



## Where do businesses fit? Hard Questions Answered

As we implement the Food Act 2014, and make the purpose and intentions of the Act a reality, some hard questions have emerged. Where answers are still not clear after robust discussion, the questions are put to an ‘adjudication panel’. This panel comprises senior MPI decision-makers from Policy, Legal and Technical Standards areas. The panel considers whether the answer is available within the current legislative framework, or whether changes to legislation might be needed to be able to give or support a clear answer.

The following table outlines questions that have gone to the adjudication panel, the answer given, and a summary of why/how that answer was arrived at. The answers will not cover every possible situation, but if you see how we’re thinking you can apply a similar approach if you come across something you’re uncertain about. You are also welcome to submit your question to MPI for adjudication if you’re stuck.

### Disclaimer

These answers do not constitute, and should not be regarded as, legal advice. While every effort has been made to ensure the information in these answers is accurate, the Ministry for Primary Industries does not accept any responsibility or liability whatsoever for any error of fact, omission, interpretation or opinion that may be present, however it may have occurred.

Question	Answer	Why
If a grower of nuts sends their nuts to a processor for drying (minimal processing) only, then has them returned to sell themselves to the consumer, are they still exempt from needing to register a FCP or NP?	No, a grower that sends their produce to a third party for processing (even only minimal processing), then sells the produce themselves to consumers (e.g. at stalls or farmers markets) is not exempt under the sector “horticultural producers: direct sales of own produce to consumers only”. They become a multisector business. Whether they are then required to register under a risk-based measure will depend on what they do with the produce they receive from the processor. For example, receiving and selling packaged nuts would be exempt under “retailers or direct sellers of shelf-stable, manufacturer pre-packaged food”, but sale of bulk nuts would fall into NP3 under “Retailers that handle food (but do not prepare or manufacture food)”.	The idea that someone can sell their own produce direct to consumer is based on the consumer being able to ask any question about the product and they’d be able to answer it. This is no longer true if the product has been in the control of a third party.  “Direct sale” is interpreted to mean that the grower has had full control of the produce through the entire chain of growing through to sale to the consumer. Once a third party takes control of the product, at any point prior to sale to the consumer, the sale is ‘indirect’ (i.e. the chain of direct control has been broken).

Question	Answer	Why
<p>Where does loose tea fit it? The Act mentions teabags and instant tea (dry mix products), but not loose tea leaves.</p>	<p>Loose tea can be considered a herb, and people curing, drying and packing tea leaves a processor of herbs or spices (growing and harvest would be under horticulture).</p>	<p>We considered that tea could be thought of as a herb or a vegetable, and could sit with processors of herbs and spices (NP2) or drying fruits and vegetables (NP1). Although some would argue tea isn't strictly a herb, salt is included in the processor of herbs and spices category and it isn't strictly a herb or spice either.</p> <p>We considered how other similar products on the market would be treated. Tea (in teabags) is handled under dry mix products (NP2), and herbal teas (e.g. peppermint or chamomile teas) fits into the category of 'processor of herbs and spices'. Therefore, it was considered loose tea should be managed under NP2, along with similar products.</p>
<p>Where does repacking of whey protein concentrate powder fit?</p>	<p>Repacking of dairy products (e.g. WPC, cheese etc) goes to 'manufacturing of dairy products'.</p>	<p>Although the title for this sector is 'manufacturing', the description includes preparing. Because 'preparing' is not defined in the Act the dictionary meaning can be given. In the context of the Act preparing is interpreted as any activity to get the product ready to sell. This includes repacking.</p> <p>Further, the description indicates that this category is intended for operators [dairy processors] exempt from having to operate under an RMP by clause 8A of the Animal Products (Exemptions and Inclusions) Order 2000. Repacking of WPC would normally be required to be carried out under an RMP, and repacking for the domestic (Aus/NZ) market falls under this exemption. Therefore to require this activity to be managed under a risk-based measure other than an FCP would create an inconsistency between the Animal Products Act (APA) and the Food Act (FA). Section 6(6) of the FA indicates that where there is an inconsistency between the Food Act and the APA, the APA prevails.</p>

Question	Answer	Why
<p>Could the definition at NP1 for horticulture production and packing operations be extended to cover a greengrocer or fruit and veg stall (selling fruit and vegetables, sourced through a wholesaler, to other retailers and consumers)?</p>	<p>No. This activity falls under NP3.</p>	<p>The primary activity of a greengrocer is retail sale. Appreciating that the activities may not be significantly different from a packhouse, the primary activity clearly fits within the retail sale description.</p> <p>Further, if, at any point the greengrocer elected to sell any other food product (bread, milk, chocolate), they would immediately have to fall under the higher risk-based measure.</p>
<p>Are sprouts and microgreens (growing, harvesting, packaging) fresh RTE salads or horticultural produce?</p>	<p>Horticultural Produce.</p>	<p>The technical view is that sprouts (in particular) are a high risk product (seeds can be contaminated with Salmonella that can contaminate the whole crop during growing). However, the risk associated with sprouts cannot be controlled through the same processes and activities generally carried out by a RTE Salad manufacturer. Another consideration was that sprouts are commonly packaged in punnets and sold alongside RTE salads – so could be considered to be a salad. However packaging for sprouts is often of a similar nature to cherry tomatoes or strawberries in a punnet – which are considered to be horticultural produce. It was also noted that fresh herbs can also be packaged in similar packaging and sold alongside RTE ingredients. The description of ‘processor of herbs and spices’ clearly states that preparation of fresh herbs is managed under horticultural produce. It was considered growing, harvesting and packing of sprouts and microgreens more closely resembled fresh herbs than RTE salads.</p>

Question	Answer	Why
<p>Does a salad need to be a mixture of ingredients or could it be a single ingredient (e.g. triple washed lettuce leaves)?</p> <p>Where do we draw the line between horticultural produce vs RTE salads (e.g. bulk unpackaged apples vs whole apples in a bag vs sliced apples in modified atmosphere packaging. Or whole lettuce vs lettuce in a bag vs lettuce leaves washed and packaged in a bag vs mixed greens washed and packaged in a bag)?</p>	<p>It can be a single ingredient. The processes used, nature of product and intended use will determine whether the product is RTE salad or (for example) a horticultural product.</p>	<p>The panel considered whether it is packaging or processes used that determined whether a product fit best with RTE salad manufacture or with horticultural production/packaging.</p> <p>A whole apple may be considered RTE, but it is clear that sorting and packing apples fits best within horticultural production and packing operations. The act of putting a whole apple in a bag doesn't make a salad. However slicing the apple, and packaging it in modified atmosphere packaging is more than minimal processing, and would put it either into RTE salads or manufacturers of meals and prepared foods – both of which are required to operate under a FCP (so clear categorisation is not required).</p> <p>It seems that the main question is whether taking green leafy vegetables, removing roots, tearing leaves off, triple washing them and packaging them is more than minimal processing (e.g. rinsing, trimming). The general consensus was that the nature of the washing operation was more than 'rinsing' and the nature of vegetable preparation was more than 'trimming'. It was also considered that the consumer had a higher expectation that the product was genuinely 'ready to eat' (compared, for example, to a lettuce with a few outer leaves removed and put into a bag). Therefore the panel concluded these products sat best with either RTE salads or manufacturers of meals and prepared foods – both of which are required to operate under a FCP.</p>

Question	Answer	Why
<p>Where does an early childhood education (ECE) service operating solely on subsidies and providing food to kids, with no charge to parents, fall in terms of the scope of the Food Act?</p>	<p>Where there is no charge to parents for the service provided, there is no sale, therefore the activity is outside the scope of the Act.</p> <p>However, if the subsidy provided to the ECE required that they provide food to children attending, then the food would be food supplied on or behalf of the Crown, and would be subject to the Act.</p>	<p>MPI clarified with the Ministry of Education how the subsidy is allocated, and what services it is intended to cover:</p> <p>The main subsidy for ECE services is based on the proportion of registered teachers at the centre and the centre type. This subsidy is provided regardless of whether food is provided by the centre. There is no restriction on the centre using the subsidy to provide food, but this is strictly a decision for the individual centres (there is no instruction or direction by the Crown either to provide food, or to not use the subsidy to provide food).</p> <p>Therefore, if the centre chooses to buy food for the children attending, and there is no charge to parents for any of the ECE services, there is no sale and the activity falls outside the scope of the Act. In this case the centre would be donating food with the consent of the parent that their child can be given the food.</p> <p>Any charge to the parents would bring the provision of food into the scope of the Act (as the food would be considered to be provided as part of an inclusive charge – which constitutes sale of food).</p>