

# Considering due diligence, skills and knowledge under the Food Act 2008

By Tim Beckett

## Background

While there are many offences under the *Food Act 2008* (WA) (**Act**) which are easily detectable and identifiable, especially by reference to the requirements of the Food Standards Code (**FSC**), there are a number of concepts which require a more fluid interpretation. Local governments frequently consider that a particular food business has failed to ensure that staff possess appropriate skills and knowledge for food handling operations without there being any objective test for that standard. Similarly, food businesses regularly seek to rely upon a defence that all reasonable precautions and due diligence have been exercised to prevent the commission of an offence, in the absence of a proper objective basis for doing so.

A recent decision in the Perth Magistrates Court addresses elements of both of these issues.

## Nature of prosecutions

On 11 January 2021, a food business proprietor was convicted of two offences under the Act, following a three day trial in December 2020. The charges arose as a result of an incident in which the accused company, which provided a service of supplying school lunches to primary schools through an online ordering platform, inadvertently caused a child with coeliac disease to be given a toasted sandwich containing ordinary wheat bread, rather than the gluten free bread which had been ordered. As a result of that error, and an investigation of the relevant food premises in the aftermath of the incident, the City of Canning alleged two charges against the food business, namely:

1. The food business supplied food which was not of the nature or substance demanded by the purchaser, contrary to section 20(1) of the Act; and
2. The food business failed to ensure that persons undertaking and supervising food handling operations had appropriate skills and knowledge in food safety and food hygiene matters commensurate with their work activities, contrary to Standard 3.2.2 clause 3(1) of the FSC and, by extension, contrary to section 22(1) of the Act.

A number of issues were raised at trial, though there was no dispute that the complainant had, in fact, ingested wheat bread rather than the gluten free bread which had been ordered. Furthermore, it was not in dispute as to whether the accused company had been responsible for supplying that product. However, the processes used by the accused company, and the adequacy of training and supervision of employees of that company, were central to the question of whether the alleged offences had been committed:

In relation to the first charge, did the accused company exercise reasonable precautions and due diligence to prevent the complainant from being given the wrong product?

In relation to the second charge, did the accused company fail to ensure that its staff had appropriate skills and knowledge 'commensurate with their work activities'?

### **Due diligence**

Section 27(1) of the Act provides:

'In any proceedings for an offence under this Part, it is a defence if it is proved that the person took all reasonable precautions and exercised all due diligence to prevent the commission of the offence by the person or by another person under the person's control.'

Sections 27(2) and (4) provide further specific options for satisfying the requirements of section 27(1) of the Act, including the proper use and implementation of approved food safety program and quality assurance programs. However, those defences are not satisfied by the mere existence of those programs and require further evidence of compliance with those programs and documentation of the same.

While prosecutions under the Act require all elements to be proven beyond reasonable doubt, the due diligence provisions set out in section 27 of the Act are required to be proved by the defence on the balance of probabilities. That is, the prosecution need not prove beyond reasonable doubt that the food business failed to exercise all due diligence and reasonable precautions in relation to the matter.

In this case, while the accused company was able to provide evidence of the existence of a training program and a quality assurance officer, along with evidence as to the manner in which orders were prepared, packaged and labelled to prevent any errors, the Court was not satisfied that the accused company had satisfied the due diligence test in section 27(1) of the Act.

Amongst those failures, the Court considered that:

- the staff member who had packaged this particular lunch had not undergone the relevant training program at the time of the offence, despite having been employed for a period of at least two months;
- at the time of the alleged offence, there were at least 10 employees who had not undergone that training; and
- in relation to the labelling and packaging process itself, the Court noted that there were other precautions available to better identify allergens within the food preparation process, including the use of coloured stickers to identify allergen sensitive items a precaution which was subsequently adopted by the business.

Having regard to those facts, the Court was satisfied that a due diligence defence under section 27(1) of the Act could not be satisfied, as there were clearly other training and food handling process improvements that could have further mitigated the risk of the commission of this offence.

### **Skills and knowledge**

In order to prove the second charge, the prosecution had to satisfy the Court beyond reasonable doubt that the food business failed to ensure that its food handling staff possessed all skills and knowledge in food safety and food hygiene matters commensurate with their work activities.

The prosecution case did not specifically rely upon the employee who had failed to appropriately package and label the relevant item. Instead, the prosecution referred to a broader failure by the food business in relation to the training and supervision of its employees, as referenced by the fact that at least 10 of those employees had not undergone the intended training at the time of the alleged offence.

Clause 3(1) of FSC provides:

‘A food business must ensure that persons undertaking or supervising food handling operations have:

- (a) skills in food safety and food hygiene matters; and
- (b) knowledge of food safety and food hygiene matters,

commensurate with their work activities.’

While it is accepted that there are some materials which provide commentary as to the proper application of the FSC, those materials are unlikely to be admissible in a prosecution or, even if they are, limited weight will attach to that commentary. In this case, the admissibility of the ‘Safe Food Australia – A Guide to the Food Safety Standards (**Guide**)’ was considered by the presiding Magistrate, who found that the Guide was not admissible, consistent with the position of the prosecution. The Court noted that the Guide has no legislative force and no written law makes provision for its admissibility, as the document is to be used as a reference guideline, rather than a document which can be relied upon by the Court in the interpretation of the FSC.

In the current case, there was some evidence that, despite the formal training program not having been undertaken by several employees at the time of the alleged offence, those employees had received training and supervision from other staff while carrying out their functions. It was contended that the ‘on the job’ training received by those staff was sufficient to imbue them with the appropriate skills and knowledge for the tasks they were performing.

While it was accepted on the evidence that staff members had received some ‘on the job’ training, the Court was ultimately satisfied that the food business failed to ensure that the staff had skills and knowledge commensurate with their work activities. In considering that charge, the Court also noted that, as was consistent with the drafting of the relevant provision of the FSC, the skills and knowledge that may be commensurate with work activities will vary according to the specific roles or tasks being undertaken by a food handler. For example, a person with limited training in food labelling and food packaging may not have skills and knowledge commensurate with an activity requiring the handling and preparation of raw fish products. Equally, an experienced and qualified chef may not have adequate skills and knowledge to pick, pack and label food orders, if that person has not undergone training specific to that role. Ultimately, it is a question as to whether the relevant food handler has appropriate skills and knowledge, which will typically include a component of training and supervision, to undertake the specific food handling activities within their role.

In this case, the Court was satisfied that appropriate skills and knowledge did not exist, having regard to (amongst other things) the fact that the food business considered that an induction and training program should be prepared for and delivered to staff and, in this case, failed to ensure that staff underwent that program before carrying out their work activities.

## Conclusion

While this case related to very specific procedural failures of a food business, a broader lesson emerges in relation to enforcement under the Act. That is, while it was clear that the complainant intentionally ingested an allergen which was inadvertently provided to her by the food business, it may not have been possible to successfully prosecute the food business for either of these charges without the local government having fully investigated the processes and training records of the food business and obtained a full understanding as to the manner in which food was handled at the premises and identifying improvements for those processes.

Given that concepts such as 'due diligence' and 'skills and knowledge' will inevitably require a complete understanding of the full context of the food businesses processes, it is essential that officers investigate the entirety of those operations to the fullest extent possible.

The information contained in this article should not be relied upon without obtaining further detailed legal advice in the circumstances of each case. For further information in relation to Food Act matters please contact Tim Beckett by email at [tbeckett@mcleods.com.au](mailto:tbeckett@mcleods.com.au) or Peter Gillett at [pgillett@mcleods.com.au](mailto:pgillett@mcleods.com.au).

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