

1992-1993

AUSTRALIAN CAPITAL TERRITORY LEGISLATIVE ASSEMBLY

FOOD (AMENDMENT) BILL (NO. 2), 1993

EXPLANATORY MEMORANDUM

**Circulated by authority of
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Minister for Health**

OUTLINE

The Food (Amendment) Bill (No. 2) 1993 is the third and final stage of a program to review and modernise food legislation in the ACT.

Stage 1 of the legislation was enacted in 1992 and adopted the Australian Food Standards Code into ACT legislation in accordance with the 1991 Agreement between the States, Territories and the Commonwealth.

Stage 2 of the legislation was enacted in August 1993 and comprised food safety requirements.

The main purpose of the Bill is to give administrative support to the previous legislation by defining the appointment and powers of health officers and providing for sampling of food, analyses of food and associated enforcement provisions.

The powers of inspection officers are currently contained in the Public Health (Sale of Food and Drugs) Regulations which were adopted in the 1930's. The legislation provides for entry, inspection and seizure but does not either give specific details of each power or provide for remedies for persons aggrieved by the inspecting officer's exercise of his or her powers. The lack of guidance by the legislation as to the extent of powers conferred on officers has led to confusion by both government and industry.

The Bill addresses the powers of health officers by defining the term "health officer", detailing rights of entry to specific types of premises and specifying the powers available to the health officer after entry to a premises has been effected. Entry, at reasonable times, to food premises, or premises where records relating to food for sale are kept (excluding residential premises) can be without notice or consent which is consistent with food legislation interstate and overseas. Entry to such premises must otherwise be by consent or search warrant except in emergency situations. The powers of health officers are specified and reflect modern food production and distribution methods which rely on electronic record keeping.

A good example of the differences in approach between existing legislation and the Bill is in the seizure provisions. Under existing legislation a health inspector can seize articles and things but there are no provisions to explain what happens to the article subsequent to seizure or any remedies available to the person who owns the seized article to either have the seized article returned or to receive compensation for wrongful seizure. The Bill requires a notice containing all relevant details to be given to the owner or person in charge at the time. It also provides for relief and any applicable compensation if a court subsequently disallows the seizure.

There are provisions relating to the sampling of food for analysis and the subsequent analysis of that food contained in the Bill. A health officer is required to follow a prescribed procedure when purchasing food for analysis. The purchasing provisions include an obligation on the health officer to tender or pay the current market value of the food to the owner of the food providing the opportunity to receive fair compensation for the food.

Offence provisions include penalties for obstructing health officers during the performance of their duties and is an offence for a health officer to disclose information gained during an inspection for any purpose other than as prescribed in the Bill.

FINANCIAL CONSIDERATION

The cost of administering the legislation will be met from within existing funding levels.

INDEX

CLAUSE NOTES

		Clauses	Page
Amendments to Part I	Preliminary	1-3	4
Amendments to Part II	Amendments of Principal Act including:	4-8	4-16
	<i>Part IA - Administration:</i>		
	· <i>Health officers</i>		
	· <i>Identity cards</i>		
	· <i>Analysts</i>		
	· <i>Secrecy</i>		
	<i>Part IICA - Inspection and Analysis</i>		
	· <i>Division 1 - Preliminary</i>		
	· <i>Division 2 - Health officers' powers</i>		
	· <i>Division 3 - Things seized by health officers</i>		
	· <i>Division 4 - Procedure for taking samples</i>		
	· <i>Division 5 - Analysis of samples</i>		
	· <i>Division 6 - Offences in relation to investigations</i>		
	<i>Evidentiary value of copies of records</i>		
	<i>Further amendments</i>		
Part III	- Miscellaneous	9-10	16-17

CLAUSE NOTES

Clauses 1 and 2

Clauses 1 and 2 deal with citation and commencement. The provisions will commence on the same date as the Minister fixes for the commencement of the remaining uncommenced provisions of the *Food (Amendment) Act 1993*. This will enable the *Food Act 1992* to be consolidated into one piece of legislation.

Clause 3 defines the Principal Act as the Food Act 1992.

PART II AMENDMENTS OF THE PRINCIPAL ACT

Clause 4: Interpretation

Clause 4 amends section 4 of the Food Act 1992 to include an additional element to the definition of "handle" by including the word "store" and omits the outdated definition "inspector". It also includes definitions for "health officer" (qualified environmental health officer) and "analyst".

Clause 5: Insertion

Clause 5 inserts a new part, "Part 1A - Administration", into the Food Act 1992.

PART 1A - ADMINISTRATION

Proposed Section 8A - Health Officers

The Minister may appoint suitably qualified environmental health officers as health officers who shall perform such duties as the Minister directs.

Proposed Section 8B - Identity Cards

Each health officer shall be issued with an identity card which is to include a recent photograph of the person.

A penalty of \$100 is provided if a health officer does not return the identity card on ceasing to be a health officer unless the officer has a reasonable excuse for failing to do so.

Proposed Section 8C - Analysis

The Minister may appoint Analysts. An analyst may be appointed in respect to a particular type of analysis (eg. microbiological examination of food) or for all types of analyses.

(2) The name and address of each person appointed as an analyst is to be published in the Gazette within 4 weeks of the appointment and thereafter annually.

It is anticipated that analysts employed in private industry and other government agencies will be appointed as analysts (as well as analysts employed by the Territory) as is the case in other States. This is to allow comparative analyses to be carried out by the owner of a food premises which has had food sampled for analysis by a health officer.

Proposed Section 8D - Secrecy

This section is to protect information and records obtained by persons engaged in the administration of the Act from being divulged to other persons except:

- . with the consent of the Minister in the public interest
- . with the consent of the person who has a proprietary interest in the information
- . to a court in proceedings arising out of the Act or Regulations - provided that a health officer may not be compelled to disclose a confidential report or a report containing "confidential commercial information" during a court hearing.

Clause 6: Insertion

Clause 6 inserts "Part IICA - Inspection and Analysis" after Part IIC inserted by the Food (Amendment) Act 1993.

PART IICA - INSPECTION AND ANALYSIS

Division 1 - Preliminary

Proposed Section 19YA - Interpretation

The purpose of this section is to allow a "thing" to be connected with an offence where the thing is the subject of the offence; where it provides evidence of the offence or where it was used, or is intended to be used, for the purpose of committing an offence.

(2) Widens the definition of offence within this Part of the Act to include an offence for which there are reasonable grounds for believing an offence is being, has been or will be committed.

(3) Extends the definition of "occupier" of the premises to include a person whom the health officer believes on reasonable grounds to be the occupier or the person in charge of the premises.

The reason is that if a person represents himself or herself as the occupier or person in charge of a particular premises any action taken by the health officer is not negated if it is subsequently proved that the person was not the occupier or person in charge.

Division 2 - Health officers' powers

Proposed Section 19YB - Entry to premises

(1) A health officer may enter prescribed premises at a reasonable time where the officer believes there are reasonable grounds to do so under the Act and may use such force and such assistance as is reasonable.

- Reasonable grounds would include the knowledge that the premises are a licensed food premises under the Act, or where a complaint and a preliminary investigation suggests food for sale is being handled on the premises, or the discovery in the market place of food bearing a label showing an address and implying that those premises are being used as a food premises.
- Entry without consent may be effected at any reasonable time to prescribed premises which are food premises or premises that contain records relating to food for sale, such as solicitors or accountants' offices. Entry to premises where records relating to food are kept is often required as the records may not be obtainable if right of entry were restricted to a food premises.
- "Reasonable time" is defined in relation to a food business as the hours when the food business is being conducted on the premises and for other types of premises, during normal business hours.
- The right of entry to prescribed premises without consent does not extend to a dwelling or the residential portion of a premises.
- Entry can also be gained to prescribed premises by a health officer with the consent of the occupier, in accordance with Section 19YC or pursuant to a warrant issued under section 19YE or if the health officer believes it is necessary to do so because of the seriousness or urgency of the situation.
- Prescribed premises are defined in subsection (4).

(2) a health officer is not entitled to remain on a food premises or premises where records relating to food are kept unless he or she produces an identity card on request.

Proposed Section 19YC - Consent to entry

This section applies where consent to enter is required under paragraph 19YB(1)(b).

- (1) A health officer shall produce his or her identity card and advise the person that he or she can refuse to give consent.
- (2) If consent is obtained, the health officer shall ask the person to sign a written acknowledgment which notes the time and day the consent was given, states that the person has been informed that they may refuse consent and acknowledges that consent was given voluntary.
- (3) In any subsequent court proceedings the court shall assume, unless proven otherwise, that consent was not given unless the signed consent is produced in evidence.

Proposed Section 19YD - Powers of health officers

This section prescribes the powers of a health officer where the officer enters premises in accordance with this Part. The section specifies each power differently from the existing food legislation. A health officer may:

- (a) inspect, examine, conduct tests and take measurements in relation to the premises and plant.
- (b) inspect and test any container equipment or appliance believed to be used in connection with food for sale.
- (c) inspect and test any food, material or substance believed to be used in connection with food for sale. An example is the field testing of minced meat for sulphur dioxide whereby a dye test is carried out to detect the unlawful addition of the preservative. A sample is only obtained if the meat fails the test.
- (d) open or require a person to open any package that is believed to contain food for sale. Food is quite often distributed and stored in packages which may need to be opened to determine if the food is wholesome or complies with a standard.
- (e) take photographs, videos, sound recordings or films in connection with an inspection. Existing legislation does not either permit or prohibit an officer from using such recording devices. This paragraph clearly indicates that contemporary methods of recording the details of an inspection can be utilised. Information gathered by these methods is quite often much more accurate so it can provide assistance to a court if legal proceedings follow an inspection.
- (f) seize anything that is believed to be connected with an offence against the Act or Regulations. Sections 19 YF - 19YQ provide safeguards against wrongful seizure and ensure that the rights of all parties are protected.

Seizure powers are used to enable food that is considered dangerous to health to be immediately removed from the marketplace. Seizure powers are also used to prevent the sale of products that are falsely described or contain illegal ingredients that may be detrimental to the consumer.

(g) require the occupier to make available records and documents in connection with food for sale. Records and documents are vital elements in any investigation as they may disclose the addition of illegal additives to a food. A further example of the use of records to investigate an offence is the use of sales records to ascertain where substandard or unsafe food has been distributed. Distribution information is often required to alert other law enforcement agencies that a food may be on sale within their jurisdiction.

(h) require the occupier of premises to produce computer records in a visible form. Computer records are virtually inaccessible without a detailed knowledge of a particular computer system. Since a great majority of records are now stored on computer this power is necessary if (g) above is to be effective.

(i) inspect and make copies and extracts of records and documents relating to the sale of food.

(j) require the occupier of the relevant premises to provide information reasonably related to the use of the premises. An example would be the food technologist in a factory who may be the only person with a knowledge of a particular process or product formulation.

(k) require the occupier to render reasonable assistance in the exercise of his or her powers. It is often impossible to gain access to equipment to carry out an inspection without a detailed knowledge of that equipment so assistance sometimes is necessary if an inspection is to be effective.

(m) stop and detain any vehicle used in connection with food for sale.

The powers are designed to enable an inspection to be carried out with due regard to contemporary production processes, product formulation and distribution methods of food for sale.

Proposed Section 19YE - Search warrants

(1) A health officer may obtain a search warrant to enter particular premises on application to a magistrate. A warrant would normally only be necessary where consent to enter the premises had been refused under Section 19YC.

To obtain a search warrant a health officer must make information on oath to a magistrate giving the reasons for seeking the warrant. The magistrate may then issue a search warrant if he or she is satisfied that an offence is or may be being committed against the Act or Regulations. The warrant authorises the health officer named in the document to:

- (a) enter the premises with such assistance and reasonable force if necessary.
- (b) to search the premises for the things in the information made under oath.
- (c) to exercise any powers of a health officer (see section 19YD)

(2) A magistrate shall not issue a search warrant unless he or she has received all the information required concerning the reasons for seeking the warrant and the magistrate is satisfied that the reasons given provide reasonable grounds to issue the warrant.

(3) A search warrant must state the purpose for which it is issued; specify the nature of the alleged offence, which of the health officers powers under Section 19YC are to be exercised, specify the times the warrant may be effected and specify an expiry date for the warrant (which cannot be later than 1 month from the date of issue).

The most common reason for a health officer to obtain a warrant would be where investigations disclose that particular premises are being used in connection with food for sale and that those premises are unlicensed to sell food.

Division 3 - Things seized by health officers

Proposed Section 19YF - Notice of seizure

The purpose of this section is to require a health officer who seizes anything under the powers conferred under paragraph 19YD (f) to give notice in writing of that seizure to the owner or person in charge of that thing at the time of the seizure.

The notice of seizure will ensure that the owner of the goods seized is fully aware of what has been seized, why it has been seized and the remedies available should that person feel aggrieved by the seizure. The notice of seizure must contain all relevant information necessary for the owner of the seized item or his or her representative to determine if an appeal is warranted and if so, what steps are necessary to initiate legal proceedings to recover the item.

Proposed Section 19YG - Storage of things seized

- (1) When a health officer has seized anything it may be left on the premises on which it was found and may be:
- (a) placed in a room, compartment or enclosed area;
 - (b) secured against interference; or
 - (c) identified in such a manner as to be clear that it is an item under seizure.

This power would normally be exercised where the nature of seized goods makes removal impractical and /or where the goods require special storage conditions to avoid deterioration (eg. bulk milk in a large storage tank).

(2) If a health officer detains the seized item on the premises he or she must give the occupier notice in writing describing the seized item, the manner and circumstances of the detention, the expected time period of the detention, the liability of the occupier and details of how to contact the health officer involved in the detention.

Proposed Section 19YH - Access to seized records

The person or the agent of a person entitled to possession of any seized documents must be permitted to inspect and make copies or take extracts of the documents.

Proposed Section 19YI - Return of things seized

This section requires the Minister to return a seized item if the Minister becomes satisfied that no contravention of the Act or Regulations has been committed in respect of that item. For example, a health officer may seize an item with honest belief that an offence had been committed but subsequent review and investigation by the Department may prove the health officer wrong. The seized item would have to be returned under the provisions of this section.

The Minister must return the item even if the statutory time limit to appeal against the seizure under Sec 19YJ had expired unless the seized item has been disposed of or destroyed.

Proposed Section 19YJ - Application for relief against seizure

Any person claiming to be entitled to anything seized may apply to a court of competent jurisdiction in the Territory for an order disallowing the seizure. The application must be made within 72 hours in relation to food with a shelf-life of less than 7 days and within 10 days in all other cases.

The reason for the relatively short time limits is to require the action to be commenced before the seized item has lost its commercial value due to any spoilage.

(2) An application to disallow a seizure cannot be heard by a court unless a copy of the application has been served on the relevant health officer by the applicant.

Proposed Section 19YK - Appearance to application

The health officer responsible for the seizure is entitled to appear as respondent at the hearing for the disallowance of the seizure.

Proposed Section 19YL - Order disallowing seizure

A court shall disallow a seizure at the hearing if the applicant proves that he or she is entitled to the food and if it is not proved beyond a reasonable doubt that an offence was being or had been committed in relation to the seized item.

The onus of proof in relation to an offence rests with the Territory. There is no obligation conferred on the applicant to prove that an offence was not being or had been committed with regard to the seizure.

The court may also disallow a seizure if there are exceptional circumstances justifying the making of an order.

Proposed Section 19YM - Ancillary orders

If a seizure is disallowed the court may order the respondent to return the seized item to the applicant. Compensation may be awarded to the applicant if for any reason the goods cannot be returned or if the seized item has depreciated in value.

- (2) The court may also direct the Territory pay compensation for any financial loss incurred by the applicant as a result of being deprived of the thing seized.
- (3) The award of any costs in relation to the hearing of the application is at the discretion of the court.
- (4) Any awards for compensation or costs are enforceable as a court judgement.

Proposed Section 19YN - Adjudgment pending other hearing

One of the elements that has to be proven at a hearing to disallow a seizure is that an offence had or was being committed against the Act at the time of the seizure. A conviction for an offence in a court hearing constitutes the necessary evidence to satisfy this condition.

This section allows the court the discretion to adjourn a hearing for the disallowance of a seizure until such time as concurrent court proceedings in relation to an offence are determined.

Proposed Section 19YO - Forfeiture of things seized

If no application to disallow a seizure is made to the court within the time specified in section 19YL or if an application to disallow a seizure has been made and subsequently refused by the court or if the seized item has not been returned under section 19YI then the item under seizure is forfeited to the Territory.

Forfeited items may be destroyed, sold or disposed of as the Minister directs.

Proposed Section 19YP - Cost of destruction or disposal of things forfeited

The purpose of this section is to require the owner of a forfeited item to pay for the subsequent costs of its disposal or destruction. However, the section only applies where the owner of the food which has been seized is convicted of an offence in relation to the seized food.

(2) If the seized item was owned by more than one person then each owner is responsible for the debt.

(3) A certificate of costs signed by the Minister is evidence of those costs.

Proposed Section 19YQ - Destruction of noxious material

A health officer may cause any food seized under the Act to be destroyed at any time if the food is decomposed or dirt contaminated. However this section would only be used if the seized food was in such a state that it would not be able to be stored without causing a nuisance. In all other circumstances the food would be kept as evidence in the event of an application being made to disallow the seizure.

Division 4 - Procedure for taking samples

Proposed Section 19YR - Owner of sample to be informed

Where a sample of food is obtained for the purposes of analysis the owner of the food or the person in charge of the food at the time must be informed by the health officer that the food is being taken for analysis.

Proposed Section 19YS - Payment for sample

A health officer must pay or tender the current market value of the food being sampled. This will ensure that monetary compensation for the sample is at the discretion of the owner of the food.

(2) For the purposes of the Act the taking of a sample is deemed to be a sale of the food.

Proposed Section 19YT - Sampling procedure

This section specifies the procedures to be followed by a health officer when obtaining a sample of food for analysis.

Samples must be taken in accordance with an applicable standard or in accordance with this section. Applicable standards are those in the Australian Food Standards Code. Some standards require division of the sample into less than 3 parts and others into more than 3 parts. Sampling procedures are only prescribed for a standard if the division of the sample into 3 parts would not give an accurate result on analysis.

(2) If the sampling procedure for the particular food is not specified in a standard the food must be divided into 3 parts and for that purpose -

- each part is to be labelled and sealed to enable the sample to be readily identified and its integrity maintained.

- one part is to be delivered to the owner, agent or person in charge of the food. This requirement gives that person the opportunity to get the food independently analysed if desired.
- return one part for future comparison if conflicting certificates are obtained from the government analyst and the independent analyst
- submit one part to an analyst for analysis

(3) In the case where there is an insufficient amount of food in a package for analysis, other packages from the same batch can be mixed together to enable a meaningful analytical result to be obtained.

(4) If several packages are purchased for mixing, all the packages are deemed to comprise one sample.

(5) & (6) as an alternative to mixing the foods from several packages to form the sample, the sample may be comprised of several unopened packages. For example 3 cartons of milk may be purchased which means that the samples consist of 3 cartons of milk. One unopened carton may be sealed and retained for future comparison one other carton sealed and submitted to the analyst and the remaining carton sealed and delivered to the owner or person in charge of the milk.

Proposed Section 19YU - Sample from vending machines

The provisions of the Division do not apply in relation to samples taken from vending machines where there is no one in charge of the machine and it cannot be ascertained who is owner or manufacturer of the food at the time of sampling.

An example would be a vending machine located on government property such as a railway station where the station staff have no responsibility for the food in the machine.

Division 5 - Analysis of samples

Proposed Section 19YV - Duty of analysts

If a sample of food is submitted for analysis the analyst shall:

- analyse the food or act as supervisor for the analysis of the food;
- furnish a certificate of analysis to the person who submitted the sample containing details prescribed under subsection 19VW(1); and
- carry out the analysis in the method prescribed in the Australian Food Standards Code if a method is prescribed.

A method of analysis is prescribed in the Code if different results of analysis are possible by different methods of analysis. A prescribed method ensures that both government and independent analysts use the method to arrive at a result. There is then no need to prove to the court which method is the most appropriate in any subsequent legal proceedings.

Proposed Section 19YW - Certificate evidence

- (1) The purpose of this section is to allow an analyst's certificate containing all prescribed details to be admitted as evidence in court proceedings without the necessity for the analyst to attend and testify in person.
- (2) Subsection (1) only applies if a copy of the certificate is served on the defendant or the defendant's legal representative 14 days or such shorter period as the court orders, before the commencement of the proceedings. This is to advise the defendant of the results of the analysis to enable him or her to prepare a proper defence to an alleged offence.
- (3) An analyst's signature on a certificate is evidence that the certificate is genuine unless otherwise proven.
- (4) & (5) The defendant has the option to require the analyst to appear in court to be cross examined on the details in the certificate. However, the analyst can only be called to court if the defendant has given the prosecutor 4 days notice of the requirement or if the court orders the analyst to be called.

Proposed Section 19YX - Analysis of spare part of sample

(1) & (2) Where any court proceedings are instituted as a result of a sample of food being submitted for analysis, the court will order, on application by either party, that the part of the sample of food retained by the health officer for future comparison be analysed by an independent analyst. However, the court can only order that part of the food be analysed if the owner of the food produces an analyst's certificate stating that the part delivered to him or her complies with that section of the Act or regulations that is alleged to have been breached.

The intent of this section is that the third part of the sample of food which is kept by the health officer is to be used as a referee if there are conflicting certificates as a result of the analyses of the other 2 parts.

- (3) The analyst must follow a method of analysis, if prescribed, and furnish the court with a certificate of the results of the analysis.
- (4) The costs of the analysis shall be in the discretion of the court.
- (5) An order under subsection (1) can be made by a higher court, on appeal, where no order was made by the lower court.

Proposed 19YY - Time limit for certain prosecutions

This section prescribes a time limit of 6 months to implement proceedings in respect of food taken for analysis.

Division 6 - Offences in relation to investigations**Proposed Section 19YZ - Obstruction of health officers**

The purpose of this section is to enable a health officer to exercise his or her powers and perform any duties under the Act and regulations without hindrance or obstruction. A penalty of \$5,000 or 6 months imprisonment, or both sanctions for the offence of obstructing or hindering without reasonable excuse and for the lesser offence of contravening a requirement made by a health officer, a penalty of \$5,000 is prescribed.

Proposed Section 19YZA - False information

This section provides for a penalty of \$5000 with or without 6 months imprisonment for knowingly providing false information to a health officer in relation to an offence.

To obtain a conviction under this section it is necessary to prove that the person knew that the information given to a health officer was false.

Proposed Section 19YZB - Prohibited use of analysis

This section prevents the use of an analyst's certificate obtained for the purposes of the Act from being used for trade purposes or advertising. A penalty of \$5000 is specified. An example is if a health officer takes a sample of a meat pie from a premises and the meat pie is subsequently analysed and found to comply with the standard. The proprietor of the premises is always notified of the result of the analysis. This section will prevent him or her from advertising the fact that the government analysts had analysed the pie and found it to be satisfactory and so gain a commercial advantage from a government procedure. The section does not apply if the proprietor arranges for a private analysis of the meat pie.

Proposed Section 19YZC - Interference with things detained

A penalty of \$5000 or imprisonment for 6 months, or both, is applicable if a person interferes in anyway with anything that has been placed under seizure and left on the premises on which it was seized by the health officer.

(2) the same penalty applies to the occupier of the premises as well as to the person who actually interfered with the seized item.

(3) however, the occupier can successfully defend the prosecution if he or she can prove that he or she had taken all reasonable steps to prevent the interference or the occupier believed that another person would take all reasonable steps to prevent interference with the seized item.

Clause 7: Insertion

Clause 7 inserts a further section into Part III of the Principal Act before section 20:

Proposed Section 19ZA - Evidentiary value of copies of records

If a health officer makes a copy of a record or part of a record relating to food for sale and subsequently certifies that the copy is a true copy then the copy is admissible in evidence in proceedings unless the court is not satisfied that the certificate is accurate.

Clause 8: Further amendments

Inserts a Schedule for the following matters:

- (1) The penalty attached to certain unlawful practices under the Principal Act are amended so as to include the option of both a financial penalty and imprisonment for 6 months.
- (2) the term "health officer" is substituted for "inspector" wherever occurring in the Principal Act.

PART III MISCELLANEOUS

Clause 9: Renumbering of provisions

This clause renumbers all Parts and sections of the Food Act 1992, the Food (Amendment) Act 1993 and the Food (Amendment) Bill (No 2) 1993 in a single series so they bear consecutive numerals.

Clause 10: Savings

This clause provides that persons who are currently inspectors under the Principal Act will become Environmental Health Officers under the amended Act and identity cards that have been issued to inspectors under the Public Health Act 1928 will be taken to be identity cards under the amended Act.

The Clause also provides that analysts appointed under the Public Health Act will be taken to be analysts under the amended Act.

Clause 11: Amendment of Food (Amendment) Act 1993

This clause will facilitate the commencement of the Bill on the same date fixed by the Minister for the commencement of the remaining uncommenced provisions of the Food (Amendment) Act 1993.