



13 February 2023

Food Standards Australia New Zealand
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Dear Sir/Madam

Attached are the comments that the New Zealand Food & Grocery Council wishes to present on the *1st Call for submissions – Proposal P1056: Caffeine Review*.

Yours sincerely

A handwritten signature in blue ink, appearing to be "Raewyn Bleakley".

Raewyn Bleakley
Chief Executive



1st Call for submissions – Proposal P1056: Caffeine Review

**Submission by the New Zealand Food & Grocery
Council**

13 February 2023

NEW ZEALAND FOOD & GROCERY COUNCIL

1. The New Zealand Food & Grocery Council (“**NZFGC**”) welcomes the opportunity to comment on the 1st *Call for submissions – Proposal P1056: Caffeine Review (“CFS1”)*.
2. NZFGC represents the major manufacturers and suppliers of food, beverage and grocery products in New Zealand. This sector generates over \$40 billion in the New Zealand domestic retail food, beverage and grocery products market, and over \$34 billion in export revenue from exports to 195 countries – representing 65% of total good and services exports. Food and beverage manufacturing is the largest manufacturing sector in New Zealand, representing 45% of total manufacturing income. Our members directly or indirectly employ more than 493,000 people – one in five of the workforce.

PROPSAL

3. This proposal is a follow up to the Call for Submissions – Urgent Proposal P1054: Pure and highly concentrated caffeine products conducted in November 2019. Urgent proposals are required to be followed up by full assessments that deal with the science, environment and measures put in place under urgency to assess ongoing appropriateness.
4. Under urgency, the Australia New Zealand Food Standards Code (“**the Food Standards Code**”) was amended to include a prohibition of the retail sale of a food in which caffeine is present in a concentration of 1% or more of the food if that food is a liquid and 5% or more of the food if that food is a solid or semi-solid food. This separate proposal considers whether additional measures are required in relation to the regulation of caffeine in the food supply in order to protect public health and safety particularly in relation to caffeine in Formulated Supplementary Sports Foods (“**FSSF**”) and the extent of risk posed to vulnerable sub-populations and whether and how any such risk should best be managed.

COMMENTS

5. In order to address the broader concerns associated with caffeine in FSSF and the extent of risk posed to vulnerable sub-populations, FSANZ conducted:
 - a safety assessment
 - A dietary intake assessment
 - A social science assessment
 - an assessment of caffeine and sports performance.
6. These assessments examined the risk posed by caffeine consumption in various sub-populations, intakes of caffeine from foods, consumer understanding and/or behaviour regarding caffeine in both general foods and sports foods and the effect of caffeine on aerobic exercise performance.
7. Safety assessment – The safe caffeine consumption for adults (which is not associated with significant adverse effects) is generally agreed by major reputable safety assessment experts in Europe and the US and concurred with by FSANZ, to be 400mg/day (5.7 mg/kg bw/day). FSANZ considered a range of sub-population groups ranging from children to athletes for variations to this. Different safe levels were identified for pregnant women (200 mg/day) and children (less than 3 mg/kg bw/day) compared to adults. The safe level for athletes, while starting at 400 mg/day is uncertain beyond that level through a lack of evidence/studies.

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8. Sports science in the area is poor and NZFGC is concerned that basing decisions for limits for athletes on poor science does not reflect well on the integrity of the system.
 9. Dietary intake assessment – The dietary intake assessment was hampered by the age of the national nutrition surveys conducted in Australia (2011-12) and New Zealand (2008) and their scope (no children in the 2008 New Zealand survey). Changes in food and beverage consumption patterns over the past 12 years cannot be assessed. All that can be concluded is non-alcoholic beverages, particularly tea and coffee were the main contributors to caffeine intake.
 10. NZFGC is concerned that the paucity of current dietary intakes of caffeine is a major impediment for the imposition of regulatory change.
 11. Social science assessment – This considered consumer understanding and behaviour, risk perceptions and sources of information. The safety assessment (Supporting Document 1 – “SD1”) had found that there is very little evidence that children were exceeding 3 mg/kg bw/day or that adolescents were exceeding 5.7 mg/kg bw/day. It appeared around 15% of pregnant/lactating women were exceeding the recommended daily levels (200 mg/day). Some adult groups may be exceeding the 400mg/day level but uncertainty was due to the lack of nationally representative data and there was no information for athletes’ consumption and no clarity about whether sports foods were a contributor to the consumption of caffeine for any group.
 12. FSANZ noted that children under 5 years were at the greatest risk of excessive exposure to caffeine due to low body weights and that some pregnant/lactating women may be exceeding recommended levels. FSANZ reported that:

“Infants and pre-schoolers are at considerable risk of accidental or malicious caffeine poisoning, due to their low bodyweight.” (SD1 p23)

And in CFS1 that:

“...available data from poisons centres in Australia and New Zealand indicate that these groups are over-represented among cases of accidental caffeine consumptions and acute caffeine toxicosis” (p22 of the CFS1).
 13. There is no evidence of the food source of the accidental or malicious caffeine poisoning of children under 5 years and a prohibition across the general food supply of the addition of caffeine seems unnecessarily excessive without further targeted research and evidence. NZFGC understands the importance of addressing potential risk even in the face of lack of evidence. The only evidence appears to be the number of events recorded by reports to poisons centres.
 14. Because the limitations proposed are intended to change behaviour (and reduce reports), it is strongly recommended that poisons centre data for the next 5 years is analysed and, if there is no change in number of reports, the prohibition is reviewed with the expectation that it be removed.
 15. For the purposes of the assessment of caffeine and sports performance, FSANZ found a low level of certainty from the evidence that caffeine is beneficial for athletes in relation to time trials.

Options

16. FSANZ identified 3 options:

- Option 1 – No change
- Option 2 – No change but the development and application of non-regulatory measures (consumer education on specific risks)
- Option 3 – Regulatory change (explicit permission for FSSF up to 200mg in a one day quantity, prohibition of caffeine in other foods other than cola drinks and formulated caffeinated beverages (“FCBs”), removal of previous measures and non-regulatory measures (favoured by FSANZ).

17. NZFGC supports an amended Option 3 whereby FSANZ considers the inclusion of exemptions for selected foods to which caffeine could be added in the future in order to remove the prospect that this is an unnecessarily broad measure that may not have any impact on rates of reports to poisons centres in the future. The prohibition of caffeine in other foods other than cola drinks and FCBs could present as a major impediment to flavourings and ingredients for foods generally and presents as over-regulation

18. Some of our members consider that there may be difficulties with determining which types of products that would be included in an exemptions provision, what their caffeine thresholds would be, whether they are required to include labelling etc. NZFGC would be pleased to discuss this further with FSANZ.

Questions in CFS1

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.

19. The Dietary Intake Assessment reported in SD2 concluded that usual caffeine intakes did not show overconsumption for children and adolescents, and only a small per cent of adults exceeded the recommended limit. FSANZ’s analysis would suggest that of the vulnerable groups, infants and children appear most at risk but that this was due to accidental or malicious consumption. A general prohibition of adding caffeine across the general food supply will not address accidental or malicious impacts if the bulk of caffeine consumption is tea and coffee drinks.

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

20. Yes. NZFGC considers the proposal is potentially over-regulation. Without updated national nutrition survey data available, the consumption of any particular food proposed for the addition of caffeine in the future will not be able to be demonstrated. An exemption from the prohibition is unlikely at any time in the medium to long term, potentially limiting product development and the expansion of the variety of foods for consumers. The ability to apply for a premarket assessment by way of application to add caffeine to any other food (unless FSANZ has in mind an alternative process) will not be realised.

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?

21. NZFGC does not foresee any compliance and enforcement issues with the appr Option 3 (the approach preferred by FSANZ) although the food supply will still reflect naturally

occurring caffeine through the addition of chocolate and other ingredients which naturally contain caffeine.

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

22. No, however we emphasise support for the public education FSANZ proposes as the non-regulatory component of ways of addressing the lack of understanding by the population of caffeine impacts.

Q5 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?

23. NZFGC is not aware of any research in the areas identified by FSANZ.

Q6 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?

24. Individual companies may be able to provide commercial-in-confidence information in response to this question. The food industry globally is continually developing and innovating products to meet consumer expectations and desires and this may include caffeinated products.

Q7 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?

25. From a product development perspective this is a question best answered by member companies. NZFGC 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.

Q8 Beyond the mandated labelling imposed by the Code, is there any current or planned industry-led mitigation measures to reduce consumers' exposure to caffeine?

26. NZFGC advises that energy drink manufacturers have been active in developing and following responsible sales and marketing practices. In 2011, the New Zealand Beverage Council launched the [Energy Drink Industry Commitments](#) in 2011 and has regularly reviewed and updated the Commitments such that they currently reflect a range of commitments including:

- Not to direct any marketing and advertising activities to children;
- Not to sell energy drinks in primary or secondary schools;
- Not to provide samples of energy drinks to children;
- Not market energy drinks as only providing hydration;
- Not promote the mixing of energy drinks with alcoholic beverages
- Provide consumers with up-to-date information about energy drinks on the New Zealand Beverage Council's website.

27. Additionally, the members of Spirits New Zealand have committed to do the following (amongst other things) in relation to 'ready-to-drink' products ("RTDs")

- Not produce RTDs containing energy supplements with greater caffeine-equivalence than cola products as set out in section 14.1.0.3.2 of Schedule 15 attached to Standard 1.3.1 "Food Additives" of the Australia New Zealand Food Standards Code,

which limits the amount of added caffeine in these products to a maximum of 145 mg/L. Nor will we market/promote the effects of caffeine in any products that meet this commitment

- Ensure that RTDs are marketed in accordance with the *Code for the Advertising & Promotion of Alcohol* and *Section 237 of the Sale & Supply of Alcohol Act 2012* so they do not have specific appeal to, nor are targeted at, those below legal purchasing age
- Advertise only in media channels or engage in sponsorship where the audience is at least 75% legal purchasing age and above.

28. The New Zealand Beverage Council's Commitments also provide broader helpful information on the Food Standards Code provisions and a comparison of caffeine in non-alcoholic beverages to assist consumer understanding.

29. Smaller pack-sizes have also been developed by industry to contribute to the moderation of caffeine consumption and promote the responsible consumption of caffeinated beverages by New Zealanders.

Q9 Will your company be prepared to help develop non-regulatory measures to monitor and manage the number of food products that contain caffeine?

30. NZFGC would be pleased to work with regulators and FSANZ on the development of non-regulatory measures to monitor the number of food products that contain caffeine.

Q10 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 pre-market assessment?

31. If an 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.