

Commerce Commission comments on MPI's discussion document on options for regulation of organics

15 June 2018

1. Thank you for the opportunity to comment on the Ministry's Discussion paper 'Would New Zealand benefit from new organic regulation?' (Discussion paper).
2. The Commission enforces the Fair Trading Act which prohibits misleading and deceptive conduct by traders, and makes it illegal for traders to make an unsubstantiated representation about a good or service.
3. As an enforcement agency, we do not take a position on the policy question as to whether the way in which organic products are regulated should be changed.
4. Rather, our comments focus on practical enforcement considerations that might arise if the option of a mandatory standard for all organic operators is progressed (referred to as the Preferred Option: 1C in the Discussion paper).

Enforcement implications

5. In the context of the Commission's enforcement of the Fair Trading Act, we consider that the introduction of a mandatory standard for all organic operators has the potential to materially assist the Commission's work.
6. Currently, as noted in the Discussion paper, producers can reference a range of voluntary organic standards and choose to use a variety of methods and practices to verify and claim organic production. Additionally, given the voluntary nature of the standards, it is possible that some producers may not reference any organic standard, relying on the plain meaning of the word. This can make it difficult for the Commission to determine whether an 'organic' representation may be false, misleading, or unsubstantiated in breach of the law. It also creates uncertainty for

businesses as to the level of substantiation that may be required to support organic claims.

7. The introduction of a minimum standard, supported by legislation, would provide an accepted benchmark against which 'organic' claims could be assessed. This would be likely to provide greater certainty and consistency, and clarify the meaning of organic for businesses and the Commission alike.
8. A minimum standard applying across all producers would further provide greater certainty for consumers and increase their confidence in their purchasing decisions. Over the past financial year, the Commission has run a programme of work dedicated to 'credence goods', which are goods where consumers must take product claims on trust because they are not able to, or it is not practicable for them to assess whether the claims are genuine. In our experience, 'organic' claims fall within the category of 'credence goods'.

Evidential implications

9. In assessing whether or not a claim of 'organic' is accurate or able to be substantiated, the Commission must seek information or evidence regarding the basis for the claim. If, as is suggested in the Discussion paper, there were a requirement for businesses making organic claims to keep complete and accurate production records, that would have obvious advantages for the enforcement of the provisions. Of course, even this may not be sufficient to establish whether a business is compliant with the Fair Trading Act.
10. Currently section 12A of the Fair Trading Act prohibits a trader from making an unsubstantiated representation. Section 12A (2) defines a representation as being unsubstantiated if the person making the representation does not, when the representation is made, have reasonable grounds for the representation, irrespective of whether the representation is false or misleading. However, currently, the Fair Trading Act does not contain any requirement for traders to keep records of the basis for their claims (either organic or otherwise), meaning that the onus is on the Commission to prove this. In practice, this can be problematic.

11. If the proposed legislation had the effect of requiring traders making organic claims to keep contemporaneous records of the basis for those claims, it would make it easier for the Commission, or any other enforcement agency, to assess whether the trader did have reasonable grounds for the organic claims at the time they were made.

Scope

12. The Discussion paper invites feedback on whether products other than primary and processed products should be included in any new proposed standard. We have encountered and investigated 'organic' claims across a range of products, including food, dietary supplements and personal care products. While the current scope proposed will clarify the law relating to food and beverages, it will not do the same for supplements and personal care products. These areas and others outside scope will be left to fall under the general provisions of the Fair Trading Act.