



# Policies, Procedures and Guidelines

## COMPLIANCE AND ENFORCEMENT FOOD PREMISES POLICY

ENV006

### BACKGROUND

This policy sets out how Council fulfils its obligations under the Food Act 2003 in relation to compliance and enforcement impacting on food premises.

### OBJECTIVE

The objectives of this policy are to:

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

### SCOPE

The NSW Food Authority (the Authority) administers the Food Act 2003. Lachlan Shire Council and the Authority are both defined by Section 4 of the Food Act as an enforcement agency.

The objects of the Food Act 2003 are defined in Section 3 as:

- 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.

The Food Act 2003, S21 provides for enforcement of the Food Standards Code which has requirements relating to:

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- labelling and advertising;
- substances added to foods (food additives, vitamins and minerals, processing aids, identity and 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.

This policy establishes how Council meets its compliance and enforcement obligations to 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 Council and 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 Food Act, 2003 are classified as criminal offences and significant fines 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.

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

### **Compliance and Enforcement Principles**

As regulators Council will:

- 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 it does 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 Council's website;
- explain the benefits of compliance to food businesses and discuss specific compliance failures or problems;
- Council will provide advice on mechanisms that can be used by food businesses to improve compliance;
- Council will confirm its 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;
- Council will advise those regulated of their right of appeal where provided by law;
- Council 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 Council will not exempt, or give any special consideration, to public sector organisations or their employees in enforcement of the Food Act and Regulations, including food premises operated by the Council or its contractors.

### **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.

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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 Council in investigating and proving the elements of the particular offence or the type of offence;

When considering prosecutions, Council will consider:

- the efficiency and cost to the Council 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.

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## Privacy

The Council 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 Council 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.

## 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.

## 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 a relevant court
- request of court orders for corrective advertising by a person found guilty of an offence;

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- publication of the names of offenders immediately after conviction.

### **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 insufficient evidence to justify a warning letter.

### **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 Director Environment and Planning.

Warning letters will be followed-up within three 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.

### **Improvement Notices**

Authorised Officers may serve Improvement Notices under of the Food Act, S57. 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.

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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 the Director Environment and Planning.

Appeals concerning Improvement Notices will be considered by the Director Environment and Planning.

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 a Prohibition Order under the Food Act, S60.

### **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 the Food Act, S4, 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 a 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 Council or the person who made the order. If an

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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.

The Food Act, S65, provides for appeal to the NSW Civil and Administrative Tribunal (NCAT) 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 General Manager or duly authorised delegate under the Food Act, S109E. 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.

### **Seizure Powers**

Authorised Officers have power under the Food Act, S38, 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 Director Environment and Planning.

### **Penalty Notices**

A penalty notice is a notice referred to in the Fines Act 1996, Part 3, 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

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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 the Food Act, S120. 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 this policy 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 the Food Act Part 2, Division 1. 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 Council immediately upon receipt of a penalty notice detailing any mitigating circumstances. The Director of Environment and Planning 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.

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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 Council.

Penalty notices will be served by post. Penalty notices must be approved by the Director Environment and Planning prior to posting.

### **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. 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 this policy 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 six 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 Council 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.

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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 Council.

### **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 Council that there may have been a deliberate attempt to defraud consumers.

### **Publication of the Names of Offenders**

It will be the normal procedure for the Authority to publicise, in accordance with the Food Act, S137, the names of persons convicted of offences immediately after conviction.

### **Conclusion**

This policy cannot be used to limit the discretion of the Council to take any enforcement action.

### GENERAL MANAGER

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