

7.2**DELEGATIONS OF POWER UNDER FOOD ACT 2003
AND FOOD REGULATION 2004****Reporting Officer**

Manager Compliance Services

Purpose

Council received correspondence from the NSW Food Authority on 5 October 2004 regarding concerns raised in relation to the legality of the functions to issue a Prohibition Order and appoint Authorised Officers under the Food Act 2003 being exercised by the General Manager of a local council, and not by the “enforcement agency” as prescribed in the legislation (copy of correspondence attached – Attachment).

The following report outlines the process that Council may choose to take in obtaining the required delegations to legally administer and enforce the functions under the *Food Act 2003* (and *Food Regulation 2004*).

Impact on Council Budget

There is no direct financial impact on Council’s adopted budget or forward estimates.

RECOMMENDATION OF DIRECTOR PLANNING AND ASSESSMENT SERVICES

1. That Council delegate to the General Manager the powers as the enforcement agency under the Food Act 2003 and Food Regulation 2004, in particular the issuing of Prohibition Orders under Section 60.
2. That Council delegate to the General Manager the authority to appoint new authorised officers for the purposes of this Act under Section 114.
3. That Council delegate to the General Manager the authority to sub-delegate functions under section 60 to appropriate senior officers with line responsibility for operational or compliance work.
4. That Council write to the Director-General of NSW Food Authority advising of the exercise of the functions of council as a delegate of the Food Authority in its capacity as the appropriate enforcement agency under the food safety standards.
5. That Council write to the Director-General of NSW Food Authority requesting the authority for sub-delegation of the functions of council as a delegate of the Food Authority in its capacity as the appropriate enforcement agency under the food safety standards.

REPORT

Introduction

The Commonwealth Department of Health and Ageing is responsible for ensuring food regulatory reforms are coordinated throughout Australia.

Food Standards Australia New Zealand (FSANZ) is the national regulatory authority responsible for the development of the Australia New Zealand Food Standards Code.

The Food Standards Code is adopted through the relevant Food Act 2003 for each state and is enforced by each state's relevant agency or under delegated authority such as local government.

The NSW Food Authority is the state agency responsible for food regulation in NSW. The agency, established in April 2004, is responsible for food safety across the entire food industry, from primary production to the point of sale.

The Food Act 2003 (and Food Regulation 2004) commenced on 23 February 2004. The objectives of the Act are defined within Section 3 of the Act as:

- To ensure food for sale is safe and suitable for human consumption.
- To prevent misleading conduct in connection with the sale of food.
- To provide for the application of the Food Standards Code.

The Food Regulation 2004 prescribes all local Council as enforcement agencies under Section 4 of the Food Act. Under the Act, enforcement agencies have a number of powers and functions, including the service of prohibition orders (Section 60) and the appointment of authorised officers (Section 114).

It is noted that the Food Authority is prescribed as the appropriate enforcement agency for the purposes of Sections 93, 95 and 100 of the Food Act.

Previously the General Manager was nominated as the appropriate enforcement agency.

The NSW Food Authority is still obtaining legal opinion whether the General Manager can be the enforcement agency or this power is only vested in the Council.

The Food Authority has consulted with the Department of Local Government and has provided an agreed assessment of the legal position is as follows:

- Functions conferred on local councils by the Food Act 2003 are conferred on the body corporate. Therefore, these functions may be appropriately delegated within the council without being invalidated by section 110(2) of the Food Act.

Report to Council Meeting on 14 December 2004

- Section 377(1) of the Local Government Act allows the governing body (i.e. the Councillors) to resolve to delegate such functions to the General Manager, and such delegation would not be invalidated by section 110(2).
- Section 378(2) of the Local Government Act allows the general manager to sub-delegate such functions to another employee of the council, again without being invalidated by section 110(2).
- However, delegation of such functions by the governing body (or sub-delegation by the general manager) to a person external to the council is not permitted by section 110(2).

As indicated, the Food Authority may delegate functions to an authorised officer, however under the Regulations this is prescribed as the general manager of a local council.

Improvement Notices and Prohibition Orders replace clean-up notices and closure powers provided under the Food Act 1989.

A Prohibition Order is issued if the order is necessary to prevent or mitigate a serious danger to public health. Only the Food Authority or the enforcement agency, the local council, has the power to serve the prohibition order.

However, the delegation would only be valid if the governing body, by resolution, makes the delegation, otherwise there is a risk that any exercise of the functions may be found to be of no legal effect.

Inspectors already holding that position before the commencement of the Act are deemed to be appointed as authorised officers under the Food Act 2003.

Section 120 of the Food Act allows the provision of Penalty Infringement Notices however this enforcement tool is not currently available. It is anticipated that the legislative changes allowing the issue of these penalties will be available by the end of 2004.

The NSW Government has agreed in principle that the local government role in food safety will be mandated and resourced. The NSW Food Regulation Partnership Steering committee has prepared an Options Paper to develop a model for the future role of local government in food regulation. A number of consultation workshops are presently being held and Council's Environmental Health and Building Surveyor will be attending a workshop to be held Thursday 9 December 2004.

This Options Paper is currently open for submissions to be received by 24 December 2004. It is anticipated a submission would be prepared following the workshop attendance.

The Development and Environmental branch aims to protect public health by regular reviews of retail food businesses along with an ongoing education program.

The review follows the requirements set out in the Food Safety Standards.

Report of Warringah Council Meeting held on 14 December 2004

ITEM

7.2

A review protocol has been prepared which incorporates food safety. During the current financial year businesses will be assessed and rated for food safety. Council's Environmental Health Officer also conducts an annual Food Handler Training Seminar covering the requirements of the Food Standards Code. The seminar is provided free of charge by Council to food business proprietors.

Consultation

Consultation and Food Act training is currently being undertaken by Councils Environmental Health Officers with the NSW Food Authority and adjoining local Councils.

Council is also currently in the process of obtaining legal advice from Mark Preece (McHugh Chambers) regarding the delegation of powers.

Council Officers are continuing to liaise with the Solicitor due to the NSW Food Authority advising that the legislation regarding the enforcement agency may be amended in due course.

However, at this time, the Food Authority have indicated that the following approach would be appropriate:

- Delegation by the council of functions under sections 60 (prohibition orders) and 114 (appointment of authorised officers) to the general manager be permitted;
- Sub-delegation by the general manager of functions under section 114 to other council employees not to be permitted; and
- Sub-delegation by the general manager of functions under section 60 **either** not to be permitted **or** to be permitted only to appropriate senior officers with line responsibility for operational or compliance work.

Clause 7 of the Food Regulation also prescribes the General Manager of a local council for the purposes of section 109E(1)(d) of the Food Act. This mechanism permits the Director-General to delegate specified functions to the general manager of a local council.

The Director-General has exercised the power of delegation with respect to the functions set out in the paragraph above.

However, the delegation is subject to two statutory conditions as follows:

- Section 109E(4) of the Food Act requires the written consent of the council for the functions to be delegated; and
- Section 381(3) of the Local Government Act requires such delegations to the General Manager to be approved by the council.

Section 109E(3) of the Food Act permits the delegate to sub-delegate these specified functions if authorised in writing by the Food Authority

A submission to the Director-General will be required in writing indicating the council consents to delegation of the functions and approves the delegation specifically to the general manager. This would include a formal request to sub-delegate these functions as required.

Conclusion

The delegation of these functions to the general manager would ensure that Council could provide a timely response for the protection of public health and safety, enabling Notices to be served expeditiously without the need to wait for a formal meeting of council.

The appropriate changes have been implemented to ensure Council procedures address the current amendments to the relevant legislation.

The council may delegate their power as the local enforcement agency to the General Manager.

Correspondence from NSW Food Authority



30 September 2004

11 OCT 2004

Mr Stephen Blackadder
General Manager
Warringah Council
Civic Centre, Pittwater Road
DEE WHY NSW 2099

11 OCT 2004

Dear Mr Blackadder

Delegations under the Food Act 2003

I wish to consult with you on certain aspects of the operation of the Food Act 2003, particularly with respect to delegation of functions under the Act to the general manager, and also the delegation of functions from the general manager to other members of staff.

As you may be aware the Food Act 2003 commenced in February 2004 and contains a number a new powers and functions including the serving of improvement notices and prohibition orders. The Food Regulation 2004, which commenced at the same time, prescribes all local councils as enforcement agencies. Under the Act, enforcement agencies have a number of powers and functions, including the service of prohibition orders (section 60) and the appointment of authorised officers (section 114).

There has been some debate on the legality of such functions being exercised by the general manager of a local council. The Food Authority has consulted with the Department of Local Government and our agreed assessment of the legal position is as follows:

- Functions conferred on local councils by the Food Act 2003 are conferred on the body corporate. Therefore, these functions may be appropriately delegated within the council without being invalidated by section 110(2) of the Food Act.
- Section 377(1) of the Local Government Act allows the governing body (i.e. the Councillors) to resolve to delegate such functions to the general manager, and such delegation would not be invalidated by section 110(2).
- Section 378(2) of the Local Government Act allows the general manager to sub-delegate such functions to another employee of the council, again without being invalidated by section 110(2).
- However, delegation of such functions by the governing body (or sub-delegation by the general manager) to a person external to the council is not permitted by section 110(2).

6 Avenue of Americas, Newington NSW 2127
Postal Address: PO Box 6682, Silverwater NSW 1511 Tel: 02 95 11 4777 Fax: 02 9741 4886
Industry and Consumer Contact Centre Tel: 1 800 552 406 Fax: 02 9647 9826 Email: contact@foodauthority.nsw.gov.au
Internet: www.foodauthority.nsw.gov.au

Delegation of these functions has been extensively discussed with council environmental health officers during Food Act training sessions organised by the Australian Institute of Environmental Health, Environmental Development Allied Professionals, local councils, and the Food Authority. There appears to be consensus that delegation of these functions to the general manager is entirely appropriate. In particular, prohibition orders, which protect public health and safety, should be served expeditiously without the need to wait for a formal meeting of council.

However, the delegation will only be valid if the governing body, by resolution, makes the delegation; otherwise there is a risk that any exercise of the functions may be found to be of no legal effect. I would therefore urge all New South Wales councils to make the necessary arrangements to ensure these delegations are validly made.

The Authority has also been considering the implications of sub-delegation of these functions by the general manager to other members of council staff. Environmental health officers from some larger councils have already suggested that some degree of sub-delegation is essential for the efficient operation of council and the protection of public health.

While the Authority supports the delegation of these functions by the council to the general manager, there are concerns in relation to the potential extent of sub-delegation by the general manager within the council. For example, just as all appointments of authorised officers under section 114 by the Authority are made by the Director-General, it may be appropriate for all such appointments by councils to be made by the general manager (if delegated by the governing body).

Section 111 of the Food Act permits the Food Authority to impose conditions or limitations on the exercise of functions under the Food Act by enforcement agencies, after consultation with those enforcement agencies. The Authority is considering use of section 111 to limit delegation of functions under sections 60 and 114.

Subject to consideration of any advice or views from councils, the Authority believes that the following approach may be appropriate:

- delegation by the council of functions under sections 60 (prohibition orders) and 114 (appointment of authorised officers) to the general manager to be permitted;
- sub-delegation by the general manager of functions under section 114 to other council employees not to be permitted; and
- sub-delegation by the general manager of functions under section 60 **either** not to be permitted **or** to be permitted only to appropriate senior officers with line responsibility for operational or compliance work.

The Authority seeks the advice or views of councils in relation to this proposed approach. I would be grateful if any responses could be provided no later than 12 November 2004.

Delegation by Director-General of certain functions to general managers

I would also like to draw your attention to clause 4(1)(c) of the Food Regulation 2004, which prescribes the Director-General as the "appropriate enforcement agency" for the purposes of the Food Standards Code. The Code refers to the "appropriate enforcement agency" in Standard 3.2.2 (clauses 15 and 17), and Standard 3.2.3 (clauses 10 and 14), which relate to alternate hand washing requirements and the construction of floors of food premises.

The Food Regulation under clause 7 also prescribes the general manager of a local council for the purposes of section 109E(1)(d) of the Food Act. This mechanism permits the Director-General to delegate specified functions to the general manager of a local council. I have now exercised my power of delegation with respect to the functions set out in the paragraph above.

However, this delegation is subject to two statutory conditions as follows:

- section 109E(4) of the Food Act requires the written consent of the council for the functions to be delegated; and
- section 381(3) of the Local Government Act requires such delegations to the general manager to be approved by the council.

You should also be aware that section 109E(3) of the Food Act permits the delegate to sub-delegate these specified functions if authorised in writing by the Food Authority

If you wish to access this delegation, I will therefore need to be advised in writing that the council consents to delegation of the functions and approves the delegation specifically to the general manager. Also, if you wish to sub-delegate these functions I will need a formal request in writing.

In the interests of effective liaison between our agencies I would appreciate being advised of any exercise of the functions of your council as a delegate of the Food Authority in its capacity as the appropriate enforcement agency under the food safety standards. This will enable the Authority to monitor the application of this aspect of the food safety standards and review the process in the future.

The contact officer for all enquiries in relation to these matters is Bill Porter, Acting Manager, Regulatory Affairs, phone (02) 9741 4866.

Yours sincerely



George Davey
Director-General