

28 November 2019

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Organic Products Bill

Purpose

1. We have considered whether the Organic Products Bill ('the Bill') is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 ('the Bill of Rights Act').
2. We have not yet received a final version of the Bill. This advice has been prepared in relation to the latest version of the Bill (PCO 21118/24.0). We will provide you with further advice if the final version includes amendments that affect the conclusions in this advice.
3. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered the consistency of the Bill with s 14 (freedom of expression), s 21 (unreasonable search and seizure), and s 25(c) (right to be presumed innocent until proven guilty). Our analysis is set out below.

The Bill

4. The Bill proposes a regime to regulate organic claims and the businesses who make them. The Bill's objectives are to:
 - a. increase consumer confidence in purchasing organic products;
 - b. increase certainty for businesses making organic claims; and
 - c. facilitate international trade in organic products.
5. The Bill will increase consumer confidence by creating consistency amongst organic claims and decrease consumer confusion by enabling mandatory requirements to be set for:
 - a. any product sold, labelled or represented as organic whether it is imported, produced and sold domestically, or exported; and
 - b. each step along the supply chain, including production, preparation and processing plus all aspects of handling.
6. 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 to check organic businesses before approval and on an ongoing basis for compliance.
7. The Bill will further facilitate New Zealand to negotiate new and more secure access to organic markets by increasing government oversight of the sector regarding what is

produced in New Zealand and exported. Part 3 of the Bill also contains requirements for exporters.

Consistency of the Bill with the Bill of Rights Act

Section 14 – Freedom of Expression

8. Section 14 of the Bill of Rights Act affirms that everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions in any kind in any form. The right to freedom of expression has also been interpreted as including the right not to be compelled to say certain things or to provide certain information.¹ The right to freedom of expression includes commercial expression (such as advertising or labelling).²
9. The Bill contains various provisions of a regulatory nature that *prima facie* limit the right to freedom of expression, such as to: make and keep records, publish statements and provide information requested by the relevant chief executive, organic products officer or any other prescribed person in certain situations. They mostly apply to the operator or recognised entity. These provisions are necessary to ensure efficient and effective regulation of businesses who make organic claims and are clearly justified.
10. Clause 8 of the Bill restricts a person from describing a product as an “organic” product, if there is an organic standard that relates to the product, unless the product complies with the standard. A product is described as organic if its labelling or advertising uses such words as “organic”, “organically grown” or any other word that would suggest to a reasonable person that the product is organic.³
11. We consider that restricting the use of the term “organic” is a clearly justified limitation on the right to freedom of expression. The restriction on describing a product as organic is necessary to create consistency amongst organic claims and does not go further than required to protect consumers against misrepresentation.

Section 21 - Unreasonable Search and Seizure

12. Section 21 of the Bill of Rights affirms that everyone has the right to be secure against unreasonable search and seizure, whether of the person, property, correspondence or otherwise.
13. The reasonable justification test, set out in s 5 of the Bill of Rights Act, does not apply to s 21 of the Bill of Rights Act as the Supreme Court has held that an unreasonable search cannot logically be demonstrably justified in a free and democratic society.⁴
14. Whether a search will be unreasonable turns on a number of factors, including the nature of the place or object being searched, the degree of intrusiveness into personal privacy and the rationale of the search.⁵ The greater the degree of intrusiveness, the greater the need for justification and attendant safeguards.

¹ *RJR MacDonald v Attorney-General of Canada* (1995) 127 DLR (4th) 1.

² *Irwin Toy Ltd v A-G (Quebec)* (1989) 58 DLR (4th) 577 (SCC).

³ Clause 9.

⁴ *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [162].

⁵ *Ibid*, at [172].

15. Clause 62 of the Bill empowers an organic products officer to enter certain places (except for a dwelling house or marae) without a search warrant.
16. Warrantless searches have been interpreted as presumably infringing on s 21 of the Bill of Rights Act and will be unreasonable except in a narrow range of circumstances.⁶ For instance, warrantless search powers may be reasonable where it is necessary to monitor compliance of an individual or organisation with a regulatory regime.⁷ This is because individuals and organisations that operate within a regulated industry can expect to be subject to scrutiny to ensure compliance with the law.
17. We consider the power under cl 62 is reasonable for the following reasons:
 - a. the power enables an organic products officer to establish whether a person or a product is complying with the provisions of the Bill or regulations;
 - b. the Bill limits where such searches may take place; and
 - c. the power is subject to part 4 of the Search and Surveillance Act 2012 (other than subparts 2, 3, 6 and 8, and sections 118 and 119). These subparts place reasonableness and lawfulness requirements on the search and seizure powers conferred by cl 62.
18. Clause 65 of the Bill empowers an organic products officer and/or constable to enter and search a place (including a dwelling house or a marae) under a warrant. We consider this power to be reasonable for the following reasons:
 - a. the issuing officer must have reasonable cause to believe that there is, at a place, anything in relation to which an offence against the provisions of the Bill has been or is being committed; or that there is evidence of the commission of an offence against the provisions of the Bill;
 - b. the power is subject to part 4 of the Search and Surveillance Act 2012 (other than subparts 2, 3, 6, and 8, and sections 118 and 119). These subparts place reasonableness and lawfulness requirements on the search and seizure powers conferred by cl 65; and
 - c. where a warrant is executed at a marae or building associated with a marae, it must be exercised in way that takes account of the kawa of the marae.
19. Clause 66 of the Bill empowers the organic products officer to test samples or have samples tested to assess compliance with the requirements under this Bill, whether under a search warrant or under warrantless entry. As both warrantless entry and search warrant powers are subject the reasonableness and lawfulness requirements of the Search and Surveillance Act 2012, we consider that the power to test samples is reasonable.
20. We consider that the Bill is consistent with the right to be secure against unreasonable search and seizure as affirmed in s 21 of the Bill of Rights Act.

⁶ Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at 1018.

⁷ *Ibid*, at 1023.

Section 25(c) – Right to be presumed innocent until proven guilty

21. Section 25(c) of the Bill of Rights Act affirms that everyone who is charged with an offence has, in relation to the determination of the charge, the right to be presumed innocent until proven guilty according to law. The right to be presumed innocent requires the prosecution to prove an accused person's guilt beyond reasonable doubt.
22. The Bill contains several strict liability offences. Strict liability offences *prima facie* limits 25(c) of the Bill of Rights Act because the accused is required to prove a defence or disprove a presumption in order to avoid liability.
23. We have identified the following strict liability offences in the Bill:
 - a. selling non-compliant products as organic products (cl 85);
 - b. selling a product described as organic without being certified or approved (cl 86);
 - c. failing to meet export requirements (cl 87); and
 - d. failure to comply with the duties in the Bill (cl 88).
24. We considered the following factors in assessing whether a departure from s 25(c) of the Bill can be justified under s 5 of the Bill of Rights Act:
 - a. the nature and context of the conduct to be regulated;
 - b. the ability of the defendant to exonerate themselves; and
 - c. the penalty level.
25. A reversal of onus of proof is generally considered to be more easily justifiable for regulatory offences. Those who choose to participate in regulated industries should be expected to meet certain expectations of care and accept the enhanced standard of behaviour required of them. In this Bill, operators voluntarily come under the Bill by choosing to advertise or label their product as organic. The offences are intended to incentivise those who opt into the regime to adopt appropriate precautions to prevent breaches of organic standards.
26. The Bill contains defences that allow the defendant to exonerate themselves. Clause 89 of the Bill provides defences for events outside of the defendant's control, the defendant taking reasonable prevention steps, where the defendant was supplied with non-compliant products and where the defendant could not reasonably have known products were non-compliant.
27. Strict liability offences can be more easily justified where the offence turns on a particular matter that is peculiarly within the knowledge of the defendant. For the specified offences in this Bill, the defendant is in the best position to justify their apparent failure to comply with the law, rather than requiring the Crown to prove the opposite.
28. Reversing the onus of proof is less concerning where the penalty is relatively low and would therefore have a low impact on the defendant. The strict liability offences in this Bill impose maximum fines of \$20,000 to \$50,000 for an individual, and \$100,000 to \$250,000 for a body corporate.

29. The parties governed by these offence provisions are likely to be commercial actors and body corporates engaged in a regulated industry. The purpose of the Bill is to increase consumer confidence in purchasing organic products, increase certainty for businesses making organic claims, and facilitate international trade in organic products. Strong incentives to comply with the organic product standards are logically linked to these goals. We therefore are satisfied that the penalties are proportional to both the commercial nature of the actors and the objectives of the Bill.
30. Taking into account the above factors, we consider the strict liability offences set out in the Bill are justified under s 5 of the Bill of Rights Act.

Conclusion

31. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.

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