



SOUTH AFRICA

SURVEYS OF BUSINESS PERCEPTIONS

Food Safety and
Liability Protection
for Food Donations
in South Africa

SEPTEMBER 2022

Authors

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About The Global Food Donation Policy Atlas

The Global Food Donation Policy Atlas is a first-of-its-kind initiative to promote better laws on food donation to help address food loss and food insecurity. This project maps the laws affecting food donation in countries across the globe to help practitioners understand national laws relating to food donation, compare laws across countries and regions, analyze legal questions and barriers to donation, and share best practices and recommendations for overcoming these barriers. The project is a collaboration between the Harvard Law School Food Law and Policy Clinic (FLPC) and The Global FoodBanking Network (GFN). To learn about and compare the food donation laws and policies for the countries FLPC has researched to date, visit www.atlas.foodbanking.org.



About FoodForward SA

Established in 2009, FoodForward SA is the largest food redistribution charity in South Africa that addresses widespread food insecurity by connecting a world of excess (surplus) to a world of need. We recover good quality, edible surplus food from farmers, manufacturers, and retailers, for redistribution to 2,750 registered beneficiary organisations that collectively reach 950,000 vulnerable people daily. FoodForward SA is part of a global movement committed to reducing food loss and waste and its environmental impact through surplus food recovery and diversion.



About The Consumer Goods Council of South Africa

The Consumer Goods Council of South Africa (CGCSA) is an industry association representing over 9 000 member companies in the Consumer Goods, Retail and Services (FMCG) sector, which is one of the largest employers in South Africa providing employment to more than 1.2 million people and contributes up to 20% of the national GDP. The Food Safety & Sustainability Initiative (FSSI) is a division of the CGCSA, which provides thought leadership, guidance and technical support on regulatory aspects of the FMCG value chain (including retail and technical services) with focus on food safety, quality, nutrition, health and wellness and related matters. The CGCSA serves as the secretariat for the South African Food Loss and Waste Initiative, which aims to reduce food loss and waste in South Africa by half by 2030.



About the Harvard Law School Food Law and Policy Clinic

FLPC serves partner organizations and communities by providing guidance on cutting-edge food system legal and policy issues, while engaging law students in the practice of food law and policy. FLPC focuses on increasing access to healthy foods; supporting sustainable food production and food systems; and reducing



waste of healthy, wholesome food. For more information, visit www.chlpi.org/food-law-and-policy.

About The Global FoodBanking Network

The Global FoodBanking Network supports community-driven solutions to alleviate hunger in more than 40 countries. While millions struggle to access enough safe and nutritious food, nearly a third of all food produced is lost or wasted. GFN is changing that. GFN believes food banks directed by local leaders are key to achieving



Zero Hunger and building resilient food systems. For more information, visit www.foodbanking.org.

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Food Law and Policy Clinic alone and do not necessarily reflect the opinions of the Walmart Foundation.

Report design by Najeema Holas-Huggins.



EXECUTIVE SUMMARY

Food loss and waste is one of the greatest food system challenges. An estimated one-third of food produced globally is ultimately lost or wasted along the supply chain.¹ In South Africa, an estimated 10 million tons of food goes to waste annually,² while approximately 20% of households live below the food poverty line.³ Food donation is a critical solution to the dual burden of rising rates of food waste and simultaneous food insecurity, through redirecting safe, surplus food destined for landfills into the hands of those who need it most.

Two barriers to the donation of safe, surplus, and wholesome food are lack of clear and specific food safety laws and regulations or guidance regarding food donations. In addition, there is fear among donors that they will be found liable if someone becomes sick after consuming donated food. As a result of these barriers, many food donors and food recovery organizations choose to throw away food rather than donate it. In April 2021, the Harvard Law School Food Law and Policy Clinic (FLPC) and the Global Food Banking Network published a South Africa Legal Guide explaining the South African laws relevant to food donation, and provided tailored Policy Recommendations for South Africa highlighting applicable global best practices for policymakers. These documents were published under the Global Food Donation Policy Atlas, an innovative project that maps the laws and policies affecting donations in countries around the world and facilitates comparison through an online interactive map.⁴

As a follow-up, FLPC, in partnership with Food Forward South Africa (FFSA) and the Consumer Goods Council of South Africa (CGCSA), administered two online surveys from April to May 2022 to understand the concerns potential donors have around food donation, particularly regarding food safety for donations and liability protection for food donations. The aim of these surveys was to collect data to support FFSA and CGCSA's work to improve the legal and policy landscape for food donations in South Africa. The two surveys were administered to food business within the network of the CGCSA. In total, sixty respondents responded to each of the two surveys. Food businesses remained anonymous in the survey to glean honest feedback regarding perceptions of obstacles and opportunities for food donation. As such, it is unclear whether the same respondents completed both surveys.

The majority of the respondents reported that they currently donate food to non-profit organizations such as food recovery organizations. Results confirmed that donors' concerns about liability impede increased food donation and, therefore, providing liability protection would encourage food businesses to start donating or donate more food. Additionally, respondents indicated that guidance on applicable food safety requirements would support more donation, and that the guidance should clarify that food businesses are allowed to donate unsaleable food⁵ and food past the "best before" date.

The following sections of this report outline the detailed findings of both surveys – food safety for donations and liability protection for food donations. The liability protection for food donations survey examined business perceptions of barriers to food donation, the need for liability protection, and who should be protected. The food safety for donations survey highlights business perceptions about where food is donated, types of foods businesses think they are allowed to donate, the need for clearer food safety laws and guidance, and whether

unsaleable food and food past the “best before” date should be allowed to be donated.

DETAILED FINDINGS

SURVEY I: LIABILITY PROTECTION FOR FOOD DONATIONS

A significant barrier to food donation is the fear among donors that they will be found liable if someone becomes sick after consuming donated food. This fear is particularly heightened when the applicable law provides for “strict liability,” i.e., a donor or food recovery organization that did not intend to inflict harm and even that did not act negligently may still be held legally and financially responsible for any resulting damage. In South Africa, most claims of harm arising from food or other goods are brought under the Consumer Protection Act (CPA).⁶ The CPA promotes the rights and safety of consumers and governs liability in respect to defective and unsafe goods.⁷ When applied, the CPA establishes a strict liability scheme, holding all supply chain actors legally responsible for damage, regardless of whether they were negligent.⁸ South Africa also does not offer any liability protection for food donors and food recovery organizations. As such, food donors and food non-profit organizations may be reluctant to donate food for fear of liability that can result even if food is safe and the donor or non-profit handled it correctly.

Number of Food Businesses Donating to Non-profit Organizations

This survey inquired into the number of businesses donating to non-profit organizations. Most respondents (74%) currently donate food to non-profit organizations.

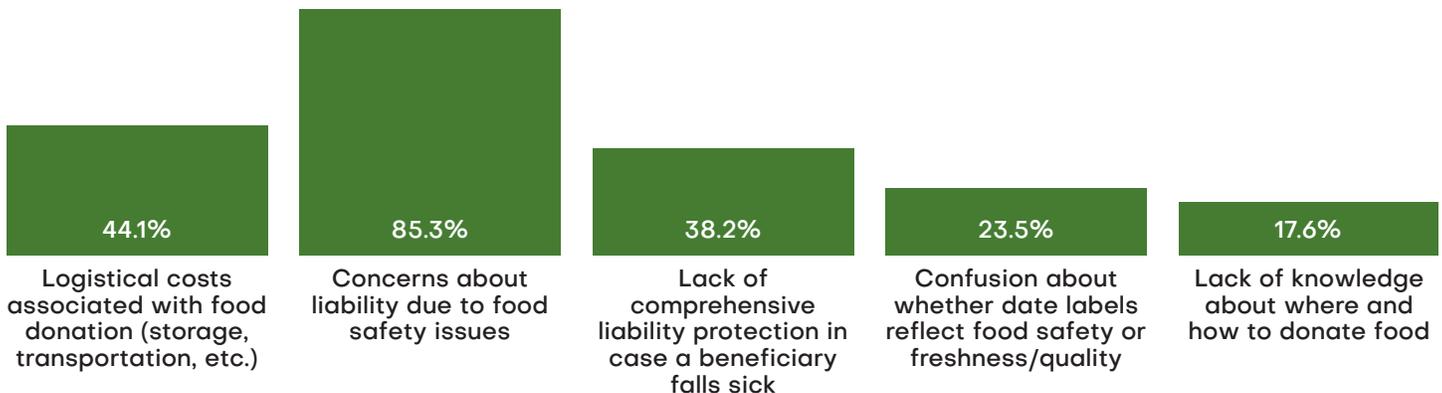
“My food business donates to non-profit organizations”



Barriers to Food Donation

The survey sought to understand the respondents’ opinions on the main barriers to food donation in South Africa. Results show that over 85% of respondents noted concerns about liability due to food safety issues as a barrier to donation and 38% also cited the lack of liability protection as a barrier to donation. In addition, 44% of respondents cited logistical costs associated with food donations such as storage and transportation costs as a barrier to donation, 23% cited confusion about whether date labels reflect food safety or freshness/quality and 17% cited a lack of knowledge about where and how to donate food, as a barrier to donating food.

“Do any of the following create a barrier to food donation for your food business? (Check all that apply)”



Business Perceptions on Liability and Who Should Receive Protection

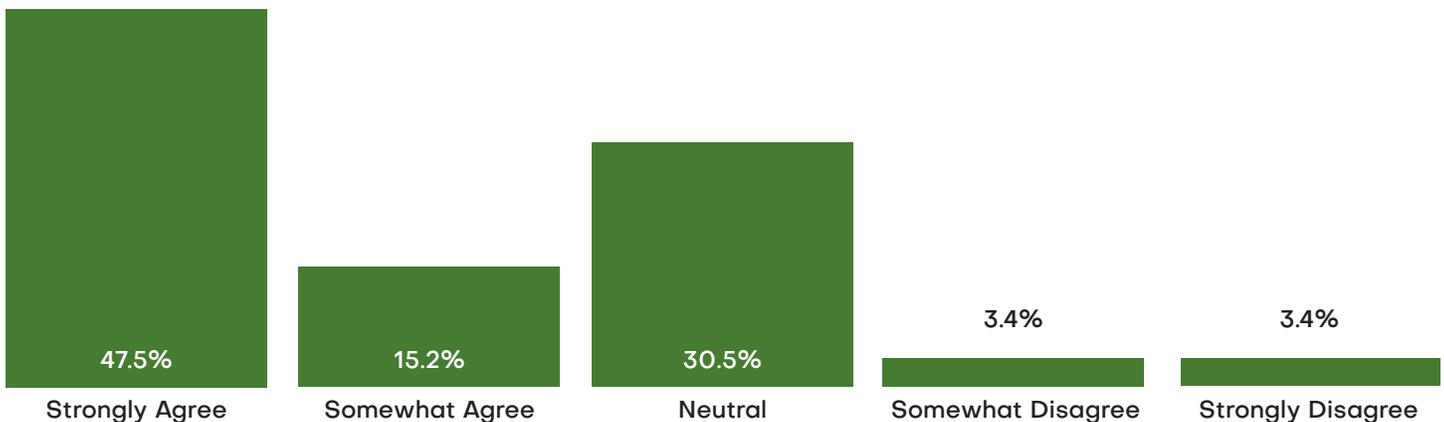
The survey also sought to understand the perceptions of businesses regarding liability protection, and entities that should receive this protection. Most respondents (78%) believe that if a food business donates surplus food, taking all steps to ensure the food is safe for the consumer, that food business should not be liable for resulting harm or injury to a beneficiary of free food.

“I believe if a food business donates surplus food, taking all steps to ensure the food is safe for the consumer, that food business should not be liable for resulting harm or injury to a beneficiary of free food.”



Also, 62% of respondents agreed with the statement that if their food business was legally protected from liability, they would be more likely to start donating food or to donate more food, 30% of respondents were neutral on whether they would be more likely to donate more food, while 6% of the respondents disagreed with the statement that liability protection would increase their donation.

“If I knew my food business was legally protected from liability, I would be more likely to start donating food or to donate more food.”



Individuals or Entities that Should have Liability Protection

Finally, the survey inquired about which individuals or entities should be covered by liability protections. Respondents were asked to select all that apply, and results show 80% of the respondents believed food donors that donate surplus food to non-profit organizations should be covered by liability protections and 56% of the respondents said that food donors that donate directly to needy individuals should be protected. 61% of respondents indicated that non-profit organizations that redistribute safe surplus food to needy individuals should be protected.

With regard to protection for certain types of foods, 51% indicated that food donors that donate surplus food that is close to or past the “best before” date label that indicates quality should be protected and 28% indicated that donors that donate non-food, grocery products such as soaps and hygiene products should be protected.

Which of the following individuals, food businesses or organizations would you want to be covered by liability protections? Check all that apply.



SURVEY II: FOOD SAFETY FOR FOOD DONATIONS

In many countries, a key barrier to the donation of surplus food is the lack of knowledge or readily available guidance regarding safety procedures for food donation. Potential donors are often uncertain as to which food safety regulations apply to donated food, as opposed to purchased food, as well as the steps necessary to safely donate food in compliance with applicable regulations. While South Africa's Foodstuffs, Cosmetics, and Disinfectants Act of 1972 (FCDA) and accompanying regulations set forth food safety requirements, the FCDA does not explicitly mention food donation. Generally, the FCDA prohibits the sale of food containing any prohibited substance that is contaminated, impure, decayed, or deemed harmful to human health.⁹ The FCDA applies even when there is no payment for foodstuffs.¹⁰ Thus, while the FCDA does not explicitly reference food donation, this broad definition suggests that the FCDA would indeed apply to donated food offered free of charge. However, the FCDA does not provide any specific guidance as to what food safety requirements must be met for donated foods. As such, food donors and food non-profit organizations may face challenges determining which food safety requirements apply to donated food.

Food Businesses that Donate to Non-profit Organizations

The second survey first analyzed whether respondents are food businesses that donate food to non-profit organizations, such as food banks and food recovery organizations. Most of the respondents (80%) indicated that they donate food to non-profit organizations.

"My food business donates to non-profit organizations"



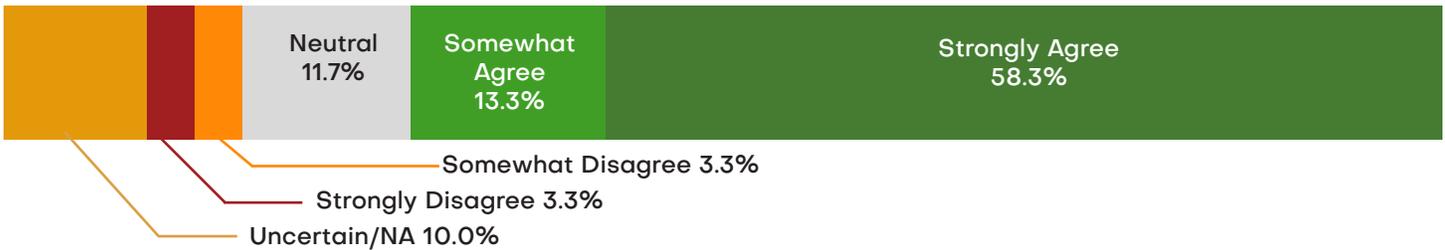
Donating Perishable and Non-perishable Food

The survey also sought to identify current knowledge regarding what types of foods businesses think they can donate safely under existing food safety laws and regulations.

Non-perishable food

More than 70% of respondents believe that food businesses are allowed to donate non-perishable food under existing food safety laws and regulations, 11% of respondents were neutral on whether they believe a food business is allowed to donate non-perishable food, 7% of respondents believed that a food business is not allowed to donate non-perishable food, while 10% of respondents were uncertain of whether they can donate such foods under existing food safety laws and regulations.

“I believe my food business is allowed to donate packaged nonperishable food under existing food safety laws and regulations.”



Perishable food

The survey found that 70% of respondents believe that a food business is allowed to donate perishable food under existing food safety laws and regulations, 8% of respondents were neutral, another 8% of respondents did not believe that a food business is allowed to donate perishable food, while 13% of respondents were uncertain as to whether a food business could donate perishable food.

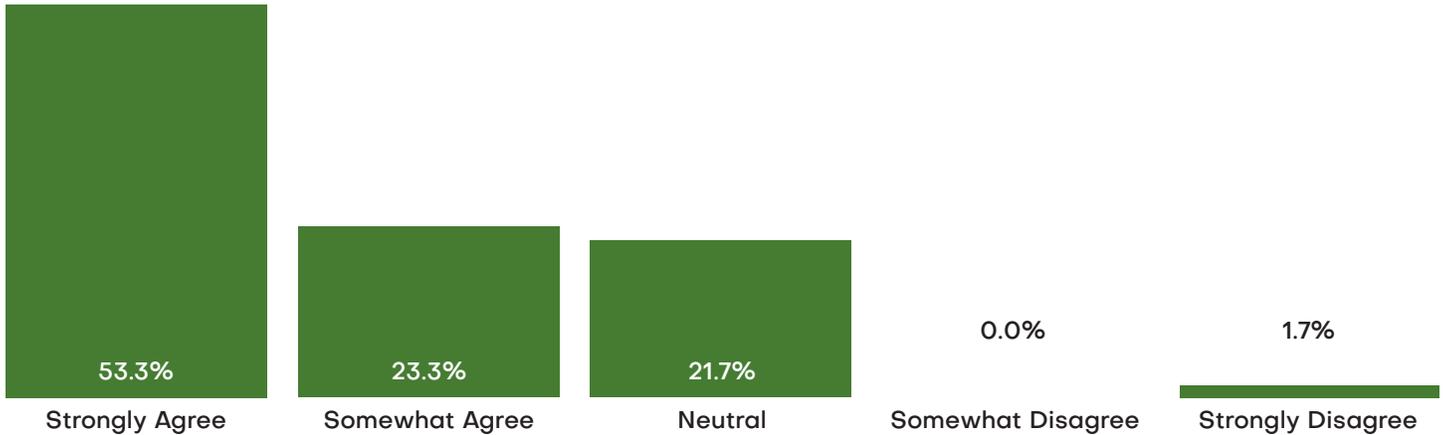
“I believe my food business is allowed to donate packaged perishable food under existing food safety laws and regulations.”



Official Guidance on Food Safety for Donations

The survey found that most respondents (76%) agreed that if the South African government provided official guidance to help food businesses understand what food safety laws and regulations must be followed to donate food, food businesses would more likely start donating food or donate more food.

“If the South African government provided official guidance to help me understand what food safety laws and regulations I must follow to donate food, my food business would be more likely to start donating food or donate more food.”



Donating Unsaleable Food

The survey also asked about the types of food that should be legally permissible for donation, particularly whether unsaleable food should be allowed to be donated. Unsaleable food refers to food that could not be sold due to, for example, an error on the label, incorrect weight, aesthetic imperfection but not due a contamination or food safety hazard. Survey results show that 91% of respondents think that a food business should be allowed to donate food that is unsaleable, 3% of respondents were neutral, while 5% of the respondents indicated that a food business should not be allowed to donate unsaleable food. Food safety regulations or guidance would be needed to explain to food businesses what unsaleable foods can or cannot be donated.

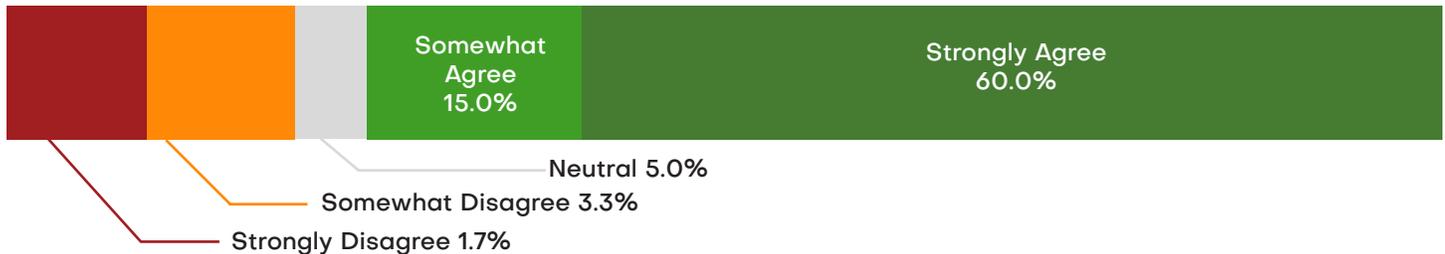
“I think a food business should be allowed to donate food that is unsaleable but remains safe to eat.”



Donating Food Past the “Best Before” Date

Businesses were also asked about their perceptions on whether a business should be allowed to donate food past the “best before” date that remains safe to eat. Survey results show that 75% of respondents agreed that a business should be allowed to donate such food, 5% of respondents were neutral, while 20% of respondents did not agree that food business should be allowed to donate food past the “best before” date.

“I think a food business should be allowed to donate food “past the best before date”, but remains safe to eat.”



DISCUSSION

Both surveys confirm that most respondents currently donate food. The majority of the respondents, (81%) of the food safety for donations survey and (74%) of the liability protection for food donations survey, indicated that they donate food to non-profit organizations.

Regarding liability protection for food donations, survey results confirmed that concerns about liability impede food donation in South Africa. An overwhelming majority of the respondents (85%) indicated that concerns about liability, particularly due to food safety issues, is a barrier to food donation. A large majority of respondents (78%) believe that if a food business donates surplus food, taking all steps to ensure the food is safe for the consumer, that food business should not be liable for resulting harm or injury to a beneficiary of free food. More than half of survey respondents (62%) indicated that if their food business was legally protected from liability, the food business would be more likely to start donating food or donate more food. This confirms research that providing liability protection for good faith donations would encourage donation of surplus, wholesome food. Respondents were in large agreement that such protection should apply to food businesses who donate to non-profit organizations, with a large majority of respondents (80%) saying such food donors should be covered by liability protections. In addition to protecting food donors, many national liability protection laws also protect the non-profits that distribute food. A majority of survey respondents (61%) believe that the non-profit food recovery organizations that collect food donations and distribute them to those in need should receive protection as well.

In some instances, it may be difficult to re-distribute food through food recovery organizations, necessitating direct donations to needy individuals. Most of the respondents (56%) indicated that food donors that donate safe surplus food directly to needy individuals should also be protected from liability. Also, in some instances, businesses donate non-food grocery items such as soaps and hygiene products. Some of the respondents (28%) believe that donation of non-food grocery items should also be protected.

All donated food should be safe for consumption and comply with the applicable food safety laws and regulations. However, South Africa does not offer clear laws or readily available guidance regarding safety procedures for food donation. Providing guidance on applicable food safety laws and requirements relevant to liability protection would help encourage more food donations.¹¹ A large majority of respondents (76%) indicated that if

the South African government provided official guidance to help food businesses understand what food safety laws and regulations must be followed to donate food, food businesses would more likely start donating food or donate more food.

In addition, it is also not always clear to food businesses, consumers, and regulators whether the date label accompanied by language such as “sell by,” “best before,” or “use by” relates to quality or food safety. Many food donors interpret date labels affixed to food products as indicators of safety and will therefore throw away food once the date has passed. In general, date labels are intended to reflect freshness or quality rather than food safety for most foods. Food is wasted when laws expressly prohibit or are silent on whether food can be donated past a quality-based date label.¹² Permitting food donation after the quality based date and providing liability protection for past-date donation of clearly safe food would encourage the donation of surplus food that is safe for human consumption.¹³ Survey results indicated that the large majority of respondents (75%) agree that food businesses should be allowed to donate food past the “best before” date. Similarly, more than half of the respondents (51%) indicated that food donors that donate surplus food that is close to or past the quality “best before” date label should be protected from liability.

In addition, there are instances where food may be unsaleable, for example, because of an error on the label or aesthetic imperfection but not due to contamination or a food safety hazard. An overwhelming majority of the respondents (91%) believe food businesses should also be allowed to donate food that is unsaleable but is safe to consume.

CONCLUSION

Surveys of food businesses in South Africa conducted in April and May 2022 aimed to understand business perceptions of barriers to food donation, food safety for donations, and liability protection for food donations. This report confirms that businesses are concerned about liability when donating food and support protection, and that businesses articulate a need for clearer food safety laws and guidance around food donations. Addressing these challenges would help to unlock additional food donation, based on these survey results.

ENDNOTES

- ¹ FOOD & AGRIC. ORG. OF THE U.N., GLOBAL FOOD LOSSES AND FOOD WASTE—EXTENT, CAUSES, AND PREVENTION 4 (2011).
- ² WORLD WILDLIFE FUND, FOOD LOSS AND WASTE: FACTS AND FUTURES, 8 (2017), https://wwfafrica.awsassets.panda.org/downloads/wwf_2017_food_loss_and_waste_facts_and_futures.pdf?21641/Food-Loss-and-Waste-Facts-and-Futures-Report
- ³ DEP'T OF STAT. S. AFR., MEN, WOMEN AND CHILDREN: FINDINGS OF THE LIVING CONDITIONS SURVEY 2014/15 13, <http://www.statssa.gov.za/publications/Report-03-10-02%20/Report-03-10-02%202015.pdf>.
- ⁴ The Global Food Donation Policy Atlas project would not be possible without the support of the Walmart Foundation. The Walmart Foundation is not responsible for the content of this document, or the views contained herein. The content of this document should not be interpreted as legal advice; those seeking legal advice should speak to an attorney licensed to practice in the applicable jurisdiction and area of law.
- ⁵ Unsaleable food refers to food that could not be sold due to, for example, an error on the label, incorrect weight, aesthetic imperfection but not due a contamination or food safety hazard.
- ⁶ Consumer Protection Act 68 of 2008 § 4 (S. Afr.).
- ⁷ Consumer Protection Act 68 of 2008 § 3 (S. Afr.).
- ⁸ Consumer Protection Act 68 of 2008 § 61 (S. Afr.).
- ⁹ Foodstuffs, Cosmetics, and Disinfectants Act, § 2(1)(b)(i).
- ¹⁰ See Foodstuffs, Cosmetics, and Disinfectants Act, § 1 (xxiii). (Defines “sell” broadly to include the conveyance or disposal of food to any person “whether for consideration or otherwise.”)
- ¹¹ See generally HARV. FOOD L. & POL'Y CLINIC, ISSUE BRIEF, PROMOTING FOOD DONATION: LIABILITY PROTECTION LAW AND POLICY, <https://www.foodbanking.org/wp-content/uploads/2021/12/Liability-Protections.pdf>.
- ¹² See FLPC & NRDC, THE DATING GAME: HOW CONFUSING FOOD DATE LABELS LEAD TO FOOD WASTE IN AMERICA (2013), <https://www.chlpi.org/wp-content/uploads/2013/12/dating-game-report.pdf>.
- ¹³ See generally HARV. FOOD L. & POL'Y CLINIC, ISSUE BRIEF, PROMOTING FOOD DONATION: LIABILITY PROTECTION LAW AND POLICY, <https://www.foodbanking.org/wp-content/uploads/2021/12/Liability-Protections.pdf>; HARV. FOOD L. & POL'Y CLINIC, ISSUE BRIEF, PROMOTING FOOD DONATION: DATE LABELING LAW AND POLICY (Nov. 2021), <https://www.foodbanking.org/wp-content/uploads/2021/11/atlas-date-labeling-issue-brief.pdf>.

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