

Proposal 1025

Code Revision – NSW Food Authority Submission

Major Procedure

Summary

P1025 addresses most of the issues identified by the Office of Legislative Drafting and Publishing (Commonwealth Attorney-General's Department) in its legal review of the Food Standards Code (the Code) in 2010.

It is a necessary risk management measure to improve the clarity and legal enforceability of the Code and generally, achieves its objective for chapters one and two which have been substantially recast.

NSW considers that the revised drafting significantly improves legal certainty and the effectiveness of the Code as a regulatory instrument but raises two key issues for further consideration:

1. the application of the rules of statutory interpretation, and
2. the definition of the new concept “food product”.

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.

Specific Issues

A. COMMENTS ON OBJECTIVE – to improve the legal efficacy of the Code

P1025 proposes a revised version of the food standards contained within chapters one and two of the Food Standards Code (the Code). It is being proposed as a preliminary but significant measure to address fundamental concerns relating to the clarity and legal enforceability of the standards.

The Food Authority acknowledges the extensive work that has gone into the re-casting of these sections of the Code and is of the view that generally, the proposal achieves its stated objectives.

The Code as a single instrument

Presenting the Code as a single, unified instrument, rather than a collection of individual food standards, creates a more “user-friendly” document. Definitions are now largely contained within a compendium at the front of the Code, or, if located in other parts of the Code, are referenced at the front. As the meanings of terms are much easier to find, this improves accuracy and speed of interpretation.

Similarly, the tables that were scattered throughout the Code have now been consolidated, co-located within schedules in a separate volume and presented with a consistent format.

This allows a reader an uninterrupted passage through the written text of a division, again, improving accessibility and interpretation. Over time, the tables placed together will also improve a regular user's familiarity with them. Placing the tables in a separate section away from the substantive provisions also enables them to be referenced from more than one part of the Code and avoids unnecessary duplication of information.

Also, converting individual food standards to a single instrument has enabled the introduction of sequential numbering of provisions. This streamlines the referencing of Code provisions in other documents. It also makes amendments easier to draft and understand.

Labelling requirements are all in one place

Currently, basic labelling and general information requirements are throughout the Code. Exceptions to the requirements are sometimes found in a different part of the Code. Navigation is difficult, key provisions are missed and it is easy to become confused or fall into error in interpretation. This re-structure places the requirements together in one Part of the Code and divides them into ten clearly identified divisions. This improves certainty of interpretation and the efficacy of these provisions.

Placement of the general prohibitions and specific permissions together

Presently, the Code has general prohibitions for food that are then qualified by specific permissions. It is difficult for a newcomer to locate, let alone correctly interpret, all the general and specific provisions that are relevant to a particular requirement or obligation. The re-structure in this area assists with obtaining a correct understanding of the relationship between prohibitions and permissions. Again, this structural change vastly improves the Code's readability and enforcement potential.

Integration of obligation and offence provisions

The general offences found in the application Acts of each State and Territory rely on the Code to establish the specific requirements which must be complied with. In linking a provision of the Code to an offence there is sometimes a disconnection between the two where the provision of the Code does not clearly establish the requirement. Ambiguity or uncertainty surrounding a requirement renders effective enforcement difficult and problematic.

In this revision, drafting work has been undertaken to re-phrase many of the obligations and requirements to remove ambiguity and improve clarity. This should make the requirements easier to understand and improve the effectiveness of the document as a regulatory instrument.

Food definition and composition provisions

We note that the revised draft separates the definition of a food from its substantive compositional requirements. This should overcome the current problem where particular foods that are defined according to their compositional requirements may be excluded from the operation of the standards if they are non-compliant. We agree with this approach which should improve the clarity and operation of those requirements.

Removal of purpose and outline statements

The use of purpose and outline statements in the Code have been greatly reduced and the substantive provisions (and their headings) have been generally re-worked to convey their own meaning. Sometimes, purpose statements create confusion because they are either potentially inconsistent with the substantive provisions or contain additional statements that should properly be substantive provisions. Minimising their use (or converting them to substantive provisions) encourages the drafting of a set of provisions that can operate effectively without the need for additional guidance. Outline statements often duplicate the provisions themselves, are largely unnecessary and can be potentially confusing. This editing streamlines the document and improves its clarity.

B. APPLICATION OF RULES OF STATUTORY INTERPRETATION

This revised version of the Code is drafted so that

- a) the meanings of the terms “food” and “sell” are to be taken from the application Act of that jurisdiction (sections 1.15 and 1.20), and
- b) the Code is to be interpreted in accordance with the Commonwealth *Acts Interpretation Act 1901* (section 1.04).

In this regard, we make the following comments for further consideration:

1. The position that the Code should be interpreted under the Commonwealth *Acts Interpretation Act 1901* had previously been rejected by Her Honour Justice Simpson in the *Nutricia* case (Supreme Court of NSW - 74 NSWLR 148). It was Her Honour’s view that in NSW the Code should be interpreted by NSW interpretation law. This was because the Code was given force of law by a NSW Act (Food Act of NSW) and the prosecution was brought under NSW law and was governed by the rules of evidence and interpretation of NSW law. This remains persuasive.
2. Where criminal offences under a State law result in convictions, fines and possible imprisonment, an accused person will ordinarily be entitled to the benefit of interpretation under that State law as opposed to a potentially harsher interpretation (if one exists) under Commonwealth law.
3. If a State agency is considering a particular prosecution and its prospect of success, uncertainty arises if the agency is required to apply different laws of interpretation to different terms ; the applicable State Interpretation Act for the basic concepts of “food” and “sell” and the Commonwealth *Acts Interpretation Act 1901* for other terms in the Code.

For example, in the definition of “food product” in section 1.16, how could the jurisdiction-based definitions for “food” and “sell” inter-relate and be reconciled with Commonwealth interpretation law placed on the remaining term “product” and the words in the definition for “food product” itself – “(a)...sold to a consumer on the basis of a representation that it is suitable for human consumption”?

Another example is the meaning given to “food” itself. Under the Food Act, “food” is defined to include “...*substances* used as an *ingredient* or *additive*...” In contrast with the Code, no specific definitions are provided under the Food Act for these uses. Different outcomes and confusion may well arise depending on whether non-Code or Code meanings are adopted in attempting to define or classify a food or the substances within it.

It appears that there are no other circumstances in which a combination, or hybrid arrangement regarding interpretation exists in the criminal law.

4. The option of each jurisdiction amending its application Act to provide that the Commonwealth interpretation law shall apply to the Code would provide greater legal certainty in the long term.

(See, for example, the approach adopted in the NSW Fair Trading Act 1987. Section 31 of that Act provides for the application of Commonwealth interpretation law to the interpretation of the Australian Consumer Law (NSW), as it applies in NSW. See also the approach recently adopted in the NSW Road Transport Act 2013 which introduces agreed national reforms relating to a uniform approach to driver licensing and vehicle registration – section 12 of that Act creates a regulation-making power to apply any or all of the provisions of Commonwealth interpretation law to the interpretation of that Act or its regulations or to particular provisions of that Act or its regulations. See also section 5 of the recently repealed NSW Road Transport (Drive Licensing) Act 1998 which provides that Commonwealth interpretation law applies to the interpretation of that Act but NSW Interpretation law may apply if it is not inconsistent with the Commonwealth law.)

C. FOOD PRODUCT – NEW CONCEPT

The term “food product” is a key concept in this revised version of the Code.

The approach of creating the concept of “food product” has some merit as it improves clarity as to the stage of production at which the particular Code requirement applies. The concept appears intended to capture the very “end” food, or food that is almost complete for retail sale.

However, we raise the following concerns with the definition that has been proposed:

1. The use of the past tense term “sold” is confusing. As enforcement action under the application Acts is engaged when it is established that food is for sale or intended for sale, it may encourage an argument that, before any prosecution can advance, a completed sale must be established. Whilst we note that the broad definition of “sell” in the Code includes “offer for sale”, it would need to be argued that the meaning of “sold” in the definition of “food product” corresponds to the defined meaning of “sell” in the Code. This is not very user friendly.

It is suggested that the present tense words “*for sale*” be used instead of the past tense “*sold*”.

2. To establish that a “*food*” is a “*food product*”, evidence will be required to prove that a *representation* has been made that the food is either suitable for human consumption (or suitable for sale to a consumer for human consumption) in the form in which it is sold or after cooking, or that a *representation* has been made that the food is suitable for sale to a consumer after cooking.

Proving that one of these representations has been made may be difficult, particularly where the food business is a wholesaler or importer. (Can the representation be inferred by evidence to show that the item is normally used for human consumption?) Although an enforcement agency may be able to establish that an item is a “*food*” and is also “*intended for sale*” or is “*in possession for sale*” there may not be sufficient evidence to establish that the *required representation* has occurred and that the “*food*” is therefore also a “*food product*”. In these circumstances, an agency may be unable to prevent a non-compliant food from entering the market.

It is suggested that consideration be given to defining “*representation*” in the Code for the purpose of the “*food product*” definition. The definition of “*representation*” should allow for a broad interpretation of that term such as would enable the concept “*food product*” to apply to those foods it is intended to capture.

D. OBSERVATIONS ON DRAFT

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

E. IMPLEMENTATION/COMMUNICATION

We note that this variation is intended to take effect from 1 July 2014. 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 re-drafting, the revised structure and the changes made. 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.

24 September 2013

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.

Attachment 1

DRAFT NEW SECTION	P1025 – OBSERVATIONS ON DRAFT
CHAPTER 1	INTRODUCTION AND STANDARDS THAT APPLY TO ALL FOODS
PART 1	PRELIMINARY/INTERPRETATION
1.04	Application of interpretation legislation - refer to main submission
1.06	Note the effect within the definitions of the phrase “ <i>used as a</i> ”, before a number of definitions. This connotes “intent” to some degree – does this remain consistent with absolute liability offences?
PART 2	BASIC CONCEPTS
1.15	<p><i>food – is to have the “same meaning as in the application act.”</i></p> <p>This demonstrates some confusion, in the sense that the Code says that the meaning of food will take the meaning it has in the application Act. If that is the case, how does one apply the Commonwealth Acts Interpretation Act (AIA) to it where the application Act is in turn interpreted by its local Act?</p> <p>For example, what happens to the terms “ingredient” and “additive” in the application Act meaning? Are they to take on their respective definitions under the Code, or is it required to first ascertain a meaning derived from the application act(s)? Does the AIA apply to those terms, or does the application Act?</p> <p>In other words, does the Code call for simply a transplanting of the “meaning of food” into the Code, without any determinative input or interpretative assistance from the local interpretation legislation? In this case so we have to rely on the statutory interpretation principle “by necessary implication”?</p>
1.16	“ <i>food product</i> ” – refer to main submission
1.19	<p>“used as a nutritive substance”</p> <p>The shift is that it now deems a substance as “<i>used as a nutritive substance</i>” as opposed to meaning that a substance “<i>is a nutritive substance</i>”</p> <p>How does this change then sit with the second part of the definition – namely, “to achieve a nutritive purpose” ? – does this then necessarily require <u>proof of intent</u>, which goes against the spirit or intent of a deeming provision?</p> <p>Do we get to the same place by changing it from “add..to achieve” to “<i>added and achieves a..</i>” ? or “<i>added and whereby a nutritional purpose is achieved</i>”?</p> <p>(The term would be assisted by a definition of “<i>nutritional purpose</i>”. It is requested that this form part of the considerations in the review of the</p>

	regulatory approach to nutritive substances in P1024”
1.20	<p>“Sell” is to have the same meaning as it has in the application act.</p> <p>A similar argument as to “food” applies, but not likely to be so controversial, as it does not appear to have interspersed terms for which there are specific definitions under the Code. Note that under s 18 of the AIA words and expressions which are defined under an Act retain their meaning where expressed in various grammatical form, unless specific meanings are provided. (A similar provision exists in the NSW Interpretation Act)</p>
1.21	<p>*The note to 1.21(1) is inaccurate. There is no mention of “offer for sale” in the definition of a food product.</p> <p>1.21(3) – if read as disjunctive alternatives – a food product must not: <u>consist of</u>, or <u>have as an ingredient</u>, or <u>have as a component</u>... this would capture avget chemicals, even where you cannot identify them as a constituent part of the food.</p> <p>1.21(3) appears to be consistent with an “absolute liability” concept. The four foods or substances in column 1 as described are simply not permitted in a final food (food product) save for the express provisions.</p> <p>However:</p> <p>1.21(4): Contrast the wording “<i>a substance that is used for any of the purposes listed in column 1.</i>” vs the current Code (1.3.1(2)):<i>“ a food additive must not be added to food unless expressly permitted..”</i></p> <p>“used as a food additive” is defined as “1.122: <i>that is added to perform..”</i></p> <p>Does this wording now place the onus on the prosecution to prove a level of intent? How does this sit with an absolute liability offence?</p> <p>Not sure that this was the intended effect as expressed at page 6 of Attachment B:</p> <p>*First, proof is needed that it was used for one of the purposes listed</p> <p>*second, proof will be need of the deemed “purpose”, which carries in itself a degree of intent (whether it be “to achieve” a technological purpose, or nutritional purpose, etc.)</p> <p>Eg: I added SO₂ to raw meat. Why? It was a mistake, I thought it was water. Provision 23 of Model Food Provisions (MFP) – “honest and reasonable mistake” – now reintroduced? (See MFP23 (s27 NSW Food Act 2003) which precludes the defence of “mistaken but reasonable belief” for Code offences)</p> <p>No offence at all because can’t prove that it was “<i>used for any of the purposes..”</i>?</p>

	<p>It may still have the substance in it, but the prosecution can't prove or does not have sufficient evidence as to what purpose it was used for.</p> <p>Consider an alternative: rather than "<i>a substance that is used for any of the purposes</i>" – "<i>a substance as listed..</i>" etc. Aim: take away the "intent" – used for a purpose.., as it is already contained in the deeming definition of "<i>used as a food additive</i>"</p> <p>1.22(5): Should there be a definition for "natural occurrence" or is it better to leave it undefined and the words retain their ordinary and everyday meaning?</p> <p>Is 1.21 to be the primary offence provision? Note references of a general nature to packaging (1.21(7)) and labelling (1.21(8)) and information (1.21(9))</p>
1.22	Importers who sell, or intend to sell, to distributors or wholesalers, will not be sanctioned if the food cannot qualify as a "food product", as defined. It may be difficult to prove that a representation has been made.
1.24	<p>Is 1.24 the "offence" provision as opposed to Chapter 3 obligations? Does 1.24 introduce duplicity when it comes to enforcement?</p> <p>For example, Provision 17 MFP (s21 NSW Food Act) creates the offence provisions – namely, it is an offence not to comply with the Code. Chapter 3 provisions set out the terms of the obligations – failure to comply, or the terms of the offence, are dictated by a description as to how the obligations were not followed. This necessitates reference to the specific Chapter 3 provision(s), not to 1.24 What then is the point of 1.24? Does it not conflict with MFP 17?</p>
PART 3	LABELLING & OTHER REQUIREMENTS
1.26	<p>Is there a reason that "retail sale" is not defined? Note the definition for "food for retail sale" under current 1.2.1 (1). Is it expected to be inferred from the definition of "food product" that a "retail sale" is implicit within that definition? Does the definition, however, go beyond what is normally considered a retail sale?</p>
1.31(1)	Comprehensive statement, but does not allow for the exception in 1.32(1)b). Need to reconcile the conflicting clauses.
1.37(1)	Comprehensive statement, but does not allow for the exception in 1.39(b). Need to reconcile the conflicting clauses.
1.66	<p>"use-by" date markings. "For the labelling provisions" replaces the wording "Unless otherwise expressly prescribed in this Code.."</p>

1.118	<p>“Applies to a food product that is displayed for retail sale.” Consider again the cumbersome definition for “food product” within this capture</p> <p>Also, conflicts with the “code” wide application of 1.31.</p>
PART 4	SUBSTANCES ADDED TO FOOD
1.122	<p>Aim appears to “deem” the meaning of – <i>“used as an additive”</i>, but is there not introduced in the definition an element or degree of intent, namely,</p> <p><i>“...added to the food to perform one or more of the technological purposes...”</i> Does this introduce a degree of “intent” to an otherwise absolute liability offence? Compare, say, to the wording, “added to the food <u>and performs</u>”</p> <p>Is the prosecution now required to prove that a manufacturer added the substance to perform one or more of the listed things; what if the evidence is that it was added by mistake?</p> <p>(Note that honest and reasonable mistake is no defence for Food Act offences, including non-compliance with the Code: MFP23 (s27 NSW Food Act 2003)) Comment</p> <p>In most or the majority of cases, there can be no other available inference than the fact that a substance has been added to perform a task (technological purpose), be it as a preservative, colouring agent or the like. In such circumstances, is it not appropriate to shift the wording to <i>“and performs”</i> so that it accords more with the nature of the absolute liability offence? This or similar wording abrogates the induction of “intent” arguably open to interpretation by the use of the words <i>“to perform”</i>. Does this not remain within the current meaning of the Code, as opposed to a contrary position, where intent may be introduced at least inadvertently?</p> <p>The problem of an inference arising as to the need to prove intent is compounded when inputting the definition into an alleged offence against 1.21(4), as it talks of <i>“a substance that is used for any of the purposes listed in column 1”</i></p>
1.123	<p>This clause applies in relation to food, not the food product. It is stated as the equivalent to the present permitting clause under Std 1.3.1 clause 3. Question if it is restricted by the use of the headings referring to <i>“ingredients”</i>, whereas 1.3.1(3) was open, simply referring to <i>“Permitted use of additives”</i> and <i>“may be added to a food”</i>.</p> <p>In other words, there were no specific limitations – be it added as a component, etc. as opposed to simply an ingredient, which might arise as a result of the heading (the heading forming part of the Act or instrument)</p>

Division 4	<p><i>“used as a processing aid”</i> – similar observation as in 1.122 in terms of possible need to prove “intent” applies.</p> <p>Could be <i>“and performs”</i> rather than <i>“to perform”</i>?</p>
1. 131(1)(c)	Does the term <i>“processed food”</i> equate to <i>“final food”</i> as applied in the definition of <i>“processing aid”</i> in previous standard 1.3.3? Does <i>“processed food”</i> equate to <i>“food product”</i> ?, or is it a step short of <i>“food product”</i> ? This may need to be clarified.
1.148	How does this reconcile with MFP23 (s27 of NSW Food Act?) Is the Code providing a statutory defence? Does it now displace the Food Act?
1.158	<p>It is not clear that current clause 5 of Standard 1.6.1 has been properly incorporated. Present clauses 2 and 5 of Standard 1.6.1 refer to the mandatory requirement – “must comply with the limits”. Clause 5 has the effect of a “lot” of food failing; there appears to be no reference or effect on a “lot” in 1.158.</p> <p>All it refers to is “food” – query whether this will lend an argument to the sample only rather than the lot of food, being the subject of prosecution. The sample may come from a segment or part of set of food, rather than a lot.</p> <p><i>“activity”</i> is not the appropriate term in this context. Use of <i>“n,c,m and M”</i> should be retained as secondary references as they are well understood.</p> <p>The wording, in general, is not as clean and precise as present Standard. Not as in mandatory language; seems more discretionary. (“may..only..”)</p>
CHAPTER 2	FOOD STANDARDS
2.17-18	Who is the responsible party under these provisions?
2.69	Confusing definition for “fruit wine product” – is it meant to be read as 700ml/l of fruit wine, or 700ml/l of vegetable wine, or, when both fruit and vegetable wine are combined, they total together 700 ml/L?
2.72	In contrast to the other subdivisions, wine is expressed as <i>“when sold on the basis that it is wine”</i> , as opposed to <i>“sold on the basis <u>of a representation</u> that it is beer..”</i> etc. in those other food subdivisions
2.77	Sugar – similar to “wine”, in that no representation is permitted?
2.78	Likewise – icing
2.79	Likewise, Honey

VOLUME 2	SCHEDULES 1 - 30
Schedule 15.04	<p>9.3 and its subheadings do not appear to reflect the current requirements as they are presented in 8.3 of Schedule 1 of Standard 1.3.1.</p> <p>See for example, 9.3.2 <i>Sausage and sausage meat containing raw, unprocessed meat</i> which appears to inadvertently permit Annatto extracts, Nisin and Nitrates.</p>