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NSW Food Authority Compliance and Enforcement Policy

Contents

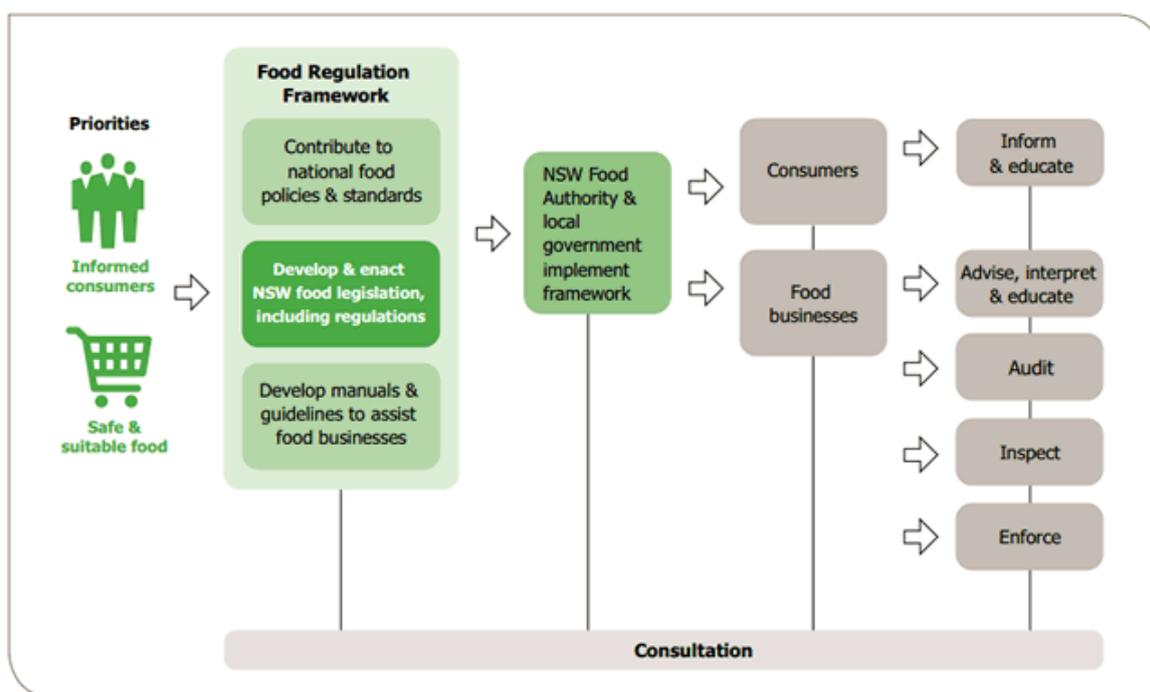
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Introduction

The NSW Food Authority (Food Authority) is a through-chain food safety agency that works to ensure food produced, manufactured and sold in NSW is monitored and safe at each step it goes through – from paddock to plate. We provide certainty in the safety and integrity of the food supply chain in NSW by regulating and measuring food safety across the food industry.

The Food Authority provides the regulatory framework for the food industry in New South Wales by administering and enforcing state and national food legislation. This includes the national Food Standards Code and the *Food Act 2003* (NSW), as well as a range of food safety schemes in the Food Regulation 2010, which regulate key industry sectors.

The NSW Food Regulation Framework



The Food Authority works to ensure food sold in the state is safe and correctly labelled, and that consumers are provided with information that helps them make informed choices about the food they eat.

The Food Authority follows a risk-based approach to compliance. This means that it:

- clearly defines the regulatory outcomes
- identifies and assesses risks to achieving regulatory outcomes
- links what it does to achieving desired regulatory outcomes
- measures what it does
- allocates resources according to risk
- tailors its use of enforcement and other regulatory tools based on the severity and behavioural drivers of noncompliance, and
- uses monitoring and reporting to continually improve what it does.

Ensuring compliance

The Food Authority works closely with the Commonwealth Government, other state regulators and 152 councils across NSW to enforce all aspects of the:

- Australian and New Zealand Food Standards Code
- *Food Act 2003* (NSW), and
- state's food safety programs.

To help keep food safe the Food Authority:

- conducts risk-based surveillance of all food industry sectors
- improves compliance of the NSW food industry with food regulations, and
- benchmarks and verifies NSW food industry performance.

Links with other agencies

The Food Authority values and utilises links with other agencies at a state and national level, particularly with the NSW Ministry of Health, NSW Department of Primary Industries, NSW Office of Environment and Heritage, NSW Office of Fair Trading and Food Standards Australia New Zealand (FSANZ), and supports local government which conducts essential enforcement work through Environmental Health Officers.

Benefits of this policy

This compliance and enforcement policy explains how the Food Authority uses reactive and proactive strategies to manage risks to food safety and enhance compliance with the Food Standards Code, *Food Act 2003* (NSW) and Food Regulation 2010. It also provides a framework for enforcement agencies in NSW.

This compliance and enforcement policy is informed by the *Australia and New Zealand Food Legislation Enforcement Guideline* (the Guideline). The Guideline was developed to promote a consistent approach across jurisdictions for the implementation and enforcement of food regulations and standards in Australia and New Zealand and was endorsed by all jurisdictions in Australia and New Zealand through the Implementation Subcommittee (ISC) in November 2009. The Guideline can be viewed in full at www.foodsecretariat.health.gov.au

Implementation of the strategies and principles of the Guideline through this policy helps provide a level playing field across Australia for businesses.

Complaints or information about breaches of the *Food Act 2003* can be lodged with the NSW Food Authority Consumer & Industry Helpline on:

- **E-mail: contact@foodauthority.nsw.gov.au**
- **Tel: 1300 552 406**
- **Fax: 02 9741 4888**

The Food Authority's Consumer & Industry Helpline can provide general information on the Food Authority and advice on who to contact for specific issues.

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

1 Scope and purpose of the policy

1.1 Scope

The Food Authority administers the *Food Act 2003* (NSW) (the Act). The Food Authority is defined by Section 4 of the Act as an enforcement agency. The objects of the Act as defined in Section 3 include:

- ensure food for sale is both safe and suitable for human consumption
- prevent misleading conduct in connection with the sale of food, and
- provide for the application in this state of the Food Standards Code.

The Food Standards Code means the Australia New Zealand Food Standards Code as defined in the *Food Standards Australia New Zealand Act 1991* of the Commonwealth of Australia.

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 Food Authority is committed to ensuring there is a high level of compliance with the Act and the Food Regulation 2010 (the Regulation).

This document sets out the Food Authority's policies on compliance and enforcement that will facilitate the effective achievement of the regulatory goals of the Act.

Breaches of the Act are classified as criminal offences and penalties of up to \$550,000 and/or two years imprisonment apply. The range of offences under the Act and Regulation vary greatly in their seriousness and accordingly a variable range of penalties and enforcement options are available. This policy describes the graduated options that are available and provides details of the matters that will be considered in their application toward achieving the objects of the Act.

The policy also sets out the principles the Food Authority will apply in its compliance and enforcement activities.

1.2 Purpose

This policy:

- summarises the Food Authority's general approach to compliance and enforcement
- explains how the Food Authority undertakes activities that reduce food safety risks and enhance compliance with established standards for food production and labelling, and
- guides decision-making to ensure that compliance actions are consistent, fair and based on best practice.

The aim of the policy is to:

- promote compliance with the legislative provisions of NSW food regulation consistent with the objects of the Act
- promote transparency to consumers and industry on how the Food Authority will make decisions on enforcement action
- guide decision making and action by staff in the use of enforcement options

- encourage use of regulatory implements in such a way as to best achieve our organisational objectives
- have a risk-based approach to compliance and enforcement activities through adoption of a graduated and proportionate response to legislative noncompliance
- encourage use compliance and enforcement strategies in such a way as to best achieve legislative compliance
- have a cooperative and collaborative approach with businesses or between jurisdictions to legislative compliance, and one that does not place unnecessary impost on food businesses in Australia, and
- protect consumers from inappropriate and/or misleading trade practices.

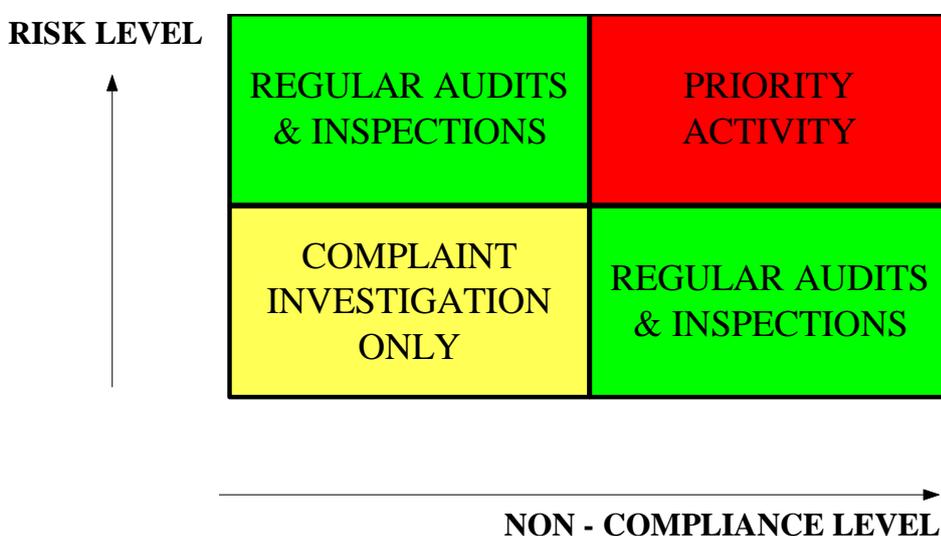
2 Compliance and enforcement strategies

In meeting the objectives stated above the Food Authority has adopted a risk based strategic approach to the application of enforcement provisions and implemented a compliance strategy that addresses the:

- identification of food industry sectors with a history of adopting non-compliant practices
- identification of inappropriate or misleading trade practices with the potential to intentionally mislead consumers
- development of compliance level indicators for food businesses
- prioritisation of enforcement tasks based on a risk and compliance matrix
- identification of behavioural issues, and
- use of compliance data to evaluate/review the compliance strategy.

Figure 1 (below) provides further guidance.

Figure 1. Risk and compliance matrix



3 Enforcement principles

This policy sets out the guiding principles the Food Authority will apply when conducting regulatory and enforcement activities and includes an approach that is:

- graduated and proportionate
- authorised by law
- impartial and procedurally fair
- accountable and transparent
- consistent in terms of the enforcement response between food regulators
- in the public interest, and
- allows for application of multiple enforcement tools under appropriate circumstances.

3.1 A graduated and proportionate response to legislative noncompliance

The Food Authority will apply a graduated and proportionate approach to the application of enforcement tools upon food businesses. This approach envisages the application of mild enforcement tools to businesses in the first instance, to be followed by more severe tools should the business continue the noncompliant activity.

Examples of mild enforcement tools that may be employed include improvement notices or warning letters. Examples of more severe tools include prohibition orders, penalty notices, licence suspension/cancellation or prosecution. The tool box appended to this policy provides further detail.

The Food Authority may at times consider using mediation and conciliation as preliminary steps in enforcement processes. Mediation and conciliation provide the proprietor of the business with the opportunity to explain mitigating circumstances of the legislative noncompliance. Following this explanation, the Food Authority may make a determination on an appropriate course of action.

Through employment of a graduated approach, it is considered that offences may be appropriately managed and allow the Food Authority to use its resources to the greatest effect.

3.2 Proportionate response

Notwithstanding the above advice, the Food Authority will select an enforcement response that is proportionate to the identified noncompliance and capable of providing sufficient incentive to the business to amend the noncompliant behaviour. For example, identification of a critical non-conformance in a business's food safety management program, or of a matter where a business is intentionally providing inappropriate or misleading information to the consumer in order to capture market share, may lead to more severe enforcement tools such as product seizure, issue of a prohibition order or prosecution being used in the first instance.

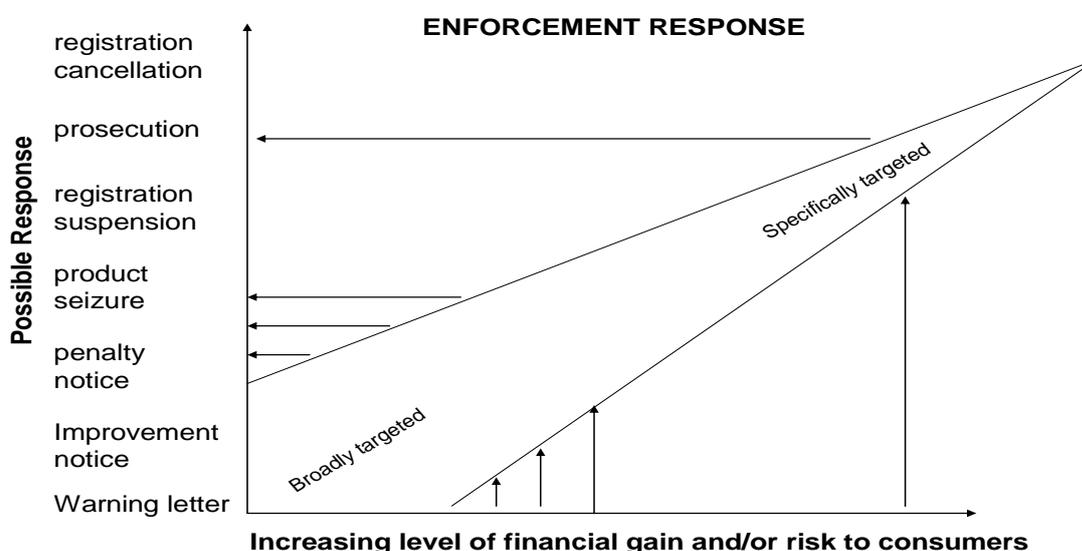
Furthermore, should the circumstances surrounding an offence be considered sufficiently serious (eg an imminent risk to public health and safety), the Food Authority may elect to employ multiple enforcement tools at the same time. This policy should not be interpreted as preventing the Food Authority from exercising such powers.

Factors that the Food Authority will consider in making decisions concerning the choice of enforcement tool to respond to a particular incident include:

- impact of the alleged offence, on the consumer, to competitors of the offending business and to any profits earned by the business resulting from the offence
- circumstances of the alleged offence and the individual circumstances of the business and persons associated with the business that is subject to enforcement action
- compliance history of the business that is subject to enforcement action, both in general and with respect to the incident that is the subject of enforcement action
- cooperation demonstrated by the alleged offender; both in relation to investigations conducted on the offender’s premises relating to the offence and in respect to the cooperation demonstrated by the alleged offender following commencement of enforcement action
- remedial action implemented by the alleged offender to address the noncompliance that is the subject of enforcement action
- degree of care and due diligence exercised by the food business to avoid noncompliance (eg implementation of Australian Standard AS3806-1998 *Compliance programs*)
- timeframe over which the offence was committed, and
- need to provide the Food Authority staff with a safe working environment within the requirements of occupational health and safety laws, particularly in relation to matters involving assaults and intimidation.

The following diagram illustrates the graduated nature of enforcement responses in unity with the seriousness of the non-compliance.

Figure 2. Enforcement response



3.3 Authorised by law

Authorised officers are required to act within their legal remit of statutory power when undertaking enforcement activity. Businesses should not be required, either directly or by inference, to observe requirements that are not authorised by law.

The following advice is offered concerning the collection of evidence:

- evidence obtained by authorised officers relating to actual or alleged offences should be obtained within the requirements of food legislation, and also within the requirements of criminal law
- decisions should be based on evidence. That is, enforcement action is to be supported by evidence that is appropriate in the circumstances. Generally that evidence should be admissible and sufficient to establish that an offence has been committed (this will assist in ensuring that enforcement action is only taken under appropriate circumstances)
- evidence should also be sufficient to support a case against appeal (eg a penalty notice referred to a court for a defended hearing, or matter reviewable by the NSW Civil and Administrative Decisions Tribunal), and
- evidence need not be assembled into a full prosecution brief for minor enforcement action, however evidence collected should be sufficient to substantiate the offence if questioned.

3.4 Impartiality and procedural fairness

The Food Authority will undertake enforcement activity against food businesses in a timely manner that is procedurally fair and impartial. This will assist in minimising opportunities for arbitrary or inexplicable differences between the handling of individual cases, or classes of cases, to occur.

Discrimination (eg with regard to ethnicity, religion, age or gender) by authorised officers when undertaking enforcement action is unacceptable practice.

Decision making about applying enforcement provisions should not be influenced by:

- political advantage or disadvantage to a government or any political party or group
- the consequences of a decision to undertake enforcement action on the personal or professional circumstances of staff of the Food Authority, or
- the personal feelings of the decision makers towards the offenders.

Food business proprietors will receive written advice of available statutory rights of appeal when decisions are made by the Food Authority to apply enforcement provisions.

Reasons for a decision (eg to suspend or revoke a licence) will be documented and included in a statement of reasons as part of any administrative review of the decision.

Many juveniles (10 to 18-year-olds) work in (or operate) food businesses and may therefore be subject to enforcement action under some circumstances. Under these circumstances, legislation for dealing with children between the ages of 10 and 18 (young offenders' legislation) applies to compliance and enforcement activity.

3.5 Accountable and transparent

To ensure the Food Authority is accountable and transparent in the application of enforcement tools the Food Authority's officers will:

- ensure that legislation, enforcement policies, complaints procedures and relevant information are readily accessible to food businesses and the public
- use plain language to communicate with the public and the food industry
- ensure that policies and procedures that will be followed in addressing stakeholder issues associated with enforcement action are readily available
- advise of available complaint or appeal processes associated with enforcement action inclusive of timeframes applicable to these processes, and
- provide advice on fees and charges that may be applied in discharging enforcement obligations or providing services under the relevant legislation.

In relation to issuing penalty notices, the Food Authority has adopted the Attorney General's Department's 'Caution Guidelines' and 'Internal Review Guidelines' which came into effect on 31 March 2010 and can be found at:

www.ipc.nsw.gov.au/lawlink/legislation_policy/ll_lp.d.nsf/pages/lp_lp_cautionguidelines

A summary of both guidelines is also included in *Appendix A – Enforcement toolbox, Penalty notices* (section 7).

The constraints of any privacy legislation and confidentiality provisions when initiating enforcement action against food businesses (unless a statutory requirement exists to disclose the information) will be observed.

3.6 Promote consistency of enforcement activity between food regulators

The Food Authority will work with state and territory jurisdictions to promote consistency in the application of enforcement provisions by food regulators to ensure that food businesses in different Australian jurisdictions do not receive differential treatment with respect to measuring compliance with legislative obligations.

3.7 The public interest

The overriding consideration in taking enforcement action should always be the protection of public health and safety.

3.8 Application of multiple enforcement tools

A graduated approach to the application of individual enforcement tools does not preclude the simultaneous application of multiple enforcement tools. For example, there are circumstances, such as a serious hygiene breach, where the concurrent issue of a penalty notice and prohibition order would be appropriate.

Additionally there may be circumstances where there are multiple noncompliances detected, each of varying significance. In such circumstances, the use of different enforcement tools may also be warranted. Equally the existence of multiple breaches may indicate system failure which may result in the use of more significant enforcement tools.

3.9 Cross-jurisdictional issues

The Home Jurisdiction Rule is an administrative process for liaison and coordination between food regulators in different states and territories where goods produced and used by food businesses are traded across borders and where the head office of a business is located in a different state or territory.

The Home Jurisdiction Rule aims to:

- provide a framework for food regulators to manage issues of legislative noncompliance or complaints outside the scope of the National Food Incident Response Protocol (NFIRP)¹ for foods processed in one state or territory and sold, transported or traded to another
- facilitate and support efficient communication between food regulators on cross-jurisdictional matters
- reduce duplication of enforcement action in more than one jurisdiction, and
- promote the provision of information to another jurisdiction of any compliance or enforcement activities involving a business that is based in the other state/territory.

Conclusion

On a daily basis the NSW Food Authority investigates compliance issues and applies enforcement tools. This policy provides general guidance on how the Food Authority will undertake enforcement action. It does not limit the discretion of the Food Authority to take enforcement action.

¹ Note that the NFIRP will generally override the Home Jurisdiction Rule (HJR), however there may be incidences where the NFIRP may operate in conjunction with the HJR. The NFIRP may be downloaded from the Food Regulation Secretariat website: www.foodsecretariat.health.gov.au

Appendix A – Enforcement toolbox

The following list of tools, ranked in order of graduating severity, provides guidance in the application of enforcement provisions against food businesses:

- warning letter
- statutory improvement notice which may consider issues such as cleaning of premises, equipment or transport, or repair or replacement of equipment or transport, or request revision of a food safety management system
- prohibition order which controls certain activities, the use of certain appliances or prevents operation of the food business entirely. May be used in situations where there is failure to comply with an improvement notice or to prevent or mitigate a serious danger to public health
- downgrading the status of food or restricting its use, eg for reprocessing or sale as animal food
- seizure of food, vehicles, equipment, and labelling or advertising material that does not comply with the legislation or as evidence of an offence
- penalty notice
- prosecution in the Local Court
- publication of the names of offenders on the Food Authority's website registers
- request of court orders for corrective advertising by a person found guilty of an offence
- requiring a registered food business to show cause why licence conditions should not be altered or why a licence should not be suspended or cancelled
- alteration of licence conditions
- institution of proceedings in the Supreme Court
- suspension of a licence, and
- cancellation of a licence.

Details on some of the more commonly used enforcement tools is provided in this Appendix.

The success of strategies adopted by the Food Authority to address noncompliance may be influenced by identification of the behavioural causes of noncompliance and the implementation of suitable measures to promote compliant behaviour.

1. Verbal warnings

Authorised officers are recommended to routinely provide food safety advice to food businesses. Advice should be presented in a way that businesses may readily determine the difference between general advice and directed compliance advice (ie a legal requirement). Such advice should not extend beyond the level of expertise of the authorised officer.

Verbal warnings, as they are not accompanied by formal notification, are prone to improper documentation by the regulator and the business, or misinterpretation or being completely forgotten. Due to the informal nature of verbal warnings, it is suggested that they are only used for issues of a minor technical nature.

2. Corrective action requests

While predominately associated with compliance and auditing, corrective action requests (CARs) are useful as preliminary steps in the enforcement process when auditing food businesses licensed by the Food Authority. A corrective action request (CAR) is a request for a business to implement action to eliminate the cause of a detected noncompliance during an audit.

3. Written warnings

Generally speaking, warning letters should only be used for breaches, where the issuing of an improvement notice is not appropriate or warranted in the first instance. When issued, it is suggested that warning letters detail the:

- nature of the offence
- relevant legislation and clauses breached
- required remedial action
- timeframe for implementation of the proposed remedial action, and
- maximum penalty for the offence and the intention of the agency to enforce the legislation should the business fail to address the detected breach.

Warning letters are to be followed-up within three months of the expiry timeframe to ensure the required actions have been undertaken.

It is likely that failure to comply with a warning letter may, in most cases, result in the implementation of more serious enforcement action, eg a penalty notice.

4. Improvement notices

Improvement notices are statutory notices issued by authorised officers upon food businesses that address prescribed issues and have prescribed content.

An authorised officer may issue an improvement notice to a food business if it is believed that the business is acting in contravention to the food legislation, or to particular instruments associated with the legislation (eg not operating in accordance with a food safety management system). Improvement notices should only be issued when considered to be an appropriate tool, ie capable of providing sufficient incentive to the business to address the matter.

Improvement notices may be issued to businesses for cleaning, sanitation and maintenance issues (including repair and replace) for premises, food transport vehicles or processing equipment within premises. Improvement notices may also be issued in relation to a business's food safety management system, compliance with the Food Safety Standards of the Food Standards Code (ie Standards 3.2.2 and 3.2.3), or concerning a business's particular practice for handling food.

Improvement notices should include the following information:

- provision(s) of the appropriate legislation that the authorised officer reasonably believes is being, or has been, contravened
- brief description of how the relevant legislative provision(s) have been, or are being, breached, and

- particular action that the business should undertake in order to rectify the observed legislative noncompliance.

The timeframe in which the legislative contravention should be resolved by the business. For more serious issues this period is likely to be 24 hours and for less serious issues, a period considered appropriate by the authorised officer, but normally longer than 24 hours

Advise the business that it is an offence not to comply with a notice without reasonable cause.

Follow up inspections are to occur at the timeframe nominated in the improvement notice.

Extensions to the date of compliance provided in an improvement notice may be granted at the discretion of an authorised officer. However, it is recommended that extensions are only provided in instances where the business requests an extension before the expiry date of the notice. Extensions may only be considered for more minor matters such as repairs to equipment or replacement of equipment parts, or for minor revision of a business's food safety management system. Exceptions may be granted by authorised officers at their discretion subject to the business satisfying the officer that exceptional circumstances prevail.

Businesses are advised that failure to comply with an improvement notice will generally result in implementation of more serious enforcement action such as a prohibition order, penalty notice or both.

5. Prohibition orders

A prohibition order forbids the handling of food on a specified premises, vehicle or equipment, or requires that food may not be handled in a specified way or for a specified purpose.

Prohibition orders may be issued where it is necessary to prevent or mitigate a serious danger to public health or where an improvement notice has not provided sufficient incentive to a business to address an issue of legislative noncompliance. A penalty notice may also be issued to businesses that have not addressed matters listed in an improvement notice within the prescribed timeframe.

Prohibition orders may be specifically directed, such as to apply to a specific piece of equipment or part of the premises, or be more broadly directed and applied to an entire premises.

Breach of a prohibition order is a serious matter that will likely result in prosecution.

A prohibition order will remain in place until a certificate of clearance is issued following a request for inspection from the business. An inspection is to take place within 48 hours of receiving a written request for inspection from the proprietor of a food business. Should an inspection not be undertaken within this timeframe, the *Food Act 2003* requires that a certificate of clearance be automatically issued to a business under a prohibition order.

6. Seizure powers

Authorised officers generally have legislative seizure powers to seize food, vehicles, equipment and labelling or advertising materials which the authorised officer reasonably believes do not comply with a provision of the relevant legislation, or may form part of evidence that an offence has been committed.

Seized goods that are forfeited to the Crown should be destroyed or disposed of in a manner that ensures there can be no allegation of improper conduct. Records should be kept of how, when and where seized goods are disposed. It is further advisable to have disposals of seized goods witnessed.

While seizures are undertaken to collect evidence or prevent further offences being committed they effectively impose a penalty upon the person from whom the food, vehicle, equipment and labelling or advertising material has been seized.

The person from whom items have been seized must be provided, at the time of seizure, with a statement that describes the items seized, the reasons for seizing those items and the address where those items will be held, as well as be informed of their right of appeal.

Should subsequent investigation reveal that the business has not contravened the legislation; all seized materials should be returned to the business as soon as possible.

It should be noted that the Act provides for compensation to be paid to food businesses where materials (ie food, equipment etc) have been seized should the grounds for making the seizure be proven to be inadequate.

7. Penalty notices

A penalty notice is issued to a person who has committed a specific offence against the Act or Regulation. If the person does not wish to have the matter dealt with before a court, they will need to pay a specified amount for the offence within a specific timeframe. Alternatively, the person may elect to have the matter heard before a court.

Penalty notices provide an efficient method of dealing with breaches of food legislation that may otherwise require presentation to a court.

As penalty notices may be referred to a court for hearing, authorised officers are advised to collect sufficient evidence to prove the elements of the alleged offence before issuing penalty notices. It is suggested that this evidence be appropriately logged and secured as for a prosecution.

Penalty notices may not be used where the penalty imposed is significantly out of proportion to the profit gained by the business through the noncompliance or where the penalty is not likely to have an impact on the proprietor of a very large food business. In this instance, another enforcement tool may be more appropriate, eg prosecution or the imposition of specific licence conditions upon a business.

Caution guidelines under the *Fines Act 1996*

When considering the issuing of a penalty notice the Food Authority will have regard to the Attorney General's 'Caution Guidelines' issued under section 19A (3) of the *Fines Act 1996* and effective from 31 March 2010. The guidelines will be used by the Food Authority to assist officers in exercising their discretion. **They do not create any right or obligation to give a caution.**

In summary:

Officers who issue penalty notices may give cautions instead.² The *Fines Act 1996* states that a caution may be given if the officer believes:

² Section 19A, *Fines Act 1996*

- on reasonable grounds that a person has committed an offence under a statutory provision for which a penalty notice may be issued, and
- it is appropriate to give a caution in the circumstances.

The matters that should be taken into account when deciding whether it is appropriate to give a person a caution instead of a penalty notice include::

- a) the offending behaviour did not involve risks to public safety, damage to property or financial loss, or have a significant impact on other members of the public
- b) the person is homeless
- c) the person has a mental illness or intellectual disability
- d) the person is a child (under 18)
- e) the person has a special infirmity or is in very poor physical health
- f) the offending behaviour is at the lower end of the seriousness scale for that offence
- g) the person did not knowingly or deliberately commit the offence
- h) the person is cooperative and/or complies with a request to stop the offending conduct, and
- i) it is otherwise reasonable, in all the circumstances of the case, to give the person a caution.

A full version of the 'Caution Guidelines' can be found at:

www.ipc.nsw.gov.au/lawlink/legislation_policy/ll_lpd.nsf/pages/lp_lp_cautionguidelines

The *Enforcement and Compliance Policy* advocates the use of a graduated approach to enforcement and allows for not only cautions to be given but the use of less severe enforcement tools if warranted.

Internal review guidelines under the *Fines Act 1996*

The *Fines Act 1996* provides that all agencies that issue penalty notices have the power to internally review the decision to issue a penalty notice, and sets out the basic requirements for such reviews. The 'Internal Review Guidelines' have been issued by the Attorney General and are effective from 31 March 2010.

These guidelines will be used by the Food Authority as a standard to assist in conducting internal reviews of penalty notices fairly, impartially, and consistently across government and in accordance with the law. A full version of the 'Internal Review Guidelines' can be found at:

www.ipc.nsw.gov.au/lawlink/legislation_policy/ll_lpd.nsf/pages/lp_lp_cautionguidelines

In summary:

- there are two ways to challenge a penalty notice – applying for internal review of the decision to issue the penalty notice or electing to have the alleged offence heard in court
- an application for internal review of the decision to issue the penalty notice may be made at any time up to the due date for payment specified in the penalty reminder notice.³ On review, the penalty notice must be withdrawn if the reviewing agency finds that:
 - the penalty notice was issued contrary to law
 - the issue of the penalty notice involved a mistake of identity
 - the penalty notice should not have been issued, having regard to exceptional circumstances relating to the offence
 - a caution should have been given instead of a penalty notice, having regard to the relevant caution guidelines, or
 - the person to whom the penalty notice was issued is unable, because the person has an intellectual disability, a mental illness, a cognitive impairment or is homeless:
 - to understand that their conduct constituted an offence, or
 - to control such conduct.⁴

Note that the fact that a person has an intellectual disability, mental illness, cognitive impairment or is homeless is not in itself sufficient grounds to require withdrawal of a penalty notice.

A reviewing agency is to notify the applicant in writing of the outcome of the review within 42 days of receipt of the application (or 56 days if additional information has been requested).

8. Prosecution

Prosecution will generally be utilised for more serious legislative breaches or for matters where less severe enforcement action has not been sufficient to convince the business to address the observed noncompliance. It should be noted that matters heard in the Local Court are subject to jurisdictional limit in relation to the maximum penalties available under the *Food Act 2003* and therefore may not attract the full penalties provided by the legislation. Where offences result in serious consequences and where offences are committed with deliberate intent, or are committed repeatedly despite previous prosecutions, consideration will be given to having matters heard before the Supreme Court.

Submissions to the court on penalties will generally include details about the risk to public health, including the severity of the possible harm that may result (where appropriate) and take account of the economic benefit gained by the food business in not complying with the legislation.

³ *Fines Act 1996*, s24A(3).

⁴ *Fines Act 1996*, s24E (2).

As a prosecution always proceeds before a court or related tribunal, it is recommended that all supportive evidence concerning enforcement action taken be made available. Evidence supporting enforcement action should be objective and as comprehensive as possible.

Briefs of evidence for the commencement of proceedings may include the following:

- physical evidence (seized material)
- photographs or video recordings of evidence
- video or sound recordings of conversations and interviews with alleged offenders, and
- records of interviews signed by all parties.

Full documentation of the chain of evidence and secure storage of all exhibits submitted as evidence should further form part of the brief of evidence.

To enable an unprejudiced offence, an accused person or company on request will generally have access to the brief of evidence once investigations have been completed and proceedings have commenced.

In all cases, an opportunity should be provided for alleged offenders to place their version of events on record and to outline any mitigating circumstances to be considered by those making decisions before proceedings commence.

Prior to commencing a prosecution, authorised officers are advised to collect sufficient evidence to prove each element of the alleged offence beyond reasonable doubt. The prosecution case should be structured in an organised fashion that allows for expedient processing by the courts.

The food legislation extends liability to a wide range of persons who could be in some way involved with legislative contraventions, including employees, proprietors, managers and individual company directors. It is at the Food Authority's discretion as to whom the prosecution is directed toward. Action against the directors and managers of food businesses should only be considered where evidence exists that a director or a manager knowingly allowed noncompliance to occur.

The charge/s laid should appropriately reflect the nature and extent of the legislative breach disclosed by the gathered evidence, and provide sufficient material for the courts to consider when imposing an appropriate penalty on the offending business. Care should be taken to ensure that the laying of multiple charges does not infringe the prohibition against duplicity.

Furthermore, food legislation may provide several different provisions that may be applied to the same offence, which may be activated by a single incident. Discretion is to be applied in selecting the most appropriate charge/s to apply, bearing in mind that sufficient evidence should be obtained to substantiate any charges applied.

On commencing proceedings, the defence may wish to pursue charge negotiations. Generally speaking, this process involves negotiations between the defence and the prosecution that may result in the prosecution withdrawing one or more charges in return for the defendant pleading guilty to some or all of the remaining charges. Charge negotiation arrangements may sometimes include agreements on submissions to be placed before the court.

Charge negotiations are generally initiated by the offender. Where charge negotiation occurs the prosecution should ensure that the remaining charges adequately reflect the elements of the offence to assist the court in making an appropriate judgement.

The prosecution should not accept charge negotiation proposals should the defendant wish to maintain their innocence with respect to a charge or charges to which they have previously offered to plead guilty as part of the charge negotiation arrangement. Any agreements that the prosecution will not oppose defence submissions on penalty, or the scale of the offence should only be made where the penalty nominated is considered to allow a proper exercise of the sentencing discretion.

9. Corrective advertising

Requests may be made for court orders for corrective advertising should a person be found guilty of an offence where there is potential ongoing risk to public health, or where it has been proven that a food has been promoted through advertising, in an inappropriate or intentionally misleading way (eg deliberately incorrect Country of Origin labelling).

10. Injunctions or injunctive relief

It is also possible for food regulators to seek an injunction or injunctive relief to prevent continuing illegal activity. However, this is an exceptional remedy and only available in the Supreme Court.

11. Publication of the names of offenders

The NSW Food Authority publishes lists of businesses that have breached or are alleged to have breached the *Food Act 2003* or Food Regulation 2010. Individuals and businesses may receive either a penalty notice for their alleged offence or be prosecuted before a court. The Food Authority publishes a register of penalty notices and a register of offences (prosecutions).

The information, which can be published, is set out in ss133A to 133F of the NSW *Food Act 2003*. Decisions about which penalty notices are published are made according to the Food Authority's 'Penalty Notice Publication Protocol' which is available on the Food Authority's website. A mechanism for having information changed or removed from the registers is also available on the website.

12. Action against Food Authority licences

Licensed food businesses that fail to comply with licence conditions imposed by legislation will be subject to enforcement action. This may involve the imposition of additional conditions upon a business's licence to limit or otherwise control their activities or the suspension or cancellation of a business's licence. Licence cancellation is a very serious level of enforcement action as the removal of a licence, if imposed by legislation as an operating condition for the business, effectively closes the business. This is likely to impact not only on the proprietors of the food business, but also employees, suppliers, and customers.

A licensed food business found to be noncompliant with licence conditions may be asked to show cause why the licence should not be suspended or cancelled. Failure to respond, or to respond in an inadequate manner to a request concerning a food business's licence, may result in changes to the business's licence conditions or suspension of the business's licence for a set period or the immediate cancellation of the business's licence.

Anyone who operates a food business required by legislation to be licensed will usually be subject to prosecution if found to be operating while that licence is under suspension or cancellation.

A licence may be refused where the applicant does not satisfy the Food Authority that they have the necessary capacity, experience or qualifications to ensure the production of safe food, or the applicant is a person who was previously the proprietor or director of a

company that has had its licence cancelled. In circumstances where the Food Authority rejects a business's application for licence, the applicant must be informed in writing of the reason for refusal, citing the appropriate legislation that supports the decision to refuse the application.

Appeals concerning changes to licence conditions, licence suspensions or licence cancellations will undergo formal review by senior officers independent of those who actioned the change of licence status. Applications for review of a decision may also be made to the NSW Civil Administrative Decisions Tribunal.

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