

How to apply to change a register

**Explanatory guidelines for *Register of offences*
or *Register of penalty notices***

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Background

This guide explains how to apply for a change to be made to information published in the *Register of offences (prosecutions)* or the *Register of penalty notices*. Applications can be made under s133F of the *Food Act 2003* (NSW).

About the Authority

The NSW Food Authority is the government organisation responsible for ensuring NSW food is safe and correctly labelled. It works with industry, consumers, and other government organisations to minimise food poisoning by regulating and providing information about the safe production, storage, transport, promotion and preparation of food.

Food Act 2003 (NSW)

The Authority administers the *Food Act 2003* (NSW). The objects of the Act set out in section 3 include to:

- (a) ensure food for sale is both safe and suitable for human consumption
- (b) prevent misleading conduct in connection with the sale of food
- (c) provide for the application of the Food Standards Code in NSW

Enforcement of the Act is essential for the effective management of food safety risks and the prevention of misleading conduct in connection with the sale of food. Accordingly, the Authority is committed to ensuring there is a high level of compliance with the Act and regulations.

The Authority's *Compliance and enforcement policy* (on the website) details how the Authority facilitates the regulatory goals of the Act in a manner that is:

- authorised by law,
- procedurally fair,
- consistent,
- proportionate,
- accountable, and
- transparent.

Registers of alleged breaches

The Authority began web publication of its **successful prosecutions** under the Act on 1 July 2007. In addition, qualifying prosecutions by councils were also published.

Following amendments to the Act in 2008, the Authority started publishing details of **penalty notices**.

The Act creates two registers or lists to contain these details:

- the *Register of offences* contains successful prosecutions, and
- the *Register of penalty notices*.

Among other things, the Act sets out what may be published, the period of publication and various processes to be followed relating to the registers.

Why are details of penalty notices and prosecutions published?

Consistent with the Authority's *Compliance and enforcement policy*, authorised officers of the Authority and local councils may serve a penalty notice or commence a prosecution on a person if the officer believes the person has committed an offence(s) under the Act or the regulations.

The Act permits the Authority to publish particular details on its website about any penalty notice issued if the alleged offence relates to the handling or sale of food. The Authority may also publish certain details on its website about a person convicted of an offence, if the offence relates to the handling or sale of food.

Publishing the lists gives consumers more information to make decisions about where they eat or buy food.

For further information on the Authority's policies and procedures for publication please see: http://www.foodauthority.nsw.gov.au/Documents/corporate/publication_criteria_penalty_notices.pdf

What details can the Authority publish?

Register of offences

Under section 133 of the Act, the Authority may keep a register of information on its website (and any other approved means) about offences under the Act or the regulations relating to the handling or sale of food (the *Register of offences (prosecutions)*). The register may contain any of the following information in relation to a person who has been convicted by a court of an offence under the Act or the regulations relating to the handling or sale of food, or whose employee or agent has been convicted of such an offence:

- (a) the name of the person,
- (b) the name and address of the place of business at which the offence was committed, including the local government area in which it is located,
- (c) the name and address of the usual place of business of the person,
- (d) the trade name under which the person trades,
- (e) if the person is a company, the name of the chief executive officer and any director of the company,
- (f) a description of the nature and circumstances of the offence, the decision of the court, the penalty imposed and any forfeiture incurred,
- (g) the enforcement agency or other body under the direction of which, or on behalf of whom, the relevant prosecution was conducted, and
- (h) such other information of a general nature in relation to matters connected with food safety or other interests of consumers as the Authority thinks necessary.

Register of penalty notices

The Act allows the Authority to keep a register of information on its website (and any other approved means) about penalty notices issued for alleged offences under the Act or the regulations relating to the handling or sale of food (the *Register of penalty notices*). The register may contain any of the following information:

- (a) the name of any person served with a penalty notice for an alleged offence under the Act or the regulations relating to the handling or sale of food,

- (b) the name and address of the place of business at which the offence is alleged to have been committed, including the local government area in which it is located,
- (c) the name and address of the usual place of business of the person,
- (d) the trade name under which the person trades,
- (e) if the person is a company, the name of the chief executive officer and any director of the company,
- (f) a description of the nature and circumstances of the alleged offence, including the short title of the offence,
- (g) the date, time and place of the alleged offence,
- (h) the penalty notice infringement number,
- (i) the amount payable under the penalty notice,
- (j) the date the penalty notice was served,
- (k) the enforcement agency or other body under the direction of which, or on behalf of whom, the penalty notice was served,
- (l) the status of the penalty notice (that is, particulars of whether the penalty notice has been fully or partly paid, whether a penalty notice enforcement order under Part 3 of the *Fines Act 1996* (NSW) has been issued in respect of the penalty notice or whether the penalty notice is unresolved), and
- (m) such other information of a general nature in relation to matters connected with food safety or other interests of consumers in food as the Authority thinks necessary.

When must the Authority change the information?

The Authority must change the information in the registers on its website in the following circumstances:

- (1) it must correct any error in the information as soon as practicable after it becomes aware of the error,
- (2) it must remove information about a conviction for an offence from the register of offences as soon as practicable after it has become aware that:
 - (a) the conviction has been quashed or annulled,
 - (b) an appeal has been made against the conviction¹, or
 - (c) a period of two (2) years has elapsed since the end of the period during which an appeal could have been made against the conviction, or if an appeal was made against the conviction, the date on which a final order was made affirming the conviction, and
- (3) it must remove information about a penalty notice from the *Register of penalty notices* as soon as practicable after it has become aware that:
 - (a) the penalty notice was not properly served,
 - (b) the person on whom the notice was served has elected to have the matter dealt with by a court,

¹ The Authority may restore information to the Register of offences, which was removed because an appeal had been made against the conviction, if the Authority is satisfied that the appeal was unsuccessful.

- (c) a decision has been made by the body, by or on behalf of whom the penalty notice was issued, not to enforce the penalty notice,
- (d) a penalty reminder notice or penalty notice enforcement order in respect of the penalty notice has been withdrawn under the *Fines Act 1996* (unless the enforcement action authorised by the enforcement order is authorised by another penalty notice enforcement order),
- (e) a penalty notice enforcement order in respect of the penalty notice has been annulled under the *Fines Act 1996* and the matter has been referred to a court, or
- (f) a period of twelve (12) months has elapsed since the date on which the Authority was first authorised to publish information about the penalty notice on the register.

When can the Authority change the information?

The Authority can, but is not required to, change the information in the registers on its website in the following circumstances:

- (1) it may correct an omission from information in a register,
- (2) it may remove information about a conviction for an offence from the *Register of offences* if it is appropriate in the circumstances,
- (3) it may remove information about a penalty notice from the *Register of penalty notices* if it is satisfied it is appropriate in the circumstances, and
- (4) it may add information to a register for the purpose of indicating that a business named in a register has been sold or otherwise disposed of after the date on which the offence is committed or a penalty notice served.

When will the Authority generally not change, add or remove information?

Where the Authority is authorised, but not required, to make a change to the information in the registers on its website, having regard to the scope and purpose of the Act, it will generally **not** be appropriate to make a change in the following circumstances:

- (1) you have since rectified the issue that led to the offence or alleged offence,
- (2) the publication of the details of the offence or alleged offence have adversely impacted upon your reputation,
- (3) the publication has caused you financial hardship or other adverse impacts,
- (4) you were experiencing financial hardship at the time of the offence or alleged offence,
- (5) you were not aware the details of the penalty notice or prosecution would be published on the website at the time of the offence or alleged offence, payment of the fine or entering of a plea in court, or
- (6) you or the food handler has not received a penalty notice before and is seeking leniency for good character.

The Authority will, however, consider the circumstances of each case on its own merits.

How do I request a change?

The Authority is authorised or required to change the information in the registers on its own volition or following an application under s133F of the Act.

To make an application to the Authority to change information in the registers you must:

- (1) determine if you are an 'interested person' and so entitled to apply to the Authority for a change to a register. To be an 'interested person', you must:
 - (a) be the person to whom the information on the register relates, or
 - (b) be the employer or principal of the person to whom the information on the register relates, that is, the information relates to your employee or agent, or
 - (c) own or have an interest in the business or company to which the information on the register relates.
- (2) download an *Application under s133F of the Food Act 2003 for change to the register* from the Authority's website www.foodauthority.nsw.gov.au,
- (3) refer to Appendix A in this guide when completing the application,
- (4) attach all supporting documentation as outlined in Appendix A (it may not be possible for the Authority to grant your application without the supporting documentation),
- (5) include a cheque/money order payable to the NSW Food Authority for the prescribed fee (\$55), which may be waived under the circumstances as outlined below, and
- (6) send the completed application form to the Authority. Include either the cheque/money order for the fee or supporting evidence for waiver of the fee.

What will the Authority do with the application form and criteria for waiving the fee?

Once an *Application under s133F of the Food Act 2003 for change to the register* is received with the prescribed fee of \$55 the Authority will firstly consider whether it is **required** or **authorised** under the Act to change the information in the relevant register. If it is authorised, but not required, to change the information, it will consider whether the change is appropriate in the circumstances.

Fee waiving

The prescribed fee will be waived when the Authority is **required** to change the information published. As a guide, this will be when you demonstrate with supporting evidence either:

- (1) the Authority has made an error in the publication of the information,
- (2) the information published does not meet the criteria under the Penalty Notice Publication Protocol (available on the website),
- (3) the conviction has been quashed, annulled or an appeal has been filed, or
- (4) the permitted publication time has transpired and the Authority had not removed it immediately.

If you believe your application falls into one of the four situations above you do not need to attach the accompanying fee with your application. However you must provide supporting evidence for this as suggested in Appendix A when you submit your application.

If the Authority determines that your application does not fall within one of the four situations above, it will advise in writing and request from you the prescribed fee of \$55 to process the application.

The \$55 fee will generally not be waived in circumstances when the Authority is **authorised** to add, change or remove information contained on the registers. Please refer to Appendix A of this guide for examples of scenarios 'appropriate in the circumstances' to change the information.

Fee required

The prescribed fee of \$55 is to accompany all other applications and must be received for the application to be considered. If an application is received without the fee we will advise in writing and request the prescribed fee of \$55 to process the application.

If you provide the prescribed fee of \$55 and the Authority decides that in your particular circumstances fee waiving is appropriate, the fee will be returned.

The prescribed fee of \$55 may be reduced if the Authority deems it appropriate in the circumstances. A written request for consideration of a fee reduction is to accompany the application form with supporting documentary evidence.

Outcome and appeals

The Authority will advise you in writing of the outcome of your application.

If you disagree with the Authority's decision not to make a correction or addition to information, or not to remove any information, in accordance with your request, you may apply to the NSW Civil and Administrative Decisions Tribunal for a review of the decision.

An application for review must be made within 28 days after the day on which you receive notice of the Authority's decision.

For further information, tribunal forms and fees:

Internet: www.ncat.nsw.gov.au

Telephone: 1300 006 228

Complaints about food

Complaints or information about breaches of the Act can be lodged with the Authority's Consumer & Industry Helpline on:

Email: contact@foodauthority.nsw.gov.au

Telephone: 1300 552 406 (Australia wide)

Facsimile: (02) 9647 0026

The helpline can provide general information on the Authority, and advice on who to contact for specific issues.

The Authority cannot give legal advice but may be able to offer you practical information.

Appendix A

The following tables provide:

- an overview of the circumstances in which the Authority may be required or authorised to make a change to the information published on the website, and
- an outline of the suggested information and supporting documentation to form part of the application.

There may be other circumstances not listed where it is appropriate for the Authority to make a change to the information published on the website.

Register of offences (prosecutions)

1. You request a change to the information published

Circumstance	Information needed to support request
There is an error in the information published on the website	Details of your claim including supporting documentary evidence confirming the error
There is an omission in the information published on the website	Details of your claim including supporting documentary evidence confirming the omission

2. You request the removal of the published details from the register of offences

Circumstance	Information needed to support request
An appeal has been made against the conviction	Details of your claim including supporting documentary evidence confirming the lodgement of the appeal within the relevant appeal period
A period of 2 years has elapsed since the date on which the Authority was first authorised to publish information about the particular conviction on the register	Details of your claim including supporting documentary evidence confirming the date marking the end of the relevant appeal period
The conviction has been quashed or annulled	Details of your claim including supporting documentary evidence of the final order quashing or annulling conviction
The offences do not relate to the 'sale or handling of food'	Details of your claim including reference to the definition of 'sale and handling of food' in Appendix B
The person who committed the offence and named on the register is now deceased	Proof of death which may include: <ul style="list-style-type: none"> • original or copy of death certificate issued by the Principal Registrar of Births, Deaths and Marriages • original or copy of Certificate of Death issued by a medical practitioner • original or copy of any document issued by a legal practitioner, police officer or Coroner which refers to the death • any other documentary evidence that is sufficient proof of death

3. You request the removal or addition of information to the register of offences²

Circumstance	Information needed to support request
<p>The business named on the register has been sold or otherwise disposed of since the date of the offence</p>	<ul style="list-style-type: none"> • Verification of the changes to NAFSIS, • A signed statutory declaration by the new owner outlining details of their purchase and stating whether or not they are related to, or share any business interests with, the person named in the register, and • Evidence of the transfer or sale of the food business. <p>The Authority will generally remove an entry where it is satisfied that the business has been sold after the offense listed in the register was committed and there is no relationship between the person named in the register and the new owner.</p> <p>The Authority will generally add a note to the register that 'The food business has been sold or otherwise disposed of' where it is not satisfied that there is no relationship between the person named in the register and the new owner.</p>

² Section 133E of the Food Act 2003 permits the Authority to add information to a register for the purpose of indicating that a business named in the register has been sold or otherwise disposed of after the date on which an offence is committed, or a penalty notice served, in relation to an offence committed or alleged to have been committed in the conduct of the business. A business will have been 'disposed of' if there has been a change of ownership of the business through a gift, transfer by the operation of will, or transfer pursuant to mortgage or security arrangements

Register of penalty notices

1. You request a change to the information published

Circumstance	Information needed to support request
There is an error in the information published on the register	Details of your claim including supporting documentary evidence confirming the error
There is an omission in the information published on the register	Details of your claim including supporting documentary evidence confirming the omission
You are the owner/occupier of the place of the food business but did not commit the offence as described	Details of your claim including supporting documentary evidence

2. You request the removal of the published details from the register of penalty notices

Circumstance	Information needed to support request
The penalty notice has not been paid and an enforcement order has not been issued	Details of your claim including supporting documentary evidence
The penalty notice was not properly served	Details of your claim including supporting documentary evidence
The person on whom the notice was served has elected to have the matter dealt with by a court	Details of your claim including supporting documentary evidence
The alleged offences do not relate to the "sale or handling of food"	Details of your claim including reference to the definition of "sale and handling of food" in Appendix B
A penalty notice enforcement order in respect of the penalty notice has been annulled and the matter has been referred to a court	Details of your claim including supporting documentary evidence
A period of 12 months has elapsed since the date on which the Authority was first authorised to publish information about the particular penalty notice on the register	Details of your claim including supporting documentary evidence
You were not the proprietor of the food business who committed the offence and believe another food business or person has used your particulars	<ul style="list-style-type: none"> • Details of your claim including supporting documentary evidence that you or an employee or agent were not subject to an inspection to which the offence relates and did not receive a penalty notice • If overseas, proof of absence overseas – copy of passport showing entry and exit dates • Copy of photo identification
You sold or transferred the food business ownership prior to the date of the offence	Evidence of the transfer or sale of the food business is to be produced with the statutory declaration
Food business was not under effective control because of natural emergency conditions such as flood or electrical storm	Details of your claim and this will be checked against the information recorded by the issuing officer at the time of issue

Circumstance	Information needed to support request
The offence occurred because there was a medical emergency	Details of the medical emergency on letterhead from a medical authority
The person who committed the offence and named on the register is now deceased	<p>Proof of death which may include:</p> <ul style="list-style-type: none"> original or copy of death certificate issued by the Principal Registrar of Births, Deaths and Marriages original or copy of Certificate of Death issued by a medical practitioner original or copy of any document issued by a legal practitioner, police officer or coroner which refers to the death <p>Any other documentary evidence that is sufficient proof of death</p>
Issuing the penalty notice contravened the Authority's policy for enforcement of the <i>Food Act 2003</i>	<p>Evidence that shows a contravention of Authority's policy</p> <p>(<i>Compliance and enforcement policy</i> is available at http://www.foodauthority.nsw.gov.au/_Documents/industry_pdf/compliance-enforcement-policy.pdf or telephone 1300 552 406)</p>
The Authority applied the decision matrix incorrectly when determining whether to publish the penalty notice	<p>Evidence that would change either the assessed risk profile of the business or severity of the alleged breach and result in a determination to not publish the penalty notice</p> <p>(Decision matrix and summaries of breach severity and risk profile are available at http://www.foodauthority.nsw.gov.au/news/offences/penalty-notice-publication-protocol/ or telephone 1300 552 406)</p>

3. You request the removal or addition of information to the register of penalty notices³

Circumstance	Information in support of request for a correction of the register of offences
The business named on the register has been sold or otherwise disposed of since the date of the offence	<ul style="list-style-type: none"> Verification of the changes to NAFSIS A signed statutory declaration by the new owner outlining details of their purchase and stating whether or not they are related to, or share any business interests with, the person named in the register, and Evidence of the transfer or sale of the food business

³ Section 133E of the *Food Act 2003* permits the Authority to add information to a register for the purpose of indicating that a business named in the register has been sold or otherwise disposed of after the date on which an offence is committed, or a penalty notice served, in relation to an offence committed or alleged to have been committed in the conduct of the business. A business will have been 'disposed of' if there has been a change of ownership of the business through a gift, transfer by the operation of will, or transfer pursuant to mortgage or security arrangements.

Circumstance	Information in support of request for a correction of the register of offences
	<p>The Authority will generally remove an entry where it is satisfied that the business has been sold after the offense listed in the register was committed and there is no relationship between the person named in the register and the new owner.</p> <p>The Authority will generally add a note to the register that 'The food business has been sold or otherwise disposed of' where it is not satisfied that there is no relationship between the person named in the register and the new owner.</p>

Appendix B

Definition of 'handling or sale of food'

Section 4 of the Act defines 'handling of food' and 'sell' as follows:

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

sell includes:

- (a) the trade name under which the person trades,
- (b) barter, offer or attempt to sell,
- (c) receive for sale,
- (d) have in possession for sale,
- (e) display for sale,
- (f) cause or permit to be sold or offered for sale,
- (g) send, forward or deliver for sale,
- (h) dispose of by any method for valuable consideration,
- (i) dispose of to an agent for sale on consignment,
- (j) provide under a contract of service,
- (k) 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,
- (l) dispose of by way of raffle, lottery or other game of chance,
- (m) offer as a prize or reward,
- (n) give away for the purpose of advertisement or in furtherance of trade or business,
- (o) 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,
- (p) supply food (whether or not for consideration) in the course of providing services to patients in public hospitals or inmates in correctional centres, or
- (q) sell for the purpose of resale.