



FOOD BILL 2005

Explanatory Memorandum

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INTRODUCTION

The objects of this Bill are:

- to ensure the safety of food for human consumption;
- to prevent misleading conduct in relation to the sale of food; and
- to provide for the application of the Australia New Zealand Food Standards Code in Western Australia.

The Bill is the key initiative in achieving national consistency in the regulation of food, incorporating model provisions agreed to by the Commonwealth, States and Territories in the *Food Regulation Agreement* (“the Agreement”) of 2002. The Bill adopts the uniform model provisions in relation to significant offences regarding food, definitions of key terms (eg “food”, “food business”) and emergency powers. Variation from the model provisions is allowed for in the Agreement to accommodate jurisdictional differences in areas such as administrative and procedural/evidentiary requirements.

The purpose of the Bill is to improve the existing food regulatory system by providing for a risk-based approach to the management of the handling and sale of food for human consumption, together with robust enforcement tools to protect Western Australia’s food chain.

In particular the Bill:

- a) repeals Part VIII of the *Health Act 1911* and other parts of the Act that currently regulate food;
- b) will provide consistency with other Australian jurisdictions in the interpretation and application of the Australia New Zealand Food Standards Code;
- c) provides strong emergency and recall powers in relation to food that presents a risk to public health;
- d) allows for the application of less prescriptive and outcome based requirements on food business, so that business has more flexibility to determine the best way to comply with those requirements – providing food safety is not compromised;
- e) provides for more significant penalties, reflecting the seriousness of a failure to provide safe food;
- f) continues the dual responsibility of State and local government for the administration of food regulation;
- g) contains comprehensive investigation and enforcement provisions;
- h) enables regulation of certain significant primary food production activities where such activities have the potential to impact on the safety of food for human consumption;
- i) enables the requiring of food safety programs for high risk food businesses and the auditing of those programs;
- j) contains requirements for food businesses to provide government with information that will enable improved monitoring of the safety of Western Australia’s food; and

- k) provides for procedural fairness in relation to significant decisions made under the Act.

The Bill is divided into 14 parts as follows.

Long Title

The long title sets out the purpose of the Bill, which is to provide for the safety and suitability of food for human consumption, and for related purposes.

Part 1 – Preliminary

This part contains the title of the Act and the relevant commencement and application provisions of the Bill.

Clause 1 – Short title

The first clause states the short title of the proposed Act.

Clause 2 – Commencement

Clause 2 provides that the majority of the provisions in the Act will come into operation upon Royal Assent.

Subclause (2) provides that the provisions requiring registration and notification of food premises will come into operation 6 months after Royal Assent. This is to allow local governments and industry time to put registration and notification systems into place.

Subclauses (3) and (4) provide that the provisions relating to auditing and food safety requirements will come into operation on date/s to be fixed by proclamation. The commencement date/s of these provisions will be dependent upon the making of any necessary rules and regulations.

Clause 3 – Objects of the Act

Clause 3 sets out the objectives of the Act namely -

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

Clause 4 – Application of the Act to Primary Production

Clause 4 provides that Part 6 (relating to improvement notices and prohibition orders for premises and equipment), Part 8 (relating to auditing) and Part 9 (relating to notification and registration of food businesses and approval of food premises) do not apply to or in respect of primary food production. The functions conferred by Part 5 (powers of entry, inspection and

procedure) and Part 7 (taking and analysis of samples) may be carried out with respect to primary food production to enable the investigation and prosecution of offences under the proposed Act or in connection with the making or enforcing of emergency orders.

Clause 5 – Application of Act to water suppliers

Clause 5 provides that certain food offences and Parts 6, 8 and 9 do not apply to a water supplier in respect of the supply of water for human consumption through a reticulated water system.

Clause 6 – Application of Act to prescribed community activities

Clause 6 provides for the exemption from all or some of the more administrative aspects of the legislation for small low risk community fundraisers. This is achieved by providing a power to exempt a prescribed activity of a charitable or community nature relating to food or an activity within a prescribed class of activities from all or any of the provisions of the legislation by regulation.

Clause 7 – Act to bind Crown

Clause 7 provides that the proposed Act binds the Crown.

Part 2 – Interpretation

This part contains the definitions of the terms used within the Bill.

Clause 8 – Terms used in this Act

This clause contains the definitions required for the purposes of the proposed Act. Of note are the definitions relating to the entities that will administer and enforce the provisions of the proposed Act.

The term **CEO** means the Chief Executive Officer of the department of the Public Service principally assisting in the administration of the proposed Act.

The term **enforcement agency** means:

- a) the CEO;
- b) a local government; or
- c) person/s or bodies etc who may be prescribed by regulation for the purposes of this definition.

Clause 9 – Meaning of “food”

Clause 9 defines **food** for the purposes of the proposed Act. Food may include live animals or plants eg sprouts, oysters.

Clause 10 – Meaning of “food business”

Clause 10 defines **food business** for the purposes of the proposed Act. It means a business, enterprise or activity (other than a business, enterprise or activity that is primary food

production) that involves the handling of food intended for sale, or the sale of food, regardless of whether, subject to section 6, the business, enterprise or activity concerned is of a commercial, charitable or community nature or whether it involves the handling or sale of food on one occasion only.

Clause 11 – Meaning of “primary food production”

Clause 11 defines ***primary food production*** for the purposes of the proposed Act. Of note is subclause (2)(c), which provides for the prescribing by regulation of food production activities in order to exclude an activity from the definition of primary production activity. This provision may be used to bring certain significant primary food production activities eg dairies and seafood processing within the provisions of the proposed Act, where it is considered that such activities have the potential to impact on the safety of food for human consumption.

Clause 12 – Meaning of “unsafe” in relation to food

Clause 12 defines ***unsafe food*** for the purposes of the proposed Act. Of note is that subclause (2) excludes foods from the definition that, merely because of some inherent property, cause adverse reactions in people with allergies or sensitivities that are not common to the majority of people.

Clause 13 – Meaning of “unsuitable” in relation to food

Clause 13 defines ***unsuitable food*** for the purposes of the proposed Act. Of note subclause (2) excludes from the definition foods that contain substances that are permitted in the levels that are permitted by the Food Standards Code. It also excludes foods that may contain an agricultural or veterinary chemical prior to sale for human consumption.

Part 3 – Offences relating to food

Part 3 specifies conduct that constitutes an offence under the proposed Act and sets out defences in respect to certain offences. Offences are separated into serious offences and other offences.

Division 1 - Serious offences relating to food

Clause 14 – Handling of food in an unsafe manner

Clause 14 creates the offences of handling food intended for sale in a manner that the person knows will render, or is likely to render, the food unsafe, or in a manner that the person ought reasonably to know is likely to render the food unsafe.

Clause 15 – Sale of unsafe food

Clause 15 creates the offences of selling food that the person knows is unsafe or ought reasonably to know is unsafe.

Clause 16 – False description of food

Clause 16 creates the offences of causing food intended for sale to be falsely described if the person knows, or ought reasonably to know, that a consumer of the food who relies on the description will, or is likely to, suffer physical harm.

Offences are also created of selling food that the person knows is falsely described and will, or is likely to, cause physical harm to a consumer of the food who relies on the description or that the person ought reasonably to know is falsely described and is likely to cause physical harm to a consumer of the food who relies on the description.

Division 2 - Other offences relating to food

Clause 17 – Handling and sale of unsafe food

Clause 17 creates the offences of handling food intended for sale in a manner that will render, or is likely to render, the food unsafe and of selling food that is unsafe. The offences created by this clause and the other clauses in this Division are of a strict liability nature and have lower penalties than those contained in Division 1.

Clause 18 – Handling and sale of unsuitable food

Clause 18 creates the offences of handling food intended for sale in a manner that will render, or is likely to render, the food unsuitable and of selling food that is unsuitable.

Clause 19 – Misleading conduct relating to sale of food

Clause 19 creates an offence of engaging in conduct (in the course of carrying on a food business) that is misleading or deceptive or is likely to mislead or deceive in relation to the advertising, packaging or labelling of food intended for sale or the sale of food.

An offence is also created of causing food to be advertised, packaged or labelled in a way that falsely describes the food, for the purpose of effecting or promoting the sale of the food in the course of carrying on a food business.

An offence is also created of selling food (in the course of carrying on a food business) that is packaged or labelled in a way that falsely describes the food.

Clause 20 - Sale of food not complying with purchaser's demand

Clause 20 creates an offence of supplying food (in the course of carrying on a food business) by way of sale if the food is not of the nature or substance demanded by the purchaser. This is mainly designed to capture the sale of unpackaged food where the consumer has asked for a particular product and is provided with a different product eg asking for coral trout and being provided with shark.

Clause 21 – Sale of unfit equipment or packaging or labelling material

Clause 21 creates an offence of selling equipment that if used for the purposes for which it was designed or intended to be used:

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

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

Clause 22 – compliance with the Food Standards Code

Clause 22 creates an offence of not complying with any requirement imposed on the person by a provision of the Food Standards Code in relation to the conduct of a food business or to food intended for sale or food for sale. The following offences are also created:

- (a) selling any food that does not comply with any requirement of the Food Standards Code that relates to the food;
- (b) selling or advertising for sale any food that is packaged or labelled in a manner that contravenes a provision of the Food Standards Code; and
- (c) selling or advertising for sale any food in a manner that contravenes a provision of the Food Standards Code.

Clause 23 – False description of food

Clause 23 lists a number of circumstances in which food is taken to be falsely described for the purposes of the Part. These include where food is represented as being of a particular nature or substance and it does not comply with the Food Standards Code for that food, or it has been diluted or mixed with a substance of lower commercial value, or so that its food value or nutritional properties are diminished.

Clause 24 – Application of provisions outside Western Australia

Clause 24 makes it clear that the offences also apply to food intended for sale outside Western Australia. However, there is a defence contained in clause 25 in relation to food for export.

Division 3 – Defences

Clause 25 – Defence relating to publication of advertisements

It is a defence to an offence under the Part in relation to the publication of advertisements if the person published the offending material in the ordinary course of carrying on a publishing business. This defence is not available if the person should reasonably to have known that publication was an offence, had been given notice that the publication was an offence, or is engaged in the conduct of the food business for which the material was published.

Clause 26 – Defence in respect of food for export

Clause 26 provides a defence to an offence under the Part if the food in question was for export and complied with the laws of the place to which it was being exported.

Clause 27 – Defence of due diligence

Clause 27 provides a defence to an offence under the Part if the person concerned proves that they took all reasonable precautions and exercised due diligence in order to prevent the offence. Examples of ways in which the requirement of due diligence can be satisfied are given.

Clause 28 – Defence in respect of handling food

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

Clause 29 – Defence in respect of sale of unfit equipment or packaging or labelling material

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

Division 4 – Alternative verdicts

Clause 30 – Alternative verdicts for serious food offences

Clause 30 enables alternative verdicts to be reached in proceedings for certain offences relating to the handling and sale of unsafe food.

Part 4 – Emergency powers

This part provides for the making of emergency orders where necessary to prevent or mitigate a serious danger to public health.

Clause 31 – Making of an emergency order

Clause 31 allows an order to be made under the Part by the CEO only if the CEO has reasonable grounds to believe that the making of the order is necessary to prevent or reduce the possibility of a serious danger to public health or to mitigate the adverse consequences of a serious danger to public health.

Clause 32 – Nature of an emergency order

Clause 32 enables an emergency order to be made in relation to food. Such an order may, for

example, require the publication of warnings about unsafe food, prohibit the cultivating or taking of food from a particular area, the recall of a food, prohibit certain food from being advertised or sold or require particular food to be destroyed or disposed of.

Clause 33 – Special provisions relating to recall orders

Clause 33 enables recall orders to be made requiring certain matters to be disclosed to the public or a class of person about the food concerned. A person bound by a recall order must notify the CEO when the recall is completed and is liable for the costs involved in the recall.

Clause 34 – Manner of making orders

Clause 34 sets out the manner of making emergency orders under the Part and sets out other procedural requirements relating to such orders.

Clause 35 - Compensation

Clause 35 enables a person who is bound by an order under the Part to apply to the CEO for compensation if the person suffered loss as a result of the order and considers that there were insufficient grounds for the making of the order. If there were insufficient grounds for making the order the CEO must pay reasonable and just compensation.

The CEO must provide written notification of the determination made. If a determination is not made within 28 days of the application the CEO is taken to have refused the application.

Subclause (5) enables application to the State Administrative Tribunal for review of determinations made under this clause.

Clause 36 – Failure to comply with emergency order

Clause 36 creates an offence of failing to comply with an order under the Part.

Clause 37 – Limitation on stay of operation of emergency orders

Clause 37 prevents a court or tribunal from making an interlocutory order in judicial review or other proceedings that has the effect of staying the operation of an order under the Part.

Part 5 – Powers of entry, inspection and seizure

This part provides for the powers that are to be used to ensure compliance with the proposed Act and regulations

Division 1 – Entry, inspection and seizure

Clause 38 – Powers of authorised officers

Clause 38 sets out the entry, inspection and investigation powers of authorised officers under the proposed Act. Subclause (2) provides that entry to residential premises is not authorised except where the occupier of the premises consents to entry, a warrant under section 41

authorises entry, or to a part of the premises where meals are being prepared or served as part of paid accommodation.

Clause 39 – Self-incrimination not an excuse

This clause over rides the common law privilege against self-incrimination. However, any information obtained under a requirement of section 37 cannot be used in evidence against the person in criminal proceedings except in proceedings for offences relating to failure to comply with the requirements of an authorised officer, interference with a seized item, the provision of false information, or obstructing, impersonating or threatening authorised officers.

Clause 40 – Power of seizure

Clause 40 enables an authorised officer to seize food, or a vehicle, equipment, labelling or packaging or advertising material or any other thing that is evidence of an offence against the proposed Act or the regulations or does not comply with the proposed Act or the regulations.

Clause 41 – Application for warrant to enter premises

Clause 41 enables an authorised officer to apply for a search warrant to enter premises if there are reasonable grounds for believing that an offence against the proposed Act or the regulations has been or is being committed. In particular, this may be necessary if the premises to be entered are solely residential premises. The clause makes provisions in relation to applications for warrants to be made by remote communication in particular circumstances.

Clause 42 – Issue of warrant

Clause 42 provides for the issue of a warrant if there are reasonable grounds for doing so and requires the Magistrate issuing the warrant to record the matters of fact which have been relied upon to justify the issue of the warrant.

Clause 43 – Duration of warrant

A warrant remains in force either for the period specified in the warrant or, if no period is specified, one month from the date of issue.

Clause 44 – Execution of warrant

A warrant may only be executed by the authorised officer to whom it was issued. A warrant authorises the officer to use any reasonable necessary force to enter the premises concerned and to search the premises for evidence of a contravention of the proposed Act. The authorised officer must produce the warrant if asked by the occupier of the premises and may be accompanied by a police officer if necessary.

Clause 45 – Failure to comply with requirements of authorised officers

Clause 45 creates an offence of failing to comply with a requirement of an authorised officer duly made under the Division. An offence cannot be made out unless a person has been informed that failure to comply with a requirement constitutes an offence.

Clause 46 – Interfering with seized items

Clause 46 creates an offence of detaining, removing or tampering with any food or other thing seized by an authorised officer under the Part.

Clause 47 - False information

Clause 47 creates an offence of giving false information in connection with a requirement or direction under the proposed Act.

Clause 48 – Obstructing, impersonating or threatening authorised officers

Clause 48 creates offences of resisting, obstructing or attempting to obstruct an authorised officer and of impersonating, and threatening or intimidating an authorised officer.

Division 2 - Items seized by authorised officers

Clause 49 – Seized items

Clause 49 enables an authorised officer who seizes an item under the Part to detain it at the premises where it was found or to remove it and detain it at another place.

Clause 50 – Notification of seizure

Clause 50 requires an authorised officer to give a notice containing certain specified information to the person from whom an item is seized under the Part.

Clause 51- Destruction of filthy, decomposed or putrid matter

Clause 51 enables an authorised officer to destroy food that is seized and that is filthy, decomposed or putrid or poses an immediate risk to health or property.

Clause 52 – Return of seized item

Clause 52 provides that an item seized under the Part is to be returned if there is no evidence that there has been a contravention of the proposed Act or the regulations.

Clause 53 – Forfeiture of item

Clause 53 provides that after a stipulated period of time an item seized under the Part is forfeited to the State and may be destroyed, sold or otherwise disposed of.

Clause 54 – Cost of destruction or disposal of forfeited item

Clause 54 provides that the owner of a seized item is liable for costs incurred in connection with its lawful destruction or disposal.

Clause 55 – Return of forfeited item

Clause 55 provides that a forfeited item must be returned, if possible and as soon as is practicable, if there has been no contravention of the proposed Act or the regulations.

Clause 56 – Compensation to be paid in certain circumstances

Clause 56 enables a person to apply for and receive compensation in relation to a seized item if there has been no contravention of the proposed Act or the regulations and the item cannot be returned or has depreciated in value. An application can only be lodged if the time has expired to lodge an application under section 56 for disallowance of seizure, or such an application has been lodged and refused or been withdrawn. Written notice of the determination must be given. Subclause (5) enables review by the State Administrative Tribunal of the determination.

Clause 57 – Application for order disallowing seizure

Clause 57 enables a person claiming entitlement to an item seized under the Part to apply to the Court for an order disallowing the seizure.

Clause 58 – Enforcement agency entitled to answer application

This clause allows the enforcement agency concerned to appear as respondent at the hearing of an application for an order under section 56.

Clause 59 – Order disallowing seizure of item

This clause enables the court to make an order disallowing the seizure of an item in certain circumstances.

Clause 60 – Ancillary orders

If the court disallows a seizure it must make ancillary orders, directing the respondent to return the seized item or, if the item cannot be returned or has depreciated in value, directing the payment of compensation.

Clause 61 – Adjournment pending hearing of other proceedings

Clause 61 enables the court to adjourn the hearing of an application for an order if the item in question is required as evidence in other proceedings.

Part 6 - Improvement notices and prohibition orders

Part 6 provides for the issue of notices and orders in relation to food businesses' compliance with the proposed Act and regulations.

Division 1 – Improvement notices

Clause 62 – Grounds for serving improvement notice

Clause 62 enables an authorised officer to serve an improvement notice on the proprietor of a food business if certain circumstances exist, for example, if the premises on which the food business is conducted are unclean or do not comply with the Food Standards Code, or a food safety program is not being adequately implemented.

Clause 63 – Improvement notice may require certain actions to be taken

Clause 63 sets out the form that an improvement notice must take. Such a notice may contain certain requirements that are to be complied within a period of 24 hours or a longer period specified in the notice. The authorised officer may extend the period given in the notice.

Clause 64 – Compliance with an improvement notice

Clause 64 provides that an authorised officer is to note on an improvement notice the date on which it is complied with. If requested, an authorised officer must give a copy of the notice with the note to the person on whom the notice was served.

Division 2 – Prohibition orders

Clause 65 – Prohibition order

Clause 65 enables the CEO or other enforcement agency to issue a prohibition order on the proprietor of a food business if an improvement notice has not been complied with or it is necessary to prevent or mitigate a serious danger to public health. The clause provides for the form of the order. Such an order may, for example, state that no food intended for sale is to be handled on specified premises or conveyed in a specified vehicle until such time as a certificate of clearance under clause 64 has been given.

Clause 66 – Certificate of clearance to be given in certain circumstances

Clause 66 provides that a certificate of clearance must be given if there is no serious danger to health, and the prohibition order and any improvement notice has been complied with.

Clause 67 – Request for re-inspection

Clause 67 enables the proprietor of a food business who has been served with a prohibition order to request a re-inspection of the relevant premises or item. Subclause (3) provides that a certificate of clearance is taken to have been given if a premises or item has not been inspected within 48 hours of a written request for re-inspection, and through no fault of the proprietor of the food business, the re-inspection does not take place. Subclause (4) requires that written notice must be given of a decision not to give a certificate of clearance.

Clause 68 – Contravention of a prohibition order

Clause 68 creates an offence of contravening or failing to comply with a prohibition order.

Clause 69 – Review of decision to refuse certificate of clearance

Clause 69 enables a person to apply to the State Administrative Tribunal for a review of a decision not to issue a certificate of clearance.

Clause 70 - Compensation

Clause 70 provides for the payment of compensation in cases where there were insufficient grounds for the making of a prohibition order and a person suffers loss as a result of the making of the order. Subclause (3) provides that written notification must be given of the determination made in relation to payment or refusal to pay and the amount that is to be paid. If a determination is not made within 28 days of the application subclause (4) provides that it is taken that the application has been refused. Subclause (5) enables an applicant to appeal against a refusal to pay or as to the amount of compensation to the State Administrative Tribunal.

Division 3 – Other matters

Clause 71 – Scope of notices and orders

Clause 71 lists the premises, items or matters to which an improvement notice or a prohibition order may relate.

Clause 72 – Notices and order to contain certain information

Clause 72 requires certain information to be specified in an improvement notice or a prohibition order.

Part 7 – Taking and analysis of samples

Part 7 enables the taking and analysing of samples of food for human consumption for the purposes of determining compliance with the Act and regulations and sets out requirements in relation to the laboratories and analysts that will perform the analyses.

Division 1 - Taking of samples

Clause 73 – Application of division

Clause 73 provides that the procedures set out in this Division apply only to samples taken in the exercise of powers under Part 5, that is for the purpose of determining compliance with, or breaches of the proposed Act or regulations, particularly the Food Standards Code.

Clause 74 – Proprietor to be informed

Clause 74 requires an authorised officer to inform the proprietor or person in charge of a food business from which a food sample was taken that the sample is to be analysed.

Clause 75 – Payment for sample

Clause 75 requires an authorised officer to pay for any food sample taken.

Clause 76 – Sample from vending machines

Clause 76 provides that clauses 74 and 75 do not apply to food taken from a food vending machine where the person in charge of the vending machine cannot be identified by the authorised officer taking the sample.

Clause 77 – Packaged food

Clause 77 provides that an authorised officer must take the whole of a package of food in certain circumstances rather than breaking up the package.

Clause 78 – Procedures to be followed

Clause 78 sets out the procedure to be followed by an authorised officer when taking samples for analysis. Except for the circumstances set out in subclauses (3) and (4), a sample of food must be divided into 3 separate parts, marked, sealed and fastened. One part must be provided to the proprietor of the food business from whom the sample was purchased, one part must be submitted for analysis and one part must be retained for future comparison.

Clause 79 – Samples to be submitted for analysis

Clause 79 requires an authorised officer to submit samples for analysis under Division 2.

Division 2 – Procedure relating to analyses

Clause 80 – Compliance with Food Standards Code

Clause 80 requires a person carrying out an analysis for the purposes of the proposed Act to comply with the Food Standards Code.

Clause 81 – Certificate of analysis

Clause 81 requires for the issue of a certificate of analysis that must contain specified information.

Division 3 - Approval of laboratories

Clause 82 – Approval of laboratories

Clause 82 enables the CEO to approve laboratories for the purposes of carrying out analyses under the proposed Act. Approval, with or without conditions and refusal of approval must be issued in writing together with reasons for refusal where applicable.

Clause 83 – Term of approval

Clause 83 provides that an approval remains in force until cancelled and except during any period of suspension.

Clause 84 – Persons in charge of approved laboratory to give notice of certain interests

Clause 84 requires a person in charge of an approved laboratory to notify the CEO of any direct or indirect interest in a food business.

Clause 85 – Variation of conditions or suspension or cancellation of approval of laboratory

Clause 85 enables conditions of approvals to be varied and approvals to be suspended or cancelled; these must be notified in writing, and reasons and an opportunity to make submissions must be given.

Clause 86 – Review of decisions relating to approval

Clause 86 enables certain persons to apply to the State Administrative Tribunal for a review of certain decisions in relation to an approval.

Clause 87 – List of approved laboratories to be maintained

Clause 87 requires the CEO to maintain a list of approved laboratories, make the list publicly available and to revise the list at least annually.

Division 4 - Approval of analysts

Clause 88 – Approval of persons to carry out analyses

Clause 88 enables the CEO to approve analysts for the purposes of carrying out analyses under the proposed Act. Approval, with or without conditions and refusal of approval must be issued in writing together with reasons for refusal where applicable.

Clause 89 – Term of approval

Clause 89 provides that an approval remains in force until cancelled and except during any period of suspension.

Clause 90 – Approved analyst to give notice of certain interests

Clause 90 requires an approved analyst to notify the CEO of any direct or indirect interest in a food business.

Clause 91 – Variation of conditions or suspension or cancellation of approval of analyst

Clause 91 enables conditions of approval to be varied and approvals to be suspended or cancelled; these must be notified in writing, and reasons and an opportunity to make submissions must be given.

Clause 92 – Review of decisions relating to approval

Clause 92 enables certain persons to apply to the State Administrative Tribunal for a review of certain decisions in relation to an approval.

Clause 93 – List of approved analysts to be maintained

Clause 93 requires the CEO to maintain a list of approved analysts, to make the list publicly available and to revise the list at least annually.

Part 8 – Auditing

Part 8 puts in place a framework for the auditing of food safety programs including requirements in relation to reporting and food safety auditors.

Division 1 - Approval of food safety auditors

Clause 94 – Approval of food safety auditors

Clause 94 enables the CEO to approve food safety auditors for the purposes of the proposed Act, having regard to the technical skills and experiences of an applicant for approval as an auditor, as well as to any competency guidelines. An approval may be granted with or without conditions or may be refused, notice of which must be provided in writing.

Clause 95 – Term of approval

Clause 95 provides that an approval remains in force for the period specified in the approval until cancelled and except during any period of suspension.

Clause 96 – Food safety auditor to give notice of certain interests

Clause 96 requires an approved food safety auditor to notify the CEO of any direct or indirect interest in a food business.

Clause 97 – Variation of conditions or suspension or cancellation of approval of auditor

Clause 97 enables conditions of approvals to be varied and approvals to be suspended or cancelled. Notice and reasons must be given in writing and the person must be given the opportunity to make submissions. Subclause (2) sets out the grounds on which an approval may be suspended or cancelled.

Clause 98 – Review of decisions relating to approvals

Clause 98 enables certain persons to apply to the State Administrative Tribunal for a review of certain decisions in relation to an approval. If the decision has been made by a delegate of the CEO the person may apply to the CEO for a review of that decision. This does not prevent the person from applying to the Tribunal for a review of the CEO's decision relating to the review of the delegate's decision.

Division 2 - Auditing and reporting requirements

Clause 99 – Food safety programs and auditing requirements

Clause 99 requires the proprietor of a food business to ensure that any requirements of the regulations in relation to the preparation, implementation, maintenance or monitoring of a

food safety program for the food business are complied with. The clause also requires that the food safety program be audited as frequently as is determined under clause 100.

Clause 100 – Priority classification system and frequency of auditing

Clause 100 requires the appropriate enforcement agency to determine the priority classification of individual food businesses and to determine how frequently food safety programs for food businesses are to be audited depending on how they are classified. The agency must notify a proprietor of a food business of the priority classification that has been determined for that food business.

The determination of the priority classification of a food business must be made having regard to the priority classification system for types of food premises which is to be approved by the CEO. A priority classification system is a risk-based system designed to classify food businesses into priority ratings based on the risk they present to public health and safety. Requirements for food safety programs and frequency of auditing of those programs will be linked to the priority classification of a food business.

The appropriate enforcement agency must give written notification to the proprietor of a food business of its determinations in relation to the priority classification for the food business, the frequency of auditing of any food safety program required by the regulations and the date by which any food safety program must be implemented. A priority classification for an individual business may be changed if it is inappropriate eg the nature of the food that is processed has changed. Any such change must be notified in writing.

Clause 101 – Duties of food safety auditors

Clause 101 sets out the duties of food safety auditors, particularly in relation to the auditing of food safety programs for food businesses.

Clause 102 – Reporting requirements

Clause 102 requires food safety auditors to report to the appropriate enforcement agency on the results of any audit or assessment carried out for the purposes of the proposed Act and if certain contraventions of the proposed Act are discovered. A food safety auditor may also report that the priority classification of a food business should be changed. A copy of the audit report must be given to the proprietor of the food business concerned.

Clause 103 – Redetermination of frequency of auditing

Clause 103 enables a food safety auditor to change the priority classification of a food business after it has been audited so long as the change is within a certain range within the priority classification system. In making such a determination a food safety auditor must have regard to the compliance history of the food business in relation to any requirements in the regulations and in the Food Safety Standards.

Division 3 – Other matters relating to food safety auditors

Clause 104 – Certificates of authority of food safety auditors

Clause 104 requires the CEO to provide certificates of authority to food safety auditors and sets out the matters that must be included in a certificate of authority.

Clause 105 – List of food safety auditors to be maintained

Clause 105 requires the CEO to maintain a list of approved food safety auditors, make that list publicly available and to revise the list at least on an annual basis.

Clause 106 – Obstructing, impersonating or threatening food safety auditors

Clause 106 creates offences of obstructing and impersonating and threatening or intimidating food safety auditors carrying out functions under the proposed Act.

Part 9 - Registration of food businesses

Part 9 sets out requirements and procedures in relation to the notification to and registration with enforcement agencies of food businesses.

Clause 107 – Notification of conduct of food businesses

Clause 107 requires the proprietor of a food business to notify the appropriate enforcement agency of certain information required to be notified by the Food Safety Standards. If a business involves more than one premises, for example, a supermarket chain, it must notify the appropriate enforcement agency or agencies in relation to each premises.

The information will be kept and used by enforcement agencies to enable efficient administration of the proposed Act and for use in notifying the food industry of relevant issues or emergencies such as food recalls.

Subclause (3) enables local government to impose and recover fees for notification under the *Local Government Act 1995*. The regulation making powers conferred by clause 144 enables the prescribing of fees by other enforcement agencies.

Clause 108 – Exemption in relation to notification of information

Clause 108 contains certain exemptions from the operation of clause 107. Of note is that any premises that is required to be registered either under the proposed Act or under another law prescribed by regulation is not required to notify.

Clause 109 – Conduct of unregistered food businesses

Clause 109 makes it an offence for the proprietor of a food business that is required by the regulations to be registered to carry on the business unregistered. The clause enables the exemption of a food business or class of food businesses eg a volunteer not-for-profit organisation, from the registration requirements.

Clause 110 – Registration of food businesses

Clause 110 sets out the procedure for registration of a food business including the matters to be included in a registration application. If a business involves more than one premises eg a supermarket chain, it must register with the appropriate enforcement agency or agencies in relation to each premises. An enforcement agency may grant registration with or without conditions, and must set out any conditions on the registration certificate. Conditions must only relate to compliance with an improvement notice or prohibition order.

Clause 111 – Term of approval

Clause 111 provides that the registration of a food business remains in force until cancelled.

Clause 112 – Variation of conditions or cancellation of registration of food businesses

Clause 112 enables conditions of registration to be varied and registration to be cancelled. A registration may only be cancelled if the food business has ceased to operate at the premises for which it is registered, if registration fees have not been paid or if the holder of the registration requests cancellation. Notice of variations of conditions and cancellation of registration must be given in writing with reasons to the holder of the registration and an opportunity must be given to make submissions on the question of variation or cancellation.

Clause 113 – Notification of certain changes to registered food businesses

Clause 113 requires the proprietor of a registered food business to notify the appropriate enforcement agency of certain changes in circumstances.

Clause 114 – Review of decisions relating to registration

Clause 114 enables certain persons to apply to the State Administrative Tribunal for a review of certain decisions in relation to registration.

Clause 115 – Register of food businesses to be maintained

Clause 115 requires each enforcement agency to maintain a list of notified and registered food businesses.

Part 10 - Administration

Part 10 sets out the functions and powers of the CEO of the department responsible for administering the proposed Act and the functions of enforcement agencies

Division 1 – Functions of the CEO

Clause 116 – Functions of the CEO

The CEO has the functions in relation the administration of the proposed Act that are conferred on the CEO by the Act, in particular: to take measures to ensure that the Act is complied with; and to provide advice to the Minister concerning possible changes to the Act or regulations.

Clause 117 – CEO may delegate

Clause 117 enables the CEO to delegate in writing certain powers or duties under the proposed Act to a member of staff, an authorised officer, a local government or the holder of an office prescribed by the regulations. The following functions may only be delegated to a member of staff:

- placing of conditions on the performance of functions of enforcement agencies;
- issuing of guidelines in relation to the qualifications and experience of authorised officers;
- issuing of certificates of authority to authorised officers who are the CEO's staff;
- CEO's emergency powers; and
- approvals of laboratories, analysts and food safety auditors.

With the exception of the powers that may only be delegated to a staff member, the CEO may authorise the further delegation of powers that he or she has delegated.

Powers must not be delegated to another enforcement agency without the consent in writing of the enforcement agency.

Division 2 - Functions of enforcement agencies

Clause 118 – Functions of enforcement agencies

Clause 118 provides that enforcement agencies have functions that are conferred or imposed by the Act or delegated by the CEO. The clause also enables an enforcement agency to delegate functions subject to the conditions set out in subclauses (2), (3) and (4).

Clause 119 – Conditions on performance of functions by enforcement agencies

Clause 119 enables the CEO, after consultation with an enforcement agency, to impose conditions or limitations on the exercise of functions under the proposed Act by the enforcement agency.

Clause 120 – Performance of functions by enforcement agencies and authorised officers

Clause 120 enables the CEO to adopt national guidelines prepared by Food Standards Australia New Zealand relating to the exercise of functions under the proposed Act and to require enforcement agencies and authorised officers to adopt those guidelines. The CEO may adopt guidelines with modifications to take account of circumstances that are particular to Western Australia.

Clause 121 – Reports by and about enforcement agencies

Clause 121 requires an enforcement agency to submit reports to the CEO relating to the exercise of functions and proceedings for offences undertaken under the proposed Act. The clause also requires the accountable officer of the department administering the proposed Act to report on the performance of enforcement agencies and the CEO in the annual report required by the *Financial Administration and Audit Act 1985*.

Division 3 - Appointment of authorised officers

Clause 122 – Appointment of authorised officers

Clause 122 enables an enforcement agency to appoint environmental health officers or other suitably qualified persons as authorised officers for the purposes of the proposed Act. The CEO may issue guidelines as to the qualifications and experience that are appropriate for a person to be appointed as an authorised officer.

Clause 123 – Certificates of authority

Clause 123 requires enforcement agencies to provide certificates of authority to authorised officers and requires an authorised officer to produce the certificate if asked to do so in the course of performing functions under the proposed Act.

Division 4 – Advisory committees

Clause 124 – Establishment and functions of advisory committees

Clause 124 enables the Minister to establish advisory committees to assist the CEO in the exercise of his or her functions.

Part 11 – Procedural and evidentiary provisions

Part 11 sets out procedural and evidentiary provisions in relation to offences under the Act.

Clause 125 – Institution of proceedings

Clause 125 provides that proceedings for offences under the proposed Act must be instituted within 12 months of the alleged offence or within 6 months if the proceedings are in respect of a sample of food. The court may extend the time in relation to proceedings that are not in respect of a food sample.

Clause 126 – Infringement notices

Clause 126 enables infringement notices to be issued for prescribed offences under the proposed Act or the regulations and sets out the procedures and requirements in relation to the issuing of infringement notices.

Clause 127 – Offences by employees – liability of employer

Clause 127 makes an employer liable for offences committed under the proposed Act by an employee unless the employer establishes that he or she had no knowledge of the contravention and that he or she could not have prevented the offence by the exercise of due diligence.

Clause 128 – Offences by bodies corporate

Clause 128 deals with offences committed by bodies corporate and makes directors and other

persons concerned in the management of a body corporate liable for an offence committed by the body corporate. It is a defence for a director or other person concerned with the management of a body corporate if it can be proven that the offence was committed without the knowledge or connivance of the person and that the person took all reasonable measures to prevent the commission of the offence, having regard to the person's functions and all of the circumstances surrounding the offence.

Clause 129 – Liability of employees and agents

Clause 129 provides that it is no defence in proceedings for an offence under the proposed Act that the defendant was an employee or agent unless the defendant can show that he or she was under the personal supervision of the proprietor or other person in charge of the food business, place or vehicle concerned in the offence.

Clause 130 – No defence to allege deterioration of sample

Clause 130 provides that it is no defence to an offence under the proposed Act or the regulations to argue that samples taken by authorised officers have deteriorated.

Clause 131 – Onus to prove certain matters on accused person

Clause 131 places the onus of proving the accuracy of certain representations and statements made in connection with food for sale on the defendant in proceedings for offences under the proposed Act or the regulations.

Clause 132 - Presumption

Clause 132 specifies some matters that are to be presumed in proceedings for offences under the proposed Act and the regulations.

Clause 133 – Certificate evidence and evidence of analysis

Clause 133 deals with the evidence of analysts in proceedings for offences under the proposed Act or the regulations.

Clause 134 – Documentary evidence of certain matters

Clause 134 provides that documents purporting to be a copy of any registration, approval, order, notice or authority constitute evidence of that registration, approval, order, notice or authority. A document purporting to be signed by the CEO, certifying certain matters in relation to registration, approval, order, notice or authority, or applications, payment or non-payment of fees or other money also constitutes evidence of the matters contained in the document.

Clause 135 – Power of court to order further analysis

Clause 135 enables a court to order a further analysis where there is disagreement in the evidence of analysts for the parties to proceedings for an offence under the proposed Act or the regulations.

Clause 136 – Disclosure by witnesses

Clause 136 enables a witness for the prosecution or an authorised officer in proceedings for an offence under the proposed Act or the regulations to keep certain information and documents confidential, unless the Court orders the disclosure in the interests of justice.

Clause 137 – Court may order costs and expenses

Clause 137 enables a court, in proceedings for an offence under the proposed Act or the regulations, to award certain costs.

Clause 138 – Court may order forfeiture

Clause 138 enables the Court to order forfeiture of anything that was used in the commission of an offence.

Clause 139 – Court may order corrective advertising

Clause 139 enables a court, in proceedings for an offence under the proposed Act or the regulations, to order corrective advertising. An example of where such an order might be made is where a person is convicted of misleading conduct in relation to the advertising of food.

Part 12 – Miscellaneous

Part 12 provides for miscellaneous items such as fees and charges, review of the Act and regulation making.

Clause 140 – Fees and charges may be imposed and recovered by local governments that are enforcement agencies

Clause 140 enables local government to impose and recover fees and charges in relation to the performance of functions under the Act.

Clause 141 – Protection from liability for wrongdoing

Clause 141 protects certain persons from personal liability in connection with acts done in good faith for the purpose of executing a provision of the proposed Act or any other Act or the regulations. The clause also provides protection from liability for the State in relation to such acts.

Clause 142 – Certain confidential information not to be disclosed

Clause 142 prevents persons from disclosing information obtained in the execution of the proposed Act except in certain circumstances set out in subclause (1). Of note is the ability to disclose information to Food Standards Australia New Zealand or a person enforcing a law of another jurisdiction that corresponds to the proposed Act or other law prescribed by the regulations. This will enable distribution and sharing of information between agencies administering and enforcing food legislation across Australia and where necessary, internationally, where food safety issues are not confined within the borders of Western

Australia.

Clause 143 – Publication of names of offenders

Clause 143 enables the CEO to publish notifications relating to persons convicted of offences under the proposed Act or the regulations. Such notification may only be published within 21 days after the conviction. If an appeal is made against a conviction, a notice must not be published unless a final order has been made confirming the conviction, in which case, notification may only be published within 21 days after the final order is made.

Clause 144 - Regulations

Clause 144 enables regulations to be made prescribing all matters that are required or permitted or are necessary or convenient for giving affect to the proposed Act. While the clause identifies some of the matters that may be the subject of regulations, the matters that may be prescribed by regulation are not limited to those matters set out in the clause.

Subclause (2) requires the Minister to consult with the relevant industry or industry sector before the making of any regulation that imposes a requirement in relation to a food safety program.

Regulations may also be made adopting or incorporating the Food Standards Code. As a signatory to the Food Regulation Agreement of 2002, Western Australia has agreed to do so in the manner specified in subclause (7).

Clause 145 – Temporary emergency regulations modifying the Food Standards Code

Clause 145 enables emergency regulations to be made modifying the Food Standards Code that have effect for no longer than 12 months if the Minister has certified that such a regulation is necessary as it relates to an issue of public health and safety.

Clause 146 – Minister to review and report on Act

Clause 146 is a standard clause for all new legislation. The Minister is to review the operation of the Act five years from its commencement and provide a report of the review to Parliament.

Part 13 – Consequential amendments

Part 13 provides for consequential amendments to the *Health Act 1911* and the *Liquor Licensing Act 1988*.

Clause 147 – Health Act 1911 amended

Clause 147 repeals Part VIII as well as a number of other provisions of the *Health Act 1911*, all of which relate to the regulation of food safety. Minor consequential amendments are also made.

Clause 148 – Liquor Licensing Act 1988 amended

Clause 148 makes consequential amendments to the *Liquor Licensing Act 1988*.

Part 14 – Transitional provisions

Part 14 provides transitional provisions for the introduction of the new Act relating to notification by food businesses and orders made under the *Health Act* prior to the repeals effected by the Bill.

Clause 149 - Definition

Clause 149 defines *commencement day*.

Clause 150 – Interpretation Act 1984 not affected

Clause 150 provides that nothing in the Part affects the terms of the *Interpretation Act 1984*.

Clause 151 – Orders under Health Act 1911 section 246W

Clause 151 provides that emergency orders made under the repealed Part VIII of the *Health Act* continue as if they were emergency orders made under the proposed Act.

Clause 152 – Orders under Health Act 1911 section 246Y

Clause 152 provides that orders made under section 246Y(1) and (2) continue as if they were improvement notices and prohibition notices made under the proposed Act.

Clause 153 – Transitional regulations

Provides for the making of regulations to deal with other transitional matters should the need arise.
