ANZFA
Australia New Zealand Food Authority
TE MANA WHAKARITE KAI MŌ ĀHITERIRIA ME AOTEAROA

National Competition Policy

review of the

Food Standards Code

February 2002

Terms of Reference

1. The *Food Standards Code* (the *Code*) is referred to the *Food Standards Code* Review Committee (the Review Committee) for evaluation and report by early September 2000. The Review Committee is to focus on those parts of the *Code* which restrict competition, or which impose costs or confer benefits on business.

2. The Review Committee is to report on the appropriate arrangements for regulation, if any, taking into account the following:

   a) provisions in the *Code* (provisions) which restrict competition should be retained only if the benefits to the community as a whole outweigh the costs; and if the objectives of the regulation can be achieved only by restricting competition. Alternative approaches which may not restrict competition include quasi-regulation and self-regulation;

   b) in assessing the matters in (a), regard should be had, where relevant, to effects on the environment, welfare and equity, occupational health and safety, economic and regional development, consumer interests, the competitiveness of business including small business, and efficient resource allocation;

   c) the need to promote consistency between regulatory regimes and efficient regulatory administration, through improved co-ordination to eliminate unnecessary duplication;

   d) There should be explicit assessment of the suitability and impact of any provisions, and justification of their retention if they remain as referenced standards; and

   e) compliance costs and the paper work burden on small business should be reduced where feasible.

3. In making assessments in relation to the matters in (2), the Review Committee is to have regard to the analytical requirements for regulation assessment by the Commonwealth, including those set out in the Competition Principles Agreement. The report should:

   a) identify the nature and magnitude of the social, environmental or other economic problem(s) that the *Code* seeks to address;

   b) clarify the objectives of the *Code*;

   c) identify whether, and to what extent, individual provisions restrict competition;

   d) identify relevant alternatives to the *Code*, including non-legislative approaches;

   e) analyse and, as far as reasonably practical, quantify the benefits, costs and overall effects of regulation and alternatives identified in (d);

   f) identify the different groups likely to be affected by the *Code* and alternatives;

g) list the individuals and groups consulted during the review and outline their views, or reasons why consultation was inappropriate;

h) determine a preferred option for regulation, if any, in light of objectives set out in (2); and

i) examine mechanisms for increasing the overall efficiency, including minimising the compliance costs and paper burden on small business, of the *Code* and, where it differs, the preferred option.

4. In undertaking the review, the Review Committee is to advertise nationally, consult with key interest groups and affected parties, and publish a report.

5. In undertaking the review and preparing its report and associated recommendations, the Review Committee is to note the Government's intention to announce its responses to the recommendations, after obtaining advice from the Managing Director and, where appropriate, after consideration by Cabinet.

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Summary of the report against the Terms of Reference

1. The *Food Standards Code* (the *Code*) is referred to the *Food Standards Code* Review Committee (the Review Committee) for evaluation and report by early September 2000. The Review Committee is to focus on those parts of the *Code* which restrict competition, or which impose costs or confer benefits on business.

The Review Committee found that the *Code* in its entirety restricted competition, and that it was appropriate to focus on its overall impacts. The Review Committee also notes that the date for completion of the Review was September 2000, but that the Review has been overtaken by the adoption of a new food code by the Australia New Zealand Food Standards Council in November 2000 and the introduction of a new food regulatory system. Nevertheless, the Review Committee believed there was some value in completing the Review as it was in its final stages.

2. The Review Committee is to report on the appropriate arrangements for regulation.

(a) The Review Committee found that the regulation of food provided benefits to consumers and the community in terms of maintaining a safe food supply. While regulations did restrict competition and impose costs on industry and government, overall regulation of the food supply, in principle, was warranted. However the Review Committee did not believe that the *Code* was a cost-effective means of achieving the objectives and does not recommend that the *Code* be retained. Instead, following an analysis of the regulatory options (as required by National Competition Policy) it recommends that the Code be replaced with a new Code based on the principle of minimum effective regulation.

(b) Consistent with minimum effective regulation, the Review Committee recognised the need for the preferred option to promote consistency in the application of national standards, improve efficiency of regulatory administration, eliminate unnecessary duplication, minimise the regulatory burden on business and maximise the use of other non-regulatory measures to achieve food safety objectives.

(c) The analysis undertaken in this report assesses the suitability and impact of all regulatory options.

(d) The impact of food regulation on small business was considered in the analysis. It was noted that while the costs of complying with food regulation are of the same order of magnitude as for larger businesses, these costs represent a greater burden for small business.

3. In making assessments in relation to the matters in (2), the Review Committee is to have regard to the analytical requirements for regulation assessment by the Commonwealth, including those set out in the Competition Principles Agreement.

(a) The nature of the problem that the *Code* seeks to address is that, in the absence of government certified food standards and other interventions, consumers would have insufficient information to assess that food is safe and suitable for consumption. The magnitude of this problem is large because of the large number of food products on the market and the risks that unsuitable food would present public health and safety concerns for consumers.

(b) The ANZFA Act objectives for setting food standards in developing the *Code* are listed below.[1] They also served as a point of reference for the Review Committee in preparing this report. The objectives are :

- the protection of public health and safety; and
- the provision of adequate information relating to food to enable consumers to make informed choices; and
- the prevention of misleading or deceptive conduct.

A number of Committee members noted that the second objective is relatively ambiguous, and that ambiguity makes it more difficult to apply the principle of minimum effective regulation. Accordingly, policy advice to ANZFA on interpretation of this objective might be beneficial.

(c) The provisions of the *Code* restrict competition by prescribing the ingredients, processing aids, colourings, additives, residue limits, and compositional requirements that are acceptable for each food product. This limits the ability of firms to compete by developing new production techniques, or new products. Provisions of the *Code* also determine how each product can be described on its label.

(d) Alternatives to the *Code* identified in this report are:

- Minimum intervention – removing specific food standards and relying on the general provisions in New Zealand and State / Territory food laws. A variation of this alternative option includes an industry code of practice.
- A new code based on minimum effective regulation principles.

(e) The Review Committee undertook an analysis of the overall effects of the *Code*, and alternatives to it. A summary of this analysis is set out below.

Option 1 – removing specific food standards. This would not maintain public confidence in the food supply, nor protect consumer needs for safe and suitable food. It would not provide a suitably robust and coordinated framework for industry. It would not achieve Government's objectives, particularly the protection of public health and safety.

Option 1 (Variation) gives more flexibility to industry through codes of practice, but these may be less enforceable. It would raise competition concerns, as standards development by industry would necessarily involve co-operative arrangements amongst competitors. There are equity considerations in relation to small enterprises that may not be able to participate adequately in the development of industry codes of practice.

Option 2 – retaining the *Code*. This option would achieve government's objectives to only a limited degree and was not consistent with National Competition Policy principles. It would provide some benefits to the economy, particularly consumers who would maintain confidence in a safe food supply. However this option involves substantial and increasing costs to industry and government. The growing complexity of the regulations requires increasing resources to understand, implement and enforce them, with the regulatory burden impacting

[1] See further under "1. Objectives" in Chapter 2 below.

disproportionately on small business. For industry generally, the prescriptiveness of the regulations would stifle innovation.

Option 3 – a new code based on minimum effective regulation principles. This would achieve the Government objectives and, based on minimum effective regulation principles, would also be cost-effective. Costs of understanding, implementing and enforcing the regulations would be set at a minimum consistent with achieving the objectives. This option particularly would benefit industry and consumers, where the emphasis on generic rather than prescriptive standards would encourage innovation and broaden the range of food products available.

(f) The different groups likely to be affected by the *Code*, and alternatives, are:

- Government – New Zealand, State / Territory and Commonwealth.
- Industry – primary food producers, food manufacturers, food retailers, and food service, both big and small enterprises, supplying domestic and export markets.
- Consumers.
- The wider Community.

(g) Comments from the individuals and groups consulted focussed on the nature of a possible new code based on minimum effective regulation principles, rather than the costs and benefits of the *Code* under review.

(h) **The preferred option is Option 3** – a new code based on minimum effective regulation principles. In comparison with Option 2, Option 3 more effectively achieves the regulatory objectives and does so at a significantly lower cost. It also offers greater benefits, to industry and consumers, through facilitating greater innovation.

(i) The Review Committee believes that the preferred option would be substantially more cost-effective than the *Code*, and would involve lower compliance costs to industry and small business.

4. In undertaking the review, the Review Committee is to advertise nationally and consult with key interest groups and affected parties, and publish a report.

The Review Committee advertised in the major metropolitan newspapers in May 2000, seeking comments from all interested parties, and also mailed out a call for submissions to over 200 stakeholders.

5. In undertaking the review and preparing its report and associated recommendations, the Review Committee is to note the Government's intention to announce its responses to the recommendations, after obtaining advice from the Managing Director and, where appropriate, after consideration by Cabinet.

The Review Committee notes that NCP Review has largely been overtaken by events with the Government having decided and announced its response to an earlier 1998 Review on Food Regulation undertaken by Dr Blair at the Government's request, and an earlier standard-by-standard review by ANZFA of the Code. As a result, the governments of New Zealand and the States and Territories, and will implement a new, joint *Australia New Zealand Food Standards Code* effective from December 2000, with full implementation by December 2002.

Abbreviations used in NCP Review Report and Attachment including Appendices

ACCC	Australian Competition and Consumer Commission
AFGC	Australian Food & Grocery Council
ANZFA	Australia New Zealand Food Authority
ANZFA Act	*Australia New Zealand Food Authority Act 1991*
ANZFSC	Australia New Zealand Food Standards Council
ANZ Treaty	Agreement between the Government of Australia and the Government of New Zealand Establishing a System for the Development of Joint Food Standards [1995]
AQIS	Australian Quarantine and Inspection Service
Blair Review	"Food a Growth Industry, Report of the Food Regulation Review" August 1998, Chaired by Dr Bill Blair OAM, ISBN 0 642 34518 X
CER	Australia New Zealand Closer Economic Relations Trade Agreement
COAG	Council of Australian Governments
Code Review	standard-by-standard Review of the *Food Standards Code* undertaken by ANZFA (described in Attachment)
Code	The *Food Standards Code* as at 27 May 2000 (see "Item 7 – Date of NCP Review" below in Chapter 1)
CPA	Competition Principles Agreement
DSICA	Distilled Spirits Industry Council of Australia
Food Acts	State and Territory Food Acts
GATT	General Agreement on Tariffs and Trade
GI	Geographical Indicators
joint Code	joint *Australia New Zealand Food Standards Code* (as contained in Volume Two of the Australian Food Standards Code)
MOU	Memorandum of Understanding
NCC	National Competition Council
NCP	National Competition Policy
NFA	National Food Authority (from 1996, Australia New Zealand Food Authority)
NFA Act	*National Food Authority Act 1991* (prior to name change in 1996 to *Australia New Zealand Food Authority Act 1991*)
NFSC	National Food Standards Council (now ANZFSC)
NHMRC	National Health and Medical Research Council
QA	quality assurance
Relevant Authority	The State or Territory government department responsible for the administration of its Food Act
RIS	Regulatory Impact Statement
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
TBT Agreement	Agreement on Technical Barriers to Trade

Contd.

Volume One	Volume One of the *Food Standards Code*[2]
Volume Two	Volume Two of the *Food Standards Code*
WTO	World Trade Organization
1991 Agreement	Agreement between the Commonwealth of Australia the States the Northern Territory of Australia and the Australian Capital Territory in relation to the adoption of uniform food standards (1991)

[2] The *Food Standards Code* up to and including Amendment No. 47 (ie. up until 1 January 2000) was compiled into a document 'Food Standards Code Up to and Including Amendment 47' ISSN 1441-3809 published by Information Australia, 75 Flinders Lane Melbourne, Victoria 3000, enquiries Australia New Zealand Food Authority, 55 Blackall St Barton, ACT 2600, phone (02) 6271 2222. Since then (until end June 2001) amendments to the *Food Standards Code* have been as follows:

Amendment No. 48	was published in Gazette No. P5	27 April 2000
Amendment No. 49	was published in Gazette No. P10	22 June 2000
Amendment No. 50	was published in Gazette No. P16	17 August 2000
Amendment No. 51	was published in Gazette No. S464	24 August 2000
Amendment No. 52	was published in Gazette No. P28	7 December 2000
Amendment No. 53	was published in Gazette Nos. P30 & P31	20 December 2000
Amendment No. 54	was published in Gazette No. P17	14 June 2001

Volume Two, containing the *joint Code*, was published in Amendment No. 53.

Chapter 1 Introduction

1. Legislation Reviews under National Competition Policy

In 1995 the Council of Australian Governments (COAG) agreed to implement National Competition Policy (NCP) based on the recommendation of the National Competition Policy Review Committee chaired by Professor Fred Hilmer AO.

NCP represents a commitment by all Australian governments to a consistent approach to fostering greater economic efficiency and improving the overall competitiveness of the Australian economy.

2. How National Competition Policy Is Given Effect

NCP is being given effect through the implementation of three intergovernmental agreements signed by COAG in April 1995:

- *Conduct Code Agreement*, which committed Governments to the application of uniform competition laws;

- *Competition Principles Agreement* (CPA), which established consistent principles governing pro-competitive reform of government business enterprise and government regulation;

- *Agreement to Implement National Competition Policy and Related Reforms*, which incorporated a timetable for reform and a commitment by the Commonwealth to make additional general purpose payments to the States conditional upon compliance with the agreed reform agenda and timetable.

Following the Prime Minister's policy statement of March 1997, *More Time for Business*, the Commonwealth's legislation review requirement was extended to include the assessment of legislation that imposes costs or confers benefits on business. The aim is to reduce compliance costs and paperwork burden for business.

3. Competition Principles Agreement

As part of the CPA, all governments agreed to adopt the following guiding legislative principle:

A: Legislation should not restrict competition unless it can be demonstrated that:

- the benefits of the restriction to the community as a whole outweigh the costs; and

- the objectives of the legislation can only be achieved by restricting competition.

B: To give effect to this principle, governments have agreed to:

- review, and where appropriate, reform all existing legislative restrictions on competition against the guiding legislative principle; and

- ensure that all new legislative proposals are assessed against this principle.

C: The CPA provides that in assessing the costs and benefits of a restriction on competition, the following matters, where relevant, are taken into account:

- Government legislation and policies relating to ecologically sustainable development; social welfare and equity considerations, including community service obligations;
- Government legislation and policies relating to matters such as occupational health and safety, industrial relations and access and equity;
- economic and regional development, including employment and investment growth;
- the interests of consumers generally or of a class of consumers;
- the competitiveness of Australian businesses; and
- the efficient allocation of resources.

D: The CPA also requires that a legislation review should consider the following:

- clarify the objectives of the legislation;
- identify the nature of the restriction on competition;
- analyse the likely effect of the restriction on competition and on the economy generally;
- assess and balance the costs and benefits of the restriction; and
- consider alternative means for achieving the same result, including non-legislative approaches.

Under the CPA, all Governments made a commitment to review and, if necessary, reform legislation that restricts competition, by the year 2000. In November 2000, CoAG agreed to extend this deadline to 30 June 2002.

4. NCP Review Committee

The NCP Review Committee comprised representatives of the Departments of Health and Ageing; Treasury; Agriculture, Fisheries and Forestry; Industry, Tourism and Resources (including the Office of Small Business); and (chaired by) the Australia New Zealand Food Authority (ANZFA). It is normal practice in such NCP reviews to have agency involvement to provide practical insight into the agency's processes and policies.

The purpose of the NCP Review is to evaluate the *Australian Food Standards Code* - the *Code* - against the NCP framework that is embodied in the Terms of Reference.

5. Consultation

Term of reference 3(g) - list the individuals and groups consulted during the Review and outline their views, or reasons why consultation was inappropriate; and

Term of reference 4 - In undertaking the review, the Review Committee is to advertise nationally, consult with key interest groups and affected parties, and publish a report.

During the course of its standard-by-standard review of the *Code*, ANZFA sought comment from stakeholders on each of the standards reviewed. In March 2000, ANZFA commenced a process of consultation on the proposed joint *Australia New Zealand Food Standards Code*, which comprised all the standards reviewed, and several new standards developed since the establishment of the Authority[3].

Subsequently, ANZFA advised stakeholders of the NCP Review through a notice on its website posted on 26 May 2000, and an advertisement in national newspapers on 27 May 2000, in accordance with the requirements of the Terms of Reference. In addition, ANZFA included the notice and call for submissions in a mailout to over 200 stakeholders. The notice and advertisement provided background on the NCP Review, and invited all interested persons to make submissions by 7 July 2000 and comments on the likely effects on competition and business of the legislative restrictions imposed by the *Code*, including the potential regulatory impact on consumers, industry, government and the wider community.

Ten organisations made submissions, which are outlined at Appendix 3 of the Attachment. None of the submissions addressed the NCP Review of the *Code*, but considered issues relating to then-proposed joint *Australia New Zealand Food Standards Code.*

6. Structure, Scope and Approach of the NCP Review

Chapter 1 provides background on Legislation Reviews under NCP, the NCP Review Committee and the Terms of Reference for the NCP Review.

Chapter 2 assesses the *Code* against competition principles, including a cost benefit analysis of options to address restrictions in the *Code*. Conclusions are drawn and recommendations made.

The Attachment to the report outlines the standard-by-standard review of the *Code*, undertaken by ANZFA, and the joint *Australia New Zealand Food Standards Code* developed by that process and adopted by the Australia New Zealand Food Standards Council (ANZFSC) on 20 November 2000.

Appendix 1 of the Attachment outlines the policy framework for ANZFA decision making in relation to Food Standards.

Appendix 2 of the Attachment provides background to the standard-by-standard review undertaken by ANZFA, the objectives of the review, policies underpinning the review, and other

[3] This document included standards equivalent in substance to Standards A17 - Irradiation of Food, A18 - Food produced using Gene Technology, and A19 - Novel Foods set out as Part 1.5 of the *new Code*, but these Standards do not fall within this NCP Review. The Proposal dealing with 'Health Claims' (P153) is still being finalised by ANZFA.

regulatory mechanisms. It also provides a summary of the changes incorporated in the joint *Australia New Zealand Food Standards Code*.

Appendix 3 of the Attachment outlines consultation undertaken during this NCP Review. The decision was taken to include Appendix 3 in the Attachment because the submissions all related to the proposed *joint Code* (as noted above under "5 Consultation").

7. Date of the NCP Review

The NCP Review report is based on the legislation (including the *Food Standards Code*) that existed at the date of publication of national advertisements calling for submissions to the Review, that is 27 May 2000. In this Report, the term "the *Code*" means the *Food Standards Code* as at 27 May 2000 unless the context demands otherwise. In any event, the term "the *Code*" in this Report should not be read to include Volume Two of the Australian Food Standards Code (Volume Two contains the new joint *Australia New Zealand Food Standards Code*).

Chapter 2 - Assessment of the *Food Standards Code* against National Competition Principles

Introduction

There has long been a strong community consensus on the need for food standards. The first food standards in Australia were promulgated in NSW in the 1830s, largely to prevent consumer fraud and deception. Food law and standards were developed within the separate jurisdictions, often for trade protection purposes. Subsequently, the National Health and Medical Research Council (NHMRC) became involved in developing and recommending standards from the 1950s. The NHMRC Food Standards Committee evaluated issues and provided advice on relevant food standards. The NHMRC recommendations were also adopted as regulations, often with minor changes, by the Parliaments in each State and Territory. They formed the basis for the *Code*.

When food standards were first introduced, all major food groups were standardised, and the general approach was to seek to standardise all foods. Some traditional foods were characterised by industry innovation resulting in a plethora of standards for different market segments. An example is dairy, where there are 40 different standards for cream. Other foods were relatively stable and so had basic compositional requirements only. More recently, new foods and cuisines have been introduced and have gained acceptance at a pace that has outstripped the capacity of the *Code* to develop appropriate compositional standards. As a consequence, almost half of the foods on the market are now not standardised under the *Code*.

The *Code* comprises a mixture of approaches to standard setting. Some standards regulate individual food commodities. Other standards apply to all foods or a range of related foods. The *Code* lacks consistency in approach and in drafting, a reflection of its piecemeal, ad hoc historical development over many years. Although highly prescriptive, it can be difficult to enforce by State and Territory enforcement agencies.

1. Objectives

Term of Reference 3(b) - clarify the objectives of the Code

The *Code* reflects the objective of the States, Territories, and the Commonwealth to address the situation that existed prior to the enactment of the ANZFA Act in 1991.[4]

A major criticism of previous food regulatory systems had been the failure to enunciate and apply clear and agreed objectives when developing and varying food standards. To remedy this deficiency, the ANZFA Act when first enacted included a list of objectives that the Authority was required to meet when developing and reviewing food standards. This allowed all parties affected by the food regulatory system to know in advance the objectives that would be applied in assessing food standard applications and variations. The ANZFA Act provided an express mandate for ANZFA to consider both consumer and industry needs in the assessment process.

[4] At that time the ANZFA Act was called the *National Food Authority Act 1991*.

The objectives of ANZFA in developing standards and variations to standards are provided for by section 10 of the ANZFA Act as follows:

> **"10 Objectives of the Authority 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." [5]

Accordingly, the objectives of the *Code* largely should be predetermined by the section 10 objectives. A number or observations are relevant here.

First, the statutory section 10 objectives can be altered only by Parliament.

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[5] This is section 10 as at 27 May 2000 and as provided for by Act No. 200 of 1999, commencing on 23 December 1999.

The history of section 10 is as follows. Section 10 appeared in the ANZFA Act in 1991 (Act No. 118 of 1991) (then the *National Food Authority Act 1991*), as follows:

> "**Objectives of the Authority in developing food regulatory measures and variations of food regulatory measures**
>
> 10. The Authority, in developing standards and variations of standards, must have regard to the following objectives in descending priority order:
>
> (a) the protection of public health and safety;
>
> (b) the provision of adequate information relating to food to enable consumers to make informed choices and to prevent fraud and deception;
>
> (c) the promotion of fair trading in food;
>
> (d) the promotion of trade and commerce in the food industry;
>
> (e) the promotion of consistency between domestic and international food standards where these are at variance, providing it does not lower the Australian standard."

The words "providing it does not lower the Australian standard" were deleted from section 10 as from 1 July 1996 by Act No. 152 of 1995.

Section 10 of the ANZFA Act was subsequently repealed and substituted by new section 10 provided for by Act No. 200 of 1999, commencing on 23 December 1999. Since that date and through to the reference date for this NCP Review Report, that is 27 May 2000, section 10 has not altered.

Secondly, even though the *Code* should be a manifestation of the section 10 objectives, an amended section 10 inherits the *Code* from earlier section 10 objectives.

Thirdly, and in spite of the previous observation, the section 10 objectives have consistently been primarily concerned with public health and safety. Nevertheless a large proportion of the *Code* has survived a number of amendments to section 10. It follows that significant parts of the *Code* may not be relevant to contemporary statutory objectives as set out in section 10 of the ANZFA Act.

Finally, some of ANZFA's objectives as set out in Section 10 of the ANZFA Act are open to interpretation and therefore clarification of ANZFA's objectives may be necessary to guide in the application of the principle of minimum effective regulation. For example, the objective to provide adequate information about food to enable consumers to make an informed choice is relatively ambiguous. What level of information is adequate? What is the scope of information that should be provided? Should it be limited to information that enable consumers to determine whether the food is safe and suitable for consumption (eg. nutrition content), or should it extend to other qualitative information (eg. country of origin information)? What are the criteria for determining the scope of information?

The Committee did not address these policy issues.

2. Nature of the restrictions created by the *Food Standards Code*

Term of Reference 2 - the appropriate arrangements for regulation; and

Term of Reference 3(c) - identify whether, and to what extent, individual provisions restrict competition

The *Code* represents a legal framework that sets a range of generic limits on the use of ingredients, processing aids, colourings, additives, residue limits, and compositional requirements. Specific standards impose requirements on some food groups or individual products. These specific requirements may include permissions and limits for food additives, processing aids, contaminants, ingredients and labelling. Labelling requirements are set for both packaged and unpackaged, including specific mandatory warning or advisory statements. Advertising and marketing are affected by prohibitions on health claims, unless they are specifically permitted.

It was recognised at the time of the establishment of the National Food Authority (NFA) under the "Agreement between the Commonwealth of Australia the States the Northern Territory of Australia and the Australian Capital Territory in relation to the adoption of uniform food standards (1991)" (1991 Agreement) that there were many differences and discrepancies between the original *Australian Food Standards Code* based on recommendations made by the National Health and Medical Research Council and the standards adopted by each jurisdiction. These were seen as a barrier to effective interstate trade. The 1991 Agreement also reflected government moves at the time for greater deregulation and the removal of barriers to competition.

Under the 1991 Agreement, the *Australian Food Standards Code* is incorporated, by reference and without amendments, as food standards in force under the food laws of each State and Territory. This ensures a single regulatory approach that results in uniform consumer protection as well as consistent enforcement and compliance for industry.

Issues that the *Code* seeks to address

There are over 6,500 businesses making food. Hundreds of thousands of businesses handle a range of foods. Those businesses range from service stations to newsagents, from restaurants to community organisations like church fetes, and from butchers to bread shops and supermarkets. The *Code* seeks to address a number of situations that, if left unregulated, would fail to deliver sufficient protection of public health and safety, consumer confidence, and certainty for industry. The market is diverse and must have effective regulatory and non-regulatory arrangements to meet community expectations of ensuring that:

(a) there is a safe food supply; and

(b) consumers are not mislead or deceived about the food that they purchase.

The *Code* seeks to ensure that unsafe food does not make its way to consumers by providing for a range of food standards.

The *Code* imposes prescription to manage misleading or deceptive representation or conduct. Although the Food Acts of each State and Territory contain fair trading provisions, they are general in nature. The *Code* seeks to remove uncertainty for industry by providing a clear framework for the manufacture and distribution of safe food and prescribes the most significant circumstances in which representations would be misleading or deceptive.

Current standards

Standards that restrict competition may be classified broadly as follows:

(a) Commodity standards that regulate specific foods such as chocolate or yoghurt; and

(b) General standards that apply across a range of foods.

Commodity standards

Standards that regulate particular commodities form the bulk of the *Code* (see Box below). These standards are contained in Parts B to R of the *Code*. They are often called commodity standards because they regulate particular foods. Because these standards are largely self contained, they are also referred to as 'vertical standards'. The restrictions arise because these standards define, for each specific food, the nature of that food. A commodity standard may also specify the food's composition, what must or may be added to the food and in what quantities if necessary. Ingredients are generally prohibited unless specifically permitted in the commodity standard.

The *Australian Food Standards Code* and specific commodities

As can be seen, the *Code* is largely comprised of specific commodity standards:

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Part A - General Standards
Part B - Cereals and Cereal Products
Part C - Meat, Canned Meat and Products Thereof
Part D - Fish and Fish Products
Part E - Eggs and Egg Products
Part F - Vegetables
Part G - Edible Fats and Oils and Related Products
Part H - Milk and Other Dairy Products
Part I - Gelatine and Jelly Products
Part J - Spices, Condiments, Sauces, Vinegar and Pickles
Part K - Sugar and Related Products, Honey, Confectionery, and Icing Mixture
Part L - Ice Cream and Related Products
Part M - Nuts and Nut Products
Part N - Fruits and Fruit Products
Part O - Non Alcoholic Beverages
Part P - Alcoholic Beverages
Part Q - Tea, Coffee, Chicory, Cocoa and Related Products
Part R - Special Purpose Foods
Part S - Miscellaneous Provisions
Part T - Temporary Standards

In addition to the above, numerous Standards are contained within each Part of the *Code*.

In effect, these standards prescribe the general 'recipe' for making that particular food. They may also contain additional requirements specific to the food, including processing and labelling requirements and microbiological standards and prescribed testing methods. A manufacturer will be prevented from calling a food by a particular name unless it complies with the 'recipe' as set out in the standard.

The *Code*, however, permits foods to be mixed to create new foods, the components of which should comply with the specific standards regulating the individual ingredients.

General Standards

Unlike commodity standards, there are other generic standards that regulate requirements that apply to all foods, or a range of related foods. These are often called 'horizontal standards'. However, a number of horizontal standards were not exhaustive in their application. Other specific commodity standards also had to be consulted to obtain a full understanding of the regulatory requirements.

Many opponents of horizontal standards believe that such standards represent virtual deregulation by removing any compositional requirements or limits. This allows manufacturers total discretion in how a food is produced, thereby depriving consumers of the protection offered by specific commodity standards. However horizontal standards may well be as prescriptive as specific commodity standards, the difference being in the way they are drafted rather than the rules they apply.

The standards contained in Part A of the *Code* apply across all foods or a range of foods. These include labelling requirements and standards for additives and contaminants in food. Like the standards for individual foods contained in Parts B to R of the *Code*, these standards operate on the

basis of prohibition and are no less prescriptive. In fact the permissions contained in Standards A7, A8 and A9 of the *Code* are duplicated in the standards for individual foods in which the use of these additives is allowed.

Standard S1 - Miscellaneous Foods, is a less prescriptive horizontal standard. It sets the requirements for foods not regulated individually or foods that are mixtures of other standardised or whole foods. It permits manufacturers to develop products using standardised foods as the "building blocks" and contains permissions on the use of food other than the vertical standards. The majority of processed foods available on the market actually fall within this Standard.

General standards that restrict competition cover areas such as:

- labelling requirements;
- additives and processing aids;
- maximum residue limits; and
- prohibited botanicals (herbs and plants that cannot be used in food).

The requirements in these standards specify things like substances these can or cannot be used, and specific labelling information.

3. Impact on stakeholders created by the restrictions

> *Term of reference 3(a) - identify the nature and magnitude of the social, environmental or other economic problem(s) that the Code seeks to address;*
>
> *Term of Reference 3(c) - identify whether, and to what extent, individual provisions restrict competition; and*
>
> *Term of reference 3(e) - analyse and, as far as reasonably practical, quantify the benefits, costs and overall effects of regulation and alternatives identified in (d);*

To a large extent the *Code* represents a series of standards to form an aggregated code. It has grown incrementally over many years. As a result, many provisions are anachronistic. There is considerable duplication within the *Code*. The *Code* reflects traditional western dietary habits. Although it is published as a *Code*, it does not contain any unifying set of principles and is in fact a collection of gazette notices published as a single document.

Standard setting has a direct cost on food producers and processors as a result of the time that the process necessarily involves, the cost of participating in the process and the cost of compliance. Whilst a consistent process has generally been used in setting standards, the resultant *Code* does not represent a coherent and consistent body of regulation. Major problems, which are created for business, governments and consumers by the restrictions, include the following.

(a) Arbitrary prescriptiveness and divisions

The *Code* contains many instances of divisions between and within food groups. This can create niches for food in the marketplace. The divisions can be arbitrary and unrelated to the ANZFA's current section 10 objectives.[6]

Examples include the standard for chocolate, which defines dark, milk and white chocolate but does not permit mixing of these as ingredients to create new forms of chocolate. Such innovations by chocolate manufacturers would be technically unlawful under the *Code*.

The standard for yoghurt describes normal yoghurt, reduced fat and low fat. The specific requirements for each category leaves gaps between the three categories. As products have developed in response to market demands, manufacturers have had to resort to describing their product as something other than yoghurt (eg. YoBaby or Yoplait).

Standard H2 - a Case Study: When is cream not cream

The standard for cream (H2) describes over 40 types of cream as prescribed names. For example:

- cream, rich cream, light cream, extra light cream, reduced cream, pasteurised cream, pasteurised rich cream, pasteurised light cream, pasteurised extra light cream, pasteurised reduced cream;
- sour or cultured cream, sour or cultured rich cream, sour or cultured light cream, sour or cultured extra light cream, sour our cultured reduced cream
- thickened cream, thickened reduced cream, thickened light cream, ultra heat treated thickened cream, ultra heat treated thickened reduced cream, ultra heat treated thickened light cream;
- scalded cream, devonshire cream, clotted cream;
- whipped cream, whipped rich cream, whipped light cream, whipped extra light cream, whipped reduced cream, whipped thickened cream;
- ultra heat treated cream, ultra heat treated rich cream, ultra heat treated extra light cream, ultra heat treated reduced cream;
- ultra pasteurised cream, ultra pasteurised rich cream, ultra pasteurised light cream, ultra pasteurised extra light cream, ultra pasteurised reduced cream, ultra pasteurised thickened cream, ultra pasteurised thickened reduced cream, ultra pasteurised thickened light cream, ultra pasteurised whipped thickened cream; and
- dried thickened cream.

Under the old Code this level of prescription stifles competition and innovation. Despite the exhaustive attempt by ANZFA to define and regulate the scope of the many types of cream available to consumers, under Standard H2, manufacturers continued to innovate and many of their

[6] See section 10 of the ANZFA Act.

products fell between these requirements for cream level and technically were in breach of the *Code*.

These arbitrary standards also lead to anomalies in enforcement. Foods falling within a commodity standard are easier to enforce for compliance than mixed foods complying with Standard S1.

(b) Inconsistent labelling

Standard A1 addresses general labelling requirements. However, commodity standards also include individual labelling requirements. The *Code* labelling requirements are inconsistent and difficult to comprehend which increases compliance costs.

Prescribed names - a Case Study

In the Preliminary Provisions, clause 3(a) states that if a name of a food is included in the *Australian Food Standards Code*, then it is a prescribed name and must be used to describe that food on labels. However, there are exceptions. Although there are standards mandating requirements for canned products, the term 'canned' is excluded, as it is obvious to the consumer that a product in a can is 'canned'. So tomatoes in a can are not 'canned tomatoes' but 'tomatoes'. Further, miscellaneous foods regulated under Standard S1 are not assigned a prescribed name. Although clause 3(a) purports to cover all foods - with exceptions set out in the same Standard - in practice around 50% of foods are regulated as miscellaneous foods under Standard S1.

This lack of clarity makes it more difficult for industry to understand regulatory requirements. It takes longer to bring labels into compliance, and may require legal or consultancy advice, all adding to compliance costs.

(c) Arbitrary permissions for additives and other ingredients

Although the permissions for additives and other ingredients should be science based, in fact many have been adopted over time without the benefit of adequate scientific investigation. In some cases the information was simply not available and a low precautionary limit was set. In many instances the permissions for food additives are duplicated in Standard A3 and individual commodity standards. For industry to change an existing arbitrary permission in response to improvements in scientific knowledge, or new substances of use to the manufacturing process, takes time, effort and money.

Standard A3 - Case Studies

Standard A3 purports to regulate food additives. In reality, food additives are regulated by individual commodity standards and Standard A3 is a grab-bag standard covering many unrelated issues which have been assigned to that Standard because they do not fit readily elsewhere. For example, Standard A3, contrary to its title “Food Additives”, regulates such products as frozen avocado pulp, canned soups, chilli pastes, imitation cream, dips containing more than 700g/kg of dairy products, scrambled eggs mix, textured vegetable protein, toppings. As a result, this standard contains arbitrary distinctions, becomes very complex and can be confusing.

It is not obvious what advantage the consumer gains from these arbitrary distinctions that have occurred over the last twenty years.

- Dairy dips are permitted to use sorbic acid as a preservative, if they have a fat content of greater than 700gm per kg. But at less than 70%, say 65%, they can include benzoic acid as they are non-dairy dips and Standard A3 provides for the inclusion of benzoic acid in non-dairy dips.

- Sauces are not permitted to include preservatives, so sauces containing preservatives are styled 'dips'. Both are safe foods.

- Frozen avocado pulp may contain preservatives, but not unfrozen pulp. Chilli paste may contain preservative but not chilli sauce. If chilli paste is included in a chilli sauce, then the sauce as presented to the consumer may contain preservative under carry-over rules. If avocado pulp which was once frozen is included in a food, then it may include preservative, even though the food as presented to the consumer is unfrozen.

- Chocolate topping has permission to include preservative but not chocolate.

There is a case for a consistent, comprehensive standard covering additive permissions for foods.

(d) Inflexibility and rigidity

Commodity standards define particular foods. A new product may present no health and safety or consumer fraud and deception issues, and may be developed in response to market demand. But if it does not conform to a published commodity Standard it cannot be named as a particular food. If the new product does not fit the definition and uses the prescribed name of the food, it is an illegal food. If it does not use the prescribed name, it may be a mixed food or an unstandardised food. Examples include new flavoured dairy products, which cannot be called flavoured milk because they do not contain the required proportion of milk, or new fermented milk products that cannot be named yoghurt because they contain water or too little fat.

There are no clear benefits in such arbitrary definitions under the old Code, which represent a disincentive to innovation and impediment to marketing of new products (in that it is more difficult to advise the consumer about the product and its benefits compared to other products).

A good example is the distinction that the *Code* draws between a soft drink and a fruit drink. Under Standard O4, a soft drink is defined as: 'a product prepared from water, mineral water or mineralized water, and flavourings'. The compositional requirements of Standard O4 permit the addition of fruit juice to a soft drink, however, the labelling provisions of the same standard prohibit the name of a fruit to be included on the label (except in obscure places such as a statement of ingredients or a trade name). A soft drink becomes a fruit drink when the drink contains 5% of fruit and is then subject to Standard O9. It would be illegal to label a drink containing 5.1% fruit as a soft drink and a drink which contained 4.9% fruit as a fruit drink. Unlike Standard O4, Standard O9 makes it mandatory to include the name of the fruit from which the drink was prepared. In addition, the additive permissions are also different for soft drinks and fruit drinks.

Standard B1, which regulates bread, is based on a western recipe for bread. A failure to comply with the prescriptive recipe means that the product cannot be sold as bread irrespective of any consumer demand for the product. Standard B1 even goes so far as to prescribe the symmetry which a finished loaf of bread must have. This standard has been superseded by the modern, multicultural society in Australia which demands a highly varied range of breads.

(e) Coverage

Almost half of the foods on the market are unstandardised foods, subject to the general provisions of the *Code* and Standard S1 - Miscellaneous Foods. If a manufacturer develops a new product that does not conform to current standards, then the available regulatory choice is to create a new standard or vary an existing standard, or seek to conform to Standard S1. The first two approaches are time-consuming to the manufacturer and create a strict regulatory regime; the third course is easier but defeats the original intent of the Standard S1.

There are no clear benefits in such arrangements, which represent a disincentive to innovation and impediment to marketing of new products (in that it is more difficult to advise the consumer about the product and its benefits compared to other products). Notwithstanding these disincentives, many of the non-standardised products have managed to establish positions in the market place.

(f) Complexity and difficulty of navigation

The *Code* is not an easy document to comprehend or use. The many individual standards are poorly set out and inconsistent in approach. There are specific and at times arbitrary permissions and exclusions. General labelling and additive requirements are augmented in individual commodity standards. It is not clear whether the general requirements prevail over individual commodity standards where conflict is apparent. This creates enforcement and compliance uncertainties thereby increasing compliance costs on business that flow through to the consumer by way of higher prices.

For example, Standard N1(b) says that fruit for manufacturing purposes must include a statement – 'For manufacturing purposes only'. However, Standard A1(2C) exempts all foods from statements otherwise required if there is no direct sale to a consumer. This Standard lists exceptions to this rule, but N1(b) is not included. Such anomalies are endemic in the Code and create an excessive reliance on lawyers to understand it.

The *Code* also contains much needless repetition. Standard H2, which regulates cream, uses the phrase "pasteurised cream, pasteurised rich cream, pasteurised light cream, pasteurised extra light cream and pasteurised reduced cream" seven times.

(g) Fosters uneven enforcement

Commodity standards seek to establish clear regulation of a specific food. They are easier to enforce in many cases. However, the arbitrary nature of compositional requirements can make it impossible for an enforcement agency to differentiate between minute differences between similar products, such as the soft drink versus fruit drink example above.

Despite the problems in monitoring compliance with commodity standards, the added level of complexity of general standards, makes enforcement of food and beverages subject to these standards even more problematic. The unintended effect of the *Code* is to focus enforcement action on those foods (around 50% of the total market) that are governed by commodity standards.

(h) Lacks transparency for consumers

The *Code* is a dense document, which is difficult to understand. It is continually amended and shows the impact of drafting over a long period by many different people. It is largely impenetrable to all but the legal profession, the regulator and the industry regulatory affairs specialists. It was not drafted for use by consumers who by and large do not understand the purpose of the *Code* and what

part of the food supply it regulates. In addition, labelling requirements are not generally aimed at fostering consumer understanding of the product.

As a tool to provide consumers with information to enable them to make informed choices about food (ie. an ANZFA objective), the *Code* is less than satisfactory. Consumers want information. The *Code* does not deliver this information. On the other hand, it is unclear to what extent regulation is required to force manufacturers to satisfy consumer needs for product information, or whether these needs could be better satisfied through other means. Clarification of the scope of ANZFA's section 10 objectives may be an important precursor to identifying an appropriate response.

(i) Inconsistent with modern regulatory practice

The *Code* is inconsistent with NCP principles in that the restriction on competition imposed by the *Code* outweighs the benefits to the community of those restrictions. The *Code* is inconsistent, confusing, and overly prescriptive in some areas, yet leaves almost half of the foods unstandardised and therefore regulated unevenly by State and Territory enforcement agencies.

The *Code* does not focus on the production and supply of safe food. It is concerned more on following a recipe approach to food manufacture.

(j) Duplication

The *Code* has numerous duplications for permissions and restrictions in general standards and commodity standards. In addition, the *Code* duplicates other, more pertinent, regulation. For example, the *Code* sets out maturation requirements for spirits, which are in fact addressed in the Commonwealth *Wine and Brandy Corporation Act 1980*. Such duplication is confusing and difficult to comprehend.

(k) Barriers to Trade

The framework and arbitrary nature of the *Code* is not conducive in helping Australia and New Zealand discharge their obligations as members of the World Trade Organization (WTO). The historical lack of risk-based decision-making leaves some provisions in the *Code* open to challenge under contemporary international trade law principles. Arbitrary restrictions prevent easy flow of some product across the borders into Australia and reinforce historical approaches that sometimes used food standards (as a trade barrier) to protect local product from foreign competition.

Conclusion

In essence the *Code* is inflexible, arbitrary and inhibits innovation. It applies to a shrinking proportion of the total number of foods on the market. There is a need for regulation to ensure a safe food supply and maintain informed consumer confidence consistent with minimum regulation.

Innovate or perish

Diversity and development is the name of the food game. There are currently 24,000 foods on Australian supermarket shelves. 75% of these items were introduced within the last five years.

A study of a New Zealand supermarkets shows it has 7,000 items on its shelves. 5,100 new items were offered in 1999; 10% made it to the shelves. 120 - 200 are removed every 10 weeks. 1% will survive after five years.[7]

4. Stakeholders

Term of Reference 3(f) - identify the different groups likely to be affected by the Code and alternatives;

The NCP Review Committee identified the following groups as likely to be significantly affected by the *Code*:

- Government – Commonwealth, State/Territory, New Zealand and local;
- Industry – primary food producers, food manufacturers, food retailers and food service businesses both big and small supplying either the domestic or export market;
- Consumers; and
- the wider community.

Key stakeholders in the *Code* are enforcement agencies, consumers and business. All share concerns about public health and safety, and misleading and deceptive conduct. Government and business have the additional interest of a *Code* that gives more scope for innovation within clear boundaries. Consumers have an interest in the regulation of food safety and the provision of more information and greater choice. Governments and business have an interest in reducing the cost of complying with regulation, and of ensuring that there is an appropriate level of regulation to meet community expectations. The wider community has an interest in efficient, enforceable regulation that meets community objectives.

5. Alternative approaches

Term of Reference 3(d) - identify relevant alternatives to the Code, including non-legislative approaches;

Term of Reference 3(e) - analyse and, as far as reasonably practical, quantify the benefits, costs and overall effects of regulation and alternatives identified in (d); and

Term of Reference 3(i) - examine mechanisms for increasing the overall efficiency, including minimising the compliance costs and paper burden on small business, of the Code and, where it differs, the preferred option.

Three possible options are considered below, namely:

- Option 1, minimum intervention (with a variation of including some intervention in the form of industry codes of practice);
- Option 2, the status quo; and

[7] Presentation to ANZFA: Professor RJ Winger, Professor of Food Technology, Massey University.

- Option 3, a new code based on minimum effective regulation principles.

These options are now examined taking into consideration the costs and benefits to stakeholders. Due to difficulties in quantifying the outcomes, the following analysis is qualitative rather than quantitative in nature.

Option 1: Minimal Food Standards - Greater reliance on Food Laws, as well as trade practices, fair trading and other legislation

This approach would remove the need for specific food standards. It would rely on current general provisions in the Food Acts (and those of the Model Food Act to be incorporated into the Food Acts), which require that food must not be adulterated, damaged, deteriorated or perished, and must be safe for human consumption. It would use general provisions in the Food Acts, fair trading law and the Commonwealth *Trade Practices Act 1974*, which require that products (food) must not be presented in a manner that is false, misleading or deceptive. State/Territory agricultural legislation would be used to manage residues of agricultural and veterinary chemicals in food, and environmental and land use laws for managing environmental contaminants. Self-regulation including possible industry codes of practice would amplify legislation where appropriate.

Option 1: Cost Benefit Analysis

Benefits

Government

Commonwealth. Relying solely upon the State and Territory Food Acts, fair trading laws and national trade practices law would reduce costs by making ANZFA redundant resulting in a saving of around $14 million a year.

Industry

Large enterprises. Industry would benefit from flexibility to respond more quickly to changing production techniques and consumer demands. Reduced compliance costs resulting from simplified regulatory arrangements should make firms more globally competitive.

Small and medium enterprises would benefit from flexibility to respond more quickly to changing production techniques and consumer demands. Reduced compliance costs should make firms more profitable.

Retailers should benefit from flexibility and increased product responsiveness to consumer demands, including a greater range of niche products being developed. Retailers would also be able to introduce their own quality assurance systems with minimum government interference.

Consumers

This option would generally benefit consumers owing to competitive market forces being able to operate more freely. Consumers would benefit through lower prices from increased competition. The extent of the benefit would depend on how much the cost savings to industry are passed on. Consumers would also benefit from more innovation, greater choice and improved quality of food products.

Costs

Government

Commonwealth. The Government believes it has a strong social obligation to protect the health and safety of the Australian community. Self-regulation and reliance on general food law is not likely to adequately meet the Government's objectives, or the community's expectations, to protect public health and safety, and there is a real danger of fragmentation of enforcement.

It would transfer responsibility for managing critical issues to other agencies in a fragmented and uncoordinated manner, and dissipate the considerable expertise in food safety issues that has been developed over many years. The Australian Competition and Consumer Commission (ACCC) is likely to incur increased costs as a result of a more significant enforcement role. At present enforcement is a State and Territory matter.

Australia would risk becoming a completely open market and a dumping ground for unregulated, unsafe product. Although offsetting this risk, is the trend for the major retailers to introduce their own quality assurance schemes.

This option entails a higher level of risk to public health and safety than the status quo, which would become evident through higher rates of food-borne illness. Costs to government of providing health care are likely to increase.

State / Territory and local Government. As the Code has been adopted unevenly by States and Territories, it is unclear what the full impact of removal of the Code would be on State/Territory and local governments.

The offence provisions of the Food Acts are often general in nature offering little in the way of guidance as to what constitutes adulterated food, unsafe food, misleading or deceptive conduct and the like. The prescription contained in the *Code* is a resource to States and Territories that relieves enforcement agencies of the cost of developing their own regulations to add certainty to the general offences in the Food Acts. Costs to States and Territories for the development of State-based food standards may grow if this resource is eliminated, and divert resources from the important task of enforcement. States and Territories could act cooperatively to ameliorate these issues, but this is unlikely to fully compensate for these costs.

The absence of a *Code* is likely to see a greater responsibility placed on agencies such as the ACCC and State/Territory Fair Trading Departments to fill the void left by the absence of coordinated national regulation

This option entails a higher level of risk to public health and safety than the status quo, which would become evident through higher rates of food-borne illness. Costs to government of providing health care are likely to increase.

Industry

Large enterprises – reliance on fair trading and state-based regulation may impose additional regulatory costs on industry because of the potential for even more fragmentation and inconsistency than currently exists if standards are developed independently in each State and Territory

jurisdiction. Costs could be particularly high for businesses that operate across jurisdictions and also export product.

Minimal regulation would mean that businesses would have to assume a greater responsibility for safety and public health issues. Minimal regulation combined with the use of industry codes of practice, would also place a greater onus on industry to monitor its compliance with "industry-based" standards and safety outcomes, including the management of food-related threats to public health. These tasks would be made more difficult by the loss of access to the considerable scientific expertise built up within ANZFA.

Offsetting part of these costs is the growing trend for food businesses and retailers to introduce quality assurance (QA) procedures, and so the need for the development of further codes of practice and compliance monitoring compliance should be mitigated. Nevertheless, government standards provide driven impetus for clarity and certainty of QA and safety requirements.

Further discussion on industry codes of practice is provided in the analysis of Option 1 (Variation) presented below.

Finally, as government compliance arrangements become less effective and cross-jurisdictional inconsistencies become more prevalent, an increase in the number of foodborne illnesses occurring becomes more likely. This could lead to a loss of confidence by consumers and Government (domestically and internationally) in Australian food products.

Most of these points apply equally to small and medium enterprises and Australia's food retail sector. However, for small and medium enterprises the problems are magnified. Many would find it more difficult to identify risks as Commonwealth Government information and education processes are withdrawn, although this problem could be overcome if State / Territory Governments moved to fill this role.

Consumers

An increase in the incidence of foodborne illness may result if State /Territory Governments fail to maintain and augment responsibility for food safety issues or food businesses fail to introduce satisfactory QA procedures to fill regulatory gaps. Consumers could then be expected to lose a degree of confidence in product safety. In addition, increased food-borne illness would result in significant social and economic costs to individuals, the community and the nation.

Costs incurred by industry through its assuming responsibilities for developing and implementing QA procedures and industry based standards could be passed on to consumers. There is a potential for such costs to be passed on many times over. This might occur in the event of a number of industry bodies developing their own QA systems, standards or codes of practice.

There would be a loss of confidence in the food industry as there is likely to be less focus on public health and safety, little consistency in presentation of products in the marketplace, a lack of independent safety assessments for substances added to foods, and fewer controls on claims about foods.

This option does not address a fundamental source of market failure: the information asymmetry between consumers and producers. Where consumers make poor choices, due to a lack of relevant information about food products, any adverse outcomes would be a cost to consumers.

Conclusion on Option 1:

Option 1 would lead to less public confidence in the food supply. It would not adequately protect consumer needs for safe and suitable food or provide information to enable them to make informed choices. It would not provide a sufficiently robust and coordinated framework for industry. In addition, it would not meet the Government's objective to maintain a safe and suitable food supply.

Option 1 (Variation): include industry self-regulation and reliance on Food Acts

Option 1 could be supplemented by industry codes of practice. For example, codes of practice could provide for claims, labelling requirements and safety.

Benefits

Government

Commonwealth. By relying upon codes of practice, possible industry food standards, and the Food Acts there would be cost savings to the Commonwealth Government because of the reduction in ANZFA's role to that of an accreditation or auditing agency.

Industry

Large enterprises, small and medium enterprises and Retailers. The benefits are the same as for Option 1.

Consumers

The benefits are the same as for Option 1.

Costs

Government

Commonwealth. Self-regulation and reliance on general food law and codes of practice are not likely to meet the Government's objectives in relation to public health and safety.

State / Territory. Codes of practice can be made enforceable under the *Trade Practices Act 1974* or other appropriate legislation (in which case they are in effect regulation, with all the inherent inflexibilities and difficulties of regulation).

Local Government is largely responsible for enforcement of food standards. Enforcement may become even more complex and enforcement costs higher.

Industry

Large enterprises. Many of the costs to business are the same as for Option 1. In addition, codes of practice may not sufficiently balance the absence of Government assurance systems in the perceptions of consumers and Government (domestically and internationally).

Industry may incur higher costs as it assumes responsibilities for development of codes of practice. There is no certainty that industry codes of practice will indeed be less prescriptive or encourage innovation.

As a counter to these increased responsibilities, it should be noted that already there is a proliferation of quality assurance schemes in existence that could mitigate the need for further industry codes of practice. Nevertheless, the scope of the codes of the practice is likely to be broader than those that currently exist as they are underpinned by existing standards.

Small and medium enterprises. There are many firms in the food industry, but most are small and medium sized enterprises. In practice they may find difficulty in participating in the process of developing codes of practice. The relatively small number of large companies could dominate that process.

Retailers. Apart from the largest enterprises, Retailers also may find difficulty in participating on the process of developing codes of practice. It must be noted however that the big supermarket chains dominate Australia's food supply chain.

General. It would be difficult for industry to impose codes of practice on imported foods, which represent around 10% of the food market.

Consumers

Unless consumers are involved in the development of industry codes of practice (and even if they are), consumers may not perceive codes of practice as ensuring product safety in place of State and Territory enforcement and Australian Quarantine and Inspection Service (AQIS) inspection on imported goods.

Costs incurred in developing codes of practice through industry could be passed on to consumers. As for Option 1, there is a potential for such costs to be passed on many times over, particular if a number of industry bodies develop their own codes. Such cost pressures might be contained, to some degree, through government initiative to establish and maintain a legislative framework, although at a further cost to government.

Conclusion on Option 1 (Variation):

As for Option 1, Option 1 (Variation) would not maintain public confidence in the food supply, nor protect consumer needs for safe and suitable food. It could provide for greater consistency in information provided to consumers provided industry and consumers were prepared to cooperate to develop a code of practice on labelling.

This Option gives more flexibility to industry through codes of practice, but these may be less enforceable. It may raise competition concerns, as standards development by industry would necessarily involve co-operative arrangements amongst competitors. Those who participated in the setting of industry food standards may have incentives to develop standards that protect market segments and technologies whilst excluding other products and new technologies. There are equity considerations in relation to small enterprises that may not be able to participate adequately in the development of industry codes.

Non-compliance with Codes of Practice could impact negatively on public health and safety, representing a social and economic cost to consumers and the community.

Option 2: Continue amending the *Code (Status Quo)*

Under this option the system would continue to amend the *Code* in compliance with the requirements of the ANZFA Act.

This system provides a well-developed, transparent system for reviewing individual standards against the objectives of section 10 of the ANZFA Act. Under this option, ANZFA would continue to perform its statutory functions, including assessing applications to vary the *Code*, and making its own proposals. The *Code* would continue to evolve, as required, by continued stakeholder participation and input.

The existing framework relies largely on specific commodity standards to regulate individual foods. If Option 2 were chosen, the existing standards would need to be critically revised to remove duplications and inconsistencies. The *Code* would need to be extended with new standards that would cover, in an effective and similar manner, the increasing number of foods that are currently unstandardised.

Option 2: Cost Benefit Analysis

Benefits

Government

Commonwealth. The current arrangements are relatively effective in achieving the objective of producing safe food products. The proposed introduction of uniform Food Safety Standards into the *Code* will strengthen those arrangements.

ANZFA would continue to perform its statutory functions, including varying the *Code* or developing new standards as required, so cost impact would be neutral.

State / Territory and local government. The impact is likely to be neutral, as the current arrangements are relatively effective at producing safe food and will be strengthened by the introduction of national Food Safety Standards.

Industry

Large enterprises. There is little overall benefit to industry in maintaining the current regulatory arrangements. The 1998 Blair Review into Food Regulation found that the current system (which included the *Code* and the supporting arrangements) was relatively inefficient and imposed considerable cost on industry. Industry may however find some comfort in "the devil" it knows, while some sectors of industry believe that the regulations offer protection of certain market segments.

Small and medium enterprises. These enterprises are familiar with current arrangements. In addition, some sectors of small and medium business believe that the regulations offer protection of certain market segments.

Retailers benefit from their familiarity with current arrangements. Regulatory change takes time, effort and resources.

Consumers

As with Government, the current arrangements are relatively effective in producing safe food. The proposed introduction of national Food Safety Standards should strengthen those arrangements. Therefore, Option 2 would be likely to have a positive impact on consumers in terms of ongoing protection of public health and safety.

Costs

Problems with the *Code* are covered in more detail in Section 3 of this Review. This earlier Section provides much of the evidence for the conclusions which are drawn in the following Section.

Government

Commonwealth. The *Code* lacks consistency, and although it is highly prescriptive, it can be difficult to enforce. Many provisions are anachronistic, and there is considerable duplication within the *Code*. There is a cost to governments in maintaining and amending a *Code* that is an outdated document.

State / Territory and local government. The *Code* lacks consistency and State, Territory and local governments often have difficulty interpreting and enforcing its provisions. Where provisions are considered inadequate, there are costs to States and Territories in developing alternative provisions.

Industry

Large enterprises. The *Code* reflects traditional western dietary habits and inhibits industry innovation and development. Definitions and compositional standards, that have little relevance to public health and safety, are arbitrary in their nature and impose artificial restrictions on industry. This inhibits the development and sale of new products.

To the extent that the *Code* inhibits innovation and development of food products it is a burden on industry, consumers and the wider community. It has become a serious impediment to business competitiveness.

The *Code* has not been adopted uniformly by State and Territory Governments. Inconsistencies between State and Territory regulations can add significant costs to businesses that operate in more than one jurisdiction.

As mentioned previously, the 1998 Blair Review into Food Regulation found that the current system (which included the *Code* and the supporting arrangements) was inefficient and imposed considerable cost on industry. Inefficiencies can compound over time progressively reducing the profitability and therefore international competitiveness of domestic suppliers.

Because the *Code* is inadequate in its coverage and because of the pace of innovation, the *Code* is in a state of constant amendment. The majority of applications to amend the *Code* come from industry. The application process places a hefty burden on industry. The standard setting process is a long and exhaustive one. Significant resources are expended by industry in participating in the standards setting process: in the provision of information, data, comment and participation in the consultation process.

Small and medium enterprises. The *Code* inhibits innovation and development, has become a serious impediment to the development of a competitive domestic market and has impeded development of export-oriented small businesses.

Inconsistencies between States and Territory regulations add to costs for businesses that operate in more than one jurisdiction.

There are costs in participating in the standards setting process, and small and medium enterprises are likely to be marginalised in the process.

Retailers. The current system inhibits speedy product development, restricts competition among suppliers to retailers and limits the variety of food that retailers can offer the public.

Consumers

Many provisions in the *Code* have little relevance to public health and safety. They often tend to inhibit innovation and development of new food products. Consumers ultimately carry the additional costs associated with the production and manufacture of food products that must meet prescriptive definitional and compositional standards. Under this option, new or amended standards would maintain a high degree of prescription, and the associated costs would be passed on to consumers.

The Blair Review of Food Regulation also noted that the inefficiencies in the *Code* and the supporting system had the potential to compromise food safety outcomes.

To the extent that current arrangements inhibit innovation, consumers are denied access to new food products in a timely and efficient manner.

Conclusion on Option 2:

Option 2 would only achieve Government's objectives to a limited degree and is not consistent with NCP principles.

Option 2 would not make the *Code* easier to understand, rationalise and simplify food standards to make them more transparent, or remove the inherent and unjustified barriers to competition and industry competitiveness in Australia.

This option would require significant additional resources for ANZFA to expand and maintain the *Code* to keep pace with changes in the food industry. It would create a framework that maintained barriers to trade and acted against food imports by the imposition of compositional parameters for all foods. It would not create a framework that sustains innovation and would continually define market segments and niches that constrain competition.

It would also create major difficulties for enforcement. Current enforcement resources of the States and Territories are limited. Significant additional resources would be needed to enforce an expanded code. Without proper enforcement, the public and industry confidence in the food system would decline.

Such an approach would create significant barriers to the entry of smaller players to the industry, as they would need to be aware of an increased array of food standards in developing products.

Option 3: A new code based on minimum effective regulation principles

Under this option a new code would be developed, consistent with the objectives set out in section 10 of the ANZFA Act and the principles of minimum effective regulation. The new code would have less prescriptive standards. This would facilitate innovation and encourage growth of industry. The new code would allow for information which enables consumers to make informed choices about the safety and suitability of foods while at the same time having due regard to other impacts which may restrict competition. The following features of this option are particularly significant.

- Priority would be placed on providing a consistent approach to the protection of public health and safety, through consistency across and between standards.

- Increased emphasis would be placed on generic standards such as those applying to food additives, microbiological requirements and labelling rather than on commodity-by-commodity standards. One benefit of this is to make enforcement easier.

- Standards would be retained where justified and co-regulatory options or non-regulatory alternatives would be encouraged where feasible.

- Other requirements would be retained to prevent fraud and deception.

- Greater emphasis on science-based and evidence-based decisions, focussing on safety, not quality, issues.

- Labelling would aim to provide consumers with important information about the foods they consume. It would also enable a comparison of a wide range of miscellaneous and unstandardised foods.

- Standards would be consistent as far as possible with international Codex standards.

- In developing or amending specific regulations, the practicalities of enforcement will be fully taken into account.

- The new structure would be easier to follow.

Such a radical restructuring of food standards for relevance to a modern market economy may impact on consumer confidence as it moves from a highly prescriptive compositional base to a more enabling framework. It is therefore critical that this be balanced with measures to provide better consumer information and hence confidence in a new code. A loss of consumer confidence in the regulatory system and the processed food sector would be a major setback and would drive political pressure for a return to far greater government intervention.

Industry confidence in the system would also be enhanced by taking its needs into account as much as possible, and by reducing anomalies in the *Code* that lead to inefficiencies.

Option 3 - Cost Benefit Analysis

Benefits

Government

Commonwealth. This option would lead to a more coherent and consistent code, which would be easier to amend, understand, apply and enforce.

Drafting a new code, rather than making ad hoc amendments as has been the practice for many years, would enable changes to be made that would generally improve the effectiveness of the legislation. For example, standards could be developed to focus on outcomes rather than prescriptive mechanisms that limit innovation. Plain English drafting styles could be adopted and the use of non-legislative measures could be incorporated. This would benefit all stakeholders.

Less prescription should result in fewer, or at least less complex, applications and proposals, thereby reducing the associated costs incurred by ANZFA.

State / Territory and local government. A more coherent and consistent code would be easier to amend, apply and enforce.

Such a code would facilitate enforcement and assist enforcement agencies focus resources on public health and safety or deceptive practices.

Better information on labels should improve consumer understanding of the nature of food and facilitate informed food choices and so reduce complaints.

Industry

Businesses operating across States and Territories could adopt common compliance strategies, practices and documentation. Overall, compliance costs would be reduced.

Restrictions on competition should be reduced in the domestic market.

Large enterprises. A more coherent and consistent code would allow for greater scope for industry innovation and encourage growth of industry. This would provide greater choice and increased consumer satisfaction, while placing greater responsibility on manufacturers for the foods they make.

Industry would not need to go through the process of making an application to amend the *Code* as frequently because the existing high level of prescription would not be required.

Introducing food safety management systems should lead to better staff management, improved stock management, reduced frequency and scale of product recalls. The costs of producing, storing and disposing of spoiled goods would be reduced.

Small and medium enterprises. There would be greater scope for industry innovation and development, choice and increased consumer satisfaction. Manufacturers would have more responsibility for the foods they make. There would be more scope for reducing costs through food safety management, lower insurance premiums and reduced exposure to litigation by purchasers.

Retailers. There would be greater scope for innovation, greater choice in product offerings and better service to customers.

Consumers

Consumers would benefit from access to a greater range of foods facilitated by a more flexible, less prescriptive code fostering innovation and product development. They would also benefit from increased business competitiveness leading to lower prices. The reduction in costs borne by industry in complying with a prescriptive *Code* should be passed on to consumers.

A new code would offer reassurance that public health and safety will continue to be protected.

Improved labelling requirements would provide consumers with more information than before about the foods they eat in an increasingly diverse food market.

Costs

Government

Commonwealth. The main costs to the Commonwealth from this option relate to a high level of scientific, policy and legal resources to draft a new code. There is the additional burden of administrative costs associated with preparing and drafting the legislation, consultation processes, preparing the Regulatory Impact Statements and Cabinet processes.

This is partly offset by the fact that the review process supersedes the normal ongoing activity of amending the current *Code*. (It should be noted that, at this point, the cost to ANZFA of undertaking a review of the *Code* and developing a new joint *Australia New Zealand Code* has largely been met.)

Industry

Change takes time to be understood and accepted, and there could be an initial loss of confidence by consumers and industry (domestically and internationally) until a new system is understood and beds down.

Large enterprises. There would be adjustment costs to industry, including additional costs associated with labelling changes. However, proposed labelling changes should be consistent with minimum effective regulation.

Overall, industry should be able to spread costs over the lead-time for introduction of a new Code.

Small and medium enterprises. While the base costs are similar to those for large enterprises, these costs represent a greater burden for small and medium enterprises. There would be costs particularly to small and medium enterprises in learning about the new system. Change takes time to be understood and accepted, and the cost of training and managing change could be higher as these enterprises have fewer resources to devote to regulatory and compliance issues.

Consumers

Industry may pass on the costs of new labelling requirements to consumers. There is also the potential for some increase in food prices partly due to one-off compliance costs.

Consumers may initially lose some confidence in the changes from vertical to horizontal standards, at least until the changes were adequately understood.

Conclusion on Option 3:

A new code should aim to reduce the prescriptiveness of standards wherever possible, and replace standards regulating individual foods with horizontal standards wherever possible. The level of restrictions should be reduced. Standards regulating requirements for individual foods should be retained only where it would be consistent with the objectives of section 10 of the ANZFA Act.

A new code structure should seek to ensure a focus on protecting public health and safety. It should reduce the regulatory burden on industry by reducing the level of prescriptiveness of food standards, and balance the removal of prescription by providing better information to consumers. Permissions and restrictions should be consolidated into single standards. It should be consistent with international obligations and facilitate harmonisation of Australian and New Zealand food standards.

General permissions that reflect modern food technology should be provided for additives and processing aids. Standards that regulate individual foods should be replaced by standards that apply across all foods or a range of foods. Standards that are easier to understand should be developed and amendments made more straightforward. Industry codes of practice should be considered as an alternative to regulation where appropriate.

A new code should not maintain sanctioned market segments that constrain innovation and competition.

6. Conclusions of the NCP Review Committee

Term of Reference 3(h) - determine a preferred option for regulation, if any, in light of objectives set out in Term of reference (2)

The options discussed in the previous section represent three different possible regulatory approaches.

Option 1 would not maintain public confidence in the food supply, nor protect consumer needs for safe and suitable food. It would not provide a robust and coordinated framework for industry. It would not adequately achieve Government objectives, particularly the protection of public health and safety.

Option 1 (Variation) gives more flexibility to industry through codes of practice, but these may be less enforceable. It may raise competition concerns, as standards development by industry would necessarily involve co-operative arrangements amongst competitors. There are equity considerations in relation to small enterprises that may not be able to participate adequately in the development of industry codes of practice.

Option 2 would only achieve Government's objectives to a limited degree and would not be consistent with NCP principles. It would provide some benefits to the economy, particularly consumers who would retain their confidence in a safe food supply. However this option involves substantial and increasing costs to industry and government. The growing complexity of the regulations requires increasing resources to comprehend, implement and enforce them, with the regulatory burden impacting disproportionately on small business. For industry generally, the prescriptive nature of the regulations would stifle innovation.

Option 3 would achieve the objectives of the regulations and, based on minimum effective regulation principles, would also be cost-effective. Costs of understanding, implementing and enforcing the regulations would be set at a minimum consistent with achieving the objectives. This option would particularly benefit industry and consumers, where the emphasis on generic rather than prescriptive standards would encourage innovation and broaden the range of food products available.

The preferred option is *Option 3* – a new code based on minimum effective regulation principles. In comparison with Option 2, Option 3 more effectively achieves the regulatory objectives and does so at a significantly lower cost. It also offers greater benefits, to industry and consumers, through facilitating greater innovation. Option 3 would deliver a net benefit to the community as a whole.

The Committee notes that ANZFA has already developed a *joint Code*, which came into effect in December 2000, with a two year transition period with the old *Code*. The NCP Review Committee did not consider any aspect of the *joint Code*. The opportunity is being taken to attach, for the record, a description of the processes and policies that led to the development of the *joint Code* (see Attachment and Appendices 1 and 2 of the Attachment).

ATTACHMENT

Development of the joint *Australia New Zealand Food Standards Code* (*joint Code*)

Introduction

It is fitting for the NCP Review Report to provide a description (particularly regarding the policy foundations) of the development of the *joint Code*. That description is contained in this Attachment to the NCP Review Report.

ANZFA commenced a comprehensive review of the *Code* in 1994, in response to a commitment by governments during the establishment of the National Food Authority in 1991.

A review of the policy underpinning food standards was made a priority for the National Food Authority on its establishment. This was to be followed by a comprehensive review of the *Code*.

Further impetus was given to this process following the commencement of the treaty arrangements between Australia and New Zealand in July 1996 (see further below in Appendix 1 of the Attachment) and the formation of ANZFA. From then the *Code* Review was conducted jointly by Australia and New Zealand, and became the primary vehicle in the delivery of the new *joint Code*.

This new *joint Code* was adopted by the ANZFSC in December 2000. The impact of the regulatory framework provided by the *joint Code* will require review against competition policy principles in due course.

1. The Review of the old *Code*

With increasing pressures for the food industry to improve its efficiency and to develop new products to respond to consumer demands for greater choice, ANZFA considered it necessary to examine the extent to which the level of prescription reflected in existing standards was necessary to protect consumers. Whilst submissions from industry groups on the Draft Policy Review indicated strong support for a significant reduction in the degree of prescriptiveness in standards, other groups were concerned that a less prescriptive approach would have negative implications for consumers in terms of public health and safety, including nutritional concerns, and had the potential for consumers to be misled as to the composition of foods.

The intent of the *Code* Review was to develop more generic regulations and strengthen the general rules that apply to all foods.

At the same time, much of the detail and prescription has been removed from commodity standards with the aim of reducing barriers to competition and allowing innovation in the food industry.

The removal of many prescriptive standards which largely dealt with quality parameters has been offset by an increase in the amount of information provided to consumers to allow a better basis on which to make a choice.

2. How the new *joint Code* addresses the shortcomings of the old *Code*

The development of the *joint Code* follows the COAG Principles and objectives (see Appendix 1 and Appendix 2) set out in section 10 of the ANZFA Act to set a clear framework that gives –

- consistent decision making within and between standards;
- scientific risk assessment to justify restrictions and permissions for food/food ingredients;
- rigorous pre-market safety assessment when needed to protect public health and safety;
- consistent and better consumer information about what is actually in the food; and
- freedom for market forces to drive innovation and product development in a context where consumer and market confidence is maintained.

The *joint Code* provides general permissions for use of a range of ingredients unless the scientific risk assessment requires a more restrictive approach. It places a greater emphasis on consumer information.

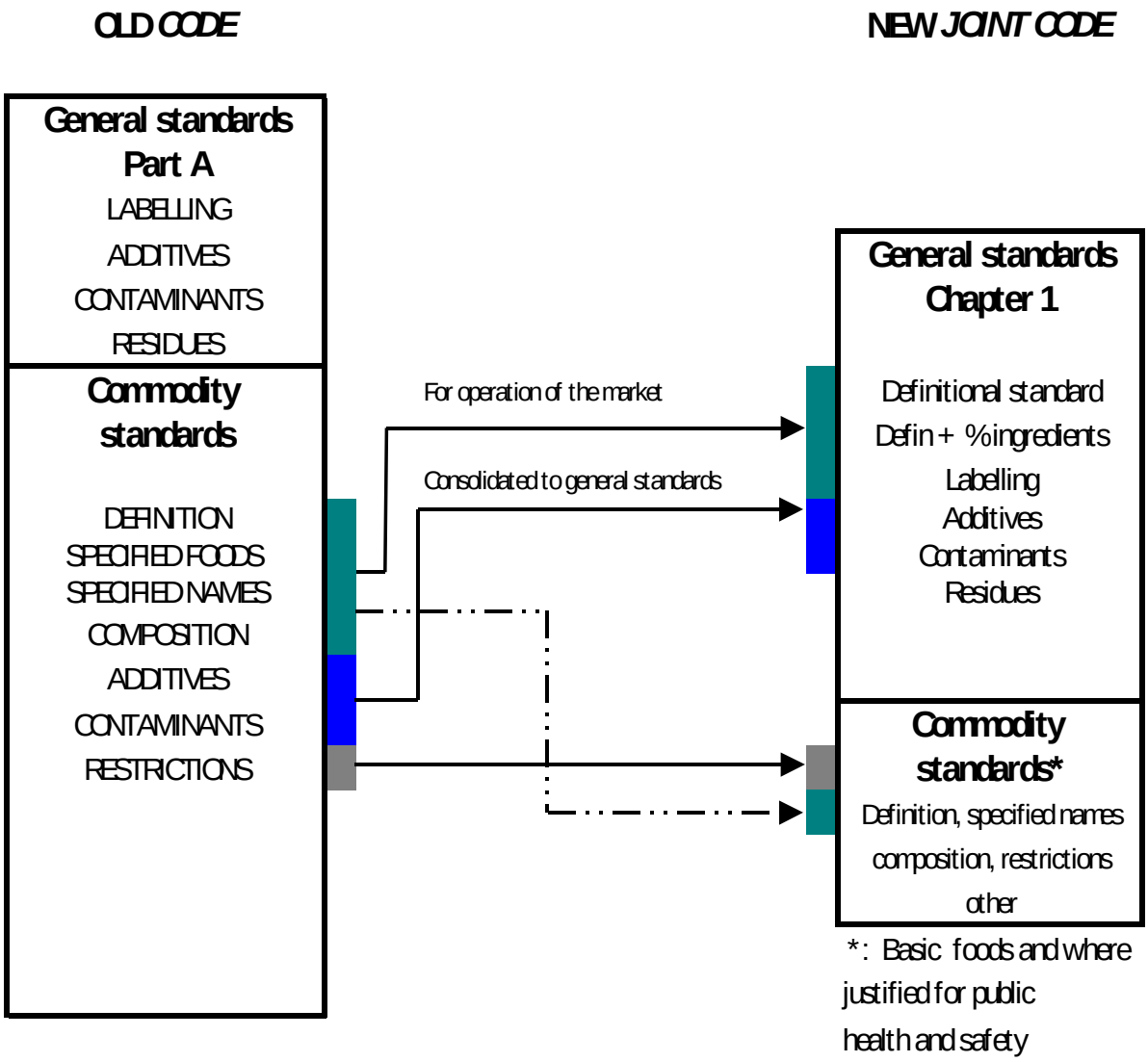
Under the *joint Code*, manufacturers will be required to declare the actual percentage contents of the key ingredients of foods rather than meet a compositional definition before a product can use a particular food name. Some specific standards are retained to impose requirements on some food sectors or individual products.

Overarching generic labelling requirements are set for both packaged and unpackaged food, including specific mandatory or advisory statements. For the first time, it is intended that health claims be permitted. Pre-market safety assessment and approval will still be required before certain foods/ingredients are allowed on the market, such as additives, processing aids, novel foods, irradiated foods and genetically modified foods. Some general compositional standards are retained (for example cereals and cereal products, edible oils and spreads, milk, cream).

This approach results in a new *joint Code*, which, like the old *Code*, comprises a mixture of standards that regulate individual food commodities and standards that apply to all foods or a range of related foods. It will, however, provide a significant rationalisation of and more consistent approach to, the use of horizontal standards and justify the level of prescription in commodity standards.

An illustration of how the *joint Code* is broadly structured relative to the old *Code* is at Figure 1 below.

Figure 1 - Structure of the *joint Code*



Objectives of the Authority in developing food regulatory measures and variations of food regulatory measures

As noted in the body of the NCP Review Report, ANZFA's objectives are set by section 10 of the ANZFA Act (see above under "1. Objectives" in Chapter 2 of the NCP Review Report).

In the Review of the *Code*, the following criteria had to be met for a standard to be necessary:

- the proposed standard must not duplicate other legislation (eg Food Acts, agricultural or environment legislation);
- the proposed standard must be justified by data / evidence;
- the proposed standard must be the minimum necessary to achieve the objective;

- the proposed standard must be enforceable; and

- the ANZFA statutory process must be used in its development.

In addition in the Review of the *Code*, greater reliance has been placed on food, health and related legislation, including the Model Food Act to provide that:

- food must not be represented in a way that is false, misleading or deceptive;

- food must not be adulterated, damaged, deteriorated or perished (as is generally the case with State / Territory Food Acts); or

- food must be safe and suitable (as proposed in the Model Food Act).

3. Key features of the new *joint Code*

Review of the old *Code* has led to a new *joint Code* in which:

- Priority is placed on providing a consistent approach to the protection of public health and safety, through consistency across and between standards.

- Increased emphasis is placed on generic standards such as those applying to food additives, microbiological requirements and labelling rather than on commodity by commodity standards. This approach is aimed at making enforcement easier.

- Standards are retained where justified.

- Other requirements are retained to prevent fraud and deception.

- More comprehensive labelling requirements are proposed. Labelling aims to provide consumers with important information about the foods they eat. It will also enable a comparison of a wide range of miscellaneous and unstandardised foods.

- The new structure is easier to follow.

- The compositional standards for 'basic' foods (such as dairy products and cereals) have been retained and labelling requirements have been strengthened.

- Many existing compositional requirements for other foods (such as gelatine, pickles and chutneys, tomato ketchup) that can no longer be justified when set against ANZFA's section 10 objectives have been removed.

- Principles, which have been applied inconsistently to different foods, will now be applied consistently to all foods (such as the use of food additives, rules about how foods are represented, percentage labelling of foods etc.).

- The compositional and definitional standards are retained in the *joint Code* for individual foods where these are justified against the objectives of section 10 of the ANZFA Act.

- Minimal standards are retained for some individual foods (e.g. meat in sausages) where these have been justified.

- Requirements that apply to all foods have been strengthened and/or extended to ensure that consumers have better information about foods (for example date marking requirements are extended, there are fewer exemptions from ingredient listing on the label of foods, percentage labelling of characterising ingredients and mandatory nutrition labelling).

Appendix 1 of the Attachment

Policy Framework for ANZFA Decision Making in Relation to Food Standards

1. Agreement between the Commonwealth of Australia the States the Northern Territory of Australia and the Australian Capital Territory in relation to the adoption of uniform food standards (1991) (1991 Agreement)

The National Food Authority was established as an independent and expert body with the primary functions of developing, varying and reviewing food standards for foods for domestic sale in Australia. A pre-requisite to its establishment was a formal COAG agreement by State and Territory Governments to adopt, without variation, standards developed by the NFA and approved by then-National Food Standards Council (NFSC).

The aims of these reforms were to consolidate responsibility for domestic food standards development with a minimum number of decision-making layers; ensure uniformity between jurisdictions; establish objectives for food standards; promote the coordination of domestic and international standards; ensure an open and publicly accountable process of standards development; and retain the involvement of the States and Territories.

On its establishment, the NFA was faced with a large backlog of 109 applications and proposals that it inherited from the previous NHMRC system. NFA fulfilled its statutory obligation to clear the backlog of applications and proposals within two years.

2. Second Reading Speech commitment

When the NFA was established, the Commonwealth Government promised that one of its tasks would be to undertake a review of the policy for setting food standards and to prepare a timetable for review of each existing standard in the *Code*. In the Second Reading Speech for the National Food Authority Bill, then Minister for Family and Health Services, the Hon Peter Staples MP, announced that the Authority would review the policy for setting food standards and prepare a timetable for the review of each existing standard.

On 1 July 1992, the Minister issued a direction under section 11 of the *National Food Authority Act 1991* that the Authority should undertake, by 19 February 1993, a Policy Review in accordance with the following terms of reference:

a) the role of food standards in ensuring and promoting a safe and healthy food supply;

b) the Authority's role in informing and educating consumers;

c) the opportunities for improving the development and administration of food standards in Australia to better achieve the statutory objectives of the Authority;

d) whether aspects affecting quality, other than those relating to safety, should he included in food standards;

e) the adequacy of mechanisms for ensuring that food sold in Australia complies with the *Australian Food Standards Code*; and

f) the scope for food standards and their administration to promote innovation and export by the food industry, particularly in the context of the Authority's industry and trade harmonization objectives.

The terms of reference for the review were developed after consultation with State and Territory health ministers and their departments, relevant Commonwealth departments, the food industry and consumer organisations.

An integral part of the new food standards system was its emphasis on open and transparent decision-making and on public participation in the standards setting process. It was regarded as important that there be public participation in the Policy Review. Public comment was sought throughout the review process and wide interest was evident.

The terms of reference for the Policy Review were published in the national press in mid-July 1992 and circulated to interested organisations and individuals. Comments in response to the terms of reference were sought by the end of August 1992 with detailed consultations with interested groups taking place in September and October. Following this, the National Food Authority prepared a Draft Report, published in December 1992.

Over 500 copies of the Policy Review Draft Report were sent to Commonwealth, State, Territory and local government agencies, New Zealand food regulatory bodies, industry groups, manufacturers, public health and consumer groups and individuals who had made submissions on the terms of reference or specifically requested a copy. Over seventy submissions were received in response to the Draft Report, and the concerns raised were considered in the preparation of the Final Report of the Policy Review.

The Policy Review provided an opportunity for the Authority to look at the *Code* in its entirety, setting principles and priorities for the standard-by-standard review. The Policy Review was a key part of the evolution of a streamlined food standards system. The establishment of the National Food Authority was an important first step in that process but a well considered and relevant policy framework needed to be developed and articulated to build on the institutional changes and create a forward looking food standards system. The Report also established a timetable for the review of existing standards in the *Code*.

3. NFA Board Policy Review commitment to Standard-by-standard Review

In its Policy Review, the NFA committed to conduct a review of all standards in the *Code*, applying the objectives in section 10 of the NFA Act and the policies developed through the Policy Review process. In May 1993 the NFA published the Final Report of the Policy Review.

4. Approaches to setting food standards

In reviewing existing food standards, the NFA undertook to consider the extent to which the retention of strict standards regulating requirements for individual foods were necessary to achieve

the objectives of the NFA Act, and to examine existing standards with a view to:

- reducing the prescriptiveness of standards wherever possible to provide wider permissions on the use of a range of ingredients and additives and so facilitate innovation;

- replacing standards regulating individual foods with standards which apply instead across a class of foods wherever possible;

- retaining standards regulating individual foods only where this is consistent with the objectives in section 10 of the NFA Act;

- where such standards are retained, redrafting them in a tabular format (rather than the current list format) to provide greater ease in reading and understanding and to facilitate simpler amendments as required; and

- developing definitional standards for other foods which describe their main or definitive qualities to provide a benchmark for consumers and industry.

At that time the Authority envisaged that Standards of general application would be reviewed first (Part A and the Preliminary Provisions, followed by Standard S1). Standards contained in Parts B to Q, and some standards in Part R would then be reviewed in light of the general standards and Standard S1, and if no longer needed then deleted. The review would culminate with a review of foods other than commodity foods (Part R).

These policy objectives, amended to take account of the "Agreement between the Government of Australia and the Government of New Zealand Establishing a System for the Development of Joint Food Standards" (ANZ Treaty) and the respective countries' regulatory policies, were considered by the ANZFSC in December 1997 when it was noted that they were based on the strong commitment of the ten governments to the protection of public health and safety and the promotion of trade liberalisation.

The Authority saw an integral part of the standard-by-standard review as the formation of consultative working groups, including industry, consumer and State and Territory representatives. This participation of affected groups in the standard-by-standard review was seen as facilitating the development of a more responsive and appropriate *Australian Food Standards Code*. The Authority also noted that as part of the development of an Australasian food standards system, it would be vital that New Zealand play an active role in the process.

5. Policy Basis for the Review of the *Food Standards Code*

Of primary concern to the *Code* review process were the objectives set out in section 10 of the ANZFA Act.

6. Other Government Agreements which relate to Food Standards Setting Policy

a) Trade and Commerce Ministers - Agreement between the Government of Australia, the Government of New Zealand and the Governments of the States and Territories of Australia, 1990

This Agreement refers to the use of international standards and requires that all new or reviewed standards will reference or adopt the most appropriate international standards unless there are compelling reasons for not doing so. The Agreement also agreed to accession to the WTO Agreement on Technical Barriers to Trade.

b) Agriculture and Resource Management Council of Australia and New Zealand (ARMCANZ) Memorandum of Understanding on Animal and Plant Quarantine Measures December 1995

This Agreement agreed to accession to the WTO Agreement on Sanitary and Phytosanitary Measures.

c) Council of Australian Governments requirements

The Principles and Guidelines for National Standards Setting and Regulatory Action by Ministerial Councils and Standards Setting Bodies requires that a Regulatory Impact Assessment be made (in the form of a Regulatory Impact Statement) for all new standards to demonstrate cost effectiveness and that the regulatory burden imposed on industry is justified.

d) New Zealand Government Code of Good Regulatory Practice

This Code, which is similar in impact to the NCP principles, specifies minimum effective regulation and establishes principles for regulation consistent with WTO agreements.

7. Bilateral Policy Platforms

Agreement between the Government of Australia and the Government of New Zealand Establishing a System for the Development of Joint Food Standards (ANZ Treaty)

The ANZ Treaty was agreed in 1995 and implemented in July 1996 and resulted in the Australian NFA being superseded by ANZFA. As a direct consequence, the Review of the *Code* was redirected to become the vehicle by which the *joint Code* would be developed.

The Treaty interprets the ANZFA Act section 10 objectives, establishing two basic objectives for joint food standards and explicitly requiring standards to be science and risk based in compliance with WTO obligations. Standards under the joint system must be developed with regard to:

(i) The protection of public health and safety, including the provision of adequate information relating to food to enable consumers to make informed choices and to prevent fraud and deception; and

(ii) the facilitation of access to market including, the promotion of fair trading, the promotion of trade and commerce, and the promotion of consistency between the domestic food standards of the Member States and international food standards.

In addition, the Treaty requires joint standards to be:

- consistent with the obligations of both Member States as members of the World Trade

Organization;

- consistent with domestic laws and regulations of both Member States, other than existing food standards that are intended to be superseded by food standards developed under the joint system;

- based on the best available scientific data, including systematic application of public health risk analysis and risk management principles to the development of food standards;

- of a generic nature where possible; and

- subject to the principles set out in the 1995 COAG Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standards Setting Bodies.

8. Implications of International Agreements

The World Trade Organization (WTO) was established through the Uruguay round of multilateral trade negotiations of the General Agreement on Tariffs and Trade (GATT). The declaration concluding the Uruguay round and establishing the WTO was done in Marrakesh on 15 April 1994. Both Australia and New Zealand played a prominent role, as Chair and member (respectively) of the Cairns Group, during the Uruguay round GATT negotiations to promote free trade and market access for food and agricultural products.

Australia and New Zealand are both parties to the two key WTO agreements relating to food regulation.

Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)

The SPS Agreement relates directly to the way in which ANZFA addresses objective 10(1)(a)[8] - the protection of public health and safety. The SPS Agreement seeks to facilitate international trade by harmonising the sanitary and phytosanitary measures adopted by countries on the basis of international standards. In the context of food standards, the primary reference organisation for international standards is the Codex Alimentarius Commission.

Article 2 of the SPS Agreement recognises the rights of member states to take sanitary measures necessary for the protection of human health, provided these are consistent with the SPS Agreement. Members are required to ensure that any sanitary (or phytosanitary) measure is applied only to the extent necessary to protect human life or health, is based on scientific principles, and is not maintained without sufficient scientific evidence.

Member countries are required to base their sanitary measures on international standards (Codex) where they exist (Article 3.1) and to take into account risk assessment techniques developed by relevant international organisations (Article 5). Members may introduce or maintain a sanitary measure that results in a higher level of protection than the corresponding international standard, provided there is adequate scientific justification and it is not inconsistent with any other provisions of the Agreement.

[8] See section 10 of the ANZFA Act.

An important principle that runs through the SPS Agreement is that of consistency in the level of public health protection achieved by standards (or other measures) and the need to ensure that such measures are not used as arbitrary barriers to trade.

In summary, the SPS Agreement obliges members to not develop standards (or other regulatory measures) for the protection of public health and safety unless there is a clear necessity to do so. Sanitary measures should be based on sound scientific and risk assessment principles, should provide a consistent level of public health protection and should be no more stringent than necessary to achieve this level of protection. The appropriate level of public health protection would normally be that provided by relevant international standards (Codex), unless scientific justification is provided for a higher level of protection. Where no Codex standards exist, the benchmarks of consistency and necessity must still be applied to avoid the establishment of barriers to trade.

Agreement on Technical Barriers to Trade (TBT Agreement)

The TBT Agreement seeks to encourage the development of international standards and conformity assessment systems and to ensure that technical regulations and standards are not used to create unnecessary obstacles to international trade. The TBT Agreement recognises the right of member countries to take the measures necessary to ensure the quality of its exports, or for the protection of human, animal and plant life or health, of the environment, or for the prevention of deceptive practices at the level it considers appropriate provided that these are not applied in an arbitrary or discriminatory manner or as disguised restrictions on trade.

Article 2 of the TBT Agreement obliges Members to ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. Technical regulations must not be more trade-restrictive than necessary to fulfil a legitimate objective, taking into account the risks non-fulfilment would create. In assessing these risks, the TBT Agreement establishes relevant elements of consideration as, *inter alia*: available scientific and technical information, related processing technology or intended end-use of products.

The SPS and TBT Agreements also oblige members, in the interests of harmonising technical regulations on as wide a basis as possible, to play a full part, within the limits of their resources, in the activities of appropriate international standards bodies.

In summary, therefore, the principles underpinning the TBT Agreement are essentially the same as for the SPS Agreement. Members are free to determine the protection in their own country, providing it is applied consistently. However, members must not develop standards (or other regulatory measures) unless there is a clear necessity to do so.

Technical measures should be based on sound scientific principles, which fulfil a legitimate objective, provide a consistent level of protection and be no more trade restrictive than necessary to fulfil a legitimate objective. Where no international standards exist the benchmarks of consistency and necessity must still be applied to avoid the establishment of barriers to trade.

Geographical Indications and the Trade Related Intellectual Property (TRIPS) Agreement

Australia is a signatory to the World Trade Organization's TRIPS Agreement. The Agreement provides general protection for geographical indications, requiring that the use of geographical indications must not be false or misleading.

'Geographical indications' (GI) are defined in the Agreement as -

> *indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.*

Members are required to provide the legal means for interested parties to prevent the use of any designation or representation of a good that indicates or suggests that the good originates in a geographical area other than the true place of origin in a manner which misleads the public as to the geographical origin of the good (Article 22).

However, Article 23 of the Agreement goes further with respect to geographical indications for wine and spirits. Article 23 requires each Member to provide the legal means to prevent use of a geographical indication identifying wines for wines not originating in the place indicated by the GI or identifying spirits for spirits not originating in the place indicated in the GI, even where the true origin of the goods is indicated or the GI is accompanied by expressions such as 'kind', 'type', 'style', 'imitation' and the like.

The expression 'the legal means' in the Australian context is, for example the *Trade Practices Act 1974*. The Department of Foreign Affairs and Trade (DFAT) advises that when Australia has been called upon to show what legal means have been implemented to give effect to the terms of Article 22, the *Trade Practices Act 1974* has been quoted.

The GI is fundamental to this issue. However, a representation about the origin of a spirit for example is not a geographical indication unless the origin conveys a representation as to the quality, reputation or other characteristic of the product i.e. the indication must carry some reputation in the minds of the consumer.

The policy underpinning the Agreement is that other products should not be permitted to misappropriate a reputation. In this sense the protection intended to be afforded by the Agreement is akin to the concept of 'passing off'. Examples of express GIs are Scotch whisky or Irish whisky. Implied GIs might include tequila and bourbon. The wording of the Agreement might be interpreted as meaning that implied GIs are also to be protected.

Australia - European Union Wine Agreement

Australia has a bilateral agreement with the European Union to facilitate market access for wine. Under the agreement, both jurisdictions recognise the wine making practices of the other for wines of designated origin.

The European Union recognises two distinct classes of wine - wine of designated origin (e.g. appellation controlle, qualitats wein etc.) and table wine. Significantly higher standards of production apply to wine of designated origin.

To facilitate market access for Australian wine into the European Union all Australian wine is produced to the standard of wine of designated origin and is recognised as such by the European Union. The agreement has been recognised within the *Code* Standard P4 - Wine, Sparkling Wine and Fortified Wine, which prohibits winemaking practices more usually associated elsewhere with table wine (for example, the production of wine from carbohydrate sources other than fresh grapes, the use of reconstituted grape juice concentrate and the addition of spirit other than grape spirit).

9. Regulatory Impact Statement process

Each Standard reviewed was subject to a Regulatory Impact Statement (RIS). An RIS is required under NCP Guidelines to justify regulatory changes. The RIS assesses the costs and benefits of any particular regulatory proposal, against NCP Guidelines.

The RIS process considered the need for regulation against section 10 Objectives, *Code* Review policy and NCP principles. The RIS stated the objective of the proposed Standard, and detailed consultation undertaken.

Options to address the issues arising during the review of the Standard, including alternatives to regulation, were assessed. Affected parties were identified. Issues arising in public submissions were addressed.

The advantages and disadvantages / costs of the various options to industry, consumers, health professionals, and Government were considered. The RIS formed part of the publicly available Full Assessment Report.

Appendix 2 of the Attachment

The Standard-by-Standard Review of the *Food Standards Code* (*Code* Review)

1. Background

The first food standards in Australia were largely to prevent consumer fraud and deception. Food law and standards were developed within the separate jurisdictions, often for trade protection purposes. During the 1950s, the National Health and Medical Research Council (NHMRC) became involved in developing standards, with consultation through industry and professional bodies. These Standards were adopted by States and Territories as regulations under State and Territory Food Acts, often with some modification on passage through State / Territory Parliaments. The system in effect imposed 8 sets of food regulations on industry, with inconsistent interpretation of requirements, and inconsistent implementation where standards were agreed.

During the 1980s, industry, consumers and Governments concluded that a more transparent system, with more certain and consistent outcomes, was necessary to remove arbitrary impediments to competition and innovation.

There was agreement that a new system was needed to provide objective recommendations on uniform food standards. This system needed to include open consultation and legislated time limits, to ensure efficiency, transparency and acceptance of outcomes.

Critical to the 1991 Agreement that established the National Food Authority in August 1991 was that a review of existing food standards be undertaken. The policy framework for this review was elaborated in the Authority's *Final Report of the Policy Review 1993* and subsequently expanded to encompass NCP Guidelines, the Australia New Zealand Treaty on Food Standards, the Trans Tasman Treaty on Mutual Recognition Arrangements and Australia and New Zealand commitments to the World Trade Organization.

The policy framework for decisions on Standards in the Review of the *Code* can be distilled to the following principles:

1. Reduce the level of prescriptiveness of standards to facilitate innovation by allowing wider permission on the use of ingredients and additives, but with consideration of the possible increased need for consumer information.

2. Develop standards that are easier to understand and make amendment more straightforward.

3. Replace standards that regulate individual foods with standards that apply across all foods or a range of foods.

4. Consider the possibility of industry codes of practice as an alternative to regulation.

5. Facilitate harmonisation of food standards between Australia and New Zealand.

6. Ensure that duplicative or overlapping regulatory requirements are avoided where possible.

These principles were applied in the context of the objectives in section 10 of the ANZFA Act.

2. Decision making in the *Code* Review - Justification of Types of Standard against the objectives in section 10 of the ANZFA Act

In addressing individual standards, ANZFA developed two 'decision trees' to assist in addressing competition principles and in ensuring consistency of approach. The first 'tree' addressed policy issues, including whether a standard was needed or other means such as industry codes of practice or consumer education, might best be pursued. As the review of a standard (or standards) commenced, ANZFA tested the standard and the issues arising when considering change.

This led to a simple decision tree approach that, at each step, required justification for any decision against the principles of the NCP and policy framework for the *Code* Review. For food composition, this approach is reflected in Figure 2.

This approach meant that the purpose or requirement had to be identified in the first instance. Non-regulatory approaches needed to be considered, and if a regulatory intervention were proposed, this had to be justified. If a regulatory intervention were considered appropriate, then a hierarchy of approaches was followed. At the least complex level, a general requirement that applied to all foods could be applied to resolve the issue. If the intervention required was more specific, then the approach required consideration of whether a simple definition, a definition with a minimal composition requirement, or a more detailed commodity standard could resolve the matter. At each stage, self-regulatory approaches were considered.

A similar approach was taken with labelling provisions and the description of foods. Again, the specific intent of the regulation should be justified, and dealt with in the least prescriptive manner, defaulting to general provisions that apply to all foods wherever possible (see Figure 3).

In this way, many historical prescriptive requirements in the *Code* were eliminated, focusing regulatory interventions on critical issues that address public health and safety, and consumer deception issues.

The issue of consumer protection in food matters can be addressed in two distinct ways. Traditionally this has been managed through prescriptive compositional requirements with generally broad labelling specifications that identify the true nature of the food. The prescriptive requirements in food standards were established in a piece-meal fashion, with little consistency and arbitrary coverage of foods. Less than half the foods on the market are covered by prescriptive requirements. Where such prescription exists, the alternative approach is to provide broad permissions with a strengthened requirements for accurate description of the food through labelling. This approach increases the scope for innovation and development of new products, but ensures that consumers have better information.

In determining the necessity for a standard for inclusion in the proposed *joint Code* a decision tree as shown below in Figure 2 was used.

Figure 2 *Code* Review - Policy Overview

Standards under Review.....

Level	Question	Yes	No	Justification/Explanation of Decision
A	Is the aim of the standard/ measure to: - protect PH&S[9] - prevent deception - remove impediments to trade	**Go to B**	No standard	
B	Can the aim be met through a horizontal standard which applies to all foods?	**Go to C**	**Go to D**	
C	Can the aim be achieved by any other means? (Industry self-regulation, Code of Practice)	No standard	**Address in Horizontal Standard**	

D	Define the commodity issue/s being addressed			
	• The food is a basic/primary food. Essential compositional definitions important for adequate nutritional status. (eg bread, milk, fish, meat)	**Go to E**		
	• Ambiguity or significant differences exist in the publicly available definitions. Reliance on Fair Treading legislation may not be a practicable option.	**Go to E**		
	• Necessary to support trade access (eg wine, mineral water)	**Go to E**		

[9] Health promotion may be cited as basis for standards in certain circumstances. In these cases the overarching objective will be the protection of public health and safety.

	• Other reason (give details)	**Go to E**	No standard	
E	Can the aim be achieved by other means? (eg fair trading laws, Industry Code of Practice, self regulation)	No standard	**Go to F**	
F	Can the aim be best met by a minimum definition	Minimum definition in Part 1.1.2	**Go to G**	
G	Can the aim be best met by a minimum definition and percentage labelling of defining ingredient(s)?	Minimum definition in Part 1.1.2 and % labelling required in Part 1.2.4 labelling of ingredients standard	**Commodity standard.** Justify format (definition, essential composition, specific labelling etc)	

In the case of formulating food labelling requirements, again the questions commence at Level A and proceed down the 'tree' as shown in Figure 3 below.

Figure 3 *Code* Review - Labelling Checklist

Standards/Provisions Under Review.....

Level	Question	Yes	No	Justification
A	Can the objective be addressed through generic legislation	No standard	**Go to B.**	Minimum effective regulation.
B	Can the objective be addressed in the general labelling standard?	Consider amending general labelling standard. **Go to D.**	**Go to C.**	There is greater consistency if an objective is met with generic requirements

C	Can the objective be addressed through percentage labelling?	Consider percentage labelling. **Go to D.**	Consider commodity specific labelling. **Go to D.**	
D	Would the proposed labelling be: - likely to be used by the consumer - enforceable - not otherwise likely to be applied by manufacturers, and - no more onerous than Codex standards, except where essential to protect public safety.	Develop identified standard: General, percentage labelling or commodity specific	Labelling requirement in *Code* will not meet objective. Consider other means to achieve objective	

3. Objectives of the *Code* Review

Consistent with section 10 objectives, the *Code* Review also aimed to do the following.

- Ensure a focus on protecting public health and safety.
- Reduce the regulatory burden on industry by reducing the level of prescriptiveness of food standards.
- Balance the removal of prescription by providing better information to consumers.
- Consolidate permissions and restrictions into single standards.
- Provide general permissions for additives and processing aids that reflect modern food technology.
- Replace standards which regulate individual foods with standards that apply across all foods or a range of foods.
- Develop standards which are easier to understand and make amendments more straightforward.
- Consider the possibility of industry codes of practice as an alternative to regulation.

- Facilitate harmonisation of food standards between Australia and New Zealand.

4. Other Regulatory Mechanisms

There is a considerable body of legislation that applies directly and indirectly to food at all stages of production, processing and sale. One aim of the proposed *Code* Review was to ensure that requirements of other laws relating to food were not duplicated in any *joint Code*.

Food standards are enforced under Food Acts and New Zealand legislation for the Australian and New Zealand domestic markets. For foods imported into Australia, food standards are enforced in Australia by AQIS under the *Imported Food Control Act 1992*.

5. Food Regulation Framework

The *joint Code* is structured to provide a consistent framework that applies to all foods and complements other laws that may impact on food. The framework, if it works effectively, will also strengthen and support the work of public health professionals and those who provide consumer advice. This is shown in the following Figure 4:

Figure 4 Food Standards Code and interactions with other legislation

<table>
<tr><th colspan="3">JOINT AUSTRALIA NEW ZEALAND FOOD STANDARDS CODE</th><th>OTHER LEGISLATION</th></tr>
<tr><td>Specific standards
apply to particular foods</td><td>COMMODITY STANDARDS

Must comply with generic requirements but may include specific definitions, additional labelling, compositional or other requirements.</td><td>SPECIAL PURPOSE STANDARDS
Must comply with generic requirements, but will have specific additional requirements reflecting the critical nature of the foods (such as infant formula).</td><td></td></tr>
<tr><td>Generic requirements</td><td colspan="2">MANDATORY LABELLING

• general requirements
• advertising restrictions
• warning and advisory statements
• ingredients
• date marking
• representations
• directions for use
• nutrition information
• health claims</td><td>CONSUMER LAWS

TRADE PRACTICES LAW

FAIR TRADING LAW

CO-REGULATORY APPROACHES

SELF-REGULATORY APPROACHES</td></tr>
</table>

apply to all foods	Vitamins, minerals and micronutrients Contaminants in foods (MPCs) Prohibited botanicals Residues in foods (MRLs) - do not apply to New Zealand Materials in contact with foods Additives, processing aids Foods with pre-market approval Supplementary foods Microbiological standards and processing requirements Analytical requirements	**ENVIRONMENT LAWS** **LAND USE LAWS** **POISONS LAW**
	FOOD SAFETY STANDARDS • general requirements • food safety plans • premises and equipment	**PUBLIC HEALTH LAW**

6. Summary of Changes

The *joint Code* represents a move away from prescriptive regulation to performance-based standards. The main differences between the old *Code* and the *joint Code* may be characterised as follows.

- A change from recipe based standards to outcome measures that facilitate industry meeting market needs with an increased focus on labelling.
- A change from detailed specifications to more inclusive broadly based standards.
- A change in labelling requirements to provide better information to consumers.
- The *joint Code* acknowledges and embraces new food technologies in an enabling manner.
- Public health and safety considerations are maintained in the *joint Code*.
- The *joint Code* will integrate with other legislative requirements.

Appendix 3 of the Attachment

Consultation

Submissions to NCP Review were received from the following organisations:

Food Technology Association of Victoria;

Infant Formula Manufacturers' Association of Australia;

New Zealand Infant Formula Marketers' Association;

Chamber of Commerce and Industry West Australia;

Australian Dairy Products Federation;

General Foods (National Foods);

Australian Food and Grocery Council;

Distilled Spirits Industry Council of Australia;

Confectionery Manufacturers' Association of Australasia Ltd; and

Dieticians' Association of Australia

As noted in the body of the NCP Report (see Chapter 1, "5 Consultation") submissions were largely directed towards issues relating to the proposed *joint Code.* The main issues raised in submissions (most of which had been addressed by ANZFA as part of the *Code* Review) are set out below.

Need for public health and safety to be prime concern

The Dietitians' Association of Australia commented that the link between public health and food regulation is critical, and should be seen in terms of creating 'supportive environments' for healthy lifestyle changes. The Dieticians' Association of Australia believes that when calculating 'cost', it is important to consider the broader implications for the community, as well as the direct costs to industry.

Mandatory warning/advisory statements on milk – proposed Standard 1.2.3

Standard 1.2.3 in the then proposed *joint Code*, which would impose a mandatory warning/advisory statement on milk to the effect that milk should not be the sole source of nutrition for infants under twelve months, was of concern to the Australian Dairy Products Federation, National Foods, and the Australian Food and Grocery Council.

Industry argued that the statement had the potential to unfairly burden manufacturers with additional costs and the possibility of reduced sales. At the same time, the implementation of the ANZFA recommendations would not benefit consumers significantly, compared with the disadvantages to manufacturers. The requirement would cause apprehension with the result that parents would be likely to turn to alternative beverages that are less nutritious (and that are not required to have similar labelling requirements). There was not enough evidence to suggest this

was a significant public health issue that warranted an advisory statement, and alternative approaches were available.

Costs associated with the changes

The Food Technology Association of Victoria expressed concern at the likely cost of implementing the changes set out in the *joint Code*.

Time for introduction of *joint Code*

The Food Technology Association of Victoria argued for at least two years of concurrent operation of the *Code* and the *joint Code* before repeal of the old *Code* and full implementation of the *joint Code*. This would allow industry adequate time to adjust to the *joint Code*.

Nutrition panels is a costly impost – proposed Standard 1.2.8.

Food Technology Association of Victoria and the Australian Food and Grocery Council expressed concerns with proposed Standard 1.2.8. The Standard was seen as imposing a cost on industry, and by redefining low joule food would destroy market segments and cause commercial damage to some companies. There was no evidence to justify the extension of nutrition labelling and wide exemptions based on the contribution to the diet of nutrients was recommended.

Percentage labelling – proposed Standard 1.2.10.

Percentage labelling was of concern to the Australian Dairy Products Federation, Chamber of Commerce and Industry Western Australia, National Foods, Confectionery Manufacturers' Association of Australasia Ltd and the Australian Food and Grocery Council. Industry groups claimed that the proposal was not justified, imposed additional costs and was an attempt to offset the removal of a number of compositional standards. Industry considered the standard would mislead the public and that Codex Alimentarius labelling standards should be followed.

Infant Formula Products – proposed Standard 2.9.1

Concerns were expressed by the Infant Formula Manufacturers' Association, the Australian and New Zealand Infant Formula Marketers' Association and the Australian Food and Grocery Council. They considered the proposed standard would stifle innovation, restrict the introduction of new products, raise costs and replace tested formulations with untested requirements.

The impartiality of the NCP Review Committee

The Chamber of Commerce and Industry Western Australia expressed concern that the NCP Review Committee included ANZFA staff.

Changes to dairy standards - Part 2.5 – proposed Standards 2.5.3, 2.5.6

National Foods and the Australian Food and Grocery Council did not support less prescriptive standards, which they argued would destroy market categories, particularly yoghurt, milk and flavoured milk. They also claimed the proposed standard would be inconsistent and prescriptive. It would restrict competition and increase compliance costs. Industry argued for retention of standards for composition.

Vitamins & Minerals – proposed Standard 1.3.2

National Foods and the Australian Food and Grocery Council considered that ANZFA has failed to address the basic principles of fortification and restoration. The resulting standard was seen as inconsistent and discriminatory.

Omission of standards

The Australian Food and Grocery Council opposed omission of several standards which it considered essential on the basis of consistency, fair trading and consumer deception. It was argued that the current prescriptive standards did not inhibit innovation. These included standards for jam and marmalade and ice cream.

Changes to isomalt energy factor

The Confectionery Manufacturers' Association of Australasia Ltd objected to the change in the energy factor for isomalt from 9kJ/g to 11kJ/g, the effect of which would be to raise the stated energy level in existing product when there was no change in formulation. This is of concern in sugar free products. The Confectionery Manufacturers' Association of Australasia Ltd argued that the proposal would not align with international practice, would require different packaging for domestic and export markets and would represent a hindrance to competition on export markets.

Generic Protection of Geographical Indicators – proposed Standard 2.7.5

The Distilled Spirits Industry Council of Australia expressed concern that the proposed standard did not properly protect, in a generic fashion, beverages with an identity and reputation based upon their place or origin, composition and production.