



7 May 2015

Consultation: Policy proposals for the Food Safety Law Reform Bill
Ministry for Primary Industries
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Dear Sir/Madam

Attached are the comments that the New Zealand Food & Grocery Council wishes to present on the ***Policy proposals for inclusion in the Food Safety Law Reform: MPI Public Discussion Paper No: 2015/08.***

Yours sincerely

Katherine Rich
Chief Executive

Ministry for Primary Industries
POLICY PROPOSALS FOR INCLUSION IN THE FOOD SAFETY LAW
REFORM BILL: MPI PUBLIC DISCUSSION PAPER No: 2015/08
7 May 2015

The New Zealand Food & Grocery Council (the “NZFGC”) welcomes the opportunity to comment on the *Policy proposals for inclusion in the Food Safety Law Reform Bill: MPI Public Discussion Paper No: 2015/08*.

New Zealand Food & Grocery Council

NZFGC represents the major manufacturers and suppliers of food, beverage and grocery products in New Zealand. This sector generates over \$34 billion in the New Zealand domestic retail food, beverage and grocery products market, and over \$28 billion in export revenue from exports to 185 countries – some 61% of total merchandise exports. Food and beverage manufacturing is the largest manufacturing sector in New Zealand, representing 46% of total manufacturing income and 34% of all manufacturing salaries and wages. Our members directly or indirectly employ 370,000 people – one in five of the workforce.

Food Safety Law Reform Bill

The Paper proposes a range of recommendations to implement the recommendations of the Whey Protein Concentrate Inquiry Committee. This is intended to demonstrate New Zealand’s commitment to preserving and maintaining its food safety reputation by addressing the identified improvements and continuing to adapt the regulatory system to meet new challenges. In addition the opportunity is taken to harmonise key provisions in the three main Acts that cover food safety in New Zealand and to address other minor issues.

Overarching Comments

NZFGC is generally supportive of the intent of the Food Safety Law Reform Bill of improving the food safety regulatory system to protect New Zealand’s reputation as a supplier of safe and suitable food. However, the proposals contained in the discussion paper are at the level of policy intent only and it is difficult to comment in detail on the final impact of the changes proposed. Our comments are therefore subject to further review of the proposed clause of the new Bill. NZFGC would expect to be consulted on the legal drafting for amending the Acts as we were on the Food Act 2014.

We do not support the proposals in two key areas: limiting the content of RMPs and provision of RMPs to the regulator and the verifier. In both areas, the current arrangements have proven appropriate over a long period of time and the recommendations in these areas need to be reconsidered against tangible food safety benefits and costs involved. NZFGC considers there are other options available that have not been considered that should be explored. Some alternatives would deliver the desired results at no or least cost and with much more greater protections for all involved.

The provisions proposed for inclusion in the Food Safety Law Reform Bill are limited to an event almost two years ago. Since then another event has highlighted further limitations of New Zealand’s legislative framework relating to food and other products concerning anti-tampering. New Zealand does not have specific legislation that adequately protects New

Zealand businesses selling consumer products against malicious tampering. This includes direct tampering of products, altering labels, spreading false information or colluding to tamper. There are broad offence provisions under the Food Act 2014 (dealing with tampering in relation to compliant products) but these do not appear to deal with maliciously spreading false information about products, defacing products or inserting unauthorised material into packaging to cause economic harm. We believe the government needs to consider tailoring specific laws for these sorts of offences which impact all consumer goods categories not just food.

Similarly there are broad provisions in the Terrorism Suppression Act 2002 but the threshold for offences under this Act require an action to be considered a 'terrorist act' which can be a high threshold for some tampering and which does not deal with economic consequences. Equally, the blackmail provisions under the Crimes Act 1961 might be used but they require a high burden of proof which may not be the appropriate standard in relation to eco-terrorism threats. It's worthwhile remembering that many tampering crimes might not include a demand at all.

A comparison with eco-terrorism and anti-tampering legislation overseas provides some useful models (such as the US Federal Anti-Tampering Act 1983 and specific anti-tampering provisions to packaging added to US legislation by the US Product Packaging Act 2002) but most have gaps including the legislative provisions in many of the Australian States and Territories, the Commonwealth of Australia, Canada, the UK and the EU.

NZFGC considers the gaps in New Zealand's legislative arrangements to be of very significant concern to the food and grocery industry, particularly as there is very little covering the grocery or non-food items of medicines and cosmetics. MPI is appropriately food-focused, but eco-terrorists wishing to use branded products and supermarket environments to make their political points, will select both food and non-food consumer goods for their campaigns. This is an issue that requires a whole of government approach because tampering is not limited to food and can include a range of other consumer goods including pharmaceuticals, cosmetics and personal goods.

We would like to see these gaps addressed and suggest that in the current environment they might, following appropriate Cabinet approvals, be included in the Food Safety Law Reform Bill. This could require a separate legislative process.

Specific Comments

The following responds to the questions in the MPI consultation paper. Each question/set of questions is preceded by the relevant chapter heading and by a summary of the matters covered for completeness.

Question 1. Do you agree with the way the problem/opportunity that the Food Safety Law Reform Bill is aiming to address has been described? If not, why not?

Response: NZFGC acknowledges that the the priority of the Food Safety Law Reform Bill is to respond to the WPC Inquiry in a timely way, in line with government assurances to the public and overseas trading partners. However, with the best of intentions, it is now almost two years since the event and other events have occurred that also warrant legislative consideration. To this end, NZFGC recommends that the Food Safety Law Reform Bill also provides the opportunity to deal more comprehensively with anti-tampering provisions in New Zealand law. Current laws relating to malicious tampering have some obvious gaps and it is time to consider specific laws rather than relying on broad-brush provisions.

Question 2. Are there any areas covered in the proposals in this document where you think the status quo (no change) should apply? Please provide evidence to support your views.

Response: NZFGC is firmly of the view that the risk management programme should reflect the business operation and therefore does not support the proposals related to RMPs including those related to information to the regulator and the verifier.

Question 3. Have all the objectives of the FSLR Bill been identified? If not, what other objectives for the Bill should the Ministry for Primary Industries consider?

Response: NZFGC notes that the main objective of the Food Safety Law Reform Bill is to help protect New Zealand's reputation as a supplier of safe and suitable food that is fit for its intended purpose, by making improvements to the food safety regulatory system. This objective would accommodate inclusion of more comprehensive anti-tampering provisions, a need that has emerged since the whey protein concentrate event.

Legislative design proposals

These proposals focus on the process and content of delegated legislation with the intention that proposals will improve the design of the enabling provisions for regulations and notices, by providing more direction on whether a notice or regulation should be developed, making the relationship between some regulation-making and notice-making provisions clearer and removing inappropriate duplication

Question 4. Do you support the proposal to provide more guidance and direction for the delegated notice and regulation-making powers under the food safety Acts?

Response: NZFGC supports the proposal to streamline and make clearer the delegated notice and regulation-making powers under the food safety Acts through the provision of more guidance and direction. NZFGC is also supportive of the valuable work being undertaken by MPI under its Regulation and Guidelines Programme which is aimed at ensuring tertiary legislation is developed in a way that is clear, consistent, easy to navigate and easier to understand. We would like to see this project progressed more rapidly.

NZFGC is nonetheless concerned at the amount of tertiary legislation under the Animal Products Act, an issue clearly recognised by the WPC Inquiry. We are concerned that there are no clear timelines identified for resolving the issues with the current regulations and notices even though the existing set of tertiary instruments is confusing, difficult to use and internally inconsistent at times. The WPC Inquiry report, recommended that work be undertaken to streamline these instruments as a priority within 2 years and NZFGC would like to see solid timelines committed to for this work.

Improving risk management programmes (RMPs)

Three options are presented for limiting RMP content to food safety and related regulatory matters. There are also proposals around receiving and maintaining records of up to date programmes by the regulator and verifying agencies.

NZFGC does not agree that RMPs "have grown to thousands of pages" but rather that this was always envisaged as being the reality for some of the largest businesses operating in New Zealand. Many food companies oversee sophisticated and large operations so it makes sense that some RMPs are appropriately comprehensive. For this reason, from the outset when the Animal Products Act first commenced, the regulator was never intended to hold complete documentation sets. The administrative burden of holding such documentation and receiving updates from the thousands of such documents throughout the country is significant, a cost that presumably the industry would likely have to bear. In agreeing to the management plan model, industry agreed that the updated, current version would always be held by the business.

NZFGC considers the proposals do not meet the relevant food safety principles agreed by Cabinet during the development of the Food Act 2014, particularly the first principle, that government involvement and compliance costs imposed on the food sector will be minimised, consistent with the need for food to be safe and suitable.

Question 5. Which of the options for limiting the content of RMPs (and potentially FCPs and WSMPs) to food safety and related regulatory matters, as recommended by the WPC Inquiry, do you support? Please give reasons.

Response: NZFGC does not agree with any of the three options proposed on the basis of cost and benefit. The costs of amending plans is not offset by the benefits. NZFGC is most strongly opposed to options 1 and 3 as being impractical and costly on the one hand and inconsistent and bureaucratic on the other.

As a result, if this area is pursued at all, then option 2 is the only feasible approach. Having said that, considerable time and guidance would be required to determine the separation of the regulatory elements from the non-regulatory elements. We would also recommend this option be assessed for cost since each and every change to an RMP would potentially require approval and evaluation to ensure the regulated elements of the plan as identified delivered the food safety outcomes desired. The impost on the country of going down this route cannot be underestimated, all direct costs to business for what appears to be very limited benefit.

NZFGC recommends the Government reconsider acceptance of this recommendation and look for more efficient options to pursue to address the concern of large RMPs.

Question 6. What would the impact be on your business from each of these options? What costs might your business incur? Please give details.

Response: See response to Question 5.

Keeping the regulator up to date with RMPs and changes made to them

The WPC Inquiry recommended that the Ministry for Primary Industries should receive and maintain records of full and up-to-date programmes. The discussion paper states that keeping up to date with all amendments to the documents is essential to robust verification.

NZFGC does not agree that the regulator should receive and maintain records of full and up-to-date RMPs as has been discussed above. The regulatory model clearly places this role on the verifier. NZFGC does not agree that robust verification requires the verifier to be kept up to date with all amendments to the documents. The verifier needs to have access to all amendments to the documents that comprise the RMP at the time of verification. If necessary a statutory document could be signed by the relevant person responsible for the RMP that the verifier has access to all amendments to the documents. This, or a similar approach, would be a far more efficient and far less burdensome approach.

Costs in storing and recording and filing base documents and amendments by two recipients appears to be a recipe for high cost. An alternative might be electronic access to the relevant documents held by the company (subject to protections for access of commercially sensitive material).

Question 7. Do you agree that this proposal will adequately address the WPC Inquiry recommendation to ensure better access to full and up to date RMPs? If not, why not?

Response: NZFGC does not agree with the proposal on grounds of practicality, cost, time and complexity.

Question 8. What impacts might there be from implementing this proposal?

Response: See the comments provided above. NZFGC recommends acceptance of this recommendation be reconsidered and that other alternatives be examined.

Traceability and recall

The proposal addresses the WPC Inquiry recommendation by adding appropriate provisions to ensure the visibility of traceability in the Acts and to ensure appropriate regulation-making and notice-making powers for traceability are available.

Question 9. Do you agree that the Food Act 2014, Animal Products Act, and the Wine Act should be clearer about traceability requirements? If not, why not?

Response: NZFGC strongly supports robust traceability in the food sector. We therefore look forward to further consultation on these matters. We support the proposal that primary legislation be amended to more clearly outline industry's responsibility to have robust systems that ensure products can be traced. While we support in principle the importance of having ingredient traceability, the two areas are different and in our view more consideration of the implications of ingredient traceability needs to be undertaken before applying the same approach as is applied to products.

Question 10. Are the amendments proposed sufficient to enable traceability systems for ingredients and other inputs? If not, please identify what else is needed, and explain why.

Response: See the response to Question 10.

Ensure there are explicit regulation-and notice-making powers

Regulation-making and notice-making provisions are proposed to be amended to explicitly enable traceability requirements, to require simulated traceability and recall exercises that are independently verified and to set out the circumstances for voluntary recalls.

Question 11. Do you agree with the proposal to widen the regulation- and notice-making powers for traceability and recalls in the three food safety Acts? If not, why not?

Response: NZFGC supports in principle amendments to regulation-making and notice-making provisions relating to traceability and to the provision of traceability and recall exercises. However, we are less supportive of regulations relating to voluntary recalls since a business may decide on a voluntary recall for a range of reasons way beyond safety. We are concerned that businesses may be unnecessarily constrained in making such decisions.

Alignment of compliance and enforcement tools

This proposal implements the WPC Inquiry recommendation by aligning compliance tools so all three food safety Acts will have the same provisions for improvement notices, infringement notices, a penalty based on commercial gain, and compliance orders.

Question 12. Do you agree that the enforcement and compliance tools should be aligned between the Food Act 2014, the Animal Products Act, and the Wine Act? If not, why not?

Response: NZFGC is generally supportive of aligning enforcement and compliance tools across the food Acts except in relation to infringement notices. While we are yet to see the final decisions around the Food Act infringement regime, the initial proposals have been excessive and unnecessarily extensive (running to 13 pages of infringements) and we would not want to see this approach replicated further. Considerably more information is required regarding how such provisions might be applied before a complete understanding of the proposed changes can be made. FGC has commented to MPI over the years about labelling compliance, but we think there is a better balance to be struck between giving MPI appropriate tools to enforce compliance and these 13 pages of new rules. There is an opportunity to summarise these infringements into categories.

Question 13. Do you agree that the Animal Products Act should include: a) improvement notices; b) an infringement regime; c) a penalty based on commercial gain?

Response: NZFGC supports the inclusion in the Animal Products Act of improvement notices. NZFGC does not support inclusion in the Animal Products Act of an infringement regime (for the reasons set out in response to Question 12). NZFGC believes that further analysis is

necessary to consider the inclusion of a penalty based on commercial gain. Consideration could be given to phasing in any penalty based on commercial gain only after the review of secondary and tertiary legislation has been completed.

Question 14. Do you agree that the Wine Act should include: a) improvement notices; b) an infringement regime; c) compliance orders; d) a penalty based on commercial gain?

Response: Consistent with our response to Question 13, NZFGC supports the inclusion in the Wine Act of improvement notices and compliance orders. NZFGC does not support inclusion in the Wine Act of an infringement regime (for the reasons set out in response to Question 12). NZFGC believes that further analysis is necessary to consider the inclusion of a penalty based on commercial gain.

Proposals to improve responses to food safety incidents

The three food safety Acts are intended to be aligned so that they all permit Director-General Statements to be made for the purposes of both “informing” and “protecting” the public. It is also proposed that a provision to compel information disclosure when identifying and responding to food safety incidents be provided and that a power to require information from parties providing services to or contracted by a food business (such as the laboratory involved in the WPC contamination incident) when identifying or responding to a food safety incident be provided. It is also proposed that food safety contingency planning be subject to statutory oversight.

Question 15. Do you agree with the proposal to permit Director-General Statements to be made to both inform and protect the public? If not, why not?

Response: NZFGC agrees in principle with aligning provisions for the making of Director-General statements but would be concerned if these were used as a matter of course rather than as a last resort.

NZFGC is concerned that the paper suggests there is no obligation for the Director-General of MPI to supply underlying scientific or test results to affected parties when making a Director-General Statement. That may be the case but NZFGC would like to see a mandatory obligation for the Director-General to provide the necessary scientific and testing information that would provide supporting information to businesses in the event of the Director-General issuing a statement. If a statement is made New Zealand citizens should have every expectation that it has been made based on evidence.

Question 16. Do you support the proposed extension to the power in the Food Act 2014 to require disclosure of information during a food safety response by persons or businesses that contract with food business operators?

Response: NZFGC supports in-principle the proposed extension to the power in the Food Act 2014 to require disclosure of scientific information during a food safety response by persons or businesses that contract with food business operators. That is the information required to be disclosed should be limited to scientific information. The reservation is in relation to release of that information under Official Information Act provisions since the information may be particularly commercially sensitive. Safe guards in this area must also remain strong.

Question 17. Are the proposed safeguards appropriate? If not, why not?

Response: NZFGC has noted particular issues with the release of information disclosed from third parties during a food safety response under Official Information Act provisions since the information may be particularly commercially sensitive. Safe guards in this area must be strong.

Question 18. Do you support a change to make it explicit that the Ministry for Primary Industries has a statutory role in contingency planning for food safety incident responses? If not, why not?

Response: NZFGC supports the proposed change and while noting that food safety response planning and simulations with industry are established and ongoing initiatives, these are costly activities and any expansion of these would need to be justified over alternatives available.

Verification

It is proposed to clarify that verifiers owe their duties primarily to the regulator, and that verifiers' accreditation reports be provided directly to the regulator:

Question 19. Do you support the proposal to, for the avoidance of doubt, clarify in the legislation that recognised agencies and persons owe their duties primarily to the regulator? If not, why not?

Response: NZFGC supports this proposal.

Question 20. Do you agree that the legislation should require accreditation bodies to provide their accreditation assessment reports directly to the Ministry for Primary Industries? If not, why not?

Response: NZFGC supports this proposal.

Enhance electronic transactions

Amendments are proposed that would align the Animal Products and Wine Acts with the Food Act 2014 provisions to allow the Ministry for Primary Industries to use automated electronic systems for its statutory functions including decision-making and allow the Director-General to require information to be provided electronically and in a particular format.

Question 21. Do you support making it explicit in the Animal Products Act and Wine Act that automated electronic systems can be used (as appropriate) for all statutory food safety functions, as the Food Act 2014 currently permits?

Response: NZFGC supports this proposal but that the operationalisation of such a provision requires detailed and extensive consultation with industry concerning formats, systems and translators.

Question 22. Do you agree that where appropriate the Ministry for Primary Industries should be able to require persons to use electronic means and specific formats to provide information or for transactions? If not, why not?

Response: NZFGC is concerned that small businesses may not have the level of hardware and software necessary to meet such requirements. Further consideration should be given to this proposal for this reason.

Technical amendment proposals

Minor and technical amendments that harmonise similar requirements across the three Acts are proposed to clarify legislative inconsistencies, and make minor enhancements.

Harmonising and aligning similar requirements – proposed to align the limitation periods for bringing criminal proceedings: all three Acts will align with the Food Act 2014 provision for a 4 year limitation period;

Question 23. Do you agree with the proposal to align the limitations period to 4 years across the three food safety Acts? If not, why not?

Response: NZFGC considers 4 years is an overly extensive limitation period and suggests all three food Acts align on three years.

Reliance on superior officer's reasonable belief.

Question 24. Do you support the proposal that compliance officers may rely on the reasonable belief and directions of superior officers or the DG when forming a reasonable belief?

Response: NZFGC does not support this amendment until its application in the Food Act has been operationalised and evaluated. The Food Act provision has not been tested to assess its impact. We recommend this proposal be deferred until use of the provision in the Food Act has been applied and evaluated.

Completion of matters by other officers

Question 25. Do you support the proposal that actions started by one compliance officer may be completed by another?

Response: NZFGC supports this proposal, that actions started by one compliance officer may be completed by another.

Align incorporation by reference provisions: the same provisions should apply across the system.

Question 26. Do you support the proposal to align the incorporation by reference provisions across the food safety Acts and generally follow the Legislation Act?

Response: NZFGC supports the proposal to align the incorporation by reference provisions across the food safety Acts and generally follow the Legislation Act but that further consultation is warranted on the final approach for each affected provision.

Question 27. Do you have a preferred option for incorporating updates of material? Please give reasons.

Response: NZFGC considers that both options of incorporating material may have a role (statutory procedure whereby all updates of material must be specifically incorporated by a later instrument and allowing an instrument that incorporates material to specify that updates of certain material can be incorporated automatically) and that both options should be included and then considered on a case-by-case basis. Our preference would be with first option due to the certainty this provides but there may be occasions when the alternate may be more effective.

Clarifying intent

Clarify 'no right of review' of a delegated decision to suspend an export operation while an investigation is carried out.

Question 28. Do you support the proposal to clarify that a right of review of a decision made under delegation only applies to the deregistration decision, rather than to the interim decision to suspend an exporter? If not, why not?

Response: NZFGC supports the proposal to clarify that a right of review of a decision.

Clarify the process for and finality of review decisions made under delegated authority;

Question 29. Do you support the proposal to clarify that the Director-General decides whether to designate a person to make a review decision?

Response: NZFGC supports the proposal to clarify that the Director-General decides whether to designate a person to make a review decision.

Question 30. Do you agree that just as the DG's review decision is final, so too should be the decision made by a person designated by the DG to undertake the review?

Response: NZFGC supports the proposal that the decision made by a person designated by the DG to undertake a review is final.

Clarify which provisions Overseas Market Access Requirements can be made under

Question 31. Do you support the proposal to make clear that OMARs can be made under either the specific provisions of the Animal Products Act and Wine Act, or under the general notice-making provisions?

Response: NZFGC supports the proposal to make clear the provisions under which OMARs can be made and would be interested in the type of OMARs that might be made under the general notice-making provisions.

Clarify the definition of “retail butcher” in the Animal Products Act

Question 32. Do you support the proposal to clarify that dual operator butchers can only be retail butchers who “primarily” engage in retail trade? If not, why not?

Response: N/A.

Clarify regulatory regime for dual operator butchers’ premises

Question 33. Do you agree with the proposal to clarify that all animal products at the premises must operate under the Animal Products Act, but other food items being sold at the same premises may operate under the Food Act?

Response: N/A.

Clarify the definition of “dairy processor” – in the Animal Products Act: the current definition could be read to include people or businesses that should be regulated under the Food Act.

Question 34. Do you agree with the proposal to clarify the scope of a dairy processor? If not, why not?

Response: NZFGC supports the proposal to clarify the scope of a dairy processor.

Clarify the scope of section 60B of the Animal Products Act.

Question 35. Do you have any comment on the proposed clarification that section 60B of the Animal Products Act covers all requirements in regulations or notices?

Response: NZFGC supports the proposed clarification of section 60B.

Minor enhancements

Provide a notice-making power to notify levy formula components

Question 36. Do you have any comment on the proposal to provide a notice-making power to notify people of the specific component of a levy formula?

Response: NZFGC supports the proposal to provide a notice-making power to notify people of the specific component of a levy formula.

Make references to “part-business” consistent in the Animal Products Act.

Question 37. Do you support the proposal to insert “part business” into section 28A of the Animal Products Act and section 26 of the Wine Act to make the Acts internally consistent?

Response: NZFGC supports the proposal to insert “part business” in the relevant provisions of the Animal Products Act and the Wine Act.

Monitoring, Evaluation and Review

The Ministry will monitor implementation of the legislative changes

Question 38. Are there any particular aspects we should consider when designing the approach to monitoring these amendments?

Response: NZFGC does not propose any particular aspects for designing the approach to monitoring the proposed amendments other than cost but would be interested in continuing to be involved as this is developed.