



Food Act 2008 (WA) - Guideline for allergen declarations by food businesses

This document contains information on the application of the *Food Act 2008* (WA) in relation to allergen declarations and is designed to assist enforcement agencies in applying a consistent approach. As well as providing a background to food allergen declarations, this document also covers the labelling provisions detailed in the *Australia New Zealand Food Standards Code Standard 1.2.3 - Information requirements – warning statements, advisory statements and declarations*.

Version: 2

Date: March 2019

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Abbreviations, acronyms and definitions

<i>Assessment</i>	the process of reviewing a food business in order to confirm compliance or non-compliance with the <i>Food Act 2008 (WA)</i> (Food Act), <i>Food Regulations 2009 (WA)</i> (Food Regulations) or the Code
<i>Authorised Officer</i>	means a person appointed under Part 10, Division 3, section 122 of the Food Act
<i>CEO</i>	the Chief Executive Officer of Department of Health Western Australia
<i>Code</i>	means the <i>Australia New Zealand Food Standards Code</i> as defined in the <i>Food Standards Australia New Zealand Act, 1991</i> of the Commonwealth of Australia. Part 3, Division 2, Section 22 of the Food Act provides for enforcement of the Code
<i>Compliance</i>	refers to a state when persons, food businesses or primary producers are operating within the regulatory requirements that apply to that person, food and associated inputs, food business or primary producer
<i>DOH</i>	Department of Health Western Australia
<i>Enforcement</i>	refers to use of regulatory options to achieve compliance
<i>Enforcement Agency</i>	means <ul style="list-style-type: none">▪ the CEO;▪ a local government; or▪ a person or body, or a person or body within a class of persons or bodies, prescribed by the Food Regulations for the purposes of this definition
<i>Food Act</i>	refers to the Food Act
<i>FSANZ</i>	Food Standards Australia New Zealand
<i>Food Regulations</i>	refers to the Food Regulations
<i>Infringement notice</i>	means a statutory notice served by a designated officer (provided for by Part 11, Division 4, Section 126 of the Food Act) who has reason to believe that a person has committed a prescribed offence under the Food Act or Food Regulations and sets out the procedures and requirements
<i>Non-Compliance</i>	refers to a state when persons, food businesses or primary producers are operating outside any regulatory requirements
<i>Powers of Seizure</i>	Refer to section 40 of the Food Act
<i>Prosecution</i>	refers to the application of legal action through the court procedures to seek a conviction of an offence

1. Background

Robust allergen management in food businesses is required to ensure susceptible individuals are not placed at risk of an allergic reaction when consuming food. Substances in a food that cause an allergic reaction are called “allergens”. For sensitised individuals, food allergens can trigger allergic reactions that range from mild to severe. Some individuals may be allergic to more than one food allergen. Eating even the smallest amount of the allergen, for some sensitised individuals, can cause a life threatening allergic reaction called anaphylaxis. Anaphylaxis is usually rapid in onset, and can sometimes be fatal.

All food businesses are responsible for compliance with the legislative requirements specified for declaring allergens in their food; including where a customer has requested a food to not contain a specific food allergen ingredient. A sensitised individual needs to identify and manage their exposure to food allergens.

2. Objectives

The objectives of this document are to:

1. Clarify the application of the provisions of the Food Act in relation to declaration of certain substances in food (food allergens)
2. Promote consistency in the application of the Food Act by enforcement agencies in relation to food allergen declaration requirements

3 Compliance and enforcement of allergen declarations

Food businesses must comply with the provisions of the Food Act. The Food Act adopts the Code in full, therefore all food businesses must comply with the requirements of the Code. This includes Standard 1.2.3 of the Code Information requirements – warning statements, advisory statements and declarations.

Section 22 of the Food Act specifies the offence for not complying with the Code. Section 16 of the Food Act – ‘False description of food’ will apply in relation to selling food with undeclared allergens, if food can cause physical harm to the food allergic individual, who has requested the food to not contain that food allergen. Refer to section 5 of this document for link to webpage of an example of an allergen prosecution of a food business in Subiaco under section 16 (2) of the Food Act whereby the food business served an individual a dish containing nuts after the consumer had specifically asked whether any of the dishes contained nuts.

Section 23 of the Food Act expands on the circumstances in which food may be falsely described. Additionally, other sections may apply including section 19 and section 20 of the Food Act. Determining the sections of legislation that may apply is dependent on the circumstances of the individual case. The information below describes key sections of legislation relevant to the compliance and enforcement of allergen declarations in food businesses.

3.1 'Unsafe' and 'unsuitable' food

The DOH recognises that there are unique challenges for enforcement agencies in relation to the regulation of allergen declarations in food businesses. One of the main challenges is in understanding the Food Act meanings for “unsafe food” and “unsuitable food”; and other risks.

To clarify, “unsafe food” as described in section 12 Meaning of “unsafe” in relation to food, subsection (2) of the Food Act, states the following:

12(2) However, food is not “unsafe” for the purposes of this Act merely because it’s 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.”

Additionally, the meaning of “unsuitable” as described in section 13 of the Food Act is as follows:

13. Meaning of “unsuitable” in relation to food

(1) For the purposes of this Act, food is unsuitable if it is food that —

- (a) is damaged, deteriorated or perished to an extent that affects its reasonable intended use;
- (b) contains any damaged, deteriorated or perished substance that affects its reasonable intended use;
- (c) is the product of a diseased animal, or an animal that has died otherwise than by slaughter, and has not been declared by or under another Act to be safe for human consumption; or
- (d) contains a biological or chemical agent, or other matter or substance, that is foreign to the nature of the food.

However, **the presence of undeclared allergens in a food is a risk** due to the severe consequences that can occur if this product is consumed by sensitised individuals. Food allergic individuals rely on the allergen declaration information to make decisions about foods they buy and consume. The FSANZ Review of the Regulatory Management of Food Allergens (2010, p i) states that “Rigorous declaration requirements are considered the most appropriate risk management option for food allergens since even small amounts of the allergen may trigger allergic reactions.” The Code requires these declarations to alert consumers when the food contains substances that may cause adverse reactions in sensitised individuals.

Refer to FSANZ Review of the Regulatory Management of Food Allergens (2010) available from: <http://www.foodstandards.gov.au/publications/Pages/Review-of-the-regulatory-management-of-food-allergens.aspx>

3.2 Compliance with Section 22 of the Food Act

The Food Act requires under Section 22 that all food businesses comply with the provisions of the Code. This includes allergen declaration requirements specified in clause 4 of **Standard 1.2.3 of the Code – Information requirements – warning statements, advisory statements and declarations** Standard 1.2.3 applies across all foods, including those that are exempt from bearing an ingredient label.

3.2.1 Compliance with Standard 1.2.3 of the Code

Standard 1.2.3 of the Code sets out advisory, warning statements and declarations which must be made in relation to certain foods or foods that contain certain substances. Food businesses

must declare certain substances listed in clause 4 of Standard 1.2.3 of the Code below, which may be present as an ingredient, or an ingredient of a compound ingredient; or the substance is used as a food additive, or an ingredient or component of a such a substance; or a substance or food used as a processing aid or an ingredient or component of such a substance or food. Schedule 10 also sets out specific requirements for the naming of ingredients.

- **Crustacea and their products**
- **Egg and egg products**
- **Fish and fish products**, except for isinglass derived from swim bladders and used as a clarifying agent in beer or wine
- **Milk** other than alcohol distilled from whey and **milk products**
- **Peanuts and peanut products**
- **Sesame seeds and sesame seed products**
- **Soybeans other than: soybean oil (that has been degummed, neutralised, bleached and deodorized); or soybean derivatives that are a tocopherol or a phytosterol,**
- **Tree nuts and tree nut products** other than coconut from the fruit of the palm *Cocos nucifera*
- **Lupin and lupin products**
- **Cereals containing gluten** and their products, namely, **wheat, rye, barley, oats and spelt and their hybridised strains** other than:
 - (A) where these substances are present in beer and spirits; or
 - (B) glucose syrups that are made from wheat starch and that:
 - (a) have been subject to a refining process that has removed gluten protein content to the lowest level that is reasonably achievable; and
 - (b) have a gluten protein content that does not exceed 20 mg/kg; or
 - (C) alcohol distilled from wheat;
- **Added sulphites** in concentrations of 10 mg/kg or more

The manner in which the allergen declaration is required, is specified in Standard 1.2.3 and Standard 1.2.1 of the Code depending on the type of food for sale.

3.2.1.1 Food for retail sale

Retail sales – includes retail sale of a food, and a sale of food that is not retail sale if the food is sold as suitable for retail sale without any further processing, packaging or labelling. Food for sale in a package must have allergen declarations unless:

- a) Is made and packaged on the premises from which it is sold; or
- b) Is packaged in the presence of the purchaser; or
- c) Is whole or cut fresh fruit and vegetables (other than seed sprouts or similar products) in a package that does not obscure the nature or quality of food;
- d) Is delivered packaged, and ready for consumption, at the express order of the purchaser (other than when the food is sold from a vending machine); or
- e) Is sold at a fund raising event; or
- f) Is displayed in an assisted service display cabinet

For food required to bear a label under clause 6 of Standard 1.2.1, the allergen declaration must be made on the label. For food for retail sale that is not required to bear a label, then under Standard clause 9(6) of Standard 1.2.1, the allergen declaration must be displayed in connection with the display of food or provided to the purchaser on request.

Requirements set out for food sold in a hamper and foods sold in a vending machine are as follows:

- Hamper: In this case, each package must have the allergen declaration on the label, and each item of food not in a package must be accompanied by labelling which includes the allergen declarations.
- Vending machine: Food sold from vending machines – the allergen declaration must accompany the food or be displayed in connection with the display of the food.

3.2.1.2 Food for sale to caterers

In this instance, caterers means a person, establishment or institution e.g. catering establishment, restaurant, canteen, school, hospital etc. which handles or offers food for immediate consumption.

Food sold to caterers must provide allergen declarations on the label for foods that must bear a label under clause 12 of Standard 1.2.1. For foods sold to a caterer that do not need to bear a label under clause 12 of Standard 1.2.1, the allergen declaration must be provided with the food.

Under clause 17 of Standard 1.2.1, a caterer can request any information to enable the caterer to comply with any compositional, labelling or declaration requirement of the Code.

3.2.1.3 Other sale of food

This applies to sales of food that are not intra-company transfer, foods for retail sale or foods for sale to caterers. Under clause 21 of Standard 1.2.1, a purchaser must be provided with any requested information (or any information required by a relevant authority) to enable the purchaser to comply with any compositional, labelling or declaration requirement of the Code in the sale of food or of another food using it as an ingredient.

3.2.2 Compliance with Standard 1.2.4 of the Code

Standard 1.2.4 of the Code – Information requirements – statement of ingredients sets out specific requirements for the labelling and naming of ingredients.

- Clause 4 of Standard 1.2.4 specifies that ingredients need to be listed by common, descriptive or generic name. Schedule 10 lists generic names and conditions for use. For example, the generic name of 'nuts' has a condition of use of "The specific name of the nut must be declared".
- Clause 5 of Standard 1.2.4 sets out the requirement to declare the substances specified in Clause 4 of Standard 1.2.3 that are present in a compound ingredient regardless of the amount in the food.

3.3 Section 16 of the Food Act – false description of food

Section 16 of the Food Act – 'False description of food' will apply in relation to selling food with undeclared allergens, if food is falsely described and can cause the consumer physical harm. This may apply when a consumer requests a food to not contain a certain ingredient (food

allergen) and relies on the information provided by the food business (or employee of the food business) in order to make a judgment as to whether the food is safe to consume. When a person at the food business falsely describes the food and they know or ought to reasonably know that the food contains an ingredient that can cause physical harm, an offence is committed under one of the sub sections (1) – (4) of section 16. False description is defined in subsections (1) and (2) of section 23 of the Food Act. Subsection 23(2) states that it can include "...if it (food) 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 that type or contains that ingredient."

Some people may be allergic to other food allergens that are not listed in Standard 1.2.3 of the Code. Where an individual requests for food to not contain a food allergen, disclosure of this information to the allergic individual should be treated equally seriously as those listed in Standard 1.2.3 of the Code.

3.4 Assess the compliance to Standard 1.2.3 of the Code

Assessment of compliance to Standard 1.2.3 of the Code should be completed by the appropriate enforcement agencies in accordance with their internal compliance and enforcement policy. Situations such as routine food business assessments provide an ideal environment for an authorised officer to assess compliance with the Standard 1.2.3.

The DOH has provided a series of information resources aimed to assist food businesses in meeting the requirements of the Food Act and Standard 1.2.3 of the Code. These resources can be accessed from the DOH website: https://ww2.health.wa.gov.au/Articles/F_1/Food-allergen-declarations

- **Food Allergy - Creating Safer Food Choices:** this resource contains tips for food business on how to reduce the risk of undeclared allergens in their food.
- **Food allergen declarations information for food businesses:** this resource contains background information on food allergy, and anaphylaxis, statutory requirements for the food business on identifying food allergens in their food; and practical suggestions on risk reduction strategies. An allergen management checklist is also provided that includes some suggested best practice and provides an example of how a food business may manage risks and demonstrate compliance to statutory requirements under the Food Act. The checklist suggestions are not exhaustive.

3.5 Enforcement action

An authorised officer with responsibility in the district where the food business is trading, is able to initiate enforcement action under the relevant provisions of the Food Act.

The Food Act provides the following enforcement options regarding allergen declaration:

- Infringement notices
- Power of Seizure (the item(s) seized is believed on reasonable grounds to be evidence that an offence under this Act has been or is being committed)
- Institution of court proceedings

The appropriate enforcement action will depend on the severity and circumstances of the non-compliance. It is recommended that enforcement agencies follow their own compliance and enforcement policy to determine the appropriate action to be taken.

In 2015, the City of Subiaco successfully prosecuted a food business that served an individual a dish containing nuts after the customer had specifically asked whether any of the dishes contained nuts. The basis of the prosecution was that under section 16 (2) of the Food Act the food business did not demonstrate they were allergy aware, in that:

- The majority of staff had not undertaken allergen training
- Standard operating procedures to assist staff with allergen incidents were not developed
- The menu did not indicate whether allergens were present in any of the dishes
- Ingredient changes (which were undertaken during preparation of these dishes) were not disclosed to staff
- Although the chef made the dishes which contained nuts, they did not demonstrate any allergen awareness, when questioned by service staff
- Although dish recipes were accessible in the restaurant, the service staff was not aware and therefore did not check the recipes before responding

For more information on this case - refer to the City of Subiaco website:

<https://www.subiaco.wa.gov.au/getattachment/735737f8-42a1-47a6-b6ca-005ef16fd573/City-of-Subiaco-Food-Allergy-Kit-for-Food-Businesses.pdf>

Another recent case involved the conviction of a catering company for breaching Victoria's *Food Act 1984* - false description of a food. Details of the case included:

- Family advised the catering company of the child's allergies multiple times before the event
- Family stopped staff serving pasta with parmesan cheese and steak with gravy during the event which contained the child's trigger allergens
- Staff served 'dairy free' frozen dessert declaring it to be dairy free, when it was vanilla ice-cream
- The child had an anaphylaxis following one lick of the ice-cream
- Company convicted for "falsely describing" food and ordered to pay \$55,000

For more information on this case – refer to <http://www.timebase.com.au/news/2013/AT671-article.html>

4. Useful resources and websites

- WA Department of Health https://ww2.health.wa.gov.au/Articles/F_I/Food-allergen-declarations
- FSANZ <http://www.foodstandards.gov.au/consumer/foodallergies/foodallergenportal/Pages/default.aspx>
- NSW Food Authority <http://www.foodauthority.nsw.gov.au/foodsafetyandyou/life-events-and-food/allergy-and-intolerance>

- Environmental Health Association (EHA) <https://www.ehawa.org.au/products/foodsafef>

5. Further information

The following document may also be of assistance:

- **WA Food Regulation: Department of Health Compliance and Enforcement Policy.**
Department of Health. November 2014. Available from
<https://ww2.health.wa.gov.au/~media/Files/Corporate/general%20documents/food/PDF/DOHComplianceandEnforcementPolicyVersion3.pdf>
- **Allergen prosecution of a food business within the City of Subiaco**
<https://ww2.health.wa.gov.au/~media/Files/Corporate/general%20documents/food/PDF/FoodforThoughtAutumn2016.pdf>

Contact the Environmental Health

Any feedback or concerns please use the 'Food Unit Query' form which can be downloaded from our website:

https://ww2.health.wa.gov.au/~/_/media/Files/Corporate/general%20documents/food/PDF/Food_Unit_Query_Form.pdf

E: FoodUnit@health.wa.gov.au

Tel. +61 8 9222 2000

Website: <http://ww2.health.wa.gov.au>

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