Explanatory Statement

1. Authority

Section 13 of the *Food Standards Australia New Zealand Act 1991* (the FSANZ Act) provides that the functions of Food Standards Australia New Zealand (the Authority) include the development of standards and variations of standards for inclusion in the *Australia New Zealand Food Standards Code* (the Code).

Division 2 of Part 3 of the FSANZ Act specifies that the Authority may prepare a proposal for the development or variation of food regulatory measures, including standards. This Division also stipulates the procedure for considering a proposal for the development or variation of food regulatory measures.

FSANZ prepared Proposal P293 to implement the COAG Legislative and Governance Forum on Food Regulation Policy Guideline for the development of the regulatory framework for the management of nutrition, health and related claims. The Authority considered the Proposal in accordance with Division 2 of Part 3 and has approved a draft Standard.

On 6 June 2008, the then Australia and New Zealand Food Regulation Ministerial Council[1] asked FSANZ to review its decision in relation to the new Standard. FSANZ has reviewed its decision and has re-affirmed the approval of Standard 1.2.7 subject to amendments in response to the review request and to additional advice in July 2012 from the COAG Legislative and Governance Forum on Food Regulation[2], regarding the regulatory approach for general level health claims.

Following consideration by COAG Legislative and Governance Forum on Food Regulation section 92 of the FSANZ Act stipulates that the Authority must publish a notice about the standard or draft variation of a standard.

Section 94 of the FSANZ Act specifies that a standard, or a variation of a standard, in relation to which a notice is published under section 92 is a legislative instrument, but is not subject to parliamentary disallowance or sunsetting under the *Legislative Instruments Act 2003*.

2. Purpose and operation

The purpose of this variation is to repeal Standard 1.1A.2 – Transitional Standard – Health Claims so that it can be replaced with a new Standard. The variation also makes a number of consequential amendments to Standards 1.1.1, 1.2.1, 1.2.8, 1.3.2, 2.6.2, 2.6.4, 2.9.1, 2.9.2, 2.9.3, 2.9.4, 2.9.5 and 2.10.2.

3. Documents incorporated by reference

The variations to food regulatory measures do not incorporate any documents by reference.

[1] Now known as the COAG Legislative and Governance Forum on Food Regulation
[2] Previously known as the Australia and New Zealand Food Regulation Ministerial Council

4. Consultation

The Authority's consideration of Proposal P293 has included six rounds of public consultation following assessments, the preparation of draft Standards, a draft variation and associated reports. Public submissions were called for in 2004, 2005, 2007, 2009 and 2012.

A Standards Development Advisory Committee (SDAC) was established with representatives from the industry sector, the relevant State and Territory government agencies and consumer organisations to provide ongoing advice to the Authority throughout the standard development process. The SDAC contributed a broad spectrum of knowledge and expertise covering industry, government, research and consumers. The SDAC was involved in the initial development of the new Standard, however it was not active during the review of the Standard that commenced in 2008.

A Regulation Impact Statement was required because the proposed variation, Standard 1.2.7, is likely to have an impact on businesses and individuals.

5. Statement of compatibility with human rights

This instrument is exempt from the requirements for a statement of compatibility with human rights as it is a non-disallowable instrument under section 94 of the FSANZ Act.

6. Commencement

Items [1] to [14] amend existing Standards. Each of these amendments other than items [2.3], [4] and [13] will commence on gazettal.

Items [2.3] and [4], which give effect to the repeal of the transitional health claims standard, commence three years after gazettal. Item [13.1], which removes the reference to the transitional health claims standard from Standard 2.9.5 when that transitional standard is repealed, also commences three years after gazettal.

Items [13.2] to [13.4] anticipate the commencement of Standard 2.9.5 and will commence immediately after the commencement of Standard 2.9.5.

Item [15] is a transition provision that establishes a regulatory framework that permits the co-existence of alternate forms of regulation during the transition period. The transition period is the period that ends when the transitional health claims standard is repealed. A supplier will be able to elect whether to comply with the new measures established in Standard 1.2.7 or the measures that had been established immediately prior to the commencement of Standard 1.2.7, but not a combination of those alternatives.

7. Variations

Item [1] Standard 1.1.1

Item [1.1] omits from subclause 1(6) the reference to transitional standards generally and replaces that reference with a reference to Standard 1.1A.6. The effect is to remove any application of subclause 1(6) to the transitional health claims standard, when it is repealed.

Item [1.2] amends the current definition of 'claim' to make it clear that a claim can be express or implied.

Item [2] Standard 1.1A.2

Item [2.1] replaces the Purpose statement in Standard 1.1A.2 with an editorial note which explains the transitional arrangements following the gazettal of Standard 1.2.7.

Item [2.2] amends the time in which Standard 1.1A.2 ceases to have effect, from two years to three years.

Item [2.3] repeals the transitional health claims standard—Standard 1.1A.2, at the end of the transition period.

Item [3] Standard 1.2.1

Item [3] inserts a reference to subclause 24(5) of Standard 1.2.7 in the list of labelling provisions in subclause 2(2) of Standard 1.2.1.

Item [4] Standard 1.2.7

This provision removes a transitional editorial note from Standard 1.2.7 at the end of the transition period during which Standard 1.1A.2 has parallel operation.

Item [5] Standard 1.2.8

Item [5] amends Standard 1.2.8.

Under item [5.1], the second paragraph of the current purpose statement is revised as an editorial note and updated to take account of the new Standard 1.2.7.

Item [5.2] removes the definitions of gluten and nutrition claim as these have been incorporated into Standard 1.2.7 (where the 'nutrition claim' definition has been revised and referred to as 'nutrition content claim').

Under items [5.3] and [5.6] the existing calculation for determining average energy content has been incorporated into subclause 1(3) and reformatted.

In item [5.6] subclause 1(2) is added to Standard 1.2.8, so that the definitions in Standard 1.2.7 also apply in Standard 1.2.8.

Item [5.7] inserts new clause 1A to clarify that Standard 1.2.8 does not apply to infant formula products, which are standardised in Standard 2.9.1.

Item [5.8] updates the existing clause 4 to refer to terminology used in the new Standard 1.2.7. The term 'claims requiring nutrition information' has been introduced and defined.

Items [5.10], [5.13] and [5.14] amend current paragraph 5(1)(g) and subclauses 5(4) and 5(5) to incorporate the new term 'claim requiring nutrition information' (see item [5.8] above). Declarations of certain substances must be declared in the nutrition information panel when 'claims requiring nutrition information' are made.

Item [5.11] inserts new subclauses 5(1A) and (1B). The new provision restates the current requirement in subclause 12(2), which is deleted by a later provision.

Item [5.15] amends existing subclause 7(2), which deals with declaring percentage daily intake (DI) information in a nutrition information panel.

The amendment maintains the current provision in the Code, however, the requirement for these declarations to be on a per serving basis has been added. Subparagraph 7(2)(b)(ii) requires certain statements to be included in the nutrition information panel if percentage daily intake information is provided. The amendment means these statements are shorter than the statement currently required.

Item [5.16] adds new clauses 7A and 7B. Clause 7A sets out the requirements for percentage recommended dietary intake (RDI) declarations in the nutrition information panel when certain claims are made. Requirements for percentage RDI declarations were previously in Standard 1.3.2. Clause 7B sets out the requirements if the percentage RDI or DI information required or permitted by clause 7 or 7A is also declared outside the nutrition information panel.

Item [5.17] revises the existing clause 8 to provide clarity about the nutrient declarations required on the label of a small package if a claim requiring nutrition information is made.

Item [5.18] corrects a typographical error in clause 11.

Item [5.19] adds a new clause 11A which requires that if a claim requiring nutrition information is made about a food that is required to be prepared and consumed according to directions, with at least one other food, the nutrition information panel must include an additional column at the right hand side, specifying certain information about the additional food or foods.

Item [5.20] deletes Division 3, which contained conditions for making nutrition claims. Most of these conditions have been moved to Standard 1.2.7.

Item [5.21] adds a new clause 19 which gives permission for certain nutrients to be declared voluntarily in the nutrition information panel, without requiring the declaration to meet the conditions for the applicable nutrition content claim in Standard 1.2.7. New subclause 19(4) allows a nutrition information panel to be provided voluntarily on a food containing more than 1.15% alcohol by volume. Such a declaration will not be regulated as a nutrition content claim.

Item [6] Standard 1.3.2 – Vitamins and Minerals

Item [6] amends Standard 1.3.2. Items [6.3], [6.4] and [6.5] omit the conditions for making claims about the presence of vitamins and minerals and good source claims about vitamins and minerals (clauses 4, 6 and 9) as these are now contained in Standard 1.2.7 or 1.2.8. The remaining clauses 5 and 8 have minor reformatting amendments and are renumbered.

Item [8] Standard 2.6.4 – Formulated Caffeinated Beverages

Item [8] amends Standard 2.6.4. This amendment deletes the current prohibition on making nutrition content claims about vitamins and minerals in formulated caffeinated beverages. This prohibition is restated in Standard 1.2.7 (conditions for making claims about vitamins and minerals in Schedule 1).

Item [9] Standard 2.9.1 – Infant Formula Products

Item [9] amends Standard 2.9.1. Item [9.1] removes the reference to ‘claims’ from the existing requirement in clause 28.

Item [10] Standard 2.9.2 – Foods for Infants

Item [10] amends Standard 2.9.2. It deletes the current cross reference to the exemption (in Standard 1.2.8) from the requirement to declare the sodium and potassium content of a food for infants when a claim about the salt, sodium or potassium content of that food is made. A new subclause is included to provide the exemption from declaring the potassium content. As the sodium content must be declared in the nutrition information panel on foods for infants, an exemption from the requirement to declare the sodium content when a claim about salt, sodium or potassium has not been included.

Item [11] Standard 2.9.3 – Formulated Meal Replacements and Formulated Supplementary Foods

Item [11] amends Standard 2.9.3. New subclauses are added setting conditions for 'good source' of vitamin and mineral claims on formulated meal replacements and formulated supplementary foods. These reflect the same conditions as those prescribed in Standard 1.2.7 for these claims on other foods.

Items [11.2], [11.3], [11.5] and [11.6] amend Standard 2.9.3 to specifically permit nutrition content claims about the vitamins and minerals listed in the Schedule to Standard 1.1.1 on formulated supplementary foods. This will provide consistency with the permissions under Standard 1.2.7.

Item [12] Standard 2.9.4 – Formulated Supplementary Sports Foods

Item [12] amends Standard 2.9.4. It removes the cross reference to the requirement in Standard 1.3.2 to declare certain information when a claim about the presence or absence of a vitamin or mineral is made about a formulated supplementary sports food. This requirement is now in Standard 1.2.8 (which applies to formulated supplementary sports foods).

Item [13]

Item [13.2] amends Standard 2.9.5, when that Standard commences, to refer to the definition of nutrition content claim in Standard 1.2.7.

Items [13.3] to [13.4] amend the conditions in Standard 2.9.5 for making claims about lactose content to be consistent with the claims in Standard 1.2.7.

Items [2.3] and [15]

Item [15] establishes a transition period starting when Standard 1.2.7 commences and ending when Standard 1.1A.2 is repealed. During that period of three years Standard 1.1A.2 will operate concurrently with Standard 1.2.7.

During the transition period, if Standard 1.1A.2 is relied on, the changes made to other Standards by the other items in this Variation have no effect. For a particular food, either Standard 1.2.7 and the changes made to other Standards, or the Code (including Standard 1.1A.2) as it was immediately prior to the commencement of Standard 1.2.7 can be relied on, but not a combination of both.

Three years after the gazettal of Standard 1.2.7 and associated variations, the Transitional Standard 1.1A.2 ceases to operate and the conditions in Standard 1.2.7 must be met. All food labels and advertising in the marketplace at that time must comply with Standard 1.2.7 and the variations to other standards outlined above.

Minor technical amendments

Items [5.4], [5.5], [5.9], [5.12], [5.22], [6.1], [6.2], [6.6], [7], [9.2], and [14] contain minor amendments that are necessary as a result of the new Standard and other amendments mentioned above. For example, in item [5.4] a cross reference to the definition of 'claim requiring nutrition information' is provided to clarify where this definition is located within the Standard; item [7] updates the existing clause to reflect new terminology and location of claim conditions in Standard 1.2.7.