
5 Consumer food safety regulation

Key points

- All Australian jurisdictions have reformed their Food Acts to include Annex A of the Model Food Act.
 - However, Western Australia proclaimed its new food act only in October 2009 — nine years after the initial agreement. Victoria, South Australia and the ACT introduced the Model Food Act within the agreed timeframe of 12 months.
 - New South Wales, Victoria, South Australia and Tasmania have implemented between 80 to 90 per cent of Annex A provisions with the same wording. Further, Victoria has not added to or excluded any of the Annex A provisions in its Food Act.
 - Despite having a national Model Food Act and the relative consistency in the implementation of Annex A of that Model Act, the size of the Foods Acts in each jurisdiction varies considerably. Although the *Queensland Food Act 2006* contains almost twice as many sections as the Model Food Act, it was written with the intention of making it easier for industry to understand.
 - Reflecting that the adoption of Annex B was not mandatory, there is considerably more variation among the jurisdictions in their adoption of these provisions into the Food Acts.
- During 2008-09, there were a number of differences between Australian jurisdictions' food laws and regulations. For example:
 - Western Australia had separate hygiene regulations which prevailed over the Australia New Zealand Food Standards Code (ANZFS Code) when inconsistency occurred. These hygiene regulations were repealed when the Western Australia Food Act was fully proclaimed in October 2009
 - despite the national recall protocol, Queensland has the additional requirement of mandatory reporting of suspected intentional food tampering.
- Australia and New Zealand essentially share the same food standards relating to food composition and labelling (except country of origin labelling). However, New Zealand and Australia have fundamentally different food hygiene standards. Those for Australia are contained in the ANZFS Code and are outcome based whereas those for New Zealand are in quite prescriptive regulations.

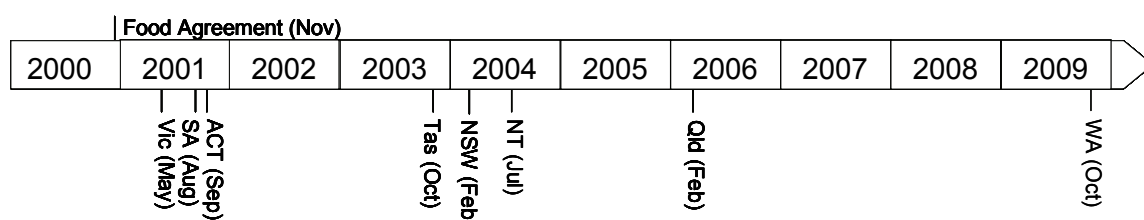
5.1 Adoption of the Model Food Act in Australia

The agreement in 2000 by the Commonwealth, state and territory governments that the states and territories would adopt the Model Food Act provided an opportunity for all jurisdictions to address food safety issues in a consistent manner in an effort to reduce the regulatory burden on the food industry while providing safe food controls to protect public health and safety. The states and territories agreed to submit to their respective parliaments, within 12 months, legislation which gave effect to the Annex A and Annex B of the Model Food Act.

Annex A of the Model Food Act forms the core provisions which each state and territory agreed to adopt. It mainly relates to definitions, offences and defences and provides the method of adoption of the Australia New Zealand Food Standards Code (ANZFS Code). Annex B forms the non-core provisions and each state and territory has some discretion over these. It includes issues such as notification of the existence of a food business, licensing, registration, food safety programs and auditing.

All jurisdictions have reformed their Food Acts to include the provisions from the Model Food Act (figure 5.1). Victoria, South Australia and the ACT introduced the Model Food Act within the agreed timeframe. Queensland, Northern Territory, New South Wales and Tasmania introduced the agreed laws, somewhat later, between 2003 and 2006. However, almost nine years after agreeing to reform food laws which gives effect to the provisions of the Model Food Act, Western Australia implemented these reforms in late October 2009. During the benchmarking period, Western Australia operated under the *Health Act 1911*.

Figure 5.1 Initial implementation date of Model Food Act



Data sources: Food Acts of the Australian jurisdictions.

Despite having a Model Food Act, there is variation in how the jurisdictions have incorporated these provisions into their respective Food Acts. A simple comparison of the number of sections and subsections illustrates which jurisdictions may not have closely followed the Model Food Act (table 5.1). For example, Queensland's *Food Act 2006* contains around twice the number of sections and subsections

compared to the Model Food Act. Queensland claims that part of the reason for the comparatively high number of sections and subsections within the *Food Act 2006* (Qld) is explained by its approach to drafting legislation which entails a separation of provisions to support improved interpretation and understanding and ensure clarity of intent. Nevertheless, some industry participants have a stronger preference for national consistency, with the Australian Food and Grocery Council (AFGC) reporting that it:

... remain[s] concerned that jurisdictions fail to understand that variation in regulation between jurisdictions imposes additional cost on industry in having to employ specialist regulatory compliance staff, take additional measures to ensure compliance, and apply different measures to company operations in each of the jurisdictions. (sub. 17, p.4)

The difference in the size of the Acts is a broad indicator of inconsistency between jurisdictions. It provides an indicator of the seamlessness to which business can find information regarding their legislative requirements relating to food safety. Differences in the presentation and location of this information may add to regulatory costs for businesses operating across jurisdictions (for example, additional time taken to establish requirements, inform and educate staff and develop different policies or guidelines, if necessary).

Table 5.1 Comparison of jurisdictions' Food Acts with the Model Food Act
as at 23 October 2009

<i>Total number</i>	Model Food Act	<i>NSW</i>	<i>Vic</i>	<i>Qld</i>	<i>SA</i>	<i>WA^a</i>	<i>Tas</i>	<i>NT</i>	<i>ACT</i>
Sections	156	168	155	302	113	154	144	145	126
Sections & subsections	368	442	394	845	295	425	347	373	364

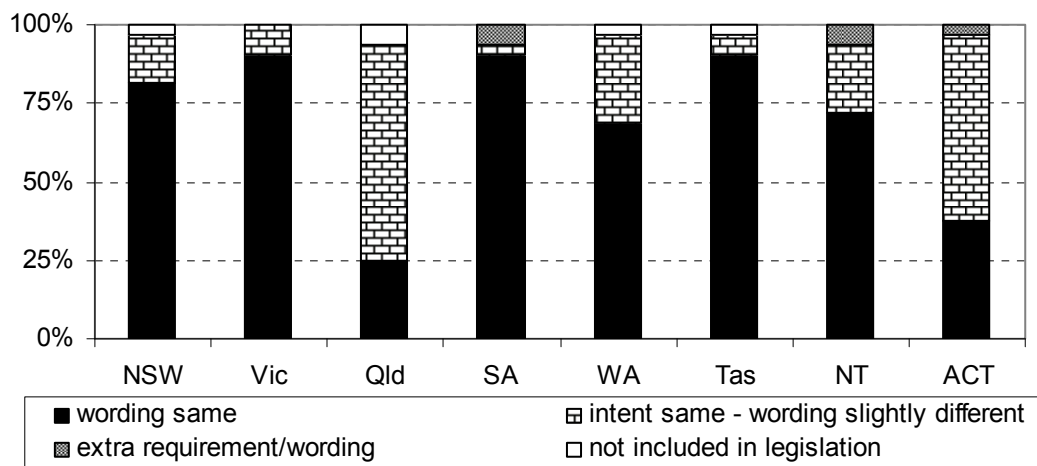
^a Relates to the *Food Act 2008* (WA).

Source: Theobald (2007) updated by the Commission.

Annex A Model Food provisions

The provisions in Annex A were intended to be adopted consistently by each state and territory government and for the most part this has been achieved. Of the 32 sections, New South Wales, Victoria, South Australia and Tasmania have implemented between 80 per cent to 90 per cent of Annex A provisions with the same wording (figure 5.2). Victoria has no extra requirements and has not excluded any of the Annex A provisions.

Figure 5.2 Consistency of Annex A provisions with jurisdiction Food Acts^a
as at 31 July 2007



^a Analysis for Western Australia relates to the *Food Act 2008* (WA).

Data sources: Theobald (2007); Commission estimates.

Annex B Model Food provisions

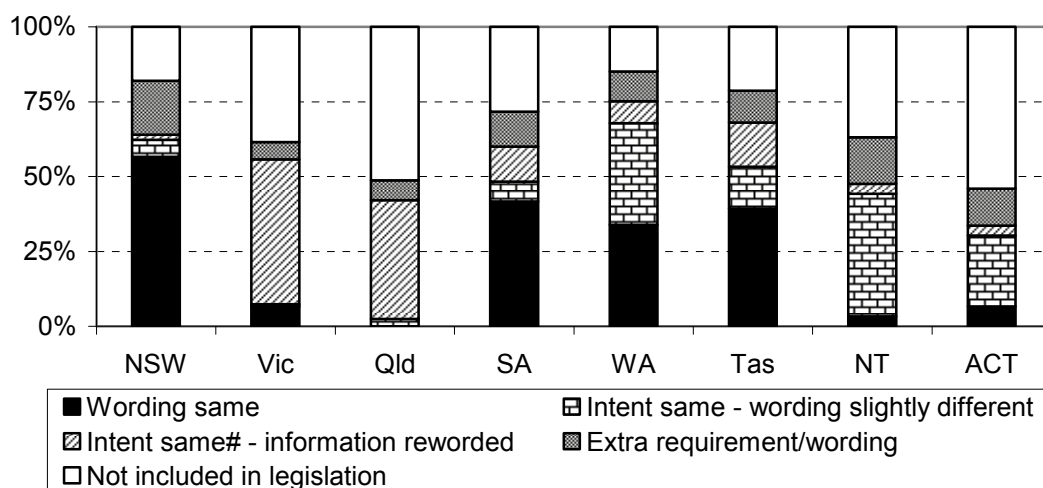
As the adoption of Annex B was not mandatory¹, there is considerably more variation among the jurisdictions in their adoption of these provisions (figure 5.3) For example, Queensland's Food Act does not keep with the general structure of the Model Food Act with many sections being omitted, significantly reworded, amended or added to (Theobald 2007).

In some jurisdictions a number of the provisions from Annex B are not included in the Food Acts. This does not necessarily mean the activities are not undertaken as they may be contained in other acts and regulations. For example, the ACT Food Act does not contain provisions for administering food safety auditors. Instead these requirements are outlined in the *Food Regulation 2002*.

The different approaches used for establishing the regulatory requirements across the jurisdictions highlight the complexities for food businesses and the lack of consistency at a high level.

¹ One of the reasons for this is that, as food safety laws are enforced by the states and territories, these laws must align with the administrative law (relevant to licensing and appeals against orders) and criminal law of the respective jurisdictions. Accordingly some flexibility in the take up of the Annex B provisions was required.

Figure 5.3 **Adoption of (optional) Annex B provisions in the jurisdictions' Food Acts^a**
as at 31 July 2007



^a Analysis for Western Australia relates to the *Food Act 2008 (WA)*. # Intent same – information reworded and/or contained in more than one section/subsection.

Data source: Theobald (2007).

5.2 Differences in Australian food laws, regulations and standards

Differences in key definitions contained in the Food Acts

Four jurisdictions (South Australia, Tasmania, Queensland and New South Wales) have made subtle variations to the definition of primary production from that contained in the Model Food Act.

In South Australia and Tasmania, an extra provision in the definition of ‘primary food production’ excludes places where food is packed or treated on premises where the food was ‘grown’ and those actions are undertaken by those who have purchased the food or who are undertaking the actions under a contract (but not employment). Instead, this provision means these food businesses come under the Food Act in South Australia and Tasmania. However, in other jurisdictions food businesses undertaking this activity would come under the relevant primary production acts. This represents a cross-jurisdictional difference in the regulation and may add to regulatory costs for businesses operating across jurisdictions (for example, additional time taken to establish different requirements, educate staff and develop different policies or guidelines for these jurisdictions).

There may also be some confusion over which stream of legislation covers a particular activity within these two jurisdictions (South Australia and Tasmania). This arises because the extra provision only applies to food businesses which purchase the food or to the activities that are performed under contract for the primary producer. The same activities undertaken by the primary producer would be governed by the relevant primary production act. For example, if a primary producer washes the strawberries on the premise where they are grown, the activity of washing is considered to be governed by primary production regulations. However, if the primary producer sells the strawberries to a separate business and this business washes the strawberries on the producer's premise, the activity of washing will be governed by the relevant Food Act.

In Queensland, the meaning of primary food production is not contained in the *Food Act 2006*, therefore primary production is not excluded from the definition of 'food business'. Instead a definition of production of primary produce is contained in the *Food Production (Safety) Act 2000* (Qld) — the Queensland Act that deals with food safety matters relating to the primary production. Nevertheless, Queensland has not adopted the standard definition contained in the Model Food Act.²

The New South Wales *Food Act 2003* also has a subtle variation in the definition of 'food business'. In New South Wales, primary production is not excluded from the definition of food business. As a consequence, the New South Wales Food Act applies to all food including primary production (see chapter 8).

In the South Australian Food Act an extra provision has been added to the definition of 'unsafe food'. This clause appears to clarify components of the definition by specifying that the definition of 'unsafe' is applied at the time of sale and that the physical harm suffered can be reasonably attributed to the food. This is unlikely to add extra regulatory costs on food businesses in South Australia.

Variations in adoption of the ANZFS Code

Despite the provisions contained in the Food Agreement, not all jurisdictions adopt the ANZFS Code in its entirety.³ New South Wales, Queensland, South Australia

² The Commission understands the legislative intent was that the *Food Act 2006* (Qld) and the *Food Production (Safety) Act 2000* (Qld) would be read together with a view to establishing a comprehensive food safety regime that complied with the Food Agreement (see chapter 2).

³ The Food Agreement provides that individual provisions may be made for a state or territory where ANZFRMC is satisfied they are needed given exceptional conditions in that state or territory, and where the provision would not present a risk to public health or safety, or contravene Australia's international treaty obligations.

and Western Australia have provisions within their legislation/regulations that provide for partial application of the ANZFS Code and/or modifications to the operation of the ANZFS Code in their jurisdictions (table 5.2).

Table 5.2 Variations to the adoption of the ANZFS Code

	<i>Standard</i>	<i>Variation</i>
NSW	3.2.2 (clause 4) – requires food businesses to notify appropriate authorities before commencing business	An exemption for fundraising activities
	3.3.1 – food safety plans for vulnerable persons	An exemption for child care businesses and a delay in the start date for other applicable food businesses ^a
Qld	3.3.1 – food safety plans for vulnerable persons	Does not apply (for 12 months) The definitions for: <ul style="list-style-type: none"> • sell is altered to align with the Act • primary food production replaced with the definition in the <i>Food Production (Safety) Act 2000</i>
	1.6.2 (clause 9) – uncooked comminuted fermented meat ^b	Does not apply
	3.2.1 – food safety plans	Does not apply
	3.2.2 (clause 4) – required food businesses to notify appropriate authorities before commencing business	Does not apply
	chapter 4 – primary production standards	Does not apply
SA	2.5.1 subclause – application of primary production standard 4.2.4	Does not apply to goat's milk
	3.1.1 (clause 3) – subtext added	Excludes primary production business covered by other Acts (such as <i>Meat Hygiene Act 1994</i>) and a number of other specific cases
WA	2.5.1 subclause – application of primary production standard 4.2.4	Does not apply to goat's milk
	1.6.1 – microbiological limits for food	Amendments to the microbiological requirements for packaged water and packaged ice and mineral water
	3.3.1 – food premise & vehicle ^c	Definition altered to align with the <i>Health Act 1911</i>
	3.3.1 – primary production ^c	The following is added to the definition: <ul style="list-style-type: none"> • extracting milk from an animal • storing untreated milk • transporting untreated milk
	3.3.1 – definition of proprietor ^c	Altered to align with the <i>Health Act 1911</i> with a distinction between the proprietor of a food premise and a food vehicle.
	3.3.1 – definition of sell ^c	Altered to align with the <i>Health Act 1911</i> – a number of sections from the code not included
	3.2.3 – definition of sewage ^c	Altered to align with the <i>Health Act 1911</i>

^a See chapter 6. ^b This clause does not exist. ^c As the definition of sell in the *WA Food Act 2008* is the same as the ANZFS Code, this modification disappeared with the proclamation of the act on 23 October 2009.

Sources: Adapted from Theobald (2007); Food Acts and regulations for each state.

Some of the modifications are minor or transitory such as the delay in the start of food safety plans for vulnerable persons in New South Wales and Queensland (chapter 6). Other changes are ongoing but are designed to lower the regulatory burden in these states (presumably, with a less than proportionate decrease in outcomes), such as not requiring fundraising activities to notify the appropriate authorities of a food event.

Western Australia's hygiene laws

In 2008-09, Western Australia had not reformed its food law. As a result, Western Australia had separate hygiene regulations in addition to those contained in chapter 3 of the ANZFS Code. Furthermore, if there was any inconsistency between the ANZFS Code and the *Health (Food Hygiene) Regulations 1993 (WA)*, the regulations prevailed. These regulations covered essentially the same broad topic areas as the ANZFS Code but can differ in wording or content (table 5.3).

Table 5.3 Selected examples of additional hygiene provisions in Western Australia

<i>Area</i>	<i>Details</i>
<i>Food premise & equipment</i>	
General requirements	Duplicates the ANZFS Code
Kitchen space	Specified as a percentage of dining area
Walls	Prescriptive requirements including the need to be 'finished in a light colour' and tiling requirements for some businesses
Floors	Additional requirements
Ceilings	Additional requirements including the need to be 'finished in a light colour'
Supply of water	Duplicates the ANZFS Code
Cleaning equipment	Glass washing machines must have water that is not less than 50°C when washing with a chemical sanitizer or alternatively not less than 75°C
Lighting	Light fitting must have protective covers to prevent contamination of food with broken glass
Ventilation & exhaust equipment	All kitchens and cooking areas in food premises and vehicles must have exhaust hoods in compliance with the Australian Standard AS 1668.2-1991
Change rooms	Change rooms must be at least 3 square metres with an additional 0.75 square metres for each person in excess of 4
<i>Personal hygiene & conduct of food handlers</i>	
Cleanliness of persons	Food handlers are required to wear 'hair coverings'
Unwell employees	Duplicates the ANZFS Code Requires records to be kept on all absences from work of persons due to illness

Source: *Health (Food Hygiene) Regulations 1993 (WA)*.

Some of the sections of the *Health Regulations 1993* (WA) appear to duplicate the ANZFS Code. Slight wording changes may leave open the possibility of different interpretation and uncertainty (particularly for businesses operating across jurisdictions). For example, the Western Australian health regulations require all food premises and food vehicles to be designed and constructed to enable easy and adequate cleaning (schedule 4). However, the ANZFS Code also has an equivalent provision — but with slightly different wording (Standard 3.2.3, division 2).

The Western Australian regulations also have prescriptive requirements. For example, when the dining floor area is on the food premise the regulations specify the kitchen to be no less than 25 per cent of the total floor area. This requirement is presumably to ensure that food handlers have sufficient space to work and the work area is not compromised for more dining area. While not prescriptive, the ANZFS Code states that the design and construction of food premises must ‘provide adequate space for the activities to be conducted’ (Standard 3.2.3, division 2).

Nevertheless, with the proclamation of the *Food Act 2008* (WA) on 23 October 2009, Western Australia has repealed these food hygiene regulations.

Food recall and deliberate tampering requirements

The ANZFS Code (Standard 3.2.2) outlines that a food business in wholesale supply, manufacture or importation must have a documented (written) system to recall unsafe food. The purpose of a recall plan is to enable a food business to ‘remove unsafe food effectively and efficiently to protect public health and safety’ (FSANZ 20081).

Food retail businesses are not required to have a recall plan unless they are also engaged in the wholesale supply, manufacture or importation of food. It may be the case that mixed businesses, such as supermarket chains, are required to have a recall system because they also operate as wholesale suppliers, for example. While food retail businesses may not need a recall plan, they must comply with the food disposal requirements of the ANZFS Code if they are involved in another business’ recall. For example, they may need to remove recalled stock from shelves and return it to the appropriate business (manufacturer, importer or wholesaler). Retail businesses within the food service sector (such as restaurants, cafes, takeaways) are generally not required to have a recall plan. This is because the food processed by them is eaten shortly after it has been made, and in the case that a problem was to occur, the food will have been consumed before it can be recalled.

The *Food Standards Australia New Zealand Act 1991* (Cwlth) specifies that FSANZ, at the request of states and territories, is responsible for coordinating recall

action. This means that when FSANZ is notified of a recall, it liaises with the food business and state and territory authorities to gather and collate all necessary information. One industry participant expressed the view that this system is working well:

Woolworths acknowledges that in some areas co-ordination between the States and Territories is good. For example, in respect of recalls the practice is that a manufacturer only needs to notify the ACCC, FSANZ and the manufacturer's 'home state'. (sub 10, p. 7)

The national protocol requires the following parties to be notified of a recall:

- government authorities (FSANZ, consumer affairs, 'home' state or territory authority)
- the distribution network/chain, trade customers, retailers
- the public (in the case of a consumer level recall)
- food industry organisations.

Queensland's notification requirements for suspected intentional food tampering

Queensland has overlaid the national food recall arrangement with a unique requirement for the mandatory reporting to the health authority where a business suspects intentional food tampering/contamination has occurred. This includes all businesses: wholesalers, manufacturers, food importers as well as retail businesses. This additional requirement in the Food Act was introduced in 2006, following a case of food contamination in a number of buffet style family restaurants.

The *Food Act 2006* (Qld) requires that a food business must verbally notify Queensland Health (via a hotline) of the suspected intentional tampering/contamination immediately after first forming the reasonable suspicion. The Industry Protocol, developed by Queensland Health, provides guidance material on when it is reasonable to suspect that intentional contamination has occurred (Queensland Health 2006).

After Queensland Health receives notification of a suspected case of intentional food tampering, it contacts the Queensland Police to advise them of the matter. Queensland Health works with the Queensland Police and the notifying business to balance the 'criminal investigation' and 'food safety' aspects of any confirmed tampering event. Queensland Health also works with the notifying business to establish whether tampering/contamination has occurred, the extent of the tampering/contamination (if it has occurred) and, if required, to prepare the business to initiate a recall.

Not all notifications will result in a recall and, for some businesses (such as food service) a food recall cannot be initiated and other measures (such as a temporary cessation of business or part of the business) are required. In the event of a recall, the notifying business is required to contact FSANZ (as per the national protocol), but Queensland Health prepares the business for that event and ensuing recall process.

The Queensland protocol provides a template detailing the information needed when notifying suspected intentional contamination of food to Queensland Health. A summary of the information is provided in box 5.1. Similar information is required by FSANZ for all recalls (including intentional contamination) and also needs to be supplied to FSANZ if a food recall is initiated.

While the Queensland government argued, at the time the notification requirement was introduced, that it did not want to overly burden businesses with compliance, a number of food businesses and organisations have claimed that the additional requirement was introduced without consultation. One industry participant views the additional requirements as:

- an ‘add-on’ to the national policy
- not necessarily best practice
- having an excessive number of mandated tasks.

A number of participants to the Bethwaite Review stated that these requirements create an additional regulatory burden on Queensland food businesses.

These discrepancies are costly as they force national multi-plant companies to institute different rules and procedures in each state or territory ... and differing and/or more complex training programs ...

The recent changes to the *Queensland Food Act 2006* mean that Queensland has differing requirements with respect to tampering provisions. The ABCL has in place a national recall reporting protocol with appropriate contacts for all states, commonwealth and territories health authorities. These are no longer applicable to Queensland. (Australian Beverages 2007)

... the recent amendment of the *Queensland Food Act 2006* (without consultation) with respect to tampering provisions now requires separate reporting provisions for Queensland (to the Director General Health) on suspicion of a tampering incident. AFGC has in place a national recall reporting protocol with appropriate contacts in health and police for all states and territories which is no longer applicable in Queensland. (Australian Food and Grocery Council 2007)

Another example of inconsistency in terms of food regulation is the recent addition of food tampering provisions within the *Queensland Food Act 2006* (without consultation). This requires mandatory reporting of suspected tampering incidents in

Queensland to the Director General Health, which is different to the established national reporting protocol we already have in place. (Coles 2007)

However, now that the system is operational, this additional requirement appears to be offset to a degree by the guidance provided to business by Queensland Health in dealing with an issue (intentional tampering/contamination) that would be outside the experience of many business operators — particularly the police liaison aspects. Food businesses operating only in Queensland may have higher compliance costs than other jurisdictions as they need to be familiar with the additional requirements for intentional tampering/contamination.

Box 5.1 Information requirements when intentional contamination has occurred in Queensland

Prior to reporting a deliberate tampering incident to Queensland Health the following information needs to be collected and then provided:

- name of caller
- caller's position in business
- phone number & alternative phone number
- name of business
- address of business & post code
- brand of suspect food
- name of suspect food
- package size
- quantity
- further description of food
- detail of contamination
- date of incident
- reason for suspicion
- any other comments

While speaking with a representative of Queensland Health, the following information needs to be recorded:

- name of call centre representative
- date call lodged
- time call lodged
- any directions given

Source: Queensland Health (2006).

5.3 Comparisons with New Zealand food safety laws

New Zealand's food laws are governed by the *Food Act 1981*. New Zealand's Food Act has some similar provisions to those contained in Australia's Model Food Act, including definitions and offences, as well as matters of enforcement, administration and recall.

Nevertheless, this is where the similarities stop. Overall, New Zealand's Food Act has limited resemblance to the Food Acts in Australia. Differences in the nature and structure of the act reflect, in part, the different food safety and hygiene system. For example, the New Zealand Food Act has a considerable number of sections devoted to situations where food businesses could be exempted from the food hygiene regulations. There also is a section outlining the creation of food standards (in addition to the standards adopted in the ANZFS Code). These types of provisions are not replicated in Australian laws.

Unlike the Australian Food Acts, the New Zealand Food Act has provisions relating to sales and advertising, including misleading and false labelling and packaging. These types of provisions are contained in the jurisdictional fair trading acts and the *Trade Practices Act 1974* in Australia. New Zealand also has laws governing false or misleading representations in the *New Zealand Fair Trading Act 1986*.

The New Zealand Food Act also brings the control of imported food within its ambit — unlike Australia where this is in separate legislation. In Australia, the *Imported Food Control Act 1992* (Cwlth) provides for the compliance of food imported into Australia with the ANZFS Code and the requirements of public health and safety. The differences in this area are examined in chapter 14.

The New Zealand Government has acknowledged that their Food Act is 'outdated' and as a consequence it imposes unnecessary compliance costs on businesses (Wilkinson 2009a). The New Zealand Government has announced a 'complete overhaul' of the food regulatory system. It is expected that a new Food Bill will be in place by late 2010 or early 2011.

Comparison of key definitions

Both the Model Food Act in Australia and the New Zealand Food Act define 'to sell' — a pivotal concept in defining a food business — with a common number of elements (table 5.4). Nevertheless, the Australian definition, contained in the Model Food Act, has a number of additional elements, presumably capturing more operations within the scope of the Food Acts across Australia. For example, public hospitals and prisons are considered food businesses in Australia and must comply with food standards and laws.

While some elements are not contained in the definition in the New Zealand Act, they are covered in other sections of the Act. For example, food 'given away' in a raffle or as a prize is considered to be 'sold' and, therefore, comes under the scope of the relevant Food Acts and associated laws in both countries.

Both countries define ‘food’ in their respective Food Acts in a similar way (table 5.5). Even so, Australia has two additional elements to the definition for ‘food’. Substances that come into contact with ‘food,’ such as processing aids, are also considered to be ‘food’ in Australia. Also, there is another legislative mechanism under which a substance can be declared as ‘food’ in Australia. While not part of the definition, Australian laws also clearly delineate that the definition of food does not include therapeutic goods as defined in the *Therapeutic Goods Act 1989*.

Table 5.4 Definition of ‘sell’

<i>Elements of the definition of ‘sell’</i>	<i>Australia</i>	<i>New Zealand</i>
Sell for the purpose of resale	✓	✓
Barter	✓	✓
Offering or attempting to sell	✓	✓
Having in possession for sale	✓	✓
Display for sale (exposing for sale)	✓	✓
Send, forward or deliver for sale	✓	✓
Cause or permit to be sold or offered for sale	✓	✓
Supplying under a contract, together with accommodation, service, or entertainment, in consideration of an inclusive charge for the article supplied and the accommodation, service, or entertainment	✓	✓
Dispose of by any method for valuable consideration	✓	x
Dispose of to an agent for sale on consignment	✓	x
Provide under a contract of service	✓	x
Dispose of by way of raffle, lottery or other game of chance	✓	a
Offer as a prize or reward	✓	a
Give away for the purpose of advertisement or in furtherance of trade or business	✓	x
Supply food (whether or not for consideration) in the course of providing services to patients or inmates in public institutions	✓	x

^a Within scope of the Act but not contained in the definition.

Sources: *Food Act 1981* (NZ); Model Food Act (Annex A).

Table 5.5 Definition of food

<i>Elements of the definition of 'food'</i>	<i>Australia</i>	<i>New Zealand</i>
Any substance, ingredient, nutrient or thing of a kind used, or represented as being for use, for human consumption or used in preparation of 'food'	✓	✓
Chewing gum, and any ingredient of chewing gum, and anything that is or is intended to be mixed with or added to chewing gum	✓	✓
Any substance used in preparing 'food' that comes into direct contact with the 'food' such as a processing aid	✓	✗
Any substance or thing declared to be a food under <i>Australia New Zealand Food Authority Act 1991</i> (Cwlth)	✓	✗

Sources: Food Act 1981 (NZ); Model Food Act (Annex A).

There are a number of other definitions in the Australian Food Acts which are not replicated in the New Zealand Food Act such as the meaning of a 'food business', 'unsafe food' and 'unsuitable food' or similar terms.

New Zealand food and hygiene standards

Despite FSANZ being a bi-national body responsible for developing food standards for both Australia and New Zealand, a number of standards within the ANZFS Code are not applicable in New Zealand — some of these standards relate to areas outside the Joint Food Standards Setting Treaty and, for other standards (such as Country of Origin Labelling — Standard 1.2.11) New Zealand has exercised its right under the Joint Food Standards Setting Treaty to 'opt out'.

The *New Zealand Food Standards 2002* regulation gives effect to the relevant parts of chapters 1 and 2 of the ANZFS Code in New Zealand. The following standards within these chapters of the ANZFS Code do not apply in New Zealand:

- maximum residue limits (Standard 1.4.2)
- country of origin labelling (Standard 1.2.11)
- processing requirements for milk, cheese, eggs, dried meat, eviscerated poultry, crocodile meat, game and fermented comminuted processed meat (Standard 1.6.2)
- fortification of wheat flour for making bread with folic acid (Standard 2.1.1)
- requirements relating to bovine meat and meat products being derived from animals free from bovine spongiform encephalopathy (Standard 2.2.1 (clause 11)).

In New Zealand, the food hygiene standard (chapter 3 of the ANZFS Code) and the primary production standards (chapter 4 of the ANZFS Code) do not apply. Consequently, New Zealand has a number of its own food standards (table 5.6). The differences in regulations relating to primary production and process and maximum residue limits in Australia and New Zealand are examined in chapters 9 to 13.

Table 5.6 New Zealand Food Standards

New Zealand Food Standards

Food (Tutin in Honey) Standard 2008
New Zealand (Mandatory Fortification of Bread with Folic Acid) Food Standard 2007
Food (Prescribed Foods) Standard 2007
New Zealand (Maximum Residue Limits of Agricultural Compounds) Food Standards 2008
Food (Milk and Milk Products Processing) Standard 2007
New Zealand (Bee Product Warning Statements — Dietary Supplements) Food Standards 2002
Food (Uncooked Comminuted Fermented Meat) Standard 2008
Food (Importer Listing) Standard 2008
Food (Importer General Requirements) Standard 2008

Source: NZFSA (2009j).

Differences in fortification of bread

The food standard requirement for the composition of bread differs between Australia and New Zealand (Standard 2.1.1). From 13 September 2009, the standard requires bread to be fortified with folic acid and thiamine in Australia. It outlines the amount of thiamine and folic acid required for each kilogram of flour.

The proposed mandatory fortification requirements of bread are outlined in the New Zealand (*Mandatory Fortification of Bread with Folic Acid*) Food Standard 2007. The New Zealand standard specifies the fortification quantity for folic acid that is to be added during the bread-making process rather than to the flour. However, New Zealand requirements do not specify the way manufacturers are required to fortify the bread so long as the final bread product contains between 0.8 and 1.8 mg/kg of folic acid. This is lower than the Australian requirement — 2 mg/kg and no more than 3 mg/kg of folic acid.

Nevertheless, the New Zealand government recently announced the decision to defer the commencement date of the New Zealand mandatory fortification of bread with folic acid until 31 May 2012. The reason for the deferred commencement is that the New Zealand government is concerned that the New Zealand folic acid standard may place an unnecessary cost burden on industry and limit consumer choice. There are also concerns about whether or not folic acid can be evenly

distributed within a loaf of bread (NZFSA 2009k). NZFSA argues that the delayed commencement date would allow new evidence to be considered (including the planned 2011 independent review of the Australian standard) before making a decision in 2012 regarding the standard.

With New Zealand’s decision to delay the introduction of mandatory fortification of bread with folic acid, Australian food businesses affected will face higher regulatory costs in comparison. Australian millers will face higher upfront costs, estimated to be at a minimum of \$7.9 million, and higher ongoing costs of about \$1.1 million per annum (FSANZ 2007b) Nevertheless, Australia is expected to receive the (projected) benefit of reduced incidence of neural tube defects (NTD) — the central aim of fortification of bread with folic acid (table 5.7).

Table 5.7 Projected number of NTD cases prevented per year

	<i>Australia</i>	<i>New Zealand</i>
Live NTD births prevented	5.0	1.3
Still NTD births prevented	3.0	1.3
Terminations of pregnancy prevented	18.0	5.2
Total NTD cases prevented	26.0	7.9

Source: FSANZ (2006).

New Zealand’s hygiene standards

New Zealand’s food hygiene standards are set out in *Food Hygiene Regulations 1974*. This regulation has some broader categories similar to the ANZFS Code (applicable in Australia) such as the registration of premises, maintenance of food premises and conduct of workers. However, unlike the ANZFS Code, the regulations are generally prescriptive. For example, food handlers engaged in the manufacture, preparation, packing, or handling of food are required to wear:

- light-coloured outer overalls or smock over clothing
- ‘effective apparel’ (such as a hat or hair net) to restrain hair from touching any food and food contact surfaces. This apparel also needs to be clean, washable, light-coloured or disposable.

The similar requirement in the ANZFS Code for Australia is outcome focused with no prescriptive requirements on what food holders need to wear:

A food handler must, when engaging in any food handling operation –

- (a) take all practicable measures to ensure his or her body, anything from his or her body, and anything he or she is wearing does not contaminate food or surfaces likely to come into contact with food...

(c) ensure outer clothing is of a level of cleanliness that is appropriate for the handling of food that is being conducted. (Standard 3.2.2)

Presumably, under the Australian requirements, food handlers do not *need* to wear light coloured clothing or wear a hat or hair net. In many situations, however, food handlers will wear a hat or hair net as a method of fulfilling the requirement of the ANZFS Code.

A benefit of outcome-based standards is that they are able to capture a broad range of circumstances without the need to explicitly state each one. For example, the Australian standard is broader than the New Zealand standard requiring food handlers to take steps to ensure objects like jewellery and bandages do not contaminate the food being prepared (not just hair). This is not to say that outcome-based standards are necessarily better than prescriptive standards — there are costs and benefits to both (box 5.2).

The New Zealand food hygiene regulations also differ from the ANZFS Code in that there are specific regulations for particular types of food businesses, including bakeries, delicatessens and eating houses. These regulations relate to the food premise and equipment of these types of businesses and are also prescriptive in their requirements. For example, a bakery is required to have a separate, damp-free room or compartment to store flour and no other food can be stored in the same room. In addition, the regulations require that the floor area (clear of furniture, fittings, and stored goods) be either 9.5 square metres or 3 square metres multiplied by the number of workers engaged in the premises — which ever is greater. In contrast, Australia has generic food premise and equipment requirements that apply to all food businesses without such prescriptive space requirements (Standard 3.2.3).

The New Zealand food hygiene regulations also outline requirements relating to particular food products including the manufacturing and sale of ice-cream and beverages (along with some primary products). Like other provisions in the regulation, they relate to the conduct of food handlers or to the food premise and equipment and are highly prescriptive. For example, a food business selling ice-cream must store scoops and servers either in running water, or in a covered container that is free from water. The regulation also requires scoops, servers and the storage containers to be cleaned every four hours.

New Zealand food businesses have the option of seeking an exemption to the *Food Hygiene Regulations 1974*, instead operating according to a food safety program that is approved and audited by the NZFSA. These food businesses are not subject to the inspection regime under the food hygiene regulations but instead require auditing against their food safety plan. This differs from the Australian hygiene

standards in that the food safety program system works in conjunction with food hygiene standards (see chapter 6).

Box 5.2 Outcome-based and prescriptive standards

Prescriptive standards may provide greater certainty and information to businesses, which is especially valued by small and medium sized enterprises. However, they can limit flexibility, prevent adoption of new technologies and lead to regulatory overload with managers and workers adopting a minimum compliance mentality. They can also impose costs without the desired improvement in outcomes. One potential example of the latter, in the New Zealand regulations, is the requirement for food business owners to place a sign in each toilet and near every changing room requesting workers to wash their hands thoroughly before commencing, before handling food and on every occasion after using the toilet.

In contrast, outcome-based standards give businesses much greater flexibility in how they will meet regulatory requirements. They are usually valued highly by larger enterprises which may find significant cost savings by discovering innovative ways to deliver mandatory outcomes.

This greater flexibility comes at the price of greater uncertainty both in terms of what inspectors or auditors will accept as compliant and likely outcomes if prosecuted. In commenting on the nature of the regulations contained in the ANZFS Code, the South Australian Health Department said:

The majority of food businesses in South Australia are small and medium enterprises (SMEs) who struggle [to understand and meet] the outcomes based nature of many standards. As these outcomes based standards do not include 'deemed to comply' provisions [that incorporate codes of practice or other prescriptive requirements] SA Health must provide considerable assistance.

Similarly, the Victorian Department of Health also commented:

Where possible, regulation should be outcome-based (such as the Food Standards Code) so that businesses are not subject to arbitrary rules designed for the majority that do not work for the minority. But they should also be supplemented by additional guidance or assistance which explains how to comply, for those businesses (particularly smaller businesses and community groups) that need this advice.

The inclusion of 'deemed to comply' provisions (or equivalent) within outcomes-based standards is one way to gain the benefits provided by the certainty of prescriptive standards and the flexibility afforded by outcomes based standards. However, there are few examples of such provisions within food safety regimes of Australia and New Zealand.

Sources: Bardach and Kagan (1982); PC (1998); Productivity Commission survey of food safety regulators (2009, unpublished).

Not all of New Zealand's food safety and hygiene provisions are contained in the hygiene regulations. New Zealand's *Food Safety Regulations 2002* also include provisions relating to 'infected' people not working as food handlers. This includes manufacture, preparation, storage, packing, carriage or delivery of food. These

regulations only apply when a person is unwell and this illness is a concern for greater public health and safety (such as a person suffering from a communicable disease). More generic requirements are outlined in the ANZFS Code for Australia (table 5.8).

As part of New Zealand’s domestic food review, it is proposed that the *Food Hygiene Regulations 1974* be revoked and be replaced by new regulations made solely under the new Food Bill. The proposed regulations are expected to be outcome-based.

Table 5.8 Obligations relating to the health of food handlers

<i>Australia</i>	<i>New Zealand</i>
Standard 3.2.2	Food Safety Regulations 2002
(16) Health of persons who handle food – duties of food businesses	(10) Infected persons
(1) A food business must ensure the following persons do not engage in the handling of food for the food business where there is a reasonable likelihood of food contamination:	(1) No person referred to in subclause (2) may be engaged, or employed, in the manufacture, preparation, storage, packing, carriage, or delivery, for sale, of—
(a) a person known to be suffering from a food-borne disease, or who is a carrier of a food-borne disease; and	(a) a food
(b) a person known or reasonably suspected to have a symptom that may indicate he or she is suffering from a food-borne disease.	(b) an article used or likely to be used as a food
	(c) any material or article that is used, or is likely to be used, as a wrapper, package, or container for a food.
	(2) The persons are—
	(a) a person who is suffering from a communicable disease
	(b) a person who is a carrier as defined in the <i>Health Act 1956</i>
	(c) a person who is suffering from a condition causing a discharge of pus or serum from any part of the head, neck, hands, or arms.

Sources: The ANZFS Code; *Food Safety Regulations 2002* (NZ).