## **Explanatory Statement**

*Food Standards Australia New Zealand Act 1991*

***Food Standards (Proposal P1059 - Energy labelling 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 P1059 to consider amending the Code to require energy (kilojoule) labelling information on certain alcoholic beverages. The Authority considered the proposal in accordance with Division 2 of Part 3 and has approved a draft variation – the *Food Standards (Proposal P1059 - Energy labelling 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 sunsetting provisions of the *Legislation Act 2003.* Subsections44(1) and 54(1) of that Actprovide that a legislative instrument is not disallowable or subject to sunsetting 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 sunsetting legislative instruments a primary purpose of which is to give effect to an international obligation of Australia.

The FSANZ Actgives 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 alsogives 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 Standards 1.1.2, 1.2.1 and 2.7.1 of the Code to require a statement of energy, on the label of certain standardised alcoholic beverages, and certain beverages containing no less than 0.5% ABV that are not standardised alcoholic beverages.

The approved draft variation also amends Standard 2.7.1 to prescribe content and format requirements for nutrition information panels for certain foods containing alcohol.

**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 P1059 included one round of public consultation following an assessment, and the preparation of a draft variation and associated report. Submissions were called for on 16 January 2023 for a 9-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 (OIA) exempted FSANZ from the need to prepare a formal Consultation Regulation Impact Statement (CRIS) in relation to the regulatory change proposed (reference number OBPR22-02135). The OIA was satisfied that ongoing consultation had been undertaken over a prolonged period, and the options under consideration were tested with relevant stakeholders and representative stakeholder views known.

A Decision Regulation Impact Statement was prepared by the Authority and the OIA has assessed the DRIS as compliant (reference number OBPR22-02135).

**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 P1059 – Energy labelling on alcoholic beverages) Variation*.

**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.

**Clause 4** of the variation sets out the transitional arrangements applying to the relevant food products (see below for details).

**Item [1]** of the Schedule to the variation amends Standard 1.1.2 by adding two new subsections to section 1.1.2—9 in numerical order: subsections 1.1.2—9(5) and 1.1.2—9(6).

Section 1.1.2—9 sets out the definition of *nutrition content claim* for the purposes of the Code.

New subsection 1.1.2—9(5) provides that the display of a mandatory energy statement required by new section 2.7.1¾4A (see **item [5]** below) does not constitute a *nutrition content claim*.

New subsection 1.1.2—9(6) provides that the voluntary display of an energy statement referred to in new section 2.7.1¾4A (see **item [5]** below) on a layer of packaging of a *prescribed beverage* does not constitute a *nutrition content claim.*

A *prescribed beverage* is defined in section 1.1.2—2 as:

* a standardised alcoholic beverage i.e. beer, brandy, cider, fruit wine, fruit wine product, liqueur, mead, perry, spirit, vegetable wine, vegetable wine product, wine or wine product; or
* a beverage containing no less than 0.5% alcohol by volume.

**Item [2]** of the Schedule to the variation amends Standard 1.2.1 by repealing existing paragraph 1.2.1—8(1)(z) and substituting it with the same paragraph 1.2.1—8(1)(z) (except with a semi-colon at the end), followed by new paragraph 1.2.1—8(1)(za).

As paragraph 1.2.1—8(1)(z) is currently the last paragraph in subsection 1.2.1—8(1), it has a full stop at the end. So it was necessary to change the full stop to a semi-colon because of inserting new paragraph 1.2.1—8(1)(za).

New paragraph 1.2.1—8(1)(za) provides that the label on a packaged *prescribed beverage* must contain an energy statement in accordance with the new section 2.7.1¾4A (see **item [5]** below).

**Item [3]** of the Schedule to the variation amends Standard 2.7.1 by inserting in the Note to section 2.7.1—2 references to the following terms and their definitions in section 1.1.2—2:

* *average energy content*;
* *prescribed beverage*;
* *serving*; and
* *small package*.

The Note to section 2.7.1—2 sets out references to terms defined in section 1.1.2—2 which are relevant to Standard 2.7.1.

The definitions of these additional terms relate to the new requirements in Standard 2.7.1 (see **items [4]** and **[5]** below).

These terms are italicised in the Explanatory Statement.

**Item [4]** of the Schedule to the variation amends Standard 2.7.1 by inserting new subsection 2.7.1—4(1A) after subsection 2.7.1—4(1).

Section 2.7.1—4 sets out certain requirements for providing a statement of the approximate number of standard drinks in a food for sale that:

* is capable of being consumed as a beverage; and
* contains more than 0.5% alcohol by volume, measured at 20ºC.

In particular, subsection 2.7.1—4(1) requires the provision of the statement for that food for sale.

New subsection 2.7.1—4(1A) provides that the statement required by subsection 2.7.1—4(1) must not appear in:

* an energy statement required by paragraph 1.2.1—8(1)(za); or
* a nutrition information panel.

The note to this new subsection explains to the reader that:

* an energy statement required by paragraph 1.2.1—8(1)(za) of the Code must state the approximate number of standard drinks equivalent to one *serving* of the *prescribed beverage*; and
* section 2.7.1—4F requires a nutrition information panel for certain *prescribed beverages* to state the approximate number of standard drinks equivalent to one *serving* of the beverage concerned.

The effect of the amendment in **item [4]** is that the standard drink statement required by section 2.7.1—4 must be separately located on the label for that beverage from:

* an energy statement required by paragraph 1.2.1—8(1)(za); or
* any nutrition information panel.

A standard drink is defined in section 1.1.2—2 for a beverage containing alcohol, and means the amount that contains 10 grams of ethanol when measured at 20°C.

**Item [5]** of the Schedule to the variation amends Standard 2.7.1 by inserting six new sections in ‘Division 2 – Requisite statements’ of the Standard, after section 2.7.1¾4: sections 2.7.1¾4A, 2.7.1¾4B, 2.7.1¾4C, 2.7.1¾4D, 2.7.1—4E and 2.7.1—4F.

The new sections 2.7.1¾4A, 2.7.1¾4B, 2.7.1¾4C, and 2.7.1¾4D set out requirements for an energy statement for *prescribed beverages*. New section 2.7.1—4E sets out the requirements for a voluntary nutrition information panel for certain food containing alcohol. New section 2.7.1—4F sets out requirements for providing information about standard drinks in the nutrition information panel for a *prescribed beverage*.

The new sections are as follows:

New section 2.7.1¾4A

New section 2.7.1¾4A is the primary provision relating to mandatory energy statements for *prescribed beverages* and sets out when an energy statement is required.

Subsection 2.7.1¾4A(1) provides that for the labelling provisions, an energy statement is required for a *prescribed beverage* (as defined in section 1.1.2—2 – see **item [3]** above).

The Note to this subsection explains that the labelling provisions are set out in Standard 1.2.1.

Subsection 2.7.1¾4A(2) provides that an energy statement required by subsection (1) does not apply to a *prescribed beverage* that:

* has a nutrition information panel required by Standard 1.2.8 on the label of its package; or
* has a voluntary nutrition information panel in accordance with new section 2.7.1—4E (see below); or
* is a food for sale in a *small package* (as defined in section 1.1.2—2 – see **item [3]** above).

Subsection 2.7.1¾4A(3) provides that an energy statement required by subsection (1) must comply with new sections 2.7.1—4B, 2.7.1—4C and 2.7.1—4D (see below).

New section 2.7.1¾4B

New section 2.7.1—4B sets out requirements about what information an energy statement must contain, and how that information must be set out.

Subsection 2.7.1—4B(1) provides that an energy statement must contain:

* the number of *servings* in the package of the beverage; and
* the *average quantity* of the beverage in a *serving* expressed in millilitres; and
* the *average energy content* expressed in kilojoules or both in kilojoules and in kilocalories per:
* *serving* of the beverage; and
* 100 mL of the beverage; and
* the approximate number of *standard drinks* equivalent to one serving of the beverage.

A *standard drink* is defined in section 1.1.2—2 for a beverage containing alcohol, and means the amount that contains 10 grams of ethanol when measured at 20°C.

Subsection 2.7.1—4B(2) provides that the approximate number of *standard drinks* required by subsection 2.7.1—4B(1) must be accurate to the first decimal place.

Subsection 2.7.1—4(B)(3) requires an energy statement to be set out in a prescribed format, unless the Code provides otherwise. That prescribed format is:

|  |  |  |
| --- | --- | --- |
| ENERGY INFORMATION  Servings per package: (insert number of servings)  Serving size: mL ([insert number] standard drinks) | | |
|  | Quantity per serving | Quantity per 100 mL |
| Energy | kJ (Cal) | kJ (Cal) |

New section 2.7.1¾4C

New section 2.7.1—4C sets out requirements about how to express particular matters in an energy statement.

Subsection 2.7.1¾4C(1) provides that the energy statement must clearly indicate that any average quantities set out in the statement are average quantities.

Subsection 2.7.1¾4C(2) permits the word ‘package’, in an energy statement, to be replaced by the word ‘can’, ‘bottle’ or any other word or words that accurately describe the package containing the *prescribed beverage*.

Subsection 2.7.1¾4C(3) requires the *average energy content* in an energy statement to be expressed to not more than 3 significant figures.

Subsection 2.7.1¾4C(4) provides that if the *average energy content* per serving or 100 mL of the *prescribed beverage* is less than 40 kJ, that *average energy content* may be expressed in the energy statement as ‘LESS THAN 40 kJ’.

New section 2.7.1¾4D

New section 2.7.1¾4D sets out provisions related to percentage daily intake information in an energy statement.

Subsection 2.7.1¾4D(1) permits information relating to percentage daily intake of energy to be included in an energy statement. Therefore, the inclusion of such information in an energy statement would be voluntary.

Subsection 2.7.1¾4D(2) provides that if information relating to percentage daily intake of energy is included in an energy statement, the statement must include:

* the percentage daily intake of energy per serving of a *prescribed beverage* calculated using 8700 kJ as the reference value (see paragraph 2.7.1¾4D(2)(a)); and
* either of the following statements (see paragraph 2.7.1¾4D(2)(b)):
* ‘based on an average adult diet of 8700 kJ’, or
* ‘Percentage daily intakes are based on an average adult diet of 8700 kJ’.

Subsection 2.7.1¾4D(3) provides an example of an energy statement with percentage daily intake information for the purposes of subsection 2.7.1¾4D(2).

New section 2.7.1—4E

New section 2.7.1—4E sets out the requirements for a voluntary nutrition information panel for certain food containing alcohol.

Subsection 2.7.1—4E(1) provides that section 2.7.1—4E applies to a food that contains more than 1.15% alcohol by volume and is not required by Standard 1.2.8 to have a nutrition information panel.

Subsection 2.7.1—4E(2) provides that the label on a package of that food may include a nutrition information panel that is not required to be included on its label by Standard 1.2.8. This panel is referred to as a ‘voluntary nutrition information panel’.

Subsection 2.7.1—4E(3) sets out the content and format requirements for the voluntary nutrition information panel.

Paragraph 2.7.1—4(E)(3)(a) provides that the voluntary nutrition information panel must contain the information as required for a mandatory nutrition information panel by paragraphs 1.2.8—6(1)(a), (b) and (c); and subparagraphs 1.2.8—6(1)(d)(i), (ii) and (iii). Additionally, if the voluntary nutrition information panel is for a *prescribed beverage*, the panel must contain the information about *standard drinks* required by new section 2.7.1—4F (see below).

Paragraph 2.7.1—4(E)(3)(b) provides that the voluntary nutrition information panel must be set out in the format prescribed in section S12—2.

New section 2.7.1—4F

New section 2.7.1—4F sets out the requirements for providing information about *standard drinks* in a nutrition information panel for a *prescribed beverage*. The new section applies to both a voluntary nutrition information panel, and a nutrition information panel that is required by the Code.

Subsection 2.7.1—4F(1) requires a nutrition information panel for a *prescribed beverage* that is not a *prescribed beverage* to which subsection 2.7.1—4F(3) applies, to state the approximate number of *standard drinks* equivalent to one *serving* of the *prescribed beverage*. This measure is mandatory.

Subsection 2.7.1—4F(2) permits a nutrition information panel for a *prescribed beverage* that is a *prescribed beverage* to which subsection 2.7.1—4F(3) applies to state the approximate number of *standard drinks* equivalent to one *serving* of that beverage. This measure is voluntary.

Subsection 2.7.1—4F(3) applies to a *prescribed beverage*:

* that bears a label with the statement required by section 2.7.1—4; and
* the number of *standard drinks* declared in that statement is the same as the approximate number of *standard drinks* equivalent to one *serving* of that beverage.

The note to this subsection explains to the reader that section 2.7.1—4 and the labelling provisions in Standard 1.2.1 require the labelling for a food for sale that is capable of being consumed as a beverage and contains more than 0.5% alcohol by volume, measured at 20°C, to state the approximate number of *standard drinks* in that food for sale.

Subsection 2.7.1—4F(4) imposes two requirements in relation to how the approximate number of *standard drinks* equivalent to one serving of the *prescribed beverage* must be stated in accordance with the requirement in subsection 2.7.1—4F(1) or with the permission provided by subsection 2.7.1—4F(2). The requirements are that:

* the stated number must be accurate to the first decimal place (paragraph 2.7.1—4F(4)(a)); and
* the number must be stated in the nutrition information panel in brackets and immediately after the entry in the panel for the *average quantity* of the food in a *serving* (paragraph 2.7.1—4F(4)(b)).

A *standard drink* is defined in section 1.1.2—2 for a beverage containing alcohol, and means the amount that contains 10 grams of ethanol when measured at 20°C.

**8. Transitional arrangements**

The above amendments commence or take effect on the date of gazettal of the instrument (see clause 3 of the variation).

The stock-in-trade exemption provided by section 1.1.1—9 of Standard 1.1.1 does not apply to any of the above amendments (see subclause 4(1) of the variation).

Clause 4 provides two transitional arrangements:

First, there is a general transitional arrangement where during a three year transition period commencing on the date of gazettal of the instrument, a food product 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.

Second, there is a specific transitional arrangement where relevant food products packaged and labelled before the end of the transition period may be sold after the transition period without having to comply with the new requirements.

The intent of these transitional arrangements is to assist in minimising the costs of complying with the variation for industry while not unduly delaying exposure of the energy content statement and the other requisite information to consumers.