



PRACTICE NOTE 6

January 2018

FOOD ACT 2014 Territorial Authorities and shared services under the Food Act 2014

Purpose

This document sets out guidance for Territorial Authorities considering shared service agreements to manage functions, duties and powers under the Food Act 2014.

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

Territorial Authorities, Registration Authorities.

Context

TA functions

TA functions are set out in section 173(1) of the Act. Section 173 goes on to set out the different ways in which those functions can be managed, and further imposes constraints on the ability of TAs to contract certain functions.

The options available to TAs to manage their Food Act functions are, in summary to:

- Directly employ or engage sufficient staff to carry out all of their functions.
- Develop a memorandum of understanding or cooperative agreement to meet intermittent service delivery needs, noting that all TAs involved need to achieve certainty around accountabilities, authorities and delegations.
- Contract out any of their section 173 functions to another TA.

- Contract out certain functions to a third party.

NOTE: Section 173(4) and (5) of the Act prohibits TAs from contracting out certain functions to third parties. For example, verification functions (including acting as a recognised agency) may only be contracted out to persons recognised by MPI under the Act to carry out said functions. More information about which functions TAs may and may not contract out to third parties is described further in Practice Note 4.

- By written agreement, combine with one or more other TAs for the purpose of performing the function of a registration authority in the combined district of the TAs that are parties to the agreement. Once combined, the TAs may designate any of them as the TA responsible for performing the function.
- Pursuant to the Local Government Act 2002, arrange for a transfer of any functions to another TA or regional council, except for the function of a recognised agency. The transferring TA ceases to have responsibility for transferred functions.

It is important to note that in any of the above situations, which involve a TA contracting out a function, the TA continues to have responsibility for that function.

Delivery of functions, duties and powers under the Food Act 2014

The Local Government Act 2002 requires local authorities to carry out their activities in an efficient and effective manner. One way that local authorities can meet this requirement is through shared service arrangements.

Historically, TAs across New Zealand have entered into shared service agreements with other TAs to undertake a variety of their functions. These have ranged from simple informal agreements through to more formal shared service agreements. The introduction of the Food Act 2014 and its new requirements relating to the regulation of food businesses may provide further reasons for TAs to explore the possibility of shared service arrangements.

Shared service arrangements developed to manage TAs functions and responsibilities under the Food Act can help address potential conflict of interest situations and can help cover service delivery gaps or resourcing shortfalls. These agreements may also allow access to capability that might otherwise be unaffordable.

Guidance content

This guidance is not intended to address the specific content of possible shared agreements but to alert TAs to touch points or points of caution when considering such arrangements. It is not intended to constrain individual approaches by TAs, rather it is to encourage good practice. Accordingly, it is prudent to have any shared service agreements reviewed by competent legal counsel.

Possible shared service models

There are a variety of cooperative approaches that can be adopted by TAs that could be termed shared service agreements.

In the past TAs may have provided coverage for other TAs during staff absences based on 'handshake' agreements. The complexities of contemporary local government work means this approach is now less common and one of the following approaches is more likely:

1. Memorandum of Understanding (MOU) or cooperative agreements

This is where a MOU or agreement is put in place,

usually between TA Chief Executives, setting out the services each organisation may provide to the other in specific circumstances. This could include some form of recognition of authority to act, lines of accountability and means of dealing with disputes.

There are a number of potential issues that should be considered by TAs related to this and other forms of shared service agreement:

- The need to provide for appropriate recognition, delegations and authorities for staff from a neighbouring TA acting in another's boundaries.
- Reporting lines / lines of accountability.
- Limitation of liabilities and indemnities.
- Implications around the Local Government Official Information and Meetings Act 1987.

This is not an exhaustive list of potential issues but they are likely to be important considerations in any agreement covered in this guidance.

SCENARIO 1

Sarah is employed as a sole charge environmental health officer for Waiworrie District Council (WDC). She provides verification services and acts, under delegation, as the registration authority for her Council. She is also warranted as a food safety officer. WDC has a reciprocal Memorandum of Understanding with neighbouring Anxious City Council (ACC) to provide coverage when their food safety officers are unavailable.

Sarah receives a request for service from ACC following a customer complaint about one of the food businesses in the city. She phones the business and determines the issue is relatively minor. When Sarah reviews the business's file she sees the business is verified by a third party verifier.

In the past, acting under delegation, as the registration authority for WDC, Sarah has requested a business's verifier to either undertake an unscheduled verification or, in some cases, include the matter in an imminent verification. However, in this case ACC does not have a delegation of that function in place for Sarah. Sarah can still recommend an unscheduled verification to ACC as registration authority or she could choose to investigate the issue as a food safety officer but the process of cost recovery for her time has become more complex.

Both councils may be comfortable with sequence of events described, but it is important they are aware of the implications of decisions made around shared service agreements.

2. Shared services for specific functions

The Act makes provision for TAs to contract out functions under the Act effectively allowing for the creation of shared service agreements. However, there are important constraints to this:

- Verification functions can only be contracted to recognised agencies.
- Functions which encompass coercive powers are limited to being contracted to TAs.
- Functions the Act prohibits from being contracted to third parties include the registration authority function or food safety officer functions.

These 'restricted' functions are set out in Section 173(4) of the Act. This prohibition on contracting certain functions to anything other than another TA may encourage some TAs to explore shared services.

Traditional shared service arrangements may have involved the use of or creation of a business entity, external to the TAs. However, this structure is not permissible for certain functions as specified in Section 173(4) of the Act the Food Act 2014.

Section 173 of the Act addresses situations where two or more councils combine resources to perform the function of registration authority. This requires a written agreement and the TAs can designate any of the participating TAs responsible for performing the function of a registration authority for the combined area. However, the individual TAs continue to retain responsibility for the function itself (see Section 173(6)).

It is also possible for a TA to completely transfer functions, duties and powers to another TA. When this occurs the 'transferring TA' no longer has responsibility for those functions. This possibility is dealt with in more detail in option 4 in this guidance.

Any form of shared services agreement needs to be created taking into account duties of territorial authorities specified in Section 174 of the Act.

Summarised and paraphrased, these are:

- a) There needs to be adequate resourcing of all activities undertaken.
- b) Appropriate levels of management of activities in accordance with relevant national outcomes should be in place.
- c) Appropriate persons to undertake activities under the Act are employed.
- d) The staff competencies are maintained.
- e) All reasonable steps are taken to preserve impartiality and independence of officers.
- f) Monitoring of performance and report provisions occurs.
- g) Emergencies under the Food Act can be addressed should they occur.
- h) Providing information and facilitating the conduct of ministerial reviews.
- i) A general requirement to undertake duties or directions under the Act.

There are numerous other factors a shared service agreement could include, however the provisions of section 174 provide a basis for understanding general duties in creation of contracts.

SCENARIO 2

Honeyville District Council (HDC) has decided to enter into a shared services agreement with Buzzybee District Council (BDC) to perform the function of registration authority. The pair of TAs have designated BDC as registration authority for the combined area. HDC decided that while it was happy to pass on the administrative burden of registration authority functions to a TA with more resources, they wanted to retain responsibility for verification and the food safety officer related functions.

Periodically decisions made in BDC, acting as registration authority, may affect businesses located in HDC. For example, a business failing to register the appropriate food control plan may result in a request to HDC from BDC for a food safety officer to investigate and initiate appropriate action. The two TAs will need clear lines of responsibility and accountability for any such issues.

3. Full shared services model

The Act recognises the possibility that two TAs, by agreement, could combine all functions they are responsible for under the Act. Similar to the above, while one of the participants may be designated responsibility for performing the functions, each TA continues to be responsible for the functions contracted out.

SCENARIO 3

Massive City Council (MCC) and Gigantic City Council (GCC) have decided to combine all functions set out under the Food Act 2014 for TAs. MCC is to take on responsibility for the performance of all functions.

In order to fulfil the responsibility that GCC retains for each function, council representatives meet with the senior food safety managers from MCC each month and receive regular reports of activities.

4. Transfer of functions

Although not strictly a type of shared service, the Act makes provision for transfer of functions, duties and powers from one TA to another. This is distinct from the approach of entering into an agreement or contract set out previously, as the transferring TA relinquishes responsibility for the transferred functions.

Sections 176-178 of the Act set out the provisions around transfer of functions, duties and powers. There are two primary requirements set out in relation to such a transfer:

- The transfer requires an agreement in writing between the parties involved.
- The TA that takes on the additional responsibilities must have the capability to meet any national outcomes.

Finally, transfer of powers to the Chief Executive is provided for under the Act. These provisions are set out in Sections 179 to 183. Such a transfer must be agreed to by the Chief Executive and could potentially occur when all other options have been considered.

5. Shared Quality Management Systems (QMS)

It is possible for TAs to decide to collaborate on the creation and maintenance of a QMS covering their verification services. While a single QMS covering multiple TAs can present some organisational challenges, it can also promote consistency of practice and allow TAs to draw on expertise from other organisations. Shared systems and processes can also make it easier to work with food businesses as knowledge of how to work with a TA becomes normal.

Creating a QMS means that clear lines of responsibility and accountability must be established and maintained for all TAs and staff involved. It can also be difficult to draft procedures and policies that are sufficiently generic to allow for differences in approach that occur between TAs.

In broad terms, the service being shared in this situation is that of administering the QMS. It may be that the function of acting as a verification agency remains otherwise separate between the TAs. Generally, the establishment a quality system requires the designation of senior management to ensure it has a suitable level of organisational support. Where several organisations share a quality system there needs to be a clear understanding of authorities and reporting lines.

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.