

Departmental Disclosure Statement

Organic Products Bill

The departmental disclosure statement for the Organic Products Bill (the Bill) seeks to bring together in one place a range of information to support and enhance Parliamentary and public scrutiny of the Bill.

It identifies:

- the general policy intent of the Bill and other background policy material;
- some of the key quality assurance products and processes used to develop and test the content of the Bill;
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

This disclosure statement was prepared by the Ministry for Primary Industries.

The Ministry for Primary Industries certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

5 February 2020

Contents

Contents.....	2
Part One: General Policy Statement.....	3
Part Two: Background Material and Policy Information	5
Part Three: Testing of Legislative Content.....	7
Part Four: Significant Legislative Features	9
Appendix One: Further Information Relating to Part Two.....	12
Appendix Two: Further Information Relating to Part Three.....	14

Part One: General Policy Statement

Demand for organic products has grown markedly in recent years in New Zealand and overseas with the global market now worth over \$116 billion annually. In 2017, New Zealand's organic industry was worth \$600 million. Organic claims are credence claims that consumers cannot independently verify. As a result, production rules that reflect organic production are important tools for all participants in the system, and are widely used internationally by all of our key trading partners.

The Organic Products Bill proposes a regime to regulate organic claims and the businesses who make them. The Bill's objectives are to –

- increase consumer confidence in purchasing organic products;
- increase certainty for businesses making claims that their products are organic (organic claims);
- facilitate international trade in organic products.

These objectives and how the Bill will achieve them are discussed below.

Increased consumer confidence

Under the current framework, New Zealand businesses that make organic claims can choose whether or not to be certified to one of a range of private standards with different requirements. This can create inconsistency in organic claims and confusion for consumers.

The Bill will create consistency amongst organic claims and decrease consumer confusion by enabling mandatory requirements to be set for –

- any product sold, labelled or represented as organic whether it is imported, produced and sold domestically, or exported; and
- each step along the supply chain, including the production, preparation and processing plus all aspects of handling (including storage, packing, labelling, transport, and wholesale).

Increased business certainty

Under the current legislative framework, businesses are required to substantiate organic claims and make sure these are not misleading, which can create uncertainty for businesses who make organic claims. It is unclear what organic practices would be acceptable to consumers, regulators, or trading partners, and what evidence they need to demonstrate that they comply with organic production requirements.

The Bill will create certainty for businesses wanting to make organic claims by enabling requirements for organic production to be made in regulations. The Bill also enables administrative regulations to be set as to how to demonstrate compliance. The Bill enables recognised entities (third party agencies recognised by the relevant ministry) to check organic businesses before approval, and on an ongoing basis for compliance.

Facilitating international trade

Countries who regulate organic production are increasingly expecting comparable regimes from their trading partners. Currently, the Ministry for Primary Industries runs a voluntary export programme, the Official Organic Assurance Programme, which enables exporters to access specific organic markets that require assurance.

The Bill will further facilitate New Zealand to negotiate new and more secure access in organic markets by increasing government oversight of the sector regarding what is produced here and exported. Part 3 of the Bill also contains requirements for exporters. These measures are likely to –

- increase trust with trading partners;
- improve New Zealand’s ability to negotiate better market access; and
- state New Zealand’s position on organics and allow us to defend it internationally.

Special features of the Bill

The Bill enables any relevant ministries to become responsible for the regulation of organic products relevant to their mandate, including the development of organic production standards and the administration, monitoring, and enforcement of associated regulatory requirements. The Ministry for Primary Industries will be the administering department for the Bill.

Part Two: Background Material and Policy Information

Published reviews or evaluations

2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill?	YES
<p>Ministry for Primary Industries, Discussion paper: Would New Zealand benefit from having a new regulatory regime for organic production? (2018): https://www.mpi.govt.nz/news-and-resources/consultations/proposed-changes-to-the-way-organic-production-is-regulated/</p> <p>Carmen Bullon Caro, Gracia Marin Duran, and Elisa Morgera, <i>Organic Agriculture and the law</i>, Food and Agriculture Organisation of the United Nations (2012): http://www.fao.org/3/i2718e/i2718e.pdf</p> <p>Organics Aotearoa New Zealand Market Report 2018: https://my.pcloud.com/publink/show?code=XZd19t7ZbqMEQghJyM0KJBfWljPrnJTtBI97</p>	

Relevant international treaties

2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?	NO
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Regulatory impact analysis

2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?	YES
<p>The link to the regulatory impact statement can be found below. https://www.mpi.govt.nz/news-and-resources/consultations/proposed-changes-to-the-way-organic-production-is-regulated/</p>	

2.3.1. If so, did the RIA Team in the Treasury provide an independent opinion on the quality of any of these regulatory impact statements?	NO
<p>The regulatory impact statement was reviewed by the Ministry for Primary Industry's internal RIA panel, as recommended by the Treasury.</p>	

2.3.2. Are there aspects of the policy to be given effect by this Bill that were not addressed by, or that now vary materially from, the policy options analysed in these regulatory impact statements?	NO
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Extent of impact analysis available

2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?	NO
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2.5. For the policy to be given effect by this Bill, is there analysis available on:	
(a) the size of the potential costs and benefits?	YES
(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?	NO
The cost/benefit analysis for 2.5(a) can be found in Appendix one, and in the regulatory impact analysis.	

2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by:	
(a) the level of effective compliance or non-compliance with applicable obligations or standards?	YES
(b) the nature and level of regulator effort put into encouraging or securing compliance?	YES
<p>Business that do not comply will likely have increased compliance checks that will incur additional costs. These businesses may also not be able to market their product as organic, which is likely to reduce the price premium sought.</p> <p>Costs incurred by the administering department will be recovered from businesses and recognised agencies/persons, which means that costs will increase with the level of regulator effort to ensure compliance.</p>	

Part Three: Testing of Legislative Content

Consistency with New Zealand's international obligations

3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations?

The Ministry for Primary Industries has consulted the Ministry of Foreign Affairs and Trade to ensure that the policy in the Bill is consistent with New Zealand's international obligations, and will notify the World Trade Organization. The Ministry for Primary Industries has also consulted with the Ministry of Business, Innovation and Employment.

Consistency with the government's Treaty of Waitangi obligations

3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?

The MPI legal consider that it is consistent with the principles of the Treaty of Waitangi.

Consistency with the New Zealand Bill of Rights Act 1990

3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?

YES

Advice provided to the Attorney-General by the Ministry of Justice, or a section 7 report of the Attorney-General, is generally expected to be available on the Ministry of Justice's website upon introduction of a Bill. Such advice, or reports, will be accessible on the Ministry's website at <http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/bill-of-rights/>

Offences, penalties and court jurisdictions

3.4. Does this Bill create, amend, or remove:

(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?

YES

(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?

YES

The Bill creates a number of new offences, including an infringement scheme, to ensure compliance with the proposed organics regime. Offences can be found in part 5, clauses 82 to 88.

Prosecution of these offences will take place in either the High Court or the District Court.

3.4.1. Was the Ministry of Justice consulted about these provisions?

YES

The Ministry of Justice was consulted as part of policy development on the offences regime. Input was sought from the Ministry of Justice on what type of offences were most appropriate for enforcement. The provisions reflect the Ministry of Justice's comments.

Privacy issues

3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?	YES
Clauses 35 and 43 allows the relevant Ministry to request information from operators and recognised entities, and clause 39 requires the relevant Chief Executive to maintain a publicly available register of approved operators and recognised entities.	

3.5.1. Was the Privacy Commissioner consulted about these provisions?	YES
The Office of the Privacy Commissioner was consulted on early drafts of the Bill, and asked for more clarity on the role of recognised entities. It was also noted that the Privacy Bill currently before the House might have impacts on the way public registers are established and maintained under this Bill. More clarity to the definition surrounding recognised entities was added.	

External consultation

3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill?	YES
The Ministry for Primary Industries undertook consultation on proposals for inclusion in the Bill: Consultation document [<i>Would New Zealand benefit from new organic regulation?</i> May 2018] (available at: https://www.mpi.govt.nz/dmsdocument/28797-would-new-zealand-benefit-from-new-organic-regulation). This included seeking feedback on a discussion document and ten public meetings. The regulatory impact assessment (link in section 2.3) also describes the consultation undertaken.	

Other testing of proposals

3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete?	NO
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Part Four: Significant Legislative Features

Compulsory acquisition of private property

4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?	NO
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Charges in the nature of a tax

4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax?	NO
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Retrospective effect

4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?	NO
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Strict liability or reversal of the usual burden of proof for offences

4.4. Does this Bill:	
(a) create or amend a strict or absolute liability offence?	YES
(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?	YES

Strict liability offences reverse the usual burden of proof as the defendant must prove the existence of a statutory defence or absence of fault. There are four strict liability offences in the Bill:

- **Clause 85– Sale of non-compliant product**
It is an offence if a business sells a product described as organic that is not compliant with the standard. Operators are liable for a fine of up to \$50,000 per individual, and up to \$250,000 for a body corporate.
- **Clause 86– Sale without being approved**
It is an offence to sell a product described as organic when that person isn't an approved operator or specifically exempt from approval. Individuals are liable for fines up to \$20,000 and body corporates are liable for a fine of up to \$100,000.
- **Clause 87– Failure to meet export requirements**
It is an offence to export a product described as being organic and they are not an approved exporter. Individuals are liable for fines up to \$20,000 and body corporates are liable for a fine of up to \$100,000.
- **Clause 88 – Breach of duty for recognised agency/person**
It is an offence for recognised agencies/people if they breach any of their obligations under the Bill. Individuals are liable for fines up to \$20,000 and body corporates are liable for a fine of up to \$100,000.

The strict liability offences in the Bill are justifiable as operators are voluntarily part of the Bill by opting to classify their product as organic. The Ministry for Primary Industries consulted with the Ministry of Justice on this, and it was decided that using strict liability offences was justified. Defences are included in the Bill.

Civil or criminal immunity

4.5. Does this Bill create or amend a civil or criminal immunity for any person?	YES
<p>Clause 98 contains an immunity for people acting under authority of the Bill, in good faith and with reasonable cause. This includes:</p> <ul style="list-style-type: none"> • the relevant chief executive, • an employee of the relevant Ministry, • an employee of a recognised entity, • organic product officers. <p>The immunity is from both civil and criminal proceedings.</p> <p>The immunity is necessary for people acting under authority of the Bill as they need to collect evidence and information to ensure compliance. The benefits of being able to collect information and evidence to ensure operator compliance outweigh an operator who is voluntarily choosing to market organic products.</p> <p>The immunity in clause 98 is only limited to employees and the relevant Chief Executive, and does not prevent proceedings against the employer, in line with Law Commission recommendations.</p>	

Significant decision-making powers

4.6. Does this Bill create or amend a decision-making power to make a determination about a person's rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?	NO
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Powers to make delegated legislation

4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?	YES
<p>Clauses 108 and 112 of the Bill allow for exemptions to be made in regulations for classes of operators, and notices to be made for the exemption of individual operators. It is intended to allow flexibility in administrative requirements for operators, and allow exemption from specific administrative requirements. The exemptions are necessary to ensure that costs imposed by the regime remain proportionate to the benefits.</p> <p>To ensure these clauses are constrained and used appropriately, these exemptions must be consistent with the purpose of the Bill, and cannot relate to the requirements set in the organic standard. Class-exemption provisions that will be set in regulations will also be publicly consulted on to ensure they are granted appropriately.</p>	

4.8. Does this Bill create or amend any other powers to make delegated legislation?	YES
<p>Part 7 of the Bill contains regulation- and notice-making powers to ensure the Bill can be given full effect. These include regulations that set out the processes that will need to be followed by operators, recognised entities and relevant agencies.</p> <p>The regulations will also include the standards. Standards will set the rules for products marketed as organic, such as production methods, and can be made by the relevant Ministry. The Ministry for Primary Industries is proposing that the first standard will be for food, plants, animal products, beverages and aquaculture.</p>	

Any other unusual provisions or features

4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?	YES
The Bill allows for multiple ministries to make and administer regulations on certain organic products they wish to regulate within the scope of their mandate.	

Appendix One: Further Information Relating to Part Two

Extent of impact analysis available – question 2.5(a)

Who are the main expected beneficiaries and what is the nature of the expected benefit?

The organic sector would receive the greatest benefits from a mandatory national standard. Mandatory standards replacing a range of voluntary standards would provide them with certainty about what the government considers to be organic. Mandatory standards would facilitate international trade as they would align with our trading partners and provide them with the certainty that New Zealand products meet standards. This may reduce the number of extra requirements that need to be met for many export markets. While the organic sector broadly would receive the greatest benefits, the benefit would not be evenly felt by all businesses within the sector. Some businesses will have a higher costs to benefits ratio than others.

Consumers are likely to benefit by being more confident that the product they are paying a premium for is produced organically according to a government mandated standard. A survey conducted by MPI in 2018 shows a majority of consumers would be more likely to buy organic food if they had confidence in a standard and that organic products were checked for compliance with that standard.

Where do the costs fall?

Mandatory standards would come with increased costs for the organic industry.

Checking compliance:

Businesses' compliance would be required to be checked against the standards. This check would be done by a recognised agency. The cost of checking compliance against private organic standards in New Zealand currently ranges from approximately \$350 per year for checking the compliance of a group (where systems and costs are shared amongst a group of businesses) to \$2,500 per year for individual compliance checks for exports. However this includes certification, whereas the approval part of the process is proposed to be separate in the regulatory regime.

Given that many businesses already choose to undergo voluntary certification against private standards, these costs are already incurred by most organic businesses, and will only be additional to those businesses that are not already voluntarily checked for compliance. However, businesses that adhere to lighter-touch voluntary regimes may see their costs rise.

It is important to note that these costs will only apply to businesses that choose to make organic claims, and that consider it commercially beneficial to make those claims and be independently verified.

Approval by the administering department:

All businesses who want to make organic claims (including those already undergoing voluntary compliance checks) would have the cost of obtaining approval from the administering department, where there is a standard in place.

MPI approval under other Acts (such as the Food Act or the Wine Act) range from \$68 to \$310 per year, depending on the complexity of the application. We expect the cost of organic approval to be similar. Significant changes to businesses' scope of approval would be subject to variation fees within a similar range.

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.

Costs to Government:

The primary legislation would enable different departments to develop and administer organic standard for products within their expertise. For many departments this is likely to mean that they will have to set up a new function to approve organic businesses and carry out compliance and enforcement activities. The costs will depend on the functions within the administering department.

Cost recovery of additional government services:

In addition, the administering department would incur costs that may be cost recovered from sector. These costs include:

- developing, maintaining and implementing national organic standards;
- monitoring compliance of businesses and approved third parties;
- negotiating trade arrangements for organic products; and
- enforcing the regime (except for prosecutions).

The primary legislation would establish a principles-based framework to enable costs to be recovered using a range of methods, including levies and direct charges for services. Details of cost recovery, including fees and levies, would be set in regulations.

Further detail on the proposed cost recovery framework is provided in Section 6.4 of the regulatory impact analysis.

Cost to third parties (recognised agencies):

There will also be costs for third parties to become recognised to check compliance under the legislation. Costs will include the costs to meet the relevant competences to become recognised, as well as the costs of the application process. Two third party agencies in New Zealand currently bear these costs already in order to certify organic products for MPI's export programme. However this would be an ongoing cost, and a new cost for any other agencies wanting to carry out this role. It is likely that these costs will be passed on to businesses as part of the cost of checking compliance.

Cost to consumers:

Ultimately, it is likely that the costs to the industry will be passed on to the consumer, resulting in higher prices for organic products.

Appendix Two: Further Information Relating to Part Three

Offences, penalties and court jurisdictions – question 3.4

New offences in part 6:

Operator offences

The Bill introduces five offences for operators of organic businesses.

Offences involving deception for benefit

A new offence is created for people intentionally deceiving or misleading a consumer or a recognised entity about the status of a product claimed to be organic. The maximum penalty for an individual is \$200,000 and the maximum penalty for a body corporate is \$600,000.

Sale of noncompliant product that is described as organic

A new offence is created for operators selling products as organic and the product does not meet the standards set out in the Bill. The maximum penalty is \$50,000 for an individual and \$250,000 for a body corporate.

Selling product described as organic by person not approved as an operator

A new offence will be created for people selling products as organic without being an approved operator. The maximum penalty is \$20,000 for an individual, and \$100,000 for a body corporate.

Exporting products described as organic when unregistered

There is also an offence created for unregistered exporters exporting organic products. The maximum penalty is \$20,000 for an individual and \$100,000 for a body corporate.

Other than offences involving deception for benefit, the operator offences have a defence if the offending was outside the operator's control, the operator took reasonable steps to stop the offending or the operator was supplied with products that did not comply with requirements and there was no way of knowing otherwise

Obstructing an organic officer

The Bill creates an offence for operators who refuse to comply with organic officers or obstruct organic officers from carrying out their functions under the Act. The maximum penalty for an individual is \$20,000 and \$100,000 for a body corporate.

Recognised entity offences

Breach of duty

The Bill creates an offence for recognised entities if they fail to carry out any duties under the Bill or future regulations without a reasonable excuse. The maximum penalty for an individual is \$20,000 and the maximum penalty for a body corporate is \$100,000.

Other offences

Impersonating an organic officer

The Bill creates an offence for impersonating an organic officer, a recognised entity or an employee of the relevant ministry. The maximum penalty for an individual is \$20,000 while the maximum penalty for a body corporate is \$100,000.