

## **Proposal 1025**

### **Code Revision – NSW Food Authority Submission**

#### **Major Procedure**

### **Summary**

Proposal 1025 represents a step forward in the development of the Food Standards Code (Code). The legal review by the *Office of Legal Drafting and Publication* (OLDP) and subsequent draft and restructure of the Code by FSANZ has resulted in a product of enhanced legal clarity. NSW is supportive of the process and views the structural reform to the Code as providing further opportunity to integrate and advance future development of the Code in a constructive and systematic manner, with the associated benefits of greater legal and regulatory clarity.

For the first time since the Code's creation in 2000, the Code came under forensic scrutiny in a superior Court in December 2008, in the case of *Nutricia*.<sup>1</sup> In an extensive judgement, the Supreme Court of NSW observed that interpretation of the Code was hampered by a lack of available definitions, and the language and structure of the Code lacked legal clarity and understanding.

In response to this decision, the OLDP, as it then was, undertook a review of the Code and made a number of recommendations to improve the legal efficacy of the Code and update it in accordance with modern drafting standards.

Following this review, FSANZ raised Proposal 1025, to restructure and overhaul Chapters 1 and 2 of the Code with the purpose of implementing the recommendations of the OLDP.

As noted by NSW in the *Call for Submissions*, the terms of reference set by FSANZ in relation to Proposal 1025 were not intended to alter the effect of provisions that impose obligations or requirements. As a result, there was no requirement for the preparation of a Regulatory Impact Statement in relation to the proposed changes.

In responding to a number of issues raised by submitters following the first public round of consultation for P1025, FSANZ produced a draft (number 148) of Chapters 1 and 2 of the Code that represents a significant restructure of the current Code in terms of plain language, understanding and in turn, legal clarity.

As expressed in our first submissions, NSW recognises that P1025 is designed to address, in a substantive manner, the issues identified by the OLDP (Commonwealth Attorney-General's Department) in its legal review of the Code in 2010.

As acknowledged by FSANZ, a number of issues were identified by submitters that, for reasons of time and resources, were unable to be addressed by this Proposal. It is anticipated that these issues, involving policy and other considerations relating to the structure of the Code, are likely to form the basis for new Proposals and ongoing, omnibus

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<sup>1</sup> *Turnney (NSW Food Authority) v Nutricia Australia Pty Ltd; Turnney (NSW Food Authority) v Michael Speare Hocken Sharpe; Turnney (NSW Food Authority) v Toni Lee Brendish* [2008] NSWSC 1382; 74 NSWLR 148

amendments. In addition, NSW notes that a key issue arising from the *Nutricia* case, namely the effective legal capture of the concepts of nutritive substances and novel foods, remains for resolution at a later time under Proposal 1024.

Although it is acknowledged by NSW that the responses to this Proposal have raised additional issues relating to further structural and legal reform of the Code, the revised draft represents an important step forward for the Code, laying a more contemporary and modern legal framework from which such changes can be facilitated and integrated with greater confidence and assuredness in terms of regulatory understanding and effectiveness.

In summary, NSW considers that the revised drafting represents a considerable improvement in the legal structure, form, certainty and understanding of the Code, in turn, enhancing the Code as a more effective regulatory instrument.

## **A. Comments on FSANZ response to OLDP principal recommendations:**

For convenience and understanding, NSW draws on as headings the principal recommendations in the Code Audit Report, taken from documents SD2, namely the *Table of Matters Identified in the Legislative Report*, in providing the following observations:

### **(a) Interpretation of the Code by the *Acts Interpretation Act 1901* (Cth)**

Although FSANZ state in their response (SD2) to this recommendation that the introduction of a specific application provision at 1.1.1-4 of the draft Code effectively “maintains the current position, that is, that the Code is to be interpreted pursuant to the Commonwealth interpretation law,” this appears to be odds with the observations of the Court in *Nutricia*,<sup>2</sup> which found that the Code was to be interpreted according to the Interpretation Acts of NSW, as it was brought into force under the *Food Act 2003* (NSW).

Following NSW and other submitter’s observations on this issue, FSANZ sought legal advice from the Australian Government Solicitor. In the careful and detailed opinion provided by the Australian Government Solicitor on this point and referred to as SD6 in the supporting documents released by FSANZ, the AGS recommended the inclusion of a provision expressly applying the relevant Interpretation Act(s). The AGS discussed the various merits of adopting either State or Commonwealth interpretation law, FSANZ deciding, in the stated interests of promoting consistency of outcomes across the jurisdictions, the better course was to provide for the express application of the Commonwealth Act.

NSW acknowledges the need to address the uncertainty surrounding the applicable interpretation law following the *Nutricia* judgement, and views the express application of the *Acts Interpretation Act 1901* (Cth) to the Code as a positive step, filling a lacuna, and likely to reduce the uncertainty surrounding this issue. As a corollary, given that the Interpretation Acts between NSW and the Commonwealth bear a number of similar provisions, a significant divergence of construction or interpretation of terms is unlikely. This observation is strengthened by the inclusion in the draft of the key terms of “food” and “sell”, where the meanings for those terms are provided for expressly under the application acts.

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<sup>2</sup> *Op.cit* at paragraphs 68-73 of the judgement

**(b) Words defined in the model provisions (Annex A of the Food Regulation Agreement 2008) and the Food Acts in the States and Territories to apply for the Standards**

NSW notes that, in response to its first round submissions and similar submissions made by other contributors, FSANZ removed the terms "*food product*", then "*food item*", and has replaced these terms with the phrase "*food for sale*" at relevant junctures within the draft Chapters 1 and 2 of the Code.

The advantage this phrase now presents is that it more closely and clearly aligns with the key terms of "food" and "sell", which, under the draft, take on their respective meanings under the application acts of each jurisdiction. For NSW, this is the *Food Act 2003* (NSW). As noted in both the NSW and Commonwealth Interpretation Acts, provision is made for the grammatical variant of a word ("sale") to adopt the defined meaning ("sell") under the substantive Act. The removal of the previous terms "food product" and "food item" takes away an otherwise complicated, additional and overlapping definition that required satisfaction before turning to consider the circumstances of a food and the point at which relevant requirements under the Code would apply to that food.

The adoption of the term "food for sale" as it relates to the requirements under the Code and when they apply, carries with it an appropriate degree of understanding and clarity, so as to lend greater certainty to regulators and stakeholders alike.

**c) Requirements under the Code and integration with the relevant model offence provision - identifying the person responsible**

As reflected by its nature, the Code is a compilation of Standards containing requirements relating to all aspects of food for sale. The Code itself is not a stand-alone regulation; it does not in itself create offences – this is the exclusive province of the model food provisions, and in turn the application of appropriate offence provisions in the application Acts of jurisdictions.

The offences under the model food provisions contain the relevant, essential elements for each offence as they relate to the Code. In turn, the Code serves the important requirement of particularising the nature of the offending conduct – in other words, details of how a requirement of the Code has not been satisfied or adhered to.

In the main, given the generic and straightforward nature of the model provision offences, the essential elements of "person" and "sell" are readily identifiable. A jurisdiction is enabled, by this flexibility, to make an appropriate determination as to when, and against whom, to exercise regulatory activity.

This is not to say that the Code is not improved, nor the understanding of the requirements enhanced, by taking the opportunity to identify, with greater precision, the timing and personal responsibility of requirements as they arise under the Code.

In this regard, NSW recognises and supports three examples in the latest draft. Firstly, draft clause 1.2.1-22 – *Prohibition on Altering Labels*. NSW considers this is an improvement over the latent uncertainty, in terms of where the requirements and obligations lay, in respect to the present clause 11 of Standard 1.1.1, which avers only to a requirement not to interfere with a label, and is silent as to when, or on whom, that requirement lies.

Draft clause 1.2.1-22 now clarifies that a person who sells or deals with a packaged food, must not deface the label, except with permission or to correct incorrect information in an incorrect label. This points to a positive act or omission by a person, at a particular point in time, enabling the exercise of regulatory activity to be more targeted and to operate within the boundaries of the respective jurisdiction.

Secondly, draft clause 1.2.2 -4 now fixes reference to the "person" who is the supplier, be it in Australia or New Zealand, for the purposes of the name and address under the Labelling Information Requirements.

Thirdly, draft clause 1.5.3-8 – *Record –keeping*, in relation to irradiated food, now nominates a "person who irradiates food" for the appropriate attachment of responsibility, whereas, under the present mirrored clause 1.5.3 –(7), reference is made simply to "*records must be kept at a facility..*".

**(d) Requirements under the Code to have certainty of meaning and operation with respect to the offence provisions**

As explained in the first round of submissions, NSW observed that various Standards in the present Code suffer from a disconnection between the model offences found in the application Acts, and the specific requirements which must be complied with, where the provision of the Code does not clearly establish the requirement. Ambiguity or uncertainty surrounding a requirement renders effective enforcement difficult and problematic.

The creation and collation in the draft Code at 1.1.1-10 of all the significant requirements in relation to food for sale is supported by NSW. The bringing together of these requirements into the one place, and the manner in which they are expressed, lends convenience and clarity to the nature of obligations under the Code, to regulators and stakeholders alike. The structure presents to a reader the over-arching requirement as a prominent and primary obligation; the link to relevant permissions as they appear and apply in the re-crafted Standards follows in a logical manner. A notable example in this regard are the labelling requirements, where the confusing list of exceptions and contra-exceptions under 1.2.1 in the present Code have been removed and explained in a clear and orderly manner.

As explained in (c) above, the nature of the model offence provisions relating to the Code under the application acts are relatively uniform and non-descriptive of the requirements under the Code. As a result, the OLDP identified the need for a requirement to be express and explicit, in addition to establishing the particulars of an offence. This approach assists in refining and explaining the particulars, in turn supporting the essential elements of the offence. The proposed drafting is supportive of this objective, as the structure facilitates, in a uniform way, an examination, firstly, of the primary requirement, the second step being reference to the applicability and nature of permissions provided in the Code.

(e) **All defined items in a single place with appropriate signposts**

NSW notes that this recommendation is reflected in the composition of draft Standard 1.1.2, where *definitions used throughout the Code* are presented at 1.1.2-1-2, followed by *definitions for particular foods* at 1.1.3.

(f) **Make sure that terms have a single meaning in the Code unless this is unavoidable and use signposts where appropriate**

NSW notes the restructure in the redraft at Standard 1.1.2, where, appropriately, definitions that apply across the Code are grouped at the front of the Standard. Notably and conveniently, at the beginning of draft Standard 1.1.2, in respect to *general definitions*, and, at the beginning of draft Standard 1.1.2-3 – *Definitions – Particular Foods*, the various definitions are expressed to apply for the Code, unless a contrary intention appears. This represents a marked improvement on the current Code, where inconsistencies can arise as to the application of definitions when expressed to operate either exclusively within a particular Standard (and located only within that Standard), or across the Code, but appearing within a particular Standard.

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

Unlike the current Code, the draft has sought to address this recommendation by, firstly, re-modelling definitions for various foods across chapter 2, including, where appropriate in those definitions, other foods that those foods may contain, and secondly, by making distinct and express the requirement that, where the food is sold as a particular food, it must consist of that food and have, if so stated, a concomitant, compositional requirement. Aside from other requirements under the Code that apply for a food, this approach is designed to work with the re-casted provision at 1.1.1-13, which imposes particular requirements in the Code for foods specifically named, ('NN') or in circumstances where a purchaser is "led to assume" that a food being sold is a particularly-named food.

The restructure of definitions and compositional elements for foods, and the drafted provision 1.1.1-13 goes some way to addressing the otherwise confusing position presented by the current provisions 1.1.1 – 3 and 1.1.1-14, as they relate to "Prescribed Standards" and "Interpretations of Definitions" respectively.

Overall, NSW is supportive of the manner in which the definitions, compositions and naming of foods have been re-drafted. As noted above, this remains an area for further development and refinement. It is also useful to bear in mind that these provisions in the Code lie within the context of, and are complementary to, the model food offences relating to false description and misleading and deceptive conduct in relation to the sale of food.

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

As stated by FSANZ, the draft now includes a general prohibition and clear signposts to relevant permissions. As discussed above at (d), NSW supports this revision, as it reflects modern legislative drafting practices.

The casting of the prohibitions in this manner also facilitates the clearer operation of the model offences relating to the Code as offences of “absolute liability”, in accordance with section 23 of the model food provisions, which remove the defence of “honest and reasonable mistake” in relation to such offences. As a corollary, the greater clarity provides for greater certainty in the application of section 417A of the *Crimes Act 1900* (NSW), which provides that the proof of any exception (in the case of the Code, for example, proof that express permission exists or is provided under the Code to do or add something) lies with the accused person.

- (i) **Amend the Code to keep references to incorporated material up to date**

NSW notes the consideration of this issue, and assumes the approach taken by FSANZ will follow the recommendation of the OLDP, in that the Code, by way of ongoing maintenance, will be updated from time to time to keep references up to date.

- (j) **Restructure the Code by consolidating the Standards so that they form a single Standard, or, by consolidating smaller portions of the Code, e.g. the Chapters, so that the Code is made up of fewer discrete documents**

Following the first round of submissions, NSW notes that the present draft reverts to the same configuration and collection of Standards, consistent with the structure of the current Code.

Although not opposed to the earlier draft, which presented a single, unified instrument, more consistent with modern legislative instruments, NSW is comfortable with the reversion in style, with the added acknowledgement that the familiarity of the structure is likely to relieve a significant amount of the transitional burden falling on stakeholders and food businesses as they come to terms with the draft.

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

Reference is made to the observations at (c) and (h) above, and the reorganisation and re-order of definitions, in addition to the re-location of Schedules, with the option that they be grouped together at the back of the draft Chapters. Despite the retention of separate Standards, the draft is more analogous in character to contemporary legislation, the increased use of plain English throughout the Chapters complementing this feature and improving overall context and readability. With prominence for construction of meaning emphasised by the Courts in the language and words used in the legislation, recourse to extrinsic materials to establish an interpretation should be avoided where possible. The draft promotes this objective in the refinement of text and language used.

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

FSANZ explain that in the draft food regulatory measure, schedules are placed in separate standards that can be published either at the back of the relevant standard or as a separate volume of schedules at the end of the Code. As mentioned in the first round of submissions, the removal of Schedules from the body of, or interspersed between, clauses in Standards, now allows a reader an uninterrupted flow in the sequence of the Standard. This can only serve to benefit a fuller and proper understanding of the meaning of a Standard.

NSW recognise that this versatility will assist those stakeholders who prefer the co-location of Schedules with relevant Standards, particularly where the focus for a particular stakeholder is on a limited number of Standards.

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

NSW notes, in accordance with this recommendation, that a useful adjunct to each Schedule is a direct reference, at the commencement of each Schedule back to relevant clauses of the applicable Standards. Unlike the current Code, there are also helpful explanatory clauses and Notes to each Schedule.

In this regard, it may also be of benefit, in respect to Schedule 27 – Microbiological limits for foods, to set out the meanings of the letters in each column, to minimise or obviate repeated referral back to the substantive Standard 1.6.1.



(n) **Recast purpose statements to distinguish properly between purposes and outlines**

The removal in the main of Purpose Statements in the draft is a positive step and is supported by NSW. Although explanatory in nature, the presence and use of Purpose Statements in the present Code, particularly where, as in the case of additives, they purport to provide a definition, is problematic, and attracts ambiguity.

By contrast, in the draft, there is the retention of one Purpose Statement, cast at clause 2 of Standard 1.4.2 – *AGVET Chemicals*. By retention in a clause, the purpose statement carries legal effect, and, in this instance, is beneficial in explaining the relationship between the select Schedules and the types of limits for AGVET chemicals allowable under the Code.

The Outlines provided for various Standards in the draft (for example, clause 1.2.7 – 3 – for the *Nutrition, Health and Related Claims Standard*, and clause 2.9.1-2 – for the *Infant Formula Products Standard*) are also of assistance in mapping out the sequence, and manner of working, for a particular Standard. Again, as a clause within the Standard, they carry legal effect, aiding the reader in capturing the appropriate intent and nature of the obligations, reducing the need for recourse to extraneous materials.

(o) **Use OLDIP templates so that the appearance of the Code is consistent with other legislation on the statute book**

FSANZ respond that the draft food regulatory measure has applied Commonwealth drafting templates developed by the Australian Government Solicitor. This is reflected in the observations and comments across the Code and at (k) above.

## **B. Specific Issues**

(i) ***Food Additives***

NSW acknowledges the greater degree of clarity and meaning now provided under the draft for the term *used as a food additive*. As stipulated by FSANZ in the *second call for submissions* and the *explanatory statement* to the draft, the definition is confined to the regulation of those substances already identified as food additives under the Code, but also allows for other substances that *have been selectively concentrated or refined to perform one or more technological purposes listed within Schedule 14*. This definition tends to complement, in a clearer manner, co-relationship and the over-arching presence of the model offence in relation to unsuitable food.

The removal of the phrase “not normally consumed” is helpful. Its inclusion would unnecessarily complicate and burden the definition. It would also invite confusion, potentially narrow the available scope and heighten regulatory uncertainty, raising the prospect for additional and potentially complicated survey or other forms of evidence in the event of forensic challenge.

As a general observation, it may be of benefit to readers to have, as a separate an additional list, the food additives mentioned in Schedule 15, either in alphabetical and/or numerical sequence. At present, they appear in respect to permissions relative to the specified foods (as before). The benefit of such a list will be in more readily identifying a food additive that, once identified, has been used in relation to a food where there is no permission for its use.



(ii) **AGVET Chemicals – The restructure of 1.4.2**

Although the re-structure of Standard 1.4.2 represents an improvement on the current Code, particularly in relation to the creation of a specific requirement, now included at draft Standard 1.1.10-4 (d), the shift in terminology to “*active constituent*” and a “*metabolite or degradation product of the active constituent*” is a noticeable departure from the present terminology used in the Code.

FSANZ explain at pages 25-26 of the *Second Call for Submissions Paper* that the use of this terminology aligns with the use of the term “active constituent” under the AGVET Code. The current Code definition in Standard 1.4.2 of “*chemical*” as simply an “*agricultural or veterinary chemical*” is abandoned. It is argued that, in relation to non-listed AGVET chemicals, to be captured within the Standard would require, as a necessary proof in any event, the presence of an active constituent.

NSW understands that further development of this Standard, particularly in relation to managing low levels of AGVET chemicals without maximum residue limits, is the subject of a separate Proposal 1027. It is anticipated that P1027 will address uncertainty concerning the narrowing effect, perceived or otherwise, of the restructure of draft Standard 1.4.2.

As in all cases, parallel and complementary to the model offence provisions for the Code remain the primary offence provisions relating to the sale of unsafe and unsuitable food.

In the draft, “active constituent” and “agvet chemical” are defined as follows:

***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.

***agvet chemical*** means an agricultural chemical product or a veterinary chemical product, within the meaning of the Agvet Code.

In examining the permissions provided under draft Standard 1.4.2, reference is made to “permitted residue” which in turn is defined as,

***permitted residue***, of an active constituent, means a chemical that is identified in Schedule 20 or Schedule 21 as being a permitted residue in relation to that active constituent.

Clauses 1.4.2-4 and 1.4.2-5 provide permissions, in accordance with Schedules 20 and 21, for maximum residue limits and extraneous residue limits of AGVET chemicals, respectively. Although reference is made in the terms to “*permitted residue of an active constituent of an agvet chemical*”, some confusion may arise in referencing back to the express requirement, in particular draft clause 1.1.10-4(d)(ii), as it excludes reference to the specific term “residue(s)”, and instead refers to the undefined terms of “*metabolite or degradation product*..”

It is suggested that, rather than relying on available inference in that regard, clarity of understanding is likely to be enhanced by express reference to, or the addition of, the term “residue” in the requirement, with an associated definition.

### **C. OBSERVATIONS ON DRAFT**

**Attachment 1** provides some comments on the drafting of individual sections for further consideration by FSANZ drafters.

### **D. IMPLEMENTATION/COMMUNICATION**

We note that this variation is intended to take effect from early January 2015. This is a major revision of the Code and a comprehensive stakeholder communication strategy will be required prior to its commencement. Such a strategy will need to clearly outline the need for the revision, the approach taken in drafting, the revised structure and the changes made.

Although transitional changes for stakeholders are likely to be reduced following the reversion of the draft to the present format in relation to the Standards and their numbering, there are still likely to be significant logistical consequences. Practical tips for navigating the revised Code will be required and a general assurance should be given that the Code's intention has not been altered.

### **ENDS**

The views expressed in this submission may or may not accord with those of other NSW Government agencies. The NSW Food Authority has a policy which encourages the full range of NSW agency views to be submitted during the standards development stages before final assessment. Other relevant NSW Government agencies are aware of and agree with this policy.

Further, NSW has identified some other drafting issues for further consideration by FSANZ and provides a schedule of such issues by way of comment on the revision.

## Attachment 1

DRAFT NEW SECTION	P1025 – OBSERVATIONS ON DRAFT
CHAPTER 1	INTRODUCTION AND STANDARDS THAT APPLY TO ALL FOODS
PART 1	PRELIMINARY/INTERPRETATION
1.1.2-2	Align the definitions of 'nutrition information panel' and 'warning statement' with the definition of 'statement of ingredients' in 1.2.4-2. Ie: "a SoI/NIP/WS is a SoI/NIP/WS that complies with this code" Definition of 'nutritive substance' should refer to section 1.1.2-12 not 1.1.2-10
1.2.1-9(4)	Insert after the words 'stated in labelling' the words 'or documents'.
1.1.2-2 and 1.2.5-3	Amend the definition of 'use-by date' by deleting the words 'the supplier estimates that'
1.2.7-2	Definition of 'nutritional profiling score' should refer to section 1.2.7 – 25 not 1.2.7-26
1.3.3	Typo in 1.3.3-3 – missing "used as a processing aid" in (a)
1.4.2	replace 'permitted residue' with 'residue' throughout
1.5.1	1.5.1-2 is incorrectly formatted – could be confusing
	<b>CHAPTER 2 – Food Standards for Specific Foods</b>
2.9.5-10(2)	Replace <b>or</b> with <b>and</b>
Schedule 5-4(8)	In the equation replace <b>P</b> with <b>%fnvl</b>
Schedule 27 - 3	Add limits for: <ol style="list-style-type: none"> <li>1. Ready-to-eat food in which growth of <i>Listeria monocytogenes</i> will not occur; and</li> <li>2. Ready-to-eat food in which growth of <i>Listeria monocytogenes</i> can occur</li> </ol>