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Don't Raise Your Glass: Post COVID-19 it is Critical to Pass Legislation to Ban the Sale of Energy Drinks to Children

MARILYN BROMBERG*

Abstract

Energy drinks are non-alcoholic beverages with caffeine and additives, such as Guarana extract, taurine and ginseng. Manufacturers heavily promote them through social media as increasing physical and mental energy. The drinks can cause serious negative health consequences, particularly for children, such as mental health issues and weight gain. COVID-19 made these same health challenges, mental health and weight gain, worse for children. Consequently, Australian Governments must follow the lead of the British Government and other overseas governments and legislate to ban the sale of energy drinks to children under the age of 18. The author believes that this article is the first to consider implications of COVID-19 when deciding to legislate to ban the sale of energy drinks to young people under the age of 18 in Australia.

I Introduction

You may have seen a child buy an energy drink from a supermarket, convenience store or elsewhere and drink it. If you are familiar with the contents of energy drinks and the health consequences of children drinking them, then the aforementioned scenario would disturb you. However, this scenario may appear entirely unremarkable if you are not.

Energy drinks are non-alcoholic beverages with caffeine as their main ingredient.¹ They have other additives, such as Guarana extract, taurine and ginseng.² Energy drink manufacturers promote their

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¹ Aisha Abdalla Almulla and Mo'ez Al-Islam E Faris, 'Energy Drinks Consumption Is Associated with Reduced Sleep Duration and Increased Energy-Dense Fast Foods Consumption Among School Students: A Cross-Sectional Study' (2020) 32(5) *Asia-Pacific Journal of Public Health* 266, 266.

² *Ibid.*

products through social media, particularly Facebook,³ as increasing physical and mental energy.⁴ Energy drinks also contain considerable sugar and caffeine.⁵ Consuming energy drinks can harm a child's mental and physical health, including causing weight gain.⁶ In many countries, such as Australia and the United States, no law currently exists to regulate the number of energy drinks that a person can purchase or consume, or a minimum age to buy them.⁷

It is important to consider children consuming energy drinks in light of COVID-19 and its negative impact on children's health. COVID-19 'is a global health emergency that has major potential ramifications for health and well-being'.⁸ It began as cases of pneumonia in Wuhan, China.⁹ It spread quickly to other countries and the World Health Organisation declared it a pandemic about three months after.¹⁰ The effects of COVID-19 are less serious in children than in adults,¹¹ but children can still carry and transmit it.¹² Also, people who are obese or overweight suffering from COVID-19 are more likely to go into hospital and experience more severe forms of the virus than those who are not.¹³ Many governments worldwide enforced a lockdown,

³ Limin Buchanan et al, 'A Thematic Content Analysis of how Marketers Promote Energy Drinks on Digital Platforms to Young Australians' (2018) 42(6) *Australian and New Zealand Journal of Public Health* 530, 531; Genevieve A Cowie and Bruce Bolam, 'An Epidemic of Energy? The Case for Stronger Action on "Energy Drinks"' (2015) 39(3) *Australian and New Zealand Journal of Public Health* 205, 206.

⁴ Almulla and Faris (n 1) 266. See also Naim Degirmenci et al, 'Consumption of Energy Drinks among Adolescents in Norway: A Cross-Sectional Study' (2018) 18(1) *BMC public health* 1391, 1; Andrew P Smith and Gareth Richards, 'Energy Drinks, Caffeine, Junk Food, Breakfast, Depression and Academic Attainment of Secondary School Students' (2018) 32(8) *Journal of Psychopharmacology* 893, 893.

⁵ Ofir Turel, 'Are Energy Drinks Scapegoats? Decomposing Teenagers' Caffeine Intake from Energy Drinks and Soda Beverages' (2018) 53(12) *Substance Use & Misuse* 2089, 2089; Vivica I Kraak et al, 'Policy Recommendations to Address Energy Drink Marketing and Consumption by Vulnerable Populations in the United States' (2020) 120(5) *Journal of the Academy of Nutrition and Dietetics* 767, 767.

⁶ Kraak et al (n 5) 767.

⁷ Ibid.

⁸ Emma Sciberras et al, 'Physical Health, Media Use, and Mental Health in Children and Adolescents with ADHD During the COVID-19 Pandemic in Australia' (2022) 26(4) *Journal of Attention Disorders* 549, 549.

⁹ Carlos Alberto Nogueira-de-Almeida et al, 'COVID-19 and Obesity in Childhood and Adolescence: A Clinical Review' (2020) 96(5) *Jornal De Pediatria* 546, 546; World Health Organization, 'A Year without Precedent: WHO's COVID-19 Response' (23 December 2020) <<https://www.who.int/news-room/spotlight/a-year-without-precedent-who-s-covid-19-response>>.

¹⁰ Nogueira-de-Almeida et al (n 9) 546; World Health Organization (n 9).

¹¹ Jonas F Ludvigsson, 'Systematic Review of COVID-19 in Children Shows Milder Cases and a Better Prognosis than Adults' (2020) 109(6) *Acta Paediatrica* 1088, 1092; Nogueira-de-Almeida et al (n 9) 546.

¹² Centres for Disease Control and Transmission, *COVID-19 in Children and Teens* (Web Page, 18 December 2020). <<https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/children/symptoms.html>>.

¹³ Zhu I, She ZG, Cheng X et al, 'Association of blood glucose control and outcomes in patients with COVID-19 and pre-existing type 2 diabetes' (2020) 31(6) *Cell Metabolism* 1068, 1068; N Sattar, IB McInnes IB and JJ Murray, 'Obesity a risk factor for severe COVID-19 infection: multiple potential mechanisms' (2020) 10 142 *Circulation* 142, 142.

requiring people to remain at home in order to stop the COVID-19 transmission.¹⁴ The restrictions allowed people to only leave for certain essential reasons.¹⁵

In Australia, the first COVID-19 case was recorded on 25 January 2020, when a man who returned from Wuhan, China, to Australia tested positive for the virus.¹⁶ New COVID-19 cases increased exponentially.¹⁷ The Australian State and Federal Governments worked together to create and enforce restrictions to stop COVID-19 transmission.¹⁸ Australia's health system began to respond to COVID-19 in February 2020.¹⁹ Australian Governments took significant measures: they closed schools, universities and all non-essential stores.²⁰ Adults had to work from home, social visits were forbidden and wearing a mask became compulsory.²¹ While Australian governments acted quickly and initially handled COVID-19 better than many governments overseas, some parts of Australia still experienced additional waves of the virus. For example, in Victoria's second wave, from 1 July and 31 August 2020, COVID-19 cases increased from 7,837 to 25,746.²² The measures that Australian governments took to stop COVID-19 spreading, such as social distancing and social isolation, 'may present significant risks to the population'.²³

Some of these significant risks are that young people experienced mental health challenges²⁴ and consumed more unhealthy food than they did previously,²⁵ which can contribute to becoming overweight or obese.²⁶ Selling energy drinks to children has always potentially resulted in serious health risks to children.²⁷ COVID-19 has brought some of these risks into sharper focus and added pressure to act in

¹⁴ Sarah Cuschieri and Stephan Grech, 'COVID-19: A One-Way Ticket to a Global Childhood Obesity Crisis?' (2020) 19(2) *Journal of Diabetes and Metabolic Disorders* 2027, 2027.

¹⁵ Ibid.

¹⁶ Nancy A Pachana et al, 'COVID-19 and Psychogeriatrics: The View from Australia' (2020) 32(10) *International Psychogeriatrics* 1135, 1135.

¹⁷ Ibid.

¹⁸ Andrea Nathan et al, 'Impact of COVID-19 Restrictions on Western Australian Children's Physical Activity and Screen Time' (2021) 18(5) *International Journal of Environmental Research and Public Health* 2583, 2584.

¹⁹ Benjamin Jones, 'COVID-19 Pandemic: The Impact on Vulnerable Children and Young People in Australia' (2020) 56 *Journal of Paediatrics and Child Health* 1851, 1851.

²⁰ Samantha Batchelor et al, 'Use of Kids Helpline by Children and Young People in Australia During the COVID-19 Pandemic' (2021) 68(6) *The Journal of Adolescent Health: Official Publication of the Society for Adolescent Medicine* 1067, 1067.

²¹ Ibid.

²² Ibid.

²³ Elizabeth M Westrupp et al, 'Study Protocol for the COVID-19 Pandemic Adjustment Survey (CPAS): a Longitudinal Study of Australian Parents of a Child 0-19 Years' (2020) 11 *Frontiers in Psychiatry* 1, 1.

²⁴ See, eg, Sciberras et al (n 8) 549-53.

²⁵ See, eg, Elizabeth L Adams et al, 'Food Insecurity, the Home Food Environment, and Parent Feeding Practices in the Era of COVID-19' (2020) 28(11) *Obesity (Silver Spring, Md.)* 2056, 2056-7.

²⁶ Ibid.

²⁷ See eg, Turel (n 5) 2089.

children's best interests. COVID-19 should be a wakeup call to Australian Governments to address children's mental health and obesity, because both worsened due to the virus.²⁸ One action for Australian governments to take to address children's mental health and obesity is to ban the sale of energy drinks to children under the age of 18. The high amount of caffeine and sugar in the drinks²⁹ can contribute to children becoming obese and overweight and can harm their mental health.³⁰ There are also many other reasons, unrelated to COVID-19, to ban the sale of energy drinks to children, which this article will discuss later.

Specifically, this article will explain what energy drinks are. Then, it will consider the relationship between children and energy drinks, including the negative impact that energy drinks can have on children's health. After this, it will consider the effect of COVID-19 on children's health. It will explore some actions relating to public health that occurred in the United Kingdom: measures that the Government decided to take due to COVID-19 to lower the number of people who are overweight or obese and actions that it and supermarkets took to ban the sale of energy drinks to children. It will discuss the initiatives of other countries overseas to ban the sale of energy drinks generally or just to children and Australian law concerning energy drinks. Then, it will explain why Australian Governments must legislate to ban the sale of energy drinks to children now. The author believes that this is the first article to consider banning the sale of energy drinks to children in the COVID-19 context.

II What are Energy Drinks

Energy drinks 'are beverages containing additives that claim to increase physical or mental energy. They contain large amounts of caffeine'³¹ and sugar, plus vitamins, minerals, amino acids and herbal supplements.³² Some energy drinks have zero calories, no added sugar and the like but still contain significant amounts of caffeine and other

²⁸ Melissa K Siebach, Giovanni Piedimonte and Sylvia H Ley, 'COVID-19 in Childhood: Transmission, Clinical Presentation, Complications and Risk Factors' (2021) 56(6) *Pediatric Pulmonology* 1342, 1351.

²⁹ M Hargraves, S Lockyer and L Chambers, 'Are Energy Drinks Suitable for Children?' (2018) 43(2) *Nutrition Bulletin* 112, 116.

³⁰ See eg, Russell Viner, 'Ban on Sale of Energy Drinks to Children' (2018) 362 *BMJ* (Clinical research ed.) k3856, k3856; Marilyn Bromberg et al, 'Have a (Non-Energy) Drink on Me - Modifying the Laws Regarding Energy Drinks in Australia' (2019) 74(3) *Food and Drug Law Journal* 440, 442; Smith and Richards (n 4) 1; Cem Özde et al, 'Acute Effects of Red Bull Energy Drinks on Atrial Electromechanical Function in Healthy Young Adults' (2020) 125(4) *The American Journal of Cardiology* 570, 573; Turel (n 5) 2089.

³¹ Marilyn Bromberg and Justine Howard, 'Red Bull: Does It Give You Wings or Cardiac Disturbances? Modifying the Law Regarding Energy Drinks in Australia' (2016) 24(2) *Journal of Law and Medicine* 433, 433.

³² Smith and Richards (n 4) 1.

ingredients that may harm health.³³ Energy drinks have approximately four times more caffeine than a typical soft drink³⁴ and no nutritional value.³⁵ They typically have nice packaging³⁶ and are coloured brightly.³⁷

Energy drinks first appeared in Asia and Europe in the 1960s.³⁸ They were relatively unheard of for about 20 years afterward.³⁹ More people learned about them when they began being sold in Austria in 1987 and in the United States in 1997.⁴⁰ Athletes first purchased energy drinks.⁴¹ This changed to shift workers, then people in the military and adolescents.⁴² In Australia, energy drink manufacturers started selling their product in the early 2000s.⁴³

Energy drinks are a multi-billion dollar industry.⁴⁴ In Australia, the energy drinks market is about \$444 million and growing.⁴⁵ Red Bull, RockStar and Monster are some of the energy drink brands,⁴⁶ with Red Bull the most popular.⁴⁷ In 2018, the American energy drinks market in

³³ Kraak et al (n 5) 771.

³⁴ Özde et al (n 31) 572.

³⁵ Amanda Doggett et al, 'Youth Consumption of Alcohol Mixed with Energy Drinks in Canada: Assessing the Role of Energy Drinks' (2019) 14 *Preventive Medicine Reports* 100865, 100865; G Jean, 'How Can We Restrict the Sale of Sports and Energy Drinks to Children? A Proposal for a World Health Organization-Sponsored Framework Convention to Restrict the Sale of Sports and Energy Drinks' (2017) 62(4) *Australian Dental Journal* 420, 423.

³⁶ G Trapp et al, 'Prevalence and Pattern of Energy Drink Intake among Australian Adolescents' (2021) 34(2) *Journal of Human Nutrition and Dietetics* 300, 300; Kraak et al (n 5) 771; Gina Trapp et al, 'Energy Drink Intake and Metabolic Syndrome: A Prospective Investigation in Young Adults' (2020) 30(10) *Nutrition, metabolism, and cardiovascular diseases: NMCD* 1679, 1679.

³⁷ Trapp et al, 'Prevalence and Pattern of Energy Drink Intake among Australian Adolescents' (n 37) 300.

³⁸ Joseph B Kuhns, Tammatha A Clodfelter and Heather Y Bersot, 'Examining and Understanding the Joint Role of Caffeine and Alcohol in Facilitating Violent Offending and Victimization' (2010) 37(2) *Contemporary Drug Problems* 267, 269; Octav Sorin Candel and Mihaela Jitaru, 'Energy Drinks – a Real Danger or a Scapegoat? An Analysis of the Commercially Available Products in Romania' (2020) 8 *Technium Social Sciences Journal* 745, 745 ('Energy Drinks – a Real Danger or a Scapegoat?').

³⁹ Kuhns, Clodfelter and Bersot (n 39) 269; Candel and Jitaru (n 39) 711.

⁴⁰ Kuhns, Clodfelter and Bersot (n 39) 269; Candel and Jitaru (n 39) 711. See also Andres Enriquez and David S Frankel, 'Arrhythmogenic Effects of Energy Drinks' (2017) 28(6) *Journal of Cardiovascular Electrophysiology* 711, 711; Kathleen E Miller, Kurt H Dermen and Joseph F Lucke, 'Caffeinated Energy Drink Use by U.S. Adolescents Aged 13-17: A National Profile' (2018) 32(6); *Psychology of Addictive Behaviors: Journal of the Society of Psychologists in Addictive Behaviors* 647, 647.

⁴¹ Miller, Dermen and Lucke (n 41) 647. See also Trenton David, 'Return to Regulation: FDA, Energy Drinks, and Our Youth' (2016) 53(5) *Houston Law Review* 1401, 1410.

⁴² Miller, Dermen and Lucke (n 41) 647. See also David (n 42) 1410.

⁴³ Cowie and Bolam (n 3) 205.

⁴⁴ Smith and Richards (n 4) 1.

⁴⁵ IBISWorld, 'Functional Beverage Production in Australia -Market Research Report' (Web Page, 2 September 2020) <<https://www.ibisworld.com/au/industry/functional-beverage-production/5502/>>.

⁴⁶ Mohamad Moussa et al, 'Cardiovascular Effects of Energy Drinks in the Pediatric Population' (2021) 37(11) *Pediatric Emergency Care* 578, 578.

⁴⁷ Özde et al (n 31) 570.

the United States was \$11 billion and it is expected to increase to \$83.4 billion by 2024.⁴⁸

Energy drinks are different from sports drinks, such as Gatorade and Powerade, which are flavoured drinks with carbohydrates, electrolytes and minerals, but do not have added stimulants.⁴⁹ While many people compare energy drinks to soft drinks, there is an important difference. Energy drinks normally have approximately three or more times the amount of caffeine in soft drinks and often contain additional ingredients like herbal stimulants, sodium and amino acids.⁵⁰ This is an important difference that helps explain why advocacy is necessary regarding children consuming energy drinks, separately from soft drinks. Now that this article explained what energy drinks are, it will discuss energy drinks and young people.

III Energy Drinks and Young People

Energy drinks have become more popular recently,⁵¹ particularly among young people⁵² as a way to increase their energy.⁵³ Energy drinks promotion to children is increasing.⁵⁴ Energy drink producers market to children and young people ‘aggressively’⁵⁵ and significantly promote them at events that youth frequent, such as sporting events and rock concerts.⁵⁶ Some of the mediums where energy drink manufacturers advertise their products to children are digital media, network and cable television.⁵⁷

Many children overseas and in Australia consume energy drinks. For example, a study of over 40,000 Canadian students in grades nine to 12 found that over 15% consumed energy drinks at least weekly.⁵⁸ In Western Australia, a survey of over 3,650 students in grades seven to 12 in 25 randomly selected schools found that over 49% of participants

⁴⁸ Kraak et al (n 5) 767.

⁴⁹ Moussa et al (n 47).

⁵⁰ Ignacio Carreno, ‘Energy Drinks: Stricter Health Warnings on Caffeine Content in the EU and Sales Bans to Minors and New Excise Taxes’ (2014) 5(4) *European Journal of Risk Regulation* 543, 543. See also David (n 42) 1408; Trapp et al, ‘Prevalence and Pattern of Energy Drink Intake among Australian Adolescents’ (n 37) 300.

⁵¹ Hargraves, Lockyer and Chambers (n 29) 116; Degirmenci et al (n 4); Doggett et al (n 36) 100865.

⁵² Doggett et al (n 36) 100865; Degirmenci et al (n 4).

⁵³ Hugues Sampasa-Kanyinga, Hayley A Hamilton and Jean-Philippe Chaput, ‘Sleep Duration and Consumption of Sugar-Sweetened Beverages and Energy Drinks Among Adolescents’ (2018) 48 *Nutrition* 77, 77.

⁵⁴ Almulla and Faris (n 1) 266.

⁵⁵ Joao Joaquim Bred et al, ‘Energy Drink Consumption in Europe: a Review of the Risks, Adverse Health Effects and Policy Options to Respond’ (2014) 2 *Frontiers in Public Health* 131, 135.

⁵⁶ Kraak et al (n 5) 771; Trapp et al, ‘Energy Drink Intake and Metabolic Syndrome: A Prospective Investigation in Young Adults’ (n 37) 1679.

⁵⁷ Kraak et al (n 5) 767.

⁵⁸ Doggett et al (n 36) 100865.

had tried an energy drink and 9.5% drank them weekly or more often.⁵⁹ Just under 20% of participants consumed more than two energy drinks in one day.⁶⁰ The average age of children who consumed an energy drink was 10.7 years old and males more frequently consumed energy drinks than females.⁶¹ Another Australian study of 8,888 students aged 12-17 years old in grades eight to 11 found that 13% consumed energy drinks weekly and another 18% consumed less than a cup a week.⁶² Being male, of a low socioeconomic background, not sleeping for long periods of time and eating a lot of fast food and sugar-sweetened beverages were associated with drinking energy drinks weekly.⁶³ There can be significant health challenges for young people who consume energy drinks, which this article will group into the following areas and discuss:

- a) mental health issues,
- b) obesity,
- c) sleep problems, and
- d) other issues.

A. *Mental Health Issues*

To young people, energy drinks appear to be a cheap and quick way to gain energy, but drinking a lot of caffeine (and there is a significant amount of caffeine in energy drinks) can cause fatigue.⁶⁴ Young people should ideally obtain energy from eating and sleeping well, exercising and spending time with others, not energy drinks.⁶⁵

Research links consumption of energy drinks in children, adolescents and young adults with greater rates of alcohol consumption (including binge-drinking), taking other substances, self-destructive behaviour, irritation, hyperactivity⁶⁶ and anxiety.⁶⁷ When young people consume energy drinks, it is linked to taking risks, such as unsafe sex and aggression.⁶⁸

It is common for young people to mix alcohol with energy drinks.⁶⁹ If young people consume energy drinks alone, it is more probable that

⁵⁹ Trapp et al, 'Prevalence and Pattern of Energy Drink Intake among Australian Adolescents' (n 37) 302.

⁶⁰ Ibid 302.

⁶¹ Ibid.

⁶² Belinda C Morley et al, 'Controlled Cohort Evaluation of the *LiveLighter* Mass Media Campaign's Impact on Adults' Reported Consumption of Sugar-Sweetened Beverages' (2018) 8(4) *BMJ Open* e019574, 255–256.

⁶³ Ibid.

⁶⁴ Viner (n 30) k3586.

⁶⁵ Ibid.

⁶⁶ Trapp et al, 'Prevalence and Pattern of Energy Drink Intake among Australian Adolescents' (n 37) 301.

⁶⁷ Özde et al (n 31) 573; Turel (n 5) 2089.

⁶⁸ Miller, Dermen and Lucke (n 41) 647.

⁶⁹ Doggett et al (n 36) 100865; Turel (n 5) 2089.

they will consume energy drinks mixed with alcohol.⁷⁰ When people drink alcohol combined with energy drinks, they are more likely to be aggressive than if they just consume alcohol.⁷¹ Mixing energy drinks with alcohol is associated with excess drunkenness among 16- to 17-year-olds.⁷²

B. Obesity

Children in high income countries consume more sugar and calories than they need.⁷³ Overweight or obese children face a higher increase in risk of being overweight as adults.⁷⁴ Childhood obesity is a significant problem in Australia. It affects about a quarter of Australian children.⁷⁵ In Australia, in 2017-2018, 25% of children and adolescents aged two to 17 and 67% of adults were overweight or obese.⁷⁶

Energy drinks contain, on average, 50 grams of sugar/carbohydrates and 200 calories (827 kJ) per drink.⁷⁷ Their high sugar and calorie content can contribute to weight gain, poor nutrition, and childhood obesity.⁷⁸

Sugar-sweetened beverages are ‘any liquids that are sweetened with various forms of added sugars like brown sugar, corn sweetener, corn syrup, dextrose, fructose, glucose, high-fructose corn syrup, honey, lactose, malt syrup, maltose, molasses, raw sugar and sucrose’.⁷⁹ Examples of sugar-sweetened beverages include soft drinks (not the sugar-free kind), fruit drinks and energy drinks.⁸⁰ Children who consume sugar-sweetened beverages increase their risk of weight

⁷⁰ Doggett et al (n 36) 100867.

⁷¹ Natalie J Ball et al, ‘Alcohol Mixed with Energy Drinks and Sexually Related Causes of Conflict in the Barroom’ (2021) 36(7-8) *Journal of Interpersonal Violence* 3353, 3354.

⁷² Turel (n 5) 2089.

⁷³ Viner (n 30) k3856.

⁷⁴ Thomas Lung et al, ‘Can Reducing Childhood Obesity Solve the Obesity Crisis in Australia’ (2020) 28(5) *Obesity* 857; Alison Hayes et al, ‘Early Childhood Obesity: Association with Healthcare Expenditure in Australia’ (2016) 24(8) *Obesity* 1752, 1752.

⁷⁵ Australian Government, Australian Institute of Health and Welfare, ‘Overweight and Obesity among Australian Adolescents’ (Web Page, 2020) <<https://www.aihw.gov.au/reports/overweight-obesity/overweight-obesity-australian-children-adolescents/summary>>.

⁷⁶ Australian Government, Australian Institute of Health and Welfare, ‘Overweight and Obesity’ (Web Page, 2021) <<https://www.aihw.gov.au/reports-data/behaviours-risk-factors/overweight-obesity/overview>>.

⁷⁷ Viner (n 30) k3856; Bromberg et al (n 30) 442; Smith and Richards (n 4) 1.

⁷⁸ Viner (n 30) k3856; Bromberg et al (n 30) 442; Smith and Richards (n 4) 1.

⁷⁹ Centers for Disease Control and Prevention, ‘Get the Facts: Sugar-Sweetened Beverage Intake’ (11 April 2022) <<https://www.cdc.gov/nutrition/data-statistics/sugar-sweetened-beverages-intake.html>>.

⁸⁰ *Ibid.*

gain.⁸¹ Drinking sugar-sweetened beverages does not lower hunger like solid food.⁸²

C. *Sleep Problems*

Energy drinks can reduce how long children sleep, especially when they consume them near bedtime.⁸³ There is a positive association between drinking energy drinks and sleep disturbances among young adult females.⁸⁴ The reason for this could be that caffeine in energy drinks may block brain receptors that help with regulating alertness and sleeping.⁸⁵ Poor sleeping is associated with a greater risk of depression for everyone, especially young people.⁸⁶ Young people with sleep problems are also at a higher risk for anxiety and low self-esteem.⁸⁷

D. *Other Issues*

In adults, moderate caffeine consumption can help physical endurance, cognitive function and fatigue.⁸⁸ High caffeine intake is associated with headaches, cardiovascular symptoms and gastrointestinal problems.⁸⁹ Children and adolescents may be more vulnerable to experiencing challenges consuming caffeine than adults because they weigh less and their bodies are not as used to consuming it.⁹⁰

The high sugar and calorie content in energy drinks can contribute to type two Diabetes Mellitus and dental problems.⁹¹ When young, healthy people consume energy drinks, this can increase their blood glucose and diastolic blood pressure.⁹² It can also cause stomach aches, hyperactivity⁹³ and a greater likelihood of poor school performance.⁹⁴

⁸¹ Sara N Bleich and Kelsey A Vercammen, 'The Negative Impact of Sugar-Sweetened Beverages on Children's Health: An Update of the Literature' (2018) 5 *BMC obesity* 6, 23; Rebecca J Scharf and Mark D DeBoer, 'Sugar-Sweetened Beverages and Children's Health' (2016) 37 *Annual Review of Public Health* 273, 273.

⁸² Bleich and Vercammen (n 82) 23.

⁸³ Hargraves, Lockyer and Chambers (n 29) 113.

⁸⁴ Georgina Trapp et al, 'Energy Drink Intake Is Associated with Insomnia and Decreased Daytime Functioning in Young Adult Females' (2021) 24(6) *Public Health Nutrition* 1328, 1334.

⁸⁵ *Ibid.*

⁸⁶ VicHealth, *Sleep and Mental Wellbeing: Exploring the Links* (No P-MW-604, March 2018) <<https://www.vichealth.vic.gov.au/-/media/ResourceCentre/PublicationsandResources/Mental-health/Summary-sleep-and-wellbeing-summary-report.pdf?la=en&hash=767B3589F60B0122368567813204E46FDAA8EA5C>>.

⁸⁷ *Ibid.*

⁸⁸ Miller, Dermen and Lucke (n 41) 647; Hargraves, Lockyer and Chambers (n 29) 113.

⁸⁹ Miller, Dermen and Lucke (n 41) 647; Hargraves, Lockyer and Chambers (n 29) 113.

⁹⁰ Miller, Dermen and Lucke (n 41) 647; Hargraves, Lockyer and Chambers (n 29) 113.

⁹¹ Bromberg et al (n 30) 442.

⁹² Nowak, Gośliński and Nowatkowska (n 52) 8.

⁹³ Trapp et al, 'Prevalence and Pattern of Energy Drink Intake among Australian Adolescents' (n 37) 301.

⁹⁴ Smith and Richards (n 4) 1.

Consuming energy drinks contributed to the deaths of adolescents who suffered from pre-existing heart conditions.⁹⁵

Even with all the health problems that consuming energy drinks can cause children, parents are likely not knowledgeable about the potential health risks that their children can experience if they consume them.⁹⁶ Energy drinks are still relatively new in Australia and the product promotion could possibly sway parents to buy them for their children. Parents potentially not knowing about the potential health risks that their children can experience if they drink energy drinks is another reason why Australian Governments should legislate to ban the sale of energy drinks to children.

IV COVID-19 and Children

Now that this article examined how consuming energy drinks can negatively impact children's health, it will consider how COVID-19 can hurt children's health. The article does this so that it can later establish why COVID-19 adds pressure on Australian Governments to legislate to ban the sale of energy drinks to children. It will discuss the international and Australian research on this topic.

A. *Mental Health*

The international research in this area states that COVID-19 may harm children's mental health because of its associated social isolation, economic challenges and public health crisis.⁹⁷ As stated previously, to prevent COVID-19 transmission, many schools closed, including in Australia, and students were educated at home. School closures disrupt families' lives and impact children's health.⁹⁸ Schools provide mental health care help to students and during COVID-19, many students did not have their usual access.⁹⁹ Telehealth care (healthcare through the telephone or technology) is similarly effective to health care in person.¹⁰⁰ However, many students do not have access to the requisite technology to use it due to technological inequalities.¹⁰¹ Also, peer contact is important to children's wellbeing.¹⁰² Closing schools, in

⁹⁵ See, eg, Larry D. Treat, 'Energy Drink Regulations: Why the Time for More FDA Authority Is Not Ripe and How States Can Protect Children without Unjustly Infringing on Adult Autonomy' (2016) 12 *Journal of Food Law & Policy* 163, 164.

⁹⁶ Cowie and Bolam (n 3) 205.

⁹⁷ Ezra Golberstein, Hefei Wen and Benjamin F Miller, 'Coronavirus Disease 2019 (COVID-19) and Mental Health for Children and Adolescents' (2020) 174(9) *JAMA Pediatrics* 819, 819.

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² Jörg M Fegert et al, 'Challenges and Burden of the Coronavirus 2019 (COVID-19) Pandemic for Child and Adolescent Mental Health: A Narrative Review to Highlight Clinical and Research Needs in the Acute Phase and the Long Return to Normality' (2020) 14 *Child and Adolescent Psychiatry and Mental Health* 20, 23.

addition to playgrounds, social clubs and social group activities to try to reduce COVID-19 transmission resulted in less peer contact.¹⁰³

Australian children and young people may have worried about themselves or their family members contracting COVID-19.¹⁰⁴ Also, domestic violence increased internationally during COVID-19.¹⁰⁵ When children are exposed to domestic violence it can impact their mental health.¹⁰⁶

Studies in Australia and abroad considered how COVID-19 can impact on young people's mental health. Kids Helpline is Australia's only national youth helpline.¹⁰⁷ It helps children and young people aged five to 25 years by giving information and counselling 24 hours a day, seven days a week.¹⁰⁸ Counsellors have a relevant degree and receive considerable training.¹⁰⁹ Kids Helpline analysed data between January 2017 and August 2020.¹¹⁰ There was a 'rapid increase' in demand for Kids Helpline's services when COVID-19 began, particularly its online chat.¹¹¹ Demand declined, then increased significantly when the second wave occurred.¹¹² The main concern of children who used the service was mental health.¹¹³ Admittedly, this data applies to young people up to age 25, and the focus of this article is people under the age of 18. Since the starting age that children can use the service is five, it is relevant.

A survey that over 200 Australian parents of children with ADHD aged five to 17 completed during May 2020, when COVID-19 restrictions existed, found that 'child COVID-19 stress' was associated with, among other things, increased general worry, sadness, anxiety, fidgety behaviour and fatigue.¹¹⁴

Overseas, a survey of 668 Chinese parents with children aged seven to 15 found that 7.16% of their children suffered from PTSD and depression due to COVID-19.¹¹⁵ Children were stuck at home, concerned about their education, worried about contracting COVID-19 and their families' financial situation.¹¹⁶ Also in China, a cross-sectional online questionnaire given to children aged seven to 18 on the mainland during COVID-19 with over 3,500 participants found that

¹⁰³ Ibid.

¹⁰⁴ Batchelor et al (n 20) 1068.

¹⁰⁵ Fegert et al (n 103) 4.

¹⁰⁶ Ibid.

¹⁰⁷ Batchelor et al (n 20) 1068.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

¹¹⁰ Ibid 1071–2.

¹¹¹ Ibid.

¹¹² Ibid.

¹¹³ Ibid.

¹¹⁴ Sciberras et al (n 8) 549–53.

¹¹⁵ Ma et al (n 28) 1–5.

¹¹⁶ Ibid.

children's anxiety levels were higher than prior to the pandemic and that factors associated with depression increased.¹¹⁷

Finally, an online study given to over 300 children aged nine to 12 in Turkey during May to June 2020, when COVID-19 restrictions were enforced, found that over 96% were aware of COVID-19 and about 41% stated that their sleeping patterns became irregular.¹¹⁸ While COVID-19 was experienced differently in China¹¹⁹ and Turkey¹²⁰ than Australia,¹²¹ the information regarding children's mental health in those countries is still relevant to show that there was also a trend internationally of children experiencing mental health challenges due to COVID-19.

B. *Obesity*

The impact of the COVID-19 lockdown on children's weight demands 'concern'.¹²² Children normally gain weight during their summer vacation from school.¹²³ Typically, this weight stays when children return to school and they gain more weight the following summer.¹²⁴ Childhood weight gain is associated with being overweight as an adult.¹²⁵ The COVID-19 lockdowns 'exacerbates all the risk factors for weight gain associated with summer recess'.¹²⁶

C. *Food*

Children spent more time at home during COVID-19 due to lockdowns, so the type of food that they ate during this time was even more important than usual.¹²⁷ Parents may have travelled to supermarkets less frequently due to lockdowns¹²⁸ and many lost their jobs.¹²⁹ Consequently, parents purchased cheaper shelf-stable food, which

¹¹⁷ Duan Li et al, 'An Investigation of Mental Health Status of Children and Adolescents in China During the Outbreak of COVID-19' (2020) 275 *Journal of Affective Disorders* 112, 112 - 115.

¹¹⁸ Murside Zengin, Emriye Hilal Yayan and Elanur Vicnelioglu, 'The Effects of the COVID-19 Pandemic on Children's Lifestyles and Anxiety Levels' (2021) 10 *Journal of Child and Psychiatric Nursing* 1, 1-5.

¹¹⁹ Worldometer, Coronavirus China (Web Page, 5 July 2021) <<https://www.worldometers.info/coronavirus/country/china/>>.

¹²⁰ Worldometer, Coronavirus Turkey (Web Page, 5 July 2021) <<https://www.worldometers.info/coronavirus/country/turkey/>>.

¹²¹ Australian Government, Department of Health, 'Coronavirus (COVID-19) Current Situation and Case Numbers' (Web Page, 5 July 2021) <<https://www.health.gov.au/news/health-alerts/novel-coronavirus-2019-ncov-health-alert/coronavirus-covid-19-current-situation-and-case-numbers>>.

¹²² Siebach, Piedimonte and Ley (n 28) 1351.

¹²³ Andrew G Rundle et al, 'COVID-19-Related School Closings and Risk of Weight Gain Among Children' (2020) 28(6) *Obesity* 1008, 1008.

¹²⁴ Ibid.

¹²⁵ Ibid.

¹²⁶ Ibid.

¹²⁷ Adams et al (n 25) 2056-7.

¹²⁸ Ibid.

¹²⁹ Ibid; Rundle et al (n 124) 1008.

might have negatively impacted what their children ate and is often less healthy, with fewer nutrients.¹³⁰

The stress that lockdowns caused may also have influenced some children to 'stress eat', which can cause weight gain.¹³¹ Parents may give children food as a reward more often during lockdown to try to influence their behaviour while they worked at home.¹³²

An online cross-sectional survey completed by 584 parents in the United States in April to May 2020 found that about a third of families increased how many high-calorie snack foods, desserts and sweets they ate at home and about half increased the amount of non-perishable processed food they ate.¹³³ Sixty-two percent stated that they decreased the amount of takeaway food they ate.¹³⁴ Parents' concern about their children being overweight also increased.¹³⁵

D. *Physical Activity and Screen Time*

Since many schools closed during COVID-19 lockdowns, children could not participate in organised physical activity, which may lead to weight gain.¹³⁶ When children stay at home, particularly in apartments in urban areas, they may be less likely to exercise.¹³⁷

Parents became 'increasingly reliant' on technological screens for their children during COVID-19.¹³⁸ They used them for entertainment, learning and socially.¹³⁹ A retrospective cohort study of parents of children aged five to nine in Western Australia during May to June 2020 with 157 participants found a significant increase in the amount of time the children spent in front of screens during lockdown: an additional 400 minutes of screen time per child.¹⁴⁰ The amount of minutes of total physical activity remained the same as before the pandemic and unstructured physical activity increased.¹⁴¹ In another Australian study, over 500 young people aged 13 to 19 living in Sydney were monitored for food, activity and wellbeing from 18 November 2019 to 19 April

¹³⁰ Rundle et al (n 124) 1008.

¹³¹ Cuschieri and Grech (n 14) 2028.

¹³² Adams et al (n 25) 2056–7.

¹³³ Ibid 2059.

¹³⁴ Ibid.

¹³⁵ Ibid.

¹³⁶ Cuschieri and Grech (n 14) 2028.

¹³⁷ Rundle et al (n 124) 1008.

¹³⁸ Leigh Vanderloo et al, 'Applying Harm Reduction Principles to Address Screen Time in Young Children Amidst the COVID-19 Pandemic' (2020) 41 *Journal of Developmental & Behavioral Pediatrics* 335, 335.

¹³⁹ Ibid.

¹⁴⁰ Nathan et al (n 18) 8–9.

¹⁴¹ Ibid.

2020.¹⁴² Part of this period involved a lockdown due to COVID-19,¹⁴³ and during that time, physical activity decreased.¹⁴⁴

About one-third of families reported an increase in the amount of high-calorie snack foods and desserts/sweets in their home, while almost half reported an increase in non-perishable processed foods during the pandemic.

Overseas, in Italy, a questionnaire completed by 41 parents found that their children's eating and activity levels changed 'in an unfavourable direction' three weeks after the COVID-19 lockdown begun.¹⁴⁵

V UK Obesity Initiatives in the Aftermath of Covid-19

Obesity in the United Kingdom is a serious problem. There were about 900,000 hospital admissions between 2018 and 2019 related to obesity and it cost the National Health Care Service 6.1 billion pounds annually.¹⁴⁶ The British Government decided to take significant and ambitious measures to address obesity among its citizens due to COVID-19 because people who are overweight or obese are more likely to suffer from serious ill effects or complications from COVID-19.¹⁴⁷

The British Government started a new campaign to encourage people to lose weight and provided evidence-based tools and apps with relevant, helpful information.¹⁴⁸ It promised to offer more weight management help.¹⁴⁹ It published a public consultation regarding nutrition labelling.¹⁵⁰ It introduced law to compel large businesses that sell food outside the home to provide calorie information on the food they sell.¹⁵¹ It consulted with businesses that sell alcohol regarding

¹⁴² Sithum Munasinghe et al, 'The Impact of Physical Distancing Policies During the COVID-19 Pandemic on Health and Well-Being Among Australian Adolescents' (2019) 67 *Journal of Adolescent Health* 653, 658–9.

¹⁴³ Ibid.

¹⁴⁴ Ibid.

¹⁴⁵ Angelo Pietrobelli et al, 'Effects of COVID-19 Lockdown on Lifestyle Behaviors in Children with Obesity Living in Verona, Italy: A Longitudinal Study' (2020) 28(8) *Obesity (Silver Spring, Md.)* 1382, 1384.

¹⁴⁶ Department of Health & Social Care (UK), *Tackling Obesity: Empowering Adults and Children to Live Healthier Lives* (Policy paper, 27 July 2020) <<https://www.gov.uk/government/publications/tackling-obesity-government-strategy/tackling-obesity-empowering-adults-and-children-to-live-healthier-lives>>.

¹⁴⁷ Ibid.

¹⁴⁸ Ibid; Department of Health and Social Care et al, 'Front-of-Pack Nutrition Labelling in the UK: Building on Success' (13 August 2020) <<https://www.gov.uk/government/consultations/front-of-pack-nutrition-labelling-in-the-uk-building-on-success>>.

¹⁴⁹ Department of Health & Social Care (UK) (n 147); Department of Health and Social Care et al (n 149).

¹⁵⁰ Department of Health & Social Care (UK) (n 147); Department of Health and Social Care et al (n 149).

¹⁵¹ Department of Health & Social Care (UK) (n 147); Department of Health and Social Care et al (n 149).

adding calorie information on packaging.¹⁵² It passed law to ban advertising food that is high in fat, sugar or salt that airs on TV and online between 530 am and 9 pm, which was supposed to commence in 2023¹⁵³ and it held a consultation in late 2020 regarding banning advertising food that is high in fat, sugar or salt online.¹⁵⁴

The British Government held consultations regarding nutrition labelling and banning advertisements of food that are high in fat, sugar or sale online in 2020, when COVID-19 was extremely serious in the jurisdiction:¹⁵⁵ this supports the importance of addressing being overweight and obese in the COVID-19 era, particularly when people who are overweight or obese can suffer from COVID-19 symptoms more than those who are not. Australian Governments should follow the British Government's lead to address obesity. A similar proportion of Australian and British people suffer from overweight and obesity. In an OECD comparison of countries concerning obesity, Australia ranked sixth for the highest number of obese and overweight people: 65.2% of its population aged 15 years or older is overweight or obese.¹⁵⁶ The United Kingdom was ninth: 63.3% of its population aged 15 years or older is overweight or obese.¹⁵⁷ As previously stated, a measure that Australian Governments can take to help accomplish this among young people is to pass legislation to ban the sale of energy drinks to people under the age of 18.

VI Actions in the United Kingdom to Ban the Sale of Energy Drinks to People Under the Age of 18

In January 2018, famous British chef and restaurateur Jamie Oliver advocated a ban on selling energy drinks to young people under the age of 16 due to the product's caffeine and sugar.¹⁵⁸ After this, British supermarket Waitrose announced that it would cease selling energy drinks to children under the age of 16.¹⁵⁹ Then, many retailers in the United Kingdom, such as ASDA, Aldi, Boots, Co-op, Morrisons, Sainsbury's and Tesco followed by banning the sale of energy drinks to

¹⁵² UK Government, 'Calorie Labelling for Food and Drink Served Outside of the Home' (Web Page, 10 June 2021) <<https://www.gov.uk/government/consultations/calorie-labelling-for-food-and-drink-served-outside-of-the-home>>.

¹⁵³ *Health and Care Act 2022* (UK) s 172, sch 18.

¹⁵⁴ UK Government, 'Total Restriction of Online Advertising for Products High in Fat, Sugar and Salt' (Web Page, 24 June 2021) <<https://www.gov.uk/government/consultations/total-restriction-of-online-advertising-for-products-high-in-fat-sugar-and-salt-hfss>>.

¹⁵⁵ *Ibid.*

¹⁵⁶ Australian Institute of Health and Welfare, 'Overweight and Obesity: An Interactive Insight' (27 November 2020) <<https://www.aihw.gov.au/reports/overweight-obesity/overweight-and-obesity-an-interactive-insight/contents/time-trends>>.

¹⁵⁷ *Ibid.*

¹⁵⁸ Hargraves, Lockyer and Chambers (n 29) 112.

¹⁵⁹ *Ibid.*

children under the age of 16.¹⁶⁰ The supermarkets banned the sale of energy drinks to people under 16 because they wanted to.¹⁶¹ No legislation existed at that time requiring them to.¹⁶² The stores chose their customers' health over maximizing their profits. Their actions support the view that energy drinks must surely cause harm, since they made such an uncommercial decision. Indeed, Simon Moore, the Director of Technical and Corporate Social Responsibility at Waitrose said:

[t]hese drinks carry advice stating that they are not recommended for children, so we're choosing to proactively act on that guidance, particularly given the widespread concerns which have been raised about these drinks when consumed by under-16s.¹⁶³

Following stores in the United Kingdom voluntarily banning the sale of energy drinks to people under the age of 16, the British Government held a consultation regarding the issue. One of the topics the consultation considered was whether the appropriate age to ban the sale of energy drinks should be 16 or 18.¹⁶⁴ Supermarkets in the United Kingdom chose to stop selling energy drinks to young people under 16, as opposed to 18, although 16- and 17-year-olds are the main consumers.¹⁶⁵ Age 18 is when people legally become an adult and they can purchase and consume other substances like alcohol and tobacco.¹⁶⁶ It makes sense to choose 18 as the minimum age to sell energy drinks to young people, although banning the sale of energy drinks to people under the age of 16 still protects many young people from the negative consequences of consuming energy drinks. After its public consultation, the British Government decided that it would legislate to ban the sale of energy drinks to people under the age of 18.¹⁶⁷ This is the better decision, because it protects more young people from the potential harmful effects of energy drinks.

¹⁶⁰ Ibid.

¹⁶¹ Ibid.

¹⁶² The author conducted a thorough search of relevant legal databases at the time, such as Westlaw.

¹⁶³ Rebecca Smithers, 'Waitrose Bans Sale of Energy Drinks to Under-16s', *The Guardian* (online, 4 January 2018). <<https://www.theguardian.com/society/2018/jan/04/waitrose-bans-sale-energy-drinks-to-under-16s-children>>.

¹⁶⁴ UK Government, *Consultation on Proposal to End the Sale of Energy Drinks to Children* (Consultation Paper, August 2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/736398/consultation-on-ending-the-sale-of-energy-drinks-to-children.pdf>.

¹⁶⁵ Ibid.

¹⁶⁶ Ibid.

¹⁶⁷ UK Government, 'Advancing our Health: Prevention in the 2020s: Consultation Document' (Consultation Document, July 2019) <<https://www.gov.uk/government/consultations/advancing-our-health-prevention-in-the-2020s/advancing-our-health-prevention-in-the-2020s-consultation-document>>.

VII Other Countries' Initiatives Concerning Banning the Sale of Energy Drinks Generally or Just to Minors

The Governments of many countries legislated to ban the sale of energy drinks to minors or banned their sale outright. The Lithuanian Government passed a law that banned the sale of energy drinks with at least 150 mg/litre to people under 18.¹⁶⁸ The Latvian Government also banned the sale of energy drinks to people under the age of 18.¹⁶⁹ The Government of the United Arab Emirates banned the sale of energy drinks to people under the age of 16 and the Swedish Government banned the sale of energy drinks to children under the age of 15.¹⁷⁰ The governments of some countries banned the sale of energy drinks to all people, such as Denmark, Turkey, Norway, Uruguay, Iceland and France.¹⁷¹

Storeowners and store managers in rural interior Alaska try to persuade young people to buy healthier drink options, instead of energy drinks.¹⁷² Some also refuse to sell energy drinks to children under 10 and tell the children that they will inform their parents about their energy drink consumption.¹⁷³ They also partner with school employees to lower the number of energy drinks that children consume by point of sale counselling.¹⁷⁴ The store owners prioritising children's health is commendable and in a similar spirit to the British supermarket retailers who banned the sale of energy drinks to children under the age of 16 without legislation requiring them to. The storeowners and store managers' decisions to pursue such an uncommercial action supports this article's argument that energy drinks are harmful and Australian Governments should legislate to ban their sale to children.

VIII Australian Law Regarding Energy Drinks

The *Australian New Zealand Food Standards Code* has a standard that regulates energy drinks.¹⁷⁵ It calls energy drinks 'formulated caffeinated beverages' and defines such a beverage as 'a flavoured, non-

¹⁶⁸ Jaspreet Kaur et al, 'Energy Drinks: Health Effects and Consumer Safety' (2019) 49(6) *Nutritional Food Science* 1075, 1080.

¹⁶⁹ Werner Schroeder, 'Age Restrictions on the Sale of Energy Drinks from an EU Law Perspective' (2016) 11(5) *European Food and Feed Law Review* 400, 401.

¹⁷⁰ Telethon Kids Institute, *Submission No 074 to Legislative Council Selection Committee on Personal Choice and Community Safety, Inquiry on Personal Choice and Community Safety* (5 October 2018) <<https://www.nslhd.health.nsw.gov.au/HealthPromotion/Documents/cs.ccs.074.181005.sub.Telethon+Kids+Institute.pdf>>.

¹⁷¹ *Ibid.*

¹⁷² Janet M Wojcicki and Peter de Schweinitz, 'Store Owners as Potential Agents of Change: Energy Drinks in the Interior of Alaska' (2017) 76(1) *International Journal of Circumpolar Health* 1400362, 1400362-1400364.

¹⁷³ *Ibid.*

¹⁷⁴ *Ibid.*

¹⁷⁵ *Australia New Zealand Food Standards Code* s 2.6.4.

alcoholic beverage, or a flavoured, non-alcoholic beverage to which other substances (for example, carbohydrates, amino acids, vitamins) have been added, that: (a) contains caffeine; and (b) has the purpose of enhancing mental performance. To avoid doubt, a formulated caffeinated beverage is a water based flavoured drink for the purposes of item 14.1.3 of section S15—5, and section S18—10.¹⁷⁶

It also states that beverages cannot be sold that contain both energy drinks and alcohol.¹⁷⁷ It has requirements regarding the amount of caffeine in an energy drink: they must have between 145 mg/L and 320 mg/L.¹⁷⁸ They have strict labelling requirements. For example, energy drinks need to have a label that states the average amount of caffeine that they have per serving size and per 100 mL.¹⁷⁹ The labels must also state that they contain caffeine and are not recommended for children, pregnant or lactating women and people who are sensitive to caffeine.¹⁸⁰ One may assume that a strong warning label on energy drinks, which states that they are not recommended for children, is sufficient and no further measures are necessary to stop them from being sold to children. That is not the case. Just because a warning label exists does not mean that children will read it, understand it or abide by it. This is particularly the case when energy drinks are marketed to children and sold in attractive packaging.

The Australian Beverages Council represents the Australian non-alcoholic beverage industry.¹⁸¹ It has members of different sizes that make up over 95% of the beverages in the beverage industry and contribute over \$7 billion to the Australian economy.¹⁸² It advocates for the industry and works with its members to improve the industry.¹⁸³ The organisation makes some commitments that directly or indirectly apply to children.¹⁸⁴ They are:

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; provide consumers with up-to-date information about energy drinks on the ABCL website.¹⁸⁵

¹⁷⁶ Ibid s 2.6.4 subs 2.

¹⁷⁷ Ibid s 2.6.4 subs 4.

¹⁷⁸ Ibid s 2.6.4 subs 2.

¹⁷⁹ Ibid s 2.6.4 subs 3.

¹⁸⁰ Ibid.

¹⁸¹ Australian Beverages Council, 'About', *Australian Beverages* <<https://www.australianbeverages.org/about-us/>>.

¹⁸² Ibid.

¹⁸³ Ibid.

¹⁸⁴ Australian Beverages Council, *Energy Drinks: An Industry Commitment* (Brochure, February 2019) <https://www.australianbeverages.org/wp-content/uploads/2019/02/Energy-Drinks_AnIndustryCommitment-1.pdf>.

¹⁸⁵ Ibid.

The Australian Beverages Council provides guidance, it is not law. There are no penalties for not abiding by the guidance, so member companies need not follow it. The advice not to promote energy drinks to children is excellent, but advertising directed at 18- or 19-year-olds may also appeal to younger people. It does not define the word 'child', so theoretically, an energy drinks company could interpret this word as an extremely young age, increasing the chances that its advertising will appeal to older children, such as those 10 years and older. Importantly, it does not advocate banning the sale of energy drinks to young people under the age of 18. One would not expect it to, given that this could lessen its members' profits.

IX Recommendations

A. *Reasons to Ban the Sale of Energy Drinks to Under 18-Year-Olds that Involve COVID-19*

The author strongly recommends that Australian Governments legislate to ban the sale of energy drinks to people under the age of 18 for many reasons. As stated previously, energy drinks can negatively impact on children's mental health and weight, both issues that were worsened due to COVID-19. COVID-19 presents an important juncture to consider how to improve children's mental health and lower the number who are overweight or obese.

Australia's challenges regarding childhood obesity are similar to those of the United Kingdom. In 2016, 36% of Australian children aged five to nine were overweight or obese and 32.5% of British children were overweight or obese.¹⁸⁶ The British Government took bold action due to COVID-19 to try to lower the number of people who are overweight and obese which this article discussed, and the Australian Government should act similarly. Banning the sale of energy drinks to children under the age of 18 could be one such bold and significant step. As well, the British Government and governments of other jurisdictions separately banned the sale of energy drinks to children. Australian Governments should follow. Australian Governments have the benefit of being able to read through the documents from the British Government's public consultation regarding legislating the ban of the sale of energy drinks to people under the age of 18 to help understand the issue.¹⁸⁷

¹⁸⁶ Organisation for Economic Co-operation and Development, 'Overweight and Obesity among Children' (Web Page, 2021) <<https://www.oecd-ilibrary.org/sites/010c22fe-en/index.html?itemId=/content/component/010c22fe-en>>.

¹⁸⁷ See, eg, UK Government, 'Government Response to the House of Commons Science and Technology Report on Energy Drinks and Children' (March 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/788862/govt-response-to-science-and-technology-committee-energy-drinks-report-web.pdf>.

B. *Parents and Existing Legislation to Protect Children*

One might also argue that whether children consume energy drinks is a decision best left to parents.¹⁸⁸ As stated previously, parents are unlikely to know about the potential health risks that their children can experience if they consume energy drinks.¹⁸⁹ One can create education and media campaigns regarding energy drinks to encourage parents to delay their children's energy drink consumption¹⁹⁰ and learn about the negative impacts of energy drinks on their children¹⁹¹ to counter their current ignorance. This may help to lower the number of children who consume energy drinks, but it is insufficient. Children may still choose to purchase energy drinks despite their parents' warnings, particularly when they are not with their parents, so Australian Governments should legislate to ban their sale to people under the age of 18.

Many important rules exist to protect children that do not apply to adults in Australia, such as rules requiring children to wear car seats or helmets when bicycling or to stop them from smoking or consuming alcohol.¹⁹² Such laws are critical to protect children because they are vulnerable. Banning the sale of energy drinks would be a similarly important law to protect children.

One might argue that energy drinks should not be banned to people under the age of 18 since other caffeinated drinks, like coffee, are not.¹⁹³ There is an important difference between energy drinks and coffee.¹⁹⁴ Energy drinks are cold, so people (including children) may easily drink them quickly (as opposed to hot coffee) and can consume a significant amount of caffeine in a short time period which can cause health problems, particularly in young people, who cannot tolerate caffeine like adults.¹⁹⁵

C. *Comparing Energy Drinks with Tobacco and Alcohol*

Energy drinks may not seem harmful because of their attractive packaging and appearance similar to soft drinks. That could not be further from the truth. There are some similarities between energy drinks and tobacco. They are both legal, clearly cause harm and their marketing is 'misleading' and aimed at vulnerable people.¹⁹⁶

¹⁸⁸ Viner (n 30) k3856.

¹⁸⁹ Cowie and Bolam (n 3) 205.

¹⁹⁰ Miller, Dermen and Lucke (n 41) 657; Cowie and Bolam (n 3) 207.

¹⁹¹ Bromberg and Howard (n 32) 452.

¹⁹² Telethon Kids Institute (n 171).

¹⁹³ Bromberg and Howard (n 32) 452.

¹⁹⁴ *Ibid.*

¹⁹⁵ *Ibid.*

¹⁹⁶ Jean (n 36) 420-1.

Some scientists and psychologists consider caffeine, like nicotine, to be a poison that causes addiction and negative health effects on the body.¹⁹⁷

Australia has been a worldwide leader in protecting the public from tobacco.¹⁹⁸ It should also become a leader regarding banning the sale of energy drinks to children.

‘Energy drinks are in a similar position to alcohol regarding balancing potential side-effects with the requirement for public access.’¹⁹⁹ It may be appropriate to legislate distributing energy drinks in Australia similar to alcohol distribution,²⁰⁰ since legislation regarding distributing alcohol is established and bans the sale of the product to people who are under the age of 18, which this article recommends also occurs for energy drinks.

D. *Other Considerations Regarding Legislation Banning the Sale of Energy Drinks to People Under the Age of 18*

There are many other reasons to create legislation that bans the sale of energy drinks to people under the age of 18. Many health organisations support a ban on the sale of energy drinks to children,²⁰¹ such as the Royal College of Paediatrics and Child Health in the United Kingdom,²⁰² the British Dental Association in the United Kingdom,²⁰³ the Australian Medical Association, the Australian Dental Association, the Australian Obesity Coalition, and the American Academy of Pediatrics.²⁰⁴

A law to ban the sale of energy drinks to people under the age of 18 would be unlikely to stop children from consuming them completely. They may acquire energy drinks in other ways, such as from people who are over the age of 18 or from jurisdictions outside Australia online. Nevertheless, it is reasonable to assume that passing legislation that bans selling energy drinks to children under the age of 18 will decrease children consuming energy drinks to some degree, similar to banning selling alcohol to people under the age of 18.

It is also important to consider creating legislation to ban the advertising of energy drinks to children in Australia (in addition to

¹⁹⁷ Joseph G. Hoflander, ‘A Red Bull Instead of a Cigarette: Should the FDA Regulate Energy Drinks’ (2011) 45 *Valparaiso University Law Review* 689, 725-726.

¹⁹⁸ T Kirby, ‘Australia to be the First Country to Use Plain Cigarette Packaging’ (2011) 12(5) *Lancet Oncology* 427, 427.

¹⁹⁹ Bromberg and Howard (n 32) 452.

²⁰⁰ *Ibid* 444.

²⁰¹ See, eg, Viner (n 30) k3856.

²⁰² *Ibid* k3857.

²⁰³ Adrian O’Dowd, ‘Clinicians Call for Ban on Sales of Energy Drinks to Children’ (2018) 225(7) *British Dental Journal* 591, 591.

²⁰⁴ Telethon Kids Institute (n 171).

banning their sale to children). This topic, while important and highly relevant to this issue, is outside of the purview of this article.

One may also argue that selling energy drinks should be banned to everyone in Australia, and not just to those who are under the age of 18, because consuming energy drinks can negatively impact adults' health²⁰⁵ and as previously stated, some governments overseas took such action. This argument is also outside of the purview of this article. The author believes that people over the age of 18 are sufficiently mature to make decisions regarding their health. Indeed, that is the current view that applies to other food and beverages that can be harmful, such as alcohol. Governments must protect children due to their vulnerability.

X Conclusion

People have consumed caffeine for centuries.²⁰⁶ In the last 500 years, they have consumed caffeine mostly through coffee and tea.²⁰⁷ Today, many products include caffeine, such as coffee, tea, soft drinks, chocolate, over the counter stimulants and energy drinks.²⁰⁸ Energy drinks can negatively impact the children who consume them in many ways, including their mental health and their weight.²⁰⁹ COVID-19 also negatively affected these areas.²¹⁰

[The] COVID-19 pandemic has collateral effects extending beyond those of direct viral infection. Children and adolescents struggling with obesity are placed in an unfortunate position of isolation that appears to create an unfavo[u]rable environment for maintaining healthy lifestyle behavio[u]rs.²¹¹

Since energy drinks could clearly negatively affect children's health before COVID-19, COVID-19 should not have been necessary to take action. Nevertheless, COVID-19 has brought particular attention to this problem and Australian Governments should take action to help children's health. Australian Governments should follow Britain's lead, and create legislation to ban the sale of energy drinks to people under the age of 18.

While one might argue that people should be allowed to choose to buy the products they want even if they are harmful, there is also 'a need to balance individual autonomy and commercial interests with

²⁰⁵ See, eg, Chad J Reissig, Eric C Strain, Roland R Griffiths, 'Caffeinated Energy Drinks – a Growing Problem' (2009) 99 *Drug and Alcohol Dependence* 1; Mykin R Higbee et al, 'Nurses Consuming Energy Drinks Report Poorer Sleep and Higher Stress' (2020) 42(1) *Western Journal of Nursing Research* 24.

²⁰⁶ David (n 42) 1408.

²⁰⁷ *Ibid.*

²⁰⁸ *Ibid.*

²⁰⁹ Viner (n 30) k3856.

²¹⁰ See, eg, Ma et al (n 28) 1–5; Siebach, Piedimonte and Ley (n 28) 1351.

²¹¹ Pietrobelli et al (n 146) 1384.

regulatory oversight to protect vulnerable populations'.²¹² Children are clearly a vulnerable population. They lack the ability to understand and critically analyse energy drink labels as well as adults and make important decisions about whether to consume them and in what quantities.

Energy drink manufacturers may decrease their profits if children cannot buy energy drinks, but it is reasonable to assume that this large and profitable industry can find other ways to recoup this money. Even if energy drink manufacturers cannot find alternatives to make the money that they will lose, Australian Governments must prioritise children's health over money they may receive in tax revenue from energy drink manufacturers. Children deserve no less.

²¹² Kraak et al (n 5) 767.