

**22 August 2001**  
**03/02**

## **FULL ASSESSMENT REPORT**

### **PROPOSAL P248**

## **DEVELOPMENT OF “STOCK-IN-TRADE” PROVISIONS (VOLUME 2 OF THE *FOOD STANDARDS CODE*)**

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### **EXECUTIVE SUMMARY**

On 24 November 2000, the Australia New Zealand Food Standards Council (ANZFSC) adopted Volume 2 of the *Food Standards Code*. It is currently envisaged that Volume 2 will become the sole repository of food products standards in Australia and New Zealand (under the joint food standards setting system) from approximately 20 December 2002.

It appears that to date, little consideration has been given to the issue of whether food products produced lawfully prior to the end of the transition period at the end of 2002, in accordance with Volume 1 of the *Food Standards Code* or the New Zealand *Food Regulations 1984*, would be rendered illegal to sell immediately the end of the transition period.

In New Zealand, subsection 42(4) of the *Food Act 1981* makes provision for the lawful sale of foods which can be shown to have been “stock-in-trade” prior to the date of any change to food regulations. This provision only relates to “food regulations” and not to “food standards” contained with the *Food Standards Code*. Furthermore, no such provision exists in the food legislation of the Australian States and Territories.

The Authority’s preliminary view is that it would be unreasonable, following the end of the transition period, to require the removal of foods manufactured and packaged in accordance with the requirements in place during the transition period. The Authority therefore proposes to allow foods produced during and prior to the transition period to remain lawfully on the market for a further period of 12 months. All food products manufactured or imported following the end of the transition period will be required to comply with the requirements of Volume 2 of the *Food Standards Code*.

### **1 INTRODUCTION**

On 1 July 1996, an Agreement between Australia and New Zealand (the Treaty) came into force that established a joint Australian New Zealand Food Standards System, which served to underpin the development of Volume 2 of the *Food Standards Code* (Volume 2).

Under the Treaty, during the transition period to the joint system, products sold in New Zealand and Australia could comply with either the New Zealand *Food Regulations 1984* (NZFR), (if manufactured or imported into New Zealand) or Volume 1 of the *Food Standards Code* (Volume 1) (formerly known as the Australian *Food Standards Code*) until such time as Volume 2 had been developed and became the sole set of regulations for the two countries.

Volume 2 came into effect in Australia on 20 December 2000 and in New Zealand on 8 February 2001. It is expected that Volume 1 of the *Food Standards Code* and relevant New Zealand *Food Regulations 1984* New Zealand (other than Volume 2) will be repealed towards the end of 2002.

## **2 BACKGROUND**

On 24 November 2000 the Australia New Zealand Food Standards Council adopted the joint Food Standards Code, currently referred to as 'Volume 2 of the *Food Standards Code*'. At the time of adoption, Ministers agreed (in principle) that there be a two year 'transition period' in which the Australian *Food Standards Code*, known as 'Volume 1 of the *Food Standards Code*' operate in parallel with, and as an alternative to, Volume 2. The practical effect of the transition arrangement means that in New Zealand, food manufacturers are subject to three alternative sources of regulation in the forms of the New Zealand *Food Regulations 1984*, or Volume 1 of the *Food Standards Code* or Volume 2 of the Code. In Australia, manufacturers may chose between producing food to Volume 1 or Volume 2.

### **2.1 Regulatory framework**

#### **2.1.1 Australia**

The Food Acts of the Australian States and Territories and the *Imported Food Control Act 1992* (Commonwealth) require that food for sale or imported into Australia must comply with the requirements of the *Food Standards Code*. There are no provisions in the Food Acts of the States and Territories, nor in the *Imported Food Control Act 1992* that specifically make allowance for the continued lawful sale of "stock-in-trade" when changes to food standards are made.

#### **2.1.2 New Zealand**

In New Zealand, food for sale, or food imported into New Zealand, must comply with either the *Food Regulations 1984*, or as an alternate the *Food Standards Code* (Volume 1 or Volume 2). On 20 December 2000, the Minister of Health under the *Food Act 1981* (New Zealand), issued the "*New Zealand Food Standard 2001*" which provided Volume 1 and Volume 2 as alternates to the *Food Regulations 1984*. The 2001 food standard was gazetted on 11 January 2001 and came into legal effect on 8 February 2001.

Subsections 42(4) and 42(5) of the *Food Act 1981* (New Zealand) provide –

- (4) Notwithstanding anything contained in any regulations made under this section, it shall be lawful for any person, at any time within 12 months after the date of the commencement of the regulations, to sell any food of which the sale is otherwise lawful, if he proves that at the said date the food was part of the existing stock-in-trade in New Zealand of any person carrying on business there, and that since the said date no act has been done whereby the food fails to conform to the regulations.
- (5) For the purposes of subsection (4) of this section, any goods purchased before the said date for importation into New Zealand shall be deemed to be part of the purchaser's stock-in-trade in New Zealand.

The effect of subsection 42(4) is to create a defence for stock-in-trade food that is made unlawful by any amendments to the *Food Regulations 1984* or *Dietary Supplements Regulations 1985*. Subsection 42(5) of the Act goes on to provide that, for the purposes of subsection (4), any goods purchased before the said date for importation into New Zealand shall be deemed to be part of the purchaser's "stock-in-trade" in New Zealand.

These "stock-in-trade" provisions do not apply to the *Food Standards Code*, as the Code is issued as a "food standard", under section 11C of the *Food Act 1981*, rather than as "regulations" under section 42.

## **2.2 Transition period – Implementation of Volume 2 of the *Food Standards Code***

During the 'Stakeholder Forum' discussions held by ANZFA at the time of its Board meeting in May 2001, a number of industry representatives raised the possibility of implementing a 'stock-in-trade' provision for the operation of Volume 2 of the *Food Standards Code*.

The Food Regulation Standing Committee recommended to the ANZFSC meeting of 31 July 2001, that ANZFA be requested to raise a proposal to consider the development of provisions relating to "stock-in-trade". This recommendation followed representations from the food industry advising that it was considered necessary to include provisions in the *Food Standards Code* which had the effect of allowing the continued sale of "stock-in-trade" brought into existence during the transition period.

Of particular concern was how long shelf life foods produced during the transition period would be handled. It was argued that an explicit provision in the *Food Standards Code* was necessary to permit products manufactured during or before the transition period, but still available for sale after this date.

The Council of Health Ministers at their meeting in July 2001 requested that ANZFA prepare a proposal to develop provisions that permitted "stock-in-trade" manufactured or packed during the transition period to continue to be lawfully sold after that date.

## **2.4 International and World Trade Organization obligations**

Australia and New Zealand are members of the World Trade Organization (WTO) and are bound as parties to WTO agreements. In Australia, an agreement developed by COAG requires States and Territories to be bound as parties to those WTO agreements to which the Commonwealth is a signatory. Under the Treaty between the Governments of Australia and New Zealand on joint Food Standards, ANZFA is required to ensure that food standards are consistent with the obligations of both countries as members of the WTO.

In certain circumstances Australia and New Zealand have an obligation to notify the WTO of changes to food standards to enable other member countries of the WTO to make comment. Notification is required in the case of any new or changed standards which may have a significant trade effect and which depart from the relevant international standard (or where no international standard exists).

## **2.5 International and Overseas Standards**

### **2.5.1 *Codex Alimentarius***

Being investigated

### **2.5.2 *European Commission Directive***

Being investigated

### 2.5.3 United States

Being investigated

## 3 OBJECTIVES & POLICY

### 3.1 Objectives of Development of a “stock-in trade” provision

The development of all food standard(s) is predicated on fulfilling ANZFA’s Section 10 objectives given below.

#### **ANZFA’s statutory objectives in developing food regulatory measures and variations of food regulatory measures**

- (1) The objectives (in descending priority order) of the Authority in developing food regulatory measures and variations of food regulatory measures are:
  - (a) the protection of public health and safety; and
  - (b) the provision of adequate information relating to food to enable consumers to make informed choices; and
  - (c) the prevention of misleading or deceptive conduct.
- (2) In developing food regulatory measures and variations of food regulatory measures, the Authority must also have regard to the following:
  - (a) the need for standards to be based on risk analysis using the best available scientific evidence;
  - (b) the promotion of consistency between domestic and international food standards;
  - (c) the desirability of an efficient and internationally competitive food industry;
  - (d) the promotion of fair trading in food.

The development of food standard(s) are also carried out in accordance with the competition policy principles which have been adopted by the Council of Australian Governments (COAG) and the draft Code of Good Regulatory Practice (New Zealand). These principles require the review of all business regulation to remove unnecessary obstacles to competition and an assessment of proposed regulation on all affected sectors of the community, and can be encapsulated in the phrase ‘minimum effective regulation’.

The specific objectives for this Proposal are to:

1. Protect public health and safety and provide information to consumers to enable them to make informed choices about food and to prevent misleading or deceptive conduct.
2. Not unnecessarily jeopardise the efficiency and international competitiveness of the food industry of Australia and New Zealand.

An assessment of this proposal must necessarily involve a balancing of these statutory objectives.

## 4 OPTIONS FOR REGULATION

There are two options for the implementation of Volume 2 of the *Food Standards Code*:

**4.1 Option 1:** Status Quo – Require all food prepared for sale, packed for sale, or imported for sale before or during the transition period to comply with Volume 2 of the *Food Standards Code* after the end of the transition period.

**4.2 Option 2:** Develop provisions to allow the continued lawful sale of foods produced prior to or during the transition period, after the end of the transition period.

## **5 AFFECTED PARTIES**

The parties affected by this application are set out below.

**5.1 Consumers** in Australia and New Zealand;

**5.2 Food industry**, including New Zealand and Australian manufacturers, exporters to Australia and New Zealand including multi-national manufacturers, and New Zealand and Australian importers;

**5.3 Governments** of New Zealand, the States and Territories and the Commonwealth of Australia.

## **6 IMPACT ANALYSIS**

### **6.1 Option 1**

Status Quo – Require all food prepared for sale, packed for sale, or imported for sale before or during the transition period to comply with Volume 2 of the *Food Standards Code* after the end of the transition period.

#### **6.1.1 Government**

*Advantages*

- None identified

*Disadvantages*

- Food may need to be recalled to comply with labelling requirements.

#### **6.1.2 Consumers**

*Advantages*

- Foods available for sale may contain additional information required by Volume 2 of the *Food Standards Code*.

*Disadvantages*

- Substantial amount of food that is safe to consume may cease to be available due to the recall of such products.
- The costs of recalling and relabelling affected food products is likely to be passed on to consumers.

### **6.1.3 Industry**

#### *Advantages*

- None identified

#### *Disadvantages*

- Substantial costs of determining whether foods already packaged for sale complies with Volume 2 of the *Food Standards Code*.
- For non compliant food products, the costs of recalling re-labelling these products.
- Potential for significant disruption to the food supply.

## **6.2 Option 2**

Develop provisions to allow the continued lawful sale of foods produced during the transition period, after the end of the transition period.

### **6.2.1 Government**

#### *Advantages*

- Avoid costs of conducting recalls of non-compliant products

#### *Disadvantages*

- None

### **6.2.2 Consumers**

#### *Advantages*

- Food products lawfully produced during and prior to the transition period would remain available for sale.
- Avoiding the additional costs of re-labelling foods that do not comply with Volume 2 of the *Food Standards Code* that were produced during and prior to the transition period.

#### *Disadvantages*

- Some foods may remain on the markets without the additional information required under Volume 2 of the *Food Standards Code*.

### **6.2.3 Industry**

#### *Advantages*

- Food products lawfully produced during and prior to the transition period would remain available for sale.
- Avoiding the additional costs of re-labelling foods that do not comply with Volume 2 of the *Food Standards Code* that were produced during and prior to the transition period.

#### *Disadvantages*

None identified

## **7 ASSESSMENT**

### **7.1 Assessment against objectives set out section 10 of the ANZFA Act.**

Volume 2 of the *Food Standards Code* was adopted by ANZFSO with a view to the protection of the public health and safety of the populations of New Zealand and Australia, and to providing information to consumers to enable informed choices about the food they choose to purchase and consume. Subsection 10(2) provides further matters that must also be taken into account when developing food regulatory measures. Of particular note in this instance is paragraph 10(2)(c) which requires ANZFA to have regard to the “desirability of an efficient and internationally competitive food industry”. The content of Volume 2 has already, for the most part, been adopted by ANZFSO, and at this stage it is merely the implementing of the provisions of Volume 2 that is at issue.

### **7.2 Implementation of Volume 2 of the *Food Standards Code***

In developing and adopting standards, ANZFA and ANZFSO are obliged to do so in a manner that protects the public health and safety of consumers and provides adequate information to consumers to allow informed choice and prevent false or misleading conduct. This must however be done in a manner that does not unnecessarily impact upon the efficiency and international effectiveness of the food industry in New Zealand and Australia.

It appears that since gazettal of the Standards, the issue of how food products manufactured or imported into Australia or New Zealand prior to and during the transition period, had not been specifically considered. State and Territory enforcement agencies indicated at the time to the food industry that enforcement priorities would be focused upon on the date of manufacture of the product rather than the date of sale of the product. It has become apparent that this approach does not provide the certainty that the food industry requires in order to effectively carry on their business.

### **7.3 Conclusion**

ANZFA’s preliminary view is that it would be unreasonable to require retailers to remove from their shelves food products produced during and prior to the transition period or where any change to the requirements of the *Food Standards Code* is effected. To do so would potentially mean the removal of substantial quantities of food from retailers’ shelves because the labelling requirements have changed from those in effect at the date of manufacture of the food. ANZFA considers this to be an unwarranted and arbitrary imposition on industry and ultimately on consumers to do so.

It is therefore proposed to provide a concession to food manufactured or imported into Australia or New Zealand prior to and during the transition period which would have the following effect –

- In New Zealand, food manufactured or imported prior to the end of the transition period will be required to comply with Volume 1 of the *Food Standards Code*, Volume 2 of the *Food Standards Code* or *Food Regulations 1984*. Food manufactured or imported after the transition period will be required to comply with Volume 2 of the *Food Standards Code*;
- In Australia, food manufactured or imported prior to the end of the transition period will be required to comply with Volume 1 of the *Food Standards Code* or Volume 2 of the *Food Standards Code*. Food manufactured or imported after the transition period will be required to comply with Volume 2 of the *Food Standards Code*.

In recognition that the implementation of Volume 2 of the *Food Standards Code* raises issues of a general nature in relation to foods produced prior to any amendment, it is proposed that Standard 1.1.1 also be amended to include a provision which has the effect of allowing food manufactured or imported before any amendment to the *Food Standards Code* to lawfully remain on the market after that amendment. It is envisaged that the transition period will cease on 20 December 2002.

However, ANZFA does not consider it reasonable, in the light of the objectives prescribed in section 10 of the ANZFA Act to provide an open-ended exemption for food produced or imported into Australia or New Zealand prior to 20 December 2002. A balance must be struck between consumers' ability to access information as required by Volume 2 of the *Food Standards Code* as adopted by ANZFSO in November 2000, and industry's ability to adapt in a reasonably cost effective manner to the new requirements.

In New Zealand, subsection 42(4) of the *Food Act 1981* (New Zealand), provides a 12 month limit on any concession being granted to food products which are part of the existing stock-in-trade in New Zealand of any person carrying on business there at the date of any amendments to the food regulations.

While subsection 42(4) does not apply in New Zealand in relation to food standards, this would appear to have provided a workable for the food industry. It would therefore seem reasonable in the circumstances to limit the concession being proposed in this case, to a period of 12 months. This further period would provide industry with the opportunity to identify affected products and recall and re-label if necessary.

## **8 CONSULTATION**

### **8.1 Invitation for Public Submissions**

#### **Simplified procedures**

The Authority has decided, pursuant to section 36 of the *Australia New Zealand Food Authority Act 1991*, to omit to invite public submissions in relation to the proposal prior to making a full assessment. The Authority is satisfied that omitting to invite public submissions prior to making a full assessment is warranted as the proposal deals raises matters of a mechanical nature that are of minor significance or complexity. Furthermore, the Authority considers that omitting to invite public submissions prior to making a full assessment will not have a significantly adverse affect on the interests of any person or body.

Section 63 of the Act provides that, subject to the *Administrative Appeals Tribunal Act 1975*, an application for a review of the Authority's decision may be made to the Administrative Appeals Tribunal by a person whose interests are significantly affected by the decision to omit to invite public submissions in relation to the proposal.

The Authority has completed a full assessment of the proposal, developed draft variations to Standard 1.1.1 in Volume 2 of the *Food Standards Code* and will now conduct an inquiry to consider the draft variations and their regulatory impact.

Written submissions containing technical or other relevant information which will assist the Authority in undertaking a Final full assessment on matters relevant to the, including consideration of its regulatory impact, are invited from interested individuals and organisations. Technical information presented should be in sufficient detail to allow independent scientific assessment.

Submissions providing more general comment and opinion are also invited. The Authority's policy on the management of submissions is available from the Standards Liaison Officer upon request.

The processes of the Authority are open to public scrutiny, and any submissions received will ordinarily be placed on the public register of the Authority and made available for inspection. If you wish any confidential information contained in a submission to remain confidential to the Authority, you should clearly identify the sensitive information and provide justification for treating it in confidence. The *Australia New Zealand Food Authority Act 1991* requires the Authority to treat in confidence trade secrets relating to food and any other information relating to food, the commercial value of which would be or could reasonably be expected to be, destroyed or diminished by disclosure.

## 8.2 Public Consultation

This Proposal/Full assessment Report will be released in August 2001 with a three-week consultation period. The views of the submitters will be incorporated into the development of the Inquiry Report.

## FOOD STANDARDS SETTING IN AUSTRALIA AND NEW ZEALAND

The Governments of Australia and New Zealand entered an Agreement in December 1995 establishing a system for the development of joint food standards. On 24 November 2000, Health Ministers in the Australia New Zealand Food Standards Council (ANZFSC) agreed to adopt the new *Australian New Zealand Food Standards Code*. The new Code was gazetted on 20 December 2000 in both Australia and New Zealand as an alternate to existing food regulations until December 2002 when it will become the sole food code for both countries. It aims to reduce the prescription of existing food regulations in both countries and lead to greater industry innovation, competition and trade.

Until the joint *Australia New Zealand Food Standards Code* is finalised the following arrangements for the two countries apply:

- **Food imported into New Zealand other than from Australia** must comply with either Volume 1 (known as *Australian Food Standards Code*) or Volume 2 (known as the joint *Australia New Zealand Food Standards Code*) of the *Australian Food Standards Code*, as gazetted in New Zealand, or the *New Zealand Food Regulations 1984*, but not a combination thereof. However, in all cases maximum residue limits for agricultural and veterinary chemicals must comply solely with those limits specified in the *New Zealand (Maximum Residue Limits of Agricultural Compounds) Mandatory Food Standard 1999*.
- **Food imported into Australia other than from New Zealand** must comply solely with Volume 1 (known as *Australian Food Standards Code*) or Volume 2 (known as the joint *Australia New Zealand Food Standards Code*) of the *Australian Food Standards Code*, but not a combination of the two.
- **Food imported into New Zealand from Australia** must comply with either Volume 1 (known as *Australian Food Standards Code*) or Volume 2 (known as *Australia New Zealand Food Standards Code*) of the *Australian Food Standards Code* as gazetted in New Zealand, but not a combination thereof. Certain foods listed in Standard T1 in Volume 1 may be manufactured in Australia to equivalent provisions in the *New Zealand Food Regulations 1984*.
- **Food imported into Australia from New Zealand** must comply with Volume 1 (known as *Australian Food Standards Code*) or Volume 2 (known as *Australia New Zealand Food Standards Code*) of the *Australian Food Standards Code*, but not a combination of the two. However, under the provisions of the Trans-Tasman Mutual Recognition Arrangement, food may **also** be imported into Australia from New Zealand provided it complies with the *New Zealand Food Regulations 1984*.

- **Food manufactured in Australia and sold in Australia** must comply with Volume 1 (known as *Australian Food Standards Code*) or Volume 2 (known as *Australia New Zealand Food Standards Code*) of the *Australian Food Standards Code* but not a combination of the two. Certain foods listed in Standard T1 in Volume 1 may be manufactured in Australia to equivalent provisions in the *New Zealand Food Regulations 1984*.

In addition to the above, all food sold in New Zealand must comply with the *New Zealand Fair Trading Act 1986* and all food sold in Australia must comply with the *Australian Trade Practices Act 1974*, and the respective Australian State and Territory *Fair Trading Acts*.

Any person or organisation may apply to ANZFA to have the *Food Standards Code* amended. In addition, ANZFA may develop proposals to amend the *Australian Food Standards Code* or to develop joint Australia New Zealand food standards. ANZFA can provide advice on the requirements for applications to amend the *Food Standards Code*.

### 8.3 INVITATION FOR PUBLIC SUBMISSIONS

Written submissions containing technical or other relevant information which will assist the Authority in undertaking a draft assessment on matters relevant to the application, including consideration of its regulatory impact, are invited from interested individuals and organisations. Technical information presented should be in sufficient detail to allow independent scientific assessment.

Submissions providing more general comment and opinion are also invited. The Authority's policy on the management of submissions is available from the Standards Liaison Officer upon request.

The processes of the Authority are open to public scrutiny, and any submissions received will ordinarily be placed on the public register of the Authority and made available for inspection. If you wish any confidential information contained in a submission to remain confidential to the Authority, you should clearly identify the sensitive information and provide justification for treating it in confidence. The *Australia New Zealand Food Authority Act 1991* requires the Authority to treat in confidence trade secrets relating to food and any other information relating to food, the commercial value of which would be or could reasonably be expected to be, destroyed or diminished by disclosure.

Following its draft assessment of the application the Authority may prepare a draft standard or draft variation to a standard (and supporting draft regulatory impact statement), or decide to reject the application. If a draft standard or draft variation is prepared, it is then circulated to interested parties, including those from whom submissions were received, with a further invitation to make written submissions on the draft. Any such submissions will then be taken into consideration during the inquiry, which the Authority will hold to consider the draft standard or draft variation to a standard.

All correspondence and submissions on this matter should be addressed to the **Project Manager - Proposal P248** at one of the following addresses:

Australia New Zealand Food Authority  
PO Box 7186  
Canberra Mail Centre ACT 2610  
AUSTRALIA  
Tel (02) 6271 2222 Fax (02) 6271 2278

Australia New Zealand Food Authority  
PO Box 10559  
The Terrace WELLINGTON 6036  
NEW ZEALAND  
Fax (04) 473 9942 Fax (04) 473 9855

Submissions should be received by the Authority by: **12 September 2001**.

## **9 CONCLUSION**

This Proposal/Full Assessment Report discusses issues specific to the application Volume 2 of *Food Standards Code* to “stock-in-trade”. This Report is accompanied by draft variations to Standard 1.1.1 in Volume 2 of the *Food Standards Code*, for which ANZFA seeks public comment. Responses to this Report will be used to develop the next stage of the Proposal, including drafting an Inquiry Report and recommendation to the Australia New Zealand Food Standards Council.

## **10 ATTACHMENTS**

1. Draft variations to Standard 1.1.1 in Volume 2 of the *Food Standards Code*

*Volume 2 of the Food Standards Code is varied by deleting clause 1 of Standard 1.1.1, substituting -*

**1 Application of this Code**

- (1) Unless expressly provided elsewhere in this Code, the provisions of this Code apply to food which is sold or prepared for sale in Australia and/or New Zealand; and/or imported into Australia and/or New Zealand.
- (2) Subclause (1) does not apply to food which –
  - (a) is manufactured and packaged prior to 20 December 2002; and
  - (b) complied with all relevant food standards in the case of Australia and all relevant food standards or New Zealand Food Regulations in the case of New Zealand.
- (3) Food is taken to comply with variations to this Code, made from time to time after 20 December 2002, for a period of 12 months after the commencement of those variations, if the food otherwise complied with this Code before those specific variations commenced.