Ministry for Primary Industries
Manatū Ahu Matua

12 September 2014

Project Officer Proposal P1025 Food Standards Australia New Zealand
PO Box 10559
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FS350-118-1025

Dear Sir/Madam

Proposal P1025 – Code Revision – 2nd Call for Submissions Report

Thank you for the opportunity to comment on this proposal. The Ministry for Primary Industries (MPI) comments are contained in the attachment to this letter.

Yours sincerely

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MPI submission on Code Revision P1025 — Second Call for Submissions paper – 12 September 2014

Dear Sir/Madam

Thank you for the opportunity to comment on P1025. We have provided comments on drafting suggestions, formatting errors, etc in a separate document.

We appreciate the work that FSANZ has undertaken in preparing this new draft of the Food Standards Code, and the active engagement between FSANZ and jurisdictions. We accept that many of the underlying problems with the Code cannot be addressed within this proposal, and we look forward to further work that will address these issues, as the Code evolves. When the work on P1025 is completed, we suggest that jurisdictions and FSANZ meet to set priorities for future revisions of the Code.

General Comment on the use of the Commencement Notes

MPI queries whether it is necessary to include the commencement note in each standard. It does not appear to be necessitated by any statutory requirement. In addition, while the note is correct, for New Zealand it may give an incorrect impression, as it does not convey the full picture. The date of adoption by New Zealand is not necessarily the same as the commencement date. It is anticipated that for the commencement of this new Code, the commencement date and adoption date will be the same, but for any subsequent amendments, the New Zealand adoption is likely to involve a time lag.

General comment on the Commencement Date

MPI supports the proposal in the Call for Submissions at 3.2.26 to delay commencement for six months. MPI's intention is to align with the Australian commencement date. To this end, a six month period between Gazettal and commencement will ensure that this administrative process can be achieved.

General comment on references to definitions or standards

Where the Draft Food Regulatory Measure (DFRM) refers to definitions or standards, it is not always clear that this is the case. For this reason, definitions or references to standards should be identified

in some way, eg bolding. The phrases can be quite long, and are not always signposted from 1.1.2—2 or 1.1.2—3.

Examples:

Definitions – colouring permitted in processed food to a maximum level

Standards that apply – The phrase 'standardised alcoholic beverage' is used in several places, but it is not obvious that this means those beverages standardised in Chapter 2. It could take on a more literal meaning, not the narrower meaning intended. Other examples are foods for infants, and special purpose foods as referred to in 1.2.7—18 (4).

Chapter 1 Introduction and Standards that apply to all foods

MPI has prepared Appendix 1, that sets out options for the references to the New Zealand Application Act. MPI and FSANZ can discuss these options.

Part 1.1Preliminary

Standard 1.1.1 —Structure of the Code and general provisions

1.1.1—3(1) (a) This refers to 'sold, processed or handled for sale in Australia or New Zealand'. As noted in the draft Explanatory Statement, 'handle' is defined in the Australian legislation, and 'processing and handling' is defined in the New Zealand *Food Act 2014* . Because standard 1.1.1—3(1)(a) is a substantive application provision, MPI submits that the terminology should be changed so that for each Treaty partner there is an exact match with the wording in its application Act.
For these purposes, 'processed or handled' does not sufficiently cover 'processed and handled'. Therefore MPI submits that the application provision will need to include the phrase 'processed and handled'. This may necessitate a slight restructure of the application provision into separate paragraphs applicable to each country.

1.1.1—9 This restates the provisions in current subclause 1(2) of Standard 1.1.1 – and is the 'stock in trade' provision. 1.1.1 – 9(2) is new, and defines 'kind of sale'. We note that the wine 'stock in trade' provision in 1.1.1 – 3 (2) uses different language, referring to 'all food standards'. Is there a reason 1.1.1 – 9(2) sets this out by referring in turn to composition, packaging and labelling? Could 'all food standards' be referred to here as well? 'Composition' could be interpreted too narrowly, for example, it is not immediately clear if contaminants and the microbiological standards are included.

Related to this comment, the Note following 1.1.1—10 (6) may create ambiguity about the breadth of the term composition. See later comment.

Division 4 Basic Requirements

Note 2. MPI submits that Note 2 should also set out relevant provisions of the *Food Act 2014*. Please see **Appendix 1.**

1.1.1—10 (1) MPI generally accepts the new phrase "food for sale" to replace "food", "final food" and "food product" in relation to its legal effect and enforceability. There are of course different types of sale within the scope of the Code. 'Food for sale' may mean:

- food sold to a consumer (ie retail sale, and this term is used in DFRM);or
- food sold to a caterer; or
- food sold to a food manufacturer (eg ingredients, including food additives etc); or
- other food sales (referred to in 1.2.1 – 18) eg intra—company transfers.

In some cases however, MPI recommends alternative descriptors to provide greater clarity, for example 'final food' in relation to characterising ingredients, and 'food sold to a caterer' in relation to this type of sale. The suggested changes are provided in this submission.

There is some concern that the new phrase 'food for sale' may not be understood by industry (especially by first time Code users) and that an argument that the food was **not** for sale could be proposed. However, guidance that explains the meaning and all inclusions (handling, preparing, offering and intended for sale etc) could be developed to clarify the intention of the new phase 'food for sale'.

1.1.1—10 (2) The Explanatory Statement notes that this restates the provision in current subclause 10(3) to Standard 1.1.1., which permits the addition of one food to another, unless there is a specific prohibition. The current wording is *'In cases where no specific foods are authorised for addition in a standard, any other food or anything that may be lawfully added to that food may be added'.*

The new wording appears to have taken on a broader meaning, as there is no reference to *'in cases where no specific foods are authorised....'*

Some of the compositional standards restrict the ingredients to the list provided (eg butter, jam, edible oil spreads and margarine), whereas other compositional standards allow the addition of

other foods or other ingredients (eg Bread , Sausage , Fermented milks , Ice cream , Non-alcoholic beverages , Fruit wine product , Icing , formulated caffeinated beverages). There is inconsistency in the DFRM when permitting these additions. MPI suggests that one term or the other is used, ie food or ingredient, but not both.

The current Code provision in subclause 1.1.1 (10)(3) is clearer, as it states that other foods may be added in cases where no specific foods are authorised for addition. In other words, where specific foods are authorised, but the Code is silent about the permission to also add 'other foods or other ingredients', no other foods may be added. If they are, then they are not that food and the name should be qualified – eg garlic added to butter to make 'garlic butter'.

To summarise our comment, new provision 1.1.1 – 10 (2) needs to be clear that some foods have a limited list of ingredients permitted to be added. In other cases, there are no limitations and foods can contain any ingredients (subject to 1.1.1-10 (3) and (4)), and all foods can be mixed to produce "mixed foods" providing the name/descriptor indicates the true nature of the food (and unless the Code specifies otherwise).

If 1.1.1-10 (2) is not amended, an unintended (broad) interpretation may be applied. This is a provision that industry should be able to interpret with ease, as it is a basic concept that is key to the Code. The Explanatory Statement could also contain a summary of requirements.

We also recommend that 1.1.1-13 (4) be moved to follow 1.1.1-10 (2), so that these two related composition provisions are read together. 1.1.1-10 (6) should also be moved, to follow these provisions.

1.1.1—10(2) and (3) These provisions, and others in the Code, use the phrase 'consist of'. It appears to be used in the sense of the composition of the whole, rather than partial composition; this sense is apparent from its use in subsection (2) in distinction to 'have as an ingredient', but in other places the meaning of 'consist of' could be subject to a "part/whole" ambiguity. It is suggested that consideration is given to replacing 'consist of' with 'be'. Other examples of this issue are provided in this submission – eg, 'unit quantity' definition (1.1.2—2). Further comments are provided in this submission, in the Chapter 2 section.

1.1.1—10(4) This subsection prohibits the presence of certain types of substances if they are not expressly permitted; because this prohibition is an exception to the general permission in subsection (1), it is important that it be drafted effectively, without potential gaps. The substances regulated under paragraphs (a), (b) and (c) are as defined in sections 1.1.2—11, 1.1.2—12, and 1.1.1—13 (food additives, nutritive substances and processing aids). Those definitions are unusual in combining a

list of things and a list (or description) of purposes. In any areas where those lists are finite, there is a risk that section 1.1.1—10(4)(a), (b) and (c) will regulate only the things which are permitted substances used for permitted purposes, leaving other substances unregulated. Possible examples are:

- Caffeine added as a stimulant
- A vitamin or mineral added for a non-nutritive purpose
- A non-listed decolourant.

It is probable that some such examples can be regulated under the Code via some other provisions, eg novel foods. It is, however, undesirable for this fundamental "basic requirements" provision to leave such gaps. Nor is it satisfactory for a regulator to have to rely on the concept of unsuitability and argue about what might be foreign to the nature of the food. There is a general problem of intention under the Code: in the absence of a presumption that any substance present was added intentionally, the onus is on the prosecutor to prove intention, rather than on the defendant to disprove intention. A phrase such as "performs a technological purpose in the food" appears more susceptible to objective proof than "was added to the food to perform a technological purpose". The latter focuses more on the manufacturer's actual subjective intent at the time. This raises concerns about enforceability, particularly in the context of strict liability offences, which are also referred to in our comments under 1.1.1—13. Assistance from the labelling requirements in proving intention may be limited: the food additive requirements will only be triggered if something was "used as a food additive" within the definition of that term, and the mere listing of an ingredient would not be sufficient to show a particular purpose was intended.

Furthermore, circularity may result from these "used as a …" definitions: the Code defines "used as a food additive" (ie what <u>is</u> in and what <u>is</u> out of the definition) and then effectively states (eg in 1.3.1—3) the circumstances in which a substance <u>may</u> come within that definition. That is unusual and arguably contrary to expected legal use of definitions.

1.1.1—10 (6) As noted above, new provision 1.1.1 – 10(6) should be read in conjunction with 1.1.1 – 10 (2). We suggest this is moved, so that it becomes 1.1.1—10 (3), and the following subsections are renumbered.

For completeness, a second example should be provided, that relates to composition (from Chapter 2).

Please see our earlier comment regarding the note, and the ambiguity around the breadth of the term composition.

1.1.1—10 (8) As noted in our submission at the 1st CFS stage, the Code should not include a provision which no packaged food can comply with.

1.1.1—12 Applicable Standards for Importation of Food.

MPI understands that this provision is needed for Australia. It is our view that the provision already contained in 1.1.1 – 3 is effective and nothing further is required for New Zealand.

The Food Act (both the 1981 Act and the 2014 Act) focus on managing risks associated with food, rather than prohibiting the importation of food. Under the current imported food regime, under the Food Act 1981, all foods are allowed to be imported but restrictions apply at clearance stage. Foods that are categorised as 'prescribed foods' are sampled and tested for specified hazards as a condition of clearance. The new imported food regime, under the *Food Act 2014*, will follow the same principle, with some modifications. See Part 3 of the *Food Act 2014.* It is for this reason that 1.1.1—12 (1) may not be consistent with the regime applying in New Zealand.

Composition for retail-ready foods cannot be changed and would need to comply on importation. The current wording in 1.1.1—12(1) goes further than composition, as it captures microbiological limits. The current wording suggests that microbiological limits must comply on importation, whereas it is not possible to ascertain compliance at the point of importation. The process in New Zealand is to test the imported food on importation; when results are received, subsequent action can be taken. MPI submits that nothing in this section should prevent microbiological testing on importation, and therefore that this section/subsection reflects that food may be tested and treatments applied.

It is our interpretation that 1.1.1 (2) — (3) allows for re—labelling, so that labels on imported foods can be over-stickered to comply with the Code. This is because the provision relates to sale, so it contemplates changes in labelling (or packaging), if necessary . We agree with this approach.

As a further comment, the suggested order of the subsection is (3), (2), (1).

1.1.1—13 Use of food with a specified name or nature

The interpretation of this provision has been challenging. In order to assist industry and enforcement agencies to interpret and apply this provision, several drafting changes are suggested, as set out below. In particular, see our concerns under 1.1.1—13 (2), second part of this subsection (relating to the test to determine that a purchaser would be led/may be expected to assume that a food was NN).

Heading

Suggest changing the heading to "Food sold with a specified name or representation". This change is a better description of the substandard but does not solve the concern with wholegrain and wholemeal, which is explained further in the comments on 1.1.1—13 (1).

1.1.1—13 (1) We recommend changing subsection (1) as follows — "This section applies in relation to a provision of this Code that provides that 'a food that is sold as NN' or 'a food that is sold as being made from NN', where NN is a particular food or ingredient, must satisfy certain requirements (usually that the food being sold must satisfy the definition and any compositional requirements of NN in this Code)."

This would help capture all intended uses of a name when selling a food, ingredients in a food (specifically 'wholegrain' and 'wholemeal'), and mixed foods. It would, for example, clarify that wholegrain bread must be, or be made from, wholegrain that meets the definition of wholegrain. A second example that this provision clarifies is that the butter component in 'Garlic Butter' would need to meet the definition and compositional requirements for 'butter', and that cheese in a 'Cheese Roll' would need to meet the definition and compositional requirements for cheese .

1.1.1—13 (2) Suggest splitting subsection (2) into two separate subsections as shown below, to set out the two different ways that the requirements apply:

> 1.1.1—13 *(2) If the provision specifies NN in quotation marks, any requirement that must be satisfied applies only if that name (NN) is used in connection with the sale.*
>
> ***Note 1…***
>
> ***Example…***

1.1.1—13 (3) If the provision specifies NN without quotation marks, any requirement that must be satisfied applies to any sale in which a purchaser may be expected to assume that the food being sold was NN.

Note 2…

Example…

We also suggest the following:

- Amending the two lists of foods in Note 1 and Note 2 (see below)
- providing full sentence examples, under both Note 1 and Note 2.

We are still concerned that the test to determine that a "purchaser would be led/may be expected to assume" that the food was NN not in quotation marks could be circular and could be subjective, which would make enforcement very difficult.

"May be expected to assume" is a rather vague and subjective phrase in this important "basic requirements" provision. "May" is less certain than "would". "Expected" – by whom? "Assume" – some sort of subjective mental element.

This provision may also be difficult to enforce where a food definition is not only unused by consumers but is extremely long and complicated. An example is edible oil. It might be difficult for a prosecutor to allege that a consumer may be expected to assume that the food being sold was the triglycerides, diglycerides, or both the triglycerides and diglycerides of fatty acids of plant or animal origin etc etc.

The *Food Act 2014* (NZ), like the Australian Model Food Provisions, contains some strict liability offences which do not sit well with this subjective wording. An example is section 243 of the Food Act 2014 (NZ), which provides that it is an offence to breach or fail to comply with a requirement in an adopted joint food standard.

1.1.1—13 (3)

Enforcement of subsection (3) will also be challenging and a subjective assessment may be required to determine if the "context makes it clear that this is not the intention". It is not clear in the section what is meant by "context". In most of the examples provided, it appears to mean when there is a history of use of a name. Product descriptions, product placement, and qualifying names are some

examples of “context” that may be considered during an assessment of naming and compositional compliance, but reaching agreement on context and intention could be contentious.

We are also concerned that the ‘unhopped beer’ example may set a precedent for removing or reducing core compositional requirements, which may or may not be acceptable. We therefore recommend removing this example.

We note that enforcement agencies could develop guidance around expectations to help alleviate these concerns. It would also be helpful if the Explanatory Statement provided information on the rationale behind the placement of foods in the two lists.

Comments on the two lists (under Note 1 and Note 2) and Examples

<u>Move from Note 1 ‘NN’, to Note 2 NN</u>

We recommend that Meat Pie and Processed Cheese are moved to list two. The following examples explain our reasoning: ‘Meat Pie’ is also sold as ‘Steak Pie’ and ‘Lamb Pie’, (but should still be required to meet the standards for meat pie. ‘Processed Cheese’ could be sold as ‘Sandwich Cheese Slice’ or ‘Cheddar Slice’, and not necessarily as processed cheese, but it should still meet the requirements for processed cheese.

Edible Oil and edible oil spread – these are missing from list two.

<u>Move from NN to ‘NN’</u>

We recommend ‘Jam’ be included in list one (ie Note 1), otherwise any time someone is being led to assume that a food is ‘a product prepared by processing fruit, with sugars/honey’, that product would need to meet the jam standard. If jam is in list two (ie Note 2), this would allow for jam type products to be sold with descriptions such as ‘Breakfast Berry Spread’ and not be captured by the definition and compositional requirements for ‘Jam’. We suggest discussions with jurisdictions on this, to form a consensus view, as we agree that there is a case for jam and conserve to both be in list two.

Following any amendments, a cross- check of foods and use of quotation marks is required.

The following proposed changes are recommended for the examples:

Examples under Note 1

A cocoa-based confectionery that is not named or described as being or being made from chocolate would not need to meet the requirements for chocolate.

Examples under Note 2

Bread sold as sourdough, cheese sold as cheddar, a sausage sold as bratwurst must meet the requirements for bread, cheese and sausage respectively.

1.1.1—13 (4) As noted above, this provision needs to be moved to 1.1.1—10, to follow on from 1.1.1—10 (3), as it is of general application regarding compositional requirements. In 1.1.1 – 13, its application is limited to provisions stating that a food that is sold as NN must satisfy certain requirements, by virtue of 1.1.1 — 13(1).

Examples of where this would not apply (unless moved) are packaged water 2.2.2 – 3 (not an NN provision), and electrolyte drinks 2.6.2 – 9 (NN provision separate from permission to add).

Standard 1.1.2 — Definitions used throughout the Code

1.1.2—2 Definitions

1.1.2—2 (3) sets out definitions, and subsections (1) and (2) provide for further interpretive guidance and the respective priorities. Each of the subsections includes 'unless the contrary intention appears', so as to ensure appropriate interpretation. We query whether the relative priorities have been fully spelled out. The FSANZ Act meaning is expressly subject to the application Act meaning, which is unusual but presumably appropriate for this particular instrument. What are the priorities between the application Act meaning and the Code definitional meaning? If the Code definitions set out in subsection (3) are intended to "trump" the application Act meaning, it may be helpful if subsection (2) referred to terms 'used but not defined in this Code'. Note that this would reflect section 8(2) of the New Zealand Food Act 2014 which provides "To avoid doubt, terms and expressions used, but not defined, in the Code have the same meaning as in this Act". For example, there are different definitions of 'label' in the Code and the New Zealand Food Acts; their application may depend on an analysis of 'unless the contrary intention appears', but it would be helpful if 1.1.2—2 clarified the rules and priorities as much as possible.

Definitions:

The following definition is not included, but should be considered for inclusion:

> **Ingredient –** There are instances in the DFRM where this term is used and the specific meaning applying under the current Code is important. The specific meaning is that the definition includes food additives and processing aids. Examples of where this needs to be included are provided in this submission.

MPI comments on definitions in the DFRM:

RDI – suggest this reads: RDI means Recommended Dietary Intake – see section 1.1.2—10. Similarly for ESADDI. This is to avoid other uses of the abbreviations, such as the US definition of RDI, which is *Recommended **Daily** Intake,* which is commonly seen on labels and is based on different nutritional values. It needs to be clear that it is intended that only the Code definition and RDI values apply, particularly as the Code RDI values are different to those specified by the NHMRC .

1.1.2—11 Definition of used as a food additive, etc.

The current Code Purpose statement and exposure draft had a clause regarding not normally consumed as a food and not normally used as an ingredient of a food, but it has been removed. MPI submits that these statements should be retained, and comment is provided below.

MPI drafting comments on 1.1.2—11:

1.1.2—11 (2) (a) Suggest that after (ii), (iii) and (iv) the S 16 references are provided, consistent with providing S15 after (i). The phrases used are definitions, and there are set lists of approved additives, so for clarity the schedule reference should be included.

1.1.2—11 (2) (b) Suggest that the Exposure Draft wording (which is in current Code Purpose statement) regarding 'not normally consumed as a food in itself and not normally used as an ingredient of food' is retained, as this is Codex wording, and is well understood and provides added clarity.

If the words are not reinstated, then 1.1.2 – 11 (2) (b) does not need **: or (i)** any longer.

We note that the wording used to describe extracts refers to three verbs (concentrated, refined, and synthesised), but arguably only the verb "synthesised" is tied to the phrase "to perform 1 or more of the technological purposes listed in Schedule 14". If that phrase colours all three verbs, we suggest it should read "selectively concentrated, refined, or synthesised to perform ...". This comment applies not only to the food additives provision 1.1.2—11(2)(b) but also to the nutritive substances provision 1.1.2—12(2)(c).

1.1.2—12 (2) As this is a list of things, the word 'and' is not needed after the end of (a) and (b).

1.1.2—13 Definition of used as a processing aid

While we have provided some comments below, we would like to discuss the wording of this section with FSANZ. The definition in 1.1.2—13 is not consistent with the Note in standard 1.3.3 (the order of the sub-sections is different).

The comment below applies to the definition in the Note in standard 1.3.3, as this also refers to a limited number of technological functions (by referencing S15, which we think is intended to refer to S14).

1.1.2—13 (1) (b) and (2) (a) (ii) The reference to the technological purposes listed in S 14 appears to have been included principally to distinguish processing aids from food additives. However, the current wording and format of 1.1.2—13 may obscure the fact that a processing aid not only performs a technological purpose in the course of processing but also must not perform a technological purpose in the food for sale ie the final food.

Processing aids do not perform a technological function in the final food – this point is not clear in 1.1.2—13. This is perhaps the key point in relation to processing aids, and more prominence is suggested. 1.1.2-13 (1) (b) could perhaps refers to 'final food', not 'food for sale'.

1.1.2—13 (3) (b) Add the schedule reference S16—2. This is another example of a defined term that may not be obvious to Code users (please refer to similar comments on this point, in this submission).

Standard 1.2.1 - Requirements to have labels or otherwise provide information

1.2.1—9

In several places the phrase "displayed in connection with the sale of the food" has replaced the current Code wording "displayed in connection with the display of the food". This attempt to avoid double reference to "display" has changed the meaning, and we submit that it should be changed back to current wording. A consumer makes the decision to purchase at point of display, which may not be the same as the point of sale, eg in a big supermarket.

The wording from the current Code "is displayed in connection with the **display** of the food" is required in the following places:

- The heading to 1.2.1-9 (2) and
- 1.2.1-9 (2) (b), and
- the heading to 1.2.1—9 (5)

This is consistent with the current Code. Display of the food and sale of the food do not have the same meaning and the change would be significant.

Standard 1.2.4 — Information requirements—statement of ingredients

Ingredient is no longer defined, and this subsection contains references to ingredients, that are taken to mean the inclusive term as defined in the current Code, i.e. as including food additives and processing aids. This needs to be clear, please see comments below.

1.2.4—5 (5) (b) Rephrase to *each ingredient, including substances used as a food additive of the compound ingredient .....sale*

1.2.4—5 (6) (a) Same comment as above, need to add in the underlined words after 'all ingredients'

1.2.4 – 6 Another example of where it needs to be amended to make it clear that an ingredient includes food additives.

1.2.4—7 (6) This represents a change in wording compared with the current Code and the intent could be misinterpreted.

In both the current Code and the DFRM, the heading to the subsection refers only to food additives. The reference to 'otherwise' should be removed, as caffeine added to other foods such as formulated caffeinated beverages (and the labelling) is dealt with under standard 2.6.4. We suggest that this reads along the following lines (possibly also with reference to used as a food additive):

If caffeine is added to a food for sale (as as a flavouring), it must be listed in the statement of ingredients as caffeine.

Standard 1.2.5 — Information requirements—date marking of food items

The current standard 1.2.5 cl 7(1) is no longer stated, but to delete this would be a change in policy (it is different to new 1.2.5—6, as this only refers to packed on dates or codes, not to date marking systems more generally). The current Code requirement is that there must only be one date marking system used, and this is not reflected in the DFRM.

Standard 1.2.8 Nutrition Information Requirements

1.2.8—9 (3) This needs to state that the RDIs in S1—2 and S1—3 must be used (to avoid other RDIs being used, such as the age-group specific RDIs derived by the NHMRC and NZ Ministry of Health or United States RDI's).

1.2.8—14 (3) Suggest to add in *prescribed* before 'form of a nutrition information panel'. This is to make it clear that the information should still be set out in a *panel* of some sort.

Standard 1.5.2 — Food produced using gene technology

1.5.2—3(b) This is confusing as written, as this statement only applies to those food additives and processing aids that have been approved as GM-derived. It is not all food additives and processing aids.

1.5.2—4(1)(b)(ii) suggest to add the words in italics (as this applies to final foods, not to the processing aid which is by definition, a food):

> no novel DNA or novel protein from the substance remains present in the food *to which the processing aid was added; or*

1.5.2—4(3) suggest to add the words in italics (to avoid doubt):

> For the labelling provisions, the information relating to foods produced using gene technology *must include* ~~includes~~ the statement 'genetically modified' in conjunction with the name of the relevant food.

1.5.2—4(4) As commented earlier, as "ingredient" is no longer defined, it should be spelt out here that this usage includes food additives and processing aids. Therefore, the following words in italics should in our view be added:

> If the relevant food is an ingredient, *including food additives and processing aids,* the information may be included in the statement of ingredients.

Chapter 2 Food standards

General comment – the phrase 'x must consist of x' is not supported, as it is not clear if x must be solely x, or partly x. We would prefer:

- x must meet the definition of x; or
- x must satisfy the definition of x;
- x must be x

Part 2.2 Meat, eggs and fish

Standard 2.2.1 — Meat and meat products

As a general comment, we are not sure if the requirements for manufactured meat and processed meat have been correctly captured in the DFRM. The DFRM does not appear to prevent the manufacture of *fermented comminuted processed meat* (fcpm) with less than 300 g/kg meat. The standards for manufactured meat and processed meat are relevant for the food additive permissions, and the labelling requirements (for food safety reasons). Discussion between FSANZ and jurisdictions is suggested, to ensure that the revised Code accurately reflects the policy intent and drafting of the current Code.

Standard 2.3.2 – Jam

The new definition is clearer and is preferred, as it clarifies that jam is made up of fruits or the liquid from fruit, with or without sugars or honey. The current Code definition incorrectly listed all ingredients, giving the impression that jam could be made from only sugar/honey, with no fruit, for example.

The Jam standard states that it applies to conserve a well as jam, therefore the name of the Jam standard should also be changed to "Jam and Conserve". In our view, a product cannot be called Conserve, unless it meets the definition of jam. We do not think that the current drafting achieves this outcome (and note this was carried over from the current Code).

If FSANZ agrees that anything called 'Conserve' should meet the requirements under standard 2.3.2, then the drafting should be changed in other applicable places, i.e. in both standard 2.3.2, and in 1.1.1—13. This is why, in our view, jam and conserve should both be listed in section 1.1.1—13.

Standard 2.7.3 — Fruit wine and vegetable wine

We welcome the explanation in the 2nd CFS paper (paragraph 3.2.5.4) setting out the requirements for cider and perry, and the naming of these when other fruits are added. This clearly sets out that cider and perry are made from apples and pears only (with certain proportions as set out in standard 2.7.3).

2.7.3—2 The revised definitions of cider and perry are supported, however an additional comma is suggested; as shown in bold below. This is to make it clearer that there are two compositional options under each definition, ie for cider; pure apples, or apples and pears (and for perry, pure pears, or pears and apples).

Cider means the fruit wine prepared from the juice or must of apples**,** or apples and pears and with no more than 25% of the juice of must of pears.

Perry means the fruit wine prepared from the juice or must of pears**,** or pears and apples and with no more than 25% of the juice or must of apples.

Part 2.9 Special purpose foods

Standard 2.9.1 — Infant formula products

General comment

Several of the comments in this submission regarding standard 2.9.1 relate to the prohibition contained in standard 1.2.7—4 (1) (b) , which states that nutrition content claims and health claims cannot be made on infant formula products. Several provisions in new standard 2.9.1 can be misinterpreted with regard to nutrition content claims, and therefore MPI suggests that this standard contains a Note with a link to 1.2.7—4 (1) (b), that serves as a reminder. This could be placed at the beginning of Division 5, or the end of 2.9.1—5 (it would seem to fit well here, as there is already a Note, to which extra information could be added).

Specific comments

2.9.1—3 The definitions for 'follow-on formula' and 'infant formula' specify the age range in a different way to the current Code. For 'follow-on formula', *over the age of 6 months* is used (rather than aged from six months), and for infant formula, *under the age of 4 to 6 months* is used, (rather than infants aged up to 4 to 6 months). For infant formula, this appears to change the meaning, as under the current Code the infant can be 6 months old, whereas in the DFRM the infant must be under 6 months old. The meaning has possibly changed for follow-on formula, as *over the age of 6 months* could mean 7 months of age. These changes are not supported.

2.9.1—5 (2) This implements clause 7(2) to standard 2.9.1. The purpose of the current standard 2.9.1 clause 7(2), is to only allow the declaration of added nutritive substances in the ingredient list and the NIP, if minimum levels are met (and maximum levels are not exceeded). The phrase '...any words indicating, or any other indication, that...." provides that words or numbers might be used (in the ingredient list and the NIP). It is mandatory to make this declaration (2.9.1 —21), not optional.

However, the DFRM 2.9.1—5(2) states 'may', when in fact the ingredient list and NIP must provide the required information about added nutritive substances.

Furthermore, we strongly recommend that 2.9.1—5(2) is linked to the prohibition listed in 2.9.1—24(1) (f), and the prohibition on making claims in standard 1.2.7. Ideally, they would be in one

place in standard 2.9.1, as to separate the provision is confusing and may appear as a conflict of requirements.

Solution: Amend 2.9.1—5 (2) to clearly reflect that this provision deals with the ability to declare added nutritive substances in the nutrition information statement, only if the level in the product complies with the values in S30—5. In other words, it is not a permission to make nutrition content claims.

Amend the current Note by adding the italicised words:

> The labelling provisions are set out in Standard 1.2.1. *Standard 1.2.7 prohibits nutrition content claims and health claims on infant formula products. Standard 2.9.1 —21 restricts the provision of nutrition information to a singular statement.*

2.9.1—10(2) The 'may' should read 'must', consistent with the current Code. This is a mandatory requirement.

2.9.1—19(3) The words in brackets, i.e. 'words or pictures' are not consistent with the current Code. This should read 'words **and** pictures'. It is not an option to provide the information using pictures only.

2.9.1—21 The current standard 2.9.1, clause 16, refers to a 'statement'. In our view, the current requirement clearly points to a singular statement, so that nutrition information can only be in one place (such as the NIP), so that separate statements cannot appear elsewhere on the label. However, the DFRM does not limit the provision of the nutrition information to a singlular statement. This changes the meaning, and appears to allow additional nutrition information being provided elsewhere on the label (which is a change in policy, as additional information on these products can be viewed as nutrition claims, which are not permitted, as noted in our comments above).

Solution: Amend **2.9.1—21 (1)** to read:

(1) For the labelling provisions, a statement of the following nutrition information is required:

2.9.2—21 (1) The current wording 'average amount' has been carried over from the current Code, but is intended that the term 'average quantity' (as defined in the 1.1.2) is not applicable in this standard? In our view, average quantity could be used in 2.9.2., instead of average amount.

2.9.1—24 (f) There has been a change in meaning, as the current Code refers to 'any nutrient or nutritive substance', whereas this clause refers to 'any nutrient or substance used as nutritive

substance'. This appears to mean that the restriction on making claims only applies if the nutritive substance is added, whereas the current Code restricts claims on all nutritive substances (added or naturally occurring). This is a change in policy, so we suggest clause 2.9.1—24(f) is rephrased to make this clear. Once again, this subsection links to the prohibition contained in 1.2.7—4 (1) (b), and a Note could be added to this effect.

Standard 2.9.3 — Formulated meal replacements and formulated supplementary foods

2.9.3—6 (1) (b) The current provision in standard 2.9.3, cl 5(1) states 'added', whereas this states 'is present'. This appears to be a change in meaning.

2.9.3—6 The definitions and concept of 'claimable vitamin and mineral' have been removed from Division 3, but have been maintained in Division 4. In Division 3, it is now hard work for the reader to decipher, and retention of the definition, consistent with Division 4, is suggested. See further comment below.

2.9.3-7 (3) It is not clear that this substandard is a permission to add inulin-type fructans or galacto-oligosaccharides (as well as setting a maximum level); can this be improved?

2.9.3—8 (7) We support this provision, ie retaining the definitions for claimable vitamin and mineral. These claims permitted in the products regulated by standard 2.9.3 are complex to understand, due to the ability to claim both naturally occurring and added vitamins and minerals; the different schedules for which list the permitted vitamins and minerals; the setting of maximum levels and maximum claims; and the requirement to state the actual levels in the NIP (and are therefore not claims). This complexity is aided by defining 'claimable vitamin and mineral'.

2.10-4 – 4 Peanut butter

We recommend moving the part of the definition "means a peanut based spread" to the definitions section. This is because the description being included in the compositional section, may mean the requirement is overlooked (Code users are likely to look for a definition and then link this to the composition requirement), particularly as this is the only food that does not have a definition.

Chapter 6 Schedules

Schedule 7 Food additive class names (for statement of ingredients)

S7—2 has an incorrect layout, with the two lists side by side. The lists should be set out as one list, followed underneath by another list (as in the current Code). As presented now, the Code could be read across from one column to the next and interpret as being linked (when there is no link).

Schedule 8 Food additive names and code numbers (for statement of ingredients)

S8— 2 The table needs a heading for the columns, which should read 'Food additive prescribed name' above the chemical names, and 'Code Number' above the numbers, throughout the schedule.

Note that we support the term 'Code Number', and that we do not support the term 'INS' in this schedule (see later comments under S15 and S16).

S7 refers to 'prescribed class name', and this is an illustration that the concept of name being optional. As it is not intended that this option applies in S8, this highlights the need to specify prescribed name in S8.

Schedule 15 Substances that may be used as food additives

The table to section S15—5 includes several *Notes* in the "Conditions" column (at 5, 13.5, 14.1.2, 14.1.2.1, 14.1.3.3, 14.1.4). This is different from, and much more extensive than, such notes in the current Schedule 15 at 4.2 and 6.1. This use of notes in the draft Code appears to be in part a shorthand way of avoiding repetitions of conditions. However, the notes contain material which is a substantive part of the Code's requirements. There is a risk that the material in question could be regarded as non-substantive because:

- the "note" terminology tends to indicate mere information rather than substantive material; and
- legally, text identified as an editorial note is not part of the Code, by virtue of section 4 of the FSANZ Act; it may be possible to argue that there's a distinction between a "note" and an "editorial note", but there are no clear guidelines around that.

Examples of substantive material are in the notes at 14.1.2 and 14.1.2.1 - these contain substantive conditions that are not imposed elsewhere in the Code. It is suggested that "note" is not used in this context.

MPI submits that the Code should be drafted so as to avoid any ambiguity over the status of such substantive material. The draft should not identify material in the table to section S15—5 as a

"*Note*" unless it is very clearly for information purposes only. We suggest that FSANZ does a cross check of the Notes, to see if they are indeed a note, or a substantive provision not captured elsewhere.

Column headings

INS column heading – INS is used, but is not defined. Suggest that this is replaced with 'Code Number', here and elsewhere in the Code. Note: while the Code Numbers used in the Food Code are based on the INS (international numbering system), there is not complete alignment, therefore the current system (ie Code Number) should continue.

The column heading 'Description' should be rephrased to read **'Additive name'**.

Wherever the following phrases appear in the table, the following bolded and underlined changes are needed:

- Additives permitted in processed foods **(Schedule 16—2)** **GMP** (in the MPL column)
- Colourings permitted in processed foods **(Schedule 16—3)** **GMP** (in the MPL column)
- Colouring permitted in processed foods to a maximum level **(Schedule 16—4)**

The S16—2 and S16—3 additives may only be used at GMP levels. This is stated in 1.3.1—4, however this requirement is not obvious when reading S15—5. Furthermore, the titles to S16—2 and S16—3 no longer refer to GMP.

MPL column – while this is defined elsewhere, stating the units (mg/kg) in the heading would be helpful.

Appendix 1

References to New Zealand Application Act (Food Act)

The draft Code refers throughout to the New Zealand application Act as the Food Act 1981. The wording has been in the draft for some time, but MPI submits that reconsideration of it is appropriate, as the current draft's formatting into separate standards has resulted in multiple references to the 1981 Act, and the legislation replacing the 1981 Act has now been enacted.

Reference in the draft to the 1981 Act is correct, but even at the present date it does not fully describe New Zealand's application legislation. The Food Act 2014 was given Royal Assent on 6 June 2014; some provisions came into effect on 7 June 2014; most of the Act will come into force on 1 March 2016, or an earlier date or dates set by Order in Council. The 1981 Act will be repealed on such date. If the new Code commences in, say, August 2015, it will be in force only a matter of months before the 1981 Act is repealed.

There are several types of references to the New Zealand application Act in the draft Code:

- Note 2 at the beginning of each and every standard;
- A few notes which set out application Act provisions for greater context, eg Note 2 at the beginning of Part 1 Division 4;
- Note 1 under 1.1.1—3(1), which lists the non-New Zealand standards;
- Notes which reference where non-Code New Zealand requirements can be found eg Note 3 under 1.6.2.

It does not appear that the 1981 Act is referred to in any of the current draft's substantive provisions

MPI invites FSANZ to consider how the draft might best reflect and accommodate this New Zealand legislative change, in order to:

- ensure that the Code is accurate and fully informative for users, and
- identify, manage, and perhaps minimise, the need for multiple amendments in the reasonably near future.

There appear to be various options:

1. Keep the draft as is, which makes no reference to the 2014 Act. We understand that there may be an intent to cover off the 2014 Act in some transitional provision, but this does not give users accurate information regarding the New Zealand position, and will necessitate many amendments. Even if the amendments can be done relatively easily (though

presumably at some expense), the result will not be user-friendly for users who rely on print versions of the Code, in that it will involve the expense and inconvenience of reprinting. New Zealand regulators and industry will be fully occupied in understanding and implementing the domestic legislative change, and it is important to remove any risk of ambiguity concerning the status of the relevant Code application Act. For example, it is important that businesses have a clear understanding about which NZ application Act applies at any given time; Code application will not involve any transition period as such, whereas there will be a lengthy transition period for some other aspects of food regulation such as new risk-based measures. MPI submits that in this context it is too simplistic and not user-friendly to retain the reference to the 1981 Act without more, simply on the basis that the legislative change will be dealt with by a transitional provision. Also, although it is usually possible to rely on (Acts) Interpretation Act provisions that a reference to a repealed Act can be interpreted as referring to the replacement Act, that is not beyond argument, given the international context and the relationship between the various Acts governing interpretation. It is strongly submitted that the DFRM references to the 1981 Act should be accompanied by reference to the 2014 Act.

2. Remove or reword Note 2 at the beginning of each standard. The note spells out each standard's application in New Zealand, but this may be unnecessary, as the application in New Zealand is set out in 1.1.1—3, to which Note 1 refers, as well as being intuitive from the name of the Code. We are not aware whether there is any particular requirement, for example, in the Legislative Instruments Act (Cth), for Note 2. If Note 2 is to be retained, perhaps it could be reworded to avoid the specific 1981 reference.

3. Add material to the notes which reproduce sections, eg Note 2 at the beginning of Part 1 Division 4. This should refer to the 2014 Act, and preferably set out the relevant sections.

   For Note 2 at the beginning of Part 1 Division 4, there are the following suggestions. Note 2 could commence with "In New Zealand, the current application Act is the *Food Act 1981*. The repeal and replacement of that Act by the *Food Act 2014* takes effect on or before 1 March 2016." Note 2 could then replicate the 1981 provisions as in the DFRM. It could then state "Under the *Food Act 2014* (NZ), it is an offence to breach or fail to comply with a

requirement in an adopted joint food standard. Other offences relate to compliance with all requirements of the Act, including requirements of an adopted joint food standard."

4. In relation to Note 1 under 1.1.1—3(1), which lists the non-New Zealand standards, it may be clearer to state "The following provisions do not apply in New Zealand as they have not been incorporated by reference into a food standard under the *Food Act 1981* (NZ)". Additionally, it may be possible to future-proof this provision now by making the Note read "... have not been incorporated by reference into a food standard under the *Food Act 1981* (NZ) nor adopted as an adopted joint food standard under the *Food Act 2014* (NZ)". Such a simultaneous reference to both Acts would be appropriate, as existing Code standards in March 2016 will retain their NZ application status by virtue of the 1981 Act (though they are deemed adopted under the 2014 Act), and it is only post- March- 2016 amendments which will be actually adopted under the 2014 Act.

5. In relation to provisions which refer to non-Code requirements, these will need to be amended upon the full coming into force of the 2014 Act. It may be possible to avoid amendment by referring to both Acts, by adding in some wording such as "and when the relevant provisions of the Food Act 2014 commence, those provisions will replace the provisions of the Food Act 1981".

These comments are made on the assumption that the new Code will come into force prior to 1 March 2016. If that is not the case, different changes would be required, although not all references to the 1981 Act would be removed (eg as referred to in option 4 above).

For reasons stated above, MPI considers that the new Code should appropriately reflect the pending New Zealand legislative change; please advise if this warrants further discussion outside the submission process.