



AUSTRALIAN
**FOOD &
GROCERY**
COUNCIL

AFGC SUBMISSION

RESPONSE TO:

FSANZ 1ST CALL FOR SUBMISSIONS – PROPOSAL P1056 CAFFEINE REVIEW

13 February 2023

Sustaining Australia

PREFACE

The Australian Food and Grocery Council (**AFGC**) is the leading national organisation representing Australia's food, beverage and grocery manufacturing sector.

With an annual turnover in the 2020-21 financial year of \$133 billion, Australia's food and grocery manufacturing sector makes a substantial contribution to the Australian economy and is vital to the nation's future prosperity.

The diverse and sustainable industry is made up of over 16,000 businesses ranging from some of the largest globally significant multinational companies to small and medium enterprises. Each of these businesses contributed to an industry-wide \$3.2 billion capital investment in 2020-21.

Food, beverage and grocery manufacturing together forms Australia's largest manufacturing sector, representing over 32 per cent of total manufacturing turnover in Australia. The industry makes a large contribution to rural and regional Australia economies, with almost 40 per cent of its 272,000 employees being in rural and regional Australia.

It is essential to the economic and social development of Australia, and particularly rural and regional Australia, that the magnitude, significance and contribution of this industry is recognised and factored into the Government's economic, industrial and trade policies.

Throughout the COVID19 pandemic, the food and grocery manufacturing sector proved its essential contribution to Australian life. Over this time, while our supply chains were tested, they remain resilient but fragile.

The industry has a clear view, outlined in *Sustaining Australia: Food and Grocery Manufacturing 2030*, of its role in the post-COVID19 recovery through an expansion of domestic manufacturing, jobs growth, higher exports and enhancing the sovereign capability of the entire sector.

This submission has been prepared by the AFGC and reflects the collective views of the membership.

OVERVIEW

The Australian Food and Grocery Council (**AFGC**) appreciates the opportunity to respond to *1st Call for submissions – Proposal P1056 Caffeine review*¹.

Food Standards Australia New Zealand (**FSANZ**) prepared this proposal to consider whether additional measures are required in relation to caffeine in the Australian and New Zealand food supply in order to protect public health and safety. In particular, the proposal is examining caffeine in formulated supplementary sports foods (**FSSF**) and other foods in the general food supply, and the extent of the risk posed to sensitive sub-populations by caffeine in those foods and whether and how any such risk should best be managed.

GENERAL COMMENTS

The AFGC submitted a response on the earlier *Call for Submissions on this Urgent Proposal P1054 Pure and highly concentrated caffeine products – Assessment of the approved variation*². At that time, AFGC supported option 1 to reaffirm the approved variation, and did not support FSANZ's preferred option to prepare a proposal to amend and/or add to the approved variation. The basis upon which the AFGC did not support further limits to caffeine in food was to wait until after the implementation of a public consumer information campaign on safe caffeine consumption and the continued monitoring of caffeine consumption through targeted research across Australia and New Zealand (and, then only if there was a clear indication that intake is a concerning issue among sub-populations at risk of over-consumption should we consider approval of the variation).

However, the AFGC and its Members have re-considered its position with this current consultation paper and support **option 3** a hybrid mix of regulatory and non-regulatory approaches as it promotes certainty and clarity in the regulation of the addition of caffeine to foods and beverages which does not currently exist. It also supports the industry having the ability to apply for a premarket assessment to add caffeine to any other food in the future.

In order to protect public health, and provide flexibility and incentive for innovation, policy and regulatory instruments must ensure a balance between this and restrictions on use and formulation. The AFGC notes that no impact will occur on the current ability under the FSANZ Food Standards Code (**Code**) to add caffeine-containing foods as ingredients to other foods, for example adding coffee or chocolate to a cake or confectionery.

Importantly, while FSANZ acknowledges in its safety assessment that the majority of caffeine consumption occurs through non-alcoholic beverage consumption (i.e. coffee) and not through sports foods; the proposed caffeine limit of maximum 200mg in a one-day quantity in FSSF is to protect a sub-population group who may be consuming above the maximum daily limit.

¹ <https://www.foodstandards.gov.au/code/proposals/Pages/p1056.aspx>

² <https://www.foodstandards.gov.au/code/proposals/Documents/P1054%20Report%20-%20CFS%201%20Sep%20-%20Copy.pdf>

The above limit is based on a safety assessment which concluded that acute intakes of caffeine over 210 mg/serve are associated with adverse health effects such as increased blood pressure, plasma catecholamines and anxiety. The AFGC supports the intent of the proposed caffeine limit in FSSF.

The AFGC continues to strongly recommend an ongoing public consumer information campaign on safe caffeine consumption across Australia and New Zealand. The impact of such a campaign could be assessed for its effectiveness in protecting sub-populations beyond the protections already in place such as labelling and warnings.

SPECIFIC COMMENTS

The AFGC wishes to make the following specific comments in relation to this application.

Support of option 3 - Hybrid mix of regulatory and non-regulatory approaches

Currently, the Code does not expressly prohibit the addition of caffeine to food or the presence of caffeine in food for purposes other than as 'a food additive', 'a processing aid', 'a novel food' or 'a nutritive substance'.

The AFGC and its Members in order to promote certainty and clarity in the regulation of the addition of caffeine to foods and beverages, supports option 3, viz:

- the introduction of a new express permission to add caffeine to FSSF, and
- an express prohibition on the addition of caffeine to foods for retail sale other than those that have a specific permission i.e. currently cola-type drinks and formulated caffeinated beverages (**FCBs**). This measure would have no impact on the current ability under the Code to add caffeine-containing foods to other foods, for example adding coffee or chocolate to a cake or confectionery.
- the inclusion of the non-regulatory options outlined in option 2.

The ability of the industry to apply for a premarket assessment to add caffeine to any other food in the future is also strongly supported by the AFGC. The AFGC seeks further clarification on this process.

The AFGC is strongly supportive of continued permission for the presence of caffeine by natural occurrence in foods or ingredients (such as coffee, tea or chocolate) as defined in *Standard 2.10.4 – Miscellaneous standards for other foods*³. Please also note that Subsection 1.1.1—10(7) of *Standard 1.1*⁴ allows for the presence of caffeine by "natural occurrence" in a compliant food or ingredient (such as coffee, tea or chocolate).

³ <https://www.legislation.gov.au/Series/F2015L00487>

⁴ <https://www.legislation.gov.au/Series/F2015L00383>

Furthermore, that the current regulation permission of caffeine addition to cola-type drinks and FCBs will not be impacted. Caffeine is a permitted food additive for cola type drinks, in food class 14.1.3.0.2, up to a maximum permitted level (MPL) of 145 mg/kg. In the case of FCBs, they must contain no less than 145 mg/L and no more than 320 mg/L of caffeine in total, from any source.

FSSFs are a potential source of excessive caffeine intake in some sub-population groups

The AFGC understands that the regulation of FSSF (under *Standard 2.9.4 – Formulated Supplementary Sports Foods*⁵) is currently being reviewed through Proposal *P1010 – Formulated Supplementary Sports Foods*⁶. Under Standard 2.9.4, there is no express permission for caffeine to be added to FSSF. The AFGC is supportive of addressing the issue of caffeine in FSSF through P1056 rather than P1010, to expedite any risk management measures.

The AFGC notes in the Call for Submission (**CFS**) (page 28) that sports foods are consumed by the general population and athletes in Australia and New Zealand. While the majority of the general population in Australia and New Zealand consume caffeine within the recommended maximum daily limit (<400mg/day for adults, adolescents and athletes), there is a subset (around 14-33%) exceeding that limit on a regular basis, and who may also consume sports foods.

Current consumption data is required to better understand the size of the issue

The AFGC notes the identified limitation of FSANZ's dietary intake assessment that data is drawn from surveys conducted in 2011-2012 (Australia) and 2008 (New Zealand) and therefore may not reflect changes in consumption of caffeinated foods and beverages since these surveys were conducted.

For example, the CFS refers to the potential excessive caffeine intake as a result of the practice of 'stacking' by athletes with other FSSF products (which promotes consumption of multiple products in one day) and/or that products have recommendations on their labels which promote taking a 'double serve' prior to an exercise session. New consumption data will provide insight as to whether this remains an issue, and the size of the issue.

The AFGC recommends the use of up-to-date data when it becomes available through national nutrition surveys available is to ensure best practice when setting regulation.

A caffeine limit of 200mg in a one-day quantity is to avoid adverse health effects

The AFGC supports the limit of a maximum of 200mg in a one-day quantity in FSSFs for health reasons, noting that the FSANZ's safety assessment at SD1 concluded that acute intakes of caffeine over 210 mg/serve (approximately 3 mg/kg bw) is associated with adverse health effects including increased blood pressure, plasma catecholamines and anxiety.

⁵ <https://www.legislation.gov.au/Series/F2015L00421>

⁶ <https://www.foodstandards.gov.au/code/proposals/Pages/P1010.aspx>

FSANZ states that caffeine up to 400mg/day is not linked with significant side effects in the general adult population with the exception of pregnant women who should limit to no more than 200mg/day (CFS, page 14):

“Chronic moderate consumption of caffeine at up to 400 mg/day (5.7 mg/kg bw/day based on a 70 kg bodyweight) is not associated with significant adverse effects in the general adult population. This is based on extensive epidemiological evidence, including systematic reviews and meta-analyses.”

The CFS (page 15) also references that caffeine has a positive effect in athletes.

“Caffeine has positive effects on physical exertion, and the purported risks of dehydration or acute mountain sickness from the diuretic effect of caffeine appear to be unfounded.”

And,

“A maximum level of 400 mg/day is considered safe for athletes.” (CFS, Page 16)

The AFGC wishes also to highlight that the main contributor to the overconsumption of caffeine in the diet of the general adult and pregnant women population groups is coffee (CFS page 22).

Consistency of NIP format and advisory and warning statements

The AFGC supports FSANZ’s proposal for FSSF’s containing caffeine:

- to be required to display an advisory statement using words to the effect of ‘contains caffeine’;
- to be required to declare the average quantity of caffeine present (on a per serving and per unit quantity (100mg or 100ml); and
- to not required a warning or advisory statement specifically for lactating women or individuals sensitive to caffeine.

The AFGC agrees with FSANZ’s suggestion to not required a warning or advisory statement for FSSF containing added caffeine specifically for lactating women and individuals sensitive to caffeine for the reasons set out on page 32 of the CFS.

QUESTIONS

1. **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.**

Given the results of the Dietary Intake Assessment outlined in the CFS, being that usual caffeine intakes did not show overconsumption for children and adolescents, and only a small per cent of adults exceeded the recommended limit, the AFGC submits that any risks to consumers relating to caffeine consumption to be limited (and then likely limited to concentrated forms of caffeine).

The AFGC considers that there is an understanding by some industry participants that the current regulation relating to caffeine in the Code exists with a 'loophole' through which caffeine can be added to products despite there being no express *permission* for such products to contain caffeine. The introduction of P1054 variation ("**P1054 Variation**") goes some way to closing this loophole and provided greater regulatory clarity as it relates to FSSFs.

To explain further, Standard 1.1.1-10(5)(g) states:

- (5) *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:*
- (i) *5% or greater – if the food is a solid or semi-solid food; and*
 - (ii) *1% or greater – if the food is a liquid food.*

Accordingly, one interpretation of this section of the Code is that caffeine can be added to *any* food or beverage for retail sale so long as it is below the thresholds set out in Standard 1.1.1-10(5)(g). This *potentially* creates a risk for consumers as certain products that do not typically contain caffeine may have caffeine added. Introducing an express prohibition (as proposed by FSANZ under the P1056 consultation) would create regulatory certainty in that only categories of food for which an express permission exists can add caffeine up to an amount as stipulated in the express permission.

There is also an ongoing issue of parallel imports of caffeinated foods and beverages, with limited compliance checking at the border. Parallel imports can pose issues for the brand owners as importers do not necessarily seek specific permission from the manufacturer to sell those products in Australia and the imported products are often can be non-complaint with compositional and labelling requirements set out in the respective Standards under the Code.

- 2. 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 premarket assessment is then required to add caffeine to any other food? If not, are there other approaches that would better address the problem?**

Yes. In order for regulatory certainty, the AFGC supports the preferred FSANZ approach (Option 3) to prohibit the addition of caffeine to all foods except for where express permission exists (i.e., cola-type drinks, FCBs and FSSFs in the future), with the ability to apply for a premarket assessment to add caffeine to any other food.

The AFGC does, however, respectfully request for FSANZ to provide clarity on the process through which industry participants can undertake a pre-market assessment and apply for a permission to add caffeine to a food category (taking into consideration the associated time and costs likely to be incurred by any manufacturer applying for pre-market assessment).

- 3. 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?**

The AFGC does not foresee any compliance and enforcement issues with the preferred approach.

In contrast, including an express prohibition for the addition of caffeine to all foods apart from cola type drinks, FCBs and FSSFs in the future will provide regulatory certainty and in turn provide clarity for enforcement agencies regarding which products can include added caffeine, and which products are prohibited from adding caffeine.

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

Yes. To address the above issue of monitoring and enforcement, the AFGC supports new ways of doing business to reduce regulatory burden and costs and make it easier for industry to comply with import requirements.

Additionally, the AFGC continues to strongly recommend an ongoing public consumer information campaign on safe caffeine consumption across Australia and New Zealand. The impact of such a campaign could be assessed for its effectiveness in protecting sub-populations beyond the protections already in place such as labelling and warnings.

The AFGC welcomes the opportunity to work with FSANZ in creating collateral to form part of a public consumer information campaign, highlighting correct and accurate information regarding caffeinated products.

5. Can you share any further knowledge of current research about? a. the health effects of caffeine, b. global developments in caffeinated food products, or c. regulatory approaches being taken in comparable markets?

The AFGC is not able to provide any current research on this topic.

However, it particularly supports targeted research of caffeine consumption across Australia and New Zealand as this will likely prove invaluable during the Proposal P1010 review of sports foods⁷.

6. In the medium term, does your company have any plans to expand the number of SKUs that contain caffeine? What would be the nature of those SKUs?

The AFGC understands from members that companies continually innovate and renovate products. Based on the experience of caffeine-containing products in overseas markets, it is likely that there will be plans to expand domestically in this market, however, members are not at liberty to provide details of these plans.

⁷ FSANZ. P1010 – Formulated Supplementary Sports Foods
<https://www.foodstandards.gov.au/code/proposals/Pages/P1010.aspx>

7. Do the current regulations around caffeine, in particular where cola-type drinks and FCBs are concerned, allow for your future product development needs? If not, please explain why not and what regulation you think would be more suitable?

From a product development perspective this is difficult to answer as it is likely that there will be plans to expand domestically products containing caffeine in this market, however, members are not at liberty to state what these plans may be. The AFGC does, however, support the current regulations that govern the addition of caffeine to cola-type drinks and FCBs as being suitable and appropriate for these products.

8. Beyond the mandated labelling imposed by the Code, is there any current or planned industry led mitigation measures to reduce consumers' exposure to caffeine?

Energy drink manufacturers have been at the forefront of responsible sales and marketing practices. In 2011, the Australian Beverages Council (the peak Australian beverage industry association) launched the Energy Drink Industry Commitments, and over the years has updated and strengthened these commitments.

The current version commits members of the Australian Beverages Council to the following:

- not direct any marketing and advertising activities at children;
- not sell energy drinks in primary or secondary schools;
- not promote excessive consumption;
- not market energy drinks as only providing hydration;
- not use labelling to promote the mixing of energy drinks with alcoholic beverages;
- not manufacture or sell energy shots; and
- provide consumers with up-to-date information about energy drinks on the Australian Beverage Council's website.

The Energy Drink Industry Commitments also provide detailed information relating to the permissible amount of caffeine allowed in energy drinks under the Code, and a helpful comparison of caffeine in non-alcoholic beverages to assist consumers.

The non-alcoholic beverage industry has also invested in innovation to offer smaller pack-sizes to moderate caffeine consumption and promote the responsible consumption of caffeinated beverages by Australians. Some non-alcoholic beverage manufacturers also choose to only feature smaller pack-sizes in marketing and advertising campaigns.

9. Will your company be prepared to help develop non-regulatory measures to monitor and manage the number of food products that contain caffeine?

The AFGC on behalf of its members would be available to help develop non-regulatory measures to monitor and manage the number of food products that contain caffeine.

10. For product developers considering the addition of plant or other extracts containing caffeine, do you consider these would meet the definition of a novel food and therefore require a

Potentially, if the extract is one which is currently not an ingredient that can be shown to have a long and safe history of use, then by definition it will be a novel food.

If this extract which does not have a long history of tradition and safe use also contains caffeine, then it too will need to be assessed for safety as a novel food, but this is independent of its caffeine content.

If the new ingredient does contain caffeine, a serving size of the new or novel extract would need to meet current regulations for caffeine content in foods (which will presumably remain the same – i.e. a manufacturer may use an ingredient to “dose up” the caffeine content of food beyond that which is currently allowed).

RECOMMENDATION

The AFGC

- Supports the option 3 (hybrid mix of regulatory and non-regulatory approaches)
- Strongly recommends an ongoing public consumer information campaign on safe caffeine consumption across Australia and New Zealand. The impact of such a campaign could be assessed for its effectiveness in protecting sub-populations beyond the protections already in place such as labelling and warnings.
- Recommends the use of up-to-date data when it becomes available through national nutrition surveys available is to ensure best practice when setting regulation.
- Seeks clarity on a ‘pre-market’ assessment may be undertaken by industry, should industry wish to innovate by adding caffeine to products in the future.

For further information about the contents of this submission contact:

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