

Food Act Compliance and Enforcement

Date September 2016
Council Resolution Date 27 February 2017
Clause Number CCL17/6 (WSC17/3)

Responsible Position Manager Environmental Control
Branch Environmental Control
Division Environmental Services
Version One
TRIM Reference Number ED17/34149
Review Period Every two (2) years
Review Date September 2018
Consultation Public consultation

Document Revision History	
Description	Date
Dubbo City Council Policy	26 April 2005
Notes	

POLICY

PURPOSE

The purpose of the Policy is to:

- To provide transparency to consumers and industry on how the Council will make decisions on enforcement action;
- To guide decision-making and action by staff in the use of enforcement options;
- To use regulatory implements in such a way as to best achieve Organisational objectives;
- To promote compliance with the legislative provisions of NSW food regulation consistent with the objects of the Act; and
- To have a risk-based approach to compliance and enforcement activities through adoption of a graduated and proportionate response to legislative non-compliance.

BACKGROUND AND RELATED LEGISLATION

The Policy was created in 2005 to provide general guidance to Council's authorised officers on how Council will undertake enforcement and compliance action with a consistent approach. Due to amendments to the legislation and developments in the food industry, the Policy has been updated accordingly.

Relevant legislation:

- Food Act, 2003;
- Food Regulation, 2010;
- Australia New Zealand Food Standards Code;
- Food Standards Australian New Zealand Act, 1991.

SCOPE

Council administers the Food Act 2003 (NSW) within the Local Government Area. The Council is defined by Section 4 of the Act as an enforcement agency. The objectives 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 Council is committed to ensuring there is a high level of compliance with the Act and the Food Regulation.

This Policy sets out 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 may 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 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 Council will apply in its compliance and enforcement activities.

POLICY

Council's authorised officers will conduct at least one inspection per year of medium and high risk food premises. The inspection will be conducted using the Food Premises Assessment Report and will result in either a satisfactory outcome or a result requesting further Council action for compliance.

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;
- In the public interest; and
- Allowing for application of multiple enforcement tools under appropriate circumstances.

1. A graduated and proportionate response to legislative noncompliance

Council 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 Enforcement Toolbox is attached to this Policy as **Appendix 1**.

Council 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 non-compliance. Following this explanation, Council 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 Council to use its resources to the greatest effect.

2. Proportionate response

Notwithstanding No. 1 above, the Council 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.

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

Factors that Council 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 or to competitors of the offending business;
- 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 non-compliance that is the subject of enforcement action;
- The degree of care and due diligence exercised by the food business to avoid non-compliance
- Timeframe over which the offence was committed; and
- The need to provide Council officers with a safe working environment within the requirements of work, health and safety laws, particularly in relation to matters involving assaults and intimidation.

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); and
- Evidence should also be sufficient to support a case against appeal (eg a penalty notice referred to a court for a defended hearing).

4. Impartiality and procedural fairness

Council 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 Council; or
- The personal feelings of the decision-makers towards the offenders.

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 years (young offenders' legislation) applies to compliance and enforcement activity.

5. Accountable and transparent

To ensure Council is accountable and transparent in the application of enforcement tools, Council 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 and utilise interpreter resources where required;
- 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.

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.

6. The public interest

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

7. 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.

RESPONSIBILITIES

The Council officers responsible for this Policy are those officers who are authorised under the NSW Food Act, 2003. Council is required to report to the NSW Department of Primary Industries Food Authority, as required by the legislation.

APPENDICES

Appendix 1 – Enforcement Toolbox

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, 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;
- 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;

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. 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 following:

- Nature of the offence;
- Relevant legislation and clauses breached;
- Required remedial action; and
- Timeframe for implementation of the proposed remedial action.

Warning letters are to be followed-up within three (3) 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.

3. 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. 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 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 non-compliance.

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. 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.

4. 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 non-compliance. 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.

5. 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 those items being seized, 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.

6. 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.

7. Cautions

In accordance with Council's Enforcement and Prosecution Policy a caution may be issued instead of a Penalty Infringement Notice if the officer believes:

- 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 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.

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 limitations in relation to the maximum penalties available under the Food Act, 2003 and therefore may not attract the full penalties provided by the legislation.

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.

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.

9. 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.