



## NSW Food Authority

# FSS Training Module: NSW Food Act 2003 Offences

## Overview

Australia and New Zealand share a joint food standards setting system that ensures food sold in both countries is safe and suitable for human consumption. This is the Australia New Zealand Food Standards Code. In Australia the States and Territories enforce Code through their own State or Territory laws. In New South Wales this is the *Food Act 2003*, and the Food Regulation 2015.

Other states and territories deliver this through their own Food Acts (e.g. Victoria has the *Food Act 1982*, Queensland has the *Food Act 2006* etc).

Serious offences related to the sale of food are consistent across all states and territories and provides a level playing field for food businesses nationwide.

These offences are:

- Sale of unsafe food
- Sale of unsuitable food
- Misleading conduct in relation to the sale of food (includes advertising)
- Sale of food not complying with purchaser's request (e.g. allergenic declaration made by consumer).
- Sale of equipment or packaging and labelling material in a way that may render food unsafe.
- Non-compliance with a provision of the Australia New Zealand Food Standards Code.
- False description of food.

This module is designed to provide an overview of the core offences food handlers and proprietors need to be aware of when working in NSW. Appendix 1 is an extract of the *Food Act 2003*, covering the laws discussed in this module.

## Introduction

### *The Australia New Zealand Food Standards Code*

The NSW *Food Act 2003* requires all food businesses operating in NSW, whether large scale manufacturers, major supermarkets, fast food chains, local cafes, or small home-based food businesses to comply with the Australia New Zealand Food Standards Code (the Code). The Code consists of four chapters that cover mandatory requirements for food



safety, food identity (i.e. prescribed names for certain foods) and food labelling wherever food is sold.

Two chapters of the Code are very important for food safety supervisors:

- *Chapter 3* describes requirements for food businesses generally, retail food handler skills and knowledge, food handling controls, health and hygiene requirements, cleaning and sanitation requirements, and animal and pest controls for food businesses (Standard 3.2.2). Standard 3.2.3 of the Code relates to food premises construction and food transport vehicles.
- *Chapter 1* describes food labelling requirements. Food Safety Supervisors should also be familiar with provisions for food identification, names and addresses of suppliers, and allergen descriptions.

### *Food Act 2003*

The NSW Food Authority enforces the Code through the *Food Act 2003* and the Food Regulation 2015. The *Food Act 2003* defines the offences all food handlers must avoid when working with food. The Food Authority has agreements with all NSW Local Councils to share food law compliance and enforcement across the state. Local councils are the primary enforcement agency for food retail and hospitality businesses.

The offences food handlers and food businesses must be aware of are covered in Part 2 of the *Food Act 2003*. Other parts of the Act support compliance and enforcement activities of the Food Authority and local councils, including food safety schemes for licenced businesses, kilojoule labelling information, and the powers of authorised officers to enter and inspect premises.

Part 2 is divided into two Divisions; Serious offences, and Other offences. At the end of the module there are also two other offences important for retail food businesses.

## **Division 1 – Serious offences relating to food**

Division 1 offences are, as the name suggests, the most serious offences for mishandling food and can attract prison sentences. These laws are designed to protect customers against food being sold that is a known risk of causing food poisoning and intentionally falsely described food.

These matters are referred directly to court for prosecution and guilty verdicts include criminal conviction recordings. The presiding judge will determine the appropriate penalty.

If you are convicted of a Division 1 offence it will stay on your criminal record for 10 years and you and your business will face fines of tens of thousands of dollars. You could even be sent to prison.

These offences are:

- Handling food in an unsafe manner (Section 13)
- Sale of unsafe food (Section 14)
- False description of food (Section 15)

#### *Handling and sale of unsafe and unsuitable food*

The first two offences concern handling food intended for sale in such a way that the food handler knows or should reasonably be expected to know, that handling and selling it in this manner will make the food unsafe.

Handling is a catch-all term for all manner of methods of preparing food including cooking, chilling, cutting or otherwise changing the food.

The *Food Act 2003* defines food as unsafe if it is likely to cause physical harm to a person who might consume it even if properly processed (such as cooked) but includes an exemption for allergen sensitivity that is not common in most people.

In the event of a prosecution an offending business may likely be charged with both Section 13 and Section 14 offences because the Act separates handling and sale. Either way the food business and the food handler are in serious trouble.

The NSW Food Authority Prosecutions webpage

(<http://www.foodauthority.nsw.gov.au/offences/prosecutions>) provides examples of recent court prosecutions and charge sheets. If you explore the website you will find businesses sometimes receive multiple convictions under the *Food Act 2003*, and often multiple convictions for the same offence (e.g. one charge per implicated food sold from the same business), depending on what Food Authority or local council officers found during their investigation.

#### *False descriptions of food*

Section 15 (1) is about truth in the sale of food. This offence is primarily aimed at ensuring businesses truthfully describe foods they sell. Where this is very serious is if consumers are harmed because of incorrect information about the foods they purchase.

For retail and hospitality workers this is very important for things like allergen management. Food safety supervisors need to take care food handlers are aware of the ingredients in the products being sold so as not to falsely describe food they are selling.

Another issue that may trigger a Section 15 conviction is where the business does not remove stock for sale that has been recalled. Often this includes recalls for undeclared allergens such as dairy. Knowingly selling or using a food subject to a recall is a very serious breach.

## **Division 2 – Other Offences relating to food**

Unlike in Division 1, Division 2 offences do not require proof food handlers' knew what they were doing was wrong. The maximum penalties are not as harsh but it means the offence only must be proven to warrant enforcement action. The Food Authority or local council does not need to prove food handlers knew what they were doing would make the food unsafe, or they were selling unsafe food.

Division 2 offences are usually not contested in the Courts, and instead receive fines (Penalty Infringement Notices). The following offences are contained in Division 2:

- Handling and sale of unsafe food (Section 16)
- Handling and sale of unsuitable food (Section 17)
- Misleading conduct relating to sale of food (Section 18)
- Sale of food not complying with purchaser's demand (Section 19)
- Sale of unfit equipment of packaging or labelling material (Section 20)
- Compliance with Food Standards Code (Section 21)
- False descriptions of food (Section 22)

### **Learning Activity**

Go to the appendix and compare Section 13 offences with Section 16. You will see Section 16 is much more likely to occur, because it only requires that the offence happened, intent is irrelevant. A business will not avoid a fine for not knowing the food was unsafe or unsuitable.

Regardless of whether the food handler knows the food is unsafe, customers eating unsafe food are likely to suffer physical harm, including potential hospitalisation or even death. These offences can apply to both the individual food handler and the business, so it is important for all staff in the business to be aware not to sell unsafe food. The food safety supervisor should put in place procedures to ensure all staff know what to do if they suspect a food product is unsafe.

#### *Unsuitable food*

Unsuitable food means food that is rotten, spoiled or otherwise damaged, or contains a biological or chemical material that is foreign to the nature of the food (contaminant). The *Food Act 2003* definition also includes criteria for meat from animals not slaughtered properly or is diseased.

It is always important to check food in the kitchen prior to use to confirm that it is not rotten or spoiled.

Remember, unsuitable food is not necessarily unsafe, but may cause harm to your customers.

#### *Misleading conduct*

Misleading conduct includes misleading advertising, labelling and packaging, whether verbal, printed or digital. It captures instances where the product or food handler makes claims about the nutritional or health effects, or the product contains undeclared ingredients, or ingredients in different quantities to what is advertised.

Authorised officers, can and will take samples to ensure products contain the described energy and nutrient amounts, or ingredients if they suspect a business is substituting ingredients or making false claims about foods they sell. Food handlers are not usually responsible for labelling packaged foods but must ensure they are able to respond to customers' questions about products accurately.

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

This offence is a little more complex than misleading conduct. Its broad generality is designed to capture sales where products are similar, but not the same. Examples include selling substitute cuts of meat (a sirloin instead of a rib eye) or using alternative ingredients due to a shortage (caged instead of free range eggs in a quiche). Food handlers must declare changes to the standard product in such instances.

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

This offence is about the need to ensure food is sold in food grade packaging. Poor or unsuitable packaging can lead to food becoming contaminated by chemicals in the packaging leaching into food. It is important that food is sold in food grade packaging

materials. If you are concerned about the quality of packaging used ask the owner of the business to confirm that the packaging is food grade.

While this offence is likely to be an issue for stock controllers, food handlers should ensure items like paper and plastic containers are suitable for hot food or are microwave safe.

### *Compliance with Food Standards Code*

This clause is very important. Its sections give legal power to the Food Standards Code in New South Wales and is the most common conviction for food businesses who are fined or prosecuted for food safety breaches.

The Food Standards Code contains requirements for many types of foods and labelling. Food handlers and food safety supervisors should be particularly mindful of the requirements listed in Standards 3.2.2 – *Food safety practices and general requirements* and Standard 3.2.3 – *Food premises and equipment*. These two standards outline food safety requirements for people working in food businesses, including health and hygiene responsibilities.

Key examples of compliance concerns with Standard 3.2.2 include:

- Food processing control failure (clause 7 of Standard 3.2.2)
- Food display control failure: 2hr/4hr rule (clause 8 of Standard 3.2.2)
- Health and hygiene (Division 4 of Standard 3.2.2)
- Cleaning and Sanitation (Division 5 of Standard 3.2.2)

### *False descriptions of food*

Section 22 is a good example of how laws operate to add clarity about a word or function mentioned elsewhere in the Act. This section provides a list of all the times food can be falsely described and applies to the offences listed in both Section 15 and Section 18. A product only needs to meet one of these criteria to potentially meet the definition of false description.

Improvement notices part 5

## **Other laws**

### **Notification**

Section 100 of the *Food Act 2003* requires all businesses selling food in NSW to notify the relevant enforcement agency. For businesses requiring an FSS, including home-based businesses, this is usually the local council.

### **Appointment of food safety supervisor**



Section 106C specifies that the owner of a food business must appoint a food safety supervisor. There must be at least one FSS appointed at all times the business operates. However, a food business has 30 working days to replace an FSS if the appointed person leaves the business or their certificate expires.

## Appendix 1 – Food Act 2003 Extract

### Reading the Food Act 2003

Legislation, i.e. Acts and Regulations, are written to be as clear as possible for courts to interpret. This means that they will often spell out specific words more than once in each clause or section.

This is to make to whom a certain matter applies very clear. This is especially important if the matter has a penalty attached.

In the example below, you can see the “proprietor of a food business” is mentioned three times, to clarify responsibility between the proprietor and the appointed food safety supervisor.

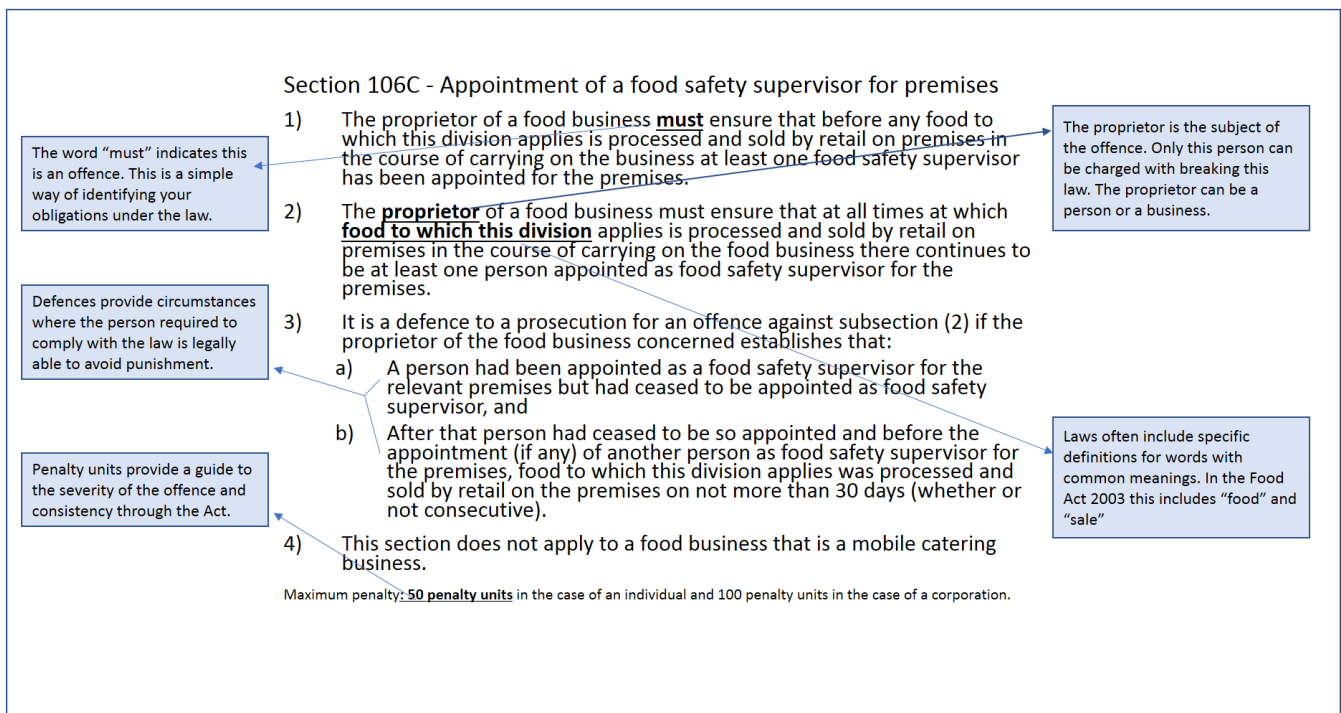


Figure 1 – Extract of NSW Food Act 2003: Section 106C

### Penalty Units

Penalty units are used to describe matters in law that may be enforced through financial punishment (i.e. fines). Punishment for breaking the law is not limited to fines. Some offences in the *Food Act 2003* may be enforced through imprisonment (e.g. intentional sale of unsafe food), however most offences are enforced through fines or other methods (e.g. prohibition order – mandatory order to cease trade).



In NSW, penalty units are set at \$110 across all Acts and Regulations, therefore if you are fined for breaking a law, you will be fined a multiple of \$110 up to the maximum, depending on the severity of the offence. Corporations are fined at two to five times the rate of individuals.

Authorised Officers (such as *Environmental Health Officers* working for Local Councils, or Food Authority *Authorised Officers*) are also able to issue penalty notices with fixed fines for breaking the law. The amounts of these notices are outlined in Food Regulation 2015 Schedule 2. These fines are generally 6 or 7 times the standard \$110 penalty unit (i.e. \$660 or \$770 for an individual or \$1,320 or \$1,540 for a corporation).

## **Part 2 Offences relating to food**

### Division 1 Serious offences relating to food

#### 13 Handling of food in unsafe manner

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

Maximum penalty: 1,000 penalty units or imprisonment for 2 years, or both, in the case of an individual and 5,000 penalty units in the case of a corporation.

(2) A person must not handle food intended for sale in a manner that the person ought reasonably to know is likely to render the food unsafe.

Maximum penalty: 750 penalty units in the case of an individual and 3,750 penalty units in the case of a corporation.

#### 14 Sale of unsafe food

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

Maximum penalty: 1,000 penalty units or imprisonment for 2 years, or both, in the case of an individual and 5,000 penalty units in the case of a corporation.

(2) A person must not sell food that the person ought reasonably to know is unsafe.

Maximum penalty: 750 penalty units in the case of an individual and 3,750 penalty units in the case of a corporation.

#### 15 False description of food

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

Maximum penalty: 1,000 penalty units or imprisonment for 2 years, or both, in the case of an individual and 5,000 penalty units in the case of a corporation.

Note. Examples of food that is falsely described are contained in section 22.

(2) A person must not cause food intended for sale to be falsely described if the person ought reasonably to know that a consumer of the food who relies on the description is likely to suffer physical harm.

Maximum penalty: 750 penalty units in the case of an individual and 3,750 penalty units in the case of a corporation.

Note. Examples of food that is falsely described are contained in section 22.

(3) A person must not sell food that the person knows is falsely described and will, or is likely to, cause physical harm to a consumer of the food who relies on the description.

Maximum penalty: 1,000 penalty units or imprisonment for 2 years, or both, in the case of an individual and 5,000 penalty units in the case of a corporation.

Note. Examples of food that is falsely described are contained in section 22.

(4) A person must not sell food that the person ought reasonably to know is falsely described and is likely to cause physical harm to a consumer of the food who relies on the description.

Maximum penalty: 750 penalty units in the case of an individual and 3,750 penalty units in the case of a corporation.

Note. Examples of food that is falsely described are contained in section 22.

## Division 2 Other offences relating to food

### 16 Handling and sale of unsafe food

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

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

Maximum penalty: 500 penalty units in the case of an individual and 2,500 penalty units in the case of a corporation.

### 17 Handling and sale of unsuitable food

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

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

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

Maximum penalty: 400 penalty units in the case of an individual and 2,000 penalty units in the case of a corporation.

### 18 Misleading conduct relating to sale of food

(1) A person must not, in the course of carrying on a food business, engage in conduct that is misleading or deceptive or is likely to mislead or deceive in relation to the advertising, packaging or labelling of food intended for sale or the sale of food.

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

Note. Examples of food that is falsely described are contained in section 22.

(3) A person must not, in the course of carrying on a food business, sell food that is packaged or labelled in a way that falsely describes the food.

Note. Examples of food that is falsely described are contained in section 22.

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

Maximum penalty: 500 penalty units in the case of an individual and 2,500 penalty units in the case of a corporation.

## 19 Sale of food not complying with purchaser's demand

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

Maximum penalty: 500 penalty units in the case of an individual and 2,500 penalty units in the case of a corporation.

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

## 20 Sale of unfit equipment or packaging or labelling material

(1) A person must not sell equipment that if used for the purposes for which it was designed or intended to be used:

(a) would render or be likely to render food unsafe, or

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

(2) A person must not sell packaging or labelling material that if used for the purposes for which it was designed or intended to be used would render or be likely to render food unsafe.

Maximum penalty: 500 penalty units in the case of an individual and 2,500 penalty units in the case of a corporation.

## 21 Compliance with Food Standards Code

- (1) A person must comply with any requirement imposed on the person by a provision of the Food Standards Code in relation to the conduct of a food business or to food intended for sale or food for sale.
- (2) A person must not sell any food that does not comply with a requirement of the Food Standards Code that relates to the food.
- (3) A person must not sell or advertise for sale any food that is packaged or labelled in a manner that contravenes a provision of the Food Standards Code.
- (4) A person must not sell or advertise for sale any food in a manner that contravenes a provision of the Food Standards Code.
- (5) This section does not require compliance with a provision of the Food Standards Code in relation to the conduct of a food business that is primary food production unless a food safety scheme provides that the provision applies to the food business or to a class of food businesses that includes the food business concerned.

Maximum penalty: 500 penalty units in the case of an individual and 2,500 penalty units in the case of a corporation.

## 22 False descriptions of food

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

(2) Without limiting the application of subsection (1) of this section to section 18 (2), food is falsely described for the purposes of section 18

(2) if it is supplied in response to a purchaser's request for a particular type of food, or a food that does not contain a particular ingredient, and the food is not of that type or contains that ingredient.

### 23 Application of provisions outside the State

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

Note. See section 25 for a defence in relation to food intended for export.