



## The Peak Body for the Australian Organic Sector

From the desk of:

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### OFA Position Paper The Australian Standard for Organic and Biodynamic Products and Regulation

#### Introduction

The Australian Standard for Organic and Biodynamic Products (the *Australian Standard*) will be a voluntary standard that will provide Australia's main consumer regulatory authority the Australian Competition and Consumer Commission (ACCC) with a platform for enhanced consumer protection of organic product using the existing *Trade Practices Act 1974* (TPA).

#### Background

Australia does not have a mandated regulatory system for organic products. Despite repeated requests from the industry, successive Australian governments have refused to do this due a reluctance to have mandatory systems unless there is a proven failure of the existing regulatory systems.

In an effort to ensure that the existing regulatory system can effectively ensure the integrity of products labelled as organic, the OFA on the advice of government Ministers, several government departments and regulatory authorities such as the ACCC and with significant industry consultation put in an application to Standards Australia to develop a new standard.

The publishing of The Australian Standard for Organic and Biodynamic Products (the *Australian Standard*) will help the Australian Competition and Consumer Commission (ACCC) to operate more effectively under the *Trade Practices Act 1974* (TPA) to ensure that claims made about organic and biodynamic products, whether domestic or imported, comply with Section 52, misleading and deceptive conduct, and Section 53, false or misleading representations, of the Act.

It will be a co-regulatory system rather than a self regulatory or government mandated regulatory system.

The organic sector stakeholders define the requirements for products labelled as organic and biodynamic through the main accepted standards setting process in Australia - Standards Australia. The *Australian Standard* will assist the national consumer regulatory authority, the ACCC to ensure that the claims of organic or biodynamic status are not misleading, deceptive or false under the Trade practices Act. It will also assist state regulatory authorities through their respective laws.

#### Why a New Standard?

The existence of numerous standards and other definitions for Organic and biodynamic products in Australia has made it difficult for regulatory authorities to take action against misleading, deceptive or false claims.

The industry uses the export standard, The National Standard for Organic and Biodynamic Produce (NS) as the base standard and has been using it for around 15 years. 7 organic certifiers are accredited by AQIS to use this standard for exports. However on the domestic market several certifiers use their own standards – each with variations that are approved by AQIS as complying with the export standard. One AQIS approved certifier and a non-approved certifier have a standard that does not comply with the NS. Also on the domestic market there are a lot of imported organic products that comply to a range other national or private organic standards.

The issue of numerous standards was made clear by an Australian Federal Court decision in August 2007 where the Hon. Justice Gray acknowledged the absence of any recognised legal definition of

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the term 'organic' and the difficulty this presented in creating an enforceable injunction in broader terms to prevent misrepresentation of eggs as 'organic'.

Justice Gray stated 'attempts to overcome the lack of clear criteria by which it can be said eggs are, or are not, organic have been unsuccessful'.

The ACCC considers that Justice Grey's ruling has highlighted the need for a uniform, accepted standard which deals with organic and biodynamic produce.

The Australian Standard is a base or reference standard. This means that Certifiers can still keep their own standards or use the export standard (the National Standard for Organic and Biodynamic Produce)

In some cases it is possible for other standards such as the NS to fulfill this function. However given that the majority of products sold on the Australian market are certified to a range of private and national standards, including standards that do not comply with the NS, it is difficult for it be used effectively.

The ACCC considers that the Standards Australia process of developing the draft Australian Standard for Organic and Biodynamic Produce (the Australian Standard) has been conducted with rigour and transparency, and this and the ensuing standard will be useful for the future interpretation of the terms 'organic' and 'biodynamic'.

An important part of the process of developing the *Australian Standard* was the transparent input from relevant stakeholder groups including industry, consumers, retailers and regulators. The ACCC is of the view that the *Australian Standard* will be of assistance to courts when they next attempt to determine the meaning of organic.

### **The Role of the ACCC**

The ACCC is a statutory authority responsible for ensuring compliance to the *Trade Practices Act 1974* (TPA). The ACCC's objectives are to improve competition and efficiency in markets, foster adherence to fair trading practices in well-informed markets and inform the community at large about the TPA and the rights and obligations it brings upon business and consumers.

### **The Trade Practices Act 1974 (TPA)**

There are two main provisions in the TPA which are of greatest relevance to the sale and marketing of 'organic' products:

1. Misleading and deceptive conduct—s. 52  
Section 52 is a very broad provision. It prohibits conduct by business that is misleading or deceptive, or likely to mislead or deceive. Whether or not conduct is held to be misleading or deceptive will depend on the particular circumstances of each case. Generally, sellers must tell the truth or refrain from giving an untruthful impression. Failure to disclose material information (i.e. silence) may in some circumstances be a breach of the TPA.
2. False or misleading representations—s. 53  
Section 53 prohibits a variety of false or misleading representations about specific aspects of goods and services. These include false claims about:
  - the standard, quality, value, grade, composition, style, model or history of goods or services (ss. 53(a), 53(aa))
  - the sponsorship, approval, performance characteristics, accessories, uses or benefits of goods or services (s. 53(c))
  - the sponsorship, approval or affiliation of a corporation (s. 53(d)).

The ACCC's role is not to police specific industries but rather to enforce the TPA. The ACCC advocates consultation and negotiation as the first and best option to settle disputes, but once the ACCC pursues legal action it is unlikely that mediation will be an option.

It is the aim of the ACCC that all businesses comply with the TPA. The ACCC fosters a culture of compliance with the TPA by having an integrated approach to the administration and enforcement of the law. Depending on the circumstances, the ACCC will choose from a range of compliance

strategies: court action, court endorsed and administrative settlements, education and liaison programs, the media, and by working with business (both large and small) on specific programs to bring about a change in conduct.

While it is not the ACCC's role to police the *Australian Standard* as it is a voluntary measure, the ACCC sees the standard as assisting it in two key areas of its enforcement activity. The first is ensuring that where a representation is made about complying with a standard, this representation is not misleading and deceptive or likely to mislead or deceive. For example, if a producer represents that it complies with the *Australian Standard* when it does not, the ACCC may take further action. Equally, if a producer represents that they comply with a lesser known standard, and they don't, the ACCC may also take action.

The second area in which the ACCC may reference the standard is as an indicator of the requirements of organic production more broadly if, for instance, a claim is made that a product is 'organic' without any reference to a specific standard. In that case, an *Australian Standard*, as developed with broad stakeholder input, provides guidance as to the processes and requirements of organic production. Should investigations reveal that a producer falls well short of the standard, the ACCC may argue that the term 'organic' should not be used at all. It should be noted that such circumstances would be measured on a very much a case by case basis and that it would not be automatic the ACCC's view would be supported by a Court. In short, it is likely the ACCC would refer to *Australian Standard* in future investigations, as warranted.

Under changes to the TPA, which are intended to take effect from 1 January 2010, the ACCC will be given the power to issue substantiation notices. Under this power, the ACCC will be able to issue a notice requiring a person to provide the ACCC with material which may be capable of substantiating claims or representations made by the person in relation to goods or services.

The ACCC will not first be required to suspect that a claim or misrepresentation is false or misleading before issuing a substantiation notice.

The ACCC would apply these powers to an organic or biodynamic labelled product as they would with any other product or service— in the process of an investigation or inquiry.

### **Conclusion**

The Australian Standard for Organic and Biodynamic Products will assist Australia's regulatory authorities, such as the ACCC, in using existing regulatory laws, such as the Trade Practices Act, to ensure the integrity of products that are sold as organic or biodynamic in Australia.

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