Comments from PrimeSafe and the Departments of Health and Environment & Primary Industries, Victoria

Due: 12 September 2014

Introduction

The Victorian Departments of Health and Environment and Primary Industries and PrimeSafe (hereafter Victoria) welcome the opportunity to provide comments on Proposal P1025 – Code Revision (P1025).

Victoria recognises that Food Standards Australia and New Zealand (FSANZ) has undertaken a complex task, and that significant efforts have been made to address the issues raised by jurisdictions in previous submissions and after recent cross-jurisdictional communication.

Victoria notes the reversion to the current Code numbering from the previous draft version released for public consultation. We appreciate that retaining the current structure lessens the impact and costs on industry and regulators. This is because changes such as those proposed in the previous draft version imposed an appreciable burden for industry and enforcement agencies, particularly where references to the Code are integral to the operation of management systems. Victoria also notes that fundamental concepts of the Code that added complexity and ambiguity (such as "food product" "ingredient" and "component") have been amended since the previous draft released for public comment. These changes will also improve the clarity and useability of the document.

FSANZ has generally achieved the major intended effect of clarifying and giving priority to the primary role of the food laws of the states territories and New Zealand and of strengthening the relationship between the Code and the application Acts in each jurisdiction. However, there are areas of the revised draft that Victoria considers should be revisited to further improve consistency, clarity and enforceability.

The comments provided by Victoria are provided in three parts:

- **Part 1** addresses issues of the Code revision process.
- **Part 2** addresses issues of consistency and clarity in individual standards
- **Part 3** discusses recommended next steps for consideration by FSANZ.

Part 1: comments on the process of the Code revision

Victoria has previously expressed concerns around the approach taken by FSANZ in the development of P1025.

In 2010 FSANZ released the *Legislative Audit of the Food Standards Code* consultation paper, which stated: 'The purpose of this paper is to seek comments from jurisdictions on the principles and priorities that should underpin the implementation of the OLDP's[1] recommendations. The results of this consultation will be used to develop an implementation plan'.

The failure to develop that implementation plan in collaboration with jurisdictions to address, over time, all the matters raised in the 2010 consultation paper, represents a lost opportunity for the substantive Code reform sought by jurisdictions and industry.

As raised in comments that we made in confidence to FSANZ in response to the 2013 call for submissions on P1025, Victoria again draws attention to the lack of a coordinated, national approach to consultation during this Code revision. Even though in the lead up to the release of this second consultation draft South Australia convened and led a cross-jurisdictional consultation and engaged FSANZ in this process, this review has been extremely resource intensive for jurisdictions. Each jurisdiction has had to independently scrutinise the voluminous draft revision. This has been an inefficient use of limited resources, time consuming and extremely laborious. It has necessitated, for each jurisdiction, a constant rechecking of one document to the next because of the absence of 'tracked changes'.

What is significant for jurisdictions is that the Code is automatically adopted as law. This has been of particular concern for Victoria where the *Food Act 1984* provides for the automatic adoption of the Food Standards Code. The Food Standards Code is therefore a body of law that, at least in Victoria, is not subject to the same parliamentary scrutiny that is applied to other Victorian laws. For instance, it will not subjected to rigorous Business Impact Assessment that would be reviewed by Cabinet, it will not be debated in the Victorian Parliament and subjected to the attention of both Houses, nor after its passage, will it be considered by the Scrutiny of Acts and Regulations Committee which is a joint investigatory committee of the Parliament of Victoria. Consequently, it is important for Victoria that changes to the Food Standards Code are the subject of genuine consultation, and that there is opportunity to influence what is released for public comment so that changes are enforceable and the Code is usable.

In national jurisdictional fora FSANZ indicated that the revision process was one focussed on legal drafting. This approach by FSANZ has limited the scope of P1025. The limited scope has, in turn, had the effect of transferring the costs and initiative for future Code reform to businesses and regulators, through raising Applications to address flaws that should properly have been considered, prioritised and scheduled as part of this work. Pursuing this course will result in an *ad-hoc* and uncoordinated Code revision process.

[1] Office of Legislative Drafting and Publishing

Part 2: Standard specific comments

(Please note that these comments are presented in the order in which the Standards are presented in the Revision draft.)

Victoria provides here detailed analysis of issues identified with individual standards of the draft Code. Please note that because of resource and time constraints, this list of issues may not be exhaustive.

1.1.1 – 3 Application of Code

The draft now includes 'handled' for sale as requested in earlier submissions. However this amendment has not been addressed under *Standard 1.1.1 – 14 Other requirements for food*, which remains in the draft as for *preparation* only and does not include *handled*.

1.1.1 – 8 Compliance with requirements for mandatory statements

This replaces the current *Standard 1.1.1 – 12 Modification of prescribed statements*, which was contradictory where standards clearly prescribe words or statements.

The draft *Standard 1.1.1 – 8* seeks to address this issue by making it explicit that the prescribed wording for warning statements cannot be modified. Warning statements are clearly identified under *Standard 1.2.3 cl 3* and under *Standard 2.9.1 cl 14*.

However, there are other current standards which prescribe statements and wording (usually in quotation marks), distinguished from the more common 'must include words to the effect that'. It is clear that the intent is that **those precise words should be used** (the statements often appear to read as warnings). *Standard 1.1.1 – 8* should recognise these statements as well as designated warning statements.

Thus, *Standard 1.1.1 – 8* could be amended to read

> ***If a provision of this Code requires a statement, other than a warning statement or where the statement or words are specifically prescribed.***

More consistency would be applied by placing *all* such words or statements in quotation marks.

Examples in the current Code include:

1. *Std 2.6.3 Kava cl 3 – there shall be written…. the following statements;*
   a) *'use in moderation', and*
   b) *'may cause drowsiness'*
2. *Std 2.9.2 Food for infants cl 6 (2)… must include the words; 'not suitable for infants under the age of 6 months'*
3. *Std 2.9.4 Formulated supplementary sports foods (3)… must include the statement; 'not suitable for children under 15 years of age or pregnant women'*

There are other current standards prescribing words or statements where consistency is important and no flexibility should be permitted. For example:

> *4. Std 1.2.5 Date marking cl 4 Prescribed form of date mark; … must use the words…*

1.1.1 – 9 Effect of variations to Code

The proposed *cl 2* states:

> *In this section a food is **compliant** for a kind of sale if:*
> *(a) It complies with a provision of this Code relating to the composition of food of that kind*

Standard 1.1.1 – 10 – Requirements relating to food for sale then sets out compositional requirements and *cl 6* the requirement states:

> *Compositional requirements*
>
> *Food for sale must comply with any provisions of this Code relating to the composition of, or the presence of other substances in, food of that kind.*

This Clause is accompanied by a note that states:

> *see for example Standard 1.4.1 (which deals with contaminants and natural toxicants)*.

There is potential for ambiguity in the presentation of these requirements as *composition* is presented as separate from *the presence of other substances*. This separation also brings into question whether or not a food is compliant under *Standard 1.1.1 – 9* if it fails *Standard 1.1.1 – 11 Microbiological requirements for a lot of food.*

This could be resolved by amending *cl 6* to read:

> ***..relating to the composition of, including the presence of other substances in*,…**,

and by adding a reference to Standard 1.6.1 in the 'note'.

1.1.1 – 10 Compositional requirements and 1.4.2 – Agvet chemicals

Victoria does not support the change to the scope and enforceability of the current *Standard 1.4.2 Maximum residue limits*, created by both the introduction of the term *active constituent* and the attempt to consolidate the current three categories of requirements into one.

The proposed Code introduces the definition:

> *active constituent of an agvet chemical: means the substance that is, or one of the substances that together are, primarily responsible for the biological or other effect of the agvet chemical*

Active constituent is both relevant and required under Agvet regulations for usage and labelling but is not relevant for the enforcement of MRLs in the Code. The introduction of this term changes the effect of the current Standard and adds complexity to enforcement.

Currently, *Standard 1.4.2 cl 2* states that:

> (*1) The permitted MRL for a residue of a chemical in food is listed in Schedule 1, and is expressed in mg/kg of food.*

This is straightforward as it relates only to the chemical entities listed in the Schedule. Chemical is defined in the current Code as an agvet chemical, whether or not listed in bold type in the shaded boxes in Schedules 1 or 2. Further:

> *(2) If a MRL for a chemical is not listed in this Standard there must be no detectable residue of that chemical in that food.*

This statement is also clear in that the prohibition is only on the chemical listed. For enforcement processes it is only necessary to prove the presence of that chemical. Further:

> (*3) If a chemical is not listed in this Standard there must be no detectable residue of-*
>
> *(a) that chemical in food; and*
> *(b) metabolites of that chemical in food.*

Again, this requirement is clear. It is only necessary to prove the presence of that chemical, or a metabolite of that chemical, for enforcement purposes.

However the proposed Standard *1.1.1 - 10 cl 4* states that:

> *Unless expressly permitted by this Code, food for sale must not have as an ingredient or component, any of the following:*
> *(d) In Australia - a detectable amount of:*
>
> *(i) an active constituent of an agvet chemical; or*
> *(ii) a metabolite or degradation product of the active constituent.*

This change represents a consolidation of the old *1.4.2 cl 2 (1), (2) & (3)* into a single overarching requirement. However, it changes the effect of the requirements and introduces complexity in enforcement with the requirement to prove that the chemical entity detected is in fact the active constituent. This is particularly the case in relation to the enforcement of the circumstances previously covered under *(3)*.

It could be argued that the changes to circumstances covered by *(1)* and *(2)* are not significant even though the prohibition is extended to **all** metabolites **and** degradation products, not just those listed. After all, these would not be present if the 'primary' chemical had not been used at some point.

Victoria is concerned with the proposed *cl (3)*. Enforcement currently relies only on the presence of any non-listed chemical or its metabolites. With the introduction of *active constituent* regulators would have to prove beyond reasonable doubt that the entity detected was in fact *primarily responsible for the biological or other effect of the agvet chemical*. That is, it would be necessary to demonstrate the effect of the chemical rather than just establish its presence.

Thus, in our view **the definition of active constituent serves no purpose in the proposed standard, and it could be easily be replaced with *agvet chemical* in all instances**, without significantly changing the effect of the Standard.

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

General

The title of this Standard is inaccurate. The Standard deals with requirements for food with a specified name or nature not *use of food* and **the title of the Standard should be amended** to reflect this intent.

It is understood that where there are definitions for foods that include references to composition, but no Chapter 2 requirement exists for those foods (that is, there is no *food sold as NN requirement*), the only effect of those definitions is to trigger the application of other Standards (such as a food additive permission). The application of the other standards would only be triggered if those 'compositions' are met.

Specific issues

- Processed cheese is not drafted in quotation marks, yet is used as an example under note 2 (names not in quotation marks). It is therefore incorrectly listed in Note 1.
- Sausage is correctly listed in Note 2 but is incorrectly drafted in *2.2.1 – 3* in quotation marks.
- Meat pie is listed in Note 1 and is drafted in quotation marks. We conducted a scan of such products at retail, and the results indicated that the majority of single meat species products are labelled as such (that is, as a steak pie, beef pie, pork pie, or lamb pie) and the words *meat pie* are not on the label.

  The generic brands and other multi meat species products generally were labelled as *meat pie*, although there were other labelling variations. In light of the results of this scan, we recommend that *meat pie* should be drafted in the revised Code without quotation marks, and moved to Note 2.

Cl 4 refers to where the compositional requirements permit the use of *other foods* or *other ingredients*. This replaces current *Standard 1.1.1 10* which only refers to the addition of *other foods*.

The OLDP report stated that the principle of 'one term, one meaning' was a goal of good drafting practice. Permission to add *other foods* does not include food additives, food processing aids and the like, and this concept is well understood by both industry and regulators.

The proposed change is to the permission from *contain other foods* to *other ingredients* for four foods: bread (*Std 2.1.1*); processed meat (*Std 2.2.1-2*); sausage (*Std 2.2.1-2*); and fermented milk desserts (*Std 2.5.3-3*). However, the current permission is retained for five foods: fish (Table, *Std 1.2.11*); ice cream (*Std 2.5.6-2*); formulated caffeine beverages (*Std 2.6.4 -2*); fruit wine (*Std 2.7.3-2*); and spirits (*Std 2.7.5-2*) and this appears to be inconsistent with the stated OLDP principle. We are unsure as to the reason for these distinctions and thus the changes. **If there is no underlying reason**

for this distinction then we recommend that only one term, *other foods*, should be used.

1.1.1 – 14 Other requirements relating to food

Requirements for preparation of food should be amended to *preparation and handling of food*, both in the sub-heading and in *subclause (1)* in line with the changes previously recommended in *1.1.1 – 3.*

1.1.2 Definitions used throughout the Code

In submissions made in 2009 and 2010, Victoria advocated for the inclusion of *definitions and interpretation* in the tasks for the technical drafting working group that was proposed in 2010. It was anticipated that this group would develop rules around when definitions were required and what form they should take, and that this would lead to a later review of all definitions for currency and necessity. This did not occur.

Definitions are critical in providing clarity around requirements and around the foods to which these requirements apply. It is clear from comments made by jurisdictions (in response to FSANZ's request in 2009) and made in the OLDP's subsequent report, that definitions within the Code needed to be reviewed. More importantly, the OLDP had recommended that rules around the drafting of definitions be developed prior to raising proposal P1025.

1.1.2 – 2 Definitions - general

Clause (3) states:

> *In this Code, unless the contrary intention appears, the following definitions apply*.

The definitions include those for *Fruit*, which sets out the definition to apply only in *Standards 1.2.7 and 1.2.8*, and *Vegetable,* which similarly sets out the definition to apply only in *Standards 1.2.7 and 1.2.8.*

However, under *1.1.2 – 3 Definitions – particular foods*, there is also a definition for *fruit and vegetables.* In our view the definitions, and exceptions, should all be set out under *1.1.2 – 3* as both fruit and vegetables are particular foods, and a similar approach to that is used for *sugars* under *1.1.2 – 2* should be taken.

Further, the treatment of fruit and vegetables should be amended in line with OLDP recommendations, wherein definitions for *fruit* and *vegetable* exist across the Code, but where there is an intention that a requirement should apply to fruit, vegetables, nuts, spices, herbs, fungi, legumes and seeds, this should be made explicit. This would provide more clarity.

We recommend that the same approach should apply to the definition of *fish* which is currently defined as:

a cold- blooded aquatic vertebrate or aquatic invertebrate including shellfish, but not including amphibians or reptiles.

The current Code, and the draft revised Code, are inconsistent in the application of this definition. For example, *Standard 1.4.1* sets out mercury level requirements for fish, molluscs and crustacea. It is recommended that where the broader definition is to apply that this should be explicit. Otherwise the specific terminology, as used in Standard 1.4.1 should be applied.

We believe that it would also be more logical to move the definition for *special purpose food* from *1.1.2 – 2 to 1.1.2 – 3*.

1.1.2 – 3 Definitions – particular foods

Definitions and enforceability – general comments

Whilst there have been improvements in the drafting of compositional requirements and definitions, there are areas that would benefit from further drafting review, to be consistent with the changed approach apparent in this draft.

The discussion on pages 16 and 17 of the Call for Submissions does explain the rationale for why, in the future, there should still be some definitions which include compositional elements as substantive requirements, rather than referring to composition when it is part of a true definition of a term used elsewhere in the Code. There appear to be two reasons for including compositional requirements in the Code:

- to protect health (see *Stds 2.9.3-3* or *2.9.3-7*)
- to ensure consumers are buying what they think they are buying (*Std 2.10.4* or *Std 2.5.6*).

In each case, Victoria is of the view that compositional requirements be expressed as a substantive obligation. This substantive obligation occurs in some sections of the Code that fall into both categories listed above, but not others (for example *Std 2.10.4*).

The drafting within *Std 2.10.4* seems inconsistent. The composition element is appropriately included as an express obligation in *cl 4* (in the case of peanut butter), but rolled into the definition in *cl 5* (in the case of chocolate). In our view it would be difficult to explain to a court how the obligation in *cl 5* is established, and why the drafting differs.

Specific issues

It has been stated that some definitions which make references to composition are descriptive. Victoria does not agree with this view, given the history of regulation of those foods.

Even where definitions were initially intended to be descriptive or characterising, the gazettal of *Standard 1.1.1 cl 14* effectively changed these to compositional requirements. That is:

> *where a definition for a food in the Code contains a reference to the composition of the food, the definition is to be taken as a -*

(a) substantive requirement for the composition of the food; and

(b) standard for the composition of the food.

Any attempt to 'restore' a descriptive status to these definitions would change the effect of the Code, which we have been led to believe by FSANZ to be outside the scope of the Code Revision proposal.

Historically, excluding the current Code but reflected in Codex and FDA regulation to varying degrees, standards of identity existed that had up to four components: definition, description of essential characteristics, compositional requirements (usually minimum compositional requirements), and a prescribed name. All elements were required for the operation of the standard.

The current draft has moved to "horizontal standards" and insufficient regard has been given to the need for the approach taken to definitions and compositional requirements to cooperate across Standards in the Code. There are limited prescribed names now in the Code, rendering *class of food* definitions such as *manufactured meat* essentially meaningless. This definition no longer serves its original intended purpose of ensuring a minimum meat content for products described as frankfurts, saveloys, devon, strasburg, salami, brawn, meat paste and the like. Even confining discussion to issues around health and safety, and leaving aside consumer protection, the following are some examples of where there are implications:

Cured and/or dried meat in whole cuts and pieces should be set out with a minimum compositional requirement. That is, these products must contain not less than 160 g/kg meat flesh on a fat free basis (equivalent to a meat content of ~ 77%).

The risk of not setting out these requirements is that products pumped with more water will not meet the definition of a cured and dried meat, and so will not be required to meet the microbiological limits set out for cured meat in *Standard 1.6.1*.

Dried meat has historically been required to have a water activity of not more than 0.85. This is a food safety requirement and is not descriptive. For enforcement purposes it is clearer to establish that a product does not meet a safety requirement (water activity in this case) rather than it being falsely described.

Spirits and liqueurs were originally set out with minimum alcohol contents which were intended for consumer protection and not differentiation. Individual spirits were separately defined, often with separate compositional requirements. The names of the spirits were prescribed names. The removal of other elements of a standard of identity (see above) created problems for enforcement in the existing Code.

Methanol is regarded as a contaminant formed in spirits. Currently there are requirements for maximum levels of methanol set out in the Table to Clause 3 of *Standard 1.4.1*: that is, 0.4 g of methanol per litre of ethanol in *Whisky*, *Rum, Gin* and *Vodka*; and 8 g methanol per litre of ethanol in *Other Spirits, fruit wine, vegetable wine* and *mead*. Where spirits are watered down, they would that fail to meet compositional requirements, and thus the methanol requirement would not apply. The inapplicability of this food safety requirement reinforces our view that the compositional requirements must be stated separately to protect health.

Victoria continues to advocate that all definitions with references to composition, with the exception of Sweet Cassava (the definition of which operates across a number of standards, creating unique issues), be split into a true definition/description and a compositional requirement. This gives the best outcome, allowing for the cooperation with other standards, pending a review of definitions and interpretation.

Representations

As a result of cross jurisdictional communication, FSANZ supplied jurisdictions with a table that provides guidance as to how the Code fits within the model offences and national arrangements. This table, however, states only that "Chapter 2 requirements may be relevant".

Jurisdictions require additional clarification about which offences have been drafted with model offence section 18 in mind so that we can be reassured about the enforceability of the model offences.

1.1.2 – 10 Definition of RDI and ESADDI

The definitions of RDI and ESADDI appear only as a 'Note' to this Standard, that is there is no **legal** definition. We recommend that these be defined and included as part of *Standard 1.1.2 – 2*. The current Code provides definitions in *Standard 1.1.1 cl 2*.

1.1.2 – 13 Definition of used as a processing aid

The distinction between a processing aid and a food additive is based on whether or not the substance has an ongoing technological function in the final food. This is presented generically in the current definition of processing aid, and is also part of the rationale for the exemption from ingredient labelling requirements for processing aids. The application of the current definition considers whether or not the processing aid has an ongoing technological function in the final food.

The proposed drafting (under *1.1.2 – 13 (1) (b)*) changes the effect of the current Standard by restricting ongoing technological functions to those listed in the *food additive* Schedule 14.

There are many processing aids performing functions not listed in Schedule 14 which are removed or deactivated, once their role is completed, to ensure compliance with the Code. The proposed change would have the effect of permitting these substances to remain active in food for sale. It would allow some processing aids, with functions not listed in Schedule 14 and with no permissions as food additives, to operate as food additives.

We recommend that the definition of processing aid should revert to: *does not perform a technological purpose in a food for sale*.

1.1.2 – 4 Calculation and expression of amount of a vitamin or mineral

The Code includes provisions in various Standards where a number of related chemical entities are permitted to be added to, or be present in food. The Code sets maximum levels for additives such as preservatives, maximum residue limits (MRLs) for agvet chemicals, and in this case RDIs or ESADDIs for vitamins and minerals.

Where there are multiple forms of a vitamin permitted to be added, or naturally present, it is a fundamental principle that it must be made clear how the RDI is expressed and how the level of vitamin present (in whatever permitted forms) is to be calculated to test for compliance.

This matter has been discussed with FSANZ. While some changes have been made to provide the same clarity in this respect as in the current Code, the treatment of vitamin C has not been addressed.

We recommend that this discrepancy be addressed by **deleting** the proposed 1.1.2 – 14 (3) (c), that is:

> *for vitamin C, add the amounts of L-ascorbic acid and dehydroascorbic acid*

(as this is interpreted as excluding the other permitted forms) and **inserting** in columns 3, 4 and 5 of Schedule S1-2 the *form*; total of L-ascorbic acid and dehydroascorbic acid.

This change would allow *1.1.2 13 (1)* to operate as intended. For Vitamin C, column 3 would then read: *40mg total of L-ascorbic acid and dehydroascorbic acid*. Thus the RDI for Vitamin C is read as 40 mg calculated and expressed as the total of L-ascorbic acid and dehydroascorbic acid.

Retail sales

1.2.1 – 4 When this division applies

In 1.2.1 – 4 the wording is unnecessarily complicated, where it describes

> *(b); if the food is sold as suitable for sale from a retail outlet….*

We propose that it would be clearer if the expression - *if the food is sold as suitable for retail sale* is used, as there is no definition of a retail outlet, and that sales from street vendors are considered to be retail sales.

Food for sale

Victoria supports the removal of the concept of ‘food item’ from the draft as that definition was unduly complex and circular. It duplicated terms used in the application Acts about sale, and also aspects of the offence provisions.

The current approach of referring to food ‘for sale’ in relevant sections is preferred.

To add clarity and aid enforceability, it is suggested that FSANZ considers whether the following additional or different phrases regarding sale are necessary. If they are not, they should be removed.

- The phrase which describes food being *offered* for retail sale is included in *Standard 1.1.1 – 10 (3)(b)* and *(4) (f)*. It is unclear as to how the *offering* differs to *for sale* (as the latter is broadly defined in the application Acts to include display or possession for sale). It is not clear that it is intended to be narrower than the definition of *for sale*. If, on the other hand, this is *intended to be any retail sale*, it is suggested that *offered* be deleted, to avoid uncertainty.
- Whilst the reason for the addition of the words *for sale* in *Standard 1.2.1* are understood, and are necessary in key application/requirement sections (such as sections *1.2.1-4* and *1.2.1-5*), it is unclear whether the numerous additions are always necessary in the associated detailed Standards such as *1.2.1-6*. Sometimes they appear to be unnecessary, as is the case in *Standard 1.2.1-9 (2) (b)*.
- *Section 2.2.2-4* refers to eggs *intended for* retail sale or sale to a caterer being stamped. This arguably broadens the scope of the equivalent clause in the current *Standard 2.2.2* which focuses on eggs for sale. Is this obligation meant to arise at an earlier point of time (that is, not just to food in possession for sale and the like)? We are unclear as to why this is necessary.
- The definitions of *label* and *labelling* in *Standard 1.1.2-2* refer to food <u>*being*</u> *sold* rather than *for sale*. Amending these definitions to refer to *for sale* would improve consistency and clarity.
- The definition of *package* in *Standard 1.1.2-2* refers to for *intended for sale*. Is this deliberate, or should it be “for sale”?

Standard 1.3.2 Food additives and Standard 1.3.1 Processing aids

These standards are in need of review (as recommended by the OLDP), but not until there has been a full review of definitions and terms in the Code.

The Code revision process, dating back to 2009, together with issues identified in the current Application A1088, has again highlighted the underlying flaws in *Standard 1.3.1*.

These include:

- foods listed in Schedule 1 which are not defined, not in common usage and not in the Macquarie dictionary;
- conflicts between the definition, which restricts food additive to the technological purposes listed in Schedule 14, and the labelling requirements for food additives (*1.2.4 – 7 (1)(a) and (b)*) from which it can be inferred that food additives are permitted to perform functions not listed in Schedule 14; and
- the definition of ‘permitted flavouring’ which is so broad as to permit substances that should be captured by the novel foods standard.

Chapter 2 Food standards for specific foods

Until all definitions and interpretations are reviewed, all definitions that still contain references to the composition of the food should have those references stated separately as compositional requirements. This is consistent with the effect created by the introduction of *Standard 1.1.1 14 – Interpretation of definitions*, and with the recommendations of the OLDP.

The exception is Sweet Cassava, which illustrates the problems associated with providing for the cooperation of Standards while establishing a distinction between permitted and prohibited forms of cassava.

2.2.1 – 3 Requirement for food sold as sausage.

Sausage should not be in quotation marks.

2.2.1 – 4 Requirements for food sold as meat pie

Meat pie should not be in quotation marks. See comments under *1.1.1 – 13*.

Cured meat and dried meat

These products are defined under *1.1.2 – 3* but, in the absence of *any provision that provides that a food sold as cured meat or dried meat must satisfy certain requirements* (*1.1.1 – 13*), it would appear that the **only** consequence of not meeting the meat protein or water activity (for dried meat only) minima in the definitions would be that certain food additives would not be permitted and the microbiological limits would not apply.

The only offence committed would be related to the presence of non-permitted food additives, which would not be grounds for recall or similar action.

Microbiological limits and a minimum water activity are clearly food safety parameters, which should not be compromised. Failing a compositional limit should not ensure an exemption from a microbiological standard, particularly as the higher water content can present an even higher risk.

The definitions should be redrafted as compositional requirements and set out under *2.2.1* as:

Cured and/or dried meat flesh in whole cuts or pieces, including any attached bone, must contain not less than 160 g/kg meat protein on a fat free basis.

Dried meat, excluding slow cured dried meat, must have a water activity of no more than 0.85.

There are also food safety consequences associated with the changes that are in the proposed draft to definitions of, and standards applicable to, *manufactured meat* and

processed meat products. It would be difficult to address those matters without a review of both definitions and *Standard 2.2.1.*

However, the current *Standard 1.1.1 – 14* made it clear that there was a compositional requirement of not less than 660 g/kg of meat for *manufactured meat* and 300 g/kg for *processed meat*.

Again, our view is that the definitions should be redrafted to split out these compositional requirements from the description. This would provide more certainty to the application of *Standard 2.2.1 – 8* and *2.2.1 – 9*, which apply directly to food safety.

Standard 2.7.5 Spirits

Up until the current Code was introduced, spirits and liqueurs historically had their definitions and compositional requirements stated separately.

The rationale for change was to prevent products that fell into the broad definition but which had lower alcohol contents, from being captured by the Standard. Victoria is not aware of any issues that would support this rationale, nor are we aware of any enforcement action that has been taken in this regard. Regardless, it is the responsibility of a food business to label a food in a manner that clearly differentiates it from a product with which it might be confused.

We re-state our position that there are food safety consequences in choosing to define the products in terms of their composition. Watered down 'spirits', which fail to meet the definition of the Code would also not be required to meet the maximum levels for methanol contamination set out in *Standard 19-5*. It would be very difficult to prove beyond reasonable doubt that the levels of methanol in watered down spirits were unsafe under the Food Act; that is, the levels would be likely to cause physical harm. The definitions and compositional requirements should be stated separately to allow the methanol requirements to apply.

2.10.2 – 3 Requirement for food sold as salt

Victoria supports the change in drafting for *salt* from that of the previous draft Code. That is, splitting the compositional requirements from the definition.

The expression of the maximum levels of metal contaminants as compositional requirements (*2.10.2 – 3 (b)*) now allows for these to be included, for consistency, in *Schedule S19 – 4 Maximum levels of metal contaminants*. This is the logical repository for all such maximum levels (MLs).

It is noted that the proposal has removed mercury from *Schedule S19 - 4* and created a new schedule (*Schedule 19 -7*) to deal with the levels of mercury in fish, crustacea and molluscs, and the associated sampling plans.

This has the potential to create confusion as users would expect that mercury would be referenced in a schedule titled *Maximum levels of metal contaminants*.

It is recommended that mercury be reinstated in *Schedule 19 – 4* to allow for the listing for ‘salt’, and that there also be a sign post to *Schedule 19 – 7* for mercury in fish, crustacea and molluscs. This will also allow for the inclusion of MLs for mercury in other foods in the future, should this become necessary.

Part 3: next steps.

Victoria is appreciative of the proposed amendments to the Code which address the issues around the application and interpretation Acts, and which draft the requirements in the Code to better align with the application Act offences. It is important to recognise that acceptance of this or any subsequent re-draft of the Code will be contingent upon jurisdictions being confident that what is presented is workable. This will necessitate FSANZ compiling and addressing swiftly the issues of the individual standards identified here and by other jurisdictions.

However, with P1025 limited to those matters considered by FSANZ to be technical legal drafting, Victoria believes than an opportunity has been missed for substantive reform.

Victoria will work collaboratively with FSANZ, jurisdictions and industry as appropriate to develop a plan to implement the remaining OLDP recommendations, including major projects identified in the 2010 consultation paper. The first priority for that plan should be a systematic review of all terms and definitions used in the Code to assess consistency, currency and relevance. This needs to be done in the context of both international regulation and the current market.

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