Food safety offenses In New South Wales, Australia: a critical appreciation of their Complexities

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Food is essentially a primary need of all life to remain alive. Faults or carelessness of human beings renders foods unsafe, which may cause disease and death. This article examines selected food safety offenses of New South Wales aimed at assessing their definitional clarity and penal rationality looking through the lens of an offender’s culpability. It carries out a critical analysis based on archival materials and concludes that the present offense provisions hold significant merits to regulate food safety; however, further clarity of their inherent complexities could enhance their efficacy.

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Food Safety Offenses in New South Wales, Australia: A Critical Appreciation of Their Complexities

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Abstract

Food is essentially a primary need of any life to remain alive. Faults or carelessness of human beings renders foods unsafe which causes diseases and deaths. This article examines the selected food safety offences of NSW aimed at assessing their definitional clarity and penal rationality looking through the lens of offender’s culpability. It concludes that the present provisions hold strong merits to regulate food safety, however, further clarity of their inherent complexities could enhance their efficacy. Having regard to the relative newness of this area of regulation, this article submits that the law of NSW, which has been highly acclaimed both in home and abroad as one of the most successful regulatory regime, could assist others in designing and articulating their own legal regime for food safety.

A. Introduction

Benefits of any law spring from its effective enforcement which entails clarity in its definition of contents and adequacy of remedies against its breaches. A lack of either of these two critical attributes in the law is likely to render its objective futile. Food safety is now a serious concern all over the world particularly in developing countries where unscrupulous businesspersons randomly produce unsafe foods which are consumed by people who have little choice but to go for it owing to either their poverty or unavailability of alternatives in the market. However, sometimes culture or religion of a particular group of consumers may also favour certain foods regardless of their harmful ingredients. Though it is a relatively new avenue of regulation, laws have emerged to criminalise conduct concerning food safety around the world. New South Wales (NSW) is the oldest and most populous state of Australia, and its food regulation has been highly acclaimed both in home and abroad as one of the most successful regulatory regime.¹ Consequently, the legal and regulatory regime for food safety of NSW is sometimes regarded as model for other countries to design and

improve their own regulation of the same area. Nonetheless, the legal provisions defining food safety offences in NSW do not seem to be flawless. This article intends to reflect on the definitions of offences regrading unsafe and unsuitable foods and their penalties in NSW under its key legislation, the *Foods Act* 2003 (FA 2003), for the regulation of food safety. It finds that there are significant niceties in them, however, at the same time, some complexities seem to have weakened their intensity to some extent at least in respect of their smooth enforcement and creating deterrence.

**B. Food Safety Offences and Their Elements**

Part 2 of the FA 2003 containing sections 13–29 deals with offences relating to foodstuff in NSW. These sections are divided into four divisions in the legislation. Division 1 elucidates ‘serious offences’, while Division 2 describes ‘other offences’ relating to food. Division 3 provides for the defences to the offences incorporated in this part. In order to keep the article with a certain limit, the following discussion will focus on selective offences under the FA 2003 chosen based on their prominence and different *mens rea* elements. It will also highlight the penalties of the offences aiming at showing their relation with the fault elements. To explain the meanings of the constituent elements of an offence in general terms, *actus reus* refers to the physical or external component of an offence, whilst *mens rea* denotes its fault or mental element.

**C. Definitions of the Food Safety Offences and Their Penalties**

The FA 2003 contains food safety offences embracing a three-tier model of *mens rea*, and penalties are prescribed commensurate with the degree of culpability of the offender.3

Amongst these three categories of offences, the highest penalty is set for a Tier 1 offence,

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2 Division 2A is concerned with beef labelling which is unrelated to this article.
followed by an offence of Tier 2 which attracts a penalty higher than that of a Tier 3 offence. Thus the penalties are gradually decreased apparently based on the fault elements of an offence that are correspondingly downgraded from Tier 1 to Tier 3. So there are offences in this legislation where their conduct components are the same, but they are primarily distinguished from one another with respect to fault or mental elements. Hence, the offences at hand are divided below based on their \textit{mens rea} elements. The following figure represents a three-tier \textit{mens rea} model of the selected offences.

![Three-Tier Mens Rea Model](image)

\textbf{Figure 1: Three-Tier Mens Rea Model in the Food Act 2003 (NSW)}

**Tier 1 offences**

Tier 1 offences apply to the conduct affecting food safety with subjective fault elements. These offences require the prosecution to prove specific \textit{mens rea} of the accused as stipulated in the relevant sections of the legislation. Proscribing the conduct constituting Tier 1 offences, the FA 2003 states in §13(1) that '[a] person must not handle food intended for sale
in a manner that the person knows will render, or is likely to render, the food unsafe.’ Section 14(1) further asserts that ‘[a] person must not sell food that the person knows is unsafe.’ As stated in s 13(1), it vividly requires proof of the accused’s ‘knowledge’ of rendering the food unsafe as mens rea, where the food was intended to be sold, whilst conviction under s 14(1) requires the prosecution to prove as the mental element of the offence that the accused knew that the sold food was unsafe. The knowledge of the accused has to be proved subjectively.

Giving emphasis to this higher degree of fault element, the legislation itself has categorised these offences as ‘serious’ ones. The prosecution bears the onus of proving that the defendant’s handling of food had the potential to render the food unsafe, or sold (actus reus) the unsafe food with the requisite knowledge in each instance. Once both actus reus and mens rea are proved beyond reasonable doubt, the defendant can be punished with a maximum fine of 1,000 penalty units or imprisonment for 2 years, or both as applicable to individuals, while a maximum fine of 5,000 penalty units applies to a corporation. However, the conviction can be avoided if a designated defence can be established.

The complexity in s13(1) lies in mainly the element of overarching ‘ulterior intent’ without which this offence cannot be committed. It prohibits handing of food ‘intended for sale in a manner that the person knows will render, or is likely to render, the food unsafe’. This is an offence which specifies an additional mental element that has no actus reus equivalent. It means, mens rea goes beyond the actus reus. Usually this type of offence attracts a greater penalty compared to that of one having no such additional requirement.

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4 Fault elements are typically ordered from the highest to lowest degree in the following way: intent, knowledge, recklessness and negligence.
5 As mentioned in the heading of Div 1–Part 2 of the Food Act 2003 (NSW).
6 Food Act 2003 (NSW) ss 13(1), 14(1) (‘FA 2003’).
7 Relevant defences can be found in Division 3 of Part 2 of the FA 2003 and a detailed discussion of defences fall beyond the scope of this article.
8 For example, the maximum penalty for wounding someone with intent to cause grievous bodily harm under s33(1) of the Crimes Act 1900 (NSW) is 25 years of imprisonment whereas the maximum penalty for recklessly wounding a person in a company which is in itself an aggravating factor is only 10 years under s35(3) of the Crimes Act 1900 (NSW).
required to prove this extra element in addition to its usual actus reus and mens rea. The way it has been added does not provide any certainty as to whose intention is required to be provided. This is relevant because where a company is a manufacturer of unsafe foods, handling staff members practically handle the food for their employer. As it is generally understood, this intention has to be the intention of the actor meaning who commits the actus reus. A question may emerge as to who will be held liable then – the company or its controlling officers or handling staff or all of them. A Local Court of NSW in New South Wales Food Authority v Van Thuong Nguyen⁹ (Bankstown case) fined a director of a company under, amongst other sections, s16(1) which contains almost identical expression, that is, ‘[a] person must not handle food intended for sale in a manner that will render, or is likely to render, the food unsafe’. The company was the second defendant, whilst the convicted director was the first defendant. He was charged as a director under the deeming provision of s122(1) of the FA 2003. Section 122(1) makes the corporate executives liable for the offences committed by their corporations under certain sections. The charges against the company were dismissed as it had been deregistered and therefore was incapable of being brought before the court as a defendant. It was a ‘small family business’¹⁰ and the convicted director and his wife were in its day to day control, and they handled the food together with their employees.¹¹ Nonetheless, she (director’s wife) remained completely out of the hook as she was not charged at all. When it was proved that wife ‘did handle the food intended for sale’ it is unclear how she remained blameless. Similarly, the employees who handled the food were also not included as defendants. This should raise a question as to the person whose intention to sell is relevant to s16(1). Clearly, employees had helped the errant

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⁹ This is an unreported case decided on 5 Sep 2012 (Case no 2012/81006-001) which can be read at the website of NSW Food Authority (NSWFA), <http://www.foodauthority.nsw.gov.au/_Documents/corporate_pdf/bankstown_decision.pdf> (‘Bankstown case’).
¹⁰ Bankstown case [13].
¹¹ Ibid [4–SF6], [7].
company and its director to commit the offence. Assisting someone with committing an
offence constitutes an offence in itself under the complicity rules as applicable in NSW.\textsuperscript{12}

Moreover, a failure to inform the police of any material information about the commission
of an indictable offence is an offence by itself under s316 of the \textit{Crimes Act 1900} (NSW).

Section 316 provides that:

\begin{quote}
(1) If a person has committed a serious indictable offence and another person who knows or
believes that the offence has been committed and that he or she has information which might
be of material assistance in securing the apprehension of the offender or the prosecution or
conviction of the offender for it fails without reasonable excuse to bring that information to
the attention of a member of the Police Force or other appropriate authority, that other person
is liable to imprisonment for 2 years.

(2) A person who solicits, accepts or agrees to accept any benefit for himself or herself or any
other person in consideration for doing anything that would be an offence under subsection
(1) is liable to imprisonment for 5 years [emphasis added].
\end{quote}

\textsuperscript{12} See David Brown et al, \textit{Criminal Laws – Materials and Commentaries on Criminal Law and Process of New
South Wales} (Federation Press, 5\textsuperscript{th} ed, 2011) 985–1029.
Quite clearly, the offence under s13(1) is not an indictable one, therefore s316 does not apply literally, however, its spirit seems still relevant. If s 316(2) is given a fair thought, at least from moral point of view, one should ask oneself a question whether someone should go unpunished if he or she knowingly helps someone else to commit an offence which is punishable with two years imprisonment (the maximum punishment under s13). Perhaps due to the effectiveness of regulation in place and resultant scarcity of cases, the questions raised here remain unanswered. A clarity of the ambiguities of relevant intention and the responsibility of persons handling the food other than the company director(s) may make the law even more effective by creating greater general deterrence.

Part of the abovementioned complexities may also be relevant to s14(1) which provides that ‘[a] person must not sell food that the person knows is unsafe.’ In the case of a corporate seller, different persons, such as, the entity, its officers and employees who all may have the requisite knowledge and get involved in selling the unsafe food. In such a situation, who is to be hooked up needs to be clarified. The remainder of the Tier 1 offences looks full of niceties.

**Tier 2 Offences**

Tier 2 incorporates the mid-range offences that require the commission of *actus reus* with a fault element of an objective standard. These offences are defined in s 13(2) and s 14(2) of the FA 2003. Section 13(2) provides that ‘[a] person must not handle food intended for sale in a manner that the person ought reasonably to know is likely to render the food unsafe,’ whilst s 14(2) stipulates that ‘[a] person must not sell food that the person ought reasonably to know is unsafe.’

Clearly, s 13(2) can be differentiated from s 13(1) by referring to only the mental elements of these two offences, as their physical components are exactly the same. Unlike s 13(1), s 13(2) does not impose any burden on the prosecution to prove any subjective *mens rea*, instead it
should be sufficient if the knowledge can be proved objectively by applying a reasonable person test (objective test) that the accused had the knowledge that the handling of food in question would or was likely to render the substance unsafe. However, the prosecution must also prove the food was intended to be sold. That is, there is no need to prove that defendant actually knew that his/her/its handling of food intended to be sold was at least likely to render the food unsafe, rather it would suffice to prove that a reasonable person would have realised this consequence of the accused’s conduct. Notably, no actual consequence of the offence is required to be proved. The same distinction exists between ss 14(1) and 14(2) with respect to fault elements though the conduct is again exactly the same in both subsections. The sufficiency of knowledge as mens rea proven objectively was accepted in the following case.

The Chief Industrial Magistrate’s Court of NSW applied ss 13(2) and 14(2) of the FA 2003 in *NSW Food Authority v Terry Allan Harding* (Harding case) in 2008.\(^{13}\) The Court convicted defendant Harding of contravention of these two subsections. He was charged with handling and selling unsafe oysters that he harvested from the Hastings River. He harvested them at a time when all the harvest zones on the river were closed due to rainfall.\(^{14}\) While other oystermen were not harvesting oysters in the river as they were aware of the unsafety of the food and closure of the river, the defendant did and sold them to the Sydney Fish Market. Fortunately, officers from the Food Authority seized the batch of oysters before they reached consumers. Harding claimed that he did not know that river was closed at that time. So, he virtually denied any knowledge of closure and rendering the harvested oysters unsafe. The Court mentioned that his actual knowledge was not necessary, because he failed to act as a reasonable person as he could have easily known about the closure of the river by giving a


call to the authority or by sending an SMS. He committed the *actus reus* at the time when others refrained from harvesting oysters. Therefore, the Court ignored his denial and relied on the objective test in punishing him with a record penalty of AUD42,000 as he ought to have reasonably known about the unsafety of the oysters. It is worth mentioning that s 27 of the *FA 2003* excludes a defendant from being able to rely on the defence to the offences under ss 13(2) and 14(2) on the basis of a person having ‘a mistaken but reasonable belief as to the facts constituted the offence’, so he could not raise this defence.

The maximum penalties for the Tier 2 offences are 750 penalty units for individuals and 3,750 penalty units for corporations. These penalties are lower than those for Tier 1 offences, and this distinction is a reflection of the difference in the required fault elements of these two tiers. Nonetheless, the Tier 2 offences are not trivial as the legislators have deliberately prescribed significant maximum penalties that can be imposed on serious offenders.

The complexities discussed above in relation to Tier 1 offences equally apply to Tier 2 offences. Similarly, the niceties of Tier 1 are also echoed in Tier 2.

**Tier 3 Offences**

Tier 3 offences appear to be completely reliant on physical elements, requiring no *mens rea* whatsoever. So, proving the *actus reus* of the defendant beyond reasonable doubt alone should be sufficient for a conviction. These offences are mentioned in ss 16(2), s 17(2) and s 21 of the *FA 2003*. Section 16(2) simply prohibits a person from selling ‘food that is unsafe’, while s 17(2) lays down a similar restriction by asserting that ‘[a] person must not sell food that is unsuitable.’ Each of these two subsections deals with a single offence, that is, selling...

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15 *NSW Food Authority v Terry Allan Harding* (case number 20274893/06) 5–6 ('Harding Case').
16 'Record Fine for Unsafe Oysters', above n 14.
17 *FA 2003* ss ss 13(2), 14(2).
18 *Harding Case*, 7.
of ‘unsafe’ or ‘unsuitable’ food respectively. Hence, the difference between these two
offences relates to the quality of the food sold to anyone in any place within NSW. However,
s 21 involves multiple offences referring to contraventions of the *Australia New Zealand
Food Standards Code (ANZFSC)*\(^{19}\) instead of the FA 2003, as it reads:

(2) A person must not sell any food that does not comply with a requirement of the Food
Standards Code that relates to the food. (3) A person must not sell or advertise for sale any
food that is packaged or labelled in a manner that contravenes a provision of the Food
Standards Code. (4) A person must not sell or advertise for sale any food in a manner that
contravenes a provision of the Food Standards Code.

All the three offences proscribe sale or advertising for sale of foodstuffs in contravention of
the ANZFSC. Hence, s 21 aims to ensure the standard of food to be sold by requiring the
sellers or advertisers to strictly abide by the ANZFSC. First, s 21(2) prohibits selling of any
food by any person if the product does not conform to the relevant standards enshrined in the
ANZFSC. Secondly, s 21(3) imposes restrictions on both selling of, and advertising for sale
of, any foodstuff that flouts the packaging or labelling requirements set forth in the ANZFSC.
Thirdly, s 21(4) contains a general prohibition intending to prevent selling of, or advertising
for sale of, any food in violation of any provision of the ANZFSC. Plainly, it would be an
offence to sell or advertise for sale of any foodstuff in NSW that does not comply with the
standards prescribed in the ANZFSC with respect to the contents, packaging and labelling or
any other aspects of food mentioned therein. In other words, considering the entire s21 of the
FA 2003, it can be plausibly said that the *actus reus* components of the offences integrated in
this section are quite broad, and a defendant may violate the prohibitions by simply failure to
comply with the requirements of the ANZFSC.

Noticeably, none of the offences is explicit about the fault element. However, it may not
readily mean that no *mens rea* is required. The High Court of Australia in *He Kaw Teh v The

\(^{19}\) The *Australia New Zealand Food Standards Code* can be seen at
<http://www.comlaw.gov.au/Search/Australia%20New%20Zealand%20Food%20Standards>; See also Food
Standards Australia New Zealand (12 May 2012),
*Queen* interpreted a statutory provision which was silent about the fault element. The Court held that the statutory silence about the *mens rea* requirement does not necessarily negate the need for this crucial element of an offence. If the legislation is silent where there is no exclusion, either expressly or by necessary implication, of *mens rea* in the section creating the offence, there is still a common law presumption that *mens rea* is required. However, the presumption is rebuttable. It can be displaced if it is successfully rebutted. Such a rebuttal would actually mean that the legislators intended to displace the fault element of the offence. The High Court set out the ways in which the presumption of (subjective) *mens rea* can be rebutted. It stipulated three matters to be taken into account in determining whether the presumption has been displaced by the relevant section of the statute, and whether the Parliament intended the provision creating the offence should have no mental element. The factors are: the language of the section creating the offence, the subject matter of the statute, and the efficacy of law.

*First*, regard must be had to the words of the statute creating the offence, as the statutory expressions might suggest the intention of the Parliament. Sections 16(2), 17(2) and 21 of the FA 2003 lack any clear indication of intention of the lawmakers regarding a blameworthy state of mind, and there is no mention of even ‘reasonable excuse’ either. Such a lack may provide an indication that the Parliament intended to displace the presumption. Further, the words used in creating the offences in all three sections, give emphasis to the conduct part by inserting the words ‘must not’ preceding the prohibited conduct in the absence of any indication for mental element. Admittedly, the same prominence has been given to the Tier 1

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20 [1985] HCA 43; (1985) 157 CLR 523 (*He Kow Teh Case*). The case involved importation of a large amount of heroin.

21 *Customs Act 1901* (Cth) s 233B. It was concerned with the importation of prohibited narcotics.

22 See *He Kow Teh Case* [5]–[7].

23 Ibid [5].

24 Sections 16(2), 17(2) and 21(2)–(4) of the FA 2003.
and Tier 2 offences; but unlike Tier 3, they overtly mention the requisite *mens rea*. Therefore, the same words are especially important for Tier 3 to highlight the physical elements.

*Second*, the subject matter of the statute is to be taken into account.\(^{25}\) It refers to the nature of the offence, that is, whether or not the offence is truly criminal. Generally, the more serious the offence, the more likely is that a *mens rea* element was intended. The offences of Tier 3 are not truly criminal as it can be argued in the following way.

(i) Of course, the offences under Tier 3 deal with a social evil, but not as grave as the importation of prohibited narcotics, (a large quantity of heroin) as it was found in *He Kaw Teh*, tending to substantiate the argument that the legislators naturally wanted to rigorously suppress the conduct.\(^{26}\) The High Court in *He Kaw Teh* stated that if the prohibited acts ‘are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty’, then it is likely that the presumption of subjective fault element will be displaced.\(^{27}\) The offences under Tier 3 are of a regulatory nature, and food safety offences are treated as public interest offences.\(^{28}\) It is judicially recognised that the statutory offences created to protect public interest are generally deemed to have displaced fault elements.\(^{29}\)

(ii) The offences are concerned with not only ‘unsafe’, but ‘unsuitable’ food products, whereas Tier 1 and Tier 2 deal exclusively with unsafe food. The adjective ‘unsuitable’ is arguably less dangerous than ‘unsafe’ when it comes to foodstuff as it attracts lower penalty compared to the penalties for the similar offence concerning ‘unsafe’ food (to be discussed below). This somehow dilutes the seriousness of the offences in question. On the other hand, the offences under s 21 involve breach of the ANZFSC rather than the food legislation. These

\(^{25}\) *He Kaw Teh* Case [6].
\(^{26}\) See ibid.
\(^{27}\) Ibid, quoting from *Sherras v De Rutzen* (1895) 1 QB 918, 922.
\(^{29}\) See Gibbs CJ in *He Kaw Teh* Case quoting from *Sherra v De Rutzen* [1895] 1 QB 918.
offences are generally regarded as less serious ‘on the spot offences’ under the FA 2003. In practice, if an infringement of the ANZFSC is found, the regulator as an enforcement measure directly issues a penalty notice requiring payment of a penalty by an offender. Criminal prosecutions for committing a crime belonging to Tier 3 are unlikely to be initiated as the penalty notices issued by regulators are not typically dealt with by courts unless the accused person wishes to bring the issue to a court for a final decision.31

(iii) The less serious nature of the Tier 3 offences is also reflected in their penalties. As discussed previously, all the Tier 3 offences prohibit sale, or advertisement for sale of, foodstuffs in breach of the ANZFSC. Advertising for sale of food is an offence which is absent in Tier 1 and Tier 2. Seemingly, it has been regarded as less serious by the Parliament as it is not included in the legislation. The other conduct being selling of unsafe foods has been proscribed in the preceding two tiers. However, the penalties for Tier 3 offences are lower than those for Tier 1 and Tier 2. The maximum Tier 3 penalties are 500 penalty units for individuals under ss 16(2) and 21, whereas it is 400 penalty units for offences against s 17(2) which deals with unsuitable foods. Similar to the other tiers, the penalties of corporations are higher than individuals in Tier 3, but yet lower than the corporate penalties in other two tiers. Corporate penalties are 2500 units for offences against s 16(2) and 21, whilst it is 2000 units under s 17(2). Evidently, the maximum penalties for the Tier 3 offences are lower than even that of the Tier 2 offences which require objectively proved mens rea.

Therefore, it can be inferred based on the above arguments that the subject matter of the Tier 3 offences are not truly criminal and their subject matter does not uphold the common law presumption of a mens rea requirement.

31 FA 2003 s 120(2).
Third, the efficacy or utility of the law should be given due consideration having regard to the impact of the law, whether the imposition of strict or absolute liability would be a good deterrent. Also, it is to be considered, if a strict liability or absolute liability provision ‘will assist in the enforcement of the regulations’ and ‘will promote the observance of the regulations’, then the presumption is likely to be displaced.³² A strict liability offence in NSW does not require any mens rea element as such; it allows the defence of honest and reasonable mistake of fact. But s 27 of the FA 2003 has displaced that defence and thereby has negated the possibility of their being offences of strict liability.³³

Arguably, if mens rea is attached to the offences of Tier 3, the society may experience less legal efficiency with respect to its enforcement by regulators due to the inherent complexity of proving the fault element that may affect the prevention of harm in a quick and cost effective manner. This may have a negative impact on public confidence in the law and in the legal system as well. A threat of prompt action by regulators would reasonably work as a deterrent. On the other hand, the offences carry low penalties. Therefore, it is unlikely to unjustly penalise anyone in an excessive manner for committing a Tier 3 offence, in other words, it may not be unreasonably harsh on offenders.

To conclude, the above discussions suggest that it is unlikely that the Parliament intended to attach any subjective mens rea as an element to the offences of Tier 3. Clearly, the lawmakers did not intend to add a fault element of objective standard either, because the Tier 2 offences require such an element with a higher penalty. In such a situation, the presumption of mens rea can be successfully displaced. Therefore, it can be finally inferred that the offences of Tier 3 are of absolute liability.

³² As quoted in He Kow Teh [7] Lim Chin Aik v The Queen at 174.
³³ Section 27 of the FA 2003 states that the defence of ‘mistake of reasonable belief’ to the offences against pt 2, div 2 of the Act is not available.
The above conclusion cannot be verified by judicial decisions due to the paucity of court cases. However, as referred to earlier, a Local Court decision of conviction in the *Bankstown case* has been found, but the Court did not interpret the *mens rea* requirement simply because of guilty plea by the defendant.\(^{34}\) Its facts state that on 5 January 2011, the NSW Department of Health notified the NSW Food Authority (NSWFA) that a salmonella outbreak had occurred which resulted in 83 people becoming ill (20 of them hospitalised) in western Sydney. The NSWFA’s authorised officers discovered that a local food manufacturer, the ‘Bankstown Bakehouse’, had been handling and selling unsafe food, thereby violating both s 16(1) and s 16(2) of the FA 2003. Moreover, the bakery was alleged to have also violated the ANZFSC under s 21 of the FA 2003. Considering the seriousness of the incident, it resulted in a criminal prosecution for contravention of several sections of the FA 2003. Examining the *actus reus*, the court found that due to the inappropriate temperature used in manufacturing unit, and inadequate unclean handling of the foods, salmonella had spread in all foods and contaminated other foods available in its entire food business. The defendant director was held guilty and was fined and ordered to pay the Prosecutor’s costs in addition. This case thus generates more questions than answers to the complexities at hand.

A simple phrase of ‘absolute liability’ could be added to the sections cited above under Tier 3 offences in order to make the nature of liability succinct to everyone. This precision could increase its deterrent effect further. Besides, sections listed under Tier 3 are concerned with sale and/or advertisement and they direct ‘a person’ not to sell and/or advertise for sale food that is unsafe and/or unsuitable. Again, the concerns about person(s) who should take the ultimate responsibility are valid here too, especially where a business entity is involved in a breach. The provisions defining the offences and prescribing penalties in Tier 3 sounds fine otherwise.

\(^{34}\) *Bankstown case* [3].
As demonstrated above, there are differences amongst the statutory offences grouped under the three-tier model in terms of fault elements. The following section displays the reflection of the varying degrees of *mens rea* in the penalties of those offences.

**Tier 1: Offences with *mens rea* (subjective standard)**

- ss 13(1), 14(1)
- **Penalty:** Individual - 1000 penalty units/ 2 years imprisonment
  Corporation - 5000 penalty units

**Tier 2: Offences with *mens rea* (objective standard)**

- ss 13(2), 14(2)
- **Penalty:** Individual - 750 penalty units
  Corporation - 3750 penalty units

**Tier 3: Offences without *mens rea* (absolute liability)**

- ss 16(2), 17(2), 21(2)(3)(4)
- **Penalty:** Individual - 500 penalty units u/ss 16(2) & 17(2)
  and 400 penalty units u/s 17(2)
  Corporation - 2500 penalty units u/ss 16(2) & 17(2)
  and 2000 penalty units u/s 17(2)

**Figure 2: Three-Tier Penalty Model in the *Food Act 2003* (NSW)**

The Three-Tier Penalty Model shows changes in punitive sanctions escalating to higher punishments from lower penalties in correspondence with the degrees of culpability measured in terms of *mens rea* attached to the offences. The changes are quite logical. Tier 3 offences are the easiest of all to prove as they do not leave much room for the offenders to argue lack of guilty mind. Hence, when a food seller or advertiser is caught contravening the FA 2003 offences, a regulator can prompt to impose the Tier 3 penalties. However, Tier 2 offences are harder to prove compared to those of Tier 2 which require proving objective *mens rea* in the court. Tier 1 offences remain at the apex of the pyramid and prosecution may
find these offences hardest to establish since they involve subjective forms of *mens rea*. It appears that the Three-Tier system of *mens rea* and penalties prescribed in the FA 2003 has been useful in introducing a check and balance type regulation where both regulators and the regulatees are offered space. Courts cannot impose higher penalties if the regulators (as the prosecution) fail to establish the fault elements of the accused for Tier 1 and Tier 2 category offences. On the other hand, an accused can hardly escape criminal liability for Tier 3 offences because the regulator can impose a fine perhaps ignoring the necessity for *mens rea* of the wrongdoer.

**D. Conclusions**

The preceding discussions of offences of the FA 2003 reveal that legislators had been thoughtful about penalising a business entity and persons behind it. Perhaps the foremost emphasis has been placed on the criminality of contraveners of the law, whilst wrongful conduct has also been given due consideration in criminalising the food safety conduct discussed above. The gradual escalation of punishments commensurate with the fault elements does provide the law with efficacy and help the business entities avoid noncompliance with it. Moreover, the prescription of penalties based on culpability which is required to be proved by the prosecution is justified when looked through the prism of the golden thread of criminal law. However, the enforcement of the legislation to optimally achieve its objective of regulating food safety in NSW can be facilitated further, if the complexities explained above are addressed properly. Having said this, it can be concluded that the provisions of offences embodied in this piece contain more strengths than weaknesses. Hence, the FA 2003 could be taken into consideration by others in formulating their own legal regime for such a serious and life threatening concern of food safety.