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THE LEGISLATIVE ASSEMBLY FOR THE  
AUSTRALIAN CAPITAL TERRITORY

FOOD AMENDMENT BILL 2014

REVISED EXPLANATORY STATEMENT

**Presented by**  
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# Food Amendment Bill 2014

This explanatory statement relates to the *Food Amendment Bill 2014* as introduced to the Legislative Assembly.

## Outline

The Food Amendment Bill 2014 (the Bill) proposes to amend the *Food Act 2001* (the Food Act) to implement regulatory reform measures designed to reduce the compliance burden on some food businesses and non-profit community organisations. The amendments to the Food Act will do the following:

- remove the notification requirement for businesses that are exempt from registration;
- remove food-related activities conducted for the purpose of fundraising by non-profit community organisations from the application of the Food Act, except at declared events;
- provide the Minister with a power to exempt registered food businesses from the requirement to appoint a Food Safety Supervisor; and
- allow for registrations to be granted for a period of up to 3 years.

The Bill also includes supplementary amendments of a technical nature, to:

- remove the time limit, of 21 days, in which the Chief Health Officer must publish a conviction on the register of offences; and
- recast the offence relating to interference with a closure notice to place the obligation on the proprietor to maintain the closure notice.

## Human Rights Assessment

It is a requirement that compatibility with the *Human Rights Act 2004* (the HRA) be addressed in explanatory statements to Bills proposed to the Legislative Assembly. The assessment is included at clause 9.

## Clauses

**Clause 1** declares the name of the Act to be the *Food Amendment Act 2014*.

**Clause 2** provides for the commencement of the Act to be by written notice by the Minister, to enable different dates. Whilst some provisions can commence sooner, others require a longer lead-in time to allow the administrative mechanisms to be implemented.

Due to the operation of section 75(1) of the *Legislation Act 2001* (the Legislation Act) the naming and commencement provisions of this Act, in clauses 1 and 2, commence automatically on the day the Act is notified. A note to that effect is included in the provision.

**Clause 3** provides that the Act amends the *Food Act 2001* and the Food Regulation 2002 in accordance with the provisions that the Act contains. This Act will then be immediately repealed. Consequentially, from the date that this Act commences a new republication of the *Food Act 2001* and the Food Regulation 2002 will be available which will feature the amendments made by this Act.

**Clauses 4 and 5** update references to Part 8 of the Food Act. Part 8 of the Food Act is concerned with the notification and registration of food businesses. With the removal of notifications, the references in sections 6 and 7 are updated.

**Clause 6** inserts a new section 7A to provide for the application of the Food Act to certain food businesses. It provides an exemption from the application of the Food Act for the handling or sale of food by non-profit community organisations for the purposes of fundraising, except when operating at a regulated event. Regulated events are provided for in the new section 91. Regulated events are discussed at clause 11.

The clause provides definitions for community organisation and volunteer. These definitions are aligned with provisions relating to volunteers for the purposes of the *Civil Law (Wrongs) Act 2002*. This is to ensure consistency between definitions.

The exemption is intended to include the operation of non-commercial fundraising stalls by community organisations, such as a weekend canteen by a community sports club or cake stall at a school fete. Food businesses that operate on a commercial scale or primarily to provide a food service, rather than raise funds, are not intended to be exempted from the Food Act. For example, a school canteen with volunteer staff is not considered to be an exempt food business in this context and will still be required to register under the Food Act. The primary function of a school canteen is to provide a food service to students, irrespective of its capacity to raise funds for the school. This is distinct from the activity of a food stall at a school fete, the core function of which is to raise funds. Food stalls at fetes sell food to any persons who choose to attend, and customers attending do not need to purchase food at the fete and have the option of going elsewhere to purchase food. In contrast, a school canteen sells food nearly exclusively to children attending the school. When at school, it is generally not possible for these children to purchase food elsewhere and some children depend on the canteen to provide their lunch. As such, this makes the core function of a school canteen one of a service to the children and any funds raised constitute a secondary consideration.

Both a canteen and a fete cake stall may be operated by the same entity, for example a Parents and Citizens Association, however each activity is considered a separate food business under the Food Act; whereas the fete cake stall is an exempt food business, the school canteen is not an exempt food business.

In circumstances where a food business meets the exclusion in section 7A(1) but that exclusion is not desirable from a public health perspective, or where there is doubt about the application of the exclusion in section 7A(1), the Minister may make a declaration under section 7A(2) that applies the Food Act to the food business.

Section 7A(2) also provides that food businesses conducted at a regulated event are subject to the Act. Any exemptions under section 7A(1) that would apply to a food business generally, have no effect in respect of food businesses operating at a declared event.

Under subsection (3), the definition of community organisation has been framed to exclude a club that holds a licence under the *Gaming Machine Act 2004* (such as a trading club). Subsection (3) also allows the Minister to declare an organisation that would otherwise have met the operation of section 7A(1) not to be a community organisation for the purposes of the Act. A declaration that a community organisation is not included in the exemption may be necessary where an entity has been identified as operating inconsistently with the exemption.

The declarations under 7A(2) and (3)(b)(ii) are disallowable instruments.

The Minister is also granted the power to declare by regulation the circumstances in which a volunteer may be paid but still be considered a volunteer for the purposes of this section. Clause 32 amends the Food Regulation to provide for this in relation to a person being paid by a community organisation to manage the work of unpaid volunteers, or paid an amount in relation to work done that is not assessable income for taxation purposes.

**Clause 7** amends section 84A of the Food Act to clarify that only an authorised officer (Public Health Officer) can remove a closure notice. Proprietors, or other persons, are not permitted to remove closure notices in any circumstances. This eliminates any uncertainty as to whether section 84A(2)(b)(i) authorised a proprietor or another person to remove the closure notice when the clearance certificate is issued.

**Clause 8** further amends section 84A to insert a new subsection (3) outlining when an authorised officer may remove a closure notice. Subsection 3(a) establishes that an authorised officer may remove the closure notice when the clearance certificate has been issued. Subsection 3(b) enables an authorised officer to remove a closure notice in order to reposition, update or correct the notice.

**Clause 9** amends the current offence of interference with a closure notice (section 84C). Closure notices are placed at the public entrance of a food business premises when the proprietor has been served with a prohibition order. The closure notice is affixed, where possible and appropriate, inside the premises, placing the closure notice under the control of the proprietor. This provision is being amended to place responsibility on the proprietor to maintain a closure notice at their premises, and ensure the closure notice is not moved, obscured or defaced.

It is a defence for the proprietor to show they took reasonable steps to ensure the closure notice was not moved from where it was placed and no part of the closure notice was obscured or defaced.

The steps that can be taken by a proprietor to ensure that the closure notice is not removed, obscured or defaced will to a degree vary in relation to individual circumstances. Nevertheless, a reasonable step by the proprietor would certainly include informing any staff, cleaning contractors or tradespersons engaged to address matters within a prohibition order about the existence of the closure notice, and that it is not to be interfered with. Similarly, a proprietor should make arrangements so that no furniture, plants or posters are placed inside or outside the premises that may obscure the closure notice. A routine check to ensure that the notice is in place, undamaged and unobscured might also be regarded as a reasonable step.

There may be instances in which a closure notice may be damaged, accidentally removed, or start to come away from where it was affixed. In such circumstances an important reasonable step that should be taken by the proprietor is to notify the authorised officer so that the authorised officer may return and replace the notice to rectify the issue.

In reading and applying an offence, regard must be given to the provisions of the *ACT Criminal Code 2002* (the Criminal Code). The Criminal Code has codified many common law principles concerning offences; including such matters as the burden of proof and defences that can be relied upon.

Section 56 of the Criminal Code confirms that the prosecution has the legal burden, being the burden of proving the existence of a matter, of every element of an offence relevant to the guilt of the person charged. This legal burden of proof must be discharged beyond reasonable doubt.

In many instances, a burden of proof imposed upon a defendant by a law is, according to section 58 of the Criminal Code, to be an evidential burden only. An evidential burden is the burden of presenting or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist. In response, the prosecution carries the legal burden of disproving any matter in relation to which a

defendant has discharged an evidential burden. Again, the prosecution must discharge this legal burden beyond reasonable doubt.

Accordingly, a legal burden of proof is a heavier burden than an evidential burden. For this reason section 59 of the Criminal Code establishes that the heavier burden of a legal burden can only be imposed on a defendant if the law imposing the burden expressly requires the defendant to prove a matter, or expressly provides that the burden of proof imposed on the defendant is a legal burden.

The proposed offence in section 84C establishes a defence in subsection 2 through which a defendant may claim that the defendant took reasonable steps to ensure elements of the offence did not occur. However, the defence requires the defendant to prove that the defendant took reasonable steps, and as such a legal burden falls upon the defendant, as per section 59 of the Criminal Code.

Placing the burden on the defendant engages the presumption of innocence, protected by section 22(1) of the HRA. It therefore needs to be considered whether imposing the burden on the defendant is permissible as a reasonable limitation under section 28 of the HRA.

The presumption of innocence is, in its simplest form, that a person be treated as not having committed any offence until the State, through a prosecution, adduces sufficient evidence to satisfy an independent and impartial tribunal that the person is guilty. That is, a court should not begin proceedings with the preconception that the person has committed the offence.

Imposing a legal burden on the defendant potentially raises an issue because the defendant may have to raise a defence to prove their innocence. The general principle is that a defendant is not obligated to offer a defence. The defendant, however, need only prove that they took reasonable steps to prevent the interference with the notice, something that would only be within their knowledge and not that of the prosecution. As such, the reverse burden is appropriate in the circumstances and is a reasonable limitation under section 28 of the HRA.

**Clause 10** amends the name of Part 8 to Registration of food businesses. As the Bill will remove notifications as a process to inform the Health Protection Service of the activities of certain food businesses, the reference to notification in the heading requires updating.

**Clause 11** amends sections 89 to 91. These sections establish the registration requirements for the purposes of the Food Act. Under the Act, all food businesses must be registered unless exempted by regulation. Prior to this amendment, food businesses exempted from registration were required to notify their details to the

Chief Health Officer. As part of regulatory reform efforts, the notification requirement has been removed, along with the offence provision previously in section 90 of the Act. The offence requiring the registration of a food business, previously in section 91, is updated and now in section 89. The power to exempt a food business from registration is new section 90. New section 91 provides for the process of declaring a regulated event.

It is an offence to conduct a food business without a registration pursuant to section 89, for which the maximum penalty is 50 penalty units or 6 months imprisonment or both. However, if a food business is exempt under a regulation made under new section 90, the offence will not apply.

Although a non-profit community organisation that operates a fund-raising food stall will be otherwise exempt from the Act, such organisations that operate a food business at a regulated event will be required to register under the Act in relation to that event. This will ensure the Act applies to the community organisation for the duration of the event. A registration granted in respect of a regulated event will enable a food business to operate at an event declared to be a regulated event, generally for the duration of the event only. Declarations of regulated events made under new section 91 are intended for large public gatherings, such as the National Multicultural Festival, at which the potential impacts of unsafe food handling are significant.

Businesses and organisations that operate only at regulated events will be able to undertake a streamlined registration process appropriate for a temporary food stall. This would include being able to appoint a Food Safety Supervisor based on completion of simplified training, rather than full national competencies. The training requirements for Food Safety Supervisors at regulated events are specified in guidelines issued by the Chief Health Officer. A registration fee may apply, however, most community organisations would be fee-exempt, consistent with the current fee determination. Organisations that already have a registration will not be subject to further registration requirements in order to operate at a regulated event.

**Clause 12** amends section 92(6) to provide that a registration can be for a period of up to 3 years. The purpose of the amendment is to provide for the short-term registration for a regulated event and also to enable multi-year registrations. Enabling multi-year registrations is part of a broader ACT Government regulatory reform program to reduce administrative burden on businesses.

**Clause 13** provides that the period of renewal for registrations granted under section 92 may also be for a period of up to 3 years. Enabling multi-year registrations is part of a broader ACT Government regulatory reform program to reduce administrative burden on businesses.

**Clause 14** amends section 96(2)(b) to provide that a trading name is included on a certificate of registration if there is one. This will ensure that if a certificate is issued and the food business does not have a trading name, for example a community organisation, then it is not a requirement that a trading name is included on the certificate.

**Clauses 15 to 20** make amendments associated with the register of food businesses. Clause 15 updates the heading of section 105 following the removal of the notification requirement. Prior to the commencement of this Act there were two food business registers. The first register was for businesses that have been registered, and this register remains applicable following the commencement of this Act. The other register was for food businesses that did not require registration, but that were required to notify the Chief Health Officer of their details. Following commencement of this Act the second register is no longer required.

Accordingly, section 105(1) is amended to refer only to a single register of registered businesses, following the removal of the notification requirement and its associated register. Section 105(2) is removed as it no longer applies, as the notification register no longer exists. Technical amendments are also made by clauses 18 to 20.

**Clauses 21 and 22** update the heading of section 106 and make a technical amendment to refer to the food register.

**Clause 23** inserts a new definition of *site* for the purposes of this section, to exclude sites at regulated events. This provides that a Food Safety Supervisor appointed to a site of an ongoing food business may also be a Food Safety Supervisor for that food business when operating at a regulated event.

**Clause 24** makes a technical amendment to the heading of section 117.

**Clause 25** inserts a new section 117(1A) to put beyond doubt that the requirement to have a food safety supervisor applies to all registered food businesses, including those at regulated events.

**Clause 26** amends section 117(1) to provide that the offence relating to Food Safety Supervisors in that provision does not apply to regulated event registrations.

Section 117 provides that it is an offence for a proprietor to fail to have a Food Safety Supervisor within 30 days of being registered or at any time after the establishment period. The section is amended to provide that the offence does not apply to a food business at a regulated event.

Because regulated events tend to be of a short duration, usually between three and five days, and there is no minimum time period in which a business must register prior to a regulated event, the regulated event may be held and concluded before the



30 day timeframe in which a business has to appoint a Food Safety Supervisor has elapsed.

As part of the registration process for an entity that applies for registration for a regulated event, ACT Health will require evidence of the Food Safety Supervisor for the food business at the regulated event.

**Clause 27** inserts a new section 120 that provides that the Minister may exempt a food business from the requirement to appoint a Food Safety Supervisor. The exemption is to be used on a case-by-case basis where it is identified that the requirement to appoint a Food Safety Supervisor is disproportionate to the public health risk posed by the food-related activity. By including an exemption power, the Minister may more quickly address situations where an inappropriate regulatory burden is imposed.

The exemption is a disallowable instrument.

**Clause 28** removes the time limit of 21 days in which the Chief Health Officer must publish a conviction on the register of offences under section 146. The time limit was carried over when the register of offences was created by the *Food Amendment Act 2012*. The Chief Health Officer is still obliged to publish convictions on the register, but this would be as soon as possible after the information for the register is verified rather than within a 21 day period.

**Clause 29** inserts a new note alerting the reader to the application of the Legislation Act, and that a notice must be published on the register of offences as soon as possible after the applicable time mentioned in section 146(8).

**Clause 30** removes the regulation-making power relating to notifications in section 152(2)(b).

**Clause 31** provides for a new definition to be inserted into the dictionary; that of a *regulated event*. As the meaning of a regulated event is dealt with in section 91, the definition simply refers the reader to that section.

**Clause 32** amends the Food Regulation 2002. This amendment provides for circumstances when a person is a volunteer, as provided for by new section 7A. The regulation prescribes that a person who is paid to manage the work of unpaid volunteers operating on behalf of a community organisation is considered to be a volunteer for the purposes of the Food Act. This is intended to include, for example, a situation where a non-profit community organisation remunerates a canteen manager to oversee the work of volunteer food-handlers at fund-raising stalls.

The regulation also prescribes that a person who is paid an amount that is not assessable income for taxation purposes is considered to be a volunteer for the purposes of the Food Act. This will ensure that payments to a person by a non-profit

community organisation that are not salary or wages, or a fee for services, do not alter that person's status as a volunteer for the purposes of the Food Act.