

Passed by both Houses



New South Wales

Food Amendment Bill 2007

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I certify that this public bill, which originated in the Legislative Assembly, has finally passed the Legislative Council and the Legislative Assembly of New South Wales.

*Clerk of the Legislative Assembly.
Legislative Assembly,
Sydney, , 2007*



New South Wales

Food Amendment Bill 2007

Act No , 2007

An Act to amend the *Food Act 2003* to make further provision with respect to enforcement agencies and to establish a Food Regulation Forum; and for other purposes.

I have examined this bill and find it to correspond in all respects with the bill as finally passed by both Houses.

Assistant Speaker of the Legislative Assembly.

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Food Amendment Act 2007*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

3 Amendment of Food Act 2003 No 43

The *Food Act 2003* is amended as set out in Schedule 1.

4 Repeal of Act

- (1) This Act is repealed on the day following the day on which all of the provisions of this Act have commenced.
- (2) The repeal of this Act does not, because of the operation of section 30 of the *Interpretation Act 1987*, affect any amendment made by this Act.

Schedule 1 Amendments

(Section 3)

[1] Section 4 Definitions

Omit paragraph (b) of the definition of *enforcement agency* in section 4 (1).

Insert instead:

- (b) a relevant body appointed as an enforcement agency under Division 2 of Part 9, or
- (c) any person or body, or a person or body within a class of persons or bodies, prescribed by the regulations for the purposes of this definition (other than a relevant body within the meaning of Division 2 of Part 9).

[2] Section 4 (1)

Insert in alphabetical order:

exercise a function includes perform a duty.

Forum means the Food Regulation Forum established under Division 3A of Part 9.

function includes a power, authority or duty.

member of staff of the Food Authority means a person employed under Chapter 1A of the *Public Sector Employment and Management Act 2002* in a Division of the Government Service to enable the Food Authority to exercise its functions.

[3] Section 39 Search warrants

Omit “Part 3 of the *Search Warrants Act 1985*” from section 39 (3).

Insert instead “Division 4 of Part 5 of the *Law Enforcement (Powers and Responsibilities) Act 2002*”.

[4] Section 66AA

Insert after section 66:

66AA Fee

- (1) A person who is given an improvement notice by an authorised officer of an enforcement agency must, within 28 days after the notice is given, pay the fee prescribed by the regulations to the enforcement agency if the notice contains a requirement to do so.

- (2) The enforcement agency may:
 - (a) extend the time for payment of the fee, on the application of the person to whom the improvement notice was given, or
 - (b) waive payment of the whole or any part of the fee, on the enforcement agency's own initiative or on the application of the person to whom the improvement notice was given.
- (3) A person to whom an improvement notice is given in accordance with this Part must pay the fee required by this section within the time provided under this section.
Maximum penalty (subsection (3)): 50 penalty units.

[5] Section 102 Regulations relating to establishment of food safety schemes

Omit section 102 (8)–(10).

[6] Section 108 Functions of Food Authority

Insert after section 108 (2) (f):

- (f1) to make recommendations as to the maximum fees to be charged by local councils in relation to inspections carried out under section 37 by authorised officers of enforcement agencies (other than inspections in connection with premises the subject of a licence under a food safety scheme or the granting of a licence under a food safety scheme),

[7] Section 109E Delegation

Insert “(whether by name or by reference to the holder of an office)” after “Food Authority” in section 109E (1) (a).

[8] Section 109E (1) (d) and (e)

Omit section 109E (1) (d). Insert instead:

- (d) the holder of an office prescribed by the regulations, or
- (e) an enforcement agency or a person holding a position prescribed by the regulations as the head of an enforcement agency,

[9] Section 109E (2) (c)

Omit the paragraph. Insert instead:

- (c) any function under section 111B (Conditions and limitations on exercise of functions by enforcement agencies).

[10] Part 9, Division 2

Omit the heading. Insert instead:

Division 2 Enforcement agencies

[11] Sections 110–111D

Omit sections 110 and 111. Insert instead:

110 Definitions

In this Division:

guidelines means the guidelines issued under section 111C, as in force from time to time.

relevant body means a local council, or the Director-General of the Department of Environment and Climate Change (but only in respect of Kosciuszko National Park).

111 Appointment of enforcement agencies

- (1) The Food Authority may appoint a relevant body to be an enforcement agency for the purposes of this Act.
- (2) The Food Authority is not to appoint a relevant body as an enforcement agency unless the Food Authority:
 - (a) has consulted with the relevant body and considered any representations made by the relevant body in accordance with the guidelines, and
 - (b) has considered the resources and skills that will be available to the relevant body to enable the exercise of the functions of an enforcement agency that are proposed to be conferred or imposed on the relevant body, and
 - (c) in the case of a local council, has considered any representations made by another local council in accordance with the guidelines as to the other local council's willingness to exercise the functions of an enforcement agency in the area concerned and the resources and skills that will be available to that other local council to enable the exercise of such functions.

- (3) An appointment:
 - (a) is to be by instrument in writing given to the relevant body concerned, and
 - (b) is to contain any limitations or conditions relating to the exercise of functions by the enforcement agency or the type of functions that may be exercised by the enforcement agency that are imposed under section 111B (whether by reference to a category of functions to be exercised by the enforcement agency or otherwise), and
 - (c) takes effect from a day specified in the instrument of appointment.
- (4) The Food Authority may appoint a local council as an enforcement agency in respect of any or all of the following:
 - (a) its own local government area or part of its own local government area,
 - (b) another local government area or part of another local government area, but only after consultation with the local council of that other area,
 - (c) an area that is not within a local government area.
- (5) Nothing in this Act prevents the Food Authority from appointing more than one enforcement agency in respect of the same area so long as each of those enforcement agencies is only authorised to exercise functions under this Act in relation to that area that are different from the functions that may be exercised under this Act in relation to that area by any other enforcement agency.

111A Variation or revocation of appointment of enforcement agency

- (1) The Food Authority may vary or revoke an appointment of a relevant body as an enforcement agency by notice in writing given to the enforcement agency concerned.
- (2) A variation or revocation of an appointment has effect from a day specified in the notice of the variation or revocation, being a day occurring after the day on which the notice is given under this section.

111B Conditions and limitations on exercise of functions by enforcement agencies

- (1) The Food Authority may, in writing, impose conditions or limitations on the exercise of functions under this Act by any enforcement agency and may vary or revoke any such condition or limitation.

- (2) The Food Authority may not take action under subsection (1) unless it has consulted with the person or body who or which is, or is proposed to be, the enforcement agency.
- (3) If the person or body concerned is a relevant body appointed or proposed to be appointed as an enforcement agency under section 111, the imposition, variation or revocation of any such condition or limitation is to be done as part of the appointment under section 111 or in accordance with section 111A as a variation of the appointment.

111C Guidelines relating to appointment of enforcement agencies

- (1) The Food Authority may issue guidelines in relation to any or all of the following matters:
 - (a) the different categories of functions that may be exercised by enforcement agencies,
 - (b) an explanation of the nature of the obligations in respect of those different categories of functions,
 - (c) the matters to be taken into account by the Food Authority when determining the appropriate functions to be exercised by an enforcement agency,
 - (d) the making of representations to the Food Authority by a relevant body as to whether or not the relevant body should be appointed as an enforcement agency,
 - (e) the making of representations to the Food Authority by a relevant body in relation to the appropriate types or categories of functions to be exercised by the relevant body as an enforcement agency,
 - (f) the provision of information to the Food Authority by a relevant body to enable the consideration by the Food Authority of the matters referred to in section 111 (2),
 - (g) the time within which any such representations must be made or information must be provided.
- (2) The exercise of functions under this Act, or the appointment of any enforcement agency, is not affected by anything contained in the guidelines.

111D Functions of enforcement agencies in relation to this Act

Subject to section 135, it is the duty of an enforcement agency to exercise the functions conferred or imposed on it by or under this Act or delegated to it under this Act.

[12] Section 113

Omit the section. Insert instead:

113 Reports by enforcement agencies

- (1) An enforcement agency for which an appointment is in force under this Division is to report to the Food Authority on the exercise of functions under this Act by or on behalf of the agency.
- (2) The reports referred to in subsection (1) are to be made in accordance with protocols prepared by the Food Authority in consultation with the Food Regulation Forum.
- (3) Any other enforcement agency (except the Food Authority) is to report to the Food Authority, at such intervals as the Food Authority requires, on the exercise of functions under this Act by or on behalf of the agency.
- (4) In addition to any report required under subsection (1) or (3), an enforcement agency is to forward to the Food Authority details of any proceedings for an offence under this Act or the regulations taken by or on behalf of the agency within 21 days after the proceedings are finally dealt with.

[13] Section 113A

Insert after section 113:

113A Publication of information relating to enforcement agencies

- (1) The Food Authority is to keep a record of each appointment of an enforcement agency under this Division, including any limitations and conditions in relation to the appointment and any variation or revocation of an appointment.
- (2) The record is to be published on the Food Authority's internet website, is to be updated regularly and is to indicate when it was last updated.

[14] Section 114 Appointment of authorised officers

Insert after section 114 (2):

- (3) Unless sooner revoked, the appointment of an authorised officer by a person or body ceases to have effect if the person or body ceases to be an enforcement agency.

[15] Part 9, Division 3A

Insert after Division 3 of Part 9:

Division 3A Food Regulation Forum

115A Food Regulation Forum

- (1) The Minister is to establish a Food Regulation Forum consisting of the following members:
 - (a) the Director-General or a nominee of the Director-General,
 - (b) 2 persons appointed by the Minister, on the nomination of the Director-General, who are members of staff of the Food Authority,
 - (c) one person who the Minister is satisfied has experience in local government matters and who is appointed by the Minister with the concurrence of the Presidents of the Local Government and Shires Associations,
 - (d) 3 persons appointed by the Minister, on the nomination of the Local Government and Shires Associations, to represent those Associations,
 - (e) one person appointed by the Minister, on the nomination of the Local Government Managers Australia, NSW, to represent that body,
 - (f) 2 persons appointed by the Minister, on the nomination of the Australian Institute of Environmental Health, NSW Division, to represent that Institute,
 - (g) 2 persons appointed by the Minister, on the nomination of the Development and Environmental Professionals' Association, to represent that Association.
- (2) The person appointed under subsection (1) (c) is to be the Chair of the Forum.
- (3) If a nomination referred to in subsection (1) (d), (e), (f) or (g) is not made by a body within such time as the Minister allows, the Minister may appoint a person the Minister considers to be suitable to represent that body in place of a person required to be so nominated.
- (4) A person appointed by the Minister under this section holds office for the term specified in the instrument of appointment but may be removed from office by the Minister.
- (5) Subject to any directions of the Minister, the Forum is to determine the procedure of the Forum, including the calling and

conduct of meetings of the Forum, the vacation of office of members, the filling of vacancies and the appointment of deputies.

115B Functions of Food Regulation Forum

The Food Regulation Forum has the following functions:

- (a) to evaluate, and provide advice to the Food Authority on, guidelines issued from time to time under section 111C,
- (b) to evaluate, and provide advice on the improvement of, arrangements for the sharing of functions under this Act by the Food Authority and other enforcement agencies,
- (c) to advise the Food Authority on a program to support and assist the role of other enforcement agencies in food regulation,
- (d) to assist the Food Authority in the preparation of protocols for enforcement agencies exercising functions under this Act, including protocols relating to any or all of the following:
 - (i) emergency situations where there is an imminent threat to food safety,
 - (ii) the taking of food recall action where the Food Authority determines such action is required,
 - (iii) the use of the facilities and resources of NSW Health for the analysis of food samples,
 - (iv) the making of reports to the Food Authority on the exercise of functions under this Act,
 - (v) the exchange of information for the purposes of this Act by enforcement agencies with other persons and bodies authorised to give or receive such information,
- (e) to assist in the preparation of reports by the Food Authority on food regulation in New South Wales,
- (f) to advise the Food Authority on appropriate bodies to which particular issues relating to food regulation might be referred for assistance or advice,
- (g) any other function conferred or imposed on it by or under this or any other Act.

[16] Section 117A Food Authority Fund

Omit section 117A (2). Insert instead:

- (2) The Fund is to be applied for the purposes of enabling the Food Authority to exercise its functions under this Act and, in such cases as the Food Authority determines, enabling another enforcement agency to exercise its functions under this Act.

[17] Section 136A

Omit the section. Insert instead:

136A Certain information may be provided to and by Food Authority

- (1) An enforcement agency is authorised to provide information:
 - (a) to a relevant authority if the enforcement agency considers the provision of the information is necessary to enable the relevant authority to exercise its functions under the *Public Health Act 1991*, or
 - (b) to another enforcement agency if the enforcement agency providing the information considers the provision of the information is necessary to enable the other enforcement agency to exercise its functions under this Act.
- (2) A relevant authority is authorised to provide information to an enforcement agency if the relevant authority considers the provision of the information is necessary to enable the enforcement agency to exercise its functions under this Act.
- (3) Information may be provided in accordance with this section despite any prohibition in, or the need to comply with any requirement of, any Act or law (in particular, the *Privacy and Personal Information Protection Act 1998* and the *Health Records and Information Privacy Act 2002*).
- (4) In this section, **relevant authority** means any of the following:
 - (a) the Director-General of the Department of Health,
 - (b) a public health organisation (within the meaning of the *Health Services Act 1997*).

[18] Section 137 Publication of names of offenders

Omit “21 days” wherever occurring in section 137 (2) and (3).

Insert instead “42 days”.

[19] Section 139 Regulations

Insert “regulations for or with respect to” after “including” where firstly occurring in section 139 (1).

[20] Section 139 (1) (c1)

Insert after section 139 (1) (c):

- (c1) the waiver or refund of any licence fees or other fees or charges under this Act,

[21] Section 139 (2B)

Omit the subsection. Insert instead:

- (2B) Without limiting subsections (1) (a) and (b) and (2A), a fee or charge referred to in any of those provisions may cover the following matters:
 - (a) the costs of the Food Authority in administering a food safety scheme and other related provisions of this Act,
 - (b) the costs of the processing of applications for licences and for the grant or renewal of licences under food safety schemes,
 - (c) other costs of providing services in relation to a food safety scheme (whether or not the provision of the service is requested or agreed to),
 - (d) annual administration charges in respect of the exercise by enforcement agencies, or any class of enforcement agency, of all or specified functions under this Act in relation to food businesses that are not required to be licensed under this Act, or any class of such food businesses.

[22] Schedule 2 Savings, transitional and other provisions

Insert at the end of clause 1 (1):

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[23] **Schedule 2, Part 4**

Insert after Part 3:

**Part 4 Provisions consequent on enactment of
Food Amendment Act 2007**

18 Existing enforcement agencies

- (1) Despite the amendment of the definition of *enforcement agency* by the *Food Amendment Act 2007*, a relevant body that, immediately before the commencement of that amendment, was prescribed by the regulations as an enforcement agency is taken to continue from that commencement to be an enforcement agency for the purposes of that definition until:
 - (a) the expiration of the period of 18 months after that commencement, or
 - (b) the appointment of the relevant body as an enforcement agency under section 111, or
 - (c) the publication in the Gazette of an order made by the Food Authority declaring that the relevant body is no longer an enforcement agency,whichever occurs first.
- (2) Nothing in this clause prevents a relevant body who ceases to be an enforcement agency by operation of this clause from subsequently being appointed as an enforcement agency under section 111.
- (3) In this clause, *relevant body* has the same meaning as in Division 2 of Part 9.

19 Pending proceedings by enforcement agencies

- (1) This clause applies to an enforcement agency or former enforcement agency on which a function was conferred or imposed under this Act (an *original function*), whether before or after the commencement of this clause, and that ceases to be authorised to exercise the function (including because of ceasing to be an enforcement agency).
- (2) If an enforcement agency or former enforcement agency has exercised an original function before ceasing to be authorised to do so, the agency may, in accordance with this Act, do any of the following:

- (a) commence or continue any proceedings, or take any action, in connection with that exercise of the original function,
 - (b) without limiting paragraph (a), if the exercise of the original function involved the issuing of an improvement notice under Part 5 of the Act, take any action under that Part to enforce compliance with the improvement notice, including issuing a prohibition order.
- (3) In this clause:
- (a) a reference to an ***enforcement agency*** includes a reference to an authorised officer of an enforcement agency, and
 - (b) a reference to a ***former enforcement agency*** includes a reference to a former authorised officer of an enforcement agency.
- (4) Nothing in this clause limits the operation of section 30 of the *Interpretation Act 1987*.