

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 P1025 to revise the Code. The Authority considered the Proposal in accordance with Division 2 of Part 3 and has approved a draft revised Code.

Following consideration by the Legislative and Governance Forum on Food Regulation¹, 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 sunseting under the *Legislative Instruments Act 2003*.

2. Purpose

The Authority has approved variations to Chapters 1 and 2 of the Code. Each new standard is a separate instrument and every standard has a name provision—a requirement of the *Legislative Instruments Act 2003*.

3. Documents incorporated by reference

The variations to food regulatory measures do not incorporate any documents by reference. The variations update some references to documents that are incorporated by reference.

4. Consultation

In accordance with the procedure in Subdivision F of Division 2 of Part 3 of the FSANZ Act, the Authority's consideration of Proposal P1025 included two rounds of public comment following an assessment and the preparation of a draft Standard and associated reports. Submissions were called for on 23 May 2013 for a 12-week period, and on 10 July 2014 for an eight-week period.

A Regulation Impact Statement was not required, because the proposed variations to the Code are likely to have a minor impact on business 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.

¹ Previously known as the Australia and New Zealand Food Regulation Ministerial Council

6. Variation (Chapter 1—Introduction and standards that apply to all foods, Part 1—Preliminary)

Standard 1.1.1 – Structure of the Code and general provisions

Each standard will be introduced by two notes that provide information about the place of the standard within the Code and the application of the standard in New Zealand. Other notes will also be provided if appropriate.

Division 1 Preliminary

New section 1.1.1—1 Name

This section establishes that the instrument is the *Australia New Zealand Food Standards Code – Standard 1.1.1 – Structure of the Code and general provisions*.

New section 1.1.1—2 Structure of the Code

Subsection (1) provides that the standards are to be read together as a single instrument.

Subsection (2) provides an outline of the structure of the Code.

In Australia, *Australia New Zealand Food Standards Code* is a defined term in the FSANZ Act.

In New Zealand, the Code is given effect through the making of an adopted joint food standard under section 397 of the *Food Act 2014* (the Food Act).

Throughout the Code, editorial notes indicate if a provision does not apply in either Australia or New Zealand. In addition, section 1.1.1—3 sets out the application of the Code in Australia and New Zealand.

Division 2 Application and interpretation

New section 1.1.1—3 Application of Code

New section 1.1.1—3 re-states the application provision that is currently in subclauses 1(1) and (5) of Standard 1.1.1. The Code applies to food that is sold, processed or handled² in, or imported into, Australia or New Zealand.

Notes provide information about the standards that have not been adopted in New Zealand and a standard that does not apply in Australia, but has been made as a standard for the purposes of the joint food standards arrangements.

New subsection 1.1.1—3(2) repeats the current content of subclause 1(5) of Standard 1.1.1 concerning wine that was bottled prior to 20 December 2002.

New section 1.1.1—4 Application of interpretation legislation

This section provides that the general interpretation laws of Australia and New Zealand will apply, as appropriate, to the Code. Within Australia, this means that a prosecution for an offence would be conducted under state or territory law (including the state or territory interpretation law) but the Code itself would be interpreted consistently by all state and territory courts, applying the Commonwealth law. This provision reflects the current state of the law.

² 'Sell' and 'handle' are defined in the Australian legislation and 'processed and handled' is defined in the New Zealand *Food Act 2014*.

New section 1.1.1—5 References to other instruments

New paragraph 1.1.1—5(1)(a) provides that any reference in the Code to an Act, including the legislation of a State, Territory or New Zealand, includes a reference to any instruments made under that Act. This provision is new.

New paragraph 1.1.1—5(1)(b) provides a mechanism for making reference in the Code to the United States Code of Federal Regulations. The subsection repeats the content of clause 16 of Standard 1.1.1 of the current Code.

New subsection 1.1.1—5(2) provides that guidelines issued by FSANZ to assist in the interpretation of the Code are not legally binding. This repeats subclause 5(1) of Standard 1.1.1 of the current Code.

New section 1.1.1—6 How average quantity is to be calculated

New section 1.1.1—6 repeats the content, but not the format, of the definition of average quantity in clause 2 of Standard 1.1.1. The term average quantity is defined in section 1.1.1—6. The clause provides that an average quantity can be determined by any one of the manufacturer's analysis of the food, calculation of the actual amount of the ingredients in a food or calculation from generally accepted data relevant to the food. An average should reflect the best estimate having regard to seasonal variance or other factors that could reasonably be a cause of lot variance.

New section 1.1.1—7 Units of measurement

New section 1.1.1—7 repeats, in different form, the current content of clauses 6 and 8 of Standard 1.1.1. The clause provides the meaning of symbols used in the Code and provides that the relevant Australian or New Zealand measurement legislation or international convention will apply if a symbol is not in the table. The relevant symbols and their meaning are listed in Schedule 2.

New section 1.1.1—8 Compliance with requirements for mandatory statements or words

New section 1.1.1—8 is similar to clause 12 of Standard 1.1.1 of the current Code. It provides that where a provision of the Code requires a statement or information to be provided and suggests a form of words (for example, an advisory statement) a different form of words can be used if the intent is retained.

However, warning statements³ must be expressed in the words set out in the Code. Also, some provisions require specific words to be used in labelling, such as the date marking requirements, and those words must be used.

Division 3 Effect of variations to Code

New section 1.1.1—9 Effect of variations to Code

New section 1.1.1—9 re-states the provisions in current subclause 1(2) of Standard 1.1.1. The clause provides a stock-in-trade protection for foods that comply with a provision of the Code prior to the Code being varied but would not comply after the variation. Those foods are deemed to be compliant for 12 months after the date of variation.

An effect of this provision is that there will be a 12-month stock-in-trade period, after the commencement date, for food that is compliant with the current Code.

Subclause (2) makes it clear that the types of provisions that are relevant for the stock-in-trade provisions are labelling, packaging or composition requirements.

³ Warning statements are a particular type of statement identified in the definition of warning statement.

Division 4 Basic requirements

Note on enforcement of the Code

A lengthy note on the enforcement of the Code in Australia and New Zealand is set out at the beginning of this Division. The Code is enforced by laws made by the parliaments of Australia, New Zealand and the states and territories. It is a common element of the New Zealand and state and territory legislation that it is an offence to sell food that does not comply with a requirement in the Code. Other offences are established in relation to the making of false or misleading statements about food or failing to comply with a requirement of the Code that is imposed on a person.

The note is not a legally binding element of the Code or a source of legal advice.

Division 4 sets out the basic requirements that must be complied with by suppliers, importers, and manufacturers or preparers of food for sale.

New section 1.1.1—10 Requirements relating to food for sale

New section 1.1.1—10 sets out the basic labelling and information, packaging and compositional requirements for the Code. These requirements are expressed to apply to food for sale.

New subsection (1) provides that the requirements established by this section apply to foods for sale.

Compositional requirements

New subsection (2) re-states the permission, currently in subclause 10(3) of Standard 1.1.1, for the addition of one food to another food, unless there is a specific prohibition.

New subsection (3) states the requirement that a food for sale must comply with any provision of the Code relating to composition or the presence of substances in a food of that kind.

New subsection (4) repeats the current content of subclause 10(1) of Standard 1.1.1, which provides that a compositional permission to add 'other foods' is not a permission to use a substance as a food additive, nutritive substance or processing aid in that food if that use is not explicitly permitted.

New subsection (5) establishes a requirement that a food that is for sale must not be a food that is listed in the table to the subsection, unless expressly permitted. The substances listed are: prohibited or restricted plants or fungi; coca bush; novel foods offered for retail sale; foods produced using gene technology; irradiated foods; and kava or a substance derived from kava.

New subsection (6) establishes a requirement that a food that is for sale must not contain, as an ingredient, a substance that is listed in the table to the subsection, unless expressly permitted. The substances listed are: a substance that is used as a food additive; a substance that is used as a nutritive substance; a substance that is used as a processing aid, in Australia, a detectable residue of an agricultural or veterinary chemical; prohibited or restricted plants or fungi; coca bush; novel foods offered for retail sale; foods produced using gene technology; irradiated foods; and kava or a substance derived from kava.

New subsection (7) provides that the prohibition on addition or use of substances does not apply (unless the Code provides otherwise) to naturally occurring substances. Other provisions of the Code require declaration of some naturally occurring nutritive substances.

Labelling requirements

New subsection (8) states the requirements that a food for sale must comply with any provision of the Code relating to labelling.

Information requirements

New subsection (9) states the requirements that a food for sale must comply with any provision of the Code that requires information to be given.

Packaging requirements

New subsections (10) and (11) set out the packaging requirement that is now set out in Standard 1.4.3.

New section 1.1.1—11 Microbiological requirements for lot of a food

New section 1.1.1—11 provides that a lot of a food for sale must not have an unacceptable level of microorganisms. The limits for unacceptability are set out in Standard 1.6.1.

New section 1.1.1—12 Applicable standards for importation of food

This new section establishes requirements in the Code for imported food. The provisions supplement Australian and New Zealand legislation.

Food imported in the form or package intended for sale must comply with applicable standards in Australia or relevant standards in New Zealand. This provision identifies the applicable, or relevant, standards for the purposes of import control legislation.

New section 1.1.1—13 Food sold with a specified name or representation

New subsections 1.1.1—13(2) and (3) describe how requirements are applied to foods that are defined in the Code. Requirements apply to some foods only if they sold with the stated name. Other foods may be subject to a requirement even if the food is not sold with the defined name. New subsection (1) identifies the type of provision that the section applies to—any provision that provides that a food sold as a named food must satisfy certain requirements.

New subsection 1.1.1—13(4) provides that if a name is used when a food is sold, that name is assumed to be the true name of the food unless another name is apparent from the sale context.

New subsection 1.1.1—14 Other requirements relating to food

New section 1.1.1—14 provides that if a provision of the Code imposes a requirement for the handling of food or for record-keeping that requirement must be complied with. This provision establishes a requirement that will support enforcement of the food hygiene standards in Chapter 3 in Australia and any record-keeping requirements, such as those relating to irradiated food. In New Zealand, food handling is dealt with in the Food Act

New section 1.1.1—15 Identity and purity

New section 1.1.1—15 sets out the operative requirements of Standard 1.3.4—that a substance added to food as a food additive, a processing aid, a nutritive substance or a novel food must comply with a relevant specification. Specifications are set out in Schedule 3.

New section 1.1.1—16 Use of asterisks to identify terms defined in subsection 1.1.2—2(3)

New section 1.1.1—16 describes how some definitions used in the Code are highlighted, using asterisks, to assist navigation within the Code.