OFFICE OF
REGULATION REVIEW
INDUSTRY COMMISSION

# Enforcing Australia's food laws

A survey and discussion of the practices of Australian food regulation enforcement agencies

**INFORMATION PAPER**
**NOVEMBER 1995**
**CANBERRA**

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ISBN 0 64223557 0

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# ABBREVIATIONS

| | |
|---|---|
| AIEH | Australian Institute of Environmental Health |
| AQIS | Australian Quarantine and Inspection Service |
| BRRU | Business Regulation Review Unit |
| EHO | environmental health officer |
| EPA | Environment Protection Agency |
| FAO | Food and Agricultural Organisation |
| HACCP | Hazard Analysis Critical Control Points |
| IFIP | Imported Food Inspection Program |
| JECFA | Joint FAO/WHO Expert Committee on Food Additives |
| NFA | National Food Authority |
| NHMRC | National Health and Medical Research Council |
| ORR | Office of Regulation Review |
| PHU | Public Health Unit |
| SEINS | self-enforcing infringement notice system |
| TAFE | Technical and Further Education |
| WHO | World Health Organisation |

# INTRODUCTION

Food and its safety are extensively regulated. Regulations cover how, where, when and/or by whom food can be grown, transported, stored, processed, packaged, prepared, displayed, sold, consumed and disposed of.

In recent times, food regulation has been subject to significant scrutiny and reform at the national level. Reflecting problems under previous systems, there has been increased cooperation between the Commonwealth and the various State and Territory governments. This has manifested itself most obviously in the establishment and operation of the National Food Authority (NFA).

But there has been less action at the national level regarding the 'enforcement '[1] of food regulations. The Commonwealth Government has expanded the surveillance of imported food and there has been some centralisation of enforcement tasks to the Australian Quarantine Inspection Service (AQIS). However, there has been no reform to mirror the changes in regulation-making arrangements which are the responsibility of the NFA.

There has been more scrutiny and/or change at the State and Territory level. For example, NSW has moved to a regional health unit structure, local government amalgamations in Victoria are causing changes there, the Queensland Department of Health has recently reviewed its food act, part of which deals with enforcement provisions, and aspects of the South Australian approach are being rethought. Not all of these changes have received universal approval from those involved in enforcing food laws and, in some cases, the changes have yet to fully work their way through the system.

Meanwhile, food inspectors at the local government level have been faced with fundamental pressures to modify their approaches to enforcement. There have been changes in institutional boundaries in some States, a reduction or abolition of prescriptive regulations in others, greater emphasis on self-regulation, industry competitiveness and quality management systems, changes in technology, and cut-backs in resources for enforcement in many areas. These changes have necessitated greater sophistication in dealing with food safety issues or, at least, a refinement of traditional approaches.

Against this background, it is timely to examine the enforcement of food regulation throughout Australia.

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1 Broadly defined, enforcement is a process or series of actions to promote adherence to the law. It is a means by which compliance with regulations can be encouraged and, to some extent, achieved. It can provide the regulated party with the necessary incentives and facilities (including knowledge) to modify behaviour to reduce socially damaging activity.

The Office of Regulation Review (ORR)[2] has been involved with food regulation issues for some time. Its predecessor, the Business Regulation Review Unit, released reports on the packaging and labelling of food products and food safety regulations generally.[3] The ORR's parent body, the Industry Commission (formerly the Industries Assistance Commission), has conducted inquiries into food processing, horticulture, the sugar and dairy industries, and meat processing, and it is currently undertaking an inquiry into product labelling issues.[4] The ORR itself has had input into the NFA policy review and commented on progress in food policy reform across a range of issues, including national uniformity and mutual recognition, cost-recovery arrangements for the NFA, country-of-origin labelling, and imported food inspection arrangements. The ORR will also shortly assume responsibility for advising the National Food Standards Council on national regulation review requirements relating to food standards.

In November 1994, the ORR, with the cooperation of the NFA and State food agencies, commenced a project to examine current approaches to the enforcement of domestic food regulations in Australia.

In undertaking the project, the ORR sought information from a variety of sources. It surveyed some 82 agencies at the local, State and Commonwealth level, receiving 57 responses. It visited several rural, metropolitan, regional and State agencies in Victoria, NSW, South Australia and the ACT. During these visits, it toured a number of food retail and manufacturing premises to gain a better understanding of the issues entailed. It held discussions with the NFA and the Australian Institute of Environmental Health (AIEH). It also made interim presentations of the project results to meetings of State/Territory Senior Food Officers and the NFA Advisory

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2 The ORR (located in the Industry Commission) is a government agency responsible for advising on the Commonwealth's regulation review program. The unit has expertise in microeconomics, law and regulatory design. As well as providing technical advice to Cabinet on specific regulatory proposals, the ORR undertakes research and comments publicly on a range of regulatory issues.

3 BRRU, *Packaging and labelling of food products*, Discussion Paper, December 1986.

— *Australian Food Standards Regulations*, Discussion Paper, September 1987.

— & Victoria BRRU, *Food regulation in Australia*, Discussion Paper, November 1988.

4 Industries Assistance Commission, *Food processing and beverages industries*, Report No. 424, December 1989.

Industry Commission, *Statutory marketing arrangements for primary products*, Report No. 10, March 1991.

— *Australian dairy industry*, Report No. 14, November 1991.

— *The Australian sugar industry,* Report No. 19, March 1992.

— *Horticulture,* Report No. 29, February 1993.

— *Meat processing*, Report No. 38, April 1994.

— *Packaging and labelling*, Draft Report, October 1995.

Council — comprising senior Commonwealth, State and Territory food policy officials — and received feedback from those groups. And it circulated a number of drafts of this paper to agencies participating in the project (listed in Section C3) to gain feedback and further information.

To define the boundaries of the exercise, the ORR focussed on the enforcement of regulations applying to food supplied to the domestic market, and concerning issues such as food safety and/or consumer protection. Included under this approach are those food matters which fall under the ambit of State/Territory health departments and the NFA. The approach also allows coverage of the imported food inspection program, although the program itself was not examined in any depth. Excluded are those sector-specific regulations which fall under the ambit of primary industry departments at the State/Territory or Commonwealth levels .[5] Also excluded is the enforcement of food export regulations.

In this paper, the ORR documents and comments on the information received. The paper seeks to illustrate not only the objectives and formal procedures established by the different agencies but also the practical experiences of food inspectors. Beyond that, the paper discusses the policy implications which arise from this information. However, the paper does not seek to compare the food enforcement systems in different jurisdictions, nor to recommend or prescribe one 'ideal' approach to food enforcement in Australia. Rather, it aims to describe present practices, highlight and discuss key issues, and point to possible directions for reform.

The paper is divided into three parts:

- Part A provides an overview of the survey results and a discussion of the policy issues which arise from them;
- Part B sets out in detail the agencies' responses to the survey questions; and
- Part C contains appendix material, including a detailed description of AQIS arrangements, and of State and Territory institutional arrangements for food law enforcement.

5 The various departments of primary industry at State/Territory and Commonwealth levels make Acts dealing with specific food-related industries. An example is the *Commonwealth Dairy Produce Act 1986*. A number of these Acts also establish authorities which may also make regulations. The Commonwealth *Meat and Livestock Industry Act 1995* is an example. It provides for, and gives regulation-making power to, the Australian Meat and Live-stock Corporation. These Acts, and the enforcement of regulations made under them, are not specifically covered in this paper.

# PART A:
# OVERVIEW AND POLICY ISSUES

# A1 INSTITUTIONAL ARRANGEMENTS

As part of the survey, the ORR sought information and views on the current institutional arrangements both for the making and enforcing of domestic food regulations in Australia. An outline of these arrangements is presented in Sections A1.1–2. Policy issues relating to the current allocation of responsibilities for food regulation and enforcement within Australia's multi-tiered system of government are discussed in Section A1.3.

## A1.1 Regulation-making

Regulations affecting the manufacturing, preparation and sale of food for Australia are promulgated by all three levels of government.

At the national level, draft standards relating to food composition, ingredients, additives, labelling and advertising are developed by the NFA. This body was established as a result of a 1991 agreement between the Commonwealth, States and Territories to adopt nationally uniform food standards. The NFA's draft standards are considered by the National Food Standards Council — which comprises Commonwealth, State and Territory Health Ministers — and, if passed, these standards are embodied in the Australian Food Standards Code and automatically adopted by reference into State and Territory legislation.

As well as adopting the national standards, the States and Territories also make hygiene, packaging and other environmental regulation. There are differences in these State regulations. For example, in Victoria there are no specific regulations setting down temperature requirements for food storage; South Australian regulations require only that food be stored at temperatures that "as far as practical preserve it from deterioration"; whilst regulations in other States specify exact maximum and minimum temperature requirements for cold and hot food storage, albeit with different maxima for cold storage in different states.

Most local government agencies also enact by-laws covering the processing and handling of food for sale. Further, food premises are subject to Local Government Acts and ordinances made under those Acts, particularly building ordinances. As with State and Territory regulations, there are differences in the ordinances made by different councils.

## A1.2 Enforcement

The enforcement of food regulation in Australia remains, for the most part, a prerogative of the States and Territories. Constitutionally, laws relating to food form part of State law. Each State and Territory has a slightly different system of enforcement but all rely on local governments to some degree. A detailed description of the approach taken in each State and Territory is provided in Part C1.

While the States' systems all differ in detail, three models can be discerned:

- *the mixed State-local model:* under this approach, the central State department has responsibility for some food law enforcement functions, such as undertaking and/or coordinating food sampling, whilst other functions are devolved to local agencies. Examples include Western Australia, South Australia and Tasmania.
- *the mixed regional-local model:* this is the same as the mixed State-local model except that certain functions are performed by regional health units rather than by a central agency. These regional health units assist in coordinating the councils below them. This model is followed in NSW and Queensland.
- *the decentralised local model:* under this model, all enforcement is undertaken by local government agencies. This model applies in Victoria.

The Territories do not fit into any of these models. The ACT operates under a fully *centralised model,* but this is an inevitable result of the fact that, apart from the Commonwealth Government, there is only one level of government in this compact jurisdiction. The Northern Territory operates under a *regional* model. All enforcement functions are undertaken by the seven district offices of the Territory Health Department except in one district, Alice Springs, where all functions have been devolved to the local council.

At the local government level, most councils have an environmental health section responsible for various matters of which food safety is just one. In smaller councils, these sections tend not to have a formal internal structure. For larger councils, however, the environmental health sections functions may be broken into units: by subject, task, or geography. For example, Adelaide City Council's environmental health section has a food cell as well as a liquor cell, a vermin control cell, and an environmental cell, each with between one and three environmental health officers (*ehos*) specialising in those areas. Sydney City Council divides its environmental health section up by geographic area, with different *ehos* responsible for particular areas of the city, although there is also a specialist food officer who helps coordinate food activities throughout the city.

In addition to the above enforcement arrangements, imported food is inspected by AQIS for compliance with the Australian Food Standards Code. The Imported Food Inspection Program (IFIP) is jointly run by AQIS and the NFA, with the NFA developing food risk assessment policy for the program and AQIS having

operational responsibility. Inspection is risk-related insofar as different categories of imported foods are subject to different levels of surveillance (see Section C2). The AQIS structure involves a Canberra Head Office which deals with policy issues, and functional offices in regional centres.

In total, there are over six hundred agencies throughout Australia which have responsibility for the enforcement of domestic food regulation.

## A1.3 Policy issues

### Allocation of regulation-making responsibilities

While the States and Territories have agreed to national arrangements for the development of food standards, there remain several matters, such as food processing and handling, food premises, hygiene and packaging, for which regulations are set by States and/or local agencies. Hence, national uniformity is being achieved is some areas of food regulation-making but not in others.

The question thus arises as to whether uniform national regulations should also be developed for these other areas, by the NFA or an equivalent national body.

The main benefits of national regulation-making processes are the potential for focussing regulatory expertise in the one agency, obtaining savings from ‘economies of scale’ in the development and variation of regulations, and the reduced scope for cross-jurisdictional discrepancies in regulations to impose costs on businesses seeking to establish outlets or make sales in different areas.

However, as the ORR has cautioned in other contexts [1], uniformity is not without its down sides. For example, problems can arise where national regulations are insufficiently flexible to deal with differences in local conditions — this seems more likely to be a consideration in the case of food hygiene and premises regulations than in the case of food standards.

The NFA is currently seeking to develop uniform food handling and hygiene regulations for Australia. The NFA’s proposed approach, involving the use of ‘food safety plans’ based on Hazard Analysis Critical Control Point (HACCP) principles, itself offers a degree of flexibility in meeting regional differences .[2] The National

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1 ORR, *Recent developments in regulation and its review*, Discussion Paper, November 1993.

2 See NFA, *Safe food handling Australia: the future direction of food hygiene regulation*, Discussion Paper, October 1994.

Food Standards Council recently gave its support to the principle of nationally consistent food hygiene regulations.

## Allocation of enforcement responsibilities

The present diverse and complicated allocation of enforcement responsibilities — with enforcement being undertaken by Commonwealth, State/Territory, regional and local agencies — raises the issue of whether different and/or more uniform structures should be contemplated and what an 'ideal' system might be.

Conceptually, a key principle for efficient multi-tiered regulatory systems is that of aligning responsibilities with accountabilities, such that responsibility for enforcing a particular law is matched as closely as possible to the jurisdiction which will be most affected by the enforcement or non-enforcement of the law.

On this basis, regulations for which a breach in one location would impose costs at a national level should ideally be administered by a national agency; regulations for which a breach in one location would impose costs at a State/Territory level should ideally be administered by a State/Territory agency; those with essentially regional implications should be administered by a regional agency; and those with essentially local implications should be administered by a local government agency.[3]

Some aspects of the current allocation of responsibilities for enforcing food law in Australia are consistent with this principle. For example, responsibility for enforcing export regulations lies with a national agency, AQIS. Likewise, fitout and hygiene regulations for retail food premises, which are most likely to have local impacts, are generally the responsibility of local government agencies.

However, some aspects of the current institutional arrangements contravene this principle. For example, some local government agencies and regional inspectorates are responsible for enforcing laws related to food manufacturing premises, where these should ideally be allocated to agencies at higher levels of government.

These arrangements can skew priorities. For example, if a local government agency were faced with two problems — one with mainly local ramifications and one with mainly State or national ramifications — it would have a natural incentive to devote

3 Sometimes it can be difficult to classify a particular issue as local, regional, state or national. For example, a breach at a franchise may reflect a problem at the local level where an individual store is located. Alternatively, it may reflect a national problem because franchises operate, and adopt certain practices, nationally as required in the franchise agreement.

more of its resources towards solving the former problem, *even if* the latter problem were more serious overall.

Further, the existing State-based arrangements can result in uneven enforcement of national provisions, thereby causing problems for businesses competing nationally. For example, where national regulations for food manufacturers are enforced vigorously by some States but not by others, manufacturers in the former States may suffer a competitive disadvantage (see A4.3).

Beyond the foregoing principles, there are several other considerations for allocating enforcement functions within a multi-tiered regulatory system.

One issue is the desirability of specialising enforcement tasks. One of the main benefits of the centralised, higher level model of government is the ability to reap 'economies of scale' by pooling expertise into specific functional units. Where a central body is responsible for enforcement over a large jurisdiction, the overall enforcement task can more readily be broken into cells with officers in those cells developing more specialised expertise. However, if enforcement is undertaken at a lower level of government, any one officer may be required to undertake a range of tasks, thus providing less opportunity to develop highly specialised skills. On the other hand, this devolved, lower level government approach can reap 'economies of scope' through the simultaneous performance of several enforcement functions. That is, for certain issues, it may be more efficient for one 'generalist' to inspect a premises for a range of matters rather than for several specialist inspectors to attend each premises. Further, as Northern Territory Health Services indicated, there may be inherent synergy-based advantages in this approach:

> Food standards and food hygiene do not exist in isolation from other aspects of environmental health. They are part of a large interactive continuum which requires ongoing, integrated monitoring and evaluation to ensure adequate protection of the community.

A second issue is the scope for duplication and coordination. Centralised approaches can facilitate greater coordination of efforts and limit duplication which might occur if enforcement were undertaken by lower levels of government. In relation to food, compositional sampling is one area where there appears to be significant potential for duplication when undertaken by lower level governments. Of course, coordination can in theory be achieved in other ways, such as the use of computer databases or liaison between lower level authorities. Indeed, as information technology improves allowing more efficient data transfer, the advantages of centralised coordination can be expected to decrease.

A third issue relates to the scope and effects of different enforcement approaches in different jurisdictions. As noted above, uneven enforcement can distort competition between firms from different jurisdictions. Clearly, the more centralised the system, the less the number of jurisdictions and, hence, the less scope there will be for such

outcomes. Further, under more centralised systems, firms operating in several areas, such as franchises, may gain economies of scale by being subject to the same requirements in each location. And finally, the less decentralised is the system, the less scope there will be for firms to attempt to play one jurisdiction off against another (see A4.3). These points all favour centralising enforcement functions.

A fourth issue relates to the benefits of regulatory experimentation and innovation. Under the decentralised model, the greater number of agencies and the smaller size of each jurisdiction may encourage greater innovation and experimentation in regulatory enforcement styles. Provided mechanisms exist for disseminating the results of such experimentation across jurisdictions, differences in the enforcement approaches of jurisdictions may have some positive effects.

A fifth issue relates to the benefits of tapping local knowledge. Local area officers are generally better informed about the siting and ownership of premises, and are more sensitive and responsive to specific local problems and concerns, than officers from centralised bureaucracies. These points also favour decentralised enforcement.

There is no consensus on how these various considerations should be weighed up, nor on which enforcement tasks should be undertaken by local authorities and which should be undertaken by higher level authorities. In its discussions with agencies, the ORR met supporters and critics of all three models currently in operation in Australian States and, indeed, of fully centralised approaches to enforcement. So while many of these issues are not new to food policy makers, the diversity of institutional arrangements around Australia indicates that the 'magic formula', if one exists, has not yet been found or agreed upon.

Indeed, there may be sound reasons for some differences between jurisdictions. For example, the larger the coverage of local government jurisdictions, the greater will be the scope for specialisation within the agency and the less reason there will be for pushing enforcement responsibilities upwards towards the regional or State level. This adds some support for the decentralised approach in Victoria where agencies at the local government level, which have recently been subject to amalgamation, are responsible for virtually all enforcement matters. Likewise, the Tasmanian Department of Health indicated that reducing the number of local jurisdictions from 49 to 29 had greatly improved local government food regulation enforcement. Another example is the Northern Territory, where low population densities and a large area may support the district model used there.

Further, in considering the case for reform to institutional arrangements, several other issues arise. Given that there are costs in changing institutional arrangements, the magnitude of problems with the current arrangements is pertinent. While the survey has identified several problems, it has not attempted to quantify them. Moreover, some problems commonly associated with the current institutional

arrangements are arguably more attributable to limited and uneven resources (see A2.2) or inadequate coordination mechanisms (see A4.2), factors which, although possibly exacerbated by current arrangements, would cause some problems irrespective of the arrangements in place. Finally, there will also be political considerations related, for example, to perceptions of jurisdictional sovereignty which will affect the extent and direction of actual reforms.

Nevertheless, the foregoing analysis indicates that there are some sound ‘in principle’ arguments for reforming aspects of present institutional arrangements, including moving towards more uniform national arrangements for some matters.

# A2 EXTENT AND PRIORITISATION OF ENFORCEMENT

In examining the degree to which domestic food laws are enforced in Australia, the ORR sought information on three issues:

- the extent to which agencies undertake the enforcement tasks ascribed to them;
- the reasons, where relevant, for non or partial enforcement of food laws; and
- the priorities agencies pursue and the basis on which they are set.

The responses are outlined in Sections A2.1–3.

In discussing associated policy issues (Section A2.4), the ORR focuses on the implications of the apparent under-resourcing of enforcement agencies and the variability in resource levels across jurisdictions.

## A2.1 Extent of enforcement: current policy and practice

While the majority of agencies surveyed indicated that their *policy* is to enforce all food law provisions for which they are responsible, around half indicated that they are unable to do so *in practice*. Further, of those which indicated that they enforce all provisions in practice, none indicated that they are able to ensure that no breaches occur: that is, they enforce all provisions but cannot ensure full compliance (see B2.1).

The extent of enforcement varies between jurisdictions. Some agencies focus on only one or two functions. Dorset Council (Tas) indicated that most of its food enforcement activities involve responding to complaints from the public. Others undertake a variety of enforcement functions. Launceston Council (Tas), for example, registers all food premises, licenses operators, follows-up all public complaints, investigates all notifiable diseases associated with food poisoning, undertakes food sampling, and conducts an educational program (see B2.2).

## A2.2 Reasons for limitations in enforcement

### Resource constraints

The survey results indicate that food enforcement agencies generally consider themselves significantly under-resourced for the tasks they are given. Sixty six

percent of agencies nominated limited resources as the main constraint on their enforcement activities with a further 12 percent identifying it as a secondary constraint (see B2.2). The agencies' views on this matter need to be interpreted with some care because of the subjective nature of self-assessment and the incentives for agencies to overstate the extent of their resource problems. There are also a few agencies which do not see themselves as particularly under-resourced. Nevertheless, at an aggregate level, it is apparent that the agencies are unable to fulfil the full gamut of enforcement tasks for which they are responsible.

Agencies indicated that under-resourcing manifests itself in various (and sometimes inter-related) ways, including:

- budget constraints;
- understaffing;
- vastness of a unit's jurisdiction (relative to available resources);
- non-affordability of prosecutions; and
- resource seepage to other agency programs.

Some examples of the under-resourcing problems experienced by certain agencies are striking. The NSW Central West Public Health Unit ( *PHU*) comprises just one *eho* who is responsible for an area of over 60 000 square kilometres, which includes the city of Bathurst. Tea Tree Gully Council (SA) had, until recently, just two *ehos* to do all food and other environmental health work for an area covering 93 000 people including around 360 food premises.

However, there is no pattern to the resourcing of local government agencies — autonomous jurisdictions resource their environmental health units as they see fit.

Thus, whereas many agencies appear to be poorly resourced, some agencies are comparatively well resourced. For example, the ACT Public and Environmental Health Unit, which services a population of around 300 000, has 20 officers of which 12 to 13 are devoted specifically to food safety matters (although it is responsible for both State and local issues). Launceston Council (Tas), which services a population of 63 000, has a separate environmental health department with seven full time and one part time position. It indicated that, "...at present we have sufficient staff to enforce all the food legislation on a day-by-day basis."

### Other reasons

The agencies gave several other reasons as to why they do not enforce certain food legislation (see B2.2 for further data):

- some food laws are inherently difficult to enforce, perceived as impractical or unjustified, old and outdated or are already covered by overriding regulation;

- for issues of a cross-jurisdictional nature, some agencies rely on the efforts of others;
- a lack of communication and information sharing between agencies hampers enforcement;
- lack of national consistency undermines the enforcement of some regulatory initiatives;
- differences in the ethnic backgrounds of food business proprietors can cause problems for enforcement;
- some agencies lack appropriate remedies for rectifying certain breache s; and
- some *ehos* perceive that their governing bodies place limited emphasis on the enforcement of certain food laws.

## A2.3 Prioritisation

Given the lack of resources, agencies inevitably must prioritise their enforcement activities.

The survey responses, while giving an imperfect picture of the specific problems or laws that receive most focus, do highlight two points. Firstly, there is a degree of variation between the agencies on what specific issues are seen as most important. Secondly, most agencies put problems such as hygiene practices and the standard of premises ahead of food standards, and devote few resources specifically to enforcing the Food Standards Code. Labelling issues in particular gain little attention. On this matter, the NFA understands that:

> when the States determine enforcement priorities, this is done on the basis of the degree of risk to public health and safety. For instance, some low risk labelling standards are not enforced (or rather compliance is not proactively monitored) where there are no health and safety concerns.

The survey results provide better information on the basis on which prioritisation decisions are made, with risks to public health and safety indeed being the main concern. The agencies indicated four ways in which their enforcement activities take into account risk levels:

- several agencies rank different types of *food premises* according to health and safety risk to prioritise the stringency of their enforcement efforts;
- several agencies give more emphasis to enforcing certain *food laws* on the basis of the perceived seriousness of the health risks which those laws seek to address;
- some agencies use or inspect food premises which use HACCP procedures to prioritise risks *within the premises;* and

- some agencies modify their *enforcement actions* according to the health risk involved, with breaches of regulations posing a lower threat to public health attracting a less stringent response than those posing a more serious threat.

Beyond public health and safety risks, other bases for prioritisation include:

- program efficiency and effectiveness;
- business and community consultations;
- public perceptions and political imperatives;
- consumer protection;
- business exigencies;
- revenue considerations; and
- other agency demands.

## A2.4 Policy issues

### Aggregate level of resources

Given the apparently wide-spread lack of resources, the question arises as to whether resources for food law enforcement should be increased?

The ORR is unable to provide a definitive answer. Conceptually, there exists an economically optimal level of resources for food law enforcement and, were this to exceed the current level, an increase in resources would be warranted. In practice, it is not possible to calculate the optimum level of resources for food law enforcement at the aggregate level, and decisions on resource allocation must be made by other means. Inevitably, the level of resources devoted to food law enforcement will reflect political decisions and priorities and, under the present system, the aggregate outcome of decisions made by the more than 600 bodies in three levels of government.

Nevertheless, without making any judgments about the appropriateness of current resource levels, the ORR is able to offer the following three observations which give some perspective to the apparent under-resourcing of food law enforcement agencies.

First, food enforcement agencies are not alone in this regard. The ORR's experience is that enforcement agencies in many other regulatory fields in Australia — including road transport, consumer product safety, occupational health and safety, environmental protection and corporate regulation — are also ostensibly

under-resourced. Likewise, reflecting on overseas experience, Kagan [4] states:

> Few laws, from those against robbery and reckless driving to those against tax evasion and securities fraud, are fully enforced... Although regulatory agencies generally lack the appropriations to ensure full enforcement, hardly any government body — the highway department, the Coast Guard, the Bureau of Prisons, and so on — is allocated sufficient funds to fulfil its statutory duties perfectly.

Second, there is an 'opportunity cost' to resources allocated to food law enforcement. That is, additional government resources directed to food law enforcement will reduce the resources available for other government programs. [5] For example, in the absence of off-setting tax increases, more resources to food enforcement may mean that governments would need to cut-back on other law enforcement activities, such as in the areas of road travel and transport, therapeutic goods or safety in the workplace. Alternatively, they may need to cut-back on other social programs, such as child-care, education and so on. Or alternatively, they may need to increase taxes. In other words, trade-offs need to be made when considering the allocation of resources to food law enforcement programs.

Following on from this, the fact that food enforcement is currently under-resourced in one sense does not mean it would, or should, have first call on any new government expenditure (or redistribution of existing expenditure). It may be that food enforcement is *relatively* well resourced compared to other government programs or, at least, that governments consider that the current allocation of resources between programs is appropriate.

Third, even if sufficient resources were available, full enforcement would not necessarily be desirable. This would be the case under the following conditions:

- if food standards were excessively stringent. Standards in many policy fields are often overly stringent and conservative. [6] In relation to food, the ORR's recent survey of agencies regulating safety risk in Australia [7] placed the NFA at the lower end of the risk spectrum. While determining an optimal level of risk is difficult, this suggests *a priori* that current food standards may be excessively

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4 Kagan, R., 'Regulatory enforcement' in Rosenbloom, D. and Schwartz, R., *Handbook of Regulation and Administrative Law,* Marcel Dekker Inc, 1994, p. 384.

5 One qualification to this point is that, for expenditure up to a certain level, additional expenditure on food law enforcement could reduce government outlays in other areas, such as the public provision of health services.

6 ORR, *Recent developments in regulation and its review*, Discussion Paper, November 1993.

7 ORR, *The analysis and regulation of safety risk: A survey of the practices of National and Commonwealth regulatory agencies*, Information Paper, February 1995.

stringent. As discussed elsewhere[8], excessively stringent standards require less than complete compliance to promote optimum safety-cost outcomes; and

- if food standards were overly prescriptive in nature. As discussed elsewhere [9], highly prescriptive and even performance-based standards can lack the flexibility necessary to promote optimal safety-cost outcomes. Rigid enforcement of such standards can result in an undesirable focus on regulations and not their underlying objectives. Hence, where prescriptive and performance-based standards are in place, as they often are in relation to food, flexible approaches to enforcement involving less than complete compliance will in some cases be desirable.

Drawing together the foregoing three points, even though the agencies surveyed have insufficient resources to carry out fully all the responsibilities they are ascribed, it does not automatically follow that aggregate resources should be increased.

Be that as it may, the lack of resources highlights the need for food law enforcement strategies to be efficient. That is, given that resources are limited, it is vital that agencies use the resources they do have to bring about the best food law outcomes possible.

The lack of resources also raises the issue of whether agencies, and food law makers, should make greater use of mechanisms for achieving the objectives underlying food laws in ways which utilise non-governmental resources. This may include, for example, laws which place more responsibility and onus on employers or employees to ensure that food law objectives are met, cooperative arrangements with tertiary institutions whereby food technology and environmental health students might undertake real-world food premise inspections and testing as part of their studies, and engaging the active assistance of industry in monitoring and enforcement. The ORR understands that some of these types of mechanisms are already used or being considered to some extent.

The wide-spread lack of resources also raises the issue of whether and how different food laws should be prioritised. As discussed above, most domestic agencies already prioritise, either implicitly or explicitly, their enforcement activities, often according to public health risks. The AQIS IFIP is also based on a risk management system. However, although public health and safety appears to be the main basis for prioritisation, the actual priorities nominated by agencies vary. The question then arises as to whether the NFA, in conjunction with developing and varying the Food Standards Code, should issue mutually agreed guidelines, developed on a public

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8 ORR, *Compliance with the Road Transport Law: A submission to the National Road Transport Commission*, Public Submission, December 1994.

9 *loc. cit.*

health risk and consumer protection bases, on the prioritisation of the matters it deals with, and whether State/Territory agencies should do likewise for those matters dealt with at the regional or local level. Again, the ORR understands that this type of guidance is already being provided or considered (see further below).

### Variability in resources between jurisdictions

The variability in the level of resources across jurisdictions also has a policy implications.

Firstly, conceptually there could be some improvement in overall compliance with food laws if there were a transfer of resources from well endowed to poorly endowed jurisdictions, such that, for the same aggregate amount of resources devoted to food law enforcement, there was a more uniform level of enforcement across jurisdictions.

Against that argument, it should be noted that differential levels of food enforcement resources may reflect different priorities of jurisdictions. For example, councils with high expenditure on food law enforcement might achieve this by spending less on other services, such a parks and playground maintenance, rubbish collection etc. From an equity point of view, the conceptual attractiveness of redistributing ‘food law resources’ might thus incur problems.

Nevertheless, where allocations reflect chance rather than choice, there may be a rationale for those jurisdictions spending amounts substantially different from the average to review their allocation and priorities.

Secondly, differences in enforcement resources between jurisdictions may affect the regulatory posture adopted by enforcement officers. Officers in poorly resourced jurisdictions may see the lack of resources as indicative of a lax attitude from the governing body regarding food laws, and may thus tend towards unduly ‘retreatist’ enforcement behaviours. Conversely, officers in well resourced areas may see the relatively high level of resources in their jurisdiction as reflecting a view on the part of their governing body that food law is to be taken seriously, and this may translate into a more ‘aggressive’ and potentially over-vigorous enforcement style. While the ORR is aware of some anecdotal evidence to suggest this may happen, the survey data is not sufficiently detailed to test this proposition. However, to the extent that is the case, actions to have field officers modify their approaches may be necessary.

Thirdly, the existence of disparities in enforcement resources means that the appropriate enforcement strategies may differ. As discussed later in this paper, in cases where enforcement resources are limited, more combative deterrence strategies may be warranted whereas, where resources are relatively plentiful, more cooperative compliance strategies may produce better results. Following on from

this, attempts to seek high level uniformity in enforcement strategies may run into problems where there are disparities in resources, because the ideal deterrence strategy will differ from jurisdiction to jurisdiction (see A3.6).

### Priority setting

Policy issues which arise in the context of priority setting include: what are the relevant variables; how should priorities be set; and at what administrative level of government they should be set?

As discussed above, most agencies identified risk as the primary basis for establishing priorities. In doing so, most agencies considered the nature of both the laws and the premises for which they are responsible. Indeed, many agencies have developed ranking systems for food premises according to health risk. Whilst varying in sophistication, these rankings typically take into consideration the type of food sold, age and condition of the premises, past performance, number of potential customers, and the state of internal controls including HACCP procedures.

The agencies also consider perceptions of political risk and notions of 'customer service' as important in determining priorities. This became particularly clear when agencies indicated their reasons for giving priority to responding to public complaints over general inspections (see A3.2).

Beyond these considerations, some agencies also prioritise on other issues, including the cost-effectiveness of enforcement activities. This may be influenced by the level of resources available to an agency, the enforcement powers at its disposal, and the skills of its staff. These issues are taken up in A3.4–6 on enforcement practices.

From a policy perspective, whatever the final priorities may be, it is important that they result from a systematic and transparent process of analysis involving explicit objectives and the best use of available information. The process should also involve assessments of the cost and effectiveness of different enforcement strategies, as well as the level of risk associated with the problems at which they are aimed.

Following on from this, the question arises as to the appropriate administrative level for setting priorities. In particular, it raises the issue of the appropriate role for the NFA as it moves to develop its national priority listings as part of its National Surveillance Strategy.

Again, the traditional pros and cons of centralisation versus decentralisation (discussed in A1.3 and A3.6) are relevant here. Centralised priority setting would provide benefits of economies of scale and consistency across jurisdictions, but may not be sufficiently flexible to capture local preferences or conditions.

Despite these conflicting arguments, breaking down the priority setting process allows for some useful insights. In particular, that part of the priority setting process concerned with risk assessment and the cost-effectiveness of enforcement strategies may be most efficiently done centrally where the benefits of economies of scale are large. For example, technical risk assessments could supplement new regulations made by the NFA, perhaps in explanatory notes. Information on the cost-effectiveness of various enforcement strategies could also be collated centrally and distributed to enforcement agencies as part of an information sharing arrangement. Enforcement agencies could then use this information and supplement it with information on local conditions and preferences. It may be, for example, that dietary and hygiene matters should be treated differently according, amongst other things, to localised socio-economic circumstances. Indeed, some agencies pointed out that depressed local employment and financial conditions meant that they had to use discretion in terms of enforcing certain laws, implying a reduction in the stringency with which they enforced certain food laws and the laws on which they gave priority. It may be, however, that consumers in other areas expect, and are willing to pay for, more stringent standards of enforcement including enforcement of different laws.

### Other issues

The other (non-resource) constraints on the enforcement of food laws identified in the survey responses generally have obvious implications. Clearly, where food laws are old and outdated, overridden by other laws, inherently difficult to enforce or impractical, there is a case for reviewing and either reforming or repealing them. Where a lack of national consistency or the cross-jurisdictional nature of laws inhibit their enforcement, there is a case for considering the allocation of institutional responsibilities (see A1.3 above) and/or further coordination of food law enforcement (see A4.1 below).

# A3 ENFORCEMENT PRACTICES

In examining the enforcement practices used by the agencies, the survey sought information on three sub-issues:

- what approaches are used to identify and rectify specific problems or breaches?
- what other measures are used to improve the overall ‘culture of compliance’?
- what balance is struck between these two broad approaches?

These responses are outlined in Sections A3.1–3.

In discussing policy issues (in Sections A3.4–6), the regulatory literature is drawn on to shed light on when various measures and strategies may be most useful.

## A3.1 The broad focus

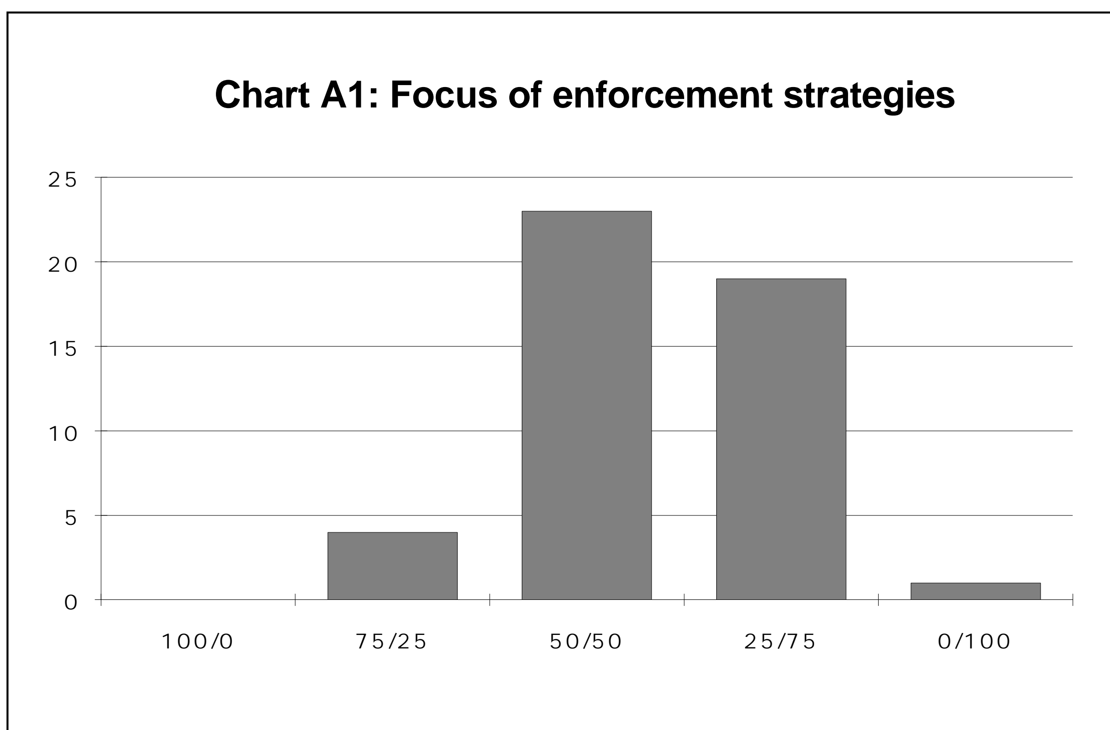
As Chart A1 shows, while around half of the agencies indicated that they give an equal weighting to influencing business culture and dealing with specific breaches, the overall balance is clearly towards the latter.

Agencies that indicated that they devote about half of their effort and resources to addressing specific breaches and influencing business culture gave three reasons for doing so:

- a belief that each is equally important;
- a preferred emphasis on improving the culture of compliance coupled with a recognition that some proprietors do not respond and that specific issues do arise that need attending to; and
- past experience suggesting that a balance gives acceptable results.

Nearly all of those agencies that adopted a main focus on identifying and rectifying specific breaches cited, directly or indirectly, a lack of time and/or resources as the reason. In other words, measures to modify business culture were seen as an optional extra — desirable but not a core function of the agencies.

In contrast, the few agencies that focus on influencing business culture have made a deliberate choice to do so, and justify that choice with views such as “prevention is better than cure” and “if successful it, will lead to a reduction in the incidence of specific problems.”



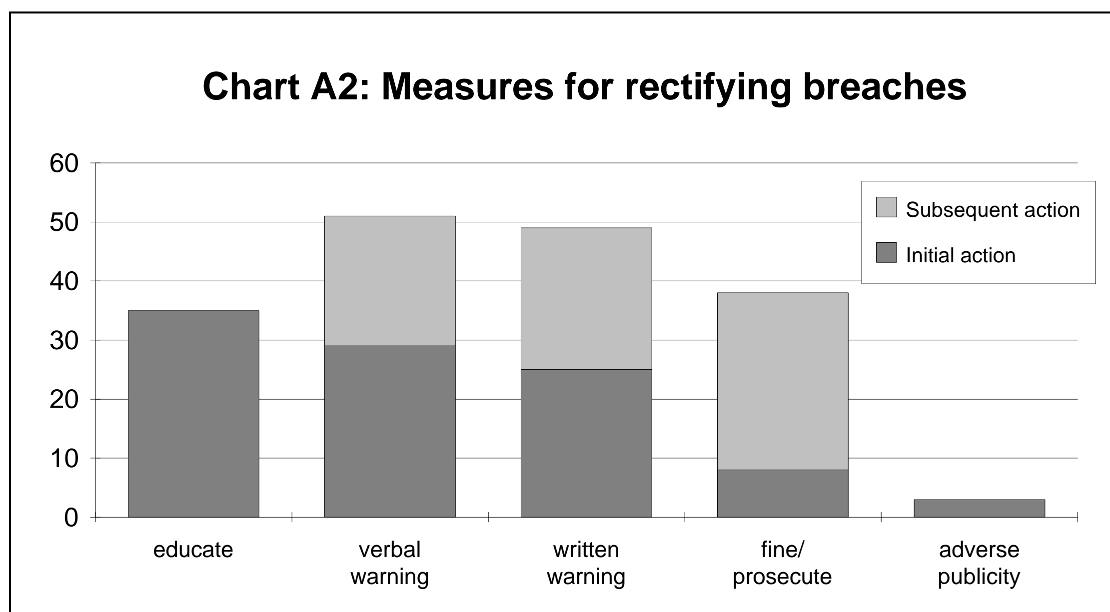

## A3.2 Identifying and rectifying specific breaches

Inspection and surveillance are the most common bases of identifying specific breaches of food laws (see Table B4). Further survey data (see Table B5) indicates that, in conducting inspection programs, most agencies undertake systematic rather than random inspections; inspection frequency is in most cases weighted according to the assessed risk involved in particular classes of premises; and general inspections patterns are preferred to blitzes on particular areas or problems.

Public complaints received a lower rating as a means of identifying specific breaches, but this reflects limits on the number of complaints received rather than the importance attached to them by the agencies. Indeed, 84 percent of agencies indicated that they give priority to public complaints, reflecting underlying notions of 'customer service' in many cases.

Chart A2 (based on Table B6) shows that education and warnings are the most commonly used tools for rectifying specific breaches and are often used together. On identifying a breach, an enforcement officer will often issue a warning and also advise the proprietor on how to deal with the problem.

Fines and prosecutions are used less frequently, and adverse publicity is rarely used.




Further breakdown of the survey data (Table B6) demonstrates that the agencies generally take a graduated approach to rectifying breaches. In terms of warnings, verbal warnings are more commonly used when a breach is first identified, whereas written warnings are favoured if no remedial action is taken by a proprietor following a first warning. Likewise, fining or prosecuting immediately after a breach is detected is rarely or never used. Indeed, only nine agencies indicated that they actually have the power to issue on-the-spot fines and survey responses indicate that it is rarely used in the first instance. However, the majority of agencies indicated that they would be willing to resort to fining or seeking prosecution if initial attempts to have problems rectified were to fail.

These graduated approaches are reflected in formal or informal hierarchies of measures. Nearly all agencies (47 out of 49) indicated that they do use a hierarchy of measures. Of those that do, most used an informal approach (29 out of 49) whilst the remainder have formal procedures.

Typically, the hierarchies used involve some or all of the following elements:

- education/advice on the nature of the problem and how to rectify it;
- a verbal warning is given;
- a written warning is issued;
- a formal clean-up notice is issued; and
- fines are imposed, prosecution commences, or closure orders are served.

If action on the first level of the hierarchy fails to bring about the desired results, the agencies will escalate up to the next level.

That said, some agencies also indicated a willingness to immediately use higher level mechanisms in certain circumstances, such as where fraud has occurred or where a major public health risk results from a breach.

These points are neatly encapsulated in Mandurah Council's (WA) response:

> Generally, a warning is issued to the proprietor on the first occasion, in addition to education as to how the deficiency or problems can be addressed in order to comply with the relevant legislation. Subsequent breaches of the legislation will result in legal action being initiated. Should results indicate a breach which has severe health implications, then legal action may be initiated without a warning being issued.

Overall, these survey results suggest that agencies adopt a more cooperative than combative posture when dealing with breaches in food laws.

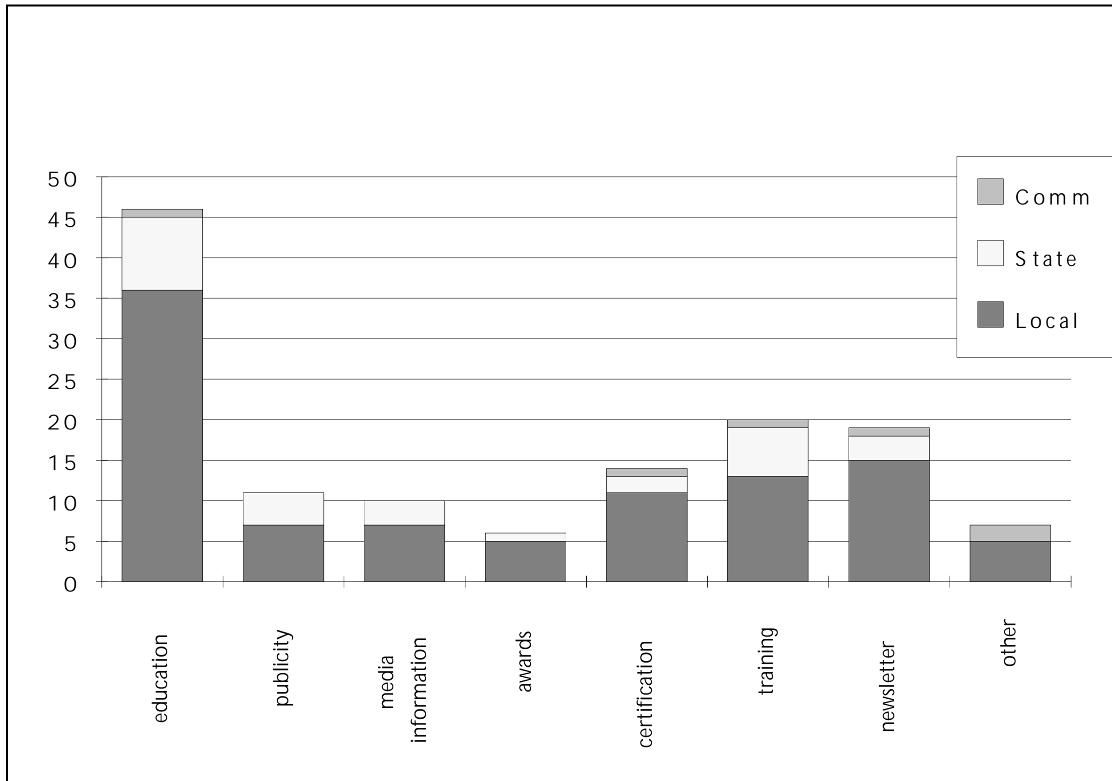
## A3.3 Influencing the 'culture of compliance'

As Chart A3 (based on Table B7) shows, general education of proprietors and firms was the most common measure nominated by agencies to improve the 'culture of compliance'.

Following general education of firms, the next most common measure nominated by the agencies was food handler and related training. This function tends to be undertaken more by agencies in higher levels of government, although 14 regional and local agencies also conduct training. Werribee Council (Vic) described its training program as follows:

> We have established a food handlers training courses at a local campus of Victoria University of Technology. Food handlers are encouraged to attend. Field officers attempt to educate by explaining the reasons for directives, requirements, and regulatory enforcement. Proprietors/food handlers are provided with booklets, posters and other promotional material obtained from other agencies or developed inhouse.

Other commonly nominated measures include the distribution of newsletters, media publicity, and the certification of companies and/or premises. The use of food industry awards was rarely adopted.




## A3.4 Policy issues: enforcement mechanisms

The foregoing discussion highlights the diversity of tools available to agencies to enhance compliance with food laws, including education and training, licensing, warnings and penalties, and award schemes.

It also indicates that, while some tools are commonly used, others are used by only a subset of agencies and, indeed, may be available only to a subset. For example, while virtually all agencies have the discretion to establish training courses or to initiate prosecutions, some agencies do not have the legal ability to levy on-the-spot fines or to license food-related businesses.

From a policy perspective, the first issue which arises is whether these tools should be available to a wider range of agencies or, conversely, whether some of them are inappropriate for food-related matters and should in fact be removed from the armouries of some agencies.

In this section, the advantages and disadvantages of these tools, and some basic design issues, are discussed. (How, and in what circumstances, they should be deployed is discussed in A3.5).

## Identification systems

Several approaches can be used to identify breaches, including random sampling, routine inspection, targeted sampling (blitzes), risk-based sampling, and third party complaints.[10] The survey results indicate that the main basis for identifying specific breaches of food laws is general inspection of premises/surveillance of foods, with systematic (non-random), risk-based, general (non-targeted) patterns of inspection being given precedence. Public complaints are less used to identify breaches of food laws, but are given higher priority when they arise.

*Random sampling* for inspection and surveillance involves drawing on sample units with an equal probability of selection. Advantages of this approach include:

- minimising strategic behaviour aimed at avoiding compliance, due to the uncertainty of an inspection;
- allowing for the projection of sample results to the population, which may be useful for risk management purposes; and
- absence of bias.

However, random sampling of itself does not incorporate known information about risk probabilities (if there is any), and *may* result in an unrepresentative sample of the target population because, whilst samples on average will be representative, a given sample may, by chance, not be (particularly if the sample size is small).[11] Further, the expected costs to the enforcement agency of identifying and rectifying a breach are not directly considered in determining the sample units .

*Routine (non-random) sampling,* such as an inspection which is part of a once a year registration process, tends to be relatively simple to administer but may provide a warning to businesses of upcoming inspection such that they may adopt strategic behaviour and achieve only 'temporary' compliance during the inspection period.[12]

*Targeting* areas for inspection by product, geography, class of business etc can be based on risk and/or cost assessments. This approach is likely to be more effective the more information is known about a concentration of poor practices in a particular area. However, in the absence of additional random sampling, and if the

10 Other sampling techniques include convenience sampling — where samples are chosen because they are easy to select, and snowball sampling — where original sample units are asked to identify other, similar sampling units.

11 There are various sampling methods involving random sampling principles, such as cluster sampling and stratified sampling, which can overcome some of these difficulties.

12 Further, routine sampling is not in itself risk-based or cost-based. That is, the cost of detecting a breach (being determined by the probability of detection and cost of inspection) is not inherently considered. That said, routine inspections can incorporate risk and/or cost if desired by modifying the frequency or intensity of particular inspections on the basis of risk and/or cost assessments.

'targets' become well known, businesses which are not caught in the targeted activities may perceive there is a very low risk of their breaches being detected and commensurately lower compliance may result.

*Risk-based inspections* use risk as a criteria for selection frequency or inspection intensity. As such, it can be applied to all of the above mentioned procedures. For example, high risk premises may receive two *routine* inspections a year instead of one; *targeted* samples can be, and indeed often are, based directly on risk assessments; and even *random* samples which, while selecting sampling units randomly, may incorporate risk assessments by dividing the population into 'strata' (groups) on the bases of risk, with more sampling units taken (randomly) from the higher risk strata. Risk targeting has the advantage of directing inspection resources to areas where the potential pay-off is greatest. That said, risk targeting of itself ignores both the different costs that may be associated with inspecting any given sample and the probability that a problem can be detected. Therefore, it may not, on its own, represent the most 'cost-effective' approach. Further, risk targeting, like any type of targeted inspection, may generate incentives for low risk businesses to lower compliance in the expectation of fewer or less comprehensive inspections.

*Third party complaints* may come from several sources, including consumers, employees and other businesses. Following up public complaints may:

- be an inexpensive way of identifying potential food hazards, given the public has already identified them;
- allow identification of breaches which are hard to detect during inspections; and
- enhance public confidence in the food industry.

Further, if a complaint is received from an employee or another business, an enforcement agency may be able to act before the breach affects the public. As such, this would overcome a basic limitation of using public complaints — that action comes too late and consumers (and society) may have already suffered. However, regardless of the source, public complaints, like many other procedures, do not necessarily take account of relative health risks. For example, conducting a general inspection at a major manufacturing premises may reduce the expected health risks to the community more than following up on a food poisoning case involving a premises which sells food products to very few consumers. Against that, following up complaints may have cost advantages and public confidence gains (mentioned above).

An implication of the preceding discussion is that, whilst different identification systems will be appropriate under different circumstances, and for different types of products and breaches, some inclusion of risk assessment, cost assessment, detection probability, and randomness is likely to provide for a more effective inspection program.

## Education and training

Education of proprietors and staff has three main advantages:

- it directly addresses the problem of business ignorance of food safety issues;
- it can increase awareness and knowledge of food safety issues beyond the specifics of any one breach; and
- it can enhance cooperative attitudes in business, encouraging greater compliance overall.

The first of these advantages is significant in the context of food safety because ignorance is often the prime cause of breaches. Indeed, in a survey of food business proprietors and employees conducted by Tea Tree Gully Council (SA), 61 percent had never been exposed to food laws and, when tested, more than half of responses to questions on those laws were answered incorrectly. Similarly, several agencies indicated that, in their experience, ignorance underlies the vast majority of breaches. South Sydney Council in discussions with the ORR said:

> Most breaches result from businesses not knowing what to do. In fact, half the battle is communicating that a problem exists.

Unlike penalty systems, education directly addresses these problems.

After advice given as part and parcel of an inspection, the next most widely used educative mechanism is the provision of voluntary training courses. The survey highlighted two design issues related to training courses. Firstly, there is a trade-off between the comprehensiveness of a course and the cost to both the agency and the business people attending. Particularly for firms with high staff turn-over, comprehensive courses may be seen as prohibitively costly. While some agencies run quite extensive courses, others have decided that shorter, more basic courses, are more effective. There may also be a role for a layered system, with shorter courses for staff and more comprehensive courses for managers. The second issue is about who should run the course. In some areas such as Sydney, councils run their own courses. However, in Victoria, several councils have pooled their resources to run a combined course, thereby potentially enhancing quality and reducing costs.

An alternative to providing education is to encourage businesses and employees to engage in voluntary training. On this issue, respondents to Queensland Health's recent review of the Queensland Food Act suggested that agencies could offer incentives such as reduced registration or accreditation fees, or certificates, to businesses who trained staff or employed trained staff.

A further issue is the extent to which there should be mandatory training or education requirements for workers in the food sector. Several agencies surveyed identified the lack of such a requirement as a major problem. On this matter, in its recent review of the Queensland Food Act, Queensland Health stated:

> The food industry is one of the few industries having the potential to impact on public health whereby no formal training or qualification requirements apply to operators. In view of the significant recorded level of the incidence of food borne illness (food poisoning) in recent years, consideration is being given to the introduction of a requirement that food establishment operators and food handlers be required to undertake formal training or obtain formal qualifications before they are permitted to be engaged in food preparation or food handling.[13]

Counterbalancing the potential benefits to public health, the cost of obtaining the necessary qualifications both for prospective employees and firms is also an important consideration. A proprietor faced with a legislative need for more highly qualified staff will have incentives to reduce the average staff levels and the rate of staff turn-over. Longer hours for existing employees, less part-time work opportunities and greater use of labour-saving devices could result, particularly in labour-intensive businesses. Educational requirements could also act as a barrier to entry into food-related vocations. The extent of these effects would depend on the stringency of the training/educational requirements. Clearly, the cost of obtaining competencies needs to be matched with the health benefits which flow from them.

Reflecting the need for tailoring training, Queensland Health stated:

> The degree of training required would need to be aligned to the activities and responsibilities of the person. It is considered not unreasonable to expect that a person overseeing production in a major food processing or manufacturing establishment is the holder of a degree in food technology or other food science. An employee handling or serving food in a retail outlet such as a lunch bar of small take away food shop could be expected to have undertaken a short (eg half day) course in basic food hygiene principles and practices. People engaged in activities between those extremes could be expected to undertake training appropriate for their activity.

These types of issues are currently being examined by the NFA in the context of the development of national hygiene regulations.

## Warnings

Warnings and directives are another possible response to breaches of regulations, and the survey indicates their wide use in the food industry. They may be verbal or written, and may vary in 'tone' according to the circumstances and the severity of the breach.

The advantages of warnings include:

- they can increase the offender's awareness of a safety standard and/or a sense of responsibility;

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13 Queensland Health, *Review of the Food Act 1981,* Discussion paper, December 1994, p 7.

- delivered correctly, they can maintain reasonably cooperative relations between the enforcement agency and the business. Indeed, if delivered together with advice on how to avoid further sanctions, cooperative relations may be enhanced; and
- they avoid the costs associated with formal education and/or punitive sanction systems.

However, a potential problem with warnings and directives is that they may encourage businesses to adopt strategic behaviour. In particular, businesses may deliberately give insufficient attention to certain safety risk areas if they know that, in the first instance, the only punishment will be a warning. Hence, warnings may be an inappropriate for intentionally blatant breaches.

## Penalty systems

Formal penalty systems include on-the-spot fines and court remedies following successful prosecutions. As discussed above, the latter route is open to most of the agencies surveyed, but the former is only available to a sub-set.

The question arises as to what level of reliance should be placed on these alternative systems and, related to that, whether the level of penalties available under them is sufficient to provide an appropriate deterrent.

Where these systems are insufficient to promote compliance, the issue arises as to whether alternative penalty systems, such as the use of adverse publicity, should also be used.

### *Prosecutions*

The main advantages of prosecution are that it can potentially provide a more effective deterrent because of the severity and range of remedies under prosecution, and the daunting nature of court proceedings. The threat of prosecution can also be used as a bargaining chip by enforcement agencies.

Against that, prosecution has several disadvantages:

- high costs for both the prosecuting agency and the defender;
- according to some agencies, penalties in courts are often not significant enough to act as an appropriate deterrent or to justify the expense of undertaking court action (discussed further below);
- consequently, for some breaches the threat of prosecution is not credible because offenders may perceive it unlikely that enforcers would bother seeing

through court proceedings. This was mentioned by Holroyd Council (NSW) in

relation to local court hearings (see below). In addition, the Victorian Department of Health indicated:

> Our legal system, rightly or wrongly, is very expensive in jurisdictions beyond the magistrates court level. In times of Australia wide budget restraint, the use of funds must be very carefully considered before pursuing individuals or companies through the higher court system for breaches of food law in cases other than clear, demonstrable harm being inflicted on the public.

- in the case of imprisonment, the question arises as to who should be held responsible — an individual operator, supervisor, manager or director.

These disadvantages indicate that, whilst prosecutions may be appropriate as a 'last resort' and possibly for some intentional and severe breaches, more intermediate penalty systems will also be desirable.

### *On-the-spot fines*

The main advantages of on-the-spot fines are:

- they are easy to dispense and cheap to administer;
- they provide both a moderate financial penalty and 'moral shock' to the offender. According to the regulatory literature, it is often the act of being fined, more than the amount, that is likely to generate improvements in compliance; [14] and
- their very existence and moderateness creates an ongoing and credible deterrent.

On-the-spot fines may be appropriate when punitive action is justified, but the delays and costs of court action need to be avoided, perhaps due to limited agency resources. For example, if a food operator is caught smoking whilst preparing food, this may be considered a blatant enough breach to deserve immediate punitive action, yet if the court system were used it would involve considerable costs, as well as requiring a witness. Other situations where on-the-spot fines could be warranted include where food is left exposed to contamination by flies and dust, where unclean utensils or equipment are used in food preparation, and where animals gain access to food preparation areas. [15]

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14 Kagan, R., 'Regulatory enforcement' in Rosenbloom, D. and Schwartz, R., *Handbook of Regulation and Administrative Law,* Marcel Dekker Inc, 1994.

15 Queensland Health, *Review of the Food Act 1981,* Discussion paper, December 1994, p 16.

On-the-spot fines also have a greater deterrence effect, and represent a more appropriate response to repeat or serious offences, than education or warnings, because they are likely to be perceived as more punitive.

Indeed, they may bridge a potential gap in an enforcement agency's response armoury, offering a compromise between warnings and education on the one hand, and prosecution on the other. On this matter, Holroyd Council (NSW) identified a lack of power to issue on-the-spot fines as causing reluctance to pursue minor offences due to the costs involved in taking an offender to court:

> There is a need for council to be granted the legislative powers to grant 'on-the-spot' fines...for minor breaches of the standards. At present all breaches must be pursued in the local court. This is costly in both financial and personal terms. Council at present is reluctant to pursue these minor offences.

A common disadvantage associated with on-the-spot fines is that they may be open to abuse by unduly legalistic or combative field officers, but these fines are used in many other regulatory fields without raising excessive concern. Indeed, some of the food officers who are, or would be, responsible for issuing on-the-spot fines for food law offences already do so in other aspects of their work outside the food area, such as in pollution control.[16] Further, appropriate appeal mechanisms could be established.

That said, the inappropriate use of on-the-spot fines may antagonise firms and reduce the possibility of cooperation. Therefore, the enforcement agency needs to consider carefully the circumstances when they are used (see Section A3.5). Indeed, the agency may want to ensure its staff are fully cognisant of these issues.

Overall though, on-the-spot fines can represent an appropriate form of deterrent for certain breaches of food laws.

### *Financial penalties*

According to the theory of optimal deterrence, 'expected penalties'[17] should be set equal to the 'social costs' of a breach.

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16 This reflects the nature of the food enforcement system in Australia, where a number of 'food officers' are qualified in, and perform work in, several health areas.

17 Expected penalties are equal to amount of penalty multiplied by probability of being detected and penalised. So if a penalty for a particular type of breach is $5000, the probability of being detected is one in ten and the probability of being penalised once detected is one in five, the expected penalty for committing the breach will be $100. (As well as pecuniary costs, some people may also incur physic or moral costs from breaching the law or, at least, from being discovered and publicised. People will also obviously incur significant personal costs if they are jailed. In theory, these costs should also be considered in judging whether the expected penalty for a breach is appropriate).

This theory has implications for the *relative* size of penalties for different breaches. In particular, it implies a need for penalties to be risk-rated, such that penalties for higher risk (ie more dangerous) breaches are greater than those for lower risk breaches with the difference between the penalties reflecting the proportional difference in risk.

However, the survey responses indicate that, in some cases, the financial penalties available through the courts are not risk-rated. For example, the South Australian Health Commission indicated that minor labelling breaches are liable to the same penalty ($2500) as major breaches relating to health claims. South Sydney noted that the maximum penalty for unclean premises is $2500 whereas it is $5000 for selling sausages with excess fat content.

These problems may be overcome if the courts themselves vary the level of penalty they impose (under the maximum penalty available) according to the seriousness of different breaches, or if enforcement agencies compensate by varying the frequency with which they prosecute different types of breaches.

However, there may also be a need to realign the maximum available penalties.

The theory of optimal deterrence also has implications for the *absolute* size of penalties. Where the probability of detection and penalisation for breaches is low, there will be a need for higher penalties to compensate and maintain the required expected cost of a breach.

Penalties for breaches of food regulations in Australia vary from State to State. For example, the maximum penalty in Queensland is $6000 whereas it is $20 000 (or six months imprisonment) in Victoria.

The survey elicited differing views on the current level of penalties available through the courts. South Western Sydney *PHU* indicated that the courts had levied what it considered to be quite reasonable penalties in some cases. On the other hand, the South Australian Health Commission noted that it is not uncommon for courts to award around 10 percent of the maximum penalty for many breaches. When combined with limited prosecution, expected penalties can be quite low. This would be consistent with the situation in many other regulatory fields. [18]

On the matter of penalties, Queensland Health has stated:

> There is a major problem with the small fines in relation to composition standards where a manufacturer may deliberately not conform because of the major financial gains that are available and which outweigh the insignificant penalty imposed if convicted (eg, flooding

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[18] For example, expected penalties for breaches of OHS regulations in Australia amount to approximately $20 per breach when averaged across jurisdictions. See Industry Commission, *Health, Work and Safety*, Draft Report, p. 113, May 1995.

> the market with low standard product at cheap prices netting significant returns in a short period of time prior to actions being completed by authorities).[19]

To the extent that court penalties are too low to provide an optimal deterrent, a case could obviously be made for increasing them. Alternatively, the need for higher expected penalties could be satisfied if agencies were to increase their inspection and prosecution rates. However, where resource constraints or other reasons limit this course of action, higher legal penalties may be required for optimal deterrence.

That said, other considerations may limit the scope for increasing available penalties. In particular, where low detection and penalisation rates require *extremely* high financial penalties to produce the desired 'expected penalty', equity and practicality considerations may intervene. Governments and the courts may be reluctant about imposing extremely high penalties on those few firms which are prosecuted, and agencies may be reluctant about pursuing prosecution under such circumstances anyway. Consequently, beyond some point, higher pecuniary penalties may lack credibility and actually reduce the 'expected penalty' associated with any particular breach. This in turn implies a practical limit to the application of the optimal deterrence model based purely on financial penalties.

These limitations mean that, if a deterrence strategy is to be pursued, alternative penalties may be appropriate. One possibility is the seizure and/or recall of certain products. However, these should arguably be seen essentially as a consumer protection or safety measure rather than a punitive sanction because they can 'waste' a resource if the product is fit for consumption. Other possibilities include custodial penalties, compulsory training for firms and/or employees responsible for breaching particular laws, and adverse publicity.

### *Adverse publicity*

Beyond conventional court-based penalties, further deterrence can be generated via the use of adverse media publicity against firms breaching the law. Adverse publicity can involve naming firms which have been successfully prosecuted to increase the 'expected penalty' of such breaches, or simply publicising the fact that certain unspecified firms have been prosecuted, thus increasing the general deterrent effect associated with legal penalties. Although extensively used in other fields such as road safety and financial regulation, the survey results indicate that, at present, this approach is little used in relation to food laws.

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[19] Queensland Health, *op. cit*, p. 15

The main advantages of adverse publicity are:

- it can provide a large deterrent at relatively little cost to an agency. Indeed, with agencies facing limited resources, adverse publicity may be a credible and effective tool, especially given the limitations of prosecutions (see above); and
- it may raise the awareness of other businesses to food safety issues, and therefore encourage them to comply.

However, adverse publicity is a 'blunt' instrument, and it is difficult to know in advance the effect it will have. Sometimes it will reach numerous households and be interpreted by the media as a significant problem, causing considerable loss to an offending business. At other times, a problem may receive little exposure or interest in the community, and correspondingly cause little loss. [20] This makes it difficult to match an offence with an appropriate amount of corrective action. Indeed, in discussions with the ORR, South Western Sydney *PHU* said:

> With adverse publicity you do not have complete control. It can be too soft or too harsh. On one occasion, local newspapers decided not to publish offences that we had advised them about.

Further, adverse publicity may harm innocent businesses, whose reputation may be damaged by the publication of a breach by another business. An example is the small goods industry which suffered as a result of the publicity associated with the Garibaldi incident in South Australia. [21]

## Licensing

Licensing for food-related firms can specify structural requirements for premises, procedures to be followed and staff training/educational requirements. As well as applying to firms and particular premises, individuals can also be separately licensed to perform certain functions (such as pilot's licences in aviation). In the context of food safety, however, most focus is on the need for licensing firms with the possibility of specifying staff training/educational requirements in that license (or in legislation relating to it).

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[20] Further, in the case of manufacturers of generic goods, consumers may not be able to identify the offender's product and therefore the cost to the offending manufacturer may be very low.

[21] Further, the loss of reputation may extend beyond similar businesses, and effect the general reputation of the locality in which the breach occurred. This could particularly be a problem if adverse publicity was used in one jurisdiction, but not another. Under these circumstances the public may perceive one area as a higher food safety risk than another, when it may not be.

At present, licensing powers differ between jurisdictions. Full licensing of food premises occurs in Queensland, Victoria and the ACT. There are provisions for licensing of a limited range of establishments under Eating House regulations in the Northern Territory, by-laws in Western Australia, and the Food Act in Tasmania (although the proposed new Food Act for Tasmania will allow comprehensive licensing).[22] In NSW and South Australia there is no formal food premises licensing — only ad hoc, indirect mechanisms such as building approvals.

The main advantages of licensing are:

- it gives enforcement agencies knowledge about ownership/location of food premises and changes there-in;
- it helps ensure that new establishments have appropriate processes/premises which can reduce/avoid high fix-up costs later;
- it increases businesses awareness of food safety issues and regulations. (A particularly innovative method of achieving this is the approach of Brisbane City Council which uses self-assessment by business as part of the registration process);
- licence renewals provide a bargaining tool for enforcers to gain increased compliance with food laws; and
- licences can be one mechanism for obtaining money for inspections and other enforcement activities (without the malincentives associated with fee-for-inspection systems[23]) and this can be useful for resource-constrained agencies.

Licenses can also be risk based, with either varying degrees of stringency or levels of fees. Indeed, Tasmania's new draft Food Act proposes discounted licence and inspection fees, and at Moreland Council (Vic) an insurance like rating system was being considered (see Box B7).

There are also potential costs in licensing systems which need to be weighed and considered in licence design. In addition to administrative costs incurred by the enforcement agency, licensing can impose compliance and paper-burden costs on businesses. Further, licensing can act as a barrier to entry for new firms entering the industry where licensing requirements are enforced more rigidly for new firms than for existing firms. These problems are exacerbated where businesses face multiple licensing requirements for different aspects of their operations.

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[22] In Western Australia, local councils have the option of enacting Eating House by-laws under the State Health Act. These by-laws apply to restaurants, dining rooms, takeaways and tea-rooms (but not butchers, supermarkets, small goods retailers, fish merchants or food manufacturers). Premises can be registered under these by-laws. Gosnells Council (WA) reports that the use of registration provisions across the State is ad hoc.

[23] Councils which are unable to charge a license fee for food-related business often charge on a 'fee-for-inspection' basis. Sydney City Council indicated that this has caused it to give greater priority to inspections than it otherwise would, in order to gain additional revenue.

### Food awards

Although still not widely used, awards are increasingly being adopted by enforcement agencies in the food industry, with many of them addressing issues beyond those covered by regulation such as general nutrition (see ACT Award Scheme — Box B6).

The advantages of awards include:

- encouraging compliance in a positive and cooperative manner, where firms are rewarded for good performance rather than punished for poor performance;
- providing consumers with information to assist them in purchasing decisions; and
- encouraging the attainment of food health and safety beyond the level specified in regulations (such as encouraging the use of oils low in saturated fat in commercial food preparation).

However, one issue with award systems is whether they expose an agency to potential liability in court cases involving poor safety standards at a certified/awarded food premises.

Another matter is that of the administrative cost of running award schemes. By expending agency resources on food awards, a disproportionate amount of resources may be directed towards those businesses which would be likely to comply voluntarily with regulations anyway, leaving fewer resources for dealing with less compliant businesses.

Further, a change of staff or proprietor may substantially affect the quality of food service provided such that the justification for an award may be lost. This change in service quality is unlikely to be detected until the next award review period, resulting in a misleading message to consumers in the meantime, except to the extent that the award can be designed to take account of these issues, perhaps requiring notification of a change in ownership.

Beyond these issues, there are several other considerations involving the design of award systems. Firstly, in designing awards which encourage business to achieve standards that go beyond established regulations, risk assessment is needed to determine which areas of attainment are most worthwhile. Secondly, the extent and stringency of award requirements needs to be determined, with consideration given to the possibility that too high a standard, or too many standards, may discourage businesses from participating. Thirdly, agencies may want to consider different levels of awards, so as to encourage businesses to lift their game at all ends of the market. Indeed, in Tasmania, butchers have the choice of two awards reflecting different levels of health and safety.

### Industry involvement

Industry involvement can manifest itself in the establishment of committees to advise on enforcement matters; industry sponsored education or media campaigns; the dissemination of information via industry newsletters; and industry association sanctions and disciplines.

Agencies ability to use industry involvement will vary, depending for example on the level of organisation of the food industry within the jurisdiction and the incentives it faces to cooperate.[24] Further, there is a potential danger that industry involvement may encourage the use of enforcement practices which favour the industry, but not society.

However, where feasible this approach can:

- draw on the expertise, knowledge base, reputation and ‘goodwill’ of industry participants on various food related matters, such as identifying non-complying businesses and encouraging compliance;
- save agency resources and/or facilitate enforcement activities, such as education or media campaigns, that may not have been conducted by the agency alone due to limited resources;
- encourage a cooperative atmosphere, which may be useful for achieving compliance at the individual firm level; and
- lift general awareness within the industry of food health and safety issues.

An example of the successful use of industry involvement is provided by Tea Tree Gully Council (SA) (see Box B8). Its initiative involved surveys, workshops and the establishment of several joint Council-industry committees and resulted in a more compliant industry culture.

## A3.5 Policy issues: enforcement strategies

Beyond considering the array and design of tools available for enforcing food laws, the issue arises as to how, and in what circumstances, they should be deployed.

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[24] If penalties for non-compliance are high, either in amount or frequency, then the incentive for the food industry to learn how to comply will also be high. For example, Tea Tree Gully Council (SA) informed numerous businesses within their jurisdiction that they were technically liable to fines, and invited them to cooperate to avoid them. The result was that industry came forward and began participating in the enforcement process.

The regulatory literature[25] provides a number of conceptual frameworks which can assist in understanding the alternative behaviours and approaches that enforcement agencies can, do and should use for enforcing regulations in different situations. Relevant enforcement frameworks include:

- proactive–reactive;
- combative–cooperative; and
- legalistic–discretionary.

The food enforcement agencies which responded to this survey are explicitly or implicitly already operating within these frameworks.

That said, it is not possible to precisely 'locate' the enforcement agencies as a group within these frameworks. This is because studies in the regulatory literature demonstrate great variability in the approaches used, not just between agencies but also sometimes between different officers within agencies or even by the same officer in different circumstances.

But while there are difficulties in pin-pointing the way enforcement agencies *do* operate, the frameworks assist in understanding the ways enforcement agencies *can* operate, and theoretical developments based around them can provide insights into how agencies *should* operate in particular circumstances. In other words, the frameworks can assist in understanding the circumstances when deploying particular enforcement tools is most appropriate.

In this section, strategies for enforcement agencies are discussed in the context of these frameworks.

### Proactive versus reactive strategies

The *proactive-reactive* framework refers to whether a regulatory agency seeks to modify behaviour before or after a breach occurs. Proactive approaches encourage (via education), coerce (via the possibility of inspection) or require (via licensing) compliance before a breach occurs. They are preventative. In contrast, reactive approaches involve the following up of complaints or adverse inspection results. Of course, in some respects, reactive strategies can have proactive effects where action to rectify a breach has a broader educative or deterrent effect.

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25 See, for example, Rosenbloom, D. and Schwartz, R., *Handbook of Regulation and Administrative Law,* Marcel Dekker, Inc, 1994; and Grabosky, P. and Braithwaite, J., *Business Regulation and Australia's Future*, Australian Institute of Criminology, 1993; Ayres, I and Braithwaite, J., *Responsive Regulation*, Oxford University Press, 1992.

At a superficial level, the evidence of where food enforcement agencies as a group lie on the *proactive-reactive* continuum seems mixed. On the one hand, the agencies tend to focus on dealing with specific breaches rather than improving business culture, implying a partly reactive approach. On the other hand, in seeking to identify specific breaches, the agencies undertake proactive measures such as inspection and surveillance more frequently than responding to public complaints. The licensing of premises as required in some jurisdictions and the enforcement of construction and fitout requirements also implies a proactive stance.

While the evidence is thus mixed, a pattern can be discerned wherein an individual agency's location on the continuum is linked to its resource levels. Agencies with very limited resources tend to respond mainly to complaints and most agencies give priority to complaints — a reactive measure. Those agencies with more resources, whilst generally having complaints as their first priority, allocate additional resources to inspections — a measure involving proactive deterrence. Those agencies with relatively plentiful resources tend to devote further resources to broad education — a purely pro-active measure. There are exceptions to the pattern: some agencies with quite limited resources focus on proactive approaches. But generally, agencies start off reactive and, as resources increase, tend to become more proactive in their approach.

Is this approach warranted?

Some proactive strategies, involving formal education and licensing, can appear resource intensive. Education, for example, is used as an instrument for directing behaviour in many aspects of human life, but it is widely recognised that the effectiveness of education depends on variables such as the quality of the program, the teaching staff, time available and the venue and facilities provided. As such it may appear that an educative approach requires an enforcement agency to have reasonable resource levels, a point frequently raised in the responses to the survey.

However, whilst resource intensive, proactive strategies may still be more cost-effective than some reactive strategies. For example, it may be that devoting scarce resources to a broad education program generates a higher level of compliance than an enforcement strategy lacking in credibility due to the inability of the agency to fund adequate inspections or involving the follow-up of only those matters which generate specific complaints from the public. If so, agencies with constrained resources may achieve better results by reducing or even eliminating inspections, particularly of premises in low-risk groupings, and limiting time spent on less compelling[26] public complaints, and instead focussing their resources on broader education. The experience of Tea Tree Gully Council (SA) is pertinent in this

26 Some complaints may be 'less compelling' than others because they deal with trivial matters or because they are poorly substantiated or vague.

context. Faced with limited resources and systematic non-compliance, it adopted a proactive approach involving significant industry involvement (see Box B8).

At a more general level, proactive strategies have advantages for matters where:

- *breaches are hard to identify* — the effect of a breach may be so dispersed, unmeasurable or difficult to trace back to the offender such that reactive approaches become quite ineffective. Under these circumstances, proactive strategies are more likely to achieve a higher level of compliance;
- *the costs of a breach are very high* — in these cases, the costs to society of 'waiting' for a breach to occur before taking action may rule out reactive approaches; and
- *initial mistakes are hard to rectify subsequently* — proactive approaches can prevent businesses inadvertently establishing processes that create a hazard and require high adjustment costs to bring about compliance. This not only has the potential to save businesses money, but also encourages ongoing compliance as the costs of doing so are lower.

The foregoing points suggest that, while some proactive strategies may be appropriate for the enforcement of food regulation generally, proactive approaches will offer relatively greater advantages in the case of food manufacturers and, possibly, higher risk and more complex retail businesses such as restaurants. [27]

However, just as the poor visibility of breaches may provide some justification for adopting proactive approaches, the poor visibility of *potential* breaches may, by making it difficult for an agency to know what proactive measures to take, provide some justification for using reactive approaches.

Further, proactive measures sometimes act as a barrier to entry. Licensing in particular can form a barrier to entry, but so can proactive mandatory education (see A3.4). If such requirements are unduly onerous, the costs of operating in the food industry will increase with effects on profitability, employment and prices.

Finally, if pro-active measures are poorly targeted, they may waste resources on those firms which would comply anyway. For example, some business managers and their staff may not need external training, either because of experience, previous

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[27] This is because, relative to breaches by retailers, breaches by manufacturers are likely to be harder to identify due to the relative complexities of manufacturing operations; the higher costs of a breach because more people are likely to be affected; and it is likely to be more expensive to adjust manufacturing operations once they are established given that they tend to be relatively more capital intensive. Further, 'barriers to entry' problems may be less significant in manufacturing because, to the extent that barriers involve fixed costs, these will be more easily dispersed over relatively higher output levels (see text above for a discussion on barriers to entry).

training or because the firm provides it in-house. Education systems that do not account for this will waste the resources not only of the enforcement agency but also of businesses. For such firms, reactive educational requirements may be preferred where businesses in need of training will reveal themselves through their breaches. Further, requiring business managers and/or staff to undergo training upon discovery of a breach will, if communicated, mean that only businesses expecting to breach the law will consider educational requirements as a cost of entering the industry, with businesses confident of complying with the law not being discouraged from entering the industry. This points to the need for some degree of targeting of pro-active measures.

## Combative versus cooperative strategies

The *combative-cooperative* continuum refers to whether regulatory agencies adopt a threatening or friendly posture in dealing with those regulated. Combative approaches often involve the threat of severe punishment as the incentive for compliance. This has been described as regulating with ‘a big stick and raised eyebrows’. Combative approaches may alternatively involve a frequently used ‘little stick’. The central idea behind a combative approach is deterrence, which may manifest itself in a number of ways, often making it uneconomical for business not to comply with the regulations. In obvious contrast, cooperative approaches focus on education, advice, working together and mutual interdependence.

In general, the agencies surveyed appear to take a cooperative approach. Most agencies indicated that they seek to remedy breaches initially through advice and warnings rather than more punitive approaches and that most breaches faced did not escalate beyond this stage. That said, a subset of agencies indicated a willingness to use punitive sanctions in certain instances.

The appropriateness of cooperative or combative approaches will depend partly on:

- the cooperativeness of business;
- agency resource levels;
- available penalties;
- visibility of violations; and
- the rate of firm turn-over.

### *Cooperativeness of business*

When businesses are not cooperative, with the propensity to comply only when it is profitable to do so, combative approaches may be more appropriate. For these businesses, resources spent on education and gaining compliance progressively through negotiation will be relatively ineffective. Further, negotiation and

cooperation can be abused by the non-cooperative businesses undertaking strategic behaviour, using it to ‘buy’ time and avoid compliance.

On the other hand, if a business is cooperative, resources spent on legal costs will be poorly spent as cooperative firms may not need to go through the courts in order to modify their behaviour. It may also create an environment of resistance to compliance. As Gunningham puts it:

> ...if regulators assumed all firms require threatening with a big stick in order to bring them into compliance, then they will unnecessarily alienate (and impose unnecessary costs on) those who would willingly comply voluntarily.[28]

One strategy that offers guidance on this issue of identifying appropriate enforcement stances, based on the cooperativeness of businesses, is referred to as ‘tit for tat’ enforcement. This strategy involves the enforcement agency adopting a cooperative strategy until a business displays non-cooperative behaviour, if it indeed does, where upon the agency’s strategy will change substantially to a combative one. As Ayres and Braithwaite state:

> ...the regulator refrains from a deterrent response as long as the firm is cooperating; but when the firm yields to the temptation to exploit the cooperative posture of the regulator and cheats on compliance, then the regulator shifts from a cooperative to a deterrent response.[29]

These analysts conclude that the ‘tit for tat’ strategy:

> ...resolves the contradictions of punishment versus persuasion...By cooperating with firms until they cheat, regulators avert the counter productivity of undermining the good faith of socially responsible actors. By getting tough with cheaters, actors are made to suffer when they are motivated by money alone; they are given reason to favour their socially responsible, law abiding selves over their venal selves.[30]

A related solution, and one the survey revealed is often used in food enforcement, is the regulatory enforcement pyramid (see Diagram A1) where regulators start at the bottom of the pyramid, assuming that business is willing to comply voluntarily, but with the provision that they can move up the pyramid to increasingly combative approaches for continued non-compliance.

Support for a pyramid enforcement structure also comes from its subtle ability to encourage compliance without actually having to move up the hierarchy. Ayres and Braithwaite state:

> The key contention of this regulatory theory is that the existence of gradients and peaks of ...enforcement pyramids channels most of the regulatory action to the base of the pyramid — in the realms of persuasion and self-regulation. The irony ...[is that] the existence and signalling of the capacity to get tough as needed can usher in a regulatory climate that is

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28 Gunningham, N., ‘Optimal Regulatory Strategy’, *Search*, Vol. 25., No 4., May 1994, pp. 99.

29 Ayres and Braithwaite 1992, *op cit*, p. 21.

30 *ibid.*, pp. 26-27.

> more voluntaristic and non-litigious than is possible when the state [regulator] rules out adversariousness and punitiveness as an option.[31]

Following on from this, these authors argue that cooperative strategies can be more effective when regulators display an explicit enforcement pyramid. Businesses are then made aware of the consequences if cooperative relations breakdown and non-compliance continues.

However, a potential danger in making the regulator's pyramid known to the regulatees is that they may adopt strategic behaviour. Business may use the pyramid as a way of delaying compliance until higher levels of the pyramid have been reached, where the expected costs of non-compliance become greater than the costs

of compliance. By keeping the pyramid unknown to regulatees, an element of risk is introduced to those regulatees that want to adopt strategic behaviour. Assuming regulatees are risk averse, this will tend to reduce the incidence of strategic behaviour and encourage compliance at an earlier stage in the enforcement process.

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31 *ibid*. p. 39.

### *Agency resources*

An agency faced with scarce resources may achieve more using combative measures where the use of large penalties (assuming the agency has sufficient discretion over the size of penalties) may encourage reasonable compliance even if inspections are infrequent. This is because, although the probability of being found in non-compliance will decline with reduced inspections, the use of tougher penalties can keep the expected costs of non-compliance faced by regulatees sufficiently high to induce compliance. Further, where resources are scarce, cooperative strategies may require too much time, thus unduly diminishing enforcement efforts in other areas. Indeed, to be most effective, tit-for-tat and enforcement pyramid strategies require frequent interaction between the agency and the business to promptly identify and punish any betrayal of trust. They may therefore be inappropriate if agencies' resources are severely limited.

However, a lack of resources does not unambiguously support the use of combative measures and, in certain circumstances, cooperation may be the preferred approach. Tea Tree Gully Council's (SA) industry involvement approach is again pertinent.

### *Available penalties*

Three aspects of the legal environment will affect the choice between cooperative and combative approaches.

One is the functioning of the legal system, such as the financial costs and delays involved, and whether facility is provided to reimburse an enforcement agency for the full costs involved in prosecution. Several enforcement agencies indicated in their survey responses that the high legal and time cost of mounting court action often deters them from prosecuting. Under these circumstances, the adoption of combative methods may depend on the extent of an agency's non-court related remedies.

The second aspect, therefore, is the *range* of non-court remedies available to the enforcement agency, such as its ability to issue administrative fines and seize produce without court involvement. Where these exist and agencies do not need to rely on the courts, combative approaches may be seen as more credible and effective.

The third aspect is the *size* of penalties involved. Clearly, the larger the penalties imposed for breaches, the more effective the combative approach will be.

### *Visibility of violations*

The visibility of violations is another influence on the usefulness of combative or cooperative approaches. If breaches are hard to identify or link back to the offending

party, the use of combative methods can be somewhat blunted. For example, gaining a successful conviction will be very difficult if the defendant can not be clearly linked to the alleged offence. On the other hand, ease in detecting breaches may make combative approaches more effective.

However, it does not necessarily follow that ease of identifying breaches justifies a more actively combative approach. For example, as discussed earlier, the mere existence of potential combative action on the part of an enforcement agency may be sufficient to induce businesses to remain at the bottom of the pyramid (cooperating with the regulatory agency), with the easy detection of breaches likely to encourage business to adopt such a position. Under these circumstances, more cooperative approaches, with the potential for escalation into combative mode, may better encourage compliance.

Related to this issue of the ease of detectability is the frequency of inspections. The more frequent an enforcement agency is able to inspect a premises, the more it will learn about the regulated business's technologies, vulnerabilities and resources, and the better it can evaluate risks and alternative ways of achieving regulatory goals. This makes adopting a tit-for-tat enforcement strategy more feasible.

#### *Rate of firm turnover*

The turnover rate of different types of food businesses is also a relevant issue in choosing between combative and cooperative approaches. If a business is likely to continue in the area under the same management for a long period of time, the benefits of adopting a cooperative approach, involving education and relationship building, are more likely to be realised because these activities require some time to have their full effect on compliance. On the other hand, cooperative approaches can be abused if ownership in particular areas or for particular types of food businesses change hands frequently or if, as in the case of some mobile food operators, firms do not remain in the area for very long. In these cases, firms may, in adopting strategic behaviour, gain the benefits of abusing a cooperative approach without having to face the costs of such action. This is because the enforcement agency may take time to discover and act upon such abuse, in which time ownership (or location) may have changed.

### Legalistic verses discretionary strategies

The *legalistic-discretionary* framework refers to the flexibility agencies show in interpreting regulations and applying legal sanctions. Legalistic approaches entail strict enforcement and letter-of-the-law interpretation, whereas a discretionary approach is more tempered, often involving flexibility and judgment in interpreting regulations and hierarchies of enforcement levels. It often provides offenders with a

second chance, frequently coupled with advice on how to comply. Strategic trade-offs may be used where, for example, the enforcement agency overlooks one violation in return for enhanced compliance in other areas.

The survey responses suggest that many of the agencies tend towards the discretionary end of the continuum, at least in terms of the way they respond to breaches. For example, most agencies take a graduated approach to rectifying specific breaches, relying on advice and warnings rather than up-front fines and prosecution. In particular, several agencies indicated that they use considerable discretion in applying certain building requirements to old premises, implicitly weighing up the costs of abatement with the costs of the breach, and allowing the owner time to comply or not requiring compliance with certain regulations.

In terms of interpreting the law and identifying a breach, while it is unclear from the survey responses whether the agencies adopt a legalistic or discretionary approach, the industry visits conducted by the ORR suggested that many enforcement officers are prepared to identify a breach using a fairly literal approach and put it to the attention of the owner. That said, if a business is breaching several laws, the officers will tend to raise with the owner only the more important breaches. One prominent example was a manufacturing business in Essendon. This business was in breach of numerous regulations, both in terms of operations and premises fit-out. Under these circumstances, the local *eho* used discretion and focused on bringing to the attention of the owner the most important breaches.

While discretionary approaches to food law enforcement will often be appropriate, the degree of discretion that is appropriate in any particular situation will depend on several variables, including:

- variations in the cost of compliance for different businesses;
- how much knowledge the agency possesses about a particular busines s;
- the importance of business cooperation;
- the type of regulation being enforced; and
- aspects of the legal system.[32]

### *Cost of compliance*

Where regulations are costly to comply with fully, businesses have a commercial incentive to avoid any attempt to rectify their operations and simply risk the legal consequences (or seek to escape the legal consequences by exiting the industry).

[32] Three other factors, which lessen slightly the advantages of discretionary approaches, are: greater scope for inconsistent application of food regulations across similar businesses; exposure of enforcement agencies to superficial criticism for “not doing their job”, and greater potential for businesses to ‘capture’ the enforcement agency.

In such cases, a discretionary approach may provide the benefit of lifting the level of compliance by encouraging business to meet an intermediate standard whereupon discretion will be used to overlook the fact that total compliance has not been achieved. In other words, rather than an ‘all or nothing’ option, discretion can provide the business with attainable, intermediate goals. [33]

This has particular implications for the treatment of existing businesses compared with proposed or new businesses.

If a business is already established, with equipment and operations organised in a particular way, a discretionary approach to enforcement may be appropriate. This is because if a regulation requires a major modification of existing equipment or facilities, the adjustment cost faced by the business may be very high, indeed, possibly higher than the expected public health benefits of the change. As such, adopting a strict legal interpretation of the law may involve greater costs than benefits.[34] Discretion under these circumstances, in terms of the time frame of adjustment or the degree of compliance, should be the preferred solution. As mentioned earlier, a number of enforcement agencies already adopt this approach in relation to premises fit-out requirements.

On the other hand, whilst applying a strict legal interpretation of the law upon *proposed* businesses will also impose costs, the costs will be smaller because the business has not yet committed itself to particular equipment or processes. As such, there will be less or no need for discretion in applying the law.

### *Importance of cooperation*

Another consideration for enforcement style is the level of cooperation and responsiveness of businesses and, related to it, the importance of cooperative relationships for the enforcement agency and the chance of losing them by adopting legalistic enforcement. For example, if a business is cooperative, and this is important for achieving regulatory objectives, the use of legalistic enforcement may

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33 Similar incentives can also be obtained using a staggered penalty system (similar to that used for violations of speed restrictions in the road safety field). Under this approach, businesses face incremental benefits (in the form of reduced penalties) every time they improve compliance, rather than a discrete cut-off point where a penalty is avoided. Such systems in themselves involve an element of discretion whereby different levels of compliance with standards are tolerated, albeit with some penalties for incomplete compliance.

34 Costs faced by a business are resource costs, and therefore are relevant costs to society. As such, whilst enforcing strict legal compliance may generate benefits to society, for example in the form of higher food safety, these benefits should be weighed up against the costs to society of imposing such standards.

be counter-productive if the agency's pursuit of breaches is viewed as trivial or unreasonable and leads to a breakdown in cooperative relations.

### *Agency knowledge of a business*

Where an agency possesses a good understanding of a business, discretionary approaches may be appropriate. Making trade-offs with proprietors and establishing discretionary time frames for compliance are more likely to achieve regulatory objectives if the agency understands the risks involved in a particular business and the capacity of a business to adjust.

### *Regulatory design*

Appropriate enforcement approaches will depend in part on whether the type of regulation being enforced is prescriptive, performance-based or principle-based.

Prescriptive regulations are specific requirements which entail little flexibility. As such, by themselves they are unable to cater for the myriad of variables which influence optimal regulatory outcomes. One example is specific maximum temperature limits for cold food storage, normally set at five degrees (but seven degrees in Tasmania), specified in regulations. Some products, such as milk, are amenable to undue bacteriological growth at lower temperatures, whilst other products, such as certain hard cheeses, may be suitable for storage or display at higher temperatures. Another example is the requirement for 'coving' in food premises. Whilst appropriate for 'wet areas', it is not clear that it is necessary for dry areas. A further example is Standard A12 from the Food Standards Code which specifies a maximum permitted concentration of cadmium in wheat (0.05 milligrams per kilo) that is below the naturally occurring level for wheat grown in many areas in South and Western Australia and is not a major health risk issue.

Interpreted literally and enforced legalistically, these regulations could impose unnecessary costs on business and/or promote sub-optimal health and safety outcomes in some cases. Hence, discretionary enforcement is needed to complement prescriptive standards to introduce some flexibility into the overall regulatory regime.

For performance-based and particularly principle-based regulations (such as the general requirement that food premises be maintained in clean and hygienic conditions), flexibility is built in to the regulation such that discretion and judgment are largely unavoidable in interpreting whether a breach has occurred.

### *Legal system*

There are two aspects of the legal framework which will affect the feasibility of a legalistic approach to enforcement. Firstly, high court costs, without adequate reimbursement, may make it impractical for enforcement agencies to enforce all aspects of the law in a legalistic manner, especially for minor and infrequent breaches. As discussed above, this appears to be the case for some aspects of enforcing food laws. The second aspect is the range of enforcement remedies available to the enforcement agency, such as administrative fines or adverse publicity. If sufficient alternative remedies are available, then legalistic enforcement need not be severely limited by the high costs of prosecution.

## A3.6 Policy issues: future directions

Given the array and possible combination of mechanisms and strategies available or potentially available for enforcing Australia’s food laws, the question arises as to whether it is possible to prescribe an ideal set of enforcement practices and, if so, at what level of government such policies might best be determined.

While many local government agencies already have their own guidelines and procedures, some State agencies have also promulgated enforcement guidelines, both for internal use and for the use of regional or local government agencies. Further, in its response to the survey, the NFA stated:

> It is thought the Authority could play a useful and more active role in co-ordinating surveillance and enforcement and by working towards the development of draft national strategies for enforcement and surveillance of the Food Standards Code – for further consideration by those agencies with enforcement responsibilities. Clearly, adoption of any strategies so developed will rely on the continued co-operative arrangement with and between the States and Territories, at all levels.

The ORR has not attempted to use the enforcement theories outlined above to suggest a single ideal enforcement approach.

Apart from lacking the detailed knowledge of food necessary, a key point of the above theories is that there is no one particular strategy that will be ideal in all situations. For example, whilst cooperative approaches will be appropriate in most circumstances, agency resource levels will influence the extent to which, and speed with which, it is appropriate to shift to more combative approaches. Where enforcement resources are scarce, a relatively more combative approach may be warranted compared to where resources are plentiful. Similarly, whilst a discretionary approach will often be appropriate for applying fitout regulations to existing businesses, it will be less appropriate for new businesses. And a proactive strategy will be more appropriate for dealing with significant risks than for dealing with lower level risks. Further, there are many permutations and combinations of these approaches which could be considered ideal in particular circumstances.

As alluded to above, which strategy would be ideal also depends on what mechanisms are available to enforcement agencies. For example, the availability of on-the-spot fines and the extent of legal sanctions for breaches of food laws will influence the effectiveness of combative strategies. Where licensing provisions do not exist, the potential for proactive approaches is reduced. As discussed earlier, there are currently differences in the enforcement mechanisms available for agencies in different parts of Australia.

Clearly, it is appropriate for higher level government agencies to examine the mechanisms available for enforcement and to seek to provide an appropriate array of tools for field agencies. As mentioned above, some of these matters have or are being covered as part of the Queensland Health’s review of the Queensland Food Act, Tasmania’s new Food Act currently being drafted, and the NFA’s development

of uniform hygiene standards. There is also a need for measures to overcome coordination problems, particularly in the area of food surveillance. And on some matters there is a need to ensure that non-uniform approaches to enforcement do not lead to undue differences in regulatory outcomes across jurisdictions.

However, the case for central agencies developing enforcement strategies for field agencies is mixed. On the one hand, a complex array of variables will influence the ideal approach (see Box A1). To the extent that central agencies can marshal appropriate expertise, there may be economies in a central agency examining these issues and determining and disseminating an appropriate mix of strategies for enforcing food regulations. On the other hand, several of the variables relate to localised conditions. Hence, while central agencies could provide broad guidance on these matters, there will always be a role for decentralised decision-making by field agencies in determining specific enforcement approaches.

**Box A1: Factors influencing ideal enforcement behaviours**

Relevant firm and industry-specific factors include:

- size of the regulated firm;
- cooperativeness of the regulated firm (and its employees);
- whether the firm is new or existing; and
- rate of firm turnover.

Relevant regulation-specific factors include:

- nature of standard breached (principle, performance-based or prescriptive);
- risk levels associated with particular breaches;
- relative costs of rectifying a particular breach proactively and reactively; and
- visibility of particular breaches.

Relevant agency-specific factors include;

- resources available to the enforcement agency;
- sanctions and mechanisms available to enforcement agency;
- costs to the enforcement agency of undertaking different enforcement actions;
- the enforcement agency's level of knowledge of the regulated enterprise; and
- political environment.

# A4 OTHER MATTERS

In addition to the foregoing matters, the ORR sought information on a range of other issues. These included coordination matters, non-uniformity, approaches to dealing with interpretation difficulties, and agencies' perceptions regarding the issues taken into account in the development of food regulations. As well, the survey included a broad question relating to any problems agencies saw in current enforcement practices. The responses were extensive and broad-ranging and are summarised in detail in Section B4.

In this section, the ORR discusses four main issues arising from the survey and its own investigations. These are coordination, uniformity, interpretation and implications for the development of food regulations.

## A4.1 Coordination and communication

Coordination and communication problems are perceived to be widespread, manifesting themselves in four ways.

First, there can be duplication of enforcement activity. For example, the South Australian Health Commission stated:

> Apart from procedures for food recall, advice between States is informal. Because there is no official recording and access to information on an Australia wide basis (a National Database), it may take time to identify that a company is regularly in breach of standards. This is particularly important for breaches involving the sale of unfit food. This lack of interchange means that *duplication* of activity must take place if a State Authority is to be in a position to monitor standards within its own jurisdiction. If a State food authority could, for the purpose of reporting to its own administration, access a common database to show adequate monitoring and enforcement of food standards in the State where foods were produced, then there is scope to minimise duplication of work.

Second, limited coordination and communication between local councils and the national level can result in poor input by some local councils in the law making process. South Sydney Council said:

> Very little information comes to council from the national level. Local government does not seem to have much say in legislative change or to comment on the proposals formulated.

Third, poor coordination and communication can also reduce enforcement effectiveness. For example, the lack of communication of sampling results from other agencies can clearly limit the enforcement effectiveness of some agencies because sampling results can often be very useful in identifying non-compliant businesses that may operate over several jurisdictions.

Finally, a lack of coordination and communication between enforcement agencies with regard to their respective activities and interpretations of the law can lead to problems of non-uniform enforcement (see A4.3). Monash Council (Vic) provided an example of this with respect to sampling activities:

> ...a national retailer was found in Victoria through the sampling program to be unable to consistently substantiate a label claim relating to fat content. The action recommended by this office was to drop the label claims. We were advised that it was not possible to do this as the policy came from Sydney and they were not aware of problems in other States. Our view was that the only reason that there was no problem interstate was that the product does not get sampled in other States. Legal action was commenced but was withdrawn when the retailer decided to drop the label claims in Victoria. However the label claims are still being used in other States.

These coordination problems have several causes. One is the complex institutional structure which exists in some States and Australia generally. In NSW, for example, some councils find themselves traversed by two (autonomous) regional units, as well as having contact with the State Department's policy unit. Another is the lack of formal coordination mechanisms in some areas, particularly a lack of formal information systems (such as a national database).

In terms of 'horizontal' coordination between different agencies at the same level of government, some measures have been put in place to reduce coordination problems. For example, formal or informal systems of networking exist in many areas (such as South East Queensland and Adelaide), and some groups of agencies are pooling resources (as in the WA food sampling program (see Box B9) and joint training programs in Victoria).

In regard to 'vertical' coordination, the NFA is in the process of developing explanatory memoranda and interpretation notes, and is planning to bring together representatives from all levels of enforcement to explore issues of communication between the Commonwealth, States/Territories, and local authorities. And with the agreement of the States, the NFA is also developing a national database: the Australian Food Safety Information Network.

## A4.2 Non-uniform enforcement

Information gained from the survey indicates that there is often non-uniform enforcement across jurisdictions, which reduces enforcement effectiveness. Some agencies indicated that they were "exasperated" and "hamstrung" by other jurisdiction's inaction. Moreland Council (Vic) said:

> The lack of uniformity taken by different authorities and indeed local government *ehos*, creates confusion in the minds of proprietors and does not create an image of professionalism.

Further, Monash Council (Vic) said that non-uniformity can result in businesses avoiding compliance with the law, particularly on more minor issues:

> When enforcement agencies do take the time to investigate a breach, especially a minor breach, the reply from the offender [is often that] 'no one had ever mentioned that before' or that they had 'not been told this by another municipality'.

Uneven enforcement can also cause distortions and inequalities between businesses in different jurisdictions. For example, a NSW diced apple manufacturer incurred considerable costs and competitive disadvantage when sodium dioxide regulations were enforced on it but not on its inter-State competitors (see Box B1). Further, Penrith Council said:

> ...a clear direction for ensuring food quality and hygiene standards needs to be established so that all facets of the industry compete on level terms and can factor the cost into budgets.

That said, non-uniform enforcement need not always be undesirable. As discussed in A3.5, different enforcement strategies may be appropriate in different circumstances. For example, depending on certain factors, it may be appropriate for one agency to trade-off one breach for compliance in another higher risk area, as part of their discretionary strategy, whilst a different approach may be appropriate in other circumstances.

It is therefore necessary to identify the various causes of non-uniformity, beyond the one mentioned above.

One is the lack of coordination between enforcement agencies with regard to their respective activities (see A4.1).

A second possible cause is the variability of resources between jurisdictions, with less resourced agencies unable to maintain the same level of enforcement as their better resourced counterparts:

> Where some agencies (and it is not many) are able to fully enforce standards and others are not (through a lack of resources), this will lead to inconsistency. (Monash Council)

A third reason is that, in addition to differences in interpretation which result from agencies adopting different enforcement strategies (see *legalistic v discretionary strategies* in Section A3.5), some jurisdictions may interpret a law differently due to different understandings of its meaning or content (see A4.3).

Fourthly, some jurisdictions may intentionally choose not to enforce certain provisions for political reasons.

Finally, the possibility of non-uniformity may be aggravated by institutional arrangements which require, for example, a business operating across Australia to deal with a number of enforcement agencies. This increases the chance of non-uniform enforcement across such businesses operations.

Several policy implications arise out of these issues including:

- the extent to which enforcement strategies can, or should, be harmonised;
- whether institutional arrangements require restructuring;
- whether there should be mechanisms to ensure more even distribution of resources across jurisdictions; and
- in what ways communication and coordination should b e improved.

These are the sorts of issues that have been discussed in previous sections of this paper (see Sections A1, A2, A3 and A4.1). What becomes clear, therefore, is that policy makers should keep in mind that non-uniformity is the result of a number of factors, each with its own set of complex issues.

## A4.3 Interpretation

As discussed above, differences in interpretation can lead to non-uniform enforcement, and that this can reflect either different optimal enforcement strategies or differences in agencies' understanding of a law. If agencies are adopting different 'interpretations' as part of different optimal enforcement strategies, these differences may be appropriate.[35] However, if differences in interpretation emerge as a result of different understandings of what a law says, or intends, then any resulting non-uniformity may be inappropriate.

In terms of the uniform understanding of laws, the survey responses show that interpretation uncertainties are resolved in several ways. At the national level, interpretation issues for food composition and labelling standards are often discussed at biannual NFA-State/Territory Senior Food Officers' meetings, and during monthly teleconferences arranged by the NFA. State/Territory Departments disseminate newsletters, policy directives and bulletins to local government agencies. At the local government level, interpretation issues may be resolved through:

- liaison with the NFA (although some local government agencies feel constrained from doing this);

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35 However, other factors may be relevant in deciding whether such differences in interpretation are appropriate. For example, in the diced apple case study (see Box B1), the differences in interpretation were severe, with one state enforcing the law and others not. While each State's decision may have been optimal according to its own criteria and priorities, businesses in NSW engaging in interstate trade were put at a competitive disadvantage. As discussed earlier, this problem ultimately resulted from poor institutional arrangements, or a lack of effective coordination to overcome such institutional inadequacies.

- meetings/liaison with other ‘up-line’ bodies, such as regional units or State/Territory central offices;
- meetings/liaison with other local government agencies;
- internal staff meetings; and
- reference to AIEH guidelines.

Where disputes over specific interpretation issues arise, the agencies have recourse to several additional mechanisms:

- negotiation with proprietors/industr y;
- mediation/appeal mechanisms;
- formal legal advice; and
- council decisions.

Despite the mechanisms for resolving such interpretation differences, some agencies consider that there are still problems in this area. Some of these problems appear to be related to hygiene-related issues regulated by the States/Territories and local governments, while some agencies also indicated that they have trouble following the Food Standards Code which is developed at the national level.

To the extent this is the case, there may be a need for better explanatory materials and formal arrangements for its dissemination than presently exist. Indeed, in its response to the survey, the NFA stated:

> The Authority is in the process of developing procedures to support uniform interpretation. This will involve the production by the Authority (in association with the States/Territories) of explanatory memoranda and interpretation notes. Developing these documents in consultation with field officers (in order to draw on their experience and expertise) at the same time as developing draft standards will alleviate interpretation problems at their conception.

At a general level, developments in other areas of law, such as taxation law and corporations law, suggest the usefulness of flow-diagrams, plain English and a statement of broad aims/objectives.

Finally, whilst most interpretation issues arise at the enforcement agency level, where court action is taken magistrates’ interpretations will also have an impact. In these cases, issues of networking etc may not be relevant, although better explanatory materials are likely to assist the consistent application of the law in the courts.

## A4.4 Development of food laws

The survey results indicate that:

- most respondents see risk as the main basis on which food laws are made; and
- the majority of *ehos* consider that regulators give little or no attention to resource issues when developing food laws.

One obvious policy implication is that, when making laws, regulators need to give due weight to the availability of resources for enforcement and ensure that regulations are appropriately designed. This can be done by:

- modifying the stringency of regulations;
- modifying the form of regulations; and
- prioritising regulations (see A2.4).

In terms of modifying the stringency of regulations, economic theory [36] suggests there may be a rationale for reducing the stringency of standards to promote greater compliance levels, and higher overall levels of food safety, in some circumstances. According to this theory, faced with a choice between complying or not complying with a standard, a firm will only undertake the expenditures necessary to comply provided the expected benefits (including the benefits of avoiding legal penalties) exceed the necessary expenditures. The more stringent is the relevant standard, the higher will be the necessary expenditures for firms to meet the standard, and the lower will be the proportion of firms willing to make those expenditures. Beyond some point, in the absence of adequate enforcement resources and sanctions, higher food safety standards will potentially worsen overall safety/quality outcomes.

In terms of modifying the form of regulations, several issues are relevant, including agency resource levels and the effect of different forms of regulations on business and their compliance.

With respect to the inadequacy of enforcement resources, two countervailing implications emerge. On the one hand, regulations focussed on desired *outputs* and outcomes rather than inputs may be warranted such that a given level of enforcement effort results in a higher level of compliance with food safety *objectives*. Further, to the extent that output-based regulations are more amenable to ‘audit compliance’, less enforcement resources will be needed. On the other hand, less prescription may in some cases hamper the efforts of enforcement officers in the field, making it harder to prove breaches of the law or, as some *ehos* said, to “get a conviction”.

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[36] See Viscusi, K. and Zeckhauser, R. J., ‘Optimal standards with incomplete enforcement’, *Public Policy*, Vol. 27, No. 4, 1979, pp. 437-456.

On the latter issue, there can be both advantages and disadvantages for businesses in prescriptive regulation as against performance or principle based regulation. Less prescriptive regulation can allow businesses to achieve health and safety goals at lower cost, although some businesses prefer the certainty and simplicity of prescriptive regulation. Small businesses, in particular, often favour a degree of prescription, whilst large businesses with the resources to develop efficient alternatives often prefer more performance oriented regulations.

Which approach is warranted? If business can achieve health and safety objectives at a lower cost following performance regulation, and enforcement agencies are not faced with an undue increase in enforcement costs, then society would gain from such regulations. If, however, business could achieve health and safety objectives at lower cost by following a simple, easy to understand set of prescriptive input-based regulations, and enforcement agencies faced no increase in enforcement costs, then they would be preferable.

In practice, the NFA is presently moving towards more performance-based regulations, and similar changes are or have been taking place in some States. Victoria, for example, has purely principle-based standards with voluntary codes of practice. Some agencies consider that the lack of prescriptive regulations restrict their performance of enforcement functions. Others suggest that it provides *ehos* with a better and broader focus in their enforcement activities, and is consistent with building more cooperative relationships with business and using an educative approach.

Whilst case-by-case analysis is to some extent necessary to determine which approach is appropriate, it is often possible to design regulations that allow for both the greater certainty of prescriptive direction, and the ability for innovation and lower cost solutions to achieve regulatory objectives. One means of achieving this is the compliance plan approach. These plans are negotiated between the enforcement agency and the business, and set out what a business will do to ensure the objectives of the regulations are achieved. The NFA’s Food Safety Plan proposal is an example. An alternative means is the use of performance-based standards accompanied by more prescriptive ‘codes of practice’ which, if followed, result in the business being ‘deemed to comply’ with the performance requirements. These can provide simple steps to ensuring compliance with the law for those businesses seeking the certainty of prescription, whilst providing other businesses with the flexibility to choose alternative, and potentially lower cost, means of compliance. [37]

[37] Whereas the ‘compliance plan’ places the onus of proof for compliance on the business, this approach places the onus of proof for non-compliance on the enforcement agency.

# A5 SUMMARY/FINDINGS

This section summarises the main points and findings from earlier sections in Part A. It does not attempt to cover all matters raised, however, and should be read and interpreted in conjunction with the discussion contained in earlier sections.

## A5.1 Institutional arrangements

*Regulation making*

- Food regulations are promulgated by all three levels of government:
  - the NFA makes national standards relating to food composition, ingredients, additives, labelling and advertising;
  - the States and Territories make hygiene, packaging and other environmental regulation; and
  - local government agencies enact regulations covering the processing and handling of food for sale.
- Regulations differ between jurisdictions.
- The issue arises as to whether there should be an extension of national uniformity to those areas not yet covered, as the NFA is currently seeking to achieve for food handling and hygiene matters.

*Enforcement*

- Institutional arrangements for enforcement are diverse and complicated:
  - enforcement functions are undertaken by all three levels of government;
  - each State and Territory has its own unique system, although all rely on local governments to some degree;
  - in some States, regional units also undertake enforcement; and
  - in total, over six hundred agencies throughout Australia are involved in enforcing domestic food regulation.
- There are several considerations for allocating enforcement functions within Australia's multi-tiered regulatory system, including:
  - aligning jurisdictional responsibilities with accountabilities;
  - specialising enforcement tasks in centralised agencies;

  - the scope for duplication and coordination problems ;
  - the costs of different enforcement approaches in different jurisdictions ;
  - the scope for regulatory experimentation and innovation;
  - the benefits of tapping local knowledge through decentralised approaches;
  - the different size and nature of jurisdictions in each State and Territory; and
  - the costs of modifying institutional arrangements.

- While presently there is no consensus on which enforcement tasks should b e undertaken by local authorities and which by higher level authorities, there are nevertheless some sound 'in principle' arguments for reforming aspects of present institutional arrangements, including moving towards more uniform national arrangements for some matters.

## A5.2 Extent and prioritisation of enforcement

### *Extent*

- Food enforcement agencies are unable to fully enforce all provisions and, in many cases, consider themselves significantly constrained from doing so.

- The extent of enforcement also varies between jurisdictions.

### *Resource levels and other constraints*

- Limited resources are the main constraint on enforcement.

- The lack of resources highlights several policy issues:
  - should resources be increased?
  - should agencies, and food law makers, use enforcement mechanisms which utilise non-governmental resources?
  - how should different food laws be prioritised? and
  - what enforcement practices are most efficient?

- Although resource constraints limit enforcement, it does not automatically follow that resources should be increased because:
  - trade-offs need to be made when allocating resources between food law enforcement and other government programs; and
  - even if sufficient resources were available, full enforcement would not necessarily be desirable because it can be optimal to use discretion in enforcing certain regulations.

- Enforcement resources vary across jurisdictions, implying:
  - overall compliance could increase if resources were transferred from well endowed to poorly endowed jurisdictions; and
  - the regulatory posture adopted by enforcement officers and the appropriate enforcement strategies may vary.
- Other constraints on enforcement include problems with some food laws; lack of cross-jurisdictional communication, cooperation and consistency; lack of appropriate enforcement remedies; ethnicity issues; and directions to de-emphasise strict enforcement in certain circumstances.

### *Priorities*

- While many agencies have developed priority rankings, they differ in detail between agencies.
- The main basis on which agencies set priorities is risk to public health.
- Priority setting involves two main policy issues:
  - how should priorities should be set and what are the relevant variables? and
  - at what administrative level of government should prioritisation occur ?
- Priorities should be set from a systematic and transparent process of analysis involving explicit objectives. In addition to risk levels, relevant variables include the costs and effectiveness of different enforcement actions.
- An efficient multi-tiered priority setting system could involve:
  - technical risk assessments and cost-effectiveness analyses undertaken (or coordinated) centrally, with the results disseminated to enforcement agencies; and
  - these assessments augmented with localised information by decentralised units to determine final priorities.

## A5.3 Enforcement practices

### *Overview of current practices*

- Premises inspection and food surveillance are the most common means of identifying specific breaches of food laws, but agencies generally give priority to following up public complaints as and if they arise.

- Most agencies use graduated approaches to rectify specific breaches of food laws, starting with education and warnings and escalating to fines and prosecutions only if initial measures fail.
- General education of proprietors and firms and food handler training courses are the most common means the agencies use to improve the 'culture of compliance'.
- Overall, agencies give more emphasis to dealing with specific breaches of food laws rather than attempting to improve business culture.

### *Mechanisms*

- While there is a diversity of enforcement mechanisms (or tools) which can be used to enhance compliance with food laws, some of these mechanisms are only available to a subset of agencies.
- From a policy perspective, the question arises as to what range of mechanisms is appropriate and how they should be designed.
- Whilst different identification systems will be appropriate in different circumstances, the inclusion of risk assessment, cost assessment, detection probability and randomness is likely to enhance the design of inspection programs.
- Education and training can promote compliance by reducing business ignorance (which is a major cause of food law breaches); increasing business awareness of food safety issues beyond the specifics of any one breach; and encouraging greater business cooperation.
- Design considerations for training courses include:
  - the trade-off between course length and business participation;
  - the range of different courses offered; and
  - the potential for agencies to pool resources and run joint courses, or to 'contract out' courses to outside educational bodies.
- Where policy makers are considering *mandating* training or qualifications for food sector employees, the public health benefits need to be balanced against the costs to business and workers of gaining qualifications.
- Warnings are appropriate for many initial and minor breaches of food laws, but their routine use risks encouraging some firms to adopt strategic behaviour and avoid compliance.

- Prosecutions, while appropriate for major breaches of food laws, have several disadvantages which diminish their effectiveness as a deterrent:
  - — they impose high costs on both the prosecuting agency and the defendant;
  - — penalties awarded in the courts are not always significant; and
  - — the threat of prosecution may not be credible for more minor breaches.
- On-the-spot fines represent an appropriate deterrent for intermediate breaches of food laws, but at present most food enforcement agencies do not have this power.
- Financial penalties for many food offences warrant review because:
  - — they appear too low to provide an optimal deterrent; and
  - — they are not always risk-rated.
- While business licensing proffers advantages for enforcement, efficient licence design is necessary to avoid undue administrative costs, compliance and paper-burden costs for business, and barriers to entry for new businesses. Licensing powers vary between jurisdictions, and the issue arises as to whether separate food licenses are warranted or would/do cause undue costs and duplication.
- The merits of food awards are unclear. Amongst other things, while encouraging participating firms to go 'beyond compliance', they focus on firms which would most likely largely comply anyway and divert agency resources away from other firms and enforcement functions.
- Where feasible and appropriately designed, industry involvement schemes can capitalise on the resources, networks and expertise of industry participants, save agency resources, engender greater cooperation, and lift general awareness of food health and safety issues.

### *Strategies*

- Conceptually, agencies enforcement strategies can contain proactive and/or reactive elements, cooperative and/or combative elements, and legalistic and/or discretionary elements.
- From a policy perspective, the question arises as to what strategies agencies should use in applying the foregoing enforcement mechanisms.
- On the proactive-reactive continuum, at present the agencies generally start off reactive and, as resources increase, become more proactive in their approach.
- While proactive strategies can appear resource intensive, if properly designed they may still be more cost-effective than some reactive strategies, and there

are grounds for agencies to review their mix of proactive and reactive approaches.

- Proactive approaches are particularly justified for food safety issues where:
  - breaches are hard to identify;
  - the cost of breaches is very high; and
  - initial mistakes are hard to rectify subsequently.
- Agencies generally adopt cooperative approaches to rectify a breach before moving on to more combative approaches, with combative approaches often being unnecessary.
- In determining the appropriateness of cooperative or combative approaches (and the speed at which to move from the former to the latter), relevant considerations include:
  - cooperativeness of businesses;
  - resources available to the enforcement agency;
  - size of range of available penalties;
  - visibility of violations; and
  - rate of business turnover.
- Many agencies use discretion in responding to breaches rather than adopting strict, legalistic approaches.
- Discretionary approaches will be particularly appropriate when:
  - costs to business of full compliance are very high;
  - businesses are cooperative;
  - an enforcement agency possesses a good understanding of a business;
  - regulations are prescriptive and do not provide much flexibility; and
  - court costs are high and few alternative remedies are available.

### *Future policy directions*

- Given the array of mechanisms and strategies available, th e question arises as to whether it is possible to prescribe 'ideal' enforcement practices, and at what level of government this may be most appropriately done.
- No one approach will be appropriate in all situations.
- Higher level government agencies should examine the mechanisms available for enforcement and provide an appropriate array of tools for field agencies.

- There is a case for higher level agencies to promulgate information and advice on enforcement strategies, but there will also be a role for decentralised decision-making by field agencies to determine specific enforcement approaches.

## A5.4 Other Matters

### *Coordination and communication*

- Coordination and communication problems manifest themselves in four ways:
  - — duplication of enforcement activity;
  - — poor input by some local councils in the law making process;
  - — non-uniform enforcement; and
  - — reduced enforcement effectiveness generally.
- Agencies have responded to coordination problems by developing networks, pooling resources and seeking to improve formal communication systems.

### *Non-uniform enforcement*

- Non-uniform enforcement is perceived to be widespread and can cause distortions and inequalities between business in different jurisdictions and reduce enforcement effectiveness.
- Policy issues arising out non-uniform enforcement include:
  - — harmonisation of enforcement strategies;
  - — institutional restructuring;
  - — resource redistribution; and
  - — coordination and communication improvements.
- As non-uniform enforcement is often an outcome of other processes, each with their own complex set of considerations, proposals to seek uniformity need to address these other matters.

### *Interpretation*

- Differences exist in the interpretation of food laws, although some of these may reflect differences in optimal enforcement strategies in different environments.
- Interpretation uncertainties are being tackled at all levels of enforcement, although some problem areas remain.

*Development of food laws*

- Most agencies consider that risk is the main basis on which food laws are made, and that little attention is given to resource issues.
- Law makers can give weight to resource availability by:
  - modifying the stringency of regulations;
  - modifying the form of regulations; and
  - prioritising regulations.
- In modifying the form of regulations, approaches should be considered which allow for both the greater certainty of prescriptive direction and the potential for the innovative, lower cost solutions of performance or principle-based standards. Compliance plans are one such approach.

# PART B:
# SUMMARY OF SURVEY RESPONSES

# B1 RESPONSIBILITIES OF THE AGENCIES

## B1.1 Involvement in food law enforcement

*Is your agency directly involved in the enforcement of food legislation?*

Of the 57 government agencies which responded to the survey, all bar three are directly involved in the enforcement of various food regulations. The three agencies which do not enforce food regulations are the NFA, the Food and Nutrition Policy Unit of the NSW Department of Health, and the Food Safety Unit of the Victorian Department of Health and Community Services (although the Victorian department can enforce food laws 'as necessary' through its regional *ehos*, action is taken only rarely). For presentational simplicity, these units have been deleted from the data presented in the following questions, although their comments are included where relevant.

## B1.2 Enforcement of the Food Standards Code

*Does your agency enforce the Australian Food Standards Code?*

As Table B1 shows, the majority of units surveyed enforce the Food Standards Code. All AQIS and State/Territory Departments responsible for enforcing food laws enforce the Food Standards Code, as do three quarters of local government and regional units.

The agencies which do not enforce the Food Standards Code are:

- South Australian councils — enforcement of the Food Standards Code is the responsibility of the State Health Department in South Australia.
- Some NSW councils which only enforce hygiene regulations and leave enforcement of the Food Standards Code to the regional public health units.
- All Queensland councils — instead, they enforce parts of the *Food Act (Queensland) 1981* that pertain to local authorities, in addition to the *Food Hygiene Regulation (Queensland) 1989* and local by-laws. Regional health units are responsible for enforcing food standards in Queensland.

**Table B1: Agencies which enforce the Food Standards Code**

| *Level of agency* | *Enforce Code* | *Don't enforce Code* | *Total Respondents* |
|---|---|---|---|
| Commonwealth (AQIS)* | 4 | nil | 4 |
| State and Territory* | 6 | nil | 6 |
| Local Government and Regional Health Units | 33 | 11 | 44 |

* As noted, the NFA, the NSW Food and Nutrition Policy Unit and the Victorian Food and Nutrition Unit generally are not responsible for enforcing food legislation and have been excluded from these survey statistics. Sample size 54.

## B1.3 Other enforcement responsibilities

*Does the food legislation developed/administered/enforced by your agency include regulations other than the Food Standards Code? If so, what else does it include? (eg state regulations, local by-laws etc)*

Beyond the Food Standards Code, the officers of the units surveyed are responsible for enforcing, and thus must be familiar with, a wide variety of legislation relating to food processing, handling and other health matters:

- the AQIS officers are responsible for enforcing the *Imported Food Control Act (Commonwealth)1992*, Imported Food Control Regulations and Export Control Processed Food Orders.
- food inspection officers and *ehos*[43] are responsible for enforcing various regulations specifically related to food. These include State food acts, State hygiene acts, State public health acts, State premises codes, meat hygiene acts, meat transport regulations, country slaughterhouse regulations, State dairy regulations, poultry processing establishment regulations, State codes of practice, game meat regulations, pet meat regulations, nuisance provisions and infectious disease regulations, codes for construction and fitout of food premises, council by-laws relating to food vendors, mobile food vans, eating

43 In NSW, *PHUs* generally employ 'food inspection officers', while local governments employ *ehos* whose responsibilities are far wider than food alone. In other States and Territories, both food inspection officers and *ehos* are employed by both the States and the councils. Food inspection officers usually have tertiary qualifications in food technology or food processing, while *ehos* have tertiary qualifications in environmental health, which includes a range of sub-disciplines in addition to food safety.

houses, hostels and hotels and environmental control, and inspection, approval and licensing of food premises.

- enforcement agencies also need access to documents covering several other standards and regulations which the Food Standards Code adopts by reference. For example, Standard H5*k* – Goat Milk refers to AS 2300.2.4, *Determination of the Freezing Point of Milk – Modified Hortvet Method*; AS 2300.2.5, *Determination of the Freezing Point of Milk – Thermistor Method*; AS 1766.3.11*k* – 1991, *Estimation of Penicillin in Milk*; and AS 1095, *Microbiological Methods for the Dairy Industry.* While the tests described in these documents are primarily pertinent to the analyst conducting the test, food inspection officers and *ehos* may also need to refer to them when conducting prosecutions involving breaches of that standard.
- *ehos* of the local councils are also responsible for a variety of other health inspection and enforcement activities. These include: building and plumbing control, waste management and recycling, water, sewerage and septic tank control and monitoring, notifiable disease investigation, immunisations, building and planning issues concerning sawmills, quarries etc, tobacco and liquor licensing, litter legislation, legionella control programs (air conditioning monitoring) and health education and promotion across a wide range of issues. The officers undertaking these activities are often the same officers who enforce food laws.

# B2 EXTENT AND PRIORITISATION OF ENFORCEMENT

## B2.1 Extent of enforcement: policy and practice

*Is it the policy of your agency to enforce all food laws for which you are responsible?*

*Is there any food legislation delegated to your agency which is not enforced by your agency?*

*In practice, is your agency able to fully enforce all food legislation such that no breach goes undetected and unrectified?*

As Table B2 indicates, the majority of units surveyed said that their *policy* is to enforce all food laws for which they are responsible. Only eight local and regional authorities and two State/Territory agencies said that it is not their policy to do so. One local government agency said that they do not have a policy but attempt to enforce food laws with the resources they have.

**Table B2: Extent of enforcement**

| *Level of agency* | *Policy to/not to enforce all* | *Attempt/don't attempt to enforce all laws* | *Fully enforce all laws in practice* |
|---|---|---|---|
| Commonwealth (AQIS)* | 4/nil | 3/1 | nil |
| State and Territory* | 4/2 | 4/2 | nil |
| Local Government and Regional Health Units | 36/8 | 24/20 | nil |
| Total | 44/10 | 31/23 | nil |

* NFA, NSW Food and Nutrition Policy Unit and Victoria's Food Safety Unit are not responsible for enforcing food legislation and are not included in these statistics. Sample size 54.

Table B2 also shows that *in practice* just over half (31 of 54) the agencies indicated that they enforce all the legislation for which they are responsible. However, no agency said it was able to fully enforce all food legislation such that no breach goes undetected or unrectified.

## B2.2 Limitations on enforcement

*Which of the following represent the main and secondary limitations on the extent of your agency's enforcement of food laws for which you have responsibility?*

### Table B3: Limitations on food law enforcement

| *Limitations* | *Main** | *Secondary*** |
|---|---|---|
| Resource limitations | 33 | 6 |
| (Some) laws are out of date or inapplicable to current technology or production methods | 1.5 | 16 |
| (Some) food laws are covered by overriding legislation | nil | 3 |
| (Some) food laws are inherently difficult to enforce | 3.5 | 25 |
| You perceive that some laws are either impractical or unjustified | nil | 20 |
| For issues of a cross-jurisdictional nature you rely on the efforts of other agencies | 3 | 20 |
| Limited enforcement powers | 2 | 12 |
| Lack of communication and information sharing between agencies | 3.5 | 19 |
| Directives from a higher authority not to emphasis enforcement in certain situations | 1.5 | 11 |
| Ethnic/language difficulties | nil | 16 |
| Other reasons | 1 | nil |

* Sample size 49. If an agency nominated two 'main' limitations, each was weighted at 0.5.
** Sample size 51. Multiple responses were allowed from each agency for this category, each receiving a value of 1.

## Resource constraints

As Table B3 shows, the main limitation on enforcement is a lack of resources. It was nominated as the main limitation by 33 agencies (65 percent), with a further six agencies nominating it as a secondary limitation.

Agencies indicated that under-resourcing manifests itself in a number of ways (some of which may be inter-related), including:

- *funding* — Alice Springs Council (NT) nominated budget constraints as a limit on its food law enforcement activities. Mandurah Council (WA) stated:

  > Local government generally has a lack of resources to effectively carry out its duties and responsibilities under relevant health legislation. Food legislation is no different.

- *staffing* — several agencies indicated that they are understaffed. For example Tea Tree Gully (SA) said that, during council staff reductions in 1992, food premises inspection and food surveillance were amongst the first health functions to be cut. Monash Council (Vic), in lamenting the removal of the previous Victorian Health Act requirement for a minimum number of *eho*s per head of population, stated:

  > These days staff cuts have resulted in *eho*s not having enough time to perform all of their tasks and sometimes routine (but important) food supervision is not carried out.

- *size of jurisdiction* — the NSW Central West *PHU* has only one officer who is responsible for an area of 63 261 square kilometres which includes the city of Bathurst.

- *cost of legal action* — the Victorian Department of Health and Community Services said:

  > Our legal system, rightly or wrongly, is very expensive in jurisdictions beyond the magistrates court level. In times of Australia wide budget restraint, the use of funds must be very carefully considered before pursuing individuals or companies through the higher court system for breaches of food law in cases other than clear, demonstrable harm being inflicted on the public.

  Sydney City Council said that, as well as being costly, prosecutions can be time-consuming and administratively cumbersome to put in train.

- *other agency demands* — several councils nominated this as a problem. Dorset Council (Tas) has one *eho* who indicated that he is subject to other Council demands and priorities, such as administering building and planning controls. Likewise, Essendon Council (Vic) said:

  > ...Health Officers are always juggling other functions like immunisation services and Health Act nuisance controls. Food surveillance tends to get pushed down the priority list, even though the profession considers this function to be its top priority.

  Queanbeyan Council (NSW) indicated that, in recent years, its building, health and parks and gardens sections have been incorporated into one branch — called ‘environmental services’. Since this change, most resources have gone

into building, not health. This is partly because Queanbeyan is a rapidly developing urban area, so most council attention is focussed on building approvals and related matters. Food inspection comprises just part of the health function, and Queanbeyan Council estimates that, at present, less than five percent of its environmental services effort is devoted to food issues.

Further, Tea Tree Gully suggested that because other local council tasks, such as dog control, planning, building and traffic functions, can raise significant income through fees and expiration notices, and because food enforcement doesn't, this works against food enforcement.

While many agencies indicated that they lack resources, the survey data also reveal that there is significant variability in resource levels between agencies [44]:

- Launceston Council (Tas), with a population of 63 000, has an Environmental Health Department with seven full time positions and one part time. [45]
- ACT's Public and Environmental Health Service has 20 staff of which 12 to 13 are dedicated specifically to food law enforcement, in a compact jurisdiction of around 300 000 people and few food manufacturing premises.
- Queanbeyan Council (NSW), with a population of around 30 000, currently devotes the efforts of 0.5 *eho* to food matters (although it hopes to increase this to 1.5 *eho* in the near future).
- Tea Tree Gully Council (SA) until recently employed just two *eho*s to do all food and other health work for an area with a population of around 93 000, with around 360 food premises. The figure has since increased to four.
- Stirling Council (SA), with a population of 17 000 and about 120 food premises, has an effective staff level of around 1.5 *ehos*.
- Dorset Council (Tas) employs one *eho* for a population of 7690.

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[44] Some of the differences in the agencies listed reflect different responsibilities and functions. For example, the Tasmanian Councils are responsible for Code and non-Code enforcement matters, whereas the South Australian Councils are responsible purely for the latter.

[45] Consequently, amongst other functions, the Department is able to follow-up every complaint within 24 hours, investigate every notifiable disease associated with food poisoning, and conduct water analysis and swabs from all work surfaces. In addition, the Department's budget has been increased to allow its educational and sampling program to expand as necessary. This council also registers all food premises and licenses the operators on an annual basis. The director holds the delegation for approval of food premises which council cannot overturn and makes all decisions pertaining to food matters including prosecutions. Moreover, the 'medical officer of health' has the legal power to close any food premises on-the-spot if deemed unsafe. *Ehos* of this unit also have the power to seize unfit food.

- The South Eastern NSW *PHU* has just one food inspector for a large non-metropolitan region with a population of around 200 000.

## Problems with legislation

Other reasons given for non-enforcement are that certain pieces of legislation are:

- *outdated* — the Tasmanian Department of Community Services and Health nominated its food hygiene regulations as being out of date, and Bunbury Council (WA) described some of its regulations as antiquated. Both these units indicated that they are reviewing their older legislation. Werribee Council (Vic) commented that:

  > Regulations rarely keep up pace with best practice movement in industry, quality systems, HACCP, self audits, self certification systems, etc.

- *perceived as impractical* — Tea Tree Gully Council (SA) cited an example of a State law which it believes is impractical:

  > I feel that some of the laws are taken to the extreme and are totally impractical when they have to be put into practice. For instance, one of our laws for washing utensils used in common requires the wash bowl of the double bowl sink to have hot water, soap and disinfectant but if the rinse bowl has clean running water at not less than 77 °C they only need to have hot water and soap for washing utensils. There are two anomalies here.
  >
  > (1) Disinfectant and detergents can work against each other which means a proprietor needs to have them compatible with each other or a combined mixture. Why do you need disinfectant anyway? What is the proven risk?
  >
  > (2) I cannot put my hands in water at temperature greater than 45 °C...It makes it very difficult to enforce this law.

  Sorrell Council (Tas) commented that “Flexibility is shown in situations where food is prepared at fairs and markets with regard to product labelling”. Similarly, Townsville Council (Qld) said that “Weekend markets, fetes and like activities are subjected to a watered down version of...regulation in some areas”.

- *inherently difficult to enforce* — Tasmanian Department of Community and Health Services nominated country of origin labelling for unpacked fresh fruit and vegetables in this regard. South Sydney Council indicated that the enforcement of many aspects of the Food Standards Code required considerable expertise not only to identify breaches but also to be able to credibly maintain that position in the face of a business arguing against it. Glen Eira Council (Vic) also sees parts of the Food Standards Code as unenforceable, although it did not elaborate.

- *over-ridden by other legislation* — Stirling and Bunbury Councils (both WA) said that some of their regulations are over-ridden by State laws. However, this was nominated as a secondary limitation only by three agencies.
- *not consistent on a national basis* — the Tasmanian Department of Community and Health Services noted that lack of national consistency can frustrate proposed enforcement in some cases, such as in relation to the National Heart Foundation logo endorsement scheme.
- *perceived as unjustified* — for example, a number of States, including Western Australia and Victoria, perceived that previous preservative standards for diced apples were not justified and did not enforce them (see Box B1).

**Box B1: Preservative standards for diced apple**

In 1993, the Food Standards Code made it illegal to use sulphur dioxide SO2 (preservative) in apple products (except apple juice). According to the South Western Sydney *PHU* and NSW Food and Nutrition Policy Unit, whilst NSW manufacturers where forced to comply with the standard, manufacturers in WA and SA were not. In these latter states, the authorities had decided that up to 200 mg of SO2 did not represent a significant health risk to the public, and refused to enforce the Food Standards Code. This disparity remained for some time despite representations by NSW authorities to force WA and S A to take action.

As a result, manufacturers in WA and Victoria gained a competitive advantage over manufacturers in NSW. One manufacturer in NSW in particular suffered considerable loss as a result of the inconsistent enforcement of the Food Standards Code across states.

In 1994, the Food Standards Code was amended to allow up to 200 mg of SO2 in apple used for ‘bakers filling’.

*Source: NSW Food and Nutrition Policy Unit and South Western Sydney PHU.*

## Other reasons

Agencies identified several other reasons for the non-enforcement (or restricted enforcement) of food laws:

- *no statutory requirement to enforce* — South Sydney Council indicated that it performs some enforcement activities but, like other NSW councils, is under no statutory responsibility to do so, with responsibility in NSW laying with *PHUs*. It therefore enforces those aspects of the *NSW Food Act 1989* and Food Standards Code which it considers most important for its local community.
- *some issues deemed to be the natural responsibility of other jurisdictions* — Northern Territory Health Services said:

  > It is expected that larger States and particularly the home State for a national product will deal with non-public health issues relating to that product.

  Monash Council (Vic) supplied an example of how problems can arise where there are inconsistencies in enforcement between jurisdictions:

  > ...a national retailer was found in Victoria through the sampling program to be unable to consistently substantiate a label claim relating to fat content. The action recommended by this office was to drop the label claims. We were advised that it was not possible to do this as the product came from Sydney and they were not aware of problems in other States. Our view was that the only reason that there was no problem interstate was that the product does not get sampled in other States. Legal action was commenced but was withdrawn when the retailer decided to drop the label claims in Victoria. However the label claims are still being used in other States.

- *regulatory stance of a higher authority* — several respondents indicated that they understood that their controlling body did not want to emphasise the strict enforcement of some legislation. For example, Kwinana Council (WA) included as reasons for non-enforcement both a lack of support from the State Health Department and a lack of commitment by the council to enforce.

  In NSW, the Food and Nutrition Policy Unit of the Department of Health indicated that food enforcement activities were being de-emphasised and that this was manifested in a number of ways, including:

  — one public health unit with no inspector;

  — inspector numbers dropping from 40 to 30 in recent years;

  — inspectors diverted to non-food duties;

  — prosecutions not approved;

  — some public health units not attending bimonthly meetings; and

  — food inspectors' career paths cut.

  Further on this matter, Sydney City Council stated:

  > Enforcement practices in NSW have been influenced by the former State Government which decided that business should not be 'hindered' by regulatory enforcement officers. This mode of thinking resulted in the removal of the license requirement for food premises. Restructuring of the State Government Health Department resulted in Food Inspectors being taken over by professionals from other government areas, such as medical officers. The restructuring was the main factor in

> the substantial drop in Court actions for food legislation breaches by State Government inspectors.

- *ethnicity issues* — some agencies indicated that dealing with firms where the proprietors or staff were drawn from different ethnic backgrounds could make it more difficult to gain adherence to regulations. The ACT Environmental and Public Health Service indicated that language barriers could sometimes make it difficult to explain the rationale for, and meaning of, particular regulations. Sydney City Council also mentioned problems arising from different customs, traditions and philosophies regarding food preparation and hygiene. Stirling Council (SA) indicated that, in its experience, some groups are less receptive to governmental authority than others.
- *lack of enforcement remedies* — several agencies indicated that the limited range of enforcement remedies restricted their ability to respond to certain problems appropriately, such that non-enforcement occurred. For example, Holroyd Council (NSW) identified a lack of power to use on-the-spot fines as resulting in some minor offences not being pursued:

  > [There is] a need for council to be granted the legislative powers to grant 'on-spot' fines under the S.E.I.N.S system for minor breaches of the standards. At present all breaches must be pursued in the local court. This is costly in both financial and personal terms. Council at present is reluctant to pursue these minor offences.

## B2.3 Prioritisation of enforcement

*If your enforcement resources are limited, what in practice are your priority areas of enforcement and/or what criteria do you use to determine them?*

Responses to this question took several forms. Some agencies nominated problems or regulations to which they gave priority (eg: hygiene versus composition versus labelling). Others nominated the enforcement measures they gave priority to (eg: inspection versus licensing versus education). Some responses focussed on the criteria used for determining priorities (eg: health risk versus cost-effectiveness versus political imperatives). And some responses included elements of some or all these aspects.

### Priorities

Responses which focussed solely (or mainly) on priority problems or regulations included:

- Holroyd Council (NSW) indicated that its current areas of enforcement are:
  - i) temperature control;
  - ii) condition of premises; and
  - iii) hygiene and handling practices of employees.
- Queensland Department of Health stated:

  > Health and safety matters are highest priority followed by composition and labelling.

- Hindmarsh/Woodville Council (SA) said:

  > Priority is given to Council's duty of care under the Food Act and Food Hygiene Regulations namely that food is fit and that premises are maintained in a clean and sanitary condition. (It must be remembered that in South Australia the Food Code is enforced by the State Health Commission.)

- Tasmanian Department of Health and Community Services indicated that:

  > Because of limited resources, priority must be given to addressing food issues which have the potential to cause immediate or long term public harm, such as food adulteration or contamination or serious labelling deficiencies...However, the intention is that all breaches of food laws will be dealt with, even though some issues may not be addressed for some time after discovery.

- NSW Central Western *PHU* indicated that, until recently[46], it did not enforce:

  > those areas perceived as non health risks: for example, labelling of food, sulphur dioxide, fat in sausages, and adulterated liquor.

- Mandurah Council (WA) said:

  > While enforcement resources are limited, the City's Health Section endeavours to enforce all legislation to the best of its ability. However, chemical analysis of foods to ensure compliance with the Food Standards Code is limited to the following foods: mince, sausages, pies, bread, and other foods based on complaints only.

Responses which focussed solely (or mainly) on priority enforcement measures included:

- Dorset Council (Tas) indicated that it gives priority to food poisoning complaints, food licensing and inspections of premises, and occasional food sampling for analysis as part of the State Government sampling program .
- Brighton Council (Tas) advised that inspections of manufacturing and processing premises receive high priority, along with complaints and compliance with the State sampling program.
- Hindmarsh/Woodville Council (SA) indicated that priority is given to responding to public complaints. Beyond that, additional resources go towards inspection. (The issue of priority between public complaints and general inspections is discussed in A3.1.)

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46 Recently, the *PHU* Director has issued a policy stating that all food laws will be enforced.

- Queanbeyan Council (NSW) indicated that, at present, its main p riority is responding to complaints. In addition, it undertakes some inspection functions and promotes education and an industry award. It does not undertake food sampling.
- South Eastern NSW *PHU* indicated that, to date, its main focus has been reacting to public complaints.
- Mackay Council (Qld) indicated that it gives priority to licensing and registering of premises along with inspecting for operational compliance and structural compliance. It indicated that education of food handlers is still somewhat limited.

While there is thus a deal of variation between the agencies' priorities, particularly at the micro-level, it is possible to identify some commonality in the broad areas given priority by the agencies. Where they have discretion, most agencies put problems such as hygiene matters and premises standards ahead of food composition and labelling requirements. Indeed, few agencies mentioned the Food Standards Code as amongst their main priorities, and agencies devote few resources specifically to enforcing the Food Standards Code. Under its food enforcement program, for example, the ACT Public and Environmental Health Service allocates less than 10 percent of its resources to Food Standards Code enforcement. Northern Territory Health Services said that "any additional resources would be directed to public health priorities before the enforcement of food standards which do not have public health significance".

## Bases for determining priorities

### *Prioritisation on the basis of public health risks*

The main factor agencies mentioned was the level of risk to public health and safety. In total, 39 agencies indicated that they use a 'risk management' approach.

The agencies indicated that they see risk management as being manifested in one of four ways.

Firstly, several agencies use a system of ranking different types of food premises to prioritise the stringency of their enforcement efforts. These rankings are typically based on the likelihood that certain types of problems will arise in premises (or classes of premises) and on the assessed seriousness of such problems. The rankings can also take into account the past history of the proprietor in upholding or breaching food laws. Such ranking systems are used for determining the frequency of inspections and/or licensing requirements. For example:

- Stirling Council (WA) stated:

  > the City's *ehos* routinely inspect all food premises, but with varying frequency. The frequency of inspection...has been linked to the potential risk associated with the food product being prepared, served and/or stored (ie the greater the risk, the greater the number of inspections per year).

- Moreland Council (Vic) said that the broad aim of its prioritisation program is "the regular inspection of premises at which there is constant handling of food".
- Queanbeyan Council (NSW) said that several factors effect its inspection priorities, including: type and condition of premises; number of staff; number of customers; age and health status of customers (very young or very old get extra attention); past history of the premises; and internal hygiene systems.
- Essendon Council (Vic) said that it carries out a greater number of inspections in premises with a history of poor food handling practices, and that when conducting risk assessment it takes into account the level of education and professionalism of the operator.
- Wollondilly Shire Council (NSW) indicated that "food premises are categorised according to risk and, depending upon the category, receive one to four inspections per year...A take-away food premises would receive higher priority than a bottle shop or supermarket".
- North Sydney Area *PHU* nominated the past history of the food proprietor as one factor influencing the stringency of its enforcement actions.

In some cases, these inspection prioritisation systems have been developed into formal grading systems. For example:

- Hindmarsh/Woodville Council (SA) said:

  > Routine inspections of food premises are conducted using a risk based grading system.

- Eastern Metropolitan Regional Health Authority (SA) indicated that:

  > Food premises are graded from high risk (4) to low risk (1). For high risk premises, it is endeavoured to inspect four times annually, down to a low risk premises receiving one annual inspection.

- Adelaide City Council (SA) indicated that, within a broad overall target of at least 2 inspections per year on average, the frequency of inspections varies according to the types of products sold at premises:
  - — sealed/packaged food: one inspection every 12 months (eg, liquor bottle shops, chemist shops and confectionary shops);
  - — fruit and vegetables: one inspection every 9 months;
  - — meals: one inspection every 6 months (eg, hotels, restaurants and take-away foods); and

— food manufacturing/processing: one inspection every 3 months.

- Penrith Council (NSW) classifies business according to risk. Inspections vary with those most at risk having the most inspections (see Box B2).

Secondly, some agencies indicated that they give more emphasis to enforcing certain food laws — for example, hygiene laws in preference to composition standards and labelling requirements — on the basis of the perceived seriousness of the health risks which those laws seek to address. For example, South Western Sydney *PHU* stated:

> Risk management is taken into account in setting up the priority areas: eg, preservatives (and their levels) enforcement in foods consumed by children holds greater priority over percentages of ethanol in beer, wine and spirit.

**Box B2: Penrith's Food Premises Surveillance Program**

Penrith Council has developed a food outlet surveillance program involving local and state inspectors supported by an emphasis on education and not just legal enforcement.

Food outlets are identified in categories so that priorities can be made for resource allocation. Outlets preparing foods having a high microbiological contamination potential are placed in Category A; medium potential are placed in Category B; low potential in Category C. The categories are:

| | | | |
|---|---|---|---|
| Butchers | A | Delicatessens | A |
| Bakeries | A | Manufacturers | B |
| Pre-packaged goods | B | Cafes | A |
| Take-aways | A | Service Stations | B |
| Franchise Take-aways | B | Registered Clubs | A |
| Restaurants | A | Hotels | B |
| Mobile vendors | A/B | Supermarkets | B |
| Fish/seafood outlets | A | Fruit and vegetable outlets | C |
| Markets | B | Specialty outlets (eg, donuts) | C |

These categories are further broken down, based on premise size, estimated floor traffic loads and so on. The surveillance regime is based on this system.

Thirdly, some agencies mentioned that they use, or inspect premises which use, HACCP (also known as HAZOP) procedures. HACCP involves the identification of critical hazard points in the production chain and the focus on controlling risks

at those points. Willoughby Council (NSW) noted that whilst it uses HACCP procedures for larger facilities, they are harder to implement in small food outlets. According to Stonnington Council (Vic), its priority areas are determined by “risk analysis, HACCP principles, and an educative approach to proprietors thus moving from enforcement to empowerment and self-determination”. The NFA’s proposed approach for nationally uniform hygiene standards is also based around HACCP principles.

Fourthly, several agencies saw risk management as being reflected in the form of enforcement action taken when breaches are found. Under this approach, breaches of standards posing a lower threat to public health would attract a less stringent response than those posing a more serious threat. For example:

- Queensland Health indicated that, for common breaches of composition standards related to staple foods, where health or nutrition are affected (eg, excessive fat or preservative, or deficient nutrients), prosecution is standard procedure. However, in other situations, warnings and advice are used to correct a deficiency and only when corrective action is not taken is prosecution or product seizure used.
- North Sydney Area *PHU* said:

  > ‘Risk management approach’ means the risk to the consumer is assessed and the form of action taken is based on this assessment (eg warning letter, prosecutions, etc).

- Stirling Council (SA) indicated that the choice between using an expiation notice or prosecuting would depend on, amongst other things, the severity of the breach.

One agency which said it explicitly didn’t take risk into account was Dorset Council (Tas):

> It is not generally the role of my agency to ‘pinpoint risk areas’, as time/resources restrict such an approach due to the demands of a broad and varied position that requires building and plumbing control, waste management and recycling, water, sewage and septic tank control and monitoring...etc.

### *Other bases for prioritisation*

Beyond risks to public health, other bases nominated for prioritisation include:

- *program efficiency and effectiveness*: these are included in the ACT Public and Environmental Health Service’s transparent weighting system (see Box B3) which it uses to prioritise its enforcement efforts;

- *business and community consultation:* South Sydney Council has identified a number of priorities for council resources through a joint industry, community, council working party (see Box B4);
- *public perceptions and political imperatives:* these are explicit in the ACT's approach to prioritisation and may be implicit in other agencies' priorities;
- *consumer protection:* in determining priorities, several agencies include consumer protection as a consideration, although it generally gets a lower weighting than public health risks;
- *business exigencies:* AQIS Tasmania advised that, along with allocating priority on the basis of risk to public health, it considers export facilitation and the urgency of shipments (with airfreight gaining priority over shipping);
- *revenue considerations:* Sydney City Council said that, due to the council's inability to charge a licence fee, it undertakes inspections at food premises each year in order to charge an inspection fee. This limits the councils flexibility in prioritising inspections and focusing on high risk areas; and
- *other agency demands:* as noted in B2.2, several agencies nominated other agency objectives and activities as affecting the priority given to enforcing food laws generally. Adelaide City Council indicated that other agency demands reduced the amount of resources it could devote to food. In particular resources are given to matters such as vermin control, general sanitation, air, noise and water pollution, and cooling towers. Similarly, Werribee Council (Vic) said its prioritisation criteria include "risk, demand, public good, and duties other than food related issues". Townsville Council (Qld) said "Enforcement resources are limited by the personnel available to carry out enforcement. Individual inspectors are required to set their own priorities in regard to routine inspections in the time left available after new applications, complaints etc, are dealt with". And, as mentioned earlier, Tea Tree Gully Council (SA) suggested that 'other agency demands' which earn significant income for the council, such as dog control, planning, building and traffic functions, can receive priority over food enforcement.

**Box B3: The ACT's approach to prioritisation**

The ACT Public and Environmental Health Service has developed a Business Plan for its Food Safety and Compliance Program.

The Plan states that the Program's aim is: "To promote the health of people living in the Canberra region by fostering a safe and nutritious ACT food supply and by reducing the incidence of food borne disease."

The Plan notes that the key issues driving the program relate to health, economics and consumer choice. In determining the allocation of resources between its sub-programs, the expected outcomes of those sub-programs are weighted according to the following scale:

| | |
|---|---|
| Achievable health gains | 6 |
| Efficiency and effectiveness | 5 |
| Professional/national imperatives | 4 |
| Political imperatives | 3 |
| Public perceptions | 2 |
| Other agency demands | 1 |

**Box B4: South Sydney's food policy**

In 1993 South Sydney Council established a Food Policy Working Party comprised of Councillors, the business sector, community representatives, relevant council *eho*, and *eho* from the two regional public health units which traverse the jurisdiction. The Working Party's purpose was to assess and improve the local food supply system. In February 1995 the Council released a Food Policy (*What's Eating South Sydney*) and Food Management Program (entitled *Safe and Properly Described Food*).

*What's Eating South Sydney*

In preparing this document, the Food Policy Working Party distinguished aspects of the food system under local control from areas where council needs to cooperate with other sectors involved in the food system, and reviewed research conducted on local health conditions and behaviours.

The document identified and discussed six key issues: access to the food supply, education for healthy eating, food quality issues, food diversity, the Council's own food services (such as meals-on-wheels), and issues of environmental sustainability.

*Public Health Services Plan: Safe and Properly Described Food*

The Council's current policy includes:

- routine inspection of food outlets two to four times per year with results recorded on a computerised database.
- investigation of all public complaints regarding food quality and contamination.
- issue warnings and institute legal processes for breaches of the Food Act 1989.
- routine food sampling, including foods such as pies and sm allgoods for fat content, preservatives and other additives, and high risk take-away and restaurant foods for microbiological analysis.
- assessment of Development and Building Applications to ensure compliance with the *Food Act 1989* and National Code for the Construction and Fitout of Food Premises.

# B3 ENFORCEMENT PRACTICES

## B3.1 Identifying specific breaches

*Firstly, in identifying breaches, what proportion of your efforts and resources are aimed at following up public complaints relative to inspections?* [47]

*Secondly, regardless of the total amount of time and resources devoted to either following up public complaints or conducting inspections (as answered above), which receives priority when a choice has to be made between the two? Why (ie on what basis do you give the aforementioned priority)?*

*Thirdly, in terms of the pattern of inspections you undertake, which of the following do you use the most:*

- *random or systematic?*
- *risk based or non-risk based (eg, treating all premises equally)?*
- *blitzes (ie to target geographic areas of problems) or general purpose (ie across the board)?*

*Finally, as part of your surveillance activities, do you undertake chemical or micro-biological food sampling?*

The first question examined the extent to which agencies split resources devoted to identifying breaches of food laws between responding to public complaints and undertaking inspection or surveillance. Whilst recognising that agencies devote resources to other enforcement activities, the question focused on the breakdown of resources used for identifying breaches.

As shown in Table B4, most respondents (67 percent of agencies) indicated that a resource allocation of 25 percent on following up public complaints and 75 percent on inspections was the most accurate description for their agency. An allocation of resources of 75 percent to public complaints and 25 percent to inspections was the next most popular response (14 percent), with a 50/50 split close behind (12 percent). No agency indicated that it allocated all its resources to public complaints.

[47] For the purposes of the questionnaire, inspections included any visit to a food premises involving at least some reviewing of practices or facilities. It excluded visits to premises in response to complaints.

**Table B4: Identification systems: complaints versus inspections**

| *Level of agency* | *ratio of resources on complaints to general inspections* | | | | |
|---|---|---|---|---|---|
| | *100/0* | *75/25* | *50/50* | *25/75* | *0/100* |
| Commonwealth (AQIS) | nil | nil | nil | 3 | 1 |
| State and Territory | nil | 1 | 1 | 3 | nil |
| Local Government and Regional Health Units | nil | 6 | 5 | 28 | 3 |
| Total | nil | 7 | 6 | 34 | 4 |

Sample size 51.

That said, resource allocation of itself does not indicate the priority or preference that these two means of identifying breaches are given by agencies. The number of public complaints received will also influence resource allocation independently of priority, with a smaller number of complaints received resulting in relatively less resources devoted to following up public complaints.

The second question addressed this issue. 84 percent of agencies indicated that they give priority to following up public complaints above inspections when a choice had to be made between the two, with 10 percent giving equal priority. Further, of the remaining six percent that gave priority to inspections, all were AQIS agencies. AQIS's primary role is implementing an inspection program, namely the IFIP, and this largely predetermined the AQIS responses.

The agencies gave several reasons as to why they give priority to following up public complaints:

- *useful for identifying problems* — several agencies nominated this as a reason for giving priority to following up public complaints. Responses included:

  > ...nearly always identifies a problem, general inspections don't. (Sydney City Council)
  >
  > ...in most cases public complaints identify definite problems whereas inspections only offer the possibility of detecting a problem. (Northern Territory Health Services)
  >
  > ...useful in identifying trouble spots when you have a lack of resources. (Willoughby Council (NSW))

- *useful background information on premises* — Alice Springs Town Council (NT) mentioned that public complaints can represent a useful source of information on premises.

- *lack of resources* — Ballarat Council (Vic) suggested that a lack of resources “dictates that short term, fix it solutions take priority over long term strategies”.
- *need to respond whilst evidence is available* — Both Launceston and Devonport Councils (Tas) indicated that if priority is not given to following up current complaints the evidence may disappear, making corrective action more difficult.

Other reasons were customer service, perceptions and expectations of service to rate payers, agency policy or plan, and duty of care for food to be fit for consumption.

The third question looked at which inspection procedure agencies use the most. It found that most agencies use more inspections which are systematic as opposed to random; risk based compared to non-risk based; and general purpose instead of targeted (blitzes). Specifically, 73 percent of agencies indicated that they undertake more random than non-random inspections, 82 percent indicated that they undertake more risk based inspection than non-risk based, and 76 percent said more of their inspections were general purpose than blitzes (see Table B5).

### Table B5: Inspection systems

| *Level of agency* | *random/ systematic** | *risk/ non-risk** | *blitz/ general*** |
|---|---|---|---|
| Commonwealth (AQIS) | 3/0 | 1/2 | 1/2 |
| State and Territory | 1/4 | 5/0 | 2/3 |
| Local Government and Regional Health Units | 8/33 | 35/6 | 8/31 |
| Total | 12/37 | 41/8 | 11/36 |

* Sample size 49. ** Sample size 47.

For the final question, all but ten agencies — all councils — indicated that they undertake chemical or micro-biological food sampling as part of their general surveillance activities.

## B3.2 Rectifying specific breaches: mechanisms

*Once you have identified a specific problem or breach, what action do you take to rectify it?*

- *educate/advise the proprietor or company.*
- *verbally warn the proprietor or company.*
- *issue a written warning to the proprietor or company.*
- *create, or threaten to create, adverse publicity for recalcitrant proprietors / companies if problem not rectified.*
- *other.*

*Also, do you have the power to issue on-the-spot fines?*

As Table B6 shows, the most commonly used tools for rectifying specific breaches are education/advice and warnings. In terms of warnings, verbal warnings are more commonly used when a breach is first identified, whereas written warnings are favoured if no remedial action is taken by a proprietor following a first warning. Education and warnings are often used together. On identifying a breach, an enforcement officer will often issue a warning and also advise the proprietor on how to deal with the problem.

Fining or prosecuting immediately after a breach is detected is rarely used with no agency indicating that it takes this approach either usually or always, and a considerable number never using it. Only nine out of 54 agencies indicated that they actually have the power to issue on-the-spot fines. Further, Monash Council (Vic) commented that, although it has the power, it rarely uses it (although it was seen as a useful bargaining device).[48]

It is more popular to fine or seek prosecution of the offending party if initial attempts to rectify the problem fail. Some 13 agencies indicated that they would always take this course of action, and another 17 indicated that they usually would.

48 A number of responses were received on the issue of on-the-spot fines, whether used immediately after a breach or subsequently. ACT Public and Environmental Health Service indicated that they could be very useful, especially given expensive court action, but only if used sensibly such that co-operative relationships are not broken. Essendon Council (Vic) took a similar view and suggested that staff may need training before using on-the-spot fines. Tea Tree Gully Council (SA) advised that it has recently introduced on-the-spot fines with the result that businesses have begun actively seeking education in order to avoid being fined. Queanbeyan Council (NSW) also noted that on-the-spot fines would be useful in getting timely responses to minor level breaches, siting the difficulties it had encountered in getting temporary toilets installed on building sites where firms were liable to engage in strategic behaviour and not comply unless court action was begun.

The use or threat of adverse publicity to deal with specific breaches received little support with 38 agencies never using it, and the ten that do use it nominating it a only an occasional option.[49] Publishing inspection or prosecution results in the local newspaper sometimes occurs in Kwinana (WA) and Queanbeyan (NSW), but these reports do not generally include the name of the business involved.

**Table B6: Action to rectify specific breaches (frequency of use) ***

| *Type of action* | *never* | *sometimes* | *usually* | *always* |
|---|---|---|---|---|
| educate/advise | nil | nil | 9 | 32 |
| verbal warning (a) | 5 | 11 | 12 | 20 |
| verbal warning (b) | 7 | 10 | 8 | 13 |
| written warning (a) | nil | 20 | 9 | 13 |
| written warning (b) | 5 | 8 | 12 | 15 |
| fine/prosecute (a) | 19 | 25 | nil | nil |
| fine/prosecute (b) | 1 | 14 | 18 | 13 |
| adverse publicity | 38 | 10 | nil | nil |
| other | nil | 6 | 1 | 2 |

(a) Action taken immediately. (b) Action taken only if other actions fail to rectify problem.
∗ Entries have been rounded to the nearest whole number. Sample size 54.

Other approaches, or variations on those discussed above, mentioned in the survey responses are presented below.

- Several agencies indicated that they have the power to issue closure orders for premises or seize food.
- AQIS Brisbane indicated that, if a breach was detected, the product would be rejected involving either re-shipment to the country of origin, destruction or re-labelling if appropriate.
- Monash Council (Vic) said that it usually seeks the reimbursement of the council's costs involved in sampling as an alternative remedy to prosecution.

[49] Monash Council (Vic) stressed that it is hard to determine what damage may occur through adverse publicity, and only the courts can properly judge what is a fair penalty, not the media. South West Sydney *PHU* said it had limited success in getting stories published, but Queanbeyan Council (NSW) said the Queanbeyan Age often reported court proceedings.

- Werribee Council (Vic) disclosed that it sometimes commences prosecution and then adjourns on the condition that remedial action is taken.

- Three councils (Stirling (WA), Willoughby (NSW) and South Sydney) indicated that they sometimes require the offending proprietor, and/or his or her staff, to attend a hygiene seminar or undergo specific health promotion programs.
- Monash Council (Vic) and Essendon Council (Vic) indicated that they occasionally use the customers of a business to apply extra pressure. Specifically, where a food manufacturer is in breach of standards, the wholesaler or retail chain to which the manufacturer supplies its output may be alerted. In some cases, such action has resulted in pressure being applied to the manufacturer to improve its performance or risk losing its contract with the wholesaler or retailer.
- Victorian Department of Health said that it sometimes consults with, and seeks action through, industry organisations as a means of response.
- South Western Sydney *PHU* indicated that sometimes it addresses a common problem across a number of businesses at the same time, and in doing so uses a combination of approaches (see Box B5).

### Box B5: A case study in enforcement

In Cabramatta NSW, a number of restaurants and take-away premises are predominantly run by people from non-English speaking backgrounds. According to the South Western Sydney *PHU*, a number of these businesses were in breach of hygiene standards, largely due to cultural differences in food preparation practices.

The *PHU* tried several approaches over time to address these common problems.

Firstly, it attempted to educate individual proprietors, and did so a number of times, even involving the local member of parliament to encourage compliance and minimise any political backlash.

After continued non-compliance, a few proprietors were prosecuted but, according to the *PHU*, this caused more difficulties than it resolved as relations in the area were soured. The *PHU* then attempted to publicise the issue in foreign language newspapers in order to raise awareness and encourage compliance. However, this failed because the local newspapers decided not to publish.

Finally, the *PHU* sent warning letters, written in the language of individual proprietors, on mass to several offending businesses. Prosecution was then instituted against 35 businesses remaining in breach.

## B3.3 Rectifying specific breaches: hierarchies of measures

*Regarding the practical enforcement of food legislation, do you use a hierarchy of control measures, such as giving warnings on the first occasion, possibly coupled with education about how the law should be observed, with fines or prosecutions for subsequent breaches?*

*If 'yes', do you have formal procedures setting out the steps to be followed and when they should be taken, or is it an informal approach?*

Nearly all agencies which responded to this question indicated that they do use a hierarchy of measures (47 out of 49). Of those that do, most used an informal approach (29 out of 49).

However, the categorisation of agencies into formal or informal hierarchies, whilst useful, needs to be treated with caution. For example, many agencies with formal hierarchies do not strictly follow them all the time, and the effective difference between agencies with formal compared to informal hierarchies may be minimal. Further, some agencies currently using informal hierarchies may be in the process of developing formal hierarchies, such as the Northern Territory Health Services.

### Specific hierarchies

Specific responses are presented below.

- Stirling Council (WA):

  > Once results [from sampling] have been received, this information is forwarded to the vendor. If the results show that the product is substandard, a warning letter is sent to the proprietor in the first instance. If the proprietor has been previously warned for breaches of the Code or if the breach is serious, then a different standard letter is sent asking for written explanation within 14 days, as to why the product was substandard and what measures will be taken to prevent a similar recurrence. If a satisfactory response is received, then only a warning is issued. If not, the matter will proceed to prosecution. Irrespective of whether a warning is issued or prosecution undertaken, advice on how to comply with legislation is given. Follow up (repeat) samples are also taken a month or two later to ensure that the products now comply with the relevant standards.

- Mandurah Council (WA):

  > Generally, a warning is issued to the proprietor on the first occasion, in addition to education as to how the deficiency or problems can be addressed in order to comply with the relevant legislation. Subsequent breaches of the legislation will result in legal action being initiated. Should results indicate a breach which has severe health implications, then legal action may be initiated without a warning being issued.

- Kingborough Council (Tas) and Stonnington Council (Vic) both indicated that they use a dual hierarchy approach with a different hierarchy for inspections compared to food sampling.

  Stonnington's hierarchy for inspections is:

  1) verbal or informal written notice.
  2) formal Council letter.
  3) at times, a request asking reasons why prosecution should not happen.
  4) prosecution.

  Its hierarchy for food samples is:

  1) full investigation of causes of non-compliance.
  2) recommendations of appropriate measures to minimise or stop non-compliance.
  3) formal notification of the above.
  4) prosecution only if a blatant breach.

- Willoughby Council (NSW):

  1) inspection, which incorporates an educational component (explain problem and show corrective measures, preventative measures etc to ensure that resolution is not a band-aid measure etc;
  2) fully detailed letter including suggestions and advice regarding cleaning and food handling hygiene tips forwarded to proprietor;
  3) follow-up inspection — if the problem is not rectified (which is rare), a warning is given and reinspection occurs within a couple of days;
  4) if the problem is still not rectified, a formal clean-up order is given with the threat of legal action without further warning; and
  5) if the problem remains unrectified, prosecutions and perhaps referral to State Department for a closing order results.

- Maryborough Council (Qld) indicated that its procedure involves an inspection, verbal advice, a letter and then a formal notice.

- Adelaide City Council:

  1) verbal warning (and advice) followed up with a warning letter.
  2) direction notice issued which has legal standing.
  3) an expiation notice may then be issued.
  4) may prosecute.

  Adelaide City Council indicated that careful consideration is given before taking punitive action. Persuasion is its preferred path, and it has developed a range of educational material written in several languages.

- Queensland Health indicated that, whilst it sometimes has a hierarchy, prosecution is frequently used in the first instance for certain breaches:

  > Prosecution is utilised as a standard procedure for common breaches of compositional standards related to staple foods where health or nutrition are affected; for example excess preservatives/fat or deficiency in nutrient content (meat, fibre). Warnings and advice to correct deficiency are used in other situations followed by prosecution and/or seizure of product where corrective action is not taken.

- ACT Public and Environmental Health Service:

  > If a breach is identified, the degree of severity is assessed on a food safety basis. A warning is usually issued. A letter is given to the operator. Any further non-compliance is usually followed up with an improvement notice or a [new] license condition. A prohibition notice may be served in severe cases. Non compliance with the improvement notice may result in fines usually totalling $5000 for the individual or $50 000 for a company. Imprisonment may also result. It is the Service's policy to educate, warn and then prosecute if a non-cooperative attitude is displayed in patterned behaviour.

- Northern Territory Health Services:

  > Each breach is considered on its individual merits. Some of the issues considered are identifiable from above. Previous history, degree of public health risk, any illness/damage caused, reasons for contravention, and willingness of responsible party to take appropriate and timely remedial action are all taken into consideration.

- Devonport Council (Tas) indicated that it gives warnings for first offenders coupled with education and follow-up inspections. Repeat offenders face seizure of goods and/or prosecution.

- Melbourne City Council:

  > The processes [for practical enforcement of food legislation] can consist of warnings, orders being served or prosecutions in particular instances. Also included is food process profiling, food sampling (depending on categories of risk), on site education in certain circumstances, and training. Awareness programs are also built into the process. Fines are not issued for all breaches observed.

- Sorell Council (Tas):

  > Generally, education and warnings are used in most situations depending on the seriousness of the situation. Serious offences such as dangerous objects in food items would necessitate immediate enforcement. However, food premises that start to get a bit 'run down' are educated and warned.

- Glen Eira Council (Vic) has general steps, flowing from verbal warnings to written advise to seizure (if immediate and direct threat to health) to warnings of legal action if breaches continue to legal action being taken. However, "legal action is extremely rare and viewed as counterproductive".

- Northern Sydney Area Health Service (*PHU*) uses a hierarchy developed by the NSW Department of Health in 1992 called *Guidelines for Prosecution of Breaches of the Food Act 1989.* The general procedure involves issuing written warnings unless an immediate threat to public and safety exists and it

is in the public interest to prosecute, in which case a recommendation to prosecute is made to the Director of the Unit who may then refer it to the NSW Health Department for final approval. If such a recommendation is rejected, a written warning is issued followed by subsequent re-inspection. [50]

- South Western Sydney Area Health Service (*PHU*) also follows these guidelines, but with the express qualification that they need not be followed under all circumstances. A strong educative theme also underlies its approach:

  > We have prosecution guidelines. However, although these basically state that warnings should be given on the first occasion, they are after all only guidelines.
  >
  > Our *PHU* will prosecute without warning, even if the potential defendant has no prior record. This is done on the basis of public concern: ie, if it is in the interest of public health, then we will prosecute. If substantial (and substantiated) fraud occurs, then prosecution may also proceed even if no prior warning has been issued and the individual has no record.
  >
  > Education is always done with our inspectors going to great lengths to 'get the message across' (not just what they have to do but also WHY). If all else fails then there is an 'educative' session in court.

- NSW Central Coast Area Health Service (*PHU*) also follows the *Guidelines for Prosecution of Breaches of the Food Act 1989*, but added that:

  > These guidelines have the effect of ensuring that very few prosecutions proceed. They are based on a vague 'public health' philosophy which nobody has been able to define for practical purposes. The guidelines are applied on an extremely subjective basis by individual *PHU* directors.

- Sydney City Council's approach involves moving from verbal warnings to warning letters to hygiene lectures to clean-up notices to closure orders and finally to court action.

## Other responses

Other agencies highlighted specific aspects of their approaches, including:

- *cooperative solutions:* Werribee Council (Vic) stated:

  > Warnings, second warnings, and 'threats' are also used where necessary. We concentrate on strategies that will provide the best result for all concerned. Prosecution is always seen as a last resort. If an alternative *cooperative solution* can

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[50] In helping to determine whether a prosecution is in the public interest, the 'Guidelines' suggest that the following be considered: actual injury, public confidence in the food regulation system, need for deterrence, co-operation of defendant, mitigating or aggravating circumstances, whether prosecution would be counter-productive or bring the Food Act into disrepute, length and expense of proceedings, likelihood of defendant being found guilty, and whether any resulting conviction would be unduly harsh. The Guidelines also require that there be "...a reasonable prospect of a conviction being secured" before prosecution goes ahead. The ORR understands that the Guidelines are currently being internally reviewed.

> be found which will result in longer term benefits to consumers and the food handler/food business, we will always pursue such opportunities. Prosecution rarely delivers long term benefits.

- *education:* Melville Council (WA) said "Our role is seen as one of education and rehabilitation tempered with industry and environmental knowledge. However, a risk management approach is used when determining what enforcement provisions will be used". Likewise, Willoughby Council (NSW) places particular emphasis on education:

  > ...our hierarchy is backed by an extensive and intensive *education* program with seminars (in house if required), regular newsletters coupled with high profile and accessible Council officers to discuss any problem, advise and support. Indeed, an officer drops in regularly when passing as a courtesy call...developing good rapport between an officer and food handler.

- *self-assessment* — Brisbane City Council uses a hierarchy, incorporating self-assessment, in its annual registration process. The process begins upon receipt of an application and fee whereupon the applicant is given a self-assessment form asking the applicant to assess their businesses performance on reducing risks, customer satisfaction and keeping costs down. The next stage involves an *eho* carrying out a joint appraisal of the premises with the applicant, discussing the outcome and negotiating a response. Registration is then granted, or withheld until certain issues are addressed and then granted. If compliance with the negotiated plan is slow, informal notices are drafted, although this is only to remind the applicant of the plan. However, if the quality of food is directly threatened, formal notices are served.

- *discretion:* Eastern Metropolitan Regional Health Authority (SA) indicated that prosecutions or expiation notices were only used as a last resort and that in regards to complaints of allegedly unfit food, it considers many factors prior to a decision to take action against an alleged offender, including:

  — was it a 'one off' event?
  — was all reasonable care taken?
  — does the business have a system in place to prevent such occurrences?
  — was it foreseeable?
  — is the matter minor or serious? Was anyone injured?
  — does the business have a previous record in regard to incident?
  — was there deliberate negligence?

- *officer preference:* AQIS Darwin raised the issue of personal preference:

  > Each case would be looked at individually and depend on local knowledge: is it the first offence, second offence etc. Also, it can depend on the officers involved in the case: one may want to prosecute while another may give a warning.

- *offender enquires* — as part of its hierarchy, the SA Health Commission encourages an alleged offender to contact suppliers of ingredients or seek technical advise before responding to a request for written explanations

(which occurs subsequent to a breach being detected). The Commission believes that, “This approach generally results in a more thorough examination of the cause of the failure”.

## B3.4 Improving the ‘culture of compliance’

*A broader issue is what can be termed the ‘culture of compliance’. This relates to the general awareness of, attitudes towards, and adherence to, food laws by proprietors and companies.*

*What measures, if any, do you use to promote a culture of compliance?*

- *general education of proprietors and firms.*
- *adverse media publicity (for example, of prosecutions of breaches by firms).*
- *informative media strategies.*
- *annual or occasional food industry awards.*
- *certification of companies/premises.*
- *food handler training and related courses at TAFEs or other institutions.*
- *newsletters.*
- *other.*

**Table B7: Measures to improve culture, by level of government**

| *Measures* | *Commonwealth* | *State** | *Local* | *Total* |
|---|---|---|---|---|
| education | 1 | 7 | 38 | 46 |
| adverse publicity | nil | 5 | 8 | 13 |
| informative publicity | nil | 5 | 7 | 12 |
| food awards | nil | 2 | 5 | 7 |
| certification | 1 | 3 | 11 | 15 |
| training | 1 | 6 | 13 | 22 |
| newsletters | 1 | 3 | 16 | 20 |
| other | 2 | 1 | 5 | 8 |

* While NSW Food and Nutrition Policy Units and Victoria’s Food Safety Unit are not responsible for enforcing food laws (in the narrow sense of the term), they do undertake education and other measures which seek to affect the culture of compliance in their States. They have thus been included in these statistics. Sample size 56.

As Table B7 shows, education was the most common measure nominated by agencies. This applies equally across State and local levels although, at the Commonwealth level, only AQIS Head Office said it is involved in education.

There is some potential that the number of responses nominating education may be inflated in so far as, in one sense, all the other measures listed — particularly training courses, publicity and the distribution of newsletters — could be regarded as having an educative function.

Following education, the most common measures nominated by the agencies were food hygiene and related training. This function tends to be undertaken by units a higher levels of government with 6 out of 8 State/Territory agencies conducting training, compared to 14 out of 44 local and regional units.

The agencies' training programs vary. The ACT Public and Environmental Health Service's standard course for food handlers is run by staff from the Service itself in four half day modules. Willoughby Council (NSW) indicated that it provides training on-site by an accredited trainer. Werribee Council (Vic) conducts its training program externally:

> We have established a food handlers training courses at a local campus of Victoria University of Technology. Food handlers are encouraged to attend. Field officers attempt to educate by explaining the reasons for directives, requirements, and regulatory enforcement. Proprietors/ food handlers are provided with booklets, posters and other promotional material obtained from other agencies or developed inhouse.

Launceston Council (Tas) organises both on-site training, which it runs, and external courses through various colleges and hospitality institutions. At any of these sessions the attendee is given a Food Handlers Kit (compiled by the Council) and a certificate of attendance signed by the Mayor and chief *eho*. Sydney City Council also runs internal training courses. Materials developed for its courses are often picked up and used by other councils.

Other commonly nominated measures include the distribution of newsletters, media publicity, and the certification of companies and/or premises.[51] In the case of newsletters and information leaflets, both South Sydney Council and the South West Sydney *PHU* indicated that they distributed their information in several different languages to reflect the ethnic background of many of their constituents.

On the other hand, the use of food industry awards was rarely adopted by agencies with only five councils and two State/Territory authorities (see Box B6 for the ACT Award Scheme) including it as a tool for promoting compliance. However, a

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51 This category may have been ambiguous and open to different interpretations by agencies. Some appeared to equate it with licensing; others with quality assurance type certification beyond that necessary to meet legislative requirements.

number of other agencies indicated that they had/were considering such awards. Further, in Tasmania a state wide award scheme for butchers has been adopted, referred to as the 'Q Award'. Tasmania is also developing another butcher award scheme to complement the Q Award, but for which the requirements are lower, in order to encourage a lifting in standards for those butchers who find the Q Award too difficult to comply with.

Another approach to improving the 'culture of compliance' was being developed by Moreland City Council (Vic), during 1994 and early 1995 [52], which incorporated the idea of food awards with the use of a risk and performance based registration system. A premises would be rated on the bases of perceived health risk to the community and its performance in a number of health related areas over the past year. This rating would be used to both as a means of determining the registration fee payable by a premises and as a system of 'quality' certification with the rating being displayed on the premises' registration certificate (see Box B7).

Tea Tree Gully Council (SA) indicated that, as part of its response to a cut back in resources, greater emphasis was being placed on facilitating self-regulation rather than seeking to play policeman (see Box B8):

> We have been working with food businesses in the City to organise training and information, guidelines/checklists and awards, to assist them in meeting their requirements and to become more self-regulated.

Other approaches/comments include:

- Monash Council (Vic) requires operators to pass a questionnaire test on food handling before registration is given.
- at the Commonwealth level, AQIS Brisbane advised that they notify customs agents of non-compliance by an importer as a means of developing a compliant culture.
- several agencies indicated that they provide information or fact sheets on various food law issues. For example, Mackay Council (Qld) indicated that it distributes information sheets for each product type, whilst Penrith Council (NSW) provides specific information sheets which address particular problems which may arise out of an inspection. Greater Ballarat Council (Vic) issues general advisory circulars.
- South Sydney Council used community involvement in developing its food policy, which was subsequently distributed within the local community (see Box B4).

52 This project lapsed after the officer who was developing this system has left the Council.

**Box B6: The ACT food industry award scheme**

ACT Health has developed a Food Industry Award where businesses are rewarded with a certificate and other promotional material, including a window display sticker, in return for satisfying certain ‘health related’ criteria.

The program views food as impacting on health in two ways — causing short term illness (food poisoning) or long term diet-related illness. The criteria set by the authority reflects both these issues, requiring:

- a percentage of food choices meeting dietary guidelines; and
- high standards of hygiene and kitchen construction, and a percentage of staff holding certificates of competency in food safety.

To comply with the nutritional component, businesses must adhere to the intent of the Australian dietary guidelines. In order to assist businesses to meet this requirement, two general guidelines have been developed, one for ‘eat in’ premises and one for ‘take-away’ premises. The guidelines for ‘eat in’ premises require at least one low fat entree and one low fat main course meal to be offered on the menu. For ‘take-away’ premises, a point system is used with each application of low fat ‘healthy’ principles earning pre-specified points, with the premises required to accumulate 100 points. For example, using skinless chicken earns a premises 20 points. One extra compulsory requirement for ‘take-away’ premises is that any deep fryer must be operated in a prescribed manner.

To comply with the hygiene and training standards component, the premises must:

- comply with the ACT public health food legislation and regulations; and
- ensure that a proportion of food handlers, depending on the size of the operation, possess a certificate of competency in food hygiene (which may be achieved by attending the ACT Public and Environmental Health Service course, a TAFE 10 hour food safety course, or similar courses).

### Box B7: Moreland Council’s registration ratings system

Moreland City Council’s proposed risk and performance rating system involved grading premises into low risk, medium risk and high risk categories, depending on their potential impact on public health, as well as rating them on their performance during the past year, taking into consideration the following criteria:

- results of inspections;
- results of samples taken for analysis;
- the absence of justifiable complaints;
- the absence of Food Act prosecutions;
- attendance of the proprietor/staff at an accredited food handler course;
- results of on-the-spot tests conducted on the premises; and
- final assessment of premises prior to renewal of registration.

The proposal also suggested that the integration of general food health issues, such as nutritious menus and non-smoking, could be considered in determining a rating.

The proposed system envisages that low risk premises always receive a rating of 1, medium risk premises could receive a rating of 1 or 2, and high risk premises could receive a rating of 1,2 or 3 depending on how they performed regarding the above criteria (with the higher number indicating higher risk)

The final rating could then be used to directly determine a premises’ registration fee. Alternatively, each criteria satisfied could involve a specific discount applied to a standard fee applicable to the relevant risk category. For example, a high risk premises may face a standard registration fee of $200, but by satisfying the ‘attendance at an accredited training course’ criteria, the fee would fall.

The rating assigned to a premises would not only influence the registration fee payable, but would also be displayed on the premises’ registration certificate which, combined with a public awareness campaign, should encourage businesses to achieve a lower rating.

**Box B8: Tea Tree Gully's industry involvement approach**

Tea Tree Gully Council indicated that, in response to the introduction of expiration notices, greater emphasis was being placed on self-regulation.

In 1993 the Council surveyed 100 local food businesses. The survey indicated that the majority of premises were in breach of some aspect of the Food Act and associated regulations and that around 60 percent of proprietors were unaware of their legal responsibilities.

The Council wrote to local businesses indicating that many were technically liable to being served expiation notices, and inviting industry to cooperate with Council to find ways to avoid this outcome and improve its performance.

In response to this invitation, around 150 business people attended joint Council-industry workshops and 4 industry committees were established, dealing with:

- training and education of businesses.
- information of food laws and how to communicate to business.
- guidelines for the serving of expiation notices on businesses.
- food certification and award schemes.

Although partially hampered by an ongoing lack of resources, the Council *ehos* report significant progress, with agreed protocols for the serving of expiation notices, more industry activism in reducing food safety problems, and significantly improved compliance with relevant regulations.

There have been other spin-offs. For example, the industry group and Council *eho* discussed the NFA's proposal for Food Safety Plans and made a joint submission to the NFA on the matter.

In discussions with the ORR, Council *ehos* indicated that they saw the success of the project as reflecting the Council's recognition of the limitations of the 'policeman' model ,and tapping into the genuine desires of businesses to 'do the right thing'.

## B3.5 Balance between rectifying specific breaches and improving the general culture

*To what extent are your efforts and resources aimed at rectifying specific problems relative to improving the general culture of compliance with food laws?*

An almost equal number of agencies balance their efforts and resources half and half (23) as agencies that mainly focus on specific issues whilst giving residual attention to cultural issues (19). It is in these two categories that nearly all agencies fall with only four agencies focusing mainly on culture and one agency focusing exclusively on specific issues.

Agencies that indicated that they devote about half of their effort and resources each to specific and cultural issues gave three main reasons for doing so:

- several agencies mentioned that they did so on the a belief that each is equally important. Bunbury Council (WA) viewed addressing specific problems as assisting the present and cultural advancement as assisting the future, and that, as such, an equal weighting is placed on each.
- other agencies suggested that the 50/50 split came out of a preferred emphasis on improving the culture of compliance but with a recognition that some proprietors do not respond and that specific issues do arise that need attending to. Melville Council (WA) said “We find that many times similar results of non-compliance arise. We therefore try to improve these specific problems whilst at the same time having a general direction of improving food industry culture”. Gosnells Council (WA) came to a similar conclusion but also mentioned that part of the reason for the preferred focus on cultural improvements and training is because of the diverse background of food handlers and the need to increase awareness about food standards.
- one agency, Devonport Council (Tas), indicated that combining prosecutions with public relations have given acceptable results in the past and it is therefore experience that determined their preferred balance. (Experience is also used to determine the appropriate balance by the Central Coast Area Health Service (NSW), although it adopts a focus mainly on specific issues).

In addition, in explaining its 50/50 position, Glen Eira Council (Vic) emphasised that it saw culture as meaning more than compliance:

> At Glen Eira Council (formerly the City of Caulfield), we have introduced a Food Hygiene Audit which operates on the basis of using competition, consumer demand and self regulation to comply with legislation. It is focussed on risk products and risk activities, not on compliance for compliance sake.
>
> Food sampling is targeted at areas of risk in production, storage and handling of food in order to identify and rectify problems before any transmission of illness occurs.

> We also respond to complaints and provide advice on specific problems we see.
>
> The culture we attempt to instil is one of quality assurance and control rather than simply a culture of compliance with legislation as legislation sets minimum standards only.

Nearly all of those agencies that adopted a main focus on specific issues cited, directly or indirectly, a lack of time and/or resources as the reason. Some, like AQIS Head Office, indicated that steps to improve culture were residual due to the substantial workload involved in dealing with specific issues. The South Western Sydney Area Health Service mentioned that, due to the low socio-economic status of its area, many businesses respond by cutting prices and often quality standards. This means that the unit has a lot of specific issues to deal with. South Sydney Council indicated that the high-turnover of businesses in its jurisdiction was a factor influencing it to focus more on dealing with specific problems.

Two agencies which indicated that they focus mainly on specific issues mentioned that they were in the process of moving away from such an approach and towards a more “proactive and educative function” (Brisbane City Council). Mackay City Council (Qld) indicated that part of its move towards cultural changes is via accreditation and food handler training. Rehabilitation and education will form an important part of Brisbane City Council’s new ‘Food Quality Management Strategy’.

In contrast to the situation of those agencies that currently focus on specific issues, the few that focus on cultural issues do so purely out of choice. Launceston Council (Tas) coined the familiar phrase, “prevention is better than cure” and indicated that specific problems were addressed on a needs basis only. Hindmarsh/ Woodville Council (SA) explain that their focus on cultural issues is because, “...if successful it will lead to a reduction in the incidence of specific problems”. In the case of the Western Australian Health Department, information provision of itself is often seen as a means that “can and does rectify a problem”.

## B3.6 Discrimination between firms

*In enforcing and/or encouraging compliance with food laws, do you use a different approach for large firms than the approach you use for small firms?*

The majority of councils indicated that they made no distinction between large and small firms in enforcing or encouraging compliance. Of the agencies surveyed, only 14 indicated that they applied a different approach.

Of those agencies that said they take firm size into account, comments included:

- Stirling Council (WA) uses a tougher approach to non-compliance by large firms.
- Kingborough Council (Tas) said:

  Quite often the path to who is responsible is very difficult to establish in larger companies (especially interstate). Problems etc are often more easily rectified with an educative approach to smaller companies.

- Essendon Council (Vic) said:

  Depending on size, resources available etc, a large company can be expected to place more resources into food testing, production plans etc. Whereas a small company must still endeavour to have in place some form of quality assurance, the resources will not be available to have input into such quality assurance.

- Gosnells City Council (WA) said:

  [Our] *eho*s feel it would be difficult and somewhat impractical to gain the cooperation of small business operators to embrace the principles of HACCP because of time limits and cost. I refer to delicatessens, small one or two person restaurants and dining rooms.

- Sorell Council (Tas) said:

  Major differences occur when larger firms have HACCP in place. Investigation becomes more of an auditing role rather than an inspection to gather facts. Otherwise, the same basic principles apply.

- Monash Council (Vic) made the point that differences in attitudes and compliance between firms, and therefore appropriate enforcement responses, depended more on the age of the firm than its size with older premises generally providing higher risks because of their more antiquated practices and older facilities.
- ACT Health indicated that, although neither large nor small firms received more or different attention from the agency *per se*, by adopting its risk classification system large firms may, by falling into a higher risk class, receive more attention. ACT Health also added that large businesses do not necessarily represent higher risk because, despite higher volumes, superior internal systems and cooperation are more likely.

# B4 OTHER MATTERS

## B4.1 Responsibility for interpretation and dispute resolution

*At what level does discretion for interpretation of food standards lie? That is, who interprets the law for enforcement purposes?*

*If a dispute arises over interpretation of food standards, what procedures does your agency have in place for resolution? Does your agency contact the NFA or another agency which does liaise with the NFA?*

As reflected in Table B8, interpretation of food standards lies mainly with field officers although a number of agencies replied that unit management and senior managers also have some discretion for interpretation.

The survey responses also indicate that agencies may seek assistance in interpreting food legislation and regulations from a wide variety of sources. Some agencies have formal procedures in place for resolving disputes, such as referral to the NFA or a legal body. Others have no official procedures.

**Table B8: Interpretation within agencies**

| *Level of agency* | *Field officers* | *Managers* | *All staff* |
|---|---|---|---|
| Commonwealth (AQIS) | 2 | 2 | 1 |
| State and Territory | 5 | 1 | 2 |
| Local Government and Regional Health Units | 39 | 12 | 4 |

Sample size 54.

In the case of AQIS, practical interpretation and enforcement is undertaken by field officers. However, AQIS Head Office issues orders and sets procedures with respect to foods imported under the IFIP legislation. Regional AQIS inspectors indicated that they contact the AQIS Head Office Science Administrator for decisions. NFA clarification may then be sought.

At the State/Territory level, representatives from all State/Territory Health Departments attend the biannual NFA Senior Food Officers meeting at which issues of interpretation of the Food Standards Code are discussed. The Victorian Department of Health and Community Services indicated that it resolves interpretation issues by discussions with local professionals, departmental staff and/or local government inspectors, and on some issues:

> ...the NFA organises meetings and/or teleconferences between State Food Officers to discuss interpretation matters.

At the local government level, the survey responses indicated several ways in which agencies handle interpretation issues:

- *liaison with the NFA* — the NFA stated:

  > The Authority receives requests for explanation/interpretation of the Code from many different levels of management in the States/Territories, and from field officers and technicians/analysts (both at the State and local government level) and from enforcement managers.
  >
  > There does not appear to be any particular pattern based on State/Territory, but most requests from enforcement agencies seem to come from *eho*s employed by local governments. Fewest requests appear to come from NSW, Western Australia and the Northern Territory.

  While some councils approach the NFA directly, others appear to see themselves as constrained to first approaching their State Department or, alternatively, are unaware that they can approach the NFA. Sorell Council (Tas) said:

  > ...as the Food Standard Code is becoming more extensive and specialised, it would be very useful for small councils who have less day-to-day dealings with the Code to be able to seek advice where necessary from an 'expert' within the NFA.

- *meetings/liaison with the other 'up-line' bodies* — as alluded to above, several agencies indicated that they approach their State Departments (or public health units where relevant) for advice on interpretation matters or to overcome disputes. For example, the Northern Sydney Area Health Service stated:

  > If a dispute arises over interpretation of the Food Code, an officer from a different agency (ie Food and Nutrition Policy Unit) is referred to, to clarify interpretation of the Code.

  The NSW Food and Nutrition Policy Unit added that it "...disseminates policy to public health units, although directors of public health units may or may not follow policy."

- *meetings/liaison with other councils* — Southern Queensland councils have regular combined meetings where a group of councils discuss enforcement and interpretation issues. Similarly, the local councils in Western Australia have formed coordinated food sampling units which discuss interpretation issues.

- *internal staff meetings* — several agencies indicated that they have regular meetings of staff involved in food enforcement to discuss interpretation issues.
- *AIEH guidelines* — some councils indicated that they use AIEH codes of practice and methodologies or variations on them. Ballarat Council (Vic) said that the guidelines have been developed "with a view to achieve uniformity of interpretation of laws". It uses them in conjunction with meetings of staff, and advice from food analysts and the Victorian Department of Health.

Where specific disputes occur which relate to interpretation issues, many of the above avenues are used in resolving them. In addition, agencies nominated the following mechanisms:

- *negotiation with proprietors/industry* — Kwinana Council (WA) advised that it sometimes discusses issues with industry representatives and small business managers. Brisbane City Council said that consultation and negotiation with local proprietors usually solves these issues.
- *mediation/appeals mechanisms* — Tasmania has mediation mechanisms in place involving the Chief Food Safety Officer and Director of Public Health. In the case of AQIS, importers of foods which do not comply with the Food Standards Code must submit an application in respect of that food. The application is considered by the AQIS program manager and any disputes arising are referred to the Administrative Appeals Tribunal. In South Australia, local council directives to businesses made under the SA Food Act are appealable to the South Australian Health Commission.
- *council decisions* — at local government level, some dispute resolution decisions are made by council directors or are referred to the Council.
- *formal legal advice* — several agencies indicated that, in dealing with disputes (and interpretation issues generally), one option is to seek formal legal advice, either from within or outside the agency. For example, the Northern Territory Department indicated that it refers disputes to the program director who may seek advice from the NFA, another State or Territory, or the Territory's Department of Law. The ACT Public and Environmental Health Unit indicated that it contacts the NFA or refers matters to the ACT Attorney General's Department. The Western Australian Department of Health indicated that, if necessary, it obtains opinions from its Legal Policy Branch. The South Australian Health Commission indicated that if a producer disputed an interpretation of the Food Standards Code, then court action would follow unless the producer:

  > suggested a reconsideration of the matter where interpretation can be checked by consultation with the NFA, other interstate Senior Food Officers, or the Commission can seek its own legal advice.

## B4.2 Systems for uniform interpretation

*Does your agency have any systems in place to encourage uniform interpretation of food legislation across your jurisdiction? For example, is it a regular item on meeting agendas, do you have a panel of people who undertake interpretations on behalf of the agency, etc?*

*Further, does your agency promote networking on interpretation issues with other agencies, encourage staff membership of professional organisations or encourage staff attendance at seminars and meetings on food legislation and its interpretation?*

Four local agencies and the Victorian Health Department all answered that they do not currently have any such systems in place.

All but seven agencies indicated that they promote networking. Further, nearly all agencies reported that they encourage both the membership of professional organisations and the attendance of seminars and meetings on food legislation and its interpretation.

Regarding mechanisms for obtaining uniformity at the national level, the NFA said:

> The Authority meets regularly (biannually) with senior State/Territory enforcement representatives in order to discuss issues of interpretation and enforcement. It also holds frequent telephone conferences on interpretations to discuss more urgent issues.
>
> Situations do arise where the States interpret the Code differently to the NFA. It is important for the NFA to be aware of inconsistencies in interpretation. The problem can be alleviated by working with the States and Territories at an early stage in drafting standards and circulating agreed interpretation for advice of enforcement officers, or by amending the Code to remove problems/ambiguities.
>
> The Authority is in the process of developing procedures to support uniform interpretation. This will involve the production by the Authority (in association with the States/Territories) of explanatory memoranda and interpretation notes. Developing these documents in consultation with field officers (in order to draw on their experience and expertise) at the same time as developing the draft standards will alleviate interpretation problems at their conception.

At the State/Territory level, State Departments indicated that they encourage uniformity by disseminating newsletters, policy documents or bulletins. Central offices provide regular interpretation advice to regional offices by correspondence or telephone.

The Western Australian Department of Health said that it uses a close team approach, constant communication, and consideration of previous advice to promote consistency. Contact with local councils is maintained through bulletins, by fax, telephone and direct correspondence, and through participation in the Food

Monitoring Steering Group which forms part of the WA Food Monitoring Program (see Box B9).

The South Australian Health Commission stated:

> The State is the only authority responsible for administration of the Australian Food Standards Code so in those matters the problem of different authorities within the State interpreting the Code differently does not arise.
>
> For matters of food hygiene, the SA Food Act includes powers for Local Councils to issue directions for the purposes of hygiene and preventing the sale of unfit food. These directions are very broad and deal with matters including premises construction and the storage and handling of food. Because these powers are so broad the Act provides a mechanism for the person receiving a direction a right of appeal to the Commission.
>
> Food hygiene regulations (unlike the Food Act) are not covered by this appeal process and there is a potential for differing interpretations between councils. There is no formal mechanism for resolution. Councils may choose to consult with the Commission, however the Commission generally prefers the Councils seek their own legal advice. The AIEH (South Australian Division) also provides a forum for discussion of issues .

In States with a regional structure, meetings are sometimes convened for inspectors from the regional units. Amongst other things, interpretation issues are discussed at these meetings. In commenting on the NSW system, the Northern Sydney Area Health Service (*PHU*) mentioned that bi-monthly Senior Food Inspectors (advisory) meetings attended by representatives of *PHUs* in NSW assists by "...regularly attending to issues of uniform interpretation of food legislation". However, reflecting more generally on the changes in the system over recent years, another *PHU* said:

> there used to be a state-wide system but since the dismantling of the Food Branch of NSW Health, and public health units have been set up, priorities are set by the directors of the units. Inspectors meetings are actively discouraged with the consequence that inspectors learning curves on legislation is mostly a "one off" situation. Therefore, uniform interpretation is "hit and miss".

The NSW Food and Nutrition Policy Unit added that it "...disseminates policy to public health units, although directors of public health units may or may not follow policy".

In addition to mechanisms employed by State Departments, uniformity within particular States (or within areas within States) is sometimes pursued through formal or informal systems of discussion or communication between local authorities:

- Gold Coast Council (Qld) has developed a commentary on the State's hygiene regulations which is used by councils (and industry) throughout Queensland.
- Monash Council (Vic) advised that regional meetings are held to allow discussion of a number of issues with other *ehos*. (The Council also indicated that they were looking to form discussion groups between *ehos* and food premises proprietors).

- Launceston Council (Tas), while recognising that there can be a lack of uniformity between different municipalities, indicated that “communication between the professional officers on a regional basis keeps this to a minimum”.

At the local government level, many councils have developed formal procedures and systems for encouraging uniform interpretation within their jurisdiction:

- Moreland Council (Vic) advised it has adopted a structural Code of Practice for food establishments in conjunction with a local law; and a health section procedure manual, providing the basis for a uniform approach.
- Brisbane City Council issues policy bulletins, conducts regular meetings and updates its food procedures manual which is on issue to each *eho*.
- Melbourne City Council said:

  > Guidelines on inspection strategy and structural requirements [have been] endorsed by Council. A panel of solicitors is used for legal interpretation.

- South Sydney Council said:

  > Council’s *eho*s attend fortnightly meetings with management. Problems or particular matters pertaining to interpretation are discussed. Letters and written warnings are also checked to ensure uniformity. No other systems are in place.

- Werribee Council (Vic) has developed its own codes of practice, enforcement procedures and relevant policies by consultative team effort involving field staff. The Council indicated that regular discussions are held between field staff and management on topical issues.

Size seems to be a consideration in the need to develop such systems, with some smaller councils not bothering to formalise arrangements. For example, Capel Shire Council (WA) said that “Due to the small size of the shire, such systems are not necessary.” Likewise, Bunbury Council (WA) stated:

> There are only four *eho*s in the City of Bunbury with an interest in pursuing the provision of the Code, and as such, the pooling of ideas on an informal basis is easily accomplished and encouraged. The most compelling argument is the one that usually prevails. Lingering doubts are dispelled by encouraging further inquiry.

In the case of some agencies with only one food officer, such as Sorell and Dorset Councils (both Tas) and Mount Gambier Council (SA), uniformity of interpretation across the jurisdiction occurs automatically.

**Box B9: Western Australia's Food Monitoring Program**

Western Australia has developed an integrated approach through the establishment of the its Food Monitoring Program. The program aims to:

- establish the safety of the food supply generally within Western Australia.
- obtain recognition of the program as an ongoing public health measure.
- provide an across-government approach to food monitoring
- make maximum use of resources and avoid dup lication of effort.
- anticipate areas of concern where analytical data are lacking or absent.

The program involves Commonwealth, State and local agencies (eg Department of Agriculture, Chemistry Centre, State Health Laboratory Services, Fisheries, EPA) and has completed and published a number of surveys. These surveys include the *Quality of Smallgoods Manufactured in WA – 1993*, *Gluten in WA Foods – 1994*, and *Microbiological quality of spoilable foods – 1994.*

Stirling Council (WA) says of this system:

> City of Stirling participates in a NW Coordinated Food Sampling Program with three other metropolitan local authorities in the area. This allows for a greater range of foods to be monitored in a cost efficient manner. Meeting four times per year provides a great support system and a forum for exchange of ideas and information.

## B4.3 Uniformity, coordination and communication

*Are there any difficulties with current enforcement practices: eg, sampling problems, lack of uniformity, lack of communication or transfer of knowledge between jurisdictions?*

Responses at both the national and intra-State level indicated that inadequate uniformity, coordination and communication is a recognised problem which can, amongst other things, result in:

- reduced enforcement effectiveness;
- duplication of enforcement effort; and
- uneven and/or inconsistent enforcement of provisions across jurisdictions.

Specific comments on the lack of uniformity include:

- Moreland Council (Vic) mentioned a loss of professional image, as well as confusion, resulting from a lack of uniform enforcement:

  > The lack of uniformity taken by different authorities and indeed local government *ehos* creates confusion in the minds of proprietors and does not create an image of professionalism.

- Queensland Department of Health stated:

  > Lack of uniform guidelines and documented procedures on a national basis limits uniform interpretation and application between States and Territories.

- Stonnington Council (Vic) identified a "lack of uniformity throughout Australia leading to problems with information, communication, transfer of knowledge". It suggested that the roles of Federal, State and local governments are unclear and overlapping, which can often lead to "manufacturers playing jurisdictions off against each other".[53] Stonnington cited an example of prawns seized by local authorities for destruction which would have been re-exported by AQIS.

- Tasmania's Department of Health and Community Services likewise indicated that non-uniformity can manifest itself in "offenders playing one State off against another", suggesting that national enforcement action may be warranted for cross-jurisdictional breaches.

- Kingborough Council (Tas) also mentioned as a current difficulty "some degree of inconsistency between enforcement bodies".

- NSW Food and Nutrition Policy Unit expressed concern about the lack of food law enforcement in other States, and highlighted the damage that can be imposed on complying traders if non-complying traders are allowed to continue to do so as a result of non-enforcement. Specifically, it mentioned a case (also highlighted by the South Western Sydney Area *PHU*) in which a NSW producer suffered a competitive disadvantage and was materially injured as a result of its enforcement of sodium dioxide provisions for diced apple, when the same national regulation was not enforced on producers from other States (see Box B1).

- South Western Sydney Area *PHU* stated:

  > .....we are often exasperated (and hamstrung) by inaction in other jurisdictions.

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53 The ORR witnessed this strategic behaviour by firms whilst on a field trip in Essendon Victoria. A fast food business was planning to move to another location, advising Essendon council *eho* that it could no longer stay in Essendon with their 'strict' hygiene requirements.

- Penrith City Council also mentioned the need for uniform direction to ensure that industry competes on level terms:

  > ...a clear direction for ensuring food quality and hygiene standards needs to be established so that all facets of the industry compete on level terms and can factor the cost into budgets.

- The NSW Central Coastal Area Health Service (*PHU*) said:

  > A total lack of uniform approach (to enforcement with a)...virtual total prohibition on prosecution by some directors.

- Ballarat Council (Vic) mentioned inconsistency across States in sampling methods and approaches, and gave the example of Victoria which takes three samples per 1000 head of population in contrast with other States where it is often less explicit. Inconsistency in institutional arrangements was also mentioned, with reference to Victoria and its reliance on Local Government, and NSW with its use of regional *PHUs*.

- Mt Gambier Council (SA) indicated that non-uniform interpretation, and therefore enforcement, can easily emerge from the 118 agencies enforcing South Australia's "broadly worded" food legislation. It recognised that the Health Commission has issued one code of practice under the Food Act for the sale of unpacked foods by self service, but suggested that more codes of practice would assist in the uniform interpretation of the legislation.

- Monash Council (Vic) supplied an example of what can happen if there are inconsistencies in enforcement from area to area.

  > ...a national retailer was found in Victoria through the sampling program to be unable to consistently substantiate a label claim relating to fat content. The action recommended by this office was to drop the label claims. We were advised that it was not possible to do this as the policy came from Sydney and they were not aware of problems in other States. Our view was that the only reason that there was no problem interstate was that the product does not get sampled in other States. Legal action was commenced but was withdrawn when the retailer decided to drop the label claims in Victoria. However the label claims are still being used in other States.

  Monash also pointed out that a lack of resources in one jurisdiction, compared to another, can lead to inconsistent enforcement where a business operates in more than one jurisdiction:

  > Where some agencies (and it is not many) are able to fully enforce standards and others are not (through a lack of resources), this will lead to inconsistency.

  Monash also indicated that these inconsistencies can allow firms to "get away" with breaches of the law, particularly small breaches:

  > When enforcement agencies do take the time to investigate a breach, especially a minor breach, the reply from the offender [is often that] 'no one had ever mentioned that before' or that they had 'not been told this by another municipality'.

Specific comments on coordination and communication include:

- South Australian Health Commission stated:

> Apart from procedures for food recall, advice between States is informal. Because there is no official recording and access to information on an Australia wide basis (a National Database), it may take time to identify that a company is regularly in beach of standards. This is particularly important for breaches involving the sale of unfit food. This lack of interchange means that duplication of activity must take place if a State Authority is to be in a position to monitor standards within its own jurisdiction. If a State food authority could, for the purpose of reporting to its own administration, access a common database to show adequate monitoring and enforcement of food standards in the State where foods were produced, then there is scope to minimise duplication of work.

- Sydney City Council suggested that communication flows between the local level and the national level were poor:

> Very little information comes to council from the National level. Local Government does not seem to have much say in legislative change or to comment on the proposals formulated.

- Eastern Metropolitan Regional Health Authority (SA) said that it receives:

> No communication from the South Australian Health Commission regarding sampling results under the Food Standards Code.

- Essendon Council (Vic) noted that there is:

> Poor communication across municipality boundaries with regard to food sampling and State wide there has traditionally been a poor approach to this program. Poor uniformity of standards has always been a problem across jurisdictions.

- Mt Gambier Council (SA) advised that whilst the AIEH runs short worksho ps and seminars, some country officers are precluded from gaining this valuable information due to travelling distances and the fact that the proceedings are not disseminated to those who do not attend.

The survey responses indicate that some attention has been, and is continuing to be, given to these issues.

The NFA stated:

> The Authority believes that lack of communication between agencies does lead to enforcement problems. This results in some unevenness of implementation which needs to be addressed.
>
> As part of its recent discussions with the States and Territories on coordination of enforcement and compliance, the Authority has raised the issue of effective communication lines and is planning a workshop to bring together representatives from all levels of enforcement to explore the issue of communications between the Commonwealth, the States/Territories and local authorities.

> ...It is thought that the Authority could play a useful and more active role in coordinating surveillance and enforcement and by working towards the development of draft national
>
> strategies for enforcement and surveillance of the Food Standards Code — for further consideration by those agencies with enforcement responsibilities. Clearly, adoption of any strategies so developed will rely on the continued cooperative arrangements with and between the States and Territories, at all levels.

Willoughby Council (NSW) was among some of the agencies who advocated networking as the way to overcome some of the difficulties encountered by enforcement agencies:

> Whilst isolated problems exist with current legislation, vital support and mutual help has been developed between Government and Local Government Officers because of the specialised nature of the work. This may not apply to ALL Local Government Authorities, but is the basis of specialised Food Surveillance Officers Work Methods. (Networking overcomes the need to reinvent the wheel and provides a ready similarly motivated and educated information bank.)

The ORR has found this particularly the case in NSW where jurisdictions overlap between local government authorities and *PHUs*, and where areas of responsibility can be blurred. South Sydney Council, which covers parts of two different *PHU* areas, indicated that it has come to an implicit agreement with its *PHUs* as to who does what kind of inspection, such as leaving manufacturing premises largely up to the *PHUs*. Penrith Council (NSW) also supports networking stating that:

> Data sharing between State and Local authorities should be compulsory. This is happening at Penrith Council with the local NSW Health Office, and the benefits of knowing what the other body is doing greatly assists in planning specific surveillance programs and also leads to better use of human resources.

This type of networking is also apparent in other States. For example, it occurs in the South Queensland food hygiene group which incorporates a member of the Queensland Health Department on its committee. It also occurs in the Western Australian food sampling program where the State interacts with the council committees. Stirling Council (WA) suggested that, whilst cross-council communication is generally lacking in Western Australia, effective communication can be achieved with significant benefits:

> There is a lack of communication between most local authorities in WA. The City of Stirling however participates in a NW Coordinated Food Sampling Program with three other metropolitan local authorities in the area. This allows for a greater range of foods to be monitored in a cost efficient manner. Meeting four times per year provides a great support system and a forum for the exchange of ideas and information.

The benefits of greater inter-jurisdiction cooperation were also mentioned by Essendon Council (Vic) where their expensive, previously individually run training program was replaced by a centralised program conducted by the local TAFE incorporating 10 councils. According to the Council, both the quality of the training and the number of local participants has increased and costs have fallen.

However, the Victorian Health Department suggested that formal systems of coordination were unnecessary in Victoria which, assisted by its geography, maintained a relatively good informal communication and coordination system. This approach to communication systems was also supported at the local level by Essendon Council (Vic), which feared that formalised systems may create obligations that are regarded as a ‘chore’ and reduce the goodwill that generally exists. Both agencies, however, saw a role for a national database and improved communications, and their above comments should be viewed in this light, suggesting only a resistance to overly formal and prescriptive communication protocols.

Beyond networking, several agencies advocated better information systems:

- Kwinana Council (WA) identified a lack of nation-wide information on recent court action, appeals or decisions made by State and local governments, and recommended that a national newsletter be established and sent to all councils for that purpose.
- The ACT addressed the need for a national database to avoid duplication of sampling programs and to better handle complaints from interstate operators concerning the various legislative differences in each state. It advised that a database would enable evidence compiled in other jurisdictions to be drawn upon to “support local prosecutions or persuade business into action”.
- Capel Shire Council (WA) indicated that it would be useful to have a central register of offences and prosecutions.
- In supporting a national database, Glen Eira Council (Vic) argued that there was currently minimal knowledge transfer between jurisdictions and that, “...indeed a rivalry can exist to the detriment of the industry”.

## B4.4 Development of food laws

*In your view, to what extent, if any, do those involved in developing food laws take into consideration:*

- *the resources available for enforcement.*
- *the level of risk associated with different food related problems.*

### Resources

As indicated in Table B9, local government authorities overwhelmingly replied they consider that those involved in developing food legislation do not consider enforcement resources when formulating legislation. Penrith Council stated:

> there has never been a serious effort by either NSW or Commonwealth regulators to evaluate the resource impact of legislation in terms of enforcement. At the local government level in NSW, food outlets are surveyed only when possible because of greater pressures to inspect buildings under construction.

**Table B9: Perceived consideration given to resource availability**

| *Level of agency* | *None* | *Moderate* | *Fully considered* |
|---|---|---|---|
| Commonwealth (AQIS) | 3 | 2 | nil |
| State and Territory | 2 | 2 | 4 |
| Local Government and Regional Health Units | 34 | 5 | 2 |

Sample size 54.

Likewise, Kwinana Council (WA) said:

> Complex laws are enacted with very poor assessment of the ability to implement the standard and impact on industry.

These types of views contrast with those of most State and Territory health authorities. The South Australian Health Commission indicated that:

> When preparing or amending food law, the provision of resources for administrations is usually taken into consideration indirectly. The specific allocation of resources to a new standard is usually not appropriate. The need to include controls in legislation for identified risks presumes that resources will be made available for enforcement. The level of resources available for administering any specific part of the legislation will be allocated on the basis of priority.

ACT Health indicated that it requests more resources when tasked with additional new legislation and if resources are not available then reprioritisation of tasks takes place. In indicating that most consideration is given to risk, Victoria's Food and Nutrition Unit said "Possible resources to achieve enforcement is an irrelevant consideration against health and safety objectives." Commenting on national law-making, Tasmania's Department of Community and Health Services said:

> In developing food law nationally, very little account is taken of the resources available for enforcement. Certainly, from my experience with the national process, questions have not been routinely asked about the level of local resources available to enforce proposed laws, nor about the practicality of enforcing some laws which are inherently difficult to police.

At the national level, AQIS head office advised that they do not think adequate consideration is being given to resources available, or to the level of understanding of food standards, during the development of standards. They find the Food Standards Code is a “difficult publication to use”.

South Sydney Council suggested that the problem is not so much the lack of consideration of resources in developing food laws but the lack of priority setting by law makers. The council suggested that it would be very difficult to consider resource levels in developing food laws because of the varied resource levels between enforcement agencies. It also suggested that regulators developing other types of law are unlikely to consider resource levels either. In its view, legislators should prioritise or give weightings to laws.

The NFA conceded that, in developing food standards, it gives little specific consideration to enforcement resources:

> [The NFA] does not, at the moment, specifically seek advice from the States and Territories on the resources they employ, nor on their enforcement policies or methods. However, it is the Authority’s aim to develop standards which are enforceable and which do not require unreasonable enforcement resources.

The NFA indicated that it has commenced discussions with the States and Territories on the need for developing national strategies and priorities for the enforcement of food standards with the aim of making the most use of available resources. The development of the national food safety information network may also assist in resource efficiency.

### Risk level

Many of the enforcement agencies surveyed believe that risk level is a primary consideration in drafting of food legislation but were divided regarding the amount of weight given to it.

The NFA stated:

> Risk analysis and risk management practices underlie the decision making processes used by the Authority for the development of food standards. The concepts and procedures used are broadly consistent with those of other regulatory agencies and with principles established both by the Codex Alimentarius Commission under the Joint FAO/WHO Food Standards Program and by the International Program on Chemical Safety in cooperation with the Joint FAO/WHO Expert Committee on Food Additives (JECFA).
>
> It is proposed that [the national food safety information network] database and system be used to increase communications between health agencies and to improve access to disease information collected in the States and Territories. It will form the basis of a more coordinated national approach to risk assessment and risk management. The Authority is also working towards more widespread use of Codes of Practice and Best Practice Guidelines and less prescriptive regulations.

As reflected in its 1994 discussion paper on Safe Food Handling, the NFA has extended the use of risk management in standard setting to the consideration of linking Hazard Analysis Critical Control Point (HACCP) procedures to legislation.

Most State and Territory authorities (6 out of 8) also indicated that they considered that risk was taken into account in developing regulations. The Western Australian Department of Health simply replied “Fully”. Northern Territory Health Services responded in a similar manner regarding the regulations it promulgates. Without commenting on past practices, the Queensland Department of Health indicated

**Table B10: Perceived consideration given to risk**

| *Level of agency* | *None* | *Moderate* | *Fully considered* |
|---|---|---|---|
| Commonwealth (AQIS) | 1 | 2 | 2 |
| State and Territory | 2 | nil | 6 |
| Local Government and Regional Health Units | 13 | 17 | 6 |
| Total | 16 | 19 | 14 |

Sample size 49.

that risk assessment and cost-benefit analysis is a requirement under the State’s current regulatory review requirements. The South Australian Health Commission indicated that it views the development of food law as primarily about risk management:

> The development of food law is primarily about risk management. The risks may be acute requiring the exclusion by law of certain ingredients which could lead to illness or death, or aimed at longer term health issues where the law is designed, as in labelling law, to provide purchasers with sufficient and accurate information to adjust their diet to minimise risk factors; for example, coronary heart disease associated with the consumption of high levels of saturated fats. This broad interpretation of risk in my view is the current approach taken in the development of food law.

Local and regional units were more pessimistic about risk levels being considered at the drafting stage, with 13 out of 36 believing that their is no consideration of risk, 17 believing it receives moderate consideration and six responding that it receives full consideration.

Specific responses from *eho*s included:

> “perhaps consideration is given but legislation is often insufficient”
>
> “risk is considered but with no relationship to resources”

"obviously considered but too much emphasis on compositional requirements of foods instead
of public health and safety"

"no, the analysts use a system of ease of sampling and/or transport difficulty"

South Sydney Council pointed to an apparent discrepancy in fines wherein higher risk problems receive lower fines. It said:

> Possibly slightly more consideration is given [to risk than to the little given to resources], but it is not sufficient. For example, the maximum penalty for unclean premises is $2500 whereas it is $5000 for selling sausages with excess fat content.

Monash Council (Vic) thought that the previous regulatory regime in Victoria, before regulations were abolished, did reflect risk, especially the cleanliness regulations. Monash pointed out, however, that problems still occurred in the area of premises regulation:

> ...there was no clear classification of premises etc based on the risk of the premises. This could result in unnecessary requirements in low risk food premises in relation to structural matters.

Glen Eira Council (Vic), while indicating that risk is considered in developing food laws, identified what it saw as a few problems in the development process, namely that consumer affairs issues and political factors sometimes override sensible argument, and that:

> data is not always available to demonstrate a need for a new law or an amendment. Proposals may be put forward because someone thinks it is a 'good idea'.

## B4.5 Other current difficulties/issues

*In your view, are there any other difficulties with current enforcement practices?*

A number of other issues and concerns were also raised by agencies:

- *industry ignorance/lack of mandatory training:* Mount Gambier Council (SA) said that many potential problems in food premises are bought about by, among other things, an inadequate knowledge of food hygiene by proprietors of premises where potentially hazardous foods are handled. Likewise, Devonport Council (Tas) criticised the "lack of basic training for food outlet staff and management in food hygiene, personal hygiene and food preparation/storage".

  Tea Tree Gully Council (SA) undertook a random survey of people in the food industry, and found that a large number of people in the industry had no training and little knowledge of food laws. In response to this, the council held three workshops which focused on how businesses could avoid getting on-the-spot fines. 144 people attended. The result was that:

> Industry wanted training, information, guidelines/checklists (and) certificates and awards for doing the right thing. 49 people volunteered to work with us on four project groups to implement the industries ideas/suggestions.

The same council indicated that training needed to incorporate information on food laws, giving the opinion that there is a need for documents which describe to the various levels of the food industry how to meet the requirements of the law. Copies of legislation are too difficult for many proprietors to understand. The council itself is introducing training for the food industry about how to meet these requirements in the hope that the industry will be more self monitoring and therefore make the *eho*s job less policing and more one of guidance and control (also see Box B8).

Eastern Metropolitan Regional Health Authority (SA) stated as one of its current difficulties with enforcement, “No requirement for training or knowledge by food handlers and business owners”. A lack of basic training was also raised as a problem by Devonport Council (Tas). Mackay Council (Qld) suggests compulsory education as a “boost” to the industry and to make the *eho*s job easier. Likewise, Gosnells Council (WA) said:

> Officers employed by this Authority consider that there should be a minimum requirement for persons running food premises to have some basic knowledge of food law and hygiene before they can operate a food premises.

- *eho competencies*: the role of education was also seen to extend to the enforcers of food legislation. Whilst *ehos* are highly trained, the need for continued education was emphasised by councils such as South Sydney. This council also mentioned that different training is required for different enforcement tasks, suggesting that its officers where well equipped to undertake inspections at retail premises but that manufacturing premises inspection can require different skills. Adelaide City Council said “ *ehos* need to know the process steps, and critical control points, of products being manufactured in their areas”.

- *lack of mandatory inspections:* Sydney City Council suggested that NSW, and indeed the whole of Australia, should legislate for a mandatory number of inspections of food premises.

- *lack of licensing powers:* Mt Gambier Council (SA) advised that no notification or approval requirements for commencing a food business exist in South Australia. This problem was mentioned by several other councils, both in South Australia and other States.

- *lack of legal avenues for rectifying certain problems:* Brighton Council (Tas) said:

  > Food Standards Code has become ‘the gospel’ and there is a tendency to dismiss anything not included. In fact I have had instances where I believed action should have been taken only to be told by ‘State Health’ that no legal avenue existed.

- *lack of information on the "need and usefulness of sampling":* Northern Sydney Area Health Service (*PHU*) suggested that Directors of *PHU*s would be assisted by being provided such information which "may be used as a guide in decision making regarding subsequent warning letters and prosecutions".
- *lack of sufficient laboratory facilities for testing food samples in NSW:* Penrith Council (NSW) said "Another State laboratory facility would greatly assist; alternatively the State should subsidise analysis by private labs in order to encourage more sampling".
- *lack of national hygiene standards:* Glen Eira Council (Vic), amongst others, mentioned this caused difficulty for enforcement.
- *enforcement information costs:* Gosnells Council (WA) pointed out that local councils have to subscribe to the Commonwealth Government Gazette to find out about changes in food legislation, because they do not automatically receive a copy, which costs money.
- *problems on legislative interpretation:* AQIS identified a lack of feedback on legislation interpretation, and that minor problems have been experienced between the Therapeutic Goods Administration, NFA and IFIP as it is difficult to decide if some products are foods or therapeutic goods.
- *subjective interpretation of standards:* this concern was raised by, amongst others, Brighton Council (Tas).
- *the need to add value, and to be fair, equitable and flexible:* Brisbane Council advised that:

  > In talking to industry the most important points that have been brought to our notice are that Legislation and its implementation should have the potential to not only protect the community and ensure that a high quality, safe, food product is offered for sale but also:
  >
  > - Provide a value added factor to offset the costs involved
  > - Be clear, precise, fair and equitable and structured to cater for the whole industry which ranges from large, highly resourced companies to the small family run snack bar.
  >
  > Future legislation should be so structured and have the potential to produce the desired effect.

- *inspection fees: s*everal agencies, in particular NSW councils where license fees have been replaced with inspection fee provisions, commented on this issue. Sydney City Council said that incentives existed for councils to focus on building inspections because of the revenue benefits of such a prioritisation. Queanbeyan, on the other hand, pointed out that it under-recovers on its inspections and that it can only charge for two inspections per business per year anyway. South Sydney City Council charges an 'annual' inspection fee of $110. This fee does not reflect any risk assessment or the

number of inspections that may actually occur, although they are normally between two and four a year.

- *Victorian Council amalgamations:* a number of agencies expressed opinions about Council amalgamations in Victoria, some seeing them positively, others less so. For example, the AIEH indicated that it estimates that there will be 30 to 45 percent fewer *ehos* in Victoria after the current Council amalgamations are completed. According to the AIEH, "This drastic reduction could have serious ramifications...There is also an uneven distribution of *ehos* in Victoria".

# PART C: APPENDICES

# C1 STATE/TERRITORY INSTITUTIONAL ARRANGEMENTS

This appendix contains consolidated information on the institutional arrangements and responsibilities of the States and Territories in relation to enforcing Australia's food laws.

## Western Australia

### *Food legislation*

In Western Australia, food matters are covered by the following laws:

- *Health Act 1911;*
- *Health (Food Hygiene) Regulations 1993;*
- *Health (Adoption of the Food Standards Code) Regulations 1992;*
- *Health (Game Meat) Regulations 1992 ;*
- *Poultry Processing Establishment Regulations;* and
- various Local Government Authority Health by-laws.

All regulations and local authority by-laws are established by the *Health Act 1911*.

### *Relevant bodies and functions*

The Health Department of Western Australia has overall responsibility for the development and administration of the Food Act and the regulations made thereunder.

The Department is also the central focus point for the dissemination of information (eg, food recalls, infectious disease notifications, and coordinating investigations). Food sampling is coordinated under the Western Australian Food Monitoring Program.

That said, both local authorities and the Health Department administer the Food Standards Code, which is adopted by regulation made under the Health Act.

Further, the State's 143 local councils generally also administer the Health (Food Hygiene) Regulation.

Other local government functions include adopting and administering health by-laws (eg, eating house registrations), and undertaking routine inspections of food premises.

### *Enforcement powers and penalties*

Enforcement powers available in Western Australia include various orders (which if issued by local authorities are appealable to the Executive Director of Public Health); licensing powers over a limited range of establishments under Eating House regulations; and prosecutions. Maximum penalties for breaches of the Health Act are $10 000 or 12 months imprisonment.

On-the-spot fines are not available.

## South Australia

### *Food legislation*

The *South Australian Food Act 1985* covers four principal areas of food legislation:

- composition (ingredients, residues, additives);
- labelling;
- hygiene of premises and personnel; and
- the prevention of the sale of unfit food.

The *SA Food Hygiene Regulations 1990* supports the Act on hygiene and unfit food. These regulations are generally broadly worded, replacing previously prescriptive requirements.

### *Relevant bodies and functions*

The South Australian Health Commission has overall responsibility for the development, administration and enforcement of the Act, although in practice the Commission is responsible mainly for enforcing the composition and labelling regulations contained in the Food Standards Code. The Commission conducts a regular food sampling program both in metropolitan and country areas, and it maintains a database of the sampling results. The Commission uses a two-phase approach to sampling involving an informal ‘trial’ sample followed up by a legally robust ‘official’ sample. However, for some specific food types where composition breaches are or used to be common, the Commission by-passes the trial sample step and simply takes regular official samples.

Local Councils are responsible under the Act for food hygiene and prevention of the sale of unfit food. Council *ehos* are directly delegated powers under the Act, including powers of inspection, the power to issue an Order to require firms to rectify hygiene or unfit food problems (although these Orders are appealable to the SA Health Commission), the ability to impose expiation notices, and the power to initiate prosecutions. Councils may also undertake some limited sampling as part of their investigations into the fitness and hygiene of food.

There are 118 Councils in South Australia. While many councils have their own *ehos*, some councils are very small and, in some cases, one *eho* is contracted to undertake enforcement activities for several local government areas. Alternatively, the functions of a number of local governments may be undertaken by ‘county boards’ such as the Eastern Metropolitan Regional Health Authority. Further, in some remote parts of the State, there is no local government coverage. In these areas, administration of food hygiene and unfit food provisions is undertaken by the SA Health Commission.

### *Enforcement powers and penalties*

Enforcement powers available in South Australia include expiation notices (maximum $200), orders to rectify hygiene and unfit food problems (although seizure/destruction/recall orders for unfit food are only available to the Commission), and court proceedings. Maximum penalties for breaches of the Act are $8000 and a maximum of two years imprisonment.

There are no licensing powers related specifically to food businesses, although building approvals for new premises must be granted by Councils.

## Tasmania

### *Food legislation*

The *Tasmanian Public Health Act 1962* covers the following areas of food legislation:

- labelling;
- composition and analysis (ingredients, residuals and additives);
- hygiene and personal premises; and
- offences in connection with the sale of unfit food, use of unfit premises etc.

The Act is supported by the *Food Hygiene Regulations 1977*.

### *Relevant bodies and functions*

Whilst the Tasmanian Department of Community and Health Services has overall responsibility for the development and administration of the Act, local government authorities throughout Tasmania have a responsibility for enforcement of the Act and related Regulations.

As part of the Department's responsibilities, the Director of Public Health has been given powers to intervene to ensure local government undertakes it responsibilities in accordance with the legislation, with the public able to request that the Director resolve public health issues. Despite these powers to intervene, the administration of public and environmental health is based on a partnership between State and local government, and council officers are encouraged to call upon State officers when assistance is required.

The Department also conducts a regular food sampling program in conjunction with local government and maintains a data base of the results. Complementary food sampling programs are also undertaken by many councils and this data is included in the State data base.

From time to time, the Department also undertakes surveys of food premises to ascertain current hygiene practices and to assist local government develop and implement programs to improve standards.

In addition to the central office located in Hobart, the Department also has regional officers located in the North and North West of the State staffed by qualified *ehos* who have the power of local government *ehos*. The principle role of the regional officers is to provide assistance and coordination to local government and their *ehos* on the full range of public and environmental health duties.

Local governments, of which there are 29 in Tasmania, are required to register and license 'prescribed' food premises, including all eating houses, take-aways, butchers, bakeries, fish shops, shellfish sheds and smallgoods manufacturers. Regular inspections of these premises by council *ehos* are required under the Food Hygiene Regulations, with provision for the serving of orders or notices requiring works to be completed by the licensee.

Each Tasmanian council has at least one *eho*, responsible for a range of duties including food, and the Department monitors local government *eho* numbers to ensure a minimum ratio of one *eho* per 10 000 population.

### *Enforcement powers and penalties*

As mentioned above, councils have the power to license 'prescribed' premises and issue rectification orders and notices to licensees.

In extreme cases, the food premises may be closed down until standards are improved to the satisfaction of the council or departmental (regional) *eho*, although appeals against orders and notices can be made to the courts. Likewise, *ehos* may initiate prosecution against food premises proprietors for breaches of the Act or Regulations, and penalties range from $5000, though traditionally the Courts have imposed fines much less than those stated in the Act.

Seizure of unfit foods may be undertaken by any *eho* and the food destroyed forthwith or held for 48 hours pending an appeal.

Provisions to levy on-the-spot fines are not currently provided for, but will be included in the new Tasmanian Food Act presently being drafted.

## Victoria

### *Food legislation*

In Victoria, the law regarding the wholesomeness, purity, preparation and sale of food is contained in the *Food Act 1984*. Amongst other things, the Act gives effect to Australian Food Standards developed by the NFA. The Act also makes it an offence for any person to sell, prepare for sale or pack any food that is unfit for human consumption or that is adulterated.

There are no subordinate regulations under the Act.

### *Relevant bodies and functions*

At the State level, the Food Safety Unit (within the Public Health Branch of the Department of Health and Community Services) is responsible for coordinating and managing a state-wide strategy for ensuring the provision of a safe and nutritious food supply, particularly through the monitoring and surveillance of the production, processing and handling of food.

The Unit's major activities include:

- coordinating surveillance activities through, amongst other things, the compilation of a state-wide analytical database on food samples;
- legal and policy development and coordination; and
- emergency response (maintaining 24 hour capacity to respond to major food poisoning and contamination incidents).

The Department of Health and Community Services also operates regional offices. These offices employ *ehos* and provide services to respond to regional needs, including assisting in food recalls.

Virtually all food enforcement, however, is conducted at the local level. Victoria's 78 local governments are responsible for registering food premises and employing most of the State's *ehos*.

### *Enforcement powers and penalties*

Enforcement powers in Victoria are contained in the *Food Act 1984* and penalties are set down for various breaches of the Act. The penalties range from fines to imprisonment. The maximum financial penalty is $20 000 and the maximum term of imprisonment is six months.

Provision is made for licensing by local governments.

## New South Wales

### *Food legislation*

The *New South Wales Food Act 1989* generally follows the National Health and Medical Research Council (NHMRC) Model Food Act. It operates in conjunction with the *Food (Standards) Regulation 1989*, which was replaced on 1 September 1995, and the *Food (General) Regulation 1992.* The Act creates offences in relation to the sale of food in the State, in particular:

- food composition (standards, safety, purity, etc);
- labelling and advertising; and
- food handling.

### *Relevant bodies and functions*

The administration of the Food Act is vested in the Minister for Health. The Minister's administration and enforcement responsibilities are predominantly carried out by the Area Health Services. Area Health Services where constituted under the *Area Health Services Act 1986*, providing for food inspectors to be attached to *PHUs* of which there are currently 28. The Department itself no longer has food inspectors, although three members of the Environmental Health Food and Nutrition Branch are authorised under the Act.

Area Health Services and the Health Department effectively operate in parallel. The Health Department's Food and Nutrition Policy Unit networks with the food inspectors in the *PHUs*; the Department's Director of disease prevention networks with the Directors of the *PHUs*; and the Department's Director General networks with the higher management of the Area Health Services.

Whilst many of the 178 local councils in NSW employ *ehos*, with around 800 state-wide, they have no obligation to administer or enforce the Food Act. Council activities are discretionary, and range from nothing to substantial involvement in the area of food handling.

The NSW Dairy Corporation and the NSW Meat Industry Authority have limited involvement, and some of their officers are authorised under the Act.

### *Enforcement powers and penalties*

*Ehos* can prosecute under the Act, which provides a maximum penalty of $5000, six months imprisonment or both, and the Food (General) Regulations, which contain a maximum penalty of $2500.

Further, some councils are able to issue on-the-spot fines (although *PHUs* are not).

However, neither councils or *PHUs* are permitted to license any food business; with building approvals by councils being the only related mechanism in this area.

The introduction of a SEINS on-the-spot fine system is currently being examined.

## Queensland

### *Food legislation*

Food legislation administered in Queensland includes:

- *Food Act 1981* (currently under review);
- *Food Standards Regulation 1994* ; and
- *Food Hygiene Regulations 1989.*

The *Food Act 1981* sets out basic administration and enforcement provisions and prescribes offences and penalties in connection with the sale and preparation of food. The Act also sets general labelling requirements. More specifically, the Act regulates all aspects of food preparation, processing, handling, packing, labelling, serving, supplying, storage transport, and sale.

The *Food Hygiene Regulations 1989* prescribe for, among other things;

- structural specifications for food stores;
- conduct and personal hygiene of workers;
- food handling and storage requirements; and
- conditions for licensing of persons and registration of premises.

The *Food Standards Regulation 1994* adopts the Food Standards Code.

### *Relevant bodies and functions*

The Queensland Department of Health is involved in development of legislation, codes of practice and policies regarding food as well as coordinating food sampling and surveys carried out by the Regional Health Authorities. It also coordinates recalls for hazardous foods throughout Queensland.

Regional Health Authorities, of which there are 13, have responsibility for monitoring and enforcing the Food Act, and the Food Standards Regulations within their respective area of jurisdiction. This involves various activities including:

- food sampling for examination or testing as part of regional food sampling programs;
- participation in state-wide food surveillance programs; and
- assessing and enforcing food labelling requirements and food advertising.

Regional Health Authorities also provide technical advise to local government, industry, members of the public and other interested organisations on food standards, food hygiene and food safety generally, and have responsibility for ensuring that food recalls have been effected and that complaints and incidences of food-borne illness are investigated and reported.

The 136 local governments in Queensland have the responsibility for administering the Food Hygiene Regulations.

### *Enforcement powers and penalties*

Penalties under the *Food Act 1981* range from $2400 to $6000. The *Food Act 1981* has been under review in 1995 with, among other things, increased penalties, custodial sentences and on-the-spot fines being considered. Licensing of food premises is also provided for in Queensland.

## Northern Territory

### *Food legislation*

The principle Northern Territory food safety legislation consists of the:

- *Food Act 1986*;
- *Food (Administration) Regulations 1995*;
- *Food (Interim Provisions) Regulations 1986*; and
- *Food Standards Regulations 1988*.

The *Public Health (Shops, Eating Houses, Boarding ¾ Houses, Hostels and Hotels) Regulations* contain certain provisions relating to the registration and standards for Eating Houses. The building code of Australia, which is adopted into the laws of the Northern Territory through the Building Act, provides standards for internal finishes and fitting out of new food premises.

The Territory's Food Act is based on the NHMRC Model Food Act.

### *Relevant bodies and functions*

All public health and food legislation is administered throughout the Northern Territory by Territory Health Services *ehos*, except in Alice Springs where this function has been devolved to Alice Springs Town Council through a Service Agreement with Territory Health Services.

Legislation and policy development, intersectoral liaison, and program development and coordination are undertaken by the Environmental Health Program Directorate of Territory Health Services.

### *Enforcement powers and penalties*

Maximum penalties for contravention of the Food Act and Regulations range from $1000 to $5000.

Provision is made for licensing of a limited range of establishments under Eating House by-laws.

The power to issue on-the-spot fines is not currently provided for but is being investigated.

## Australian Capital Territory

### *Food legislation*

The ACT's legislation includes:

- *Food Act 1992*;
- *Public Health (Sale of Food and Drugs) Regulations 1928* ;
- *Public Health (Meat) Regulations 1928*; and
- *Public Health (Eating House) Regulations 1928.*

The legislation lists offences, sets penalties and provides for licensing of food businesses. It also provides for exemptions from licensing in restricted cases and exemption from fees for some businesses.

### *Relevant bodies and functions*

The Public and Environmental Health Service of the ACT Department of Health and Community Care carries out all functions of the legislation throughout the ACT. The Service also develops legislation and policy, and undertakes program development and coordination.

### *Enforcement powers and penalties*

The above regulations have penalties to $500 and to $1000 for continuing offences. The Act has penalties to $10 000, imprisonment for up to one year, or both, for an individual, and up to five times the fine for a company.

There is provision for licensing food business, but not for on-the-spot fines.

# C2 ARRANGEMENTS FOR IMPORTED FOOD

As well as being subject to certain domestic food enforcement procedures, imported food is inspected under the *Imported Food Control Act (Commonwealth)1992.* This Act makes all imported food liable to point of entry inspection with requirements for set safety standards and compliance with Australian food laws generally, as embedded in the Food Standards Code. The IFIP, which began in 1990 [54], is jointly run by AQIS[55] and the NFA, with the NFA developing food risk assessment policy for the program and AQIS having operational responsibility. AQIS inspectors are alerted to commercial shipments of imported food from Custom's computer system. This systems applies a profiling program so as to refer foods to AQIS at appropriate rates. The foods may be in one of three categories:

- Foods of the RISK category. These are foods which the NFA has identified to be targeted for surveillance at a rate of 100 percent of imports. They are inspected for certain commodity/analysis combinations, and are referred by Customs on entry into Australian ports. Provision is, however, built in for 'good performance' where once an importer has established a record of reliability inspection intensity will drop. By having five consecutive shipments of a particular food cleared without problems inspection intensity drops to one in four, and with 20 problem free shipments inspections drop to one in 20.
- Foods of the ACTIVE surveillance category. These are foods which are targeted for surveillance at a rate of 10 percent of imports per country of origin and are inspected for certain commodity/analysis combinations. Foods are classified for active surveillance for a set period — normally six months.
- Foods of the RANDOM surveillance category. This category targets 5 percent of all of the other food shipments into Australia for inspection by product type.

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54 The original program which focused only on certain high risk foods has been expanded since 1993 to include three risk classifications of food.

55 By agreement between the Commonwealth Government and State/Territor y Governments, AQIS also inspects meat for domestic purposes in NSW, Victoria, South Australia, the Northern Territory and the ACT. Under these arrangements AQIS provides the physical function of inspection, and the States and Territories have responsibility for determining the standard of inspection and construction and equipment requirements for the relevant establishments. However, in Tasmania, South Australia and the Northern Territory, inspection requirements at plants not engaged in interstate trade are a State matter and do not involve AQIS.

Imported food must comply with the provisions of the Food Standards Code. Food which is inspected by AQIS and found not to comply may be either destroyed, re-exported, downgraded or treated to bring it into compliance.

As well as the inspection program, AQIS has been negotiating certification agreements with overseas countries where control systems in those countries are recognised by AQIS for certain food categories. Countries with whom certification agreements already exist include New Zealand, Canada and Singapore.

# C3 LIST OF PARTICIPATING AGENCIES

| *Agency* | *Survey response* | *ORR visit* |
|---|---|---|
| ACT Public and Environmental Health Service | ✓ | ✓ |
| Adelaide City Council | ✓ | ✓ |
| Alice Springs Town Council | ✓ | |
| AQIS Brisbane | ✓ | |
| AQIS Darwin | ✓ | |
| AQIS Hobart | ✓ | |
| AQIS Canberra (Head Office) | ✓ | |
| Brighton Council (Tas) | ✓ | |
| Brisbane City Council | ✓ | |
| Bunbury City Council (WA) | ✓ | |
| Capel Shire Council (WA) | ✓ | |
| Central Coast Area Health Service (NSW) | ✓ | |
| Central Western Public Health Unit (NSW) | ✓ | |
| Devonport City Council (Tas) | ✓ | |
| Dorset Council (Tas) | ✓ | |
| Eastern Metropolitan Regional Health Authority (SA) | ✓ | |
| Essendon City Council (Vic) | ✓ | ✓ |
| Glen Eira City Council (Vic) | ✓ | |
| Gold Coast City Council (Qld) | ✓ | |
| Gosnells City Council (WA) | ✓ | |
| Greater Ballarat Council (Vic) | ✓ | |

| *Agency* | *Survey response* | *ORR visit* |
|---|---|---|
| Hindmarsh and Woodville City Council (SA) | ✓ | ✓ |
| Holroyd City Council (NSW) | ✓ | |
| Kingborough Council (Tas) | ✓ | |
| Kwinana Town Council (WA) | ✓ | |
| Launceston City Council (Tas) | ✓ | |
| Mackay City Council (Qld) | ✓ | |
| Mandurah City Council (WA) | ✓ | |
| Maryborough City Council (Qld) | ✓ | |
| Melbourne City Council | ✓ | |
| Melville City Council (Vic) | ✓ | |
| Monash City Council (Vic) | ✓ | ✓ |
| Moreland City Council (Vic) | ✓ | |
| Mount Gambier City Council (SA) | ✓ | |
| National Food Authority | ✓ | ✓ |
| North Sydney Area Health Service | ✓ | |
| NSW Department of Health, Food and Nutrition Policy Unit | ✓ | ✓ |
| Penrith City Council (NSW) | ✓ | |
| Queanbeyan City Council (NSW) | | ✓ |
| Queensland Department of Health, Environmental Health Branch | ✓ | |
| South Australian Health Commission | ✓ | ✓ |
| South Eastern Public Health Unit (NSW) | ✓ | ✓ |
| South Western Sydney Area Health Service | ✓ | ✓ |
| Southern Sydney Public Health Unit | ✓ | |

| *Agency* | *Survey response* | *ORR visit* |
| --- | --- | --- |
| Stirling District Council (SA) | | ✓ |
| Stirling City Council (WA) | ✓ | |
| Stonnington City Council (Vic) | ✓ | |
| Sorell Municipality Council (Tas) | ✓ | |
| South Sydney City Council | ✓ | ✓ |
| Sydney City Council | ✓ | ✓ |
| Tasmanian Department of Community and Health Services | ✓ | |
| Tea Tree Gully City Council (SA) | ✓ | ✓ |
| Territory Health Services (NT) | ✓ | |
| Townsville City Council (Qld) | ✓ | |
| Victorian Department of Health and Community Services, Food Safety Unit | ✓ | ✓ |
| Wakefield Plains District Council (SA) | ✓ | |
| Western Australia Health Department | ✓ | |
| Willoughby City Council (NSW) | ✓ | |
| Wollondilly Shire Council (NSW) | ✓ | |
| Wyndham City Council (Vic) | ✓ | |