

EXPLANATORY STATEMENT

Issued by Authority of the Minister for Agriculture

*Imported Food Control Amendment (Pure and Highly Concentrated Caffeine Products)
Order 2019*

Legislative Authority

The *Imported Food Control Act 1992* (the Act) provides for the compliance of food imported into Australia with Australian food standards and the requirements of public health and safety.

Section 16 of the Act provides that the Minister may make regulations setting out particulars of a food inspection scheme. These regulations are the *Imported Food Control Regulations 2019* (the Regulations) and the food inspection scheme referred to as the Imported Food Inspection Scheme (the Scheme). The Scheme is applicable to all food to which the Act applies.

The following provisions of the Act and Regulations provide authority for the amendments in the Imported Food Control Amendment (Pure and Highly Concentrated Caffeine Products) Order 2019:

- paragraph 16(2)(a) of the Act provides that the regulations may empower the Minister, subject to section 17, to make orders identifying food of a particular kind as food of a kind that is required to be inspected, or inspected and analysed, under the Scheme.
- section 17 of the Act provides that the Minister must not make an order for the purposes of paragraph 16(2)(a) without first consulting Food Standards Australia New Zealand (FSANZ).
- subparagraph 10(d) of the Regulations provides for the Minister to make orders classifying food of particular kinds into particular categories.
- section 11 of the Regulations provides for the Minister to make orders classifying food of a particular kind as risk food only if Food Standards Australia New Zealand advises the Minister that food of that kind has the potential to pose a high or medium risk to public health.

Purpose

The purpose of the Amendment Order is to:

- classify pure and highly concentrated caffeine products as risk foods, so that these foods can be targeted for inspection to verify compliance with proposed new limits in the Australia New Zealand Food Standards (the Code) for caffeine in foods to protect public health and safety.

Background

In July 2019, the Minister for Aged Care and Senior Australians, the Hon Richard Colbeck and the Minister for Health, the Hon Greg Hunt, requested FSANZ review the Code. As part

of the review FSANZ established a multi-agency caffeine working group consisting of food regulatory authorities from Australia and New Zealand.

In September 2019, FSANZ published on their website their findings of the review in the report on the safety of caffeine powders and high caffeine content products, including a recommendation that the Code be amended to prohibit the retail sale of these products.

FSANZ subsequently provided advice on 9 December 2019 that these products present a potential medium or high risk to public health.

The amendments to the Code will prohibit the retail sale of pure and highly concentrated products in which caffeine is present at a concentration of:

- (a) 5% or greater—if the food is a solid or semi-solid food; or
- (b) 1% or greater—if the food is a liquid food.

Impact and Effect

Amending the Order to classify pure and highly concentrated caffeine products as risk food will enable the department to refer these products to the Scheme for inspection and analysis consistent with the risk to public health. In practice, this will involve an assessment of these products against the requirements of the Code. Importers of pure and highly concentrated products that are determined to be prohibited from retail sale will be ordered to bring the food into compliance (where applicable), export the food or destroy the food.

Consultation

On 21 November 2019, the department informed the Imported Food Consultative Committee (IFCC) of progress on the prohibition of pure and highly concentrated caffeine products for retail sale in the Code and the subsequent amendment of the Order to enforce the prohibition at the border through the Scheme. The IFCC is comprised of industry representatives, including the Australian Food and Grocery Council, the Food and Beverage Importers Association, Seafood Importers' Association and the Australian Horticultural Exporters' Association.

On 11 December 2019, the Minister consulted with FSANZ as required by section 17 of the Act. FSANZ noted it has no objection to the decision by the Minister for these amendments.

The Office of Best Practice Regulation was consulted in the preparation of the Amendment Order (ID 25907) and advised that the matter has already been considered as likely to have a minor economic impact through a FSANZ proposal (OBPR ID 25674) and therefore a regulation impact statement is not required (OBPR ID 25907).

Details/ Operation

Details of the instrument are set out in [Attachment A](#).

Other

The Amendment Order is compatible with the human rights and freedoms recognised or declared under section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. A full statement of compatibility is set out in Attachment B.

The Amendment Order is a legislative instrument for the purposes of the *Legislation Act 2003*.

Details of the Imported Food Control Amendment (Pure and Highly Concentrated Caffeine Products) Order 2019

Section 1 – Name

This section provides that the name of the Amendment Order is the *Imported Food Control Amendment (Pure and Highly Concentrated Caffeine Products) Order 2019*.

Section 2 – Commencement

This section provides for the Amendment Order to commence the day after the instrument is registered.

Section 3 – Authority

This section provides that the Amendment Order is made under section 10 of the *Imported Food Control Regulations 2019*.

Section 4 – Schedules

The effect of this section is that the *Imported Food Control Order 2019* is amended as set out in the Schedule.

Schedule 1 – Amendments

Imported Food Control Order 2019

Item 1 Section 3

This item omits “regulation 10”, and substitutes “section 10” in section 3. Section 3 of the Order declares that ‘This instrument is made under regulation 10 of the Food Control Regulations 2019’. The substitution reflects modern drafting practices.

Item 2 Clause 1 of Schedule 1 (at the end of the table)

This item inserts:

“26 Food in which caffeine is present at a concentration of:
(a) 5% or greater – if the food is a solid or semi-solid food; or
(b) 1% or greater – if the food is a liquid food.”

in Clause 1 of Schedule 1(at the end of the table). The effect of this amendment is to classify pure and highly concentrated caffeine products as risk food.

Section 11 of the Imported Food Control Regulations specifies that food of a particular kind may be classified as risk food only if, Food Standards Australia New Zealand advises the Minister that food of that kind has the potential to pose a medium or high risk to public

health. Paragraph 10(d) of the Imported Food Control Regulations allows the Minister to make orders classifying food of particular kinds into particular categories.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

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This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The Imported Food Control Amendment (Pure and Highly Concentrated Caffeine Products) Order 2019 will:

- classify pure and highly concentrated caffeine products as risk foods, so that these foods can be targeted for inspection to verify compliance with proposed new limits in the Australia New Zealand Food Standards (the Code) for caffeine in foods to protect public health and safety.

Human rights implications

The Amendment Order engages the right to enjoy the highest attainable standard of physical and mental health (Article 12) in the International Covenant on Economic, Social and Cultural Rights (ICESCR).

The Amendment Order engages and promotes this right by:

- providing for the inspection, or the inspection and analysis of, pure and highly concentrated caffeine products to verify compliance with proposed new limits in the Australia New Zealand Food Standards (the Code) for caffeine in foods that are intended to protect public health and safety.

Conclusion

The Amendment Order is compatible with human rights because it promotes the right to enjoy the highest attainable standard of health through managing risks in food so that food is safe for human consumption.

Senator The Hon. Bridget McKenzie
Minister for Agriculture