28 May 2020

Mr David Bennet, MP
Chairperson
Primary Production Select Committee
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Parliament Buildings
WELLINGTON 6160

Email: pp@parliament.govt.nz
And: https://www.parliament.nz/en/pb/sc/make-a-submission/document/52SCPP_SCF_BILL_94967/organic-products-bill

Dear Mr Bennet

Attached are the comments that the New Zealand Food & Grocery Council wishes to present on the *Organic Products Bill 2019.*

This may be published in full, with my signature redacted.

Yours sincerely

Katherine Rich
Chief Executive

Organic Products Bill 2019

Submission by the New Zealand Food & Grocery Council

28 May 2020

NEW ZEALAND FOOD & GROCERY COUNCIL

1. The New Zealand Food & Grocery Council ("NZFGC") welcomes the opportunity to comment on the *Organic Products Bill 2019* ("the Bill").

2. NZFGC represents the major manufacturers and suppliers of food, beverage and grocery products in New Zealand. This sector generates over $40 billion in the New Zealand domestic retail food, beverage and grocery products market, and over $34 billion in export revenue from exports to 195 countries – representing 65% of total good and services exports. Food and beverage manufacturing is the largest manufacturing sector in New Zealand, representing 45% of total manufacturing income. Our members directly or indirectly employ more than 493,000 people – one in five of the workforce.

OVERARCHING COMMENTS

3. NZFGC is pleased to have the opportunity to comment on the Bill and for the extended period to do so. We have a number of major concerns listed below and expanded on in the body of this submission. These are primarily based on our experience with the *Food Act 2014* ("the Food Act"), the *Animal Products Act 1999* ("the Animal Products Act") and the *Wine Act 2003* ("the Wine Act"), collectively, the three food-related Acts.

4. Our most significant concerns are in three areas:
   - Duplication and precedence
   - Costs, both resource and financial
   - Warrantless access.

5. In broad terms, much of the Bill parallels and clearly duplicates provisions in the three food related Acts in relation to the broad issues of approvals, recognitions, compliance and enforcement making it unnecessarily cumbersome:
   - the Bill contains no description of the relationship between it and other relevant Acts yet contains extensive overlap and duplication. This will lead to excessive and duplicated costs across the food industry and potentially other goods and services industries
   - there is no recognition of the general equivalence of food safety regimes across the three food-related Acts.
   - the Bill describes what an organic product is (clause 9), such that if its labelling uses certain words that would suggest to a reasonable person that it is an organic product then it is such a product. The reasonable person is hypothetical and its use in the Bill provides no clarity or certainty as to the definition of organic. This is currently defined in relation to a good's production.
   - duplication with other food-related legislation is further confused the absence of any statements on precedence where there is conflict such as for compliance, official assurances or other related activities especially where costs are involved
   - defining an operator is a convoluted 'all in then some out' process (clause 10) which could simply be delivered with greater clarity and certainty if the operator was the operator of an organics products business or similar – as is the case for food-related operators
   - we are very concerned about the cost-plus approach presented by the Bill where existing arrangements attracting costs, both resource and informational, are already in place. This is particularly the case in the food and beverage sector in relation to:
     - approval as an operator
     - recognised person or agency
     - exporter and importer

- official assurances and
- assurances of compliance.

- warrantless entry provided for in the Bill is disproportionate to the subject of the Bill.
  - NZFGC sees no justifiable reason for organics officers to have powers to enter property without warrants and is strongly opposed to such a provision. The subject of the Bill, organic products, are consumer goods, are not dangerous or likely to present as serious crimes or that require protection for human health or the safety of persons (food safety is handled in other legislation) or the border.

6. The Bill contains no provisions for transition. Since there are existing, voluntary regulator and commercial operated programmes in place for organic products and operators in organic businesses, then transitioning for those to a legislated regime should be provided on the face of the Bill.

DETAILED COMMENTS

Part 1 Preliminary Provisions
Relationship between this Act and other relevant Acts

7. Contrary to provisions in other food related Acts, the Bill contains no description of the relationship between the Bill and other relevant Acts yet the Bill contains extensive overlap and duplication with such matters as control/management/national plans/ programmes and recognition/evaluation/verification. This will lead to excessive and duplicated costs across the food industry and potentially other goods and services industries.

8. By way of example, the Food Act includes clarity about the relationship between the Food Act, the Animal Products Act and the Wine Act (at section 6). This is to recognise the general equivalence of food safety regimes across the three Acts and minimise overlap.

9. Additionally, a section on relationships with other Acts provides clarity as to resolving conflict across closely related Acts. There is no such provision in the Bill, potentially adding to the prospect of legal challenge and the costs that such measures would incur.

Section 5 Interpretation

10. NZFGC is concerned with the breadth of the definition of 'advertising' which is defined in the Bill as follows:

    'advertising' – means any form of communication to the public or a section of the public for the purpose of representing products or promoting the supply of products'.

11. This is a truncated version of the definition of advertise used in the Food Act:

    'advertise means to use any form of communication (including selling or giving away any goods and services for any other purpose and excluding communications of personal opinion made by a natural person for no commercial gain) to the public or a section of the public in relation to: any—
    a) Goods and services; or
    b) Brand of goods or services; or
    c) Person who provides goods or services.'

12. The inclusions and exclusions in the Food Act definition make it very clear that freedom of opinion (which might be expected to be as expansive of particular foods and other goods as all foods) is preserved on the face of the Act. Our strong preference is for the definition of 'advertising' to be more fulsome so as to be clear on inclusions and exclusion.

13. The definition of exporter in the Animal Products Act includes a provision that "where an exporter … is based overseas, [exporter] includes the New Zealand agent or

representative of that exporter". It seems important that, in a globalised environment, this provision is included.

14. The definition of final consumer service means "(a) the preparation and delivery of a product described as an organic product in a restaurant, canteen or similar food business;". The term is used to determine who needs to be an approved operator. The definition would suggest anyone in the supply chain prior to retail which is excessive.

15. The definition of an official assurance in the Bill is set out in section 47 and is largely the same as contained in section 61 of the Animal Products Act. The issue is, which has precedence if a product is an organic animal product or whether the intention is to combine the official assurances in some way. This should be clear on the face of the Bill.

16. There are no explicit compliance provisions in the Bill and therefore no evaluation, verification or audit yet there are provisions for recognised persons and agencies who, in the three food-related Acts, all have responsibilities associated with compliance through some aspects of evaluation, verification or audit. There is also, in section 39, reference to the keeping a public register of operators and recognised persons and agencies for the purpose, amongst others, of facilitating "compliance, audit and other supportive functions".

17. We know, from a draft consultation document from MPI (for which we are most appreciative) that provisions relating to labelling will require an organic management plan, evaluation and verification. These are substantial requirements and their execution in other food-related Acts is central to the regimes in those Acts. We are concerned at their relegation to secondary legislation when they will result in no lesser costs than other aspects of the Bill and possibly more.

Part 2 Approval and recognition
Subpart 1—Describing a product as organic
Clause 8 Restriction on describing product as organic product

18. Clause 8 states that a product must not be described as organic to which an organic standard relates unless the product complies with the standard. This will be workable for food where a standard is already in preparation. We are concerned for products where a standard does not exist and the prospect of products such as cosmetics, personal hygiene products, textiles, timber, vape products or anything non-food could be called 'organic' according the manufacturer or importers view. This also goes to Clause 9 and the prospect of a baseline definition that would be more definitive across a range of products.

19. We are pleased to note that the Regulatory Impact Statement accompanying the Bill states, in relation to the Trans-Tasman Mutual Recognition Arrangement, that:

> "while Australia does not currently have mandatory domestic standards for organic products, if New Zealand adopts a mandatory organic regime, products that are legally able to be sold in Australia, and are imported to New Zealand from Australia, would still be able to be sold in New Zealand, even if they do not meet the organic standards."

Clause 9 Describing product as organic product

20. Clause 9 in the Bill is a two-step process relying on words used in the labelling or advertising and what this might suggest to a reasonable person. The clause reads:

> 'A product is described as an organic product if its labelling or advertising uses words such as "organic", "organically grown", "organically produced ", or "organic standards", that would suggest to a reasonable person that it is an organic product.'

21. This clause is far too wide and subjective. The Commerce Commission uses a reasonable person test in its enforcement of labelling. It is important to recognise that this is a common

law test and neither the *Commerce Act 1986* nor the *Fair Trading Act 1986* contain definitions or clauses reliant on 'a reasonable person'. The reasonable person is a hypothetical concept and denotes the average person for determining understanding, judgement, skill or response in a certain circumstance.

22. Its use in the Bill provides no clarity or certainty as to the definition of organic which is currently defined in relation to a good's production whether this is food, textiles (such as wool, cotton or bamboo) or timber.

23. We note that MPI has a working definition on its website that reads: "The term 'organic' is used for products that are made or grown according to organic production standards and can be certified by an official body." (https://www.mpi.govt.nz/exporting/food/organics/). We also note there are international definitions that should be considered such as from the International Federation of Organic Agriculture Movements (IFOAM) and the International Standards Organization (ISO). We suggest the IFOAM definition could be adapted for broader application to products.

24. As well, there is no consideration for 'partial claims' whereby the ingredients are organic but the production processes may not be certified eg "wine made from organically grown grapes" or "yoghurt using organic milk".

25. Partial claims raise concerns about whether all of an operator's operations would need to be covered in an approval or just those pertaining to the organic claims. For example, if an operator was just pre-packaging some organic goods, but also other goods that were not organic, would all the goods now need to be subject to the approval? There is also the issue of multiple organic goods made to multiple standards such as an organic food product in organic packaging – or a non-organic food product in organic packaging. Would this require multiple approvals or just one which covers them all?

26. We understand there are only around 20 retail outlets in New Zealand that are certified organic. The process to be approved as an operator will be uneconomic for many outlets. We also suggest it may be unknown to many SMEs. We suggest retailers and others can alternatively choose to have their organic trade regulated if they fall under a threshold.

27. To avoid further administrative complications and cost, an organic component might be added to an existing management plan where those retailers (including hardware businesses, pharmacies, garden centres, supermarkets, restaurants, cafes and others) that sell organic products but where the organics range does not constitute a major part of their business, complete an addition to a management plan they might operate to and share inspection that allows organic trade to a certain threshold.

Subpart 2—Approval as operator

Clause 10 Who must or may be approved as operator

28. Clause 10 states that "A person who describes a product to which an organic standard relates as an organic standard must be approved as an operator". In an effort to limit the breadth of this very wide definition, application of the clause is by excluding the final consumer, caterer/restauranteur and retailer. In limiting the exclusions only to the end user, by default it captures the rest of supply chain – every producer, manufacturer, processor, handler and potentially transporter – road, rail, sea and air vehicles, ports where products are loaded/unloaded, warehouses and storage facilities etc.

29. The definition is too wide and the exclusions too limited. Its breadth of application will be high cost to industry and a revenue raiser for regulators. It also fails to take account of

definitions applying in other food legislation that might be adapted or recognised for the purposes of removing duplication:

- in the Food Act the operator of a food business means the owner or other person in control of the business. The operator of a food control plan is the same or the person responsible for the food control plan.
- Similarly, in the Animal Products Act, the operator of an animal products business means the owner or other person in control of the business.

30. There would seem to be greater clarity and certainty if the operator was the operator of an organics products business or similar.

31. Clauses 11 to 17 relate to applying for approval, the approval process, the granting or refusal of approval, ongoing, ceasing, suspending or withdrawing approval. These are very familiar to operators in the food system. It will be important that there is alignment between the organic products and other existing food product system processes so as to streamline regulatory requirements for operators and reduce regulatory burden and cost.

32. We note that no time limit is placed on the Chief Executive to make a decision on approval. With over two decades of experience of approvals in the food sector at least, we suggest it is time for consideration to be given to placing a time limit on approval or at least making provision for a time limit to be set by the relevant Ministry. While this could include provisions for 'stopping the clock' on an approval process, such as where information is deficient, it has the real advantage of providing regulatory certainty in what is a very unpredictable environment.

Clause 18 Use of national mark

33. There is no indication of the relationship between a national mark and existing certification marks already in the market e.g. Bio-Gro. A manufacturer may wish to use both.

Clause 22 Relevant Chief Executive may recognise certain entities without application

34. It is not clear what the basis would be for a 'Chief Executive' to permit an exemption from recognition since no application has been made. The individual's rights not to be recognised should be provided for.

Subpart 3—Recognising entities

35. This subpart (clauses 19 to 37) replicates recognition provisions in the Food Act, Animal Products Act and Wine Act. In clause 38, provision is made for the exemption, waiver, or refund of fees in circumstances such as when an application or renewal is made concurrently for more than one type of approval or recognition. we are concerned there is no acknowledgement of the duplication that this appears to present with other legislation. This provision is limited to the Organic Products Bill yet application or renewal for recognition could also be made under three other food related acts: Food Act, APA and Wine Act. This is particularly pertinent if applications are made for recognition concurrently under two, three or four Acts.

36. Other than knowledge of the legislation and the particular industry, all the requirements are the same. Relief from duplication and cost is vital to avoid a multiplicity of fees for the same function.

Clause 40 Content of prescribed register

37. It is not clear what level of specificity is intended for information that must be entered into the register and whether it goes to the level of product. There is concern that if this is the case, the timeline (or Service Level Agreement) needs to be clear for updating the register.

Clause 42 Removal from register

38. In removing an operator or a recognised entity from the register, it is not clear what details will be made available within the register as to the reason the operator or entity was removed.

Clause 44 Duty to keep records

39. For this clause we ask what precautions or provisions are in place to protect intellectual property in the event the operator or recognised entity is requested to provide information by the 'organic products officer' or 'chief executive'. These are increasingly significant for global trade especially.

Part 3 Imports and Exports

Clause 45 Chief Executive approval of foreign organic products regimes for importation into New Zealand

40. A retailer selling overseas organic products must be approved as an importer but there is no clarity in the legislation that provides for approval. As well, if it is only the retailer to be approved as an importer, there is no clarity around provisions for a manufacturer importing organic ingredients for making an organic product in New Zealand, whether food or textile.

41. If no foreign organic products regime for imports is approved, we wonder if that means the organic products cannot be imported where an organic claim is made. We are concerned that this would present as a non-tariff barrier (NTB). Further, bearing in mind the definitions in clauses 8 and 9, we are also concerned about whether this clause actually provides jurisdiction in relation to overseas regimes that do not use the word "organic" such as for linguistic reasons.

42. We repeat our comfort from the Regulatory Impact Statement accompanying the Bill, that the Trans-Tasman Mutual Recognition Arrangement will apply, even though Australia does not currently have mandatory domestic standards for organic products. That is, organic products that are legally able to be sold in Australia, and that are imported to New Zealand from Australia, would still be able to be sold in New Zealand, even if they do not meet the organic standards.

Clause 46 Restriction on exports

43. These provisions generally parallel existing arrangements in food related legislation which NZFGC is largely supportive of in order to protect New Zealand's reputation as a trusted supplier of food products. However, there are issues about which takes precedence of export requirements in cases of inconsistency or conflict and duplication of approvals and approval fees. We are also concerned that no provision is made for producers where the regime in the importing country differs from the regime in New Zealand in terms of either practices or labelling. Where market access requires a departure from the New Zealand standards to meet importing country requirements than a facility should be available for exemption from the New Zealand Standard.

Clause 47 Official Assurances

44. As noted under the section above on Interpretation (section 5), the definition of an official assurance in the Bill is set out in this section. It is largely the same as contained in section 61 of the Animal Products Act. The issue is, which has precedence if a product is an organic animal product. We are also interested to know if the intention is to combine the official assurances in some way. In our view this should be clear on the face of the Bill.

45. There are also concerns about the impact of the Bill on existing organic export programmes including organic official assurances (OOAP or Organic Official Assurance Programme, under the Animal Products Act). We are aware that overseas authorities already directly recognise agencies and persons in New Zealand to certify to the current commercial standards and we would like to see a seamless process of transferring that recognition in

order to avoid interruption of trade. By way of example of the sensitivity associated with such arrangements, when the EU changed its organic production rules for wine, it unilaterally voided the recognition of the existing OOAP. This created significant market access difficulties for organic wine. Seeking recognition even of the exact same schemes should not be taken for granted. This should be specific to a transitional arrangement.

Clause 49 Providing statement of compliance

46. NZFGC is pleased to see provision for the issuing of a statement of compliance even though the Bill contains no section on compliance beyond references to the powers of the regulator for assessing compliance (such as in sections 66, 70 and 74).

Clause 50 Exemption from organic standard for exported product

47. We understand that if an exemption is issued for the difference between New Zealand and destination/importing country standards and the product was compliant with that exemption, then that product would meet the requirements of clause 46(2) (the product meets requirements for export). In our view, for the avoidance of doubt, this should be made clear on the face of the Bill.

Part 4
Cost recovery

48. NZFGC is supportive of the principles of cost recovery in clause 52 and notes the balance of the provisions relating to this Part are familiar to the food and beverage industry.

49. Nonetheless, we are very concerned about the cost-plus approach presented by the Bill where existing arrangements attracting costs, both resource and informational, are already in place. This is particularly the case in approval as an operator, recognised person or agency, exporter and importer, official assurances and assurances of compliance. We note that the Regulatory Impact Statement said: "It is likely that some businesses that would be within scope of the organics regime are already registered with MPI under other regimes such as the Food Act or the Wine Act. The primary legislation will allow for processes to be aligned and fees to be reduced or removed where possible to avoid unnecessary costs to businesses." We see no evidence of this in the Bill.

50. The Bill is very prescriptive and its application will require substantial effort and work as well as additional costs as proposed under these clauses. These will all increase the compliance burden, add additional red tape and increase unnecessary costs. We note in particular the proposal from the Regulatory Impact Statement that cost recovery may well apply to: maintaining and implementing national organic standards; processing approvals and recognitions; monitoring enforcement of businesses and approved third parties; and negotiating trade arrangements for organic products. This is a substantial list of activities to be cost recovered from a sector that has been emerging fin recent years and will be hurting as much as other sectors in the current environment.

51. We note the Regulatory Impact Statement said: "Given that many businesses already choose to undergo voluntary certification against private standards, these costs will only be additional to those businesses that are not already voluntarily checked for compliance." We see no evidence of provisions that recognise private standards as equivalent and removing the need for regulator compliance.

52. Regulatory Impact Statement goes on: "However, businesses that adhere to lighter touch voluntary regimes may see their costs rise where more onerous requirements are introduced." These are likely to be SMEs that have sought a system that delivers cost effectively to their scale of operation. We are concerned that the regulatory burden imposed by the Bill will potentially remove these businesses from the market. In the current

depressed economic environment this is quite contrary to assisting New Zealand businesses continue.

Part 5
Enforcement
Organic Products Officer powers
Clause 62 Power of warrantless entry

53. The *New Zealand Bill of Rights Act 1990* gives us protection from unreasonable search and seizure. Warrantless entry is contrary to that protection without very strong reason, limitations and checks on exercise. In those rare cases where it is provided for, it is generally for reasons of protecting people (including children) or animals. In the case of police, there are also for reasons of arrest, to prevent crimes, seize evidence, in emergencies or for firearms and drugs. Police can enter to prevent an offence that is about to be committed if it is likely to cause immediate and serious injury to any person or property. Unless they have a warrant, the Police generally only have the power to search premises when the occupier permits them to do so. In almost all circumstances marae and dwellings are excluded.

54. The number of Acts in New Zealand that have provisions for warrantless entry are very limited and include the *Land Transport Act 1998*, the *Immigration Act 2009* and the *Animal Welfare Act 1999*. In the *Land Transport Act 1998*, warrantless entry is provided for in pursuing a person driving under the influence of drink or drugs or during the fresh pursuit of a vehicle. In the *Immigration Act 2009*, immigration officers have access without warrant to protect the border or pursue a deportee amongst other things. In the *Animal Welfare Act 1999*, such access is for the safety of animals.

55. In recent debate of the *COVID-19 Public Health Response Bill*, May 2020, right to the end of the third reading[1], the provisions around warrantless entry were hotly debated. It was described as 'the real kicker' and 'draconian legislation that curtails our freedoms'. It was noted that it is critical for provisions to be proportionate and that powers must be kept in check otherwise they can be executed and exploited and become coercive.

56. In light of the foregoing, NZFGC sees no justifiable reason for organics officers to have powers to enter property without warrants and is strongly opposed to a provision for warrantless entry. The subject of the Bill, organic products, are consumer goods that are consumer driven and are not dangerous or likely to present as serious crimes. The provision for warrantless entry in the Bill is disproportionate to the subject of the Bill.

Clause 67 Power to issue an improvement notice

57. We understand that this provision is triggered in relation to a compliance assessment carried out by a recognised agency that results in a non-compliance for which an improvement notice is then issued. If this is not the case, greater clarity in the provision is necessary.

Clause 69 Statements by relevant chief executive

58. This clause provides that a chief executive can make a statement about any organic product or advertisement to protect or inform the consumer. The only check on this is that it should be made in good faith and should not be made recklessly.

59. We recognise that some statements may need to be refuted as we have seen with health and immune claims for products against COVID-19 but clause 69 should not purport to be in the same league. It is disproportionate to the impact. In fact, no impact other than protect and inform is included. We strongly recommend additional checks be included that such a

[1] https://www.parliament.nz/en/pb/hansard-debates/rhr/combined/HansDeb_20200513_20200513_24

statement only be made after reasonable discussions with the party responsible for the product or advertisement and that other avenues, such as voluntary withdrawal or apology/explanation as provided in clause 73(2) by the party responsible.

Part 6
Regulations and Notices
Subpart 1 –Regulations
Clause 105 Organic Standards

60. It is not clear whether an organic standard is to set out requirements for marketing and advertising of organic products and the relationship this potentially raises with other legislation.

Clause 107 General regulation-making power

61. In relation to the use of a national mark, the information under clause 107(1)(d) is vague. It provides no indication as to voluntary or mandatory use of a national mark, implications for packaging or marketing approvals and whether additional charges are incurred for its use.

Part 7
General provisions
Commodity levies
Clause 115 Application of the Commodity Levies Act 1990 to organic products

62. We are very concerned that this clause gives organic products special status in relation to the *Commodity Levies Act 1990*. There are two reasons for this:
    1) a commodity levy could potentially be levied on the same product as a conventional product and as an organic product. For example, a commodity levy could apply broadly to “grapes” and another levy to “organic grapes” delivering two levies to the organic operator.
    2) the *Commodity Levies Act 1990* applies only to commodities and not to processed goods (with the exception of wine). This means there is potential for a compulsory commodity levy funded industry association to exist for a class of organic products when there is no equivalent opportunity for non-organic products.

Schedule 1
Transitional, savings, and related provisions

63. NZFGC is very concerned there are no provisions for transition.

64. Given there are existing, voluntary regulator and commercially operated programmes in place for organic products and operators in organic businesses, then transitioning for those to a legislated regime should be provided for on the face of the Bill.

65. As well, appropriate transition periods by type of existing organics business could be included in the schedule such that those transition periods could be different depending on the type of operator and if they were an existing business with an Organics Management Plan under the APA. It could also differentiate between importers and exporters, primary producers (animals, agriculture, dairy), and secondary processors. It could also recognise and sequence existing evaluators and verifiers especially if they are already have, or have had, responsibilities for evaluation or verification of Organics Management Plans.