

Explanatory Statement

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 P1054 to amend the Code to prohibit the retail sale of pure and highly concentrated caffeine food products.

Following its preparation, Proposal P1054 was declared an Urgent Proposal for the purposes of the Division 4 of Part 3 of the FSANZ Act.

The Authority considered the Proposal in accordance with sections 96 and 97 of the FSANZ Act and has approved a variation.

2. Purpose

The Authority has approved a variation to amend Standard 1.1.1 of the Code to prohibit total caffeine present in a concentration of 1% (1 000 mg/100 mL, liquid form) or 5% (5 000 mg/100g, powder and gel or other dry form) or more in the product presented at retail sale.

3. Documents incorporated by reference

The variations to food regulatory measures do not incorporate any documents by reference.

4. Consultation

The Authority considered the Proposal in accordance with the procedure in Division 4 of Part 3 of the FSANZ Act. That consideration included one round of public consultation following an initial consideration and the preparation of a draft variation and associated assessment summary. After that public consultation, the Authority had regard to all submissions received and approved an amended version of the draft variation.

The approved variation must be reviewed by the Authority within 12 months of its notification in accordance with Subdivision B of Division 4 of Part 3 of the FSANZ Act. Further public consultation is required as a part of that assessment.

A Regulation Impact Statement was not required. The Authority submitted a preliminary assessment to the Office of Best Practice Regulator (OBPR) seeking advice on a regulatory intervention in relation to Proposal P1054. On 4 October 2019, the OBPR advised the Authority that a COAG Regulation Impact Statement was not required to inform the decision by the Authority to approve, amend or reject the draft variation.

5. 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 94 of the FSANZ Act.

6. Variation

Item [1.1] amends Standard 1.1.1 by inserting a new paragraph into subsection 1.1.1—10 (5).

The new paragraph is paragraph 1.1.1—10 (5)(g). The new paragraph provides that, unless expressly permitted by the Code, a food for retail sale cannot be a food that contains caffeine in a concentration of

- (i) 5% or more of the food for sale if that food is a solid or semi-solid food; or
- (ii) 1% or more of the food for sale if that food is a liquid.

The new paragraph will apply this maximum limit for caffeine to all foods for retail sale.

An example of a semi-solid food is a gel.

The reference to 'caffeine' in paragraph 1.1.1—10 (5)(g) includes caffeine that occurs or is present in the food for sale naturally. The exception provided by subsection 1.1.1—10(7) of the Code for foods (such as caffeine) that occur or are present in the food for sale naturally does not apply to a prohibition imposed by subsection 1.1.1—10(5) and, therefore, to the prohibition imposed by the new paragraph.

The new paragraph cannot - and does not - itself constitute a permission for the purposes of the Code to add caffeine to all foods (e.g., for the purposes of the prohibitions imposed by other paragraphs in subsection 1.1.1—10 (5)) or by subsection 1.1.1—10 (6)).