



# COMPLIANCE & ENFORCEMENT POLICY

October 2006

## PREFACE

The New South Wales Food Authority (the Authority) was constituted by the NSW Food Legislation Amendment Act 2004 on 5 April 2004 as a statutory body representing the Crown.

As Australia's first completely integrated or "through-food-chain" regulatory agency the NSW Food Authority is responsible for food safety across the entire food industry, from primary production to point-of-sale. Before the Authority was established, responsibility for food regulation in NSW was divided across a number of State agencies. The establishment of the Authority will create a more streamlined, consistent and efficient approach to food regulation in NSW and a single point of contact for both the industry and public.

The mission of the Authority is to ensure that food in NSW is safe and correctly labelled and that NSW consumers are able to make informed choices about the food they eat.

The NSW Food Authority is, in the exercise of its functions, subject to the control of the Minister, except in relation to:

- the contents of any advice, report or recommendation given to the Minister;
- decisions as to whether to grant, suspend or cancel a licence; or
- decisions whether to institute criminal proceedings in a particular case.

This policy is informed by the *Prosecution Guidelines* of the Office of the Director of Public Prosecutions (NSW), the Prosecution Policy of the Commonwealth issued by the Commonwealth Director of Public Prosecutions, the NSW Department of Health *Prosecution Policy and Guidelines*, Australian Standard AS 3806-1998 *Compliance Programs*, the *Table of Eleven* (Tafel van Elf) developed by the Law Enforcement Inspectorate of the Dutch Ministry of Justice in collaboration with the Sanders Institute of the Erasmus University in Rotterdam and the *Enforcement Concordat* developed by the Cabinet Office of the United Kingdom.

### **Complaints or information about breaches of the Food Act can be lodged with the NSW Food Authority Contact Centre on:**

**E-mail:**            [contact@foodauthority.nsw.gov.au](mailto:contact@foodauthority.nsw.gov.au)  
**Telephone:**      1300 552 406  
**Facsimile:**        9647 0026

The Contact Centre 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.

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## 1. SCOPE AND OBJECTIVES

### 1.1. Scope

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

- (a) to ensure food for sale is both safe and suitable for human consumption,
- (b) to prevent misleading conduct in connection with the sale of food,
- (c) to 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 Food 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 Food Act and Regulations.

This policy sets out the Authority policies on compliance and enforcement that will facilitate the effective achievement of the regulatory goals of the Food Act in a manner that is:

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

The policy recognises that most food businesses want to comply with the law and produce food that is safe; correctly described; labelled and advertised. The compliance and enforcement role of the Authority is to protect consumers from the minority, who flout the law or act irresponsibly, endangering or defrauding consumers and imposing unfair competition on compliant food businesses. It is anticipated that as a consequence of this policy food businesses will consider that compliance is an everyday part of business activity. Australian Standard AS3806-1998 *Compliance programs* provides principles for the development, implementation and maintenance of effective compliance programs.

Breaches of the NSW Food Act, 2003 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 Regulations vary greatly in their seriousness and accordingly a variable range of penalties and enforcement options are available under the Act and Regulations. This policy describes the options that are available and provides details of the matters that will be considered in their application toward achieving the objects of the Food Act, 2003.

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

This policy will be supported by detailed compliance and compliance and enforcement procedures as part of the Authorities ISO 9001 Quality Management System.

## 1.2. Objectives

The objectives of this policy are:

- to provide transparency to consumers and industry on how the Authority will make decisions on enforcement action;
- to guide decision making and action by our staff in the use of enforcement options;
- to use regulatory implements in such a way as to best achieve our organisational objectives.

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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. Section 21 of the Food Act 2003 provides for enforcement of the Food Standards Code which has requirements relating to:

- labelling and advertising;
- substances added to foods (food additives, vitamins and minerals, processing aids, identity & purity);
- contaminants and residues (metals & toxicants, environmental residues, packing materials, moisture absorbers, mould inhibitors, promotional materials, graphics, prohibited & restricted plants, fungi);
- foods requiring pre-market clearance (novel foods, food produced using gene technology, food irradiation);
- microbiological and processing requirements;
- food product standards;
- food safety standards (food safety programs, food safety practices and food premises and equipment); and
- primary production standards.

## 2. COMPLIANCE & ENFORCEMENT PRINCIPLES

As regulators we will endeavour to:

- act in the public interest;
- act consistently, impartially and fairly according to law;
- promote consistency through effective liaison with field staff and the adherence to policies and procedures;
- ensure we do not discriminate on the basis of race, religion, sex, national origin or political association;
- ensure that enforcement action is taken against the right person for the right offence;
- ensure that all relevant evidence is placed before courts or appeal tribunals;
- make food businesses aware of their legal obligations through the widest possible dissemination of information;
- make legislation available to industry through links on our website;
- explain the benefits of compliance to food businesses and discuss specific compliance failures or problems;
- we will provide advice on mechanisms that can be used by food businesses to improve compliance;

- we will confirm our advice in writing when requested and provide written advice in a clear and simple manner, explaining what and why remedial work is to be undertaken, over what time scale and ensuring legal requirements are explained;
- we will advise those we regulate of their right of appeal where provided by law;
- we will provide alleged offenders with an opportunity to discuss the circumstances of their case;
- seek the support of industry leaders to influence compliance levels.

The Authority will not exempt, or give any special consideration, to public sector organisations or their employees in enforcement of the Food Act and Regulations.

### 3. DECISION MAKING CRITERIA

Each case will be considered individually and the appropriate enforcement action to be taken determined on the particular circumstances of the case.

The Prosecution Policy of the Commonwealth states:

*“The objectives previously stated – especially fairness and consistency – are of particular importance. However, fairness need not mean weakness and consistency does not mean rigidity. The criteria for the exercise of this discretion cannot be reduced to something akin to a mathematical formula; indeed it would be undesirable to do so. The breadth of the factors to be considered in exercising this discretion indicates a candid recognition of the need to tailor general principles to individual cases.”<sup>1</sup>*

The following issues need to be considered and balanced in making a decision as to the type of enforcement action, if any, that is applied:

- the knowledge of the alleged offender as to the consequences of their actions;
- the degree of care taken by the alleged offender to ensure they did not commit an offence;
- the age, maturity, intelligence, physical health, mental health or special disability or infirmity of the alleged offender;
- the alleged offender's antecedents and background, including culture and language ability;
- the openness, honesty and cooperation demonstrated by the alleged offender;
- the contrition demonstrated by the alleged offender;
- any mitigating or aggravating circumstances;
- the antecedents of the alleged offender;
- the culpability of the alleged offender and role played by other parties that may have contributed to the offence;
- the staleness, duration and magnitude of the offence;
- the totality of offences that may have been committed;
- the proportionality of the selected enforcement option so that the action will not be unduly harsh or oppressive;
- the prevalence of the alleged offence within the industry and any need for a deterrent effect;
- the difficulty and resources expended by the Authority in investigating and proving the elements of the particular offence or the type of offence;

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<sup>1</sup> Commonwealth Director of Public Prosecutions, 2004, *Prosecution Policy of the Commonwealth*. Canberra. p 2. <http://www.cdpp.gov.au/Prosecutions/Policy/Part1.aspx> (June 2004)

- the efficiency and cost to the Authority of the compliance and enforcement option that is used;
- is the enforcement action required to achieve the objectives of the Act;
- whether or not the enforcement action would be perceived as counterproductive for example, by bringing the law into disrepute;
- whether or not the alleged offence is of considerable general public concern;
- the necessity to maintain public confidence in the enforcement of the Food Act;
- the existence of any risk to public health and the nature and extent of that risk;
- the extent to which consumers have been defrauded;
- the need to protect NSW consumers.

The overriding consideration in taking enforcement action will always be the public interest.

#### **4. PRIVACY**

The Authority must observe the Information Protection Principles set out in the *Privacy and Personal Information Protection Act, 1998*.

This legislation does provide in certain circumstances for information to be shared with other public sector agencies for law enforcement purposes and accordingly the Authority will share such information where appropriate.

Reasons for decisions regarding compliance and enforcement action will generally be made available where consistent with the *Privacy and Personal Information Protection Act, 1998*. Reasons will not be given in any case where the information may cause harm to an informant, witness, or the alleged offender, nor in circumstances which would significantly prejudice the administration of justice.

#### **5. APPLICATION OF COMPLIANCE AND ENFORCEMENT OPTIONS**

A range of compliance and enforcement options are available to Authorised Officers. This section gives guidance on when these options may be applied. The decision making criteria outlined in Section 3 will be considered in deciding which, if any, enforcement action is appropriate in each case.

##### **5.1 Types of Compliance and Enforcement Action**

The compliance and enforcement options available to Authorised Officers include:

- verbal advice;
- warning letters;
- the issue of a statutory Improvement Notice which requires cleaning, repair, replacement, revision of a food safety program, implementation of a food safety program or implementation of the Food Safety Standards;
- the issue of a prohibition order which controls certain activities where there is failure to comply with an Improvement Notice or to prevent or mitigate a serious danger to public health;
- the seizure of food, vehicles, equipment, and labelling or advertising materials which do not comply with a provision of the Act or Regulations;
- the issue of a penalty notice;
- the institution of proceedings in the Local Court;
- the institution of proceedings in the Supreme Court;
- request of court orders for corrective advertising by a person found guilty of an offence;
- publication of the names of offenders immediately after conviction;

- requiring a licensed food business to show cause why licence conditions should not be altered or why a licence should not be suspended or cancelled;
- the alteration of licence conditions;
- the suspension of a licence;
- the cancellation of a licence;
- refusal to issue a subsequent licence.

#### **5.1.1. Verbal Advice and Warnings**

Authorised Officers will routinely give advice on compliance to food businesses. This advice will relate to principles of food safety and which explain the benefits of compliance or the purpose of the law. Verbal warnings should normally only be given for extremely trivial offences, where the offence is only of a technical nature or where there is insufficient evidence to justify a warning letter.

#### **5.1.2. Written warnings**

Where there is evidence that minor breaches of the Food Act have occurred warning letters may be issued at the discretion of the Authorised Officer.

Warnings letters may be inappropriate where there are a large number of minor offences on one occasion within one food business. Similarly warnings letters will not normally be issued for a series of offences within a relatively short period of time. The totality of the offences should be considered in deciding the appropriate course of action. Where significant non-compliance is evident more significant enforcement action may be appropriate.

Warnings letters will detail the exact nature of the offence, required remedial action, cite relevant clauses of the legislation, specify the maximum penalty for the offence and the intention of the agency to enforce the legislation.

Appeals concerning warning letters will be considered by the Manager Enforcement.

Warning letters will be followed-up within 3 months to ensure the required actions have been undertaken.

Further written warnings will not be issued for a subsequent similar offence except in exceptional circumstances.

#### **5.1.3. Improvement Notices**

Authorised Officers may serve Improvement Notices under Section 57 of the Food Act. An Improvement Notice is an order that may require, in relation to premises, food transport vehicles or equipment, cleaning, repair, replacement, and relating to the handling of food, revision of a food safety program, implementation of a food safety program or implementation of the Food Safety Standards. The orders may also require food be handled in a specified way or for a specified purpose.

Improvement Notices should be issued with the same considerations as for warning letters but should only be used where there is intention to proceed to a Prohibition Order following non-compliance. In other circumstances a warning letter or other enforcement option should be considered.

An Improvement Notice must specify the specific legislative provision to which it relates and may specify the particular action to be taken by a person. The Improvement

Notice must specify the date by which compliance must be achieved. While extension of the date of compliance is at the discretion of the Authorised Officers, extensions will not be granted for matters related to cleaning or food handling without the prior approval of an officer holding seniority of Grade 5 Food Safety Officer or above.

Appeals concerning Improvement Notices will be considered by the Manager Enforcement.

Improvement Notices must be served on the proprietor of the food business. The person on whom an Improvement Notice has been served must be provided a copy of the Improvement Notice upon request. The proprietor of the food business should seek an extension of the compliance date in writing before the date of compliance.

Improvement Notices are differentiated from warning letters in that they are a statutory notice that may lead to the issue of Prohibition Order under Section 60 of the Food Act.

#### **5.1.4. Prohibition Orders**

Prohibition Orders may be issued where an Improvement Notice has been issued and there has been a failure to comply with the Improvement Notice by the date of completion **or** where the issue of a Prohibition Order is necessary to prevent or mitigate a serious danger to public health.

A Prohibition Order will take a form that prohibits the handling of food on specified food premises, vehicle or equipment, or that food is not to be handled in a specified way or for a specified purpose. It should be noted that Section 4 of the Food Act defines food handling very broadly, including activities such as collection, transporting, storing or displaying food. Breach of a Prohibition Order will normally result in prosecution.

A Prohibition Order will remain in place until certificate of clearance is issued following a written request for an inspection. An inspection will be undertaken within 48 hours of a written request being made by the proprietor of the food business to the Food Authority or the person who made the order. If an inspection is not made within 48 hours of the receipt of the written request for an inspection a certificate of clearance is deemed to have been granted.

Section 65 of the Food Act provides for appeal to the Administrative Decisions Tribunal (ADT) if there is a refusal to issue a certificate of clearance. Section 66 of the Act provides for compensation to be paid if there were no grounds for the making of the Prohibition Order.

Prohibition Orders may only be issued by the Director-General or duly authorised delegate under Section 109E of the Food Act. A brief of evidence sufficient to prove all elements of a prosecution will be the normal standard required prior to issue of a Prohibition Order.

#### **5.1.5. Seizure Powers**

Authorised Officers have power under Section 38 of the Food Act to seize food, vehicles, equipment, and labelling or advertising materials which the Authorised Officer reasonably believes do not comply with a provision of the Act or Regulations or which is evidence that an offence has been committed.

While seizures are undertaken to collect evidence or to prevent further offences being committed they effectively impose a penalty upon the person from whom the food,

vehicle, equipment and labelling or advertising material is seized. The impact of a seizure should be considered in the application of any other enforcement action.

Persons from whom items are seized must be provided with a statement that describes the items seized, states the reasons for the seizure and the address at which the items will be held.

Where it becomes evident that there has been no contravention of the Food Act or Regulations in relation to items which have been seized they should be returned as soon as possible to the person from whom the items were seized.

The person from whom items have been seized must also be informed of their right under Section 52 to appeal within 10 days of the seizure to a Local Court for an order disallowing the seizure. Compensation may be paid if there has been no application to a Local Court and no contravention of the Act or Regulations had occurred in relation to the seized items.

Seizures must be approved by an officer holding seniority of Grade 5 Food Safety Officer or above.

#### **5.1.6. Penalty Notices**

A penalty notice is a notice referred to in Part 3 of the Fines Act 1996 to the effect that the person to whom it is directed has committed a specified offence and that, if the person does not wish to have the matter dealt with by a court, the person may pay the specified amount for the offence within a specified time.

A penalty notice is issued under Section 120 of the Food Act. The notice requires payment of a specified monetary penalty, unless the person alleged to have committed the offence elects to have the matter dealt with by a court.

Prior to a penalty notice being issued Authorised Officers must prepare briefs of evidence which prove each element of the alleged offence to the standard required for prosecution. Further than establishing a prima facie case there must also be a reasonable prospect of a conviction being secured if the alleged offender chooses to have the matter heard in a court.

The decision making criteria outlined in Section 3 will be considered in the issue of a penalty notice. Penalty notices provide a cost effective and efficient method of dealing with offences and will generally be sufficient response to breaches of the Food Act. Penalty notices should not be used where the penalty is considered totally inadequate for the offence or where the penalty is likely to have no impact on the proprietor of the food business. Penalty notices are not available for the serious offences contained in Part 2, Division 1 of the Food Act. Other serious breaches such as assault of an Authorised Officer, breach of a Prohibition Order, interference with seized items or numerous simultaneous offences should generally proceed by way of prosecution.

If payment of the amount specified in the penalty notice is not made and the person does not elect to have the matter dealt with by a court, a penalty notice enforcement order may be made against the person by the Office of State Revenue (OSR). If the person does not pay the amount (including enforcement costs) within 21 days, enforcement action authorised by the Fines Act may be taken in the same way as action may be taken for the enforcement of a fine imposed on a person after a court hearing for the offence.

Representations may be made to the NSW Food Authority immediately upon receipt of a penalty notice detailing any mitigating circumstances. The Director of the Fines Division of OSR should be notified of such representations being made. A penalty notice enforcement order may be withdrawn if an error has been made.

A penalty notice enforcement order may, on application, be annulled by the State Debt Recovery Office or, if the Office refuses the application, by a Local Court. If the order is annulled, the alleged offence is to be heard and determined by the Local Court.

A payment of a penalty notice is not an admission of liability and the person is not liable to any further proceedings for the alleged offence. It should be noted the fines collected by penalty notices are forwarded to consolidated revenue and are not available to the Authority.

Penalty notices will be served by post. Penalty notices must be approved by the Manager Enforcement prior to posting.

### **5.1.7 Prosecution**

Similarly to the criteria for the issue of a penalty notice being issued Authorised Officers must prepare briefs of evidence which prove each element of the alleged offence it is intended to prosecute. Similarly the prosecution case must also provide a reasonable prospect of a conviction being secured. The resources available for prosecuting are finite and should not be expended pursuing inappropriate cases. The decision making criteria outlined in Section 3 will be considered in making a decision to prosecute.

Prosecution will normally be reserved for the more serious breaches. Matters heard in the Local Courts cannot attract the full penalties provided by the Food Act. Where offences are knowingly committed with intent to defraud or risk injury to consumers, consideration will be given to having matters heard before the Supreme Court.

While the Food Act provides that proceedings must be commenced within 6 months for matters relating to food samples and 12 months for other matters, all matters should be prepared for hearing as quickly as possible.

The Food Act extends liability to a wide range of persons who may be involved in some way with contraventions of the Act or Regulations, including employees, proprietors, and individual directors of companies. Where the Authority has selected prosecution as the appropriate option, the Authority will not necessarily proceed against all those who may be potentially liable under the legislation. The general principles that will be applied are that proceedings will be instituted against those who are primarily responsible for the offence and where offences are committed by employees, agents or officers of a corporation in the course of their employment, proceedings will usually be instituted against the corporation.

In taking action against employees their compliance with management procedures or directions will be taken into consideration. Action will normally only be taken against the directors of corporations where there is a failure to exercise due diligence or where there is evidence linking a director or manager with the corporation's illegal activity.

The charge or charges laid should appropriately reflect the nature and extent of the criminal conduct disclosed by the evidence with due consideration toward the aim of providing the appropriate framework within which the Court can impose a penalty.

Care should be taken to ensure that the laying of multiple charges does not infringe the prohibition against double jeopardy.

Where multiple charges are laid and a defendant proposes pleading guilty to some, but not all charges, it may in some circumstances be appropriate to accept the defendant's plea in return for dropping other charges. The potential saving in cost and time should be balanced the likely outcome if the matter went to hearing. A plea should not be considered where the defendant intimates that he or she is not guilty of an offence. Withdrawal of matters will not occur unless the court is still able to pass a sentence that matches the seriousness of the offences. Additionally courts should be provided with facts which do not distort the nature of the criminality.

Prosecutions will only be approved by the Director-General.

#### **5.1.8 Corrective Advertising**

Requests will be made for court orders for corrective advertising by a person found guilty of an offence where there is the potential ongoing risk to public health or where it is considered by the Authority that there may have been a deliberate attempt to defraud consumers.

#### **5.1.9. Publication of the Names of Offenders**

It will be the normal procedure for the Authority to publicise, in accordance with Section 137 of the Food Act, the names of persons convicted of offences immediately after conviction.

#### **5.1.10. Action Against Licences**

Many food businesses are required to be licensed by the NSW Food Authority under a Food Safety Scheme. Operation of these food businesses without the required licence is an offence.

Food businesses which fail to comply with regulatory requirements or licence conditions are subject to normal enforcement action but may also have additional licence conditions imposed, to limit or otherwise control their activities, or have their licence suspended or cancelled under some circumstances. The compliance and enforcement history of all licensed food businesses will be monitored by the Authority to determine if a licence sanction is appropriate. Further action may include written advice to a business when non compliance is observed, warning that future breaches may result in sanctions against their licence.

Prior to undertaking any action against a licence the proprietor will be asked, in writing, to show cause why licence conditions should not be altered, or the licence suspended or cancelled. Evidence of the development, implementation and commitment to maintain a compliance program in accordance with Australian Standard 3806-1998 *Compliance Programs* is an example of the type of submission that would be required in response to a show cause letter.

Failure to respond, or an inadequate response may result in changes to licence conditions, suspension of the licence for a period, or immediate cancellation of the licence.

Licence cancellation is viewed by the Authority as a very serious level of enforcement action as it prevents the food business from operating. This can impact severely not

only on the proprietors of the food business, but also employees, suppliers, and customers.

Enforcement action against licences will be approved by the Director-General or a duly authorised delegate under Section 109E of the Food Act.

Persons who operate a food business that is required to be licensed while their licence is under suspension or cancellation will be prosecuted.

Applications for a new licence will be refused where the application is made by a person who was previously the proprietor or director of a company that previously had a licence cancelled. Where such persons are found to have a controlling interest in another food business that licence may be cancelled.

Appeals to the Authority against 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. The Food Safety Scheme also provides for appeals to the Administrative Decisions Tribunal in relation to refusals to issue a licence or changes to licence status.

## **6. CONCLUSION**

This policy has no legal status and is not legally binding on the NSW Food Authority. The policy cannot be used to limit the discretion of the Authority to take any enforcement action.

The policy is only to be interpreted as general guidance on how the Authority will undertake enforcement action.