

Food Bill 2003

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to repeal the *Food Act 1989* and to enact new food laws as a result of an agreement between the Commonwealth, States, Territories and New Zealand dealing with the implementation of uniform food laws.

Outline of provisions

Part 1 Preliminary

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Clause 3 states the objects of the proposed Act, namely:

- (a) to ensure food for sale is both safe and suitable for human consumption,
- (b) to prevent misleading conduct in connection with the sale of food,
- (c) to provide for the application in this State of the Food Standards Code.

Clause 4 defines certain words and expressions used in the proposed Act. In particular, it defines:

- (a) **appropriate enforcement agency** as the enforcement agency prescribed by the regulations for the purposes of the relevant provision of the proposed Act, and
- (b) **Food Standards Code** as the *Australia New Zealand Food Standards Code* as defined in the *Food Standards Australia New Zealand Act 1991* of the Commonwealth (as modified in accordance with regulations referred to in clause 140 or 141), and
- (c) **Food Safety Standards** as the standards contained in Chapter 3 of the Food Standards Code, and
- (d) **regulatory authority** as the Director-General of the Department of Health.

Clause 5 defines **food** for the purposes of the proposed Act.

Clause 6 defines **food business** for the purposes of the proposed Act. It means a business, enterprise or activity (other than a business, enterprise or activity that is primary food production) that involves the handling of food intended for sale, or the sale of food, regardless of whether the business, enterprise or activity concerned is of a commercial, charitable or community nature or whether it involves the handling or sale of food on one occasion only.

Clause 7 defines **primary food production** for the purposes of the proposed Act.

Clause 8 defines **unsafe food** for the purposes of the proposed Act.

Clause 9 defines **unsuitable food** for the purposes of the proposed Act.

Clause 10 provides that Part 5 (improvement notices and prohibition orders for premises and equipment), Part 7 (auditing) and Part 8 (notification and registration of food businesses and approval of food premises) do not apply to or in respect of primary food production.

Clause 11 provides that certain food offences and the Parts referred to in the previous paragraph do not apply to a water supplier in respect of the supply of water for human consumption through a reticulated water system.

Clause 12 provides that the proposed Act and the regulations made under it prevail over other legislation where there are inconsistencies. The clause also requires the approval of the Minister to the making of any statutory rule that deals with certain specified matters relating to food and vehicles, premises and places in which food is sold or handled for sale.

Part 2 Offences relating to food

Division 1 Serious offences relating to food

Clause 13 creates offences of handling food intended for sale in a manner that the person knows will render, or is likely to render, the food unsafe or in a manner that the person ought reasonably to know is likely to render the food unsafe.

Clause 14 creates offences of selling food that the person knows is unsafe or ought reasonably to know is unsafe.

Clause 15 creates offences of causing food intended for sale to be falsely described if the person knows, or ought reasonably to know, that a consumer of the food who relies on the description will, or is likely to, suffer physical harm. Offences are also created of selling food that the person knows is falsely described and will, or is likely to, cause physical harm to a consumer of the food who relies on the description or that the person ought reasonably to know is falsely described and is likely to cause physical harm to a consumer of the food who relies on the description.

Division 2 Other offences relating to food

Clause 16 creates offences of handling food intended for sale in a manner that will render, or is likely to render, the food unsafe and of selling food that is unsafe.

The offences created by this clause and the other clauses in this Division are of a strict liability nature and have lower penalties than those contained in Division 1.

Clause 17 creates offences of handling food intended for sale in a manner that will render, or is likely to render, the food unsuitable and of selling food that is unsuitable.

Clause 18 creates an offence of engaging in conduct (in the course of carrying on a food business) that is misleading or deceptive or is likely to mislead or deceive in relation to the advertising, packaging or labelling of food intended for sale or the sale of food. An offence is also created of causing food to be advertised, packaged or labelled in a way that falsely describes the food, for the purpose of effecting or promoting the sale of the food in the course of carrying on a food business. An offence is also created of selling food (in the course of carrying on a food business) that is packaged or labelled in a way that falsely describes the food.

Clause 19 creates an offence of supplying food (in the course of carrying on a food business) by way of sale if the food is not of the nature or substance demanded by the purchaser.

Clause 20 creates an offence of selling equipment that if used for the purposes for which it was designed or intended to be used:

- (a) would render or be likely to render food unsafe, or
- (b) would put other equipment, or would be likely to put other equipment, in such a condition that, if the other equipment were used for the purposes for which it was designed or intended to be used, it would render, or be likely to render, food unsafe.

An offence is also created of selling packaging or labelling material that if used for the purposes for which it was designed or intended to be used would render or be likely to render food unsafe.

Clause 21 creates an offence of not complying with any requirement imposed on the person by a provision of the Food Standards Code in relation to the conduct of a food business or to food intended for sale or food for sale.

The following offences are also created:

- (a) selling any food that does not comply with any requirement of the Food Standards Code that relates to the food,
- (b) selling or advertising for sale any food that is packaged or labelled in a

manner that contravenes a provision of the Food Standards Code,
(c) selling or advertising for sale any food in a manner that contravenes a provision of the Food Standards Code.

Clause 22 specifies a number of circumstances in which food is taken to be falsely described for the purposes of the Part.

Clause 23 makes it clear that the offences also apply to food intended for sale outside New South Wales. However, there is a defence contained in clause 25 in relation to food for export.

Division 3 Defences

Clause 24 provides certain defences to an offence under the Part in relation to the publication of advertisements.

Clause 25 provides a defence to an offence under the Part if the food in question was for export and complied with the laws of the place to which it was being exported.

Clause 26 provides a defence to an offence under the Part if the person concerned proves that they took all reasonable precautions and exercised due diligence in order to prevent the offence. An example of a way in which the requirements of the clause can be complied with is given.

Clause 27 removes any defence of a mistaken but reasonable belief as to the facts that constituted the offence in relation to offences under Division 2.

Clause 28 provides a defence in relation to certain offences under the Part that involve handling food intended for sale in a manner that will, or is likely to, render the food unsafe or unsuitable if the defendant proves that the defendant destroyed or disposed of the food immediately after the food was handled in that manner.

Clause 29 provides a defence in relation to certain offences under the Part of selling equipment or packaging or labelling material that will, or is likely to, render food unsafe if the defendant proves that they reasonably believed that the equipment or material concerned was not intended for use in connection with the handling of food.

Part 3 Emergency powers

Clause 30 allows an order to be made under the Part by the regulatory authority only if the regulatory authority has reasonable grounds to believe that the making of the order is necessary to prevent or reduce the possibility of a serious danger to public health or to mitigate the adverse consequences of a serious danger to public health.

Clause 31 enables an emergency order to be made in relation to food. Such an order may, for example, require the publication of warnings about unsafe food, prohibit the cultivating or taking of food from a particular area, prohibit certain food from being advertised or sold or require particular food to be destroyed or disposed of.

Clause 32 enables recall orders to be made requiring certain matters to be disclosed to the public about the food concerned. A person bound by a recall order must notify the regulatory authority when the recall is completed and is liable for the costs involved in the recall.

Clause 33 sets out the manner of making emergency orders under the Part and sets out other procedural requirements relating to such orders.

Clause 34 enables a person who is bound by an order under the Part to apply to the regulatory authority for compensation if the person considers that there were insufficient grounds for the making of the order.

Clause 35 creates an offence of failing to comply with an order under the Part.

Clause 36 prevents a court or tribunal from making an interlocutory order in judicial review or other proceedings that has the effect of staying the operation of an order under the Part.

Part 4 Inspection and seizure powers

Division 1 Inspection

Clause 37 sets out the inspection and investigation powers of authorised officers under the proposed Act.

Clause 38 enables an authorised officer to seize food, or a vehicle, equipment, labelling or packaging or advertising material or any other thing that is evidence of an offence against the proposed Act or the regulations or does not comply with the proposed Act or the regulations.

Clause 39 enables an authorised officer to apply for a search warrant to enter premises if there are reasonable grounds for believing that an offence against the proposed Act or the regulations has been or is being committed. In particular, this may be necessary if the premises to be entered are solely residential premises.

Clause 40 creates an offence of failing to comply with a requirement of an authorised officer duly made under the Part.

Clause 41 creates an offence of detaining, removing or tampering with any food or other thing seized by an authorised officer under the Part.

Clause 42 creates an offence of giving false information in connection with a requirement or direction under the proposed Act.

Clause 43 creates an offence of resisting, obstructing or attempting to obstruct an authorised officer or of impersonating, threatening, intimidating or assaulting an authorised officer.

Division 2 Items seized by authorised officers

Clause 44 enables an authorised officer who seizes an item under the Part to detain it at the premises where it was found or to remove it and detain it at another place.

Clause 45 requires an authorised officer to give a notice containing certain specified information to the person from whom an item is seized under the Part.

Clause 46 enables an authorised officer to destroy food that is seized and that has decomposed or poses an immediate risk to health or property.

Clause 47 provides that an item seized under the Part is to be returned if there is no evidence that there has been a contravention of the proposed Act or the regulations.

Clause 48 provides that after a certain period of time an item seized under the Part is forfeited to the Crown and may be destroyed, sold or otherwise disposed of.

Clause 49 provides that the owner of a seized item is liable for costs incurred in connection with its lawful destruction or disposal.

Clause 50 provides that a forfeited item must be returned, if possible, if there has been no contravention of the proposed Act or the regulations.

Clause 51 enables a person to apply in certain circumstances for compensation in relation to a seized item if there has been no contravention of the proposed Act or the regulations and the item cannot be returned or has depreciated in value.

Clause 52 enables a person claiming entitlement to an item seized under the Part to apply to the District Court or a Local Court for an order disallowing the seizure.

Clause 53 allows the enforcement agency concerned to appear as respondent at the hearing of an application for such an order.

Clause 54 enables the court to make an order disallowing the seizure of an item in certain circumstances.

Clause 55 enables the court to make certain ancillary orders, for example, an order for compensation.

Clause 56 enables the court to adjourn the hearing of an application for an order if the item in question is required as evidence in other proceedings.

Part 5 Improvement notices and prohibition orders for premises or equipment

Clause 57 enables an authorised officer to serve an improvement notice on the proprietor of a food business if certain circumstances exist, for example, if premises on which the food business is conducted are unclean or do not comply with the Food Standards Code.

Clause 58 sets out the form that an improvement notice may take. Such a notice may contain certain requirements that are to be complied with in a period of 24 hours or a longer period specified in the notice.

Clause 59 provides that an authorised officer is to note on an improvement notice the date on which it is complied with.

Clause 60 enables the regulatory authority or an enforcement agency to issue a prohibition order on the proprietor of a food business if an improvement notice has not been complied with or it is necessary to prevent or mitigate a serious danger to public health. The clause provides for the form of the order. Such an order may, for example, state that no food intended for sale is to be handled on specified premises or conveyed in a specified vehicle. A certificate of clearance may later be given if the situation giving rise to the making of the order is rectified.

Clause 61 provides for the premises, items or matters to which an improvement notice or a prohibition order may relate.

Clause 62 requires certain information to be specified in an improvement notice or a prohibition order.

Clause 63 enables the proprietor of a food business who has been served with a prohibition order to request a re-inspection of the relevant premises or item.

Clause 64 creates an offence of contravening or failing to comply with a prohibition order.

Clause 65 enables a person to apply to the Administrative Decisions Tribunal for a review of a decision not to issue a certificate of clearance to the person under clause 60.

Clause 66 provides for the payment of compensation in cases where there were no grounds for the making of a prohibition order and a person suffers loss as a result of the making of the order.

Part 6 Taking and analysis of samples

Division 1 Taking of samples

Clause 67 requires an authorised officer to inform the proprietor or person in charge of a food business from which a food sample was taken that the sample is to be analysed.

Clause 68 requires an authorised officer to pay for any food sample taken.

Clause 69 provides that clauses 67 and 68 do not apply to food taken from a food vending machine.

Clause 70 provides that an authorised officer must take the whole of a package of food in certain circumstances rather than breaking up the package.

Clause 71 sets out the procedure to be followed by an authorised officer when taking samples for analysis.

Clause 72 requires an authorised officer to submit samples for analysis under Division 2.

Division 2 Procedures relating to analyses

Clause 73 requires a person carrying out an analysis for the purposes of the proposed Act to comply with the Food Standards Code.

Clause 74 provides for the issue of a certificate of analysis that contains certain information.

Division 3 Approval of laboratories

Clause 75 enables the regulatory authority to approve laboratories for the

purposes of carrying out analyses under the proposed Act.

Clause 76 provides that an approval remains in force until cancelled and except during any period of suspension.

Clause 77 requires a person in charge of an approved laboratory to notify the regulatory authority of any direct or indirect interest in a food business.

Clause 78 enables conditions of approvals to be varied and approvals to be suspended or cancelled.

Clause 79 enables certain persons to apply to the Administrative Decisions Tribunal for a review of certain decisions in relation to an approval.

Clause 80 requires the regulatory authority to maintain a list of approved laboratories.

Division 4 Approval of analysts

Clause 81 enables the regulatory authority to approve analysts for the purposes of carrying out analyses under the proposed Act.

Clause 82 provides that an approval remains in force until cancelled and except during any period of suspension.

Clause 83 requires an approved analyst to notify the regulatory authority of any direct or indirect interest in a food business.

Clause 84 enables conditions of approvals to be varied and approvals to be suspended or cancelled.

Clause 85 enables certain persons to apply to the Administrative Decisions Tribunal for a review of certain decisions in relation to an approval.

Clause 86 requires the regulatory authority to maintain a list of approved analysts.

Part 7 Auditing

Division 1 Approval of food safety auditors

Clause 87 enables the regulatory authority to approve food safety auditors for the purposes of the proposed Act.

Clause 88 provides that an approval remains in force until cancelled and except during any period of suspension.

Clause 89 requires an approved food safety auditor to notify the regulatory authority of any direct or indirect interest in a food business.

Clause 90 enables conditions of approvals to be varied and approvals to be suspended or cancelled.

Clause 91 enables certain persons to apply to the Administrative Decisions Tribunal for a review of certain decisions in relation to an approval.

Division 2 Auditing and reporting requirements

Clause 92 requires the proprietor of a food business to ensure that any requirements of the regulations in relation to the preparation, implementation, maintenance or monitoring of a food safety program for the food business are complied with. The clause also requires that the food safety program be audited as frequently as is determined under clause 93.

Clause 93 requires the appropriate enforcement agency to determine a priority classification system for food businesses and to determine how frequently food safety programs for food businesses are to be audited depending on how they are classified. The agency must notify a proprietor of a food business of the priority classification that has been determined for that food business.

Clause 94 sets out the duties of food safety auditors, particularly in relation to the auditing of food safety programs for food businesses.

Clause 95 requires food safety auditors to report to the appropriate enforcement agency on the results of any audit or assessment carried out for the purposes of the proposed Act and if certain significant contraventions of the proposed Act are discovered. A food safety auditor may also report that the priority classification of a food business should be changed.

Clause 96 enables a food safety auditor to change the priority classification of a food business after it has been audited so long as the change is within a certain range within the priority classification system.

Clause 97 requires the regulatory authority to provide certificates of authority to food safety auditors.

Clause 98 requires the regulatory authority to maintain a list of approved food safety auditors.

Clause 99 creates offences of obstructing or impersonating food safety auditors carrying out functions under the proposed Act.

Part 8 Notification and registration of food businesses and approval of food premises

Clause 100 requires the proprietor of a food business to notify the appropriate enforcement agency of certain information required to be notified by the Food Safety Standards.

Clause 101 contains certain exemptions from the operation of clause 100.

Clause 102 makes it an offence for the proprietor of a food business that is required by the regulations to be registered to carry on the business unregistered. The clause sets out the procedure for registration.

Clause 103 sets out the procedure for renewing registration.

Clause 104 provides that the registration of a food business remains in force for the period specified in the certificate of registration unless sooner cancelled and except during any period of suspension.

Clause 105 enables conditions of registration to be varied and registration to be suspended or cancelled.

Clause 106 enables certain persons to apply to the Administrative Decisions Tribunal for a review of certain decisions in relation to registration.

Clause 107 requires each enforcement agency to maintain a list of notified or registered food businesses.

Part 9 Administration

Division 1 Regulatory authority

Clause 108 sets out the functions of the regulatory authority under the proposed Act.

Clause 109 enables the regulatory authority to delegate certain functions under the proposed Act.

Division 2 Functions of enforcement agencies

Clause 110 sets out the functions of enforcement agencies under the proposed Act.

Clause 111 enables the regulatory authority, after consultation with an enforcement agency, to impose conditions or limitations on the exercise of functions under the proposed Act by the enforcement agency.

Clause 112 enables the regulatory authority to adopt national guidelines prepared by Food Standards Australia New Zealand relating to the exercise of functions under the proposed Act and to require enforcement agencies and authorised officers to adopt those guidelines.

Clause 113 requires an enforcement agency to submit certain reports to the regulatory authority relating to the exercise of functions under the proposed Act.

Division 3 Appointment of authorised officers

Clause 114 enables an enforcement agency to appoint suitably qualified persons as authorised officers for the purposes of the proposed Act.

Clause 115 requires enforcement agencies to provide certificates of authority to authorised officers.

Division 4 Advisory committees

Clause 116 enables the Minister to establish advisory committees to assist the regulatory authority in the exercise of its functions.

Clause 117 sets out the functions of advisory committees.

Part 10 Procedural and evidentiary provisions

Clause 118 provides that proceedings for offences under the proposed Act are to be dealt with summarily by a Local Court or by the Supreme Court in its summary jurisdiction.

Clause 119 sets out the time within which proceedings for offences under the proposed Act must be instituted.

Clause 120 enables penalty notices to be issued for prescribed offences under the proposed Act or the regulations.

Clause 121 makes an employer liable for offences committed under the proposed Act by an employee unless the employer establishes that he or she could not have prevented the offence by the exercise of due diligence.

Clause 122 deals with offences committed by corporations and makes directors and other persons concerned in the management of a corporation liable for an offence committed by the corporation unless they satisfy the court that they had no knowledge of the offence or were not in a position to influence the conduct of the corporation or, if they were in such a position, they used all due diligence to prevent the offence.

Clause 123 provides that it is no defence in proceedings for an offence under the proposed Act that the defendant was an employee or agent unless the defendant can show that he or she was under the personal supervision of the proprietor or other person in charge of the food business, place or vehicle concerned in the offence.

Clause 124 enables alternative verdicts to be reached in proceedings for certain offences under the proposed Act.

Clause 125 provides that it is no defence to an offence under the proposed Act or the regulations to argue that samples taken by authorised officers have deteriorated.

Clause 126 puts on the defendant in proceedings for offences under the proposed Act or the regulations the onus of proving the accuracy of certain representations and statements made in connection with food for sale.

Clause 127 specifies some matters that are to be presumed, until the contrary is proved, in proceedings for offences under the proposed Act and the regulations.

Clause 128 deals with the evidence of analysts in proceedings for offences under the proposed Act or the regulations.

Clause 129 enables a court to order a further analysis in certain circumstances in proceedings for an offence under the proposed Act or the regulations.

Clause 130 enables a witness for the prosecution or an authorised officer in proceedings for an offence under the proposed Act or the regulations to keep confidential certain information and documents obtained.

Clause 131 enables a court, in proceedings for an offence under the proposed Act or the regulations, to award certain costs.

Clause 132 enables a court, in proceedings for an offence under the proposed Act or the regulations, to order corrective advertising.

Clause 133 requires councils and police officers to notify the regulatory authority of the results of any prosecutions of offences under the proposed Act or the regulations undertaken by them.

Part 11 Miscellaneous

Clause 134 protects certain persons from personal liability in connection with acts done in good faith for the purpose of executing a provision of the proposed Act or any other Act or the regulations.

Clause 135 protects the State, authorities and others from civil liability in connection with the handling, sale or consumption of food where the claim is based on alleged negligence or other breach of duty (including statutory duty)

arising because of the exercise of (or failure to exercise) functions under the proposed Act.

Clause 136 prevents persons from disclosing information obtained in the execution of the proposed Act except in certain circumstances.

Clause 137 enables the regulatory authority to publish notifications relating to persons convicted of offences under the proposed Act or the regulations.

Clause 138 provides that the proposed Act binds the Crown.

Clause 139 enables regulations to be made for the purposes of the proposed Act.

Clause 140 enables emergency regulations to be made modifying the Food Standards Code that have effect for no longer than 12 months if the Minister has certified that such a regulation is necessary as it relates to an issue of public health and safety.

Clause 141 enables regulations to be made modifying the Food Standards Code if the Minister has certified that such a regulation does not have a significant impact on the implementation and enforcement of uniform food laws in Australia and the Premier has approved of it being made.

Clause 142 repeals the *Food Act 1989* and the *Food Regulation 2001*.

Clause 143 gives effect to proposed Schedule 1 which contains consequential amendments to certain other Acts.

Clause 144 gives effect to proposed Schedule 2 which contains savings, transitional and other provisions.

Schedule 1 Amendment of other Acts

Schedule 1 contains consequential amendments to various other Acts.

Schedule 2 Savings, transitional and other provisions

Schedule 2 contains provisions of a savings and transitional nature consequent on the enactment of the proposed Act.