

Food Act Compliance & Enforcement Policy

PURPOSE

The Department of Health (WA) administers the *Food Act 2008* (the Act). The Shire of Quairading is a designated enforcement agency under the provisions of the Act. The objectives of the Act as defined in Section 3 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.

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 Department of Health (WA) and the Shire are committed to ensuring a high level of compliance with the Act and Regulations.

This Policy sets out the Shire's policy on compliance and enforcement that will facilitate the effective achievement of the regulatory goals of the Act in a manner that is:

- Authorised by law.
- Procedurally fair.
- Accountable and transparent.
- Consistent, and
- Proportionate.

The Policy recognises that most food businesses aim to comply with the law and produce food that is safe and correctly labelled. The compliance and enforcement role of the Shire is to protect consumers from a minority who may not act in the interests of food safety. It is the aim of this Policy to undertake enforcement action only where necessary and to give priority to educating food handlers on maintaining the safety of food products produced or sold within the Shire.

It is important that enforcement options are clearly understood so that action taken against a food handler or food business is within the scope of the law and is appropriate for the given circumstances. This Policy describes the enforcement options available and provides details of the considerations made in determining their application toward achieving the objectives of the Act as well as the principles the Shire will apply in its compliance and enforcement activities.

Breaches of the Act are classified as criminal offences and penalties of up to \$500,000 and/or two years imprisonment can apply. 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 the Shire to take any enforcement action for the purposes of obtaining high standards of food safety.

OBJECTIVE

The objectives of this Policy are:

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

DEFINITIONS

- “Authorised Officer”:** means a person appointed under Part 10, Division 3 of the *Food Act 2008*
- “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.
- “Regulations”:** means the *Food Safety Regulations 2009*
- “the Act”:** means the *Food Act 2008*
- “the Shire”:** means the Shire of Quairading
- “the Policy”:** means the Food Act Compliance & Enforcement Policy

POLICY

1 Compliance & Enforcement Principles

As a regulatory authority the Shire of Quairading will endeavour to:

- Act in the public interest.
- Act consistently, impartially and according to law.
- Promote consistency through effective liaison with field staff and the adherence to policies and procedures.
- Ensure we do not discriminate based on gender, race, religion, sexual orientation, 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 aware of their legal obligations through the widest possible dissemination of information.
- Explain the benefits of compliance to food businesses and discuss specific compliance failures or problems.
- Provide advice on mechanisms that can be used by food businesses to improve compliance.

- Confirm 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 period and ensure that all legal requirements are clearly explained.
- Advise proprietors of their right of appeal as provided by law.
- Provide alleged offenders with an opportunity to discuss the circumstances of their case.
- Seek the support of industry leaders to influence compliance levels.

2 Decision Making Criteria

Each case will be considered individually and the appropriate enforcement action to be taken will be determined on the circumstances of the case. This policy seeks to align with the Prosecution Policy of the Commonwealth ⁽¹⁾. The following issues need to be considered and balanced in deciding 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 the Shire in investigating and proving the elements of the offence or the type of offence.
- The efficiency and cost to the Shire 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 concern to the general public.
- The necessity to maintain public confidence in the enforcement of the 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 Shire of Quairading.

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.

3 Privacy

The Shire must observe the privacy principles set out in the *Freedom of Information Act 1992*. Information relating to compliance and enforcement action will be made available only where consistent with the *Freedom of Information Act 1992* and Section 121 of the Act.

4 Application of Compliance and Enforcement Options

4.1 Types of Compliance and Enforcement Action

The compliance and enforcement options available to Authorised Officers include:

- Verbal Advice and Warnings.
- Written Warnings.
- Improvement Notice.
- Prohibition Order.
- Seizure Powers.
- Penalty Infringement Notice.
- Prosecution.
- Corrective Advertising.
- Injunctions or Injunctive Relief
- Publication of the Names of Offenders.
- Action Against Registration

4.1.1 Verbal Advice and Warnings

Authorised Officers will routinely give advice on compliance to food businesses. This advice will relate to principles of food safety, explaining 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 of a technical nature or where there is insufficient evidence to justify a warning letter.

4.1.2 Written Warnings

Where there is evidence that minor breaches of the Act have occurred, warning letters may be issued at the discretion of the Authorised Officer. Warning letters may be inappropriate where there are many 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
- relevant clauses of the legislation
- the maximum penalty for the offence
- the intention of the Shire 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.

4.1.3 Improvement Notices

Authorised Officers may serve Improvement Notices under Section 63 of the 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 only be used where there is an intention to proceed to a Prohibition Order following non-compliance with that Improvement Notice. An Improvement Notice must:

- Specify the specific legislative provision to which it relates.
- Describe the particular action to be taken.
- State the date by which compliance must be achieved.
- Be served on the proprietor of the food business.

While extension of the date of compliance is at the discretion of the Authorised Officer, extensions of time for compliance will not be granted for matters related to cleaning or food handling without the prior approval of the Chief Executive Officer. 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. A request is to be submitted to the Shire before the date of compliance as indicated in the Notice. Appeals concerning Improvement Notices will be considered by the Chief Executive Officer.

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 65 of the 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.

4.1.4 Prohibition Orders

Prohibition Orders may be issued by an Authorised Officer 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, vehicles or equipment, or that food is not to be handled in a specified way or for a specified purpose.
- May only be issued by the Chief Executive Officer, being a duly authorised delegate under Section 117 of the Act.
- Before issue be accompanied by a brief of evidence sufficient to prove all elements of a prosecution prior to issue.
- 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 Shire. 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.
- Include advice that Section 69 of the Act provides for appeal to the State Administrative Tribunal (SAT) if there is a refusal to issue a Certificate of Clearance.

It should be noted that Section 8 of the Act defines food handling very broadly, including activities such as collecting, transporting, storing or displaying food. Breach of a Prohibition Order will normally result in prosecution. Section 70 of the Act provides for compensation to be paid if there were no grounds for the making of the Prohibition Order.

4.1.5 Seizure Powers

Authorised Officers have power under Section 40 of the 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. The person from whom items have been seized must be informed of their right under Section 57 to appeal within 10 days of the seizure to the Magistrates Court for an order disallowing the seizure.

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 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. Compensation may be paid if there has been no application to a Magistrates Court and no contravention of the Act or Regulations had occurred in relation to the seized items.

4.1.6 Penalty Infringement Notices

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 an Infringement Notice, verbal advice will be given, at that time, to the person allegedly responsible for the alleged offence that an Infringement Notice may be issued.

Prior to an Infringement Notice being issued Authorised Officers must prepare a brief of evidence, which proves 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 Chief Executive Officer for consideration and authorisation for the Infringement Notice to be issued. An Infringement Notice shall:

- Be issued pursuant to Section 126 of the Act.
- Be to the effect that the person to whom it is directed has committed a specified offence.
- Be forwarded by post or hand delivered to the person alleged to have committed the offence.
- Be accompanied by a written advice giving the reasons for issue.
- Provide advice and requirements for the remedying or rectification of the issue/s outlined in the Notice.
- Consider the decision-making criteria outlined in Section 2 before issuing of an Infringement Notice.
- Specify that, if the person does not wish to have the matter dealt with by a court, the person may pay the specified monetary penalty for the offence within a specified time.

Infringement Notices provide a cost effective and efficient method of dealing with offences and will generally be sufficient response to breaches of the Act.

Infringement Notices are not available for serious offences contained in Part 3, Division 1 of the 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.

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.

4.1.7 Prosecution

Prosecution can be commenced with the institution of proceedings in the Magistrates Court. 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 Chief Executive Officer 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 2 will be considered in deciding to prosecute and will be reserved for more serious breaches. While the 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 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 Shire has selected prosecution as the appropriate option, the Shire will not necessarily proceed against all those who may be potentially liable under the legislation.

Prosecutions are eligible for publication by the Department of Health (WA).

4.1.8 Corrective Advertising

The Shire may request court orders for corrective advertising where a person is found guilty of an offence and there is a potential ongoing risk to public health, or where it has been proven that a food has been promoted through advertising, in an inappropriate or intentionally misleading way.

4.1.9 Injunctions or Injunctive relief

The Shire may also seek an injunction or injunctive relief to prevent continuing activity that does not comply with the Food Act, Food Regulations or the Code. In taking such action the Shire should consider the potential for compensation following failure of any subsequent prosecution.

4.1.10 Publication of the Names of Offenders

Where the Shire undertakes a successful prosecution the Department of Health may publicise, within the prescribed timeframe, format and procedure, the details of the conviction. Information on the process is outlined in the WA Food Regulation: Publication of Names of Offenders Policy.

4.1.11 Action Against Registration

The Act requires food businesses to be registered. Operation of a food business without current registration issued by the Shire is an offence.

A food business that fails to comply with regulatory requirements is subject to enforcement action. Registrations can be cancelled under the following circumstances:

- as a result of any annual or other fee not being paid by the date prescribed, or
- as a result of the food business ceasing to be conducted, or
- as the result of a request by the holder of a certificate of business registration.

GUIDELINES

Department of Health – Compliance and Enforcement Guideline for Enforcement Agencies V03

STATUTORY ENVIRONMENT

Food Act 2008 (WA)

Freedom of Information Act 1992

Food Regulations 2009 (WA)

Australia New Zealand Food Standards Code

Record of Policy Review					
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