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BARRISTERS & SOLICITORS

Local Government Update

Significant penalties for *Food Act 2008* offences

By Tim Beckett, McLeods

Introduction of the Food Act 2008

The introduction of the *Food Act 2008* (**Act**) resulted in significantly higher maximum penalties for offences relating to the preparation, handling, and sale of food. Previously, the maximum penalties under the *Health Act 1911*, as it was then known, were comparatively modest and therefore less conducive to establishing general deterrence for non-compliance with the Act.

Under the Act, the majority of offences with which food businesses are charged carry maximum penalties of \$50,000 for individuals and \$250,000 for corporate offenders. Since those more significant penalties came into effect, courts have been able to impose more substantial penalties for significant public health breaches, with some offenders receiving penalties exceeding \$100,000. Traditionally, those larger penalties were reserved for large commercial entities, such as fast food and supermarket chains, or repeat offenders who have failed to comply with fundamental cleaning and food handling requirements.

However, penalties imposed in relation to recent prosecutions carried out by McLeods in the Perth Magistrates Court indicate an increased recognition by the courts that there is a need for general deterrence for all types of offences under the Act, to prevent and deter potential risks to public health.

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Food registration and production - \$50,000

On 6 April 2018, the Perth Magistrates Court imposed penalties totalling \$50,000 against the proprietor of a small business which was found to be manufacturing food products in a factory unit without the prior approval of the local government. That activity occurred over only a relatively short period of time and had immediately ceased at the request of the local government.

In that case, the presiding Magistrate considered that the public health risks associated with the preparation of food in those circumstances were unacceptable and noted that the food business had shown a reckless disregard for proper food preparation practices.

Food labelling - \$20,000

On 9 March 2018, the Perth Magistrates Court imposed penalties totalling \$20,000 against an individual operating an Asian grocery shop. Those offences related to the failure by the food business to ensure the relevant food products were appropriately labelled. Food items within the shop did not comply with the labelling provisions of the Food Standards Code, including the requirement for English language labelling or requirements relating to nutritional and allergy information.

In that case, the presiding Magistrate noted the history of non-compliance by the food proprietor and, despite the food proprietor being an individual operating a small business, the court considered there was a significant need for deterrent penalties to address these types of offences.

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Unsuitable food and equipment - \$35,000

On 9 February 2018, the Perth Magistrates Court imposed penalties totalling \$35,000 against the proprietor of a noodle bar business, arising from the sale of a noodle dish which contained a sharp metal object. The local government investigating the complaint identified that the metal object, which was bitten into by the complainant, had come from a rusted metal strainer being used in the food preparation process.

In that case, the presiding Magistrate commented that, having regard to the condition of the relevant metal strainer used in the preparation of the food, it was foreseeable that an incident of that kind might occur. The court noted that the complainant was fortunate not to have fully ingested the metal object, which could have resulted in more severe health consequences.

Effect of significant penalties

Since the Act came into effect, the courts have been willing to impose significant penalties in relation to public health breaches by larger corporations and ongoing and repeated breaches by smaller food proprietors. However, these recent decisions confirm that courts are willing to impose significant penalties against all types of food proprietors for a variety of different offences, whether deliberate or inadvertent.

In addition to the details of these convictions being published by the Department of Health, these decisions are frequently reported by the media. Therefore, these prosecutions have a dual deterrent effect for food proprietors, as they can result in very significant penalties and negative media exposure.

Use of infringement notices

While the Act also provides for the use of infringement notices and imposition of modified penalties of \$150-\$1,000 for these types of offences, it is clear that those amounts represent a very modest penalty when compared with the penalties that might be imposed by a court in the event of a prosecution. While some offences may be of a sufficiently minor character to warrant the use of an infringement notice, the most appropriate response to significant or repeated offences under the Act will be a prosecution.

Where a potentially significant offence has been committed, food businesses are likely to prefer to pay relatively modest modified penalties for these offences, rather than face the significant maximum penalties and potential media exposure that may arise in the event of prosecutions being commenced. Food businesses are operated for profit and, in many cases, the payment of occasional modified penalties will be commercially beneficial when compared with the cost of cleaning and proper food handling and preparation practices. Local governments should be seeking to ensure that food businesses do not treat modified penalties as an acceptable operating expense in lieu of the cost of complying with the Food Standards Code and the Act.

Clearly, Parliament and the courts have demonstrated an understanding that public health offences warrant the commencement of prosecutions and the imposition of substantial commercial penalties. Accordingly, we would generally recommend against the use of infringement notices for offences under the Act, unless those offences are of a very minor and isolated nature.

Further advice

McLeods has acted for local governments in health and food prosecutions for many years and has developed significant expertise in this area. If you would like any further advice in relation to this article, or any other related matters please do not hesitate to contact Tim Beckett on 9424 6212 or Peter Gillett on 9424 6217.



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