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

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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 - Mandatory Warning and Advisory Statements and Declarations.

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Abbreviations, acronyms and definitions

Assessment the process of reviewing a food business in order to confirm compliance or non-compliance with the *Food Act 2008* (WA), Food Regulations or the Code

Authorised Officer means a person appointed under Part 10, Division 3, section 122 of the *Food Act 2008*

CEO the Chief Executive Officer of Department of Health Western Australia

Code means the *Australia New Zealand Food Standards Code* as defined in the *Food Standards Australia New Zealand Act, 1991* of the Commonwealth of Australia. Part 3, Division 2, Section 22 of the *Food Act 2008* (WA) provides for enforcement of the Code

Compliance 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

DOH Department of Health Western Australia

Enforcement refers to use of regulatory options to achieve compliance

Enforcement Agency means
- 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 2009* for the purposes of this definition

**Food Act** refers to the *Food Act 2008 (WA)*

**FSANZ** Food Standards Australia New Zealand

**Food Regulations** refers to the *Food Regulations 2009 (WA)*

**Infringement notice** 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

**Non-Compliance** refers to a state when persons, food businesses or primary producers are operating outside any regulatory requirements

**Powers of Seizure** Refer to section 40 of the Food Act

**Prosecution** 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. The objectives of this document are to:

1. Clarify the application of the provisions of the Food Act 2008 (WA) (Food Act) in relation to declaration of certain substances in food (food allergens)

2. Present a practical compliance and enforcement approach in terms of food allergen declaration requirements by defining the guiding principles

3. 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 Australia New Zealand Food Standards Code (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 - Mandatory Warning and 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. 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 its 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.”

The definition of “unsafe food” does not relate to the presence of food allergens.

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.

The definition of “unsuitable” food does not relate to the presence of food allergens.

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.

3.2 Compliance with Section 22 of the Food Act

The Food Act (under Section 22) requires that all food businesses comply with the provisions of the Code. This includes mandatory allergen declaration requirements specified in clause 4 of Standard 1.2.3 of the Code - Mandatory Warning and 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 mandatory 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 Table to Clause 4 of Standard 1.2.3 of the Code below, when present in a food as an ingredient; or an ingredient of a compound ingredient; or a food additive; or component of a food additive; or a processing aid or component of a processing aid:

- **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 and wine
- **Milk** and **milk products**
- **Peanuts** and **peanut products**
- **Sesame seeds** and **sesame seed products**
- **Soybeans** and **soybean products**
- **Tree nuts** and **tree nut products** other than coconut from the fruit of the palm Cocos nucifera
- **Added sulphites** in concentrations of 10 mg/kg or more
- **Cereals containing gluten** and their products, namely, **wheat**, **rye**, **barley**, **oats** and **spelt** and their hybridised strains other than where these substances are present in beer and spirits standardised in Standards 2.7.2 and 2.7.5 respectively of the Code

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, as follows:

<table>
<thead>
<tr>
<th>The Code</th>
<th>Clause / subclause</th>
</tr>
</thead>
<tbody>
<tr>
<td>Standard 1.2.3 - Mandatory Warning and Advisory Statements and</td>
<td>4(2) The presence of the substances listed in the Table to this clause must be - (a) declared on the label on a package of the food; or (b) where the food is not required to bear a label pursuant to clause 2 of Standard 1.2.1– (i) declared on or in connection with the display of the food; or (ii) declared to the purchaser upon request; or (c) displayed on or in connection with food dispensed from a vending</td>
</tr>
</tbody>
</table>
### Declarations

| Standard 1.2.1 – Addition of Labelling and other Information Requirements | 2 (4) Where food for retail sale is sold in a hamper –  
(a) subclause 2(1) does not apply; and  
(b) a package of food must bear a label setting out all of the information prescribed in this Code; and  
(c) unpackaged food must be accompanied with documentation setting out the information prescribed in this Code. |
| --- | --- |
| 4 Provision of information in relation to food not for retail sale etc.  
(1) Where a purchaser or relevant authority has so requested, a package of food, other than food for –  
(a) retail sale; or  
(b) catering purposes; or  
(c) supplied as an intra company transfer;  
must be accompanied by sufficient information in relation to that food to enable the purchaser to comply with the –  
(d) compositional requirements of this Code; and  
(e) labelling or other declaration requirements of this Code.  
(2) The information referred to in subclause (1) must be supplied in writing where the relevant authority or purchaser has so requested. |
| 6 (3) Where food for catering purposes is not required to bear a label, that food must be accompanied by documentation containing all of the information prescribed in subclause 5(1) of standard 1.2.1. |

### 3.2.2 Compliance with Standard 1.2.4 of the Code

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

- Clause 4 specifies that ingredients need to be listed by common, descriptive or generic name. Table to Clause 4 of Standard 1.2.4 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 6 of Standard 1.2.4 sets out the requirement to declare the substances specified in Table to 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 Application and understanding of Standard 1.2.3 of the Code

To assist enforcement agencies in determining whether a food business is complying with its legislative requirements, a Decision Tree Advisory Tool is provided (Figure 1). The principles behind the decision tree advisory tool are explained below.

The following principles relate to clause 4 of Standard 1.2.3 of the Code and clauses 4, 5 and 6 of Standard 1.2.1 where the substance is present as an ingredient; or an ingredient of a compound ingredient; or a food additive; or compound of a food additive; or a processing aid or component of a processing aid. Clause 4 of Standard 1.2.4 also sets out specific requirements for the naming of ingredients.

<table>
<thead>
<tr>
<th>Principle 1: Mandatory declaration of the presence of allergens on packaged food for retail sale, or foods for catering purpose that are required to carry a label</th>
</tr>
</thead>
<tbody>
<tr>
<td>A food business must declare the presence of a substance specified in the Table to Clause 4 of the Standard 1.2.3 of the Code on the label in compliance with the requirements of clause 4 of Standard 1.2.3.</td>
</tr>
</tbody>
</table>

Some types of retail packaged foods are exempt from the requirement to bear a label. The exemptions are specified in clause 2 of Standard 1.2.1 of the Code. Food for retail sale that is dispensed from a vending machine, and food for retail sale in a hamper have specific requirements for the allergen declarations (refer below to Principle 2 and Principle 3 respectively).

<table>
<thead>
<tr>
<th>Principle 2: Mandatory declaration of the presence of allergens on food for retail sale dispensed from a vending machine</th>
</tr>
</thead>
<tbody>
<tr>
<td>A food business must declare the presence of a substance specified in the Table to Clause 4 of the Standard 1.2.3 of the Code on or in connection with the food dispensed from a vending machine in compliance with the requirements of clause 4 of Standard 1.2.3.</td>
</tr>
</tbody>
</table>

The FSANZ Guide to Standard 1.2.3 of the Code - Mandatory Warning and Advisory Statements and Declarations states “this could be achieved through display on the outside of the vending machine, or in a leaflet, poster or brochure displayed in association with the food.”

<table>
<thead>
<tr>
<th>Principle 3: Mandatory declaration of the presence of allergens on food for retail sale in a hamper</th>
</tr>
</thead>
<tbody>
<tr>
<td>A food business must declare the presence of a substance specified in the Table to Clause 4 of the Standard 1.2.3 of the Code on the label of a packaged food in the hamper or on</td>
</tr>
</tbody>
</table>
documentation accompanying unpackaged food in the hamper in compliance with the requirements of clause 4 of Standard 1.2.3.

This applies for food for retail sale in a hamper, where under subclause 2(4) of Standard 1.2.1 of the Code the food for retail sale is not exempt from bearing a label under subclause 2(1) of Standard 1.2.1 of the Code.

Principle 4: Mandatory declaration of the presence of allergens on food for retail sale that is exempt from carrying a label.

A food business must declare the presence of a substance specified in the Table to Clause 4 of the Standard 1.2.3 of the Code on or in connection with the display of the food, or its declaration to the purchaser upon request, in compliance with the requirements of clause 4 of Standard 1.2.3.

This applies where a food for retail sale is exempt from the requirement to bear a label under subclause 2(1) of Standard 1.2.1 of the Code.

Principle 5: Mandatory declaration of the presence of allergens on food for catering purposes exempt from carrying a label.

A food business must declare the presence of a substance specified in the Table to Clause 4 of the Standard 1.2.3 of the Code in documentation in compliance with the requirements of clause 4 of Standard 1.2.3.

Where a food is for catering purposes, and the food is exempt from the requirement to carry a label under subclause 5(2) of Standard 1.2.1 of the Code, under subclause 6(2) of Standard 1.2.1 that food must be accompanied by documentation containing all of the information prescribed in subclause 5(1) of Standard 1.2.1.

Principle 6: Mandatory declaration of the presence of allergens for a package of food not for retail sale.

If requested by a purchaser or relevant authority, the package of food not for retail sale must be accompanied by sufficient information (in writing if requested), to enable the purchaser to declare the presence of a substance specified in the Table to Clause 4 of the Standard 1.2.3 of the Code.

A package of food not for retail sale, under clause 4(1) of Standard 1.2.1 of the Code must be accompanied by sufficient information in relation to that food to enable the purchaser to comply with the labelling and declarations requirements of the Code. This information must be provided in writing where requested by the relevant authority or purchaser under subclause 4(2) of Standard 1.2.1.
For Principles 1 - 6, further information on the application of Standard 1.2.3, refer to the FSANZ User Guide to Standard 1.2.3 of the Code - Mandatory Warning and Advisory Statements and Declarations available from: http://www.foodstandards.gov.au/code/userguide/Documents/Guide%20to%20Standard%201.2.3%-20-

<table>
<thead>
<tr>
<th>Principle 7: Powers to assess compliance to Standard 1.2.3 of the Code and take enforcement action</th>
</tr>
</thead>
<tbody>
<tr>
<td>A person who is appointed as an authorised officer, in accordance with the Food Act, has the powers to make inquiries and investigate suspected infringements, and to take enforcement action against any food business trading within the enforcement agency’s district.</td>
</tr>
<tr>
<td>It is important that the enforcement agency adopts sound internal policy and procedures to manage the assessment of the Standard 1.2.3 of the Code.</td>
</tr>
</tbody>
</table>

3.5 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 produced a resource titled “Food Act 2008 Tool for local government - Understanding Allergen Declarations” that has been designed to be read in conjunction with this guideline. This provides some possible scenarios of undeclared allergens and highlights the importance of providing correct allergen declarations; and demonstrates how the principles (1-7) detailed above, may be applied [Insert resource web links here]. An authorised officer checklist is also available to assist with assessing compliance to Standard 1.2.3 of the Code.

Additionally 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: [Insert resource web links here]

- **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 list of the questions, as well as type of the questions, are suggestions and are not exhaustive. They can and should be changed to fit specific food businesses operations.

3.6 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.

A recent case involved a Sydney manufacturing company found guilty and convicted of breaching the New South Wales *Food Act 2003* for failing to declare allergen in cakes. Details of the case included the following:

- Company was a cake manufacturing business - Sunfield Australia
- Prosecuted under Food Act 2003 for sale of cakes containing nut and egg allergens, which were not declared on the label as required under Standard 1.2.3 of the Code.
- The company had sold food containing undeclared allergens on multiple occasions
- In one instance, a child suffered an allergic reaction
- Food business and director convicted for not complying with allergen declaration requirements of the Code
- This conviction led to a fine of $48,000 plus costs of $21,000.

For more information on this case - refer to the media release on the NSW Food Authority’s website:


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 the following media release article:

4. Review
This guideline will be reviewed six months after introduction and annually thereafter.

5. Useful resources and websites
• DOHWA http://www.public.health.wa.gov.au
• FSANZ http://www.foodstandards.gov.au
• NSW Food Authority http://foodauthority.nsw.gov.au

6. Further information
The following documents may also be of assistance:


- **WA Food Regulation: Department of Health Compliance and Enforcement Policy.**


**Contact the Food Unit via:**

Any feedback or concerns please use the ‘Food Unit Query” form which can be downloaded from our website: [http://www.public.health.wa.gov.au/2/786/3/food_information.pm](http://www.public.health.wa.gov.au/2/786/3/food_information.pm)

Email: FoodUnit@health.wa.gov.au
Phone: +61 8 9388 4903
Fax: +61 8 9382 8119
Figure 1: Decision Making Advisory Tool for Declarations of Allergens specified in Standard 1.2.3 of the Code

Refer to PRINCIPLE ONE
Is the presence of the allergen correctly declared on the label in compliance with the requirements of clause 4 of Standard 1.2.3.

Refer to PRINCIPLE TWO
Is the food a retail food required to carry a label pursuant to clause 2 of Standard 1.2.1 of the Code?

Refer to PRINCIPLE THREE
Is the food sold in a hamper?

Refer to PRINCIPLE SEVEN
Authorised officers have the power to assess and take compliance and enforcement action against any food business trading in the enforcement agencies district.