

SUBMISSION TO
P1025 CODE REVISION

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**SUBMISSION TO FOOD
STANDARDS AUSTRALIA
NEW ZEALAND**

SUBMISSION BY THE
ALCOHOLIC BEVERAGES
INDUSTRY GROUP ON LOT
IDENTIFICATION REMOVAL

BACARDI
LION



DIAGEO
AUSTRALIA



Pernod Ricard Australia



BROWN-FORMAN

Beam

LION

SUNTORY
SUNTORY (AUST) PTY LTD





ACIL ALLEN CONSULTING PTY LTD
ABN 68 102 652 148

LEVEL FIFTEEN
127 CREEK STREET
BRISBANE QLD 4000
AUSTRALIA
T+61 7 3009 8700
F+61 7 3009 8799

LEVEL TWO
33 AINSLIE PLACE
CANBERRA ACT 2600
AUSTRALIA
T+61 2 6103 8200
F+61 2 6103 8233

LEVEL NINE
60 COLLINS STREET
MELBOURNE VIC 3000
AUSTRALIA
T+61 3 8650 6000
F+61 3 9654 6363

LEVEL ONE
50 PITT STREET
SYDNEY NSW 2000
AUSTRALIA
T+61 2 8272 5100
F+61 2 9247 2455

SUITE C2 CENTA BUILDING
118 RAILWAY STREET
WEST PERTH WA 6005
AUSTRALIA
T+61 8 9449 9600
F+61 8 9322 3955

ACILALLEN.COM.AU

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ABIG's second submission

1. Decoding and recoding

The Alcoholic Beverages Industry Group on Lot Identification Removal ("the Group" or "ABIG"), facilitated by ACIL Allen Consulting, is pleased to provide a second submission to FSANZ Code Revision P1025. Details about the Group were provided in the first submission and are not repeated here.

It is important, however, that the processes of 'decoding' and 'recoding' are understood. Decoding refers to the act of removing lot identification from products. Its occurrence is widespread in the liquor and beverage industry by importers who are not the official brand owners in the Australian/New Zealand markets. There is also evidence of decoding and recoding in other sectors subject to international price arbitrage, such as cosmetics.

The process of 'recoding' refers to the addition of alternative and different lot identification, where imported products do not have their original lot identification intact.

A diagrammatic illustration of a decoding/recoding scenario is presented in Appendix A. This is one of many scenarios in which decoding and recoding may occur.

It is likely that the majority of decoding activity is undertaken prior to importation, but could equally be undertaken once products are imported. Recoding may be undertaken either offshore or onshore, for example through use of sophisticated printing equipment or addition of stickers by importers where the original lot identification has been forcibly removed.

Decoding is an intentional act to reduce product traceability across global supply chains. Recoding with new, rather than original, lot identification, serves to further obscure global traceability and will significantly complicate recalls, where required.

While every effort is taken by product manufacturers to maintain the integrity of products through global supply chains, on occasion, products intended for a particular market may be on-sold by third parties to higher-value countries such as Australia and New Zealand.

The removal of lot identification gives rise to risks that imported products do not comply with ingredient restrictions. In cases, best before dates are removed along with lot identification and falsely reapplied, further risking consumer safety. Counterfeit trade has also occurred in international liquor markets, with products bearing no resemblance to the advertised product.

The Group demands that products imported through parallel import channels be held accountable for compliance with the Food Code and traceability protocols.

This submission outlines ambiguities in the Food Code that, in the view of the Group, impact on traceability and consumer safety.

2. The need for lot identification

The need for lot identification to aid product traceability has been established through several Australian Government documents. Key arguments in Australian Government policy reviews and reports regarding the need for lot identification are detailed below.

Review of the Australian product safety recalls system, ACCC, 2010

The Review noted that:

The ability to trace products into the hands of consumers will improve recall effectiveness by enabling suppliers to undertake more targeted and therefore cost-efficient recalls of defective products, and assuring regulators that the risk posed by the product will be addressed as quickly and effectively as possible.

Review of the Australian product safety recall system (2010), p. 44

The Review highlighted the need to improve product recall processes, particularly through better coding of products, and made a number of recommendations seeking to improve the targeting of product recalls. The Review found that:

- the use of tracking labels facilitates product traceability and can allow a recall to be more targeted and effective (Finding 9)
- recalls can be more successfully targeted if the cause of the deficiency is identified, particularly if it can be traced to a particular batch or lot number or product stream. Additionally, this can reduce the risk of the manufacture and supply of unsafe products in the future (Finding 12).

In response, a key action outlined was for the ACCC to “provide guidance and encourage suppliers to include distinguishing marks on their products or packaging to allow the product to be identified and traced” and “retain records to facilitate tracing of products through the supply chain” (Action 9).

It is unclear whether this action has been actively pursued by the ACCC.

Labelling Logic: Review of Food Labelling Law and Policy, 2011

Review report

The Labelling Logic review, commissioned by the Australia and New Zealand Food Regulation Ministerial Council and undertaken by the Independent Panel for the Review of Food Labelling Law and Policy, noted the issues associated with alteration, substitution or removal of lot identification and sought the following improvements:

- That monitoring and enforcement of food labelling requirements of the Food Standards Code (accuracy as well as the presence of labelling information) be considered equally important as other aspects of the Food Standards Code and the responsible agencies be given the appropriate level of resources to meet their obligations **(Recommendation 57)**.
- That the Model Food Provisions and the food acts of the jurisdictions be amended to allow a more versatile range of enforcement provisions, such as the power to make

- orders or require user-paid compliance testing consequent on a breach or impose enforceable undertakings in relation to non-compliant labelling (**Recommendation 58**).
- That consumer protection concerns related to food labelling be accorded a high priority by the relevant consumer protection agencies (Australian Competition and Consumer Commission, New Zealand Commerce Commission, and State and Territory consumer protection agencies) and complaints be processed and resolved in a timely and transparent manner (**Recommendation 59**).
 - That food standards always be drafted with the understanding that they are intended to be enforceable legal documents. Where current deficiencies in the labelling requirements have been identified, standards should be re-drafted to make the obligations clear (**Recommendation 60**).

The Australian Government's response

The Government responded on 9 December 2011 through the Forum on Food Regulation (FoFR):

- **Recommendation 57 Supports in principle.** *"The FoFR supports the intent of recommendation 57 to the extent it seeks to ensure the effective monitoring and enforcement of food labelling laws."*
- **Recommendation 58 Supports.** *"The review panel believed that more immediate and productive ways of securing compliance with the Food Standards Code should be considered. These could include the power to issue orders requiring improperly labelled food to be removed from the shelves or to be correctly labelled, as well as enforceable undertakings requiring specified corrective actions such as re-labelling, withdrawing products from sale, placing advertisements in the media or otherwise informing consumers."*
- **Recommendation 59 Supports in principle.** *"The FoFR notes that consumer protection concerns are afforded appropriate priority by relevant agencies within the context of their existing risk-based frameworks."*
- **Recommendation 60 Supports:** *"The review panel stated that labelling standards should be written in such a way that they clearly convey what is required of industry and are also capable of being enforced should a prosecution occur. Unclear drafting of standards poses a substantial barrier for compliance and enforcement... The interpretive advice issued by the FSANZ Code Interpretation Service is to be adopted and applied by relevant State and Territory food regulatory enforcement agencies in the course of their monitoring and enforcement activities"*.

Implications

The main points emerging from this response were to:

- support improved enforcement activities in relation to labelling
- consider alternative ways to promote compliance with labelling requirements
- follow a risk-based approach to enforcement, and most importantly...

- ensure labelling standards are clear and enforceable, including in relation to guidance provided through the FSANZ Code Interpretation Service.

Food Recall Protocols, FSANZ, May 2014

FSANZ recently updates its Food Recall Protocols. These guide companies to:

- ensure product details are clear for recall purposes, including lot markings
- promote traceability by uniquely identifying a lot/batch/consignment of food in a way that allows tracing of the food forwards through the food chain to the immediate customer and tracing backwards to the immediate supplier.

3. Activities by ABIG to clarify interpretation of the Food Code

Over the past four years, the Group has taken steps to seek clarification of key clauses relating to lot identification contained within the Food Code, including their enforcement. For example, the Group has:

- discussed requirements of the Food Code with FSANZ
- sought FSANZ clarification regarding instances of decoding, recoding and removal of best before date markings through the Code Interpretation Service (CIS)
- provided a submission to the first round of revisions to the Food Code (September 2013).

The Group has engaged with numerous enforcement bodies to clarify their interpretation of the Food Code regarding lot identification. This has included:

- meetings with enforcement bodies on several occasions in NSW, Victoria and Western Australia
- sending letters to all Ministers responsible for food regulation across Australia detailing this issue
- engaging in discussion with enforcement bodies in New Zealand to understand their interpretation and approach in relation to decoded and recoded stock
- discussing food import with Australian Quarantine and Inspection Service (AQIS).
- notifying enforcement bodies when breaches of the Food Code have been identified.

The Group has also:

- sought to raise industry awareness among the alcohol and beverage sector of the requirement to include lot identification, through advertisements in trade magazines
- developed and circulated a *Guide to Lot Identification* to enforcement bodies to detail the required structure of beverage lot identification to help target instances of legislative breaches
- provided submissions to key inquiries, including the National Food Plan Green Paper.

The Group therefore has an informed perspective on this issue and has observed variability between FSANZ and enforcement agencies, along with the persistence of issues associated with decoding and recoding. These are detailed further in the section that follows.

4. Persistent shortfalls in enforcement in relation to decoding and recoding

The Group has identified widely varying approaches to enforcement of decoded and recoded stock. This indicates inherent ambiguity in the way the Code should be interpreted. There are two primary issues:

- regulation at point of importation
- variable approaches towards monitoring decoded and recoded stock in market

Regulation at point of importation

Alcoholic products attract a low risk rating through importation, despite being ingestible by consumers. As a result of its risk status, only five per cent of alcoholic stock is reviewed upon entry into Australia by the Australian Quarantine and Inspection Service (AQIS).

The impact of this is that the vast majority of alcoholic stock entering Australia is not tested for compliance with the Food Code. The implication being that most decoded (and compliant) stock is not checked.

Given this, there is a significant need for adequate monitoring and enforcement of products that enter the Australian marketplace, given they in 95 instances out of 100, have not experienced any compliance checks prior.

Variable approaches towards monitoring decoded and recoded stock in market

Putting to one side the various ways in which food regulations are enforced in each jurisdiction, there are differences in fundamental beliefs about the legality of decoded and recoded stock between jurisdictions. These are outlined, followed by a section detailing the implications of variable actions by regulators.

Decoded stock

Some food regulators maintain that decoded stock is illegal and unsuitable for sale. For example, in New Zealand, there have been several instances in which decoded stock has been identified, seized and destroyed. Other jurisdictions have demonstrated similar approaches at various times over the past few years.

However, some jurisdictions continue to take little action, despite decoded stock being routinely reported to enforcement bodies by Group members.

Recoded stock

Some jurisdictions maintain that products need only contain any lot identification to be considered compliant with the Food Code. They consider that the addition of recodes represents an attempt by importers to provide an acceptable replacement code where no code existed prior.

These views are accepted despite the recoded data label bearing no resemblance to the original manufacturer's lot identification, which is essential in the case of a recall of a globally distributed product.

Implications

Jurisdictions that do not take action to remove decoded stock from the point of sale are adding significantly to consumer risks. In markets abroad, there are an increasing number of cases in which grey-market stock has presented a significant consumer risk, including due to the ingestion of contaminated products, the sale of expired (and unsafe) product, and the production and distribution of counterfeit product. Neglect of decoded stock despite reports from Group members increases the likelihood that similar risks will present themselves in Australia over time.

In relation to recoding, jurisdictions that allow recoded stock, considering it to be compliant with the intent of the Food Code, fall short against two key measures:

- i) Recoded lot identification bears no resemblance to the original manufacturer's lot identification, and therefore, does not provide information that can be used to indicate the premises on which the food was packed or prepared, as is required under the Food Code.
- ii) While the addition of a recode could be seen as addressing an incorrect (decoded) label, the removal of the original manufacturer's lot identification in the first instance is a deliberate act. The act of decoding purposively seeks to remove the possibility of tracing products through global supply chains. The act of recoding therefore, exists following a process that seeks to reduce traceability, and therefore does not achieve the FSANZ Recall Protocol's intentions to support traceability of products for recall purposes. Given the global nature of alcoholic beverages, the process of decoding and recoding presents real risks.

The Group strongly rejects claims made by jurisdictions that recodes may be considered adequate due to evidence being presented by importers that recodes can be linked to paperwork or other information about the original lot identification on a given product. Issues here are that:

- i) Regulators have no way of proving the accuracy of links, precisely because the production source and details about products that do not contain lot identification after the act of decoding cannot be verified. Claims of links between original codes, and recodes, cannot be substantiated with evidence.
- ii) Even if paperwork demonstrating linked codes could be provided, regulators would need to work with brand owners (such as Group members) to confirm the accuracy of information provided about links to original manufacturer's lot identification--a process which has not occurred to-date in those jurisdictions claiming maintaining that links exist
- iii) In the unlikely event that importers are able to substantiate links between original and recoded lot identification, there is no reason why regulators would accept recoded information that bears no resemblance to the original lot identification, when original manufactures lot identification information exists.

By failing to promote the use of original lot identification for the purposes of recoding (presuming this information exists), jurisdictions cloud recall processes, which would then require:

- › additional paperwork checks with multiple parallel importers in the case of any alcoholic beverage recalls, incurring time delays that would impact detrimentally on consumers
- › the need to circulate recall information regarding numerous sets of alternative lot identification based on each parallel importer's recode structure

More significantly, where any serious product issues are detected abroad and reported to Australian regulators, there would be no mechanism available to regulators to rapidly identify all affected product in the market, given decoded or recoded stock that bears no resemblance to lot identification used internationally.

These issues remain of serious concern to the Group, given their impacts on both consumer safety and product integrity.

5. Implications for FSANZ

Principles

Building on the issues outlined, the Group's first submission to P1025 stated the following principles in order to promote improved labelling of products in the Food Code:

- Where a food product is required to include lot identification, only the manufacturer's (or original) lot identification should be accepted. ***It is only the manufacturer's lot identification that a manufacturer can rely on to conduct recalls or source the origin of product faults.***
- A label on a food product that has had the manufacturer's lot identification removed, altered or replaced (by anyone other than the manufacturer or the manufacturer's authorised agent with the written consent of the manufacturer), should not be considered compliant (regardless of where the removal, alteration or replacement took place).
- Any alterations to labels must not obscure the manufacturer's lot identification.
- A person dealing in food that is not the manufacturer may add their own lot identification to a label but it must not obscure the manufacturer's lot identification.

Amendments suggested by the Group

Definitions: lot identification

The Group's original submission to P1025 sought explicit reference in this definition to the lot identification being the manufacturer or producer's lot identification. As detailed in this submission, the obliteration of the manufacturer's lot identification eliminates global traceability.

Clause 1.47

The Group also sought explicit recognition that any change to labelling must not obscure the manufacturer's lot identification. This was rejected by FSANZ as out of scope.

6. Where to from here?

Further discussions with FSANZ representatives indicated that it considers decoding and recoding issues to be largely enforcement issues, with the need for lot identification already explicit in the Food Code.

The Group agrees that enforcement issues are important, but that the major enforcement challenges stem from ambiguity of interpretation between regulators. The scenarios outlined in this paper reveal a lack of clarity regarding the type of lot identification that is acceptable. In particular, for regulators, there are varying perspectives on whether recoded information should be accepted as compliant.

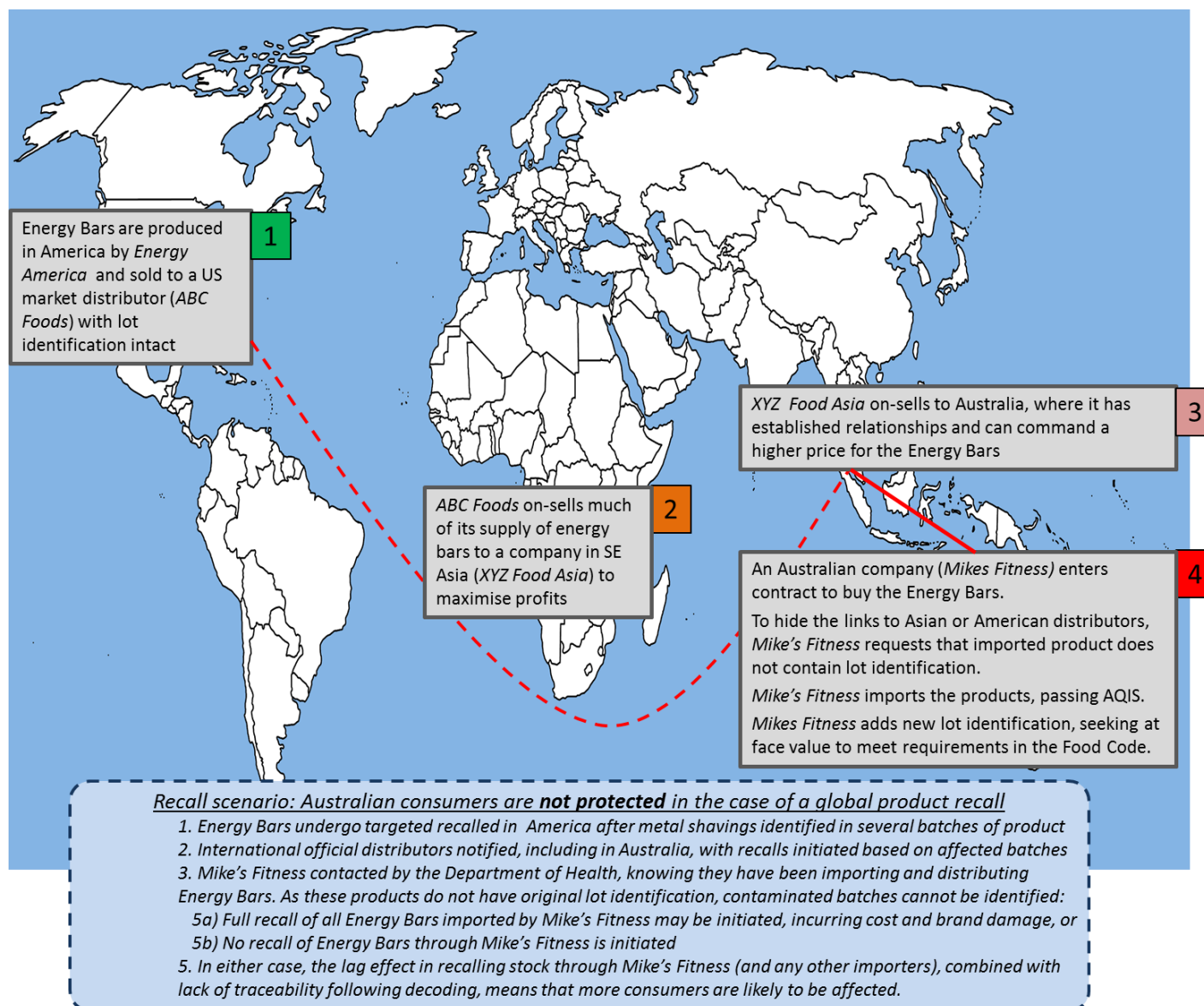
For reasons associate with product recall and consumer safety, the Group argues that the Food Code needs to be more specific in regard to the nature of Codes that are acceptable, and to provide explicit instruction to regulators to ensure that enforcement activities match the intentions of the Food Code.

The Group is happy to work further with FSANZ to draft legal wording that provides an adequate basis for enforcement and greater clarity to industry and consumers.

7. Further clarification or information

The Group welcomes the opportunity to provide further clarification or information to FSANZ. Please contact Charlie Tulloch, Senior Consultant, ACIL Allen Consulting, on (03) 8650 6000 or at c.tulloch@acilallen.com.au to discuss this response further.

Appendix A Sample decoding and recoding scenario



ACIL ALLEN CONSULTING PTY LTD
ABN 68 102 652 148

LEVEL FIFTEEN
127 CREEK STREET
BRISBANE QLD 4000
AUSTRALIA
T+61 7 3009 8700
F+61 7 3009 8799

LEVEL TWO
33 AINSLIE PLACE
CANBERRA ACT 2600
AUSTRALIA
T+61 2 6103 8200
F+61 2 6103 8233

LEVEL NINE
60 COLLINS STREET
MELBOURNE VIC 3000
AUSTRALIA
T+61 3 8650 6000
F+61 3 9654 6363

LEVEL ONE
50 PITT STREET
SYDNEY NSW 2000
AUSTRALIA
T+61 2 8272 5100
F+61 2 9247 2455

SUITE C2 CENTA BUILDING
118 RAILWAY STREET
WEST PERTH WA 6005
AUSTRALIA
T+61 8 9449 9600
F+61 8 9322 3955

ACILALLEN.COM.AU

