



PRACTICE NOTE 4

October 2017

FOOD ACT 2014 Territorial Authorities contracting functions under the Food Act 2014

Purpose

This document sets out guidance for Territorial Authorities on which tasks can be contracted out under the Food Act 2014 and those functions where contracts with third parties are prohibited.

Approach

This document draws on the content of the Food Act 2014 (the Act). It has been developed in collaboration with multiple Territorial Authorities (TAs), Local Government New Zealand and stakeholders within the Ministry for Primary Industries (MPI).

Intended audience

Registration Authorities, Territorial Authorities.

Context

Contracting functions of Territorial Authorities

Several TAs in New Zealand have historically contracted out some functions related to managing registration, verification and enforcement under the Food Hygiene Regulations 1974 and the Food Act 1981 to third parties. For many TAs these contracts have remained in place through transition to the Food Act 2014 (the Act). This guidance seeks to clarify the core functions in section 173(4) of the Act that can not be contracted to third parties.

The Act's prohibition against contracting primarily relates to functions involving regulatory and coercive powers. This is because contracting these out could

place the function beyond constitutional review such as oversight by MPI, the Auditor General and the Ombudsmen. It could also create the potential for private entities to profit from the exercise of regulatory powers, creating a conflict of interest.

Section 179 of the Local Government Act specifically provides for TAs to contract administration of enforcement functions to other local authorities or persons. However, this provision does not apply to the functions specified in Section 173(4) of the Act. Any decisions made by a contractor relevant to this section of the Act would be ultra vires.

This guidance seeks to provide further clarity as to which TA activities can be contracted to third parties under the Act.

TA roles

Section 173 (1) of the Act sets out the functions of TAs. The rest of section 173 sets out different ways in which those functions can be managed and constraints applied to contracting out some of those functions. The options available to TAs are, in summary:

- Employing or engaging sufficient staff to carry out all of the functions of a TA. This implies employment arrangements must be in place where contracting is not allowed under the Act. It is possible for resource to be shared by different TAs under this model.
- A TA can, by written agreement, combine with other TAs and designate one of them to perform the function of Registration Authority (RA) under section 173. Similarly, TAs can contract out any of their other functions under the Food Act 2014 to another TA under section 176.
- A limited range of functions can be contracted out to third parties. These are set out in the section below.
- Section 179 allows for TAs to transfer some functions duties and powers to the Chief Executive of MPI if he agrees to the transfer. Any transfer could still result in a financial cost to the TA concerned and there are consultation requirements that must be worked through before a transfer can go ahead.

Functions that can be contracted out to third parties

TAs may decide to contract out certain functions to third parties. A guide to some functions that could be contracted out are:

Administrative aspects such as -

- Gathering information to enable an RA to make decisions around whether to register a business.
- Receiving applications for registration, checking they meet the requirements of the Act and requesting further information if this is required for the RA to make an informed decision.
- Transferring information to MPI – MAPs data entry, verification reports, enforcement outcome reports - compiling information submitted by a Council's Food Safety Officer (FSO).
- If requested, compiling reports for the Chief Executive, covering the TAs role.

Managing and training staff to carry out functions and activities

- Including ensuring that staff are sufficiently competent in technical areas, administration, legislation and the implementation of processes and systems.

Monitoring and Information gathering

- Carrying out some aspects of monitoring and information-gathering for the purpose of ascertaining compliance with the applicable requirements of the Act (so long as they are not relying on the information gathering powers available to FSOs under the Act).
- This may involve implementing a monitoring program established by the TA or by MPI.

Management of verification functions

- Managing verification functions, in relation to template food control plans and where applicable national programmes.
- This needs to be contracted to a recognised agency with a sufficient number of recognised persons with appropriate competencies to carry out that function.

Functions that can only be contracted out to another TA

The Act prohibits TAs from contracting out a range of functions to 'third parties'. However, TAs may decide that a shared services arrangement is an appropriate way for them to ensure they meet their responsibilities and functions under the Act. Functions that can either be delivered this way or can be contracted to another TA are set out below:

The function of an RA:

- This means a contractor could not make a decision to register or extend registration periods nor could they decide matters relating to suspension or cancellation of registration.
- Enabling its FSOs to enforce the applicable requirements of the Act and be responsible for their performance.

The investigation of non-compliance emergencies and complaints

- Investigating reports of non-compliance or complaints related to food safety and suitability for food businesses registered with the TA.
- It should be noted that under certain circumstances a third party contractor could assist a warranted Food Safety Officer but could not investigate a matter alone. A contractor entering a business would need to be accompanied by a FSO.
- Assisting with recall situations following MPI requests.
- Responding to emergency situations.
- Requiring appropriate corrective actions for matters arising from any investigation or complaint.

Information / Advice provision

Disseminating information and provide advice promoting the safety and suitability of food to food business and the public.

- While a contractor could assist in the collation of advisory information and help determine who the information needs to go to they are not empowered to take responsibility for the dissemination of the information.

The information available in this document is intended to provide general information to territorial authorities and all reasonable measures have been taken to ensure the quality and accuracy of the information contained in it. However, the Ministry for Primary Industries disclaims any and all responsibility for any inaccuracy, error, or any other deficiency in the information, and also fully excludes any and all liability of any kind to any person or entity (whether a user of this guidance or not) that chooses to rely upon the information.

The contents of this website should not be construed as legal advice. It is not intended to take the place of, or to represent the written law of, New Zealand. Territorial authorities should seek independent legal advice where appropriate.

Contracting of TA functions under the Food Act 2014

