



# Regulation of retail food businesses

## Guidelines for the appointment of enforcement agencies

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## Regulation of retail food businesses: Guideline for the appointment of enforcement agencies

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## Overview

This guideline is made by the NSW Food Authority (Food Authority) in accordance with Section 111C of the *NSW Food Act 2003* (the Act) to outline:

1. the method of appointing a relevant body as an enforcement agency under the Act, including the making of representations to, and processes for consultation by the Food Authority
2. the factors to be considered by the Food Authority when determining a relevant body's suitability for appointment
3. the nature and extent of functions that may be exercised by appointed enforcement agencies and the associated obligations (that is, conditions and limitations).

### *Sections 111 and 111C, Food Act 2003*

This document should be read in conjunction with *Regulation of retail food businesses: Roles and responsibilities of appointed enforcement agencies* and the *Regulation of retail food businesses: Operating protocols ("protocols")*. Together, these documents are intended to:

- provide information and context relating to the regulation of the retail food sector in NSW
- provide general information about the role of appointed enforcement agencies and their obligations under the Act
- inform enforcement agencies of the Food Authority's expectations in relation to the functions conferred on or delegated to them through their instruments of appointment. These documents will also assist authorised officers to fulfil their role and obligations under the Food Regulation Partnership.

Nothing in this document is intended to affect any functions that a local council may have under the *State Emergency and Rescue Management Act 1989*, the *Competition and Consumer Act 2010*, the *Food Standards Australia New Zealand Act 1991* or any other legislation.

This is not a legally binding document.

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## Definitions

In this document:

**Act** means the Food Act 2003.

**enforcement agency** means a relevant body appointed as an enforcement agency under Division 2 of Part 9 of the Act, or any person or body prescribed by the regulations as an enforcement agency. This Guideline deals with enforcement agencies that undertake food regulatory functions in the retail food service sector.

### *Division 2 of Part 9, Food Act 2003*

#### *Clause 4, Food Regulation 2015*

**food business** means a business, enterprise or activity that involves:

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

regardless of whether the business, enterprise or activity concerned is of a commercial, charitable or community nature or whether it involves the handling or sale of food on one occasion only.

### *Section 6, Food Act 2003*

**handling of food** means the making, manufacturing, producing, collecting, extracting, processing, storing, transporting, delivering, preparing, treating, preserving, packing, cooking, thawing, serving or displaying of food.

*Section 4(1), Food Act 2003*

**premises** includes:

- a. land (whether or not vacant); or
- b. the whole or any part of a building, tent, stall or other structure (whether of a permanent or temporary nature); or,
- c. a pontoon; or
- d. a vehicle (other than a food transport vehicle while it is engaged in the transport of food).

*Section 4(1), Food Act 2003*

**principal activity** means the first or primary activity, or highest in rank, importance or value (that is, more than 50% production).

**relevant body** means a local council, or the Secretary of the Department of Climate Change, Energy, the Environment and Water (but only in respect of Kosciuszko National Park), or Lord Howe Island Board (but only in respect of Lord Howe Island).

*Section 110, Food Act 2003*

**responsible officer** means the General Manager of a local council (for local councils), the Secretary of the Department of Climate Change, Energy, the Environment and Water (for Kosciuszko National Park) and the Lord Howe Island Board (for Lord Howe Island).

**retail food business** means a food business at a premises, and vehicles used to transport food, within the designated "area":

- a. where the principal food-related activity is one or both of:
  - i. the handling of food intended for sale directly to consumers from any premises by that business; or
  - ii. the sale of food directly to consumers; and
- b. which is not a food business, or part of a food business, that is required to be licensed under the *Food Act 2003*.

**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 employment of the employee or a term of the employee's contract of service, for consumption by the employee at the employee's place of work; or

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- 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 patients in public hospitals (within the meaning of the Health Services Act 1997) or inmates in correctional centres (within the meaning of the Crimes (Administration of Sentences) Act 1999); or
- p. sell for the purpose of resale.

### *Section 4(1), Food Act 2003*

**designated area** means the local government area, part of a local government area, or other area determined by the Food Authority and described in the instrument of appointment for the enforcement agency.

### *Section 111(4), Food Act 2003*

## More information

If an enforcement agency requires additional guidance on any information provided in this document, phone the Food Authority's helpline on 1300 552 406 or email [food.contact@dpi.nsw.gov.au](mailto:food.contact@dpi.nsw.gov.au).

## Process for appointing enforcement agencies to undertake food regulatory functions in retail food businesses

The Food Authority will not appoint a relevant body as an enforcement agency unless it has:

1. consulted with the relevant body and considered any representations made
2. considered the resources and skills that will be available to the relevant body to enable the exercise of the functions of an enforcement agency that are proposed to be conferred or imposed on it
3. in the case of a local council, considered any representations made by another local council in accordance with this guideline as to the other local council's willingness to exercise the functions of an enforcement agency in the area concerned and the resources and skills that will be available to that other local council to enable the exercise of such functions.

*Section 111(2), Food Act 2003*

### Consultation

The Food Authority will consult with a relevant body prior to its appointment (including reappointment) about the nature and extent of functions proposed to be exercised by the appointed enforcement agency. The consultation may include requests for further information from the relevant body to assist in determining its suitability for appointment. It is expected that such requests be met within 10 working days or within an otherwise agreed timeframe.

The Food Authority will provide the relevant body with a draft package, including the draft instrument of appointment and Operating Protocols for consideration and feedback prior to appointment. The Food Authority will make any final amendments required to appointment documents based on feedback from relevant bodies and other stakeholders.

Relevant bodies will then be issued with instruments of appointment which take effect from the date specified within. Existing appointments will be revoked the day the new appointments take effect.

*Section 111(3), Food Act 2003*

An appointed enforcement agency may ask the Food Authority to amend its instrument of appointment, and the Food Authority will consider any such request, including seeking any further information it requires to assist in decision making.

### Factors to be considered by the Food Authority

The following factors will be considered by the Food Authority when determining whether to appoint or reappoint an enforcement agency:

1. geographic location if appointed to another local government area
2. performance history for food regulation activities
3. the size of the retail food business sector in the designated "area"
  - a. number of food businesses
  - b. type of food businesses – high, medium and low risk
  - c. geographic distribution of food businesses.
4. capacity of the enforcement agency as indicated by the enforcement agency in annual activity reports or in other correspondence as to its:
  - a. level of current category of function
  - b. number of full-time equivalent (FTE) authorised officers under the Act
  - c. number of FTE officers engaged in any type of food regulation activity.

5. evidence of partnerships or engaging contractors, including:
  - a. food regulation partnerships with adjoining, regional or other enforcement agencies
  - b. engaging food safety contractors or consultants as required.
6. regular participation in networking and training, meetings and workshops.

Additional factors may also be considered if determined to be relevant to the proposed appointment, for example an enforcement agency request to exercise additional food safety functions beyond the retail food sector.

*Section 111(2)(b), Food Act 2003.*

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## Enforcement agency functions

An enforcement agency must exercise the functions delegated to it through the instrument of appointment within the area specified in the instrument of appointment.

A sample of the instrument of appointment is in Appendix 1.

*Section 111D, Food Act 2003.*

Enforcement agencies should have robust internal procedures to assess and monitor their own compliance with the duties outlined in the instrument of appointment, associated operating protocols, and the Act.

An enforcement agency's instrument of appointment will:

1. specify the relevant local government area, part of a local government area or other area in respect of which its functions are exercisable (the designated "area")
2. set out the conditions and limitations to which its appointment is subject.

*Sections 111B and 111C(1), Food Act 2003*

## Standard conditions

The standard conditions for an enforcement agency are that the enforcement agency:

1. complies with the *Operating Protocols*
2. commits to make authorised officers available to regularly participate in networking meetings and to undertake regular professional development in food safety
3. implements a risk-based food surveillance program to ensure retail food businesses comply with:
  - a. The Australia New Zealand Food Standards Code
  - b. the NSW Food Act 2003
  - c. the NSW Food Regulation 2015, as remade from time to time.

The Food Authority may also, after consulting with the relevant body, vary conditions in the instrument of appointment.

*Section 111(3)(b), Food Act 2003*

## Standard limitations

The standard limitations of an instrument of appointment are:

1. The enforcement agency's functions under the Act are only exercisable within the "designated area" of appointment in respect of:
  - a. an imminent threat to:



- i. public health and safety; or
    - ii. the health of any individual, in connection with food; and
  - b. retail food businesses
2. The enforcement agency's function of appointing authorised officers under the Act is to be exercised within the parameters of limitation one.

**Section 111(3)(b), Food Act 2003**

In addition, the Food Authority may, after consulting with the relevant body, vary limitations in the instrument of appointment.

## Variation to or revocation of appointment

The Food Authority may vary or revoke an enforcement agency's instrument of appointment. These actions may be undertaken by notice in writing given to the enforcement agency.

**Section 111A, Food Act 2003**

## Enforcement agency failure to meet its food safety regulatory obligations

The Food Authority will monitor enforcement agency performance. This will primarily be achieved by assessing performance against key measures annually. If an enforcement agency is not fulfilling its food safety regulatory obligations, the Food Authority will:

1. liaise directly with the enforcement agency, primarily through its authorised officers or other officer as appropriate to seek further information or clarification, and
2. advise the enforcement agency of any improvements that need to take place with an agreed timeframe for resolution.

If this issue remains unresolved by the agreed timeframe, it will be escalated to the responsible officer of the enforcement agency for resolution with a new, agreed timeframe.

If the issue is not resolved by the responsible officer of the enforcement agency the Food Authority may vary or revoke an enforcement agency's instrument of appointment or impose conditions or limitations on the exercise of its functions. The Food Authority will provide notice of this change to the enforcement agency in writing. Until any changes are notified, the enforcement agency must continue to administer all remaining responsibilities within their instrument of appointment.

In certain circumstances the Food Authority may directly approach the responsible officer of an enforcement agency to discuss a compliance matter, for example an urgent need to protect public health or to address issues of concern with the performance of an enforcement agency.

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## Division of enforcement responsibilities

### Food Authority

#### Food businesses licensed under food safety schemes

The Food Authority is responsible for all food businesses licensed under food safety schemes in the Food Regulation 2015 within the designated "area" of an enforcement agency. These include primary producers, processors, food manufacturers and transport vehicles in the dairy, meat, plant products, seafood and egg sectors, as well as businesses that serve food to vulnerable persons.

Within the retail sector this includes:

- milk vendors
- retail meat premises (butcher)

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- seafood processors that also sell food to the public (for example, a seafood co-operative or certain premises at the Sydney Fish Markets).

Enforcement agencies appointed to undertake food regulatory functions in the retail food service sector are not responsible for inspecting food businesses, or parts of a food business, that are licensed with the Food Authority. For example: a licensed retail meat premises (butcher) within a supermarket.

### **Food businesses that only or principally sell food direct to other businesses**

The Food Authority is also responsible for food manufacturers and wholesalers not captured under food safety schemes in the Food Regulation 2015.

Example food businesses include:

- bakeries (for example, bread, biscuits, cakes, pies) that supply other businesses
- home-based businesses that supply other businesses
- caterers that supply to businesses (for example, provide food to hotel for service at a function)
- canneries
- cereal manufacturers
- confectionary manufacturers
- fresh fruit/vegetables providers
- manufacturers of frozen and shelf stable meals
- honey packing facility
- ice manufacturers
- importer/exporter of foods
- pasteurised juice manufacturers
- powdered drink product manufacturers
- snack food manufacturers
- vegetable oil manufacturers.

## Enforcement agency

### **Food businesses that only sell products direct to the consumer**

Enforcement agencies appointed to undertake food regulatory functions in the retail food service sector are responsible for regulating food businesses that sell food direct to the consumer, operate at a premises within the designated "area" specified in their appointment and are not licensed under food safety schemes in the Food Regulation 2015. This includes sales in person, over the phone, via the internet, or by contract or other arrangement.

The role of enforcement agencies in regulating these premises is set out in the *Operating Protocols*.

Retail food businesses that should be part of an enforcement agency's routine inspection program may include:

- cafes, clubs that prepare food, restaurants and takeaways
- supermarkets and grocery stores
- accommodation services that prepare food (such as hotels, bed and breakfast establishments)
- retailers of raw meat and seafood (excluding licensed businesses such as butchers)
- childcare facilities that prepare food (childcare including preschool, family day care)
- school canteens, boarding schools and school camps

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- residential care facilities (facilities not licensed by the Food Authority with less than 6 residents)
- canteens for the public within hospitals and retirement villages (excluding Food Authority licensed facilities)
- caterers that sell directly to the public
- mobile food vehicles (for example, food trucks)
- work cafeterias.

Examples of retail premises that are not likely to be part of a routine inspection program but can be inspected by an enforcement agency, for example following a complaint, incident or risk assessment:

- businesses that only handle packaged or non-potentially hazardous foods (such as service stations, newsagents, fruit and vegetable shops, bars and liquor stores);
- a home-based food business (for example, a domestic kitchen where no more than 10 kilograms of food per week is prepared for sale from a market stall)
- vehicles used to transport food between retail business premises or from a retail premises to a customer (for example, takeaway delivery vehicle, or vehicle used to move food between a preparation kitchen or a market stall)
- international cruise ships
- vending machines
- boarding houses and group homes
- government institutions such as correctional facilities and armed force bases.

## Enforcement responsibilities determined by principal activity rule

### Food businesses that sell food direct to consumers as well as other businesses

The appropriate enforcement agency to engage with food businesses that do not require a licence and that sell food to both consumers and other businesses is determined based on their principal activity. Enforcement agencies are responsible for food businesses that principally sell their product (that is, more than 50%) directly to consumers. Examples include:

- suburban bakery principally operating a busy retail counter but also wholesaling to local cafes
- a local cafe making chutneys and sauces that it principally uses in house but also supplies to a small number of other local food businesses.

If enforcement agencies do not have the necessary skills and resources to exercise their functions, they must seek additional help to fulfil their obligations. Options include securing the services of a contractor or third-party auditor with relevant food safety regulatory experience and knowledge, or resource sharing with other enforcement agencies.

Some examples of businesses which would be inspected by the Food Authority under the principal activity rule are:

- a large cereal manufacturer with a small retail premises on site where consumers can buy product direct from the factory
- a gelato manufacturer that sells its product range direct to the public from its factory outlet co-located with its manufacturing premises
- a manufacturer that principally grinds and wholesales coffee but also runs a small café.

Enforcement agencies should contact the Food Authority if in doubt as to whether they are responsible for a particular food business in their area. The appropriate enforcement agency will be determined by the Food Authority on a case-by-case basis and including by negotiation if appropriate.

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## Appendix 1: Samples of the instrument of appointment

### **Instrument of appointment as an enforcement agency (Sections 111, 111B and 111D of the *NSW Food Act 2003*)**

**[Name of relevant body]** is appointed in writing as an enforcement agency by the NSW Food Authority in respect of **[Name of relevant local government area, part of local government area or other area]** (“the Area”) under section 111(4) of the *Food Act 2003*.

**Commencement:** This instrument of appointment commences on **[Day] [Month] [Year]**, in accordance with sections 111, 111B and 111D of the *Food Act 2003*.

**Revocation:** The instrument dated 22 December 2017 is revoked pursuant to section 111A of the *Food Act 2003*.

As an enforcement agency, this instrument of appointment is subject to the following limitations under section 111B of the *Food Act 2003*:

1. the functions conferred or imposed on **[Name of relevant body]** as an enforcement agency under the *Food Act 2003*, excluding the function of appointing an authorised officer under Division 3 of Part 9 of that Act, are only to be exercised within “the Area” in respect of:
  - a. an imminent threat to:
    - i. public health and safety; or
    - ii. the health of any individual;in connection with food; and
  - b. retail food businesses; and
2. the function of appointing one or more authorised officers under Division 3 of Part 9 of the *Food Act 2003* is to be exercised so that the functions of each authorised officer appointed are only exercisable within “the Area” in respect of:
  - a. an imminent threat to:
    - i. public health and safety; or
    - ii. the health of any individual;in connection with food; and
  - b. retail food businesses.

As an enforcement agency, this instrument of appointment is subject to the following conditions under section 111B of the *Food Act 2003*:

1. inspect retail food businesses for compliance with the national food safety standards in the Australia New Zealand Food Standards Code; and
2. comply with the operating protocols for enforcement agencies; and
3. make authorised officers available to regularly participate in networking meetings and undertake professional development.

It is the duty of **[Name of relevant body]** to exercise the functions conferred or imposed under the *Food Act 2003*, or delegated to it under that Act, for the purposes of section 111D of that Act.

This instrument of appointment does not authorise **[Name of relevant body]** to exercise any of the functions conferred or imposed under the *Food Act 2003* on another enforcement agency appointed in respect of “the Area” under section 111(4) and section 111(5) of that Act.

For the purposes of this instrument of appointment:

**Retail food business** means a food business at a premises, and vehicles used to transport food, within “the Area”:

- c. where the principal food-related activity is one or both of:
  - iii. the handling of food intended for sale directly to consumers from any premises by that business; or
  - iv. the sale of food directly to consumers; and
- d. which is not a food business, or part of a food business, that is required to be licensed under the *Food Act 2003*.

Dr Lisa Szabo  
Chief Executive Officer  
NSW Food Authority

**[Day] [Month] [Year]**

# Instrument of appointment for an enforcement agency with responsibilities in addition to retail

## (Sections 111, 111B and 111D of the *NSW Food Act 2003*)

**[Name of relevant body]** is appointed in writing as an enforcement agency by the NSW Food Authority in respect of **[Name of relevant local government area, part of local government area or other area]** (“the Area”) under section 111(4) of the *Food Act 2003*.

**Commencement:** This instrument of appointment commences on **[Day] [Month] [Year]**, in accordance with sections 111, 111B and 111D of the *Food Act 2003*.

**Revocation:** The instrument dated 22 December 2017 is revoked pursuant to section 111A of the *Food Act 2003*.

As an enforcement agency, this instrument of appointment is subject to the following limitations under section 111B of the *Food Act 2003*:

1. the functions conferred or imposed on **[Name of relevant body]** as an enforcement agency under the *Food Act 2003*, excluding the function of appointing an authorised officer under Division 3 of Part 9 of that Act, are only to be exercised within “the Area” in respect of:
    - a. an imminent threat to:
      - i. public health and safety; or
      - ii. the health of any individual;in connection with food;
  - b. retail food businesses; and
  - c. a food business included in the class of food businesses, or a specified food business, at a premises within “the Area” set out in the document entitled ‘Schedule to instrument of appointment of an enforcement agency in respect of **[Name of relevant local government area, part of local government area or other area]**’ dated **[Day] [Month] [Year]**, provided that it is not a food business that is required to be licensed under the *Food Act 2003*;
2. the function of appointing one or more authorised officers under Division 3 of Part 9 of the *Food Act 2003* is to be exercised so that the functions of each authorised officer appointed are only exercisable within “the Area” in respect of:
    - a. an imminent threat to:
      - i. public health and safety; or
      - ii. the health of any individual,in connection with food;
  - b. retail food businesses; and
  - c. a food business included in the class of food businesses, or a specified food business, at a premises within “the Area” set out in the document entitled ‘Schedule to instrument of appointment of an enforcement agency in respect of **[Name of relevant local government area, part of local government area or other area]**’ dated **[Day] [Month] [Year]**, provided that it is not a food business that is required to be licensed under the *Food Act 2003*.

As an enforcement agency, this instrument of appointment is subject to the following conditions for the purposes of section 111B of the *Food Act 2003*:

1. inspect retail food businesses for compliance with the national food safety standards in the *Australia New Zealand Food Standards Code*; and
2. comply with the operating protocols for enforcement agencies; and
3. make authorised officers available to regularly participate in networking meetings and undertake professional development.

It is the duty of **[Name of relevant body]** to exercise the functions conferred or imposed under the *Food Act 2003*, or delegated to it under that Act, for the purposes of section 111D of that Act.

This instrument of appointment does not authorise **[Name of relevant body]** to exercise any of the functions conferred or imposed under the *Food Act 2003* on another enforcement agency appointed in respect of “the Area” for the purposes of section 111(4) and section 111(5) of that Act.

For the purposes of this instrument of appointment:

**Retail food business** means a food business at a premises, and vehicles used to transport food, within “the Area”:

- a. where the principal food-related activity is one or both of:
  - i. the handling of food intended for sale directly to consumer from any premises by that business; or
  - ii. the sale of food directly to consumers; and
- b. which is not a food business, or part of a food business, that is required to be licensed under the *Food Act 2003*.

Dr Lisa Szabo  
Chief Executive Officer  
NSW Food Authority

**[Day] [Month] [Year]**

**Schedule to instrument of appointment of an enforcement agency in respect of [Name of relevant local government area, part of local government area or other area]**

This is to be read in conjunction with the “Instrument of appointment of an enforcement agency” (sections 111, 111B and 111D of the NSW *Food Act 2003*) in respect of **[Name of relevant local government area, part of local government area or other area]**, dated **[Day] [Month] [Year]**.

**Schedule of food businesses for the purposes of paragraphs 1(c) and 2(c) of the instrument of appointment**

**Class of food businesses**

*[Include the class of food business, if relevant]*

**Specified food businesses**

*[Name and address of any additional business, if relevant]*

Dr Lisa Szabo  
Chief Executive Officer  
NSW Food Authority

**[Day] [Month] [Year]**