



# ***Food Act 2008***

## **Statutory Review**

### **Report**

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## **Acknowledgement to country**

The Department of Health acknowledges the traditional custodians throughout Western Australia and their continuing connection to the land, waters and community. We pay our respects to all members of the Aboriginal and Torres Strait Islander communities and their cultures, and to Elders past, present and emerging.

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## Glossary of terms and acronyms

Term	Explanation
ALGA	Australian Local Government Association Represents the views of 537 local governments in jurisdictions around Australia. The ALGA is an observer on the Australian New Zealand Ministerial Forum on Food Regulation and is a member of the Food Regulation Standing Committee and the Implementation Subcommittee for Food Regulation.
ANZFSC	Australia New Zealand Food Standards Code All State / Territory legislation adopts or is based on the Australia New Zealand Food Standards Code.
Communities of Practice	An organised group of professional people who share the same interests in resolving an issue, improving skills and learning from each other's experience. <sup>1</sup>
CSIRO	Commonwealth Scientific and Industrial Research Organisation A Commonwealth Government agency responsible for scientific research.
the Department	The Department of Health WA The Western Australian Government department with responsibility for administering the <i>Food Act 2008</i> and emergency powers under the Act.
Department of Agriculture Fisheries and Forestry (formerly Department of Agriculture and Water Resources)	A Commonwealth government department with responsibility for enforcing laws at the borders in relation to imported food.
Food	Has the meaning given by section 9 of the <i>Food Act 2008</i> (WA).
Food business	Section 10 of the <i>Food Act 2008</i> (WA) provides that a food business means a business, enterprise or activity (other than those used in primary food production) that involves the handling of food for sale or the sale of food.

<sup>1</sup> Goncalves, L 2021, *Community of Practice, A Summary for Leaders*:  
<https://adaptmethodology.com/communities-of-practice/> (Accessed: June 22, 2022).

Term	Explanation
FRSC	Food Regulation Standing Committee Members of government departments and agency heads responsible for food regulation in each State and Territory. The FRSC reports to the Australian New Zealand Ministerial Forum on Food Regulation. The Strategic Planning Working Group advises the FRSC.
Food Regulation Agreement 2002 (as amended)	An Agreement between the Commonwealth Government and State and Territory Governments setting out harmonised laws and regulations to ensure food safety.
Food Ministers Forum	Australia and New Zealand Ministerial Forum on Food Regulation. The Forum of Ministers from Australia and New Zealand that sets policy standards. Food Standards Australia New Zealand (FSANZ) is an observer to the Forum. The Food Regulation Standing Committee reports to the Forum.
FSANZ	Food Standards Australia New Zealand An independent statutory authority in the Australian Government Portfolio that develops food standards that become part of food law in Australian States and Territories and in New Zealand. <sup>2</sup> FSANZ is an observer member of the Australian New Zealand Ministerial Forum on Food Regulation.
FSANZ Act	<i>Food Standards Australia New Zealand Act 1991</i> (Cth)
ISFR	Implementation Subcommittee for Food Regulation This subcommittee reports to the Food Regulation Standing Committee. The ISFR is responsible for the implementation and enforcement of food laws through their jurisdiction's legislation. Members are from food regulation authorities in Australia and New Zealand. ALGA is a member of ISFR.
Intergovernmental agreement	Any agreement made between the Commonwealth and State and Territory governments. While IGAs are not legally binding, they express the commitment of

<sup>2</sup> Food Regulation Secretariat 2016, *Food Regulation System Overview*, available at: <https://foodregulation.gov.au/internet/fr/publishing.nsf/Content/system-overview-1> (Accessed: June 22, 2022).

Term	Explanation
	governments to work together on certain objectives or goals.
LG	Local government.
Local Government Professionals (WA)	Local Government Professionals in Western Australia represents local government Chief Executive Officers and senior executives in Western Australia.
Partners in Government Agreement 2021	An agreement that updates the State Local Government Agreement 2017 and applies to Western Australia.
RFSA	Registered Food Safety Auditors (under the Act)
Regulatory Guideline Number 4	Food Act 2008 Regulatory Guideline No 4 Application of section 8 of the Food Act 2008 – Approach to be adopted by the Department of health in regards to export activities – Prescribed Goods For Export.
the Review	The statutory review of the <i>Food Act 2008</i> (WA) as required under section 146 of the Act.
Strategic Planning Working Group	A national committee that advises the Food Regulation Standing Committee.
SLG Partnership Agreement	State Local Government Partnership Agreement 2017. An agreement between the State Government and local governments on collaboration and consultation between the sectors on a range of matters including setting priorities for engagement. This agreement was replaced by the Partners in Government Agreement 2021.
Uniform Legislation	An Act that is adopted or mirrored by all States and Territories.
WALGA	The Western Australia Local Government Association An independent member-based not for profit agency representing and supporting the local government sector in WA. WALGA is a member of the Australian Local Government Association.

## Terms of reference

The terms of reference for the Review of the *Food Act 2008* (WA) are to:

1. Examine the operation and effectiveness of the Act in meeting its Objects to:
  - a) ensure food for sale is both safe and suitable for human consumption
  - b) prevent misleading conduct in connection with the sale of food
  - c) provide for the application in this State of the Food Standards Code.
2. Identify, including through analysis of stakeholder submissions, any issues with the operation and effectiveness of the Act, including:

- interpretation	- taking and analysis of samples
- offences related to food	- auditing
- emergency powers	- registration of food businesses
- powers of entry	- administration
- inspection and seizure	- procedural and evidentiary provisions
- improvement notices and prohibition orders	- any other relevant matter.
3. Make recommendations that will:
  - strengthen and support the Objects of the Act being met; and
  - promote greater regulatory effectiveness.



## 1. Executive summary

1.1 The regulation of consumer food safety is a priority activity for all levels of government in Australia.

1.2 All States and Territories have enacted legislation for food safety regulation. The *Food Act 2008* (WA) (the Act) is a uniform Act that harmonises a nationally consistent approach to food safety regulation. The Act is a result of an intergovernmental agreement (the Food Regulation Agreement 2002 (as amended)) incorporating Model Food Provisions in Annex A and Annex B between the Commonwealth Government and the States and Territories. The Western Australian Department of Health (the Department) administers the Act with local government authorities sharing a key regulatory compliance and enforcement role with the day-to-day operation of the Act.

1.3 Section 146 of the Act requires the Minister to carry out a review of the operation and effectiveness of the Act and prepare a report for tabling before both Houses of the Parliament. Under the Act, a review is required, as soon as practicable, five years after the Act commenced.

1.4 The former Minister for Health, Hon Roger Cook MLA, announced the terms of reference and commencement of the public consultation period for the statutory review of the Act on 1 December 2021. The consultation period was extended to five months and closed on 5 May 2022.

1.5 In the spirit of cooperation and alignment with the intent and purpose of the Food Regulation Agreement 2002 (as amended), Western Australia (WA) exercises a strong engagement and consultation with Commonwealth, State and Territory agencies regulating food safety. Local Government is represented at the National level by the Australian Local Government Association. Any proposed amendments arising from the statutory review of the Act to any section that aligns with the Model Food Provisions (Annex A) will require consultation and agreement with the national bodies with oversight for food regulation in relation to the Model Food Provisions.

1.6 The Department is cognisant of the Commonwealth Government's strategic direction to 'create a new foundational document to underpin the food regulatory system'.<sup>3</sup>

1.7 The Department is closely engaged with and represented on national forums with oversight for the national policy on food regulation. The Health Minister for WA is a member of the Australian New Zealand Ministerial Forum on Food Regulation (Food Ministers Forum). The Department acknowledges the current work program of the Commonwealth Department of Health and its 'ambitious plan to reform the Bi-national Food Regulation System with New Zealand'<sup>4</sup> that includes the *Review of the Food*

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<sup>3</sup> Food Regulation Secretariat 2016, *Modernisation of the food regulation system*, available at: <https://foodregulation.gov.au/internet/fr/publishing.nsf/Content/Modernisation-of-the-food-regulation-system>. (Accessed: May 17, 2022).

<sup>4</sup> Australian Government Department of Health and Aged Care, *Public Consultation - Review of the Food Standards Australia New Zealand Act 1991 – draft Regulatory Impact Statement*, available at: <https://consultations.health.gov.au/chronic-disease-and-food-policy-branch/fsanz-act-review-draft-ris/> (Accessed: May 19, 2022).

*Standards Australia New Zealand Act 1991*, the *Review of the Food Regulation Agreement*, the *Jurisdictional Consistency Project*, and the *Review of the Operations of the Food Regulation System*. National food regulation priorities for 2017 to 2021 are to reduce foodborne illnesses, supporting public health objectives to reduce chronic disease related to overweight and obesity and to maintain a strong, robust and agile food regulation system.<sup>5</sup>

1.8 The statutory review of the Act (the Review) does not include matters being reviewed by the Commonwealth Government and does not capture documents outside the Parts of the Act, including any external documents such as the Australian Standards, guidelines or policies.

1.9 The Review considers the views of a wide range of stakeholders that responded to the survey or made a submission to the Review. These respondents and submitters include retailers, food businesses, academics, member charities, research institutes, communities of practice, local government regulators, the public and other stakeholders in food safety regulation. Based on these views, it also assesses which provisions of the Act are working well and those that may not be meeting the Objects of the Act.

1.10 This report is not intended to represent a comprehensive account of all respondent content nor does it provide commentary on the viability of changes suggested by respondents in their submissions.

1.11 The views expressed in this report include those of the individuals, retailers, professionals, Local Government Councils, food businesses and organisations who made submissions. Inclusion of these views in this report does not imply any acceptance of, or agreement with these views by the Department or the Government of Western Australia.

Appreciation and thanks are extended to those organisations and individuals who contributed a submission.

1.12 Based on the sixty-one (61) submissions received, the overall view of respondents is that the Act and regulations were generally working well and offer effective tools for regulation, compliance and enforcement.

1.13 The following provisions were considered by respondents as effective and meeting the purposes for which they were intended, namely, to regulate:

- offences relating to food, specifically section 22 of the Act that sets out compliance with the ANZFS
- enforcement provisions under Part 6 of the Act, including improvement notices, prohibition orders and penalties generally
- the taking and analysis of samples under Part 7
- auditing of food businesses under Part 8; and

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<sup>5</sup> Food Regulation Secretariat 2016, *Modernisation of the food regulation system*, available at: <https://foodregulation.gov.au/internet/fr/publishing.nsf/Content/Modernisation-of-the-food-regulation-system>. (Accessed: May 17, 2022).

- matters relating to the procedural and evidentiary provisions (section 126 infringement notices).

1.14 Respondent submissions made the following suggestions on how they believed the Act might be clarified, improved and/or strengthened. These are outlined further throughout the report.

- amend the scope of the Objects of the Act to include the preventative health benefits associated with healthy nutrition and diet, and chronic disease prevention
- review the definitions of 'sell' and 'food business', with consideration given to including third party delivery services as food businesses to allow for their oversight and regulation
- review the definition of unsafe foods and amend it to include a reference to allergens
- clarify the powers of entry, inspection and seizure, having regard to the impact that such powers have on both food businesses and the regulator
- clarify the powers of entry for authorised officers into residential or domestic food businesses
- clarify the provisions under self-incrimination and the admissibility of evidence
- amend the provisions relating to prohibition orders, specifically section 67(3) relating to re-inspection following the issue of a prohibition order and consider increasing time frames
- review the requirements for registration under section 107 and section 110, and whether to unify or simplify the notification and registration process for local government
- clarify the provisions under section 110 on whether there is an ability to refuse registration for non-compliance with a provision of the ANZFSO or the Act
- review approved forms under section 110 to standardise the certificate of registration format
- consider the registration of mobile food vendors
- review the requirements under section 110 in relation to the registration of community/fundraiser events where people cook at home to supply fetes/fairs
- consider amendment of section 111 to enable the specification of expiration dates upon certificates of registration
- consider whether section 112 enables the cancellation of registration for repeat non-compliance
- clarify the requirements of section 112, in particular if a registration can be cancelled for non-payment of fees.

- In relation to section 120 of the Act, correct the inconsistency between Food Regulations 2009 and the adopted guidelines.

1.15 The Review has identified a clear need to improve information to local government authorities, food businesses and retailers on the powers of the Act. Policy considerations such as food labelling of new plant protein products and the representation of plant-based products as meat alternatives are areas that require further monitoring and discussion.

## Findings

1. Submissions support the finding that the Act is generally working well in Parts 3, 6, 7, 8 and 11.
2. Issues identified with administering the Act relate to the systems that support Part 9 - Registration of food businesses and Part 5 – Powers of entry, inspection and seizure, specifically section 38 (powers of authorised officers) and section 39 (self-incrimination not an excuse).
3. Further work is required to provide and update information and guidance to stakeholders relating to registration of food businesses, the powers of authorised officers, and other matters that relate to policy or procedural considerations raised in submissions.
4. Whilst no amendment of the Act is required to section 120, there is a need to correct the inconsistency between the regulations and the adopted guidelines.

## Recommendations

Having regard to these findings in relation to the Act's operation and effectiveness, the ongoing implementation and administration of the Act can be enhanced by the Department addressing issues raised in submissions through the following mechanisms:

### **Recommendation 1**

Continue consultation with stakeholders at all levels of government on suggested improvements to the Act and engage with the sector on policy responses to emerging issues for discussion at the relevant national policy forums.

### **Recommendation 2**

Correct the inconsistency between the regulations and Regulatory Guideline Number 4.

### **Recommendation 3**

Review approved forms under the Act, with consideration given to establishing consistency in minimum information provided on Certificates of Registration under section 110(6).

#### **Recommendation 4**

Continue to develop and promote the use of a central register for mobile food businesses, with register accessibility for all enforcement agencies as a priority.

#### **Recommendation 5**

Provide guidance material for local government on the following sections of the Act:

- section 38 pertaining to power of entry into residential premises.
- section 110(5) pertaining to grounds for refusal of registration.
- cancellation of registration issued under section 110 for non-payment of annual registration fees levied under the *Local Government Act 1995*.
- clarify the notification and registration provisions of Part 9 to reduce the administrative burden upon local government and food businesses.

## 2 Introduction

2.1 The Act was enacted in Western Australia (WA) as part of a nationally consistent approach to food safety regulation that resulted from recommendations made by the Food Regulation Review Committee chaired by Dr Bill Blair OAM in their *Report of the Food Regulation Review 1998*.

2.2 The Objects of the Act are to:

- ensure food for sale is both safe and suitable for human consumption
- prevent misleading conduct in connection with the sale of food
- provide for the application of the Australia New Zealand Food Standards Code in Western Australia (ANZFSC).

2.3 Western Australia is a signatory to the Food Regulation Agreement 2002 (as amended) – an agreement between the Commonwealth, States and Territories to harmonise food safety regulation. New Zealand is a signatory to a bilateral agreement with Australia on food safety regulation.

2.4 As a uniform Act and as required under the Food Regulation Agreement 2002 (as amended), the Act adopts wording in the same terms as provisions in Annex A of the Model Food Provisions. The equivalent legislation of other signatory States and Territories does the same. However, under the Food Regulation Agreement 2002 (as amended), the equivalent legislation of signatory States and Territories may adopt provisions from Annex B of the Model Food Provisions to take into account their varying local arrangements. Equivalent legislation is therefore not identical across all jurisdictions. In WA, local government councils play a key regulatory and enforcement role.

2.5 Section 146 of the Act requires the Minister to review the operation and effectiveness of the Act and prepare a report for tabling in the Parliament. Under the Act, a review is required, as soon as practicable, five years after the Act commenced.

2.6 A statutory review provides the opportunity to consider and report on whether the provisions of the Act are meeting its purpose and whether amendments are required to strengthen or improve its effectiveness.

2.7 On 1 December 2021 the former Minister for Health, Hon Roger Cook MLA, announced the Review and invited submissions from a diverse range of stakeholders (**Appendix 1**).

2.8 The management of consumer food safety is a priority for all jurisdictions, and Food Acts operating in some jurisdictions have been subject to review at various times.

2.9 In July 2020 the Commonwealth Government also announced the Review of the *Food Standards Australia New Zealand Act 1991* (Cth) (FSANZ Act). The Commonwealth review involves a ‘comprehensive examination of the effectiveness of

the FSANZ Act and associated operations and responsibilities of Food Standards Australia New Zealand'.<sup>6</sup>

The Review does not consider submissions captured under the review of the FSANZ Act or matters under other Commonwealth reviews currently underway, such as the *Review of the Food Regulation Agreement*, the *Jurisdictional Consistency Project* and the *Review of the Operations of the Food Regulation System*.<sup>7</sup>

The Department is represented on national forums, and the Western Australian Minister for Health is a member of the Food Ministers Forum. The Food Ministers Forum develops policy guidelines that FSANZ must have regard to when setting food standards, promotes harmonised standards between Australia and New Zealand, has general oversight of the implementation of standards, and promotes consistent approaches to compliance and enforcement by jurisdictions.<sup>8</sup> FSANZ gazettes the ANZFSC, which is registered as a legislative standard.

There is considerable activity at the national level to review and improve the system of food regulation in Australia. Local Government are represented at these forums at the national level. A summary of the national forums for food safety regulation is provided in **Appendix 2**.

## Audits on the regulation of food safety in WA

2.10 In June 2020 the Auditor General tabled their report titled *Regulation of Consumer Food Safety by Local Government Entities*.<sup>10</sup>

2.11 Focusing on a sample of metropolitan and regional local government entities, the audit assessed if they regulated consumer food safety effectively in food businesses in their local areas and enforced compliance with food safety legislation and the ANZFSC. It did not attempt to detect non-compliance in food businesses.

2.12 The Auditor General's report made five recommendations for implementation by local government entities. These recommendations included making improvements to record keeping for food business inspections, prioritising food business inspections according to their risk classification, and developing procedures to ensure non-compliant businesses are followed up and standards enforced in a consistent and timely manner. The audit also recommended that local government work with the Department in the development and implementation of new electronic food safety inspection and record keeping systems. All audited entities were required to prepare an action plan addressing 'significant matters relevant to their entity for submission to the Minister for Local Government within 3 months of the report being tabled'.<sup>9</sup>

2.13 This Review does not include matters already covered by the 2020 Auditor General's report or the program of improvement undertaken by those audited local government entities.

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<sup>6</sup> Food Regulation Secretariat 2016, *Modernisation of the food regulation system*, available at: <https://foodregulation.gov.au/internet/fr/publishing.nsf/Content/Modernisation-of-the-food-regulation-system>. (Accessed: May 17, 2022).

<sup>7</sup> *ibid.*

<sup>8</sup> Food Standards Australia New Zealand 2021, *The Food Ministers Meeting*, <https://www.foodstandards.gov.au/code/fofr/Pages/default.aspx>. (Accessed: May 18, 2022).

<sup>9</sup> Office of the Auditor General 2020, *Regulation of Consumer Food Safety by Local Government Entities*, OAG, Perth.



2.14 In April 2021 the Auditor General tabled another report that examined the regulation of consumer food safety by the Department. This audit assessed whether the Department effectively regulates consumer food safety in food businesses, focussing on the Department's inspection and enforcement processes, support to local government entities, and monitoring and reporting of regulation activities.<sup>10</sup> The Auditor General's report noted that the Department had not reviewed the operation and effectiveness of the Act since 2008.<sup>11</sup>

2.15 The Department notes the findings and supports all recommendations made by the Auditor General in both reports and, as part of the Department's commitment to continuous improvement, is actively engaged in identifying and responding to risks to food safety alongside national counterparts in food regulation.

### 3 Background to the *Food Act 2008 WA*

3.1 The Act adopts the Model Food Provisions contained in Annex A that were agreed by the Commonwealth, State and Territories in the Food Regulation Agreement 2002 (as amended) in relation to significant offences regarding food, definitions of key terms and emergency powers. The Act was designed to provide a new risk-based performance and outcomes approach to the regulation of food for human consumption, rather than the previous prescriptive approach. The Act also sought to provide robust enforcement tools to protect WA's food chain from 'paddock to plate'.

3.2 Variations to Annex B of the Model Food Provisions are permitted between the jurisdictions to accommodate issues such as applicable administrative and procedural/evidentiary requirements.

3.3 The Act is uniform legislation. Annex A of the Model Food Provisions harmonises legislation across all jurisdictions, allowing for a nationally consistent performance and outcome focussed approach.

3.4 Proposals to amend provisions of the Act that are based on substantive provisions of the Model Food Provisions Annex A require consultation at the national level with other States and Territories who are parties to the Agreement.<sup>12</sup>

3.5 The Act was proclaimed in WA in 2009. The Explanatory Memorandum introduced the legislation as a '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 of 2002'.<sup>13</sup>

3.6 The Act was intended to:

- a) repeal Part VIII of the *Health Act 1911* and other parts of the Act that regulated food

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<sup>10</sup> Office of the Auditor General 2021, *Regulation of Consumer Food Safety by the Department of Health*, OAG, page 5, Perth.

<sup>11</sup> *ibid.*

<sup>12</sup> Council of Australian Governments 2008, *Food Regulation Agreement* Part 7, <https://www.foodstandards.gov.au/about/foodlawandtreaties/documents/311%20Food%20Regulation%20Agreement%202008.pdf> (Accessed: May 10, 2022).

<sup>13</sup> Government of Western Australia 2005, *Food Bill 2005 Explanatory Memorandum*.



- b) provide consistency with other Australian jurisdictions in the interpretation and application of the ANFSC
- c) provide strong emergency and recall powers in relation to food that presents a risk to public health
- d) allow 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) provide for more significant penalties, reflecting the seriousness of a failure to provide safe food
- f) continue the dual responsibility of State and local government for the administration of food regulation
- g) contain comprehensive investigation and enforcement provisions
- h) enable 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) enable the requirement for food safety programs for high-risk food businesses and the auditing of those programs
- j) contain requirements for food businesses to provide government with information that will enable improved monitoring of the safety of Western Australia's food; and
- k) provide for procedural fairness in relation to significant decisions made under the Act.<sup>14</sup>

3.7 The registration and notification of food premises came into operation five months after proclamation to 'allow local governments and industry time to put registration and notification systems in place'.<sup>15</sup>

3.8 The commencement dates for provisions relating to auditing and food safety were dependent upon the making of necessary rules and regulations, the identification of competency criteria and providing the industry enough time to obtain relevant qualifications. The Department delivered a series of information forums state-wide for local government and State Government authorities as part of the transition to the new scheme.

3.9 The Act adopts the ANZFSC in full, which means that when a change is made to the ANZFSC by FSANZ, the amendment is applicable immediately in WA once gazetted in the Federal Register of legislation.

3.10 In WA, the Act is administered by the Department and enforced by local government councils and by the Department in certain high-risk food sectors.

Under the Act, the Environmental Health Directorate's Food Unit performs the following functions:

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<sup>14</sup> *ibid.*

<sup>15</sup> *ibid.*

- coordinates all food recalls
- initiates mandatory food recalls
- investigates food borne illnesses outbreaks
- is the appropriate enforcement agency for:
  - patient catering within public hospitals
  - dairy primary production, processing and transportation businesses
  - primary production and manufacturing of bivalve molluscs,
  - food business not in a local government district (such as Rottnest Island and Kings Park)
- investigates complaints and undertakes registration, inspection, assessment, and auditing of the food business types above
- is the controlling authority for meat primary production, processing and transportation businesses
- provides information and publications on matters relating to the Act.

3.11 The Department may exercise emergency powers provisions under the Act. There has not been a need to exercise these provisions since the commencement of the Act.

3.12 For the purposes of the Review, the Food Unit provided a summary of emerging matters in food regulation policy highlighting areas of Commonwealth activity.

3.13 One hundred and thirty-seven (137) local government councils are authorised under the Act to deal with matters relating to the:

- production and preparation of food for sale
- sale and service of food
- registration of food businesses
- verification of food safety programs
- inspection and assessment of food businesses
- investigation of complaints about food businesses or products (suspected food borne illness, contamination of food, labelling, undeclared food allergens, advertising and composition of food)
- issuing improvement notices, prohibition orders, and undertaking prosecutions for breaches of the Act
- sampling of food for analyses.

3.14 Local government councils play a key role in the enforcement of key provisions of the Act. Environmental health officers are required to meet the training,

qualifications and competency in food safety regulation contained in Guidelines issued by the CEO of the Department.

## 4 Our consultation

4.1 The State Local Government Partnership Agreement 2017<sup>16</sup> (SLG Partnership Agreement) sets out common goals, aspirations, and processes for engagement between the state and local government sectors and required members to meet yearly to discuss matters of importance to both sectors.

4.2 The signatories to the SLG Partnership Agreement included the:

- Premier of Western Australia, Hon Mark McGowan MLA
- Minister for Local Government
- President of the Western Australian Local Government Association (WALGA)
- President of the Local Government Professionals Australia (WA).

The principles of community engagement and the consultation requirements underpinning the 2017 Agreement are reflected in the Environmental Health Directorate's *Customer Service and Stakeholder Engagement Charter* that provides for a twelve-week community consultation period with local government on primary legislation.

4.3 The SLG Partnership Agreement was updated in 2021. The new Agreement is known as the *Partners in Government Agreement*.<sup>17</sup> The signatories to the Partners in Government Agreement are the Minister for Local Government, the President of WALGA and the President of Local Government Professionals WA. Whilst the Partners in Government Agreement no longer prescribes any defined consultation period, the consultation period was extended to five months to allow sufficient time for all respondents to complete their submissions.

4.4 The Department recognises the key role of local government councils as co-regulators in food regulation in WA and as members of policy forums at the national level. The consultation process, extended timeframe and methodology used in the Review was designed to elicit council endorsed views and observations on the Act that were relevant to their experience of regulation.

4.5 The consultation phase of the Review included the publication of an advertisement in *The West Australian Newspaper* on 1 December 2021 and a website page publicising the terms of reference. Links were provided to an information/promotional video and the consultation paper. Articles on the Review were published by Local Government Professionals, and in WALGA's *Community and Place*

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<sup>16</sup> *State and Local Government Partnership Agreement August 2017*, 2017, available at: <https://walga.asn.au/getattachment/News,-Events-and-Publications/Media/Community-Voice-in-Partnership-Agreement/state-and-LG-partnership-agreement.pdf.aspx?lang=en-AU>. (Accessed: May 10, 2022).

<sup>17</sup> *Partners in Government Agreement*, 2021, available at: [https://walga.asn.au/WalgaWebsite/media/WALGA\\_Media/Documents/Partners-in-Government-Agreement-September-2021.pdf](https://walga.asn.au/WalgaWebsite/media/WALGA_Media/Documents/Partners-in-Government-Agreement-September-2021.pdf) (Accessed: May 10, 2022).

*newsletter*, Environmental Health e-news, and the Department's *Health Happenings* newsletter and Twitter account.

4.6 Peak stakeholder groups such as WALGA and Local Government Professionals (WA), retailers, industry/professional groups and communities of practice, 137 local governments, the legal fraternity, academia, scientific communities, including food specialists (food safety auditors) and the Department's Food Unit were directly invited to make a submission.

4.7 From 1 December 2021 to 5 May 2022, the Department's website page on the Review recorded 1,159 views and 545 YouTube Views.

4.8 In line with previous approaches taken by the Department to canvas a wide range of views and a narrative response, the online links to the Citizen Space survey called for responses to two key questions:

- What is working well with the Act?
- What, if any, changes should be made to the Act?

Respondents were asked for evidence in support of any recommended changes to the Act.

4.9 Anonymous submissions were not accepted. Respondents were required to indicate whether their submission was being made in an individual capacity or on behalf of an organisation. They were also able to indicate a preference for whether their comments should be treated confidentially – noting that submissions may be subject to release under the *Freedom of Information Act 1992* (WA).

This report is not intended to represent a comprehensive account of all respondent content, nor does it provide commentary on the viability of all changes suggested by respondents in their submissions. The views expressed in this report includes those of the individuals, retailers, professionals, Local Government Councils, food businesses and organisations who made submissions. Inclusion of these views in this report does not imply any acceptance of, or agreement with, these views by the Department or the Government of Western Australia.

4.10 The Review secretariat received 61 submissions.

Respondent categories	Number of submissions
Practitioners Includes individual environmental health practitioner, local government officers, registered food safety auditors	26
Member of the public	9
Institute / Professional association	9
Local government council	7
State Government	6
Food business / industry	2
Other	2
<b>Total</b>	<b>61</b>

**Table 1 – Respondent categories**

## Out of scope

4.11 Some submissions were not (partially or fully) accepted for the following reasons:

1. The submissions were made anonymously.
2. Parts of the submission commented on matters that lay outside the scope of the Review or were being considered under national reviews.

## Structure of the report

4.12 The report is structured to consider only those sections of the Act that were the subject of respondent commentary or suggestions, including proposed amendments. Sections of the Act that did not attract submissions are not considered. The final section of the report summarises the provisions of the Act that are working well and those provisions where clarification or amendment have been suggested. The report concludes with recommendations based on the Review's findings that are designed to improve the operation and effectiveness of the Act.

## Objects of the Act

4.13 The Objects of the Act, as set out in Part 1, are to:

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

The Food Regulation Agreement 2002 (as amended) obliges signatory States and Territories to enact legislation on the same terms as set out in Annex A (contained in the Model Food Provisions), and on terms consistent with Annex B as relevant to their local circumstances. The Objects of the Act derive from Annex A of the Model Food Provision which forms part of the Food Regulation Agreement 2002 (as amended).

4.14 If a provision of the Act derives from Annex A, it cannot be amended in the absence of agreement by the Commonwealth, States and Territories.

4.15 Cancer Council WA proposed broadening the scope of the Objects of the Act to include the promotion of long term/preventative health approaches that would improve public health outcomes generally.

Given that the food regulatory system is a key determinant to Australia's diet and public health; the promotion and protection of public health as a key principle and objective, needs to be integrated within the Food Act.<sup>18</sup>

With strong and consistent evidence of the leading contribution poor diet and overweight and obesity has on preventable deaths and disease, food standards and regulations need to adapt from their historical roles to ensure the safety and suitability of food for human consumption, to encompass the adequacy of food in promoting and protecting public health. Cancer Council WA

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<sup>18</sup> Cancer Council WA submission.

recommends that this be reflected in updating the objects of the Food Act to encompass the promotion and protection of public health, with definition in line with Public Health Act 2016 (WA).<sup>19</sup>

4.16 The Act has a role in the protection of public health by ‘ensuring food for sale is both safe and suitable for human consumption’, and through the adoption of the ANZFS. The protection of public health and the provision of adequate information relating to food to enable consumers to make informed choices are Objects of the Food Standards Australia New Zealand Act 1981 (Cth). The ANZFS has been developed with these Objects in mind and is administered in WA through the Act.

The expansion of the Objects to encompass broader public health initiatives would require national agreement.

### Definition of ‘sell’

4.17 Section 8 (of Part 2) defines the terms used in the Act. The definition of ‘sell’ in the Act mirrors the definition in Annex A of the Model Food Provisions, and changes to this term would require endorsement under the National Agreement.

4.18 Several submissions suggested that the definition of sell should be amended to capture additional activities that include third-party food delivery services (for example, Uber Eats, Menulog and DoorDash). These are exemplified by the following:

WALGA recommends the management and regulation of online food ordering and delivery platforms should be considered by the review.<sup>20</sup>

Consideration should be given towards regulating these activities (delivered meals organisations), given that they are involved in the transportation and handling of high-risk foods to customers.<sup>21</sup>

4.19 The regulation of third-party delivery platforms was raised at the national level by the ISFR and it was decided at this forum that these types of businesses do not require registration. The main reasons for this decision were:

- the sale of food occurred at the restaurant and the customer was arranging for the delivery of the meal
- food safety risks were very minimal, if any
- the food was ready to eat and for immediate consumption
- no benefits could be identified by registering these types of activities.

4.20 Several submissions suggested expanding the definition of sell to include charitable organisations that give away food to populations in need. The Review recognises food safety is a relevant consideration for people accessing soup kitchen and charitable food services. The Review further acknowledges that any administrative burden imposed upon charitable organisations by such inclusion needs to be considered and reduced.

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<sup>19</sup> *ibid.*

<sup>20</sup> Western Australian Local Government Association submission.

<sup>21</sup> City of Bayswater submission.

## Definition of ‘food’

4.21 ‘Food’ is defined at section 9 of the Act to include any substance or thing of a kind used for human consumption, and may include live animals or plants, chewing gum, or any substance or thing declared to be a food under a declaration in force under section 6 of the FSANZ Act. However, food does not include therapeutic goods within the meaning of the *Therapeutic Goods Act 1989* (Cth).

4.22 The definition of food is provided at Annex A of the Model Food Provisions which forms part of the Food Regulation Agreement 2002 (as amended). Any changes to these provisions of the Act requires agreement of the Commonwealth, States and Territories.

4.23 The submission from Australia’s National Science Agency, the Commonwealth Scientific and Industrial Research Organisation (CSIRO), identified the emergence of new food technologies such as sustainable plant-based alternatives to meat.

4.24 The CSIRO submission supports the continued use of functionality labels traditionally ascribed to food products that were required to satisfy meat based compositional requirements, such as ‘cauliflower ‘steaks’ or ‘bean ‘patties’. The CSIRO submission does not support the view that such labelling is misleading.

4.25 The degree to which functionality labels on plant based and cultured protein food products might be considered misleading was a matter subject to a Senate inquiry undertaken by the Rural and Regional Affairs and Transport Legislation Committee. The Committee released its report entitled, *‘Don’t mince words: definitions of meat and other animal products’* in February 2022.

4.26 This issue is currently being addressed as a Standards labelling issue and will be addressed by FSANZ via amendment to the ANZFSC, if and where necessary.

4.27 The Department is awaiting the Commonwealth Government response to this inquiry.

## Definition of ‘food business’

4.28 Section 10 of the Act provides the meaning of food business as:

a business, enterprise or activity (other than those used in primary food production) that involves –

(a) the handling of food intended for sale; or

(b) 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.

4.29 This definition of food business is as defined in Annex A of the Model Food Provisions which forms part of the Food Regulation Agreement 2002 (as amended). Any changes to these provisions of the Act require agreement of the Commonwealth, States and Territories.

4.30 Under Regulation 10 of the Food Regulations 2009, charitable food businesses are currently exempt from registration if any food handled is not potentially hazardous



food, or after being appropriately cooked is provided by the charity for immediate consumption. Charitable food businesses are still required, however, to comply with ANZFSO and are therefore subject to regulatory oversight. Several submissions raised the issue that charities providing free food (without associated fundraising initiatives) are not 'food businesses' and are not subject to any food safety oversight by regulatory bodies.

4.31 One submission by an environmental health officer suggested that the wording of 'food business registration certificate' be replaced with the wording 'food licence' and that the term 'food business' be amended to 'food premises' to align with the ANZFSO.

4.32 FSANZ has proposed to remove all interpretations and notification requirements from the ANZFSO that appear in the Model Food Provisions and the Act. It should be noted that the ANZFSO uses both 'food business' (when referring to a business requirement) and 'food premises' (when referring to a premises requirement).

### Food that is unsafe

4.33 For the purposes of the Act (under section 12) food is considered unsafe if it would be likely to cause physical harm to a person who consumes it, assuming that before being consumed, it was subject to all processes relevant to its reasonable intended use. 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.

4.34 A number of submissions from individual environmental health officers suggested that the definition of the term 'unsafe food' needs clarifying as the current definition of 'unsafe' under section 12(2) makes it difficult for an enforcement agency to respond appropriately to the continued risk presented by food allergies. The issue raised in these submissions relates to the wording of section 12(2) that currently excludes consideration of food allergens from the definition of unsafe. It was suggested that food containing undeclared allergens should be considered unsafe, or food that is declared as 'not containing allergens' should be considered unsafe if it does contain allergens.

4.35 Advocacy groups recommended changes to clarify that food with an undeclared allergen should be captured within the definition of unsafe. Allergy and Anaphylaxis Australia submitted that:

For persons with food allergies, the definition of 'unsafe' does not apply. In consequence, all the provisions in both the Act and the Food Standards Code directly and specifically addressing the 'safety' of food, have no application to protecting the health of persons having a food allergy, or requiring the food industry generally, through to food service to consumers, to take measures to ensure that consumers with a food allergy are



afforded the same level of protection as is available with respect to food poisoning.<sup>22</sup>

4.36 The term 'unsafe' is defined in Annex A of the Model Food Provisions which forms part of the Food Regulation Agreement 2002 (as amended). Any changes to these provisions of the Act requires agreement of the Commonwealth, States and Territories.

4.37 The labelling requirement for food allergens are specified in the ANZFSC, which is adopted under Part 3, section 22 of the Act.

### Offences relating to food

4.38 Offences under Part 3 of the Act include:

- handling food in an unsafe manner (section 14)
- false description of food (section 16)
- handling and sale of unsuitable food (section 18)
- sale of food not complying with purchaser's demand (section 20)
- compliance with the Food Standards Code (section 22)
- sale of unsafe food (section 15)
- handling and sale of unsafe food (section 17)
- misleading conduct relating to sale of food (section 19)
- sale of unfit equipment or packaging or labelling material (section 21)

4.39 Several submissions identified section 22, which adopts the ANZFSC as being highly effective.

4.40 Part 3 provides the offence provisions and penalties under the Act (sections 14 to 24). The penalty provisions (depending on the offence) range from \$40,000 to \$100,000 and imprisonment for 2 years for an individual or \$200,000 to \$500,000 for a body corporate.

4.41 Part 3 was consistently identified by respondents as a section of the Act that had been working well. This is exemplified by the following comment from the City of Stirling:

The outcome-based legislation and link to the national food standards provides flexibility and also ensures greater consistency. Specifically the following areas are considered to be working well: enforcement options available to manage non-compliances, enables local government authorities to take a graduated and proportionate response with consideration to the severity of offences. [The Act] has significant penalties for serious offences with greater penalties to larger corporations and repeat offenders.<sup>23</sup>

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<sup>22</sup> Allergy and Anaphylaxis Australia submission.

<sup>23</sup> City of Stirling submission.

4.42 Overall, most submissions from those environmental health officers with local government experience valued the range of existing enforcement provisions available to them.

4.43 In relation to suitability of penalties under the Act, the Shire of Narrogin recommended updating the Act by increasing penalties by 25 per cent for individuals and corporations, including modified penalties, to provide additional compliance incentive. The Shire's recommendation would require national agreement under the Model Food Provisions.

4.44 One agency's submission identified the issue of variable alcoholic content of fermented beverages including kombucha and water-based kefir.

4.45 The ANZFSC stipulates labelling requirements applicable to:

- beverages that contain 0.5%–1.15% alcohol by volume
- alcoholic beverages that contain 1.15% or less alcohol by volume, and
- food (including alcoholic beverages) that contain more than 1.15% alcohol by volume.

The Act adopts the ANZFSC and has significant penalties for breaches of the ANZFSC and for false descriptions of food which include fines for an individual of up to \$100,000 and two (2) years imprisonment, and fines for a body corporate of up to \$500,000.

### Powers of entry, inspection, seizure

4.46 Part 5 (subject to section 4(2) – Application of the Act to primary food production) provides for the powers of authorised officers who may be required to ensure compliance with the Act, namely the power of entry, inspection and seizure. Section 4 of the Act reads as follows:

- (1) Parts 6, 8 and 9 do not apply to or in respect of primary food production.
- (2) The functions conferred on authorised officers by Parts 5 and 7 may be performed in respect of primary food production only —
  - (a) to enable the investigation and prosecution of offences against this Act;
  - or
  - (b) in connection with making or enforcing emergency orders

4.47 Section 38 provides powers for authorised officers (alone or with police officers) to enter and inspect any premises or food transport vehicles, examine any food intended for sale, open and examine packages, take samples, examine records, stop and detain vehicles, open containers, take photographs and measurements, and require a person to provide information including their name and address. This section does not authorise entry into any part of residential premises being used solely for residential purposes except with a warrant or permission from the owner or if that part of the premises is being used for the preparation or service of meals provided with paid accommodation. The exercise of these powers must be reasonable under the circumstances.

4.48 Section 38(2) of the Act is designed to address situations where there is a food business such as a shop with a residence attached at the side or above in which the owner of the shop lives. Home-based food businesses would be excluded from this

provision as the food business is operating in the residence and the residence is not being used solely for residential purposes.

4.49 Environmental Health Australia (WA Division) queried the powers under the Act in relation to an environmental health officer's entry into home-based food businesses. For example, it is unclear as to whether the powers of entry could be exercised if an authorised officer were to investigate a matter at a home-based food business. The concerns with this section pertain to whether the proprietor of a home-based food business could refuse entry of an authorised officer on the grounds that the business is not actively engaged in food production at the time of inspection, and that any enforcement action may be invalidated if an authorised officer does not gain formal consent for entry to a home-based food business.

4.50 In relation to this matter, Environmental Health Australia WA recommended:

The powers of entry that require an authorised officer to obtain the occupier's consent prior to entering the residential portion of a food premises should be amended so that failure to gain 'consent' does not invalidate any enforcement action.

4.51 The Department will seek further guidance on these matters.

4.52 McDonald's Australia proposed that section 38 be amended to include a provision that the authorised officer should use their powers of entry for follow up inspections 'in consultation and agreement with the business'. McDonald's Australia stated that:

Specifically, for follow-up or re-inspections, our restaurant Leadership teams/Franchisees (where applicable) would like the opportunity to discuss and demonstrate compliance face to face at an agreed time, where possible. This allows the senior members of the restaurant team to be present and available for the Authorised Officer to ask questions and close out the inspection. With an average of over 6 managers and 100 employees in the majority of our restaurants, and varying levels of experience, having leadership team members present and available ensures outcomes and expectations are aligned and the matters are closed as required by the Authorised Officer<sup>24</sup>.

4.53 The Explanatory Memorandum to the Food Bill 2005 notes that the powers of entry are provided to ensure authorised officers can ensure compliance with the Act and regulations. For this purpose, authorised officers require entry into food businesses to obtain insight into normal daily operating procedures. Requiring business agreement for entry, and pre-appointed inspection times would run counter to this intent.

4.54 Another concern raised by McDonald's Australia relates to maintaining confidentiality when authorised officers obtained information and photographs under section 38 during inspections.

4.55 McDonald's Australia submitted that authorised officers should notify food business employees prior to taking photographs, films, audio or visual recordings and

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<sup>24</sup> McDonalds Australia submission.

that all materials obtained should not be shared without the written permission of the food business. It was stressed that it is a legal requirement to inform people when their conversations and surroundings are being recorded. McDonald's Australia recommended an amendment to the Act that requires early notification and conditions on how the information is kept.

Prior to conducting these activities, advise food business employees that this is to occur. All materials obtained are for internal use only and will not be shared without the written permission of the food business.<sup>25</sup>

4.56 This issue is covered under section 38(1)(m) and section 38(3) of the Act, with maintaining confidentiality being covered, in part, under section 142 of the Act and applicable Codes of Conduct. Section 38(1)(m) empowers Authorised Officers to “take any photographs, films or audio or visual recordings that the authorised officer considers necessary”, and the exercise of such powers must be “reasonable under the circumstances” (section 38(3)). Powers can only be exercised for the purposes of the Act. Section 142 imposes obligations of confidentiality on persons who obtain information in connection with administration or execution of the Act, where that information relates to manufacturing secrets, commercial secrets or confidential processes. Information that falls within this scope must be disclosed only as permitted by section 142(a) to (h).

### Self-incrimination

4.57 Section 39 provides that self-incrimination is not an excuse for non-compliance with a requirement under section 38. However, any information or answer provided (including a record, document or thing produced) in compliance with the requirement is not admissible in evidence against the person in criminal proceedings other than proceedings for an offence against section 45 (failure to comply with requirements of authorised officers, section 46 (interfering with seized items), section 47 (false information) or section 48 (obstructing, impersonating or threatening authorised officers).

4.58 Section 39 is based on the privilege against self-incrimination which is ‘a basic and substantive common law right, and not just a rule of evidence’.<sup>26</sup> This section is derived from Annex B of the Model Food Provisions.

4.59 Several submissions from individual environmental health officers identified section 39 as problematic. Under this provision, authorised officers are currently able to request information, (either written or verbally), but they cannot *require* information be provided because to do so would make the information inaccessible in criminal proceedings. These submissions recommended an amendment to the section to enable authorised officers to *require* information to be provided by a food business proprietor under section 38 without rendering that information inadmissible in proceedings against that proprietor under the broader provisions of the Act.

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<sup>25</sup> McDonald's Australia submission.

<sup>26</sup> Australian Law Reform Commission 2015, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws Interim Report* 127.

## Improvement notices, prohibition orders

4.60 Part 6 covers the issue of improvement notices and prohibition orders in relation to food business compliance with the Act. In accordance with section 4, Part 6 does not apply to or in respect of primary food production unless excluded by Regulation 6 of the Food Regulations 2009.

Regulation 6 is titled “Food production activities that are not primary food production”, and states that “for section 11(2) of the Act, any food production activity to which a standard in Chapter 4 of the Food Standards Code applies is prescribed”. Chapter 4 includes standards for poultry meat, seafood, meat, dairy products, eggs and egg products, seed sprouts, berries, leafy vegetables and melons.

4.61 It was widely recognised that provisions under Part 6 were working well to allow for effective proportionate compliance action. Respondents identified these enforcement provisions as being well regarded and effective<sup>27</sup> and submitted that ‘these tools should remain in the Act to provide a deterrent when needed’.<sup>28</sup>

4.62 Sections 62, 63 and 64 cover grounds for serving improvement notices, what needs to be included in the improvement notices, and what happens when a notice is complied with.

4.63 McDonald’s Australia suggested that Section 62 and section 64(1) of the Act be amended to require:

Notices and orders will be issued / closed out with the business with the business owner, (management team) either virtually or face to face at an agreed time and location.’<sup>29</sup>

4.64 Sections 65 – 68 cover the grounds for serving a prohibition order, what the order must specify, the requirement for a certificate of clearance to be issued when the order has been complied with, the ability for a food business to request an inspection of the premises to issue a certificate of clearance, and the offence and penalties for the contravention of a prohibition order by an individual or corporate body. The Chief Executive Officer (CEO) of the Department, or another enforcement agency may serve a prohibition order under section 65. A prohibition order may also be issued by a person who has been delegated the power to do so by the CEO of the Department under section 117 or an enforcement agency under section 118. Section 69 is titled “review of decision to refuse certificate of clearance”. If a certificate of clearance is refused, a proprietor may seek review of the decision at the State Administrative Tribunal).

4.65 One submission from an individual environmental health officer recommended that prohibition orders (under section 65) ‘should be approved by the manager and not just the CEO (of the local government) as the CEO (of the local government) takes too long to sign a document’.

4.66 Under section 118 of the Act, the enforcement agency can delegate these functions. Who holds the delegation is a decision for the enforcement agency.

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<sup>27</sup> Department of Local Government, Sport and Cultural Industries submission.

<sup>28</sup> Shire of Narrogin submission.

<sup>29</sup> McDonald’s Australia submission.

4.67 In relation to section 66 and section 67, McDonald's Australia suggested amendments to the Act to 'allow a certificate of clearance to be given at an agreed date and time with the business owner and management team. This meeting can either be face to face or virtual'.

4.68 Section 67 allows for a proprietor to request an inspection of an enforcement agency for the purposes of clearing a prohibition order. This inspection is to occur within 48 hours of the request being made. If this time frame is not met, a certificate of clearance is taken to be given.

4.69 Re-inspection arrangements are procedural matters usually made between the enforcement agency and the business, rather than prescribed by the Act.

4.70 Submissions from some environmental health officers request that section 67(3) be amended to increase the 48-hour time period during which an inspection to clear a prohibition order is to occur before a clearance certificate was taken to be given. It was further suggested that the time period be increased to between two and five working days to allow authorised officers more time to undertake clearance inspections.

4.71 One submission from an individual environmental health officer observed:

This section provides that a clearance is taken to be issued, where an inspection is not carried out within 48 hours of a request. As such, the risk of clearances being issued when the standard has not been able to be assessed and may still be sub-standard is a risk.

4.72 Respondents who raised these issues recommended that section 67(3) be amended to:

- include a greater timeframe (for example, up to 5 working days).
- remove the reference to 'hours' and replace it with 'working days'.

4.73 These are difficult issues to manage. However, this section of the Act is intended to reduce regulatory burden on industry. Prohibition orders can and do significantly impact food businesses and the issuing of clearance certificates needs to be a priority.

4.74 The number of prohibition orders issued in WA averages between 25 and 30 per year.<sup>30</sup> The impacts associated with increasing the 48-hour clearance requirement need to be considered against commercial impacts, public health imperatives and situation frequency.

4.75 Section 70 provides for payment of compensation for a person if there were insufficient grounds for serving a prohibition order. Persons may apply to the CEO or other enforcement agency who made the order for compensation.

4.76 The Town of Claremont indicated that section 70 provides 'adequate protections for food businesses to ensure that orders issued are reasonable and justified through a mechanism for compensation'.

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<sup>30</sup> Mandatory annual performance reports under the *Food Act 2008* submitted by local government enforcement agencies to the Department.



4.77 Section 71 deals with the scope of notices and orders such as improvement or prohibition orders in relation to the premises, any food vehicles or equipment specified in the notice or order. Notices and orders must specify certain information (under section 72), such as the provisions of the ANZFSC to which it relates and may specify particular action to be taken to ensure compliance with the ANZFSC.

Submissions indicated overall support for these provisions as they were seen as effective and relevant tools in achieving compliance.

### Taking and analysis of samples

4.78 Part 7 enables the taking and analysis 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.

4.79 Several submissions identified Part 7 of the Act as an area that was effective and meeting the Objects of the Act.

4.80 Section 78 deals with the procedures that an authorised officer must follow when obtaining food samples for analysis. Any samples obtained under this section must be submitted for analysis in accordance with Part 7, Division 2, unless an authorised officer is no longer of the opinion that the sample ought to be analysed (section 79).

4.81 Several submissions identified Part 7 of the Act as an area that was effective and meeting the Objects of the Act. Their comments below generally reflect the effectiveness of this Part:

This section is clearly written... the application of these sections is practical and methodical.<sup>31</sup>

The legal sampling process is comprehensive and provides clear instruction for an authorised officer to collect samples.<sup>32</sup>

Section 78 should remain as it affords a fair and reasonable process for the collection of food samples.<sup>33</sup>

4.82 Overall, submissions noted this division to be working well as demonstrated by the following:

A small example of what works well is Part 7 Division 3 Approval of laboratories and Division 4 Approval of Analysts that provides the regulatory powers to ensure the analysis of samples taken as part of the Act enforcement activities are undertaken by laboratories and analysts that are competent and able to provide true and accurate results. The regulatory mechanism in both divisions enables the CEO to require laboratories and analysts to demonstrate their competencies and the adequacy of their quality assurance systems; and this regulatory approach

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<sup>31</sup> Individual Environmental Health Officer submission.

<sup>32</sup> *ibid.*

<sup>33</sup> Town of Claremont submission.

continues to be commensurate with the evidentiary requirements for enforcement activities undertaken under the Act.<sup>34</sup>

As with part 6 the taking of samples and the analysis of food are equally important tools for Authorised Officers to be able to assess the quality and safety of food manufactured and food sold by a food business.<sup>35</sup>

## Auditing

4.83 Part 8 puts in place a framework for the auditing of food safety programs, including requirements in relation to reporting and food safety auditors. Section 103 empowers registered food safety auditors (RSFAs) to adjust audit frequencies.

The Department's Food Safety Auditing Guidelines reads as follows:

7.2.4 The enforcement agency takes note of the determination made by the RFSA in relation to the appropriate audit frequency and amends and confirms the set minimum audit frequency accordingly.

However, this guideline is a non-regulatory guideline and the RSFAs are not obligated to have adjustments to audit frequencies confirmed by an enforcement agency.

4.84 Several submissions by environmental health officers requested an ability for authorised officers to adjust audit frequencies determined by registered food safety auditors. This was seen as a mechanism to help mitigate any conflict of interest an auditor might have in determining audit frequency.

4.85 The submission from the City of Bayswater stated that 'the requirement for food businesses that cater for vulnerable persons (e.g. childcare centres and aged care facilities) to engage an approved third-party auditor, has significantly improved and maintained food safety standards within these facilities'.<sup>36</sup>

4.86 With the commencement of the automatic mutual recognition scheme in WA in July 2022, registered food safety auditors from other participating States in the Scheme will be able to practise in WA.

4.87 One submission from a registered food safety auditor (outside of WA) identified challenges with the WA competency criteria. This submission noted that in other States auditors have an induction program, whereas in WA no such induction program exists. This submission also noted that WA food auditing competency criteria:

require an unnecessary automatic requirement for a 40-hour microbiology course, there is no requirement in WA to keep the knowledge base up to date and there are no independent witness audit programs in WA to check that auditors are doing acceptable audits.<sup>37</sup>

The auditor competency requirements in WA reflect the National Auditor Competency Requirements established by the Implementation Subcommittee for Food Regulation

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<sup>34</sup> Department of Health Food Unit submission.

<sup>35</sup> Shire of Narrogin submission.

<sup>36</sup> City of Bayswater submission.

<sup>37</sup> Confidential submission.



(ISFR). This subcommittee reports to the Food Regulation Standing Committee. The ISFR is responsible for the implementation and enforcement of food laws through their jurisdiction's legislation<sup>38</sup>. Furthermore, when applying for approval as a food safety auditor, WA competency criteria require evidence of satisfactory completion of a supervised audit. Information on auditing is available to local governments, food business and registered food safety auditors. Numerous lead auditor training courses were provided for local government during the introduction of the Act and others have been provided since.

4.88 Section 100 requires the enforcement agency to determine the priority classification for food businesses and the auditing frequency. The agency must give written notice to the business about the priority classification and the auditing frequency. The duties of food safety auditors are listed under section 101.

4.89 Section 101 and section 102 identify the duties of food safety auditors, audit reporting requirements, the roles and powers of food safety auditors, and food safety assessments.

4.90 Several submissions supported independent auditing and nominated Part 8 of the Act as a part that is working well.

High risk food businesses serving food to vulnerable groups should continue to be independently audited by accredited food safety auditors under the Act.<sup>39</sup>

## Notification and registration of food businesses

4.91 Part 9 of the Act sets out requirements and procedures for notification and registration of food businesses by enforcement agencies and does not apply to or in respect of primary food production unless required under Regulation 6 of the Food Regulations 2009. All food businesses are required to notify, subject to exemptions that may apply but, not all food businesses are required to register subject to exemptions that may apply, and the low risk of the food activity undertaken.

4.92 Section 107 refers to specified information being information specified in the Food Safety Standards; Food Safety Standards are defined as standards contained in Chapter 3 of the Food Standards Code. This section requires the proprietor of a food business to provide written notice to the appropriate enforcement agency of certain information as outlined in the ANZFSC, including:

- a) 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
- b) the nature of the food business

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<sup>38</sup> Members are from food regulation authorities in Australia and New Zealand. The Australian Local Government Association (ALGA) is a member of ISFR. ISFR approved by the Food Regulation Standing Committee and noted by the Food Ministers.

<sup>39</sup> Town of Claremont submission.

- c) the location of all food premises of the food business that are within the jurisdiction of the enforcement agency.<sup>40</sup>

4.93 If a business involves more than one premise, for example, a supermarket chain, it must register with the appropriate enforcement agency or agencies in relation to each premise. 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 the Act.

4.94 Several submissions supported the current notification/registration process.

The notification / registration process has enabled food business activities within the City's jurisdiction to be captured so that appropriate monitoring can be undertaken and food safety standards can be improved and maintained. The Act has also provided allowances to reduce the burden on charitable and community organisations. This recognises the important contribution to the community, but also ensures that sufficient controls are in place to reduce risk.<sup>41</sup>

The process for registration is easily understood and is an effective way for the collection of information relating to a food business, that facilitates the role of local government in supporting food safety for the community. It is a process that has been accepted by industry. Registration being a once off process is effective in reducing the administrative burden for both local government and food businesses.<sup>42</sup>

4.95 The City of Subiaco identified two challenges when administering food business registrations – 'there is no mechanism for local government to compel a food business to provide updated information and there is no expiry date included on the food business registration certificate'. Whilst the City of Subiaco identified that it is an offence for a person not to notify the relevant local government of certain changes to a food business, it was suggested that a regular renewal process would assist in maintaining updated information.

4.96 The City of Swan submission questioned the need for having separate sections of the Act for notification (section 107) and an application for registration (section 110(2)). The submission queried whether it was necessary to have both registration and notification as approval mechanisms.

4.97 Notification and registration are two separate mechanisms that apply to distinct food business types. The purpose of separating these two processes is to enable a notification process that empowers enforcement agencies to obtain information about all food businesses types operating within their district without registering food businesses prescribed under Part 3 – Exempted food businesses of the Food Regulations and administering associated fees.

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<sup>40</sup> Food Standards Australia New Zealand 2014, *Australia New Zealand Food Standards Code*, Standard 3.2.2 Food safety practices and general requirements. The specified information is at Division 2, clause 4.

<sup>41</sup> City of Bayswater submission.

<sup>42</sup> Individual Environmental Health Officer submission.

4.98 Section 110 deals with the registration provisions for food businesses, including a requirement that an application for registration must be in the approved form and must be accompanied by information required by the appropriate enforcement agency (such as design and fit out specifications and any other information necessary to determine the priority classification).

4.99 This section enables the appropriate enforcement agency to either grant or refuse an application for registration and requires a certificate of registration to be issued in the approved form. Submissions from individual environmental health officers submitted that applications for registration of a food business should include risk information to enable a risk assessment by the enforcement agency.

## Priority Classification

4.100 Priority classification is a statutory process prescribed by the Act. It is used for determining audit frequencies under Part 8. Risk profiling is an administrative process undertaken by local governments when a new food business is registered. Risk profiling is not a statutory process but informs local government surveillance programs.

4.101 Local government authorities must follow the Priority Classification system approved by the Chief Executive Officer (of the Department of Health) but can determine their own risk profile classification and choose which tool or guideline to follow.

4.102 The City of Kwinana submitted that the priority classification defined in the Act is often misinterpreted by local government as risk classification.

4.103 The City of Kwinana submitted that:

...some local governments use the *WA Food Regulation: Food Business Risk Profiling Guidance to the Classification of the Food Businesses*, while others have used *The Australia New Zealand Food Authority (ANZFA) Food Safety: The Priority Classification System for Food Businesses* to determine the risk classification... This means local governments can assess similar risks differently and food businesses may not be subject to appropriate enforcement action after non-compliance is identified. Mandating the use of the same risk profiling tool may achieve greater consistency.<sup>43</sup>

4.104 Other issues raised in submissions relating to this Part of the Act included the:

- introduction of a central register of food businesses
- ability to refuse registration for non-compliance with a provision of the ANZFSC
- standardisation of certificates of registration across the State
- registration of mobile food vendors
- registration of community / fundraiser events where people cook at home to supply fete / fairs

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<sup>43</sup> City of Kwinana submission.

- need to establish consistency in risk profiling food businesses

4.105 The Cancer Council WA recommended the development of a centralised register of all food businesses, including categorisation of food businesses based on potential dietary and public health risk.

It is crucial that a centralised register of food businesses (including mobile food businesses) be established, in order to accurately map and describe the food environment. For this to adequately occur, food businesses need to be assigned to a type of food business that takes into consideration the types of foods sold as an indicator of nutrition quality or dietary risk associated with the type of food outlet registering.<sup>44</sup>

### Refusal of registration based on non-compliance

4.106 Several submissions requested the inclusion of an ability to refuse an application for registration on the grounds that a food business is unable to prove compliance with the Act or with the ANZFS. These submissions expressed their frustrations with having to register food businesses that did not comply with applicable standards. These submissions, which were made by individual environmental health officers, are exemplified by the following:

If the food business provides the information required by the local government i.e., a completed registration form, design and fit out information, information to establish their priority classification and have paid their fee then they should be registered. If a business does not comply with the Food Act 2008 (or the Food Standards Code) on application, then the required action is to register the premises and then immediately issue a prohibition order / improvement notice on them. This is not practical and a reactive approach.<sup>45</sup>

Expert advice has suggested that an application for registration cannot be refused based on non-compliance with the Food Standards Code. If all the required information is provided under section 110 then the certificate should be issued along with an enforcement tool i.e. an improvement notice. It is recommended that the Act provide local government the ability to refuse the registration application based on non-compliance to avoid unnecessary enforcement action.<sup>46</sup>

4.107 Section 110(5) of the Act provides an appropriate enforcement agency with discretion to either grant or refuse an application for registration. The Act is silent on what may constitute grounds for refusal. However, when refusing an application, the enforcement agency must give written notification of the decision and the reasons for the refusal. Any decision to approve or refuse an application for registration should be made on the merits of the application and should not be inconsistent with the broader

<sup>44</sup> Cancer Council WA submission.

<sup>45</sup> Individual Environmental Health Officer submission.

<sup>46</sup> *ibid.*

provisions of the Act. Furthermore, any decision to refuse an application for registration under this section is subject to appeal to the State Administrative Tribunal. The Department will provide further guidance on this matter.

## Standardisation of certificate of registration content

4.108 Section 110(6) requires that an appropriate enforcement agency must issue a certificate of registration in the approved form. The approved form is defined in the Act as approved by the CEO of the Department of Health.<sup>47</sup>

4.109 Several submissions raised issues with the format or content of certificates of registration. Submissions from environmental health officers suggest:

The approved form for the Certificate of Registration of a food business includes the information specified by the appropriate enforcement agency. As a result, the information included in Food Business Registration Certificates issued by different local governments is inconsistent. The certificates do not always include risk classification, types of foods prepared, vehicle registration numbers etc. This makes it difficult for another local government to assess a temporary food stall application.<sup>48</sup>

We think it would be better if there was a common standard used by all local governments and that consistent information was provided. A prescribed form is not recommended as this can create other issues if you want to make some minor changes but a suggested template which could be used as a base model would be ideal.<sup>49</sup>

4.110 Inconsistencies between local government registration certificates may be due to ambiguities in the approved form. While this is not indicative of a problem with the Act itself, it was noted in multiple submissions that providing updated material would afford clarity and consistency for local governments.

4.111 The Department is committed to reviewing approved forms and guidance material and will consider these matters to assist local government in establishing consistency in administrative processes.

## Registration of mobile food vendors

4.112 Submissions from individual environmental health officers identified problems with the registration of mobile food vendors that trade across different municipal areas.

4.113 The Auditor General's report also identifies that the current regulatory framework does not adequately address food safety issues associated with these mobile businesses.<sup>50</sup>

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<sup>47</sup> Government of Western Australia Department of Health 2011, Certificate of registration approved form, available at [https://www2.health.wa.gov.au/~media/Files/Corporate/general-documents/food/PDF/Certificate\\_of\\_Registration\\_Feb\\_2011.pdf](https://www2.health.wa.gov.au/~media/Files/Corporate/general-documents/food/PDF/Certificate_of_Registration_Feb_2011.pdf) (Accessed: June 6, 2022).

<sup>48</sup> Individual Environmental Health Officer submission.

<sup>49</sup> *ibid.*

<sup>50</sup> Government of Western Australia Office of the Auditor General 2021, *Regulation of Consumer food Safety by the Department of Health*, p 5, OAG, Perth.

4.114 One submission from an individual environmental health officer summarised the issues around the registration of mobile food businesses as follows:

1. The Act requires a mobile food business (such as a food truck) to be registered by the relevant enforcement agency, which is accepted as being the local government where the food truck is stored.
2. Where the storage location of a food truck changes and moves to within another local government area, the Act requires the cancellation of registration (at the original local government) and registration with the local government at the new location. This can present challenges as the Food Safety Standards (including Standard 3.2.3 Food premises and equipment) require interpretation; and in practice, there will always be some difference in opinion.
3. An issue that this can create is where the original local government may accept certain structural elements, whereas the new local government may require certain changes. Acknowledging that maintaining consistency within a local government can have its own challenges, the situation described above can be difficult to address, especially where retrospective physical upgrades are requested.

4.115 This submission suggests amendments to the Act to mandate the Department as the relevant enforcement agency for the registration of all mobile food businesses that are likely to operate across jurisdictions, ensuring compliance with Standard 3.2.3 with the option to recover costs through the application of fees.

4.116 A solution to this problem was presented by WALGA in recommending that the Department 'establish a system to better track (mobile) food businesses across all local government areas'.

4.117 The Department is in the process of developing a centralised register for mobile food vendors. This will enable local government to better regulate mobile traders by providing a centralised system for the recording of registration, inspections and improvement notices. In this regard the compliance process for each mobile food business will be informed by collective inspections across different municipal areas. It is envisaged that this will assist enforcement agencies with the compliance process, increase the standards of mobile vendors, and reduce instances of differing interpretation of standards impacting the registration process when mobile vendors relocate into new local government areas.

### Notification/registration of community events

4.118 Multiple submissions from environmental health officers identified risks with the registration process associated with community events where people cook food in residential kitchens to sell at school fetes and community fairs. It was noted that in general local governments were not aware of these events and may not be given advance notice of the activity. Sometimes people participating in these activities were



not aware of the requirement to check with local governments if they were exempted from registration.

4.119 One of these submissions suggested that a self-assessment for people preparing food for community events which includes online food safety training would be an option to deal with these situations. It was recommended that the requirements of this section be reviewed to avoid ambiguity as well as ensuring exempted food businesses can operate safely.

4.120 Sections 107 – *Notification of conduct of food businesses*, section 108 – *Exemption in relation to notification of information*, and Regulation 10 – *Food businesses conducted as fundraising events* have been identified as requiring review. The Department will consider this interface in relation to the preparation of food in residential kitchens for sale at community events, with due regard to the food safety risks, practicalities of enforcement and regulatory burden to local government.

### Business registration cancellations

4.121 Section 111 provides that a food business registration remains in force until cancelled. This section generated multiple submissions with differing opinions.

4.122 Some submissions from individual environmental health officers supported this section of the Act because permanent registration reduced the administration burden associated with annual renewals.

4.123 These environmental health officers observed:

Registration being a once off process is effective in reducing the administrative burden for both local government and food businesses. It is suggested that this process remains, noting that a food business proprietor is required to notify an enforcement agency of any change to their operation.<sup>51</sup>

If registrations expired regularly, this would increase the administration costs of local governments and consequently costs to local businesses, it would increase the legal liabilities of food businesses and local government, and I do not consider there would be a commensurate food safety benefit.<sup>52</sup>

4.124 Several submissions proposed that enforcement agencies should have the ability to stipulate expiration dates on certificates associated with mobile food vendors, temporary food stalls and homebased businesses. It was submitted that a lack of an expiry date creates challenges for local government as they still have to check whether the food businesses are approved or not. In this context the process of regular renewal is a mechanism that could help with inspection processes to establish the ongoing status of a business activity.

4.125 The City of Subiaco proposed that:

A process should be introduced where food business registration is renewed every two years to ensure that local government has

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<sup>51</sup> Individual Environmental Health Officer submission.

<sup>52</sup> Individual Environmental Health Officer submission.

accurate business details and to protect the integrity of food business registration certificates.<sup>53</sup>

4.126 WALGA also recommended:

consideration of a simple [registration] renewal process, which would ensure that business details are current and protect the integrity of food business registration certificates.<sup>54</sup>

4.127 Section 112 provides for the variation of conditions of approval or cancellation of registration of food business by an appropriate enforcement agency. A registration may only be cancelled if the food business has ceased to operate at the premises for which it is registered, if any fee in relation to the registration has not been paid, or if the holder of the registration requests cancellation. The enforcement agency must give notice to the food business of intention to vary or cancel a registration with an opportunity to make a submission on the variation or cancellation.

4.128 The matter of a cancellation of a registration for non-payment of registration fees levied under the *Local Government Act 1995* is an issue that generated high levels of uncertainty and frustration for local government officers, as exemplified by the following submissions.

Section 112(3) states that non-payment of the LGA's annual fee is not cause to cancel a registration. The Town is concerned with the resource implications for local governments for non-payment of the annual fee, given approximately 50% of food businesses do not pay their annual fee by the due date each year.<sup>55</sup>

Can you please amend section 112 so that an enforcement agency (LG) can cancel a registration due to non-payment of fees? Section 112(2) allows it and (3)(a) does not.<sup>56</sup>

While this section allows the cancellation of a food business registration if the fee imposed by the appropriate enforcement agency in relation to the registration of the food business is not paid by the time required there has been much conjecture across local government if this section extends to include annual food safety assessment or inspection fees.<sup>57</sup>

4.129 The Act enables a local government enforcement agency to cancel a food business registration under section 112 for non-payment of registration fees levied under the *Local Government Act 1995*. This position is reflected in the Department's website which states that 'a registration may be cancelled if any annual or other fee imposed by the appropriate enforcement agency that relates to the registration of the food business has not been paid'.<sup>58</sup>

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<sup>53</sup> City of Subiaco submission.

<sup>54</sup> Western Australian Local Government Association submission.

<sup>55</sup> Individual Environmental Health Officer submission.

<sup>56</sup> *ibid.*

<sup>57</sup> Individual Environmental Health Officer submission.

<sup>58</sup> Government of Western Australia Department of Health 2021, *Registration of a food business*, Available at: [https://ww2.health.wa.gov.au/Articles/N\\_R/Registration-of-a-food-business](https://ww2.health.wa.gov.au/Articles/N_R/Registration-of-a-food-business) (Accessed June 30, 2022).



4.130 The Department will provide further guidance on the status of inspection fees as relating to registration.

4.131 Many submissions suggested that noncompliance with a provision of the Act or ANZFSC should constitute grounds for cancelling a registration. For example, the City of Kwinana recommends that:

The food business registration may also be cancelled upon repeated prohibition orders or infringement notices, such as when there is a serious public health risk or when the food business is unwilling to prevent occurrence of the problem and to respond in an adequate manner following a request to address the non-compliances.

4.132 Some submissions identified difficulties for local governments in contacting businesses when seeking to make a routine inspection and suggested that consideration should be made to cancel a food business registration if the proprietor does not respond to repeated requests to make a premise available for inspection.

4.133 It should be noted that registration under the Act is an administrative process designed to assist enforcement agencies in identifying and monitoring food businesses within their districts. Registration is not intended to be an enforcement tool, as there are other provisions in the Act available for use by Councils to enforce provisions of the ANZFSC.

### Fit-out of food businesses

4.134 Section 110(3) of the Act provides that, as part of the registration of the food business, the application must be accompanied by the design and fit-out specifications (if required by the appropriate enforcement agency) and lodged in a form approved by the appropriate enforcement agency.

4.135 The City of Kwinana raised concerns that:

Businesses with existing registration are not required to obtain formal approval of the design and fit-out specifications before new equipment or alteration to fit-out occurs. While there are enforcement options, Authorised Officers are reluctant to enforce compliance.<sup>59</sup>

4.136 A number of submissions indicated support for amending the Act to make it mandatory for medium and high-risk food businesses to notify local governments of proposed fit-out and alterations before changes are made.

4.137 The City of Kwinana advised that:

Currently, there are no requirements to notify local governments of structural or fit-out changes unless it triggers building approvals (e.g. structural additions or alterations) or changes made to the activities that may likely affect the priority classification. This has become an issue in a number of businesses in Kwinana. For example, additional equipment have

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<sup>59</sup> City of Kwinana submission.

(sic) been installed without adequate exhaust ventilation and space available to allow for effectively (sic) cleaning.<sup>60</sup>

4.138 The ANZFSANZ already places a requirement upon the proprietor of a food business to notify the relevant enforcement agency of any proposed change to the nature of a food business before the change occurs. In weighing whether a new formalised approval process for alterations to a food business needs to be introduced, consideration needs to be given to the public health risks the new process proposes to address, the additional administration burden placed upon enforcement agencies and the costs imposed upon industry. Consideration also needs to be given to the threshold at which a fit-out modification approval process should apply (for example, new fixtures, new equipment, capacity alteration etc).

### Functions of the CEO, delegations

4.139 Part 10 of the Act sets out the functions of the CEO of the Department and other enforcement agencies. This part of the Act details requirements for delegations, appointment of authorised officers and enforcement agency reporting to the CEO.

4.140 Section 118 provides the functions of enforcement agencies and delegation, and section 119 provides conditions on the performance of functions by enforcement agencies.

4.141 Section 120 deals with the performance of functions by enforcement agencies and authorised officers. The CEO may adopt guidelines, including national guidelines (prepared by Food Standards Australia New Zealand), relating to the performance of the CEO's function under the Act and may require other enforcement agencies and authorised officers to adopt the guideline adopted by the CEO in performing their functions under the Act.

4.142 Section 120 of the Act is based on section 85 of the Model Food Provisions - Annex B (noting that Annex B has been modified where necessary to suit WA requirements). In the Model Food Provisions section 85 allowed for the adoption and enforcement of National Guidelines however, in the Act this was expanded to 'guidelines, including national guidelines' under section 120(1).

4.143 Primarily, this section was intended to allow the adoption and enforcement of guideline documents produced by FSANZ to assist with the implementation of standards developed by FSANZ. The FSANZ guidelines were a guide to implementation only and were not intended to be enforceable.

4.144 With respect to Regulatory Guideline No. 4 Application of section 8 of the Act – Approach to be adopted by Department of Health in regards to Export Activities – Prescribed Goods for Export, (Regulatory Guideline No. 4) the aim of this document was to reduce the regulatory burden on industry by minimising the number of enforcement agencies involved in the exporting of food products from Western Australia without compromising food safety and provide a centralised contact.

4.145 The Review identified an inconsistency between the Regulatory Guideline No.4 and the Food Regulation 2009. The Regulation does not capture the intent of the Chief Executive Officer (Department of Health) to have responsibility for enforcement of

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<sup>60</sup> *ibid.*

prescribed goods for export. The Department will take action to correct the inconsistency through aligning the Regulations with the Guidelines and advise relevant stakeholders of the process accordingly.

4.146 Section 121 requires enforcement agencies to report to the CEO at the required frequency on the performance of functions under the Act. The enforcement agency must forward to the CEO details of any proceedings for an offence under this Act taken by an officer of the agency within one month after the proceedings are complete. A report on the performance by enforcement agencies (including the CEO) of functions under the Act must be included in the agency's annual report submitted under the *Financial Management Act 2006* (WA) (Part 5).

4.147 The Act's reporting requirements have been in place since 2009–2010.

4.148 Analysis of the Act's reporting data is used to produce an annual data overview report on the performance of functions under the Act. The report provides insight into the administration of food safety legislation in WA and is used by the Department to identify issues that require support to ensure the consistent and effective implementation of food legislation in WA. These reports are available on the Department's website.

4.149 While some submissions indicated that they would like to have access to the data provided to the Department in a timely manner, no submissions were made regarding the functionality of the sections of the Act that require the provision of the data.

## 5 Other matters

### Menu Labelling

5.1 Cancer Council WA submitted there was a need for consumers to have accurate information about the energy content of takeaway meals:

Labelling of pre-prepared, ready-to-eat foods such as from quick service food outlets (e.g. fast food and other take-away food stores) is necessary given the high frequency in which they are visited, the predominantly unhealthy food and drinks available and sold in such premises and evidence that consumers substantially underestimate the energy content of this type of food.<sup>61</sup>

5.2 Several submissions expressed concerns with:

- a) inconsistent menu labelling of food and beverages
- b) the need for consumers to be more informed about the foods and beverages.

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<sup>61</sup> Cancer Council WA submission.

5.3 WA does not have mandatory menu labelling. Other Australian states have introduced provisions in their Food Act that require the display of nutritional information on menus including kilojoule labelling.<sup>62</sup>

5.4 Cancer Council WA reported that a national review of menu labelling schemes in Australia had given broad support for menu labelling schemes:

It is established that appropriately designed and implemented menu labelling at the point of sale can effectively inform consumers about their energy requirements and the energy content of products and can lead to a small but significant reduction in the energy content of meals purchased.

5.5 Another agency submission raised the merits of regulating menu nutrition labelling in the Act and suggested that WA should follow other Australian jurisdictions in mandating energy content (kilojoule) information on menus. Currently, the provision of this information in WA is reliant on chain food businesses voluntarily including it on their food business menus. The jurisdictions of Tasmania, Northern Territory and Western Australia do not mandate this information.

5.6 Menu board labelling was considered by the Food Ministers Forum in 2019. Ministers agreed that “the most effective way for this to occur would be to develop a food regulatory measure under the ANZFSC and that the development of a Ministerial Policy Guideline should be the first step”.<sup>63</sup> This process included the release of a *Public consultation regulation impact statement* in 2021. The Food Ministers “will be provided with a Decision regulatory impact statement, which will include their preferred option”.<sup>64</sup> It is anticipated that the impact statement will be provided to the Food Ministers in the second half of 2022.

## Food safety supervisors

5.7 Several submissions recommended the Act be amended to include a requirement for food businesses to appoint food safety supervisors in WA (similar to those schemes operating in NSW, the ACT, QLD and VIC). Food Safety Supervisors are typically food handlers who take on supervisory roles and are responsible for the administration of a food safety program within a food business. They are required to undertake additional training and demonstrated competencies. Unlike other States, the Act does not legislate for food safety supervisors.

5.8 Submissions from Allergy & Anaphylaxis Australia and National Allergy Strategy both advocated for the inclusion of food safety supervisors within the Act, and for mandatory food allergen training for food safety supervisors.

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<sup>62</sup> *Food Act 2003* (NSW) Requirements relating to display of nutritional information for food. *Food Act 1984* (Vic) requires kilojoule labelling scheme, *Food Act 2006* (Qld) requires display of nutritional information for food.

<sup>63</sup> Australia and New Zealand Ministerial Forum on Food Regulation 2019, *Australia and New Zealand Ministerial Forum on Food Regulation Communique*, available at: [https://foodregulation.gov.au/internet/fr/publishing.nsf/Content/B3703354A0F92AA8CA25845B000FE61A/\\$File/Australia%20and%20New%20Zealand%20Ministerial%20Forum%20on%20Food%20Regulation%20Communique%2016%20August%202019.pdf](https://foodregulation.gov.au/internet/fr/publishing.nsf/Content/B3703354A0F92AA8CA25845B000FE61A/$File/Australia%20and%20New%20Zealand%20Ministerial%20Forum%20on%20Food%20Regulation%20Communique%2016%20August%202019.pdf) (Accessed: May 5, 2022)

<sup>64</sup> *ibid.*

5.9 One submission from an Environmental Health Officer offered a differing opinion:

I don't support mandatory national competencies and food safety supervisors are not supported for most general retail food businesses. It feeds the training industry which all food consumers ultimately pay for and creates unnecessary rigidity in the food service industry which further increases the difficulty and regulatory obstacles of providing food in local communities.

5.10 The issues of mandatory competencies and food safety supervisors are currently being considered at the national level by FSANZ. Public consultation was undertaken in early 2022 with the release of a Consultation Regulation Impact Statement P1053 – Food Safety Management Tools<sup>65</sup> to amend the ANZFSO to introduce nationally consistent food safety management regulation. Proposed amendments included requirements for food safety supervisors, food handler training and evidence to substantiate food safety management for some, but not all, business types.

5.11 A few submissions raised policy considerations covering areas such as:

- the sharing of information with third parties
- human breast milk as a commercial food

One submission recommended amending the definition of 'food' to specifically exclude human tissue (including breast milk). The *WA Human Tissue and Transplant Act 1982* provides a framework to regulate the sale and supply of human tissue products for transplantation and other therapeutic purposes. It was suggested that specifically excluding human tissue from the definition of food, could avoid the commercialisation of human breast milk as a food product.

- labelling of new food products and strategies to reduce marketing and promotion of unhealthy food and drink.

One submission recommended developing regulations that restrict or prohibit the advertising or promotion of unhealthy food products or brands.

The Department will continue to seek guidance on new and emerging public health considerations related to food regulation and the administration of the Act. The Department will monitor relevant policy considerations presented in the food regulation forums and committees to which it is a member.

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<sup>65</sup> Food Standards Australia New Zealand 2022, *Consultation Regulation Impact Statement — P1053 Food Safety Management Tools*, <https://www.foodstandards.gov.au/code/proposals/Pages/P1053.aspx>. (Accessed: June 6, 2022).

## 6 Conclusion

6.1 Submissions to the Review presented wide ranging perspectives on food safety regulation.

6.2 Most Councils supported strategies to positively engage with businesses to encourage compliance under the Act recognising that in the main businesses wish to 'do the right thing'. This is demonstrated by the following:

Most businesses, especially in rural WA accept the role of authorised officers and the inspection regime for food premises. This part of the Act seems to be operating effectively with most authorised officers seeking to educate businesses and seek cooperation rather than take legal action or issue infringements on regular basis (i.e., wave the big stick) which may work for a while but will eventually build resentment and an attitude of non-cooperation. This Shire's authorised officers experience is that the majority of food businesses want to do what is right when operating their food business and provide the best possible product and service to their customers.<sup>66</sup>

6.3 The overall feedback from the local government sector indicated the Act is working well. This is exemplified by the following assessments by respondents:

The implementation of the *Food Act 2008* has offered great flexibility for both the food business and the Local Government as the enforcement agency to achieve compliance through outcome-based legislation and through the adoption of the National Food Standards Code<sup>67</sup>.

Feedback from Local Governments support the findings of the Auditor General's Report: *Regulation of Consumer Food Safety by the Department of Health* that many of the current issues with the Act are technical and relate to the systems that support the Act, rather than the Act itself.<sup>68</sup>

The Act provides enforcement officers relevant tools and frameworks for escalating offences.<sup>69</sup>

6.4 The following provisions were considered by respondents as effective and meeting the purposes for which they were intended, namely, to regulate:

- offences relating to food, specifically section 22 of the Act that sets out compliance with the ANZFSC.
- enforcement provisions under Part 6 of the Act, including improvement notices, prohibition orders and penalties generally.

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<sup>66</sup> Shire of Narrogin submission

<sup>67</sup> City of Kwinana

<sup>68</sup> Western Australian Local Government Association submission.

<sup>69</sup> Town of Claremont submission.

- the taking and analysis of samples under Part 7.
- auditing of food businesses under Part 8; and
- matters relating to the procedural and evidentiary provisions (section 126 infringement notices).

6.5 Respondent submissions made the following suggestions on how they believed the Act might be clarified, improved and/or strengthened:

- amend the scope of the Objects of the Act to include the preventative health benefits associated with healthy nutrition and diet, and chronic disease prevention.
- review the definitions of 'sell' and 'food business', with consideration given to including third party delivery services as food businesses to allow for their oversight and regulation.
- review the definition of unsafe foods and amend it to include a reference to allergens.
- clarify the powers of entry, inspection and seizure, having regard to the impact that such powers have on both food businesses and the regulator.
- clarify the powers of entry for authorised officers into residential or domestic food businesses.
- clarify the provisions under self-incrimination and the admissibility of evidence.
- amend the provisions relating to prohibition orders, specifically section 67(3) relating to re-inspection following the issue of a prohibition order and consider increasing time frames.
- review the requirements for registration under section 107 and section 110, and whether to unify or simplify the notification and registration process for local government.
- clarify the provisions under section 110 on whether there is an ability to refuse registration for non-compliance with a provision of the ANZFSO or the Act.
- review approved forms under section 110 to standardise the certificate of registration format.
- consider the registration of mobile food vendors.
- review the requirements under section 110 in relation to the registration of community/fundraiser events where people cook at home to supply fetes/fairs.
- consider amendment of section 111 to enable the specification of expiration dates upon certificates of registration.
- consider whether section 112 enables the cancellation of registration for repeat non-compliance.



- clarify the requirements of section 112, in particular if a registration can be cancelled for non-payment of fees.
- In relation to section 120 of the Act, correct the inconsistency between Food Regulations 2009 and the adopted guidelines.

6.6 The Review acknowledges that local government authorised officers require information on the scope of their powers under the Act. Suggestions to improve the Act will require further consultation and liaison with stakeholders including the Commonwealth Government, States and Territories as part of WA's commitment to national harmonisation. The Department remains committed to engaging closely with stakeholders as part of its forward work plan.

## Findings

1. Submissions support the finding that the Act is generally working well in Parts 3, 6, 7, 8 and 11.
2. Issues identified with administering the Act relate to the systems that support Part 9 - Registration of food businesses and Part 5 – Powers of entry, inspection and seizure, specifically section 38 (powers of authorised officers) and section 39 (self-incrimination not an excuse).
3. Further work is required to provide and update information and guidance to stakeholders relating to registration of food businesses, the powers of authorised officers, and other matters that relate to policy or procedural considerations raised in submissions.
4. Whilst no amendment of the Act is required to section 120, there is a need to correct the inconsistency between the regulations and the adopted guidelines.

## Recommendations

Having regard to these findings in relation to the Act's operation and effectiveness, the ongoing implementation and administration of the Act can be enhanced by the Department addressing issues raised in submissions through the following mechanisms:

### **Recommendation 1**

Continue consultation with stakeholders at all levels of government on suggested improvements to the Act and engage with the sector on policy responses to emerging issues for discussion at the relevant national policy forums.

### **Recommendation 2**

Correct the inconsistency between the regulations and Regulatory Guideline Number 4.

### **Recommendation 3**

Review approved forms under the Act, with consideration given to establishing consistency in minimum information provided on Certificates of Registration under section 110(6).

### **Recommendation 4**

Continue to develop and promote the use of a central register for mobile food businesses, with register accessibility for all enforcement agencies as a priority.

### **Recommendation 5**

Provide guidance material for local government on the following sections of the Act:

- section 38 pertaining to power of entry into residential premises.
- section 110(5) pertaining to grounds for refusal of registration.
- cancellation of registration issued under section 110 for non-payment of annual registration fees levied under the *Local Government Act 1995*.
- clarify the notification and registration provisions of Part 9 to reduce the administrative burden upon local government and food businesses.

## Appendix 1 Stakeholders invited to make submissions

The following stakeholders were invited to make submissions

Stakeholder Name/Group
Aged & Community Services Australia
Agriculture and Food division Department of Primary Industries and Regional Development (WA)
Approved regulatory food safety auditors for WA
Australian Food and Grocery Council
Australian Healthcare and Hospital Association
Australian Hotels Association WA
Australian Institute of Food Science and Technology WA
Australian Meat Industry Council
Australian Meat Industry Council
Australian Food Institute of WA
Australian Healthcare and Hospital Association
Australian Hotels Association WA
Australian Institute of Food Science and Technology WA
Cancer Council WA
Chamber of Commerce and Industry
Chronic Disease Prevention Unit Department of Health (WA)
Communicable Disease Control Directorate (OzFoodnet)
Dairy Australia
Department of Agriculture, Water and the Environment (Cth)
Director of Community and Population Health, East Metropolitan Health Service (WA)
Department of Local Government, Sport and Cultural Industries (WA)
Department of Primary Industries and Regional Development (WA)
Dieticians Australia
Egg Standards Australia
Environmental Health Australia (WA) including regional and special interest groups
Food Industry Association WA Inc.
Food Unit Environmental Health Directorate Department of Health

Stakeholder Name/Group
Food Regulation Secretariat Department of Health
Foodservice Suppliers Association of Australia
Food Standards Australia New Zealand (Cth)
Food Rescue
Foodbank (WA)
Food Frontier
Law Society of Western Australia
Local Government Professionals WA
Dairy Australia
Local Health Authorities Analytical Committee
McLeods Barristers & Solicitors
National Retail Association
Pet Food Industry Association of Australia
Public Health Advocacy Institute of WA
Restaurant and Catering WA
Retailers Association
Seafood Industry Australia
SecondBite
Small Business Development Corporation
WA Bar Association
Western Australian Local Government Association (WALGA) incorporating MEHMG group
Western Australian Meat Industry Authority
137 Local Government Authorities

## Appendix 2 Overview of National and State food regulation

The Australian and New Zealand Ministerial Forum on Food Regulation sets the policy on food regulation. The Ministerial Forum is comprised of members from the Australian Government, the Minister for Food Safety New Zealand responsible for decision making on policy matters, State and Territory governments. The membership of the Forum comprises:

- ACT (1 member) Minister for Health
- NSW (2 members) Minister for Agriculture who is also the Minister for Western New South Wales and the Minister for Health.
- NT (1 member) Minister for Health
- Queensland (2 members) Minister for Health and Ambulance Services and the Minister for Agricultural Industry Development and Fisheries
- South Australia (1 member) Minister for health and Wellbeing
- Tasmania (1 member) Minister for Health
- Victoria (2 members) Minister for Health and the Minister for Agriculture
- WA (1 member) Minister for Health
- Observers to the Forum are the Food Standards Australia New Zealand and the Australian Local Government Association.

The Forum is supported by the Food Regulation Standing Committee (FRSC).

- The FRSC is chaired by the Australian Government Department of Health and comprises the senior members of New Zealand, State and Territory government departments and the Australian Local Government Association. The Chief Executive Officer of FSANZ is an observer to the committee.
- Western Australia is represented by the Department of Health Dr Michael Lindsay.

The Implementation Subcommittee for Food Regulation is a subcommittee of the FRSC. This Committee ensures that food regulation is implemented consistently throughout jurisdictions. The Australian Local Government Association is a member.

The Strategic Planning Working Group advises the FRSC and is responsible for providing direction to the Implementation Subcommittee for Food Regulation. Food Standards Australia New Zealand (FSANZ) sets food standards which become part of the law. Each State and Territory implement, monitor and enforce food laws through their own Acts. Authorities in Australia and New Zealand work closely together to ensure food laws are implemented and enforced consistently wherever possible.