



NEW ZEALAND
LAW SOCIETY

NZLS EST 1869

Organic Products Bill

28/05/2020

Submission on the Organic Products Bill

Introduction

1. The New Zealand Law Society (**Law Society**) welcomes the opportunity to comment on the Organic Products Bill (**the Bill**).
2. The Bill proposes a new regulatory regime to govern organic claims and the businesses that make them, in order to increase consumer confidence; increase certainty for businesses; and facilitate international trade in organic products.¹

Executive summary

3. The Law Society's submission focuses on the new criminal offence provisions in the enforcement section of the Bill (Part 5, Subpart 3). In summary:
 - (a) The organics-specific fraud offences in the Bill create inconsistencies with similar offence provisions – in relation to both the applicable charge and penalty – depending on which statute (and subsequent offence provision) the person is prosecuted under.
 - (b) Section 82(3) and (4), which allows a court, as part of sentencing, to order the disgorgement of profits obtained through offences involving deception is unusual and does not directly advance one of the purposes of sentencing in the Sentencing Act 2002. The Law Society is especially concerned that subsection (4), which says assessment of the value of the wrongly obtained profit need only be to the civil standard, is contrary to section 24(2)(c) of the Sentencing Act (which requires that any disputed aggravating factor in sentencing must be proved to the criminal standard of beyond reasonable doubt).
 - (c) The Law Society also questions whether section 82(3) is necessary to achieve proportionate recovery of ill-gotten gains from infringing organic claims. The existing civil recovery regime pursuant to the Criminal Procedure (Recovery) Act 2009 would be a more principled way to divide civil recovery from criminal sentencing.
 - (d) Proposed section 84 should expressly include a mental element.
4. The Law Society also makes some minor drafting suggestions.
5. The Law Society wishes to be heard.

Part 5 – Enforcement: Subpart 3 – Offences

Section 82: Offences involving deception for benefit

6. The Regulatory Impact Statement (**RIS**) notes that currently organic products must comply with a range of overarching laws that apply equally to non-organic products, such as the Fair Trading Act 1986, which aims to prevent false and misleading claims.²

¹ Organics Product Bill, Explanatory Note, p 1.

² Regulatory Impact Statement, Organic Production and Processes, 30 January 2020, at [2.2].

7. To assist with the purpose of creating certainty for businesses, the Bill seeks to establish a standalone enforcement regime for organic claims. Section 82 creates a new criminal offence if the person “with intent to deceive and for the purpose of obtaining a material benefit or avoiding a material detriment”, does one of several things set out in that section.³ A person who commits an offence is liable on conviction to a fine of up to \$200,000 (for an individual) or up to \$600,000 (for a body corporate). In addition, the Court may order a person to pay an amount not exceeding the value of the material benefit gained or material detriment avoided resulting from the conduct in question. The value must be assessed using the civil standard of proof.

Inconsistency in penalties across similar offence provisions

8. Conduct made criminal under proposed section 82 may also be considered criminal under various other statutes, with some statutes containing significantly different maximum penalties. For example:

- (a) Subsection (1)(b) makes criminal conduct which “falsifies, removes, alters, or misrepresents a label, brand, national mark, or product description of organic products that is required or authorised by this Act”.

Removing or altering a label would appear to come within section 13 of the Fair Trading Act 1986 (although this section carries a similar applicable fine to proposed section 82).

- (b) Subsection (1)(c) states that it is an offence if a defendant “misrepresents, substitutes in whole or in part, adulterates, or tampers with a product to which an organic standard applies, so that the product no longer matches its description or official assurance as an organic product”.

If done in the context of trade that may also be considered an offence under section 13 of the Fair Trading Act. However, if the product in question is then sold without disclosure of the misrepresentation, for example, there may also be an offence of causing loss by deception under section 240 of the Crimes Act 1961 (which carries a maximum penalty of three years’ imprisonment).

- (c) Subsection 1(e) makes criminal conduct which “falsifies certificates, official assurances or other documents required or authorised by this Act”.

This conduct may also be an offence of dishonestly using a document under section 228(1)(b) of the Crimes Act 1961 (which carries a maximum penalty of seven years’ imprisonment).

9. The above examples illustrate the significant range of penalties that may be available for similar offending (from a fine of up to \$200,000 to a maximum of seven years’ imprisonment).

³ For example, makes false or misleading statements or a material omission in a communication, in an application, or in records required for the purposes of the Act (section 82(1)(a)).

10. The Department Disclosure Statement records that input was sought from the Ministry of Justice on what type of offences were most appropriate for enforcement, with the provisions reflecting the Ministry's comments.⁴
11. The RIS states the following principles were applied in designing the Bill's enforcement tools:⁵
 - (a) to disincentivise non-compliance with the standards and misleading behaviour from businesses; and
 - (b) to encourage effective participation in the system.
12. The RIS also notes that the "*sanctions recognise and reflect that the regime is primarily concerned with consumer information rather than health or safety*. Where appropriate, the enforcement regime has been modelled on the Wine Act and Fair Trading Act. This includes criminal liability for fraud and misleading behaviour but not imprisonment."⁶ (emphasis added)
13. While we note it is not necessarily unusual to have duplicate offence provisions across different statutes, and that the RIS acknowledges the sanctions reflect a connection to consumer information, the degree of overlap raises the real possibility that an offender may receive a significantly different sentence, depending on which statute (and subsequent offence provision) they are prosecuted under.
14. The Law Society recommends the Committee consider whether this duplication of offence provisions is appropriate.

Additional penalty to the civil standard of proof

15. As noted above, in addition to any monetary sentence, proposed section 82(3) allows a sentencing judge to order the person to pay an amount "not exceeding the value of the material benefit gained or material detriment avoided resulting from the conduct" in question. The Court must then assess the value of this amount to the civil standard of proof (on the balance of probabilities): proposed section 82(4). The normal rule in sentencing is that a factor tending to increase the sentence must be proved by the prosecutor beyond reasonable doubt (see Sentencing Act 2002, section 24(2)(c)). It is not clear why there is a departure from this usual practice in proposed section 82(4).
16. The additional penalty is unusual in the criminal context and is not included in the corresponding Wine Act and Food Act provisions. In rare examples where the sentencing is by reference to the benefit obtained, the defendant is not being asked to disgorge the profits obtained from the offending, rather the maximum level of the fine is measured by reference to the profit obtained. This usually occurs where there are significant public safety concerns.⁷ In these cases the criminal standard of proof (beyond a reasonable doubt) is applied.

⁴ Department Disclosure Statement, Organic Products Bill, 5 February 2020, at [3.4.1].

⁵ Above n 3, at p 39.

⁶ Ibid.

⁷ For example, see s 47 of the Civil Aviation Act 1990, s 69ZZW of the Health Act 1956, s 76 of the Outer Space and High-altitude Activities Act, s 229B of the Resource Management Act 1991, and s 8 of the United Nations Convention on the Law of the Sea 1996.

17. If this additional penalty is retained in section 82, we recommend the Committee consider whether the value of the material benefit gained should be assessed to the criminal standard of beyond reasonable doubt, not the lower civil standard of on the balance of probabilities (which is anomalous in the context of sentencing for a criminal offence).⁸
18. The Law Society also queries whether section 82(3) is necessary to achieve proportionate recovery of ill-gotten gains from infringing organic claims. Where a commercial gain is significant enough to warrant additional state attention, the existing civil recovery regime pursuant to the Criminal Proceeds (Recovery) Act 2009 (**CPRA**) is arguably sufficient. CPRA recovery would not require enactment of section 82(3), and any/all gains in excess of \$35,000 could be recovered using the CRPA's well-established framework.⁹ This would be a more principled way to divide civil recovery from criminal sentencing.

Drafting issues

19. "Material benefit" and "material detriment" are not defined, which may create uncertainty as to what is required in order to prove an offence under section 82. We recommend these terms are expressly defined in the Bill. We note section 2 of the Crimes Act 1961 contains a definition of "material benefit" and "obtains a material benefit" and invite the Committee to consider whether these definitions could be adapted for inclusion in the Bill.

Section 84: Obstruction of officers

20. Proposed section 84 states that "a person commits an offence if the person resists, obstructs, or delays an organic products officer, a recognised entity, or a person exercising powers delegated from the relevant chief executive, or a person assisting that officer, entity, or person". The Law Society raises the following issues.
 - (a) Proposed section 84 has not been included in the 'strict liability offences' section in the Bill. It can therefore be inferred that proposed section 84 is a criminal offence requiring mens rea.¹⁰ However, the proposed section does not expressly include any mental element in the offence.

The Legislation Guidelines state that "a criminal offence should include a mental element unless there are compelling policy reasons to relieve the prosecution from the burden of proving a mental element and require the defendant to prove some essential element to

⁸ We have only been able to find three examples of such a provision on New Zealand's statute books: s 40A of the Fair Trading Act 1986, s 72 of the Immigration Advisers Licensing Act 2007, and s 67 of the Waste Minimisation Act 2008.

⁹ See Criminal Procedure (Recovery) Act 2009, section 6(1)(b).

¹⁰ Legislation Design Advisory Committee, Legislation Guidelines 2018, at [24]: <http://www.ldac.org.nz/assets/documents/adaed3dc25/Legislation-Guidelines-2018-edition-2019-0515.pdf> The Guidelines state that offences can fall into three categories: offences requiring mens rea, offences of strict liability or offences of absolute liability. Offences requiring mens rea (the mental element) must include it an ingredient of the offence and the prosecution is required to prove it (along with the physical element, the actus reus, of the offence).

avoid liability. In such a case, an offence may be framed as a strict liability offence, meaning the prosecution must prove only the physical element of the offence.”¹¹

The Guidelines go on to state that “if legislation is silent as to the mental element or the defences available, the courts will generally infer a mental element, but that can create uncertainty. This is undesirable because a person is entitled to know before engaging in conduct whether it is prohibited and, if so, in what circumstances.”¹²

Although the courts may infer that intention is required, this should be made clear in proposed section 84. For example, proposed section 84 could be amended to say, “if the person *intentionally* resists, obstructs, or delays an organic products officer ...”. This would be consistent with section 235 of the Food Act, which makes it an offence “if a person intentionally hinders or obstructs” a food safety officer.

- (b) Finally, the maximum penalty provided (\$20,000 for an individual, \$80,000 for a body corporate) is lower than the comparable provisions in the Food Act (section 235) and the Wine Act (section 101).¹³ On the other hand, the maximum penalty in those Acts and the Bill is much higher than for other comparable obstruction offences, where the offence is punishable by a fine only (for example, section 134 of the Films, Videos, and Publications Classification Act 1993 carries a maximum fine of \$1,000 and section 29 of the Prostitution Reform Act 2003, carries a maximum fine of \$2,000). The Committee should consider whether the significant difference between the section 84 penalty and the comparable penalties in the Food Act and Wine Act for example, is appropriate.



Frazer Barton
Vice President
28 May 2020

¹¹ Ibid.

¹² Ibid.

¹³ Both sections both have a maximum penalty of a fine of \$250,000 for a body corporate and three months' imprisonment for an individual.