



**FOOD SAFETY COMPLIANCE AND
ENFORCEMENT
POLICY**

PREFACE – INTRODUCTION

The NSW Food Authority is responsible for food safety across the entire food industry throughout New South Wales, 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 and Councils played a major part in the administration of the Pure Food Act 1908 and Regulations. The introduction of the Food Act saw the consolidation of the administration of the food safety activities in the Food Authority.

Mosman Council has entered into a Partnership Agreement with the NSW Food Authority and the Authority has appointed and delegated to Mosman Council to undertake a range of responsibilities to administer the provisions of the Food Act. It has developed protocols to guide Council in the administration of its responsibilities under that Partnership.

Compliance and enforcement procedures are one part of those responsibilities.

It is reasonable and prudent, not only for the sake of transparency, for compliance and enforcement guidelines to be formulated for the benefit of the owners or operators of food businesses and for those Authorised Officers of the Council involved in inspections of food premises and the administration of the compliance and enforcement procedures. Clear messages of the types of actions, the decision making processes, the obligations; and the available means of redress, serve to overcome any doubt and perceptions not based on factual information.

Council has a clear objective of having all foods transported, stored, prepared and consumed in the Municipality of Mosman protected at all times from contamination or any hazards. It can achieve this objective through the provision of resources to administer the provisions of the Food Act 2003, its Regulations and the Food Safety Standards. These latter documents contain a myriad of requirements, all designed to obtain and maintain high food safety standards.

This policy guideline is modelled on the *Compliance and Enforcement Policy* (October 2006) of the NSW Food Authority. Its 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* (Tabel 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. Some of the clauses have been amended to tailor the policy guideline to meet the expectations of Council in the administration of the respective compliance and enforcement activities.

Complaints or information about breaches of the Food Act can be lodged with Mosman Council or the NSW Food Authority.

Mosman Council can be contacted on:

E-mail: council@mosman.nsw.gov.au
Telephone: 02 9978 4000
Facsimile: 02 9978 4132

The NSW Food Authority can be contacted on:

E-mail: contact@foodauthority.nsw.gov.au
Telephone: 1300 552 406
Facsimile: 9647 0026

Mosman Council or the NSW Food 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 administers the NSW Food Act 2003. Mosman Council has entered into a Partnership Agreement with the NSW Food Authority and the Authority has appointed Council to undertake those obligations set out in Category “B” in respect to its food regulation role as an enforcement agency under the *NSW Food Act 2003, as amended*.

Categories are not mentioned in the legislation and food enforcement activities are categorised by the NSW Food Authority merely to identify the various responsibility levels that Councils may elect to undertake. *Category “B”* in respect to Mosman Council’s regulation and responsibility role includes the intended standards food regulation responsibility and:

- (a) urgent food safety matters;
- (b) urgent food recall investigations;
- (c) six-monthly reporting on food regulation activities;
- (d) routine inspection and enforcement of the retail and food service sector;
- (e) medium and low risk food complaint investigations;
- (f) collaboration on single-case foodborne illness investigations

Mandatory protocols providing detail around these Council responsibilities have been formulated.

The partnership’s objectives are:

- safer food for consumers – reduce the impact of foodborne illness caused by the retail food sector
- strengthen the food safety response capacity of NSW State and Council
- better use of Council’s and the State government resources, including avoiding duplication of food regulation services.

The objectives of the *NSW 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 the 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 NSW Food Authority and the Council, in partnership, is committed to ensuring there is a high level of compliance with the Food Act and Regulations.

This policy sets out the Council's policy 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 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 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 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 that 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.

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

1. 2 Objectives

The objectives of this policy are:

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

Mosman Council administers the provisions of the NSW Food Act 2003 as it applies to the retail sector in the LGA under a Partnership Agreement with the NSW Food Authority. The objects of the Food Act 2003 as defined in Section 3 of the Act include the following:

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

The *Food Standards Code* means the *Australian 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 the 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);
- food requiring pre-market clearance (novel foods, foods produced using gene technology, food irradiation);
- microbiological and processing requirements;
- food product standards;
- food safety standards (food safe 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 persons for the right offence;
- ensure that all relevant evidence is placed before the courts or appeals tribunals;
- make food businesses are 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 period and ensure that all legal requirements are clearly 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.

Council will not exempt, or give any special consideration to public sector organisations or their employees (involved with the retail of foods) in the enforcement of the Food Act or 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” (1)

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 capability of the alleged offender to understand, cope and comply with the relevant requirements;
- 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 culpability of the alleged offender and role played by other parties that may have contributed to the offence;
- the timeliness, the staleness, duration and magnitude of the offence;
- the totality of offences that may have been allegedly 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 Council in investigating and proving the elements of the particular offence or the type of offence;
- the efficiency and cost to Council of the compliance and enforcement option that is used;
- whether the enforcement action required to achieve the objectives of the Act are appropriate;
- whether or not the enforcement action would be perceived as counterproductive – for example, by bringing the law into disrepute;
- whether or not the 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 the consumers either in or visiting the Mosman LGA.

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

(1) Commonwealth Director of Public Prosecutions 2004, *Prosecution Policy of the Commonwealth*.

4 PRIVACY

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.

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 issuing of a statutory Improvement Notice which requires cleaning, repair, replacement, revision of food safety program, implementation of a food safety program or implementation of the Food Safety Standards;
- the issuing 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 issuing of a Penalty Infringement Notice;
- the institution of proceedings in the Local Court;
- the institution of proceedings in the District Court;
- request for court orders for corrective advertising by a person found guilty of an offence;
- publication of the names of offenders immediately after conviction.

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. Verbal advice may also be given through Council's food safety training seminars, the attendance at which may be suggested to the food business operator/owner. Attendance at these seminars is voluntary and is not compulsory.

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.

Warning letters may be inappropriate where there are a large number of minor offences on one occasion within one food business. Similarly warning letters will not normally be issued for a series of offences within a relatively short period of time or in those cases where warning letters have previously been issued. 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.

Warning 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 Council to enforce the legislation.

Warning letters will be followed-up within no less than 3 months to ensure the required actions have been taken.

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 to be handled in a specified way or for a specified purpose.

Improvement Notices should be issued with the same considerations as for a warning letter but should also only be used where there is an intention to proceed to a Prohibition Order following non-compliance with that Improvement Notice. In other circumstances a warning letter or other enforcement options 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 of time for compliance will not be granted for matters related to cleaning or food handling without the prior approval of the Manager Environment and Services or managerial levels above that Manager.

Appeals concerning Improvement Notices will be considered by the Manager Environment and Services.

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 with a copy of the Improvement Notice upon request. Should the proprietor wish to seek an extension of time for compliance, that request must be in writing stating the reasons the extension is being sought. That request is to be submitted to Council before the date of compliance as indicated in the Notice.

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

The issuing of an Improvement Notice does not preclude the issuing of a Penalty Infringement Notice or the institution of court proceedings in circumstances where these types of actions may be warranted.

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 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 Council or to the Authorised Officer who made the order. If an inspection is not made within 48 hours 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 Mosman Council's General Manager being a 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 the 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 and advertising materials which the Authorised Officer reasonably believes do not comply with a provision of the Act or Regulations or which there is evidence that an offence has been committed.

Whilst 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 materials 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 are to 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.

5.1.6 Penalty Infringement Notices

A Penalty Infringement 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.

When an Authorised Officer during an inspection of premises, vehicles or equipment, detects or observes conditions or circumstances that give rise to the potential for the issue of a penalty notice, verbal advice will be given, at that time, to the person allegedly responsible for the alleged offence that a penalty notice may be issued for that alleged offence.

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. That brief is to be submitted to the Manager Environment and Services for consideration and authorisation for the penalty notice to be issued.

When a decision has been made that a penalty notice is to be issued, that notice will be forwarded by post or hand delivered to the person alleged to have committed the offence. The penalty notice is to be accompanied by a written advice giving the reasons for the issuing of the penalty notice in that instance and also providing advice and information as to the means or requirements for the remedying or rectification of that condition or circumstance that gave rise to the penalty notice.

The decision-making criteria outlined in Section 3 will be considered in the issuing 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. These relate to the handling of food in a manner that a person knows will render, or is likely to render, the food unsafe or where the food is handled in a manner that the person ought reasonably to know is likely to render the food unsafe. 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 enforcement order may be made against the person by the State Debt Recovery Office (SDRO). 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 State Debt Recovery Office immediately upon receipt of a penalty notice detailing any mitigating circumstances that the recipient of the penalty notice may deem to submit in any request for the penalty notice to be cancelled or waived. The decision in respect to any such representations is made by the State Debt Recovery Office.

A penalty notice enforcement order, issued by the SDRO, may, on application to the SDRO, be annulled by that 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 that the fines collected by the penalty notice procedures by the SDRO are forwarded to Council after deduction of the processing fee by the SDRO.

Penalty notices issued since 3 May 2008 may be eligible for publication on the NSW Food Authority's internet website. It should be noted that the decision as to whether the particulars of a business being the subject of a penalty notice are to be published on that list rests entirely with the NSW Food Authority. The particulars that are included in the published list include name of the place of the business, the name of the person on whom the notice was served, the suburb, the Council area where the alleged offence occurred, the penalty notice number, the details of the alleged offence, and the date of the offence. These details remain on that website for a period of twelve months. Those eligible for publication on this site are added progressively each week. People listed in the register on this website or with an interest in a business listed can apply to the NSW Food Authority to add, correct or remove information if a business has been sold or disposed of after an alleged offence, or a correction needs to be made. The NSW Food Authority has a *Penalty notice publication protocol* that can be accessed on its website.

5.1.7 Prosecution

Prior to any prosecution being launched Authorised Officers must prepare briefs of evidence which prove each element of the alleged offence to the standard required for prosecution. That brief is to be submitted to the Manager Environment and Services for consideration and authorisation for the prosecution to proceed. 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 Local Courts cannot attract the full penalties under 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 Council has selected prosecution as the appropriate option, Council will not necessarily proceed against all those who may be potentially liable under the legislation.

Prosecutions are eligible for publication on the NSW Food Authority's internet website. The particulars that are included in the published list include trade name of the place of the business, the name of the convicted, the suburb, the Council area where the alleged offence occurred, the date of the offence, and the decision of the Court. These details remain on that website for a period of two years.

5.1.8 Corrective advertising

A request may be made 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 Council that there may have been a deliberate attempt to defraud customers. The advice of the NSW Food Authority will be sought in such cases.

6 CONCLUSION

This policy provides information as to the processes and actions that will be followed in the majority of cases dealt with under the Food Act 2003, however due to the variety of circumstances that may be encountered through the range of inspections and enforcement procedures, the policy cannot be used to limit the discretion of Council to take any enforcement action for the purposes of obtaining high standards of food safety.

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

(ADOPTED BY MOSMAN COUNCIL {Date} {Month} {Year})