



ASSISTING FOOD DONATION AND  
COMMUNITY FOOD PROVIDERS IN THE ACT:  
SOME LEGISLATIVE CONCERNS

October 2006



## **ABOUT ACTCOSS**

ACTCOSS acknowledges Canberra has been built on the traditional lands of the Ngunnawal people. We pay our respects to their elders and recognise the displacement and disadvantage traditional owners have suffered since European settlement. ACTCOSS celebrates the Ngunnawal's living culture and valuable contribution to the ACT community.

The ACT Council of Social Service Inc. (ACTCOSS) is the peak representative body for not-for-profit community organisations, people living with disadvantage and low-income citizens of the Territory. ACTCOSS is a member of the nationwide COSS network, made up of each of the state and territory Councils and the national body, the Australian Council of Social Service (ACOSS).

ACTCOSS' objectives are representation of people living with disadvantage, the promotion of equitable social policy, and the development of a professional, cohesive and effective community sector.

The membership of the Council includes the majority of community based service providers in the social welfare area, a range of community associations and networks, self-help and consumer groups and interested individuals.

ACTCOSS receives funding from the Community Services Program (CSP) which is funded by the ACT Government.

ACTCOSS advises that this document may be publicly distributed, including by placing a copy on our website.

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## Foreword

In early 2006, ACTCOSS received funding from the ACT Government's Canberra Community Grants program to support the continuation of the Community Food Forum. The Forum aims to provide a network for the exchange of information about food service delivery between community food providers. The funding of this project has drawn the attention of ACTCOSS to the issues in this paper, and allowed us to explore them in more detail.

## **Access to Food is a Human Right**

Access to adequate food and nutrition as part of an adequate standard of living is internationally recognised as a basic human right, and is enshrined in Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), to which Australia is a party. This extends an obligation to the ACT Government to ensure that everyone has access to adequate food and nutrition.

However, while some government funding is provided to directly assist disadvantaged people gain access to a safe, nutritious and regular food supply, mainly through small amounts of funding for emergency relief provision, most direct provision of free or discounted food is undertaken independently by charities and other community organisations.

Therefore, at a bare minimum, it is clear that the ACT Government has an obligation to ensure that legislative instruments do not unnecessarily hinder the provision of food by these agencies to those who need it most.

## **Legislated Protection for Food Donors**

Donated food makes up a moderate proportion of free food provision. Yet large amounts of quality and nutritious food continue to be disposed of by food businesses which could otherwise supplement food purchased by food providers and reduce the cost of supplying food to disadvantaged people.

Organisations in other jurisdictions, including in New South Wales and Victoria, have identified legal barriers to food donation being a major obstacle to encouraging businesses to become food donors. Specifically, the identified impediment is the possibility of continuing legal liability for food donors through civil lawsuits for personal injury or other grounds as a result of their food donation. The fact that food donors have little control of the transport, storage and delivery of donated food, coupled with the fact that a business is more likely to be targeted for civil action than a community organisation because of its greater financial resources, means that the risk of legal action poses a significant disincentive to food donation.

At least two Australian jurisdictions have taken legislative action to remove this disincentive. When passing its *Wrongs and Other Acts (Public Liability Insurance Reform) Bill 2002*, the Victorian Government included protection for food donors as part of more general civil liability reforms.

Similarly, in May 2005, the NSW Government passed the *Civil Liability Amendment (Food Donations) Act 2005*, which inserted new provisions into the *Civil Liability Act 2002* protecting food donation from civil action, modelled closely upon the Victorian provisions.

Both jurisdictions protect food donors from certain civil liabilities subject to certain conditions, being:

- the food was donated for a benevolent purpose with the intention of it being distributed for free;
- the food was safe for consumption at the time it was donated;
- where there were certain requirements for the food to remain safe after donation, these were passed on to the recipient organisation; and
- where there was a time limit after which the food would not be safe, this was passed on to the recipient organisation.

The ACT also has laws that limit exposure to civil liability, contained in the *Civil Law (Wrongs) Act 2002*. However, unlike the analogous legislation in NSW and Victoria, this legislation does not include protection for food donors. There seems little impediment to introducing similar provisions into ACT law, as the legislative change appears to be straightforward and there are working examples from which the ACT could borrow.

Reports from NSW and Victoria confirm that these legislative changes have encouraged food businesses to donate excess food, and have proved to be an effective means of calming any legal concerns when organisations seek food donations.

#### **Recommendation 1**

That the ACT Government consider introducing legislative provisions into the *Civil Law (Wrongs) Act 2002* that reduce exposure to civil liability for food donors.

### **Clarifying the legal status of community food providers**

A second issue raised in consulting with community food providers is uncertainty about their legal responsibilities. It is unclear to what extent the *Food Act 2001* (the Act) regulates community food providers, being the major legislative mechanism to regulating food safety in the ACT.

The ACT Government has announced in the 2006-07 Budget that it intends to amend the Act to enhance compliance and enforcement of food safety in the ACT, as part of a COAG agreement. This presents an opportunity to review the status of community food providers and their responsibilities.

ACTCOSS observes that the Act is written from the perspective of regulating commercial businesses, and does not specifically consider the status of agencies that regularly provide food to disadvantaged people, leading to ambiguities about whether these organisations are food businesses for the purpose of the Act. These ambiguities stem from the definitions of *food business* and *selling* contained in the Act.

The Act defines a food business as:

#### **10            *Meaning of food business***

For this Act, *food business* is a business, enterprise or activity (other than a business, enterprise or activity that is primary food production) that involves

—

- (a) the handling of food intended for sale; or
- (b) the sale of food;

whether or not the business, enterprise or activity is of a commercial, charitable or community nature or whether it involves the handling or sale of food on a single occasion only.

This needs to be considered in light of the definition of *sell* in the Act, which includes to “provide under a contract of service” [s9(1)(i)] (see Appendix A for the full definition). It is unclear whether this provision intends to include organisations that are provided with government funding to support the provision of free food. Community organisations may provide food under a government grant or a service funding agreement, which may be considered a contract of service for the purpose of the Act.

The issue of whether free food provision is included by the definition of *selling* is central to the Act’s impact upon community food providers, as virtually all of the provisions regarding the enforcement of food safety and the liability for offences hinge upon whether the food has been considered to have been sold.

A further complication is raised by the additional provisions for the exemption of certain food business from registration under the Act, although they are still required to notify the Chief Health Officer of their intention to operate (sections 89 & 90). The criteria for exemption is contained in subordinate legislation (the *Food Regulation 2002*), and creates more difficulties for community providers to determine their status under the Act (see Appendix B for exemption criteria).

In summary, the impact on the obligations and liability of community food providers has not be thoroughly considered in the current legislation, which continues to be complex, uncertain and confusing for organisations to determine their status and responsibilities.

**Recommendation 2**

That the ACT Government, as part of their intended amendment of the *Food Act 2001*, determine the most appropriate legislative framework for the operation of community food providers, and assist in educating them about their status and responsibilities.

## APPENDIX A: Definition of *sell* in the Food Act 2001

### 9 Meaning of *sell* etc

- (1) For this Act, *sell* includes—
  - (a) barter, offer or attempt to sell; or
  - (b) receive for sale; or
  - (c) have in possession for sale; or
  - (d) display for sale; or
  - (e) cause or permit to be sold or offered for sale; or
  - (f) send, forward or deliver for sale; or
  - (g) dispose of by any method for valuable consideration; or
  - (h) dispose of to an agent for sale on consignment; or
  - (i) provide under a contract of service; or
  - (j) supply food as a meal or part of a meal to an employee, in accordance with a term of an award governing the employee's employment or a term of the employee's contract of service, for consumption by the employee at the employee's place of work; or
  - (k) dispose of by way of raffle, lottery or other game of chance; or
  - (l) offer as a prize or reward; or
  - (m) give away for the purpose of advertisement or in furtherance of trade or business; or
  - (n) supply food under a contract (whether or not the contract is made with the consumer of the food), together with accommodation, service or entertainment, in consideration of an inclusive charge for the food supplied and the accommodation, service or entertainment; or
  - (o) supply food (whether or not for consideration) in the course of providing services to people in—
    - (i) a correctional centre or lockup, or an institution or shelter under the *Children and Young People Act 1999*; or
    - (ii) a hospice, hospital, nursing home or other health facility operated by or on behalf of the Territory; or
    - (iii) any other institution (however described) prescribed by regulation for this paragraph; or
  - (p) sell for the purpose of resale.
- (2) For this Act, food or equipment that is displayed for the purpose of being offered as a prize or reward, or given away for the purpose of advertisement or in the furtherance of trade or business, is taken to have been *displayed for sale* by the owner of the food or equipment.

## APPENDIX B: Exemptions in the *Food Regulation 2002*

### 5 Food businesses exempt from registration—Act, s 89

- (1) The following food businesses are prescribed:
  - (a) a food business that handles or sells food if—
    - (i) all the food is either—
      - (A) non-potentially hazardous and not contained in a closed package; or
      - (B) sold, straight after thorough cooking, for immediate consumption; and
    - (ii) the food business handles or sells food during no more than 5 periods a year, and each period when it sells food is no longer than 3 days;
  - (b) the food business handles or sells food in or from a food transport vehicle that is registered under a State law that corresponds to the Act;
  - (c) a food business that transports food but does not otherwise handle or sell food;
  - (d) a food business that sells only food that is—
    - (i) contained in a closed package intended for sale; and
    - (ii) non-potentially hazardous;
  - (e) a food business that only sells, through a vending machine, food that is non-potentially hazardous.
- (2) In this section:

***non-potentially hazardous***—food is ***non-potentially hazardous*** if it does not need to be kept at certain temperatures to—

  - (a) minimise the growth of any pathogenic micro-organisms that may be present in the food; or
  - (b) prevent the formation of toxins in the food.