

EXPLANATORY STATEMENT

Food Standards Australia New Zealand Act 1991

Food Standards (Proposal P1061 – Code Revision (2023)) Variation

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 P1061 to make relatively minor amendments to the Code. The Authority considered the Proposal in accordance with Division 2 of Part 3 and prepared a draft variation – the *Food Standards (Proposal P1061 – Code Revision (2023)) Variation*. The Authority has approved the draft variation.

Following consideration by the Food Ministers' Meeting (FMM), section 92 of the FSANZ Act stipulates that the Authority must publish a notice about the standard or draft variation of a standard.

2. Variation is 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).

This instrument is not subject to the disallowance or sunset 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 sunset 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 sunset 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 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 Authority has approved a draft variation amending various provisions in the Code to correct typographical errors, omissions, inconsistencies and formatting issues; update references; and to change editorial Notes to reflect the New Zealand Government's decision to adopt in New Zealand the Code's provisions relating to folic acid fortification. These require the addition of folic acid to wheat flour sold as suitable for making bread to which section 2.1.1—5 of the Code applies. Section 2.1.1—4 of the Code provides that section 2.1.1—5 does not apply to certain foods, including bread that is represented as organic.

The approved amendments are relatively minor in nature.

4. Documents incorporated by reference

Section 14 of the *Legislation Act 2003* provides that a legislative instrument may:

- apply, adopt or incorporate provisions of a Commonwealth disallowable legislative instrument, with or without modification, as in force at a particular time or as in force from time to time; and
- incorporate any other document in writing which exists at the time the legislative instrument commences or a time before its commencement.

The Code currently contains provisions that incorporate other legislative instruments and other written documents by reference in accordance with the above section. The approved draft variation amends those provisions in the following standards of the Code to update certain references to an incorporated instrument or document. This reference by incorporation is consistent with the current practice in the Code.

Standard 1.1.1

A number of Code provisions currently refer to and incorporate by reference the United States Code of Federal Regulation (CFR). For this purpose, paragraph 1.1.1—5(1)(b) of the Code states that a reference in the Code to the Code of Federal Regulations, or CFR, is a reference to the 2019 compilation of the United States Code of Federal Regulations. This provision is outdated. The latest compilation was published by the United States Government in 2022. The approved draft variation amends paragraph 1.1.1—5(1)(b) to refer instead to the 2022 compilation.

A copy of the 2022 compilation of United States Code of Federal Regulations is freely and publicly available online at <https://www.govinfo.gov/app/collection/cfr>

Standard 1.1.2

The definition of 'permitted flavouring substance' in subsection 1.1.2—2(3) of the Code incorporates certain publications by reference. These include Edition 29 (2019) of the Generally Recognised as Safe (GRAS) lists of flavouring substances published by the Flavour and Extract Manufacturers' Association of the United States (FEMA). This reference is now outdated as FEMA has published Edition 30 (2022) of its GRAS lists of flavouring substances. The approved draft variation amends the definition of 'permitted flavouring substance' to refer instead to the new Edition.

A copy of Edition 30 (2022) of FEMA's GRAS lists of flavouring substances is freely and publicly available online at <https://www.femaflavor.org/publications/gras-publications/gras-30>

Standard 2.2.3

Standard 2.2.3 contains several editorial Notes. Note 3 provides links to websites that provide guidance on fish names. These include a link to the 2015 edition of the Australian Fish Names Standard published by Standards Australia. Standards Australia has published a 2019 edition of that Standard. The approved draft variation amends Note 3 in Standard 2.2.3 to refer instead to the 2019 edition of the Australian Fish Names Standard.

Note 3 to Standard 2.2.3 does not incorporate the Australian Fish Names Standard by reference. The Note has no legal effect. Nor does it impose or set any requirement. Editorial Notes such as Note 3 do not form part of the Code (see the definition of the term 'standard' in subsection 4(1) of the FSANZ Act).

There are various ways to access the 2019 edition of the Australian Fish Names Standard (the Australian Fish Names Standard).

Copies of the Australian Fish Names Standard can be purchased online through the SAI Global Infostore.

However, as is explained in Note 3 itself:

- the Australian Fish Names Standard is available for viewing at <http://www.fishnames.com.au>, at no cost to the user; and
- an online searchable Fish Names Database, which is understood to have the most up-to-date information on all approved group and individual species names, is publicly available at <http://www.fishnames.com.au>.

Standard 4.2.1

Section 4.2.1—16 sets out a requirement related to implementing a documented food safety management system that effectively control the hazards, with which food businesses engaged in the primary production or processing of, or manufacturing activities concerning, bivalve molluscs must comply. This provision incorporates by reference certain publications documenting food safety management systems which relevant food businesses may implement, thereby complying with the requirement. These publications include the *Export Control (Fish and Fish Products) Orders 2005* made under the *Export Control (Orders) Regulations 1982* (Cth).

The 2005 Orders have been replaced by the *Export Control (Fish and Fish Products) Rules 2021*. The approved draft variation amends section 4.2.1—16 to refer instead to the 2021 Rules.

A copy of the 2021 Rules is freely and publicly available online at <https://www.legislation.gov.au/Details/F2021L00317>.

Standard 4.2.2

Standard 4.2.2 contains an editorial Note to clause 14 of that Standard. The Note refers readers to the 2004 edition of the *Australian Drinking Water Guidelines* issued by the National Health and Medical Research Council of Australia (NHMRC). The Guidelines provide guidance on what can constitute acceptable drinking water. The NHMRC has published a 2011 edition of the Guidelines. The approved draft variation amends the editorial

Note to clause 14 of Standard 4.2.2 to refer instead to the 2011 edition of the *Australian Drinking Water Guidelines*.

The Note does not incorporate *Australian Drinking Water Guidelines* by reference. The Note has no legal effect. Nor does it impose or set any requirement. Editorial Notes do not form part of the Code (see the definition of the term 'standard' in subsection 4(1) of the FSANZ Act).

The 2011 edition of the *Australian Drinking Water Guidelines* is freely and publicly available at: <https://www.nhmrc.gov.au/about-us/publications/australian-drinking-water-guidelines>.

Standard 4.2.3

Standard 4.2.3 contains an editorial Note to the table to clause 4 of that Standard. The Note refers readers to the *Commonwealth Export Control (Meat and Meat Products) Orders 2005* (Cth) as one example of a food safety management system that a 'relevant authority' may recognise for the purposes of Standard 4.2.3. The *Commonwealth Export Control (Meat and Meat Products) Orders 2005* (Cth) have been replaced by the *Export Control (Meat and Meat Product) Rules 2021* (Cth). The approved draft variation amends the editorial Note to the table to clause 4 of Standard 4.2.3 to refer instead to the 2021 Rules.

The Note does not incorporate the 2021 Rules by reference. The note has no legal effect. Editorial Notes and examples do not form part of the Code (see the definition of the term 'standard' in subsection 4(1) of the FSANZ Act).

A copy of the 2021 Rules is freely and publicly available online at <https://www.legislation.gov.au/Details/F2021L00317>

Schedule 3

Section 1.1.1—15 of the Code requires certain substances to comply with any relevant identity and purity specifications listed in Schedule 3 of the Code.

Schedule 3 incorporates certain publications by reference to set specifications for various substances in the circumstances specified in that Schedule. The publications listed include the following:

- the Compendium of Food Additive Specifications published by the Food and Agriculture Organisation of the United Nations /World Health Organisation Expert Committee on Food Additives (JECFA) in the Monographs listed in Schedule 3;
- the 12th edition (2020) of the Food chemicals codex published by the United States Pharmacopeial Convention; and
- the 2018 edition of the International Oenological Codex published by the Organisation Internationale de la Vigne et du Vin (OIV).

The approved draft variation amends relevant provisions in Schedule 3 to update these references to refer to the following.

- JECFA has added new Monographs 25 (2020) and 26 (2021) to its Compendium of Food Additive Specifications. Copies are freely and publicly available online at <https://www.fao.org/food/food-safety-quality/scientific-advice/jecfa/jecfa-additives/en/>.
- The OIV has published a new edition (2022) of the International Oenological Codex. A copy is freely and publicly available online at <https://www.oiv.int/standards/international-oenological-codex>.

- The United States Pharmacopeial Convention has published a new 2022 (13th edition) of the Food chemicals codex (FCC). A copy is available online at <https://www.foodchemicalscodex.org/>

The FCC is not available for free. However, it is anticipated that the persons most affected by its adoption in the Code (food manufacturers), would be in possession of the document in order to manufacture food products. As an important international benchmark for the safety and quality of food ingredients, it would be infeasible from a regulatory perspective to not adopt such benchmarks on the basis that the publications are not available for free.

However, by prior written arrangement with the Authority, members of the public may arrange to view the FCC without charge at the Authority's Wellington and Canberra Offices.

It should also be noted that the National Library's Trove online system (www.trove.nla.gov.au/) allows users to identify libraries in Australia that are open to the public where editions (in most cases, earlier editions) of the FCC may be viewed. For example, Trove indicates that access to the 1996 edition of the FCC is available at the University of Melbourne Library and the Hawksbury Campus Library of the Western Sydney University, which are both open to the public. Members of the public may also approach any library that participates in inter-library loans with those university libraries to request an inter-library loan, or to obtain a photocopy of a particular part or monograph in the FCC for personal study or research (but not for commercial purposes). Fees apply in relation to the making of such a request. Enquiries should be made with local libraries, State libraries and the National Library.

5. Consultation

In accordance with the procedure in Division 2 of Part 3 of the FSANZ Act, the Authority's consideration of Proposal P1061 included one round of public consultation following an assessment and the preparation of a draft variation and associated assessment summary. Submissions were called for on 30 January 2023 for a five-week consultation period. Four submissions were received in response to the call for public submissions.

The Australian Government's Office of Impact Analysis, formerly known as the Office of Best Practice Regulation (OBPR), in an email on 22.12.22 (reference ID OBPR22-03854) advised that, on the basis of information provided by FSANZ, Proposal P1061 is unlikely to have a more than minor regulatory impact. As such, the preparation of an Impact Analysis was not required for this Proposal

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

7.1 Reflecting the New Zealand decision re-mandatory fortification of folic acid

Items [1], [5], and [6] of the Schedule to the approved draft variation include amendments to reflect the action taken by the New Zealand Government under New Zealand food laws to adopt in New Zealand the Code's provisions relating to folic acid fortification. These provisions require the addition of folic acid to wheat flour sold as suitable for making bread to

which section 2.1.1—5 of the Code applies. Section 2.1.1—4 of the Code provides that section 2.1.1—5 does not apply to certain foods, including bread that is represented as organic. These provisions will apply in New Zealand from 13 August 2023.

In order to reflect this change to New Zealand food law, amendment of Note 1 to section 1.1.1—3 of the Code and removal of the Note to section 2.1.1—5 of the Code are required. A new Note is also added at the end of paragraph 2.1.1—5(b). This paragraph contains the requirement related to thiamin and the new Note clarifies that this requirement applies in Australia only.

7.2 Correcting typographical errors, omissions, inconsistencies and formatting

Items [4], [8], [9], [11], [15], and [19] – [58] of the Schedule to the approved draft variation include amendments to correct typographical errors, omissions, and formatting issues; and to improve consistency across the Code.

7.3 Removing outdated clause

Item [10] of the Schedule to the approved draft variation includes an amendment to remove an outdated clause, which only applied to food businesses that existed at the time of the commencement of the clause. Due to the passage of time, the clause is no longer operative.

7.4 Updating references

Items [2], [3], [7], [12] - [14], and [16] – [18] of the Schedule to the approved draft variation include amendments to update references in the Code.