



Australian Dairy Industry
Represented by
Australian Dairy Industry Council Inc. and
Dairy Australia

Response to
P1025 Code Revision – First round of public
consultation

Contacts

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The Australian Dairy Industry

Australian dairy is a \$13 billion farm, manufacturing and export industry.

Australia's 6700 dairy farmers produce around 9.5 billion litres of milk a year.

The Australian dairy industry directly employs 43,000 Australians on farms and in factories, while more than 100,000 Australians are indirectly employed in related service industries.

Our industry has the potential to grow substantially over the next decade to meet growing domestic and international demand.

Realising this growth potential and expanding the industry's economic, social and environment benefits depends on a positive national and international operating environment

The dairy industry welcomes the chance to present this submission in response to P1025 - Code Revision.

This is a joint submission from the Australian Dairy Industry Council (ADIC) and Dairy Australia.

The ADIC is the national peak policy body for the Australian dairy industry and represents all sectors of the industry on issues of national and international importance. Its constituent organisations – the Australian Dairy Farmers Limited (ADF) and the Australian Dairy Products Federation (ADPF) – represent the interests of dairy farmers, manufacturers, processors and traders across Australia.

Dairy Australia is the dairy industry-owned service company, limited by guarantee, whose members are farmers and industry bodies, including the ADF and the ADPF.

Key points

The overriding purpose and drive behind the Code review only seems to consider the Code's use as a domestic enforcement instrument, when in fact the Code is used by a broad range of stakeholders for a broad range of purposes. It is important that a reasonable person should be able to look at the Code, find the information they are looking for, and know what they need to do without being confused by legalistic drafting, or requiring legal advice. This has not been achieved in the proposed Code.

Any revisions to the Code should be done within the existing structure and numbering system to assist users and minimise costs.

Costs and benefits resulting from changes to the Code need to be considered as part of the Code Review through a regulatory impact assessment.

The new Code should take effect two years from finalisation of content to minimise cost burdens and unintended consequences in transition.

Given the large volume of small changes, provision should be made for errors in transcription, or unintentional changes to the requirements of the Code, to be corrected as they emerge (even in a few years) without requiring a whole new amendment process.

The potential impact of changes on trade needs to be actively considered and prioritised.

This includes an ongoing commitment to consistency with other standards, particularly Codex, wherever relevant. The changes, and the purpose behind them, also need to be communicated to trading partners to avoid any misconceptions about what this means or disruptions to trade – a World Trade Organisation notification would therefore be appropriate.

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Overarching comments

The details required to facilitate enforcement should not impinge on the principle of food standards that are:

- Outcomes based
- Science/evidence based
- Nationally consistent
- Proportionate to risk

Purpose of review

The overriding purpose and drive behind the Code review only seems to consider the Code's use as a domestic enforcement instrument, when in fact the Code is used by a broad range of stakeholders for a broad range of purposes. These include the use of the Code:

- By operational people (non legal experts) within both small and large food manufacturing companies, to try to comply with its requirements.
- As the basis of explaining our food regulation system internationally.
- To underpin other legislation such as the Export Control Orders.
- As a training tool within universities.

While enforcement is important, it is also important that a reasonable person should be able to look at the Code, find the information they are looking for, and know what they need to do without being confused by legalistic drafting, or requiring legal advice.

A Code that is more complex to use, is more difficult to comply with, particularly for small to medium enterprises (SMEs). Prioritising enforceability and consistency with other federal regulations/legislation over usability seems counterproductive, as it will require more support for businesses (with associated costs) and may result in an increase in compliance issues as users struggle to identify what is required of them, and unintentionally fail to meet Code requirements that are confusing and difficult to follow.

Code structure and renumbering

When read as a single document, the new structure and numbering of the proposed Code does not achieve this. There are some improvements (for example the list of definitions (1.06), clear list of information required on a general label (1.33), that cross reference more detail provided elsewhere). However there are other instances where information on the same topic is separated, and difficult to link together (for example to know what to comply with regarding agvet chemical MRLs requires going to 1.21, 1.123-1.146, and Schedule 20).

In addition the large number of amendments the Food Standards Code is subject to may mean the sequential numbering system could become quite unwieldy in the future.

The purpose served by the restructuring seems to be only bureaucratic, when the redrafting for enforcement purposes could be achieved within the existing structure and numbering approach. Similarly a single, searchable, document would be useful, but doesn't require this revision.

Revisions to the Code should be done within the existing structure and numbering system.

This would mean the Parts and Standards would remain the same, even if the clauses within the standards required redrafting, reordering and renumbering. For example the standard for Fermented Milk Products would remain Standard 2.5.3, even if the clauses within were changed to reflect the proposed revisions in Chapter 2, Part 5, Division 3, 2.32 and 2.33.

Recognising that few people will access the Code as a single hard copy document, attention should also be paid to the electronic presentation of the Code. Electronic signposting and structuring could be used to make the Code easier to use. For example it should be possible to download and print all parts of the Code relevant to MRLs, or caffeine, in a single step. However at this stage it is unclear whether this is even an aim.

Content

While the intention is not to change the actual requirements of the Code, the large volume of small changes means it is very difficult to ensure that there are not slight wording changes that will change the requirements. It is unclear how will these be dealt with, particularly if they only surface after a new Code has been put in place, but are clearly different to the requirements of the old Code.

Provision should be made for errors in transcription, or unintentional changes to the requirements of the Code, to be corrected as they emerge (even in a few years) without requiring a whole new amendment process.

Trade implications

The dairy industry exports about half of Australia's milk production, to more than 100 countries; this makes Australia the fourth largest trader of dairy products on the world market, behind New Zealand, the European Union and the United States.

To facilitate trade, the dairy industry has consistently argued for regulatory harmonisation at national and international levels, whenever possible. This relies on a commitment to consistency with international regulatory frameworks and standards, such as Codex Alimentarius.

The Food Standards Code underpins the Australian food regulation system, and is therefore a critical part of explaining that system to our international trade partners. This role for the Code appears to have been ignored in the review.

The potential impact of changes on trade needs to be actively considered and prioritised. This also includes an ongoing commitment to consistency with other standards, particularly Codex, wherever relevant.

Because no regulatory content is intended to change, the consultation paper states there will be no World Trade Organisation (WTO) notification. **The changes, and the purpose behind them, need to be communicated to trading partners to avoid any misconceptions about what this means or disruptions to trade – a WTO notification would therefore be appropriate.**

The Export Control (Milk and Milk Products) Orders 2005 are the legislation that applies to dairy exports, and these reference the Code in a number of places. Most of these references are to the 'Food Standards Code' in general (eg 'produced using, or subjected to a process contrary to the Food Standards Code'), but there are direct references for contaminants, toxicants, residues, food additives, microbiological limits, GM, irradiation and ingredients lists. Some of the 'notes' in particular refer to specific sections of the Code. **If the Code order and numbering changed, the Export Control Orders will need to be updated, which should be considered in implementation timeframes.**

We also note that the intent was always for the Export Control Orders to align more directly with the Food Standards Code to prevent a situation where requirements get out of sync. This should be considered as part of the above process.

Cost-benefit analysis and implementation

FSANZ argue the Code Review does not affect what is regulated at all, so should have no burden, so no regulatory impact assessment or cost benefit analysis is proposed. Similarly little thought seems to have been given to a transition period, based on the argument that requirements are not changing. In reality, the Code is referenced in a large number of industry and government documents, including promotional material, legislation, commercial contracts and specifications etc. These would all require updating, very extensively if the structure and numbering system for the Code were to change. Given the increased complexity of the proposed Code, resources would also be required to support businesses to deal with this increased complexity, which would have costs. **Costs and benefits resulting from changes to the Code need to be considered as part of the Code Review through a regulatory impact assessment.**

While it is understood there can be no 'transitional' period where both versions of the Code apply, the date of effect for the new Code needs to allow sufficient time for communications, contract materials, and other references to the Code to be put in place, particularly if the entire numbering system is changing. Depending on when the content is finalised, 1 July 2014 is unlikely to be sufficient. If the proposed restructure/renumbering is pursued, **the new Code should take effect two years from finalisation of content to minimise cost burdens and unintended consequences in transition.** If (as recommended by the dairy industry) the current structure and standard numbering is maintained, less time may be required.

Outcome based standards and user guides

FSANZ have indicated that part of the review to come will include a move away from supplying user guides to assist users of the Code. Again this ignores the need of many Code users, prioritising only bureaucratic concerns.

Australia's food standards system is built on a philosophy of outcome based standards, which provide maximum flexibility, but also rely on providing useful information about how to comply.

This will be particularly important for Chapters 3 and 4, which have not yet been looked at. The dairy industry's experience of successfully introducing a Primary Production and Processing Standard has shown that the accompanying user guides have been essential. **Any move away from the provision of user guides, or from a philosophy of outcome based standards is not supported.**

Comments on specific provisions

Recognising the sheer volume of proposed changes, the below comments on specific provisions concentrate on areas of most concern to the dairy industry. In addition to these comments, the dairy industry is aware that the Australian Food and Grocery Council (AFGC) have conducted a comprehensive line by line assessment of all proposed changes to the Code; FSANZ should note and address the many comments on specific provisions identified by AFGC.

Chapter 1 Introduction and standards that apply to all foods

Basic Concepts (Chapter 1, Part 2)

Definition of food (Chapter 1, Part 2, Division 1, 1.15)

The redrafting appears to embed inconsistency between jurisdictions with regard to the definition of 'food', which is a poor outcome for both food producers and consumers. While we recognise that under current arrangements the Food Standards Code cannot enforce consistency on jurisdictions, at the least **the Code should stay silent rather than explicitly supporting inconsistency between jurisdictions by reference to it.**

Labelling and other information requirements (Chapter 1, Part 3)

The inclusion of a summary of all requirements of general label information (1.33 with reference to the appropriate section for the detail) is a useful addition, as are the similar lists provided for products in hampers, and foods not required to bear a label. This goes some way to replacing editorial notes in the current standard.

However there are areas covered in the current editorial notes that are useful, but have been omitted from the proposed Code. For example, the 'name of food' requirements in the current Code (1.2.2 Clause 1) include an editorial note that refers to definitions within other standards (there are two dairy examples in the current editorial note).

Throughout the labelling requirements, removing the tables to the clauses and placing them in a separate section also makes it more difficult to navigate and understand requirements. For example in the revised code, substances that require mandatory advisory or warning statements are listed, however the specific details and wording are now in separate sections.

Similarly, in Chapter 1, Part 3, Division 8 – Nutrition Information Requirements, referring to definitions under Subdivision B or Division 7 (Health Claims) instead of listing these under the standard is a prime example where navigation of the proposed Code is more cumbersome.

The current standard for Country of origin requirements (1.2.11) includes a significant amount of information in an editorial note referring to other relevant acts and where to get further detail. This is a complex area, and the removal of this information will make complying with these requirements more difficult, particularly for SMEs.

The removal of editorial notes and restructuring make complying with the labelling requirements more difficult, particularly for those less experienced/familiar with legalistic acts and regulations such as SMEs.

Substances added to or present in food (Chapter 1, Part 4)

General prohibitions (Chapter 1, Part 2, Division 2, 1.21)

The change in structure to place all prohibitions together at 1.21 creates some changes to how these are worded that may have implications for their application, as noted in the relevant sections below.

Food additives (Chapter 1, Part 4, Division 2)

The proposed wording focuses this standard and means substances are less likely to be unintentionally caught up, consistent with the overarching policy principle.

The transfer of the list of permitted additives by food type (current Code: 1.3.1 Schedule 1, proposed: Schedule 15 Table S15.04) has resulted in significant changes to the food category numbering system that mean it is now inconsistent with the Codex General Standard for Food Additives Food Category system. For example 'Dairy products (excluding butter and butter fats)' are Category 1 under Codex, and under the existing Code, but are Category 2 under the proposed Code.

This should be rectified as it is confusing for traded foods and is against the principle of consistency with Codex wherever possible that should underpin the Food Standards Code.

Other changes seem to serve no purpose, for example, the title for 1.3.1 Schedule 5, (Schedule 14 in the proposed Code) has changed from 'technological functions' to 'technological purposes' – this doesn't appear to have any direct impact, but is a shift away from Codex language.

Note there is also a mistake in Schedule 16, Table S16.01, where the table is titled 'Additive permitted at GMP – numerical listing' on page 142 and page 144, but this is the alphabetical listing.

Other specific issues relevant to dairy products include:

Section 1.124(6)(e) applies the nitrate calculation for meats to all nitrate calculations, when for cheese, nitrate salts are calculated as the nitrate ion.

In Schedule 15 mozzarella cheese should be a sub-item under 2.6.1, not a new item 2.6.2.

Vitamins and minerals (Chapter 1, Part 4, Division 3)

The proposed wording regarding addition of vitamins and minerals now specifies that this is for vitamins and minerals 'used as a nutritive substance'. This potentially allows vitamins and minerals to be used for other purposes (for example antioxidants), although different provisions regarding labelling, claims etc may apply. While this is a notable change it serves to provide greater clarity.

Some inconsistencies about how vitamins and minerals are referred to and whether they are must be 'used as a nutritive substance' in other sections remain that should be checked (see *Formulated Supplementary Sports Foods* below).

Processing aids (Chapter 1, Part 4, Division 4)

No significant changes noted.

Contaminants and natural toxicants (Chapter 1, Part 4, Division 5)

The removal of the purpose statement means all references to ALARA (as low as reasonably achievable) have been removed. From a domestic enforcement perspective this may make little difference, as the overarching requirement to produce 'safe food' applies. However it gives no reassurance to international customers or lay people using the Code, that while, for example there is no specific Maximum Level (ML) for lead in milk, this doesn't mean there are no restrictions on levels that can be present. This also affects imported foods, which must comply with the Food Standards Code. The removal of the reference to ALARA may send the wrong messages and create concerns for domestic consumers of imported foods. It should be clear to any reasonable user of the Code what it means if a listed contaminant is found in a food not listed.

A note should be included explaining that while only a small number of MLs are specified, this is under an overarching expectation that all food products meet an 'acceptable level of protection' for contaminants and natural toxicants.

Agvet chemicals (Chapter 1, Part 4, Division 6)

The removal of a large amount of context covered in the purpose statement in the current Code, potentially involves some changes.

For example the prohibition has changed from contains 'no detectable residues' of an agvet chemical (in the current purpose statement for 1.4.2), to a food 'must not consist of, or have as an ingredient or a component' an agvet chemical (in proposed 1.21). This may have an impact where the compound registered is different to the residue definition.

The removal of the purpose statement may also mean that substances naturally present, or present for other, permitted, purposes may be unintentionally caught up in the prohibition in this standard. For example if a compound is registered as an agvet chemical, but also has other uses, or is naturally produced in food, there may now be a zero tolerance approach to any detections. An example may be hormone like substances.

A clause similar to that included for additives (1.21 (5) Subsection (4) does not apply to a substance (including a vitamin or mineral) that is in the food product, or an ingredient of the food product, by natural occurrence) should be included to cover compounds that may be registered as agvet chemicals, but which also have other uses or are naturally produced in food or during processing.

Issues remain with the application of this standard, and the zero tolerance approach, including the need for a suitable default MRL to cover instances of unintentional residues (overspray, contact with 'contaminated' bins, processing equipment etc.). We understand this may be addressed in P1027 later in the year, and is beyond the scope of this review.

Food produced using gene technology (Chapter 1 Part 4, Division 9)

We note that Schedule 26 in the proposed Code lists permitted food produced using gene technology and includes all permitted foods in the current Standard 1.5.2 except canola MON88302 and soybean DAS 44406-6. Is this an oversight or is there a reason these foods have been omitted?

Microbiological limits (Chapter 1 Part 4, Division 10)

The introductory Note that refers to the general prohibition in the proposed Code 1.21 (6) uses language that is somewhat strange used in regard to microorganisms – "...provisions ...relating to

....the presence of other substances in food of that kind..” This does not appear to be meaningful when referring to microorganisms. **Additional text such as ‘or microorganisms’ or possibly ‘or contaminants’ should be considered.**

The text in 1.158 (b) appears to be incorrect when referring to the limits in column 5. ‘Number’ should be replaced with either ‘level’ or ‘activity to read ‘...is no greater than the ~~number~~ activity (if any) listed...’

Reference to AS/NZS 1766 methods included in Standard 1.6.1 have not been included in 1.159 (5). Is there a reason for this deletion?

Schedule 27 reflects the current microbiological limits in Standard 1.6.1. There are a number of issues with the existing standard, which the dairy industry understands that this is to be addressed in a separate review of 1.6.1 in regard to

- Alignment with Codex
- Alignment with raw milk product provisions
- Limits for indicator organisms; and
- Consistency with Listeria recalls

In Schedule 27, the Microbiological limits for milk are listed under a heading “Unpasteurised milk for retail sale” – in view of the removal of reference to sale in the GM provisions it would be also worthwhile to consider changing this heading to text such as ‘Raw (unpasteurised) drinking milk’.

In Schedule 27, there is a typographic error in setting out of provisions for Infant formula with added lactic acid where values for Coagulase-positive staphylococci are in the wrong columns.

Nutritive substances (Chapter 1, Part 2, Division 1, 1.19)

The proposed wording regarding nutritive substances constitutes a notable change, but serves to make the application of this requirement clearer.

Chapter 2 Food Standards

The title of this chapter has changed from ‘Food product standards’ to ‘Food standards’. The whole Code is made up of food standards – the compositional or product standards are just one part of these, making the change in title confusing and unnecessary. **Chapter 2 should be titled Food Product Standards.**

General structure

The ‘definitions’ in 1.06 that are related to dairy products (for example ‘butter means a food that may be sold as butter under section 2.36’) don’t appear to have any negative impact, but don’t add anything to what is already in the table of contents.

Within the Chapter 2 standards themselves, the repetition in the structure of: 1) a food that is sold on the basis that it is ‘milk’ must consist of ‘milk’, followed by 2) a definition of ‘milk’ – is awkward and legalistic but again unlikely to have a negative impact.

Dairy products – Chapter 2, Part 5

Overarching

There are some shifts in how the Dairy Primary Production and Processing Standard (4.2.4) is referenced, and the need to comply with these processing requirements. Part 5 starts with an overarching note stating:

Note: The Australian processing requirements for dairy products are contained in Standard 4.2.4. New Zealand has its own processing requirements for dairy products.

In the current Code an editorial note referencing Standard 4.2.4 is included in each individual dairy product standard. It needs to be very clear to users that in Australia the primary production and processing standard also applies to each dairy product covered by Part 2.5.

Within individual dairy standards, for the most part redrafting changes maintain the essential wording from the current Code and so changes are minor. Areas where redrafted text should be altered, or would change the application of the standards are noted below:

Milk (Chapter 2, Part 5, Division 1)

There is some inconsistency in the proposed wording, with different wording for 'Compositional requirement for milk', 'Compositional requirement for cow's milk', then 'Composition of skim milk'. **2.29 should be revised to 'Compositional requirement for skim milk' in line with the other clauses.**

The requirement that milk is processed in accordance with Standard 4.2.4 has moved from being part of the standard in the current Code, to a 'note' in the new drafting. It needs to be very clear that the primary production and processing requirements apply in Australia.

Cream (Chapter 2, Part 5, Division 2)

There is a wording change from 'addition of milk or products obtained from milk' in the current Code (2.5.2 Clause 2 (2)), to 'addition of milk products obtained from milk' in the proposed Code (2.31 (2)). This makes less sense and **the current wording 'addition of milk or products obtained from milk' should be retained.**

Fermented milk (Chapter 2, Part 5, Division 3)

The proposed wording for fermented milk/yoghurt combined with other foods (eg fruit yoghurt) is confusing. The proposed standard includes both wording about 'fermented milk or yoghurt with the addition of other ingredients' (2.32(1)(a)) and 'food that contains fermented yoghurt as an ingredient' (2.32(2)). It is unclear whether there is any difference between these, and whether a 'yoghurt with the addition of other ingredients' would have to comply with pH, microorganism, protein requirements for yoghurt in general under 2.32(1). **It needs to be clear that the requirements of this standard apply only to the fermented milk/yoghurt portion of a product, regardless of the proportion of the product made up of fermented milk/yoghurt.**

Cheese (Chapter 2, Part 5, Division 4)

Standard 2.5.4 Clause 3(b) restricting addition of phytosterol esters to individual portions of cheese no more than 50g has been removed from the current Code, but remains in the proposed Code. **In the proposed drafting, 2.35(b) should be deleted to reflect the current requirements.**

Butter (Chapter 2, Part 5, Division 5)

No issues.

Ice cream (Chapter 2, Part 5, Division 6)

The editorial note directing users to Standard 1.2.4 – *labelling requirements for the declaration of animal fats or oils in ice cream*. While this makes no difference to actual requirements, it may make the Code slightly more difficult to use.

Dried milk, evaporated milk and condensed milk (Chapter 2, Part 5, Division 7)

Note that the wording in the title and throughout this standard has changed to drop the plural (dried milks, evaporated milks and condensed milks). While this should have no practical implications, it does make the Code slightly less consistent with the relevant Codex standards. **For this reason the title 'Dried milks, evaporated milks and condensed milks' should be retained.**

There is some inconsistency in the proposed wording between 2.38(4), 2.39(4) and 2.40(2). Both 2.39(4) and 2.40(2) refer to either dried milk or evaporated milk as a 'milk product', 2.38(4) refers to condensed milk as a 'food'. If there is no reason for this inconsistency, it should be corrected.

In the current Code 2.5.7 Clause 2 (1) enables adjustment of 'the fat, or protein, or both fat and protein'. The equivalent clauses in the proposed Code (2.38(2) and 2.39(2)) refer only to ability to adjust 'fat or protein'. **It should be made clear that both fat and protein (and not just one aspect) may be adjusted to comply with compositional requirements.**

Special purpose foods – Chapter 2, Part 9

Recognising that these standards are currently under review, any notable changes should be delayed until these reviews are finalised.

The dairy industry also recognises that the Infant Nutrition Council is responding in much more detail to this Part, and will identify a number of further issues not covered below.

Infant formula (Chapter 2, Part 9, Division 1)

In the current Code, Clause 22 (3) reads 'L-amino acids listed in the table to this clause must be added to infant formula or follow-on formula only in an amount necessary to improve protein quality'. In the proposed Code, 2.89 states that L-amino acids may only be added in 'an amount necessary to meet the minimum amino acid requirements', and infers that the levels in the Schedule are absolute. In comparison to the current requirement this is much narrower. This is a notable change in flexibility and may have the potential for inadvertent non-compliance. **Significant changes of this nature should be considered as part of the review of the infant formula standard, not included in the Code review, and the current wording in 22 (3) should be retained for now.**

Schedule 30.9 in the proposed Code includes 'Guidelines for infant formula products' including a recommendation that quantities specified be observed as maximum levels of vitamins and minerals in infant formula. These amounts are specifically noted as 'not part of the legally binding Standard) in the current Code. This is not clear in the proposed Code, and these guideline levels may be enforced due to their inclusion. **It needs to be very clear that these recommendations are not part of the legally binding standard.**

The table numbering in Schedule 30 does not align with the order of mention in Chapter 2, Part 9, Division 1 (s30.06 is not mentioned in standard until after S30.08). These small inconsistencies make an already difficult to follow structure even harder to use.

Formulated supplementary sports foods (Chapter 2, Part 9, Division 4)

The removal of the purpose statement removes useful context on the application of this standard (for example products are not suitable for children, and not to be used as the sole or principal source of nutrition). **An editorial note or 'Outline of Division' (such as in Infant formula) should be included to provide this information.** While this may make little difference to enforcement, the removal of this information makes it harder to comply with the standard, and increases the likelihood companies may inadvertently not comply.

Clause 4 in the current Code - 'Ingredient claims', has been replaced with 2.130 'Nutritive substance claims' (as distinct from vitamins and mineral claims) for added substances used as a nutritive substance. It is unclear what this means where there are naturally occurring nutritive substances within ingredients.

2.131 in the proposed Code refers to vitamin and mineral claims. As noted earlier, elsewhere in the proposed Code these are specified as vitamins and minerals 'used as a nutritive substance'. Is there a reason for this inconsistency?

Other chapters not yet covered

Food Safety Standards – Chapter 3, and Primary Production and Processing Standards – Chapter 4

While these standards are not covered in this stage of the Code review process, the dairy industry is very interested in how the proposed approach will be applied to these Chapters. It is particularly important that the principles of standards that are outcomes based, nationally consistent and proportionate to risk are maintained.

Chapter 4 should be referred to as 'Primary Production and Processing Standards' not just 'Primary Production Standards' as they cover both food safety/hygiene requirements for primary production and elements of processing.