

ACTIONS FOR FOOD REGULATORS FOR RESPONDING TO NON-COMPLIANCE

There are many enforcement actions available to food regulators that may be used to address legislative non-compliance. The following list of actions offers advice to regulators that can further assist in enhancing consistency in the use of enforcement actions against food businesses. It should be noted that not all of the actions below are available to all jurisdictions.

Table 1 – Actions available to food regulators to respond to non-compliance

| Options for responding to non-compliance ranked in order of graduated severity | | |
|---|------------------|---|
| Responding to non-compliance | Encourage | 1. No action |
| | | 2. Advice a. General Advice b. Compliance Advice |
| | | 3. Warnings a. Verbal Warning b. Written Warning |
| | | 4. Mediation / Enforceable Undertakings a. Mediation b. Enforceable Undertakings |
| | | 5. Publication of the Names of Offenders |
| | Direct | 1. Corrective Action Requests |
| | | 2. Improvement Notices |
| | | 3. Prohibition Orders/Notices of Direction <i>Action on Non-Compliance with a Notice / Order</i> |
| | | 4. Mandated Recall |
| | | 5. Emergency/Compliance Orders |
| | | 6. Privileged Statements |
| | Enforce | 1. Seizure Powers |
| | | 2. Action against Licences, Registrations and Accreditations |
| | | 3. Injunctions |
| | | 4. Expiation or Penalty/Infringement Notices a. Expiations b. Penalty/Infringement Notices |
| | | 5. Prosecutions |
| | | 6. Corrective Advertising |

ENCOURAGE

1. No Action

No action will be taken when, after investigation, no breaches of the legislation are discovered. It may also be appropriate to take no action when:

- The complaint is frivolous, vexatious or trivial in nature;
- The alleged offence is outside a food regulator's area of authority; or
- Taking action may prejudice other major investigations.

Where a decision is made not to take action, the decision and reasons will be recorded.

2. Advice

Action to achieve compliance with legislation may include offering general or written advice. Advice should be presented in a way that businesses may readily determine the difference between general advice and directed compliance advice (i.e. a legal requirement).

2a. General Advice

Food regulators routinely provide food safety advice to food businesses. For many outcome based standards, there may be a range of options to achieve compliance. General advice given by food regulators may outline these options.

2b. Compliance Advice

Food regulators may issue a compliance advice letter in response to non-compliance.

Compliance advice letters advise of the risk of non-compliance, are educative, and will generally include:

- Advice on concerns about possible non-compliance with the law
- Information on ways to achieve compliance; and
- Set out the penalties that can be imposed for breaches of the relevant law.

A compliance advice letter does not substitute independent legal or technical advice.

Food regulators will not ordinarily publicise in the media or in any public report the details of a compliance advice letter or the identity of a letter recipient.

3. Warnings

Action to achieve compliance with legislation may include verbal warnings and requests for action or written warnings. The circumstances in which warnings may be appropriate include:

- The act or omission is not serious enough to warrant more severe action;
- The past history of the individual or entity reasonably suggests that information action will secure compliance;
- Confidence in the individual or entity is high;
- The consequences of non-compliance will not pose a significant risk; or
- Where warnings may prove more effective than a more severe approach.

3a. Verbal Warnings

As verbal warnings are not accompanied by formal notification they 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 and are followed up in writing.

3b. Written Warnings

Food regulators are recommended to use discretion about the issuing of warning letters as opposed to improvement notices. 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 warnings letters detail the following:

- The nature of the offence;
- The relevant legislation and clauses breached;
- The required remedial action;
- The timeframe for implementation of the proposed remedial action; and
- Specify the maximum penalty for the offence and the intention of the agency to enforce the legislation should the business fail to address the detected breach.

Food regulators are required to follow up within a recommended timeframe to ensure the required actions have been undertaken by the business.

Failure to comply with a warning letter will generally result in the implementation of more serious enforcement action, e.g. a penalty notice.

4. Mediation / Enforceable Undertakings

4a. Mediation

Where practical and appropriate, food regulators will make mediation available. Mediation is a possible alternative where, after investigation, an officer determines that the problem does not warrant more serious action and is unlikely to be resolved through warnings or advice. The use of mediation services may also be appropriate where an aggrieved individual has no wish to pursue action to resolve a complaint by legal means.

4b. Enforceable Undertakings

An enforceable undertaking involves an agreement between a business and a food regulator whereby a business undertakes to take a specified action within an agreed timeframe to remedy an alleged breach. The terms of an enforceable undertaking are negotiated between the parties, so that the enforceable undertaking is offered by the non-compliant business back to the regulator.

Key differences between an enforceable undertaking and other actions are that it is negotiated between the parties; includes an admission by the business that it has contravened the law (admission of 'guilt' is not necessarily required but rather an acknowledgement that the regulator believes the business has contravened legislation and this is accepted by the business); and failure to comply generally results in court proceedings.

An enforceable undertaking can be designed to simply achieve compliance rather than apply a penalty or designed to also deliver other outcomes, such as remedying the harm caused by conduct.

5. Publication of the Names of Offenders

Food regulators may wish to publicise details of successful prosecutions. In New South Wales penalty notices for alleged offences are also published. Legislative constraints should be considered prior to a decision to publicise.

DIRECT

1. Correction Action Requests (CARs)

In an audit system, corrective action requests are useful as preliminary steps in the enforcement process. A corrective action request is a request for a business to implement action to eliminate the cause of a detected non-compliance during an audit.

2. Improvement Notices

Improvement notices are statutory notices issued by food regulators upon food businesses that address prescribed issues and have prescribed content.

A food regulator may issue an improvement notice to a food business¹ if it is believed that the business is acting in contravention to the legislation, or to particular instruments associated with the legislation (e.g. not operating in accordance with a food safety management system). Improvement notices should only be issued when it is considered to be an appropriate tool, i.e. capable of providing sufficient incentive to the business to address the matter.

Improvement notices should include the following information:

- Provision(s) of the appropriate legislation that the food regulator reasonably believes is being, or has been, contravened;
- A brief description of how the relevant legislative provision(s) have been or are being breached;
- The particular action that the business should undertake in order to rectify the observed legislative non-compliance;
- Advise the business that it is an offence not to comply with a notice without reasonable cause.

Food regulators will use professional judgement and discretion to assess the variables relating to each matter under consideration, including the reasonableness of the actions required by a notice and the timeframe to comply (e.g. for more serious issues this period is likely to be 24 hours, and for less serious issues, a period considered appropriate by the food regulator, but normally longer than 24 hours) and are encouraged to conduct follow-up inspections at the timeframe nominated in the notice.

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.

¹ It is suggested that improvement notices only be issued to the proprietor of a food business.

3. Prohibition Orders/Notices of Direction

A prohibition order or notice of direction 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/notice of direction 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/infringement notice may also be issued to businesses that have not addressed matters listed in an improvement notice within the prescribed timeframe.

Prohibition orders/notices of direction may be very 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/notice of direction 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 the timeframes specified in the relevant legislation following receipt of a written request for inspection from the proprietor of a food business. A notice of direction will remain in place until the issuing officer lifts the notice.

Action on Non-Compliance with a Notice or Order

Failure to comply with improvement notices, notices of direction or prohibition orders will incur further enforcement action. Where action for a default is provided for by legislation and the necessary work has not been carried out in the time allowed without good reason, food regulators may undertake the required work. Before doing the work food regulators will consider whether there is a realistic prospect that the person responsible will complete the work within a reasonable time. Where work in default is undertaken food regulators will seek to recover all costs over a fair period, using all statutory means available.

4. Mandated Recall

All food businesses engaged in the wholesale supply, manufacture or importation of food in Australia are required to have a food recall plan under Standard 3.2.2, allowing food product that poses a health and/or safety risk to the public to be removed from all areas of the supply chain. Similarly in New Zealand food businesses including importers are required to have recall plans. Recalls can be undertaken voluntarily by the business or mandated by the regulator. Some jurisdictions are also able to mandate recalls for food that is not safe or suitable or if there is doubt about the safety and suitability; and food that is mislabelled or incorrectly identified.

5. Emergency Orders

Relevant authorities have emergency powers to make an order if it is necessary to do so to prevent or reduce the possibility of a serious danger to public health or mitigate the adverse consequences of a serious danger to public health.

6. Privileged Statements

In New Zealand the Chief Executive of the Ministry for Primary Industries has power to make privileged statements for the purpose of protecting human life or public health or informing the public. The statements are protected by qualified privilege.

ENFORCE

1. Seizure Powers

Food regulators generally have legislative seizure powers to seize food, vehicles, equipment, and labelling or advertising materials which the food regulator 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.

Persons from whom items are seized should be provided, at the time of seizure, with a statement that describes the items seized, the reasons for seizing those items, the address where those items will be held, and informed of rights of appeal.

Should subsequent investigation reveal that the business has not contravened the legislation; all seized materials should be returned to the business at the earliest possible convenience.

It should be noted that the legislation will likely provide for compensation to be paid to food businesses for materials (i.e. food, equipment, etc.) which have been seized should the grounds for the making of a seizure be proven to be inadequate.

2. Action against Licences, Registrations or Accreditations (LRoAs)

Many food regulators require food businesses to be registered as a legislative requirement. Where registration is a legislative requirement, operation of nominated food businesses without registration will be an offence.

Actions against a business' registration are likely to have defined legislative procedures and be subject to administrative review. Applications may be refused where the applicant does not satisfy the regulatory authority that they have the necessary capacity, experience or qualifications to safely conduct the activity without risk to public health.

Businesses that fail to comply with LRoA conditions imposed by legislation will be subject to enforcement action. This may involve the imposition of additional conditions upon a business' LRoA to limit or otherwise control their activities or the suspension or cancellation of a business' LRoA. Cancellation is a very serious level of enforcement action as the removal of a business' LRoA, if imposed by legislation as an operating condition for the proprietor, effectively closes the business.

The following circumstances are likely to warrant such action:

- A flagrant breach of the law such that public health has been put at risk;
- The alleged breach is too serious or the risks too great to allow the activity to continue;
- A failure to correct an identified serious problem after having been given reasonable opportunity to do so; or
- Unwillingness on the part of the individual or entity to prevent a recurrence of the problem.

A business found to be non-compliant with LRoA conditions may be asked to 'show cause' why it should not be suspended or cancelled. Failure to respond, or to respond in an adequate manner to a request from a food regulator concerning a food business' LRoA may result in changes to the businesses LRoA conditions, or suspension of the business' LRoA for a set period, or the immediate cancellation of the business' LRoA.

Anyone who operates a food business required by legislation to be LRoA will usually be subject to prosecution if found to be operating while that LRoA is under suspension or cancellation.

Appeals to the food regulator concerning changes to LRoA conditions, suspensions or cancellations will undergo independent internal formal review. Legislation may also provide for an external appeal mechanism.

3. Injunctions or Injunctive Relief

It is also possible for food regulators to seek an injunction or injunctive relief to prevent continuing illegal activity. However, this is an exceptional remedy and only available in the Supreme Court.

4. Expiation or Penalty Notices

4a. Expiation Notices

A person receiving an expiation notice is entitled to elect to be prosecuted for the alleged offence. Hence there must be substantial, reliable and admissible evidence that an identifiable person or organisation has committed the alleged offence. In other words, there must be sufficient evidence to enable a conclusion to be reached that there is a reasonable prospect of being able to prove an offence beyond reasonable doubt.

The following circumstances are likely to warrant an expiation notice:

- Failure to correct an identified problem after having been given reasonable opportunity to do so by an food regulator;
- Failure to comply with the requirements of a notice;
- Confidence in the individual or entity is low;
- A written warning has previously been given to the individual or entity for a similar offence; or
- A flagrant breach of the law such that the public health may be put at risk, albeit not necessarily to the extent to justify prosecution.

4b. Penalty / Infringement Notice

A penalty or infringement notice can be issued to a person that has committed a specific offence against a food regulator's legislation.

Penalty or infringement notices provide food regulators with an efficient method of dealing with specific breaches of food legislation that may otherwise require presentation to a local Court.

As penalty or infringement notices may be referred to a Court for hearing by the person receiving the notice, food regulators are advised to collect sufficient evidence to prove the elements of the alleged offence before issuing penalty or infringement notices. It is suggested that this evidence be appropriately logged and secured as for a prosecution.

Penalty or infringement notices should not be used where the penalty imposed is significantly out of proportion to the profit gained by the business or person through the non-compliance or where the penalty is not likely to have an impact on the proprietor of a very large business. In this instance, another enforcement tool may be more appropriate, e.g. prosecution or the imposition of specific LRoA conditions upon a business.

5. Prosecution

Prosecution will generally be used 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 non-compliance. Where offences are knowingly committed with intent, or where defendants have previously been convicted in a Local Court of offences of a similar nature within a reasonable timeframe, consideration should be given to having matters heard before the Supreme Court.

A prosecution will only proceed where there is a reasonable prospect that an offence can be proven beyond reasonable doubt.

Prosecution is likely to be warranted when any of the following circumstances occur:

- A flagrant breach or disregard of the law such that public health has been put at risk;
- The alleged breach is too serious or the risks too great to be dealt with by means of an expiation or penalty infringement notice;
- A failure to correct an identified serious problem after having been given reasonable opportunity to do so;
- A failure to comply with the requirements of a notice;
- An established and recorded history of similar offences;
- Unwillingness, on the part of the individual or entity, to prevent a recurrence of the problem; or
- The conduct is deliberate, sophisticated, serious or repeated.

Where circumstances warrant a prosecution all relevant evidence and information will be considered to enable a consistent, fair and objective decision to be made.

Before a prosecution is recommended there must be substantial, reliable and admissible evidence that an identifiable person or organisation has committed the offence.

A decision to prosecute must be in the public interest. In considering whether a prosecution is in the public interest, the following additional factors will be considered:

- Whether the offence was premeditated;
- The need to influence the offender's future behaviour;
- The effect on the offender's or witness' physical or mental health, balanced against the seriousness of the offence;
- The availability and efficacy of any alternatives to prosecution;
- The prevalence of the alleged offence and the need for deterrence, both personal and general; or
- The likely length, expense and outcome of a trial.

6. Corrective Advertising

Requests may be made for Court orders for corrective advertising should a person be found guilty of an offence where there is 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.