

Compliance and Enforcement Guidelines for Food Related Activities



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Prepared by

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HORNSBY SHIRE COUNCIL



Preface

Hornsby Shire Council (Council) has had a long history undertaking food safety inspections with the primary focus of ensuring that food for sale in the Shire is safe and correctly labelled (allowing members of the public to make informed choices about the food they consume).

Council confirmed its dedication to food safety by signing to “Category B” under the Food Regulation Partnership (FRP).¹ As a result of committing to the FRP Council is mandated to conduct food safety inspections on all retail food business with in the Shire.

These guidelines were developed to be congruent with those developed by the New South Wales Food Authority² (*Compliance and Enforcement Guidelines*), Draft National Enforcement Policy, and makes note of Council’s broader “*Environmental Division Compliance Policy*”. The Australian Standard for Compliance Programs AS 3806-2006, was also referred to in the development of these guidelines.

Complaints relating to food borne illness can be lodged with the NSW Food Authority Contact Centre on:

E-mail: contact@foodauthority.nsw.gov.au

Telephone: 1300 552 406

Facsimile: 9647 0026

Complaints relating to hygiene and handling, foreign matter, food quality labelling or advertising or information about breaches of the Food Act can be lodged with Hornsby Council’s Environment Division on:

E-mail: info@hornsby.nsw.gov.au

Telephone: 9847 6853

Facsimile: 9847 6929

Council cannot give legal advice but may be able to offer you practical information.

¹ A “Category B” commitment requires a certain level of commitment to food surveillance and inspections including but not limited to; Commencing 1 July 2008 annual and bi-annual inspections of medium and high risk shops respectively.

²http://www.foodauthority.nsw.gov.au/_Documents/industry_pdf/compliance-enforcement-policy-oct-06.pdf

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1.0 Introduction

This document sets out the guidelines for the conduct of enforcement activity by Councils Authorised Officers in relation to food safety.

The purpose of this document is to standardise the approach to compliance and enforcement activities within the Health Team. The Guidelines are supported by the Team's operational procedures that guide the Authorised Officers in utilising tools of compliance and enforcement relating to Food Safety.

The Environmental Sustainability and Health Team are responsible for administering the *NSW Food Act 2003*. Under *the Act* Council is defined as an "Enforcement Agency" and as such is able to delegate powers of that *Act* to "Authorised Officers".

These guidelines have been prepared with reference to the New South Wales Food Authority *Compliance and Enforcement Policy*, the *Australian Standard AS3806: Compliance Programs*, the NSW Ombudsman's Guidelines and the *EPA Prosecution Guidelines, 2004*.

In order to ensure effective management of food safety and mitigate the risk of non-compliance with the Food Act, it is anticipated that enforcement action will be required to ensure a high level of compliance.

It is expected that these guidelines will provide greater consistency of enforcement provisions used by Authorised Officer(s) upon food businesses, without restricting the Authorised Officers flexibility to accommodate variation in enforcement and compliance action. The guidelines aim to provide a consistent (graduated) approach to the application of enforcement provisions by Authorised Officers, whilst ensuring that and enforcement action taken across the Shire is undertaken in a manner which is;

- authorised by the law;
- graduated
- outcome based and procedurally fair
- accountable and transparent
- consistent;
- proportionate; and
- risk based

It is acknowledged that the majority of food businesses strive for compliance in ensuring that food is safe and as described. The compliance and enforcement role of Council is to protect consumers from the minority of food businesses who have a history of non-compliance or act in a manner which they are likely to impact on public health and safety. Through constant regulation and implication of these guidelines it is anticipated that businesses will see compliance as a part of everyday business activity.

These guidelines describe the options that are available to Authorised Officers and when their use would be considered appropriate to ensure compliance is achieved on an outcomes focussed basis.

1.1 Objectives

The primary objectives of these guidelines are as follows:

- Provide a uniform approach to ensure compliance with laws, regulations and guidelines and codes of conduct which impact on the day to day activities of the Environment Division
- Provide a framework to assist in protecting the members of the public against inappropriate or misleading practices.
- Establish methods of advocating a gradual approach to the application of enforcement actions executed by authorised officers
- Provide transparency to consumers and food businesses regarding compliance and enforcement actions which authorised officers execute
- To allow for concise decision making and thoroughly thought out action taken by authorised officers in the appropriate use of enforcement options
- To utilise compliance and enforcement action in such a manner that it promotes best legislative compliance yet encompasses the philosophy of outcome based regulation
- Uphold good corporate governance practices

2.0 Environmental Sustainability and Health's Role and Responsibilities

The Environmental Sustainability and Health team has regulatory responsibility under the number the following pieces of legislation:

- *Food Act 2003*³
- *Food Regulation 2004*

Hornsby Shire Council is mandated to administer food regulation inspections. The primary objects of the *Food Act 2003* as defined in Section 3 are:

- 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 Shire of the Food Standards Code⁴

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 (but not limited to):

- labelling and advertising;
- microbiological and processing requirements;
- food product standards; and
- food safety standards (food safety programs, food safety practices and food premises and equipment);

³ Updated revisions of this legislation are accessible via the Internet at <http://www.austlii.edu.au/> (Australasian Legal Information Institute).

⁴ 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, a copy of the updated code can be found at <http://www.foodstandards.gov.au/>

Updated revisions of this legislation are accessible via the Internet at <http://www.austlii.edu.au/> (Australasian Legal Information Institute). Additional legal changes and guidelines are provided by the NSW Food Authority at <http://www.foodauthority.nsw.gov.au>. Electronic copies of these Act(s) are used to ensure amendments are identified. Updates on amendments or new legislation are also received directly from State Authorities via circulars, newsletters, seminars and web sites. Overall, when amendments to Acts and Regulations are identified by the Team Manager and Coordinator they are forwarded onto the relevant authorised officers and the Team's documentation is amended accordingly.

3.0 Compliance and Enforcement Strategies

These guidelines establish benchmarks to ensure that officers when undertaking enforcement actions endeavour to;

- act consistently and with the primary focus on public interest and safety
- adopting a graduated approach in relation to enforcement provisions
- act impartially, fairly and in accordance with legal requirements and the law (officers should not discriminate on the grounds of race, sex, religion, national origin etc.)
- in an accountable and transparent manner
- liaise with other field staff and adhere to all relevant policies, procedures and guidelines
- ensure any enforcement/legal action initiated by Council is taken against the right person for the correct offence
- endeavour to assist food businesses to become aware of their legal obligations
- explain the compliance process to operators and the implications of non-compliance and the benefits of compliance to their business.
- provide advice and assistance to food business on ways they can achieve compliance
- following any non-compliance the business will receive clear, written advice highlighting non-compliances, what work is required to be undertaken to achieve compliance, over what timeframe and what legal action may be taken if non-compliance occurs
- when enforcement action is taken by council, council will advise in writing any legal avenues or rights of appeal available to the person/entity the action was taken against
- Council will allow alleged offenders an opportunity to discuss the circumstances of their cases (however this may not effect the enforcement/legal action taken by Council)
- ensure that evidence is gathered legally and in accordance with Council policy
- allows for the application of multiple enforcement tools under appropriate circumstances in order to gain desired outcomes
- seek the assistance of external stakeholders where appropriate including but not limited to NSW Food Authority, other Local Councils or peak industry bodies.

3.1 Priorities of Authorised Officers

A strategic approach is to be adopted to the application of enforcement provisions in order to assure a prioritised yet balanced and consistent approach to compliance and enforcement by Council (see inspection frequency matrix below).

In adopting this strategic approach it is important to implement a successful compliance and enforcement strategy. This strategy should address the following criteria;

- Council is mandated to under take inspections on all “Medium” and “High” risk businesses⁵
- industry sectors with higher instances of non-compliance
- compliance levels for industry sectors
- prioritisation of enforcement tasks based on the inspection matrix below
- prior identification of behavioural or other non-compliances
- use of historical compliance/non-compliance data to evaluate/review inspection matrix
-

Figure 1. Inspection Frequency Matrix

High	Minimum 2 Routine Inspections Annually	Priority Focus Area
↑		
Risk Level	Minimum 1 Routine Inspections Annually	Focus Area
↓		
Low	Complaint only Inspections	Regular Audits and Inspections
	Minor ←	Non-compliance Level → Major

⁵ Council classified Medium and High risk business in accordance to the guidelines provided in the FRP

3.2 Decision Making Criteria

Authorised Officers will treat each case individually on a case by case basis, and appropriate action taken is primarily on an outcome and risk based approach⁶.

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.”*⁷

Prior to undertaking enforcement action there are a number of issues which need to be considered in to assist in the assessment of any action (if any) which may be taken;

- prior Council intervention/instruction relating non-compliances;
- the severity of the non-compliances;
- the knowledge/intent of the alleged offender as to the consequences of their actions;
- the level of care taken by the alleged offender;
- the age, maturity, intelligence, physical health, mental health or special disability or infirmity of the alleged offender;
- prior history of compliance on other issues raised by Council
- background, including culture and language ability;
- the openness, honesty and cooperation demonstrated by the alleged offender;
- any mitigating or aggravating circumstances resulting in the non-compliance/offence;
- the culpability of the alleged offender and role played by other parties that may have contributed to the offence;
- internal policies – was alleged acting as instructed by management – in accordance to internal procedure;
- the timeframe, duration and magnitude of the offence;
- the totality and severity 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 and primarily outcome based;
- the prevalence of the alleged offence within the industry;
- the resources and time required to achieve compliance
- the difficulty and resources expended by Council in investigating and proving the elements of the particular non-compliance;
- the efficiency and cost to Council of the compliance and enforcement option used;

⁶ Officers should utilise Councils “Process for Assessing Risk” Document

⁷ 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)

- is the enforcement action required to achieve the objectives of the Act;
- whether or not the enforcement action would be perceived as counterproductive;
- 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 by Council;
- the existence of any risk to public health and the nature and extent of that risk;
- the extent to which consumers have been defrauded; and
- the need to protect consumers

The applicability of, and weight to be given to, each of the above factors will depend on the circumstances of each case. Officers will make their determination on the level of significance in consultation with Council policies, peer review and supervisor support.

The priority for Council when deciding what if any enforcement or other action to take will always be the public interest.

3.2.1 Graduated and Proportionate Approach to Enforcement

When assessing which (if any) enforcement action to utilise officers should consider exercising a graduated response, which involves taking into account prior history, prior Council enforcement and the knowledge and intent of the food handler. Council action is to be taken commencing with more lenient measures and progress to more severe enforcement responses should non-compliance continue.

However should non-compliance risk public health or have been undertaken with flaunt disregard for regulations it may be more appropriate to consider applying more substantial enforcement action (this action should be proportionate with the non-compliances).

Milder enforcement action could include, verbal warnings, written warnings, seizures increased inspections (leading to greater surveillance and acceptance as Council's role as a regulatory body) where more severe action could include penalty infringement notices (PIN), improvement notices and prohibition notices.

When selecting which enforcement application is applicable to a particular non-compliance, the officer should note the response should be commensurate to the severity of the detected non-compliance. When using this approach and selecting enforcement action to take the enforcement response should provide a balance between sufficient enforcement and still providing incentive to the business to amend the non-compliance(s).

4.0 Application of Compliance and Enforcement Options

Authorised Officers have a wide range of enforcement and regulatory tools (under the Food Act 2003) varying in severity and efficiency which can be used in the event of legislative non-compliances. Council advocates the graduated application of enforcement

measures against food businesses, commencing with less severe measures (e.g. warning letters) but then progressing to more severe measures (e.g. prohibition notices) should lighter measures not get an effective outcome. It should be noted however that there are circumstances where the graduated approach may be inappropriate and more severe action should be undertaken. One such example would be serious legislative breaches encountered and where there is likely to be an imminent threat to food safety. As a result these guidelines should be used with in the general context of a graduated approach with proportionate response to non-compliances.

4.1 Types of Compliance and Enforcement Action

The Compliance and enforcement tools available to Authorised Officers are listed below, they are in a graduated order of severity that will generally reflect the order they are applied by Officers;

- Informal and Internal Mediation and Conciliation
- Verbal advice and/or warnings
- Warning letters
- Penalty Infringement Notice (PINs)
- Seizure action
- Improvement Notice
- Prohibition Order
- Prosecution

4.1.1 Informal and Internal Mediation and Conciliation

Mediation and Conciliation can follow the identification of non-compliance(s), this tool allows the owner/operator an opportunity to explain any mitigating circumstances around non-compliance(s). This also allows for behavioural/cultural change to ensure compliance. This action is usually immediate and undertaken by the Officer at the time of inspection.

4.1.2 Verbal advice and/or warnings

Verbal advice is routinely used by Officers to provide advice on food safety issues and areas of non-compliance to food businesses. Verbal advice/warnings should be given for trivial matters or where there is insufficient evidence. It is important that there is a clear distinction made between legal requirements and general advice. Any advice given should not extend beyond the level of expertise of the Officer.

As verbal warnings are informal (and open to interpretation) there is a risk that any advice/instruction may be forgotten/misinterpreted by either the food business or the Officer. Therefore for any matter requiring compliance a warning letter should be provided to the food business, and retained for Councils records.

4.1.3 Warning Letters

Council issues warning letters to any food business that does not pass a food inspection. When issued, council stipulates the following on the letters

- The date and nature of offence
- The required remedial action
- The timeframe required for compliance
- The next graduated step in enforcement should non-compliance continue

- The contact name and number of the Officer should the food business require clarification

It is mandated that all high risk non-compliances are subjected to follow up inspections/actions (which should occur in an appropriate timeframe) to ensure the required actions have been undertaken.

Should there be further failure to comply with warning letter(s) occur, in most cases the result will be the implementation of more serious enforcement action, e.g. Penalty Infringement Notice(s)

Warning letters may be inappropriate where there a large number of high risk non-compliances identified and alternative enforcement action may be needed to ensure compliance in these situations.

4.1.4 Penalty Infringement Notices (PINs)

A Penalty Infringement Notice(s) (PINs) 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.

PINs allow Authorised Officers a cost efficient method of dealing with minor breaches of food legislation. As a penalty notice can be referred to a court for hearing Authorised Officers must collect evidence that can prove the elements of the alleged offence to the standard required for prosecution. This evidence is to be collated into a file note and stored in accordance with Council's document management system.

PINs should not be used where the penalty is significantly out of proportion to the profit gained by the non-compliance, or where the penalty is not likely to have an impact on the proprietor of a very large food business.

Other serious breaches such as assault of an Authorised Officer, breach of a Prohibition Order, interference with sized items or numerous simultaneous offences can result in PIN(s) being issued however should generally proceed by way of prosecution (due to their severe nature).

A payment of a penalty notice is not an admission of liability and the person is not liable to further proceedings for the alleged offence.

It should be noted that under the Food Regulation Partnership, the NSW Food Authority has the option to publish any PINs that Council issues on the NSW Food Authority's website.

4.1.5 Seizure action

Authorised Officers have powers under the Section 38 of the *Food Act*, to seize food, vehicles, equipment that the Authorised Officer reasonably believes do not comply with a provision of the Act or Regulations, or where there is evidence that an offence has been committed.

It should be noted that the *Food Act*, provides for compensation to be paid to the food business should the grounds for seizure be inadequate. Due to the financial/operational implications to the food business relating to seizure, any seizure must follow Councils internal procedure for seizure(s).

The financial/operational impact of seizure(s) should be considered in the application of any other enforcement action. Any seized goods which are forfeited to the Crown should be destroyed or disposed of in a manner that ensures there can be no allegation of improper conduct or corruption.

4.1.6 Improvement Notices

Improvement Notices are statutory notices which can be issued by Authorised Officers under section 57 of the *Food Act*. An Improvement notice is an order that is issued on a food business that may require, in relation to food premises, food transport vehicles or equipment, cleaning repair, replacement, and relating to the handling of food. The order may also require food to be handled in a specific way or for a specific purpose.

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

An Improvement Notice must be delivered in writing and specify the specific legislative provision to which it relates. The Improvement Notice must specify a finite period for compliance (for each identified breach), for serious issues this time period may be 24 (twenty-four) hours (the minimum permissible timeframe) greater time may be allowed for less serious issues may be considered appropriate by the Authorised Officer.

Council must follow up Improvement Notices as soon as reasonably possible after the date for compliance has lapsed.

4.1.7 Prohibition Order

A Prohibition Order may be issued in two circumstances, where it is necessary to mitigate a serious danger to public health or where an improvement notice has been issued for a serious issue and the business has not addressed the matter in the notice with in the prescribed time period.

A Prohibition Order will take a form that prohibits the handling of food on a 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.

A Brief of evidence sufficient to prove all elements of a prosecution prior to the issue of a Prohibition Notice is standard procedure. A Breach of a Prohibition Notice is a serious matter and will normally result in prosecution.

A Prohibition Order will remain in place until a certificate of clearance is issued following a written request for inspection. An inspection will be undertaken with in 48

(forty-eight) hours of a written request by the proprietor of the food business to Council. If an inspection is not undertaken by Council within the 48 (forty-eight) hour time period a certificate of clearance is deemed to have been granted.

Prohibition Orders are to be approved by the General Manager prior to issue, the General Manager should be privy to the brief of evidence and any other relevant documentation to allow a fair and reasonable decision.

4.1.8 Prosecution

Prosecutions will be reserved for more serious legislative breaches or for matters where less severe enforcement action has not achieved compliance. It should be noted that matters heard in Local Courts cannot attract the full penalties permissible under the *Food Act*.

Where offences have been knowingly committed with intent to defraud or risk injury to customers, or where defendants have previously been convicted in a local court of offences of a similar nature within a reasonable timeframe, consideration should be made to appear before the Supreme Court.

Although the *Food Act* provides that proceedings must be commenced within 6 (six) months relating to samples and 12 (twelve) months for any other matter, all matters should be prepared for hearing as quickly as reasonably possible.

5.0 Cross Jurisdictional Issues

Cases may develop where Council will be required to assist border Councils or the NSW Food Authority, Council should continue to operate within the boundaries of these guidelines.

6.0 Monitoring Compliance

Monitoring compliance with food legislation is a mandatory requirement under the Food Regulation Partnership. Ongoing food inspections assist the team to:

- Determine the level of compliance and trends in areas of non-compliance
- Allow Council to effectively manage and utilise recourses
- Identify what type of, education campaigns or enforcement action may be required
- Assess the effectiveness of its food safety approach and also to identify opportunities for improvement.

The Environment Sustainability and Health Team currently undertakes 2 (two) different types of monitoring food activities and they are:

- **Complaint**
Council receives complaints regarding alleged breaches of food legislation from members of the public, staff within Council, food shop employees and the NSW Food Authority. All alleged breaches are assessed and considered for action in accordance with this Policy, Council procedures and legislation.
- **Regulated Inspection Process**

Council is required to perform routine inspections of high and medium risk food premises. Council is also required to follow up any high risk non-compliances identified during inspections.

7.0 Ethical conduct

Council has a Code of Conduct that is based on the Department of Local Government's Model Code of Conduct for Local Councils in NSW. All compliance decisions must be made in accordance with the appropriate guidelines and to the highest ethical and professional standards. Any approaches to bribe, influence or engage officers in corrupt or unlawful behaviour are reported immediately.

8.0 Review and Evaluation

The Environmental Sustainability and Health Team will review these guidelines on an annual basis.

9.0 Conclusion

These guidelines have no legal status and are not legally binding on Hornsby Shire Council. The guidelines cannot be used to limit the discretion of the Council to take any enforcement action.

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

10.0 Reference Documents:

New South Wales Food Authority, 2006, *Compliance and Enforcement Policy*

The Implementation Sub-Committee Enforcement Policy Working Group, 2008, *Draft National Enforcement Policy*

Hornsby Shire Council, Environmental Health and Protection Team, 2006, *Environment Division Compliance Policy*

Standards Australia 2006, *Compliance Programs*, AS 3806-2006, Standards Australia, viewed January 2009, <http://www.saiglobal.com/online>

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