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

Supporting document 6

Legal advice provided by Australian Government Solicitor – Proposal P1025

Code Revision

Our ref. 11037387

23 December 2013

[redacted]

Dear [redacted]

Application of the *Acts Interpretation Act 1901* to the Food Standards Code

1. Thank you for your question regarding the *Australia New Zealand Food Standards Code* (the Code). Your question concerns a re-draft of the Code, which was released for public consultation on 23 May 2013 (the draft Code). Section 1.04(a) of the draft Code provides that, in Australia, the draft Code is to be interpreted in accordance with the *Acts Interpretation Act 1901* (Cth) (the Commonwealth Acts Interpretation Act). Inclusion of this provision was prompted by the decision of the Supreme Court of New South Wales in *NSW Food Authority v Nutricia Australia Pty Ltd*[1] (*Nutricia*), in which it was held that the Code as currently in force (the current Code) is, in New South Wales, to be interpreted in accordance with the *Interpretation Act 1987* (NSW) (the NSW Interpretation Act). We set out your question and our short answer below, followed by our reasoning.

Question and short answer

Q *Is it necessary for the Food Standards Code to, in Australia, be interpreted in accordance with State or Territory interpretation legislation?*

A In our view, no. Our view is that the question of what interpretive provisions should apply to the Code is ultimately one of policy, and that it is possible to specify in the Code the interpretive provisions or principles that apply to it. Those interpretive provisions or principles could come from Commonwealth or from State or Territory law, or the Code could contain detailed provisions relating to its interpretation. We think that it would be preferable for the Code to contain an

[1] (2008) 74 NSWLR 148.

express provision relating to interpretation, particularly if the desired outcome is to prevent Commonwealth law from applying.

Reasoning

The Australia New Zealand Food Standards Code

2. The Code is made under the *Food Standards Australia New Zealand Act 1991* (the FSANZ Act). However, the FSANZ Act does not itself require compliance with the Code. Instead, legislation requiring compliance with the Code has been passed by the Commonwealth (the *Imported Food Control Act 1992* (Cth) (the Imported Food Control Act)), the States and Territories (State and Territory Food Acts),[2] and New Zealand.[3] The Imported Food Control Act and the State and Territory Food Acts are described collectively as 'application Acts' in this advice. This advice does not consider interpretation of the Code in New Zealand.

3. The current Code consists of a series of 'standards'.[4] The draft Code would revoke Standard 1.1.1 through to Standard 2.10.3 of the current Code,[5] substituting provisions contained in Chs 1 and 2 of the draft Code in their place, and would incorporate by reference Standards 3.1.1 through to 4.5.1 of the current Code.[6]

Interpretation of the Code

4. The question focuses on what interpretation law should apply to the Code. There are 2 possible starting points for a consideration of this question, depending on the circumstances in which the Code is to be construed. For the purpose of matters such as commencement, making, registration, Parliamentary scrutiny or disallowance, or when considering the Imported Food Control Act, then clearly the starting point is Commonwealth interpretation law. This is discussed further at paras 6 ff below. However, when the Code is construed for the purposes of State and Territory Food Acts, we think that the starting point is the interpretation law of the relevant jurisdiction. This is discussed further at paras 11 ff below. In either case, we think that this would be the starting point only, and an assessment of what body of interpretation rules apply to the Code will be a question of statutory interpretation in each case.

Interpretation of the Code under Commonwealth law

5. Turning first to interpreting the Code under Commonwealth law, we note that, as the FSANZ Act is Commonwealth legislation, the Commonwealth Acts Interpretation Act and the Legislative Instruments Act will clearly apply to it. The standards which comprise the Code are 'legislative instruments' within the meaning of the Legislative Instruments Act,[7] and so they are governed by that Act. In relation to interpretation of legislative instruments, s 13(1)(a) of the Legislative Instruments Act provides as follows:

> **13 Construction of legislative instruments**
>
> (1) If enabling legislation confers on a rule-maker the power to make a legislative instrument, then, unless the contrary intention appears:

[2] See the *Food Act 2001* (ACT), the *Food Act 2003* (NSW), the *Food Act* (NT), the *Food Act 2006* (Qld), the *Food Act 2001* (SA), the *Food Act 2003* (Tas), the *Food Act 1984* (Vic), and the *Food Act 2008* (WA).
[3] See the *Food Act 1981* (NZ).
[4] See the definitions of 'Australia New Zealand Food Standards Code' and 'standard' in s 4(1) of the FSANZ Act, and also ss 94 and 97.
[5] See Ch 5 of the draft Code.
[6] See Chs 3 and 4 of the draft Code.
[7] This follows from provisions of the FSANZ Act and the Commonwealth Acts Interpretation Act. Standards and variations of standards are described in the FSANZ Act as legislative instruments (see for example see ss 82(2), 94 and 97(6) of the FSANZ Act). Further, s 15AE of the Commonwealth Acts Interpretation Act provides that an instrument that is described in another Act as a 'legislative instrument' is a legislative instrument for the purposes of the Legislative Instruments Act.

(a) the *Acts Interpretation Act 1901* applies to any legislative instrument so made as if it were an Act and as if each provision of the legislative instrument were a section of an Act; and

. . .

6. In the Legislative Instruments Act, the term 'enabling legislation' is defined relevantly as meaning 'the Act . . . that authorises the making of the legislative instrument concerned'.[8] In the present case, the enabling legislation is the FSANZ Act. Further, the Legislative Instruments Act provides that the 'rule-maker' is, relevantly, the person or body authorised to make the legislative instrument.

7. The operation of s 13(1)(a) of the Legislative instruments Act was explained by a full court of the High Court of Australia in *Berenguel v Minister for Immigration and Citizenship*[9] (*Berenguel*) in relation to the *Migration Regulations 1994*, made under the *Migration Act 1958*:

> By virtue of s 13(1)(a) of the *Legislative Instruments Act 2003* (Cth), where enabling legislation confers on a rule-maker the power to make a legislative instrument, then, unless the contrary intention appears, the *Acts Interpretation Act 1901* (Cth) applies to the instrument "as if it were an Act and as if each provision of the legislative instrument were a section of an Act". The Migration Regulations fall within the definition of "a legislative instrument" in ss 5 and 6 of the Legislative Instruments Act. This will attract to them the application of s 13 of that Act . . .

8. On this basis, in our view, it follows that, unless a contrary intention appears, the Commonwealth Acts Interpretation Act would apply to the Code.

9. However, this does not on its own mean that the Code would be interpreted in accordance with the body of interpretive rules contained in the Commonwealth Acts Interpretation Act. Importantly, both s 13(1)(a) of the Legislative Instruments Act and s 2(2) of the Commonwealth Acts Interpretation Act are subject to a contrary intention. Accordingly, we think that it is possible for the Code itself to contain a contrary intention that would impact on whether Commonwealth, or State or Territory, interpretation law, or particular provisions of that law, applied to the Code. In this regard, s 16(1)(n) of the FSANZ Act provides that standards, and variations of standards, may relate to 'the interpretation of other standards'. The current Code does not provide any such contrary intention, but it would be possible to include a provision such as s 1.04 that did provide a contrary intention. We think that such a provision could provide that the Commonwealth Acts Interpretation Act applies (to put this beyond doubt) or that State or Territory interpretation law applies, or else the Code could contain detailed provisions relating to its interpretation.

Interpretation of the Code under State or Territory interpretation law

10. We turn next to interpretation of the Code under State and Territory law. The State and Territory Food Acts apply the Code in each jurisdiction, and include provisions that create offences for a failure to comply with requirements of the Code. As the Code is applied by the State and Territory Food Acts, and jurisdictional interpretation law applies in relation to those Acts, we think the correct approach to be that the starting point for interpretation of the Code is the interpretation law of the relevant jurisdiction.

11. One example in which interpretation of the Code has been considered is the *Nutricia* decision, in which Simpson J noted that, although the Code is authorised by the FSANZ Act, enforcement and policing of food standards are within the constitutional realm of the States; for that reason, the Code is given the force of law in New South Wales by the NSW Food Act.[10] Additionally, as the prosecution in question was brought under, and was governed by rules of evidence and

[8] See s 4(1) of the Legislative Instruments Act.
[9] (2010) 264 ALR 417 at 420 per French CJ and Gummow and Crennan JJ
[10] *Nutricia* at [69].

interpretation of, New South Wales law, Simpson J concluded that construction of the current Code fell to be determined by reference to the NSW Interpretation Act.[11] In applying the NSW Interpretation Act, Simpson J proceeded on the basis that the Code was a 'statutory rule' for the purposes of that Act.[12]

12. As *Nutricia* was a decision of the Supreme Court of New South Wales, it is not binding in other States or Territories, and nor is it binding in relation to the enforcement of the Imported Food Control Act in New South Wales. However, if the *Nutricia* approach was applied in other jurisdictions, it would follow that the current Code, as it applies in relation to the State and Territory Food Acts, would be interpreted in accordance with the relevant State or Territory's interpretation legislation.

13. Another example, involving the interpretation of a different legislative instrument that was made under Commonwealth law and applied by New South Wales law, is the subsequent decision *Exclusive Imports Pty Ltd v Roads and Traffic Authority (NSW)*[13] (*Exclusive Imports*). This decision concerned registrability of certain caravans under New South Wales legislation which made it an offence for a person to use a registrable vehicle on a road or road related area unless certain requirements were complied with.[14] One of those requirements related to compliance with a 'third edition ADR'; an 'ADR', or 'Australian Design Rule', being a national standard made under Commonwealth legislation, namely, the *Motor Vehicle Standards Act 1989* (Cth). In *Exclusive Imports*, Hill J noted that:[15]

> . . . the operation of ADR's, being instruments under the Legislative Instruments Act, are incorporated by reference into the State statutory process for the registration of vehicles. Accordingly, standards set by ADRs, potentially have a role in the matter of eligibility criteria for the registration of vehicles under the State legislation (in particular, under Part I of Schedule 2).

14. Hill J then referred to the impact of s 13(1)(a) on the application of the Commonwealth Acts Interpretation Act, apparently accepting that that Act would apply to the ADRs:[16]

> The Third Edition ADRs . . . are standards made under s.7 of the Motor Vehicle Standards Act . . .
>
> . . . the Third Edition ADRs were remade as national vehicle standards in September 2006 to comply with the requirements of the *Legislative Instruments Act 2003* and registered on the Federal Register of Legislative Instruments. . . .

Section 13(1) of the *Legislative Instruments Act* provides, inter alia, that if enabling legislation confers on a rule maker the power to make a legislative instrument (as s.7 of the *Motor Vehicles Standards Act* does) then, unless the contrary intention appears, the *Acts Interpretation Act* 1901 applies to any such instrument as if it were an Act and as if each provision of the legislative instrument were a section of an Act.

15. The *Exclusive Imports* decision did not consider interpretation of the Code. However, in our view, it follows from this decision that, unless the contrary intention appears, the Commonwealth Acts Interpretation Act would apply to the Code.

16. The contrast between these decisions arguably indicates that there is some uncertainty surrounding how Commonwealth legislative instruments that are applied under jurisdictional law

[11] *Nutricia* at [70] and [95].
[12] *Nutricia* at [96].
[13] (2009) 53 MVR 156.
[14] Clause 52 of the *Road Transport (Vehicle Registration) Regulation 2007* (NSW) provided that it was an offence for a person to use a registrable vehicle on a road or road related area unless, among other things, 'the vehicle complies with the applicable vehicle standards for the vehicle'. Clause 51 provided that the 'applicable vehicle standards' were those specified in Sch 2 to the Vehicle Registration Regulations. Division 3 of Pt 1 of Sch 2 incorporated by reference the third edition Australian Design Rules (ADRs). See *Exclusive Imports* at [79]-[91].
[15] *Exclusive Imports* at [74]
[16] *Exclusive Imports* [56]-[59].

are to be interpreted, and makes it difficult to predict what approach a future court would take to interpretation of the Code.

17. We prefer the approach in the *Exclusive Imports* decision, and think that some legitimate criticism could be made of the reasoning in the *Nutricia* decision. One criticism is that no reference is made to s 13(1)(a) of the Legislative Instruments Act. Another is that the decision proceeds on the basis that the Code is a 'statutory rule' under the NSW Interpretation Act, even though Simpson J commented that 'it is not entirely clear that the Code is a statutory rule', and had to take what she described as a 'broad view' of that expression. As discussed further at paras 27 ff below, we think the better view is that the Code is not a 'statutory instrument' under the NSW Interpretation Act. Accordingly, we are not confident that a future court would necessarily reach the same conclusion as that in *Nutricia*. However, whether a future court were to approach this question consistently with the approach in the *Nutricia* decision or the *Exclusive Imports* decision, we think that there would be scope for the Code to specify its own interpretive provisions.

18. In the case of the approach of the *Nutricia* decision, this follows from s 5 of the NSW Interpretation Act, which states that that Act applies 'except in so far as the contrary intention appears in the Act or instrument concerned'.[17] Although we have not considered other State and Territory interpretation laws in detail when preparing this advice, our understanding is that State and Territory equivalents of the Commonwealth Acts Interpretation Act and the Legislative Instruments Act are similarly subject to contrary intention, and so a similar result would be reached. We would be happy to consider this further if that would be helpful.

19. In the case of the approach of the *Exclusive Imports* decision, this follows from s 13(1)(a) of the Legislative Instruments Act and s 2(2) of the Commonwealth Acts Interpretation Act, which state that those provisions too are subject to a contrary intention.

20. Accordingly, it would be open to specify in the Code, in a provision such as s 1.04 of the draft Code, the interpretation law that governed the Code. In our view, such a provision would evidence a 'contrary intention' for the above purposes, and as noted, would be within power under the FSANZ Act.

21. In the absence of such a provision, we think that, in view of the different approaches in the *Nutricia* and *Exclusive Imports* decisions, there would be some uncertainty surrounding whether the Code should be interpreted in accordance with the Commonwealth Acts Interpretation Act or the NSW Interpretation Act. Because of this, we recommend that the Code deal with this issue expressly one way or another.

Other issues

22. If a decision is made to provide that jurisdictional interpretation laws apply to the interpretation of the Code, then we recommend that consideration be given to the following issues.

23. First, this could potentially lead to the Code being interpreted differently in different jurisdictions. Whether this is desirable is primarily a policy question.

24. Secondly, we do not think that a provision of the Code ought simply to say that, for example, the Code is, in NSW, to be interpreted in accordance with the NSW Interpretation Act. This is

---

[17] See s 5 of the NSW Interpretation Act, which is relevantly as follows:

5 Application of Act

(1) This Act applies to all Acts and instruments (including this Act) whether enacted or made before or after the commencement of this Act.

(2) This Act applies to an Act or instrument except in so far as the contrary intention appears in this Act or in the Act or instrument concerned.

. . .

because it is not clear to us that the NSW Interpretation Act is capable, on its terms, of applying to the Code.

25. Section 5(1) of the NSW Interpretation Act provides that that Act applies to 'Acts' and 'instruments'. The Code is clearly not an 'Act', and so the NSW Interpretation Act could only apply to the Code if the Code was an 'instrument'. As explained below, we do not think that the Code is an 'instrument' in the relevant sense.

26. The term 'instrument' is defined in s 3(1) of NSW Interpretation Act as follows:

instrument means an instrument (including a statutory rule or an environmental planning instrument) made under an Act, and includes an instrument made under any such instrument.

27. As noted above, in *Nutricia*, Simpson J proceeded on the basis that the current Code was a 'statutory rule', but noted that this was not entirely clear. The term 'statutory rule' is in turn defined in s 21A of the NSW Interpretation Act as follows:

statutory rule means:

(a) a regulation, by-law, rule or ordinance:

(i) that is made by the Governor, or

(ii) that is made by a person or body other than the Governor, but is required by law to be approved or confirmed by the Governor, or

(b) a rule of court.

28. Contrary to the view of Simpson J, we think that the better view is that the Code is not a 'statutory rule' as so defined. In this regard, we note that the Code is not a 'regulation, by-law, rule or ordinance' (para (a)). These terms are defined in s 20 of the NSW Interpretation Act as meaning a regulation, by-law, rule or ordinance 'made under the Act in which that word occurs'. Clearly, the Code is not a regulation, by-law or ordinance, and is not described anywhere in such terms. In relation to whether the Code could be thought of as a 'rule' made under an 'Act', the Supreme Court of New South Wales has previously held that references to an 'Act' in New South Wales statutes are to New South Wales Acts.[18] As the Code is made under a Commonwealth Act (the FSANZ Act), and is not described in that Act as a 'rule', it is not a 'rule' in this sense. In any event, the Code is not made, or required to be approved or confirmed, by the Governor of NSW (subparas (a)(i) and (ii)), and nor is the Code a 'rule of court' (para (b)).[19] Accordingly, we cannot see a basis for concluding that the Code is a 'statutory rule' as this term is defined in the NSW Interpretation Act.

29. Further, we think the better view is that the Code is not an 'instrument' other than a 'statutory rule'. The definition of 'instrument' is limited to one 'made under an Act', meaning, as mentioned above, made under a New South Wales Act. However, as noted above, the Code is made under a Commonwealth Act. The Code is 'applied' by the NSW Food Act (see s 3(c) of that Act), rather than 'made' under it. Accordingly, our view is that the Code is not an 'instrument' within the meaning of the NSW Interpretation Act.

---

[18] See for example *Liddell v Lembke (t/as Cheryl's Unisex Salon)* (1994) 127 ALR 342, in which the majority (Wilcox CJ and Keely J) stated at 363:
The general principle is that, unless a contrary intention is expressed, words used in a statute are to be read in a local context. Section 65 of the *Interpretation Act 1987* (NSW) reflects this principle. It provides that an 'Act passed by Parliament, or by any earlier legislature of New South Wales, may be referred to by the word "Act" alone'. Although the Interpretation Act does not specifically state that the word 'Act', when used in statutes, refers to a New South Wales Act, we think it should be so understood.

[19] Section 21 of the NSW Interpretation Act provides the following definition: '***rules of court***, in relation to a court or tribunal, means rules made by the person or body having power to make rules regulating the practice and procedure of the court or tribunal'.

30. In relation to other jurisdictions, we note that the former Office of Legislative Drafting and Publishing, in its 2010 *Food Standards Code audit report*, considered the application of the State and Territory equivalents of the Commonwealth Acts interpretation Act and Legislative Instruments Act, and found that some do not apply to the Code (New South Wales, Western Australia, Northern Territory), some probably do not apply (Queensland, Tasmania), some probably do apply (Australian Capital Territory) some do or are likely to apply (Victoria, South Australia) and some do apply (New Zealand).

31. Although we have not verified these conclusions when preparing this advice, if a decision is taken to apply jurisdictional interpretation law to the Code, we think that these conclusions highlight the need to provide for how jurisdictional interpretation law is to be applied, as at least some of the jurisdictional interpretation Acts might or would not be capable of applying on their own terms. For example, in the case of New South Wales, the New South Wales Interpretation Act could be expressed as applying to the Code as if the Code was an 'instrument' for the purposes of that Act.

32. Thirdly, we think that some consideration would have to be given to which aspects of jurisdictional interpretation law were to apply in relation to the Code. For example, it would not be appropriate for provisions in State or Territory law that deal with disallowance of delegated legislation by the State Parliament to apply in relation to the Code.

33. Fourthly, we think that it would be inappropriate for an interpretive provision to provide that only the jurisdictional equivalent to the Commonwealth Acts Interpretation Act and the Legislative Instruments Act apply to the Code. This is because it is possible that relevant interpretational provisions or principles might also be found in the jurisdictional application Acts, and also possibly in other jurisdictional legislation, such as the criminal legislation of the jurisdiction. We think that the States and Territories would have to be consulted in relation to this.

34. Fifthly, we think that it would be preferable for a provision of the Code not to refer expressly to particular State or Territory Acts, but to refer to a body of law by a phrase such as 'rules of interpretation' or a similarly general expression. This would deal with the issues raised in the previous paragraph, and would also avoid the risk that the provision could be read as the kind of incorporation by reference referred to in s 14 of the Legislative Instruments Act (which would only apply or incorporate the jurisdictional legislation as at the time the Code was made, rather than as in force from time to time).

35. Sixthly, however carefully a provision applying jurisdictional interpretational law might be worded, it would likely not be possible to predict with precision what the results of any provision that might be drafted would be. This is due to factors such as the differences between jurisdictional interpretation Acts and other aspects of jurisdictional law, the range of other matters dealt with by jurisdictional interpretation law, and the different ways in which those matters are dealt with in that legislation.

36. [redacted], Consultant Drafter, has been consulted during the preparation of this advice, and [redacted], Senior General Counsel, has settled this advice.

Yours sincerely

[redacted]
Counsel