



Queensland Health

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3 March 2023

Standards Management Officer
Food Standards Australia New Zealand
PO Box 5423
Kingston ACT 2604

Dear Sir / Madam

Submission – Proposal — P1056 – Caffeine review

Thank you for the opportunity to provide a submission on the Call for Submissions paper for Proposal P1056.

This submission provides comments on the proposed changes to the *Australia New Zealand Food Standards Code* (the Code) and was prepared with input from health professionals from the Food Safety Standards and Regulation Unit. The submission does not represent a Queensland Government position, which will be a matter for the Queensland Government should notification be made by the FSANZ Board to the Food Ministers' Meeting.

Proposal P1056 has been prepared to consider whether additional measures are required in relation to the regulation of caffeine in the Australian and New Zealand food supply to protect public health and safety. It is imperative to combat any assumption that caffeine (as refined substance) should be permitted to be added to food without an express permission. Prior to the variations to the Code as a result of Proposal P1025, caffeine was regulated as a food additive. However, a loophole was created when the definition of 'used as food additive' was included in the Code by P1025, thus the addition of caffeine was unregulated when added for a non-food additive purpose, such as added as a stimulant. It is important this proposal clarifies legally requirements for the addition of caffeine to food because we believe it was never the policy or intention to deregulate the addition of caffeine to food as part of the P1025 Code Revision. A continued focus on this important issue is necessary to ensure that variations to the Code explicitly state caffeine (as a substance or a concentrated extract) must not be added to food (or sold as a food) unless specifically permitted by the Code.

Qualified support is provided for Option 3 in the 1st Call for Submissions paper. It is agreed that variations to the Code should be progressed to include an explicit permission for a maximum one-day quantity of caffeine in Formulated Supplementary Sports Foods (FSSF), and an express prohibition of the addition of caffeine to other foods, other than where there is a specific permission for cola-type drinks and Formulated Caffeinated Beverages.

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Whilst it is agreed that introduction of an express prohibition on the addition of caffeine to foods (other than were expressly permitted to cola-type drinks, FCBs and FSSF) means the maximum caffeine limits introduced by the P1054 variation could be removed, significant concern is raised that this will not address safety risks from caffeine rich food extracts, such as guarana extract. We request that FSANZ consider the public health risks posed by the sale of caffeine rich extracts and the use of such extract in food, and what regulatory measures may address the risks. We are not referring to traditional coffee extracts such as coffee and tea beverages, but food extracts containing very high concentrations of caffeine that may potentially be considered as 'food'. Some extracts advertised on the internet are very high in caffeine (for example 22% caffeine). In addition, some extract containing highly concentrated caffeine are advertised as 'natural caffeine' suggesting they are safer or healthier.

One option for extracts containing a high proportion of caffeine would be to retain the maximum limits for caffeine in Standard 1.1.1—10(5)(g). However, we are concerned that these limits are still very high and not suitable as maximum compositional limits for such products and could still result in harm to some individuals. Alternative options could be explored. This could include defining caffeine rich extracts above a certain concentration as 'caffeine' for the purposes of the proposed express prohibition on the addition of caffeine to foods. Inclusion of requirements relating to the type of method for extracting caffeine (e.g. limiting to water extraction only) are probably not ideal because of the difficulty enforcing this type of requirement because this information is not readily available, particularly for imported foods.

In addition to regulating the addition of caffeine to food, the requirements should regulate the retail sale of caffeine (of various concentrations), extracts very high in caffeine (both liquids and powders), and proprietary blends that contain high concentrations of caffeine. It is important that there be legal clarity in regard to extracts and proprietary blends because these could otherwise be considered to be 'foods' and permitted by the Food Standards Code.

Section 3.3 – Questions for submitters

3.3.1 Questions for all submitters:

Q1. Do you consider there are risks to consumers from caffeine in the current market environment, under the current regulations? Please provide any evidence or relevant examples in detail to assist FSANZ in its assessment.

There are a range of body building supplements on the market, typically pre-workout supplements, that contain caffeine, in some cases high concentrations of caffeine. These can be easily identified in online searches such as 'preworkout powder high caffeine Australia' and 'caffeine workout supplement Australia.' Often these products also contain other types of stimulants too. The maximum limits for caffeine in Formulated Supplementary Sports Foods proposed by Proposal P1056 should provide a safe limit for caffeine in these products, and provide greater legal clarity for businesses and enforcement agencies.

There is awareness of a non-alcoholic carbonated beverages that is presented similar to a formulated caffeinated beverage (FSB) but promoted as providing energy for sporting activities called [REDACTED]. It is available from some Australian online stores, and can be identified with a web search for '[REDACTED]'. The product contains 240mg of caffeine per serve or 490mg/L, which is greater than 320mg/L caffeine permitted in FCBs. It is promoted as a sports nutrition product with the benefits promoted as [REDACTED] and being [REDACTED]. This product was produced in [REDACTED] and imported into Australia via New Zealand under the Trans-Tasman Mutual

Recognition Agreement and is purported to be formulated to comply with the *New Zealand (Supplemented Food) Standard 2016*.

Q2. Do you have any thoughts on FSANZ's preferred option that if caffeine is prohibited to be added to all foods apart from cola-type drinks, FCBs and FSSF, that a pre-market assessment is then required to add caffeine to any other food? If not, are there other approaches that would better address the problem?

The importance of a pre-market assessment is noted, and support given for this to be required and recognises that historically caffeine was not generally permitted in all foods and food policy advice was based on the assumption caffeine could not be added to food unless specifically permitted. This is because caffeine presents risks (especially to sensitive sub-populations), and these risks may need to be managed. It is imperative that the addition of caffeine to the general food supply is regulated, and the preference would be to prohibit the unregulated addition of caffeine to the general food supply.

Without the inclusion of a requirement in the Food Standards Code that prohibits the addition of caffeine without express permission, it would remain possible to add caffeine up to the limits introduced by Proposal P1054. This could include in theory any food (other than cola-type drinks, FCBs and FSSF), some of which would be considered unacceptable from health and social perspectives, such as confectionary and foods typically consumed by children and adolescents.

Q3. Do you foresee any compliance or enforcement issues with the preferred approach of expressly permitting total caffeine in FSSF at a maximum one-day quantity of 200 mg, whilst expressly prohibiting the addition of caffeine to all foods apart from cola-type drinks and FCBs?

With the maximum level of 200 mg one day quantity of caffeine that is proposed to be permitted in FSSF, there are concerns as to whether this will still allow business to add foods and food extracts containing caffeine, such as guarana extract. This would therefore effectively be making each serve more than the maximum one-day quantity proposed to comply with the Code variations. The maximum one-day amount needs to incorporate the total caffeine from all sources including all the food ingredients (as these may also naturally contain caffeine) and not simply the caffeine that is added as a pure source.

It is anticipated that there will be existing FSSF products that do not currently comply with the preferred approach of a maximum one-day quantity of 200 mg. Therefore, whilst there may be an increased workload in the short term for jurisdictions and the Department of Agriculture, Fisheries and Forestry (imported food program) to assess compliance, this should in time result in greater regulatory certainty for both businesses and jurisdictions.

Stacking or the consumption of multiple FSSR will need to be considered. It is assumed this will be addressed through appropriate labelling advisory statements in relation to the maximum one-day quantity.

There are many 'dietary supplements' on the market that are promoted for both weight loss and for use by body builders. Often, they are promoted with claims such as 'ketogenic' and 'fat burning' and contain caffeine. The proposed express prohibition on the addition of caffeine to all foods apart from cola-type drinks, FCBs and FSSF would mean these products, if they contain caffeine, would need to comply with the requirements for FSSF. This may need to be considered also as part of Proposal P1010 – Formulated Supplementary Sports Foods.

It has been noted by food enforcement officers that some foods, particularly imported dietary supplements, will list herbal substances that contain certain substances (including drugs) and not declare the substances themselves. For example, in relation to caffeine, may list extracts of guarana, tea, green tea, kola nut, yerba mate, cocoa beans etc. This can make it more challenging for enforcement purposes.

Q4. Are there other supporting measures that FSANZ should consider, whether regulatory or non-regulatory?

Upon finalisation of Proposal P1056, the development of further education materials for both the consumer and the food industry (as stated in Section 4.2 of this Proposal) would be welcomed. This may also serve to dilute the risk to consumers of FSSF by providing information and education as to how these products should be made up and mixed in conjunction with appropriate labelling requirements, to ensure that only a maximum of 200 mg per day is being consumed. Further, simply illustrating to consumers via education that the recommended daily intake limit for caffeine is 400 mg per day would be valuable, as will be beginning to make them aware how much caffeine their drinks of choice contain. This could empower them to be able to make more considered choices to stay within that recommended daily limit which many consumers may not have been aware of previously. This may also protect the most vulnerable sub-populations within the community to prevent adverse health effects both at lower intakes and acute consumption levels.

Strategies need to be considered to ensure online shopping searches provides appropriate warnings on the dangers of highly concentrated caffeine and high caffeine content foods (including extracts). FSANZ should maintain warnings on the FSANZ website about the dangers of caffeine powders and high caffeine content foods. This should include work to ensure these webpage rank highly in web searches for caffeine powders and high caffeine content foods, because consumers are likely to attempt to purchase these products online from overseas, and high webpage rankings allows the warning to be viewed at the same time. Social media advertising may also need to be considered.

3.5.1.6 Questions for stakeholders

Q16. Are there any unintended consequences of the proposal?

The addition of caffeine rich food extracts, such as guarana extract, does not appear to have been addressed in this Call for Submissions paper. The addition of high concentrations of caffeine via foods or food extracts (e.g., guarana extract) still appears to remain as a potential loophole for companies. The caffeine extract would still be considered a food and concern is raised that there is a risk that there may be over-consumption of caffeine in a food where caffeine is naturally present (i.e., concentrated caffeine in a guarana extract). This may present a requirement for a maximum limit for foods where caffeine not an additive but rather is naturally present. The total caffeine amount considered must encompass caffeine from all sources including food ingredients. This is due to their currently being no restrictions on adding a food to another food.

In the current market environment, *Urgent Proposal P1054 – Pure and highly concentrated caffeine products* is prohibiting the retail sale of pure and highly concentrated caffeine products, and therefore the current risk to consumers is lowered. It is imperative though that when P1056 reaches completion and P1054 is no longer in place, that there is no opportunity for highly concentrated caffeine products to be able to infiltrate the market. A quick search online has found a few products that would not be permitted under current requirements, however, may legally sold in Australia and New Zealand should P1054 be withdrawn as is proposed. A web search of 'guarana extract powder' showing images returns multiple products claiming to contain at least 22% caffeine, for example:



The prohibition of pure and highly concentrated caffeine products in a concentration of '1% or more of the food if that food is a liquid; or 5% or more of the food if that food is a solid or semi-solid food' that are currently in place are still quite high amounts and may still result in serious side-effects, particularly for smaller individuals and sensitive sub-populations. It is suggested that a potential option could be – rather than removing this concentration that the concentrations be lowered to a safer limit. Another suggested option would be to set an upper limit for foods and extracts containing caffeine. Further, for the purpose of drafting in the Code, it is proposed that any food extract that is high in caffeine and therefore close to the upper limits - could be defined as caffeine.

Regarding sports foods, it is our belief that the widespread addition of caffeine to sports foods is not an argument to justify the continued addition of caffeine to sports foods. The addition of caffeine to sports foods has been driven by market forces and not government policy or informed by a risk assessment. There are many different purposes or types of sports foods. If caffeine is permitted in sports food and maximum concentrations set, it may not be appropriate for a blanket approach. That is, risk management options should be considered for the different types/purposes of sports foods.

Q17. How effective do you believe each of the proposed options would be in achieving the objectives of this proposal and why? In particular, consider risks of over-consumption of caffeine for sensitive sub-populations.

Whilst the explicit permission of up to a maximum of 200 mg in a FSSF is a positive move to protect sensitive sub-populations, there will still be potential for individuals to participate in stacking practices and therefore place themselves at risk of consuming over the maximum of 200 mg per day intake of caffeine. This new express permission will minimise the current risk of imported body building supplements that currently do not comply entering the local market.

Should you require further information in relation to this matter, please contact Food Safety Standards and Regulation, Health Protection Branch, Department of Health on ([REDACTED])
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