
7 Consumer food safety regulators

Key points

- Around 620 local government agencies across Australia and New Zealand play a key role in the regulation of food safety through formal approval and surveillance of the activities of specific food businesses, except in the two Australian territories. To varying degrees, departments of health or dedicated food authorities oversee the functions of local government in New Zealand and the Australian states.
- Anecdotal evidence from food business groups suggests that disparities in regulatory enforcement practices within and across jurisdictions cause confusion, are costly to food businesses and represent an unnecessary compliance burden.
- The extent and nature of these problems was investigated through surveys sent to all local governments and central food safety agencies in Australia and New Zealand. But the snapshot of food safety enforcement captured by the surveys needs to be viewed in light of the survey methodology and significant recent operational changes and forthcoming legislative amendments to food laws in a number of jurisdictions.
- A range of regulatory similarities emerges from the survey results including the broad enforcement approach used, and specific priorities set, by regulators. Importantly, structured, multi-level efforts to reduce the regulatory compliance burden on food businesses through measures aimed at ensuring consistency in the interpretation and implementation of food safety laws were also a common feature.
- However, a number of enforcement differences are evident which have the potential to impact on business compliance burdens in a significant way. They include the:
 - level of resourcing provided to regulators
 - frameworks employed to grade or categorise food businesses according to the risks posed to public health
 - use of risk classifications to determine fees and inspection frequency
 - availability and use of different compliance tools (particularly on-the-spot fines)
 - emphasis given to education and training
 - type, range and level of fees and charges imposed
 - frequency and duration of audits and inspections
 - transparency and accountability of regulatory practices and outcomes.
- Differing abilities of central agencies to collect and analyse data concerning local government enforcement activities (to allow better targeting and coordination of resources) may also indirectly influence business compliance burdens.

7.1 Introduction

Consultations with food business interests during the course of this study suggested anecdotally that disparities in enforcement approaches and practices both within and across jurisdictions were confusing, costly and an unnecessary impost on their constituents. That said, the Commission received very little in the way of hard evidence from participants about the extent and magnitude of these problems (with the notable exception of a leading Australian retailer).

In order to investigate these concerns, the Commission sought to gauge the nature and significance of compliance burdens through detailed surveys of local government and central food safety regulators in Australia and New Zealand. This chapter reports the results of that exercise for the functions focused on consumer food safety.

It shows a range of strategic and procedural similarities in the enforcement conduct of regulators. But there are also differences in:

- resourcing
- approach to risk profiling
- availability and use of different compliance tools
- range and level of fees and charges
- frequency and duration of audits and inspections
- the transparency, accountability and coordination of regulatory practices and outcomes.

Those differences can result in consequential variations in the regulatory compliance burden faced by food businesses. That said, many regulators also consciously endeavour to mitigate the compliance burdens associated with their responsibilities.

7.2 Role of government in food safety regulation

Responsibility for the enforcement of food safety regulation across Australia and New Zealand crosses the different tiers of government in most jurisdictions. Reflecting the advantages of local knowledge and economies of scope in the performance of both food and non-food regulatory functions, local councils play a prominent role in registering, licensing and inspecting retail and food service activities and certain other food businesses (with the main exception of primary

production activities), contributing to food safety recalls and undertaking (or assisting in) investigations into food-borne illness.

Given differences in institutional frameworks across jurisdictions, it is not possible to neatly group agencies according to whether they focus on consumer food safety or primary production and processing. Central agencies dealing with consumer food safety (the jurisdictional health departments and statutory food authorities in New Zealand and New South Wales) are responsible for the oversight and coordination of local government food safety functions as well as managing responses to state and national food recalls and disease outbreak investigations. Notable exceptions are the Northern Territory and the ACT where the health departments perform the functions that local governments do in other jurisdictions as well as other food safety regulation and enforcement (which includes primary production regulation).

The New Zealand Food Safety Authority (NZFSA) and the NSW Food Authority have broader responsibilities which cover all primary production and processing regulation and, in the case of the NZFSA, imported and exported food regulation. The surveillance activities of the NZFSA, NSW Food Authority and those regulators specifically responsible for primary production regulation are discussed in chapter 8. The activities of the NZFSA and NSW Food Authority relevant to consumer food safety (including the Food Regulation Partnership arrangement between the NSW Food Authority and local government) are discussed here.

This chapter adopts a *functional* approach to discussing regulatory aspects of consumer food safety enforcement. Where the roles and responsibilities of local government and central food safety agencies interact (such as in relation to enforcement priorities, constraints, coordination and consistency) the two regulatory tiers are discussed together. In other areas (for example, inspection and compliance activity), the focus of the discussion is on the activities of local governments and Northern Territory Department of Health (Northern Territory Health) and ACT Health.

Importantly, the sheer number of regulators and authorised food safety officers, the breadth and nature of regulations they are required to apply and the varied social, cultural, economic, environmental and geographic attributes of each jurisdiction, means the scope for differences in both the interpretation and implementation of food safety laws looms large. Importantly, the existence of any differences should not be automatically treated as inappropriate. Indeed, where food regulations have been designed to enable tailored delivery of food safety outcomes (such as the general requirements in the Australia New Zealand Food Standards (ANZFS) Code relating to food premises and hygiene practices), discretion and judgement may be desirable features of the regulatory landscape.

7.3 Methodology

In examining differences in the enforcement of food safety laws in Australia and New Zealand, the Commission sought information through a survey of regulators in four broad areas (appendix B). This information covered:

- the level of human and financial *resources* devoted to food safety regulation and the training and experience of the officers charged with enforcing jurisdictional food safety laws (section 7.4)
- the *approach* to enforcement in terms of priorities across different food activities and regulations, the hierarchy of measures used to achieve compliance with food laws, processes used to ensure uniform application of those laws by food safety staff and whether or not enforcement was risk-based (section 7.5)
- the enforcement *practices* of regulators with regard to audits and inspections (frequency, duration and basis), fees and charges levied on food businesses, the use of different compliance tools and the success of those tools in encouraging compliance (section 7.6)
- *accessibility, transparency and coordination* with respect to publication of enforcement strategies and activities, availability and use of appeal mechanisms for food businesses subject to food regulation enforcement actions and awareness of the scope of regulatory responsibility (section 7.7).

On the ground, observed differences in these indicators can directly and indirectly, individually and in combination, manifest in variations in the regulatory compliance burden placed on food businesses operating within and across different jurisdictions. Examples range across differences in the level and types of fees and charges, variations in the duration of audits and inspections, the use of compliance tools not suited to the severity of the breach, regulatory duplication and access to information regarding compliance strategies. Beyond these partial indicators, however, the subjective nature of food law interpretation and its application will potentially be one of the greatest sources of differential compliance burdens imposed on firms. This was a common theme relayed to the Commission in consultations with food businesses and their representative associations during the conduct of this study. It is also an aspect of food safety enforcement that cannot be readily captured in a desk-based survey of the type used here.

A word of caution about the local government survey

In considering the results, it is important to acknowledge the limits of the survey approach. In particular, the selection bias associated with the optional nature of participation, the associated (uneven) distribution of survey returns by jurisdiction,

local government size and location (metropolitan versus rural) and the low overall response rate (and particularly that for New South Wales and Western Australia) mean that the results should be treated as impressionistic rather than providing a definitive statistical snapshot of food safety enforcement by local governments (table 7.1). That said, responses to individual questions can reflect jurisdiction-wide practices (often set in legislation) which can be used to draw inferences about regulatory and compliance burden differences on food businesses. Moreover, while the overall *council* response rate is low, the survey results remain highly relevant to the 80 000 food premises/businesses covered by the responding councils. The Commission estimates that this figure could represent upwards of 40 per cent of all regulated food premises/businesses in Australia and New Zealand.

Table 7.1 Survey response rates by council size and jurisdiction
Number of councils

<i>Population</i>	<i>NZ</i>	<i>NSW^a</i>	<i>Vic</i>	<i>Qld</i>	<i>SA</i>	<i>WA</i>	<i>Tas</i>	<i>Total</i>
Less than 50 000	8	9	9	5	15	12	7	65
50 000 — 100 000	6	5	6	2	4	7	2	32
More than 100 000	7	12	7	10	4	3	0	43
Total responses	21	26	22	17	23	22	9	140
Total councils	73	152	79	73	74	141	29	621
Response rate (%)	28.8	17.1	27.8	23.3	31.1	15.6	31.0	22.5
Food premises ^b	12 544	15 003	14 145	20 696	8 466	7 024	2 438	80 316

^a Where practical in this chapter, the Commission has used the council population data for all 152 NSW councils provided by the NSW Food Authority (personal communication, 18/11/2009). ^b Refers to total food premises (or businesses) regulated by survey respondents. In addition to the total shown here, there were 2197 food retail and service businesses in the Northern Territory and 2408 (predominantly) food retail and service businesses in the ACT at June 30 2009 covered by the central agency surveys.

Source: Productivity Commission survey of local councils (2009, unpublished).

Given the reference period of the study is 2008-09, the information collected will reflect the legislative and operational arrangements at that time. However, transitional impacts associated with certain policy initiatives and more recent (as well as prospective) developments in a number of jurisdictions need to be kept in mind in considering the picture of food safety enforcement captured by the survey. For example:

- New South Wales introduced a Food Regulation Partnership arrangement with local councils effective from 1 July 2008 to clarify responsibilities, improve coordination and transparency and enable councils to recover costs associated with food safety enforcement, and regular collection and analysis of council enforcement activities by the NSW Food Authority (NSWFA). While these new arrangements were in place at the time of the survey, many councils were in the process of adjusting to the new regime

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- Major amendments to Victoria's food laws following an inquiry into food regulation in that state (VCEC 2007) will be implemented in stages between 1 July 2010 and mid-2011. A range of new enforcement mechanisms will be available to councils including the power to temporarily close food premises, obtain legally enforceable undertakings, issue on-the-spot fines (infringement notices) and the publication of convictions. Councils will also be granted power to charge fees for follow up food safety assessments and inspections of non-compliant businesses¹ and be mandatorily required to report specified data on the performance of food safety enforcement to the Victorian Department of Health (Victorian Health)
 - Western Australia proclaimed a new *Food Act 2008* on 23 October 2009. Under that legislation, councils will be fully responsible for local food regulation and a range of new enforcement powers will be available to them including on-the-spot fines, prohibition and improvement notices
 - A new system of food regulation in New Zealand is currently under development. The proposed law (which is the result of a lengthy review process) is being designed to: shift responsibility for food safety from inspectors to food businesses; mandate risk-based compliance tools; provide for a national restaurant grading system and improve penalty provisions over a five year transitional period (Wilkinson 2009a). In anticipation of the Bill's passage, most New Zealand councils have implemented a voluntary template-based system of food safety control plans (similar in intent to Australia's food safety programmes) for the food service and catering sectors
 - Adjustment issues associated with council amalgamations in some jurisdictions (most recently Queensland) also have the potential to influence food safety regulatory arrangements in those localities.

Nevertheless, the results can still provide a valuable reference point against which to compare the enforcement outcomes and business compliance burdens of the new legislative arrangements at some point in the future.

7.4 Resourcing of regulators

The level of financial and human resources available to food safety regulators is a key influence on enforcement priorities, enforcement activities and the uniformity of food safety regulation. Differences in those resources can lead to inconsistent enforcement and variations in the compliance burden imposed on food businesses

¹ No fee will be charged for conducting the minimum number of inspections or assessments that apply under the *Food Act 1994* to particular classes of premises.

with higher resourcing levels potentially leading to more intensive oversight of food law compliance. Resourcing levels can also influence the approach adopted by regulatory officers with more combative deterrence strategies more likely in cases where enforcement resources are limited. Where resource availability is less constrained, more cooperative compliance strategies such as education and training are likely to be more effective (Office of Regulation Review 1995).

Resourcing characteristics can also amplify the burden of enforcement. For example, a higher level of food safety resources increases the potential scrutiny of food businesses. Against that background, an understanding of the adequacy of enforcement resources (perceived or real) can provide useful contextual information against which to view business compliance burdens.

Survey responses to resourcing questions reveal a degree of uniformity across *larger* jurisdictions with New Zealand councils facing the highest average workload pressures (269 premises per EHO respectively). In contrast, surveillance workloads are considerably lower in the Northern Territory and Tasmania and, to a lesser extent, Western Australia (table 7.2).

Table 7.2 Indicators of food safety unit resourcing^a
2008-09, average responses

	NZ	NSW	Vic	Qld	SA	WA	Tas	NT	ACT
Premises/businesses per EHO ^b	269	238	230	266	243	204	177	151	287
Population per EHO ^b	41 760	41 301	27 989	39 478	31 560	31 860	19 184	14 923	39 722
Food safety budget per premise (\$) ^c	605	329	513	491	355	^d	366	1231	602

^a EHO related figures refer to full time equivalents adjusted for the proportion of time spent on food safety functions. The results may have been influenced by the way councils interpreted the resourcing questions. Some caution is therefore required. ^b Figure for NSW relates to all 152 NSW councils and was derived from information provided by NSWFA (personal communication, 18/11/2009). ^c Six Queensland councils, five New Zealand councils, four Queensland and South Australian councils, two Victorian and Western Australian councils and one NSW council did not provide a response to the food safety budget question. These figures should therefore be interpreted carefully. ^d Food safety budget estimates by Western Australian councils were so much higher than those of other jurisdictions they have not been reported here.

Sources: Productivity Commission survey of local councils, ACT Health and NT Health (2009, unpublished).

A Victorian council specifically referred to the burden that *legislated requirements* on inspection frequency placed on EHOs in Victoria:²

² Amendments to the *Food Act 1984* (Vic) that come into operation in January 2010 will enable councils to employ a broader range of skilled persons to conduct legislative enforcement. This will assist councils in addressing some of the workforce deficiencies.

The premises versus staff ratio has a major impact on completing annual work levels required by legislation.

Some unique features of the territories

Aside from the fully integrated nature of food safety enforcement in the Northern Territory and ACT, comparisons between these two jurisdictions (and with other jurisdictions) need to bear in mind the unique geographic and cultural characteristics of the territories. For example, the ACT's compact geography and urban population density means it is much less time-consuming for EHOs to perform their surveillance functions (the ACT's total land area equates to around 134 square kilometres per EHO).

In contrast, the Northern Territory's much larger geography (equivalent to 58 658 square kilometres per EHO) means that food safety officers need to travel long distances to ensure food businesses are compliant with food safety legislation. Given identical average inspection rates (see table 7.17), this may explain the higher food safety budget expenditure (per premise) in the Northern Territory compared to the ACT. In a related context, the remoteness of many communities in the Northern Territory means that access to fresh food can be limited and the incidence of food-borne illness outbreaks (and associated workloads of health officers) is greater than elsewhere. Indeed, Northern Territory Health nominated distance/remoteness as a medium level constraint on its ability to enforce food safety legislation.

Financial resources

Linked to staffing levels, larger jurisdictions generally (and the Northern Territory for the reasons discussed above) appear to have greater financial capacity (relative to the number of food businesses/premises) to undertake enforcement tasks. Notably, there is also greater dispersion in resourcing indicators *within* larger jurisdictions.

Although 60 per cent of councils considered they were able to enforce their regulatory responsibilities in full, the survey results indicate that enforcement agencies generally consider themselves under-resourced. For example, 74 per cent of all council respondents nominated budget (and 68 per cent nominated staffing) issues as either high or medium level constraints on their ability to enforce national and jurisdictional food laws (table 7.3).

Neither Northern Territory Health or ACT Health considered they were able to fully enforce food safety regulation with the Northern Territory nominating budget issues

and ACT nominating staffing issues as a high level constraints on their enforcement ability.

Table 7.3 Council constraints on enforcement activity^a
2008-09, per cent of responses

<i>Constraint/Level</i>	<i>NZ</i>	<i>NSW</i>	<i>Vic</i>	<i>Qld</i>	<i>SA</i>	<i>WA</i>	<i>Tas</i>	<i>Total</i>
Budget								
High	19	54	32	53	57	48	22	42
Medium	52	33	36	29	9	29	44	32
Low	24	13	27	6	26	19	11	19
Staffing								
High	14	38	9	53	17	38	44	28
Medium	57	38	59	12	35	43	11	39
Low	24	25	27	18	39	14	33	26

^a Where the total of percentages do not total to 100, it reflects that some councils did not provide a response.

Source: Productivity Commission survey of local councils (2009, unpublished).

While Queensland councils as a group have a high perceived level of under-resourcing with regard to both budget and staffing issues, there does not appear to be a link between resourcing of environmental health units and compliance outcomes discernible from the survey returns.³

Enforcement priorities

Given the extent of perceived under-resourcing, regulators need to prioritise their enforcement activities (table 7.4). In that respect, the surveys highlighted the emphasis most respondents place on *proactively* monitoring health risks through regular *inspections* of retail premises with 83 per cent of all councils nominating retail inspections as a high priority. Complaints from the public are also given a high priority in all jurisdictions (86 per cent of all council responses) with many local governments investigating each and every complaint received.⁴ Complaint-based inspections can be a less expensive means of identifying potential food hazards and may allow identification of breaches which are hard to detect during inspections.

3 As another cautionary note, responses to this question need to be treated with some care because of the subjective nature of self-assessment and the incentives to overstate the extent of resource problems.

4 The ACT (100 per cent), Tasmania (99 per cent), New South Wales (98 per cent) and New Zealand (81 per cent) had the highest inspection rates per complaint (table 7.17).

Table 7.4 Council high priority enforcement activities

2008-09, per cent of responses

<i>Priority</i>	<i>NZ</i>	<i>NSW</i>	<i>Vic</i>	<i>Qld</i>	<i>SA</i>	<i>WA</i>	<i>Tas</i>	<i>Total</i>
Inspections								
Retail	90	92	95	76	91	67	44	83
Other food	38	29	100	71	78	52	44	60
Complaints	81	88	91	94	87	90	56	86
Registration ^a	81	17	95	82	22	57	67	58
ANZFS Code Standards								
Food handling	100	96	100	100	96	90	78	96
Premises	90	100	100	94	96	90	89	95
Labelling ^b	5	21	23	12	4	24	22	15

^a Includes processes of licensing, registration, notification and accreditation (where they apply in the different jurisdictions). ^b In South Australia, labelling is the responsibility of Department of Health rather than local councils. In Queensland, labelling, food composition and MRLs are regulated by Queensland Health.

Source: Productivity Commission survey of local councils (2009, unpublished).

Food handling practices (96 per cent of councils nominating as a high priority) and the condition and cleanliness of premises (95 per cent of councils) stood out as key elements of the ANZFS Code receiving attention. With resources focused on these priority areas, activities receiving much less consistent attention included labelling (with just 15 per cent of councils nominating this as a high priority), food sampling and food composition (though in some cases these activities were the responsibility of a central agency such as the jurisdictional Department of Health or its equivalent).

Central agencies with *direct* responsibility for consumer food safety regulation (Northern Territory Health and ACT Health) also attached a high priority to food business inspections (table 7.5). More broadly, while food recalls and outbreak investigations were listed as high priorities by every central agency (and complaints by most agencies), there was variability in other areas most notably with respect to sampling and testing (which ranged from being a high priority in Queensland and South Australia to a low priority in Tasmania).

Table 7.5 Central agency enforcement priorities
2008-09, level of priority given to enforcement activity

Agency	Licensing	Registration	Accreditation	Audits	Inspections	Education / advice	Sampling / testing	Recalls	Complaints	Investigations	Labelling	Other
NZFSA	Med	Med	Low	Med	Med	Med	Med	High	Med	High	Low	nr
NSWFA	Med	na	na	High ^a	High	Low	Med	High	Med/High	High	Med	nr
Vic Health	na	na	na	nr	High	Low	Med	High	High	High	Med	High ^b
Qld Health	na	na	na	Med	nr	High	High	High	Med	High	Med	nr
SA Health	na	na	na	High	High	High	High	High	Med	High	Med	High ^c
WA Health	Med	Med	na	High	Low	Med	Med	High	Med	High	Low	nr
Tas Health	Low	Low	Med	Low	Low	High	Low	High	High	High	Med	nr
NT Health	na	High	na	na	High	Med	Med	High	High	High	High	nr
ACT Health	High	High	na	na	High	High	High	nr	High	High	Low	nr

na not applicable. nr no response. ^a NSWFA noted that about 50 per cent of the time spent on audits is used to educate the business on food safety compliance. Also, most complaints are assessed as either medium or high priority. ^b Vic Health nominated food standards development as a high enforcement priority. ^c SA Health noted that the most important activities should facilitate prevention of food safety issues/outbreaks as this will ultimately reduce the need to respond reactively.

Source: Productivity Commission survey of food safety regulators (2009, unpublished).

Education and advice (low in New South Wales and Victoria and medium to high elsewhere) and labelling (low in New Zealand, Western Australia and the ACT and high in the Northern Territory) were other notable areas of divergent priorities. Importantly, food labelling appears to receive much less attention by both local government and central agency regulators (except Northern Territory Health) than any other regulatory responsibility.

In conducting inspection programs, most regulators undertook systematic as opposed to random audits with inspection frequency (as discussed above) commonly (but not consistently) tied to the assessed risk posed by different classes of premises (table 7.6). Inspections are typically unannounced. Advance notice of an inspection can lower the associated compliance burden by allowing businesses to arrange for additional resources to ensure continuity of business operations. However, it can also reduce the effectiveness of inspections by giving businesses an

opportunity to temporarily rectify likely compliance breaches prior to an inspector's arrival.⁵

Table 7.6 Use of risk profiling
2008-09, per cent of responses

<i>Risk basis</i>	<i>NZ</i>	<i>NSW</i>	<i>Vic</i>	<i>Qld</i>	<i>SA</i>	<i>WA</i>	<i>Tas</i>	<i>Total</i>
Premise classification	67	100	100	65	96	71	67	83
Fees charged	62	50	95	53	26	24	33	50
Inspection frequency	57	75	45	53	83	71	67	65
Compliance history	76	54	68	41	83	81	89	69

Source: Productivity Commission survey of local councils (2009, unpublished).

The compliance history of individual food businesses also features prominently in inspection programs with 69 per cent of councils (and both ACT Health and Northern Territory Health) using this trait to target consumer-oriented food businesses posing a heightened threat to consumers.⁶

Risk profiling of food businesses

Importantly, 83 per cent of surveyed councils (and all central agencies except Western Australian Department of Health (Western Australian Health) and Queensland Health) used risk profiling to prioritise businesses according to the level of risk posed to public health. Councils often employed common risk profiling frameworks developed centrally at either the state/territory or national level. Risk targeting has the advantage of directing regulatory resources to areas where the likely pay-off is greatest and hence is potentially more cost-effective than either random or uniform regulatory regimes. That said, the different costs associated with regulating businesses in different risk classes (such as time involved in auditing and inspections) also needs to be taken into account.

⁵ Data supplied by a leading Australian retailer shows that no advance notice was provided by any one of the 36 local government inspections for which information was provided.

⁶ ACT Health noted that compliance history is used to determine audit frequency for those businesses that are required to complete FSPs under chapters 3 and 4 of the ANZFS Code (ie wholesalers of oysters, manufacturers of fermented meats and food businesses that prepare food for vulnerable populations). Compliance history is not used to determine inspection frequency for other food businesses.

Risk based fees

In that respect, there was considerable variability in the application of risk gradings to food business fees and charges and to audit and inspection frequency evident from the surveys (table 7.6). Ninety-five per cent of Victorian councils responding to the survey used risk-based charging in 2008-09 — risk-based charges were applied to annual registration fees paid by food businesses as councils were unable to charge inspection fees in the surveyed period. In contrast, local councils in South Australia and Western Australia (mainly licence fees) were much less likely to charge fees to food businesses based on the inherent and other risks involved with those businesses. For consumer food businesses operating in the territories, ACT Health imposed risk-based charges while Northern Territory Health did not.⁷

Overall, this suggests the compliance cost burden on *low and medium risk* food businesses in jurisdictions like South Australia, Western Australia and the Northern Territory could be higher than businesses in the same risk groups in jurisdictions like Victoria (if average charges in South Australia, Western Australia and the Northern Territory were the same as in Victoria). Further, *high risk* businesses in South Australia, Western Australia and the Northern Territory may incur lower regulatory compliance costs than *high risk* businesses in jurisdictions such as Victoria (again if average charges were the same).

Risk-based inspection frequency

A different picture emerges in terms of risk-based inspection frequency with food businesses in South Australia, the Northern Territory and ACT much more likely to be scrutinised according to the risks they posed to the public in 2008-09. This suggests that the compliance burden (in terms of the number of inspections) on *low- and medium-risk* food businesses in jurisdictions such as Victoria (where 45 per cent of councils used risk as the basis for inspection frequency) could be higher than similar businesses in jurisdictions like South Australia, the Northern Territory and ACT. It also suggests that *high-risk* businesses in Victoria may incur lower compliance costs (comparatively fewer inspections) than similar businesses in South Australia, the Northern Territory and ACT.

⁷ Registration fees charged for a food business under the ACT Food Act 2001 vary from \$150 (high hazard), \$100 (medium hazard) and \$50 (low hazard) and are unlikely to reflect differences in the actual risks posed by different business classifications.

Risk profiling frameworks

At a broader level, while the use of common profiling *frameworks* should reduce compliance burden differences *within* jurisdictions, the extent to which those classification systems vary *across* jurisdictions also provides scope for differences in food business compliance burdens. The potential impact of different classification frameworks can be seen in the marked variations in business grades across jurisdictions (figure 7.1). Queensland councils responding to the survey (and *all* 152 New South Wales councils) collectively classified around two-thirds of food businesses as high risk.⁸ By contrast, the Northern Territory, South Australia and the ACT accorded no more than 15 per cent of businesses that title. New South Wales and Victoria, jurisdictions with the largest number of food businesses, show a mirror reversal in the proportion of firms in the high and medium risk categories.

It should be noted however, that some of these apparent jurisdictional differences may be somewhat exaggerated as Queensland exempts very low risk businesses from licensing requirements (such as those selling unpackaged snack foods).

Nonetheless, these results suggest that the uniform *application* of risk-based enforcement and the use of a common risk assessment tool (potentially either that developed by the New Zealand Food Safety Authority (NZFSA 2005) or that by the Australian Government's Food Regulation Standing Committee (Department of Health and Ageing (Commonwealth) 2007) which is currently used in New South Wales) may offer scope to reduce business compliance burdens.

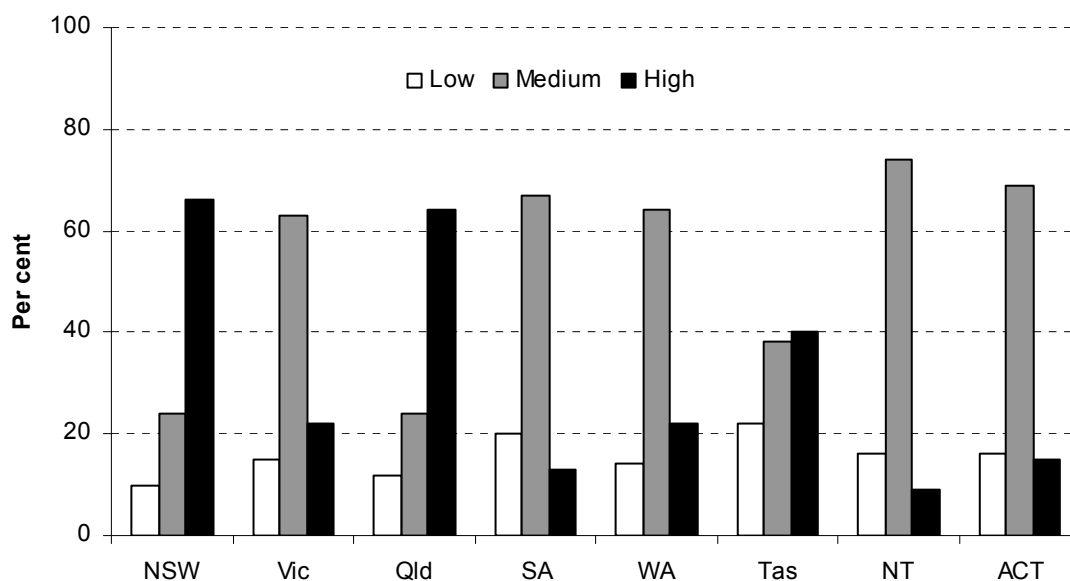
7.5 Enforcement approaches

In examining differences in enforcement approaches used by regulators, the surveys sought information on the:

- types of compliance measures available and employed to address food safety breaches
- measures used to promote a culture of compliance among food businesses
- processes to facilitate uniform interpretation of food safety laws by agency staff
- issues on which councils liaised with central agency and other regulators.

⁸ Queensland Health noted that the majority of food businesses in Queensland are classified within the legislative framework of the *Food Act 2006* as medium risk, ie licensable food businesses. However, within this risk category local governments may make additional classifications for the purpose of the application of their regulatory resources to ensure that businesses are regulated according to the relative risk they pose to consumers based on their individual standards of operation.

Figure 7.1 **Business risk classifications^a**
2008-09



^a New Zealand councils reported a risk/grading classification basis that is not directly comparable to responses from Australian jurisdictions. Business risk classification data for NSW based on NSW Food Authority (personal communication, 18/11/2009). Survey based classifications for NSW were high: 65 per cent; medium: 23 per cent; low: 13 per cent.

Data sources: Productivity Commission survey of local councils, ACT Health and NT Health (2009, unpublished); NSWFA (pers. comm. 18 November 2009).

Cooperative enforcement measures

The local government survey highlighted the importance of education and warnings (which also involve lower business compliance burdens compared to other enforcement mechanisms) as the key council measures used to improve food safety awareness and address specific compliance breaches across all jurisdictions (table 7.7). While proactive strategies such as education can be more resource intensive than reactive alternatives such as surveillance, they can still be more cost-effective. For example, devoting resources to broad education campaigns can deliver higher compliance levels than under-resourced inspection regimes that either lack sufficient frequency or do not follow up compliance breaches — discovered or notified (Office of Regulation Review 1995).

Food handler education, in particular, has a number of benefits in that it:

- directly addresses business ignorance regarding food safety issues (often the main underlying cause of compliance breaches)
- increases awareness and knowledge more broadly than in the circumstances of a specific individual breach

- enhances cooperative attitudes in food businesses, encouraging greater overall compliance (Office of Regulation Review 1995).

Table 7.7 Use of enforcement tools
2008-09, per cent of respondents using tool

<i>Tool</i>	<i>NZ</i>	<i>NSW</i>	<i>Vic</i>	<i>Qld</i>	<i>SA</i>	<i>WA</i>	<i>Tas</i>	<i>Total</i>
Education	84	96	100	100	96	100	100	96
Verbal warning	67	71	73	94	78	95	89	80
Written warning	76	83	95	88	91	100	89	89
Improvement notice	0	75	59	100	78	48	78	61
Prosecution	14	21	45	47	26	48	22	32
Fine ^a	10	29	14	35	30	5	56	23
Infringement notice	0	42	5	47	39	5	56	25
Prohibition notice	0	38	5	18	39	14	22	20
Adverse publicity ^b	24	13	0	18	9	24	11	14
Other	24	0	18	0	0	0	11	7

^a The response to the fines question from New Zealand, Victoria and Western Australia may reflect the broader interpretation of the tool to include fines imposed by a court. ^b New South Wales' name and shame powers are administered by the NSW Food Authority. Some councils may have interpreted this question as asking whether they themselves named and shamed food businesses.

Source: Productivity Commission survey of local councils (2009, unpublished)

Comments from respondents emphasised the onus they placed on cooperative as opposed to combative enforcement mechanisms in dealing with breaches of food laws. Examples included the following from a New Zealand council:

We believe in 80% education and 20% enforcement. We will always try and reach the desired outcome via education, negotiation and mediation before providing more formalised enforcement responses.

Central agency regulators such as ACT Health (which also has a local council role) noted that it:

... practises a philosophy of educating food business operators. The first warning may be verbal or written before formalised notice provisions are activated. It is considered better to encourage compliance with legislative and standards requirements. Enforcement actions such as prosecution are considered a last resort.

A South Australian council listed a suite of considerations in determining the most appropriate enforcement action:

In coming to a decision on the most appropriate means of enforcement, the officer shall consider, amongst other relevant factors, the following:

- the seriousness of the offence, ie: risk to public health
- the degree of wilfulness involved

-
- the offender's past history
 - the consequences of non-compliance
 - the likely effectiveness of the various enforcement options
 - deterrence
 - consistency of approach to similar breaches/offences.

The less frequent use of other (more burdensome) enforcement tools apparent in table 7.7 reflects a number of factors including the graduated approach used to rectify compliance breaches (the adoption of an enforcement pyramid), the unavailability of certain tools in specific jurisdictions and/or the cost of using some tools (particularly prosecution). Most if not all councils/agencies indicated the use of a formal or informal enforcement pyramid. Typically, the hierarchies involved the use of some or all of the following generically described elements:

- education/advice on the nature of the problem and how to rectify it
- verbal warning given
- written warning issued
- formal rectification notice issued
- fines imposed, prosecution commenced, or closure orders issued.

As depicted in the above comments, regulators adopt increasingly combative approaches for continued or serious non-compliance with food laws. A number of regulators explicitly *detailed* their enforcement hierarchy. For example, a New South Wales council noted a shift toward more combative enforcement in response to ongoing compliance issues which enabled enforcement activity targets to be met:

At every inspection we leave an inspection report. EHOs generally rely on warning letters and re-inspections to gain compliance and only go to an [infringement notice] or [prohibition order] for very serious breaches. Council is now starting to use [infringement notices] more frequently to gain compliance rather than relying on several re-inspections where we observe the same breaches to increase compliance and also be able to achieve the inspection targets for each year.

A more general and qualified response was provided by a South Australian council:

Council uses an Environmental Health Enforcement Policy which outlines the hierarchy of enforcement, and the appropriate tools to use to ensure fairness, consistency and transparency. A graduated response from no action, education, informal action, improvement notice, expiation notice, prohibition order and prosecution is contemplated by the policy.

Similarly, Northern Territory Health (which also has a local council role) referred to procedural enforcement guidance:

DHF has a standard operating procedure which describes the enforcement response to breaches detected. The enforcement response is dependent upon the risk to public health.

Availability of different enforcement tools

Notably, a number of regulators pointed to restrictions on the availability of certain enforcement tools in their jurisdictions and the implications this had for dealing with certain types of breaches. (Overall, around 25 per cent of councils considered enforcement powers were a medium to high level constraint on their enforcement ability). Among the central agencies only SA Health said enforcement powers were a high level constraint on its ability to enforce food safety regulations, while Queensland Health, Victorian Health and Northern Territory Health nominated enforcement powers as a medium level constraint.

In particular, existing legislation in New Zealand, Victoria and Western Australia and the Northern Territory does not provide regulators with the scope to impose on-the-spot fines for food act breaches. Such fines have the advantage of being easy to dispense and administer, serve to provide a moral as well as financial penalty and create an ongoing and credible deterrent particularly for repeat or serious offenders (Office of Regulation Review 1995). They are most appropriate when some form of punishment is justified but the delays and costs of court action render that avenue problematic (see below). Ideally, the level of on-the-spot fines should be in a range that reflects variations in the severity of compliance breaches and delivers an sufficient level of deterrence.

Importantly, Western Australian councils will gain access to on-the-spot fines (to be known there as penalty infringement notices) once the new *Food Act 2008* becomes fully operational. That legislation will also enable councils to issue improvement notices and prohibition (cessation) orders, both of which are also currently unavailable.

Victorian councils similarly indicated they were presently unable to impose fines or issue prohibition orders under existing legislation (though the amendments to food legislation in Victoria will provide councils with a broader range of enforcement tools, including on-the-spot fines).

A Victorian council highlighted the relative cost-effectiveness of on-the-spot fines:

Poor performing premises require substantial remedial action and resources, so the introduction of penalty infringement notices will be a welcome tool as currently there is a major gap between the serving of Food Act Notices and proceeding through the Court system with its often time consuming and delayed outcome.

New Zealand councils are also devoid of the power to issue fines with one survey respondent commenting:

Regulations are at times not powerful enough. No avenues to fine people on the spot or by other means. Final resort will be legal action, which is costly and lengthy.

The absence of other enforcement mechanisms (such as on-the-spot fines) in some jurisdictions will also limit the scope to tailor regulatory responses to the severity of compliance breaches. This can lead to both differences in the extent to which food laws are enforced (including a failure to enforce those laws) or a reliance on more punitive (and costly remedies) in some jurisdictions. Either outcome will lead to variations in business compliance burdens. Given the more limited suite of tools available in Victoria and Western Australia, it is perhaps no coincidence that councils in those states were among the most likely users of litigation in 2008-09.

Three jurisdictions (New South Wales, Queensland and Western Australia) provided formal avenues to publicly ‘name and shame’ businesses for breaching food safety regulations during the reference period.⁹ Unlike other jurisdictions where these powers are subject to court-based oversight (the need for a successful prosecution), the legislation in New South Wales only requires the issuance of a penalty infringement notice by a council or the NSWFA for a food business to be publicly named and shamed.¹⁰

While such powers can provide a potentially large deterrent at little relative cost to the regulator, they are a blunt enforcement instrument in that their impact on food businesses is uncertain (especially when applied to relatively minor breaches). National retailers Coles and Woolworths both commented on the need for greater consistency and fairness in the use of name and shame powers. Coles said that its:

⁹ In Western Australia, public reporting of food hygiene prosecutions was *voluntary* during the reference period but will be mandatory upon the introduction of the *Food Act 2008*. Details of South Australian food businesses found guilty of a breach of the *Food Act 2001* are to be placed on a public register from 1 July 2009 (Department of Health (South Australia) 2008). Legislated amendments to Victorian food legislation will in the future provide scope for businesses convicted of a breach of the *Food Act 1984* to be entered on a register accessible to the public (Lederman and Jannetto 2000). In the ACT, legislation does not provide for the naming and shaming of food businesses and ACT Health does not list businesses that have been successfully prosecuted. However, the names of businesses found guilty of a breach of the *Food Act 2001* can be published (ACT Health, personal communication, 24 November 2009).

¹⁰ In New South Wales, food businesses are not entered onto the ‘name and shame’ register until the timeframes for appeal against the notice have expired and after an internal review of the matter. Food businesses may also seek removal of incorrect or inappropriate information and may appeal to the New South Wales Administrative Decisions Tribunal if the NSW Food Authority refuses to do so.

... concern with this type of blunt approach is that it may not necessarily reflect the severity of the breach or provide qualitative data around the circumstances in which the breach occurred. ... It is also important that there be a common approach adopted in terms of:

- the length of time a business/person is listed on the site
- the means for appeal
- process for having the name removed once remedial action has been taken and/or improvement has occurred, or once an appeal has been won. (sub. 21, p. 2)

Woolworths similarly called for a national approach:

Woolworths has no issue with Governments wishing to ‘Name & Shame’ businesses convicted of significant Food Safety breaches, however when these breaches are listed together with minor Quality issues, prospective customers to a business cannot distinguish the difference and the final outcome for smaller businesses could be disastrous.

Having a national approach would ensure all consumers across all jurisdictions enjoy the same level of protection from food safety laws. (sub. 10, p. 4)

Overall, the Commission considers that current moves to expand the set of enforcement tools in some jurisdictions will both facilitate greater uniformity in enforcement across jurisdictions and reduce the associated variation in business compliance burdens that results from current gaps in regulatory toolkits.

Fines and penalties

There may also be a case for aligning the level of financial penalties (on-the-spot and court-based) for food safety breaches in all jurisdictions. Fines and penalties for breaches of food (or health) acts varied significantly between jurisdictions despite the intention of the Model Food Bill that the same offence would attract the same penalty across Australia (AFGC 2008). Food business penalties are associated with four basic offences — failure to be licensed (or equivalent), provision of unsafe food (either unknowingly or deliberately), obstructing an authorised officer and failure to follow a compliance order/directive — table 7.8.¹¹

¹¹ Penalties and fines are not a regulatory compliance cost for a compliant business, but the severity of repercussions for non-compliance can act as a strong incentive for some businesses to meet regulatory requirements.

Table 7.8 Court-imposed penalties by jurisdiction
as at 30 June 2009, Australian dollars

	<i>Operating an unlicensed (or equivalent) food business</i>	<i>Sale of unsafe food^b</i>	<i>Obstructing an authorised officer</i>	<i>Failure to comply with a directive/compliance order</i>
NZ ^a	Max: \$407 plus \$41 per day for a continuing offence	Max: \$81 300 (individual and company) plus up to 12 months prison	Max: \$1 626 or 3 months imprisonment plus up to \$81 per day for a continuing offence	Max: \$1 626 or 3 months imprisonment plus up to \$81 per day for a continuing offence
NSW	Max: \$55 000 (individual) \$275 000 (company)	Max: \$110 000 or 2 years imprisonment (individual) \$550 000 (company)	Max: \$55 000	\$55 000 (individual) \$275 000 (company)
Vic	1 st offence: \$5 671 2 nd & sub. offence: \$11 342	Max: \$100 000 or 2 years imprisonment (individual) and \$500 000 (company)	1 st offence \$2 836 2 nd and subsequent offence \$5 671	1 st offence \$2 836 2 nd and subsequent offence \$5 671
Qld	Max: \$100 000 (operating without a licence). Max: \$50 000 (for operating from premises other than stated on the licence)	Max: \$100 000 or 2 years imprisonment	Max: \$10 000	\$20 000
SA	Max: \$25 000 (individual) \$120 000 (company) Plus expiation fee of \$300 (individual) or \$1 500 (company)	Max: \$100 000 or 4 years imprisonment (individual) and \$500 000 (company)	Max: \$50 000	\$50 000 (individual) \$250 000 (company) Plus \$750 expiation fee if directive via improvement notice
WA	1 st offence: \$100–\$1000; 2 nd offence: \$200–\$1000; 3 rd & subs. offence: \$500–\$1000; plus, \$50–\$100 per day for a continuing offence	1 st offence: \$250–\$2500; 2 nd offence: \$500–\$2500; 3 rd & subs. offence: \$1250–\$2500 plus, \$125–\$250 per day if for a continuing offence	1 st offence: \$300–\$3 000 2 nd offence: \$600–\$3 000 3 rd & subs. offence: \$1 500–\$3 000 plus \$150–\$300 per day if offence is a continuing offence	No equivalent penalty
Tas	Max: \$60 000 (individual) \$144 000 (company)	Max: \$120 000 or 2 years imprisonment or both (individual) and \$600 000 (company)	Max: \$60 000	\$60 000 (individual) \$300 000 (company)
NT	\$55 000 (individual) \$275 000 (company)	Max: \$110 000 or 2 years imprisonment (individual) and \$550 000 (company).	\$55 000 or 6 months imprisonment	\$55 000 (individual) \$275 000 (company)
ACT	Max: \$5 000, 6 months imprisonment or both (individual) and \$25 000 (company)	Max: \$100 000 or 2 years imprisonment or both (individual) and \$500 000 (company)	Max: \$5 000 (individual) and \$25 000 (company)	\$10 000 (individual) \$50 000 (company)

^a New Zealand penalties are converted to Australian dollars based on an average exchange rate for 2008-09 of 1.23. ^b Maximum penalty relates to the intentional sale of unsafe food. Lower maximums apply for the unintentional sale of unsafe food and the sale of unsafe food.

Sources: Food (or related) Act in each jurisdiction.

Across the jurisdictions, a failure to be appropriately licensed (or registered or accredited) as a food business incurs the greatest penalty for an individual in Queensland — up to \$100 000 — and the lowest maximum penalty in New Zealand of only \$407 for domestic food premises. Penalties tend to be higher for companies. This fine may be levied even when a business is otherwise compliant in the provision of safe food. The ACT is the only jurisdiction that can impose a prison term.

Provision of food that is unsafe generally incurs higher penalties in cases where food is sold to the public (rather than to another business for further processing) and when the food is known to be unsafe yet still provided. Maximum penalties for the provision of unsafe food are of a similar magnitude in most states and territories and New Zealand for individuals (around \$100 000 to \$120 000) and for companies (\$500 000 to \$600 000). Maximum penalties in New Zealand, Western Australia and Queensland (companies only) are considerably lower. Most jurisdictions also have the option of possible imprisonment of two years except New Zealand (12 months) and Western Australia (no imprisonment) and South Australia (four years).

Penalties associated with obstructing an authorised officer and failing to comply with an order or directive also show considerable variations across jurisdictions. The greatest penalties are available in Tasmania (\$60 000 for individuals and \$300 000 for a company).

Importantly, while the potential fines may be considered significant, the resource costs involved with pursuing litigation may render this enforcement tool (and the associated penalties) impractical — a point highlighted by councils in a number of jurisdictions. A contributor from New Zealand said in that respect:

Prosecutions except for extremely serious situations are far too expensive to be a realistic tool.

A South Australian council also pointed to the costs of litigation and the inability to garner the associated penalties as disincentives to prosecute:

No incentive to prosecute under our legislation, costs to council are too great and any court fines go to state consolidated revenue not back to council.

Influencing the culture of compliance

The importance of education and media strategies (including newsletters, pamphlets and internet sites) also carried over into responses by both local government and central agency regulators regarding measures used to improve the culture of compliance among food businesses (tables 7.9 and 7.10). Food handler training was

the next most commonly used measure but there was considerable variation in the extent to which this measure was employed.

Table 7.9 Cultural change measures by local councils
2008-09, per cent of responses citing regular use

<i>Measure</i>	<i>NZ</i>	<i>NSW</i>	<i>Vic</i>	<i>Qld</i>	<i>SA</i>	<i>WA</i>	<i>Tas</i>	<i>Total</i>
Education	86	92	95	100	96	90	100	93
Information strategies	67	50	77	59	83	43	44	62
Free training	14	33	14	59	13	19	67	27
Incentives	57	4	9	12	4	19	11	17
Fee-based training	29	13	0	6	43	10	0	16
Awards	0	4	9	0	4	0	0	3
Other	24	13	5	12	4	10	0	10

Source: Productivity Commission survey of local councils (2009, unpublished).

Table 7.10 Cultural change measures by central agencies
2008-09, level of use

<i>Agency</i>	<i>Education</i>	<i>Media strategies</i>	<i>Awards</i>	<i>Incentives</i>	<i>Training - free</i>	<i>Training – fee based</i>	<i>Other</i>
NZFSA	Regularly	Regularly	Rarely	Rarely	Not used	Rarely	nr
NSWFA	Regularly	Regularly	Not used	Regularly ^a	Regularly	Not used	nr
Vic Health	Rarely	Regularly	Not used	nr	nr	nr	nr
Qld Health	Regularly	Regularly	Not used	Not used	Not used	Not used	Not used
SA Health	Regularly	Regularly	Not used	Not used	Regularly	Not used	nr
WA Health	Regularly	Regularly	Rarely	Not used	Rarely	Not used	nr
Tas Health	nr	nr	nr	nr	nr	nr	nr
NT Health	Regularly	Regularly	Not used	Not used	Regularly	Not used	nr
ACT Health	Regularly	Regularly	Not used	Not used	Not used	Not used	nr

nr no response. ^a NSWFA noted incentives take the form of reduced audit frequency for good performance.

Source: Productivity Commission survey of food safety regulators (2009, unpublished).

This may reflect different legislative requirements surrounding, for example, food safety supervisors where nominated staff are required to attain minimum competency standards and thus mitigating the need for regulators to provide such services (chapter 6). One South Australian council called for the extension of such training to all staff before they could be employed as food handlers.

Legislation does not currently prohibit the commencement of a food business without prior assessment by the Enforcement Agency ... Appropriate food handler training & qualifications must meet minimum national standards prior to commencement of working as a food handler. Details of staff & certificate of notification should be displayed in a conspicuous place within the food premises. This should be enforceable!

A New Zealand council commented similarly on the need for food safety training when asked about the main compliance costs facing food businesses:

Non compliance due to premise owners, management, their staff not having knowledge/training in food safety.

Other councils have enacted local by-laws to mandate compulsory training for food workers. This is the approach taken by one council in New Zealand which also noted potentially severe financial penalties for breaching these requirements:

Compulsory training was introduced to reduce the number of food complaints and food poisonings resulting from carelessness in food handling ... The Bylaw makes it compulsory for all food workers [subject to certain exemptions] to undertake and complete a professional training programme in food hygiene ... Any occupier who allows an untrained food handler to work at a food premises, or fails to meet the requirements of the bylaw is liable on summary conviction to a penalty of up to \$20,000.

In respect of the training issue, an observation made by Queensland Health in its 1994 review of that state's Food Act would still appear to have contemporary relevance in some jurisdictions:

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 are required to undertake formal training or obtain formal qualifications before they are permitted to be engaged in food preparation or food handling. (Queensland Health 1994)

Counterbalancing the potential benefits to public health, the cost to food businesses of obtaining the necessary qualifications needs to be considered (chapter 6). Indeed, the expense and prescription involved in food safety supervisor training was a common concern raised with the Commission in consultations with business in affected jurisdictions (particularly for firms with high staff turnover where the benefits from the training investment could be short-lived and the costs recurrent). Accordingly, the cost of obtaining competencies needs to be matched with the public health benefits they provide and the degree of training aligned to the activities performed by the individual (chapter 6).

Victorian and Western Australia stood out as having the lowest proportion of councils providing food handler training services (free and fee-based). In Victoria's case, the educative role played by food safety plans (FSPs) in food handler instruction may also be relevant (though one council simply noted there was no legislative requirement to provide such training). Indeed, a recent survey of food handling practices by FSANZ (2008a) found that among other characteristics,

Victorian food businesses and others with FSPs had generally greater knowledge and safer food handling practices than in other jurisdictions (chapter 3). That said, many Victorian councils also nominated FSPs as the major compliance cost issue facing food businesses in that state. In Western Australia, the result may reflect external involvement in the administration of such training. As one council commented:

"FoodSafe" Food Safety Training is administered by Environmental Health Australia (EHA) & delivered to proprietors of food premises by the relevant Local Government Authority. Proprietors pay EHA for the *FoodSafe* training material. The Town's EHOs promote and provide advice on *FoodSafe*, as well as providing free guidance, auditing & approval of *FoodSafe* to food business proprietors.

South Australian councils were the most likely providers of fee-based training, though as one council pointed out, this was provided at less than cost recovery.

... fee based food safety training is offered at a significantly reduced cost which aims to only cover administrative costs. Free education sessions are also held with schools and local community centres. EHOs also provide education material in different languages and also offer interpreters and translators for written and verbal communication.

While incentives such as licence fee reductions and positive advertising were rarely (if at all) used in most jurisdictions, they featured prominently in New Zealand. Survey responses from that jurisdiction did not shed light on the nature or success of those measures. The use of food industry awards as an incentive for food businesses to improve food safety was even rarer.

Measures specifically aimed at reducing business compliance burdens

Given that criticisms from food business interests centred around issues of inconsistent interpretation and implementation of food laws by environmental health and similarly authorised officers, the surveys sought information on measures that regulators employed to facilitate such consistency. The results are presented in tables 7.11 and 7.12.

Table 7.11 Measures to facilitate uniform interpretation by local councils

2008-09, per cent of responses

<i>Measure</i>	<i>NZ</i>	<i>NSW</i>	<i>Vic</i>	<i>Qld</i>	<i>SA</i>	<i>WA</i>	<i>Tas</i>	<i>Total</i>
Supervisor oversight	95	79	95	88	70	81	67	83
Structured training	52	75	59	47	65	67	67	62
Peer review	67	63	77	41	70	52	33	61
Staff rotation	38	38	59	35	52	43	33	44
Secondment	10	21	0	6	13	10	0	9
Other	33	17	41	29	43	33	33	33

Source: Productivity Commission survey of local councils (2009, unpublished).

Table 7.12 Measures to facilitate uniform interpretation by central agencies

2008-09

<i>Agency</i>	<i>Supervisory oversight</i>	<i>Structured training</i>	<i>Staff rotation</i>	<i>Secondment</i>	<i>Peer review</i>	<i>Other</i>
NZFSA	✓	✓	✓	✓	✓	✓ ^a
NSWFA	✓	✓	✓	✓	✓	x
Vic Health	x	x	x	x	x	✓ ^b
Qld Health	✓	x	x	x	✓	x
SA Health	✓	✓	x	x	x	x
WA Health	✓	✓	✓	x	✓	x
Tas Health	x	x	x	x	x	✓ ^c
NT Health	✓	x	x	x	✓	✓ ^d
ACT Health	✓	✓	✓	x	✓	x

^a Compliance systems audits. ^b Staff meetings. ^c Workshops. ^d Workshops and meetings.

Source: Productivity Commission survey of food safety regulators (2009, unpublished).

Councils in all jurisdictions clearly recognise the importance of applying food laws in a consistent manner. Aside from those councils employing just one EHO (where enforcement consistency is obviously not an issue), every respondent reported some measure (and in most cases multiple approaches) aimed at facilitating the uniform interpretation of food regulations within their respective council.

Supervisory oversight was the most common safeguard adopted in every jurisdiction. Structured training also featured prominently with 62 per cent of councils listing that element (table 7.11). Victoria stood out as the most likely jurisdiction to use staff rotation within councils as a means of exposing all food businesses to the same regulatory oversight. The issue of consistency was also one of the highest ranking topics in council discussions with central food safety regulators (which would facilitate greater consistency across councils in the same

jurisdiction). This was especially the case in New South Wales, Victoria and South Australia (section 7.7).

A range of other uniformity mechanisms was also referred to by councils in their general comments on this topic. These included the use of the Australian Food Safety Assessment (AFSA) tool by a number of councils. Other examples included that from a South Australian council which detailed at length the procedures it used to achieve consistency in its administration and enforcement of food safety regulation:

Induction of employees. Council's EHOs also conduct regular inspections in pairs to improve consistency and hold regular team meetings to discuss enforcement and education. Standard templates and procedures for enforcement are used and then reviewed by an internal quality assurance program to ensure consistency. Officers are encouraged to attend Environmental Health Australia's Food Special Interest Group meetings and use the Australian Food Safety Assessment (AFSA) checklist and guidance document.

One Western Australian council commented specifically on the importance with which it viewed this issue:

Monthly team meetings are held, common issues are discussed and issues for particular attention are identified. The need for consistency in approach is paramount and is emphasised on a daily basis.

And a New Zealand council pointed to cooperative council efforts in this area:

We have recently formed a regional food cluster group with other councils in the region. This group is sharing information, office systems, training of officers and training food premises operators signed up to the Voluntary Implementation Programme.

In a related context, EHO training also featured prominently in efforts to improve regulatory outcomes with specific food safety professional development provided to food safety staff. Survey wide, average staff training time was 44 hours per EHO in 2008-09 with Victoria, South Australia and Western Australia standing out as the jurisdictions doing most in this area (each with around 60 hours training per EHO).

Each central agency also reported similar uniformity initiatives with the NZFSA and NSWFA employing the widest range of measures. Reflecting their broader set of responsibilities, those two agencies also devoted the most resources to the training and professional development of food safety staff (see chapter 8).

7.6 Enforcement practices

In examining differences in enforcement practices, the local council survey sought information on:

- approval requirements
- types and level of fees and charges imposed on food retail and service businesses
- frequency, duration and basis of food safety audits and inspections.

Approval requirements

Formal approval requirements and charges associated with commencing and continuing a food business vary significantly from one jurisdiction to the next. As described in the Commission's recent *Cost of Business Registrations* report (PC 2008c), a retail food business must *currently*:

- notify its operation in New South Wales (at no cost if completed electronically or for a \$55 fee via hardcopy) and South Australia (without charge)
- register as a food business in the Northern Territory and the ACT
- register its premises as a 'permanent food premises' in Victoria¹²
- be licensed to carry on a food business in Queensland
- provide notification of its operation and register as a food business in Tasmania
- register the premises as an 'eating house' and be licensed to operate an 'eating house' in Western Australia.

Notification requirements do not empower regulators with the ability to disallow a food business application or to place conditions on the operation of that business. A South Australian council commented on the limits of notification systems:

Currently in South Australia food businesses are not required to be licensed/registered, which at times makes it difficult to ensure businesses are captured.

A New South Wales council commented on the benefits of licensing:

An annual licensing system would be easier to implement than charging administration and inspection fees. Many businesses see these fees as revenue raising. Also, many businesses do not pay and recovering the outstanding payments is not easy. I think many businesses would be more likely to accept licensing and see it as a way of keeping poor operators out of the industry. The fee would have to be paid at the time of application or renewal. Penalty notices could also be issued to businesses that fail to

¹² Amendments to the *Food Act 1984* (Vic) mean that, from 2010, certain low risk and community group activities will no longer need to be registered, but will only need to notify councils.

obtain or renew their licence, making recovery of costs easier. The introduction of a licensing system would also eliminate the need for food business notification.

Registration and/or licensing requirements can specify structural and fit-out requirements, operating procedures and training or educational qualifications for staff before approval is granted. Accordingly, aside from fees and charges, registration and licensing requirements impose a much higher compliance burden on food businesses in terms of the time taken to satisfy approval requirements and the conditions they place on the business operation.

Fees and charges

Variations in the types, level and basis of fees and charges imposed on food businesses were the source of greatest difference evident from the survey results both within and across jurisdictions (tables 7.13 and 7.14).

Table 7.13 Type of fee/charge for food businesses and/or premise
2008-09, per cent of survey responses using the charge

<i>Fee/charge</i>	<i>NZ</i>	<i>NSW</i>	<i>Vic</i>	<i>Qld</i>	<i>SA</i>	<i>WA</i>	<i>Tas</i>	<i>Total</i>
Licence	14	0	5	59	0	71	44	24
Registration	24	4	68	0	0	71	44	26
Administration	0	67	0	18	0	10	11	16
Notification	0	8	0	0	0	5	11	3
Inspection	43	79	9	24	48	19	44	39
Re-inspection	57	67	14	35	17	14	22	34

Source: Productivity Commission survey of local councils (2009, unpublished).

Table 7.14 Fee basis (all fee types)
2008-09, per cent of survey responses

<i>Basis</i>	<i>NZ</i>	<i>NSW^a</i>	<i>Vic</i>	<i>Qld</i>	<i>SA</i>	<i>WA</i>	<i>Tas</i>	<i>Total</i>
Type of business	76	33	82	41	22	57	22	50
Risk category	52	54	68	47	26	24	22	44
Number food handlers	0	13	55	0	83	0	22	26
Premise area	29	0	0	29	4	0	0	9
Seating capacity	24	0	0	0	4	10	0	6
Business turnover	5	0	9	0	4	5	11	4
Other	21	38	9	29	13	14	78	25

^a According to NSWFA (2008d), councils in NSW are able to charge (but may waive) an annual administration fee that depends on the number of full time equivalent food handlers at the premises.

Source: Productivity Commission survey of local councils (2009, unpublished).

While the use of licence and/or registration fees as an alternative to inspection-based charging is reflected in the survey responses this is, in part, the result of current legislative restrictions in certain jurisdictions. For example, survey respondents from Victoria and Western Australia advised they are currently unable to charge inspection fees. Notably, councils in both jurisdictions commented that registration charges included a component to cover at least part of the cost of inspections (which could explain the 9 per cent of Victorian councils shown in table 7.13 charging inspection fees). In that respect, where a fixed licence/registration fee is charged to all businesses and the frequency of inspections is risk-based (the case in Victoria¹³ and Western Australia), the direct cost burden on lower risk firms will be greater than that for medium and high risk firms.

In jurisdictions where inspection fees were potentially applicable, there was a degree of discretion exercised by councils in their application. Four out of five New South Wales councils charged for inspections while the figure in New Zealand, South Australia and Tasmania was closer to one in two. Underlying these broad indicators (and not shown in table 7.13), a number of councils *only* charged for initial inspections (a more common feature in South Australia with 30 per cent of councils so doing) while others *only* charged for follow-up inspections after a compliance breach was detected (a more common practice in Queensland and New Zealand involving 24 per cent and 19 per cent of respondents respectively). Although a fee regime based on detection of compliance breaches alone may be viewed by businesses as a form of fine (and hence motivate greater compliance), there was no evidence from the survey results that this reduced the incidence of food safety breaches (see below).

While the different approval requirements across jurisdictions has compliance implications for food businesses, these burdens are amplified by the sheer breadth of differences in fees and charges associated with those requirements. Such is the disparity in financial costs, the Commission's survey could not adequately capture the situation (with a number of councils attaching or referring to often lengthy documentary material in response to the survey question). That said, a sense of the extent of differences in this area is provided by responses to the basis on which fees were charged (table 7.14).¹⁴

¹³ Amendments to the *Food Act 1984* (Vic) mean that, from 2010, certain low risk and community group activities will no longer need to be registered, but will only need to notify councils. As a result, these businesses will not be required to pay a registration (or notification) fee.

¹⁴ The question was specifically asked in terms of inspection fees but most councils responded even where there was no inspection fee charged.

While business type and risk classification were the main influences on fees and charges in most jurisdictions, the number of food handlers featured prominently in South Australia and Victoria as did premise size in Queensland. Notably, 41 per cent of all respondents used multiple bases to set fees and charges with Victorian (77 per cent of respondents) and New Zealand (52 per cent of respondents) councils more likely to use multiple fee determinants than other jurisdictions.

By way of example, one Victorian council noted that most councils in the state charged fees based on risk (of which there were five different categories) and the number of full time equivalent employees (with establishments employing more than 5 employees paying additional fees) in line with provisions of the *Food Act 1984* (Vic).

A New Zealand council said it uses a ‘... fee structure that reflects the cost it actually takes to regulate potentially high risk premises...’ with the risk potential based on the following factors:

- type of activity carried out on the premises
- standard of hygiene and work place practices
- size of business
- time involved for staff visits
- frequency of visits.

Similarly, others from New Zealand noted the use of a performance-based rating system with the licence/registration fee determined by the inherent risk of the activity and the compliance record (number of food safety breaches) of the food business (table 7.15). One New Zealand council described the application of the grading scheme and the incentives it provided to business in the following way:

The grading scheme is an on-going incentive for businesses to comply. The grading certificates must be displayed at the restaurant door and are loaded on to our website in a searchable format. Media also run regular slots on the grading scheme. The grading scheme links directly to our fee structure, so an A grade licence costs less than an E grade licence.

Table 7.15 Food hygiene licence renewal fees (by risk rating^a) in a selected New Zealand council

2009-10, New Zealand dollars

<i>Inspection rating^b</i>	<i>Grade</i>		<i>Risk Rating 1</i>	<i>Risk Rating 2</i>	<i>Risk Rating 3</i>	<i>Risk Rating 4</i>
18–20	A	Excellent	120	144	168	192
14–17	B	Good	180	88	336	384
8–13	C	Adequate	240	432	672	786
<8	D	Unsatisfactory	360	576	1 008	1 536

^a Risk rating refers to the type of work being undertaken at the premises. ^b Inspection rating relates to the past performance of the premises.

Source: Selected New Zealand council website.

The survey responses revealed significant variability across regulators in the fees and charges imposed on food businesses (table 7.16). Aside from the Northern Territory (where there are no fees charged to food businesses), South Australia and the ACT had the lowest (and most uniform) fee structures for food businesses. There are no annual fees payable in South Australia (given it operates a notification system) and the maximum inspection and re-inspection charges are close to the lowest of all jurisdictions. In addition, inspection (and re-inspection) fees were identical in those South Australian councils indicating a charge for this activity.¹⁵ The ACT only charges a modest registration fee.

¹⁵ The South Australian *Food Regulations 2002* sets maximum inspection fees of \$80 for a business with not more than 20 food handlers and \$200 in any other case. GST is payable on those fees.

Table 7.16 Level of fees and charges for food businesses

2008-09, Australian dollars^a

<i>Fee/charge</i>	<i>NZ</i>	<i>NSW^b</i>	<i>Vic</i>	<i>Qld</i>	<i>SA</i>	<i>WA</i>	<i>Tas</i>	<i>NT</i>	<i>ACT</i>
Licence ^c	128– 1 280	na	0	0–1110	na	0–400	0–200	0	0
Registration ^c	128– 1 280	0–52	89–570	na	na	0–360	0–130	0	50–150
Admin.	41	29– 2 000	0	110–360	0	0–50	0–35	0	0
Notification	na	0	na	na	0	0–50	0–30	0	50 ^d
Inspection									
Low risk	0–98	35–250	0–80	0–317	0–88	0–212	0–100	0	0
Medium	0–98	50–250	0–80	0–350	0–88	0–420	0–196	0	0
High	0–98	50–320	0–80	0–450	0–88	0–635	0–294	0	0
Reinspection									
Low	0–122	50–195	0–185	0–271	0–88	0–100	0–80	0	0
Medium	0–122	50–195	0–185	0–271	0–88	0–100	0–80	0	0
High	0–122	50–195	0–185	0–271	0–88	0–100	0–80	0	0

na not applicable. ^a NZ dollars have been converted to Australian dollars using an exchange rate of \$1.23.

^b In NSW, the fee associated with improvement notices are proposed at \$330 (which also covers the cost of one re-inspection). Councils have the power to waive or reduce administration and improvement notice fees.

^c Dependant on risk/grade classification. ^d Related to transfer of business ownership.

Source: Productivity Commission survey of local councils (2009, unpublished); RBA (2009).

Queensland and Western Australia levied the highest inspection fees. Queensland also exhibited the greatest disparity in inspection and reinspection fees of any jurisdiction. Based on the survey responses, New Zealand food businesses faced the highest annual registration or licence fee (dependent on their compliance record) and the largest difference between low and high risk businesses — although the experience of individual businesses will depend on their location as local council fee structures are highly variable across New Zealand. One New Zealand council charged the highest risk business (based on its risk grading which incorporates past inspection performance) close to four times that levied on a business in the lowest risk category.

Fee variability was a particular concern raised by Coles in its submission which went on to suggest the adoption a national approach to fee setting:

In order to overcome the problem of different fees being charged for food business registration, inspection and auditing, Coles recommends a national risk based approach be adopted (i.e. the higher the food safety risk the higher the fee or level of regulatory surveillance). Risk assessments could be based on factors such as the size (and organisational support/processes), length of operation, history of compliance “etc”. (sub. 21, p. 3).

Importantly, there was no evidence from the survey results of a correlation between inspection fees and inspection frequency (a frequent proposition put to the Commission in consultations with food business interests). Equally however, a clear link between average inspection duration and inspection fees was also not apparent from the survey results (see below).

In addition to the fees and charges shown in table 7.16, there are a myriad of other one-off financial costs imposed on food businesses that also vary significantly across councils and across jurisdictions. These include pre-purchase inspection reports, improvement notice fees, registration transfer fees, plan approval fees for new premises and food sampling fees (for complying and/or non-complying samples) to name just a few.

Inspection frequency and duration

Business compliance burdens will also be affected by the frequency and duration of food safety inspection regimes (table 7.17). In line with the workload pressures described earlier, the most intense scrutiny of food businesses is apparent in Victoria, New Zealand and New South Wales with up to 50 per cent more inspections per premise than most other jurisdictions (the survey sample in Western Australia is such that the results for that state should be treated cautiously).

Surprisingly, the level of attention given to premise inspections in these jurisdictions is not strongly correlated with the more frequent detection of compliance breaches serious enough to warrant an on-site follow-up (the share of total inspections accounted for by re-inspections). More broadly, however, the results do not reveal a close link between inspection frequency and the relative food business risk profiles in each jurisdiction (figure 7.1).¹⁶ Inspection duration (and the associated compliance burden) also appears to vary considerably (though the small sample size makes statistical comparisons unreliable). Across all council respondents, an average inspection is around 50 minutes in duration.

¹⁶ The Commission understands that, as part of the implementation of the amended Food Act, Victorian Health will be providing local councils with guidance on how they can refine their risk-based approaches to enforcement in light of the amendments to the Act.

Table 7.17 Inspection frequency, duration and reason

2008-09, average of survey responses

	<i>NZ</i>	<i>NSW</i>	<i>Vic</i>	<i>Qld</i>	<i>SA</i>	<i>WA</i>	<i>Tas</i>	<i>NT</i>	<i>ACT</i>	Total
Inspections per premise ^a	1.5	1.4	1.6	1.1	1.1	1.9	1.2	1.0	0.8	1.3
Inspection duration (mins)	53	37	60	60	53	40	43	45	45	51
Re-inspection share of total inspections (%)	19	17	22	7	25	10	7	24	5	16
Ratio of complaint ^a inspections to total complaints (%)	81	98	71	66	74	71	99	32	100	78

^a Figure for NSW relates to all 152 NSW councils and is derived from information provided by NSW Food Authority (pers. comm., 18 November 2009).

Source: Productivity Commission survey of local councils, ACT Health and NT Health (2009, unpublished).

7.7 Transparency, accountability and coordination

There is evidence of considerable variability across jurisdictions in terms of informing food businesses about enforcement strategies and outcomes (even taking account of those regulators which noted the intention to introduce such transparency in the future). Such information can be both a proactive and cost-effective compliance tool as businesses are made aware in advance of the consequences of continued or serious non-compliance and the likelihood that combative measures will be applied in that event. As shown in tables 7.18 and 7.19, no jurisdiction excelled in this area, with the best local government performers showing around one in four councils publishing *both* their enforcement strategy and outcomes.

Table 7.18 Local government transparency and accountability

2008-09, per cent of responses

<i>Feature</i>	<i>NZ</i>	<i>NSW</i>	<i>Vic</i>	<i>Qld</i>	<i>SA</i>	<i>WA</i>	<i>Tas</i>	Total
Publish strategy	29	50	41	12	33	39	33	35
Publish outcomes	29	21	45	18	9	19	22	23
Publish both	24	21	27	6	9	19	22	18
Decisions appealable	67	71	73	82	78	76	78	74
Internal review	57	46	68	71	78	71	56	64
External review	38	42	36	24	61	57	67	45

Source: Productivity Commission survey of local councils (2009, unpublished).

Table 7.19 Central agency transparency and accountability

2008-09, availability of good governance practices

<i>Agency</i>	<i>Publish enforcement strategy</i>	<i>Publish enforcement outcomes</i>	<i>Appeal available</i>	<i>Small business assistance</i>	<i>English language assistance</i>	<i>Non-metropolitan assistance</i>	<i>Client feedback mechanisms</i>
NZFSA	✓	✓	✓ ^a	✓	✓	✗	✓
NSWFA	✓	✓	✓ ^b	✓	✓	✓ ^c	✓
Vic Health	✓	✗ ^d	nr	✗	✓	✗	✗
Qld Health	✓	✓	✓ ^b	✗	✗	✗	✗
SA Health	✗	✗ ^e	✓ ^b	✓	✓	✓	✗
WA Health	✓	✓	✓ ^b	✓	✗	✓	✓
Tas Health	✗	✗	✓ ^b	✓	✓	✓	✗
NT Health	✗	✓	✓ ^b	✓	✓ ^f	✓ ^f	✓
ACT Health	✗	✗	✓ ^b	✗	✗	✗	✓

nr no response. ^a External appeals only (courts or tribunals) were available for actions by NZFSA. ^b Both internal and external appeal mechanisms were available for actions by NSWFA, Qld Health, SA Health, Tas Health, WA Health and ACT Health. ^c NSWFA noted that it provided fee relief for drought affected areas as a means of non-metropolitan assistance. ^d Vic Health noted that it will be publishing enforcement outcomes in the future. ^e SA health noted that it began publishing enforcement outcomes from 1 July 2009. ^f NT Health offer culturally appropriate (free) training to remote communities.

Source: Productivity Commission survey of food safety regulators (2009, unpublished).

Central agency transparency indicators revealed the NZFSA, NSWFA, Western Australian Health and Northern Territory to be doing the best. Those agencies had the broadest suite of what could be described as good governance practices (including targeted assistance programs and client feedback mechanisms) leading to the lowest business compliance burdens.

Accountability indicators such as appeal processes were commonly available with three quarters of all council respondents and nearly all central agencies signalling that their enforcement decisions were appealable. The availability of internal review mechanisms (likely to be much less costly than external alternatives which could include court-based appeals) were most prevalent in Queensland and South Australian councils and in all central agencies (except the NZFSA).¹⁷

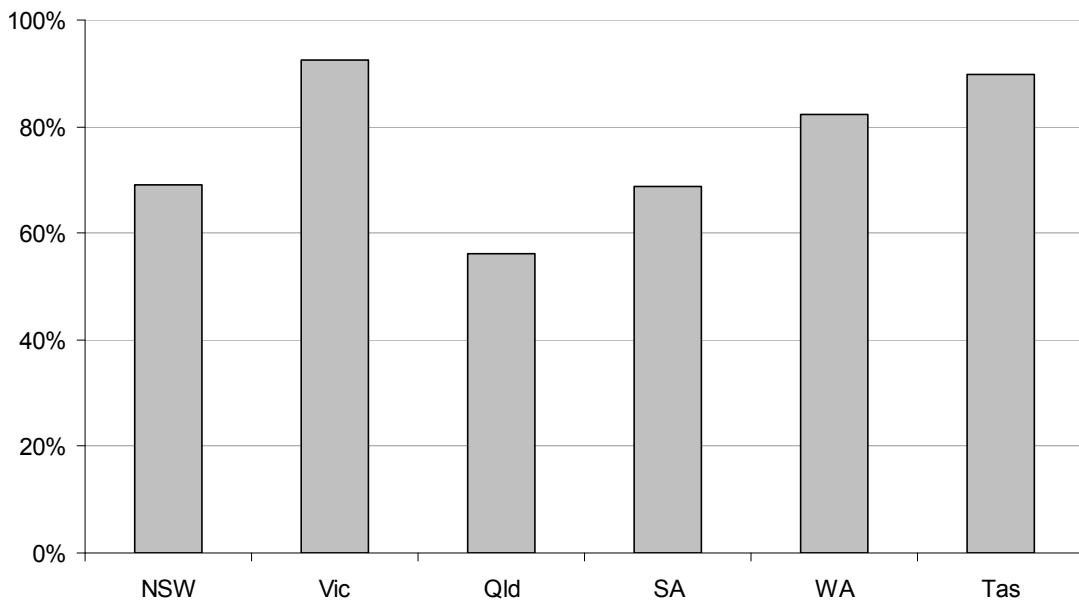
In a more anecdotal context, the Commission's assessment of a number of council websites during the course of this study also found considerable variability in the ease of access to general and specific information relevant to food businesses (including the level and basis on which different fees would be charged). In that light, this would appear to be an area where business compliance burdens (in

¹⁷ However, food businesses may view internal appeals as lacking the independence of external review mechanisms.

general and in terms of differences across jurisdictions) could be reduced in a cost-effective manner.

Indeed, in the conduct of the Commission's recent study into the *Cost of Business Registrations* (PC 2008c), a review of every Australian council website during 2007 found significant variations in the availability of any business information on food safety issues (figure 7.2).¹⁸ Victoria and Tasmania were the jurisdictions with the most councils providing such information — accordingly, food businesses in these jurisdictions arguably have better access to local information than those in other jurisdictions and so may face lower burdens when seeking information on their obligations under food safety regulation.

Figure 7.2 Availability of food safety issues online^a
Per cent of all councils (as at December 2007)



^a not applicable for New Zealand (as New Zealand was not covered in the study — PC (2008c)).

Data source: Productivity Commission estimates (2007, unpublished).

In addition to the consequences of non-uniform application of the same food laws, different interpretations of those laws can also lead to variations in business compliance burdens. As shown in tables 7.20 and 7.21, communication and coordination between councils and central agencies was a common theme emerging

¹⁸ Information available on websites ranged from registration/licensing/notification requirements (and other regulatory matters) to information on safe food handling and food safety training. A council website was deemed to contain food safety information if it contained any of these types of information.

from the survey responses. In particular, the resolution of uncertainties relating to food policy interpretation, EHO training and enforcement consistency were common issues of discussion nominated by local councils.

Table 7.20 Local government dialogue with state/national agency
2008-09, per cent of responses

<i>Issue</i>	<i>NZ</i>	<i>NSW</i>	<i>Vic</i>	<i>Qld</i>	<i>SA</i>	<i>WA</i>	<i>Tas</i>	Total
Policy interpretation	81	96	95	88	74	86	89	87
EHO training	76	92	64	65	61	86	56	73
Enforcement consistency	43	79	86	65	87	52	67	69
Fee setting	0	33	5	18	30	24	0	18
Other matters	43	29	5	35	17	57	22	30

Source: Productivity Commission survey of local councils (2009, unpublished).

The issue of consistency was also a common topic of discussion nominated by central food safety regulators (to facilitate greater enforcement consistency across councils in the same jurisdiction). Policy interpretation and regulatory gaps and overlaps were nominated by every agency (except NZFSA) as areas in which a dialogue with other regulators was conducted (table 7.21). However, despite these efforts there still appear to be differences in the way central agency regulators interpret and apply food regulation even with respect to the same food product.

Table 7.21 Central agency dialogue with other regulatory agencies
2008-09

<i>Agency</i>	<i>Regulatory overlap</i>	<i>Regulatory gaps</i>	<i>Enforcement consistency</i>	<i>Policy interpretation</i>	<i>Food recalls</i>	<i>Other</i>
NZFSA	x	x	✓	✓	✓	x
NSWFA	✓	✓	✓	✓	✓	x
Vic Health	✓	✓	✓	✓	✓	✓ ^a
Qld Health	✓	✓	✓	✓	✓	x
SA Health	✓	✓	✓	✓	✓	✓ ^b
WA Health	✓	✓	✓	✓	✓	x
Tas Health	✓	✓	✓	✓	✓	x
NT Health	✓	✓	✓	✓	✓	x
ACT Health	✓	✓	✓	✓	✓	x

^a Specific compliance matters. ^b Investigating incidents, implementing standards, interpretation consistency.

Source: Productivity Commission survey of food safety regulators (2009, unpublished).

The Nutricia case study (box 7.1) illustrates how regulators can vary in their application of the ANZFS Code. Some of the difficulties faced by regulators in applying the ANZFS Code arise due to the manner in which it was drafted. Recognising this, FSANZ has initiated a full review of the ANZFS Code by the Commonwealth Office of Legislative Drafting and Publishing (New South Wales

Government, pers. comm., 21 October 2009). The difficulty in interpreting the ANZFS Code, the variability in how it is applied by regulators and the prospect of differential enforcement actions by regulators creates uncertainty for business and may stifle product innovation and the exploration of business opportunities.

The regulatory response to the levels of cyanogenic glycoside¹⁹ observed in cassava chips in early 2008 provides another example of differing regulatory responses to a common issue. The issue was brought to the public's attention following a warning on consuming cassava chips by the NSWFA (2008f) and a subsequent voluntary food recall by the producers. The warning followed tests conducted by the NSWFA on imported chips and Queensland produced chips — in the first instance, testing of these products would be the responsibility of AQIS and Queensland Health, respectively. The NSWFA requested FSANZ complete an urgent risk assessment on cassava chips which resulted in a standard for the maximum level of cyanogenic glycoside in cassava chips being established.

The jurisdictions differed in their responses to FSANZ's risk assessment and the resultant proposed food standard:

- New Zealand supported the proposal (although for a broader range of cassava products than chips)
- Victoria disputed the need for the standard proposed by FSANZ and considered it would be difficult to enforce or comply with the proposed standard in both practical and resource terms
- New South Wales supported the proposal and saw merit in extending to coverage to a broader range of cassava products
- Queensland supported the proposal in principle, however considered further analysis of certain aspects of the proposal was warranted
- South Australia supported the proposal, although it indicated the concentration limits within the standard may need to be amended to levels with which business could comply
- Western Australia supported the proposal, although for a broader range of cassava products than chips. In contrast to Victoria, Western Australia noted the enforcement costs were expected to be nominal (FSANZ 2008n).

¹⁹ A chemical that can trigger the production of cyanide in the gut.

Box 7.1 Applying the Australia New Zealand Food Standards Code — Nutricia case study

In early 2007, Nutricia Australia Pty Limited ('Nutricia') introduced Karicare Gold Plus infant formula and Karicare Gold Plus follow-on formula (the Karicare products) into the Australian and New Zealand markets. The Karicare products contained fructo-oligosaccharides carbohydrates (FOS) and gluco-oligosaccharides carbohydrates (GOS), in part, to support the digestive system of infants/toddlers.

At the time of the Karicare products' release, there were no explicit provisions within the ANZFS Code for the inclusion (or exclusion) of FOS and GOS in relation to infant and toddler formulas sold within Australia and New Zealand.

Cooperation over the interpretation of the ANZFS Code

The Commission understands that FSANZ, NZFSA and NSWFA consulted with each other (and shared detailed legal advice prepared by FSANZ) regarding the status of the Karicare products. Both NZFSA and NSWFA were in agreement that FOS and GOS were nutritive substances. However, their different responses to the introduction of the Karicare products show how they can differ in their application of the ANZFS Code, even where there is agreement on technical matters of interpretation.

Differing application of the ANZFS Code

Between the Australian and New Zealand food safety regulators and Nutricia, the ANZFS Code was applied to the Karicare products in at least three different ways:

- the NSWFA considered FOS and GOS to be nutritive substances and saw their inclusion in food without prior regulatory approval as a breach of Standard 1.1.1 (Preliminary Provisions - Application, Interpretation and General Prohibitions). Separately, the NSWFA also considered the health claims made on the labels of the Karicare products breached the *Food Act 2003*. Accordingly, the NSWFA began legal action against Nutricia
- the NZFSA, like the NSWFA, considered FOS and GOS to be nutritive substances. However, unlike the NSWFA, Nutricia considered the NZFSA's primary concern was that, without express regulatory approval for the inclusion of FOS and GOS in infant formulas, there was a potential breach of Standard 2.9.1 (Infant Formula Products)
- the food safety regulators of Victoria, Queensland, South Australia, Western Australia, Tasmania, the Northern Territory and ACT did not take any action in respect to the Karicare products — suggesting they were either applying the 'home jurisdiction' policy (where the primary responsibility for any regulatory response lies with the jurisdiction where the supplier's registered head office is located) and/or that, from their perspective, the potential breach of the ANZFS Code (or their Food Acts) did not warrant regulatory action such as a recall. According to Nutricia, they considered the products complied with the ANZFS Code.

(continued next page)

Box 7.1 (continued)

- In 2006, Nutricia obtained a published view from FSANZ that the GOS in the Karicare products was not considered a Novel Food under Standard 1.5.1 and, as such, no mandatory pre-market approval was required under that standard.

In August 2007, as a result of the differing responses of the NZFSA and NSWFA, Nutricia voluntarily withdrew certain products from sale in New Zealand (the 'Karicare products' only) and New South Wales (all products containing FOS and GOS) — replacing them with substitute products that did not contain FOS or GOS. However, products containing FOS and GOS remained available in all other jurisdictions. The products containing FOS and GOS were subsequently returned to sale in New Zealand and New South Wales following amendments to the ANZFS Code in January 2009.

Sources: FSANZ (2008i); (FSANZ 2008k); New South Wales Government, pers. comm., 21 October 2009; Nutricia, pers. comm., 1 September 2009; South Australian Government pers. comm., 20 October 2009; *Nutricia Australia Pty Ltd v NSW Food Authority [2007] NSWSC 861*; *Christine Tumney (NSW Food Authority) v Nutricia Australia Pty Ltd*; *Christine Tumney (NSW Food Authority) v Michael Speare Hocken Sharpe*; *Christine Tumney (NSW Food Authority Australia Pty Ltd) v Toni Lee Brendish [2008] NSWSC 1382*.

Thirdly, a recent outbreak of Hepatitis A thought to involve semi-dried tomatoes was cited by Woolworths as an example of inadequate coordination in the area of outbreak investigations:

Whilst investigations were initiated by SA Health, all jurisdictions along the East Coast of Australia required Woolworths to provide them with essentially the same information. It would have been more efficient if the information could be provided once to a central Commonwealth authority (for example, Department of Health and Ageing). This example also highlighted that there was limited coordination between jurisdictions which limited the effectiveness of the response. (sub. 10, p. 7)

Regulatory duplication

The awareness of regulatory responsibilities was sometimes unclear, increasing the potential for regulatory overlap and duplication in terms of, for example, food business audits and inspections (see chapter 8). Coles highlighted the role of co-existing food regulation in some States that led to conflicts and/or duplication:

In [Queensland] for example, [Queensland] Health and Safe Food [Production Queensland] require our food business to complete two registrations and two annual inspections per store, which is costly and an administrative burden on our business. We understand the reason for this is because Safe Food [Production Queensland] cannot issue a certificate of occupancy (only QLD Health), but they require us to licence premise prior to opening. (sub. 21, p. 3)

Woolworths made a more general comment:

We are concerned that the lack of legislative consistency and administrative co-ordination between the State and Local Government jurisdictions continues to impose significant and unnecessary burdens on industry with little or no consumer benefit.

Information from a leading Australian retailer (which also has operations in New Zealand) provides another perspective on the issue of regulatory duplication and the associated costs. This information is summarised in table 7.22. Some of the key points to emerge from this exercise include:

- in 2008-09, Queensland had the most separate regulators potentially involved in compliance visits to retailers for inspections, audits, complaint investigations, sampling and/or labelling reviews, with local councils, Queensland Health and Safe Food Production Queensland (SFPQ) all entering stores — some stores (‘store 2’ and ‘store 3’) received at least one visit from each regulator in the 12 months to 30 June 2009
 - further, Queensland was also the jurisdiction with the most overlap in store aspects covered by different regulators — for example, Queensland Health and SFPQ both conducted separate visits to store 2 in relation to the meat department,²⁰ while all three regulators were said to have conducted a visit to store 3 that included the delicatessen (see note ‘d’ to table 7.22)²¹
- all Victorian stores were subject to at least one council inspection and a third party audit.²² Similarly, the two New South Wales stores were both subject to an audit/inspection by the NSWFA as well as the relevant local council
- Victorian and Western Australian councils generally inspected/audited the entire store, whereas Queensland and New South Wales councils tended to make multiple visits, including visits to target specific areas of the store

²⁰ SFPQ is responsible for retailer meat departments while Queensland Health undertakes sampling activities in relation to those same departments (for example, to determine whether only permitted additives have been used in mince meat). SFPQ noted that sampling activities for all businesses are not routinely scheduled and are part of the overall state surveillance system which is coordinated by SFPQ and Queensland Health. Together the agencies determine the products to be sampled based on national priorities (determined by the Coordinated Food Surveillance System through the Implementation Sub-Committee), state priorities and the outcomes of SFPQ’s evaluations of food safety schemes.

²¹ While no data on South Australian stores was provided, the Commission understands through its consultation with South Australian stakeholders and the leading Australian retailer that retail butchers in South Australia may be inspected/audited by both local councils and the Department of Primary Industries and Resources (PIRSA) — also see figure 9.2 (chapter 9).

²² The Victorian government is amending the *Food Act 1984* to remove the requirement for an annual council inspection for those businesses operating to quality assurance programs audited by appropriate third parties and for low risk businesses (Department of Treasury and Finance (Victoria) 2009).

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- Western Australia was the only jurisdiction where a store was not inspected or audited in respect to food safety matters for the 2008-09 period.

The data in table 7.22 also broadly supports the average inspection times reported by councils (table 7.17), with most council inspections taking around 60 minutes to complete (although the inspections may be as short as 10 minutes or as long as 120 minutes, depending on the purpose). In relation to the fees charged by councils for inspections (table 7.16), the data in table 7.22 suggests that it is mainly New South Wales councils that charge inspection fees in practice.

The data suggests the cost of the third party auditors incurred by stores in New Zealand and Victoria are higher, on average, than the combined costs of regulatory inspections in the other jurisdictions. However, as discussed in chapter 6 (section 6.2), some larger businesses see these costs as being offset by benefits such as the budget certainty of a fixed cost per store/outlet and greater consistency in the audit results and comparability of results across stores/outlets.

Table 7.22 Regulatory duplication and overlap: compliance visits

1 July 2008 to 30 June 2009

<i>Agency/ auditor</i>		<i>Aspect of store</i>	<i>Number of visits</i>	<i>Cumulative fees</i>	<i>Cumulative time taken</i>
				<i>\$Australia a</i>	<i>minutes</i>
New Zealand					
Store 1	3 rd party	Entire store	1	894	300
New South Wales					
Store 1	NSWFA ^a	Meat	2	392	40
	Local council	Fresh food	1	150	15
	Local council	Deli	1 (following complaint)	nc	15
Store 2	NSWFA ^a	Meat	1	nc	45
	Local council	Perishables	1	nc	15
	Local council	Fresh food	1	300	120
Victoria					
Store 1	3 rd party	Entire store	1	627	180
	Local council	Entire store	1	nc	60
Store 2	3 rd party	Entire store	1	836	240
	Local council	Entire store	1	nc	60
Store 3	3 rd party	Entire store	1	522	150
	Local council	Entire store	1	nc	60
Store 4	3 rd party	Entire store	1	836	240
	Local council	Entire store	1	nc	np
	Local council	Meat	1	nc	60
	Local council	Long life products	1	nc	10
Store 5	3 rd party	Entire store	1	836	240
	Local council	Entire store	2	nc	80
Store 6	3 rd party	Entire store	1	731	210
	Local council	Entire store	1	nc	120
Store 7	3 rd party	Entire store	1	836	240
	Local council	Entire store	1	nc	15
Store 8	3 rd party	Entire store	1	np	210
	Local council	Entire store	2 (including 1 following complaint)	nc	120
	Local council	Fresh food	2 (including follow up on audit finding)	nc	90
Store 9	3 rd party	Entire store	1	np	360
	Local council	Entire store	1	nc	60
	Local council	Deli	1 (sampling)	nc	30
Store 10	3 rd party	Entire store	2	np	450
	Local council	Deli	1 (sampling)	nc	np
Store 11	3 rd party	Entire store	2	np	195
	Local council	Entire store	1	nc	150
	Local council	Deli	1 (sampling)	nc	np

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Table 7.22 (continued)

Agency/ auditor		Aspect of store	Number of visits	Cumulative fees	Cumulative time taken
				Australian dollars ^a	minutes
Queensland					
Store 1	SFPQ ^c	Meat and deli ^d	1	495	90
	Local council	Deli	1	nc	25
	Local council	Seafood	1	nc	20
Store 2	SFPQ ^c	Meat and deli ^d	1	371	40
	Qld Health	Meat	1 (following complaint)	nc	20
	Qld Health	Seafood	1 ^e	nc	30
	Local council	Fresh food	1	nc	70
	Local council	Entire store	1	nc	50
Store 3	Qld Health	Perishables, deli, meat	2 ^e	nc	np
	SFPQ ^c	Meat and deli ^d	1	371	50
	Local council	Seafood, deli, bakery	1	nc	60
	Local council	Entire store	1	nc	60
Store 4	SFPQ ^c	Entire store ^d	1	309	45
	Local council	Entire store	2	nc	120
Store 5	SFPQ ^c	Meat and deli ^d	1	433	75
	Local council	Deli, seafood and baker	1 (following complaint)	nc	60
	Local council	Entire store	1	nc	60
Store 6	SFPQ ^c	Deli ^d	2 (including 1 following non-conformance)	619	np
	Local council	Perishables	1 (following complaint)	nc	60
	Local council	Long life products	1 (following complaint)	nc	60
	Local council	Entire store	1	nc	60
Store 7	SFPQ ^c	Entire store ^d	1	371	60
Western Australia					
Store 1	No inspections or audits				
Store 2	Local council	Entire store	1	nc	30
Store 3	Local council	Entire store	1	nc	30
Store 4	Local council	Entire store	1	nc	30
Tasmania					
Store 1	Local council	Entire store	2 (including 1 follow-up inspection)	nc	180

nc no charge. np not provided. ^a Estimates for New Zealand are based on an average \$A/\$NZ exchange rate of 1.23. ^b NSW Food Authority. ^c Safe Food Production Queensland. ^d SFPQ noted that they do not undertake compliance visits in relation to delicatessens or 'entire stores'. The entries for these visits may reflect factors such as store layout (for example, the meat department and delicatessen may be located in close proximity and considered by the store to be one unit) or differing interpretations on the part of regulators/respondents regarding, for example, the nature of a 'delicatessen'. ^e The nature/purpose of visit was not disclosed in the information provided. Queensland Health's compliance visits usually relate to food sampling, labelling and complaints.

Source: Information provided by a leading Australian retailer (2009, unpublished).

Once an inspection or audit has been completed, businesses generally prefer to know the outcome of that inspection/audit as soon as possible. The sooner a business knows the outcome of the inspection/audit, the sooner it can address any issues raised. The period between completion of an inspection/audit and receipt of the outcome can be a time of uncertainty for a business. For the majority of the inspections/audits outlined in table 7.22, a report detailing the outcome of the visit was provided on the same day (see table 7.23). However, some councils varied in the time taken to deliver the report and, in some instances, no report was provided.

Table 7.23 Time taken by local councils to provide inspection report

Number of inspections

	NZ	NSW	Vic ^a	Qld	SA	WA	Tas	NT	ACT
No report		1	8	3					
Same day		3	6	8		3	1		
3 days or less			1						
3-7 days			1	2					
More than 7 days									

^a Excluding 'sampling visits'.

Source: Information provided by a leading Australian retailer (2009, unpublished).

Measures to improve co-ordination

Against that background, most central agencies are unable to collect, manage and analyse data related to the enforcement activities of local government which would allow better targeting of resources to public health risks and better coordination of enforcement (with associated implications for regulatory burdens). The power to mandatorily obtain such information is currently only available in New South Wales as part of the Food Regulation Partnership agreement between the NSWFA and local councils in that state and in Queensland.²³ Councils in New South Wales are required to report semi-annually on their enforcement activities and this information is publicly available on the NSWFA's website.

Commenting on that agreement, the NSWFA said:

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

²³ Queensland Health noted that Section 28 of the *Food Act 2006* enables the State to require a report from local government on the administration and enforcement of the Act. Queensland is currently finalising the framework for reporting, with the first report expected to be completed by February 2010.

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

In addition, the Authority has set up a Local Government Unit, specifically tasked with assisting local councils and promoting consistency, ultimately benefiting food businesses dealing with multiple councils in the state. The Unit has also developed guidelines for councils in relation to its food regulation activities and pro forma documents and templates have been drafted. (sub. 4, pp. 7–8)

Recent amendments to Victoria's *Food Act 1984* include new requirements for councils to report data about the administration of the Act to the Department of Health from 1 July 2010. The intent of these changes is:

... to contribute to greater knowledge about the safe handling of food, including major problem areas, to inform future policy and be integrated into education programs. Better information will also mean the department and councils will be able to focus enforcement efforts on areas where improvements are most needed. (DHS 2009c)

Some respondents to the Commission's questionnaire commented that the lack of access to such information was a high level constraint on their ability to enforce food safety regulation. The South Australian Department of Health (South Australian Health) said in this regard:

SA Health does not have the ability to collect, manage and analyse data from 68 councils. Such data would enable SA Health to:

- monitor whether enforcement is effective and consistent
- identify emerging and priority issues and
- plan and target interventions accordingly.

South Australian Health went on to note that such informational needs would be the area where additional resources would be deployed if they were to be made available. They commented that:

... this would enable SA Health increase proactive preventative measures by:

1. better targeting of resources based on identification of trends/issues and risk
2. targeting of training and education for businesses and local government inspectors.

Such initiatives would likely reduce the compliance burden on lower risk food businesses outside New South Wales (and in the near future Victoria) and better align business compliance costs with the cost of regulation.²⁴

²⁴ Food business education, extension and research were other common areas nominated by regulators for the allocation of additional resources.