

1992

**AUSTRALIAN CAPITAL TERRITORY LEGISLATIVE
ASSEMBLY**

FOOD BILL 1992

EXPLANATORY MEMORANDUM

Circulated by authority of the Deputy Chief Minister

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OUTLINE

The Food Bill requires that food prepared and sold for human consumption meets the national food standards. This will ensure that food prepared or sold in the ACT complies with the same standards required of food prepared and sold elsewhere in Australia.

The Bill establishes a number of offences if food is sold that does not meet the standards. These offences relate to composition, packaging, labelling and advertising of food prepared or sold for human consumption.

It addresses, among other matters, two areas of public concern, food "dumping" in the ACT and date marking of food. Imported food or food prepared in the States which does not comply with the legislation in those areas and which, prior to this legislation, could be sold in the ACT, will not comply with ACT requirements and offences will be committed if such food is sold. Specified types of food will be required to carry date marking.

The Bill requires that food meet the standards contained in the Australian Food Standards Code. The Code contains standards agreed to by the National Food Standards Council after consideration of recommendations from the body responsible for preparing the standards, the National Food Authority. The Bill is fulfilling an agreement made by the ACT Government, along with other States and Territories in 1991, to adopt or incorporate by reference without amendments the Code into the food legislation of each State and Territory and to phase out conflicting existing standards.

The Bill also provides the Executive with powers to make regulations prescribing food standards. Provision for such a power was part of the 1991 Agreement and enables the Government to provide for a situation that may arise, in an emergency, that needs rapid resolution to protect public health and safety.

The Food Standards Code includes standards for packaging, labelling, advertising, date marking of packed food, food additives, (including preservatives, colourings, flavourings and flavour enhancers such as MSG,) artificial sweetening substances, vitamins and minerals, and metal and other contaminants in food. The composition of foods specifically and generally are included and microbiological standards are prescribed for certain foods.

The Food Bill is the first part of a 3-4 stage process to overhaul ACT food legislation.

FINANCIAL CONSIDERATIONS

The costs of administering the legislation will be met from within existing funding levels. There will be some initial establishment costs such as training and equipment purchasing.

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CLAUSE NOTES

PART I-PRELIMINARY

Clause 1: Short title

The legislation may be referred to as the Food Act 1992.

Clause 2: Commencement

Clause 1 and this clause will commence on a day the Bill is notified in the Gazette. The remaining clauses will commence on the day or days to be fixed by the Minister or automatically after six months.

Clause 3: Application to the Crown

The Crown in the right of the ACT will be bound by this Bill.

Clause 4: Interpretation

Clause 4 defines "food" and other words used in the Bill that are given meanings that are extensions of their usual meanings.

- "food" is given the same definition as that in the National Food Authority Act because the standards adopted by the Bill are in relation to food as defined in that Act. The definition includes all substances that are used, or capable of being used, as food or drink and also includes ingredients of food. The definition excludes therapeutic goods within the meaning of the Therapeutic Goods Act 1991. There may be cases where there is difficulty in deciding whether or not a substance is food so the Executive has the power to include or exclude substances from the definition.
- "handle" is defined in relation to food to extend its meaning to include pack, decorate, serve or transport food.
- "Land" is defined to ensure that all food prepared for sale or sold is within the scope of the Bill regardless where the preparation or sale takes place.
- "National Food Authority Act" means the National Food Authority Act 1991 of the Commonwealth.

- "National Standard" is defined to incorporate the definition in the National Food Authority Act 1991 in order to ensure uniformity with the Food Standards Code. Standards under the Code are continually updated and it is important that the amendments are included by reference to maintain uniformity. The Bill provides that the standards in force under the Bill are the standards under the National Food Authority Act in effect under that Act.
- "standard" means a national standard or a standard prescribed under regulations made under the Bill. Such emergency prescribed standards take precedence over standards in the Food Standards Code. There are provisions in the 1991 Agreement whereby such prescribed standards can only apply for six months and must be referred to the National Food Authority for consideration and ultimate adoption or rejection. Prescribed standards may be necessary to resolve a matter of public health or safety.
- "package" includes a container, wrapper, confining band or other article in which food is packed or contained or by which it is covered.
- "premises" is defined to include all structures and vehicle which could be used to prepare or sell food and includes buildings, tents, stalls, aircraft and vessels and a part of a premises.
- "sell" is in relation to food and includes barter or exchange, offers to sell food, supplying of food and having in possession for sale. It also includes causing or permitting to be sold, supplying with other goods or with services, engaging in a purported sale and supplying food as part of an arrangement between employer and employee. For example food, intended for sale and stored in a warehouse would be covered by the provisions of the Bill as would food being transported between premises.

The definition includes the sale of food for charitable and fund raising purposes as well as sale within the ordinary commercial sense because the consumer is entitled to purchase food that is safe to eat and labelled correctly irrespective of the source of the food. However it is recognised that non-commercial operators may not have the same awareness of their legal obligations as commercial operators and the current practice of providing written and oral advice on composition and labelling of food to such operators will continue.

Clause 5: Standards—inconsistency

Where a standard is prescribed, a national standard does not apply in so far as it is inconsistent with it and where a prescribed standard interprets a national standard, the latter is to be interpreted in accordance with the former.

Clause 6: Substandard Food

Food is substandard if it does not comply with those standards applicable to that food or food of that kind.

Clause 7: Presumptions

For the purposes of the Act certain presumptions are made:

food that is sold is presumed to be sold for human consumption.

food found on the premises used for the sale, manufacture for sale or handling for sale of that food or food of that kind is presumed to be intended for sale for human consumption.

food found on premises is presumed to be intended for use in the preparation of food.

food in vending machines is presumed to be for sale for human consumption.

The clause provides that in any proceedings under the Act the defence may rebut these presumptions.

Clause 8: Persons named on package

Information on a package or label relating to a person having imported, manufactured or prepared the food is evidence of the matters stated and in the case where the food has been sold is evidence that the food had been manufactured for sale. For example, where a package declares the manufacturer to be Company X even though the product has been sold to a wholesaler, a retailer and finally the customer, the label is evidence that Company X has sold the food.

PART II—UNLAWFUL PRACTICES

Clause 9: Preparation of substandard food

Clause 9 sets out the offence of manufacturing, preparing or handling food for sale that is substandard, that is, it does not comply with the standards. The purpose of this clause is to prevent food being produced that does not meet the compositional and microbiological standards applicable to the food. It would prevent the production for sale of food that contained substances not permitted in food of that type or in excess of permitted amounts. The Code provides for food both specifically by type, for example "canned fish," and in the general standards relating to additives such as flavours and flavour enhancers. There is also a standard to cover foods that are not included elsewhere in order to ensure that all foods are within the scope of the Code. For example, the preparation of a meat pie for sale that contains less than 250 g/kg of meat is an offence under Clause 9.

Clause 10: Sale of substandard food

It is an offence to sell substandard food. The purpose of this clause is to prevent the sale of food that does not meet compositional and microbiological standards applicable to the food in the same manner that Clause 9 relates to the production of such food. For example, the sale of a meat pie that did not comply with the standard for meat content would be an offence under this clause. Similarly, the sale of cooked prawns that were not free from salmonella would be an offence.

Clause 11: False representation of compliance with standards

Clause 11 makes it an offence to sell food that has been represented as complying with a standard and the food does not comply. 11(a) Selling food that has been falsely represented as complying with standards is an offence. 11(b) Selling food that has a statement attached to it or which bears a label that falsely represents that the food complies with a standard is an offence.

The purpose is to ensure that labelling of food is correct and complies with any standards applicable to that type of food. The Code contains provisions relating to size of print on labels and use of contrasting print colours, for example, with the aim of ensuring that the purchaser is not misled as to the type, composition, origin, ingredients, additives and other matters relating to the food. A person cannot verbally represent to a purchaser that food complies with a standard.

Clause 12: Sale of falsely described food

It is unlawful to sell food that is falsely described. In contrast with Clause 11 above, food may be falsely described without any reference being made to any applicable standard. There are instances when food is sold that would comply with a standard but is being sold as a different food. For example, orange juice cordial may be described as orange juice and sold as such. It would be falsely described under this clause.

12(2) Displaying food in a manner that is misleading as to its nature substance or quality is an offence.

12(3) Guidance is given as to the interpretation of false description. It includes a statement, word, design or device appearing on any label or written matter attached to the product which could reasonably be taken as relating to ingredients in the food or any physiological, curative or therapeutic effects of the food that is false or misleading.

The purpose is to prevent a sale which meets the requirements of the applicable standard but is presented in such a way that the purchaser is misled into attributing some other characteristic to that food. An example would be the sale of a breakfast cereal as a result of its inclusion in a "nutritious children's foods" display because the purchaser was misled into thinking it was low in sugar when in fact the sugar content was high.

Clause 13: Sale of food packed incorrectly

13(1) It is unlawful for a person to pack or enclose for sale food in a manner that does not meet the standards. This will prevent the method of packing from making the food unsafe. For example, packing food so that the food surface is in contact with certain packing materials or enclosing objects that would be dangerous if swallowed such as toys in breakfast cereal packets.

13(2) It is unlawful to enclose food in a package that does not satisfy the requirements of the applicable standard. The consumer is protected against the use of unsuitable or dangerous packaging materials.

Clause 14: Labelling requirements

Clause 14 makes it unlawful to sell packaged food unless the package is correctly labelled.

14(2) The information is listed that will need to be included on a label. This is the name of the food and where a standard prescribes a name that name must be used or, where no such name is prescribed a name that fairly describes the food, the business name and address in Australia of the manufacturer, or the packer or vendor, and if the food is imported, the importer's name and address. In addition, the package will need to display any other information required by the standards. One such requirement for certain foods is date marking. The purpose of this clause is to ensure that where the Code specifies the manner in which particulars are to be displayed on the label there is a requirement that these particulars are to be present. The overall effect is to ensure that the manufacturer, or, if the food is not manufactured in Australia, the importer can be traced in the event of some problem with the product. The clause also has the effect of informing the purchaser of the nature of the food; its ingredients, additives and nutritional information.

14(3) Unpackaged food is required to bear a label if such a requirement is specified in the applicable standard and to have written on the label such information as required by that standard. For example bulk displays of imported fresh fruit are required to have a sign indicating that the fruit is imported. This is to ensure that the purchaser is informed about matters that are otherwise not apparent.

Clause 15: Sale not complying with purchaser's demands

Clause 15(1) provides for the offence to sell food that does not comply with the standard that is applicable to the food demanded by the purchaser.

15(2) Where a person asks for a food by name the person is deemed to have asked for food that complies with the standards.

15(3) It is an offence to provide food that is not of the nature, substance or quality demanded by the purchaser. This would apply where there was no standard applicable to the food or the food complied with the standard but it was not satisfactory. For example, this clause would apply in the situation where one species of fish is substituted for another.

Clause 16: False advertising of food

The intention is to prevent false advertising of food.

16(1) Offences are stated in relation to false, misleading or deceptive advertisements or advertisements that do not comply with applicable standards.

16(2) The assumption is stated that an advertisement was published by the defendant unless the defendant can rebut that assumption.

16(3) An advertisement published by one person on behalf of another is deemed to have been published by the former person.

16(4) Although the content of an advertisement may be true it is deceptive if it creates, or is intended to create an untrue or inaccurate impression in the mind of a reasonable person.

Clause 17: Misleading presentation

It is an offence to display food in a manner that is likely to mislead the purchasers as to the nature substance or quality of the food. The purpose is to prevent displays of food that mislead the purchaser as to the type of food for example imported food displayed with local produce implying all is local, or low fibre food included in a display supposed to be of high fibre food, or inferior quality mixed with high quality food.

Clause 18: Food dispatched from the Territory

Food that is transported out of the ACT for sale overseas or in another part of Australia must comply with applicable standards. This clause is necessary to prevent the production of substandard food that otherwise would not need to comply with the Act because no sale was going to take place in the ACT.

Clause 19:

A person will not be guilty of an offence if the contravention was due to the fault of another person, to an accident or to some other cause beyond the person's control. However the person must have taken all reasonable precautions and exercised due diligence to avoid the contravention.

19(2) Exemptions are made for certain situations when the dispatch of food from the Territory would be an offence. Food may be dispatched if the sale is governed by the law of another place and the sale does not breach that law or the food is intended for processing after which it will meet the standards. This would permit the use of labels in a foreign language, for example, or the transport of food containing excess preservative intended for further processing during which the level of preservative would be lowered.

19(3) It is a defence for the defendant to prove that food sold in contravention of provisions in this Bill was not sold for human consumption.

19(4) "Processing" as used in this clause includes manufacture, preparation, treatment and handling to ensure that all treatment of food for the purposes of 19(2) are included.

PART 111-MISCELLANEOUS

Clause 20: Conduct of directors, servants and agents

Where it is necessary to establish the state of mind of a person or a body corporate it is sufficient to show that a director, servant, or agent of the person had that state of mind and the conduct was in the scope of his or her actual or apparent authority.

20(2) The references above to the state of mind of the body or the person includes references to their knowledge, intention, opinion, belief or purpose and the body's or person's reasons for the intention, opinion, belief or purpose.

20(3) Where a director, servant or agent of a body corporate acts on behalf of the body corporate and within the scope of his or her actual or apparent authority, the body corporate will be liable for that act where it is unlawful unless the body corporate can establish that it took reasonable precautions and exercised due diligence to prevent such behaviour. This is also the case where a person acts on behalf of another person as their servant or agent.

The purpose of this clause is to provide for responsible manufactures, wholesalers or retailers who take steps to ensure that the food they sell meets standards and to encourage those who may not take such steps at present to do so. For example, a chef who prepares and sells a prawn dish which causes food poisoning may have taken all steps to ensure that any food poisoning organisms in the prawns did not get a chance to multiply. The person at fault would be the supplier of the prawns.

20(4) A person shall not be imprisoned on conviction of an offence arising from enactment of clauses 20(1) and 20(3).

20(5) A director of a body corporate is to be read as including a reference to a member of a body corporate incorporated for a public purpose by a law of the Territories the Commonwealth, or States.

20(6) Failing or refusing to engage in conduct is included in engaging in conduct for the purposes of this section.

Clause 21: Penalty for companies

Where a fine is imposed on a body corporate under the legislation, the fine can be an amount up to five times the amount specified in the offence provisions for individuals.

Clause 22: Regulations

The Bill provides the Executive with flexible powers to make regulations to ensure that the law can be adapted to meet situations that may endanger public health and safety and to effectively enforce the provisions of the Australian Food Standards Code.

PENALTIES

In accordance with advice from the Government Law Office penalties for offences under the Bill have been set as follows:

- Clause 6 Preparation of sub-standard food
- Clause 7 Sale of sub-standard food
- Clause 8 Sale of food that is falsely described
- Clause 9 False representation of compliance with a standard
- Clause 10 Sale of incorrectly packaged food
- Clause 11 Labelling requirements
- Clause 12 Failure to comply with the purchaser's demands
- Clause 15 Dispatch of food from the Territory

\$5,000 or 6 months imprisonment (natural person), \$25,000 for a body corporate.

- Clause 13 False advertising of food
- Clause 14 Misleading presentation

\$3,000 or 6 months imprisonment (natural person), \$15,000 for a body corporate.

