**Issue**	**OLDP comments/questions**
30	[redacted] **on units of measurement provisions**	Standard 1.1.1, clauses 6 and 8.	Clause 8 appears to conflict with clause 6. Clause 6 provides that the glossary only applies if 6(1) does not apply. If it is the intention that clause 8 be subject to clause 6, it should be drafted as such. Also, aren't the symbols in the table (or some of them) already using the systeme internationale d'unites? (because they are using a metric system?) We would approach the drafting as follows: **Meanings for symbols [and units?] of measurement** (1) A unit of measurement used in this Code: (a) [for Australia], has the meaning given to it in the *National Measurement Act 1960*, as in force from time to time; or (b) [for New Zealand], has the meaning given to it in the *Weights and Measures Act 1987* (NZ) as in force from time to time. Is it the case that (a) applies in Australia, and (b) applies in NZ? (2) If there is no meaning given to a symbol of measurement under subclause (1) the symbol has the meaning given to it using the system of measurement known as the Systeme Internationale d'Unites. (3) If subclause (1) does not apply to a symbol of measurement and the use of the Systeme Internationale d'Unites does not give the symbol a meaning, the symbol has the meaning given in the following table: We don't think you need subclauses (2) and (3) in Australia. The units are provided for in National Measurement legislation.

Table 4: Issues raised by the States and Territories and New Zealand			
Item	**Agency**	**Issue**	**OLDP comments/questions**
31	[redacted]	Definition of 'food for retail sale'	Standard 1.2.1 (2)(1) (c) exempts from labelling (or *some* labelling?) food that 'is made and packaged on the premises from which it is sold'. NSW's concern is that if food comes from a place that is not readily identified by the consumer as a retail sale place (eg, a residence) the food should have a label bearing the name of the manufacturer, the packager and the processor of the food. NSW suggests that the definition of 'food for retail sale' is deficient because it does not make clear in para (a) of the definition that the food is to come from a 'retail outlet'. However, it's not clear that that was the intention. It seems to be a policy matter.

Table 4: Issues raised by the States and Territories and New Zealand			
Item	**Agency**	**Issue**	**OLDP comments/questions**
32	[redacted] **on definition of 'package'**	Definition of 'package'	'Package' is defined in Standard 1.1.1. It is defined in the NSW Food Act in the same terms as the model provision. The definition in Standard 1.1.1 differs from the model provision. It provides that the term **does not include**: "[in the case of food carried or sold ...in more than one package] bulk cargo containers; pallet overwraps; crates and packages which do not obscure labels on the food; transportation vehicles; a vending machine; a hamper; food served on a covered place, cup, tray or other food container in prisons, hospitals or other similar institutions listed in the Table to clause 8 of Standard 1.2.1" It is undesirable for the same term to be defined differently in the Act and the Code, as there may be a conflict with the Act. You should omit the definition and provide for the substantive material (that requirements relating to packages don't apply when food is sold in more than one package and is a bulk cargo container, a pallet overwrap...etc) in a clause. The model provision definition is: ***package*** includes any container or wrapper in or by which food intended for sale is wholly or partly encased, covered, enclosed, contained or packed and, in the case of food carried or sold or intended to be carried or sold in more than one package, includes every such package. I don't think there is an implication that the term will include food in bulk (carried in more than one package). It seems fairly certain that the words 'includes every such package' refers to each individual package not to a 'bulk' package. As such we question the need to exclude bulk cargo containers, pallet overwraps, crates, transportation vehicles and vending machines. They would not be assumed to be 'packages' because that term will apply to the smaller package included within those things. Para (g) of the definition provides that food served on a covered plate, cup, tray or other food container in prisons, hospitals or similar institutions is excluded from the definition. This is an actual exclusion (different in nature to transportation vehicles etc.) We think it should be provided for in a clause not the definition. It's not clear whether a covered hamper would be excluded by the Act definition, eg, do hampers include food that is not individually wrapped? This should also be provided for in a clause. Paragraph (c) refers to 'crates and packages <u>which do not obscure labels on the food</u>'. We think this should be recast into a positive requirement that, if crates or packages enclosing smaller packages obscure the labels on food, certain obligations then flow.

Table 4: Issues raised by the States and Territories and New Zealand			
Item	**Agency**	**Issue**	**OLDP comments/questions**
33	[redacted]	the expression 'displayed on or in connection with the display of food'	We don't think you need the words 'in connection with'. We think 'displayed on or with food' or 'displayed on or with the display of food' has the same meaning and is simpler. If the meaning is wider than that (eg, does 'in connection with' mean it doesn't have to be in the vicinity of the food?), we suggest 'displayed on *or in relation to* the display of food.' You would need to provide instructions about what exactly is meant by 'in connection with'.
34	[redacted], **clause 4 of Standard 1.2.3**	Standard 1.2.3, clause 4 (mandatory declaration of certain substances)	For all of the clauses in this Standard: who is the bearer of the obligation? The 'tables' to clauses 4 and 5 are really lists – the information should simply go into a provision as a list. We agree with [redacted] comments that it is not clear, on the terms of clause 4 what must be declared. To use 'egg and egg products' as an example, it could be that 'egg products' need to be declared or it may simply require the name of the substance (eg, albumen'). I don't think clause 4 provides that the source of the product must be declared, simply that if the substance is present it must be declared. It will need to be redrafted to provide that the common name, and source name, if that is what is required, need to be declared.
35	**as above** [redacted]	definitions for 'ingredient' and 'compound ingredient'	From what I can find, there is a definition of 'ingredient' in Standard 1.2.4 which is expressed to apply only to that Standard. As already discussed, this will not be able to be used for the purposes of other Standards. If that is not the intention, then drafting is required to apply the definition to Standard 1.2.3 as well. The same applies to 'compound ingredient'. That might be deliberate as Standard 1.2.4 (1)(1) provides that 'Nothing in this Standard affects the mandatory declaration requirements in Standard 1.2.3'. I don't think it's clear what that means. Is there a way in which it potentially affects the mandatory declaration requirements? I agree with NSW's comment that the 'ordinary meaning' of the word would apply. The drafting quite clearly does not extend the definitions to Standard 1.2.3.
36	[redacted] **view on Standard 1.2.3, paragraph 4 (2) (b)**	This paragraph provides that: (b) where the food is not required to bear a label...[substances must be]: (i) declared on or in connection with the display of the food; or (ii) declared to the purchaser upon request.	Subparagraph 4 (2) (b) (ii) doesn't seem to achieve very much. If a person asks, they need to be told that a substance is in the food. What if there is nobody to ask? Who is it presumed is the person that will be asked – a person serving at a counter?

Table 4: Issues raised by the States and Territories and New Zealand			
Item	**Agency**	**Issue**	**OLDP comments/questions**
37	[redacted] **definition of 'novel food' and policy intention of Standard 1.5.1**	intention is to 'encourage and require pre-market evaluation of such foods'	Agree with [redacted] that there is nothing in the Standard that provides for how it is to be known that a food 'requires an assessment' of the public health considerations listed in the definition, who is to make such a decision, and when the decision or assessment is to occur. Agree there is no obligation on a person or food business to submit to a food assessment. I cannot see any mechanism by which an assessment is made and assume that an assessment process would involve 'the relevant Authority'. If that is the intention then drafting is required to achieve that purpose – but it goes to policy. However, it is difficult to see how the Standard can be enforced given the definition of 'novel foods' is uncertain in its meaning and therefore difficult to apply. OLDP's view is that the definition of novel foods needs to be improved.

Table 4: Issues raised by the States and Territories and New Zealand			
Item	**Agency**	**Issue**	**OLDP comments/questions**
38	[redacted] **Standard 1.2.5 – date marking of food**		We suggest drafting so that the structure of the drafting sentence is simplified. 'Sandwich' provisions (where paragraphs are followed by text) are avoided in this office. It becomes problematic if that text signifies a set of exceptions to the general rule. There is nothing in the current structure of clause 2 that sets out a hierarchy of the rules. Each paragraph is at the same level and the 'unless' in between paragraphs leaves it open to doubt as to what the remaining paragraphs apply to. It is better to draft so that each concept is a chunk and it is clear how each of the chunks relates to the others. It is far preferable to have more clauses setting out all of the chunks, rather than to have one clause with a complicated syntax and resulting ambiguity. We would approach the drafting as follows: **Date marking of food** (1) If food should be consumed before a particular date because of health or safety reasons, [a food business or manufacturer?] must include, on the label of a package of the food, the food's use-by date. Before being able to develop the draft further, we would ask: who bears the obligation to label – the manufacturer, the packer, the retailer? How is it determined whether food must be consumed before a particular date because of health or safety? (2) If clause (1) does not apply to food, [the food business or manufacturer?] must include, on the label of a package of the food, the food's best-before date unless: (a) the best-before date of the food is 2 years or more; or (b) the food is an individual portion of ice cream or ice confection; or (c) the food is in a small package. [we would confirm with you whether (2) expresses the policy intention] We agree with all of [redacted] concerns about the current construction of clause (2). It is not clear what the 'unless' applies to. In any case, the clause should be structured so that it is easy to understand. The editorial note: if there is anything in the guide that would assist in the interpretation of the paragraphs, consideration should be given to drafting it into the clause. Material in a note will not affect a court's interpretation unless the court goes to extrinsic material.

Table 4: Issues raised by the States and Territories and New Zealand			
Item	**Agency**	**Issue**	**OLDP comments/questions**
39	**as above** [redacted]	comment regarding defn of 'small package' in Standard 1.2.1	The definitions in Standard 1.2.1 are expressed to apply 'In this Part' so they should apply to each of the Standards in the Part. For abundant caution, you should provide that 'this Part' means Standards 1.2.1, 1.2.2, 1.2.3 and 1.2.4.

Table 4: Issues raised by the States and Territories and New Zealand			
Item	**Agency**	**Issue**	**OLDP comments/questions**
40	[redacted] - **labelling, Standard 1.1.1**	the intent and the applicability of clause 11 is not clear **11 Prohibition on altering labels** (1) Subject to subclause (2), the label on a package of food must not be altered, removed, erased, obliterated or obscured except with the permission of the relevant authority. (2) A package of food may be relabelled by placing a new label over the incorrect one provided that the new label is not able to be removed so that the incorrect information is visible.	It is not contemporary drafting practice to use the 'provided that' formulation. We agree with [redacted] comments that the clause doesn't impose requirements at a particular time. Who is the bearer of the obligation? The retailer? manufacturer? packers? Should the requirement be that: (1) A person who sells food that is packaged, or deals with packaged food before its sale, must not alter, remove, erase, obliterate or obscure the label on the food without the permission [in writing?] of the relevant authority. (2) The authority may give permission subject to conditions. (3) Despite clauses (1) and (2), a person who sells food that is packaged, or deals with packaged food before its sale, may re-label the food if the label on the food is incorrect by placing a new label over the incorrect one in such a way that: (a) the new label is not able to be removed; and (b) the incorrect information is not visible. We would discuss with you the need to ensure obligations cover causing or allowing an action or inaction eg, to deal with the person that is responsible for the bread, not just the shop assistant, (if not already covered by section 22 (due diligence) of the model provisions.) You should provide for the meaning of 'label' in this clause, eg, that it means a label under Standards x, y and z. Is it the intention that the requirement is imposed at any time before the food is offered for sale? On the current construction of clause (11), subclause (2) operates subject to clause (1). This means that clause (2) doesn't have to take account of clause (1). So, a person doesn't have to seek permission if the label is incorrect. Is this the intention? I am not sure what [redacted] means by the comment 'Many foods, on arrival from overseas, are overstickered at this point. It is unclear from the clause when or where, permission is required from the relevant authority to cause compliance'. More instructions from [redacted] (about what the issue is) would be needed to deal with this. For instance, [redacted] may be referring to a need to remove stickers, not labels.

Table 4: Issues raised by the States and Territories and New Zealand			
Item	**Agency**	**Issue**	**OLDP comments/questions**
41	[redacted], **Standard 1.3.1- food additives**	Problems with clause (2): **2 General prohibition on the use of additives** Unless expressly permitted in this Standard, food additives must not be added to food. It doesn't take account of Standard 2.6.2 – non alcoholic beverages	1. As mentioned, OLDP is of the view that clauses should be drafted so that the 'Unless expressly permitted in this Standard/this Code' formulation is not used. We think the general prohibition formulation (with exceptions to the general prohibition throughout the Code) is clumsy. It is preferable to draft so that a reader knows what the exceptions are, and in what circumstances there is a prohibition. 2. Standard 1.3.1 purports to be exhaustive. Item 14 of the table in Schedule 1 lists the additive name and the maximum permitted level. As Standard 2.6.2 provides for minimum and maximum levels of substances in particular foods, there is a strong likelihood that there will be conflict. There is also a lot of work for the reader to do, in order to work out what the requirements are, and whether substances mentioned in Standard 2.6.2 are permitted by Standard 1.3.1. If there is direct conflict, it is uncertain how the requirements would be interpreted. We agree with the concerns of NSW on this point. OLDP's view is that drafting is needed in order to deal with the issue of how the 2 Standards sit in relation to each other. More generally, drafting is needed to deal with composition requirements in the Standards that relate to particular foods and the possibility of their overlap with Standard 1.3.1. Clause (2) could be amended to read 'Unless expressly permitted in this Code, food additives must not be added to food.'. This would remove the most obvious conflict between the 2 Standards. But it does not remove doubts that might arise about what additives are permitted in particular foods, and at what levels, if provisions in the Standards are not consistent.
42	**as above** [redacted]	the use of "*" and a footnote, in Schedule 1 to determine if Sch 2,3, or 4 additives are to be permitted in classes of foods is not a clear mechanism	Our view is that this should be improved. 1. A provision in item 0 of the table provides that the asterisk indicates that additives listed in those other Schedules is permitted. We don't think there is any doubt but find it odd that a provision provides for something significant to be indicated by a symbol. 2. The symbol is indicated by '(*)'. It doesn't actually occur with the parentheses so the reference may not technically be correct. 3. The words 'Additives in Schedules 2, 3 & 4 must not be added to [name of food] unless expressly permitted below' repeatedly occur throughout the table below the name of each food. Our view is that it is better to provide for this more directly in a provision (see example drafting below).

Table 4: Issues raised by the States and Territories and New Zealand			
Item	**Agency**	**Issue**	**OLDP comments/questions**
			4. We also suggest that its inappropriate to provide for permissions in the roundabout way of providing for permissions in Schedule 1 and then providing for further permissions, set out in detail in other Schedules, in the first Schedule. Each of the Schedules attached to a Standard should be provided for within the Standard itself. 5. Our view is that this is indicative of a number of problems with the current structure of Schedule 1: • 'INS' is well known, but it should probably be defined or spelled out in the first instance • It is drafting practice to put, below the Schedule heading, references to the provisions that the Schedule 'hangs' off. So, for Schedule 1 it would be clause 1, 3, and maybe 10. • The general provisions in item 0 of the Schedule should not be in the Schedule but in clauses in the Standard. Also, it is odd to have an item numbered '0'. • The item numbers could be simplified so that they are expressed 1, 2, 3, and so on. • For ease of making amendments, each discrete line of information in the Schedule should be numbered • The tables should be formatted so that they are consistent • The information in the Schedule should be restructured so that the headings are numbered, and information that belongs under a heading is properly identifiable. The following is an example of how the information could be restructured. Schedule 1 as it is currently structured, suffers mostly from the attempt to have too much information in the one place. I have suggested using clauses in the Schedule and having multiple tables. (In this exercise, I have not attempted to recast the general provisions in item 0 (mentioned in the 3rd dot point above)). Schedule 1 **1. Additives permitted in foods** For a food mentioned in a table in this Schedule: (a) the additive mentioned in an item in the table, that has the INS number mentioned in the table for the item (if any) may be added to the food; and (b) the maximum permitted level of the additive in the food is as mentioned in the table for the item.

<table>
<tr><th colspan="4">Table 4: Issues raised by the States and Territories and New Zealand</th></tr>
<tr><th>Item</th><th>Agency</th><th>Issue</th><th>OLDP comments/questions</th></tr>
<tr><td></td><td></td><td></td><td>
This section may be better placed in a clause in the front part of the Schedule
2. Preparations of food additives
(1) For section 1, the following table applies for preparations of food additives.
(2) Item 1 in the table applies for preparations of colours or flavours only.
Part 1 General
<table>
<tr><th>Item</th><th>Additive name</th><th>INS number(s) (if any)</th><th>Maximum permitted level</th></tr>
<tr><td>1</td><td>ethanol</td><td></td><td>as permitted by GMP</td></tr>
<tr><td>2</td><td>sorbic acid and sodium, potassium and calcium sorbates</td><td>200
201
202
203</td><td>1000 mg/kg</td></tr>
<tr><td colspan="4">Part 2 Baking compounds</td></tr>
<tr><td>3</td><td>Sodium aluminium phosphate</td><td>541</td><td>as permitted by GMP</td></tr>
<tr><td colspan="4">Part 3 Flavourings</td></tr>
<tr><td>4</td><td>benzyl alcohol</td><td></td><td>500 mg/kg</td></tr>
<tr><td>5</td><td>ethyl acetate</td><td></td><td></td></tr>
<tr><td>etc...</td><td>etc...</td><td></td><td></td></tr>
</table>
3 Dairy products
(1) This section applies to dairy products that are not butter or butter fats.
Liquid milk and liquid milk based drinks
(2) The following additives may be added to a liquid milk product or flavoured liquid milk:
</td></tr>
</table>

Table 4: Issues raised by the States and Territories and New Zealand			
Item	**Agency**	**Issue**	**OLDP comments/questions**
			[before being able to develop the draft further, we would ask: is flavoured liquid milk included in 'liquid milk products'?] (a) the additives listed in Schedule 2, 3 or 4; (b) if the milk product is UHT goat milk — the additives listed in Schedule 2. You could consider whether the Schedule is the most appropriate place to include this information. It seems to belong in a clause in the front part of the Standard. (3) For section 1, the following table applies to liquid milk products and flavoured liquid milk. etc...
43	**as above** [redacted]	lack of definitions of classes of foods in Schedule 1 problematic. It is unclear how to determine what permissions are allowed to particular food groups when they are not defined, when the class of food differs from the prescribed Standards in Chapter 2, or there is no definitional Standard in the Code.	We think this concern is justified and that each mention of foods be examined in light of NSW's comments. We have already pointed out that consideration should be given to removing the 'prescribed name' formulation. Definitions should be confined to descriptions of foods (that is, not include a requirement). There are already a few examples of this in the Standards. If dairy products is taken as an example: • Standard 2.5.1, there is no mention of 'liquid milk based drinks' (appears in heading 1.1). There is a definition of 'milk' that includes the phrase 'for consumption as liquid milk'. If those products go beyond the definition of 'milk' the additives Standard should be clear on this point, ie, a heading is not sufficient to indicate what the intention here is • is it necessary to refer to 'liquid milk products' given that 'products' is not mentioned in Standard 2.5.1? If Standard 1.3.1 is purporting to regulate addition of additives to products that have milk in them (rather than products consisting entirely of milk), for abundant caution it should be clearer on this point. (ie, providing for it only in a heading is not sufficient) • 'flavoured liquid milk' means liquid milk that has flavour added to it (eg, not other foods or water – see defn of 'milk') • there is no mention of 'rennetted milk products' in Standard 2.5.3. The additives Standard should be clearer on this point (eg, define it) • cream is a milk product. What is a 'cream product'? Is it made entirely of cream so that Standard 2.5.2 applies? The additives Standard should make it clear. It is not sufficient to provide for 'flavoured, whipped, thickened and sour cream' only in a heading. A

Table 4: Issues raised by the States and Territories and New Zealand			
Item	**Agency**	**Issue**	**OLDP comments/questions**
			reader will need to know whether the provision applies to him or her, and how it applies. • is it clear what 'reduced cream' and 'light cream' is? Do they still fall within the definition of cream? • 'whipped thickened light cream' should be defined and provided for other than in a heading. Is it open to interpretation as to what it is? • what is 'milk powder' and 'cream powder'. Dried milk is defined in Standard 2.5.7 as 'powdered milk products obtained by the partial removal of water from milk'. If that is what milk powder and cream powder are, you should limit the heading to 'dried milk'. If milk powder and cream powder go beyond the definition, the additives Standard needs to make it clear. If you just want to use those terms to provide examples of what dried milk products are called in the market place that could be done in an editorial note. (however, that depends on what the labelling requirements are for dried milk) • cheese *is* a product (see defn in Standard 2.5.4). If 'cheese products' goes beyond the definition the additives Standard needs to make it clear. Is 'processed cheese' included here? If so, the term 'processed cheese' needs to be used as it is defined in Standard 2.5.4. • butter *is* a product (see defn in Standard 2.5.5). If 'butter product' goes beyond the defn the additives Standard needs to make it clear. • you have the heading 'Margarine and similar products'. Do you mean 'Margarine and other edible oil spreads'? Edible oil spreads is defined in Standard 2.4.2. 'Similar products' is unsatisfactory and should not be used. If you mean something other than 'edible oil spreads' the additives Standard should make it clear. If you mean 'edible oil spreads' that term should be used to pick up the existing definition • does the term 'edible ice' occur elsewhere in the Code? (I couldn't find it). The additives Standard should provide for it. 'ice confection' is mentioned in Standard 1.2.2, Standard 1.2.5 and Standard 1.3.2 but there is no definition. Is it clear (and free from interpretation?) If not, there should be a definition for it for the Code. Is it clear what 'reduced and low fat ice cream' is, ie, does it still fall within the scope of the definition of ice cream in Standard 2.5.6 and the composition requirement in clause 2 of that Standard?

Table 4: Issues raised by the States and Territories and New Zealand			
Item	**Agency**	**Issue**	**OLDP comments/questions**
44	[redacted] **as above**	comment that 'foods are not required to use either definitional names or class names in schedule 1'.	I am not sure what 'class names' is referring to. Our comments about using definitions are given above.
45	[redacted] **on Standard 2.5.7 definitions**	defns or provisions that mention 'bolded' or 'unbolded' type unsatisfactory: ***components of milk products*** refers to what is not bolded in the Schedule and clause 2 refers to 'milk products listed in bolded type'.	There is no bolded type in my current version of the Schedule except for the 'column' headings. This demonstrates why referring to electronic formatting in the substantive text leads to uncertainty and is inappropriate for a legislative text. Our view is that the clause and the definition should be recast and the information in the table restructured so that there is no need to refer to format or style.
46	[redacted] **Standard 2.6.2 and 2.6.4**	Standard 2.6.2 (non-alcoholic caffeinated beverages) Standard 2.6.4 (formulated caffeinated beverages) Problems with definitions in these Standards.	NSW comments that the words 'for the purpose of enhancing mental performance' are a problem. (How do you prove 'enhancing mental performance'.) The definition may not work without those words if it is integral to the meaning that a manufacturer/food business etc is making a 'claim' about mental performance. I am not certain that it would be necessary to prove that a product enhances mental performance rather than proving that the product was manufactured with that purpose in mind, or that that is a claim the manufacturer makes for the product. We would need to be instructed on this.
47	**as above** [redacted]		NSW's second concern is that the words 'and other foods' in the definition means that other drinks might be mixed with formulated caffeinated beverages. The issue of whether this is the intention goes to policy. Clause (2)(3) in Standard 2.6.4 provides that 'A formulated caffeinated beverage must not be mixed with a non-alcoholic beverage as standardised under Standard 2.6.2'. 'non-alcoholic beverage' is defined in Standard 2.6.2 to mean 'packaged water; or a water-based beverage which may or may not contain other foods, except for alcoholic beverages; or electrolyte drinks.' Because a specific provision overrides a general provision (Standard 2.6.4, clause 2 (3) over the defn of 'formulated caffeinated beverages'), I *think that* electrolyte drinks, packaged water, and water-based beverages could not be mixed with formulated caffeinated beverages. It's not clear to me that 'fruit drinks' are covered by the definition of 'non-alcoholic beverage'. As the definition of formulated caffeinated beverages provides it is 'non-alcoholic' I don't think 'brewed soft drinks' could be mixed with it because of the alcohol content. It seems the only risk for drinks described in Standard 2.6.2 is for fruit drink to be added. I have not examined 'Supplementary Sports Foods, Fruit juices or Sparkling Water'

Table 4: Issues raised by the States and Territories and New Zealand			
Item	**Agency**	**Issue**	**OLDP comments/questions**
48	**as above** [redacted]	defn of caffeine in Standard 2.6.4 does not apply to its use in Standard 2.6.2 because of the *Nutricia* judgement	The definition of caffeine in Standard 2.6.4 is expressed to apply 'In this Standard'. If the intention is for it to apply to other Standards that should be provided for. If the term applies to more than one Standard it is preferable for it to go into the general definitions clause in Standard Standard 1.1.1. Caffeine, in the definition, means 'all caffeine present from whatever source in a formulated caffeinated beverage'. This confines references to caffeine to caffeine present in a formulated caffeinated beverage. (It is not a result of the *Nutricia* judgement but a matter of logic and drafting practice that a term that is intended to apply generally is expressed to do so)
49	**as above** [redacted]	Standard 2.6.2-intent of clause 9 (2): (2) A formulated beverage must not contain (a) carbon dioxide; or (b) caffeine	I don't understand [redacted] comment that 9(2) is frustrated if caffeine were added not as an additive but as a food or in an ingredient of food. My view is that 9(2) appears to work whether caffeine is regarded as a food or an additive. I would need further instructions from [redacted] as to any other provisions in the Code that would affect the interpretation of 9(2).
50	**as above** [redacted]	Standard 2.6.2, clause 2 and Standard 1.3.1.	[redacted] has a concern that clause 2 may not be sufficient to prevent caffeine being added to packaged water. If it is the intention that the only substances permitted to be added to packaged water are those listed in the table to subclause 2(2) I agree that it is not sufficient. The clause provides that those substances cannot be added in greater proportion that that set out in the table. It does not provide that no substances other than those listed may be added.

Table 4: Issues raised by the States and Territories and New Zealand			
Item	**Agency**	**Issue**	**OLDP comments/questions**
51	**as above** [redacted]	is 'caffeine' an additive?	The general prohibition in clause 3 is: 'unless expressly permitted in this Standard, food additives must not be added to food'. 'Caffeine' is expressly permitted in the Standard in relation to 'kola'. I don't think it is possible to say whether a court would generalise from this that caffeine is an additive because the meaning of 'additive' has not been made clear. Since caffeine occurs naturally in food, we agree with NSW that there may be a possibility that a court would interpret caffeine as an ingredient or a component of an ingredient. It should be put beyond doubt. The Code needs a definition of 'additive'. We would approach the drafting of a definition as follows: 'In this Code: ***food additive*** means a substance mentioned in a Schedule to Standard 1.3.1 that is added to a food mentioned in the Schedule in relation to the substance to achieve a technological function. [we would confirm with you whether this is the intention] We think that, rather than a general prohibition, it would be more effective to have, in Standard 1.3.1: A food additive [mentioned in a Schedule to this Standard] may only be added to foods in accordance with this Standard.
52	**as above** [redacted]	uncertainty about what 'technological function' means for caffeine	The uncertainty that might exist needs to be tested against the definition of 'technological function' and the requirement in clause 3 (b) for Standard 1.3.1. [redacted] makes the point that in kola it may be a flavouring (rather than for enhancing mental performance) I note that 'flavouring' is one of the functions listed in Schedule 5 to Standard 1.3.1. Also, there is no function that relates to enhancing mental performance: I don't think it is valid to test that as a technological function. I am not sure of the point that NSW is making about this. 'Caffeine' is nominated as being an additive for kola in Schedule 1. I wouldn't have thought that, for kola, it would be open to a court to decide that caffeine is <u>not</u> an additive.
53	[redacted] **on Standard 2.6.2 – clause 2B**		'may' is discretionary. Is it the intention that including the analysis is discretionary? There are problems with using the word 'typical'. We suggest the provision would mean the same thing if it read 'may include <u>an analysis</u> that lists the total concentration of...'

Table 4: Issues raised by the States and Territories and New Zealand			
Item	**Agency**	**Issue**	**OLDP comments/questions**
54	[redacted] **on Standard 1.6.1**	a microorganism that is not listed in the Schedule is not regulated	We agree that the effect of clause 2 of the Standard is that it is only the microorganisms listed in the Schedule that are regulated. Whether that should be the case or not is a matter of policy. OLDP's view is that it is not possible to rely on this Standard to regulate anything not mentioned in the Schedule. We agree that the scope of the Standard is likely to be more limited than is reflected in the purpose, ie that the Standard 'lists the maximum permissible levels of foodborne micro-organisms that pose a risk to human health in nominated foods'. I don't think the statement creates a legal problem – as the purpose is not in a provision, it is doubtful whether it is considered to be part of the Standard. However, it should accurately reflect what the Standard is doing.
55	**as above** [redacted]	NSW comments that the enforcement of the sale of unsafe good provisions in the Food Act, due to the presence of an unlisted food pathogen in a listed food in the Schedule, may be frustrated.	Section 8 of the *Food Act 2003* (NSW) defines ***unsafe food***. Section 14 of the Food Act makes it an offence for a person to sell food that the person knows is unsafe, or that the person ought reasonably to know is unsafe. Section 16 of the Food Act makes it an offence for a person to handle food intended for sale in a manner that would render it, or be likely to render it unsafe. That section also makes it an offence for a person to sell unsafe food. None of these provisions mention or rely on the Code. (Section 21 of the Food Act requires compliance with a provision of the Food Standards Code. Section 22 provides that food that does not comply with a Standard is falsely described)
56	**as above** [redacted]	lack of definitions for foods problem for enforcing the Standard	The food terms used in this Standard should be examined to see if they apply to the foods defined in the code. • 'butter' is it clear what 'milk products' are for butter? • 'soft cheese' is also mentioned in Standard 1.1A.2, in (3)(f), but is not defined there. In the table in Standard 1.6.1 it is explained as follows '(moisture content > 39%) with pH>5.0'. The meaning should be provided for in a definition and should apply for the purposes of the Code. • 'raw milk cheese' is not mentioned in the cheese Standard (Standard 2.5.4). It is followed in the table by words in brackets '(cheese made from milk not pasteurised or thermised)'. The term should be defined using the usual method: '***raw milk cheese*** means...'. Also, I was not able to find 'thermised' a term referring to a processing method, elsewhere in the Code. It should be explained.

Table 4: Issues raised by the States and Territories and New Zealand			
Item	**Agency**	**Issue**	**OLDP comments/questions**
			• does (can?) raw milk cheese include 'processed cheese'. [Also, does clause 2 in Standard 2.5.4 (the cheese Standard) include 'processed cheese'? If so, it should state so, clearly.] • it is not sufficient to say 'Packaged cooked cured/salted meat'. The conjunctive and necessary punctuation should be included, eg, 'Packaged, cooked, cured **or** salted meat'. Or, does it mean, meat that is packaged, cooked and either cured or salted? • what is 'meat paste'? Is it defined in the Code? Is it the same as 'pâté'? • 'comminuted' is defined for the purposes of clause 8 to Standard 1.6.2. There is no definition of the term in Standard 2.2.1 (meat and meat products).. It should be defined for the purposes of the Code. We also suggest that there should be a cross reference to clause 8 of Standard 1.6.2 (describes when meat is 'heat treated' and when it is 'cooked'). If that were not necessary for the substantive part of the text it could go in a note. • clause 8 in Standard 1.6.2 refers to 'fermented comminuted processed meat'. Column 1 of the Schedule to Standard 1.6.1 refers only to 'comminuted fermented meat'. Should it be referring to processed meat? • is it clear what 'processed finfish' is? If not, it needs to be defined. o Standard 4.2.1 (primary production Standard for seafood) defines 'processing of seafood' for the purpose of that Standard. Should that definition apply to Standard 1.6.1? If that definition were to apply generally, we suggest words as follows: ***processing***, for seafood, includes: ... o the editorial note below the definition in Standard 4.2.1 notes that the defn is for the purposes of the Standard and does not affect State and Territory legislation. If 'processed' is left undefined in Standard 1.6.1, it's 'ordinary meaning' will apply. • 'bivalve molluscs that have undergone processing other than depuration'. 'depuration' is defined in Standard 4.2.1 for the purposes of that Standard. Do you intend for that definition to apply to Standard 1.6.1? If it is not defined for Standard 1.6.1 the ordinary meaning will apply. • 'bivalve molluscs' is defined for the purposes of Division 3 of Standard 4.2.1. In that definition some scallops are included and some excluded. If the term is not defined for Standard 1.6.1, its 'ordinary meaning' will apply.

Table 4: Issues raised by the States and Territories and New Zealand			
Item	**Agency**	**Issue**	**OLDP comments/questions**
			• is it clear what, in relation to the processed finfish, 'other than fully retorted finfish' means? If not, it needs to be explained. • 'cereal based foods for infants' ***cereal-based food*** is defined for the purpose of Standard 2.9.2. It should be defined for the purposes of the Code as that definition won't apply for Standard 1.6.1 (the microbiological Standard). The definition in Standard 2.9.2 of 'infant' and 'food for infants' (defined only for the purpose of that Standard) are also be needed in Standard 1.6.1. • I note that ***infant formula product***, and ***egg products*** are defined for the purposes of the Code. • is it clear what 'cultured' seeds and grains are? If not, it should be explained. (it seems the term only occurs in this Standard) Problems with the Schedule. • Schedule heading should have a clause reference below it '(clause 2)'. • See comments above about providing definitions for foods (and taking explanations out of column 1) • the location of each of the micro-organisms should be identifiable in the table, ie, either in their own item, or paragraphed.

Table 4: Issues raised by the States and Territories and New Zealand			
Item	**Agency**	**Issue**	**OLDP comments/questions**
57	[redacted] **on Standard 1.6.2**	definitions apply only to the clause or the Standard.	'comminuted' is defined only for purposes of clause 8 (1). 1. There is an editorial note below clause 8 as follows: 'Processed meat in this clause includes processed meat and manufactured meat in accordance with Standard 2.2.1, irrespective of the prescribed names set out in that Standard.' • If you don't get the result you want from the substantive text, you need to draft so that it is provided for it in the text. (It's not clear to me whether the note is restating the legal position). • there is no need to say both 'processed' and 'manufactured' – processed includes manufactured. 2. The reference to 'A fermented meat product' in subclause 8 (4) may not be clear. Every preceding reference in the clause has been to 'fermented comminuted processed meat' It should be made clear that the meat product consists of fermented comminuted processed meat. 3. It is not grammatically correct to refer to 'A fermented comminuted processed meat'. *Meat* is plural. It should be 'Fermented comminuted processed meat.'
	[redacted]		
58	[redacted] **comment about defining 'food' for the Code**		We agree with [redacted] comments that, for the definition of 'food', it is preferable to indicate that it is the definition specified in the relevant Food Act. We think further, this should be the case for each of the definitions in the model provisions.
59	[redacted]	comment relating to paragraph 76 of *Nutricia* judgement	The principle is that a term that applies to the whole Code should go into a general interpretations Standard. A term that should be confined to a particular Standard or clause should be expressed to apply to that Standard or clause.

Table 4: Issues raised by the States and Territories and New Zealand			
Item	**Agency**	**Issue**	**OLDP comments/questions**
60	[redacted]	function of purpose statements	We are not sure if they are legislative. We think they should be headed 'Outline' rather than 'Purpose' if that is what they do. The issue of whether they should be purpose provisions or outline provisions is a matter of policy. If purpose provisions are desired, and intended to affect the interpretation of the Standards, you should consider putting them into a clause. Consider whether outline statements are needed at all - they seem to function like explanatory statements. Outline provisions are found in legislation where they would improve readability and help readers navigate their way through a complex legislative structure. In the Standards they quite often repeat material that is easily understood from the provisions themselves. This makes the Standards repetitive. It also breaks up the substantive text by adding 'filler' at the beginning of each Standard, as well as the table of contents.
61	[redacted] **comments about interoperability of legn**	the Code ought to recognise that all jurisdictions have general consumer protection and fair trading legislation in place...govt agencies responsible for administering misleading and deceptive conduct already consider cases involving misleading and deceptive conduct in relation to food. The 'double up' in regulatory coverage could be seen as a constraint on innovation.	This seems to be a matter of policy regarding food regulation as a whole. It is likely there is overlap, but it is beyond the scope of the audit to conduct this examination.
62	**as above** [redacted]	The Code needs to ensure that it does not cut across any matter dealt with at a legislative level in the applicable Food Acts.	We would need further instructions about this issue, eg, whether there are any noted overlaps.

Table 4: Issues raised by the States and Territories and New Zealand			
Item	**Agency**	**Issue**	**OLDP comments/questions**
63	[redacted] **definitions**	definitions needed for: ingredient nutritional purpose physiological biologically active nutrient	ingredient (in Standard 1.1.1) • a thing used as an ingredient of food is food under the defn of ***food*** (see par (b)). Additives and processing aids in food are also food. • the ordinary dictionary meaning may be sufficient (something that enters as an element into a mixture, a constituent element of anything). • this is so 'whether or not the substance or thing is in a condition fit for human consumption'. nutritional purpose (in Standard X, defn of ***nutritive substance***) • it should be defined if there would be dispute as to what it means. The dictionary meaning is: 'the act or process of nourishing or being nourished...food; nutriment' see also 'nourishing; and 'nutriment'. The definitions include the word 'food' so it is possible that there is some circularity and a definition needed to avoid that. • it would be possible to define 'nutritive substance' to mean particular substances set out in a Schedule, intended to be an exhaustive list. It would mean that the Schedule would be amended each time the list of things was changed. physiological (in Standard 2.9.4 (sports foods)) • the dictionary definition is very general (physiology means 'the science dealing with the functioning of physical organisms or their parts). biologically active (in Standard 1.2.8 (nutrition information requirements)) • is defined in Standard 1.2.8 for the purposes of that Standard, (I haven't see the phrase anywhere else in the Code), as follows: 'means a substance, other than a nutrient, with which health effects are associated'. This is so broad (what is the extent of the associated health effects?) as to be likely to be unhelpful in determining what is a biologically active substance. nutrient • the dictionary meaning is: 'adj - containing or conveying nutriment, as solutions or vessels of the body' The noun is: 'nourishing, affording nutriment'. The issue is that it is used in a negative proposition in the definition of ***biologically active*** with the result that a substance may be a nutrient, a biologically active substance (has associated health effects) or neither of those two. Biologically active substance needs to be distinguished from 'nutrient'.

Table 4: Issues raised by the States and Territories and New Zealand			
Item	**Agency**	**Issue**	**OLDP comments/questions**
64	[redacted] **as above**	defn of 'average quantity' insufficient	We agree with [redacted] concerns. We would approach the drafting as follows: **Meaning of *average quantity*** (1) The ***average quantity*** of a substance in food is arrived at using the method mentioned in subclause 1 that best represents the quantity of the substance the food contains after taking into account: [before being able to develop the draft further, we would ask: who decides about 'best represents'?] (a) seasonal variability [in the quality of food?] that can cause actual values [of substances in the food?] to vary [we would ask: seasonal variability of what? nutrients in food? What are the values of?]; and (b) any other factors that would reasonably cause actual values [of substances] to vary. [this is very broad in scope] (2)The methods are as follows: (a) the quantity that the manufacturer of the food determines to be the average quantity of the substance in the food; or [this is not really a method] (b) the calculation of the nutrients [*in* the substance?], or the calculation of the average quantity of the nutrients, in the ingredients used for the food; or [to develop this part of the draft we would ask: is this by the manufacturer also? Who does this? What does it mean to 'calculate' nutrients in relation to a substance?] (c) [the calculation of generally accepted data [about the substance?]] Our comment about (c) is that this seems incomplete. Do you mean: "a calculation of the substance in the food that uses generally accepted data about the substance" We agree with [redacted] that it is not clear what 'generally accepted' data is. We think you also need to be able to say how the data relates to the substance in the food.
65	[redacted] **as above**	editorial note with examples	[redacted] comment the note is unusual. We are not sure of the exact concern. Do you need to provide examples? We assume the list in the editorial note is not exhaustive. From the current drafting we would also assume that a substance can be anything in food. If <u>not</u>, it may be appropriate to provide that it does not apply to anything in food.

Table 4: Issues raised by the States and Territories and New Zealand			
Item	**Agency**	**Issue**	**OLDP comments/questions**
66	[redacted]	definition of 'bulk cargo container'	Agree with [redacted] concerns. We would approach the drafting as follows: (1) In this Code: ***bulk cargo container*** means a lift van, a movable tank, a shipping container, an aircraft cargo container or any other article of transport equipment of a similar structure, and any accessories and equipment used exclusively with the container, if the container: (a) is of a permanent character and suitable for repeated use; and (b) is designed to facilitate the carriage of goods by one or more modes of transport without immediate repacking of the goods; and [to develop the draft further we would need to clarify 'immediate repacking'] (c) is fitted with devices that allow for the ready handling of the container and the transfer of the container from one mode of transport to another; and (d) is designed to be easy to fill and empty; and (e) has an internal volume of at least 1 cubic metre; and (f) is not a vehicle, packing case, crate, box or similar structure used for packing. We would ask you to check that (f) is distinguishable from the bulk cargo containers described.
67	[redacted]	definition of 'business address'	Agree with [redacted] comments. We would approach the drafting as follows: ***business address*** means a description of the location of the premises from which a business is being operated. We don't think you need the words 'but does not include a postal address'. A postbox would not be 'premises' from which the business would be being operated.
68	[redacted]	editorial note in definition of 'claim'	Agree with [redacted] comments. We would approach the drafting as follows: ***claim*** means any statement, representation, information, design, words or reference in relation to a food: (a) that is not required by a provision in this Code; and (b) that is made on a label, package, advertisement or in any other form [*relating to the food*].
69	[redacted]	definition of 'component'	we agree there is inconsistency in the use of 'final food' versus 'final product'. One of these terms should be settled on

Table 4: Issues raised by the States and Territories and New Zealand			
Item	**Agency**	**Issue**	**OLDP comments/questions**
70	[redacted]	editorial note in defn of 'fund raising event'	we agree the note does not relate to the definition and should come out.. It is information that looks like it belongs elsewhere, eg, explanatory material available from FSANZ or in guidelines. we think the term should be singular, eg, '***fund raising event*** means an event that...'
71	[redacted]	definition of 'hamper'	we agree with [redacted] comment that the editorial note appears to contain substantive material. We would approach the drafting as follows: ***hamper*** means a decorative basket, box or receptable that: (a) contains any number of separately identifiable food items; and (b) may contain items that are not food, such as decorative cloths, glasses and dishes.
72	[redacted]	definition of 'handling'	We think the definition is okay as it is as it would be 'overbuilding' the paragraphs to have each descriptive word in a paragraph of its own. We note it is in the model provisions. It may be preferable to structure this definition so that it reflects any definitions that have been put into the Food Acts, eg, ***handling*** has the meaning it has in the Act.
73	[redacted]	definition of 'inulin derived substances'	We agree that words and phrases that are defined should be singular. If interpretations Acts do not apply, there should be included, in Standard 1.1.1 a provision that says the singular includes the plural. *[equivalent to s 18A AIA]* We also think the definition should be clarified. We would approach the drafting as follows: ***inulin-derived substance*** means a mixture of polymers of fructose, but only if: (a) the mixture includes inulin; and (b) any polymer in the mixture has predominantly *[formula]* fructosyl-fructose linkages; and (c) any polymer in the mixture is not produced from sucrose by enzygmatic action. may or may not have a terminal glucose molecule 'predominantly' is a subjective term (eg, at what point is it decided that the desired linkages are 'predominant'?) and therefore undesirable in a definition it is not clear what the phrase 'and includes inulin' in the current definition relates to. The definition should be redrafted to make it clear. The draft above assumes that all such mixtures include inulin. Is that correct?

Table 4: Issues raised by the States and Territories and New Zealand			
Item	**Agency**	**Issue**	**OLDP comments/questions**
74	[redacted]	definition of 'lot'	We agree with [redacted] comments. We think the terms 'essentially', 'usually' and 'ordinarily' are subjective and the definition would be difficult to enforce. We would approach the drafting as follows: ***lot*** , for food, means a quantity of food of a particular kind that is prepared and packed under the same, or essentially the same, conditions as follows: (a) the food is prepared and packed from a particular preparation or packing unit; and [to develop the draft further, we would ask: is food <u>both</u> prepared and packed from the particular place?] (b) the food is prepared and packed during a particular time that does not exceed 24 hours; and [we would ask: is the food both prepared <u>and</u> packed during this time?] (c) if the preparation and packing of the food does exceed 24 hours — [we would ask: is there any other way in which you can confine it? What reasons can there be for a longer time?]
75	[redacted]	definition of 'lot identification'	We agree the definition can be improved. We would approach the drafting as follows: ***lot identification***, for food, means information that indicates in a clearly identifiable form: (a) the premises where the food was prepared or packed; and (b) the lot of the food. 'Premises' is defined in the model provisions, and we would suggest putting, in Standard 1.1.1: ***premises*** has the meaning it has in the Act.

Table 4: Issues raised by the States and Territories and New Zealand			
Item	**Agency**	**Issue**	**OLDP comments/questions**
76	[redacted]	definition of 'nutrition information panel'	We agree the words 'complies with the requirements of...' creates the difficulty that a panel that does not comply is not a panel. We would approach the drafting as follows: ***nutrition information panel***, in relation to food, means a panel of information, about the nutrition provided by the food, [that is subject to the requirements of Standard 1.2.8]. *Editorial note* Standard 1.2.8 sets out requirements about nutritional information that must be provided for food and the manner in which the information is to be provided. OR ...has the meaning given by Standard 1.2.8 ...means a nutrition information panel mentioned in Standard 1.2.8. Is it a phrase that is used consistently throughout the Code? eg, it only ever means the nutrition information panel mentioned in Standard 1.2.8?
77	[redacted]	definition of RDI	Agree with [redacted] comments. We think there are problems with the way the Schedule is set up. Our suggestions appear in the cell below. ***Recommended Dietary Intake***, or ***RDI***, means .... ***Estimated Safe and Adequate Daily Dietary Intake***, or ***ESADDI***, means ... Apart from referring to the amount in the Schedule there isn't an explanation of what these are. (eg, who determines these?). If there is no further explanation I don't think they need to be defined just mentioned in the text. See draft for item 1 in the Schedule in the cell below.

Table 4: Issues raised by the States and Territories and New Zealand			
Item	**Agency**	**Issue**	**OLDP comments/questions**
78	[redacted]	structure of the Schedule in Standard 1.1.1	Column 3 and column 4 have the words 'RDI (unless stated otherwise)' Those words appear to be referring to the ESADDI? I think this can be improved. It is very odd not to have 'ESADDI' referred to in the column headings and have it appear in brackets in the cells. We would approach the drafting of the Schedule as follows: **Schedule 1.1.1-1** **Vitamins and Minerals** (clause ???) [It is worth finding a way of numbering Schedules so that they each have a unique number, eg, as above] [We think the information in the Schedule should be restructured. Think also about how the Schedule should be 'set up'. Currently it is set up via 3 sets of definitions ('permitted form', and 'ESADDI' and 'RDI'). I think this could be improved. (Readers must happen upon several key definitions before working out what the Schedule is doing.) This is not very direct.] 1. A vitamin or mineral in an item in the following table has: (a) a permitted form mentioned in Column 3 for the item; and (b) the recommended dietary intake (the ***RDI***) or the estimated safe and adequate daily dietary intake (the ***ESADDI***) mentioned in Column 4 for the item; and (c) for children who are aged between 1 year and 3 years – the RDI or the ESADDI mentioned in Column 5 for the item. [To develop the draft further, we would ask you: what is the significance of having an RDI or ESADDI? Is it just one or the other (so you can't have both?)].

Table 4: Issues raised by the States and Territories and New Zealand

Item	Agency	Issue	OLDP comments/questions

Item	Column 2 Vitamin or mineral	Column 3 Permitted form	Column 4 RDI or ESADDI	Column 5 RDI or ESADDI for children aged between 1 and 3 years
1	Vitamin A	(a) vitamin A (retinol); or (b) vitamin A acetate; or (c) (retinyl acetate); or (d) vitamin A palmitate (retinyl palmitate); or (e) vitamin A propionate (retinyl propionate); or (f) beta-apo-8'-carotenal; or (g) beta -carotene-synthetic; or (h) carotenes-natural; or (i) beta -apo-8'-carotenoic acid ethyl ester	the RDI is 750 µg retinol equivalents[1]	the RDI is 300 µg retinol equivalents[1]
2	Thiamin (Vitamin B1)	(a) thiamin hydrochloride; or (b) thiamin mononitrate; or (c) thiamin monophosphate	the RDI is 1.1 mg thiamin	the RDI is 0.5 mg thiamin
3	Riboflavin (Vitamin B2)	(a) riboflavin; or (b) riboflavin 5'-phosphate sodium	the RDI is 1.7 mg riboflavin	the RDI is 0.8 mg riboflavin
...				
8	Biotin	none is specified	the ESADDI is 30mg biotin	the ESADDI is 8 mg biotin
	etc...			

Table 4: Issues raised by the States and Territories and New Zealand			
Item	**Agency**	**Issue**	**OLDP comments/questions**
			We would ask you to consider whether there is material in footnotes that should be in a clause in the schedule. Some of them at least appear to be substantive. If they affect the interpretation, for an abundance of caution, they should go into a clause in the Schedule. We would ask: for biotin, is it clear that, if no permitted form is specified, then any form is permitted? If not, we should provide for it, eg, If no form is specified for a vitamin or mineral, it is permitted in any form.
79	[redacted]	definition of 'warning statement' in Standard 1.1.1	Our view is that the definition provides that there are statements that are required to be expressed in the way prescribed in the Code. We think it does have some effect. There could be a better explanation of what a warning statement is. Eg, a statement that warns a consumer of particular aspects of a food that....' It is somewhat incomplete (what does 'in the text' mean? In the text of the statement?) We would approach the drafting as follows: ***warning statement***, for food, means the statement mentioned in any of the following provisions that is relevant to the food, expressed in the words set out in the provision for the statement: (a) clause 3 of Standard 1.2.3 (Mandatory advisory statements and declarations); (b) etc.. OR ***warning statement***, for food, means a statement: (a) devised as a warning to consumers about a particular aspect of a food, set out in this Code; and (b) that is required to be expressed in the words set out in a provision of this Code for the statement about the food. *Note* The following provisions in this Code set out warning statements that are required to be displayed in relation to particular foods: (a) clause 3 of Standard 1.2.3 (Mandatory advisory statements and declarations): (b) clause 3 of Standard ...etc

Table 4: Issues raised by the States and Territories and New Zealand			
Item	**Agency**	**Issue**	**OLDP comments/questions**
80	[redacted]	clause 5, Standard 1.1.1	We may not be able to rely on the FSANZ Act provisions for the purposes of interpreting the Code. The guidelines themselves are not adopted by the Food Acts and so I cannot see any way in which they *could be* legally binding. What this provision appears to do is ensure that a court will know about the guidelines. We don't think it would have any real effect, as a court can look at any relevant extrinsic material. If the provision does not effectively provide for guidelines to be available to be used as 'extrinsic material' in the interpretation of the Code, the reference could probably go in a note. I think there is an argument for leaving the clause about editorial notes in the Standard because it's not the case that the relevant interpretation Act provision for a particular jurisdiction applies to the Code.
81	[redacted]	clause 10, Standard 1.1.1	Working out what 'other foods' means in this context is tricky especially considering the definition of 'food' in the Food Acts which includes a substance used as an additive, or for preparing food. We would approach the drafting as follows: **Meaning of 'other foods'** (1) Subclause (2) applies to a provision in this Code if: (a) the provision is a requirement about the composition of a food; and (b) it provides that 'other foods' may be added to, or used in [the preparation of?], the food; and (c) for a provision in Part 3 of the Code – it provides that 'foods' may be added to, or used in [the preparation of?], the food. (2) For subclause (1) [and despite the definition of 'food'?], the reference to 'other foods' or 'foods' does not include the following: (a) a nutritive substance; (b) a vitamin or mineral; (c) a processing aid; (c) a food additive.

Table 4: Issues raised by the States and Territories and New Zealand			
Item	**Agency**	**Issue**	**OLDP comments/questions**
82	[redacted]	subclause 10 (3) of Standard 1.1.1	We agree there are problems with this clause. 1. NZ asks do the words 'anything that may be lawfully added to the food' refer to anything expressly permitted by the Code or anything not expressly prohibited. Further instructions would be needed before recasting. 2. Is a reference in clause (3) to 'other foods' also not a reference to nutritive substances, vitamins or minerals, processing aids and food additives?
83	[redacted]	relationship of subclause 10 (4) of Standard 1.1.1 and clause 7, which reads: 'A reference to a compositional requirement in this Code is a reference to the composition of the final food, unless expressed otherwise.'	Our view is there is a large overlap. It should all go in the one clause. We would approach the drafting as follows: (1) A requirement in a provision in this Code about the composition of a food applies to the final food, unless a contrary intention appears. (2) For clause (x), it does not matter that a provision either allows or does not allow other foods [(within the meaning of X)] to be added to the food. Before being able to develop the draft further, we would ask you: if the food is an ingredient of another food (eg a cake) does the compositional requirement apply to the cake?
84	[redacted]	clause 12 of Standard 1.1.1 – modification of prescribed statements	We agree there are problems with this clause. We don't think that adopted standards (material incorporated into an Act) can make modifications of a provision in the adopting Food Act. Whether that is what this provision is doing is uncertain. However, I don't think there is power to provide in the Standards that strict compliance with a statement requirement or information requirement in the Act is not necessary. It may be better to stick to the idea that substantial compliance is sufficient rather than refer to modifying prescribed statements. We would approach the drafting as follows: (1) Subclause (2) applies to a statement or to information that: (a) is required by a provision in this Code to be included in a label, or an advertisement, for food; and (b) is required by the Code to be expressed in particular form of words. (2) Strict compliance with the form of words is not required and substantial compliance is sufficient.

Table 4: Issues raised by the States and Territories and New Zealand			
Item	**Agency**	**Issue**	**OLDP comments/questions**
85	[redacted]	clause 14 of Standard 1.1.1 (interpretation of definitions)	We agree there are difficulties with this formulation (drafting definitions so that they function as requirements) and we have commented on this in item 29 of this table.
86	[redacted]	Schedule – permitted forms of dietary Intakes	[redacted] comment that • the schedule is not well grafted onto an operative clause • the relationship between the columns is not clear • the significance or otherwise of ESADDIs is not explained. We agree with all of this. Our comments are in item 78 in this table.
87	[redacted]	Schedule – permitted forms of dietary intakes	[redacted] comments that the Schedule is used as a permission to add minerals but it is cast as permitted forms of RDIs not permission to add. We're not sure what the problem is here. It may be good to clarify what the purpose of the Schedule is.
88	[redacted]	Schedule – fix formatting of numbers that should be in subscript	agree
89	[redacted]	Standard 1.1.2	We think you should avoid the formulation 'unless the Code otherwise requires' where you can. Agree there is no need to put these definitions in their own Standard. Our view is they should go into Standard 1.1.1.

Table 4: Issues raised by the States and Territories and New Zealand			
Item	**Agency**	**Issue**	**OLDP comments/questions**
90	[redacted]	Standard 1.1.2 definition of 'chocolate'	As mentioned our view it that definitions should not include compositional requirements because of the problem of circularity that occurs when you are talking about a product that does not meet the requirement. We would approach the drafting as follows: ***chocolate*** means a confectionary product that gets its character from the presence of cocoa beans derivative. [we would ask you: what else is basic to the description of chocolate without going into the requirements?] **Compositional requirement for chocolate** (1) Chocolate must: (a) be prepared from a minimum of 200g per kilogram of cocoa bean derivatives; and (b) if it contains any edible oils that are not cocoa butter or dairy fats — not contain more than 50 kg per kilogram of the edible oils [in total?]. [we would ask: what if there is a mixture – some dairy fats some edible oils – should the combined amount not be more the 50kg or just the edible oils amount?]
91	[redacted]	Standard 1.1.2 definition of 'decaffeinated coffee'	***decaffeinated coffee*** means coffee from which most of the caffeine has been removed. **Compositional requirement for decaffeinated coffee** Decaffeinated coffee must not contain more than 1g per kilogram of anhydrous caffeine, measured on a dry basis.
92	[redacted]	Standard 1.1.2 definition of 'gelatine'	***gelatine*** means a protein product prepared from animal skin, bone or other collagenous material, or a combination of those things.

Table 4: Issues raised by the States and Territories and New Zealand			
Item	**Agency**	**Issue**	**OLDP comments/questions**
93	[redacted]	Standard 1.1.2 definitions of 'peanut butter' and 'sweet cassava'	We agree with NZ's comments. See item 90 in this table. We would approach the drafting as follows: ***peanut butter*** means a spread based on peanuts. ***sweet cassava*** means any variety of cassava roots grown from *Manihot esculenta Crantz* of the *Euphoribiacae* family. *Editorial note* Sweet cassava is also known by other common names such as manioc, mandioca, tapioca, aipim and yucca. **Compositional requirement for peanut butter** Peanut butter must not contain less than 850g per kilogram of peanuts. **Compositional requirement for sweet cassava** Sweet cassava must contain less than 50g per kilogram of hydrogen cyanide, measured on a fresh weight basis. Should it be: A producer/food business must ensure that sweet cassava does not contain less than ...
94	[redacted]	Standard 1.1A.2-purpose statement is an outline	Agree. See our comments at item 60 in this table.

Table 4: Issues raised by the States and Territories and New Zealand			
Item	**Agency**	**Issue**	**OLDP comments/questions**
95		Standard 1.1A.2 – drafting problems	1. Agree with comments.(no clause headings, no chapeau for paragraphs, use of 'shall') 2. NZ comment that column 1 of the table is headed 'food' but the column lists 'products'. I note there are some foods in there that might not be products as such, eg, vegetables (beetroot, cabbage), peanuts, eggs. Should it be headed '**Food or food product**'? 3. We agree that the concept expressed using the word 'standardised' (in (3)(f)) can be improved. Is it the intention that this provision apply to the foods if they are *meant* to comply with particular standards but they don't? If so, the expression below 'to which Standard X applies' is correct. Food 'standardised' is ambiguous. We would approach the drafting as follows: (7) A health claim must not be made for [A person must not make a health claim for]: (a) a food to which Part 2.7 of this Code (Alcoholic beverages) applies; or (b) a food to which any of the following Standards applies: (i) Standard 2.9.1 (Infant formula); (ii) Standard 2.9.2 (Food for infants); (iii) Standard 2.9.4 (Formulated supplementary sports foods); or (c) a food that is a formulated meal replacement to which Standard 2.9.3 applies; or (d) soft cheeses or pate. [we would need to know whether (c) does not include 'formulated supplementary foods' that are also subject to Standard 2.9.4] The short description in parentheses after the cross reference is an attempt to make a provision such as this more user-friendly.
96	[redacted]	Standard 1.1A.6 definition of 'amino acid modification food'	Agree with comments and would approach the drafting as follows: ***amino acid modified food*** means a special purpose food, if, in the preparation of the food: (a) there is a restriction in the use of ingredients containing one or more [particular] amino acids; or (b) there is a reduction of the content of one of more [particular] amino acids in any of the ingredients of the food. I don't think the word 'particular' is adding anything here.
97	[redacted]	Standard 1.2.1-clause 2 (1) (a)	Agree. See our comments in item 29 in this table.

Table 4: Issues raised by the States and Territories and New Zealand			
Item	**Agency**	**Issue**	**OLDP comments/questions**
98	[redacted]	Standard 1.2.1 clause 2 (1) (c)	Agree with [redacted] that if you want to make it clear that certain processes (eg shucking of mussels) constitute the 'making' of food, you should provide for it in an inclusive definition, eg ***made***, in relation to making food, includes: (a) for mussels, shucking the mussels; and (b) ... *etc.*

Table 4: Issues raised by the States and Territories and New Zealand			
Item	**Agency**	**Issue**	**OLDP comments/questions**
99	[redacted]	Standard 1.2.1, clause 8 "(1) The facilities listed in Column 1 of the Table to this clause are 'other similar institutions' for the purposes of Standard 1.1.1 and Part 1.2 of this Code." NZ ask how it relates to Standard 1.1.1.	The phrase 'prisons, hospitals or other similar institutions listed in the Table to clause 8 of Standard 1.2.1' occurs in paragraph (g) of the definition of ***package*** in Standard 1.1.1. It's not immediately clear why the detailed material about 'similar institutions' has been put in Standard 1.2.1 (application of labelling and other information requirements). The cross references need to be improved. The provision needs to refer to 'paragraph (g) of the definition of ***package*** in clause 2 of Standard 1.1.1'. However, I think the use of the concept 'and other similar institutions' in that definition should be examined. It may be better and more direct to have application clauses that apply labelling requirements to foods. 'other similar institutions' also occurs in Standard 1.2.11 to disapply the Standard. I can't find that it is mentioned anywhere else (but I have not searched beyond Part 1.2). There should be an editorial note that illustrates this. The phrase is not picked up in the definition of ***food for catering purposes*** in Standard 1.2.1. Is that intentional? Rules about labelling and what information is required to be displayed on or with food flow from whether food is packaged. For instance, clause 2 in Standard 1.2.1 has the effect that food that is not packaged is not required to be labelled. I think the connection could be made more clearly, so that the reader is not left trying to find what the significance of clause 8 is. Do the words 'for the purposes of Standard 1.1.1 and Part 1.2 of this Code' refer to anything else? The table comprises definitions for 'acute care hospitals', psychiatric hospitals', 'nursing homes for the aged', 'hospices', 'same day establishments for chemotherapy and renal dialysis services', 'respite care establishments for the aged, 'same-day aged care establishments', and 'low care aged establishments'. These descriptions could be improved. Do the terms occur in the Code?

Table 4: Issues raised by the States and Territories and New Zealand			
Item	**Agency**	**Issue**	**OLDP comments/questions**
100	[redacted] **clause 1, Standard 1.2.11**	Standard 1.2.11, subclause 1 (3).	Subclause (3) reads as follows: '(3) This Standard does not apply to food sold to the public by restaurants, canteens, schools, caterers or self-catering institutions, prisons, hospitals or other similar institutions listed in the Table to clause 8 of Standard 1.2.1 where the food is offered for immediate consumption.' Drafting can be improved. We would approach it as follows: This Standard does not apply to food if: OR 'for food that is sold to the public by...' (a) the food is sold to the public by: (i) a restaurant; or (ii) a canteen; or (iii) a school; or (iv) a caterer; or (v) a self-catering institution [we would ask: is it clear what that means?]; or (vi) a prison; or (vii) a hospital or other similar institution mentioned in clause 8 of Standard 1.2.1; and (b) the food is offered for immediate consumption.
101	[redacted]	Standard 1.2.1, clauses 3 and 4 'etc' in the title.	Though 'etc' is acceptable <u>if</u> the title does not cover everything that the provision is about, the headings are probably better expressed as: **3 Labelling of food** **4 Providing information about food**

Table 4: Issues raised by the States and Territories and New Zealand			
Item	**Agency**	**Issue**	**OLDP comments/questions**
102	[redacted]	Standard 1.2.1, drafting of 3 (1) (c) and 4 (1)(c)	Agree with NZ comments and think these provisions should be recast. We would approach the drafting as follows: **3 Labelling of food** (1) This clause applies to food that: (a) is not for retail sale; and (b) is not used in catering *[businesses?]*; and (c) is not supplied as an intra company transfer. (2) The food must bear a label containing the information mentioned in XXXXXX unless the food: (a) is not in a package; or (b) is in an inner package or packages contained in an outer package and the information mentioned in XXXX is contained in a label on the outer package; or (c) is in a transportation outer and the information mentioned in XXXX is clearly discernable through the transportation outer on labels on the packages within. (3) If information mentioned in clause 3 of Standard 1.2.2, is provided in documentation accompanying food, the information is not required to be contained in the label for the food. [we would comment that 'accompanying' is unclear? Does it mean *attached* to the food in some way?] I think the definition for ***food for catering purposes*** should simply be written into a clause. Does it occur in any of the other Standards?

Table 4: Issues raised by the States and Territories and New Zealand			
Item	**Agency**	**Issue**	**OLDP comments/questions**
103	[redacted]	Standard 1.2.2	In general our view is that the Parts could be combined into a single Standard/document. Standards 1.2.1 and 1.2.2 should be consolidated. We think clause 1 should be recast and would approach the drafting as follows, using a narrative style of drafting. (1) A food business [or supplier?] must include the name of a food on its label. (2) If there is a requirement under this Code for the food, the food business or supplier must use the name that is defined in this Code in relation to the requirement. (3) However, the food business or supplier must not use that name if the food does not meet the requirement. (4) If there is no food requirement under this Code for the food, the food business or supplier must use a name or a description of the food that is sufficient to indicate its true nature.

Table 4: Issues raised by the States and Territories and New Zealand			
Item	**Agency**	**Issue**	**OLDP comments/questions**
104	[redacted]	Standard 1.2.2. subclause 1 (3), and the editorial note. 'For the purposes of paragraphs (1)(b) and 2 (b), the definitions of certain foods as set out in Chapter 2 of this Code, do not of themselves establish the name of the food.'	This is not easy to understand and is quite confusing. Further instructions are needed about how it is intended to operate. We think it is preferable to get rid of the concept of 'establishing the name of a food'. The text of the editorial note is incomplete. If the note is retained, the intention should be expressed in a complete sentence. **Bread** Clause 3 of Standard 2.1.1 provides that the Standard does not prohibit the word 'bread' on the label of products that traditionally use that term. As that is contrary to the general rules about what names should be used on a label, we would suggest drafting an exception to the general rule. Does clause 3 of Standard 2.1.1 have the effect that products that traditionally use the name do not fit the description in the definition of 'bread'? Does it mean the Standard does not actually apply to those products? Our view is that the editorial note to this clause contains substantive material. It should be made clear in this Standard whether its rules apply to 'products that traditionally use' the term 'bread'. **Fermented milk** Standard 2.5.3 includes both a definition for 'fermented milk' and clauses about requirements. **Ice cream** Standard 2.5.6 includes both a definition for 'ice cream' and a clause about requirements. What is meant by 'for the purposes of paragraphs (1)(b) and (1)(c)'? Does it mean that, for those foods, it is not necessary to use the defined term? That seems inconsistent with the concept that, if there is a requirement for a food, the name associated with the requirement be used. If the proposal that requirements be removed from definitions is taken out, these provisions will need to be revisited.
105	[redacted]	Standard 1.2.2, editorial note about 'supplier'	Cross references in editorial notes would be included where you think it would assist the reader. It would be consistent to cross refer to the other defined terms. It could be done very simply as follows: ***Supplier*** is defined in Standard 1.1.1.
106	[redacted]	Standard 1.2.3	We agree it should be clarified whether palm cocos nucifera includes palm oil from fruit and seeds of the palm oil tree.
107	[redacted]	Standard 1.2.3, table to clause 5	The list should simply be incorporated into a provision.

Table 4: Issues raised by the States and Territories and New Zealand			
Item	**Agency**	**Issue**	**OLDP comments/questions**
108	[redacted]	Standard 1.2.4, subclause 1(3)	The comment is the subclause does not belong in the 'interpretation' clause and should be moved to another place. Agree.
109	[redacted]	Standard 1.2.4, clause 5	The clause should be redrafted using best drafting practice (including plain English). We would approach the drafting as follows: (1) The ingredients in a food must be set out in a statement of ingredients: (a) in descending order of ingoing weight; or (b) if subclause (2), (3), (4) or (5) applies to the ingredient — in accordance with the subclause. (2) If the ingredient is dehydrated or concentrated and is able to[intended to] be reconstituted during the preparation, manufacture or handling of the food, its position in the statement may be determined by the weight of the ingredient before its dehydration or concentration. (3) Ingredients in food that are dehydrated or concentrated may be stated in the descending order of their proportion by weight in the reconstituted food if: (a) the food is intended to be reconstituted in accordance with directions; and (b) the ingredients in the food are represented as being in the order of their weight when reconstituted. [subclauses (2) and (3) are expressed using '<u>may</u> be stated etc.'. We would ask you whether you think this is correct, or should this be a 'must'?] (4) Water or ingredients that are volatile must be set out in accordance with subclause 5 (2). (5) If an ingredient is a compound ingredient, it must be set out in accordance with clause 6.
110	[redacted]	Standard 1.2.5, definition of 'use-by date'	Note our comments at item 38 in this table. We would approach the drafting as follows: ***use-by date***, for a package of food, means the date by which [a food business or manufacturer?] estimates the food must be consumed, for health and safety reasons, if: (a) it remains in an intact package during its storage; and (b) it is stored in accordance with any storage conditions stated [on the package]? by the food business or manufacturer. The definition of 'best-before date' can also be simplified.

<table>
<tr><th colspan="4">Table 4: Issues raised by the States and Territories and New Zealand</th></tr>
<tr><th>Item</th><th>Agency</th><th>Issue</th><th>OLDP comments/questions</th></tr>
<tr><td>111</td><td>[redacted]</td><td>Standard 1.2.5, subclause 5 (3)</td><td>The comment is that it is not clear whether the day, month or year must be distinguishable from the package or from one another. This requires further instructions from you.
The day, month and year must be expressed so that they are [clearly visible and?] distinguishable from each other.</td></tr>
<tr><td>112</td><td>[redacted]</td><td>Standard 1.2.6, definition of ‘use or storage’
use or storage includes use and storage.</td><td>Agree with comments. Clause 2 should be restructured so that this is not used. For example:
2 Directions for use and storage of food
(1) [A food business or manufacturer] must include, on the label of a package of food, directions for the use of the food or the storage of the food, or both, if the food is of such a nature as to require the directions for health or safety reasons.
(2) If food is unpackaged, a food business or manufacturer must label the food with directions for the use of the food or the storage of the food, or both, if the food is of such a nature as to require the directions for health or safety reasons.
(3) For unpackaged food mentioned in subclause (2), the food business or manufacturer may provide the directions in a form that accompanies the food (instead of labelling the food).
(4) If the food is of a kind listed in an item in the following table, the food business or manufacturer must label the food, or provide directions that accompany the food, in accordance with the directions for use set out for the item.
<table><tr><th>Item</th><th>Food</th><th>Directions for use</th></tr><tr><td>1</td><td>Raw bamboo shoots</td><td>A statement that indicates that bamboo shoots should be fully cooked before being consumed</td></tr><tr><td>2</td><td>Raw sweet cassava</td><td>A statement that indicates that sweet cassava should be peeled and fully cooked before being consumed</td></tr></table>[note that subclause (4) replaces clause 3 in the Standard.]</td></tr>
<tr><td>113</td><td>NZ</td><td>Standard 1.2.8, definition of ‘nutrition</td><td>NZ comments that the definition ‘may be subject to similar criticism that was made of “nutritive</td></tr>
</table>

Table 4: Issues raised by the States and Territories and New Zealand			
Item	**Agency**	**Issue**	**OLDP comments/questions**
		claims'	substance" 'in *Nutricia.* We are not sure of the exact nature of the concern but agree the definition is far from clear and should not be kept in its current form. You might consider whether it's preferable that the matters exempted from the definition go into an application clause (see example drafting below) We would approach the drafting as follows: ***nutrition claim*** means a representation that states or implies that a food has a nutritional property and makes a reference to: (a) the energy content of the food; or (b) salt, sodium or potassium in the food; or (c) amino acids, carbohydrate, cholesterol, fat, fatty acids, fibre, protein, starch or sugars in the food; or (d) vitamins or minerals, or any other nutrient in the food; or (e) [any other nutrient]; or [should this be added to (d) — are vitamins and minerals 'nutrients'?] (f) a biologically active substance in the food. **From current definition:** 1. 'implies' would include 'suggests'. 2. I am not sure existing words 'whether general or specific' add anything. 3. I am not sure existing words 'whether expressed affirmatively or negatively' add anything. **2 Application** (1) This Standard does not apply to a representation about food that: (a) [complies with?] [is in accordance with] a requirement under this Code to provide information about the food; and (b) refers to a commonly accepted name of the food; and (c) refers to a reduction in the alcohol content of the food.

Table 4: Issues raised by the States and Territories and New Zealand			
Item	**Agency**	**Issue**	**OLDP comments/questions**
			(2) In this clause: ***information about food*** means: (a) a statement of ingredients under Standard XXXX; (b) information about nutrients or energy under clause 5 of this Standard (c) information required by this Code or the Act to be included on a label??? [refer to the Standards!!!] [To develop the draft, we would ask you how you think the current para (j) of the definition differs from (g) of the definition]
114	[redacted]	Standard 1.2.8, clause 16	[redacted] raises the issue that if manufacturers used hydrolysed wheat (eg, in rice crackers) gluten shows up as undetectable but is in the product. We agree it wouldn't be caught by the provision, It's a matter of policy whether it should be. Drafting of the clause can be improved.
115	[redacted]	Standard 1.2.9	We agree with the comment that this Standard should be consolidated into Standard 1.1.1. The first sentence in the editorial note to clause (2) appears to contain substantive material. There is nothing in this Standard that provides for information being on the outside of a package and not being obscured by another thing. Is it provided for elsewhere in the Code? The second sentence in the note: if there is a concern about font being too small, you could consider providing for it, for the purposes of subclause (1), in the same way it has been provided for in subclause (3) (warning statements to be in a size of type not less than 3mm.)
116	[redacted]	Standard 1.2.10, clause 1	[redacted] comments that examples should be put in separate examples boxes. Our view is that boxes break up the text and examples should be put in note form (with neither in boxes, but indented and in smaller font below the text they relate to, consistently with our current templates and existing legislation drafted by this Office).
117	[redacted]	Standard 1.2.10	Our view is that there are problems with Standard 1.2.10. The concepts for 'characterising component' and 'characterising ingredients' are not very robust. Those definitions rely heavily on the notes to import meaning. This is risky because notes are not legislative and will only be taken into account for the interpretation of the text if a court goes to extrinsic materials.

Table 4: Issues raised by the States and Territories and New Zealand			
Item	**Agency**	**Issue**	**OLDP comments/questions**
			We would approach the drafting as follows: ***characterising component*** means a component of a food that characterises the food and: (a) is mentioned in the name of the food; or (b) is [reasonably?] likely to be associated with the name of the food by a consumer; or (c) is emphasised on the label of the food in words, pictures or graphics *[, other than because of a labelling requirement in this Code for the food]*. *Note 1* Milkfat is an example of a characterising component in ice cream. Cocoa solids is an example of a characterising component in chocolate. [we think you need the underlined words to express this concept] [both the words usually and likely may be problematic because they are subjective. The word usually is worse because it assumes there is an objective state of affairs. [We would confirm with you whether you think the italicised words in para (c) express the concept in subclause 1 (2). It's not clear what the words 'does not of itself constitute emphasis' allude to.] ***characterising ingredient*** means an ingredient or a category [explained somewhere?] of ingredients in food that characterises that food: (a) that is mentioned in the name of the food; or (b) that is likely to be associated with the name of the food by a consumer; or (c) that is emphasised on the label of the food in words, pictures or graphics *[, other than because of a labelling requirement in this Code for the food]*. *Examples for paragraph (c):* An illustration of fruit and nuts for fruit and nut chocolate is an example of an emphasis in a label for ingredients in food. The words 'extra cheese' are an example of an emphasis on a label for the ingredient cheese. **2 Application** This Standard does not apply to an ingredient in food that: (a) is used in small quantities to flavour the food; or (b) is the sole ingredient of the food; or (c) if it belongs to a category of ingredients in the food: (i) the ingredients are used in small quantities to flavour the food; or (ii) ingredients that belong in the category comprise the whole food; or

Table 4: Issues raised by the States and Territories and New Zealand			
Item	**Agency**	**Issue**	**OLDP comments/questions**
			[see current para (f) of the definition of characterising ingredients.] (*d*) *is mentioned in the name of the food but is not likely to govern the choice of a consumer because the [variation in?] quantity:* *(i) is not essential to characterise the food; or* *(ii) does not distinguish the food from similar foods.* [We think that para (d) (based on the current para (g) of the definition of characterising ingredient) is very unclear. We would ask you: what does 'variation in quantity' mean? eg, how does it affect the character of the food or either distinguish or not distinguish it?] [(d) is properly placed in the definition (rather than an application provision) but further instructions would be needed in order to work out what it means and to develop the definition] Some of the material in the editorial note to clause 1 may be substantive and, if so, should be drafted into a clause. The concepts of 'characterising component' and 'characterising ingredient' may need to be developed further to account for the 'psuedo' requirement stated in the editorial note that if a food is capable of being described by reference to its ingredients, then there should be a declaration of the proportion of the ingredients in the food. If you need to provide for this, we would approach the drafting as follows: (1) An ingredient, or category of ingredients, ***characterises*** food if the food is capable of being described by reference to the ingredient or the category. Examples of ingredients characterising food for clause (1): are as follows: (a) chilli con carne can be described as chilli flavoured minced beef with kidney beans, *[and associated with those ingredients,]* in which case: (i) the proportion of minced beef and kidney beans needs to be declared; and (ii) the proportion of chilli need not be declared as it is a flavouring; (b) a spring roll can be described as vegetables in a light pastry *[and associated with vegetables as a category of ingredients]*, in which case the proportion of vegetables in the spring roll needs to be declared.
118	[redacted]	Standard 1.2.10, subclauses 1 (3) and (4)	Subclause (3) should be recast so that it is not a sandwich provision.
119	[redacted]	Standard 1.3.1, purpose statement includes a definition	Our view is that you would not be able to rely on a definition in the purpose statement. If you do need to rely on it for this Standard, a definition should be drafted and put into a clause.
120	[redacted]	Standard 1.3.1, Schedule subcategories not numbered	Our view is that the Schedule should be restructured. Extensive comments are at item 42 in this table.

Table 4: Issues raised by the States and Territories and New Zealand			
Item	**Agency**	**Issue**	**OLDP comments/questions**
121	[redacted]	Standard 1.3.2	The purpose statement could be redrafted into an application provision (depending on how other Standards sit with this Standard, for example, are vitamins and minerals exempted from this Standard?) [redacted] comments that the interface between clauses 2 and 3 and Standard 1.1.1 is not clear. We are unsure as to the exact concern. We note that clause 2 of Standard 1.3.2 overlaps with clause 9 of Standard 1.1.1 because there is a general prohibition in clause 9 of nutritive substances (which includes vitamins and minerals) and also in clause 2. The schedule in Standard 1.1.1 only sets out the permitted forms for vitamins and minerals and the table in Standard 1.3.2 actually permits vitamins and minerals to be added to particular foods. It seems overly convoluted to have these set out in different places in the Code. Foods mentioned in the table should be examined to see if they are picking up any relevant existing definitions of foods in the Code.
122	[redacted]	Standard 1.3.2, definition of 'claimable food' has 'and/ors'	We would approach the drafting as follows: ***claimable food*** means a food that consists of at least 90% by weight of: (a) primary foods; or (b) foods listed in an item in the table in clause 3; or (c) a mixture of any of the following: (i) primary foods; (ii) foods listed in an item in the table in clause 3, other than cream and cream products, edible oils, edible oil spreads or margarine; (iii) water.
123	[redacted]	Standard 1.3.2, table in clause 3, meaning of column 4	[redacted] comments that the use of columns 4 and 5 in this table is confusing. We agree. There is no indication as to what column 4 is doing, either on its own, or in relation to column 5. It should be explained. There is no explanation of 'maximum claim'.
124	[redacted]	Standard 1.3.2, table in clause 3, consistency of spellings of thiamine, thiamine.	Agree spelling should be consistent. If neither is incorrect, it's a matter for you which spelling should be used.

Table 4: Issues raised by the States and Territories and New Zealand			
Item	**Agency**	**Issue**	**OLDP comments/questions**
125	[redacted]	Standard 1.3.3, clause 12, comment relating to an editorial note	I cannot find a clause 12 — has it been removed?
126	[redacted]	Standard 1.4.1, clause 1, subclause (1), definition: '***arsenic*** is considered to be a metal.'	We agree this is not good drafting practice. The definition could be recast as: ***metal*** includes arsenic. However, if it is not true at all, it would be more appropriate to provide for rules relating to arsenic in clauses in the Standard, eg, 'this Standard applies to arsenic as if arsenic were a metal' OR 'arsenic is taken to be a metal'.
127	[redacted]	Standard 2.1.1, definition of 'bread'	The comment is that some material that was previously included in the definition has been removed and put in the user guide. We agree with the principle that operative material needs to be included in the definition and not put in extrinsic material. In terms of what is included or excluded from the definition, our view is that this is operative, but is often better dealt with in application clauses or provided for otherwise in a clause (rather than within a definition). We are unable to comment on the material taken out (we don't know what it was) and its effects. The current clause 1A can be improved. There is no need to provide for the 'definition of bread for the purposes of the mandatory addition of folic acid...etc'. What is actually occurring here is that particular requirements either do or do not apply for certain foods, not that the definition changes. We would approach the drafting as follows: Clauses 4 and 5 do not apply to food products as follows, or to flour or wheat flour used to make those products: (a) pizza bases; (b) bread crumbs; (c) pastries; (d) cakes, including brioche, panettone and stollen; (e) biscuits; (f) crackers

Table 4: Issues raised by the States and Territories and New Zealand			
Item	**Agency**	**Issue**	**OLDP comments/questions**
			We would also suggest that putting versions of provisions in shaded boxes expressed to commence at particular times is confusing. In Standard 2.1.1 for example, each of the 'shaded' provisions has commenced. Titles such as '**To commence on 13 September 2009**' should be removed once the commencement date is reached. Having up to 3 versions of the earlier provisions is quite confusing. The usual practice is that instruments are consolidated so that the latest version only is the one that is available. Previous consolidations can be accessed (or, should be able to be) on FRLI or the FSANZ website. Explanations about the development of provisions can be put in other publications or on the website. (The same may be said of Standard 1.3.2 (vitamins and minerals))
128	[redacted]	Standard 2.1.1, subclause 5 (3).	The comment is that the phrase 'other food containing salt' has wide application and questions whether brine during manufacture that is added to bread should be iodised. We think this is a matter of policy.
129	[redacted]	Standard 2.2.2, subclause 3 (2)	We agree the drafting in this Standard is convoluted and should be improved. Note also our comments about the definition of 'egg' in item 20 in this table. We would approach the drafting as follows: **2 Egg products — processing** (1) Egg products must: (a) be pasteurised; or (b) undergo an equivalent treatment to pasteurisation so that the egg product meets microbiological criteria for pasteurised egg products under Standard 1.6.1. *Editorial note* Pasteurised egg products are required to meet microbiological criteria mentioned in the schedule to Standard 1.6.1. (2) However, an egg product that is for non-retail sale need not be pasteurised or undergo an equivalent treatment as mentioned in subclause (1) if it is used, or intended to be used, in a food: (a) that is pasteurised; or (b) that undergoes an equivalent treatment so that the egg product used in the food meets the microbiological criteria for pasteurised egg products under Standard 1.6.1. We would confirm with you whether egg products must be pasteurised unless the food they go in will be pasteurised. We think it is incorrect to provide both that (1) is 'subject to subclause (2)' and in (2) that 'subclause (1) does not apply' (as in the current construction).

Table 4: Issues raised by the States and Territories and New Zealand			
Item	**Agency**	**Issue**	**OLDP comments/questions**
			We would clarify with you how you think how (2) is intended to work – it is still the egg product in the food that is required to meet the microbiological criteria. How will the Schedule to Standard 1.6.1 operate in relation to egg products in food that is pasteurised? **3 Cracked eggs** (1) A person must not make a cracked egg available for: (a) retail sale; or (b) *catering purposes* [is this defined somewhere?]. (2) An egg product that is derived from cracked eggs must be pasteurised or undergo an equivalent treatment so that the egg product meets the microbiological criteria for pasteurised egg products under Standard 1.6.1. *Editorial note* Eggs or egg products that are not pasteurised must be labelled with an advisory statement to that effect: see Standard 1.2.3. A cross reference in this Standard to provisions in the Code about the pasteurisation of eggs would be useful for the reader.
130	[redacted]	Standard 2.5.3, subclause 2 (3), the table	The comment relates to the proper form in which figures are to be written. A matter for you.

Table 4: Issues raised by the States and Territories and New Zealand			
Item	**Agency**	**Issue**	**OLDP comments/questions**
131	[redacted]	Standard 2.6.4, definition of 'formulated caffeinated beverages'	The comment is that legal ambiguity arises from the interplay between the definition for 'formulated caffeinated beverage' and the compositional requirement drafted in clause 2 (1). This may be correct. We think that the compositional requirement means that a beverage within the meaning of the definition must meet the requirement in order to comply with the Standard. However, it depends on how well the definition works (it can be improved). We think it would definitely be the case that the Standard applies to beverages that have between 145mg/L and 320mg/L. We would approach the drafting as follows: ***formulated caffeinated beverage*** means a non-alcoholic water based flavoured beverage that: (a) contains caffeine; and (b) is represented as being for the purpose of enhancing mental performance. We would confirm with you whether you think this is correct. **2. Compositional requirements** (1) A formulated caffeinated beverage may contain carbohydrates, amino acids, vitamins *[or any other substance, including other foods]*. We would confirm with you whether they can <u>really</u> include 'any other substance' or only the substances in the table in clause 2 (2)? The current definition and clause 2 seem to be in conflict. We would ask you whether you think the intention is that: a caffeinated beverage may contain any other substance, but, if it contains a substance mentioned in the table in clause 2 (2) — may only contain that substance in accordance with clause 2. (2) The formulated caffeinated beverage must contain no less than 145mg/L and no more than 320mg/L of caffeine.
132	[redacted]	Standard 2.7.1, clause 3	The comment is that 'a food capable of being consumed as a beverage, which contains more than 0.5% alcohol by volume' is probably broader than intended as it can also include vanilla essence (for example). We think this is a matter of policy.
133	[redacted]	Standard 2.9.1 (infant formula products), Division 3	The comments are that there are no definitions for types of conditions (for example, hepatic, malabsorptive, metabolic, immunological) that apply to infant formula for special purposes. We think that the terms in clauses 27 and 28 should be examined to determine whether their ordinary meaning is sufficient, and if not, be defined.
134	[redacted]	Standard 2.10.2, clause 2	The comments are that the clause does not provide a permission to add iodine to salt. We think it is done using the definition of iodised salt but that this is not appropriate.

Table 4: Issues raised by the States and Territories and New Zealand			
Item	**Agency**	**Issue**	**OLDP comments/questions**
			The forms permitted in the Schedule in Standard 1.1.1 are potassium iodate; potassium iodide; sodium iodate and sodium iodide. The definition of 'iodised salt' means a mixture of salt and one of these forms. Clauses 6 and 7, about the composition of iodised salt makes reference to those forms. The definition for ***iodised salt*** to some extent functions as the permission. Consistently with our previous comments we think it is preferable to take compositional requirements out of definitions. We would approach the drafting as follows: ***iodised salt*** means salt to which iodine has been added. **6 Composition of iodised salt** (1) Iodine may be added to salt if the iodine is in a form permitted under the Schedule to Standard 1.1.1. *Editorial note* The permitted forms are as follows: (a) potassium iodate; (b) potassium iodide; (c) sodium iodate; (d) sodium iodide. (2) The iodised salt may contain either: (a) potassium iodide or potassium iodate (but not both); or (b) sodium iodide or sodium iodate (but not both). I think this means it can't contain both forms of potassium or both forms of sodium. We would ask you whether you think that is correct. (3) The iodised salt must contain: (a) at least 25 mg per kilogram of iodine; and (b) not more than 65 mg per kilogram of iodine. Is iodine added to salt to achieve a 'nutritional purpose'? See the definition of 'nutritive substance' and clause 9 of Standard 1.1.1.

Table 4: Issues raised by the States and Territories and New Zealand			
Item	**Agency**	**Issue**	**OLDP comments/questions**
			It's not very clear how the Schedule to Standard 1.1.1 operates in relation to the concept of nutritive substance or to Standard 1.3.2 (vitamins and minerals). The definition of 'nutritive substance' includes vitamins and minerals, but, are vitamins and minerals always nutritive substances? In its purpose statement, Standard 1.3.2 is expressed to <u>not</u> be regulating the addition of iodine to salt.
135	[redacted]	Clarity about **who is subject to a requirement in the Code** model offence provisions and how they dovetail with requirements in the Code. Due diligence defence, model provision 22, "narrows the scope of who is liable for the sale of food that fails to meet a requirement, where the prohibited conduct is committed by a third party (rather than the retailer). Charges for many of the requirements in the Code that relate to the manufacture of food would, in practice, typically be the subject of a charge laid against the manufacturer, not the retailer who has had no role in, or knowledge of, the breach."	model offence provision 17 (1): "A person must comply with any requirement imposed on the person by a provision of the Food Standards Code." The comment is made that the extent to which many of the provisions in the Code that can be enforced under this subsection is unclear as most of the provisions do not expressly impose an obligation on any specific person. The issues are: • whether, for a particular requirement in the Code, it is the intention that a particular person be regulated. • whether charges could not be brought under subsections 17 (2) (3) or (4) because the requirement is not about, a requirement on food, a requirement about packaging or labelling, a requirement about selling or advertising. (There is an example of using the wrong provision in with which to frame charges in *Nutricia*.) There are also model offence provisions section 11 (1) and (2), 14 (2) and (3) which relate to falsely describing food. The offences pick up 18 (1)(a) of the model provisions which provides that: 'food that is falsely described includes food ...[which] is represented as being of a particular nature or substance and for which there is a prescribed standard under the Food Standards Code and the food does not comply with that prescribed Standard' model offence provision 17 (2) provides: "A person must not sell any food that does not comply with any requirement of the food standards that relates to the food." 17(3) provides: "A person must not sell or advertise any food that is packaged or labelled in a manner that contravenes a provision of the food standards Code."

Table 4: Issues raised by the States and Territories and New Zealand			
Item	**Agency**	**Issue**	**OLDP comments/questions**
			17 (4) provides: "A person must not sell or advertise any food in a manner that contravenes a provision of the Food Standards Code." The provisions of the Code that relate to composition of food, labelling, packaging, or selling and advertising can be enforced under 17 (2), 17(3) and 17 (4) without specific reference in the Code to the person that bears the obligation to comply. The offences apply both to individuals and to corporations. Under section 22(1)(a) of the AIA (Cth) 'person' includes a body politic or corporate as well as an individual. (body politic means 'collective group or artificial person' Macq. dictionary).
136	[redacted], **as above**	Standard 4.2.1, [redacted] comment that it is not clear whether 'seafood business' would be construed as referring to a person.	I think it may be construed as referring to a body politic or corporation. Whether provisions that relate to a 'seafood business' impose an obligation on a natural person may be in doubt. The liability of corporations is provided for in the criminal law as it applies in the States and Territories. [redacted] The issue is whether it is the intention that an obligation be placed on an individual as well. [redacted] say 'it might be argued that it can be inferred that the provisions referring to a seafood business apply to the proprietor...It is far from clear whether this would be sufficient to sustain a conviction.' In terms of sustaining a conviction against a natural person, unless liability is provided for specifically (in [redacted] example) in a provision of the [redacted] (and I do not know if this would be the case) or in common law, relating to liability of company directors or an agent, we agree. Use of the term 'person' instead of 'seafood business' would cover both natural persons and corporations. ([redacted]) The provisions referring to things that a seafood business must do, in Standard 4.2.1 (as an example) could use the phrase 'A person, in the course of carrying on a seafood business, must...' (in the same way the phrase has been used in model provision section 14).

Table 4: Issues raised by the States and Territories and New Zealand			
Item	**Agency**	**Issue**	**OLDP comments/questions**
137	[redacted], **as above**	[redacted] comments that section 17 (2) of the model provisions cannot be used to frame charges relating to a contravention of an obligation imposed on a seafood business in Standard 4.2.1	We agree with [redacted] proposition that model offence provision 17 (2) is confined to, or is likely to be confined to, obligations placed on food (that is, the composition of food) and not on the conduct of a business. It would be safest to assume that 17 (2) relates most clearly to the composition of food. For example, we don't think it would cover obligations about seafood premises, or the skills of seafood handlers. So the obligations in Standard 4.2.1 need to be framed so that they work with model provision 17 (1) (Code imposing an obligation on a person). At present, it's not clear whether the requirements in 4.2.1 are only enforceable against a body corporate. See words suggested in item above.
138	[redacted], **as above**	Standard 4.2.3, Standard 4.2.4 – provisions imposing obligations on a 'producer', a 'dairy processing business	The comments about provisions imposing requirements on a 'seafood business' also apply to provisions that impose requirements on a 'producer of ready-to-eat meat' and a 'dairy processing business' as both are defined to mean 'a business, enterprise or activity...'
139	[redacted], **as above**	Standard 4.2.4	The definition 'dairy transport business' appears for the purposes of the Standard but I cannot see the term repeated anywhere in the Standard. If not used, should come out.
140	[redacted], **as above**	Request from [redacted] that there be input from people with expertise in prosecutions	Agree that if a person is specified in the Code as the bearer of an obligation, this should be checked against the offence provisions. This is relevant for the enforcement of model provision 17 (1) which relates to the imposition of a requirement by the Code on a person. We think it is a policy issue as to whether it is the intention that particular categories of people are to be regulated for particular activities. We think that provisions related to the composition of food, the packaging or labelling of food, and the selling or advertising of food that are intended to pick up the offences in 17 (2), (3) or (4) should be kept general. It is likely that obligations should refer to 'A person' so as not to limit the category of persons.

Table 4: Issues raised by the States and Territories and New Zealand			
Item	**Agency**	**Issue**	**OLDP comments/questions**
141	[redacted]	clause 4 of Standard 3.1.1 The issue is that, a charge about the contravention of an obligation imposed on the proprietor of a food business has to refer to 3 sections. (the food Act offence, the obligation in the Standard imposed on a food business, and clause that imposes the obligation in turn on the 'proprietor of a food business)	We agree with [redacted] proposal that it is simpler to use the words 'the proprietor of a food business' in the provisions imposing the obligation in the first instance. eg, 'The proprietor of a food business must ensure that the food business, when storing food, store the food in such a way that...' The issue that I can see is that there may be a need (or perhaps there was the intention) to include within the scope of the offence any *other* responsible person for a food business in the sense of the corporate liability of the food business. Is there a need to retain the reference to the body corporate as being subject to the obligation?
142	[redacted]	drafting protocols suggested by Victoria	We agree with [redacted] comments at page 10 about drafting protocols related to offences. Clauses imposing obligations should be examined in light of: • how a breach will be prosecuted • what the elements of the offence are They should be drafted clearly because: • ambiguity in offences is resolved in favour of the defendant • people should know what they are required to do
143	[redacted]	References to other instruments in the Code. Issue that reference to other standards need to be kept up to date in order to remain relevant.	The standards are legislative instruments made under the FSANZ Act. As such, they are subject to the rules in the *Legislative Instruments Act 2003*. Unless otherwise provided by the delegating Act, instruments are subject to section 14 which allows for instruments to incorporate material as it is in force at the time of the incorporation. We agree that incorporated material that is out of date presents problems. The references to material that is incorporated should be amended to be kept up to date. Amending Standards from time to time to update references may be the preferred option – greater harmonisation and consistency between the jurisdictions. See the comments at paragraphs 38 and 39 of the report.
144	[redacted] – **definition issues**	[redacted] make the point that terms such as 'organic', 'nutrition information statement', 'organic', 'biologically active substance', 'available and unavailable carbohydrate',	<u>Meaning of 'nutrition information statement'</u> 1. The comment is that, in Standard 2.9.1, clause 20 (2), it is not clear what is prohibited: "Subject to clause 28, the label on a package of infant formula product must not contain a reference to inulin-derived substances or galacto-oligosaccharides except for a reference to either

Table 4: Issues raised by the States and Territories and New Zealand			
Item	**Agency**	**Issue**	**OLDP comments/questions**
		and 'dietary fibre' have no clear meaning.	substances in: (a) a statement of ingredients; or (b) the nutrition information statement." Clause 20 (2) in Standard 2.9.1could do with notes telling the reader where the rules about statements of ingredients and nutrition information statements are in the Code. 2. 'statement of ingredients' is the subject matter of Standard 1.2.4, and the term is defined in Standard 1.1.1. 'nutrition information statement' is not defined. 'nutrition information *panels*' are the subject of Standard 1.2.8. If this is what is meant, that is the term that should be used. These are related to 'nutrition *claims*' (if a claim is made, a nutrition information panel is required). The intention seems to be that what is meant by (b) is a nutrition claim (which does not include a reference to ingredients). If so, that should be provided for. The provision appears to be providing that those substances can be mentioned as ingredients or as nutrition claims. We are not sure if nutrition claims are actually possible for those substances. 3. 'ingredient' is defined in Standard 1.2.4 only in respect of that Standard and 'nutrition claim' in defined in Standard 1.2.8 only in respect of that Standard. Standard 2.9.1 refers to those Standards. It should be considered whether, if an enforcement provision relies on other Standards, the definitions and concepts in the other Standards must be phrased to apply to the enforcement provision. Alternatively, whether the enforcement provision need to incorporate the meanings from the other Standards. 'biologically active substance' 4. See comments at item 148 of this table. available and unavailable carbohydrate 5. If these terms don't have an agreed meaning in the industry, we agree they would need definition.

Table 4: Issues raised by the States and Territories and New Zealand			
Item	**Agency**	**Issue**	**OLDP comments/questions**
			dietary fibre 6. We note there is a definition for this in the Macquarie dictionary. A definition would only be needed if the policy is to depart from the dictionary definition.
145	[redacted]	clause 4 of Standard 1.2.1	1. The clause requires that a package of food (that is *not* for retail sale) must be accompanied by sufficient information so that the purchaser may comply with the compositional requirements and the labelling and declaration requirements of the Code , if the purchaser requests. Labelling requirements of food (that is not for retail sale) are in clause 3. Clauses 3 and 4 should be redrafted (they are drafted presently as sandwich provisions). We think the provisions could also be redrafted in plainer English but to do this we would need to examine the concepts. For example (for clause 4), is the purchaser of food that is 'not for retail sale' a manufacturer of other foods, and, is 'food not for retail sale' food that is sold to manufacturers? There are several cross reference in clause 3 to information prescribed in Standard 1.2.2. That Standard only has 3 clauses in it. For better readability, we think the information in Standard 1.2.2 should be consolidated into clause 3 (even if it is the case that the material is repeated again in other places in the Code).
146	[redacted], **definition issues**	definitions of foods need to be checked and redrafted	See item 43 above about food additives Schedule The Code has compositional definitions (we are suggesting removing these), food names, prescribed names, food products etc. It is necessary to ensure that a single term is used throughout for a single concept. It's also good drafting practice for a system of rules to use as few concepts as is possible. We would suggest that the name of a food and the name of a concept (eg, 'ingredient') should be defined such that it applies to the Code as a whole. Any modifications that will need to apply for the purpose of a particular provision or Standard can then be drafted as a rule. For example: 'Fruit and vegetables', for the purposes of the whole Code, does not include nuts. A particular clause or Standard applies rules to fruit and vegetables and nuts. Instead of altering the definition of 'fruit and vegetables' so that it includes nuts, include a provision that applies the particular rule to nuts.

Table 4: Issues raised by the States and Territories and New Zealand			
Item	**Agency**	**Issue**	**OLDP comments/questions**
147	[redacted], **definition issues**	There needs to be clarity about when definitions apply for the purposes of a Standard or for the entire Code. The drafting and application of definitions applying to the whole Code should be checked.	'process' is used in Standard 3.3.1 but defined in Standard 3.2.2 for the purposes of Standard 3.2.2. As the definition therefore does not apply for the purposes of Standard 3.3.1, this should be fixed. 'fruit and vegetables' defined in Standard 2.3.1 and means 'fruit, vegetables, nuts, spices, herbs, fungi, legumes and seeds'. This has consequences for provisions relating to fruits and vegetables in other parts of the Code. For example, in Standard 1.2.8, is it the intention to exclude nuts from the requirement to have a nutrition information panel? In Standard 1.3.1, is it the intention to permit addition of sulphur to nuts (because of the reference to 'dried fruits and vegetables)?
148	[redacted], **definition issues**	Victoria make the point that there are terms that are defined that are either inappropriately applied or not applied when they should be. [redacted] gives the example that the tables in Standards 1.2.8, 2.6.4, and 2.9.1 use terms such as nutrients, subnutrients, biologically active substances, substances, nutritive substances, vitamins and minerals, and components, inconsistently.	This is an issue about definitions but it is also an issue about concepts, which could probably be examined. To take one example: 'biologically active substance' is defined to mean 'a substance, other than a nutrient, with which health effects are associated'. We agree the definition should make it clear that the health effects are beneficial ones (if that is the intention). 'nutrient' in Macq. means 'containing or conveying nutriment' 'nourishing, affording nutriment' 'nutriment' is 'any matter that, taken into a living organism, serves to sustain it in its existence, promoting growth, replacing loss and providing energy' In terms of maintaining a difference between the concepts of 'nutrient' and 'biologically active substance' the associated health benefits for 'biologically active substance' must be something other than 'containing or conveying nutriment'. Also, how does the term 'subnutrient' compare with 'biologically active substance'? Do they actually mean different things? We agree that defined terms need to be used consistently and carefully.
149	[redacted]	what Standards apply to rissoles? can sulphur dioxide be added to rissoles?	1. See items 55 and 56 of this table. 'comminuted' ['means chopped, diced or minced] is defined only for the purposes of clause 8 in Standard 1.6.2 and yet the term occurs in Standard 2.2.1 and possibly other places in the Code. If a definition is necessary, it should be defined for the purposes of the Code. 2. Whether a rissole is covered by the definition of processed meat (in my view) depends on whether it undergoes processing within the meaning of that definition. (ie, a method further to boning, slicing, dicing, mincing or freezing). Standard 1.3.1 (clause 1) defines 'processed food' to mean: 'food which has undergone any treatment resulting in a substantial change in the original state of the food'.

Table 4: Issues raised by the States and Territories and New Zealand			
Item	**Agency**	**Issue**	**OLDP comments/questions**
			This is quite unclear. Would it cover combining with other ingredients, covering with breadcrumbs and then freezing? The Macq. dictionary definition for rissole is 'small *fried* ball ...'. Would processing cover cooking? The words 'substantial change' in this definition are subjective and difficult to apply. The definition should be redrafted to be clearer about what constitutes substantial change. Compare it with the definition of 'process' in Standard 3.2.2 where 'process' is defined (for the purposes of that Standard only) to mean: 'activity conducted to prepare food for sale including chopping, cooking, drying, fermenting, heating, pasteurising, thawing and washing, or a combination of these activities'. Note the definition of 'processed food' in Standard 1.3.1 does not fit neatly with the text of Schedule 1. The words 'processed food' do not occur in there, rather 'processed *meat*, processed *cereal*' etc. The definition of 'processed food' is expressed to apply to Standard 1.3.1 only. The definition of 'processed meat' is expressed to apply to the Code. 3. If a rissole can be 'processed meat' it could be 'manufactured meat' if it has 660g/kg meat (rather than at least 300g/kg of meat for 'processed meat'). 4. A rissole also seems to satisfy the definition of 'sausage'. There is nothing in the definition of 'sausage' that would prevent this. If it's the case that it *shouldn't* include rissoles, the definition needs to be redrafted to make it clear. It's quite uncertain as to whether a court could decide that the definition does not apply to rissoles for the reason that it is widely recognised that a rissole is not a sausage. A court may decide that it cannot disregard the actual words of a statute. 5. It seems unlikely (in my view) that rissoles could be classified as 'mixed foods' (at item 20 of the Schedule in Standard 1.3.1, giving the result that sulphur dioxide may not be added) given there are specific items that relate to meat products at item 8 of the Schedule and 'meat' is not mentioned at all at item 20. This view relies on the principle that the specific provision overrides the general provision. 6. If it is the policy that sulphur dioxide must <u>not</u> be added to rissoles, there needs to be drafting that makes this clear. We recommend amending the Code. 7. There should also be more clarity about what is a 'mixed food' if it is to be anything other than a food type described under item 20 of the Schedule. [eg, I don't know what is possible under item 20.2 '**Food other than beverages**'.] 8. Definitions issue: I don't think it is necessary to provide in the definition of 'processed meat'

Table 4: Issues raised by the States and Territories and New Zealand			
Item	**Agency**	**Issue**	**OLDP comments/questions**
			that it 'includes manufactured meat'. That introduces an ambiguity about whether manufactured meat does actually need to have 660g/kg of meat or not. The definition of 'manufactured meat' already provides that it is 'processed meat'.
150	[redacted]	clarity required for assessing whether sulphur dioxide has been added or is present as carry-over from an ingredient	This is regulated by clauses 7 and 8 of Standard 1.3.1. It is difficult to know what the following (underlined) words in clause 7 actually mean. It should be drafted to have a more certain meaning. 'Other than by direct addition, a food additive may be present in any food as a result of carryover from a raw material or an ingredient <u>provided that the level of the food additive in the final food is no greater than would be introduced by the use of the raw material or ingredient under proper technological conditions and good manufacturing practice</u>' Also, contemporary drafting practice avoids the use of provisos because their effect can be uncertain. '*provided that* may create an exception, a limitation, a condition, or a mere addition'. [from *Dictionary of Modern Legal Usage*, Bryan A. Garner, 1995, OUP]
151	[redacted]	Is the permitted level of sulphur dioxide in prawns under Standard 1.3.1 based on whole prawns or only the edible portion of the prawn?	There is nothing in Standard 1.3.1 (item 9 of Schedule 1), or Standard 2.2.3 to indicate whether the level is for the edible portion only. Standard 4.2.1 defines 'processing of seafood' but for the purposes of that Standard only. It would seem that the level would be based on the product as sold. We suggest amending the Code if that does not reflect the policy. It is not sufficient to provide guidance in guidance material or notes.
152	[redacted]	Is doner kebab meat 'processed meat' or 'mixed food'?	This presents many of the same issues discussed above for rissoles. The definition of 'processed meat' in Standard 2.2.1 needs more clarity about what constitutes the 'processing' of meat and something done about the difficult and conflicting definition of 'processed food' in Standard 1.3.1. We suggest amending the Code to make it clear what the intention is for doner kebab meat (and other identified products). For provisions relating to requirements that carry a criminal penalty, any ambiguity in the text will be resolved by a court in favour of the defendant.
153	[redacted]	does food in small packages not for individual sale have to be labelled under clause 2 of Standard 1.2.1 and Standard 1.2.3?	See our comments at item 29 of this table. We think the drafting of clause 2 in Standard 1.2.1 is deficient and the provision needs to be recast following instructions as to the policy intention. It is not sufficient to provide for it in guidance material.

Table 4: Issues raised by the States and Territories and New Zealand			
Item	**Agency**	**Issue**	**OLDP comments/questions**
154	[redacted]	Is there an exemption in clause 2 (1)(e) of Standard 1.2.1 from labelling packaged prepared salads, packaged prepared fresh fruit salad, packaged prepared fresh fruit pieces? (likely to not have been prepared on the premises from which they have been sold)	The comment is that the intention was for 2(1)(e) to exempt bagged whole fruit and vegetables and cut (for example, half a pumpkin), and not necessarily salads. I don't think there is anything in the words of the provision that prevent it covering salads. At best it is ambiguous. This is a policy issue. If it is the policy intention that salads should not be exempted, the provision would need to be recast to provide for that.
155	[redacted]	Does Standard 3.3.1 apply to food for a 'delivered meals organisation' that is delivered by a third party	The comment is that many 'delivered meals organisations' are small and they contract out the preparation of meals to larger organisations (who are not preparing those meals as their principal activity and therefore are not 'delivered meals organisations'). The comment is that the effect of this is that the contracted organisation does not need to have a food safety program. 1. The operative provision in Standard 3.3.1 is that a food business to which the Standard applies must comply with Standard 3.2.1. Standard 3.2.1 provides that certain food business must have a food safety program. Subclause 2 (2) is as follows: '(2) ...this Standard applies to all food and production primary food production businesses that are determined by the appropriate enforcement agency under the Act to be within a priority classification of food business from the commencement date for that priority classification of food business.' It's not clear to me whether this provides that the Standard applies to a food business if a food Act determines that it applies, or only that it applies to a food business from a date determined by the Act for that food business. Suggest redrafting to clarify. The other qualification is in clause 6 which exempts food businesses in relation to fundraising events. Unless food businesses that are not already covered by Standard 3.2.1 are given the requirement to have a food safety program because of Standard 3.3.1, it is hard to see what Standard 3.1.1 is adding to the scheme. There may be something I am missing here in terms of how the food safety standards are operating with State and Territory legislation. Note also that the fundraising exemption in clause 6 of Standard 3.2.1 still applies to the Standard 3.3.1 food businesses. We agree that organisations that are contracted by delivered meals organisations (not defined) are not likely to satisfy the requirement that they process the food as a 'principal activity' in activity 2

Table 4: Issues raised by the States and Territories and New Zealand			
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			and activity 3 in subclause 1 (1) of Standard 3.3.1. It's not clear whether the contracted organisations would not be 'delivered meals organisation'. There is no definition. It's not certain whether an organisation that prepares and processes meals is a delivered meals organisation if it does not deliver them. Because Standard 3.3.1 imposes requirements, you do need a definition of delivered meals organisation. However, if Standard 3.3.1 does not apply to contracted organisations, it is hard to see why Standard 3.2.1 would not apply to those food businesses under its own steam. But, as I said, I may have missed something about how the food safety standards scheme operates. I note also that, for [redacted] purposes, section 99 of the *Food Act* [redacted] provides for who must have an accredited food safety program, and paragraph (1) (a) or (1) (e) would seem to cover an organisation that processes meals. 2. Activity 2 in the table in subclause 1 (1) does not seem to require that the business serve the food itself. I think it is ambiguous as to whether the processing of the food must be in the facility, or the words 'for service in a facility' mean that the food is processed at any location but it is *for* service in the facility. If there is an ambiguity in the text it should be fixed. 3. The definition of 'vulnerable person' provides that a vulnerable person can be a 'client' of a delivered meals organisation, which seems to mean absolutely anybody. If it is meant to be confined in any way, we suggest the definition be recast.
156	[redacted]	lack of a definition for 'delivered meals organisation' means that businesses that deliver meals (for example, those for weight loss purposes) may not be included.	See comments in item above. We agree a definition of 'delivered meals organisation' is needed.
157	[redacted]	the Code does not regulate biologically active substances. A number of substances are currently being researched and could be added to food for their antioxidant properties in the body.	This is a policy matter.
158	[redacted]	requirements in the Code are unenforceable because there is a lack of suitable analytical methods, see Standard 1.4.1 and Standard 2.10.3	<u>Standard 2.10.3 (calcium in chewing gum)</u> The Standard includes compositional requirements about the amount of calcium in chewing gum. There is a formula which provides for the meaning of 'releasable calcium'. A claim about calcium in chewing gum can only be made where there are particular concentrations of releasable calcium per serve. In principle there is nothing wrong with this approach. It sets out objective

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			requirements. (If they are, in fact, impossible to measure, consideration should be given to how to make the requirements objective and measurable). How the amounts are determined are matters of fact and evidence. <u>Is there is a need to set out analytical methods?</u> The provision can work without an analytical method being set out. Analytical methods can be applied by industry and their veracity is a matter of evidence. It is a policy matter, however. If an analytical method is clearly preferred, and is quantifiable, it could be prescribed in the Standard. It requires some maintenance for the Code, ie the reference needs to be kept up-to-date (the Standards cannot incorporate material in force from time to time). You would need to provide for whether that method had to be used, or equivalent methods are acceptable. (this also is a policy issue). A method that is prescribed needs to be publicly available. The comment is that there aren't certain and uncontroversial methods that can be used to work out the calcium content, and that, if there are no reliable methods, there should not be a compositional Standard. It would have to be determined whether none of the available methods were reliable (itself probably controversial). Also, there may be a public policy benefit in capping the amount of a substance in a food even if that substance is difficult to measure. However, in principle it should be possible to enforce a requirement, and if it really isn't possible the requirement should be recast to be enforceable to whatever degree it can be. For example, one would imagine there would have to be an upper limit to how much calcium there should be in chewing gum. <u>Standard 1.4.1 (hydrocyanic acid in ready to eat cassava chips)</u> 1. This presents the same issues as those described above for Standard 2.10.3. 2. The phrase 'mixed food', occurring initially in subclause 1 (6), should be explained.
159	[redacted], **as above**	Standards should not rely on auditing the manufacturer's records when there is no legislative requirement for the manufacturer to be audited (Standard 2.10.3)	The requirement for the supplier to have records is made legislative in paragraphs 3 (1) (d) and (e) of Standard 2.10.3. We are not sure what the issue is in terms of the manufacturer, and would need further instructions.
160	[redacted]	overreliance on editorial notes and guidelines to understand Standards	The general principle is that anything that is substantive must be in a clause, ie, a rule must be able to be understood without reference to guidance material. See our comments about editorial notes at paragraphs 50 and 51 of the report.

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161	[redacted]	drafting with excessive cross references, and reversing general exemption. Standard 1.2.1, clause 2.	This comment goes to the issue of how information in the Standards is organised and the benefits of consolidating the Standards. Any redrafting will need to factor in the problem of excessive cross referencing and solutions sought for this. A revised way of grouping the requirements can reduce cross referencing. The construction of clause 2 of Standard 1.2.1 is very difficult and we think the clause needs to be redrafted (see our comments in item 29 of this table).
162	[redacted]	a Standard compositional limit should not be set if there is no accepted validated analytical method	This is a policy issue. It may be a matter of controversy whether there is an accepted validated analytical method (some may think there is, some not). There may be policy considerations relating to whether it is preferable to have a compositional limit despite the lack of an agreed analytical method, rather than no compositional limit on a food at all (eg because of safety implications). If there are no validated analytical methods for proving composition it *may be* that the requirement would effectively be unenforceable. (We would need further instructions, for example, how does an analytical method become 'validated'. What if an analytical method were used that was only accepted by part of industry?) In any case, It would be preferable to settle on requirements that can be applied by industry. As suggested (by SA and Qld), this may involve requiring that records be kept. You would have to provide for what goes into records (I can't see how record keeping necessarily resolves the issue of there being a lack of analytical method, but we would need to be instructed on these matters). See also our comments at item 158 of this table.
163	[redacted]	it should be stated in Standard 1.1.1 that the provisions of the Code apply to food under the relevant State, Territory or NZ legislation	It's not necessary to provide for this, as the State and Territory food Acts adopt the Standards and those Acts are the enabling legislation. This would only be appropriate as a note, and there is an editorial note that does this under the purpose statement.

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164	[redacted]	food is classified in different ways (food additive, processing aid, nutritive substance, novel food, genetically modified food). Food may be assessed differently according to how it is defined, but there can be significant overlap of categories of food.	The comment is concerned with how food is to be assessed, given it may fall into more than one category. We agree the concepts need to be tested and that an attempt should be made to rationalise how food is assessed in the context of the Code in its entirety. An improved structure of the content of the Code, so that it is more obvious how food is regulated, may help with this problem. Outline provisions (discussed at paragraph 45 of the report) may help, or a flow chart. It may not be possible to avoid overlapping of subcategories of food (eg, a particular food is very likely to be subject to multiple provisions). A more obvious structure may help the reader. It may be possible to construct a hierarchy of requirements, eg, a food has to comply with the requirements in descending order: genetically modified; novel food; ...etc.
165	[redacted]	Outcome based Standards should have 'deemed to comply' provisions so that they are enforceable	The problem expressed in the comment is broadly framed: we need further instructions before commenting. (see item 170 in this table) We don't have a problem with 'deemed to comply provisions' assuming it refers to a provision that includes a detailed standard or method and may also give an option to a business to demonstrate an alternative method of complying with the standard. We agree this gives more guidance in the legislation to people who must comply with the Code and for enforcement agencies, than outcomes based legislation on its own. (eg, at the extreme, the Code could be summarised by a small collection of outcomes such as 'a person must only sell food that is safe and suitable', but that is so broad it would not have much impact with changing or ensuring particular behaviour and so it would not achieve a regulated food system)
166	[redacted]	1. What is the scope of the primary production Standards? 2. There is uncertainty about: -the processing stages that are included - who is intended to be captured in the process chain, eg, grower, transporter, wholesaler, retailer - how the PP Standards relate to health legislation. 3. The PP Standards 'capture PP and retailers, which creates issues for enforcement under the PP and Food Acts.	The comment is broadly framed. We need further instructions about what the enforcement issues are, and what the problems with health legislation are, before commenting. To use Standard 4.2.1 as an example (seafood), 'Seafood business' is defined to mean: 'a business, enterprise or activity that involves the primary production of seafood intended for sale'. We think the definition of 'primary production of seafood' (see clause 2) clearly captures a business that is a grower or fisher. More specific instructions are needed on what is required by these Standards. Note also the comments at item 136 of this table about identifying a natural person as well as a 'seafood business' (corporate body) for the purpose of enforcing the requirements against individuals.

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Item	**Agency**	**Issue**	**OLDP comments/questions**
167	[redacted]	Definition of 'ready to eat' differs in Standard 3.2.2 and 3.3.1 and is inconsistent or absent in PP Standard in Chapter 4.	Best drafting practice is to define a single term to have a single meaning throughout an instrument. 'ready-to-eat meat' is defined in Standard 4.2.3 'ready-to-eat poultry meat' is yet to be defined for Standard 4.2.2 (reserved) It's not clear what the exact issue is. We don't think it is inappropriate to define 'ready-to-eat meat' as well as 'ready to eat' but if 'ready to eat' (food) is defined for the whole Code, it may be better if other definitions about 'ready to eat' are consistent with it (ready to eat meat is in fact ready to eat food as well). However, definitions apply unless a contrary intention appears within the context.
168	[redacted]	Problems with the definition of 'low care aged care establishments'. 'lack of clarity in the application of Std 3.3.1 to retirement villages'	1. The definition of 'low care aged establishments' ('Establishments where aged persons live independently but on-call assistance, including the provision of meals, is provided if needed') is broadly framed. (What is 'establishment', 'aged' and living 'independently? How is it determined whether on-call assistance is provided?) 2. Consider how concepts in the Code tie in with care concepts in the Aged Care Principles made under the *Aged Care Act 1997.* Eg, is the phrase 'low care aged establishment' consistent with the meaning of 'low level of residential care' in the *Classification Principles 1997* 3. The comment is that the term 'low care aged establishment' is not consistent with the intent of the Standard and mentions an approach that applies the Standard to retirement villages accredited to provide low level residential care under a Cth Act. That is a matter of policy but there is certainly nothing to indicate that approach (or any other intention presently inconsistent with the definition) on the face of the Standard. If greater particularity needs to be given to types of establishments included in the scope of the Standard, the Standard needs to provide for it.

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Item	**Agency**	**Issue**	**OLDP comments/questions**
169	[redacted]	Standard 1.6.1. Prosciutto is both a fermented and a cured meat. Which microbiological standard applies? Include definition of 'ready to eat meats by process'	1. See our comments at item 61 of this table. 2. The phrases referring to meat in the Schedule to Standard 1.6.1 are: a) 'packaged cooked cured/salted meat' (this should be redrafted. Does 'cured/salted' mean both cured and salted, either cured or salted, or cured and maybe salted? See our comments in item 61 of this table. b) 'packaged heat treated meat paste and packaged heat treated pate' ; and [we would ask whether 'heat treated' needs to be explained] c) 'all comminuted fermented meat which has not been cooked during the production process'. The Standards that most directly deal with meat are (I've not necessarily found all of them): • Standard 1.6.2 (processing requirements) • Standard 2.2.1 (meat and meat products) • Standard 4.2.3 (production and processing standard for meat) 3. Note that 'ready to eat meats' is defined in Standard 4.2.3 for the purposes of Division 2 of that Standard. As currently drafted, it's not suitable for Standard 1.6.1 because it includes cooked or uncooked fermented meat and pate. Clause 5 of Standard 4.2.3 applies requirements to 'uncooked comminuted fermented meat'. This covers one of the categories (see (c) above) in Standard 1.6.1. Clause 8 is Standard 1.6.2 describes what 'heat treated' means for 'fermented comminuted meat'. Is there any need to explain heat treated for the meat paste category? Also, this clause refers to 'fermented comminuted processed meat'. Does it then apply to the category in (c) above that does not refer to 'processed'? 'processed meat' has the meaning it has in the definition in Standard 2.2.1. 4. It is preferable that definitions or concepts about meat should be uniform across the Code and that they are available to all provisions dealing with meat. See paragraphs 22 to 28 of the report about definitions. Having separate concepts about foods for particular Standards should be avoided because it is confusing, in the context particularly of provisions in the Code (such as in Standard 1.6.1) that have general application to the foods. 5. We agree that, for a food that is both cured and fermented (eg, it falls into 2 of the categories in the Schedule), it is quite uncertain which of the microbiological standards applies and this should be clarified in the drafting.

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Item	**Agency**	**Issue**	**OLDP comments/questions**
170	[redacted]	Standard 3.2.2, clauses 7 and 20 don't provide sufficient guidance for small businesses to comply with the requirements	Clause 7 (food processing) 1. There are some prescriptive measures outlined in subclause 7 (3) and 7 (4), but subclauses 7 (1) and 7 (2) are expressed as outcomes (eg, 'take all practicable measures to process only safe and suitable food'). It is clear that outcomes depend for their operation on other material (other standards within industry, guidelines, procedures set up by businesses — none directly enforceable except to the extent they can be used to prove the contravention of the outcomes provision). Legislation expressed as outcomes is more simplified, but relies on a substratum of existing practices in industry and other materials that inform that practice. Compliance with this provision, and its enforcement, is not straightforward and may be difficult. The scope of an outcome needs to be carefully considered (it may, for example, be too broadly expressed to be useful). It is a policy matter how these factors are balanced out. Is it the intention that these outcomes are able to be complied with by a business using its food safety program? Clause 20 (cleaning and sanitising of specific equipment) 2. The comment is that this clause expresses an outcome and is difficult to comply with. It suggests as an example that one alternative to part of 20 (2) (b) is to provide for actual temperatures (instead of the generic reference to applying heat). (Note 20 (2) (b) also talks about applying chemicals). See the comments above at paragraph 1. SA's comment also refers to the possibility of including a 'deemed to comply statement'. I take this to mean a provision similar to that in subclauses 7 (3) or 7 (4) (a requirement is set out and a person/business is also given the option of 'demonstrating' an alternative process.). This seems appropriate if businesses or enforcement agencies have difficulty applying the provision, while allowing that there is more than one method of complying with it.
171	[redacted]	Standard 1.2.1, ambiguity about food packaged in presence of the purchaser, lack of definition of 'package'	See comments relating to this Standard in item 29 in this table. There is a definition of 'package' in Standard 1.1.1 that applies to the Code. See our comments about the definition at item 32 in this table.

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Item	**Agency**	**Issue**	**OLDP comments/questions**
172	[redacted]	Standard 1.2.5, food frozen before use by date and sold after expiry date	There is no ambiguity (in my view) about frozen food as such. The Standard doesn't deal specifically with food that is frozen. The provisions as expressed apply. If a person sells food past its use-by date, the person contravenes clause 3. Note also the effect of clause 6 which provides that 'the label ... must include a statement of any specific storage conditions required to ensure that the food will keep for the specified period indicated in the use-by date or best-before date'. Storage conditions would presumably include freezing, and clause 6 indicates that the use-by date and best-before date needs to take account of this. If this is not the intention, the Standard should make it clear. However, it is a policy issue.
173	[redacted]	Standard 1.2.1, paragraph 2 (1) (c). Meat products in large supermarkets prepared and packaged on-site and displayed elsewhere in the shop without full labelling.	The comment is that this is difficult for enforcement bodies and is also an issue for consumers seeking information from a butcher who is not easily accessible. The latter is a policy matter. It's not clear that meat that is cut up for packaging, is 'made' just because of that process. Consider the definition of 'processed meat' in Standard 2.2.1 that excludes 'boning, slicing, dicing mincing'. It is therefore not clear that paragraph 2 (1)(c) applies to meat prepared in a supermarket to exempt it from the requirement for full labelling under clause 2 of Standard 1.2.1. If this is not the intention, drafting is required to make it clear. Paragraph 2 (1) (c) should be made clearer in terms of what 'made' means in any case (eg, for meat, does it include what a butcher does?). See also our comments at items 31 and 98 in this table.
174	[redacted]	Standards 1.2.4 and 1.3.1, permitted additives are listed in five different schedules to Standard 1.3.1 plus also in Standard 1.2.4.	The comment is that the structure or cross referencing system should be improved. We agree and set out some ideas below: <u>Standard 1.3.1</u> 1. See our comments about Schedule 1 to Standard 1.3.1 in item 42 of this table. We agree the Schedule should be substantially restructured to improve its readability. 2. It doesn't seem possible to remove or to consolidate the different Schedules listing additives. There are general rules about how they operate (eg, Schedule 4 colours to a particular max level etc). You could consider placing the shorter lists, along with their operative provisions (currently in bold italics in item 0 of Schedule 1) within a clause in the Standard (eg, not Schedule 2 which is quite lengthy). It would then be an easy thing for an item in the table to cross refer to the clause. 3. As mentioned, we think all the operative rules should be taken out of Schedule 1. In general Schedule 1 needs to be simplified. As well as listing permitted food additives for food types, it includes rules about other additives listed in Schedules 2,3 and 4.

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			4. We've mentioned already we disagree: - with the formulation that uses the asterisk to apply rules (item X in this table) - with the general prohibition plus exemptions formulation, eg 'Additives in Schedules ...must not be added to .. unless expressly permitted' 5. The following phrase in bold italics should be removed from item 0 in the table and put in a note: 'For an explanation and examples of the different food additive classifications in Schedule 1, please refer to the user guide to Standard 1.3.1 – Food Additives'. It's very strange that a statement providing information is listed in the same way that the rules are. 6. We think Schedule 5 could be moved into the Standard. If the Code is restructured as suggested in paragraphs 52 to 57 of the audit report, it may be preferable to move some material away from the Schedule form to keep it nearer to its operative provisions. The arguments in favour of this for Schedule 5 are that it is not very lengthy (only 1 page) and the material in it is conceptually integral to the legislation. Additives are described as classes and their permitted functions set out. Standard 1.2.4 7. Food additive permitted names in alphabetical order, and numbers in numerical order, are listed in Parts 1 and 2 of Schedule 2 to this Standard. It is true that both Standard 1.3.1 and Standard 1.2.4 deal with additives and list additives. Standard 1.3.1 deals with permissions to add additives, and the part of Standard 1.2.4 that is about additives has rules about declaring additives on labels. The Standards do different things but are related by subject matter. It may be possible to organise the information in a Schedule so that the operative clauses in Standards 1.2.4 and 1.3.1 both refer to the one Schedule, but that could be a major undertaking. If the Standards were consolidated, and all the Schedules dealing with additives placed close to each other, it would be easier for a reader to deal with the information. The Standards should at least include notes that have cross references to the other standard.
175	[redacted]	Standard 1.2.4	We note that paragraph 8(4) is expressed: 'Where a food additive is capable of being classified in more than one class, the most appropriate class name must be used.' Although it can be inferred, the provision doesn't say what is the more appropriate class name. What is probably meant is that it is the one that explains what the additive was added to do, eg, as a 'flavour enhancer' rather than a 'colour', however, it is better if the provision states this is the intention.

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176	[redacted]	Standard 1.2.8, clause 15 and subclause 5 (1) — whether a nil reading of lactose or galactose means that no values need be listed, or whether they should be recorded on the label with a nil reading	Subclause 15 (2) provides that: 'A claim to the effect that a food is lactose free must not be made unless the food contains no detectable lactose.' Subclause 15 (4) provides that: 'Where a claim is made in relation to the lactose content of a food, particulars of the lactose and galactose content of the food must be provided in accordance with subsclause 5 (1).' A claim that a food is lactose free is still a claim. Paragraph 5 (1) (g) provides that a nutrition information panel must include: 'the name and average quantity of any other nutrient or biologically active substance in respect of which a nutrition claim is made, expressed in grams, milligrams or micrograms or other units as appropriate, that is in a service of the food' If there is no quantity of the thing in the food, it doesn't seem that not stating lactose in the NIP would contravene paragraph (g). However it's not entirely clear what the intention is and the provisions should be drafted to make the meaning more certain.