

SUBMISSION TO PRODUCTIVITY COMMISSION
IN RELATION TO THE STUDY
PERFORMANCE BENCHMARKING OF
AUSTRALIAN BUSINESS REGULATION: FOOD SAFETY

Issue 1 – *Has the cost of complying with food safety regulation changed significantly since 30 June 2008? If so, please provide details of the changes you have observed (including any factors you consider contributed to the change).*

There are numerous factors that contribute to the cost of compliance with food safety regulation. One of these factors is the licensing requirement imposed by food safety regulators and associated fees.

The NSW Food Authority (the Authority) recently completed a review of its licensing structure (see also comments under Issue 9) and it now uses the national food safety risk profiling framework (RPF) to classify the risk priority of NSW food businesses.

Classifications are:

Priority 1 (P1) – highest risk

Priority 2 (P2)

Priority 3 (P3)

Priority 4 (P4) – lowest risk

In terms of the Authority's licence holders this means that their priority classification impacts on their audit frequency. In short, P1 classified food businesses will receive audits more frequently than P2 food businesses and it should be noted that licence holders mainly fall within category P1 and P2, with some P3 classifications.

Furthermore, the audit regime adopted by the Authority allows good performers to further reduce their audit frequency, resulting in further savings in terms of administrative burden and costs.

Local Councils in NSW also use the RPF to classify food businesses within their area that are not licensed with the Authority. The Authority has provided guidance to councils by preparing suggested priority classifications for each type of non-licensed food business, with the understanding that each food business will need to be classified on a case to case basis and in accordance with its individual circumstances.

Issue 2 – *Is there any other regulation related to food safety that should be covered in this benchmarking study? If so, please provide details.*

In its dealings with food businesses, the Authority often receives questions in relation to food industry quality assurance audits and why the results of the audits conducted by government

regulators cannot be used by customers such as major food retailers in relation to a supplier's food safety performance.

It is clear that a large proportion of the audit burden for the food industry is not related to legislated requirements (Acts and Regulations), but rather to industry-imposed quality assurance programs which have a different scope than food safety compliance audits. The quality assurance programs tend to focus more on individual customer and consumer requirements, with varying levels of attention placed on regulatory food safety requirements. This often leads to audit duplication because major food retailers and other entities do not wish to share audit data with potential market competitors.

Although industry-imposed quality assurance audits and their associated burden are not part of the scope of the current study, it might be useful to gain some insight into the extent of the additional burden imposed by these programs.

It should also be noted that at a national level, through ISC, work is underway to implement a National Audit Policy, which includes auditor accreditation provisions to facilitate third-party audit arrangements. A third-party option for regulatory compliance audits can enable food businesses to combine quality assurance program audits with compliance audits and contract appropriately trained and accredited third-party auditors to conduct both types of audit during a single visit, resulting in a decrease in the number of audits required and the associated cost.

In NSW, the Authority has decided to implement a third-party audit option, as outlined under Issue 7.

Issue 3 – *Of those food safety regulations imposing a cost on your business, which do you consider could be improved while still meeting regulatory objectives?*

In NSW, in addition to the Food Act 2003, Food Regulation 2004 sets out controls for food safety for meat, dairy, seafood and plant products businesses and businesses preparing food for vulnerable persons in NSW.

Due to the NSW Government's automatic repeal process, which ensures regulations are maintained and updated every five years, the NSW Food Regulation 2004 is currently being reviewed with a view to remaking it later this year.

As part of the remake process, the Authority is preparing a Regulatory Impact Statement (RIS) that includes a cost benefit analysis. Although the RIS is not yet finalised, this very recent analysis does show that the proposed Regulation is justified in accordance with minimum effective regulation principles.

Once the RIS is finalised (anticipated release date 1 August 2009), a copy can be provided to the Commission if required.

The remake process has also resulted in significant streamlining of the Authority's licence categories, especially for the meat industry which, as a result of inherited structures from Authority predecessor organisations, previously had a large number of licence categories resulting in a greater administrative burden. Due to the streamlining the number of licence categories has been greatly reduced.

Furthermore, the Authority's fee structure has been reviewed, which has resulted in greater equity and consistency across the different industry sectors regulated by the Authority (See issue 9).

Issue 4 – *In conducting your business, do you face additional costs because of differences in regulations between local councils, or the Australian states and territories, or between Australian jurisdictions and New Zealand? What are those differences and what effect do these differences have on the costs you incur in complying with them? Do these differences create any other issues for your business?*

It is obvious that having to deal with a number of different regulators would contribute to an increased cost for compliance with food safety regulation.

This was one of the reasons why New South Wales integrated its food regulatory agencies and programs over a six-year period, culminating with the establishment of the NSW Food Authority in April 2004. As Australia's first completely integrated or "through-chain" food regulation agency, the Authority is responsible for food safety in NSW across the food industry, from primary production to point-of-sale.

The overall rationale was that a single agency with through-chain responsibility could provide a more streamlined, consistent and efficient approach to food regulation in NSW and a single point of contact for both the industry and public. The potential benefits are summarised in the following table.

Targeted resource allocation
<ul style="list-style-type: none"> • resource allocation (both industry and government) commensurate with risk and agreed public health goals • reduced duplication and complete coverage • swift and flexible response to changing circumstances e.g. emerging risks, shifts in relative risk, changes to enforcement priorities
Consistency of approach
<ul style="list-style-type: none"> • consistent approach to risk assessment and risk management, including balance between prevention and enforcement activities) • common operational policies and procedures (licensing, audit and inspection, sanctions and penalties) • consistent interpretation of standards and other legal requirements • standardised cost recovery arrangements • management of boundaries with other NSW agencies, local government, and cross-border issues
Effective and efficient resource utilisation
<ul style="list-style-type: none"> • pooling of specialised human resources (risk analysis, policy and program development) • better planning and delivery of regulatory services to rural and regional areas • skill transfer between staff from both agencies (e.g. preventive programs; enforcement programs) • focus on core business of food regulation
Single NSW Government interface with industry, consumers and other stakeholders
<ul style="list-style-type: none"> • single point of contact for food businesses and consumers • greater transparency and accountability • common approach to management of key stakeholder relationships, including expert advisers

The Authority has now been in operation for five years and has begun to realise a number of the anticipated benefits. Examples which may be relevant to the Review include:

- developing a risk profiling methodology (known as the Priority Classification System – PCS) to allocate the State's 55,000 food businesses into four priority categories based on food safety risk;
- using the PCS to identify excessive inherited regulatory requirements in low-risk industries and transition to requirements commensurate with risk;
- using the PCS to allocate regulatory responsibility between the Authority and local councils as part of the NSW Food Regulation Partnership;
- consolidating Food Safety Scheme regulations covering a range of industries into a single regulation with standardised core provisions;
- introducing a single Authority licence so that a food business need hold only one licence covering all activities, premises and/or vehicles requiring licence permission;
- standardising service fees and charges and standardising licence fees;
- cross-skilling of Authority audit staff so that there is no duplication of regulatory audits/inspections which can occur in other jurisdictions where multiple commodity food businesses are regulated by several agencies;
- developing standardised policies and procedures for all enforcement and complaint handling activities, including activities by local councils;
- implementing a HelpLine to deal efficiently and effectively with all enquiries and complaints to the Authority;
- developing a comprehensive website which will provide a platform for electronic service delivery to food businesses; and
- implementing an Industry Communication Program which complements the work of the industry consultative committees associated with the Authority's Food Safety Schemes.

A number of other Australian jurisdictions have taken steps to streamline or consolidate food regulatory arrangements, although none has indicated an intention to consider moving to a single agency model.

The Authority recognises that administrative arrangements for implementation/enforcement of food regulation will be determined by a range of considerations within each jurisdiction. Furthermore, the NSW approach may not suit the circumstances in other jurisdictions. Nevertheless, the Authority considers that rationalisation of food regulatory agencies was correctly identified by the 1998 Blair Review as a potentially powerful strategy to streamline the food regulatory system and drive consistency, in turn contributing to easing the regulatory burden on food businesses. The successful establishment of through-chain agencies in both NSW and New Zealand since Blair suggests that it may be appropriate to reconsider the role of structural integration in this context.

In addition to the jurisdiction-specific benefits such as those outlined above, it seems likely that key inter-jurisdictional processes, in particular the work of the Implementation Sub-Committee (ISC) on consistent implementation and enforcement, could deliver results more effectively and quickly if fewer agencies shared responsibility for food regulation. This would again ultimately benefit the food industry and help ease their burden.

NSW has also undertaken substantial work to ensure consistency between local councils within NSW, as outlined under Issue 14.

Issue 5 – *What are the main government agencies and regulators with whom you interact regarding food safety matters?*

Within NSW, the Authority has Memoranda of Understanding in place with the Department of Primary Industries and with NSW Health in relation to food safety matters. From time to time it also liaises with the NSW Department of Commerce – Office of Fair Trading and the NSW Department of Environment and Climate Change on food safety matters.

Outside of NSW, the Authority deals with Federal, State and Territory Health and Primary Industries Departments, Primary Production Authorities, Food Standards Australia New Zealand, and the Australian Quarantine and Inspection Service.

The Authority also enjoys a close working relationship with the New Zealand Food Safety Authority (NZFSA). The relationship was formalized by way of a Memorandum of Understanding in September 2006 to boost cooperation on a range of food safety and regulatory issues. Areas of collaboration include policy development, standards and systems, incident response, science, communications, local government operations, and compliance and enforcement. The MOU provides not only for the sharing of information but also the generation of information to the mutual benefit of both agencies.

Issue 6 – *What government agencies and regulators do you think should be examined in the benchmarking study? Why?*

State and Territory Health and Primary Industries Departments, Primary Production Authorities in relation to domestic implementation of food regulation and AQIS for export requirements and the imported food inspection program. A review of these agencies and regulators collectively should provide a good coverage of food regulation through-chain.

Given New Zealand's role in Trans Tasman food regulatory arrangements and NZFSA participation in the work of ISC, it would be useful to include NZFSA in the benchmarking study.

Issue 7 – *Are there food safety regulation services that have been contracted out to private service providers that should be covered by this study? Why?*

In NSW, work on a new Regulation that would allow certain food businesses to use a third party auditor for their compliance audit is well underway.

Although the Regulation has not yet been finalised, the Authority in this context recognises third party auditing as one approach which can reduce costs to some businesses without compromising regulatory objectives, provided there is an appropriate system for approving auditors and a verification program.

For a number of years, and through its statutory consultative committees, the Authority has consulted with the food industry on ways to reduce regulatory burden. It was identified that enabling food businesses to use approved auditors already contracted to undertake industry quality assurance program audits to conduct Authority compliance audits would significantly reduce the compliance burden in terms of the number of audits they are subject to each year and total audit costs. The proposed Regulation would make this possible.

Issue 8 – *Are there any particular aspects of the food production chain on which the Commission should focus its benchmarking of food safety regulations? Why?*

Most recent reviews in relation to food regulation have tended to focus on food businesses operating in the areas of highest risk. As a result, a wealth of information is available in relation to this area, primarily concerning inconsistencies.

To complement the picture, it would be useful to map out the differences in regulatory burdens between food businesses operating in low and medium risk sectors of the food industry and those in the highest risk sectors.

Issue 9 – *Food safety regulation may have different impacts on businesses operating in the same industry. For example, certain regulation may impose greater relative costs on a small business compared to a large business. Where a regulation has different impacts on businesses operating in the same industry, please provide details of the specific regulation and the differing impacts it has on business.*

The Authority recently completed a review of its licence fee structure, which addresses the issue of business size in terms of greater relative costs to smaller businesses.

In NSW, the food industry funds direct regulatory activity through licence fees and charges for audits and inspections. Regulatory activities underpin the paramount purpose of the Authority which is to ensure that food produced in NSW is safe, suitable and correctly labelled. Licence and audit systems also provide insurance from the potential damage to the food industry by rogue operators as well as industry intelligence and an emergency capacity in times of crisis.

The current structure of licence fees reflects the arrangements of earlier commodity-based primary production regulators. Inconsistent licence fees between industries represent an inequitable sharing of the cost of food regulation. As a result, the fees charged for regulatory activities do not maximise equity or efficiency.

The Authority's move away from commodity sector-based service delivery to a function-based approach to service delivery over a wider base of services has provided the opportunity to cost, allocate and deliver services more consistently on the basis of food safety risks and industry capacity.

The Authority has developed a new fee structure (to be implemented through the remade Food Regulation), whereby fees are determined by the type of activity conducted and the size of the food business. Risk priority is factored in by recognising that different operations (food transporters relative to premises) have differences in terms of attention from the Authority. The size of the business is determined by the number of full-time equivalent (FTE) food handlers that participate in food production, processing or preparation. The new model is transparent, practical, and consistent, meets equity and industry structure considerations and does not establish barriers to entry.

Issue 10 – *What is the impact on business of Australian jurisdictions using their discretion in implementing Annex B of the Model Food Act (which relates to the administration and enforcement of food safety regulation)?*

Variations in Annex B are to accommodate variations in administration generally between jurisdictions. Variations to Annex B will have to be read in the context of a particular jurisdiction's administrative structure. For NSW, additions to Annex B are to facilitate the continued operation of food safety schemes and to achieve a through-chain approach to food safety, to the benefit of industry, government and consumers. See also issue 4.

Issue 11 – *What are the differences in the fees charged to business by regulators? What are the differences in the administrative costs borne by the regulators?*

N/A

Issue 12 – *Which of the indicators in Box 6 are the most relevant to the effectiveness of a food safety regulator? Are there any other measures that would indicate the effectiveness of regulators or the burdens their actions may cause?*

The effectiveness of a food safety regulator cannot be measured by any one of the suggested indicators in Box 6 in isolation; all of these indicators are relevant.

The combination of the indicators would provide some insight in the effectiveness of a food safety regulator and in addition (although more difficult to measure), information on foodborne illness trends, as well as food recalls statistics would complement the picture.

Issue 13 – *The Commission seeks comments from participants on the incidence of non-compliance or partial compliance (by business) with food safety regulation, as well of the incidence of non-enforcement or partial enforcement by regulators.*

See attachment 1.

Issue 14 – *Among other matters, the Commission is also interested in examples of:*

- *differences in the interpretation of regulatory requirements – by the one regulator (for example, different opinions from inspectors from the same regulator on common issues) or across regulators*
- *the efficacy, consistency, timing and frequency of food safety inspections, and audits of food safety plans and programs*
- *the approach of regulators to enforcement activities*

Differences in the interpretation of regulatory requirements – by the one regulator (for example, different opinions from inspectors from the same regulator on common issues) or across regulators

In NSW, through the establishment of the Food Regulation Partnership, industry representatives report that greater consistency between local councils and between local councils and the Authority now exists when compared to the situation prior to the Food Regulation Partnership being implemented.

The Food Regulation Partnership operates under the NSW Food Act and defines roles for each of the 152 councils in NSW. The legislation also provides a mechanism whereby councils can recover costs and monetary amounts for cost recovery have been set, ensuring consistency in fees and charges.

In addition, the Authority has set up a Local Government Unit, specifically tasked with assisting local councils and promoting consistency, ultimately benefiting food businesses dealing with multiple councils in the state. The Unit has also developed guidelines for councils in relation to its food regulation activities and pro forma documents and templates have been drafted.

The efficacy, consistency, timing and frequency of food safety inspections, and audits of food safety plans and programs

The NSW Food Authority uses the national food safety risk profiling framework to classify the risk priority of NSW food businesses. This provides a guide to assist the Authority and local government in determining the audit/inspection frequency for food businesses. Food businesses engaged in low/medium risk food operations have less frequent audits or inspections with frequencies increased commensurate with the risk of the food operations. Furthermore the Authority is introducing a revised audit frequency whereby good performing food businesses will have the opportunity to have a substantially reduced frequency if they maintain an "A" rating at audit time.

Additionally a lot of work has also been put into the development of audit checklists to assist in the consistency of regulatory auditors. These checklists are also provided to the relevant industry so that they are aware of the areas they will be audited against and how that area is scored. This has substantially improved feedback from food businesses on interpretation and consistency issues with regulatory auditors to the level where the Authority receives very little negative feedback concerning audit outcomes.

The Authority, with the Food Regulation Partnership, is developing inspection procedures and checklists for use by local government to address issues raised by industry in respect of consistency by Local Council EHO's.

The approach of regulators to enforcement activities

Within NSW, the development of the Compliance and Enforcement Policy, which is used by the Authority and Local Councils, assists with achieving consistency of approach when it comes to enforcement activities.

In terms of uniformity of enforcement activities between jurisdictions, the Authority considers that the Implementation Sub Committee's (ISC) *Strategy for Consistent Implementation of Food Regulation* provides a sound strategic and operational framework for cooperative action to achieve national consistency.

Achievements to date include:

- completion of the national food safety audit framework
- development of a rolling 3-year National Coordinated Survey Plan for food surveillance and monitoring;
- development of a National Food Incident Response Protocol;

- development of a draft National Enforcement Policy, with specific suggestions relating to the enforcement of the upcoming fortification with folate and iodine standards;
- development of systems needed to support ISC's role as "Health Claims watchdog" to facilitate consistent enforcement of the forthcoming Nutrition Health and Related Claims Standard and monitor jurisdictions' action in response to complaints; and
- convening of a workshop attended by representatives of all States and Territories, New Zealand, and peak local government associations from both Australia and New Zealand, which scoped the key issues related to effective coordination of the local government role in food regulation.

Despite ISC's success to date in formulating a national/Trans Tasman strategy and progressing its workplan, progress is slow.

In four of the eight component areas of the strategy, work has not progressed beyond information sharing and scoping, namely:

- Local government coordination (4);
- Food industry support and education (6);
- Consumer education (7); and
- Reporting (8).

It is widely accepted that there are three main reasons why progress is slow:

1. The plethora of agencies involved in implementation and enforcement, many of which are not directly represented on ISC;
2. Limited capacity of smaller jurisdictions to participate across the full range of ISC's work; and
3. Resource limitations overall, with most work being undertaken by working groups of officials, many of them senior, with full time responsibilities in their agencies.

Little can be done in the short or medium term to address (1) and (2). It should be noted that ISC itself has recently taken several steps to enhance its effectiveness:

- appointed jurisdiction "sponsors" for each strategy component responsible for coordinating activities within that component and reporting on progress to ISC;
- instituted an annual planning process to develop a realistic and prioritised annual workplan; and
- established a project pool of \$120 000, refreshed annually, to enable ad hoc consultant or project officer support to be provided to projects where appropriate.

The Authority considers that the only realistic means to accelerate the ISC process is to provide additional resources. If this were to be considered, three issues need to be determined:

1. the nature and extent of the resources that would most effectively accelerate key priorities;
2. how those resources would be funded; and
3. prioritising use of the resources and ensuring they are used effectively and accountably.

The Authority's view is that a team of project officers of varying seniority (perhaps 4-5 officers), with administrative support, may be the most effective resource. Alternatively, a

smaller project team, with additional funding for short term contractors or consultants, could be considered.

If the Commission is interested in exploring the possibility of accelerating the ISC process, which would ultimately result in reducing the regulatory burden for food businesses, the Authority suggests that direct consultation with the ISC Chair (perhaps a discussion session which might include some of the ISC sponsors) would assist consideration of the first and third issues above.

The Authority also notes that ISC is required to provide its workplan and project pool allocations to FRSC and reports on progress to each FRSC meeting.

In relation to the second issue, the Authority believes, for reasons of both principle and pragmatism, that the Australian Government should fund the additional resources – probably for a set period and subject to evaluation. Most of the FRA infrastructure has been provided without additional resources. In addition to senior representation at FRMC, FRSC and ISC meetings, jurisdictions participate in a very large number of working groups and committees which are the key means by which the policies, procedures and processes required by the FRA agenda – including national consistency – are developed. The system is stretched to the maximum.

It is unrealistic to expect that ISC agencies can provide additional in-kind support to the ISC process, in addition to the substantial resources already being provided.

Issue 15 – *Wherever possible in this study, the Commission will use existing data sources on both the burdens arising from food safety regulations and food safety outcomes. Which existing studies or sources of data would you consider suitable for use in this study?*

- Blair Review – 1998
- COAG SOWG report in response to Blair - 2000
- National Risk Validation Project –2002
- *The Annual Cost of Foodborne Illness in Australia* – 2006 (Australian Government Department of Health and Ageing)
- Regulatory Impact Statement, Food Regulation 2009, A proposed regulation under the Food Act 2003 (NSW – anticipated release date August 2009)

Attached:

- Summary report of NSW enforcement agencies' activities - Food retail and food service sector for the period 1 July to 31 December 2008
- Regulatory Impact Statement - Subordinate Legislation Act 1989, Food Amendment (Vulnerable Persons Food Safety Scheme) Regulation 2008
- The NSW Food Authority Plant Products Food Safety Scheme - An Initial Benchmark Study (poster)
- NSW domestic red meat abattoir evaluation - Final report
- Evaluations undertaken to support the Food Regulation remake process (Note that these Evaluations have not yet been publicly released. Anticipated release date June 2009)

Issue 16 – *To ensure the study includes the most significant burdens on business, the Commission invites participants to provide details of the 10 obligations arising from food safety regulation that, in their experience are the most burdensome. The Commission would welcome any information participants can supply on the size/costs of their 'top 10' burdens.*

N/A

Issue 13 – *The Commission seeks comments from participants on the incidence of non-compliance or partial compliance (by business) with food safety regulation, as well of the incidence of non-enforcement or partial enforcement by regulators.*

NSW FOOD AUTHORITY 2007-08 COMPLIANCE AND ENFORCEMENT STATISTICS

Activity	2006-07	2007-08	% change from 06-07	Comment
Audits	6139	5956	Down 2.3%	As a result of applying the risk profiling framework and rewarding good performers, the audit frequency for certain food businesses decreased, whilst other food businesses changed from an audit to an inspection regime
Failed audits	556 (9% of total audits)	814 (13% of total audits)	Up 4%	New industries have come on board, some compliance issues experienced with butcher shops
Inspections	2257	2454	Up 8.7%	See comment under Audits (certain food businesses have been moved from audit to inspection regime)
Failed inspections	106	108	Up 1.2%	
Investigations of unlicensed premises	86	87	Up 1%	As a result of the Food Regulation Partnership, many complaints are now investigated by Local Councils
Complaint investigations	3847	2897	Down 24.7%	
Investigations of foodborne disease incidents (single case)	551	553	Up 0.3%	
Investigations of foodborne disease incidents (involving two or more people)	430	358	Down 16%	This could be interpreted as an indicator that overall compliance has improved
Investigations of food labelling complaints	339	324	Down 4.5%	The Authority has undertaken targeted communication to improve labelling requirements awareness
Improvement notices	739	1245	Up 31.6%	The Authority's Compliance and Enforcement Policy now encourages the use of minimum effective enforcement tools (rather than completely failing an audit)
Prohibition orders	16	17	Up 6%	See comment under Improvement Notices (minimum effective enforcement)
Written warnings	252	252	No change	
Licence cancellations	0	1		
Prosecutions	70 (against 16 defendants)	58 (against 7 defendants)	Down 17%	See comment under Improvement Notices, penalty notices are now used more frequently in lieu of prosecution and failing audits
Penalty notices	183	229	Up 25.1%	
Voluntary food recalls (nationwide)	84	53	Down 38%	This could be interpreted as an indicator that overall compliance has improved
Voluntary food recalls (NSW manufacturers)	34	19	Down 45%	This could be interpreted as an indicator that overall compliance has improved
Shellfish harvest area openings	451	816	Up 55%	Shellfish harvest area openings and closures are linked to rainfall
Shellfish harvest area closures	519	844	Up 61%	

