

EXPLANATORY STATEMENT

Food Standards Australia New Zealand Act 1991

Food Standards (Proposal P1064 – Australian only Infant Formula Product Standard) 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.

FSANZ prepared Proposal P1064 to add or amend Notes in Standards 1.1.1 and 2.9.1 of the Code in order to advise readers that Standard 2.9.1 applies in Australia only.

The Authority considered the proposal in accordance with Division 2 of Part 3 and has approved a draft variation - the *Food Standards (Proposal P1064 – Australian only Infant Formula Product Standard) Variation* (the approved 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 approved draft variation.

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).

This instrument is 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 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 approved draft variation is to add or amend Notes in Standard 1.1.1 and 2.9.1 of the Code to reflect that Standard 2.9.1 applies in Australia only and to inform readers of that fact.

Standard 2.9.1, the Code's infant formula products standard, was amended in 2024 as result of Proposal P1028. That Proposal's regulatory changes were endorsed by the FMM on 25 July 2024 and gazetted on 13 September 2024. On 5 August 2024, the New Zealand Government formally notified the FMM in accordance with paragraph 14 of Annex D of *The Agreement between the Government of Australia and the Government of New Zealand Concerning a Joint Food Standards System* that New Zealand would opt out of the amended infant formula products standard developed under P1028. As a result, Standard 2.9.1 of the Code now applies in Australia only.

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 P1064 included one round of consultation with government agencies in accordance with the FSANZ Act. Further details of the consultation process, the issues raised during consultation and by whom, and the Authority's response to these issues are available in an approval report published on the Authority's website at www.foodstandards.gov.au.

A regulation impact statement (RIS) was not prepared for this proposal. Under changes to impact analysis requirements, the Authority is not required to seek confirmation from the Office of Impact Analysis (OIA) that a RIS is not required. This is because the amendments proposed in the approved draft variation are considered unlikely to have more than a minor regulatory impact. This is in line with previous advice from the OIA on similar proposals (for example Proposal P1061 – Code Maintenance Proposal 2023, OIA reference 22-03854).

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 of the approved draft variation provides that the name of the variation is the *Food Standards (P1064 – Australian only Infant Formula Product Standard) Variation*.

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

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

Schedule to the approved draft variation

Item [1] of the Schedule would amend subsection 1.1.1—2(2) of the Code.

Subsection 1.1.1—2(2) of the Code sets out the structure of the Code and lists each standard. It provides, in effect, a table of contents for the Code. The list of standards in that subsection identifies for readers which standards of the Code apply in Australia only by the use of a Note after the entry for each relevant Chapter or standard.

Item [1] amends subsection 1.1.1—2(2) by inserting a Note stating ‘Applies in Australia only’ after the reference in that subsection to Standard 2.9.1. The Note would inform readers of the fact that Standard 2.9.1 of the Code applies in Australia only

Item [2] of the Schedule amends Note 1 to subsection 1.1.1—3(1).

Section 1.1.1—3 sets out to what food the Code applies. Subsection 1.1.1—3(1) provides that, unless stated otherwise, the Code applies to food that is sold, processed or handled for sale or imported into Australia or New Zealand. Note 1 to that subsection lists those standards or provisions in the Code which the New Zealand Government has not incorporated or adopted under the *Food Act 2014* (NZ).

The approved draft variation amends the above-mentioned list in Note 1 of subsection 1.1.1—3(1) by replacing the existing paragraph (vii) – which refers to ‘Chapter 3 (food safety standards) and Chapter 4 (primary production and processing standards)’ - with three new paragraphs as follows:

- (vii) Standard 2.9.1 (infant formula products);
- (viii) Chapter 3 (food safety standards);
- (vix) Chapter 4 (primary production and processing standards).

The effect of this amendment is to add Standard 2.9.1 to the list in Note 1 of Code provisions that have not been incorporated or adopted under the *Food Act 2014* (NZ). It also separates the references to Chapter 3 (food safety standards) and Chapter 4 (primary production and processing standards), currently combined in one paragraph (vii), into their own paragraphs: (viii) and (vix).

The amendment will inform readers of the fact that Standard 2.9.1 of the Code applies in Australia only.

Item [3] of the Schedule repeals and replaces Note 2 to the title of Standard 2.9.1.

The Code identifies standards that do not apply in New Zealand by use of a note under the title of the relevant standard and that states the standard applies in Australia only.

At present, the following note is included under the title of Standard 2.9.1:

Note 2 The provisions of the Code that apply in New Zealand are incorporated in, or adopted under, the *Food Act 2014* (NZ). See also section 1.1.1—3.

This note is now incorrect as Standard 2.9.1 of the Code (as amended by Proposal P1028) has not been incorporated in or adopted under the New Zealand Food Act and does not apply in New Zealand

Item [3] amends the text of Note 2 to state as follows:

Note 2 This Standard applies in Australia only. New Zealand has under Annex D of the *Agreement between the Government of Australia and the Government of New Zealand Concerning a Joint Food Standards System* opted out of this Standard. See also section 1.1.1—3.

The amended Note would inform readers of the fact that Standard 2.9.1 of the Code applies in Australia only. The above is the same approach as taken for other standards of the Code that do not apply in New Zealand, such as Standard 1.4.2 – *Agvet chemicals* and Standard 1.6.2 – *Processing requirements for meat*.