

EXPLANATORY STATEMENT

Food Standards Australia New Zealand Act 1991

Food Standards (Proposal P1062 – Defining added sugars for claims) 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 P1062 to consider amending the Code to define and clarify added sugars for the purposes of making claims. The Authority considered the Proposal in accordance with Division 2 of Part 3 and has prepared a draft variation - the *Food Standards (Proposal P1062 – Defining added sugars for claims) 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 draft variation.

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 to amend Schedule 4 of the Code to define and clarify what constitutes added sugars for the purposes of making voluntary nutrition content claims about added sugars.

4. Documents incorporated by reference

The approved draft variation does not incorporate any documents by reference.

5. Consultation

In accordance with the procedure in Division 2 of Part 3 of the FSANZ Act, the Authority's consideration of Proposal P1062 included one round of public consultation following an assessment and the preparation of a draft Standard and associated report. Submissions were called for on 11 September 2023 for a 4-week consultation period.

Impact analysis requirements applying to FSANZ were changed in April 2023¹. As a result, undertaking a Regulation Impact Statement (RIS) in addition to the assessment required under the FSANZ Act is no longer mandated. FSANZ has undertaken assessment in accordance with the FSANZ Act to consider the regulatory impacts and costs and benefits in line with RIS guidance.

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

Clause 1 provides that the name of the approved draft variation is the *Food Standards (Proposal P1062 – Defining added sugars for claims) Variation*.

Clause 2 provides that the Code is amended by the Schedule to the approved draft variation.

Clause 3 provides that the approved draft variation will commence on the date of gazettal of the instrument.

Clause 4 provides a transitional arrangement.

Subclause 4(1) provides that the stock-in-trade exemption provided by section 1.1.1—9 of Standard 1.1.1 will not apply to any of the amendments made by the approved draft variation.

Subclause 4(2) and paragraph 4(4)(a) provide an initial transitional arrangement where during a four year transition period commencing on the instrument's date of gazettal, a food product may

¹ For more information, refer to the Regulatory Impact Analysis Guide for Ministers' Meetings and National Standard Setting Bodies (June 2023).

be sold if the food product complies with either the Code as in force without the amendments made by the instrument; or the Code as amended by the instrument.

Subclause 4(2) and paragraph 4(4)(b) provide a subsequent transitional arrangement where during a post-transition two year period commencing on the day after the initial transition period ends, a food product that was packaged and labelled before the end of initial four year transition period, may be sold if the product complies with either the Code as in force without the amendments made by the instrument; or the Code as amended by the instrument.

8. Schedule

The Schedule of the approved draft variation amends Schedule 4 of the Code.

Item [1] of the Schedule amends the table to section S4—3 of Schedule 4 of the Code. It replaces the entry in that table dealing with the property of food “Sugar or sugars” with a new entry as follows.

The new entry restates the current entries in column 3 of the table for the specific descriptors ‘% Free’, ‘Low’ and “Reduced or Light/Lite’, and the current conditions listed in column 4 for the use of each of those descriptors.

‘No added sugar or sugars’

The new entry sets new conditions in column 4 of the table for the use of the specific descriptor ‘No added’. The new conditions are as follows.

Condition (a)

Condition (a) is that the food for sale is not an added sugar. Condition (e) defines what is an added sugar for the purposes of conditions (a) and (b).

Condition (b)

Condition (b) provides that a ‘no added sugar(s)’ claim is not permitted to be displayed on a food for sale that contains an added sugar (as defined in condition (e)) as an added ingredient and that contains more sugars than 10 g/100 g for solid food or 7.5 g/100 mL for liquid food.

Condition (c)

Condition (c) provides that a ‘no added sugar(s)’ claim is not permitted to be displayed on a food for sale in which the concentration of hexose monosaccharides and disaccharides has been increased by hydrolysis of carbohydrates during food production.

Condition (d)

Condition (d) provides an exemption to condition (c). It provides that condition (c) does not apply to a food for sale in which: the concentration of hexose monosaccharides and disaccharides was increased by hydrolysis of carbohydrates during that food’s production; and the concentration of hexose monosaccharides and disaccharides in that food is not > 1.5%. The

exemption means that condition (c) does not prevent a 'no added sugar(s)' claim from being displayed on that food for sale.

Condition (e)

Condition (e) states that, for the purposes of conditions (a) and (b), the term *added sugar* means any of the products listed below, derived from any source:

- (i) hexose monosaccharides and disaccharides (for example, dextrose, fructose, sucrose, lactose, glucose, galactose, maltose, trehalose);
- (ii) low energy hexose monosaccharide D-tagatose;
- (iii) starch hydrolysate;
- (iv) glucose syrup;
- (v) maltodextrin and similar products (for example, dextrans);
- (vi) a product derived at a sugar refinery (including brown sugar, molasses, raw sugar, golden syrup, treacle) (other examples of a product derived at a sugar refinery are cane sugar, beet sugar, white sugar, granulated sugar);
- (vii) icing sugar;
- (viii) invert sugar;
- (ix) sugar and sugar syrup derived from plants (for example, high fructose corn syrup, tapioca syrup, maple syrup, rice syrup, rice malt syrup, sorghum syrup, coconut sugar or syrup, palm sugar or syrup, agave syrup);
- (x) honey;
- (xi) malt;
- (xii) malt extracts;
- (xiii) any of the following unless the food for sale is a *prescribed beverage* (as defined in condition (g)): concentrated fruit juice; concentrated vegetable juice; deionised fruit juice; and deionised vegetable juice.

Condition (e)(xiii) provides that, if the food for sale is a prescribed beverage (as defined in condition (g)) and contains concentrated fruit juice, concentrated vegetable juice, deionised fruit juice or deionised vegetable juice, then that concentrated fruit juice, concentrated vegetable juice, deionised fruit juice or deionised vegetable juice will not be an 'added sugar' for the purposes of making a 'no added sugar(s)' claim. This will mean that, if that food for sale does not contain an added sugar listed in conditions (e)(i) to (xii), it will be a food that does not contain an 'added sugar' for the purposes of condition (b)(i). As such, that food for sale will be permitted to display a 'no added sugar(s)' claim provided that it complies with the maximum sugars content requirement set by condition (b)(ii).

Condition (f)

Condition (f) provides that the reference in condition (b) to an ingredient includes an ingredient of a compound ingredient. Subsection 1.1.2—2(3) of the Code provides that an ingredient of a food is a compound ingredient if that ingredient is itself made from two or more ingredients.

Condition (f) will mean that, if a food for sale contains an added sugar (as defined by condition (e)) as an ingredient of an added compound ingredient in that food, that food for sale is not permitted to display a 'no added sugar(s)' claim. For example, a food for sale that contains jam

(which contains added sugar as an ingredient) as an added compound ingredient will not be permitted to display a 'no added sugar(s)' claim.

Condition (g)

Condition (g) states that, for the purpose of conditions (e)(xiii), the term *prescribed beverage* means any of the following products:

- (i) a brewed soft drink;
- (ii) a formulated beverage;
- (iii) a juice blend;
- (iv) a fruit drink;
- (v) a fruit juice;
- (vi) a vegetable juice;
- (vii) a water-based beverage.

Section 1.1.2—3 of the Code provides a definition for the following terms: brewed soft drink; formulated beverage; juice blend; fruit drink; fruit juice; and vegetable juice. A water-based beverage is referred to as a non-alcoholic beverage in Standard 2.6.2 of the Code.

'Unsweetened'

The new entry restates the entry in column 3 of the table for the specific descriptor 'Unsweetened', and the current condition (a) listed in column 4 for the use of that descriptor.

The new entry in effect amends condition (b) and adds a new condition (c) in column 4 of the table for the making of 'Unsweetened' claims.

Condition (b)

The new entry amends condition (b) to provide that an 'unsweetened' claim is not permitted to be displayed on a food for sale that contains erythritol. The amended condition provides that an 'unsweetened' claim is not permitted to be displayed on a food that contains: intense sweeteners; sorbitol; mannitol; glycerol; xylitol; isomalt; maltitol; maltitol syrup; erythritol; or lactitol.

Condition (c)

The new entry imposes new condition (c) for the use of the specific descriptor 'Unsweetened' in relation to the property of food 'Sugar or sugars'.

New condition (c) provides that an 'unsweetened' claim cannot be made in relation to a food for sale that contains, as an ingredient or as an ingredient of a compound ingredient, a monosaccharide or disaccharide listed in the table to subsection S11—2(3) of the Code.

Subsection 1.1.2—2(3) of the Code provides that an ingredient of a food is a compound ingredient if that ingredient is itself made from two or more ingredients.

The table to subsection S11—2(3) of the Code lists certain substances and their energy factors for the purposes of Standard 1.2.8. New condition (c) will mean in effect that a food for sale

containing low energy sugars (monosaccharides or disaccharides) which are listed in the table to S11—2(3) will not be permitted to make an 'unsweetened claim'. At present, D-tagatose is the only low-energy sugar listed in that table.