

# Model Food Provisions—Annex A

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## Model Food Provisions—Annex A

### Part 1 Preliminary

#### 1 Objects of Act

The objects of this Act include the following:

- (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 jurisdiction of the Food Standards Code.

#### 2 Definitions

(1) In this Act:

**advertisement** means:

- (a) any words, whether written or spoken, or
- (b) any pictorial representation or design, or
- (c) any other representation by any means at all,

used or apparently used to promote, directly or indirectly, the sale of food.

**analysis** includes any examination or testing of food or any other thing.

**animal** includes an amphibian, bird, crustacean, fish, mollusc or reptile.

**equipment** means the whole or part of:

- (a) any utensil, machinery, instrument, device, apparatus or appliance that is used, or that is designed or intended for use, in or in connection with the handling of food, or
- (b) any substance, utensil, machinery, instrument, device, apparatus or appliance that is used, or that is designed or intended for use, in cleaning anything referred to in paragraph (a).

**food** has the meaning given by section 3.

**food business** has the meaning given by section 4.

**Food Safety Standards** means the standards contained in Chapter 3 of the Food Standards Code.

**Food Standards Code** means the Australia New Zealand Food Standards Code as defined in the *Australia New Zealand Food Authority Act 1991* of the Commonwealth [as adopted or incorporated by the regulations].

**Food transport vehicle** means a vehicle used for the transport of food for sale.

**handling** of food includes the making, manufacturing, producing, collecting, extracting, processing, storing, transporting, delivering, preparing, treating, preserving, packing, cooking, thawing, serving or displaying of food.

**label** includes any tag, brand, mark or statement in writing or any representation or design or other descriptive matter on or attached to or used or displayed in connection with or accompanying any food or package.

**package** includes any container or wrapper in or by which food intended for sale is wholly or partly encased, covered, enclosed, contained or packed and, in the case of food carried or sold or intended to be carried or sold in more than one package, includes every such package.

**premises** includes:

- (a) land (whether or not vacant), or
- (b) the whole or any part of a building, tent, stall or other structure (whether of a permanent or temporary nature), or
- (c) a pontoon, or
- (d) a vehicle (other than a food transport vehicle while it is engaged in the transport of food).

**primary food production** has the meaning given by section 5.

**proprietor** of a food business means:

- (a) the person carrying on the food business, or
- (b) if that person cannot be identified—the person in charge of the food business.

**recall order** means an order under Part 3 requiring the recall or disposal, or both, of any food.

**sell** includes:

- (a) barter, offer or attempt to sell, or
- (b) receive for sale, or
- (c) have in possession for sale, or
- (d) display for sale, or
- (e) cause or permit to be sold or offered for sale, or
- (f) send, forward or deliver for sale, or
- (g) dispose of by any method for valuable consideration, or
- (h) dispose of to an agent for sale on consignment, or
- (i) provide under a contract of service, or
- (j) supply food as a meal or part of a meal to an employee, in accordance with a term of an award governing the employment of the employee or a term of the employee's contract of service, for consumption by the employee at the employee's place of work,
- (k) dispose of by way of raffle, lottery or other game of chance, or
- (l) offer as a prize or reward, or
- (m) give away for the purpose of advertisement or in furtherance of trade or business, or
- (n) supply food under a contract (whether or not the contract is made with the consumer of the food), together with accommodation, service or entertainment, in consideration of an inclusive charge for the food supplied and the accommodation, service or entertainment, or
- (o) supply food (whether or not for consideration) in the course of providing services to patients or inmates in public institutions, or
- (p) sell for the purpose of resale.

**unsafe** has the meaning given by section 6.

**unsuitable** has the meaning given by section 7.

**vehicle** means any means of transport, whether self-propelled or not, and whether used on land or sea or in the air.

- (2) For the purposes of this Act, food or equipment that is displayed for the purpose of being offered as a prize or reward or given away for the purpose of advertisement or in the furtherance of trade or business is taken to have been displayed for sale by the owner of the food or equipment.

### 3 Meaning of "food"

(1) In this Act, **food** includes:

- (a) any substance or thing of a kind used, or represented as being for use, for human consumption (whether it is live, raw, prepared or partly prepared), or
- (b) any substance or thing of a kind used, or represented as being for use, as an ingredient or additive in a substance or thing referred to in paragraph (a), or
- (c) any substance used in preparing a substance or thing referred to in paragraph (a) (other than a substance used in preparing a living thing) if it comes into direct contact with the substance or thing referred to in that paragraph, such as a processing aid, or
- (d) chewing gum or an ingredient or additive in chewing gum, or any substance used in preparing chewing gum, or
- (e) any substance or thing declared to be a food under a declaration in force under section 3B of the *Australia New Zealand Food Authority Act 1991* of the Commonwealth [and prescribed by the regulations for the purposes of this paragraph],

whether or not the substance, thing or chewing gum is in a condition fit for human consumption.

- (2) However, **food** does not include a therapeutic good within the meaning of the *Therapeutic Goods Act 1989* of the Commonwealth.
- (3) To avoid doubt, **food** may include live animals and plants.

### 4 Meaning of "food business"

In this Act, **food business** means a business, enterprise or activity (other than a business, enterprise or activity that is primary food production) that involves:

- (a) the handling of food intended for sale, or
- (b) 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.

5 Meaning of "primary food production"

(1) In this Act, ***primary food production*** means the growing, raising, cultivation, picking, harvesting, collection or catching of food, and includes the following:

- (a) the transportation or delivery of food on, from or between the premises on which it was grown, raised, cultivated, picked, harvested, collected or caught,
- (b) the packing, treating (for example, washing) or storing of food on the premises on which it was grown, raised, cultivated, picked, harvested, collected or caught,
- (c) the storage of food in a silo that is not connected with a food processing operation and the transportation or delivery of food from, between or to such silos,
- (d) the sale of livestock at saleyards and the transportation of livestock to and from saleyards,
- (e) any other food production activity that is regulated by or under an Act prescribed by the regulations for the purposes of this subsection.

(2) However, ***primary food production*** does not include:

- (a) any process involving the substantial transformation of food (for example, manufacturing or canning), regardless of whether the process is carried out on the premises on which the food was grown, cultivated, picked, harvested, collected or caught, or
- (b) the sale or service of food directly to the public, or
- (c) any other food production activity that is prescribed by the regulations for the purposes of this subsection.

**Note.** Section 5 (2) (c) enables regulations to be made prescribing food production activities that are not included in the definition of primary food production. Such a regulation might be made, for example, to prescribe a food production activity in relation to which significant and unmanaged food safety hazards have been identified.

6 Meaning of "unsafe" food

(1) For the purposes of this Act, food is ***unsafe*** at a particular time if it would be likely to cause physical harm to a person who might later consume it, assuming:

- (a) it was, after that particular time and before being consumed by the person, properly subjected to all processes (if any) that are relevant to its reasonable intended use, and

- (b) nothing happened to it after that particular time and before being consumed by the person that would prevent its being used for its reasonable intended use, and
  - (c) it was consumed by the person according to its reasonable intended use.
- (2) However, food is not unsafe for the purposes of this Act merely because its inherent nutritional or chemical properties cause, or its inherent nature causes, adverse reactions only in persons with allergies or sensitivities that are not common to the majority of persons.
- (3) In subsection (1), *processes* include processes involving storage and preparation.

#### 7 Meaning of "unsuitable" food

- (1) For the purposes of this Act, food is *unsuitable* if it is food that:
- (a) is damaged, deteriorated or perished to an extent that affects its reasonable intended use, or
  - (b) contains any damaged, deteriorated or perished substance that affects its reasonable intended use, or
  - (c) is the product of a diseased animal, or an animal that has died otherwise than by slaughter, and has not been declared by or under another Act to be safe for human consumption, or
  - (d) contains a biological or chemical agent, or other matter or substance, that is foreign to the nature of the food.
- (2) However, food is not unsuitable for the purposes of this Act merely because:
- (a) at any particular time before it is sold for human consumption it contains an agricultural or veterinary chemical, or
  - (b) when it is sold for human consumption it contains an agricultural or veterinary chemical, so long as it does not contain the chemical in an amount that contravenes the Food Standards Code, or
  - (c) it contains a metal or non-metal contaminant (within the meaning of the Food Standards Code) in an amount that does not contravene the permitted level for the contaminant as specified in the Food Standards Code, or
  - (d) it contains any matter or substance that is permitted by the Food Standards Code.

- (3) In this section, *slaughter* of an animal includes the killing of an animal in the process of capturing, taking or harvesting it for the purposes of preparing it for use as food.

**8 Application of Act to primary food production**

- (1) Parts 5, 7 and 8 [of Annex B] do not apply to or in respect of primary food production.
- (2) The functions conferred on authorised officers by Parts 4 and 6 [of Annex B] may only be exercised in respect of primary food production:
  - (a) to enable the investigation and prosecution of offences against this Act or the regulations, or
  - (b) in connection with the making or enforcement of emergency orders under Part 3.

**Note.** The definition of *food business* excludes primary food production.

## Part 2 Offences relating to food

### Division 1 Serious offences relating to food

#### 9 Handling of food in unsafe manner

A person must not handle food intended for sale in a manner that the person knows will render, or is likely to render, the food unsafe.

Maximum penalty: \$100,000 or imprisonment for 2 years, or both, in the case of an individual and \$500,000 in the case of a corporation.

#### 10 Sale of unsafe food

A person must not sell food that the person knows is unsafe.

Maximum penalty: \$100,000 or imprisonment for 2 years, or both, in the case of an individual and \$500,000 in the case of a corporation.

#### 11 False description of food

- (1) A person must not cause food intended for sale to be falsely described if the person knows that a consumer of the food who relies on the description will, or is likely to, suffer physical harm.

Maximum penalty: \$100,000 or imprisonment for 2 years, or both, in the case of an individual and \$500,000 in the case of a corporation.

*Note.* Examples of food that is falsely described are contained in section 18.

- (2) A person must not sell 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.

Maximum penalty: \$100,000 or imprisonment for 2 years, or both, in the case of an individual and \$500,000 in the case of a corporation.

*Note.* Examples of food that is falsely described are contained in section 18.

## Division 2            Other offences relating to food

### 12    Handling and sale of unsafe food

- (1) A person must not handle food intended for sale in a manner that will render, or is likely to render, the food unsafe.

Maximum penalty: \$50,000 in the case of an individual and \$250,000 in the case of a corporation.

- (2) A person must not sell food that is unsafe.

Maximum penalty: \$50,000 in the case of an individual and \$250,000 in the case of a corporation.

### 13    Handling and sale of unsuitable food

- (1) A person must not handle food intended for sale in a manner that will render, or is likely to render, the food unsuitable.

Maximum penalty: \$40,000 in the case of an individual and \$200,000 in the case of a corporation.

- (2) A person must not sell food that is unsuitable.

Maximum penalty: \$40,000 in the case of an individual and \$200,000 in the case of a corporation.

- (3) For the purposes of this section, it is immaterial whether the food concerned is safe.

### 14    Misleading conduct relating to sale of food

- (1) A person must not, in the course of carrying on a food business, engage in conduct 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.

Maximum penalty: \$50,000 in the case of an individual and \$250,000 in the case of a corporation.

- (2) A person must not, for the purpose of effecting or promoting the sale of any food in the course of carrying on a food business, cause the food to be advertised, packaged or labelled in a way that falsely describes the food.

Maximum penalty: \$50,000 in the case of an individual and \$250,000 in the case of a corporation.

*Note.* Examples of food that is falsely described are contained in section 18.

- (3) A person must not, in the course of carrying on a food business, sell Food that is packaged or labelled in a way that falsely describes the food.  
Maximum penalty: \$50,000 in the case of an individual and \$250,000 in the case of a corporation.

Note. Examples of food that is falsely described are contained in section 18.

- (4) Nothing in subsection (2) or (3) limits the generality of subsection (1).

**15 Sale of food not complying with purchaser's demand**

- (1) A person must not, in the course of carrying on a food business, supply food by way of sale if the food is not of the nature or substance demanded by the purchaser.

Maximum penalty: \$50,000 in the case of an individual and \$250,000 in the case of a corporation.

- (2) For the purposes of this section, it is immaterial whether the food concerned is safe.

**16 Sale of unfit equipment or packaging or labelling material**

- (1) A person must not sell 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.

Maximum penalty: \$50,000 in the case of an individual and \$250,000 in the case of a corporation.

- (2) A person must not sell 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.

Maximum penalty: \$50,000 in the case of an individual and \$250,000 in the case of a corporation.

**17 Compliance with Food Standards Code**

- (1) A person must comply 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.

Maximum penalty: \$50,000 in the case of an individual and \$250,000 in the case of a corporation.

- (2) A person must not sell any food that does not comply with any requirement of the Food Standards Code that relates to the food.  
Maximum penalty: \$50,000 in the case of an individual and \$250,000 in the case of a corporation.
- (3) A person must not sell or advertise any food that is packaged or labelled in a manner that contravenes a provision of the Food Standards Code.  
Maximum penalty: \$50,000 in the case of an individual and \$250,000 in the case of a corporation.
- (4) A person must not sell or advertise for sale any food in a manner that contravenes a provision of the Food Standards Code.  
Maximum penalty: \$50,000 in the case of an individual and \$250,000 in the case of a corporation.

18 False descriptions of food

- (1) For the purposes of this Part, food that is falsely described includes food to which any one or more of the following paragraphs applies:
  - (a) the food is represented as being of a particular nature or substance for which there is a prescribed standard under the Food Standards Code and the food does not comply with that prescribed standard,
  - (b) the food is represented as being of a particular nature or substance and it contains, or is mixed or diluted with, any substance in a quantity or proportion that significantly diminishes its food value or nutritive properties as compared with food of the represented nature or substance,
  - (c) the food is represented as being of a particular nature or substance and it contains, or is mixed or diluted with, any substance of lower commercial value than food of the represented nature or substance,
  - (d) the food is represented as being of a particular nature or substance and a constituent of the food has been wholly or partly removed so that its properties are diminished as compared with food of the represented nature or substance,
  - (e) any word, statement, device or design used in the packaging or labelling of the food, or in an advertisement for the food, would create a false impression as to the nature or substance of the food, or the commercial value of the food, in the mind of a reasonable person,

- (f) the food is not of the nature or substance represented by the manner in which it is packaged, labelled or offered for sale.
- (2) Without limiting the application of subsection (1) of this section to Section 11 (2), food is falsely described for the purposes of section 11 (2) if it is supplied in response to a purchaser's request for a particular type of food, or a food that does not contain a particular ingredient, and the food is not of that type or contains that ingredient.

**19 Application of provisions outside jurisdiction**

For the purposes of a provision of this Part, it does not matter that the food concerned was sold or intended for sale outside this jurisdiction.

*Note.* See section 21 for a defence in relation to food intended for export.

**Division 3 Defences**

**20 Defence relating to publication of advertisements**

- (1) In any proceedings for an offence under this Part in relation to the publication of an advertisement, it is a defence for a person to prove that the person carried on the business of publishing or arranging for the publication of advertisements and that the person published or arranged for the publication of the advertisement in question in the ordinary course of that business.
- (2) Subsection (1) does not apply if the person:
  - (a) should reasonably have known that the publication of the advertisement was an offence, or
  - (b) had previously been informed in writing by the relevant authority that publication of such an advertisement would constitute an offence, or
  - (c) is the proprietor of a food business or is otherwise engaged in the conduct of a food business for which the advertisements concerned were published.

21 Defence in respect of food for export

- (1) In any proceedings for an offence under this Part involving a contravention of or failure to comply with a provision of the Food Standards Code in relation to food, it is a defence for a person to prove that:
  - (a) the food in question is to be exported to another country, and
  - (b) the food complies with the laws in force at the time of the alleged offence in the place to which the food is to be exported, being laws that deal with the same subject-matter as the provision of the Food Standards Code concerned.
- (2) This section does not apply to food that was originally intended for export but was sold in this jurisdiction.

22 Defence of due diligence

- (1) In any proceedings for an offence under this Part, it is a defence if it is proved that the person took all reasonable precautions and exercised all due diligence to prevent the commission of the offence by the person or by another person under the person's control.
- (2) Without limiting the ways in which a person may satisfy the requirements of subsection (1), a person satisfies those requirements if it is proved:
  - (a) that the commission of the offence was due to:
    - (i) an act or default of another person, or
    - (ii) reliance on information supplied by another person, and
  - (b) that:
    - (i) the person carried out all such checks of the food concerned as were reasonable in all the circumstances, or
    - (ii) it was reasonable in all the circumstances to rely on checks carried out by the person who supplied the food concerned to the person, and
  - (c) that the person did not import the food into the jurisdiction from another country, and
  - (d) in the case of an offence involving the sale of food, that:
    - (i) the person sold the food in the same condition as when the person purchased it, or
    - (ii) the person sold the food in a different condition to that in which the person purchased it, but that the difference did not result in any contravention of this Act or the regulations, and

- [(e) that the person did not know and had no reason to suspect at the time of commission of the alleged offence that the person's actor omission would constitute an offence under the relevant section].
- (3) In subsection (2) (a), **another person** does not include a person who was:
  - (a) an employee or agent of the defendant, or
  - (b) in the case of a defendant that is a body corporate, a director, employee or agent of the defendant.
- (4) Without limiting the ways in which a person may satisfy the requirements of subsection (1) or (2) (b) (i), a person may satisfy those requirements by proving that:
  - (a) in the case of an offence relating to a food business for which a food safety program is required to be prepared in accordance with the regulations, the person complied with a food safety program for the food business that complies with the requirements of the regulations, or
  - (b) in any other case, the person complied with a scheme (for example, a quality assurance program or an industry code of practice) that was:
    - (i) designed to manage food safety hazards and based on Australian national or international standards, codes or guidelines designed for that purpose, and
    - (ii) documented in some manner.

[23 Defence of mistaken and reasonable belief not available

In any proceedings for an offence under Division 2, it is no defence that the defendant had a mistaken but reasonable belief as to the facts that constituted the offence.]

24 Defence in respect of handling food

In any proceedings for an offence under section 9, 12 (1) or 13 (1), it is a defence if it is proved that the person caused the food to which the offence relates to be destroyed or otherwise disposed of immediately after the food was handled in the manner that was likely to render it unsafe or unsuitable.

**25 Defence in respect of sale of unfit equipment or packaging or labelling material**

In any proceedings for an offence under section 16 (1) or (2), it is a defence if the person proves that the person reasonably believed that the equipment or material concerned was not intended for use in connection with the handling of food.

### Part 3 Emergency powers

#### 26 Making of order

An order may be made under this Part by the relevant authority if the relevant 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.

#### 27 Nature of order

- (1) An order under this Part may do any one or more of the following:
  - (a) require the publication of warnings, in a form approved by the relevant authority, that a particular food or type of food is unsafe,
  - (b) prohibit the cultivation, taking, harvesting or obtaining, from a specified area, of a particular food or type of food or other primary produce intended to be used for human consumption,
  - (c) prohibit a particular food or type of food from being advertised or sold,
  - (d) direct that a particular food or type of food consigned or distributed for sale or sold be recalled and specify the manner in which, and the period within which, there call is to be conducted,
  - (e) direct that a particular food or type of food or other primary produce intended to be used for human consumption be impounded, isolated, destroyed or otherwise disposed of and specify the manner in which the impounding, isolation, destruction or disposal is to be conducted,
  - (f) prohibit absolutely the carrying on of an activity in relation to a particular food or type of food, or permit the carrying on of the activity in accordance with conditions specified in the order,
  - (g) without limiting the generality of paragraph (f), impose conditions relating to the taking and analysis of samples of the food or of water or soil or any other thing that is part of the environment in which that activity is carried on in relation to the food,
  - (h) specify methods of analysis (not inconsistent with any methods prescribed by the Food Standards Code)of any samples required to be taken in accordance with the order.

- (2) An order under this Part may be varied or revoked by the relevant authority in the same manner as the order was made.

**28 Special provisions relating to recall orders**

- (1) A recall order may require the person, or the persons of a class, that is bound by the order to disclose to the public or to a class of persons specified in the order, in a manner so specified, any one or more of the following:
  - (a) the particular food or type of food to be recalled or disposed of,
  - (b) the reasons why the food is considered to be unsafe,
  - (c) the circumstances in which the consumption of the food is unsafe,
  - (d) procedures for disposing of the food.
- (2) A person who is required by a recall order to conduct a recall of any Food must give written notice to the relevant authority of the completion of the recall as soon as practicable after that completion.
- (3) A person who is bound by a recall order is liable for any cost incurred by or on behalf of the relevant authority in connection with the recall order and any such cost is taken to be a debt due to the relevant authority from that person.
- (4) In any proceedings for the recovery of the debt, a certificate signed by the relevant authority stating the amount of any costs and the manner in which they were incurred is evidence of the matters certified.

**29 Manner of making orders**

- (1) An order under this Part:
  - (a) may be made in writing addressed to the person or persons intended to be bound by it, and served on that person or each of those persons, as the case requires, or
  - (b) may be addressed to several persons, to a class of persons, or to all persons.
- (2) Notice of an order addressed as referred to in subsection (1) (b) setting out the terms of the order and the persons to be bound by the order must, as soon as practicable after the order is made, be published in a newspaper that, in the opinion of the relevant authority, will be most likely to bring the order to the attention of the persons bound by it.
- (3) An order under this Part, when it takes effect, is binding on the person or persons to whom it is addressed.

- (4) An order that is served on a person takes effect when it is served.
- (5) An order, notice of which is published under subsection (2), takes effect at the beginning of the first day on which the notice was published.
- (6) An order ceases to have effect at the expiration of 90 days after the day on which it takes effect unless it is sooner revoked.
- (7) Subsection (6) does not prevent a further order being made in the same terms as an order that has expired.

**30 Compensation**

- (1) A person bound by an order under this Part who suffers loss as a result of the making of the order may apply to the relevant authority for compensation if the person considers that there were insufficient grounds for the making of the order.
- (2) If there were insufficient grounds for the making of the order, the relevant authority is to pay such compensation to the applicant as is just and reasonable.
- (3) The relevant authority is to send written notification of its determination as to the payment of compensation under this section to each applicant for the payment of such compensation.
- (4) If the relevant authority has not determined an application for compensation under this section within 28 days of receiving the application, the relevant authority is taken to have refused to pay any compensation.
- (5) An applicant for the payment of compensation under this section who is dissatisfied with a determination by the relevant authority as to the refusal to pay compensation or as to the amount of compensation may apply to the appropriate review body for a review of the determination:
  - (a) within 28 days after the day on which notification of the determination was received, or
  - (b) in a case to which subsection (4) applies, within 28 days of the 28-day period referred to in that subsection.

**31 Failure to comply with emergency order**

A person must not, without reasonable excuse:

- (a) carry on an activity in contravention of any prohibition imposed on the person by an order under this Part, or
- (b) neglect or refuse to comply with a direction given by such an order, or

(c) fail to comply with a condition specified in such an order.

Maximum penalty: \$50,000 in the case of an individual or \$250,000 in the case of a corporation.

## Part 4 Proceedings for offences

### 32 Alternative verdicts for serious food offences

- (1) If, on the trial of a person charged with an offence against section 9 the trier of fact is not satisfied that the person committed the offence but is satisfied that the person committed an offence against section 12(1), the trier of fact may find the person not guilty of the offence charged but guilty of an offence against section 12 (1), and the person is liable to punishment accordingly.
- (2) If, on the trial of a person charged with an offence against section 10, the trier of fact is not satisfied that the person committed the offence but is satisfied that the person committed an offence against section 12(2), the trier of fact may find the person not guilty of the offence charged but guilty of an offence against section 12 (2), and the person is liable to punishment accordingly.