



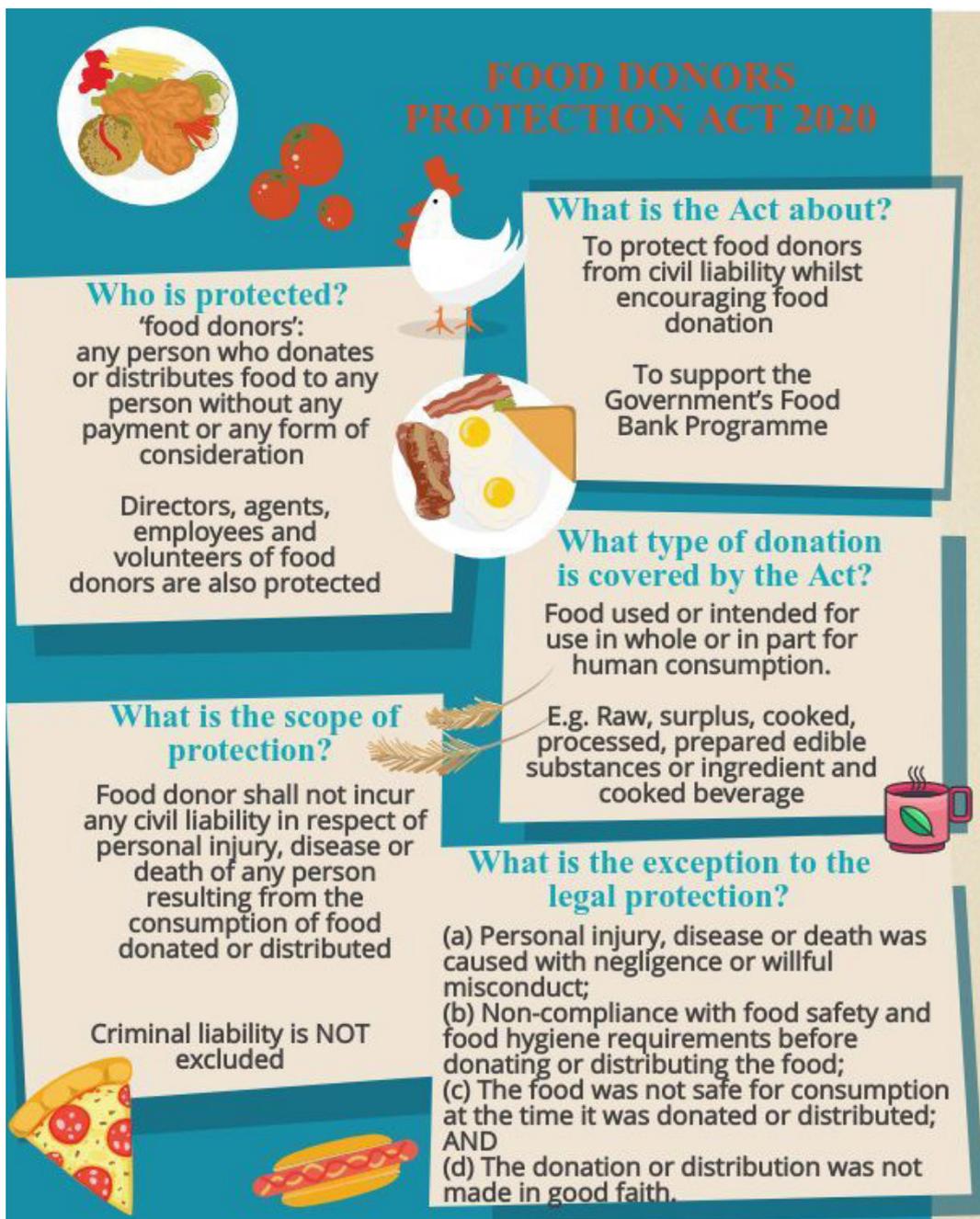
The movement control order (“**MCO**”) in Malaysia may have led to an unintended side-effect of food wastage due to supply-chain disruption. To reduce the spread of COVID-19 across the country, majority of businesses are temporarily closing their doors and events are being cancelled or postponed due to the MCO directives. Farmers with fewer outlets for their highly perishable produce exacerbate a supply bulge. Businesses especially those in the food and beverage industry endeavor to reduce food waste and loss as they navigate the COVID-19 pandemic.

This article aims to give an overview on the new Food Donors Protection Act 2020 which is timely introduced by the Government given the economic downturn and COVID-19 outbreak which expand the number of people needing food donations.

### ***Food Donors Protection Act 2020***

The Parliament has passed the Food Donors Protection Bill in October 2019. The Bill which was officially gazetted as the Food Donors Protection Act 2020 (“**Act**”) comes into force on 31 March 2020<sup>1</sup>. The Act aimed to provide protection for food donors from civil liability whilst encouraging food donation as well as to support the Government’s Food Bank Programme.

<sup>1</sup> Federal Government Gazette on Appointment of Date of Coming into Operation dated 12 March 2020, P.U. (B) 166



## FOOD DONORS PROTECTION ACT 2020

### Who is protected?

**'food donors':**  
any person who donates or distributes food to any person without any payment or any form of consideration

Directors, agents, employees and volunteers of food donors are also protected

### What is the Act about?

To protect food donors from civil liability whilst encouraging food donation

To support the Government's Food Bank Programme

### What is the scope of protection?

Food donor shall not incur any civil liability in respect of personal injury, disease or death of any person resulting from the consumption of food donated or distributed

**Criminal liability is NOT excluded**

### What type of donation is covered by the Act?

Food used or intended for use in whole or in part for human consumption.

E.g. Raw, surplus, cooked, processed, prepared edible substances or ingredient and cooked beverage

### What is the exception to the legal protection?

(a) Personal injury, disease or death was caused with negligence or willful misconduct;  
 (b) Non-compliance with food safety and food hygiene requirements before donating or distributing the food;  
 (c) The food was not safe for consumption at the time it was donated or distributed;  
**AND**  
 (d) The donation or distribution was not made in good faith.

### Who is Protected?

The Act protects 'food donors' which is defined as "any person who **donates** or **distributes** food to any person without any payment or any form of consideration"<sup>2</sup>.

<sup>3</sup> Supra note 2.

“Person who donates” is wide enough to cover those who donate food directly to the needy as well as those who donate food to a non-profit organization for ultimate distribution to the needy. Besides soup kitchen and non-profit organization which donate food directly to the needy communities, local restaurants and grocery stores which allow needy individuals to pick up food from their outlet will be protected as well.

For “person who “distributes” food, it includes a person who distributes food donated by another person, e.g. food bank.

In each case, the food must be given without any payment or exchange of consideration. If it is sold or logistic fee is imposed, even for a nominal sum or a sum which is lower than market price, that will not be considered a donation. This means the Act will not protect non-profit organizations which create meals from donated food and then sell the meal at extremely low prices to underserved communities. However, should they be left out from the protection of the Act? These organizations will be able to fill a need for food insecure individuals who, for various reasons, are not willing or able to qualify for government assistance or use a soup kitchen.

The Act provides a non-exhaustive list of ‘food donor’ which includes:

- i. corporation;
- ii. partnership;
- iii. enterprise;
- iv. association;
- v. government entity;
- vi. manufacturer;
- vii. supplier;
- viii. wholesaler;
- ix. retailer;
- x. hypermarket;
- xi. supermarket;
- xii. hotel;
- xiii. restaurant;
- xiv. caterer;
- xv. agricultural producer;
- xvi. charitable institution;
- xvii. foundation; or
- xviii. other organization / entity.

The protection under the Act also extends to the director, agent, employee or **volunteer** of the aforesaid entities<sup>3</sup>. There is however no definition of “volunteer’ under the Act.

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<sup>2</sup> The Act, Section 2

### ***What type of donation is covered by the Act?***

Only donated food comes within the purview of the Act. “Food” is defined under the Act as “food used or intended for use in whole or in part for human consumption” which includes any raw, surplus, cooked, processed or prepared edible substances, beverage or ingredient. This may include pre-packed or sealed package food (e.g. canned food, bottled food, food packed and sealed in plastic packaging, etc.), perishable food (e.g. bakery and confectionary food), cooked food (e.g. kitchen prepared food) and beverages of all kinds. Non-food grocery product (e.g. personal or household hygiene product) is not covered under the Act.

### ***What is the scope of protection?***

Section 3 of the Act provides that food donor shall not incur any civil liability in respect of personal injury, disease or death of any person resulting from the consumption of food donated or distributed. Unlike the Samaritan laws enacted in countries such as New Zealand and United States which protect donors from both civil and criminal liabilities, our Section 3 does not exclude criminal liability on the part of the food donor. This means food donors remains exposed to potential criminal liabilities.

### ***What is the exception to the legal protection?***

The protection under the Act for food donors will not be applicable if it is proven that –

- (a) the personal injury, disease or death was caused by the negligence or the willful misconduct of the food donor;
- (b) the food donor has not complied with any requirement in relation to food safety and food hygiene under any written law before donating or distributing the food;
- (c) the food was not safe for consumption at the time it was donated or distributed to any person; **and**
- (d) the donation or distribution of food was not made in good faith.

The presence of the word ‘and’ requires all the exceptions to be read conjunctively. One therefore need to prove ALL four exceptions in order to break the protective shield accorded to a food donor. In other words, it is not enough for a victimized food recipient to prove a food donor was negligent in causing harm when they failed to adhere to food safety and hygiene law, evil intention must also be proven on the part of the food donor. Does it mean food donor need not be bothered with food safety and hygiene laws or a general duty of care to ensure the food is safe for consumption at the time of donation or distribution, as long as it has good faith in doing so? This is rather implausible. In the United States, the Bill Emerson Act qualifies the liability protection offered to food donors and distributors with three requirements: donate or distribute in good faith, act without gross negligence, and act without intentional misconduct. Absence of any of the 3 requirements will result in losing the liability protection. The Act could be overprotective of donors and unduly limiting the legal recourse for a victimized food recipient.

### ***Will the Act increase food donations?***

The introduction of the Act is a right step towards encouraging food donations. However, it remains a question whether the Act will stimulate private sectors to increase food donation.

Logistics challenges remain one of the most limiting practical factors in food donation. Donors need to spare resources to store the food before delivery, which can be costly especially for cold perishable food. Donor are also required to bear the cost of transporting donated food unless food bank is prepared to fill-in the gap in tackling the logistic challenges.

Perhaps measures that benefit the bottom line of private sectors will influence donation rather than the legal liabilities protection. In some countries, food donation is tax deductible (i.e. cost incurred in donation can be counted as operating expense to reduce taxable income). For example, in Spain, 35% of the net book value of donated food can be used as a corporate tax credit (i.e. cost incurred in donation can offset tax directly). Meanwhile, in France, a total of 60% of the value of donated food can be converted as corporate tax credit. These incentives enable companies to deduct the percentage of expenses for donated food from the corporate tax of their annual revenue are considered as generous incentives. Currently, food donation is not tax deductible in Malaysia.

### ***Does Food Bank Malaysia have a role to play during COVID-19 crisis?***

Besides food wastage and loss, food insecurity is on the rise as millions of people around the globe have lost their jobs due to COVID-19 pandemic. Food donations play a role in improving food insecurity especially for the most vulnerable.

Many non-governmental organizations continue their efforts in providing food relief to the needy despite of the challenges in moving excess prepared food to the needy and gathering volunteers to prepare and distribute meals to the hungry amidst the MCO. Also, donations from grocery stores may drop off as they are now working on overdrive with consumers mass purchasing and disruption of supply chain. This calls for increased regulatory attention and innovative solutions on food security issue besides relying on food donations in the era of COVID-19 pandemic.

Food banks usually work as an intermediary in food aid supply chain to collect and distribute donated food to food-insecure individuals. In Malaysia, the Ministry of Domestic Trade and Consumer Affairs has launched a charitable initiative called Food Bank Malaysia Program (“**Food Bank Malaysia**”) in 2018. According to the website of Food Bank Malaysia, the program is managed by a charitable foundation known as the Yayasan Food Bank Malaysia. Their objectives include helping the less fortunate to obtain food supplies and coordinating, planning and carrying out the collection of surplus food nationwide. This COVID-19 crisis has made the role of Food Bank Malaysia even more important. As of the date of writing, it is unclear how Food Bank Malaysia has been responding to the current COVID-19 issues to ensure food rescue and food donations continue without disruption during the MCO. Perhaps Food Bank Malaysia should step up the effort in coordinating food rescue and food donation amidst this crisis if it has not done enough so far.

### ***Concluding remarks***

The Act presents an opportunity to increase food security besides reducing the waste of wholesome foods. However, it is doubtful whether the Act will significantly impact on reducing food waste by encouraging food donation. Ultimately, companies have no incentive to donate, nor do they face any penalty if they do not donate.



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