

EXPLANATORY STATEMENT

Food Standards Australia New Zealand Act 1991

Food Standards (Proposal P1049 – Carbohydrate and sugar claims on alcoholic beverages) 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 P1049 to clarify requirements in the Code with respect to nutrition content claims about carbohydrate content and the components of carbohydrate (such as sugar) in relation to food (including alcoholic beverages) containing more than 1.15% alcohol by volume (ABV). The Authority considered the Proposal in accordance with Division 2 of Part 3 and has approved a draft variation: the *Food Standards (Proposal P1049 – Carbohydrate and sugar claims on alcoholic beverages) 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 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 Standard 1.2.7 to clarify requirements for nutrition content claims about carbohydrate content and components of carbohydrate ('sugar' or 'sugars') in relation to food (including alcoholic beverages) containing more than 1.15% ABV.

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 P1049 included one round of public consultation following an assessment and the preparation of a draft variation and associated report. Submissions were called for on 24 July 2023 for a 6-week consultation period. 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.

The Office of Impact Analysis (OIA¹) previously exempted FSANZ from the need to prepare a formal Consultation Regulation Impact Statement (CRIS) in relation to the regulatory change proposed in the CFS². The OIA was satisfied that extensive and ongoing consultation with affected stakeholders had occurred, and that a statutory consultation process would be undertaken. The CFS included a detailed CRIS equivalent (see Attachment D of the CFS).

The OIA also exempted FSANZ from the need to prepare a Decision Regulation Impact Statement (DRIS) for P1049 because the amendments in the approved draft variation are considered unlikely to have more than a minor regulatory impact³. However, FSANZ has undertaken an assessment in accordance with the FSANZ Act requirements to consider the regulatory impacts and costs and benefits.

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

A reference to 'the variation' in this section is a reference to the approved draft variation.

Clause 1 of the variation provides that the name of the variation is the *Food Standards (Proposal P1049 – Carbohydrate and sugar claims on alcoholic beverages) Variation*.

¹ Formerly The Office of Best Practice Regulation (OBPR).

² Reference number OBPR22-02136.

³ Reference number OBPR22-02136

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

Clause 3 of the variation provides that the variation commences on the date of gazettal of the instrument.

Item [1] of the Schedule to the variation amends Standard 1.2.7 of the Code by repealing existing section 1.2.7—4, and substituting it with a new section 1.2.7—4.

Existing section 1.2.7—4 provides that nutrition content claims and health claims must not be made about certain foods.

‘Nutrition content claim’ and ‘health claim’ are defined in sections 1.1.2—9 and 1.1.2—2 respectively.

New section 1.2.7—4 is entitled ‘Restrictions on nutrition content claims and health claims about certain foods’ and contains two subsections.

New subsection 1.2.7—4(1) contains three paragraphs.

Paragraphs 1.2.7—4(1)(a) and (b) provide that a nutrition content claim or health claim must not be made about kava nor an infant formula product. These prohibitions are the same as those set out in existing paragraphs 1.2.7—4(a) and (b).

New paragraph 1.2.7—4(1)(c) provides that a nutrition content claim or health claim must not be made about a food that contains more than 1.15% ABV, other than a nutrition content claim about any of the following:

- (i) salt or sodium content of a food that is not a beverage;
- (ii) carbohydrate content;
- (iii) energy content;
- (iv) gluten content;
- (v) sugar or sugars content.

That is, the new paragraph 1.2.7—4(1)(c) retains the current exclusions to the prohibition on nutrition content claims about food that contains more than 1.15% ABV for: salt or sodium content of a food that is not a beverage, carbohydrate content, energy content and gluten content. The new paragraph then adds one new exclusion to the prohibition on nutrition content claims about food that contains more than 1.15% ABV for sugar or sugars content (subparagraph 1.2.7—4(1)(c)(v)).

A note follows the subsection. The note is identical to the existing note to paragraph 1.2.7—4(c). It states: ‘**Note** Section 1.4.4—7 proscribes health claims and nutrition content claims in relation to cannabidiol in hemp food products.’

New subsection 1.2.7—4(2) provides that a nutrition content claim about a food that contains more than 1.15% ABV must not name or refer to:

- (a) a component of carbohydrate other than sugar or sugars; or
- (b) individually named sugars.

The following example of the prohibition in paragraph 1.2.7—4(2)(b) is provided under this subsection for clarity - a nutrition content claim that refers to fructose is not permitted.