

# 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.

The Authority prepared Proposal M1019 to consider amending the Code to address inconsistencies between the foods and classes of foods and crop groups listed in Schedule 22 of the Code and those adopted by the Australian Pesticides and Veterinary Medicines Authority (APVMA) and by the joint Food and Agriculture Organization and World Health Organization Codex Alimentarius Commission (Codex). The Authority considered the Proposal in accordance with Division 2 of Part 3 of the FSANZ Act and has approved a draft variation to the Code.

Following consideration by the Food Ministers' Meeting (formerly The Australia and New Zealand Ministerial 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 sunseting under the *Legislation Act 2003*.

## 2. Variation will be a legislative instrument

The approved draft variation is a legislative instrument for the purposes of the *Legislation Act 2003* (see section 94 of the FSANZ Act) and is publicly available on the Federal Register of Legislation ([www.legislation.gov.au](http://www.legislation.gov.au)).

This instrument is not subject to the disallowance or sunseting provisions of the *Legislation Act 2003*. Subsections 44(1) and 54(1) of that Act provide that a legislative instrument is not disallowable or subject to sunseting if the enabling legislation for the instrument (in this case, the FSANZ Act): (a) facilitates the establishment or operation of an intergovernmental scheme involving the Commonwealth and one or more States; and (b) authorises the instrument to be made for the purposes of the scheme. Regulation 11 of the *Legislation (Exemptions and other Matters) Regulation 2015* also exempts from sunseting legislative instruments a primary purpose of which is to give effect to an international obligation of Australia.

The FSANZ Act gives effect to an intergovernmental agreement (the Food Regulation Agreement) and facilitates the establishment or operation of an intergovernmental scheme (national uniform food regulation). That Act also gives effect to Australia's obligations under an international agreement between Australia and New Zealand. For these purposes, the Act establishes the Authority to develop food standards for consideration and endorsement by the Food Ministers Meeting (FMM). The FMM is established under the Food Regulation Agreement and the international agreement between Australia and New Zealand, and consists of New Zealand, Commonwealth and State/Territory members. If endorsed by the

FMM, the food standards on gazettal and registration are incorporated into and become part of Commonwealth, State and Territory and New Zealand food laws. These standards or instruments are then administered, applied and enforced by these jurisdictions' regulators as part of those food laws.

### 3. Purpose

The purpose of the *Food Standards (Proposal M1019 – Review of Schedule 22 – Foods and classes of foods) Variation* is to amend Schedule 22 of the Code to align closer the foods and classes and groups of foods listed in that Schedule for plant foods or crop commodities with those adopted by the APVMA and by Codex.

As Schedule 22 is referenced by other sections of the Code, consequential amendments to other provisions of the Code will be required to account for the amendments to Schedule 22. Another approved draft variation titled *Food Standards (Proposal M1019 – Review of Schedule 22 – Foods and classes of foods – Consequential Amendments) Variation* lists the consequential amendments proposed by the Authority for this purpose.

### 4. Documents incorporated by reference

The variations in this instrument incorporate documents by reference.

The variation seeks to align closer the food classification of crop commodities in and by Schedule 22 of the Code with the food classification for food commodities of plant origin adopted by Codex. To the end, the variation will amend Schedule 22 to define certain foods and classes, groups and subgroups of foods listed in Schedule 22 by reference to a specific document published by Codex and that is or will be in force or existing at the commencement of the variation; namely -

- Appendixes IX, VIII and XI of REP17/PR, the Report of the 49<sup>th</sup> Session of the Codex Committee on Pesticides Residues, Beijing, P.R. China, 24 - 29 April 2017 as presented to the 40<sup>th</sup> Session of the Joint FAO/WHO Codex Alimentarius Commission, Geneva, Switzerland 17 – 22 July 2017.
- Appendixes VII and VIII of REP18/PR, the Report of the 50<sup>th</sup> Session of the Codex Committee on Pesticides Residues Haikou, P.R. China, 9 - 14 April 2018 as presented to the 41<sup>st</sup> Session of the Joint FAO/WHO Codex Alimentarius Commission, Rome, Italy, 2 – 6 July 2018.

This reference by incorporation is consistent with the current practice in the Code, such as in section S11—4 and Schedule 3.

The incorporated documents [REP17/PR](#)<sup>1</sup> and [REP18/PR](#)<sup>2</sup> are publically available online<sup>3</sup>. The Authority will also publish links to each document on its website.

### 5. Consultation

In accordance with the procedure in Division 2 of Part 3 of the FSANZ Act, the Authority's

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<sup>1</sup> REP17/PR: [https://www.fao.org/fao-who-codexalimentarius/sh-proxy/en/?lnk=1&url=https%253A%252F%252Fworkspace.fao.org%252Fsites%252Fcodex%252FMeetings%252FCX-718-49%252FREPORT%252FREP17\\_PRe.pdf](https://www.fao.org/fao-who-codexalimentarius/sh-proxy/en/?lnk=1&url=https%253A%252F%252Fworkspace.fao.org%252Fsites%252Fcodex%252FMeetings%252FCX-718-49%252FREPORT%252FREP17_PRe.pdf) (last accessed 12/5/2022)

<sup>2</sup> REP18/PR: [https://www.fao.org/fao-who-codexalimentarius/sh-proxy/en/?lnk=1&url=https%253A%252F%252Fworkspace.fao.org%252Fsites%252Fcodex%252FMeetings%252FCX-718-50%252FREPORT%252FFINAL%252520REPORT%252FREP18\\_PRe.pdf](https://www.fao.org/fao-who-codexalimentarius/sh-proxy/en/?lnk=1&url=https%253A%252F%252Fworkspace.fao.org%252Fsites%252Fcodex%252FMeetings%252FCX-718-50%252FREPORT%252FFINAL%252520REPORT%252FREP18_PRe.pdf) (last accessed 12/5/2022)

<sup>3</sup> Reports are also available from the Codex website: <https://www.fao.org/fao-who-codexalimentarius>

consideration of Proposal M1019 included one round of public consultation following an assessment and the preparation of draft variations and associated reports. Submissions were called for nationally and internationally (via World Trade Organisation notification) on 4 April 2022 for a four-week consultation period. The Authority has also undertaken earlier targeted consultation with stakeholders in 2017 and 2019 which informed its assessment and preparation of the draft variations.

A Regulation Impact Statement (RIS) was not required because the approved draft variation is likely to have a minor impact on business and individuals. The Office of Best Practice Regulation (OBPR) advised that a RIS was not required as the impacts of the Proposal were assessed to be below the required threshold (OBPR correspondence dated 19 May 2021, reference 44087).

## **6. 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 44 of the *Legislation Act 2003*.

## **7. Variation**

**Item [1]** of the Schedule to the Variation amends Schedule 22 of the Code by repealing section S22—2 and replacing it with the new sections below.

New section S22—2 provides that sections S22—3 to S22—8 respectively describe the foods that are classed as: animal food commodities; crop commodities; derived edible commodities of plant origin; secondary commodities of plant origin; and secondary commodities of animal origin.

New section S22—3 specifies the portion of food for the purposes of paragraph 1.4.2—3(2)(a) of the Code. That is, the portion of a commodity to which maximum residue limits and extraneous residue limits set by the Code for agricultural or veterinary chemicals will apply. Paragraph 1.4.2—3(2)(a) provides that, when calculating the amount of a permitted residue in a food, the amount to calculate is the amount of that residue that is in the portion of the commodity that is specified in Schedule 22.

Subsection S22—3(1) provides that, subject to subsection S22—3 (2), the specified portion is the portion as specified by a provision of Schedule 22. Section S22—3 to S22—8 each contain provisions that will specify the portion for commodities within the class of food to which each of those sections relate.

Subsection S22—3(2) provides that, if Schedule 19, 20 or 21 instead specify a portion of a food commodity for purposes of paragraph 1.4.2—3(2)(a), then that portion is the specified portion for the purposes of paragraph 1.4.2—3(2)(a).

The following example is provided to illustrate how subsection S22—3(2) is intended to operate. Bananas will be classified by the revised Schedule 22 as *Assorted tropical and subtropical fruits - inedible peel*. Subsection S22—5(5) and (8) specify the portion for this subgroup of foods and, for bananas, provide that the portion specified for the purposes of paragraph 1.4.2—3(2)(a) is 'the whole commodity after removal of any central stem and peduncle'. Schedule 20 may set an MRL for 'Bananas (in the pulp)'. If so, in this case, subsection S22—3(2) would provide that the portion specified for the purposes of paragraph 1.4.2—3(2)(a) is the pulp.

Section S22—4 describes the foods that are classed as animal food commodities. With one exception, the section lists the same foods and food groups, and specifies the same

portions, that are currently listed or specified for this class of food in Schedule 22. The exception is the addition of the new commodity 'Abalone' under the subgroup 'Molluscs – and other marine invertebrates'. This change is made to provide clarity for this commodity. Abalone is currently listed in section 20—3 of Schedule 20 of the Code but is not currently listed in Schedule 22.

Section S22—5 describes the foods that are classed as crop commodities.

Subsection S22—5(1) provides that the table to subsection S22—5(7) (the table) describes the classes, groups and subgroups for plant foods.

Subsection S22—5(2) provides that, unless the table expressly provides otherwise:

- each class of food listed in the table includes each of the corresponding food groups listed in that table for that class;
- each food group listed in the table includes each of the corresponding food subgroups listed in that table for that group; and
- each group and subgroup of foods listed in the table includes each of the corresponding commodities listed in that table for that group or subgroup; and any other commodity that is listed in the above-mentioned incorporated Codex documents for that group or subgroup.

Subsection S22—5(3) provides that, subject to subsection S22—5(2), a class, group and subgroup of crop commodities listed in the table shall have the same meaning as that given to that class, group or subgroup by the relevant Codex document listed in that subsection. That is, that the classes, group and subgroup of crop commodities listed in the table shall be the same as those listed in the Codex documents unless the table provides otherwise, in which case the different description stated in the table shall apply.

Subsection S22—5(4) provides a reference in subsection S22—5(3) to the table is a reference to the table for subsection S22—5(7).

Subsection S22—5(5) provides that, for a commodity in a food group listed in the table to subsection (8), the portion of that commodity that is specified for the purposes of paragraph 1.4.2—3 (2)(a) is the corresponding portion listed in that table. Subsection S22—5(5) operates subject to section S22—3, and subsection S22—3(2) in particular. As explained above, the latter provide that, if Schedule 19, 20 or 21 specify a different portion for that commodity for the purposes of paragraph 1.4.2—3(2)(a), then that different portion applies.

Subsection S22—5(6) provides that, in section S22—5, a reference to -

- the '49<sup>th</sup> Report' is a reference to REP17/PR, the Report of the 49th Session of the Codex Committee on Pesticides Residues, Beijing, P.R. China, 24 - 29 April 2017 as presented to the 40th Session of the Joint FAO/WHO Codex Alimentarius Commission, Geneva, Switzerland 17 – 22 July 2017;
- the '50<sup>th</sup> Report' is a reference to REP18/PR, the Report of the 50th Session of the Codex Committee on Pesticides Residues Haikou, P.R. China, 9 - 14 April 2018 as presented to the 41st Session of the Joint FAO/WHO Codex Alimentarius Commission, Rome, Italy, 2 – 6 July 2018.

Subsection S22—5(7) contains the table describing classes, groups, subgroups and commodities for plant foods.

Subsection S22—5(8) contains the table specifying the portion of plant commodities to which maximum residue limits and extraneous residue limits set by the Code for agricultural or veterinary chemicals will apply. See section S22—3 and subsection S22—5(5) above.

New section S22—6 describes the foods that are classed as derived edible commodities of

plant origin. With one exception, the section lists the same foods and foods groups, and specifies the same portions, that are currently listed or specified for this class of food in Schedule 22. The exception is that the addition of the commodity 'citrus oil' to the food group 'Miscellaneous'. This change is made to provide clarity for this commodity listed in Schedule 20.

New section S22—7 describes the foods that are classed as secondary commodities of plant origin. The section lists the same foods and foods groups, and specifies the same portions, that are currently listed or specified for this class of food in Schedule 22.

New section S22—8 describes the foods that are classed as secondary commodities of animal origin. The section lists the same foods and foods groups, and specifies the same portions, that are currently listed or specified for animal food commodities in Schedule 22.