

WA Food Regulation:

New Approach to Food Regulation Explained



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This document is of relevance to those interested in the regulation of food at local, regional and State levels in Western Australia.



Message from the Environmental Health Director



“We believe that a document is needed which clarifies the new approach to food regulation and how this approach is fundamentally different to previous enforcement arrangements. *The Food Act 2008* focuses on outcomes that can be applied to any and all food handling and selling activities. It also contains a wide range of offences as well as increased and graduated penalties. We hope you find this document useful and of assistance to those with an interest in food regulation”.

Jim Dodds
Director Environmental Health



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New Approach to Food Regulation Explained

1. The *Food Act 2008* and the *Health Act 1911*

The *Food Act 2008* (the Act) will be the principal stand alone piece of legislation governing food control in Western Australia (WA). The Act will endeavour to ensure the safety of food from the whole food supply chain, representing a paddock to plate approach to food regulation. The Act will replace the sections of the *Health Act 1911* that currently regulate food, including subsidiary legislation made under the *Health Act 1911* such as the *Health (Food Hygiene) Regulations 1993* and some health local laws (i.e. eating house local laws).

New food regulations are currently being drafted that will support the Act. These regulations will be mainly administrative in nature and are significantly different from the current *Health (Food Hygiene) Regulations 1993*. When complete, the draft will be available for consultation.

2. Major Advantage

The Act will be the key instrument in achieving national consistency in food regulation. It incorporates the Model Food Provisions agreed to by the Commonwealth, States and Territories in the *Food Regulation Agreement of 2000* (since amended in 2002 and July 2008) and adopts the *Australia New Zealand Food Standards Code (FSC)* in full, without amendment or alteration. This will translate to local industry being on a level playing field with industry elsewhere in Australia and is a major advantage over the existing food regulation arrangements

The Act presents a less prescriptive regime within a strong regulatory framework, compliance with which is considered less onerous than existing regulation arrangements. The current regime sets out a range of prescriptive requirements in relation to specific food handling and selling related activities, for example, requirements for food vending machines, outdoor cooking facilities, game meat processing, food premises construction and eating houses (restaurants). The Act focuses on outcomes that can be applied to any and all food handling and selling activities (e.g. the provision of safe food, the implementation of food safety programs) rather than prescribing exactly how those outcomes are to be achieved as is the case in the *Health (Food Hygiene) Regulations 1993*. This provides businesses with more flexibility to determine the best way to comply with the requirements - providing food safety is not compromised. The Act contains a wider range of offences as well as increased and graduated penalties. The most serious offences and penalties are reserved for conduct that is known to be unsafe (e.g. clause 14), with lesser penalties of offences that do not require proof of the offender's knowledge (e.g. clause 18).

3. Enhancing Consumer Protection

The Act will enhance consumer protection as it:

1. Provides for more significant penalties, reflecting the seriousness of a failure to provide safe food. Maximum penalties currently range from \$50 to \$10,000 compared with proposed maximum penalties ranging from \$50,000 to \$500,000;
2. Requires all food businesses, including charitable organisations, to notify enforcement agencies of certain information (such as contact details for the food business including the name of the food business and the name and business address of the proprietor of the food business; the nature of the food business; and the location of all food premises of the food business that are within the jurisdiction of the enforcement agency) before the business is conducted and if there are any changes in operation. By ensuring that enforcement agencies have access to better information about food businesses, enforcement will be enhanced; and
3. Enables local governments to resource enforcement of the legislation through the prescribing of fees and charges. It is anticipated that this will ensure that enforcement of the Act is adequately resourced, resulting in enhanced enforcement.

4. Administration of the Act

The Director General of the Department of Health (referred to in the Act as the CEO) will have prime responsibility for overseeing the administration of the Act (section 116). Local governments will be responsible for the management of administrative, surveillance and compliance activities within their districts with a few exemptions. These will be specified within the food regulations and it is expected that the Department of Health will remain responsible for ensuring that meat and primary production businesses comply with the requirements of the Act and the FSC. It is also likely the Department of Health will remain responsible for state hospitals.

Local Governments, largely through Environmental Health Officers and Authorised Officers in their employ, will be able to manage local compliance with the Act through the registration and ongoing surveillance of food businesses and the subsequent issuing of improvement notices and prohibition orders, and sampling and analyses of food (clauses 116 to 118).

The Administrative arrangements in the Act largely reflect the current administrative arrangements with two notable exceptions which are:

- The requirement for the Department of Health to report on the performances of functions under the Act (clause 119 (3)); and
- The ability to authorise officers in addition to Environmental Health Officers to administer the provisions of the Act, subject to guidelines relating to the qualifications and experience of Authorised Officers (clause 120).

Enforcement agencies will be required to report on the performance of their functions (clause 119 (1)). The Department of Health will, in turn, be required to report on the performance of enforcement agencies and the CEO in the annual report required by the *Financial Administration and Audit Act 1985* (clause 119 (3)).



5. Roles and Responsibilities of Department of Health's CEO

The roles and responsibilities conferred on the CEO by the Act include:

- To take measures to ensure that the Act is complied with (clause 116 (2) (a));
- Advise the Minister on possible changes to the Act or regulations (clause 116 (2) (b));
- The making of emergency orders in relation to food that presents a serious risk to health (clause 31);
- The placing of a prohibition orders in relation to food handling business, activities, sale and equipment where the order is necessary to prevent a serious danger to public health or an where an improvement notice has not been complied with (clause 65);
- Approval of a number of matters including laboratories (clause 82), analysts (clause 88) and food safety auditors (clause 94);
- The setting of conditions on the performance of enforcement agencies (clause 120); and
- Setting guidelines in relation to the qualifications of Authorised Officers (clause 122).

6. Department of Health CEO Delegations

The Act provides that the Department of Health's CEO may delegate any duties or powers under the Act to Local Government, Department of Health staff, Authorised Officers or holders of offices prescribed by the regulations. The CEO's powers that relate to overseeing state-wide compliance with the Act (e.g. the setting of conditions on the performance of functions by enforcement agencies issuing of performance guidelines on the performance of functions and emergency powers) can only be delegated to Department of Health staff.

7. Offences and penalties

Part 3 of the Act deals with offences with respect to the sale and handling of food, and prescribes penalties for those offences. These offences are **significantly different** to those which are in the *Health Act 1911*. The differences are necessary in order to effectively and uniformly implement the provisions of the Food Safety Standards (Chapter 3 of the FSC) and in order to deal with food safety concerns more effectively than the language in the *Health Act 1911* allows.

Division 1 addresses the serious offences relating to food. There are two types of serious offences; those where the offensive action was undertaken '*knowing*' that the behaviour was illegal, and those where the potential offender undertook the offensive behaviour and should '*reasonably*' have known whether or not such behaviour complied. These offences are state of mind provisions that is they require a finding of intent, negligence or knowledge before an offence will be proved.

The specific serious offences within Part 3 are:

- Handling food intended for sale in a manner that is likely to render the food unsafe –
 - i. if the handler knows that the food is likely to be rendered unsafe (section 14 (1)),
 - ii. if the food handler should reasonably know that the food is likely to be rendered unsafe (section 14 (2));
- Selling food that is unsafe –
 - i. if the seller knows that the food is unsafe (section 15 (1)),
 - ii. or should reasonably know that the food is unsafe (section 15 (2));
- Falsely describing food for sale – if the person knows, or ought reasonably to have known, that the food is falsely described and that that false description is reasonably likely to cause harm to a consumer who relies on that description (section 16 (1) and (2)); and
- Selling food knowing, or having ought reasonably to know, that the food is falsely described and that the false description is reasonably likely to cause harm to a consumer who relies on that description (section 16 (3) and (4)).

For these serious offences, the penalties are very significant:

- \$100,000 for an individual or \$500,000 for a corporation in relation to offences where knowledge is proved, and
- \$75,000 for an individual or \$375,000 for a corporation where a person ought reasonably to have known of the relevant matter.

For individuals there is also the potential to be sentenced to imprisonment for two years instead of, or in addition to, the financial penalty.

This compares noticeably with the maximum penalties of \$2,500 to \$5,000 for the offences contained within the *Health Act 1911* in relation to the sale, preparation and packing of food that is unfit for human consumption, adulterated or damaged, deteriorated or perished (sections 246L, 246M and 246N). In addition, the *Health Act 1911* does not have differential penalties for individuals and corporations.

Division 2 contains the remainder of the offences. Various categories of offences exist within this part of the Act. The first category, specified within sections 17 and 18 requires food to be safe and suitable through the creation of offences relating to the handling and/or selling of food which is not safe or is not suitable. The maximum penalties for these offences are \$50,000 and \$40,000 for individuals and \$250,000 for corporations.

Section 19 contains offences for engaging in conduct that is, or is likely to be, misleading in relation to:

- The advertising, labelling or packaging of food for sale:
- For causing food to be advertised, packed or labelled in a way that falsely describes the food; and
- For selling food that is labelled or packaged in a manner that falsely describes the food.

The maximum penalties for these offences are \$50,000 for individuals and \$250,000 for corporations. The maximum penalties for comparable offences contained within section 246Q and 246R of the *Health Act 1911* are \$2,000 and \$3,000 regardless of whether the offender is an individual or corporation.



Section 20 protects consumers by creating an offence for selling food that is not of the nature or substance demanded by the purchaser. In practice this will be mainly related to the sale of unpackaged food where the consumer has actually asked for a particular product and is provided with a different product e.g. asking for coral trout and being provided with shark. This is similar to section 2460 in the *Health Act 1911*, except that the new offence does not include a reference to 'quality'.

Section 21 introduces the new offence of sale of equipment intended for use with food which may render the food unsafe or unsuitable. This provides a mechanism for preventing the sale of, for example, crockery which has high lead content that would contaminate food if used for food service.

Section 22 creates various offences relating to non compliance with the FSC. As a result of this provision, compliance with the FSC is an integral part of compliance with the Act.

8. Defences

Given the new weighty penalties the Act provides for, it is important that the defences to prosecution available for alleged offenders are clear and codified. This is provided within Division 3 of Part 3. Included are defences relating to the publication of advertisements, food for export, handling of food, and sale of equipment (sections 25, 26, 28 and 29 respectively). Of most significance is the defence of due diligence (section 27). This defence is not provided for in the *Health Act 1911*.


9. Powers of Entry, Inspection and Seizure

Although there are some minor differences, the powers set out in section 38 largely reflect the powers of Authorised Officers which are contained in the *Health Act 1911* (section 246ZB). An Authorised Officer may enter and inspect, examine, open, obtain samples, examine records or documents, stop and detain, take photographs, take measurements, and require a person to provide information or answer questions.

An important restriction is that an Authorised Officer is not empowered to enter any part of premises that are used **solely** for residential purposes except with consent or under the authority of a search warrant. This means that Authorised Officers can have access to, for example, the kitchen and eating areas of bed and breakfast facilities or homes where food is prepared for catering. The Authorised Officer cannot, however, enter any other part of the premises without consent or a search warrant.

10. Improvement Notices and Prohibition Orders

Part 6 of the Act provides enforcement officers with new enforcement tools to use when breaches of the Act or regulations are observed. While these derive from the "non-core" provisions of the model legislation, they have nevertheless been largely adopted throughout other Australian jurisdictions and therefore contribute to the harmonisation of the administration of food legislation. The effect of the provisions is largely equivalent to existing *Health Act 1911* provisions (section 246Y), although the language is clearer and is consistent with the language used in the FSC.



Section 62 Division 1 Part 6 sets out grounds for the issuing of an improvement notice; for example where a food business does not comply with a provision of the food safety standards or demonstrate inadequate implementation of a food safety program.

Section 63 outlines the requirements and scope for the issuing of an improvement notice, and sections 64 and 65 details provisions in relation to the compliance with and contravention of improvement notices.

Prohibition orders may be issued under Division 2 if an improvement notice has not been complied with or the issue of an order is necessary to prevent or mitigate a serious danger to public health. A prohibition order may prohibit food handling or sale at a specified place or vehicle, specified equipment being used in food handling, or other activities relating to food intended for sale, until such time as a clearance certificate has been issued (section 66).

A certificate of clearance will be given once the place, activities etc do not present a serious danger to public health and the prohibition notice and any associated improvement notices have been complied with. The penalty for contravention of a prohibition order is \$50,000 for an individual and \$250,000 for a corporation (section 68).

The division also contains procedural fairness provisions discussed elsewhere.

11. Food Sampling

The sampling of food is a critical part of the enforcement powers of Authorised Officers. Division 1 of Part 7 sets out procedural requirements for the process of obtaining, paying for and sampling food. Samples will generally be taken for the purpose of determining compliance with or breaches of, the FSC or the Act more generally. It is important that a detailed and transparent procedure exists as the results of such samples will be used as evidence in any prosecutions under the Act.

Important limits around the exercise of the sampling procedures are that:

- The Authorised Officer must, as soon as practicable after obtaining a sample, inform the proprietor (or the person from whom the sample was obtained or who was in charge of the food from which the sample was taken) of his or her intention to have the food analysed (section 74);
- The Authorised Officer must pay, or tender payment, to the person from whom the sample is being obtained (unless obtained from a food vending machine where the payment is to the machine) (sections 75 and 76); and
- He or she must take the whole of the package unless the package contains two or more smaller packages of the same food. This provision is restricted to retail sales where the Authorised Officer would be unable to obtain a sample from large drums and containers and prevents the Authorised Officer from being able to open a package, take a sample, and leave an unsaleable package with the seller (section 77 and 78).

Division 2 refers to the methods of analysis which are to be used once a sample has been given to the analysing body. In order for the results of an analysis to receive appropriate weight in Court proceedings, it is essential that the analysis is carried out by either an analyst or an analytical laboratory approved by the Department of Health as appropriate to carry out such analyses (Divisions 3 and 4).



The effect of these provisions is very similar to the *Health Act 1911* provisions, with the exception of procedural fairness provisions in relation to the approval of analysts and laboratories.

12. Auditing

Part 8 provides for the auditing of Food Safety Programs (FSP). Divisions 1 and 3 set out requirements in relation to the approval of food safety auditors.

The WA approach to FSP at this point in time is that they will only be mandated for those high risk food businesses identified by the Australia New Zealand Food Ministerial Council and incorporated into the FSC. Section 144(3) requires the Minister for Health to consult with relevant industry or industry sectors in relation to regulations that might impose further food safety program requirements.

Audits and/or food safety assessments undertaken by enforcement agencies will assess the effectiveness with which food businesses meet these requirements. This is a significant change from the current regime, where food businesses are required to comply with prescriptive requirements relating to construction and activities, rather than focusing on the core responsibility of handling and selling food that is safe and suitable for human consumption.

13. Registration of Food Businesses

Part 9 requires the proprietors of all food businesses to notify the relevant enforcement agency of their food handling operations prior to commencement of the business. Local governments are provided with the ability to charge registration and annual surveillance fees and State government agencies will be able to charge fees prescribed by regulation. Certain food businesses run by charitable and community groups will be exempt from any fee (will be prescribed exempt by food regulation). These registration provisions are quite different from the current situation where only eating-houses (restaurants) are required to register.

These provisions provide the mechanism by which enforcement agencies will have the information necessary to enforce food regulatory requirements and make determinations as to the priority classification and auditing frequency of food businesses which require to have food safety programs. The ability to charge fees under the *Local Government Act 1995* will assist local governments in resourcing enforcement activities. Local government currently enforce the *Health Act 1911* provisions with little ability to resource those activities through the charging of fees.

14. Procedure and Evidence

Part 11 sets out procedures for carrying out prosecutions of offences. Provision has been made for the issuing of infringement notices by enforcement officers for breaches of the Act and associated legislation.



15. Procedural Fairness

The Act provides procedural fairness for food providers. This is achieved through the provision of appeal rights and compensation in relation to matters such as the approval of food safety auditors and analysts, prohibition orders and clearance certificates. The improvements in procedural fairness include:

- the right of a person bound by an emergency order to apply for compensation in certain circumstances (section 35) compared with no entitlement compensation under section 246ZA of the *Health Act 1911*; and
- the right to request review of decisions relating to registration of a food business, seizure of food, approval of auditors, analysts and laboratories, certificates of clearance of a prohibition notice.

16. Subsidiary Legislation

Provision is made within the Act for the making of regulations that will give effect to the Act. These provision include the power to adopt FSC, set fees and create offences; providing the penalty for a regulatory offence is no more than \$5000.

17. Charitable Donations

The issue of charitable donations of food is addressed in the *Volunteers and Food and Other Donors (Protection from Liability) Act 2002* (amended). This Act provides food businesses with protection from liability when donating food or general grocery items for distribution to disadvantaged people. The protection provided through this piece of legislation will only apply if the food is fit for human consumption and complies with food legislation at the time of donation.

18. Consultation

The Department of Health has consulted with the Western Australian Local Government Association, the Chamber of Commerce and Industry and relevant government departments during the drafting of the Act and its accompanying regulations.

WA was also a significant contributor to the preparation of the Model Food Provisions. WA's input was initially co-ordinated through the WA Food Coordinating Committee, which was chaired by a representative from the Department of the Premier and Cabinet and included representatives from the Departments of Agriculture, Fisheries, Health, and Industry and Technology, the Small Business Development Corporation and the Western Australian Local Government.

Delivering a Healthy WA



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