

Primary Produce Safety Bill 2011

Clause Notes

PART 1 – PRELIMINARY

Clause 1. Short title

Clause 2. Commencement

The Act will commence on a day to be proclaimed.

Clause 3. Object of Act

This sets out the principle purpose and objectives of the Act. The Act should always be interpreted and applied in a way that best gives effect to these objectives.

Clause 4. Interpretation

Defines the key terms used throughout the Act.

Clause 5. Meaning of primary production activity

The concept of “primary production activity” is a critical concept for establishing the ambit and focus of the Act.

Clause 6. Interaction with other Acts

The Act will not affect the operation of any Act other than the Acts it repeals. In particular the *Food Act 2003* will continue to operate to its full effect.

Clause 7. Act binds Crown

The Crown will be bound by the Act

PART 2 – ADMINISTRATION

Clause 8. Chief Inspector of Primary Produce Safety

- Establishes the position of Chief Inspector centrally administer the Act’s accreditation, auditing and regulatory systems.
- Allows for body corporate such as the Tasmanian Dairy Industry Authority to perform this role if so designated under a food safety scheme.

PART 3 – FOOD SAFETY SCHEMES

Clause 9. Food safety schemes

Sets out the potential scope and function of food safety schemes.

Clause 10. Contents of food safety schemes

States the minimum requirements of food safety schemes.

PART 4 – ACCREDITATION

Clause 11. Authority given by accreditation

States the ambit and legal effect of an accreditation.

Clause 12. Application for accreditation

Outlines the procedures and requirements for an application for accreditation.

Clause 13. Temporary accreditation

Enables the Chief Inspector to grant a temporary accreditation not exceeding three months to allow a producer to lawfully operate (pending the determination of an application for full accreditation).

Clause 14. Deciding an application for accreditation

Sets out the Chief Inspector's powers in relation to determining an application for accreditation.

Clause 15. Conditions of accreditation

Gives the Chief Inspector powers to impose conditions on an accreditation and sets out a series of minimum conditions.

Clause 16. Periodic fees and returns

Enables the Chief Inspector to charge fees and require returns (likely to be annual) in relation to accreditations.

Clause 17. Variation of accreditation

Empowers the Chief Inspector to vary an accreditation in specified circumstances.

Clause 18. Application for variation of accreditation

Sets out the procedure and basis for an accredited person to apply for a variation of accreditation.

Clause 19. Transfer of accreditation

Enables the transfer of accreditation on the application to the Chief Inspector by both parties to the transfer. Sets out criteria relating to the approval of the transfer application.

Clause 20. Suspension or revocation of accreditation

States the criteria, circumstances and procedures relating to the Chief Inspector's power to suspend or revoke an accreditation

Clause 21. Surrender of accreditation

Allows accredited producers to surrender their accreditation.

Clause 22. Review of decisions relating to accreditation

Provides rights of appeal and procedures in relation to Chief Inspector's decisions concerning accreditation.

PART 5 – OFFENCES

Division 1 – Interpretation

Clause 23. Meaning of unsafe for human consumption in relation to primary produce

- Defines what is meant by the term “unsafe for human consumption”.
- Produce will be unsafe if it could harm a person who consumes it according to its reasonable intended use.
- Corresponds with similar definition in *Food Act 2003*.

Clause 24. Meaning of unsuitable for human consumption in relation to primary produce

- Corresponds with definition of “unsuitable” in the *Food Act 2003*.
- Adds extra criteria relating to the mixing of human food with pet food.

Division 2 – Serious offences

Clause 25. Intentional or reckless supply of unsafe primary produce

- This is the most serious offence and the only one in the Act that could potentially attract a sentence of imprisonment (2 years maximum).
- Requires proof beyond reasonable doubt that (1) the offender supplied the produce; and (2) the produce was unsafe; and (3) the offender actually knew the produce was unsafe or at least suspected the produce was unsafe and was reckless of the potential consequences.

Clause 26. Negligent supply of unsafe primary produce

- Second most serious offence.

- Does not require proof of knowledge but does require proof of negligence, i.e. that a reasonable person should in all the circumstances have known that the produce was unsafe regardless of what defendant actually knew or suspected.

Division 3 – Other offences

Clause 27. Supply of unsafe primary produce

- Strict liability version of offence in clause 25.
- Strict liability means that for a person to be found guilty the prosecution only needs to prove that (1) the offender supplied the produce; and (2) the produce was unsafe.
- Do not need to prove knowledge or negligence on part of offender as to the safety of produce.

Clause 28. Supply of unsuitable primary produce

See note to cl. 27 above

Clause 29. Unauthorised production of primary produce

- Makes it a strict liability offence to engage in a primary production activity without the proper accreditation under the Act.
- Obligation to be accredited must be explicitly specified in a food safety scheme. If an activity is not the subject of a food safety scheme (e.g. apple growing and packing) then there will be no obligation to be accredited imposed by this section in relation to that activity.

Clause 30. Official marks

Makes it a strict liability offence to possess or use an official mark without authorisation.

Clause 31. Compliance with Food Standards Code

- Adopts the Food Standard Code into Tasmanian law.
- Corresponds with similar offence in the *Food Act 2003*.

Division 4 – General defences

Clause 32. Defence of due diligence

- Provides the defence of due diligence to anyone facing charges under the Act.
- Once the prosecution has proven the primary elements of an offence under the Act the onus shifts to the defendant to prove (on the balance of probabilities) that due diligence was exercised – if defendant is successful in doing so he/she must be found not guilty.

Clause 33. Defence of mistaken but reasonable belief not available

Clarifies that a defendant must rely on the statutory defences stipulated in the Act (such as that in cl. 32 above) and cannot invoke this particular common law defence.

Clause 34. Alternative verdicts for serious primary produce offences

Allows the court to find a defendant guilty of a less serious offence (in Division 3) in circumstances where they are charged with but found not guilty of a serious offence in Division 2.

PART 6 – AUTHORISED OFFICERS

Clause 35. Appointment of authorised officers

Empowers the Secretary to appoint certain classes of persons (State Service employees, local government officers etc) to be authorised officers under the Act.

Clause 36. Powers of authorised officers

- Details the powers authorised officers can use in the administration and enforcement of the Act.
- Corresponds generally with the powers of authorised officers under the *Food Act 2003*

Clause 37. Search warrants

- Sets out procedures and principles relating to applications for search warrants.
- Authorised officers cannot enter a premises used solely as a residence without a search warrant.

Clause 38. Identification of authorised officers

- The Secretary must issue a photographic identification card to an authorised officer.
- Officer must carry and present identification card.

Clause 39. Failure to comply with requirements of authorised officers

Makes it an offence to fail to comply with a requirement or direction of an authorised officer.

Clause 40. False information

Makes it an offence to provide false information to an authorised officer.

Clause 41. Interfering with seized items

Makes it an offence to interfere or tamper with any item that has been seized by an authorised officer.

Clause 42. Obstructing or impersonating authorised officers

Makes it an offence to obstruct or impersonate an authorised officer.

Clause 43. Threatening or abusing authorised officer

Makes it an offence to threaten, abuse or assault an authorised officer.

PART 7 – SEIZURE BY AUTHORISED OFFICERS

Clause 44. Seizure order

- Sets out the functional requirements and procedures relating to a seizure order.
- A seizure order is used where the item or items seized cannot be taken into possession by an authorised officer or moved from the place of seizure.

Clause 45. Seizure of primary produce suspected of being unsafe or unsuitable

Sets out the procedures and powers relating to seized items that are suspected of being unsafe or unsuitable.

Clause 46. Seizure of thing that may be used as evidence

Sets out the procedures and powers relating to seized items that are to be used as evidence in court proceedings taken under the Act

PART 8 – COMPLIANCE NOTICES AND PROHIBITION ORDERS

Clause 47. Meaning of legislative requirement in this Part

- Defines the limits of when a compliance notice or prohibition order can be used.
- Can only be used in relation to a primary production activity that is the subject of a food safety scheme made under the regulations.

Clause 48. Compliance notice

- A compliance notice can be issued by an authorised officer and imposes a legal obligation on the recipient to take the actions specified in the notice.
- A compliance notice cannot of itself prohibit an activity or shut down an operation.
- A compliance notice operates for a period of 7 days (or less if indicated in the notice)

Clause 49. Prohibition order

- A prohibition order can only be issued by the Chief Inspector.
- Can be issued after a person fails to comply with a compliance notice or at first instance.
- Unlike a compliance notice, a prohibition order can prohibit an activity or shut down an operation until it is complied with.
- Procedures are specified which ensure a prohibition order cannot operate for longer than is necessary to ensure compliance.

Clause 50. Compensation

Enables a person who is bound by a prohibition order who believes that the order is unfair or unwarranted to apply to the Chief Inspector for compensation.

Clause 51. Review of decisions relating to prohibition orders

- Provides a right of appeal to the Magistrates Court (Administrative Appeals Division) against decisions associated with a prohibition order – including a decision to refuse compensation applied for under cl. 50.
- Does not apply to compliance notices because a compliance notice only operates for 7 days and cannot require a person cease operation.
- Also – it is a defence to any a breach of a compliance notice if the person has a reasonable excuse for not complying and this can be raised in any subsequent proceedings.

PART 9 – OTHER REMEDIES

Clause 52. Infringement notices

Enables the issuing of infringement notices (instead of having to always institute a court prosecution) for prescribed offences

PART 10 – FOOD SAFETY PROGRAMS

Clause 53. Food safety programs

Sets out the scope and requirements of food safety programs.

Clause 54. Auditing of food safety programs

Imposes auditing requirements in relation to food safety programs.

Clause 55. Frequency of audits for food safety purposes

Sets out the powers and criteria for determining the frequency of audits by the Chief Inspector.

Clause 56. Check audits

Enables the Chief Inspector to cause audits to be carried out for purpose of checking the performance of a third party auditor.

PART 11 – AUDITORS

Clause 57. Approval of food safety auditor

Sets out the criteria and procedures relating to the approval of an individual as a food safety auditor under the Act.

Clause 58. Term of approval

An approval of a food safety auditor runs for the period specified in the approval

Clause 59. Declaration of interest

Imposes requirement on a food safety auditor to declare any interest in any person or business that may be subject to an audit under the Act.

Clause 60. Variation of conditions, or suspension or cancellation, of approval of food safety auditor

Sets out criteria and procedures relating to variation, suspension or cancellation of persons approval as food safety auditor

Clause 61. Review of decisions relating to approval

Provides rights of review to person aggrieved by decisions relating to the approval of a food safety auditor.

Clause 62. Duties of food safety auditors

States the duties that food safety auditors are to perform.

Clause 63. Reporting requirements

Imposes statutory responsibility on food safety auditors to report specified matters to the Chief Inspector relating to food safety and compliance with the food safety scheme.

Clause 64. Certificates of approval of food safety auditors

Imposes requirement on Chief Inspector to provide approved food safety auditors with a certificate of approval which (inter alia) specifies any conditions which the approval is subject to.

Clause 65. Identification of food safety auditor

Imposes requirement on food safety auditor to carry and present a photographic identification card issued by the Chief Inspector.

Clause 66. Register of food safety auditors to be maintained

Requires Chief Inspector to maintain a public register of food safety auditors approved under the Act.

Clause 67. Obstructing or impersonating food safety auditors

Makes it an offence to obstruct or impersonate a food safety auditor in the performance of their duties.

Clause 68. Threatening or abusing food safety auditors

Makes it an offence to threaten, abuse or assault a food safety auditor in the performance of their duties.

PART 12 – EVIDENTIARY AND PROCEDURAL PROVISIONS

Clause 69. Nature of proceedings for offences

All criminal proceedings under the Act are to be dealt with summarily i.e. in the Magistrates Court.

Clause 70. Institution of proceedings

- Proceedings may only be instituted by the Minister, Chief Inspector or an authorised officer.
- Must be instituted within 3 years of the date of the alleged offence (although there is power to extend this time).

Clause 71. Offences by employers

- Employers will be criminally responsible for the offences of their employees.
- A “due diligence” defence is provided.

Clause 72. Offences by bodies corporate

- This applies where a company has been charged with an offence under the Act and a director or officer of the company has also been personally charged with the offence.
- To personally convict the director the onus is on the prosecution to prove, in addition to the elements of the offence, personal fault (such as actual authorisation, knowledge or negligence in relation to the crime) on the part of director.

Clause 73. Liability of employees and agents

- An employee or agent of a person who was the proprietor of a primary produce business will not be liable for an offence under the Act if (when the offence was committed) the employee or agent was under the supervision of their employer or principal.
- Requires a defendant employee to give notice of intention to rely on this defence.

Clause 74. Continuing offence

Empowers sentencing court to impose a daily penalty not exceeding one fifth of the maximum penalty for a continuing offence for each day the offence continues after its initial commission.

Clause 75. Presumptions

- Contains a list of factual presumptions that a court may accept (without requiring further evidence).
- Onus is on the defendant to disprove (on the balance of the probabilities) the presumptions in any proceedings

Clause 76. Evidence

- Enables a court to accept in evidence certificates attesting to various matters without requiring further proof.
- Onus is on the defendant to disprove (on the balance of the probabilities) the contents of the certificates in any proceedings

Clause 77. Proceedings relating to third persons

Sets out principles and procedures that apply in relation to proceedings relating to third persons

Clause 78. Disclosure by witnesses

- Provides legal protection against revealing sources of information to witnesses.
- Can be set aside where the justice of the case requires disclosure

Clause 79. Court may order costs and expenses

Standard clause empowering court to order costs and expenses to be paid in proceedings taken under the Act.

Clause 80. Court may order forfeiture

Standard clause empowering court to order forfeiture of property used in the commission of offence under the Act.

PART 13 – MISCELLANEOUS

Clause 81. Protection from liability

- No individual can be liable for any harm caused by their honest act or omission while performing any function or exercising any power under the Act even if they are subsequently found to have been mistaken or negligent.
- However the Crown will be “vicariously” liable for that officer’s actions if negligence/fault were able to be proved.

Clause 82. Bribery

Makes it an offence to bribe or attempt to influence by financial reward a person carrying out any duties or functions under the Act

Clause 83. Disclosure of information

Provides constraints and protections against disclosure of confidential business or personal information except in certain limited circumstances.

Clause 84. Certificate of compliance with food safety scheme

Enables the Chief Inspector to certify that produce is compliant with a food safety scheme where a producer is not otherwise required to be accredited but needs to demonstrate compliance in order to gain access to interstate or overseas markets.

Clause 85. Regulations

Sets out the powers and scope of regulations that can be made under the Act.

Clause 86. Saving and transitional arrangements

- Ensures that primary producers authorised under legislation that will be replaced by the new Act can be transitioned to the new system in a way that will minimise any costs or disruption to their business.
- Producers licensed under the Meat Hygiene Act 1985 and the Egg Industry Act 2002 will be automatically granted a 12 month temporary accreditation under the new Act.

Clause 87. Administration of Act

Act to be administered by the Minister for Primary Industries and Water and the Department of Primary Industries, Parks, Water and Environment.

Clause 88. Consequential amendments

References to repealed Acts and regulations in other legislation will need to be changed to reflect the new Act

Clause 89. Legislation repealed

Meat Hygiene Act 1985 and the Egg Industry Act 2002 will be repealed when food safety schemes for each respective industry are finalised.

Clause 90. Legislation further repealed

Clause 91. Legislation rescinded

Clause 92. Legislation further rescinded

Clause 93. Legislation revoked

Relates to regulations made under the repealed Acts

Clause 94. Legislation further revoked

SCHEDULE 1 – PROVISIONS WITH RESPECT TO SEARCH WARRANTS

SCHEDULE 2 – CONSEQUENTIAL AMENDMENTS

SCHEDULE 3 – LEGISLATION REPEALED
SCHEDULE 4 – LEGISLATION FURTHER REPEALED
SCHEDULE 5 – LEGISLATION RESCINDED
SCHEDULE 6 – LEGISLATION FURTHER RESCINDED
SCHEDULE 7 – LEGISLATION REVOKED
SCHEDULE 8 – LEGISLATION FURTHER REVOKED