



**NSW Food Authority
Submission**

**Productivity Commission Review of Regulator Engagement with
Small Business**

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Background

Need for regulation

In the absence of any intervention, the health and safety of 7.27 million NSW food consumers (and consumers of NSW food products in other jurisdictions) can be put at an unacceptable level of risk by their own actions and the behavior of food industry participants.

The cost to Australia of problems due to food contaminated with harmful bacteria and viruses is estimated to be \$1.25 billion per year. The impact on NSW and its public health system is roughly a third of this. Problems include:

- 5.4 million cases of gastroenteritis,
- 6,000 non-gastrointestinal illnesses (e.g. listeriosis), and
- 42,000 episodes of long-term health effects (e.g. reactive arthritis).

Food businesses have significant opportunities to cause detriment, through lack of understanding about food safety practices or by adopting practices which shift the true costs of poor food safety onto consumers, other businesses and the broader community. There are also commercial incentives to withhold information or misinform consumers about issues relating to the origin or production of food as well as its properties.

A major benefit of food regulation is the maintenance of consumer confidence. The commercial consequences of a loss in consumer confidence can be catastrophic for the related industries. These impacts are not limited to the food industry and consumers as flow-on effects impact other industries through loss of productivity and diversion of resources.

National Framework

The NSW Food Authority's (The Authority's) regulatory regime reflects the national food agreement signed by the Commonwealth and all Australian States and Territories and New Zealand in November 2000 committing the parties to a co-operative bi-national system of food regulation.

The agreement commits jurisdictions to implement model legislative food regulation provisions requiring compliance with the Australian New Zealand Food Standards Code (the Code). Model legislative provisions are set out in Annex A which contains core provisions that all jurisdictions must implement and Annex B which contains administrative provisions that jurisdictions may implement.

The Agreement provides for development and variation of standards contained in the Code through a process administered by Food Standards Australia New Zealand (FSANZ) and overseen by the Legislative and Governance Forum on Food Regulation (FoFR). The FoFR includes Ministerial representation from all jurisdictions. In NSW the lead Minister is the Minister for Primary Industries.

The NSW Government has implemented the Agreement through the *Food Act 2003* (the Act) and the *Food Regulation 2010* (the Regulation) which are administered by the Authority. The Authority's role is supported by local Councils, which have historically been responsible for ensuring that the retail food sector complies with the Code.

Regulatory engagement with NSW food businesses and the community

Engagement

The Authority is responsible for implementing NSW food legislation and it does this by engaging with food businesses directly in respect of licensed food businesses (approximately 14,700) and indirectly via a cooperative partnership with Councils in respect of retail food businesses (approximately 35,000). In both cases the Authority has implemented mechanisms to ensure active and ongoing consultation with the regulated businesses. Food safety schemes that impose licensing requirements include formal industry consultative committees to ensure industry engagement. The Authority also has a formal mechanism for engaging with councils and retail businesses, which is explained below. The Authority also provides information and engages with business, local government and the community via its website, social media and call centre.

Importantly, while the Authority's diligence in exercising its regulatory functions sometimes puts it at odds with some businesses or sectoral interests, it is also well respected for the way it consults in good faith with industry, the community and local government, and acts on this consultation.

This responsiveness is reflected in its handling of legacy arrangements inherited from predecessor commodity-based primary production regulators (applying to licensed food businesses). These legacy arrangements contained inconsistencies in regulatory design, licence fees and capacity to equitably share the cost of food regulation across the food industry. The Authority has subsequently reformed and replaced these arrangements with a risk based outcome oriented approach consistent with the national framework and underpinned by a new fee structure that is transparent, practical, consistent, meets equity and industry structure considerations and does not create barriers to entry for new participants. More recent examples of the Authority's commitment to engage with industry include design and implementation of food safety supervisor requirements for retail food businesses, energy labelling requirements for fast foods and certain supermarket lines, and implementation of new national requirements for egg and poultry food safety schemes.

Direct regulation (Licensed food businesses)

Food safety needs to be maintained through the entire food chain to minimise foodborne illness impacts on the NSW community. The view of the Authority is that regulatory arrangements to achieve this need to be outcome based and tailored to cover risks relevant to industry sectors and individual businesses. For businesses licensed and overseen directly by the Authority, food safety programs reflect the type of food, method of production and measures in place to address the risks involved. The risks and complexity of measures to address them, and the regulatory arrangements to ensure compliance, will vary according to the type of business and factors including but not limited to the size of the business.

Note that the regulatory regime to ensure food businesses comply with food safety requirements also provides a mechanism for each food business to address one of their most significant business risks i.e. reputational damage arising from an outbreak of food borne illness.

These arrangements are reflected in the Regulation and the funding arrangements are explained in the next section. In summary, the Authority utilizes both reactive and proactive strategies to manage food safety risk. Reactive strategies include complaint investigation and investigation of outbreaks of foodborne illness. Proactive strategies include publishing information; targeted enforcement projects; and, licensing food businesses that produce/supply higher risk products.

Most licensed food businesses are required to develop and implement a food safety program and ensure that that program is audited by the Authority or an auditor approved by the Authority. The use of food safety programs in this way is based on the widely recognised principle that food safety is best ensured through the identification and control of hazards along the supply chain; from primary production to manufacture/processing and finally supply to the consumer. This is described in the Hazard Analysis and Critical Control Point (HACCP) system adopted by the joint WHO/FAO Codex Alimentarius Commission. Food safety programs are the preferred mechanism for addressing food safety risk over simply relying on end product standards alone.¹

Standard 3.2.1 of the Australia New Zealand Food Standards Code (Food Standards Code)² enables States and Territories to require food businesses to implement a food safety program based upon the HACCP concepts. These food safety programs are implemented and reviewed by the food business, and are subject to periodic audit by a suitably qualified food safety auditor. The regulatory process is generally co-operative.

In NSW licence conditions are outlined in food safety schemes. These schemes are tailored to address the risks that arise in particular industries – Dairy; Meat; Plant Products; Seafood; Vulnerable persons; and Egg. In most cases the schemes cover the supply of product from paddock to plate.

In addition to setting these minimum operational requirements for high risk food businesses, funds generated through the licensing of food businesses secures the funding needed to:

- administer national Standards 3.3.1, 4.2.1, 4.2.2, 4.2.3 and 4.2.4. Significant in this regard is conducting an audit verification program to ensure the consistency and integrity of regulatory audits provided by commercial food safety auditors. The Authority also undertakes general administrative tasks including maintaining a database and reviewing audit reports prepared by commercial auditors.
- provide business support services including toll-free helpline, industry focused website pages, quarterly newsletter for licensees (Foodwise), guidance material, food safety program templates, workshops, road shows and scientific/technical advice at the request of industry.

Section 105 of the Food Act 2003 requires the Authority to consult with each industry on the operation of any food safety scheme or proposed amendment of the scheme for that

¹ See: The Allen Group & Australia. Dept. of Health and Ageing. 2002, Food safety management systems : costs, benefits and alternatives : final report to the Commonwealth Department of Health and Ageing / The Allen Consulting Group Dept. of Health and Ageing, [Canberra] : <http://www.health.gov.au/pubhlth/strateg/foodpolicy/pdf/alternatives.pdf>

² The Food Standards Code is defined in the *Food Standards Australia New Zealand Act 1991* CTH

industry. The most efficient and effective way to meet this requirement is to establish a consultative or advisory committee for each food safety scheme.

Membership of these committees is largely specified in the Food Regulation 2010 and usually comprises industry representatives from peak industry associations, employees and consumers, as well as representatives from the Authority and the Primary Industries Department.

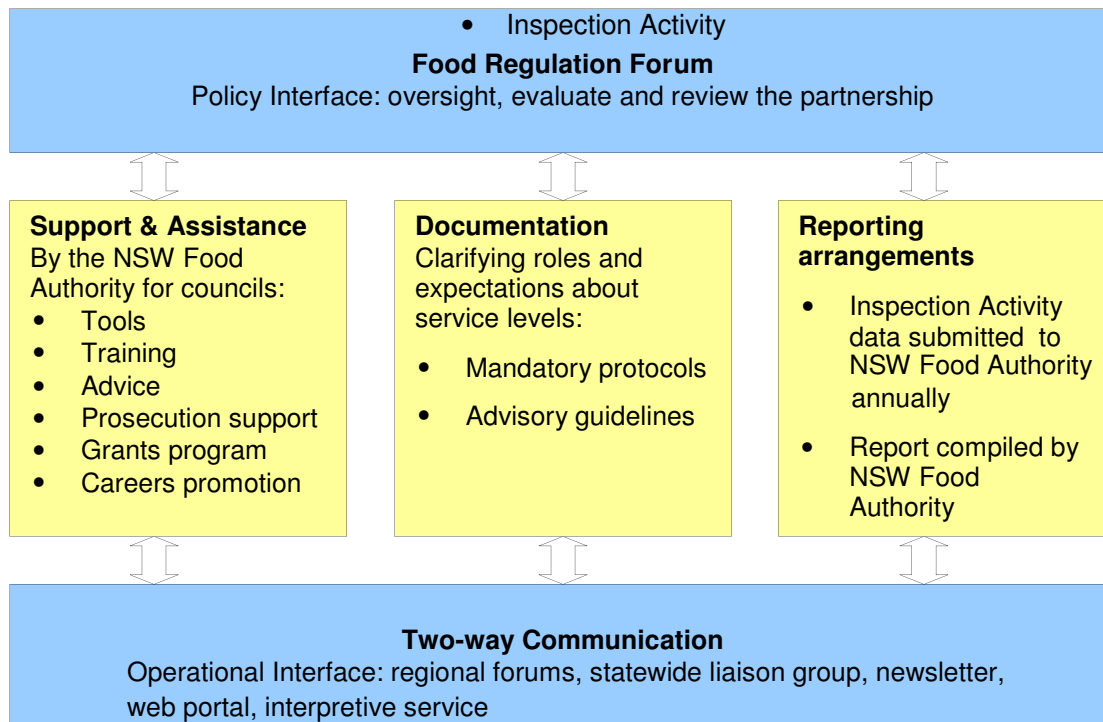
Cooperative regulation with Councils (indirect regulation)

Retail food businesses are not licenced but are required to provide notification of their details. Businesses can notify councils directly or can notify the Authority online and the notification is then forwarded to the appropriate council.

More than one-third of reported foodborne illness outbreaks (OzFoodNet 2007) involve food prepared in retail food settings. These are regulated by Councils, albeit with historic inconsistencies in engagement between local Councils and the retail food sector in terms of compliance inspections, enforcement action, recording, reporting, and cost recovery.

To address these historic inconsistencies the Authority consulted with local councils and retail food stakeholders to establish a formal Food Regulation Partnership (FRP) guided by a statutory consultation mechanism known as Food Regulation Forum (the Forum) comprising key local government stakeholders including the Local Government Association (NSW), Shires Association (NSW), Environmental Health Australia, Local Government Managers Australia, The Development and Environmental Professionals' Association and NSW Small Business Commissioner. The Forum is also informed by a Retail and Food Service Industry Advisory Group comprising representatives from key retailers and sectoral interests.

The FRP establishes clear roles for the Authority and councils and a mechanism for councils to cover their regulatory costs. Its operation is summarised in the following figure.



The Authority has reviewed the first four years of FRP operation and this is presented in three reports available on the Authority's website.³ The evaluation found that the FRP is working as intended to improve the regulation of the NSW retail food sector and is well regarded by both councils and industry.

Another point worth making in relation to cooperative regulation with councils is the distinction between regulatory requirements imposed on retail food businesses in NSW and those in some other jurisdictions. In addition to enforcing compliance with requirements in the Food Standards Code, some states require retail food businesses to document a food safety plan (FSP) against which that business is required to operate and be audited. This requirement does not exist in NSW. Instead, NSW ensures that each retail food business has the capacity to operate safely by requiring each business to have one trained food safety supervisor (FSS) for each premise it operates. The training involves two nationally accredited units of competency and is usually delivered in one day. Arrangements to deliver the training through Registered Training Organisations are overseen by the Authority whereas compliance with FSS requirements is overseen by councils.

Addressing food safety through capacity building is less burdensome than requiring adherence to a documented FSP. This issue highlights an example where industry (Restaurant & Catering NSW) supports FSS as a lower cost alternative to FSP requirements.

³ <http://www.foodauthority.nsw.gov.au/science/evaluating-what-we-do/food-regulation-partnership/>

Escalating enforcement model

The implementation Sub-Committee of the Food Regulation Standing Committee has developed a national strategy for consistent implementation of food regulation in Australia.⁴ Consistent with this strategy, the Authority has developed an enforcement policy to be followed by its staff and as a guide for council staff involved in food regulation activities.⁵

The strategy is based on the following principles:

- A graduated and proportionate approach
- Authorised by law
- Impartial and procedurally fair
- Accountable and transparent
- Promotes consistent enforcement response between food regulators
- In the public interest
- Allows for application of multiple enforcement tools under appropriate circumstances

Issues relating to or including consideration of businesses size

Relationship between size, regulatory design and fee structure

Current arrangements to fund the NSW food regulatory regime are based on the principles articulated in the SafeFood Kerin Funding Review (Kerin 2001) which was established to examine appropriate arrangements to fund SafeFood's operations and related issues⁶.

This Review sought to identify the key activities required to deliver statutory functions in relation to food regulation along with options and resources required to do this. It also determined the principles by which those activities should be funded and options for applying those principles to provide a secure and stable revenue base.

The Authority's regulatory charges are benchmarked in line with the market and were set following consultation with industry (as stipulated in the Kerin Funding Review). These funds are also used to regulate and to educate food businesses. The amount of these fees are adjusted annually in line with CPI.

The Kerin review recommended that SafeFood funding principles should range beyond strictly economic and take into account equity, practicality, structure of the industries being regulated, and consistency with funding of regulatory arrangements in non-food areas. Above all else, no funding principle should imperil SafeFood's policy objectives or scientific integrity. The review also recommended the basis for determining respective government and industry contributions to SafeFood funding.

These principles and the additional principles of transparency and contestability were adopted as the criteria for determining the most appropriate method of cost recovery:

4

[http://www.health.gov.au/internet/main/publishing.nsf/Content/189486F2B8246B42CA257896000F009/\\$File/isc-workplan.pdf](http://www.health.gov.au/internet/main/publishing.nsf/Content/189486F2B8246B42CA257896000F009/$File/isc-workplan.pdf)

5 http://www.foodauthority.nsw.gov.au/Documents/industry_pdf/compliance-enforcement-policy.pdf

6 http://www.foodauthority.nsw.gov.au/Documents/corporate_pdf/Kerin-Final-Report-Funding.pdf

- Equity - the same fees rationale applies to all NSW Food Authority regulated industries
- Practicality - the scheme is both socially and economically feasible to implement
- Industry structure - the production capacity, type of activity and size are considered
- Transparency - the rationale is clear and explicitly linked to services received
- Contestability - the fees do not undercut new entrants or prevent competition

In developing its approach to bringing consistency in the fees and charges placed on food industries it regulates, the Authority reviewed the policy approaches set out in publications such as the NSW Treasury *Guidelines for Pricing of User Charges* and the OECD *Best Practice Guidelines for User Charging for Government Services*.

The fee structure under the resulting scheme differentiates food businesses based on business size as this influences the application of the preceding principles but the fee structure and other aspects of regulatory scheme design do not rely on an arbitrary definition of small business.

Under most regulatory regimes operated by the Authority, the annual fee for a business comprising one premise with 0-5 food handlers is \$414, between 6 and 50 food handlers is \$851, and 51 or more food handlers is \$3,727.

This fee scale is also prescribed as the maximum fee that each Council may set as an annual administration charge for retail food businesses.

An additional consideration in relation to the fee structure for businesses covered by the Vulnerable Persons Food Safety Scheme⁷ is that the sale of food is not their core business and many are small, not-for-profit operations (e.g. meals-on-wheels). Under this scheme the annual fee for a business comprising one premise with 0-3 food handlers is \$259, between 3 and 10 (inclusive) food handlers is \$333, between 10 and 30 (inclusive) food handlers is \$615, between 30 and 50 (inclusive) food handlers is \$892, and more than 50 food handlers is \$1,173.

As indicated above, the design and fee structure for arrangements to regulate food safety in NSW differentiate food businesses based on business size as size influences the application of the principles used to design these arrangements. Differences in regulatory considerations for small and large food businesses include both risk and the scale of potential consequences if the risk eventuates. However, the Authority does not rely on an arbitrary definition of small business.

The Authority does not need or rely on a consistent definition of small business. A case in point is the additional consideration exercised in relation to the Vulnerable Persons Food Safety Scheme which highlights the benefit of being able to consider social and economic practicality in addition to factors relating to industry and scale. Other examples where factors specific to particular industries have been taken into account when designing regulatory schemes include exempting small egg producers (<20 dozen eggs per week) from licensing

⁷ <http://www.foodauthority.nsw.gov.au/industry/industry-sector-requirements/food-service-to-vulnerable-persons/>

requirements under the Egg Food Safety Scheme⁸ and exempting small poultry producers (<100 birds at one time) from poultry licensing requirements under the Meat Food Safety Scheme⁹.

Productivity Commission questions

Small business definitions

The NSW Food Authority does not experience problems arising from any absence of a consistent definition of small business because its approach in designing regulatory schemes is risk based and outcome oriented. As detailed above, its approach to funding regulatory requirements is based on a set of principles that include, but are much broader, than business size. For example, the Authority's 'Priority Classification' system is used to allocate a risk classification to food businesses based on the food safety risks associated with the specific type or types of food they produce. The risk classification influences the inspection frequency with higher risk businesses subject to more frequent inspections and therefore associated costs.

The Authority's engagement with food businesses includes consideration of equity, practicality, industry structure, transparency and contestability. Business size, throughput, and frequency of operation are also important factors in terms of their influence on risk and potential scale of outcomes if the risk eventuates. Consequences of regulation or its outcomes and the collective impact of multiple separate requirements also need to be recognised for small business.

Characteristics of regulators that influence posture toward small business

In addition to considerations outlined above in terms of equity, practicality, industry structure, transparency, contestability, size, throughput and frequency of operation, other factors that influence the Authority's engagement with small food businesses on food safety issues include risk, scale of potential consequences if the risk eventuates, compliance history, ethnicity and cultural considerations. Engagement with small business is also affected by its level of organisation, availability of operators to do training/meetings etc. and working hours.

The authority implements a range of measures that directly and indirectly help food businesses understand and implement their regulatory requirements, and to monitor how well this happens.

Requirements are set out as licence conditions and compliance with these conditions is checked at audit and inspection. These conditions are reinforced through annual licence renewals.

There is also two way information exchange between the Authority and industry consultative committees for each food safety scheme, industry associations, the Authority's Retail Advisory Group and the FRP with local government. The Authority's Local Government Unit

⁸ <http://www.foodauthority.nsw.gov.au/industry/industry-sector-requirements/eggs/>

⁹ <http://www.foodauthority.nsw.gov.au/industry/industry-sector-requirements/meat/poultry/>

also receives regular feedback from Councils through the FRF and an annual report from each council on its food regulation enforcement activity.

The Authority analyses failure rates in food businesses to help understand compliance barriers and actions that may be needed to address these.

The authority publishes web based information for food businesses in English and other key language groups. The frequency of access to this information can be monitored. Note that web based information, telephone and face to face dealings with food businesses are also supported by an Authority funded translation service where required. The Authority also maintains a telephone and email call centre where all enquiries are logged and emerging trends may indicate specific gaps in industry understanding.

Articles on food safety, technology and industry compliance are published in the Authority's quarterly "foodwise" magazine provided free of charge to all licenced businesses and on line.

Finally, the Authority remakes its Regulation every five years and this process is supported by consultation with regulated businesses and a regulatory impact assessment.

The Authority's regulatory regime includes a number of elements to ensure regulatory decisions and advice are clear, accessible, consistent and timely.

All food businesses receive a copy of any audit/inspection reports as they are generated during each audit/inspection and these are discussed with management. Businesses similarly receive copies of any follow up instructions or notices issued by the Authority or local councils. These processes include appeal mechanisms to ensure that businesses can have any disagreements relating to inspections or follow up properly considered. The Authority has mandated time frames/frequencies for auditing/inspecting and for responding to issues raised by licensed food businesses. Licensed businesses are free to access any records held by the Authority in relation to their business.

Finally, the Authority has developed an escalating enforcement policy to be followed by its staff and as a guide for council staff involved in food regulation activities (see foot note 4 on page 5).

The Authority has a range of measures in place to meet the information needs of small businesses including those located in regional areas or with non-English speaking or Indigenous backgrounds. These include measures outlined above and maintaining a physical presence through offices in key regional centres (Newcastle, Illawarra, Albury, Wagga Wagga, Queanbeyan, Dubbo, Coffs Harbour, Lismore).

The Authority aims to minimise the impact of its information requirements on business by only collecting information it needs to regulate effectively. The Authority operates on a model of continuous improvement which has or will subject its regulatory programs to periodic review. One area currently being reviewed is the requirement for non-licensed food businesses to notify the Authority. This review is expected to be finalised in late 2013. It would also be within the scope of current reviews being undertaken by IPART to make recommendations on this issue.

The Authority is a science based organisation that relies on sound information supported by scientific expertise and an appropriate evidence base. Relevant Authority staff are required to have Tertiary qualifications. They also receive ongoing training, remain abreast of the scientific literature and attend seminars. This is informed ongoing Intelligence from Ozfoodnet, the national foodborne illness surveillance network and targeted surveys and investigations. This intelligence is reviewed and the Authority also liaises with NSW Health in regard to new and emerging foodborne illness issues.

The Food Standards Code and national standards setting processes include rigorous risk and technical assessment steps in which the Authority participates. The Legislative and Governance Forum on Food Regulation, Food Regulation Standing Committee and its Implementation Sub-Committee also help ensure relevant information is shared between jurisdictions in a timely fashion.

The Authority uses its priority classification system to rank food safety risks and apply audit and inspection regimes that are appropriate to those risks. This compliance regime is supported by an escalating enforcement policy as outlined above (see foot note 4 on page 5). Auditors and inspectors have discretion under this policy to apply appropriate enforcement tools commensurate with the significance of breaches detected. These tools may include provision of information, warning letters and improvement notices. Further escalation requires consultation with management and may then include the issuing of penalty notices, prohibition notices, seizure of goods/products or collection of evidence for prosecution.

Audit and compliance management verification for auditors and inspectors is detailed in the Authority's field operations manual.

The Authority has also found that provision of training and face to face meetings with poor performing businesses can prove beneficial. Additional leverage is provided by the Authority's public penalty notice register which publishes penalty notices issued by the Authority and councils in relation to food safety breaches. The register is supported by a documented publication protocol and decision matrix to ensure that in all cases publication is permitted and meets the aims of the register.¹⁰

Additional factors that can potentially affect regulatory outcomes include regulatory demands created by poor performing businesses which can sometimes create a disproportionate drain on staff time to the detriment of broader compliance and enforcement activity. Another potential issue is that the adoption of the escalating compliance and enforcement policy by local councils in NSW is not mandatory and therefore individual council Officers may not always apply this policy.

The Authority considers that food safety risks are not a function of food business size per se and are more significantly influenced by the type of food business activity than business size. However, regulatory design sometimes needs to accommodate industry specific factors and issues of scale, particularly for very small businesses. Examples where factors specific

¹⁰ <http://www.foodauthority.nsw.gov.au/news/offences/penalty-notice-publication-protocol/#.UUfoFBxmh8E>

to particular industries have been taken into account when designing regulatory schemes include exempting small egg producers (<20 dozen eggs per week) from licensing requirements under the Egg Food Safety Scheme (and providing these producers with small scale egg stamping equipment free of charge) and exempting small poultry producers (<100 birds at one time) from poultry licensing requirements under the Meat Food Safety Scheme. The Authority tailors food safety program requirements according to the complexity and size of food businesses. In both the egg and poultry schemes cited above, the Authority developed food safety program templates to simplify and facilitate industry adoption. The size based exemptions to these schemes were included specifically to recognise their potential impact on small producers.

The Authority has a number of measures in place to facilitate coordination of regulatory activity and avoid overlap and duplication including:

- The Authority's Local Government Unit interaction with councils and the Food Regulation Forum
- Food business notification information is shared between councils and Authority
- The Authority maintains a MOU with DAFF/AQIS regarding export registered facilities to avoid double regulating
- The Authority maintains a MOU with Queensland to avoid double licensing of fishing vessels operating in both jurisdictions
- Joint operations with fisheries, Office of Environment and Heritage, NSW Police, Liquor Gaming and Racing, NSW Health, Local Government, NSW Fair Trading.

The Authority also uses emerging technologies and online tools to provide and exchange information and facilitate compliance including:

- The Authority operates a call centre (telephone and email) to receive and respond to business and consumer enquiries. This is supported by an interpreter service
- The Authority maintains a website which provides information required by food businesses in English and a range of other languages. This is supported by an interpreter service
- The Authority maintains face book and twitter accounts to facilitate timely provision of information and updates on emerging issues
- foodwise magazine (hard and web-based copy) provides information and updates to NSW food businesses on a quarterly basis.
- The most recent edition of foodwise explains the Authority's implementation of tablet technology "Tablets bring greater efficiencies to field work" to improve access to information in the field and allow audit/inspection reports to be provided to food businesses in real time 11

The Authority has a complaints policy and procedures which are published on the Authority's website¹² and are accessible to businesses of all sizes. This includes a right of appeal in respect of enforcement action and licence cancellations.

¹¹ http://www.foodauthority.nsw.gov.au/Documents/industry_pdf/foodwise_volume_28_2013.pdf

¹² <http://www.foodauthority.nsw.gov.au/aboutus/about-the-authority/complaints-about-the-authority/>

Rationale for treating small business differently

As explained previously, the Authority has taken industry specific factors and issues of scale into account when designing regulatory schemes. The examples cited of exempting small egg producers and poultry growers from licensing requirements under respective food safety schemes, providing small scale egg producers with egg stamping equipment free of charge and developing food safety scheme templates to simplify and facilitate industry adoption.

How regulators can reduce compliance burdens on small business

The Authority minimises its regulatory impact on businesses of all sizes by ensuring that regulation is based on the best available evidence, is developed in consultation with industry, is the minimum required to be effective and is subject to ongoing review and improvement. To this end the Authority follows best practice regulation guidelines including assessing benefits and costs of regulatory options. One example is the Regulatory Impact Statement prepared to remake the Food Regulation 2010.¹³ The Authority also takes account of the specific limitations that may exist in small businesses and any disproportionate impact regulation may create on these businesses.

¹³ http://www.foodauthority.nsw.gov.au/Documents/corporate_pdf/RIS_Food_Regulation_2009.pdf