Government of **Western Australia**
Department of **Health**

Department of Health Western Australia submission to:

Urgent Proposal P1054 - Pure and highly concentrated caffeine products

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The Department of Health WA (DOH) would like to thank Food Standards Australia New Zealand (FSANZ) for opportunity to provide comment on Urgent Proposal P1054 – Pure and highly concentrated caffeine products. The Environmental Health Directorate of the DOH has prepared this response.

The DOH is supportive of FSANZ intention to provide clarity to enforcement agencies by amending the *Australia New Zealand Food Standards Code* (the Code) to prohibit the retail sale of pure and highly concentrated caffeine products sold as food.

However, the DOH is concerned that the draft variation to the Code proposed in P1054:

- does not address concerns about concentrated caffeine products;
- does not provide regulatory certainty for compliance and enforcement;
- is inconsistent with the *Ministerial Policy Guidelines for the Regulatory Management of Caffeine in the Food Supply*, which states that the regulatory management of caffeine in the food supply should:
    - be based on risk analysis ensuring consideration of general population and taking into account vulnerable population groups, including children, adolescents, pregnant and lactating woman and caffeine sensitive consumers; and
    - consider exposure to caffeine from all dietary sources.
- is inconsistent with the current restrictions in place for caffeine in formulated caffeinated *beverages and kola beverages; and*
- may pose a risk to public health and safety by increasing the amount and variety of food products containing caffeine in the food supply.

Issues of Concern:

- The amendment proposed to Standard 1.1.1 – 10 (5), which states '*Unless expressly permitted by this Code, food for sale must not be any of the following*: (g) *if the food is for retail sale – a food in which caffeine is present at a concentration of 5% or more'*, appears to provide an express permission, for the retail sale of food (any food) in which caffeine is present at a concentration of up to 5%.

- It is the DOH understanding that currently caffeine permissions in the Code only exist for formulated caffeinated beverages (Standard 2.6.4), kola beverages, when used as a food additive; and food where caffeine is present naturally.

- It is noted that the Code revision amendments made in 2014, around the definition of a food additive have resulted in an interpretation of permission, such that if caffeine is used as something other than a food additive, like a 'stimulant', then it would be permissible in a food.

- The DOH does not consider that it was the intention of the Code to permit caffeine to be added to food, outside where there is an express permission to do so. This approach would be more in line with the *Ministerial Policy Guidelines for the Regulatory Management of Caffeine in the Food Supply.*

- The August 2013, Food Regulation Standing Committee, *Policy Options Paper on the Regulation of Caffeine in Foods*, describes the regulations applying to caffeine in food in Australia, stating that prior to 2001 caffeine was permitted only in food naturally containing caffeine, and kola-type beverages, where used as a food additive for flavouring purposes. It further states that in 2001, FSANZ amended to Code to permit the production and sale of energy drinks (formulated caffeinated beverages). In 2013, the Options Paper identifies that the Code permits the addition of caffeine to kola-type beverages, as a food additive; in food that naturally contains caffeine (tea, coffee, cocoa and guarana); and formulated caffeinated beverages. It further states that the Code is silent on whether or not caffeine can be present in 'Formulated Supplemented Sports Food' (Standards 2.9.4).

- In P1094, Table 3 – Acute effects of caffeine in adults, recognises that 3000mg of pure caffeine as potentially a lethal dose, while 5000mg is a life-threatening dose of caffeine. The DOH is concerned that by allowing caffeine to be present at up to 5% in food for retail sale, may pose a risk to health, particularly for vulnerable population groups, including children, adolescents, pregnant and lactating woman and caffeine sensitive consumers.

- The DOH is also concerned that the draft variation proposed in P1054, to Standard 1.1.1 – 10 (5) of the Code, may result in more food products containing caffeine, entering the marketplace.

    - Potentially, this could see caffeine present in a range of food and beverages at a concentration of up to 5%, including food for infants; processed cereal products, snack foods, beverages not meeting the definition of a formulated caffeinated beverage, and alcoholic beverages. While the bitterness of caffeine may be a limiting factor in the amount that can be added to food and remaining palatable, the addition of sugar (and sweeteners) can serve to counteract this to some degree.

    - The draft variation does not take into account the type of food, i.e.; is it in liquid or powder form; and the manner in which the food is consumed. It would be easier to consume a higher volume of liquids containing up to 5% caffeine, than a food, such as dried instant coffee and tea. The manner in which these products are served, for example a heaped (2-3g) teaspoon of instant coffee mixed with hot water would have a fraction of the caffeine concentration of up to 5 % allowable in 100g of the product (100g of instant coffee makes 30-50 cups); whereas a pre-made beverage with caffeine present at a concentration of up to 5%, may be consumable as one serve.

    - It is also a concern that a food may contain a caffeine concentration of up to 5% without being required to provide an advisory statement on the label. Formulated caffeinated beverages (Standard 2.6.4) containing a maximum 0.032% caffeine are required to have a

caffeine advisory statement on the label, yet food and beverages with a concentration of caffeine up to 5% are not required to carry an advisory statement.

- Finally, the DOH is concerned that there may be consistency issues with the proposed regulatory changes being proposed by FSANZ to the Code, and the Therapeutic Goods Administration (TGA).
  - On 2 September 2019, the TGA implemented a maximum permissible limit on undivided preparations (such as powders) of total caffeine content of not greater than 4% which will be reduced to 1% after March 2021.
  - It is further understood that the TGA intends to list pure and highly concentrated caffeine as a Schedule 4 substance for human internal use; and a Schedule 6 poison. It is noted that being listed as a scheduled poison will not necessarily restrict the sale of this type of product to consumers, but will apply packaging and labelling controls, including the word 'POISON' and 'KEEP OUT OF THE REACH OF CHILDREN' in prominent position on the top of the label.

<u>Suggested Amendment to draft variation proposed in P1054</u>

The DOH believes an alternative approach would be to amend Standard 1.1.1 - (5), as proposed by the draft variation in P1054, and amend Standard 1.1.1 – 10 (6) which states '*Unless expressly permitted by this Code, food for sale must not have as an ingredient or a component, any of the following*:
(j) raw apricot kernels;'
(k) *insert 'caffeine' here*

This would mean that caffeine, unless expressly permitted in the Code, could not be added to food. The permission to use caffeine as a food additive in kola-type beverages, and as an ingredient in formulated caffeinated beverages, would still apply. Food containing caffeine naturally would still be permitted in line with Standard 1.1.1 -10 (7) which states '*Subsection (6) does not apply to a substance that is in a food for sale, or in an ingredient for sale, by natural occurrence'*.