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

Supporting document 3

Response to submissions (1st Call for submissions) – Proposal P1025

Code Revision

Section in first draft	*Comment*	*FSANZ response*	*Stakeholder*
Chapter 1 Part 1 Preliminary			
Section 1.01	Notes 1 and 2 under Chapter 1 Division 2 provide a more comprehensive overview of the status of the Food Standards Code and should be relocated here. Current Note 1 should be retained, but Note 2 might be replaced or incorporated into the relocated notes.	Presumably, the submitter was referring to notes that were under either Chapter 1 Part 2 Division 1 ('food') or Chapter 1 Part 2 Division 2 (Basic requirements). There were no notes under Chapter 1 Division 2. The first set of notes ('food') are not repeated in the draft. The second set appear under the heading for Standard 1.1.1 Part 1 Division 4.	AFGC
Section 1.02	See above comments in relation to implementation. Given the time for national and international businesses to identify and resolve documentation issues, including with foreign regulators where necessary, commencement 2 years after gazettal is proposed.	A schedule for implementation is to be determined. It is unlikely that the revised Code will be considered by the COAG Legislative Forum on Food Regulation in January 2015 and, if approved, notified in February 2015. The revision would commence on 1 September 2016.	AFGC
Section 1.03	See above comments in relation to the Code structure. This provision will need to be amended to reflect any change to the structure of the proposed Code. Paragraph (a) might better refer to – Interpretation and application provisions; food labelling requirements; substances that, either generally or in particular substances, can or cannot be added to or used as food; and specifications relating to identity, purity, microbiological status and other matters of general application. Paragraph (e) should simply refer to transitional issues.	The provision is restructured as section 1.1.1-2 (Structure of the Code)	AFGC
Division 2 Interpretation			
Section 1.04	The AFGC view is that this clause should either be omitted or be replaced by a provision to the effect that the Code be interpreted according to the laws of the jurisdiction in which it is being applied. Either way, the effect would be that the Code would be interpreted in the same manner as any other	FSANZ is satisfied that the correct legal position is that Commonwealth law applies to the interpretation of a Commonwealth legislative instrument, including when requirements of that instrument are being enforced under state or territory law.	AFGC

Section in first draft	*Comment*	*FSANZ response*	*Stakeholder*
	statutory instrument, in accordance with the Acts Interpretation legislation of the relevant jurisdiction. This outcome aligns with the Nutricia decision and reflects the NZ position as stated in the current clause. AFGC appreciates that this raises some potential for inconsistency between jurisdictions due to minor differences in Interpretation legislation and in the various application Acts.		
	1. The position that the Code should be interpreted under the Commonwealth Acts Interpretation Act 1901 had previously been rejected by Her Honour Justice Simpson in the Nutricia case (Supreme Court of NSW - 74 NSWLR 148). It was Her Honour's view that in NSW the Code should be interpreted by NSW interpretation law. This was because the Code was given force of law by a NSW Act (Food Act of NSW) and the prosecution was brought under NSW law and was governed by the rules of evidence and interpretation of NSW law. This remains persuasive. 2. Where criminal offences under a State law result in convictions, fines and possible imprisonment, an accused person will ordinarily be entitled to the benefit of interpretation under that State law as opposed to a potentially harsher interpretation (if one exists) under Commonwealth law. 3. If a State agency is considering a particular prosecution and its prospect of success, uncertainty arises if the agency is required to apply different laws of interpretation to different terms ; the applicable State Interpretation Act for the basic concepts of "food" and "sell" and the Commonwealth Acts Interpretation Act 1901 for other terms in the Code: For example see S1.16. 4. The option of each jurisdiction amending its application Act to provide that the Commonwealth interpretation law shall apply to the Code would provide greater legal certainty in the long term. (See, for example, the approach adopted in the NSW Fair Trading Act 1987. Section 31of that Act provides for the application of Commonwealth interpretation law to the interpretation of the Australian Consumer Law (NSW), as it applies in NSW.	The conclusion of the New South Wales Supreme Court is not accepted as an accurate statement of the law. FSANZ considers that the matter should be put beyond doubt. FSANZ can do that only through variation of the Code.	NSWFA
	The Code has not been adopted into the laws of Queensland, but has been implemented by establishing offences in the Queensland Food Act 2006 for non-compliance with the Code and for selling food that does not comply with a requirement of the Code. Specifying in the Code that the Commonwealth Acts Interpretation Act 1901 applies will provide some clarity on the intended interpretation of the Code. However, it will not override the application of the Queensland Acts Interpretation Act 1954 in relation to offences related to the Code under the Queensland Food Act 2006. While none of the options identified in the Call for	Section 1.1.1-3 provides that the Commonwealth interpretation law applies to the interpretation of the Code. Subsection 1.1.2-2(2) provides that terms that are defined in application Acts have the same meaning in the Code, unless a contrary intention is apparent.	Queensland Health

Section in first draft	*Comment*	*FSANZ response*	*Stakeholder*
	Submissions report resolve this issue, it is desirable to provide some certainty in the drafting of the Code. Option 1 and the proposed drafting in 1.04 is probably the most practical option. It is agreed that Option 1, to provide in the Code that certain words have the meaning given to them in application Acts, is preferable. Terms such as 'food', 'sell', 'food business', 'handling' and 'manufacture' are already defined in the Queensland Food Act 2006. If definitions were provided in the Code, as in Option 3, this would create a conflict. Option 2 would require amendment of the Queensland Food Act 2006 and is not supported because a number of sections in the Queensland Food Act 2006depend on these definitions and even subtle changes could have unintended consequences in other parts of the Queensland Food Act 2006. If Option 2 were pursued, the Model Food Provisions would need to be reviewed with respect to the changes and States and Territories would need to agree to implement the revised Model Food Provisions.		
Section 1.05	The language "For the Code" seems inconsistent with other usage, where "In this Code" is preferred.	The usage was in accordance with Commonwealth legislative drafting practice.	AFGC
Section 1.06	Subclause (1) seeks to apply FSANZ Act definitions to terms used in the Code. In fact, only 2 of the definitions in the FSANZ seem to have relevant use in the Code. "Agvet Code" is used once and "Authority" (as in FSANZ) is used twice in relation to health claims self-substantiation. Both cases could be easily drafted in the Code itself without needing to use incorporation by reference. The remaining FSANZ Act definitions are more related to the process of developing standards rather than enforcing them.	Subclause (1) is repeated as subsection 1.1.2-2(1).	AFGC
	There would be merit, though, in expressly incorporating application Act definitions. This again is no more than the application of normal rules of statutory interpretation, but given that the Code is drafted by a Commonwealth entity, an express adoption of application Act definitions may have merit. The current provisions relating to the definitions of "food" and "sell" could then be removed, with the relevant notes moved to this subclause. The definition of "advertisement" also could be usefully quoted.	References to the definitions of 'food ' and 'sell' are included in subsection 1.1.2(3), with shorter editorial notes.	
	"... unless the contrary intention appears". There should be no case within the Code where it contradicts itself – especially as all definitions are now being brought into the one listing. Presumably this relates to the suggestion that there are some terms which have different definitions in various parts of the Code. If this is the case, these should be highlighted so that recommendations for resolution can be sought.	The proposition that there should be no case where a different interpretation applies is not accepted.	Poynton
	Note the effect within the definitions of the phrase "used as a", before a number of definitions. This connotes "intent" to some degree – does this remain consistent with absolute liability offences?	The prohibition of uses rather than identified substances does have an element of intention. This is not a novel element and it is considered that the element is sufficiently objective not to conflict with the offence provisions. The current provisions about food additives and processing aids each rely on the relevant substance being added 'intentionally'. In relation to the question about absolute liability offences it can be responded that the	NSWFA

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		offence provision has not changed. The content of the requirement is modified to make the purpose of addition explicit.	
	SA generally supports providing definitions at the front of the Code. However, the complete definition should be provided not just a reference number that directs the reader to another part of the Code. Lack of clarity around definitions can cause problems from an enforcement perspective. The use of editorial notes or providing guidance documents would assist in understanding the definitions. Where the Code is to be read as a stand-alone document, there would be no awareness by industry and retailers that a term may be slightly different under State legislation and could therefore inadvertently be misapplied by industry. Consideration should therefore be given to using the Application Acts wherever possible for example the definition of sell (refer to comments in the table below).The Code classifies food as an ingredient, food additive, processing aid, nutritive substance, novel food or genetically modified food, food component, flavouring, and food product. Food within each category may be assessed differently but there is often significant interface between groups. A guidance document providing examples of substances that fall within the category would be useful to understand the differences and overlaps. This would be an important resource for enforcement officers. Consideration needs to be given to how different food categories are defined and how they interface so that clear, agreed decisions are made regarding the category and assessment path to be used.	The definition provisions have been reorganised as sections 1.1.2-2 (Definitions—general) and 1.1.2-3 (Definitions—particular foods).	SAGOV
	The inclusion of the dictionary of definitions in the Code is supported. Generally it is desirable for single definitions of terms to be used to avoid confusion. It is noted the dictionary could be more comprehensive. <u>It would be helpful if the following terms were defined: 'final food' and 'delivered meal organisation.'</u>	Although a definition of final food might assist, the proposed uses of 'food for sale and of the term 'the processed food' avoid the need to use that term. The nature of 'the processed food' is clear from the context in which the term is used. Providing a definition of 'delivered meal organisation' is considered to be beyond scope for P1025.	Queensland Health
Section 1.07	Subclause (2)(a) and (d) might be better simply stating that vitamin A be calculated as retinol equivalents, and vitamin E be calculated as alpha-tocopheryl equivalents. Conversion factors are matters of scientific fact that do not require regulation (the urban legend is that Texan regulators tried to regulate pi as being 3).	Conversion factors are not a matter of scientific fact. They are a matter of debate within the scientific community	AFGC
	The problem otherwise is highlighted in Schedule S1.04 which, as a regulation, directs the reader to "see the Note" where notes are intended to NOT be legislative in character.	Agree. The provision is revised in Table S1-5.	
	Subclause 2(b) should perhaps simply exclude niacin provided by the conversion of tryptophan. This avoids the undefined concept of "pre-formed" niacin.	Agree. Paragraph 1.1.2.-14(b) provides that for niacin, the niacin provide by conversion of tryptophan is excluded.	
	Subclause 2(c) is incorrect. It should state that vitamin C be calculated as the sum of L-ascorbic acid and dehydroascorbic acid equivalents. As currently drafted, the provision might exclude vitamin C added in other permitted forms.	Vitamin C is calculated by adding the amounts of L-ascorbic acid and dehydroascorbic acid—which are equivalent sources of vitamin C. No other forms of vitamin C, or the metal component of a vitamin C salt, are to be included in the calculation. It is the molecular weight of L-ascorbic acid and the dehydroascorbic acid anion that is used in the calculation. The cation, which is of variable molecular weight, is ignored. The method of expression does not	

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		limit permitted forms. Paragraph 1.1.1.-14(c) provides that vitamin C is calculated by adding the amounts of L-ascorbic acid and dehydroascorbic acid.	
	Sections S1.03 and S1.04 in Schedule 1 are very small. S1.03 contains the conversion factors for carotenoid forms of vitamin A for the calculation of retinol equivalents and has only 4 entries. S1.04 contains conversion factors for Vitamin E forms for the calculation of retinol equivalents has 7 entries. These small tables would be far more useful to have in the main body of the Code in subsection 1.07(2).	These tables remain in the Schedules. However, schedules are now more directly related to the text of standards.	NZFGC
Section 1.08	This remains a bizarrely complicated and over regulated provision considering it exists as an exemption from labelling. This complexity and nano-regulation creates its own problems. For example, it is unclear whether, in the definition of "same day establishments for chemotherapy and renal dialysis services", there has been a change to apply the words "that provides those services" in paragraph (d) of the current definition (the Table to clause 8 of Standard 1.2.1) to paragraphs (a)-(c) as well. If so, such a change may make sense, it is nonetheless a substantive change, but in a truer sense, why does it matter for the purposes of food labelling?	It is beyond the scope of P1025 to review the list of establishments to which the exemption applies.	AFGC
	This section is drawn from subclause 8(1) of Standard 1.2.1 and the Table to clause 8. The revision converts the table to two lists and provides descriptions of the various institutions in what appear to be definitions. The descriptions should be preceded by a subsection heading. If they are definitions, they should be signposted in section 1.06. There is no impact from the revision.	Section 1.08 is repeated in section 1.1.2-7. It is not in section 1.1.2-2, as it is a long definition, but is signposted in that section.	NZFGC
Section 1.10:	While the proposed provisions mirror the current ones, the list in the Schedule could likely be pruned quite significantly, as some terms are specified in the National Measurement Act or as SI units, while others do not seem to be actually used in the Code. There are some (such as using "mcg" for micrograms) that will need to be retained.	This suggestion is considered to be beyond scope for P1025.	AFGC
Section 1.11	While the proposed provisions mirror the current ones, if read strictly it requires both food manufacturers and regulators to assess a food according to each one of the 3 methods set out in subclause (2), and then make a separate determination as to which of the three "best represents" the values in the food as conceived in subclause (1). This is a strange regulatory policy when any 1 of the three methods in subclause (2) should suffice, and for practical purposes it is unlikely that any stakeholder would actually calculate all 3 possibilities. Subclause (1) might refer to "... using any of the methods in subsection (2) taking into account: ...".	FSANZ does not agree with the AFGC interpretation. The current and draft provisions require a manufacturer to determine which method is most appropriate ('best represents') having regard to the variability factors and then to apply that method to determine the value. Only one calculation is required. However, the provision is modified in section 1.1.1-7 to address the uncertainty indicated by the submitter's comment.	AFGC
	There is a need for further clarity regarding the definition of 'average quantity' in relation to the nutrition content of a food/substance. It is currently unclear whether this definition is referring to the average value of a series of analysed values of a particular nutrient or the average range of a series of values. DAA recommends that this definition be clarified to assist manufacturers to comply with requirements.	This issue is outside the scope of P1025.	DAA
	The Code requires the 'average quantity' of a variety of substances to be listed	Agree	Poynton (Private)

Section in first draft	*Comment*	*FSANZ response*	*Stakeholder*
	in the nutrition information about a food product, for example sodium, potassium, fatty acids, amino acids and vitamins and minerals. It is preferable that the examples should refer to the components which are in all Nutrition Panels such as protein, total fat and sodium as these are in all Nutrition Panels. There are limits to the amounts of vitamins and some minerals which can be declared in Nutrition Panels and therefore these are not necessarily average values.		
	This section is drawn from clause 2 in Standard 1.1.1. 'Producer' is added as an alternative to the manufacturer undertaking the 'average quantity' calculations except that this has not been applied to paragraph 1.11(2)(c). 'Manufacturer' needs to be added this paragraph.	Agree. Subsection 1.1.1-6(2) refers to 'manufacturer or producer'.	NZFGC Heinz
	Subsections 1.11(1) and (2) refer to the calculation of average quantity of a substance in a food. However, subsection 1.11(3) concerning a reference in the Code to the 'average quantity' of a 'substance' where no quantity is specified is taken to mean the 'average quantity' of the substance in a 'food product'. This seems to assume that the only time no quantity is specified is in the final food. This is not always the case. It is therefore limiting. It is suggested that subsection 1.11(3) might cover both 'food' and 'food product' as the case may be.	Section 1.1.1-6 refers to 'food'—the broadest category.	
Section 1.12	The title to this clause is not accurately descriptive of its contents. The provision allowing modification of (non-warning) statements is important (eg to overcome minor differences in the presentation of NIPs, such as including serving size and serves per pack on the one line), but it is not clear from the heading that the provision may be found in this clause. The title might better be along the lines "Modification of mandatory statements".	Agree. Section 1.1.1-8 is now headed 'Compliance with requirements for mandatory statements'.	AFGC NZMPI Heinz
	Subclause (1) is a new provision that might change some labels. While AFGC supports it in principle, it is unable to state whether or not current labels make modifications to warning statements. This might be specifically drawn to stakeholders attention in the next round of consultations to determine whether this new provision in actual practice will require any label changes.	The requirement that a warning statement use the prescribed text is currently in the definition of 'warning statement' in Standard 1.1.1. FSANZ is unaware of any relevant product that does not use the mandated wording.	
	This section reflects in part clause 12 in Standard 1.1.1 but also, in subsection 1.12(1) the expectation in relation to mandatory warnings. There is only one mandatory warning and that concerns royal jelly where the precise words are set out (clause 3 in Standard 1.2.3). The declarations relating to allergens would, for example, be unaffected. The revision removes doubt about the requirements associated with warnings and the flexibility to modify other information.	Agree.	NZFGC
Division 3 Application of Code and effect of variations			
Section 1.13	Section 1.13 Clauses (1) and (2) are not matters that can be included in a food standard. The apparent intent is to clarify the role of the various State and Territory and New Zealand Foods Acts, the Imported Food Control Act and equivalent NZ legislation. While such effect can usefully be described by way	Partially agree. A standard can relate to the application of standards: paragraph 16(1)(o) FSANZ Act. Subclauses 1.13(2) and (3) are restated as notes in new section 1.1.1-3.	AFGC

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	of a note, it is not for the Code to specify, as a subordinate instrument, its own scope of operations. In fact, it has none of its own: it has effect only insofar as enabling legislation grants it. To illustrate this, should the Imported Food Control Act be repealed, clause 1(b) would be incorrect and ultra vires: the Code would NOT, in fact, apply to imported food coming into Australia. These subclauses should be omitted and subclause (4) reworded to the effect "This Code does not apply ....".	The illustration is misguided. If the Imported Food Control Act was repealed there would be no offence provision for which the Code could be an applicable standard. That does not, of itself, make the Code ultra vires. The Coe would simply be without any effect.	
S1.13(2)	lists all the provisions which do not apply in New Zealand. We have the following minor comments: In 1.13(2)(f), both the subsections referred to are not applicable in New Zealand; is this captured by 'or' or should it be 'and'? We suggest that 1.13(2)(f) should come after (g), as it relates to a later part of Chapter 2;	See Note 1 to section 1.1.1—3.	NZMPI
S1.14	This section is based on subclause 1(2) in Standard 1.1.1 and contains a new subsection. Subsection 1.14(1) refers to the impact on food products before and after variations and that the default period for compliance is one year after the variation. The problem is that now that 'food product' is defined, this means there is no clarity around the effect of variations on food that is not food products such as ingredients. The subsection should refer to 'food' and 'food products' Subsection 1.14(2) is also limited to 'food products' and should more properly refer to 'food' as well.	Section 1.1.1-17 is expressed to apply to food items. It applies to all food for sale, including foods that are sold as for use as ingredients.	NZFGC
	This clause relates to stock in trade – it would be helpful to have this phrase in the title or in brackets after the title, to aid stakeholders understanding of the Code. This section refers to 'food product', but in our view should refer to 'food', or be drafted in such as way as to capture 'food products' and 'ingredients'. Suppliers of certain ingredients (manufactured prior to a variation commencing) should also be able to use this provision (e.g. a food additive might be compliant prior to a variation commencing, but not after, but the ingredient containing that food additive should still be able to be legally sold for the 12 month stock in trade period). The ingredient is not a 'food product', as the sale is probably to a food manufacturer, not to a consumer. Further comments on this aspect are provided later in our submission.	The provision does not prohibit the sale of a food that is intended to be used as an ingredient, whether to a manufacturer or a consumer. There is no basis for limiting the application of the current term 'food product' to sales to consumers.	NZMPI
1.15	This provision may be omitted if the suggestion at 1.06 above, to adopt the application Act definitions, is accepted. The note might be usefully retained and moved to 1.06(1).	The Division titled 'Basic Concepts' is not repeated in the revision.	AFGC
	The redrafting appears to embed inconsistency between jurisdictions with regard to the definition of 'food', which is a poor outcome for both food producers and consumers. While we recognise that under current arrangements the Food Standards Code cannot enforce consistency on jurisdictions, at the least the Code should stay silent rather than explicitly	Noted. FSANZ does not consider that it would be helpful to apply one definition of food for interpretation of the Code and another for offence provisions. For a contrary view, see the comments of South Australia and Queensland Health.	Australian Dairy Industry Council Inc. and Dairy Australia

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	supporting inconsistency between jurisdictions by reference to it.		
	More consideration is required in relation to the concepts of "ingredient", "food additive", "component", "nutrient", "processing aid" and "nutritive substance". The relationship between these concepts is far from clear in the proposed Code, and "ingredient" in particular appears to be far too broad in scope and give rise to serious implications for composition and labelling.	Noted. FSANZ dos not consider that the revised terms expand scope beyond the intended operation of the relevant provisions or will give rise to 'serious implications' for composition or labelling.	Australian Beverage Council
	Given the Code's status as subordinate legislation in New Zealand law, there is no need to assert the primacy of application Acts within the Code's provisions. We acknowledge that this may not be the case for all Australian jurisdictions, however the complicated hierarchy established in DRM 1.15-1.20 appears to go further than necessary in ensuring that terms will be consistently interpreted. It is therefore recommended that this section of the Draft Code be reviewed for clarity and an alternative method for ensuring consistency between the Code and state/territory legislation is devised.	The Code has no formal status in New Zealand law. The Code is not subordinate law in New Zealand. Food standards made by the New Zealand minister, under the *Food Act 1981,* are subordinate law in that country.	NZ Winegrowers
	Is Note 1 part of the Code? Should the full name of the particular application Act be identified, as there are many possible application Acts (i.e. see Division 2 – Basic Requirements (3))? The full description of the Model Food Provisions should be given. Do the Model Food Provisions have a legal basis? Otherwise remove the second paragraph of Note 1.	Notes are not a legally binding part of the Code.	FTAA
	See our comments above in relation to the Call for Submissions paper, paragraph 3.2.21, about the potential breadth of this definition.		NZMPI
	food – is to have the "same meaning as in the application act.' This demonstrates some confusion, in the sense that the Code says that the meaning of food will take the meaning it has in the application Act. If that is the case, how does one apply the Commonwealth Acts Interpretation Act (AIA) to it where the application Act is in turn interpreted by its local Act? For example, what happens to the terms "ingredient" and "additive" in the application Act meaning? Are they to take on their respective definitions under the Code, or is it required to first ascertain a meaning derived from the application act(s)? Does the AIA apply to those terms, or does the application Act? In other words, does the Code call for simply a transplanting of the "meaning of food" into the Code, without any determinative input or interpretative assistance from the local interpretation legislation? In this case so we have to rely on the statutory interpretation principle "by necessary implication"?	The terms "ingredient" and "additive" are not defined in the application Acts. The Acts Interpretation Act (Cwth) contains no provisions that would impinge on the meaning that 'food' will have under the application Acts and local interpretation laws.	NSWFA
	SA Health supports Option 2: to provide, in the Code, that the definition in an application Act should apply. This approach operates to apply the relevant local law to any enforcement action and avoids the possibility of doubt in enforcement action about which definition should apply.	Agree.	SAGOV
	Page 16 of the Call for Submissions report discusses three options in relation	Noted	Queensland

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	to the definition of 'food'. Any enforcement action by The Queensland Department of Health would be based on the definition of food in the Queensland Food Act 2006. It appears appropriate, as proposed in Option 2 and shown in running number 1.15 to state in the Code 'food' has the meaning as in the application Act. It needs to be noted that there may be more than one 'application Act' in a jurisdiction. For example, the Queensland Food Act 2006 has implemented the definition of food in the Model Food Provisions, while the Queensland Food Production (Safety) Act 2000 has a different definition of food - "food means a substance ordinarily consumed, or intended for consumption, by humans or animals." Those enforcement agencies that enforce Chapter 4 – Primary Production and Processing Standards, may have different definitions to the Model Food Provisions because their scope is different. From the perspective of the Queensland Department of Health, the Code needs to provide clarity that in Queensland, the definition of food in the Queensland Food Act 2006 relates to the application of Chapters 1, 2 and 3 of the Code. However, as mentioned above in relation to editorial notes, it is potentially problematic to include in the Code the definition of 'food' shown in the Model Food Provisions in case there is a difference between it and the relevant application Act, and as such is not supported. Should there be a need to change the definition of food, to ensure national consistency, it may be necessary to go through a COAG agreement process.		Health
Section 1.16	This is a new provision aimed, it is assumed, at clarifying the difference between "food" in a generic sense and an item of food that is actually supplied. Of itself, such a distinction is appreciated and raises no concerns, provided it is used consistently and correctly throughout the remainder of the Code.	The term 'food product' in not used in the revision. The term is replaced substantially by 'food item', which applies to any food that is for sale. The type of sale is not an element in 'food item'. As with 'food product' the term will apply to foods that are intended for sale directly to a consumer and also to foods that are sold earlier in the supply chain, eg for use as an ingredient, although this is not, and need not be, stated as an element of the definition.	AFGC
	The term "consumer" requires a definition. Does consumer include a retailer and/or a wholesaler or only a person who intends for the food to be ingested after purchase, etc? Paragraph (b) appears to be too complex. "Traditional Process" requires a definition. Does "sold" also include "food intended for sale" (see Food Act)? Also "offered for sale" or "in possession for sale" are included in various associated Acts, etc. "Sold" appears to be too narrow and reduces the effect of the application of requirements. New Zealand has a much broader definition of "sell' – including "when any food is sold or offered or exposed for sale". From a food manufacturer perspective what would constitute "a representation that the food is suitable for human consumption"?	Yes. The definition of 'sell' in the Model Food Provisions is broad.	FTAA
	This section is new and establishes the concept of food product as being the product 'sold to a consumer'. The intention appears to be to clarify the stage		Infant Nutrition Council (INC)

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	of production of food to which a provision applies. Previously and still in sections 1.23(5), 1.101(9), 1.113, 1.114, 1.115(3), 1.124(5) and 2.111(1)(a), 'final food product' is referred to. The New Zealand Food Act 1981 does not define 'food product' so there is now a disjoint between the Code and the Food Act 1981. It is also the case that in places, the term 'final food' is critical for manufacturers and at times this term has not been used in favour of 'food product'. Of more concern is the application of many of the labelling provisions to 'food product' only. While INC is a strong advocate of less and better regulation, in this case the unintended consequence is to exempt foods that are not for sale to the consumer from labelling. For manufacturers, there is a need for labelling of inputs for both traceability and contractual purposes. It is therefore suggested that this definition not be used and that either 'food' or 'final food' be used. Alternatively, if the term 'food product' is retained, it is suggested that every occurrence be carefully reconsidered in light of manufacturer needs as well as application for 'sale to a consumer'.	The term 'final food' which is used without definition in the current Code is replaced by 'the processed food' or 'food item', as considered appropriate. The labelling provisions establish labelling requirements for foods for sale only. They do not establish labelling requirements for manufacture.	NZFGC
	In the definition of "food product" in section 1.16, how could the jurisdiction based definitions for "food" and "sell" inter-relate and be reconciled with Commonwealth interpretation law placed on the remaining term "product" and the words in the definition for "food product" itself – "(a)….sold to a consumer on the basis of a representation that it is suitable for human consumption"?		NSWFA
	The draft Code distinguishes between food, food product, ingredient (and also other substances such as food additives, nutritive substances, etc). 'Food product' is food that is sold to a consumer, or is intended to be sold to a consumer. It is also used in the labelling section in the context of sales to caterers, etc. In many cases, the term 'food product' has replaced the word 'food' or ingredient' in the current Code. Consideration will need to be given to the situation where food products can be either 'final foods' as ready to eat by the consumer, or foods that can be used to manufacture other foods (i.e. ingredients/raw materials). Most food products can also be ingredients, as they can be used to make other 'final foods' or 'food products'. Food products that are ingredients still need to comply with some requirements, however as currently drafted, this is not always clear. It is suggested that a cross check of requirements is undertaken, to ensure that the correct requirements apply to 'food', 'food product', and 'ingredient', etc. For example, the lot identification requirements should apply to both ingredients and food products, and section 1.21 has requirements for food products 'on sale', but no similar requirements appear for ingredients 'on sale'. There will be many other requirements to cross check, to ensure food products and ingredients are correctly regulated. Raw materials used to make processed foods (or food products) are not covered by the definition of food product as drafted (and nor should it be),	Following consultation with jurisdictions the revision has been amended to refer to food for sale as the legislative method by which food that is relevant for regulatory purposes is identified.	NZMPI

Section in first draft	*Comment*	*FSANZ response*	*Stakeholder*
	but in the draft Code, some of the sections that use the term 'food product' appear to be designed to regulate the raw material as well as the food product. Further points to note are as follows: • The section refers to 'basic or traditional processes'. Neither of these processes has been defined; and it is noted that this phrase may have been left in from earlier drafts. It may be enough to simply state 'after preparation'. • The concept of 'food product' is used to replace 'final food' (most of the time). The term 'product' is however still used extensively in the draft Code, in addition to 'food product'. In the term 'food product', 'product' is being used in a different sense from 'product' as it is used in the rest of the Code. In 'food product', 'product' is being used in the sense of food for sale, whereas other expressions use 'product' to convey the idea of a new product consisting of one main ingredient mixed with others. One example of the other use is 'wine product', another example is just the use of the term 'product', e.g. in section 2.160 (3) – definition of reduced sodium salt mixture'. We are familiar with the concept of 'wine product', however the introduction of the term 'food product' may create ambiguity or uncertainty for other Code users. • Examples of where the draft Code contains references to 'final food' are as follows: –1.23 (5), 1.101, 1.124 (5) , 2.111. Consideration needs to be given to replacing these references with 'food product', or introducing a new definition for 'final food'. For example, the use of the term 'final food' in 1.124 (5) relates to food additive permissions for the foods listed in S15. The foods listed in S15 may be 'food products' for sale to a consumer, or may be ingredients used in other foods. In this case, it may be too limiting to use the term 'food product'. • We note that Attachment C (issue number 83) provides some clarity on the compositional requirements in the Code, but we are of the view that more clarity is needed. • The draft Code contains a reference to 'retail sales' – see S 2.28 (cow's milk). Could the term 'food product' be used here instead, or is there is an intended difference between the terms? . • 'Retail sales' is also used in the subheadings in section 1.33, however retail sale is not defined. The concept of 'Food product' may need further discussion with FSANZ and jurisdictions.		
	From a drafting perspective, the term 'food product' may make drafting easier. For example, saying 'a food may contain food' could potentially be confusing compared to 'a food product may contain food'. However, a 'food products' could include another 'food product'. The term may also help clarify the point in production that the food is intended to be sold or consumed. That is, distinguish, in effect, a finished product – 'food product' from a 'food'		Queensland Health

Section in first draft	*Comment*	*FSANZ response*	*Stakeholder*
	during processing to make a final food product. However, it may not be essential to use the term by making other modifications to the requirements. Issues may lie with distinguishing a 'food product' from a 'food' [1.15]. The drafter's intention appears to be that the compositional and other requirements of the Code not apply to a 'food', principally because it is not intended for sale. However, the definition of 'sell' in each jurisdiction's application Act is very broad and seems to capture both 'food product' and 'food'. The proposed definition of 'food product' does not adequately describe the concept. The wording in 1.16 "sold to a consumer on the basis of a representation that is suitable for human consumption…" is of particular concern. What is 'a representation'? The term is not defined in the draft Code, nor is it defined in the Commonwealth Acts Interpretation Act. The Macquarie Concise Dictionary (5th Edition) includes 10 different meanings. Is it possible to sell food without a representation and if so does that not make it a food product? Also, food that is sold, such as raw meat, may not include any information in regard to whether it is suitable for human consumption. The term is also similar to (1)(a) of the definition of food in the Model Food Provisions. Application Acts do not include a definition of 'food product'. Since all the offences in application Acts refer to 'food', then if it could possibly be argued that a 'food product' is different to a 'food' the offences and hence application of the Code would be undermined. Therefore, if the term is included in the Code, it will need to be made clear that the definition of 'food' in applications Acts includes 'food product'. If the term 'food product' is used, consideration may need to be given to whether application Acts need to be amended. Issues may lie with the use of the tense 'sold'. The note to 1.16 appears to relate 'sold' equivalent to the definition of 'sell' in s1.20. It is suggested the note could specifically state 'sale' and 'sold' are equivalent, to remove any doubt. Consideration may need to be given to including a definition of 'final food' to distinguish this meaning from 'food product'.		
	SA Health is unclear of the enforcement implications of the proposed definition. The use of the term "food product" has not replaced all references in the Code to "final food" (as highlighted below) which is frequently still used in the proposed drafting. To make interpretation more difficult the term "final food product" is also used in the Code. What is the difference in meaning of "food product" and "final food product"? 1.23 Operation of compositional requirements (5) A compositional requirement for a food applies to the final food irrespective of any permission to add other foods. 1.101 What must be on nutrition information panel Declarations about certain substances (9) If: (a) one or more components (other than organic acids) listed in subsection S11.01(3) of Schedule 11 is present in the final food, Section 1.102 How to express particular matters in nutrition information panel singly or in		SAGOV

Section in first draft	*Comment*	*FSANZ response*	*Stakeholder*
	combination, in an amount of no less than 5 g/100 g; 1.113 Calculating proportion of characterising ingredients where moisture loss occurs If moisture loss occurs in the processing of a food product, the proportion of a characterising ingredient in a food product may be calculated taking into account any such moisture loss, on the basis of the weight of the characterising ingredient in the final food product. 1.114 Calculating proportion of characterising ingredient where proportion is declared in nutrition information panel Unless otherwise specified, where the proportion of a characterising ingredient is declared in a nutrition information panel, the amount declared must be the average quantity of the characterising ingredient present in the final food product.		
	AFGC considers that the inclusion of basic concepts may be useful (especially in light of the struggles faced by the NSW Supreme Court in Nutricia), but such concepts must be clearly delineated and distinguished.		AFGC Fonterra
	The definition of "ingredient" is incorrect as it includes substances that are not intentionally added to a food but which come into contact with the food as it is being processed. This includes dust, hairs and all processing aids. Processing aids are under no conception ingredients of a food even though residues may remain. This definition makes every ingredient into a compound ingredient due to incidental presence, and again this is not a result that clarifies or improves the enforceability of the Code. In its comments above, AFGC recommends the establishment of a group charged with resolving the concerns arising from the proposed draft Code in P1025. Coming to a correct definition of "ingredient" and "additive" and "processing aid" is probably one of the most important initial tasks for such a group.	No definition of ingredient was provided in the draft. This interpretation, of the provision providing an example of when a food could be an ingredient of another food, would be possible only if dust or hair is a food. Substances used as processing aids are food. However, substances that might be used as a processing aid that come into contact with a food unintentionally in processing can not be said to have been used for a technological purpose and therefore are not used as processing aids. In such circumstances they are substances that are foreign to the nature of the principal food. They are not ingredients, as the concept of ingredient implies and an element of intended inclusion in a food.	
Section 1.17	Ingredient, proposed code is much more prescriptive, but appears to have a similar intent to existing. It appears to include scenarios covered by the definition of processing aid which is confusing (e.g. 'flour dusted on bread dough' if merely used as a release agent is a processing aid, but it is being listed as an example of an ingredient!)	Section 1.17 did not define the term *ingredient* in the manner suggested. Its sole purpose was to provide examples to remove doubt about whether a food is or is not an ingredient in some circumstances. The section did not purport to define all of the foods or all of the substances that might be ingredients. It relates only to foods and said nothing about substances such as hair or atmospheric dust. Foods used as processing aids can be ingredients. They are, however, ingredients that do not need to be declared. If they were not ingredients there would be no need for a provision exempting them from the ingredient declaration requirement.	Sanitarium
	The drafting is cumbersome and is difficult to readily understand. A guidance	The term ingredient is not defined or explained in the revision. Guidance documents should be provided by regulators.	SAGOV

Section in first draft	*Comment*	*FSANZ response*	*Stakeholder*
	document with clear examples may be of better assistance rather than the examples provided as part of the definition. It is not clear how the basic concepts of ingredient and compound fit with the other basic concepts and whether there are enforcement gaps created by these definitions.	In the revision, the term 'ingredient ' is not defined. It will have its usual meaning.	
	(1) (a) (i) - Ingredient. The proposed definition is intended to apply across the draft Code. The wording and examples capture the fact that food additives and processing aids are included in the definition, but we query whether the wording covers the most common meaning of 'ingredient' – i.e. the use of one ingredient to make another food, e.g. flour used to make bread, apples used to make juice, etc. While it's possible to describe flour as being 'processed into' bread, or apples being 'processed into' juice, the introductory phrase of 1.17(1) tends to suggest that the ingredient and the second food are two distinct physical entities existing at the same time. A cross check of the use of the term 'ingredient' is suggested by MPI to ensure that it is being consistently used. We can point out three examples of the use of the term ingredient, which highlight that different interpretations may apply: 1. Section 1.123 heading – food additives are described as 'ingredients' 2. Section 1.123 (2) – the phrase '…..carry-over from a raw material or an ingredient' is used. If raw material and ingredient mean the same thing in this section, it could be clearer in this respect. 3. Section 1.130 (1) is clearly referring to ingredients that are raw materials/foods, and it is probably not intended that one of the 'ingredients' was a processing aid or a food additive	There was no definition of ingredient in the draft. The term has its natural meaning in both the draft and the revision.	NZMPI
	The Allergen Bureau believes that the definition of ingredient is incorrect and must be reviewed by FSANZ to ensure that the status of cross contact allergens and the VITAL process is maintained.	Ingredient was not defined. In the revision, the term 'ingredient ' is not defined. It will have its usual meaning.	Allergen Bureau
	The change in the definition of ingredient now includes processing aids. As an example of how this may impact, filters using filter powder are used to clarify beer prior to packaging. If there is any powder bleed, this would be considered an "ingredient" under the new definition. There are other complications with this new definition including cross contamination and label claims.	This comment demonstrates a basic misunderstanding of both the current regulatory provisions and the proposed revision. First, the current definition of ingredient in the Code is a definition that has a limited application for labelling in Standard 1.2.4. It is quite clear that the definition does not exclude processing aids from the concept of ingredient, as clause 3 specifically excludes processing aids from the labelling requirement. That exclusion would not be required if processing aids were not ingredients. Second, the proposed statement, which is not required in the revision, did no more than provide examples of the circumstances in which a food might be an ingredient. The notion that powder bleed from a filter paper might be an ingredient under the proposed provision is fanciful.	Brewers Assoc. ANZ
	Is clause 1(b) a repetition of clause 1 (a) (ii)?	No.	FTAA

Section in first draft	*Comment*	*FSANZ response*	*Stakeholder*
	In the Example the phrase "or foods used as processing aids" appears contrary as by definition all 4 processing aids are foods and if this phrase means something else then the term "foods used as processing aids" requires definition or clarification. Clause 2 – for clarity and to obviate use of the same term to define itself, change the last word from "ingredients" to "substances".	A processing aid will sometimes be present in a final food, although it will not have a continuing technological purpose. It will be an ingredient, although it will not need to be declared as such. Section 1.131 described what is meant when the phrase 'food used as a processing aid' is used.	
	Does the example following Clause 1(i) would "foods used as processing aids" mean that these foods have to be included in the Ingredient list even if they are processing aids – see Section 1.59 where processing aids do not have to be listed.	No.	
	This section is based on clause 1(1) in Standard 1.2.4 but there is very little in common with the current definitions of 'ingredient' and 'compound ingredient' and the proposed new definitions. The new definitions are excessively broad and will have significant labelling and composition implications. The first issue is with subparagraph 1.17(1)(a)(ii) which states that irrespective of any traces left in a food, a food added to another is an ingredient. This means that all processing aids become ingredients when that is not the current situation. The examples are quite alarming, such that any substance that completely breaks down during processing, even if no trace exists in the final food such as a gas that completely evaporates, becomes an ingredient. As noted, this has significant implications for a substantial part of the food supply. The second issue concerns paragraph 1.17(1)(b) which provides that any food that 'comes in contact with a second food after processing such that traces are left in the second food, the food becomes an ingredient. This is so broad as to have implications for substances that are endemic in the environment becoming 'ingredients' and has potentially significant implications for food manufacture. This concept needs to be reconsidered and recast before the revised Code proceeds.	FSANZ does not consider there is a considerable difference in the provisions and considers that this comment is quite alarmist. The current provision defines an ingredient, for the purpose of Standard 1.2.4 only, as any substance used in the preparation, manufacture or handling of a food. The definition does not apply to Standard 1.2.10, notwithstanding an editorial note that purports to give that effect. This definition is very broad and there is no basis for reading it down to exclude, for example, processing aids. It is noted that the New Zealand Food Act definition of food does not refer explicitly to processing aids, as the Australian definitions do, but there is no basis for reading that definition down in a way that would exclude processing aids. The proposed provision, which applied for the whole Code applied only to foods and did not purport to say whether or not a non-food substance is an ingredient. For such substances the ordinary dictionary would apply. The provision is not required in the revision. This provision would only have had the effect suggested if the 'substances that are endemic in the environment' are foods.	INC
	The concept of component stated here overlaps with that of "nutrient" and "biologically active substance". It seems that "component" is also used elsewhere the Code refers to a sub ingredient (eg see clause 1.21(3)), which is confusing. AFGC view is that "component" should be omitted as a concept in the Code, and the terms sub ingredient or nutrient or biologically active substance used as appropriate.	Removal of the concept of *component* from the Code would be a major change that is outside the scope of P1025. Component is defined in the Code as 'any substance…present in the final food in a primary or modified form.' The revised definition—'a substance that can be identified as a constituent part of the food'—has the same effect.	AFGC
	This section is based on clause 1(1) in Standard 1.2.4 but there is very little in common with the current definitions of 'ingredient' and 'compound ingredient' and the proposed new definitions. The new definitions are	In section 1.1.1-5 'component' is defined in the same terms as in the first consultation draft with an additional qualifier '(as distinct from an ingredient that is used to produce the food)'. The alleged 'new definitions' were not definitions at all. The description of the basic concept of ingredient, as it applied to foods, would have no labelling or compositional implications.	NZFGC

Section in first draft	*Comment*	*FSANZ response*	*Stakeholder*
	excessively broad and will have significant labelling and composition implications. The first issue is with subparagraph 1.17(1)(a)(ii) which states that irrespective of any traces left in a food, a food added to another is an ingredient. This means that all processing aids become ingredients when that is not the current situation. The examples are quite alarming, such that any substance that completely breaks down during processing, even if no trace exists in the final food such as alcohol that completely evaporates becomes an ingredient. As noted, this has significant implications for a substantial part of the food supply.	Processing aids that are added o foods are ingredients. That much is clear from the definition of food in the Australian application Acts and the FSANZ Act. It is less clear in the New Zealand Food Act. Processing aids are ingredients that are not required to be declared in a statement of ingredients. If as suggested, processing aids are not ingredients, the exception would not be necessary. In the example provided, where "no trace exists in the final food", the proposed provision would have had no application as it applied only in the event that 'traces of [the food] are left in the second food'.	
1.17(1)(a)(ii)	The second issue concerns paragraph 1.17(1)(b) which provides that any food that 'comes in contact with a second food after processing such that traces are left in the second food, the food becomes an ingredient. This is so broad as to have implications for substances that are endemic in the environment becoming 'ingredients' and has potentially significant implications for food manufacture. This concept needs to be reconsidered and recast before the revised Code proceeds.	This provision will only have that effect if the 'substances that are endemic in in the environment' are foods.	NZFGC
1.17(1)(b	Is there a real difference between "ingredient" and "component"? The definition needs to demonstrate the difference. The example of Sodium Bicarbonate is a poor choice as Carbon Dioxide is not a component of Sodium Bicarbonate but a by-product after a chemical reaction. If it is a true component of the final food, then should the Ingredient list include "Sodium Bicarbonate" or Carbon Dioxide" plus also listing the salts.	Yes. An ingredient is a substance that is used to make a food. A component is a constituent element of the food, eg protein, fat, cocoa solids. It might be, for example, a product of a heating process or a constituent part of an ingredient. The term component is used for two purposes in the current Code. The first is in relation to GMP. The second is in relation to characterising components. The draft introduces a third purpose, which is to ensure that certain substances cannot be used as ingredients or components. This is necessary because, for example, a nutritive substance will almost never be an ingredient and almost always a component. The term ingredient, in this usage, is perhaps broad enough to include component.	FTAA
Section 1.18	This section is based on the definition of component in clause 2 of Standard 1.1.1. However, the revision appears to be much broader than the current definition. The interpretation of the current definition is that an ingoing substance such as a food additive, or a component of a food for which a claim is made, is a component of the food. The revised definition suggests that any breakdown products become components if they are identifiable. The example is carbon dioxide and salt as breakdown substances of sodium bicarbonate. The problem becomes one of separating breakdown substances from other 'environmental' substances such as substances in the air – oxygen and CO2. In fact they become indistinguishable.	FSANZ does not accept that the interpretation of the current provision is correct. FSANZ considers that the term is used to refer to any substance that can be identified in the food. The term includes food additives that have been used in the processing.	INC and NZFGC
	AFGC appreciates that issues with the meaning of "nutritive substance" lay at the heart of the Nutricia case: that said, there are serious questions whether the Court's difficulties arose more from the failure of regulatory systems and supervision more than any failure of the Code itself	Noted.	AFGC

Section in first draft	*Comment*	*FSANZ response*	*Stakeholder*
	The regulation of "nutritive substances" remains Luddite in philosophy and anti-innovative in operation. AFGC notes that FSANZ Proposal P1024 seeks to review the rationale and policy for regulating such substances, and will make appropriate comment in that regard. The omission of the word "intentionally" from the current definition is understood to be deliberate (intentional?) and given that other parts of the definition refer to the substance being added for a "nutritional purpose", AFGC accepts that intention can be implied from purpose. That said, there is the problem of identifying the purpose for which a substance was added to a food, and so potential legal problems remain even with the definition as amended. So far as P1025 is concerned, it is noteworthy that a lot of effort is taken to convert the regulation of vitamins and mineral addition to regulation concerning nutritive substances, as well as to convert other references to refer instead to "use as an nutritive substance". The concept of regulating "use" is an interesting development that certainly solves the problem of regulating substances that have more than one function in a food (eg tocopherols as both an antioxidant additive and as a vitamin). However, much of this effort may be rendered nugatory by the development in P1024. It may be better to allow the reform of nutritive substances to take place solely within the scope of P1024 rather than splitting the reform between the two proposals.		
1.17	The definition needs greater clarity around its scope. For example, does it capture all ingredients, food additives, etc that are added to food, or only substances arising from the addition of an ingredient, food additive, processing aid, etc (such as the starch in a cereal, or the milk fat in milk)? An example of where the former may apply is subsection 1.21 (4). For this reason, we think that another example should be provided, in addition to the example already included. It is important also that this term is not confused with 'characterising component', and that the term 'component' is consistent between these definitions.	Noted.	NZMPI
1.18	Component, wording is significantly different and might have a different meaning: - Current, 'component means any substance including a food additive used in the preparation of an ingredient and present in the final food in a primary or modified form'. -Proposed, 'component: a component of a food is a substance that can be identified as a constituent part of the food'.	The current definition of component is very broad, ie any substance. The reference to food additives is only a subset of the broad definition.	
	The proposed wording regarding nutritive substances constitutes a notable	Noted.	Australian

Section in first draft	*Comment*	*FSANZ response*	*Stakeholder*
	change, but serves to make the application of this requirement clearer.		Beverage Council
Section 1.19	Meaning of “Not normally” is undefined and needs clarity for enforcement purposes.	“Not normally’ is well accepted terminology in international food regulation. FSANZ has not been able, in this proposal, to develop a term that better describes the intention and notes that the concept of nutritive substance is under review in P1024. It is possible that that proposal will result in provisions regulating the addition of substances for nutritional purposes that do not rely on an understanding of ‘normal use’.	SAGOV
	Drafting “or” should be “and” (2) For subsection (1), the substances are: (a) any substance that is identified in this Code as one that may be used as a nutritive substance; ‘and’ replace with ‘or’ (b) a vitamin or a mineral; ‘and’ replace with ‘or’ (c) any substance (other than an inulin-derived substance) that:	‘and’ is correct, although ‘or’ could also be used.	SAGOV and NZMPI
	Clause (2) (c) could include many other substances such as a flavouring, colour, biologically active substance, etc. used as a nutritive substance. We note that the definition has been restructured. MPI has the following comments: Subsection (2) (c) has introduced concepts in relation to consumers buying of a food product and the use of the substance by consumers. This may have taken on a different meaning, compared to the definition in the Standard 1.1.1 of the Code.	In theory, yes. However, they will only be relevant to this section if they are used to achieve a nutritive purpose.	FTAA NZMPI
	In our view, it is the nature of the substance that needs clear specification. For example, could complex mixtures (that do not have a fixed chemical composition) be regarded as nutritive substances? An example is bovine colostrum, which in MPI’s view may possibly meet the definition of a nutritive substance (under both the current Code definition of a nutritive substance, and the proposed definition). This is because complex mixtures such as colostrum contain a number of bioactive substances that on their own could meet the definition of a nutritive substance, and it is these substances within the complex mixture that are emphasised when they are used in foods.	Complex mixtures could be used as nutritive substances if they are added to a food to achieve a nutritional purpose. The fact that a substance is extracted, refined or synthesised; and is not normally sold as a food product or used as an ingredient by consumers is not a conclusive indication that the substance is a nutritive substance. It is no more than an indication that the substance could be used as a nutritive substance if the substance is added to a food to achieve a nutritional purpose.	
	Paragraph 3.2.11 of the Call for Submission paper states that the revised definition addresses two concerns identified in the Nutricia decision, and goes on to refer to the phrase ‘not normally consumed as a food’, and the operation of the provision in relation to a nutritive substance that is naturally occurring in food. We note that clause 6 (1) (b) of Standard 2.9.1 is removed from the draft Code. This clause has proved problematic, as it can be viewed as ambiguous. We agree that removal of this clause is removing the ambiguity, as section 1.19 states that the substance is ‘used as a nutritive substance’ and subsection 1.21 (5) states that the prohibitions do not apply if the nutritive substance (etc) is naturally occurring. There is now no scope to interpret the Code as permitting substances that are naturally occurring in food ingredients to be selectively added as nutritive substances (unless there is explicit permission). However, in order to definitively provide the clarity needed, we suggest that subsection 1.21 (5) also makes it clear that: If the	The section is unchanged in section 1.1.1-10.	

Section in first draft	*Comment*	*FSANZ response*	*Stakeholder*
	levels of naturally occurring substances are selectively enhanced in a food, or extracted from a food, this exemption no longer applies.		
	This section replaces the definition of 'nutritive substance' in clause 2 of Standard 1.1.1. It is attempting to capture a range of substances that might otherwise not be covered as 'nutritive substances'. However, it seems that in its current form it may limit innovation and development insofar as consumers are increasingly demanding 'natural' foods and the constraint on a 'substance used as a nutritive substance' being 'extracted, refined or synthesised' may be barrier to substances used as nutritive substances in the future.	FSANZ does not consider that the provision that was proposed would have limited the range of substances that might be added to a food for a nutritional purpose.	NZFGC
	"used as a nutritive substance" The shift is that it now deems a substance as "used as a nutritive substance" as opposed to meaning that a substance "is a nutritive substance" How does this change then sit with the second part of the definition – namely, " to achieve a nutritive purpose" ? – does this then necessarily require proof of intent, which goes against the spirit or intent of a deeming provision? Do we get to the same place by changing it from "add..to achieve" to "added and achieves a.."? or "added and whereby a nutritional purpose is achieved"?	Noted. The provision does not require proof of intent. It does, as does the alternative suggestion, require evidence as to the purpose of the addition.	NSWFA
	It is noted that 1.19(2)(c)(ii) refers to 'sold', i.e. "is not normally sold as a food product". However, the third and fourth paragraphs of section 3.2.11 of the Call for Submissions paper discusses the need to not permit products that are not 'normally consumed as a food product'. This difference is raised in case the intended wording of 1.19(2)(c)(ii) was to refer to 'consumed. Consideration should be given to amending 1.19(2)(c)(ii) clarify that this requirement relates to Australia and New Zealand, ie. "is not normally sold as a food product in Australia or New Zealand" because some countries allow the sale of nutritive and therapeutic substances in food. Failure to restrict this requirement to Australia and New Zealand will potentially undermine its application.	Noted	Queensland Health
1.19(2)(c)(ii)	This provision may be omitted if the suggestion at 1.06 above, to adopt the application Act definitions, is accepted. The note might be usefully retained and moved to 1.06(1).	Agree	AFGC
1.20	This section is new and comprises quite lengthy notes that replicate the definitions of 'sale' or 'sell' from the Model Food Act in Australia and the Food Act 1981 in New Zealand. This is an excellent clarification and removes any doubt as to the definition of these terms that should apply.		NZFGC
	The definition provided of "sell" appears to be consistent with the SA Food Act 2001 definition of sell. However given that the definition of sell is fundamental to the operation of Food Acts it is suggested that a reference to the Application Act is used to ensure there is no uncertainty created. Is note1 and note 2 necessary? Could they be put in new user guides to assist with understanding of the Code?	The definition of 'sell' is now dealt with in subsection 1.1.2-2(3); as a term that is defined in the application Acts.	SAGOV
	In this Code, for the purposes of application of the Code by an application Act,		Queensland

Section in first draft	*Comment*	*FSANZ response*	*Stakeholder*
	sell has the same meaning as in the application Act. The purpose of this provision is to introduce into the Code the concept of 'sell' and to clarify the point at which food is considered to be offered for sale. It is anticipated that each jurisdictions' Application Act has adopted the definition of 'sell' in section 2 of the Model Food Provisions. The Food Act 2006 (Qld) has in principal adopted the Model Food Provisions. However, there now may be some inconsistency across jurisdictions. A further issue is that there is a possibility that any future intention to amend the Code for clauses that impact upon a jurisdictions 'application Act', may potentially require each state and Territory to amend their 'application Act'. This would present a very large undertaking.		Health
Division 2 Basic requirements			
Section 1.21	Overall section 1.21 appears to be more complicated in the proposed Code. Subclause (4) could usefully state that it does not prohibit foods used as processing aids. This section might usefully be divided into two separate provisions: one of general application (subsections (3) to (5)) and one specifically related to the sale of a food product under a regulated name. Subsection (3) should not refer to "component". The change in structure to place all prohibitions together at 1.21 creates some changes to how these are worded that may have implications for their application, as noted in the relevant sections below: Food additives (Chapter 1, Part 4, Division 2); Vitamins and minerals (Chapter 1, Part 4, Division 3); Contaminants and natural toxicants (Chapter 1, Part 4, Division 5); Agvet chemicals (Chapter 1, Part 4, Division 6); Food produced using gene technology (Chapter 1 Part 4, Division 9); Microbiological limits (Chapter 1 Part 4, Division 10); Nutritive substances (Chapter 1, Part 2, Division 1, 1.19) *The note to 1.21(1) is inaccurate. There is no mention of "offer for sale" in the definition of a food product. 1.21(3) – if read as disjunctive alternatives – a food product must not: consist of, or have as an ingredient, or have as a component… this would capture agvet chemicals, even where you cannot identify them as a constituent part of the food. 1.21(3) appears to be consistent with an "absolute liability" concept. The four foods or substances in column 1 as described are simply not permitted in a final food (food product) save for the express provisions. However: 1.21(4): Contrast the wording "a substance that is used for any of the purposes listed in column 1.." vs the current Code (1.3.1(2)):" a food additive must not be added to food unless expressly permitted.." "used as a food additive" is defined as "1.122: that is added to perform.."	Noted. Subsection 1.1.1-18(2) provides that a food item may have another food as an ingredient. A processing aid is an ingredient. FSANZ does not agree that the prohibition should not apply to components. The changes are not a consequence of the co-location.	Heinz AFGC Australian Dairy Industry Council Inc. and Dairy Australia NSWFA

Section in first draft	*Comment*	*FSANZ response*	*Stakeholder*
	Does this wording now place the onus on the prosecution to prove a level of intent? How does this sit with an absolute liability offence? Not sure that this was the intended effect as expressed at page 6 of Attachment B: *First, proof is needed that it was used for one of the purposes listed *second, proof will be need of the deemed "purpose", which carries in itself a degree of intent (whether it be "to achieve" a technological purpose, or nutritional purpose, etc.) Eg: I added SO2 to raw meat. Why? It was a mistake, I thought it was water. Provision 23 of Model Food Provisions (MFP) – "honest and reasonable mistake" – now reintroduced? (See MFP23 (s27 NSW Food Act 2003) which precludes the defence of "mistaken but reasonable belief" for Code offences) No offence at all because can't prove that it was "used for any of the purposes.."? It may still have the substance in it, but the prosecution can't prove or does not have sufficient evidence as to what purpose it was used for. Consider an alternative: rather than "a substance that is used for any of the purposes" – "a substance as listed.." etc. Aim: take away the "intent" – used for a purpose.., as it is already contained in the deeming definition of "used as a food additive" 1.22(5): Should there be a definition for "natural occurrence" or is it better to leave it undefined and the words retain their ordinary and everyday meaning?		
	Is 1.21 to be the primary offence provision? Note references of a general nature to packaging (1.21(7)) and labelling (1.21(8)) and information (1.21(9))	The provision is not creating an offence. The offence is created by the application Act.	
	Clause 3 appears to omit the requirement of the current Standard 1.4.2 regarded no detectable residue of metabolites of an agvet chemical.	In the revision, in paragraph 1.1.1-10(4)(d), the requirement is that a food product not contain 'a detectable residue of either an agvet chemical or metabolites or degradation products of an agvet chemical'.	FTAA
	The intention to consolidate the overarching requirements for a food (composition, packaging and labelling) in this clause is supported. This will give food businesses a starting point for understanding and deciphering the requirement of the Code for a certain food.	Commentary noted.	Queensland Health
	MPI supports section 1.21, which lists all prohibitions together. The title to section 1.21 refers to food products; does 'on sale' convey any additional meaning? 'On sale' appears to correspond to 'on importation' in section 1.22, but perhaps 'on' is used in a different sense there, such as 'upon importation'. Section 1.21 applies to 'food products' on sale, but once again, we question what provisions apply to ingredients that are sold (to food manufacturers for use as an ingredient in food product). It needs to be clearer that the prohibitions on certain substances (e.g. food additives) apply to ingredients as	MPI appears to be drawing a distinction between ingredient and food that does not exist. The general prohibitions apply to any food for sale, whether it is for sale for consumption or for sale for use as an ingredient in another food.	NZMPI

Section in first draft	*Comment*	*FSANZ response*	*Stakeholder*
	well. We suggest amending subsection 1.21 (3) to make it clearer that the ingredient itself is also subject to the requirements in the table. This is another example of where the term 'food product' may be too limiting.		
	Table to subsection (3) - The table to subsection (3) lists 'agvet chemical', but this does not work when the Code is applied in New Zealand because: • The term 'agvet chemical' is not commonplace in New Zealand • The term 'agvet chemical' in the Code has no legal meaning for New Zealand, as it is defined in terms of an Australian statute	The general prohibition in relation to agvet chemicals has no application in New Zealand. This is made clear in subsection 1.1.1-3 and in Standard 1.4.2.	
	• Agricultural compounds and veterinary medicines are restricted in food in New Zealand, by an extra-Code mechanism. MPI suggests this is prefaced with 'For Australia, an agvet chemical'. Additionally, a note to the New Zealand Maximum Residue Limit requirements, as in Chapter 1, Part 4, Div 6, would be helpful clarification.	The prohibition in paragraph 1.1.1-10(4)(d) is expressed to apply 'In Australia…'	
S1.21 (3)	The difficulty in regulating the food additives and processing aids is that the Code regulates both the substances and the purpose for which they are used, i.e. a 'thing' and 'an activity'. The draft does this by prohibiting substances used for any purposes listed in a table, unless expressly permitted. It then effectively defines 'used as a food additive' etc. It is possible that the draft achieves this regulatory aim. However, careful legal analysis is required to avoid any reasonable risk that there is a circularity in this particular drafting technique. The following argument may be possible: Section 1.122 defines 'used as a food additive', i.e. if a substance complies with this section, it is by definition 'used as a food additive'. If it is already by definition 'used as a food additive', does it make sense to then impose the additional requirement in section 1.123 as to the circumstances in which it may or may not be permitted to be 'used as a food additive'? There is circularity if the definition is both defining and regulating, i.e. it's performing two functions, much like the objectionable circular definitions in the present Code.	No. Section 1.122 does not define 'used as a food additive'. Section 1.122 describes when a substance or a food is used as a food additive. The circularity that is suggested cannot arise.	NZMPI
	There is an added feature in relation to processing aids, in that there is no reference to any substance that has been extracted, refined, or synthesised. If a substance is not one of the listed substances referred to in section 1.131(3), then it simply does not fall into the definition of 'used as a processing aid'. If it cannot by definition be 'used as a processing aid', does section 1.132 in any sense effectively regulate its use?	The drafting does not seek to address the gap in the current provision, which does not regulate in any way a substance that is not listed. To do so would substantially alter the operation of the processing aid provisions. Such a change is beyond the scope of P1025.	
	Is there a fundamental gap, if someone says they are not using the substances for one of those purposes?	It is understood that substances are added to achieve a purpose. If there is no purpose for the addition and no prohibition on addition of the substance when added without a purpose there will be no requirement attaching to the addition. However, the general requirement that food be safe and suitable remains.	
Section	Section 1.22: These provisions should be omitted, as they duplicate the	The provision establishes applicable standards for the purposes of the Imported Food Control	AFGC

Section in first draft	*Comment*	*FSANZ response*	*Stakeholder*
1.22	requirements of the Imported Food Control Act. It is for that legislation to indicate which parts of the Code apply to imported food.	Act and relevant standards for the purposes of New Zealand legislation. The Imported Food Control Act makes it an offence for a person to import food into Australia if the person knows that the food does not meet 'applicable standards' (s 8(1)). An 'applicable standard' is a 'national standard', and includes standards that are included in the Food Standards Code. This section of the Code is needed to create an 'applicable standard'. For example, s 1.1.—10 only applies to food for sale for human consumption, or for use as an ingredient in food to be sold for human consumption. By its terms, that provision wouldn't apply to food that is simply imported, and so the Imported Food Control Act wouldn't require compliance with it.	
	In Clause 2 (a) and (b) it is considered to be consistent that when "food" is used in these clauses that the correct term should be "food product".	The provision is consistent with the notion that imported food must meet a composition, packaging or labelling requirement at the time that it is for sale in order to meet the Code requirements.	FTAA
	Does this allow for importers to re-label imported product, prior to sale? We need to ensure that new labels can be applied, if necessary, to meet New Zealand requirements (e.g. the addition of a NZ address).	If a product is to be relabelled it is not intended for sale with the labelling with which it is imported. The issue of relabelling is dealt with in section 1.2.1-22. In Australia, the issue is also dealt with in subsection 8A(2) of the *Imported Food Control Act 1992*.	NZMPI
	This section provision is described as being 'implicit' in paragraph 1(1)(b) of Standard 1.1.1. The provision seems to repeat in specific terms, the general statement in paragraph 1.13(1)(b) the applies the Code to imports. It is unclear why this specific statement is required for consumer ready or final foods.	The provision is required to establish an applicable standard for the purposes of the *Imported Food Control Act 1992*.	NZFGC
	The reference to compositional requirements in 1.23 is confusing. It is hard to understand how an "unhopped" beer can be a "beer" when beer is characterised by hops as an ingredient. The product is not beer. This could create confusion particular in NZ where definitions in the Food Code control what can be sold in supermarkets. We suggest adding "" Labelling a food product "Unhopped Beer" does not make the product compliant with 2.68".	The provision is designed to address the fact that a range of products are known by variations of established food names, without actually being that product. A simplistic solution would be to prohibit the use of potentially misleading names such as ginger beer or unhopped beer. However, there is no food safety justification for that approach. On the other hand, a product that is sold as beer should be the product that people know as beer and not, for example, a fruit drink. The policy approach requires that products sold as beer (or one of a range of identified synonyms) must be a beverage characterised by hops and prepared by yeast fermentation of hops. Products that do not meet that description should not be sold as beer without any qualification, although there is no reason to prohibit the use of the word beer in a food name if it is clear from the naming that the product is being presented as something other than a beverage characterised by hops and prepared by yeast fermentation of hops.	Brewers Assoc. ANZ
Section 1.23	The Call for Submissions paper notes in paragraph 3.2.5 that: Compositional provisions provide that if a good is represented as being for sale as a food or a type of food for which there is a standard, i.e. a food for which there is a definition, the food must comply with the compositional requirements. MPI finds operation of compositional requirements problematic with the current Code, and welcomes this work within the scope of the Code Revision. We appreciate that compositional requirements will continue for the so called 'icon foods' in the Code Revision.	Section 1.23 has been revised to address the range of concerns expressed by submitters. Subsection 1.1.1-13(1) provided that the section only applied to provisions of the Code that provide that food must comply with certain requirements, such as characterising or compositional requirements, if the food is sold as a particular food. Subsection 1.1.1-13(2) provided that if the name used for the sale is a name that appears in a relevant section of the Code in quotation marks the requirement applied only to a sale in which that name is used. If the name is not in quotation marks the requirement applies to any	NZMPI

Section in first draft	*Comment*	*FSANZ response*	*Stakeholder*
	Section 1.23 relates to compositional requirements imposed in Chapter 2. We have the following comments and questions: • The chapter 2 provisions introduce the complex notion of two different definitions, one of which applies in a specific section while the other applies to the rest of the Code; this may be quite difficult for Code users. • This structure also introduces a heavy reliance on the concept of representation; this may unintentionally import legal concepts and precedents around the meaning of 'representation'. • This structure has presumably been introduced to separate out the compositional requirements from the definitions; is there a simpler way of achieving that? • Section 1.23(2) deals with use of the specified name in connection with the sale of a food; is 'in connection with' wider than a name on a label? • Section 1.23(2) refers to one type of action which constitutes a representation; there is no indication that this is exhaustive; does it leave wide open the other ways in which a representation might be made, e.g. by 'get-up' (the presentation of the label and/or the packaging), etc? • Is the policy essentially that the representation relates simply and directly to the name of a food on a label (or other labelling requirements)? If so, that should be spelt out. • Is it the case that products which do not have the name indicated by quotation marks are covered via the 'specified nature' limb of section 1.23(1)? • In relation to representations that a food is food of a specified nature, section 1.23 does not appear to provide any further guidance as to what might constitute such a representation; does this leave room for ambiguity and argument? • In section 1.23(2), is there scope for too much argument about whether the context makes it clear that no such representation is intended? The examples give some idea, but something like 'low fat' ice cream might be quite ambiguous, and might well fall on the other side of the line.	sale in which a purchaser would be led to assume that the sale was of a named food. Subsection 1.1.1-13(3) deals with the situation where a food name can be used in a wide range of contexts, some of which describe a particular food but some that describe quite a different food. For example, the word bread might be used in the name of a range of foods that are not cereal products. The word beer is used in the names of many beverages that are not 'a beverage characterised by hops and prepared by yeast fermentation of hops'. The effect of the provision is to permit those usages when the context is clear. Subsection 1.1.1-13(4) deals with compositional requirements that permit the addition of other foods to a food that has characterising or compositional requirements. The provision makes it clear that a permission to add other foods is not to be taken as overriding a specific prohibition.	
	Clause 1 – without examples it is difficult to interpret what is meant by "specified name". Has this term the same meaning as "prescribed name"? i.e. (sic) Also does "quotation marks" mean single quotation marks (i.e. '…') or double quotation marks) i.e. "...")?	No. 'Specified name' was not the same as 'prescribed name'. The provision is clear that the reference is to single quotation marks.	FTAA
	What is the definition of products such as 'Bratwurst' or 'Mortadella', etc when the term sausage is not used as part of the name? Do these requirements apply to foods that do not have their names in quotation marks?	Products such as mortadella and bratwurst are not defined. They will be required to satisfy compositional requirements for sausage if they are represented as sausage.	
	In subsection (4), the words "not permitted" imply that there must be a positive permission. The wording "specifically prohibited" is preferable (eg	New section 1.1.1—13(4) refers to the addition of a food or substance the is 'not permitted to be added to food, or to the specified food, under this Code.'	AFGC

Section in first draft	*Comment*	*FSANZ response*	*Stakeholder*
	there is a specific prohibition against adding a formulated caffeinated beverage to a non-alcoholic beverage).		
	The New Zealand Ice Cream Manufacturers' Association believes that S1.23 (1) "of a specified nature" and S1.23(2) "Use of a specified name" are not clear and should be more adequately defined, to avoid other products being sold as "misrepresentations" of "ice cream", such as those with a soy or coconut base and other ingredients.	The suggested change would involve a change of the current requirements and is outside the scope of P1025.	New Zealand Ice Cream Manufacturers Association
	We submit that there should be an amendment to clarify that the use of a specified name is to be taken as a representation unless the context makes it clear that no such representation is conveyed (rather than the current wording 'that no such representation is intended'). It is the effect, not the intention, that is relevant in such circumstances and an amendment of this nature would also ensure consistency with domestic trade practices legislation.	FSANZ does not agree. The onus in food labelling should be with the supplier.	NZ Wine Growers
	This section purports to reflect the few lines that are clause 14 of Standard 1.1.1 concerning compositional definitions of food. Section 1.23 is very much broader and introduces the terms 'sold on the basis of a representation that'. It also covers 'specified names' which are undefined but which appear to be any names used that might mean a food – the example of beer being 'unhopped' if it is not made with hops is new. It would be clearer to say that a beverage that is not made with hops is not a beer for the purposes of the relevant section that defines 'beer made with hops'.		NZFGC
	The term 'sold on the basis of a representation that' is not defined and it is therefore unclear if this refers to composition, labelling, look, taste or some other attribute. This lack of clarity and the constant use of the phrase is confusing and potentially unnecessary.	The phrase 'sold on the basis of a representation that' is not used in the revision.	
	This provision does not seem to add any effect to the Code. At best, it introduces a form of double jeopardy: for example a failure to keep the records relating to a food safety plan would contravene BOTH Standard 3.2.1 clause 3(d) (referencing clause 5(f)) as well as this clause. This clause should be omitted.	The possibility of multiple charges is not double jeopardy. Choice of charges is a legitimate exercise of prosecutorial independence.	AFGC
Section 1.24	Introduces this concept of listing all the requirements under one section. Provides clarity on requirements and improved visibility of what is required. Compositional, packaging, labelling, information provision	Noted.	Fonterra
	Is 1.24 the "offence" provision as opposed to Chapter 3 obligations? Does 1.24 introduce duplicity when it comes to enforcement? For example, Provision 17 MFP (s21 NSW Food Act) creates the offence provisions – namely, it is an offence not to comply with the Code. Chapter 3 provisions set out the terms of the obligations – failure to comply, or the terms of the offence, are dictated by a description as to how the obligations were not followed. This necessitates reference to the specific Chapter 3 provision(s), not to 1.24 What then is the point of 1.24? Does it not conflict	There are no offence provisions in the Code—-only requirements. The provision creates a requirement that, for example, labelling requirements be complied with. The labelling provisions themselves create separate requirements. It will be a matter for prosecutors to determine which requirement they apply. Section 1.24 creates new requirements that could be relied on in substitution for, or supplementary to, the requirements in Chapters 3 and 4.	NSWFA

Section in first draft	*Comment*	*FSANZ response*	*Stakeholder*
	with MFP 17?		
Part 3 Labelling and other information requirements			
	This section of the Code is particularly cumbersome and difficult to work through. There is not a great deal of logic to it. If it was set up in a manner that presented the reasons for the various elements in priority order, then it becomes more obvious why the different sets of information need to be provided on labels or by other means. My recommendation is that it should be set up as below. (I have used the term Priority so as not to confuse the partition with that in either the current or proposed code. A more appropriate term should be used if this proposal is adopted.) Priority 1: Packaged products must be traceable; Supplier name and address; Date Marking; Lot number Priority 2: Packaged foods must have warning statements for certain substances Priority 3: Packaged products must be warned of some possible safety issues; Storage and use; Irradiation of foods; Genetically-modified foods Priority 4: Packaged products must declare ingredients Priority 5: Nutrition information shall be provided With this structure, the various requirements can be introduced as follows: ? Packaged Retail Products provide the information against all priorities ? Food products in hampers require packaged items to comply with all priorities and unpackaged items must be accompanied by information on all priorities as well as the hamper itself requiring the name and address of the supplier of the hamper (presumably the packed hamper rather than the carrying item itself) ? Retail sales of food products in individual portion pack items require labels under Priority 2 ? The name and address of the supplier must be prominently displayed in or on vending machines. ? For food which does not require to bear a label, any instructions related to storage and use must accompany the product, information according to Priority 2 must be displayed. Information according to Priorities 1-6 must be available to the purchaser either on request, accompanying the food or displayed with the food. Food sold to caterers must labelled according to Priorities 1, 2 and 3. If the food product is contained in more than one package, the package that is visible to the purchaser at the time of purchase (the outer package) is required to bear a label that includes the name of the product and the	Noted. It is considered to be beyond the scope of P1025 to substantially reform the labelling requirements established by the Code.	Poynton

Section in first draft	*Comment*	*FSANZ response*	*Stakeholder*
	information in Priority 1 provided that another package within the outer package bears a label which includes the information according to Priorities 2 and 3. Information according to Priorities 4, 5 and 6 must be made available to the purchaser on request to enable the Purchaser to comply with the Code in a sale or of another food product using it as an ingredient. If this information is requested by the purchaser or by a relevant authority, it must be supplied. This simplification would make the requirements a lot easier to understand and therefore to comply with.		
Division 1 Requirements to have labels or otherwise provide information	These sections have the potential to improve the clarity of the Code by co-locating the labelling obligations that apply to retail, catering and other sales respectively. Further, it is accepted (other than as noted below) that the restructured and reworded provisions are to the same effect as Standard 1.1.1 of the existing Code. However, the language remains strained due to two main factors: the concept of "label" is contorted to include, for example, information provided to consumers at point of purchase, and secondly there is a focus on whether "food" is for retail sale or catering when the touchstone is whether the packaging is a retail pack or for catering purposes. The difficulties inherent in the first issue can be seen in the clause headings. Section 1.34 refers to information requirements for food product "that does not need to bear a label", but then states certain information required to be displayed in connection with the product, information that must accompany the food product and information that can be provided upon request. The definition of "label" includes all of these information mechanisms, so section 1.34 appears to state the labelling obligations that apply to a food that is not required to bear a label. Similarly, clause 1.31 (1) states that unpackaged food is not required to bear a label when this is clearly not true if label carries the meaning in clause 1.27(1). The new language also seeks to address the second issue when, in section 1.31(3), it effectively states that only one level of packaging (excluding multipacks) is required to be labelled. However, the related note directs the reader to the provisions around legibility and prominence. Consider a (fully labelled) packaged food for retail sale that is shipped to the retailer in a carton of, say, 24 retail packs. The food product is for retail sale but the outer carton is not a retail pack. The question is whether the shipper requires full retail labelling. On the one hand, the labelling of the actual retail pack would appear to satisfy section 1.31(3), but the reference to legibility and prominence then suggests that the outer shipping carton must be labelled because the information on the inner packs is not visible at the time of sale from the	FSANZ does not agree with the assertion that the 'touchstone' is the nature of the packaging. The current Code imposes different labelling requirements on different types of sale—without regard to the form of packaging.	AFGC

Section in first draft	*Comment*	*FSANZ response*	*Stakeholder*
	manufacturer / wholesaler to the retailer (see section 1.29(b)). The intention appears to be that such sales be caught by Subdivision D, but the current language does not achieve this.	This is a matter for prosecutors, who will determine which provisions to apply in accordance with local prosecution guidelines. The only offences are in the application Acts.	
	Two comments are also necessary in relation to the co-location of labelling obligations. The first is that it does create something of a double offence system where the one labelling failure contravenes BOTH the provision here in Chapter 1 Part 3 AND in the actual labelling provision itself. The second is somewhat related in that any introduction of new labelling requires double enactment, once as a substantive provision and again as a signpost provision here in Chapter 1 Part 3.	The country of origin labelling provisions are in a separate section because they apply only in Australia. This is a judgement call. The alternative would be to express the requirements within the general labelling requirement provision, with the proviso that the provision applies only in Australia. That organisation would be cumbersome.	
	It is unclear why country of origin labelling has been singled out from other labelling obligations in this new structure.		
	Many provisions in the Draft Code are prefaced by the phrase 'for the labelling provisions'. The explanatory note states that this wording has been added so that users know "that a labelling requirement exists." Despite its good intentions, this additional wording is problematic from an interpretation perspective - particularly in situations where clauses are providing exemptions. For example, S 1.58 states: "for the labelling provisions, a requirement for a statement of ingredients does not apply to [list of products]." In this situation it could be construed that although a producer was not required to provide the information on a label, they may still be subject to the provisions which require the information to be provided at the point of sale. Given the potential for confusion (particularly given that most users will not have read the commentary to P1025 and will therefore not be aware that this phrase is intended to signal a labelling requirement) the utility of this additional phrasing should be reviewed.	FSANZ considers that the words are not confusing, especially in the context of provisions that are followed by a signpost to the labelling provisions. Regular readers of the Code will recognise these words as an indicator that the labelling provisions should be referred to. Less frequent readers will be assisted by the signpost to the labelling provisions.	NZ Winegrowers
	The current definition of food labels requires clarification as to whether products that are sold online are required to have nutrition information panels. There is currently a lack of consistency surrounding the inclusion of such information for food products sold online. DAA recommends that this definition be clarified to include products sold online to ensure consumers have consistent access to this information.	This issue, of online sales, is beyond the scope of P1025.	DAA
Sections 1.26 to 1.46	Is there a reason that "retail sale" is not defined? Note the definition for "food for retail sale" under current 1.2.1 (1). Is it expected to be inferred from the definition of "food product" that a "retail sale" is implicit within that definition? Does the definition, however, go beyond what is normally considered a retail sale?	The term does not require definition. It is a well understood term about which there is a considerable body of law. In the current Code the term is defined to permit the use of the phrase food for retail sale with an extended meaning. That objective is not relevant in the revision as there is no reliance on the term 'retail sales' (other than as a guide in headings), The effect of a definition is achieved in section [1.29], which sets out which foods the Subdivision applies to.	NSWFA
S1.26	FGC notes that subsections (1) to (4) cover Subdivisions A to D. For	Section 1.2.1—2 revises the outline statement as suggested.	NZFGC

Section in first draft	*Comment*	*FSANZ response*	*Stakeholder*
	completeness, FGC suggests the addition of the following subsections: "1.26(5) Subdivision E sets out prohibitions relating to labels. 1.25(6) Subdivision F sets out legibility requirements."		
	1.26 Outline of Division, and 1.35 When this Subdivision applies refer to 'food products that are sold to caterers'. We question if this is the correct usage of the term 'food product', as it is our understanding that the draft Code defines food product as a sale in a form suitable for use by consumers. This will be the case some of the time in sales to caterers, but not all of the time, as some ingredients will not be in the form of a food product. In other words, foods which are not in a form for use by consumers do not appear to be captured. We have discussed this point earlier under our section 1.16 comments.	The comment relied on a misconception about the definition of food product in the consultation draft. That definition was broad enough to include a food sold to a caterer for use as an ingredient in food that was then sold for consumption. The revised draft does not use the term food product.	NZMPI
Section 1.27	(1) Although there is no change from the current version, there are two issues here: 1) accompanying information described in (b) could include product specifications and; 2) information at point of sale described in (c) may be provided by a retailer, not the manufacturer. In this case it is likely that the requirements for a label in 1.33 would not be met, or would certainly be out of the control of the manufacturer.	It is beyond the scope of P1025 to alter the current requirement.	Fonterra
	This section is based on subclause 1(2) of Standard 1.2.2 but goes well beyond that subclause. There is no issue with application of the term 'label' or 'bear a label' both of which are used extensively in the current Code. The key issue is with the term 'labelling'. This is defined in the revision as: "labelling, in relation to a food product being sold, means all of the labels for the food product together." Labelling is a commonly used conjugation of the verb 'to label'. For the Code, however, it is defined as a noun meaning 'all the labels on food product'. This is confusing enough but its use in the revised Code is sometimes as the verb with the usual meaning and sometimes as the defined term and sometimes it is unclear what its use is. For example, the title of Part 3 is 'Labelling and other information requirements' appears to be the verb but could be either. However, its use later in this section (paragraph 1.27(2)(b) reads 'a requirement for the labelling of a food product to include specified content is a requirement for at least one of the labels to have that content" can only refer to the verb because otherwise there would be no need to refer to 'at least one of the labels'. Another example is its use in the term 'country of origin labelling' (sections 1.32 and 1.39) which clearly does not mean 'country of origin all of the labels of the food product'. Some selected further examples are in subsection 1.33(1) and in sections 1.40, 1.45 1.53 and subsection 1.74(a). As well, the phrase used throughout the revision: 'for the labelling provisions' seems to only make sense if this is the verb and not the noun. It is suggested that the term 'labelling' not be defined and instead a term such as 'all labels' or similar be defined.	Noted. It is an element of statutory interpretation in Australia and new Zealand that parts of speech that are defined in legislation have corresponding meanings in that legislation. Legislation is also to be given a purposive interpretation.	NZFGC INC
1.28	The term "Catering Sale" could be interpreted in ways other, such as sales by	Agreed.	FTAA

Section in first draft	*Comment*	*FSANZ response*	*Stakeholder*
	caterers of services connected to food. Suggest change wording to "Sales of food products to caterers".		
	It is not clear whether the proposed 1.31 (3) is new or is a reworded form of 1.2.1 (1)(b). "If the food product is an inner package..." is not synonymous with "if the food product has more than 1 layer of packaging" and is a potential change in meaning of the Code. We would appreciate clarification on this.	Paragraph 1(b) addresses 2 packaging types. The first is when the food is in an inner package not intended for individual sale. The second is if such a product is in an inner package with a large surface area. These 2 types are dealt with in subclauses (3) and (4) respectively.	Fonterra
	Needs to specify that EACH individual portion pack should not have a surface area of 30cm2 or greater (i.e 6 packs of yoghurt where the top of the individual packs constitute the single facing to the consumer at point of sale, but are intended to be used separately (usually different flavour variants).		
	The definition of retail sale has been deleted. There is no definition of 'retail sale' or 'retail' in the Food Act 1981. This means the term is not clear. It is recommended that a definition of retail be reinserted that reflects the 'consumer ready' nature of a retail food product.	There is no definition of retail sale in the current Code, which defines 'food for retail sale'. A definition of retail sale is not required. The term retail sale is well understood as a sale to the public.	NZFGC Fonterra
	Does immediate consumption apply to all institutions or only 'other institutions?' We would appreciate clarification on this.	The preparation and offering of food for immediate consumption is a characteristic of catering and is relevant to each of the food businesses described in the definition.	Fonterra
1.30	Clauses 1 and 2 should be reversed as the exemption (current clause 1) should follow the rule as per the heading.	Section 1.2.1—6 sets out the positive requirement first, as suggested.	FTAA
	Clause 4 should not start with "However" as clause 4 is NOT an exception to Clause 3 but a separate clause and should start with "If".	This change is made in subsection 1.2.1—6(3).	
1.31	Section 1.31 should ideally include a cross reference or flag the exemptions in 1.34. This could be done with a notation or by including in the provision wording such as 'not withstanding running number 1.34'.	The outline statement performs this function of indicating the relationship of the requirement and exceptions.	Queensland Health
	Comprehensive statement, but does not allow for the exception in 1.32(1)b). Need to reconcile the conflicting clauses.	The exception for country of origin labelling is noted in Note 2 to section 1.2.1—6.	NSWFA
	Subsection (4) is drawn from paragraph 2(1)(b) in Standard 1.2.1. This seems to reverse the exemption from labelling other than for allergens and warnings by requiring products not for individual sale to 'bear a label'. This would have a significant impact on labelling and costs of products not for individual sale	The only information that is required to be on a label of an individual portion pack is the advisory or warning information required by Standard 1.2.3.	NZFGC
	For clarity, 'made' should be defined, or this statement could read 'is made or prepared, and packaged on the premises from which it is sold'. The current use of 'made' does not clarify how this applies to a butcher who does not make meat, but prepares it. Another example is a shellfish seller who does not make mussels, but does remove the shells before sale. The User Guide makes it clear that the intent of this provision is to apply to butchers and bakeries etc.	The current provision, which is identical, has not raised a need for a definition of 'made'.	NZMPI
	Subsection 1.31(3) provides for food products with more than one layer of packaging. The Note to 'See also section 1.50' is helpful and should be retained, as it signals that the label must be legible. It is our interpretation	The editorial note purports to modify the application of clause 2 of Standard 1.2.9. It is inappropriate for this to be done in an editorial note.	

Section in first draft	*Comment*	*FSANZ response*	*Stakeholder*
	that this offers flexibility to marketers of food, allowing the labelling information to be on the inner or the outer label, so long as it is legible. An example where it would not be legible and therefore non-compliant would be a clear bag with loose but labelled packs inside, but the labels not visible at all times. To emphasise this requirement, we suggest that the editorial note from current standard 1.2.9 clause 2 is reinstated in section 1.50, to make it clear that the information must be readily accessible by a consumer prior to purchase and must not be obscured. The current wording in section 1.50 is not this explicit.		
1.31 (2)	This requires an individual portion pack with a surface area greater than 30 cm2 (not designed for individual sale) to bear a label, and a signpost/note is then provided to 'see subsection 1.33 (3…' (advisory and warning statements). We have two questions in relation to this subsection: 1. Are the advisory and warning statements all that are required on the individual portion packs, or is this simply a signpost to the advisory and warning statements? Subsection 1.31(4) (b) does say that these packs need to bear a label, so this could be interpreted as a full label. 2. If only the advisory and warning statements are required (in answer to question 1), but further information is provided voluntarily on the individual portion pack labels (i.e. fully labelling), does it need to be compliant?	The requirement to bear a label does not specify the content of that label. In relation to retail sales of individual portion packs the content requirement is set out in subsection 1.2.1-8(3). That requirement is to state any warning or advisory statements that are relevant.	NZMPI
1.31 (4)	Suggest an explanatory note that this does not prohibit food products sold trans-Tasman from also including the country of origin statement if sold in New Zealand.	It is beyond the scope of the Code to seek to explain non-standards arrangements.	Fonterra
1.32	The inclusion of a summary of all requirements of general label information (1.33 with reference to the appropriate section for the detail) is a useful addition, as are the similar lists provided for products in hampers, and foods not required to bear a label. This goes some way to replacing editorial notes in the current standard. However there are areas covered in the current editorial notes that are useful, but have been omitted from the proposed Code. For example, the 'name of food' requirements in the current Code (1.2.2 Clause 1) include an editorial note that refers to definitions within other standards (there are two dairy examples in the current editorial note). Throughout the labelling requirements, removing the tables to the clauses and placing them in a separate section also makes it more difficult to navigate and understand requirements. For example in the revised code, substances that require mandatory advisory or warning statements are listed, however the specific details and wording are now in separate sections.	Editorial notes have been removed generally unless they perform a navigation function.	Australian Dairy Industry Council Inc. and Dairy Australia"
	Suggest adding an explanatory note / qualifier to define, in this context, whether "supplier" means the manufacturer of the food or supplier of the vending machine.	Subsection 1.2.1-8(4) provides that the name and address to be supplied on a vending machine is that of the supplier of the vending machine.	Fonterra
S1.33	1.33(1) (y) – The term 'special purpose foods' in this subclause relates to a specific definition in section 2.153(1). The use of this term outside Chapter 2, Part 9, Division 6 is undefined, and it could be interpreted as the broader	Paragraph 1.2.1-8(1)(y) is revised in a manner that addresses this issue.	NZMPI

Section in first draft	*Comment*	*FSANZ response*	*Stakeholder*
	meaning, i.e. infant formula or anything else in Chapter 2, Part 9. It would be helpful therefore to reference section 2.153(1).		
	S 1.33 is intended to replace Standard 1.2.1(2) as a catch-all to encompass all requirements with a labelling component within the Draft Code. The construction of the opening paragraph "Subject to this section, labelling that is required for a food product under DRM 1.31 must state the following information in accordance with the provisions indicated" is potentially misleading in that it implies that each of the items must be included on a food label. This should be contrasted with the wording in Standard 1.2.1 ("food for retail sale must comply with any requirements specified in…") which in our view is preferable in that it does not create the impression that all items are mandatory. For example, it could be construed that all products were required to include a statement of ingredients, nutritional information panel (NIP) and information about characterising ingredients when this is clearly not the case. The reference to "in accordance with the provisions indicated" is not always going to be helpful as the exemptions are not necessarily contained in the listed provisions. We therefore recommend that the wording be amended slightly to reflect that those items must be included unless specified otherwise in the Code.	This is the effect of the words 'in accordance with the provisions indicated', which has the same effect as the words used in the current provision of the Code'.	NZ Winegrowers
	Subsection (4) sets out requirements for vending machines selling food. The current provision in Standard 1.2.2 subclause 3(2) requires the name and address of the person supplying the food for vending and has been interpreted as the business stocking the vending machine. Sometimes this is the food manufacturer if a vending machine is dedicated to a single brand of products. At other times one business may collect a range of food products from a range of manufacturers and stock the machine. The name and address is then the stocking business. Reference to 'labels ... in or on the vending machine' could refer to both the labels on the food in the machine and any labelling on the vending machine itself. This would expand the current provisions considerably. The reference to label should be removed.	The provision is clear that if food is sold from a vending machine there must be labels stating the name and business address of the supplier of the vending machine on that machine. That requirement supplements labelling requirements for the food items sold in the machine.	NZFGC
	Standard 1.2.3 subclause 3(2)(b) requires mandatory warning statements displayed on or in connection with food dispensed from a vending machine. This requirement has been removed and presumably must be on the food label on food dispensed from the vending machine.	The requirement in paragraph 3(2)(b) is now in subsection 1.1.1—9(3)(c).	
	The general labelling provision lists the requirements for a food product containing alcohol in sub-clause (x) as being 'a statement of the alcohol content' or 'a statement of the number of standard drinks in the product.' Given that both items are mandatory, we submit that the conjunction 'and'	This is now included in paragraph 1.2.1-8(1)(x).	NZ Winegrowers NZMPI

Section in first draft	*Comment*	*FSANZ response*	*Stakeholder*
	should replace 'or' for clarity.		
S1.33(1)(x)	Whether or not a glass of draught beer is required to be labelled needs to be clarified. Labelling is needed in the case of "a sale of a food product that is not a retail sale, if there is a representation that the food product is suitable for sale from a retail outlet without any further processing, packaging or labelling". While draught beer is under C02 or N2 gas pressure and is chilled, it is not clear that these meet the definition of processing. The Association believes that there should be confirmation that the process of serving draught beer through a tap, at the express request of the customer, constitutes processing for the purposes of the revised Code and, consequently, that the sale of beer in a draught beer container, such as a keg, is a catering sale and not a retail sale.	FSANZ considers that it is beyond the scope of P1025 to determine whether the Code should be varied to deal specifically with the status of draught beer. FSANZ considers that there are circumstances when the sale of a draught beer container will be a retail sale. The determining factor is not the nature of the container but the characterisation of the purchaser.	Brewers Assoc. ANZ
1.34	Requirements for this section are drawn from a number of standards and reflect the combinations of how information about unpackaged food products is to be provided to the purchaser: • accompany or displayed • accompany only • displayed only • provided only • accompany, displayed or provided on request. At some time in the future these requirements should be rationalised.	This is considered to be beyond scope of P1025.	NZFGC
	The requirement for unpackaged food or food not required to bear a label to include directions for use under the current Standard 1.2.1 2(2)(d) does not appear to have been included in the revised Code.	This requirement is in subsection 1.1.1—9(4): previously subsection 1.34(4).	Queensland Health
	The '…in connection with the display of the food..' is consistent with the current Code, but could the scope of this be clarified in this draft Code? For example, is food ordered at the express order of the purchaser (e.g. take away food, that is not on display) captured by this subclause?	This is considered to be beyond scope of P1025.	NZMPI
1.34 (5)	This refers to '….catering sale of a food product'. This is potentially confusing, if what is meant is the sale to a caterer, not from a caterer. The title to this subdivision is clear, which states 'Sales of food products to caterers'.	The revision refers to sales to caterers, to avoid this confusion.	NZMPI
1.35	Clause 1 should follow Clauses 2 and 3 as the exemption (current clause 1) should follow the rule as per the heading.	Noted.	FTAA
1.39	The two sections 1.32 and 1.39 are essentially the same. 1.32 is in the more appropriate place, so 1.39 should be deleted.	There are different requirements for retail and catering sales. There is no duplication.	Poynton
1.41	This section seems to duplicate much of section 1.40 and should be reviewed to remove duplication.	The provisions establish separate requirements and follow the separation of requirements in the current Standard.	NZFGC
	This section states that the name and address of supplier must be in documentation accompanying the food product. 1.40 (1) does not require this information to be on the label. In the current Code if the information is not on the label it must be provided in accompanying documentation, but if it is on the label there is no requirement for it to be in accompanying documentation.	Accompany includes the option of being on the label. This arises from 1.41(1).The draft Code only requires that documentation that provides the name and address information accompany the food product. The option of providing the information on a label remains but the information cannot be in information that does not accompany the food product.	NZMPI

Section in first draft	*Comment*	*FSANZ response*	*Stakeholder*
	The draft Code appears to require documentation, even if the information also is already on the label. Possibly it should say 'In the case of the information referred to in paragraph 1.33(1) (c) (name and address of the supplier) which is provided in documentation, the documentation must accompany the food product'.		
1.41 (2)	In the draft Code, the information on characterising ingredients and components that would normally be required on the label of a food for retail sale is excluded from the information that must be provided in documentation for catering foods (if not on the label). No such exception exists in the current Code, so we question if this change is intentional .This information could still be requested by the purchaser or relevant authority under 1.42.	Para 2(4)(b) of Standard 1.2.10 provides that declarations of characterising ingredients or components are not required on foods for catering purposes.	NZMPI
1.42 (b)	Repetition of the term "food product" twice is confusing in the new version. Suggest: "...sale of the food product or of a food when sold for use as an ingredient".	FSSANZ does not agree.	Fonterra
Section 1.42	Sections 1.42 and 1.46(1): These provisions are drafted more broadly that the current clause 4 and 6(4) of Standard 1.2,.1, which limits the information that must be provided to "compositional requirements" and "labelling and other declaration requirements". The proposed clauses might extend, for example, to information relating to food safety requirements that are not the responsibility of the supplier.	Agree. Sections 1.2.1—17 and 1.2.1—21 reflect the narrower requirement.	AFGC NZFGC
	The intent is unclear here. Is the intent 'food not in a retail package?' As it stands as 'food not in a package' - would a box or carton constitute a "package"? We would appreciate clarification on this.	This provision is in a Subdivision that applies to sales that are not retail or catering sales. The nature of the sale is not determined by the packaging. 'Package' is a defined term.	Fonterra
S1.46 (1)	This provision is much broader than current requirements in the same way as section 1.42 is. The comments to that section apply here as well.	Sections 1.2.1-17 and 1.2.1-21 are revised in a form that reflects the narrower requirement.	NZFGC
1.46	(1) The wording in the current Code is perhaps clearer. In our view this clause should impose a requirement for suppliers of ingredients to provide the information to purchasers of their ingredient /raw material, without the purchaser having to ask for this information. It is difficult to see how manufacturers of food products could comply with the Food Code requirement (labelling and composition) without this information.	Imposition of an additional requirement is out of scope for P1025.	NZMPI
	The Group supports the intention of this amendment, but considers that any change to labelling must not obscure the manufacturer's lot identification. Suggested alternative: 1.47 (2) "Despite subsection (1), a person who sells a food product that is packaged, or deals with a packaged food product before its sale, may re-label the food product if the label contains incorrect information, by placing a new label over the incorrect one in such a way that: (a) the new label is not able to be removed; (b) the incorrect information is not visible; and (c) does not obscure the manufacturer's lot identification, unless it corrects an error in the lot identification and the manufacturer has provided written agreement and instructions to do so"."	This proposal is outside the scope of P1025.	ABIG (Allen Consulting)

Section in first draft	*Comment*	*FSANZ response*	*Stakeholder*
S1.47	This section is drawn from clause 11 of Standard 1.1.1. However, in subsections 1.47(1) (2) reference is made to a person who also 'deals with a packaged food before its sale'. This is new and presents problems for the supply chain where packaged food may move through several changes when the labels no longer apply or necessitate change to accurately reflect the product. It would be clearer to refer to 'deals with consumer ready packaged food'.	FSANZ does not consider that the suggested change is either necessary or appropriate. If anything, the changes reduce the scope of the provision—to those selling food. The current provision is not so limited, leading some commentators to suggest that it could act to prohibit defacing a label at home (although that would not be an offence under the application Acts).	NZFGC
	The Call for Submissions paper states in section 3.2.3 that "Provisions of the Code that impose obligations or set out requirements that must be complied with are to be amended to ensure that it is clear who is required to comply with the obligation or requirement and to ensure a higher level of certainty of meaning and operation about the actual requirement. In regard to Clause 11 of Standard 1.1.1, which is proposed to be replaced by 1.47 in the Revised Code, it needs to be noted that normally importers are not required to seek permission to alter labels to ensure they comply. As such, importers would be technically breaching 1.47 each time they amend an existing label on an imported food product, such as adding a sticker with the name and address of the importer. Similarly, normally manufacturers or product sponsors (brand owners) are not required to seek permission to alter their own labels prior to selling their products. The requirement is normally confined to third parties such as retailers or in cases where a labelling problem has been identified and the enforcement agency wishes to ensure the label is corrected. Consideration should be given to legally clarifying this issue in the drafting, so it is clear who is required in the food supply chain to seek approval from the relevant food authority. Perhaps importers in particular should be exempt from the requirement in 1.47 because they are already legally responsible for ensuring the labelling of a food product complies with the Code. It should be kept in mind that enforcement agencies have other regulatory tools available under application Acts to require businesses to correct labelling mistakes. Also, there are alternative requirements such as the obligation in the Code to correctly label a food product and offences under application Acts for misleading and deceptive conduct. Furthermore, greater clarity should be given to the requirements in 1.47 confining the scope of the definition of 'deface' to ensure it only relates to information required to be present on the label by the Code. For example, as worded, adding a price sticker to a label could be considered defacing it even if the sticker is applied over non relevant information on the label such as an illustration or marketing information.	The practice described by the submitter is permitted by current subclause 11(2) of Standard 1.1.1 or by draft subsection 1.2.1—22(2). It is beyond the scope of P1025 to alter the requirement currently imposed by clause 11.	Queensland Health
	We think that this clarifies that re-labelling may occur without permission from the relevant authority if the re-labelling is correcting an incorrect label. If this interpretation is not correct, then this subclause needs further consideration.	It is a matter for regulators to interpret the provisions of the Code. The proposed interpretation does not appear to be inconsistent with the plain words of the provision.	NZMPI
1.49	There is no change to this definition. It is not clear why this term warrants a	'Size of type' is now defined in section 1.1.2-2.	NZFGC

Section in first draft	*Comment*	*FSANZ response*	*Stakeholder*
	'meaning' when a definition would suffice at the start of the next section. It does not warrant a section.		
Section 1.50	Paragraph 1(a), (b) and (d) make distinct requirements that mandatory statements be ALL of "legible", "prominent" and "contrast distinctly with the background". The current language in Standard 1.2.9 subclause 2(1) is less clear: it refers to statements being written "legibly and prominently such as to afford a distinct contrast to the background". While it is easy to banter semantics and grammar to debate the extent to which the proposed regulation matches the current language, in essence the concern is whether mandatory statements can still appear in areas such as the bottom of packs or (for small packages in particular) under product folds. It may be that this can be addressed by better definitions or explanation as to what is intended by the words "prominent" and "legible", or given the uncertainties of the language and its application, it might simply be better to retain the current language and consult on the issue by way of a separate proposal.	FSANZ considers that the restructured provision does not alter its effect or the legibility requirement.	AFGC Brewers Association of NZ
	This section is drawn from clause 2 of Standard 1.2.9. However, paragraph (1)(c) is new and has been drawn from the editorial note to clause 2. This is a significant change that has substantial costs associated with it and goes well beyond the scope of a revision of the Code.	The change incorporated a requirement that is currently to be inferred from an editorial note requirement. In the revision the change that was in paragraph (c) (a requirement that writing be large enough to be read easily) has been removed. FSANZ will consider the need to state this requirement in a review of legibility requirements that will occur when and as resources permit.	NZFGC AFGC
	General legibility requirements. 1(a) legible (means "Clear enough to read"), therefore 1(c) be large enough so that it can be read easily would appear to be superfluous. However, this is an indeterminant condition as people with failing eyesight may not be able to read it easily. It requires some further and tighter definition.		Poynton
1.51	For the sake of clarity, it should be stated that a warning statement be all in capital letters and hence any numbers will have also be the correct size OR state that the minimum type size applies to the smallest character.	FSANZ considers that this change of the legibility requirements should not be achieved in P1025.	FTAA
Division 2 Information requirements – food identification			
Section 1.52	The concept of "prescribed name" is one that is tacitly understood, rather than explained in the current or proposed Code. The proposed Code also makes references to "specified name" and "trade name" without clarifying these concepts or their relationship to "prescribed name". Subsection (2) is unclear as to its intention. If it relates to a definition not being a prescribed name, it should state so expressly. If it relates to the fact that a name used in a definition is not required to be used when selling a food, it is probably unnecessary. If it is intended to suggest that the definitional name is not exclusive to foods that meet the definition, it is probably ill-conceived and in conflict with other provisions in the Code.	The definition of prescribed name in Standard 1.1.1 is quite clear that a prescribed name is a name that is declared to be prescribed. See also section 1.1.2—2(3) in the revision.	AFGC
	The previous wording was clearer that the name of the food is a mandatory requirement	The mandatory element of the requirement is expressed in Division 1.	Fonterra

Section in first draft	*Comment*	*FSANZ response*	*Stakeholder*
Section 1.54	The intention is that the entity named as the supplier be responsible for the food in terms of regulatory compliance, recalls and regulatory or consumer contact. This concept is not captured in the current or proposed Code and the link to the offence provisions in the application Acts is accordingly vulnerable. This should be clarified to meet the goal of enforceability.	The definition of supplier is inclusive.	AFGC
Division 3 Information requirements – warning statements, advisory statements and declarations			
Section 1.55	The application of advisory statements in the proposed Code is unclear in its application to food sold from vending machines. There seems no provision in the proposed Code that equates to clause 2(2)(c) of the current Code.	Paragraph 1.1.1—9(3)(c) provides for advisory statements or declarations in relation to food sold in a vending machine.	AFGC Fonterra
Section 1.55	We note in Schedule 9 that the current soy and cereal milks statement (milk or an analogue) has been usefully grouped with the other beverage statements and the new layout is easier to follow than the current drafting. However, to be consistent with the current Code (under standard 1.2.3, clause 2), the 'under 2 years' statement in column 2 needs to be moved down from clause 3(a) to clause 3(c), so that it applies to 3(c) and 3(d). The 'under 5 years' statement in clause 2 will then correctly also apply to 3(a) and 3 (b). A further point is that the 'under 2 years' and 'under 5 years' statements should be aligned. One uses the term 'complete milk replacement' while the other uses 'complete milk food'. Our preference is that both statements use the term 'milk replacement'.	FSANZ does not agree with the reordering proposed. FSANZ agrees that the term 'milk replacement' would be appropriate in both statements. However, it is beyond the scope of P1025 to make this change as it will have consequential labelling costs.	NZMPI
Section 1.56	It is unclear why the previously generic provision relating to warning statements has become a specific provision in relation to royal jelly only. The current structure would allow the ready addition of any other food that might require a warning statement, whereas such addition would be cumbersome under the proposed Code. The rewording of the application of section 1.56 in relation to situations such as vending machines needs careful review by enforcement agencies.	The change has been made in order to reduce the number of tables in the Code. This is a change driven by information technology limitations rather than drafting considerations. Drafting a new warning statement would not be overly difficult, or cumbersome.	AFGC
Section 1.57	The scope of the provisions regarding gluten has been reworded without any apparent rationale. Such change for its own sake is unnecessary and potentially problematic.	The rationale for the proposed change was that the current provision requires declaration of 'cereals containing gluten' whereas the intention, as disclosed in P###, is that a declaration be made whether or not the cereal contains gluten in the food. What is actually intended is that a declaration be made when any of the cereals that are known to contain gluten are ingredients, so that consumers can make a choice whether or not to consume the food. On a plain reading the provision only requires a declaration if gluten is present as a result of the use of cereals as an ingredient. Nonetheless, FSANZ has reinstated the current wording on the basis that it is regarded as acceptable by both industry and public health stakeholders.	AFGC Allergen Bureau
	Clause 4 is titled "Mandatory declarations of certain substances in food" and this title is carried over to the corresponding section 1.57 in the proposed Code. Part 1 of 1.57 begins "For the labelling provisions, if one of the following foods is present in a food product in a manner listed in subsection (2), a declaration that the food is present is required:". The same allergens as currently present in Standard 1.2.3 are then listed. It is recommended that the first sentence of Part 1 is changed to "...if one of the following substances or foods is present..." to cover sulphites which is in the ensuing list.	Subsection 1.2.3-4(1) refers to foods or substances.	Sanitarium NZMPI

Section in first draft	*Comment*	*FSANZ response*	*Stakeholder*
	S 1.57 concerns the requirement to include a labelling declaration where certain foods are 'present' in the food product. Although subsection 2 notes that the food may be present as either an ingredient, a substance used as a food additive or a substance used as a processing aid, we recommend that the term 'present' is defined in order to clarify to users when a declaration is necessary. The purpose of the provision is to alert consumers who may have an allergy or sensitivity to a particular food. In operation however, it is severely restricting the range of products from which an allergenic individual can choose from for, in many cases, no meaningful reason. For example, in the absence of any definition for what constitutes 'present' in the Code currently, wine producers are forced to label the presence of allergens for all wines produced using milk or egg products regardless of whether the allergens are actually present in the final product. Not only does this impose cost on producers through unnecessary label requirements, it also limits the choice of products available to consumers with allergies. In order to address this issue, both the European Commission and the Canadian Government have designed their allergen labelling provisions in such a way as to establish a mechanism for determining whether allergens are "present" in the final product. Health Canada developed guidelines to establish acceptable processing practices that are shown to avoid the presence of allergens in the final product (wine). NZW strongly supports this approach as providing a practical mechanism for producers to determine whether or not they need to make an allergen declaration on their label.	This suggestion is beyond the scope of P1025.	NZ Winegrowers
	NZW also supports the establishment of a limit of detection beyond which allergens may be considered "not present" for the purposes of the labelling requirement. The OIV resolution Revision of the Limit of Detection and Limit of Quantification Related to Potentially Allergenic Residues of Fining Agent Proteins in Wine (OIV-Oeno 502-2012) establishes limits of detection for egg and milk products used in wine production of 0.25 mg/L. The European labelling standard adopts the OIV limit of detection and prevents producers from stating that their product 'may contain' an allergenic substance for this purpose. NZW believes that a limit of detection (or at least greater clarity around detectability in the food product for the purposes of determining 'presence') should be considered as a priority by the Code Review.	This suggestion is beyond the scope of P1025.	NZ Winegrowers
S1.57	Schedule 9: The provisions around cereal based beverages have been redrafted in a way that does not match the current provisions, raising the potential for a mandatory change in product labelling. This contravenes the stated policy of P1025.	The reordering of the provisions makes no change in the labelling requirement. Items 3(a) and 3(b), which appear to be new requirements, are implicit in the current table. They relate to products that have adequate protein but low fat content. Such products are not suitable as a complete milk food for children under the age of two while being suitable as a complete milk replacement for children at or over the age of two.	AFGC
	1.57 (1) (b) - Sets out the mandatory declaration of certain cereals and their	The current wording has been reinstated, notwithstanding its uncertainty.	NZMPI

Section in first draft	*Comment*	*FSANZ response*	*Stakeholder*
	products, which in the current Code is regardless of gluten content. The difference is subtle, but the new wording could have the effect of no longer requiring the declaration of products of gluten-containing cereals, where they have been processed to a point where they no longer contain gluten. We understand the intent of the current Code to require labelling, regardless of any processing that might remove gluten. As a further point, we are unclear why 'and' is used between the various cereal grains, rather than the term 'or' (as in the current Code). It is not a requirement that they all apply, it could be any one of the grains. Please refer to our earlier comment on usage of 'and' and 'or', in section 1.19.		
Division 4 Information requirements – statement of ingredients			
Section 1.58	Subclause (1) appears tautologous.	The provision is drafted to ensure that statements of ingredients have a regulated content.	AFGC
	Subclause (2) is incorrect. Bread labelled as "bread" with no other ingredients still requires a statement of ingredients.	Bread labelled as 'bread' would require a statement of ingredients under both the current provision and the proposed provision, as bread will always have ingredients.	
	See the above comments in relation to the definition of "ingredient". Paragraph (e) seems to suggest that illegally used processing aids do not require ingredient listing.	We assume that an 'illegally used processing aid' would be a substance that has no specific permission for use as a processing aid and performs a processing aid purpose. Such a processing aid would be a processing aid that is not excepted from the general requirement to list all foods or substances that are ingredients in a statement of ingredients. Paragraph (e) applies only to foods used as processing aids. Any food may be used as a processing aid. To the extent that a food is used as a processing aid it need not be declared as an ingredient and cannot be 'illegally' used'.	AFGC
Section 1.59	This section is drawn from clause 3 of Standard 1.2.4. The key new element is subsection 1.59(e) that reads (in relation to exceptions to a statement of ingredients): "a food that is used as a processing aid". This adds clarity to what is not required to be listed in the statement of ingredients and is supported.	Noted.	NZFGC
	This section is drawn from clause 4 of Standard 1.2.4. One provision relating to offal is from Standard 2.2.1 paragraph 4(1)(a) which requires offal to be declared in the ingredients. The table to clause 4 is now found in Schedule 10 which is commented on later in this submission. A key impact from the revision is the replacement of the term used to describe how the ingredients in a compound ingredient are to be described.	Brackets are parentheses. They are used to mark off the bounds of a statement. The example quoted is a subsense, demonstrating a common usage. The Oxford English online dictionary is not a recognised source. However it is noted that the New Oxford Dictionary, also not a recognised source, says that brackets are each of a set of marks ()[]{}<> used to enclose words or symbols.	NZFGC Heinz
	The term currently used is that the information be expressed 'in brackets' following the name of the compound ingredient (paragraph 6(1)(a) in Standard 1.2.4). The new term is the ingredients of a compound ingredient be expressed 'in parentheses'. The same change has been made to the declaration of food additives (subclause 8(2) in Standard 1.2.4). Parentheses are defined as "(parentheses) a pair of round brackets ( ) used to mark off a parenthetical word or phrase" (according to the Oxford English online dictionary English Oxford online http://oxforddictionaries.com/definition/english/parenthesis#parenthesis__9.	Nonetheless, we have reverted to the current use.	

Section in first draft	*Comment*	*FSANZ response*	*Stakeholder*
	Where round brackets have not been used, the labels would need to be amended. There are two ways of addressing this issue: revert to the term 'brackets' thereby allowing status quo to continue with the form of the brackets undefined or qualify 'parentheses' with (brackets of any form).		
1.60	1.60 (b) – Suggest that 'permitted form name' is also provided as an option. Another option is to amend (iii) - i.e. 'permitted form name' could be included in 1.60(b)(iii) i.e.: ' a name that describes the true name of the ingredient or the permitted name form.	The name of a permitted form could be used as a 'name that describes the true nature of the ingredient'. Any additional words are unnecessary.	NZMPI
Section 1.61	Subclause (4) could be better phrased as an exception for volatile ingredients to the general rule about listing in decreasing order by weight. The formula is an unnecessarily clumsy way of doing this.	Subsection 1.2.4-5(4) states the requirement for volatile ingredients in text rather than a formula.	AFGC FTAA
	1.61 (6) - Use of the word 'if' in (a) and (b) makes this wording difficult.	(a) and (b) are alternatives that each have their own precondition.	NZMPI
Subsection 1.61(8)	Clause 8 – include the word standardized before the second mention of "alcoholic beverage".	The additional word is not required. In the narrative style of drafting the full term does not require repetition.	FTAA
	8 – Declaration of food additives 3) Subclause (2) does not apply to the declaration of optional class names We have had difficulty in finding where this clause is covered in the proposed format	The provision referred to does not appear in either the current or the revised Code. In the current Code the quoted provision (subclause 8(3)) relates to the use of the optional class name 'enzyme'. That provision is restated as subsection 1.2.4-7(3) [subcl 1.63(3) in the consultation draft].	Fonterra
	Clause 3 appears to permit an added enzyme to be not listed as an Ingredient. Replace sub clause (a) with "it must be listed as 'enzyme'; but".	The provision, read in its entirety, cannot conceivably have that interpretation. The provision does not make the declaration of an enzyme optional.	FTAA
	1.63 (2) - '1 class' could be 'one class'	Australian drafting practice is to use numerals, rather than words, for cardinal numbers.	NZMPI
	1.63 (6) – This section would be clearer if the following underlined words were included, and flavouring substance replaced by food additive (as this is not necessarily the technological function of caffeine in kola drinks): If caffeine is added to a food product <u>or included in an ingredient used to make a food product</u> (whether as a permitted food additive, a flavouring substance or otherwise <u>as permitted elsewhere in the Code</u>), it must be listed in the statement of ingredients as caffeine. In our view, these underlined words are important, and the current standard 1.2.4 clause 8(9) refers to 'food' not food product.	If caffeine is in a product as an ingredient it must be declared as an ingredient. The purpose of the provision is to provide an exception to the permission, in subclause (6), to declare flavouring substances by a class name.	
1.63	This appears to suggest that nutritive substances be declared as food additives. This confuses the two concepts when all that is required is to be permit "vitamin(s)" and "mineral(s)" as class names.	Some vitamins and minerals can be used as food additives, in addition to their use as nutritive substances. This provision applies when they are used as food additives.	AFGC Fonterra
Section 1.64	Proposed format now refers to "food product "not a "food.' This clause also now states "used as a nutritive substance". This could be seen as a significant change (refer to our comments regarding vitamins, minerals with respect to their use as nutritive substances).	The draft provision has been amended (Section 1.2.4—8) to make it clear that it applies to added vitamins and minerals, without regard to the purpose of the addition.	AFGC Fonterra
Division 5 Date Marking of Food Products			
	Required wording for date marking in the proposed code uses sentence case as opposed to title case in the current code. E.g. proposed code requires "Best before" and current code requires "Best Before". Would current title case still be legally acceptable?	Section 1.2.5-5 in the revised draft uses sentence case.	Sanitarium Heinz

Section in first draft	*Comment*	*FSANZ response*	*Stakeholder*
Section 1.66	For consistency, the division heading might be prefixed by "Information requirements"	Agree	AFGC
	The need for "baked on" and "baked for" dates might be explored with the baking industry to see if these remain in current practice.	Variation of this provision is out of scope for P1025.	
	Section 1.66(2)(a) has two issues: the first is that 2 years is not a "best before date", it is a measure of durable life of the food product, and secondly, the exemption should apply to foods with a best before date that is at least 2 years from the date of first supply.	Paragraph 1.2.5-3(2)(a) provides an exemption if the best-before date is at least 2 years after packaging.	
Section 1.68	Consideration might be given to allowing other (European) forms of "best before", and allowing abbreviations of "best before" such as "BB".	Variation of this provision is out of scope for P1025.	AFGC
	Further, although cited in the examples, the use of 2 digits for year declarations should be specifically authorised.	Paragraph 1.2.5—5(3)(c) provides that the year in a best-before or use-by date must be expressed in numerical form and can be expressed as the whole year or the last two digits.	
	Subsection 1.68(6) might be better presented as a separate section as it does not relate to the presentation of date markings.	The provision is now section 1.2.5—6.	
	The current Code allows the best before or use-by date to be conveyed with the month (expressed in letters) and day in any order, irrespective of the shelf life being less than or more than 3 months. However, the proposed Code limits this to only products with less than 3 months shelf life. The specific permission is listed under 4(a) but not under 4(b). Clarification is required.	The submitter's comment is not an accurate summary of the current Code provisions. If the shelf life is less than 3 months the minimum date requirement is the day and month. If the shelf life is more than 3 months the minimum date requirement is the month and year.	Heinz
	1.68 (6) – This clause clarifies that other date marks are permitted on the pack in addition to the prescribed date mark. It is not clear whether this allows only the 'packed on date or a manufacturer's or packer's code' to be used in addition, or whether any other date mark could be used (in addition).	The provision exists to avoid any question about the marking of foods with other marking. The provision explicitly permits a 'packed on date or a manufacturer's or packer's code'. Other marks are not dealt with by this provision, which operates solely to remove doubt.	NZMPI
	Division 6 Directions for storage and use For consistency, the division heading might be prefixed by "Information requirements". It may be preferable to separate the clause in conditions for storage and conditions for use.	Agree	AFGC
	The table format for the specific products (bamboo shoots and cassava) is likely to be more flexible and usable and should be retained from the current Code.	The change has been made in order to reduce the number of tables in the Code. This is a change driven by information technology limitations rather than drafting considerations.	
	Finally, paragraph (a) gets it the wrong way around: conditions for storage are not required simply to support a product's durable life, they are there for health and safety. The durable life in fact depends on the storage conditions,	Not all storage conditions are for health or safety reasons. The provisions replicate clause 6 of Standard 1.2.5, which relate to storage conditions relevant to maintaining durability, and clause 1 of standard 1.2.6, which relate to storage conditions that have a health or safety	

Section in first draft	*Comment*	*FSANZ response*	*Stakeholder*
	not vice-versa. The current wording should be reinstated.	purpose.	
	Proposed format now includes the statement "or words to that effect" which is boarder (sic) and gives more flexibility as to what manufacturers can display on the label	The provision expresses the breadth of the current provision, 'that indicates', in different words.	Fonterra
Section 1.69	The phrase "... ensure that the food product will keep until the use-by date ..." needs to be reworded. A suitable alternative might be "... ensure that the food product will maintain its intended quality until the use-by date ...".	FSANZ is unaware of any reason for changing the words that are in the current Code.	Poynton (Private)
Division 7 Nutrition, health and related claims			
Section 1.69	This statement applies to 'food products', but this is an example of a provision that should also apply to ingredients. A purchaser of an ingredient for use in a food product should be supplied with this information, in order to ensure food safety.	Ingredients are food products.	NZMPI
	Definitions are included in individual Divisions throughout the Code; Fonterra understands this may aid interpretation of each Division. However Division 8 does not contain any definitions as they are the same as those used in Division 7. If the reader is using Division 8, the expectation is then to navigate between the two Divisions for this purpose. The combining of definitions across two Divisions has affected useability and completeness and presents an unnecessary challenge that is inconsistent with the rest of the Code.	The provisions are now moved, substantially, to section 1.1.2-2.	Fonterra Heinz
	This is new and is helpful to the user. However there are a range of styles for outlines in the Revision of the Code (sections 1.26, 1.30, 1.36, 1.44, 1.121 and 2.81) and the most helpful are the ones that describe the purpose or scope of relevant Subdivisions/sections within a Division/Subdivision. The outline for Division 7 might therefore more helpfully read along the following lines: "This Division: (a) sets out definitions that apply to the Division and to Division 8 on nutrition labelling (see Subdivision B) (b) describes the claims framework, the principles applying to the application of the provisions (see Subdivision C) (c~~a~~) sets out: (i) when ~~the~~ claims ~~that~~ may be made on labels or in advertisements about the nutritional content of food (described as 'nutrition content claims' – see Subdivision D); and (ii) when ~~the~~ claims ~~that~~ may be made on labels or in advertisements about the relationship between a food or a property of a food, and a health effect (described as 'health claims' – see Subdivision E); and (~~b) describes the conditions under which such claims may be made;~~ and (b~~c~~) describes the circumstances in which endorsements may be provided on labels or in advertisements (see Subdivision F)."	Noted.	NZFGC
1.70	The health claim definition and nutrition content claim section (1.72) both have signposted notes to section 2.163(3) and 2.47 (4). This directs the user to the reduced sodium salt mixtures/ salt substitutes and fluoride in packaged	Subsections 2.163(3) and 2.47 (4) are performing a different function. The signpost is appropriate.	Heinz

Section in first draft	*Comment*	*FSANZ response*	*Stakeholder*
	water sections, highlighting they are not a nutrition content or a health claim. This information is already captured in the relevant subsection, therefore question if this specific signposting is required.		
Subdivisio n B	The status of "Light" alcohol claim is unclear. Technically there is an argument that "Light" is a "nutrition content claim" because alcohol is a biologically active substance and "light" is not a claim about "the presence or absence of alcohol" rather it is a quantitative claim. If "Light" is a nutritional content claim then it is prohibited by 1.2.7. Clearly this is not the intent of the regulation and this should be clarified in the revised Code.	This suggestion is considered to be out of scope for P1025	Brewers Assoc. ANZ
	In General Definitions – Nutrition and Health claims (section 1.71, page 51) definitions of fruit and vegetables are provided to apply to the nutrient profiling scoring criterion. There are not similar definitions for nuts, legumes and seeds. This may have implications for use of powdered versions of these ingredients in product development. DAA recommends that definitions for each of these foods be included in the revised code.	This suggestion is considered to be out of scope for P1025.	DAA
	Standard 1.2.8 2(1) contains a definition of metabolisable energy of the food, with a corresponding calculation. This definition appears to have been left out of proposed code; however the relevance/importance of this is questionable anyway.	The calculation in the current Code does no more than explain how ME has been determined.	Sanitarium
	• It would be useful to clarify the definition of unit quantity in Chapter 1, Division 1, 1.06. Specifically, it would be helpful to further clarify what is meant by 'semi solid'. Is this something that can still be poured (e.g. custard or yoghurt), or is it aerated (i.e. ice cream)?	Clarification of this term, which is in use in the current Code, is out of scope for P1025. Manufacturers and consumers have not indicated any difficulty in determining whether yoghurt, for example, is in liquid or semi-solid form.	
1.71	"Nutrient" must be defined.	FSANZ does not agree.	FTAA
	In sub clause (b) of "endorsing body" the term 'supplier' requires clarification or definition.	Supplier has a general definition for the Code, in section 1.06.	
	Also change the wording to read "permits a supplier of food for sale to make an endorsement". In the definition of 'vegetable' sub clause (b) should be consistent with Schedule S5.03 (1) and also include "seeds" before the parentheses for easier reading.	FSANZ does not consider that either suggested change is necessary	
	It is not clear why the definition for 'Meaning of nutrition content claim' is not part of Section 1.71 but is contained in a separate section 1.72.	It is standard drafting practice to put longer or more complex definitions in a separate section. The decision to do so is arbitrary.	NZMPI
	It is noted that the definitions for monounsaturated, polyunsaturated fatty acids, saturated fatty acids and trans fatty acids no longer retain the statement '…and declared as (name of the substance)' as per the current Code. Consideration of the implication of this change should be considered.	FSANZ considers that the additional words are superfluous.	
	Special purpose foods are defined for the purposes of this Division, but a		

Section in first draft	*Comment*	*FSANZ response*	*Stakeholder*
	reference is not provided to Chapter 2, Part 9, where various types of special purpose foods are defined. The link is important, and may not be obvious to Food Code users. For example, without the link, 'food for infants' could be interpreted as any food an infant might consume, when in fact there is a prescribed standard in Chapter 2 Part 9.		
S1.72	This section largely replicates the current meaning of 'nutrition content claim'. It also adds clarifications around the inclusion of mandatory and voluntary information in the nutrition information panel and when, in each instance, a claim might or might not be made. An example is where information on sugar replacers is included. It appears this might now be considered a claim. Further clarification is required around the inclusion of voluntary information that is to assist the consumer and not intended to be a claim. The label is being used in this case to inform the consumer and responding to consumer requests.	The 'clarifications' are currently expressed in Standard 1.2.8. This provision brings the related provisions together.	NZFGC
	Clause 1 (ix) should read "any of the components of protein, carbohydrate or fat"	The provision repeats the current provision in Standard 1.2.7.	FTAA
	The statement "that does not refer to the presence of or absence of alcohol…." Should be a separate paragraph or at least start with "but" and not "that".	FSANZ does not agree. The provision repeats the current provision in Standard 1.2.7.	
	The two statements that commence "Inclusion of mandatory /voluntary information…" are printed in italics. Are these statements a legal part of the Standards or are they the same/different to Notes and Examples?	In Australia, headings are a part of the legislative instrument.	
	In the statement using the term "voluntary information" it states "might" which id (sic) indefinite and impossible to interpret. It should be clarified with examples, for and against.	The example is given in subsection (3)	
	Clause 3(b) (i) the phrase "- dietary fibre" is not required.	The phrase is required. Otherwise, the 'if' statement is incomplete.	
	Clause 4 – why is this clause necessary? All mandatory information in a NIP for any food is NOT a nutrition information claim.	A NIP is not mandatory on food with an alcohol content greater than 1.15%	
	"Section 1.73(2): DB submits that this exemption should be widened to include statements which technically are health claims but are intended as allergen warnings or to assist responsible consumption of alcohol. The key omissions are statements that a product is free or low in lactose or gluten. Most ciders are free of gluten and cider producers should be able to inform their consumers who may be celiac or have gluten allergies that their products are safe to consume. The same applies with lactose. Whilst these claims are technically a health claim, their intent is to provide allergy information as opposed to sell more product on the basis of purported benefits of consuming the product. We note that gluten free beer is currently also on the market (see Appendix A).	This comment appears to rely on a significant misunderstanding of the current Standard. The conditions for making low or free nutrition content claims in relation to gluten or lactose are set out in the Standard.	DB Breweries

Section in first draft	*Comment*	*FSANZ response*	*Stakeholder*
S1.73	The title requires to be explicit, e.g. “Nutrition Content Claims or Health Claims not to be made for Kava, Alcoholic Beverages and Infant Formula Product”.	FSANZ does not agree that the current clause requires revision.	FTAA
	Clause 1 (b) contains an explicit total ban and Clause 2 dilutes that prohibition. Perhaps (b) should include (2) or make some immediate reference to Clause 2.		
	"DB also supports the Brewers Association submission that light/lite alcohol beer should not be considered a health claim. This could be clarified in Section 1.75 as follows: 1.75 Division does not apply to certain claims or declarations This Division does not apply to: (a) a claim that is expressly permitted by this Code; or (b) a claim about the risks or dangers of alcohol consumption or about moderating alcohol intake; or (c) a claim that a product is light/lite or low alcohol; or (c) a declaration that is required by an application Act."	A claim about light alcohol beer is not a health claim, and cannot be as it does not relate to the relationship between a food and a health effect. It is a nutrition content claim. It is beyond the scope of P1025 to review the application of the claims standard to light alcohol beer.	DB Breweries
S1.75	In ‘Form of Food’ (section 1.76, page 57) reference to the form of the food to which provisions of the relevant division apply are made. For example, “If this Division imposes a prerequisite, condition, qualification or any other requirement on the making of a claim, that prerequisite, condition, qualification or requirement applies to whichever of the following forms of the food is applicable:(a) If the food can be either prepared with other food or consumed as sold—the food as sold; (b) If the food is required to be prepared and consumed according to directions—the food as prepared; (c) If the food requires reconstituting with water—the food after it is reconstituted with water and ready for consumption; (d) If the food requires draining before consuming—the food after it is drained and ready for consumption. Given that no one food ‘requires’ draining, or reconstituting or being prepared/consumed according to directions, DAA recommends further clarification on this.	Drafting practice uses ‘the’ in preference to ‘a’ in provisions such as this. The provision is not referring to a specific food that requires draining.	DAA
	In sub clause (b) the term “therapeutic” should be defined even if only with reference to TGA definition. Also does this clause include “prophylactic use”?	This suggestion is considered to be outside the scope of P1025.	FTAA
	This section reflects in part clause 9 of Standard 1.2.7. It omits subclause 9(2) which states that “Any statement or information required by this Standard may be modified if the modification does not alter or contradict the effect of the required statement or information.” This provision needs to be reinserted because clauses such as clauses 12 and 13 set out statements that must be used and that may be currently applied in a slightly variable way. Removing flexibility to provide this information is changing the Code.	Section 1.1.1-14 (Section 1.12 in the consultation draft) achieves this objective. Section 1.1.1-14 brings together provisions that are currently in Standards 1.1.1 and 1.2.7.	NZFGC
1.79	This section replaces Standard 1.2.7 subclause 9(1). The Explanatory Statement states that Standard 1.2.7 subclause 9(2) is now covered by subsection 1.12(2). MPI considers that this detracts from the understanding of this recently introduced wording in Standard 1.2.7 and suggests the text ‘Any statement or information required by this Standard (replaced with Division in Code revision) may be modified if the modification does not alter or contradict the effect of the required statement or information’.	Noted.	NZMPI

Section in first draft	*Comment*	*FSANZ response*	*Stakeholder*
	This section reflects clause 26 of Standard 1.2.7. The key impact is that the labelling exceptions for the NPSC do not apply to small packages but there is no reference to 'individual portion packs' which may concurrently meet the definition of 'small package'. For the avoidance of doubt, reference in this section should also be made to the application of exemptions to 'individual portion packs' where these are also 'small packages'	A small package is a package with a surface area less than 100cm^2. An individual portion package has a surface area less than 30cm^2. Accordingly, there is no need to specifically mention individual portion packs, which are a subset of small packages.	NZFGC
Division 8 Nutrition information requirements			
	Formula moved to Schedule 11 pg 91 but the intent of the original definition needs to be added back i.e. "energy factor means the energy of the food component expressed in kilojoules per gram of food component, rounded to the nearest whole number." Also see: S11 & S12	Clause 2 of current Standard 1.2.8 merely states the method by which energy factors are determined, and does not need to be restated in the Code revision.	NZJBA
	Similarly, in Chapter 1, Part 3, Division 8 – Nutrition Information Requirements, referring to definitions under Subdivision B or Division 7 (Health Claims) instead of listing these under the standard is a prime example where navigation of the proposed Code is more cumbersome.	These definitions are now in section 1.1.1—2.	"Australian Dairy Industry Council Inc. and Dairy Australia"
1.99	For consistency, the division heading might be prefixed by "Information requirements".	Agree	AFGC
	Section 100 should also exempt foods that are used as processing aids. Vegetable oils sold and used as lubricants might otherwise require NIP labelling.	Agree	
	Clause 1(d) (ii) - why has Saturated Fat been omitted for all other foods. See Schedule 12.01 for consistency.	This provision repeats the conditions set out in clause 5 of Standard 1.2.8.	FTAA
	Should the subheadings in italics be printed in bold? i.e. "Claims in respect of.." etc.	No	
	Should the expression "etc" be used in a Standard	This use is acceptable in a subheading.	
	Clause 3 (c) – should saturated fats be included?	They are. They do not need to be mentioned in the second listing as the requirement exists in paragraph (1)(d)(ii)/	
	Clause 4 (a) include "dietary" before fibre	The additional words are unnecessary.	
	Clause 6 the statement "the nutrition information panel may.." should be changed to "the nutrition information panel must.."	The current provision in the code is discretionary.	
	Clause 7 – define "unavailable carbohydrate".	A definition of unavailable carbohydrate is not necessary.	
Section 1.100	This section generally reflects clause 3 of Standard 1.2.8 and sets out the exceptions to the requirement to carry a nutrition information panel.		NZFGC Fonterra

Section in first draft	*Comment*	*FSANZ response*	*Stakeholder*
	In removing some of the terminology, the terms 'ice' and 'water' have been combined to read 'ice water'. This is a change and needs to revert to 'ice' and 'water'.	Amended	NZMPI
	Paragraph 100(a)(vii) is limited to 'a substance that is approved for use as a processing aid' and does not include reference to 'food' that is used as a processing aid which is part of the meaning of 'used as a processing aid' in subsection 1.131(2).	Agree	
	The header would be better phrased 'What must be on a nutrition information panel'.	It is standard drafting practice not to include infinitives in headings.	Heinz
S1.101	The ordering is not ideal in this section. It may be better to have sections on cholesterol / types of fat follow on from each other and sections on fibre, sugars or carbohydrate / declarations about carbohydrates after each other. We suggest reordering as follows: (1) (2) (3) (6) (4) (5) (7) …..	The provisions have been reordered.	NZMPI
	The wording of this subclause could be read to mean it is optional whether the declaration of subclasses of fat are declared. We believe the intent is that the declaration must be included but what is optional is whether the declaration is given as an average amount or as a minimum or maximum level.	FSANZ does not consider that the suggested interpretation is compatible with a plain reading of the section.	NZMPI
1.101(6)	States that the mandatory RDI declaration for vitamin and mineral claims MUST be in the NIP and section 105 states that it MAY appear elsewhere in the label. This structure is the opposite of the current regulation and may require some labels to change. It may be open to a simple correction by making s.104(2) subject to section 1.105.	The provision in section 1.2.8-10 permits information that is in a NIP to also be presented on a label outside the NIP. It repeats the current provision in clause 7B of Standard 1.2.8.	AFGC
S1.101	How to express particular matters in nutrition information panel (5)(c), and 1.103 (Percentage daily intake information (3)(a) - where the term 'fatty acids' is used this should be replaced with the term 'fat' in line with the requirements in sub clause 1.102(8).	FSANZ does not agree. Fatty acids are declared as fat, but are calculated as fatty acids.	NZMPI
1.102	Carbohydrate may be replaced by 'Carbohydrate, total'. Where does the term Carbohydrate come from? We are informed in section S11.02 in Schedule 11 how to calculate 'carbohydrate by difference' and 'available carbohydrate', but we are not informed where the value for 'carbohydrate' or 'carbohydrate, total' comes from. It is presumed, but not stated, that either of these values 'carbohydrate by difference' or 'available carbohydrate' is acceptable.	The provisions are revised with reference to 'available carbohydrate by difference'.	Poynton
1.102(2)(b)	This section reflects clause 7 of Standard 1.2.8. Clause 7 currently refers in two places to values being 'per serve', first in relation to dietary fibre (paragraph 7(2)(a)) and secondly in relation to the percentage daily intake of energy, fat, saturated fatty acids etc (subparagraph 7(2)(b)(i)). There is no reference in section 1.103 to 'per serve' and this is a vital element to the provision of percentage daily intake information. It is very helpful to have left the reference values for percent daily intake information in this section.	New section 1.2.8—8 refers to 'per serving'.	NZFGC
1.103	It may be helpful here to refer to section 1.07 for the meaning of RDI and	RDI is a defined term. A signpost is unnecessary.	NZMPI

Section in first draft	*Comment*	*FSANZ response*	*Stakeholder*
	where to find these.		
1.104	Should be 'constitute'.	Agree. The provision has been amended.	NZMPI
	refers to the requirements for percentage daily intake information. Reference is made to the RDI's, but it would be useful to (sic) which section of the proposed code contains the actual RDI's.	RDIs are set out in Schedule S1.	Sanitarium
	Standard 1.2.8 currently includes a reference to the schedule in Standard 1.1.1.		
	Requirements for small packages – Standard 1.2.8 includes a clause regarding additional declarations for food in small packages (8A (1)-(4)). This section does not seem to be included in the proposed code. However, the general requirements for declaring unavailable carbohydrate are covered elsewhere in the proposed code.	This requirement is repeated in paragraph 1.2.8—14(1)(c) [paragraph 1.109(1)(c).in the consultation draft.].	
Division 9 Characterising ingredients and components of food			
Section 1.110	For consistency, the division heading might be prefixed by "Information requirements".	Amended.	AFGC
			Fonterra
	The elements of "likely to be associated with the name of the food by a consumer" in the definitions of characterising ingredient and characterising component are potentially unenforceable for uncertainty.	The use of the word 'likely' permits a supplier, regulator or a court to form a view about the likelihood of a relationship being made by consumers. The current words require evidence that consumers actually make that relationship. FSANZ considers that the revision actually makes the requirement easier to apply. AGS has advised:	Heinz FTAA NZFGC
	It is uncertain exactly what these elements add to the definitions and they might be omitted without great impact on the application of the standard. The change in wording from "usually associated" to "likely to be associated" is also of concern as it may increase the number of ingredients / components required to have percentages declared.	The current definitions in St 1.2.10 refer to 'usually associated with' rather than 'likely to be associated with', and the comments were that this change makes the definitions potentially unenforceable for uncertainty, and that it is likely to increase the number of ingredients required to have percentages declared. The draft is based on the OLDP report (but is a modified form of the OLDP suggestions), which commented as follows: '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. . . . [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 share OLDP's concerns, and we think that legitimate criticisms could be made of both the current Code definitions and the current draft definitions. In relation to the current Code definition, how will anyone will know whether an ingredient or category 'is usually associated' with the name of the food by consumers? Would they have to undertake a survey? Is the aim that the prosecution would need to lead survey evidence in a prosecution? The examples in the editorial note in the current Code provisions explain how to work out whether ingredients are 'usually associated', and this involves considering 'what an	

Section in first draft	*Comment*	*FSANZ response*	*Stakeholder*
		appropriate descriptive name for the product might be, were this to be given'. We can see no clear connection between what is described in the editorial note and what we understand by the expression 'usually associated', which leads us to wonder whether 'usually associated' is really the correct concept in any event. Regarding uncertainty, the test for uncertainty of delegated legislation goes to whether a certain, objective standard has been specified. However, the word 'likely' is quite commonly used as a standard in other legislation, and courts are usually able to find a meaning for it in the particular context. We think that there is likely to be, in at least some cases, some room for difference of opinion as to which ingredients and components comprise the characterising ingredients and components, but that does not of itself render the provision void for uncertainty. Further, it seems to us that there is some unavoidable degree of 'fuzziness' around these concepts, and that any statutory formulation will leave similar room for a difference of view in specific cases.'	
	List of exceptions no longer includes a few examples including "foods for catering purposes" which are clearly exempt in the current Standard. Labelling requirements for foods for catering sale is covered in Division 1 of this Part; however, its removal from Division 9 causes confusion. Full list of exceptions should be reinstated to this Division.	There is no requirement to exempt 'food for catering purposes' from a requirement to provide characterising ingredient information as there is no primary requirement to provide that information.	Fonterra
	Subsection 1.112 seems a clumsy way of saying that characterising ingredients must be declared as a percentage based on the weight / weight basis of ingoing ingredients in the food product. Note that the definition of "TW" in the proposed clause should specifically reference the "food product" to enhance clarity.	The provision has been amended to make it clearer that the amount is the ingoing weight of the ingredients in the food for sale. The provision is in subsection 1.2.10-7(1).	AFGC

Section in first draft	*Comment*	*FSANZ response*	*Stakeholder*
	This section is based on clause 2 of Standard 1.2.10. Currently subclauses 2(3) and 2(4) provide a comprehensive list of foods that do not require characterising ingredients or components to be listed. This list has been reduced and a number of exceptions now sit in various places in the revised Code. The exceptions relate to 'food packaged in the presence of the purchaser', 'foods for catering purposes' and 'food delivered packaged and ready for immediate consumption at the express order of the purchaser'. FGC understands the driver for these deletions is to remove duplication. However, in this instance, this has been done at the cost of completeness and usability. FGC considers a list that purports to reflect exceptions to the listing of characterising information should be complete or should include a note that provides references to other exceptions.	In the current code the list of exemptions is required because the obligation to label is expressed in very general terms. In the draft the primary obligation is precise, so there is no need to refer to an exemption.	NZFGC
1.111 (3) (g)	The clause should refer to (f) not (e)	This has been corrected in paragraph 1.2.10-9(3)(g).	NZMPI
	The revision of the wording that covers characterising ingredients declarations (Divisions 1.111-1.113) is aimed at simplifying and clarifying these requirements. However this revision still does not clarify the intent of the characterising ingredients declaration requirements sufficiently. The intent as noted in the "Percentage Labelling of Food User Guide, September 2010" is to have manufacturers "state on a food label the proportion of a characterising ingredient or component contained in that food" with the aim of enabling consumers to "make informed choices about the foods they buy by allowing them to compare how much of a characterising ingredient or component is present in similar products". The wording in the Code therefore needs to ensure that food manufacturers only declare the amount of the characterising ingredient that is present in the final food at the end of production. This is partly addressed by 1.112 where it is stated that "The weight of added water or volatile ingredients removed during the course of manufacture of the food product must not be included in the weight of the ingoing ingredients when calculating PCI". Whilst the intent of 'volatile' appears to cover loss during production, there is the potential for interpreting 'volatile' to only include evaporative losses. Confusion as to whether 'volatile' should apply to all process loss or evaporative type losses only, leaves the code open to misinterpretation. Therefore, the concept of volatile should be clarified to capture any significant ingredient content that is lost during processing. For example, some manufacturers may declare the ingoing weight of soy beans	FSANZ considers this suggestion to be out of scope for P1025.	Sanitarium

Section in first draft	*Comment*	*FSANZ response*	*Stakeholder*
	during the course of soy milk production and then filter off a significant portion of the soy bean (e.g. insoluble fibre) to make the beverage more palatable. The filtered off portion should not be included in the final percentage of characterising ingredient calculated. To address this issue it is recommended that either: 1. A definition for volatile ingredients is included that captures significant ingredient losses. A suggested definition is as follows: a. "volatile ingredients mean any substance, other than water, that is added into production and then removed, or lost during the production process"; or 2. The following sentence in 1.112 be reworded from: a. "The weight of added water or volatile ingredients removed during the course of manufacture of the food product must not be included in the weight of the ingoing ingredients when calculating PCI", to: b. "The weight of added water or volatile ingredients lost or ingredient components removed during the course of manufacture of the food product must not be included in the weight of the ingoing ingredients when calculating PCI".		
Division 10—Information requirements—Country of origin labelling			
	For consistency, the division heading might be prefixed by "Information requirements".	Agree.	AFGC
1.118	Does not reflect the addition of Beef, Veal, Lamb, Hogget, Mutton, Chicken or mix of food - mentioned in Table to subclause 3(1) of the original Standard	These changes, which were in a later amendment, have now been included.	Fonterra
	"Applies to a food product that is displayed for retail sale." Consider again the cumbersome definition for "food product" within this capture Also, conflicts with the "code" wide application of 1.31.	Section 1.118 has been substantially revised in section 1.2.11-3.	NSWFA
Part 4 Substances added to or present in food			
	Division 1 Outline of Part		
1.121	As noted earlier, the concept of 'used as a food additive' does get cumbersome and at times confusing, however we agree that this approach appears to meet the objectives of correctly regulating the use of food additives. Please refer to our comments in relation to section 1.21(4).	The outline statement is not repeated in the revised draft.	NZMPI
	This is new and is helpful to the user as far as it goes. Its use would be greatly enhanced by the addition of the titles of the Divisions in (a) and (b) such that the outline would read: "(a) the addition to a food of substances that are not normally consumed (see Division 2—Food Additives, Division 3—Vitamins and Minerals and Division 4-Processing aids); and (b) the presence in a food of substances that are not normally consumed (see Division 5—Contaminants and natural toxicants, Division 6—Agvet chemicals, Division 7—Prohibited and restricted plants and fungi and Division 10—Microbiological limits for food); and".	Noted. However, the outline statement has not been included in the further draft.	NZFGC
	After 'normally consumed', should 'as a food' be added? The wording in the subsections 1.121 (a) and (b) is confusing as written, as vitamins and minerals		NZMPI

Section in first draft	*Comment*	*FSANZ response*	*Stakeholder*
	are normally consumed (via foods), but they are not normally consumed on their own.		
	This running number could be simplified by listing the names of the divisions, for example 'This part sets out the requirements for food additives (Division 2), vitamins and minerals (Division 3), Processing aids (Division 4) etc. • 1.121(a) refers to 'the addition to a food of substances that are not normally consumed'. However, they are normally consumed as part of food. It is suggested that the wording be similar to the current Code i.e. 'the addition to a food of substances that are not normally consumed as a food in itself'. • 1.121(b) refers to 'the presence in a food of substances that are not normally consumed'. However, some prohibited and restricted plants and fungi may potentially be consumed as foods in their own right rather than added as a substance, for example betel nut and magic mushrooms (psylocybe spp). • No reference is made to Division 10 – Microbiological limits for food.		Queensland Health
1.122(2)	This section is helpful in that is clearly excludes foods that may perform a food additive function, such as flour used to thicken a sauce. Subsection 1.122 (2) (b) clearly excludes 'foods' of this nature.	Noted.	
1.122 (1)(a)	Should it say 'in relation to a food'? Note that (b) says 'added to the food'. Note that 1.131(1) refers to '..a food..' (in our view, the word 'a' is needed as its status as a food additive depends on use, i.e. use in a particular food).	Substances are not identified in relation to a food in this provision. That is done in section 1.3.1—3 and Schedule 15.	NZMPI
Section 122	The proposed wording focuses this standard and means substances are less likely to be unintentionally caught up, consistent with the overarching policy principle.	Noted.	Australian Dairy Industry Council Inc. and Dairy Australia
	The transfer of the list of permitted additives by food type (current Code: 1.3.1 Schedule 1, proposed: Schedule 15 Table S15.04) has resulted in significant changes to the food category numbering system that mean it is now inconsistent with the Codex General Standard for Food Additives Food Category system. For example 'Dairy products (excluding butter and butter fats)' are Category 1 under Codex, and under the existing Code, but are Category 2 under the proposed Code. This should be rectified as it is confusing for traded foods and is against the principle of consistency with Codex wherever possible that should underpin the Food Standards Code.	The schedule has been revised to restore the current numbering system. It is noted that the Australian schedule maintains a consistency with the Codex schedule for some foods only.	
	Other changes seem to serve no purpose, for example, the title for 1.3.1 Schedule 5, (Schedule 14 in the proposed Code) has changed from 'technological functions' to 'technological purposes' – this doesn't appear to have any direct impact, but is a shift away from Codex language.	The change is a 'shift to', rather than 'away from' current 'Codex language'.	
	In Schedule 15 mozzarella cheese should be a sub-item under 2.6.1, not a new item 2.6.2."	Agree. The schedule has been revised.	

Section in first draft	*Comment*	*FSANZ response*	*Stakeholder*
	The current requirement that food additives must be intentionally added to food (to achieve a technological function) has been omitted from the proposed version. This is a significant change and should be either amended or addressed in a separate consultation.	The Code should rely on only an objective standard of intention. Subjective intention is the domain of the application Acts. In this case an objective standard is established by the requirement that substances be added for a technological purpose.	Fonterra
	Further, the term “additive used at GMP” is confusing because there (sic) additives in Schedule 15 used at GMP that are not “additives used at GMP” as defined.	The defined terms that are used in the Code to describe the substances that are now listed in Schedules to Standard 1.3.1 have been revised to emphasise the link to processed foods and to remove possible confusion in relation to GMP.	AFGC
	Importantly, s.1.122(2)(b) creates the possibility of allowing additives without pre-market clearance. This provision in the current Code relates only to flavourings (where pre-market clearance is not generally undertaken by FSANZ in any event, being largely adopted by reference from international approvals). In the proposed Code it has been given general application to all additive categories.	Section 1.122(2)(b) was inserted to ensure that refined etc, substances that perform technological purposes are caught in the net. Section 1.122 was not a permission provision and cannot be said to allow additives without pre-market clearance. The permission function was performed by section 1.123. Section 1.122 did not create the possibility that the AFGC speculates. It should be noted, in this context, that the current provisions, in Standard 1.3.1, do not prohibit substances that perform an additive function that have not been through a process of pre-market clearance.	
	The new definition of “use of an additive” and “additive” is more restrictive than the existing definitions and may constrain the use of materials that have been historically used in the industry such as clouding agents and natural colourants derived from the permitted ingredients of beer. These include extracts of coloured malt, which have minimal residual fermentability, or clouding agents derived from yeast or pectin. Under the proposed new definition, these ingredients could be considered food additives and require premarket approval before use.	FSANZ does not agree that the proposed definition is more restrictive. The provision does ensure that the safety of all relevant substances is considered. The current provision only provides permission for the limited range of substances that are assessed as being safe for use as a food additive, but leaves a significant gap in which substances that have not been assessed are treated in the same manner as substances that have been assessed but found not to be safe, ie they are not permitted but, on the other hand, are not explicitly prohibited.	Brewers Assoc. ANZ
	"Section 1.122(2): DB submits that section 1.122(2)(a)(i) should be removed as it duplicates limbs (ii)-(iv). In other words, all of the additives listed in Schedule 15 are comprised in additives or colourings permitted at GMP. Including reference to Schedule 15 creates confusion as it is not clear whether Schedule 15 has to be read in conjunction with the food type in question or not in this context.	The comment is based on an error. The list of substances in Schedule 15 is not co-extensive with the lists in Schedule 16. A note has been included with the definition of used as a food additive to highlight that point.	DB Breweries
	DB further submits that reference to substances that have been extracted, refined or synthesised, as well as reference to use of ingredients by consumers, should not be included in section 1.122(2)(b) as they are not in the current Code. Introduction of the notion of ingredients used by consumers is particularly confusing as it does not accord with the definition and general use of the term “ingredient” in the Code. The Code concerns the production of food by food manufacturers.	The inclusion of substances that have been extracted, refined or synthesised in the class of substances that might be used as a food additive is necessary to ensure that the provision has effective operation. As a basic principle additives should not be used unless there is a technological purpose to be achieved. The schedules provide lists of substances that have been recognised as being safe for use to achieve the technological purposes. The current regulation provides an implicit prohibition on the use of substances that have not been assessed for safety. Another approach might be to presume that the schedules include all acceptable food additives and to explicitly prohibit the use of any substance that is not listed. In FSANZ’s opinion that approach	

Section in first draft	*Comment*	*FSANZ response*	*Stakeholder*
		would have a wider application than is necessary to protect health and safety. FSANZ has identified substances that are extracted, refined or synthesised as the residual category of substances that require an assessment. In this respect the proposed standard operates differently to the Codex standard, which, on its own terms, is no more than a list of substances that have been recognised as suitable for use as food additives in foods. They are substances that have been assigned an Acceptable Daily Intake (ADI) or determined, on the basis of other criteria, to be safe by the Joint FAO/WHO Expert Committee on Food Additives (JECFA) and given an International Numbering System (INS) designation by Codex. Codex recognises that its list of food additives is not a complete listing of substances that may be safe for use as food additives.	
	There is a difference between 'consumed' and 'sold' with respect to food. The change in wording impacts the meaning of used as a food additive. This is because manufacturers may use an ingredient that a consumer would not have access to. Fonterra understands that this change in wording may be an attempt to differentiate between ingredients used by consumers and those used by food manufacturers. We would appreciate your clarification on this issue please.	The provision is drafted to make a distinction between substances that might be used as additives by a manufacturer but are not normally used by consumers as ingredients, eg because they are not generally available in the retail market.	Fonterra
	This clause is new which is a significant change and should be either amended or addressed in a separate consultation.	The reason for including this change in this proposal was addressed in the Call for Submissions paper. The major proposal procedure adopted for P1025 is entirely appropriate for 'significant' change.	Fonterra
	Clause 2(b) (iii) – if this clause is to have an (sic) real meaning then it must be fully described as to what ingredient are not used as an ingredient by consumers (undefined). A consumer can be a manufacturer. The term "technological function" is not used and when replaced by "technological purpose" will create some confusion as Processing Aids use "technological purpose" also. This change is usage will create interpretation concerns, especially as some Food Additives can be used as Processing Aids.	Whether an ingredient is one that is usually available for use by consumers will be a matter of fact to be determined on a case by case basis. Codex has adopted 'purpose' for food additives and processing aids. The Codex definition of food additives, in the Codex General Standard for Food Additives (Codex Stan 192-1995) is, ***Food additive*** means any substance not normally consumed as a food by itself and not normally used as a typical ingredient of the food, whether or not it has nutritive value, the intentional addition of which to food for a technological (including organoleptic) ***purpose*** in the manufacture, processing, preparation, treatment, packing, packaging, transport or holding of such food results, or may be reasonably expected to result (directly or indirectly), in it or its byproducts becoming a component of or otherwise affecting the characteristics of such foods. The term does not include contaminants or substances added to food for maintaining or improving nutritional qualities. (emphasis added)	FTAA
	The meaning of 'used as a food additive' removes reference to 'technological function' and refers to 'technological purpose'. INC considers that 'function' and 'purpose' are not directly interchangeable such that the purpose is the reason something is done while function is the action of the thing or in this case, substance. An example of the difference is provided with a food additive that is an emulsifier. The purpose of the emulsifier is to provide for a more homogeneous product but its function is to facilitate emulsification of one	See the comments above in relation to the use of 'purpose' rather than 'function' in international standards.	INC

Section in first draft	*Comment*	*FSANZ response*	*Stakeholder*
	substance into another.		
	Of greater concern is the narrowing of the definition such that a substance used as a food additive must be extracted, refined, or synthesised and not normally be sold as a food product or used as an ingredient by consumers.	This is not a requirement of the proposed section. What the provision says is that a substance that is refined, etc may be a substance that is used as a food additive. It does not say that such substances will always be food additives or that a food additive must be such a substance. Also, the substances listed in paragraph (2)(a) do not need to meet the requirement of paragraph (2)(b).	
	In an environment where 'natural' substances are increasingly sought, the definition appears to preclude the use of these substances as additives. An example of foods that are sold as food products but are additives are lecithin (sold to be sprinkled over other foods or used in baking) and vitamin C powders, the latter raising issues about substances added to supplemented foods.	The provision says nothing about the use of foods as food additives, unless those foods have been listed in Schedule 15, etc. It is beyond the scope of P1025 to determine whether the list of approved food additives should be expanded.	
	Aim appears to "deem" the meaning of – "used as an additive", but is there not introduced in the definition an element or degree of intent, namely, "…added to the food to perform one or more of the technological purposes…" Does this introduce a degree of "intent" to an otherwise absolute liability offence? Compare, say, to the wording, "added to the food and performs" Is the prosecution now required to prove that a manufacturer added the substance to perform one or more of the listed things; what if the evidence is that it was added by mistake? (Note that honest and reasonable mistake is no defence for Food Act offences, including non-compliance with the Code: MFP23 (s27 NSW Food Act 2003)) Comment In most or the majority of cases, there can be no other available inference than the fact that a substance has been added to perform a task (technological purpose), be it as a preservative, colouring agent or the like. In such circumstances, is it not appropriate to shift the wording to "and performs" so that it accords more with the nature of the absolute liability offence? This or similar wording abrogates the induction of "intent" arguably open to interpretation by the use of the words "to perform". Does this not remain within the current meaning of the Code, as opposed to a contrary position, where intent may be introduced at least inadvertently? The problem of an inference arising as to the need to prove intent is compounded when inputting the definition into an alleged offence against 1.21(4), as it talks of "a substance that is used for any of the purposes listed in column 1"	There is an element of intent inherent in the understanding of food additives. Food additives are described, in the current purpose statement, as substances that have been intentionally added to achieve a function. So, while there is an element of intent inherent in the definition it is not novel.	NSWFA
	DB submits that more flexibility should be permitted in the use of additives in line with the Overarching Objectives. As per the Brewers Association submission, this intent was more evident with the current drafting of the Code, including by cross-reference to the Codex Alimentarius General Standard. This could be achieved by permitting the use of [natural] additives	FSANZ considers that this suggestion is out of scope for P1025. The drafting in the submitter's comment begs the question about the identity of food additives. What is an additive that performs the same function as a permitted additive? Do the 'drafters' mean 'a substance that performs the same function as a permitted additive'? If so,	DB Breweries

Section in first draft	*Comment*	*FSANZ response*	*Stakeholder*
	at GMP or to the maximum level of the expressly permitted additive (whichever is the lower) where such an additive is a direct substitute for an expressly permitted additive and is listed on an internationally recognised Standard (such as the Codex) in relation to that food type. This would achieve the Overarching Objectives of promoting consistency with international food standards, create an internationally competitive food industry, promote fair trading in food (between local and offshore producers) and not prejudice the health and safety of consumers. Many New Zealand food manufacturing companies are now part of a wider international group. Permitting this flexibility not only allows international innovations (that are permitted by established international standards) to be brought to New Zealand but also ensures that New Zealand producers are not compromised by more restrictive provisions than our major competitors globally. Such wording could either be added to section 1.123 or directly to Schedule 15 so that it cross-referred to section 1.123(1)(a). Suggested draft wording as follows: Additives that: (i) perform the same technological function as an expressly permitted additive for the same food type; (ii) are listed on [internationally recognisable food standards]/[the Codex General Standard and/or the EU Directive on Food Additives] for the same food type; and (iii) are used in accordance with GMP or to the quantity permitted of the expressly permitted equivalent food additive (whichever is the lower), may be used as a food additive in relation to that food type.	do they intend to include all substances—or only substances that are already recognised as 'additives'?	
	Food additive is currently described in the purpose statement of Standard 1.3.1. Elements of that description appear in the meaning of 'used as a food additive' such as performing a technological function/purpose listed, an additive or colouring added according to GMP, a substance not normally consumed as a food and a substance not normally used as an ingredient of food. The element lost is 'intentionally added to food' and the new element is it 'has been extracted, refined or synthesised'. It is not clear what the rationale for the omission and addition is.	The Code should rely on only an objective standard of intention. Subjective intention is the domain of the application Acts. In this case an objective standard is established by the requirement that substances be added for a technological purpose.	NZFGC
	To the extent that ever more natural colourings and flavourings are being sought to satisfy consumer demand, it seems contrary to provide for a substance to be used as an additive only if it has been 'extracted, refined or synthesised'. For example, the use of fruit or vegetable juice as a colouring agent would not be available as food additives under this proposed meaning of 'used as a food additive'. The revision appears to change the application of the term 'food additive' substantially and to this extent goes beyond the	The use of fruit juice as a colouring is not covered by this provision because such a use is, in practical terms, no more than the addition of an ingredient. Fruit juice is not something that requires pre-approval because it is known that fruit juice, at least from fruits that have a history of human consumption, is safe. On the other hand, it is also known that substances that have been extracted, refined or synthesised are likely to require some safety assessment. Put simply, a food that achieves a technological purpose incidentally is not a food additive. It is	

Section in first draft	*Comment*	*FSANZ response*	*Stakeholder*
	scope of P1025.	an ingredient.	
	In subsection 1.122(3), the definitions of substances permitted at GMP or to a maximum level generally reflect current arrangements and the revision of these provisions has no impact.	Noted.	
	Following subsection 1.122(3) is a heading that currently reads "Colours and their calcium lakes". This should more correctly read "Colours and their aluminium and calcium lakes".	This change is made in the revised draft.	
1.122	FSANZ has indicated that the detailed policy principles are implemented in the current Code through standards that regulate the addition or use of food additives, vitamins and minerals, processing aids, and certain plants and fungi by imposing a series of general prohibitions on the addition of those substances and then specifying permissions for their addition. The provided definition for food additives is not supported. There is a need to improve the clarity in the divisions of substances added to food using the provided definitions. FSANZ should provide examples of substances that fall within the divisions so that jurisdictions are clear that the definitions are in fact enforceable.	There was no definition of food additive in the draft. There is none in the revised draft. There is a definition of 'use as a food additive'.	South Australia
	This clause applies in relation to food, not the food product. It is stated as the equivalent to the present permitting clause under Std 1.3.1 clause 3. Question if it is restricted by the use of the headings referring to "ingredients", whereas 1.3.1(3) was open, simply referring to "Permitted use of additives" and "may be added to a food". In other words, there were no specific limitations – be it added as a component, etc. as opposed to simply an ingredient, which might arise as a result of the heading (the heading forming part of the Act or instrument)	This comment appears to posit a situation in which a food additive is used but is not an ingredient. The suggested example is a food additive that is 'added as a component'. The comment assumes, incorrectly, that the additive would not be an ingredient. Food additives are ingredients. They are ingredients of a particular type, because they achieve a particular purpose and because they are not typical ingredients. That unique character does not stop food additives being ingredients.	NSWFA
S 1.123	The use of the following bolded words in the section title: 'When food additives may be **used as ingredients in foods'** might create confusion, but we think this is the correct term to use (food additives are ingredients and must be listed as such in the ingredient list). If this phrase proves problematic, with respect to the definition in section 1.17, it could be replaced with 'When food additives may be added to foods' or words of similar effect. Please refer also to our earlier comments on the definition of ingredient.	Noted	NZMPI
	Code users might refer to section 1.17, which defines ingredient. It is not immediately obvious that food additives are considered ingredients, in this context.	Draft section 1.17 did not define 'ingredient'. The provision is not repeated in the revised draft.	
	Subclause 2 relating to carry over of food additives seems out of place in this section. It could form a new section 1.127, or form part of 1.124.	Noted.	
	Clause 1(b) and (c) may be in conflict as (b) discussions (sic) restrictions on quantity used and in contrast (c) permits GMP levels.		FTAA AFGC

Section in first draft	*Comment*	*FSANZ response*	*Stakeholder*
	Perhaps (c) could be modified by the addition of "where permitted" after "GMP".	Agree. (c) should only apply if GMP is permitted	
S 1.123	Other specific issues relevant to dairy products include: Section 1.124(6)(e) applies the nitrate calculation for meats to all nitrate calculations, when for cheese, nitrate salts are calculated as the nitrate ion.	Agree.	Australian Dairy Industry Council Inc. and Dairy Australia
	Clause 5 of the current Code allows for the maximum amount that may be present in the food as sold. These words 'as sold' are not included in the proposed corresponding section 1.124(2).	This was dealt with in 1.21, which applied the condition to food product. The second limb of clause 5 is stated in subsection 1.3.1—4(4).	Fonterra
1.124	Section 1.124(5): This is an unnecessary rewording of clause 8 of Standard 1.3.1 which introduces ambiguity. It is not clear in the redrafted wording whether "a higher level than would otherwise be allowed" refers to the additive being allowed in the final food or in the ingredient. If the latter, this would be a new restriction of additive use in premixes that would be a significant change in the Code.	Subsection 1.3.1-4(5) is a revision that puts beyond doubt the application of the limitation to the level of the food additive in the food for sale.	AFGC Fonterra and NZMPI (re steviol calculation)
	Further, the specific reference to the "maximum permitted level in Schedule 16" appears to not capture the maximum levels for colours set out in subs.124(3).	Subsection 1.3.1-4(5) refers to 'the maximum permitted level in subsection (3) or Schedule 15'.	
	Section 1.124(6)(e) wrongly applies the nitrate calculation for meats to all nitrate calculations, In other cases (eg cheese) nitrate salts as calculated as the nitrate ion.	The provision and the schedule have been revised. Paragraph 1.3.1-4(6) now establishes the default position that the total of nitrites and nitrates is to be calculated as sodium nitrite. The exception, for the addition of nitrates to cheese, is referred to in the restriction column of the table to S15-5.	
	Section 124(6)(f) is probably unnecessary given these additives have just one permission (in relation to salt) and the unity sum rule would apply to the same effect.	The provision has been removed on the basis suggested—that section 1.3.1-6 applies.	
	Section 1.124(7): The actual steviol glycoside equivalent is the sum of the individual sources multiplied by their conversion factors. The sigma element of the equation has been omitted.	Σ has been included in the formula.	
	Nitrates and ferrocyanides appear to be new additions to the list. This is a significant change.	They were previously in the tables. There was no change. Ferrocyanides have now been removed from the list and the treatment of nitrates has been changed.	Fonterra
	1.124(1), 1.133(2) '… an additive permitted at GMP; …' GMP stand for Good Manufacturing Practice, so surely this phrase should read ' … an additive permitted according to GMP; …'.	Noted.	Poynton
	This section is drawn in part from clause 5 of Standard 1.3.1 and while it appears more convoluted, it is largely presenting the same provisions. The reference in subsection 1.124(5) to the addition of substances in ingredients in higher levels than would otherwise be allowed so long as the level in the final food complies with the maximum clarifies the situation in relation to additives in ingredients and makes it clear that the maximum applies to the final food,		NZFGC

Section in first draft	*Comment*	*FSANZ response*	*Stakeholder*
	an element omitted in other areas.		
	Paragraphs 1.124(6)(e) and (f) refer to nitrates and ferrocyanides respectively. It is not clear where these references are drawn from and the next version of the concordance could assist in identifying source	These references currently appear in the Schedules. The reference to ferrocyanides is now removed on the basis that it has no practical application.	
	Maximum permitted levels of food additives in foods - This section is helpful and sets out the requirements in a clear manner.	Noted.	NZMPI
Section 1.125	The language of this provision requires further work. As drafted, it would potentially allow addition of intense sweeteners at levels exceeding the MPL specified in the Schedules. The reference to flavour enhancers (while in the current Code as well) is not helpful in this context as flavour enhancement is a separate technological function to sweetening. The provision is really directed to imposing a limit on the use of intense sweeteners that may be present at GMP, and might be better phrased along these lines.	The provision enables intense sweeteners to be added either to enhance flavour or as a whole or partial sugar substitute. The purpose of the provision is to limit the purposes for which intense sweeteners may be used as a food additive, subject to any limits established in the schedules. Some intense sweeteners are permitted at GMP. The provision does not permit the addition of sweeteners at levels greater than specified in the schedules. The qualification recognises that conditions on use might permit addition at a level that is greater than required for sugar replacement alone, eg for brewed soft drink or formulated beverages.	AFGC
	This section allows the addition of intense sweeteners at levels exceeding the maximum permitted level in Schedule s15.04 and clarification to the note to the intense sweetener permissions for chewing gum and bubble gum is recommended.	The section does not operate in the manner suggested in the comment.	Australian Industry Group
Section 1.126	The unity sum rule for additives with the same function should be clarified in relation to additives permitted at GMP. No maximum level is specified for such additives for the term MPLi. The clause should specify that GMP additives score zero in the calculation.	Subsection 1.3.1-6(3) achieves this objective.	AFGC Australian Industry Group (in relation to unity sum rule)
Division 3 Vitamins and minerals			
Note 1. (under Division heading)	This provision (and others in the Code) is drafted on the predication that vitamins and minerals will remain regulated as nutritive substances. As discussed previously, this outcome is not certain and significant redrafting will be necessary should the concept of nutritive substance be altered or deleted.	It should not be assumed that vitamins and minerals will not continue to be regulated as nutritive substances when used for a nutritive purpose.	AFGC
Note 2	It is useful to state that folic acid fortification applies to bread sold in NZ only. This is missing in the proposed Code. Perhaps this could be included in the 'Notes' section	FSANZ has implemented a general policy of removing editorial notes that are not required for navigation within the Code, where possible. The suggested note could be included in a standard made under the New Zealand Food Act 1991.	Fonterra
	Note 2 under the Division heading does not clearly state that this Division relates to claim conditions for added vitamins and minerals. The Note should refer Code users to claims that can be made for naturally occurring levels of vitamins and minerals, i.e. to Division 7 and schedule 4.01.	Note 2 is revised in Standard 1.3.2.	NZMPI
	This Note is new and changes the scope of this Section so that only those vitamins and minerals which are used as nutritive substances are included in this Section. This is a significant change and should either be amended or the	It is impossible to make a significant change to a requirement in an editorial note. Editorial notes have no legal effect.	Fonterra

Section in first draft	*Comment*	*FSANZ response*	*Stakeholder*
	subject of a separate consultation.		
Section 1.128	This reference should read "Subsection 1.21(4)..."	This reference is now to subsection 1.1.1-10(4)(b).	Fonterra
	This section is based on clause 3 of Standard 1.3.2 with amendments mainly relating to references to information now contained in Schedules S17.01 to S17.03. There is generally no impact resulting from the revision. However, FGC notes that while subsection 1.128(c) refers to 'amounts' of vitamins and minerals in 'reference quantities' of food, the table in S17.03 of Schedule 17 refers, in column 3 to "Maximum permitted quantity per reference quantity". This creates a mismatch between the Code and the application of the Schedules that requires correction by changing the heading to column 3 of the table in S17.03 to "Maximum permitted amount per reference quantity". Vol 1, page 86 1.128 should read as no more than the maximum permitted quantity	Noted. FSANZ does not agree with the suggested drafting.	NZFGC NZJBA
Editorial note – Example calculation	Useful example now gone. Need to include an example of how to calculate.	FSANZ has implemented a general policy of removing editorial notes that are not required for navigation within the Code, where possible.	Fonterra
	The proposed wording regarding addition of vitamins and minerals now specifies that this is for vitamins and minerals 'used as a nutritive substance'. This potentially allows vitamins and minerals to be used for other purposes (for example antioxidants), although different provisions regarding labelling, claims etc may apply. While this is a notable change it serves to provide greater clarity. Some inconsistencies about how vitamins and minerals are referred to and whether they are must be 'used as a nutritive substance' in other sections remain that should be checked (see Formulated Supplementary Sports Foods below).	The wording recognises that some vitamins and minerals are used for other purposes. For example, some are permitted as food additives.	Australian Dairy Industry Council Inc. and Dairy Australia
	The calculation appears to contain a significant error in that there is no proportionality applied to the maximum level permitted in an ingredient, representing that amount of that ingredient in the food. The language also requires further work in that some references to "food" should refer to "ingredient", and the overall clarity of the provision needs to be improved.	The provision has been revised.	AFGC
1.130	This section is based on clause 5 of Standard 1.3.2. The key difference is the deletion of any reference to the 'final' food. This is problematic because it now does not make clear at what point in the processing cycle the calculation of maximum quantity of a vitamin or mineral takes place. Reference to 'final food' must be retained.	Noted. The revised draft refers to food for sale.	NZFGC
	The example calculations should be retained in a guidance document to this	FSANZ does not agree that example calculations are required in the Code.	

Section in first draft	*Comment*	*FSANZ response*	*Stakeholder*
	Division.		
	It is not clear if the amended calculation is correct, as Q1 and Q2 are no longer defined.	The series Q_1, Q_2…are defined as $Q_{i…}$	MZMPI
	This subsection states the Mrq is rounded to the nearest 2 significant figures, whereas the original in 1.3.2 section 8(2) is rounded to the nearest multiple of 5. This is an unflagged change.	The current provision, in clause 5(1) of Standard 1.3.2 provides for the calculation to be rounded to "the nearest 2 significant figures". This amendment occurred in Amendment 138 (February 2013).	Poynton
Division 4 Processing Aids			
Section 1.131	While it is understood that the proposed Code does not need to authorise foods for use as processing aids, foods sold as and used as processing aids should not require any retail food labelling. As noted above in relation to s.100, this outcome has not been fully implemented.	Noted. A product sold as a processing aid is not a food if it is not represented as being for use for human consumption. If the product is so represented it is a food and requires appropriate labelling.	AFGC Fonterra
	Change in terminology from final food to processed food implication is that a processed food may not necessarily be a final food. Final food vs. processed and no definition for processed food. Ambiguity.	The term 'final food' is itself uncertain. In the revision FSANZ uses the term 'processed food' to describe the food that is the result of the relevant processing.	NZJBA
	This section is based on clause 1 of Standard 1.3.3. Again reference to the 'final' food is deleted which is of greater concern in relation to processing aids than to vitamins and minerals since many processing aids do not remain in the final food and there are therefore significant labelling consequences as a result.	The term 'final food' is itself ambiguous. In the revision FSANZ uses the term 'processed food' to describe the food that is the result of the relevant processing.	NZFGC
	The part of the meaning relating to 'foods that are used as a processing aid' is new and its purpose is [uncertain] since Note 1 to this section states that the Code "does not regulate the use of foods as processing aids".	The Code does not proscribe the use of foods as processing aids. However, the provision is necessary to allow for provisions that, for example, exempt processing aids generally from a requirement.	
	It also contains a reference to "so much of the food as is necessary to perform the technological purpose" which also, in light of Note 1 is confusing. While this may address in part the need for greater clarity on the addition of processing aids and to ensure complete coverage, it potentially goes beyond the scope of the revision. Examples of foods used as a processing aids is corn starch in icing sugar and the oil coating dried fruit which have no technological functions in the final foods and do not currently appear in ingredients lists. Under this proposed definition both the corn starch and the oil coating would appear to need to be listed. This contradicts section 1.	FSANZ does not consider that the matter is confusing. Foods can be ingredients in other foods. If the function that a food performs in another food is solely that of a processing aid the food will be treated as a processing aid and be exempt from the ingredient labelling provisions. If more of the food than is required for the processing purpose is added the additional amount is regarded as an ingredient and must be declared as an ingredient. In the examples provided the corn starch or oil would only need to be declared if more is used than is necessary to perform, for example, the anti-caking purpose of corn starch in some icing sugar.	
	However, this would conflict with section 1.59 which exempts the need for the statement of ingredients to list substances used as processing aids. If the definition remains unchanged, it would have a substantial and costly impact and goes beyond the scope of P1025.		
	Subsection 3 (sic) provides for an additive permitted at GMP to also be a processing aid. The current application is that a substance or a food that performs the function of a food additive is a food additive and a substance	This interpretation indicates a failure to understand the effect of the provision. Subsection (3) did not establish a permission. It was a listing of the substances that might be permitted.	

Section in first draft	*Comment*	*FSANZ response*	*Stakeholder*
	that performs the function of a processing aid is a processing aid. However, since this provision may increase flexibility then it is possible there is no impact. Another take on this is that subsection 3 relates specifically to both foods and substances used as processing aids, stating that they are substances permitted as a processing aid in Schedule 18 and additives permitted at GMP. Therefore foods = substances and processing aids = additives. This is still confusing. NZFGC will continue to consider the impact of this and any revision of the term.		
	The drafting is complex and at times confusing. Clearer wording that is easily understood by Code users is preferred. For example, it is not clear why section 1.131(2) is necessary, given that section 1.21(2) permits food to be an ingredient, which would include as a processing aid, and that section 1.21(4) refers to substances rather than foods. If the main purpose of section 1.131(2) is to deal with the issue of the quantity needed to fulfil the technological purpose, could this be done in a simpler way? In other words, if the Code does not have anything specific to say about foods used as processing aids, it may be unhelpful to complicate the processing aid provisions by including section 1.31(2).	The provision is necessary to enable the effective operation of the labelling provisions. The Code does have something specific to say about foods used as processing aids. It provides that they need not be declared as ingredients.	NZMPI
	The meaning of 'used as processing aid' is generally aligned with the current understanding of the term. The key concern is the potential need to label the processing aid where this definition interfaces with the definition of ingredient. This would result in a significant change to the application of the Code.	Foods and substances used as processing aids are ingredients, but need not be included in a list of ingredients.	INC
	There is also inconsistency in the use of the term 'additive' which is proposed to be a substance used as a food additive' but in paragraph 1.131(3)(b) is referred to simply as 'additive'.	That is not how the term is used in that section, where the word 'additive' is one word in a defined phrase.	
1.131(1)(c)	The original wording 'in the final food' has been changed to 'in the processed food.' Fonterra would appreciate some clarity as to the intent of this change. Suggested wording is either 'the food as consumed' or revert to the current wording 'final food.'	The term 'final food' is itself uncertain. In the revision FSANZ uses the term 'processed food' to describe the food that is the result of the relevant processing. This definition does not relate to a food for sale.	Fonterra NZFGC
	A definition for dairy ingredient should be retained and we suggest it should be defined as being derived from milk or milk products.	The definition of dairy ingredient existed only to support the approval of dimethyl ether as a PA for dairy ingredients. The Code has subsequently been amended to allow the use for all foods and there is no requirement for a definition of dairy ingredient.	Fonterra
	Providing the former names and synonyms of certain strains was useful and should be reinstated	While the utility of the previous practice is noted, the editorial note is removed to pursue the policy that editorial notes should not be used except to assist navigation within the Code.	Fonterra
	The rewording makes it clear that it applies to all foods however 'foods including water' has been deleted. This is a significant change and should be amended.	The reference to water is removed because it is superfluous. The change is not significant.	Fonterra
Section 1.132	This section is new and sets out the circumstances when a substance may be used as a processing aid and the conditions under which such a substance may be used (only if the proportion of it is no more than the maximum level necessary to achieve the technological purpose at GMP). While the latter is an	A food may be used as a processing aid. To the extent that it is used as a processing aid it need not be declared as an ingredient. However, if more of a food is used than is required to perform a technological purpose the food is an ingredient that must be declared.	NZFGC

Section in first draft	*Comment*	*FSANZ response*	*Stakeholder*
	expansion of references to the level that may be used where not otherwise specified, it is nonetheless the approach that is already practiced and is therefore supported. As with section 1.131, there may be an issue with limiting this section to 'substances used as processing aids' and not including food used as a processing aid.		
S1.133 2 (a) (b)	This section could be rephrased as set out below, so long as it is clear what the limitations are around the permitted foods. At present, there does not appear to be a permission to use foods as processing aids, as they are not captured by subclause 1.133 (2). The drafting in current Standard 1.3.3, clause 3 (a) to (c) is clear. For subsection (1), the substances are: (a) an additive permitted at GMP; or (b) any substance listed in section S18.01 of schedule 18; or (c) foods, <u>including water</u>	It is not necessary to provide that foods including water can be used as processing aids as there is no prohibition on their use. A food, including water, is used as a processing aid when it is added to perform a technological purpose.	NZMPI
Section 1.135	Note 2 to this section states that if the enzymes are genetically modified, the food they are used on will have a GM food and therefore require GM labelling. This is not the current requirement. If the enzyme is not in the final food or not performing a technological function in the final food (which depends on the manufacturing process) the enzyme is not required to be listed. This current arrangement is reflected in subsection 1.59(c) which states, in relation to the ingredients that do not require to be listed in a statement of ingredients: "a substance used as a processing aid in accordance with Division 4 of Part 4" Section 1.135 ignores the distinction between processing aids and food additives where none of a processing aid is in the final food. <u>This is a major change in application and beyond the scope of the revision of P1025.</u>	The note does not say that GM labelling will be required. It says that the GM labelling provisions will apply. Whether GM labelling is required will be a consequence of the role of the enzyme in the food.	NZFGC
Section 1.137	This section is based on clause 11 in Standard 1.3.3. The current provision in clause 11 provides that where water is used as an ingredient, the processing aid in the water must be no more than the maximum permitted level in the table to the clause. The revision changes substantially this provision by permitting the maximum to be reflected in the food in which the water containing the processing aid is used, that is not the water. The amount of the processing aid might therefore be much greater when taken as a proportion of the food rather than as a proportion of the water as an ingredient.	Section 1.3.3—8 provides that the relevant level is the level 'in the water'.	NZFGC
Section 1.138	This section is based on clause 12 in Standard 1.3.3. The key deletion is reference to the processing aid not being in the final food (sic) a level greater than the maximum permitted. By not specifying the point in processing at which the maximum level is to be measured, clarity is lost and the clause is opened up for broad and differing interpretation.	Subsection 1.3.3-10 applies the permission to 'the processed food'.	NZFGC
1.139	This section is based on clause 13 in Standard 1.3.3. The key deletion, as in the previous section, is reference to the processing aid not being in the final food (sic) a level greater than the maximum permitted. By not specifying the point	Subsection 1.3.3—10 applies the permission to 'the processed food'.	NZFGC

Section in first draft	*Comment*	*FSANZ response*	*Stakeholder*
	in processing at which the maximum level is to be measured, clarity is lost and the clause is opened up for broad and differing interpretation.		
1.139	This section is based on clause 14 in Standard 1.3.3. Having removed the term 'function' from all preceding sections, this section retains reference to 'function' which is inconsistent and has the potential to create uncertainty especially since the body of the section refers to 'purpose' not 'function'. The more detailed explanation of the application of the table to this section is helpful. However, the key deletion, as in preceding sections, is reference to the processing aid not being in the final food (sic) a level greater than the maximum permitted. By not specifying the point in processing at which the maximum level is to be measured, clarity is lost and the clause is opened up for broad and differing interpretation.	The heading has been amended. Subsection 1.3.3—11 applies the permission to 'the processed food'.	NZFGC
	None of the notes to the table are retained. It will be important to preserve these in some other document rather than lose them entirely.	Noted.	
Section 1.141	This section is based on clause 19 in Standard 1.3.3. Subsection (2) reflects subclause 19(2) but the last two words 'as sold' are deleted. The subsection now makes no sense because when dimethyl dicarbonate is used as a processing aid, it is present in the food, a situation prohibited by subsection (2). The words 'as sold' are very purposeful in reflecting the characteristic of dimethyl dicarbonate to break down entirely over a very short period or time.	The requirement in section 1.3.3—12 is now stated to be that dimethyl dicarbonate not be present in the food item, ie the food for sale.	NZFGC AFGC
Division 5 Contaminants and Natural Toxicants			
	"The removal of the purpose statement means all references to ALARA (as low as reasonably achievable) have been removed. From a domestic enforcement perspective this may make little difference, as the overarching requirement to produce 'safe food' applies. However it gives no reassurance to international customers or lay people using the Code, that while, for example there is no specific Maximum Level (ML) for lead in milk, this doesn't mean there are no restrictions on levels that can be present. This also affects imported foods, which must comply with the Food Standards Code. The removal of the reference to ALARA may send the wrong messages and create concerns for domestic consumers of imported foods. It should be clear to any reasonable user of the Code what it means if a listed contaminant is found in a food not listed. A note should be included explaining that while only a small number of MLs are specified, this is under an overarching expectation that all food products meet an 'acceptable level of protection' for contaminants and natural toxicants."	The introductory note has been amended.	Australian Dairy Industry Council Inc. and Dairy Australia
	Subsection (1) reflects the formula applied to calculate the maximum level of a contaminant or toxicant in a food. ML, which is defined in Standard 1.4.2, is not specifically defined in this section and should be. The remaining terms in the formula are defined in alpha order not in the order in which they appear	It is not necessary to define 'ML' or 'maximum limit' in this section.	NZFGC

Section in first draft	*Comment*	*FSANZ response*	*Stakeholder*
	in the formula. Alpha order definition of terms is not the convention used with formula and the definitions should revert to the order of appearance. The editorial note is deleted and provides helpful information about the application of this Standard and should not be lost. There is no impact of the revision.		
	Clauses 1(1) and (2) of Standard 1.4.2 in the current Code have the effect of defining the commodity names used in the various MPC tables in Standard 1.4.1. This seems to have been omitted from the proposed Code. An equivalent to s.1.144(2) and (4) should be included for this Division.	Subsection 1.4.1—2(2) provides that a reference to a food in Standard 1.4.1 is for the food as described in Schedule 22. It is inappropriate to have an equivalent to section 1.144(4), as subclause 4(1) of Standard 1.4.2 is not expressed to apply to Standard 1.4.1. Subsection 1.4.1-2(1) provides that the limits apply to the portion of a food that is normally consumed.	AFGC
	Division 6 Agvet Chemicals		
Section 1.144	The title to this Division does not reflect its contents. The Division does not regulate agricultural and veterinarian chemicals.	The division does not purport to regulate Agvet chemicals. It purports to regulate the presence of residues of agvet chemicals in foods for sale.	AFGC
	There does not seem to be any equivalent to current clause 1(7) of Standard 1.4.2, which may change the testing and reporting of MRLs.		
	Clause 2 mentions “portion of foods” which although the current terminology, it is considered that the term “part” would be a better descriptor as portion could be interpreted as meaning a proportion of the whole food rather than a specific physical section of the whole food. “Part” would be a better descriptor as “portion” could be interpreted as meaning a proportion of the whole food rather than a specific physical section of the whole food. This is the terminology used in other Australian Standards, i.e. TGA.	Noted	FTAA
	Note 2: States that MRL’s in NZ are issued under section 11C of the Food Act 1981 – is this the correct section / Act? 11C of the Food Act is about the power to issue food standards.	The relevant standard states: New Zealand (Maximum Residue Limits of Agricultural Compounds) Food Standards 2013 Pursuant to sections 11C and 11L of the Food Act 1981, the Minister for Food Safety issues the following food standards for the purposes of setting the maximum permissible limits at which residues of agricultural compounds may be present in specified types of food and revokes the New Zealand (Maximum Residue Limits of Agricultural Compounds) Food Standards 2012 (and all amendments made to those standards).	Fonterra
	Section 1.21, at item 1 of the table to subsection 3, should also refer to metabolites of agvet chemicals to truly reflect the operation of clause 2(3) of current Standard 1.4.2.	The paragraph 1.1.1—10(4)(d) provides that there must be ‘no detectable residue of either an agvet chemical or metabolites of an agvet chemical’ in a food item.	
	"The removal of a large amount of context covered in the purpose statement in the current Code, potentially involves some changes. For example the prohibition has changed from contains ‘no detectable residues’ of an agvet chemical (in the current purpose statement for 1.4.2), to a food ‘must not consist of, or have as an ingredient or a component’ an agvet chemical (in proposed 1.21). This may have an impact where the compound registered is different to the		Australian Dairy Industry Council Inc. and Dairy Australia

Section in first draft	*Comment*	*FSANZ response*	*Stakeholder*
	residue definition. The removal of the purpose statement may also mean that substances naturally present, or present for other, permitted, purposes may be unintentionally caught up in the prohibition in this standard. For example if a compound is registered as an agvet chemical, but also has other uses, or is naturally produced in food, there may now be a zero tolerance approach to any detections. An example may be hormone like substances.	Subsection 1.1.1-10(5) specifically excludes substances that are naturally present from the general prohibition. The provision applies to all of the prohibitions listed in Subsection 1.1.1-10(4).	
	A clause similar to that included for additives (1.21 (5) Subsection (4) does not apply to a substance (including a vitamin or mineral) that is in the food product, or an ingredient of the food product, by natural occurrence) should be included to cover compounds that may be registered as agvet chemicals, but which also have other uses or are naturally produced in food or during processing.		
	Issues remain with the application of this standard, and the zero tolerance approach, including the need for a suitable default MRL to cover instances of unintentional residues (overspray, contact with 'contaminated' bins, processing equipment etc.). We understand this may be addressed in P1027 later in the year, and is beyond the scope of this review."	Noted.	
	Subclause (2) should at best be a note. It raises a potential for litigation should a MRL not have been determined under both (a) and (b).	FSANZ does not agree that there is a legal risk in stating this proposition in a purpose statement. Nonetheless, the provisions are restated as a note.	AFGC
	Subclause (1) may need amendment to specifically identify the AgVet Code, given the proposal above to adopt definitions from the applications Acts rather than the FSANZ Act.	The Agvet Code is defined in the FSANZ Act.	AFGC
Division 7 Prohibited and restricted plants and fungi			
Section 1.147	The note to the title of the Division incorrectly refers to "cocoa" instead of "coca".	Agree. Amended.	AFGC NZFGC AIGroup
Section 1.148	How does this reconcile with MFP23 (s27 of NSW Food Act?). Is the Code providing a statutory defence? Does it now displace the Food Act?	FSANZ has amended the draft provision to remove the element of intent that is in the current provision, on the basis that the mental element of a food regulatory offence should be dealt with in the application Act provisions.	NSWFA
	This section reflects the editorial note to subclause 1(1) in Standard 1.4.4 such that the unintentional addition of prohibited plants or fungi (sic). The key omission is reference to such an unintentional addition occurring "within the bounds of recognised acceptable Good Agricultural Practice or GMP". This is an important condition on an unintentional addition and should be retained.	See note above.	NZFGC
Division 8 Novel foods			
S1.150	It is important to clarify the relationship between permissions and general prohibitions. The proposed overarching policy principles for permission to add substances to food are supported. However, concern is raised in relation to uncertainty in the current Code, draft revised Code and Model Food Act	This is considered to be outside the scope of P1025.	Queensland Health

Section in first draft	*Comment*	*FSANZ response*	*Stakeholder*
	provisions in relation to the addition of 'medicinal' substances to food , which are probably not captured by the definition of 'nutritive substance' and not effectively regulated by the Novel Foods standard. It is questionable whether the addition of some medicinal substances to foods makes the foods 'unsuitable' as defined by the Model Food Act and Queensland Food Act 2006. The regularity of new products entering the Australian marketplace that contain medicinal like substances is creating enforcement difficulties for enforcement agencies and the need for greater clarity on this issue is becoming more urgent. If not dealt with as part of the Code Revision, it is important this matter be addressed as part of the Proposal for regulation of novel foods and nutritive substances.		
	P1025 does not clarify a key point from the Nutricia case, which is the interaction between novel foods regulation and nutritive substance regulation. This might perhaps be better considered as part of P1024, but as the draft stands, the lack of clarity remains of concern.	The matter is appropriate for consideration in P1024	AFGC NZFGC (in relation to exclusive period)
	The same issue arises in relation to GM foods, which may also be novel – do they require dual approvals?	Foods produced using gene technology are inherently novel. They do not require dual approval.	
	The reference in the note to "retail sale" highlights the difficulties of "food product" previously discussed. Sale of novel ingredients to a manufacturer should be covered by this Division. It is unclear why novel food sales other than retail sales are excluded by s.21(3). While again perhaps an issue for P1024, the definition of novel foods remains likely void for uncertainty around the words "require an assessment".	The novel food provisions of the Code are only intended to apply to foods, including foods sold as ingredients, when sold to the public. This is clear in the 1998 Final Approval report for P168, which says, "If recommended by Authority and agreed to by the Australia New Zealand Food Standards Council, an amendment to the Code, as suggested by this proposal, would require novel foods and novel food ingredients to undergo a risk-based assessment process before being made available for retail sale."	
	The current provisions relating to exclusive use have not been properly implemented in this Division, especially cl.3(2)-(4) of current Standard 1.5.1.	The provisions of subclauses 3(2)-(4) have not been restated as they are considered to be beyond the standard making power, in that they purport to confer proprietary rights. The revised provision has a similar effect, without purporting to confer proprietary rights, by including conditions as to use (including conditions such as that only a named product can contain the novel food or ingredient during a nominated period) in the schedule: See the note to section 1.5.1-3.	
	The exclusion from "traditional use" relating to foods for special medical purpose has not been implemented in this Division.	The exception for foods for special medical purposes is provided in section 2.9.5-4.	
Division 9 Foods produced using gene technology			
	Some of the definitions are included in Division 9 sections of the proposed code and others are included in Schedule 26. This is inconvenient and would be preferable to have all the definition in the one place, or the schedules associated with the divisions rather than being at the end of the proposed code.	Noted.	Sanitarium
	Previously up to 1% accidental additions. GM had to be labelled. Appears to	Paragraph 1.5.2—4(2)(d) [previously paragraph 1.156(2)(d)] provides that exception from the	NZJBA

Section in first draft	*Comment*	*FSANZ response*	*Stakeholder*
	have loosened up. Also see 1.156 and S26.01, S26.02	labelling requirement.	
	1.154 correctly uses definitions from current standard 1.5.2 7 a-d, however between the two standards 1.5.2 7 e appears to be missed. This could allow an oil to remain silent on GM-status if the nutritionals were typical of the non-GM oil even though it might be using a disease resistance gene from a pig. It is likely to be a concern to followers of Judaism & Islam.	A food produced using gene technology must comply with any labelling conditions, including a condition established to address ethical, cultural or religious concerns. The drafting removes, entirely, a provision that unnecessarily purported to provide a power to impose conditions. The power to impose conditions exists regardless of the provisions of the Standard. Those parts of that statement (paras (a) to (d)) that related to the definition of altered characteristics are restated for that purpose alone.	Sanitarium
	This provision alters the requirements for GM labelling, which is contrary to the espoused intention of P1025 -	The revision dos not alter the labelling requirements.	AFGC
	Subsection (2)(a)(ii) requires (complete) removal of novel DNA or protein, where the current provision requires only that the processing "have the effect of removing" novel DNA or protein.	The current provision is not intended to be read as establishing an aspirational standard. Industry should refer to the *Compliance Guide to Australia New Zealand Food Standards Code Standard 1.5.2: Food Produced Using Gene Technology* for guidance on the matter of highly refined food.	
	Subsection (2)(b)(ii) exempts "substances permitted to be used as a processing aid" – all foods are so permitted!	The provision is amended to apply to both foods and substances.	
	The definition of novel protein has been significantly changed by limiting the exclusion of nature identical proteins to just those present in processing aids.	The provision is extended to food additives.	
	Schedule S26: Key definitions for GM regulation are specified in this Schedule. They should be in the main body of the regulations and signposted from clause 1.06.	Noted.	
	The amendment "and/or" to "or" has changed the meaning of the clause. Fonterra recognises that the intent is to exclude both novel DNA and novel protein. This could be an editorial error, but if a deliberate amendment it should be the subject of a separate consultation.	FSANZ does not agree that the change is significant.	Fonterra Sanitarium
Section 156	In the title, are the quotation marks needed around all of 'genetically modified food', when the only prescribed words are 'genetically modified'?	Agree.	NZMPI
	Clause 4 (3) in the current code has not been included in Division 9 of the proposed code, is this covered elsewhere in the proposed code? o "Where genetically modified food is displayed for retail sale other than in a package, any information that would have been required under clause 5 of this Standard on the label on the food if it was packaged, must be displayed on or in connection with the display of the food."	This requirement is in the labelling provisions.	Sanitarium

Section in first draft	*Comment*	*FSANZ response*	*Stakeholder*
Division 10 Microbiological limits for food			
		The provision in the first consultation draft has been substantially revised in response to submissions received and work done in a review of the Standard—P1017. Accordingly, we have not repeated the comments or responded directly to individual comments.	Australian Dairy Industry Council Inc. and Dairy Australia
	Subclause (3) fails to incorporate the ability, in food poisoning incidents, to take smaller samples, as well as fewer samples, than would otherwise be required. In paragraph (5)(b), subparagraphs (i) and (ii) should be reversed for "equivalent method" to make sense.	The relevant provision is amended.	NSWFA AFGC
	Further, the standards referenced in these subparagraphs are incorrect: AS/NZS 4659 determines equivalence, whereas AS 5013 (which is NOT a New Zealand standard) sets the general standard.	Agree	
	Schedule S27.01 has some problems – • It refers to "pasteurised egg products". The current provision refers to "processed egg products" where "processed" means pasteurised or subjected to an equivalent treatment.	There are two entries, not one.	
	• There are entries in column 4 that read "< 3". As column 4 is a maximum number anyway, this should read just "3".	Must be <3. 3 indicates a higher level of certainty.	
	• The columns in relation to lactic acid infant formula have gone astray in relation to coagulase positive Staphylococcus.	Formatting has been corrected.	
Part 5 Processing requirements			
Division 1 Irradiation of food			
	It is agreed that this Division sits better within processing requirements that its current location in the existing Code.	Noted.	AFGC
Section 1.164	There is an opportunity to clarify the operation of paragraph (a) – does the 1kGray dose refer separately to each ingredient, or reflect a cumulative of the doses applied to all irradiated ingredients?	This question should be considered in the context of an application for approval of irradiation of a mixed food.	AFGC
Division 2 Processing requirements for meat			
	There is inconsistency in the placement of sectional definitions in this Division. In section 168, for example, they are at the front of the section, in section 169 (and in most other sections) they are at the end.	Noted.	AFGC
	The definition of "dried meat" (Standard 2.6.2 clause 5) is an important term that should be retained. It is used in other Standards.	The definition has been reinstated in response to consultation on P1014: see 1.1.2—3 ***dried meat.***	
Section 1.170	Subclause (3) in the current Code applies to all fermented meat products, not just fermented comminuted processed meat products.	Subsection 1.6.2-4(3) applies to fermented meat products.	AFGC
	The definition of "comminuted" has been wrongly omitted from subclause (4).	This definition is in section 1.1.2—2(3)	

Section in first draft	*Comment*	*FSANZ response*	*Stakeholder*
	The editorial note in Standard 1.6.2, to the effect that the provisions apply irrespective of the names used to standardise meat products in Chapter 2, has been omitted. It should be retained at least as a note, and may in fact need to be an operative provision, for this Division to operate as intended.	The editorial note is not required to achieve the outcome indicated.	
	Division 3 Articles and materials in contact with food		
Section 1.171	Greater thought should be given to this Division. It is not referenced in the basic requirements of Chapter 1, Part 2, Division 2 and its provisions are vague to the point of uncertainty or else so broad as to have intended consequences if literally enforced. As currently drafted, it adds very little to the definition of "unsuitable food" in the application Acts. Unless some substantive operation for the Division can be described, it should be omitted rather than retain the uncertainty or potential for perverse results that it entails (it prohibits, for example, the slightest cardboard flake from packaging that poses no choking, or any other health or safety, hazard). If retained,it must be questioned whether this Standard is properly placed among processing standards. Its current location within residues and contaminant standards seems more appropriate.	The Division is not included in the revision. The packaging requirement is restated as subsection 1.1.1—10(7).	AFGC
	This is an accurate redraft of Standard 1.4.3, but we query the policy and find it possibly ultra vires. We think the drafting could be improved, to better reflect the intent, and examples could be provided that better reflect the purpose of the provision. If this leads to the absurd result that most food products would breach this provision, perhaps it should be omitted from the Food Standards Code.	Noted.	NZMPI