

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).

FSANZ had completed a review of the Code undertaken under Proposal P1025 in order to improve the Code's clarity and legal efficacy. A revised Code has been approved and will commence on 1 March 2016. It will replace the current Code, which will be repealed on that date.

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 P1037 to improve the clarity of provisions of Standard 1.2.7 – Nutrition, Health and Related Claims and related standards and schedules to commence on 1 March 2016 and to ensure that Standard 1.2.7 operates as intended. Proposal P1037 was also prepared to exempt certain elements of the Health Star Rating (HSR) system from the Code's requirements.

The Authority considered the Proposal in accordance with Division 2 of Part 3 and has prepared draft variations to the revised Code.

Following consideration by the Australia and New Zealand Ministerial Forum on Food Regulation,¹ 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 prepared a draft variation to amend the Code to clarify the operation of Standard 1.2.7 and related standards and schedules and to exempt certain elements of the HSR system from the Code's requirements for claims.

3. Documents incorporated by reference

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

4. Consultation

In accordance with the procedure in Division 2 of Part 3 of the FSANZ Act, the Authority's consideration of Proposal P1037 included one round of public consultation following an assessment and the preparation of a draft Standard and associated report.

¹ convening as the Australia and New Zealand Food Regulation Ministerial Council

A call for submissions (which included the draft variation) was released for a six-week consultation period.

A Regulation Impact Statement was not required because the proposed variations are likely to have only a minor regulatory impact on business, community organisations or 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. Effect of the Variations

Section 1.1.1—9 of Standard 1.1.1 provides that stock-in-trade that does not comply with a variation to the Code may be sold for a period of 12 months if it otherwise complied with the Code before that variation commenced. The section also provides that instruments varying the Code may provide for an alternate arrangement in relation to stock-in-trade.

Clause 4 of the instrument provides that section 1.1.1—9 of Standard 1.1.1 does not apply to the variations made by the instrument other than the variations made by items 1, 2 and 3.1 of the Schedule to the instrument (see below).

The clause provides for a transition period and for a different stock-in-trade exemption in relation to those variations.

During the transition period, food can comply with either the Code as in force as if those variations had not taken effect or with the Code as amended by those variations, but not both. The transition period is from 1 March 2016 to 18 January 2017. This period aligns with the current transition period for Standard 1.2.7.

The exemption for stock-in-trade will operate from 18 January 2017 for a period of 12 months. In this period, food that does not comply with the Code as amended by the relevant amendments will be deemed to be compliant with the Code if that food otherwise complied with the Code before 18 January 2017.

7. Variations

Item [1] of the Schedule varies Standard 1.1.2.

Item [1.1] inserts new section 1.1.2—15 into Standard 1.1.2 to provide a definition of the term 'Permitted Health Star Rating symbol'. Section 1.1.2—15 provides that a Permitted Health Star Rating symbol means an image subject to Australian Trade Marks numbered 1641445, 1641446 or 1641447 or to a New Zealand Trade Mark numbered 1018807, 1018808 or 1018809. Section 1.1.2—15 recognises the fact that the Health Star Rating system and the relevant trademarks provide for the trademarked images to be used to indicate varying levels of energy or nutrient content. The section makes clear that any such variations do not affect an image's status as a Permitted Health Star Rating symbol for the purposes of the Code.

Item [2] of the Schedule varies Standard 1.2.7

Item [2.2] inserts a Note after section 1.2.7—3. The Note draws attention to the fact that Standard 1.2.8 may impose additional labelling requirements for claims regulated by Standard 1.2.7.

Item [2.2] varies subsection 1.2.7—6 of Standard 1.2.7 to provide that Standard 1.2.7 does not apply to a Permitted Health Star Rating symbol.

Item [3] varies Standard 1.2.8.

Item [3.1] varies section 1.2.8—3 to provide that Standard 1.2.8 does not apply to a Permitted Health Star Rating symbol.

Item [3.2] inserts new subsections 1.2.8—6(11), (12) and (13) into section 1.2.8—6.

New subsection 1.2.8—6(11) requires that the nutrition information panel must include a declaration of the average amount of galactose where a claim requiring nutrition information is made in relation to lactose. That declaration must be made in accordance with section S12—3.

New subsection 1.2.8—6(12) requires that the nutrition information panel must include a declaration of the average amount of potassium where a claim requiring nutrition information is made in relation to salt or sodium. That declaration must be made in accordance with section S12—3.

New subsection 1.2.8—6(13) requires that, where a claim requiring nutrition information is made in relation to omega-3 fatty acids, the nutrition information panel must include a declaration of the average quantity of each type of omega-3 fatty acids and a declaration of the average quantity of the total of omega-3 fatty acids. Those declarations must be made in accordance with section S12—3.

Item [3.3] varies paragraph 1.2.8—14(1)(c). It replaces ‘of unavailable carbohydrate (not including dietary fibre)’ with ‘of the average quantity of unavailable carbohydrate (not including dietary fibre) per serving of the food’.

Item [3.4] varies paragraph 1.2.8—14(1)(c). It replaces ‘presence in the food’ with ‘the average quantity per serving of the food’.

Item [3.5] varies subsection 1.2.8—14(2) to remove the reference to ‘metric cup’.

Item [4] varies Schedule 4.

Item [4.1] amends the entry for Lactose in the table to section S4—3 by removing the condition that the nutrition information panel indicate the lactose and galactose content.

Item [4.2] amends the entry for Salt or sodium in the table to section S4—3 by removing the condition that the nutrition information panel indicate the potassium content.

Item [4.3] replaces the entry for ‘Omega-3 fatty acids’ in the table to section S4—3 to remove the condition that the nutrition information panel indicate the type and amount of omega-3 fatty acids.

Item [5] varies Schedule 5.

Item [5.1] varies section S5—3 to replace ‘the content of energy and each nutrient’ with ‘the average energy content and the average quantity of each nutrient’.

Item [5.2] varies section S5—3 to replace ‘AEC is the number of points for average energy content’ with ‘AEC is the number of points for the average energy content in the unit quantity of the food’.

Item [5.3] varies section S5—3 to replace ‘ASFA is the number of points for average saturated fatty acids with ‘ASFA is the number of points for the average quantity of saturated fatty acids in the unit quantity of the food’.

Item [5.4] varies section S5—3 to replace ‘ATS is the number of points for average total sugars’ with ‘ATS is the number of points for the average quantity of sugars in the unit quantity of the food’.

Item [5.5] varies section S5—3 to replace ‘AS is the number of points for average sodium’ with ‘AS is the number of points for the average quantity of sodium in the unit quantity of the food’.

Item [5.6] removes the word ‘total’ from Table 1 of section S5—3.

Item [5.7] removes the word ‘total’ from Table 2 of section S5—3.

Item [5.8] removes the word ‘sources’ from section S5—4.

Item [5.9] amends subsection S5—5(1) to require that the ‘P points’ scored depend on the ‘average quantity’ of protein in 100 g or 100 mL of the food product, based on the units used in the nutrition information panel.

Item [5.10] amends subsection S5—6(1) to require that the ‘F points’ scored depend on the ‘average quantity’ of dietary fibre in 100 g or 100 mL of the food product, based on the units used in the nutrition information panel.

Item [6] varies Schedule 12. It amends section S12—3 to add references to subsections 1.2.8—6(11), 6(12) and 6(13).

Item [7] varies Schedule 13. It replaces the table to section S13—2 with a new table. The new table changes the requirements for some particulars that must be included on the label for certain claims requiring additional nutritional information claims.