Sentencing considerations for food offences

By Madeline Madvad

Since the introduction of the *Food Act 2008* (**Act**), courts have imposed substantial penalties for offences relating to food, with penalties ranging from several thousand dollars to hundreds of thousands of dollars. Due to the substantial maximum penalties available – especially for corporate offenders – these penalties had been somewhat unpredictable in the past, with limited guidance from Supreme Court authorities as to the appropriate sentencing considerations for food offending.

In recent years, the Supreme Court has handed down two decisions which identify relevant sentencing criteria and provide an indication of appropriate penalty ranges for these offences. In particular, in ***Radianct Holdings (Australia) Pty Ltd v City of Gosnells*** [2022] WASC 217 the Supreme Court provided further guidance as to the appropriate disposition of these charges. A recent prosecution by McLeods in the Midland Magistrates Court on behalf of the City of Kalamunda has confirmed the application of those sentencing principles.

Maximum penalties and previous authorities

For the majority of prosecutions under the Act, we typically recommend that local governments allege multiple charges against food businesses which fail to comply with the Food Standards Code (**Code**) in a number of different ways and/or across multiple inspections. In most cases, local governments do not prosecute food businesses for an isolated offence, or on the basis of a single inspection, so there are usually a number of potential charges available.

The maximum penalty for failing to comply with a provision of the Code is $50,000 or, in the case of a company, $250,000. We commonly allege between 5-20 charges against these food businesses, resulting in cumulative maximum penalties which may total several million dollars.

A review of the Department of Health website reveals a typical penalty range of $3,000-$7,500 per charge for offences under the Act. However, those decisions in the Magistrates Court are not binding on other Magistrates and it is difficult to establish a comparison to those penalties, as the individual facts and circumstances of those prosecutions are not published or otherwise made available to a sentencing Magistrate.

While there have been other past Supreme Court authorities relating to sentencing under the Act, previous decisions related to more unique circumstances arising from, for example, an isolated failure by a food business or, alternatively, a particular history of specified offending, such as failing to label food in accordance with the Code.

In ***Dragon Pacific Group Pty Ltd v City of Cockburn*** [2019] WASC 449, the Supreme Court reduced a total penalty of $60,000 for six charges to a total penalty of $24,000. However, the reasons provided for that reduction in sentence were somewhat limited. More recently, in *Radianct* the Court reduced an initial penalty of $100,000 across five charges to a global penalty of $20,000, being $4,000 per charge.

In *Radianct,* the company was operating a small fish and chips shop and, by the time this matter came before the Supreme Court, the company was no longer registered as operating the relevant food business. The Court acknowledged that although the primarily imposed sentence was excessive and the accused company had minimal means of paying any penalty imposed on it, it was appropriate for a general deterrent penalty to be imposed in any case. The Court accepted that the offences were serious as they had the potential to seriously impact the health and safety of consumers, particularly in respect of offences relating to the improper handling and storage of food. Further, it was accepted that the offences could have easily been prevented had the company implemented an adequate cleaning regime.

In our view, the *Radianct* decision is easier to apply than the *Dragon Pacific* decision and also reflects a more suitable overall penalty for the offences, having regard to the nature of the offending in *Radianct*, as compared with a much larger entity in *Dragon Palace*, which also had a more substantial record of prior non-compliance with the Code.

City of Kalamunda prosecution

On 17 April 2023, the Midland Magistrates Court imposed a penalty of $30,000 across 6 charges against *PMK Corporation Pty Ltd*, a food business operating an IGA supermarket, for its failure to comply with the Code. The offending related to a number of failed inspections over several months, including selling food past the use by date, inadequate storage of food, and the failure to maintain the food premises in a proper state of cleanliness.

The company had previously received a number of infringements in relation to similar offending, yet continued to breach the Code, which ultimately resulted in the City commencing proceedings. The Court commented that the Code set out in the Act is self-explanatory, and given the company's previous infringements and contact with the City, the company was well aware of its requirements. The Court again noted the need for general deterrence and stated that food businesses have a responsibility to mitigate any risks associated with illness caused by expired food, as the public has an expectation that the food sold by the accused company will be in a suitable condition.

The Court considered the penalty imposed in *Radianct* and compared the circumstances in that case to the offending of *PMK Corporation*, which was deemed to be more severe. Furthermore, whereas *Radianct* related to a small takeaway food premises, *PMK Corporation* related to a larger commercial operation. Given the more substantial history of non-compliance and the fact that the company is still operating, the Court appropriately imposed a higher penalty range for the charges against *PMK Corporation*, being $5,000 per charge.

Future prosecutions

While local governments cannot necessarily expect that courts will impose an approximate minimum of $4,000 per charge for offences under the Act, the nature of the charges in *Radianct* and the comments of the Court will make it difficult for Magistrates to impose substantially lower penalties in relation to future offending, unless there are some exceptional circumstances beyond those addressed in the *Radianct* decision.

By contrast, where a food business is operating as a far more substantial commercial enterprise or demonstrates a more serious history of offending, an offender may be exposed to far greater penalties than those imposed by the court in

Radianct.

In order to effectively deter food operators from viewing non-compliance with the Act as an acceptable business risk, local governments must implement sufficient measures to adequately manage offenders. This includes undertaking regular inspections, documenting unsatisfactory practices, following up on any outstanding compliance issues, and issuing infringements or commencing proceedings where appropriate. By implementing an adequate compliance regime, local governments enable the courts to effectively consider all relevant circumstances of the offending to ensure appropriately significant penalties are imposed, while simultaneously reducing the likelihood of future offending.

Furthermore, by commencing successful prosecutions against food businesses who fail to comply with the Code, local governments can use general deterrence to effectively establish an expectation that non-compliance with the Code may result in substantial penalties, along with the potential reputational damage of being identified on the Department of Health website.

We frequently advise and represent local governments in respect of enforcement action under the Act and would be happy to meet or discuss with local governments further if any assistance is being sought in relation to potential proceedings of this kind.

The information contained in this article should not be relied upon without obtaining further detailed legal advice in the circumstances of each case. For further information on matters discussed in this Update please contact Madeline Madvad by email to mmadvad@mcleods.com.au.

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