

Chair
Cabinet Economic Growth and Infrastructure Committee

Food Safety Law Reform Bill: final policy approvals

Proposal

1. This paper seeks Cabinet approval of the final proposals for inclusion in a Food Safety Law Reform Bill (the Bill) and authorisation to proceed to drafting. The Bill will address the recommendations of the WPC Inquiry that need statute change to implement, and make some other minor enhancements to the three food safety Acts.

Executive summary

2. The Bill will amend the Animal Products Act 1999, the Wine Act 2003, and the Food Act 2014 to address recommendations of the independent Government Inquiry into the Whey Protein Concentrate Contamination Incident (the WPC Inquiry) that require statute change to implement [CAB Min (13) 43/31 refers]. Cabinet agreed to implement all 38 recommendations of the WPC Inquiry. Most recommendations have already been, or are being, implemented through non-regulatory means.
3. Some proposals are for statutory provisions to enable regulations to be made that will in turn implement the WPC Inquiry recommendations.
4. Public consultation was undertaken from March to May 2015 on proposals for inclusion in the Bill. Proposals in this paper take account of feedback received. Once Cabinet has authorised drafting of the Bill I intend to release a summary of submissions on the Ministry for Primary Industries' website.
5. I am seeking Cabinet approval to proceed to drafting the Bill. The Bill is category 5 on the Government's Legislation Programme 2015 (to be referred to a select committee this year).
6. The Bill's main objective is to make improvements to the food safety system so that human health is protected and New Zealand's domestic and international reputation is maintained and strengthened. Although the WPC Inquiry focused on the dairy industry, the proposals will harmonise implementation of the Inquiry's recommendations across all sectors of the food safety system. This approach will help businesses by providing consistency across these Acts so as to apply similar provisions to similar situations.
7. Proposals cover the following areas (see summary table in Appendix 1):
 - risk management plans and programmes;
 - improving food safety incident responses;
 - alignment of compliance and enforcement tools;
 - traceability and recall;
 - minor adjustments to verification provisions;
 - legislative design;
 - enhancing the use of electronic systems; and
 - technical amendments.

Background

The WPC Inquiry

8. In August 2013 Fonterra notified the Ministry for Primary Industries (MPI) that three batches of whey protein concentrate (WPC) were contaminated with *Clostridium botulinum*. Although this later turned out to be a false alarm, the “botulism scare” made global headlines and had significant consequences for New Zealand’s international reputation as a supplier of safe food.
9. The impact of this incident led the Government to establish the independent WPC Inquiry. The WPC Inquiry investigated the causes of, and responses to, the incident. It found the incident was not the result of any failure in the regulatory system, and that New Zealand’s food safety regulatory model is consistent with international principles.
10. However, it recommended some improvements to support renewed confidence both internationally and domestically in New Zealand’s food safety and ensure that our regulatory system continues to be among the best in the world.

Government’s response to the WPC Inquiry

11. Cabinet accepted all 38 of the WPC Inquiry’s recommendations. Most recommendations are being, or have been, implemented through non-regulatory means.
12. Cabinet decided that the WPC Inquiry recommendations requiring legislative change would be addressed through a bill that will amend the Animal Products Act and other food legislation as required [CAB Min (13) 43/31 refers].
13. In December 2014 Cabinet also agreed the Bill should include amendments to address legislative implications arising from the report of the Dairy Traceability Working Group, and other enhancements that could be developed and consulted on in the given timeframe. Cabinet further agreed that Ministers would seek Cabinet approval of policy proposals by 31 July 2015, with introduction of the Bill planned for late 2015 [EGI Min (14) 20/9 refers].

Objectives of the Bill

14. The Bill will help maintain New Zealand’s reputation with New Zealand citizens and our trading partners as being a supplier of safe food that is fit for its intended purpose.
15. The objectives of the Bill are:
 - a. protecting human health;
 - b. maintaining New Zealand’s reputation as a supplier of safe and suitable food both domestically and internationally; and
 - c. ensuring all steps have been taken to address the recommendations of the WPC Inquiry.
16. The Bill will amend the three main Acts covering food safety: the Animal Products Act 1999; the Food Act 2014; and the Wine Act 2003, to harmonise implementation of the WPC Inquiry recommendations and make other minor enhancements so that similar requirements apply across the system.

Policy proposals

17. Proposals for the Bill take into account feedback received during public consultation. The proposals are relatively straightforward, and although some technical issues may be raised at select committee, overall I do not expect the Bill to be controversial.

A: Risk-based plans and programmes

18. Each of the three food safety Acts requires a food business operator to register a risk-based plan or programme, setting out how the food business will identify and manage food safety hazards and risks. These plans and programmes are legally enforceable, and are the foundation of New Zealand's food safety regime.

Content of risk management programmes

19. The WPC Inquiry recommended that the content of risk management programmes should be limited to food safety matters and related regulatory requirements. It found that risk management programmes under the Animal Products Acts have in some cases grown to many thousands of pages and include material not related to food safety regulatory requirements. Taking this course would require businesses to remove non-food safety material such as quality processes or health and safety information from their programmes.
20. Further analysis has shown that it is not feasible or practical for many complex businesses to remove or keep food safety material separate from non-food safety material in their business systems. The likely costs of redesign and re-evaluation of existing programmes would be high¹, and such a separation could result in a lack of integration between food safety risk management and other business processes.
21. The desired outcome is that the operator, regulator, and verifier can easily identify in animal product risk management programmes (and other risk-based plans under the Food Act and Wine Act) all relevant food safety matters and related regulatory requirements.
22. Consultation presented three options to address the issue of overly complex risk management programmes that are difficult to understand and verify, which impose varying degrees of compliance costs. Removing non-food safety content as recommended by the WPC Inquiry was the highest cost option, requiring significant change for little benefit to operators, and was universally rejected by industry. Thirty-five of 37 submitters commenting on that option were opposed to it.
23. Having taken account of the feedback received I recommend a two-pronged approach to address this issue. Together these proposals will achieve the intent of the WPC Inquiry recommendation and at a lower cost.

Specifying the content of risk management plans and programmes in regulations

24. First, I propose the Bill enables regulations to set the content of risk-based programmes and plans that must be supplied to MPI, and the form and manner in which it must be provided.

¹ MPI's initial estimates are in the range of \$4.1-\$7.7 million overall

25. The regulations would also require operators to differentiate food safety matters and requirements from non-food safety material in some manner. Acceptable methods of such differentiation would be developed in consultation with industry, and the regulations process would entail a separate regulatory impact assessment including detailed costings.
26. This approach will ensure there is clarity on food safety obligations without operators having to remove non-food safety content. This proposal will be less cost to business because redesign and re-evaluation of existing programmes would not be required. Initial estimates by MPI show this proposal would be around one-third of the cost to operators² compared with requiring non-food safety material to be removed.

Requiring amendment to new or existing plans and programmes

27. Second, I propose the Bill permits the Director-General of MPI to, on a case-by-case basis, decline to register a new risk-based plan or programme if the food safety requirements are not clearly identified and able to be readily understood. The Bill would make it clear that this is one criterion to be taken into account and is a discretion of the Director-General. I also propose to permit the Director-General to require an operator to amend an existing programme or plan for this same reason at any time.
28. These amendments will also apply to food control plans under the Food Act 2014, and to wine standards management plans (WSMPs) under the Wine Act, so that similar provisions apply across the food system.

Requiring businesses to provide full risk-based plans or programmes

29. The WPC Inquiry recommended that MPI should receive and maintain copies of full risk management programmes. At present, when seeking registration of a RMP under the Animal Products Act either an outline of the plan or the full plan may be provided to the regulator, along with an evaluator's report confirming that the full programme is acceptable. This is the same for a WSMP under the Wine Act, while under the Food Act 2014 either specified information or the full plan may be provided. Currently, almost all RMPs are provided in outline form.
30. I propose the Bill removes the ability of operators to send only an outline of their risk-management programmes. The regulations (proposed above) will set requirements for what must be supplied instead. Food business operators would also be required to provide copies of all amendments to their verifier within a timeframe set in the regulations.
31. The Bill will provide that verifying agencies are required to hold up-to-date versions of the risk-based programmes or plans of the businesses they verify. This obligation will take effect only once the regulations have been made.
32. Detailed costings, including determining the need for any investment by MPI in future technology solutions for storage of the programmes and plans, will be identified during the regulation-making process that includes additional stakeholder engagement and regulatory impact assessment.

² MPI's initial estimates are in the range of \$0.9-\$1.9 million overall

33. I expect that following the promulgation of the regulations there will be a phased transition for businesses to comply with these new requirements, with an initial focus on the dairy industry.
34. The proposal will ensure the regulator has a copy of each risk-based plan or programme, both at initial registration and when significant amendments are made. Having better information will improve regulators' ability to investigate and respond to food safety incidents, and will enable them to develop risk profiles across the system and identify any systemic issues.
35. Support for this proposal was mixed. The majority of submitters who commented, including the seafood industry, NZ Winegrowers Association, Meat Industry Association, and the Food and Grocery Council disagreed with it and supported the status quo.
36. These stakeholders consider that the problem lies only with the dairy industry, and that because they can be required already to produce their full risk management programme within two working days, there is no benefit from MPI holding full programmes.
37. Supporters of the proposal included verifying agency AsureQuality, Fonterra, Foodstuffs NZ, Progressive Enterprises, and a regional public health service.
38. I have taken into account the points raised during consultation. I am conscious that Fonterra was unable to provide its full risk management programme to MPI within two working days during the WPC incident, and no-one else had a copy of this information. Industries outside of dairy that are confident they can supply full copies of their risk management programmes within two working days should have no difficulty meeting the new requirement.

B: Improving food safety incident responses

Compelling disclosure of information when investigating and responding to a food safety incident

39. The WPC Inquiry recommended that the law is amended to give MPI a specific statutory power to compel disclosure of any relevant information (including test results) needed to respond effectively to a food safety incident.
40. In the early stage of the WPC incident, MPI was unable to obtain the third party laboratory test results on which Fonterra's advice about the contamination was based. It took 48 hours for the Ministry to get the necessary information. During a food safety incident, making a risk assessment of the situation at the earliest stage possible is essential for determining the scale of response required.
41. I propose the Bill provides that, for the purposes of identifying or responding to a food safety incident, the Director-General (referred to as the Chief Executive under the Food Act) may require parties who provide services to a food business to disclose relevant information.
42. The proposed provision would relate to a power already in the Food Act 2014, which covers information disclosure by operators. It would ensure that the Director-General could access information held by people or businesses not currently covered by this aspect of the Food Act (for example, laboratories or cleaners) when identifying or responding to a food safety incident.

43. Eleven submitters (including dairy, wine, and food and beverage industry representatives) of the 13 who commented on the proposal supported it with caveats such as the power should be used during food safety incidents only, or should be based on 'reasonable suspicion', and/or should be limited to analytical or scientific test results. One business said the proposed power was too wide but they could potentially support it with these types of safeguards.
44. The provision will require there to be a 'reasonable suspicion'. It will also clearly state that the intended purpose for the information disclosure is for "identifying or responding to a food safety incident", which I consider are appropriate parameters for its use.

Aligning the purposes of Director-General Statements so they may both "inform" and "protect" the public

45. The WPC Inquiry recommended that the circumstances in which privileged statements can be made should be clarified.
46. The three food safety Acts allow the Director-General to publish information under privileged statements to protect, and in some cases to inform, the public about a food safety risk. Director-General Statements are a distinct statutory power, and can be used separately from, or as well as, a mandatory or voluntary recall of food products. This power cannot be delegated by the Director-General.
47. I propose aligning the Animal Products Act privileged statement provisions with those in the Food Act 2014 and Wine Act to allow Director-General Statements under all three Acts to be made for the purpose of "informing" as well as "protecting" the public.
48. I consider it appropriate that privileged statements are made in a consistent manner across the legislation, and the release of information should be in the best interests of the public. Ten of the 12 submitters who commented on this proposal during consultation supported it.

Providing that the Ministry for Primary Industries has an oversight role in food safety contingency planning

49. The WPC Inquiry recommended that MPI should be given statutory responsibility for food safety 'contingency planning' (planning for responses to food safety incidents). The Ministry currently assumes this responsibility operationally, and no additional powers are needed; however, it would be useful to make this role explicit in statute.
50. I recommend the Bill provides for MPI's role in contingency planning for food safety emergencies to be clearly stated in the Food Act 2014.

C: Alignment of enforcement and compliance tools

51. The WPC Inquiry recommended that the compliance and enforcement tools in the Animal Products Act should be aligned with the wider range of tools in the Food Act 2014.
52. There was submitter support for alignment of these tools. However, some submitters considered the current regimes for animal products and wine provide sufficient responses to non-compliant behaviour.

53. Having an appropriate range of tools to address various levels of non-compliance is critical to the success of a compliance regime achieving the desired behavioural change. It is also appropriate that similar offending under the different Acts can be responded to in a consistent, graduated, and proportionate manner.

Adding four enforcement tools currently in the Food Act 2014 to the Wine Act and Animal Products Act

54. I propose an improvement notice, infringement regime, and a penalty based on commercial gain (for the specified offences listed below) are added to the Animal Products Act, and that these three tools plus a compliance order are added to the Wine Act.
55. I further propose the maximum penalty under both Acts for breaching an improvement notice will be \$100,000 for a body corporate and \$20,000 for an individual. The maximum penalty for breaching a compliance order under the Wine Act will be \$250,000 for a body corporate and \$50,000 for an individual. These maximum penalties are consistent with the maximum penalties for similar types of offending under the Animal Products Act and Wine Act (rather than the Food Act).
56. Infringement offences and specific infringement fees (up to a maximum of \$1,000) will be set in regulations, with further public consultation and regulatory impact assessment to be undertaken at that time.
57. Consistent with the Food Act 2014, I propose that the court may make an order on sentencing for persons convicted of the following offences under the Animal Products and Wine Acts to pay a penalty based on commercial gain (up to a maximum of three times the gain if it can be determined or up to 10 percent of the turnover of the company):
- offences involving human health;
 - offences involving deception;
 - selling non-complying product;
 - obstructing an automated system;
 - offence of breach of duty;
 - offences in relation to home kill and recreational catch;
 - failing to comply with suspension, direction, improvement notice;
 - breach of orders;
 - failing to comply with food standard or regulations;
 - general breach of the Act.

D: Traceability and recall

58. Having the ability to trace and to recall products or ingredients is critical to the food safety system. The WPC Inquiry made recommendations to improve recall and traceability, including the establishment of a Dairy Traceability Working Group to consider regulatory provisions. That Group has now reported to the Director-General of MPI.
59. To implement the Group's recommendations I propose that the food safety Acts explicitly reference food businesses' traceability obligations. Traceability obligations would be identified in the sections of the legislation that deal with risk-based plans or programmes, operator duties, records and returns, and duties for importers and exporters.

60. I also propose the Bill enables regulations and notices to allow for the development of more detailed traceability requirements, simulated traceability and recall exercises that can be checked by an independent verifier, and the setting of circumstances for voluntary recalls.
61. Many food businesses already have traceability systems. However, the vital importance of tracing and recall merits requirements for these being more explicit in the legislation. Consultation on the proposals showed there is considerable support from industry to strengthen traceability requirements.
62. These proposals form part of a wider package of steps to strengthen traceability. Cabinet will be separately requested to authorise public consultation on specific traceability requirements, which will complement the Bill proposals.

E: Verification

63. The WPC Inquiry concluded that New Zealand's verification model (using a combination of Government verifiers and third party recognised agencies and persons) is sound and that fundamental change is not required, but it recommended some minor improvements.

Clarifying that the first duty of Recognised Agencies and Persons is to the regulator

64. The WPC Inquiry recommended that the system should provide greater clarity of the verifier's role as agent of the Ministry to make clear the true client is the regulator, not the industry.
65. I propose that the Bill amends the food safety Acts to include a clear statement that when carrying out their activities the first duty of Recognised Agencies and Persons is to the relevant regulator.
66. A fundamental premise of New Zealand's food safety system is that Recognised Agencies and Persons act on behalf of the regulator when carrying out their duties. Recognised Agencies and Persons evaluate risk-based programmes and plans before they are registered, and verify operator compliance against these programmes and plans.
67. The current law states that Recognised Agencies and Persons are required to act independently, and are given a role by the Acts to carry out specified functions. However, given comments about potential conflicts of interest noted by the WPC Inquiry, I consider there is merit in clarifying in the Acts that when carrying out these functions the first duty of verifiers and evaluators is to the regulator, namely MPI (or territorial authorities for the Food Act).
68. Making this obligation explicit would strengthen the basis for verifiers and evaluators to assert their independence from food business operators. It would also provide clarity to overseas regulators about the relationship between verifiers and the regulators.

Requiring agencies applying for recognition to provide, or authorise release of, all their accreditation reports directly to the Ministry for Primary Industries

69. The WPC Inquiry recommended that verifiers' accreditation reports should be provided directly to the Ministry to ensure full and transparent reporting.

70. The Inquiry identified that MPI is not receiving accreditation reports in a consistent manner, resulting in less than complete information about candidates. It noted that all parties agreed consistency of practice is essential. In addition, in 2013 the United States Food and Drug Administration audited New Zealand's dairy regulatory programme and found that the lack of the Ministry's access to all accreditation reports was a deficiency in the programme.
71. Recognised Agencies play a vital role in New Zealand's regulatory framework. Verifiers from Recognised Agencies ensure that operators are complying with their risk-based plans and programmes. Verifying agencies must be accredited against international standards by an accreditation body. Accreditation from these bodies forms part of the basis upon which MPI recognises applicants as fit to perform their duties.
72. I propose the Bill adds this matter to an existing regulation-making power for setting recognition requirements. This will explicitly enable regulations to be made to require an agency applying for recognition as a verifier or evaluator, or for continuation of such recognition, to either provide all accreditation reports themselves or authorise the body responsible for accrediting the agency against international standards to supply all such reports, directly to MPI.
73. Having the reports will give MPI confidence that the information it holds on a recognised agency is full and complete. It will also enable MPI to identify and address any systemic issues, such as a need for improved training, and give MPI an improved picture of the overall capability of recognised agencies across the entire food safety system.

F: Legislative design

74. The WPC Inquiry referred in both its reports to the way delegated legislation has been used to regulate the food system, particularly the use of tertiary-level instruments under the Animal Products Act. Analysis has shown that in some situations the food safety Acts are not sufficiently clear about when and how delegated legislation (regulations and notices) should be used. This lack of clarity has contributed to a proliferation of notices.
75. I propose that some of the regulation and notice-making provisions in the food safety Acts be amended to provide more guidance and direction on when a regulation or a notice is the appropriate instrument to use. This would clarify the relationship between the regulation-making and notice-making powers.
76. Eleven submitters supported the proposal. Fonterra and DCANZ stated their preference for requirements to be set in regulations, with only one-off technical matters being addressed in notices. However, notices are the appropriate instrument in more circumstances than these.
77. Twenty-six seafood sector submitters (mainly template submissions) did not support the proposal, noting they have not found significant issues with the existing legislative design or structure.
78. On balance, I consider that ensuring the food safety Acts are clear on when a notice or regulation-making power applies is equally important for all food sectors. I therefore recommend implementing the proposal across all three Acts.

79. The Ministry for Primary Industries will work closely with the Parliamentary Council Office to ensure that drafting is consistent with best practice. Once the Bill is enacted MPI's internal procedures will over time align with the statutory changes, which will probably lead to more requirements being set in regulations rather than notices.
80. I also propose to specify in the Acts which notices are disallowable instruments and therefore may be examined by the Regulations Review Committee. Although many existing notices are disallowable because they fall under the catch-all "significant legislative effect" test from the Legislation Act 2012, it is good practice to clearly state within an Act which notices will be disallowable or not, as was done in the Food Act 2014. Many notices will be specified as disallowable. However, notices that relate to export requirements; are very administrative; or empower an exemption that applies to an individual, small group or a product, will not be disallowable.

G: Enhancing the use of electronic systems

Permitting the use of automated electronic systems for statutory decisions

81. An "automated electronic system" describes a computer programme that can step a user through various requirements to achieve a decision without needing a person. Electronic systems facilitate more-efficient decision making and data capture. Many government regulators use automated electronic systems as do many businesses. Examples of automated electronic systems are the SmartGate border system for entry to New Zealand, and the MPI e-certification system for exporters.
82. I propose that the ability to use automated electronic systems for statutory functions including decision-making is aligned across the food safety system. The Food Act 2014 provisions relating to the use of automated electronic systems would be used as a model for adding this ability to the Animal Products and Wine Acts.
83. Note that having the empowering provision available does not mean that new systems would be used immediately for transactions. Any costs for developing future automated systems would go through full Cabinet processes.
84. There was considerable support from submitters for this proposal –13 of the 14 who commented supported it, including Fonterra, NZ Winegrowers, Progressive Enterprises, Meat Industry Association, LeaderBrand Produce, and Federated Farmers.
85. I also propose that penalties for offences involving automated electronic systems are set at a maximum of \$250,000 for a body corporate and \$50,000 for an individual. These maximum penalties are consistent with the maximum penalties for similar types of offending under the Animal Products and Wine Acts.

Permitting the Director-General to require information to be provided electronically and in a specified format

86. I propose the Bill provides the ability for the Director-General to require information to be provided in a specified form and manner (that is, electronically).
87. At present certain provisions in the Acts allow the Director-General to require information to be provided in a specified form and manner, but there is no general ability across the statutory regime to do this. It is not clear whether MPI can always require businesses to engage via electronic means where appropriate, for example for the provision of test results.

88. In the future the Director-General may need to be able to require information to be provided electronically and specify the format. This proposal will allow greater specificity of information to be required when needed, but making this amendment would not mean that all future transactions will be required electronically.
89. There was good general support from submitters for requiring electronic transactions but with some caveats, such as consideration on the costs for small businesses. Some submissions suggested there may be situations where a business may be unable to comply as they do not use computers or do not have internet access.
90. The use of this operational power is discretionary, and will entail consideration of impacts on the sector and the Crown. Where it is not feasible for a small business to provide information electronically (for example, where it does not have access to a computer or the internet), the ability to provide a paper copy of certain information could be made available on a case-by-case basis.

H: Technical amendments

91. The consultation document included technical amendment proposals that did not directly arise from the WPC Inquiry's recommendations. The proposals aim to harmonise and align similar requirements, clarify legislative inconsistencies, and make minor enhancements to the three food safety Acts.
92. Stakeholders commented on a number of these proposals, with most generally supportive. Some concerns and comments were raised on a few of the proposals, and feedback received has been taken into account.

Proposals to align similar requirements

Amend incorporation by reference provisions

93. "Incorporation by reference" is a legislative drafting tool that allows separate written material (such as international standards or MPI's operational technical material) to be incorporated into a regulation or notice without having to reproduce the entire material.
94. I propose that the obligations in the three food safety Acts to provide access to the incorporated material are amended as necessary to achieve better alignment across the Acts. These amendments would include:
 - i. inserting into the Wine Act a provision related to "standard works of reference", similar to provisions in the Food Act 2014 and Animal Products Act;
 - ii. including in the Animal Products Act and Wine Act the definition of "standard work of reference" currently in the Food Act 2014;
 - iii. including in the Animal Products Act and Wine Act provisions similar to those in the Food Act 2014 in relation to: making incorporated material available electronically; copyright; and proof of material that is incorporated by reference;
 - iv. setting out in the Animal Products Act and Wine Act how the Legislation Act applies to material incorporated by reference;
 - v. providing in all three food safety Acts that the requirement to certify an update of material as a correct copy does not apply to "standard works of reference".

Align the limitation periods for bringing criminal proceedings

95. In the food sector the time limits ("limitation periods") within which enforcement action must be taken need to be long enough for problems to come to light and for potentially complex investigations to be carried out.
96. I propose that the relevant two year limitation period in the Animal Products Act and Wine Act be aligned with the four year period in the Food Act 2014.
97. The non-compliance that may occur under the three Acts may be very similar in nature. It is therefore appropriate that the limitation period for bringing charges set in the recently passed Food Act 2014 applies to the Animal Products and Wine Acts.

Reliance on a senior officer's reasonable belief

98. Compliance officers must have a "reasonable belief" that a certain situation exists prior to carrying out certain actions under the legislation. The Food Act 2014 provides that compliance officers may rely on the reasonable belief and directions of superior officers or the Director-General when forming a reasonable belief.
99. I propose allowing that such a reliance on a senior officer's reasonable belief is also available under the Animal Products and Wine Acts, to ensure alignment across the food safety system.

Completion of matters by another compliance officer

100. The Food Act 2014 provides that matters started by one compliance officer may be completed by another compliance officer. I propose that for efficiency reasons the Animal Products and Wine Acts are aligned with the Food Act on this point.

Proposals to clarify intent

101. The Ministry for Primary Industries consulted on proposals to clarify legislative inconsistencies. I propose the following amendments.
 - a To address a drafting inconsistency, clarify in the Animal Products Act and the Wine Act that no "right of review" exists in relation to a decision to suspend an export operation made by a person acting under the delegated authority of the Director-General. This amendment would resolve an internal legislation conflict between the specific and general powers of review for delegated decisions. A review right is not necessary as a decision to suspend triggers a statutory deregistration process, the outcome of which is reviewable.
 - b Clarify that it is the Director-General's role to decide who will undertake a review of a decision made under his or her delegated authority. At present the provision can be read as though the person seeking review can choose who undertakes that review.
 - c Clarify that where a person is designated by the Director-General to review a decision made under delegated authority, the decision made by that designated person is final.
 - d Clearly state which provisions overseas market access requirements can be made under. The way the empowering provisions in relation to market access requirements relate to each other in the Animal Products Act and Wine Act needs clarification.

- e Clarify how the Animal Products Act and the Food Act apply to non-animal product businesses operating in the same premises as a dual operator butcher.³ A dual operator butcher who also sells some non-animal products at the premises can choose to regulate both activities under the Animal Products Act. However, a provision of that Act can be interpreted to mean that non-animal product food items at dual operator butcher premises may not be regulated under the Food Act regime. The amendment will clarify that although all animal products at a premises must be regulated under the Animal Products Act, other food items being sold at the premises may be regulated under the Food Act.
- f Clarify the scope of “dairy processor” in the Animal Products Act. The scope of the current definition extends to small retailers who receive products such as milk powder, cheese or ghee in large portions and package them into smaller amounts for retail sale direct to consumers in the store. This type of activity is not intended to be captured by the Animal Products Act and should more properly be subject to the Food Act.
- g Amend a provision whereby the Director-General may exempt exporters from the requirements of “standards specified by notice under the Animal Products Act” so that such exemptions can apply also to standards specified by regulations.

Proposals for minor enhancements

102. I propose three additional minor enhancements to the legislation.

- a Provide a notice-making power to notify formula components of levies. Under the Animal Products Act and Wine Act, regulations prescribe fees, charges, and levies. For fees and charges the amount of a component of a formula may be specified by notice by the Director-General. However, there is not a comparable notice-making power for determining a levy.
- b Make references to “business” and “part business” internally consistent by inserting the term “part-business” into section 28A of the Animal Products Act [to align with section 162] and into section 26 of the Wine Act [to align with section 114].
- c Amend the Food Act 2014 so that regulations prescribing infringement offences can refer to the current version of the joint Australia New Zealand Food Standards Code. This will ensure regulations do not have to be changed each time there is a small change to the Code.

General provisions

103. Enacting the proposals in this paper will require commencement and transitional provisions, and regulation and notice-making powers, to give effect to the policy proposals.

³ A dual operator butcher is a retail butcher under the Animal Products Act who also processes homekill at the same premises

Public consultation

104. Public consultation on proposals for inclusion in the Bill ran from 26 March to 7 May 2015. The consultation document detailed policy proposals for implementing the recommendations of the WPC Inquiry that require legislative change, as well as other proposed alignments and technical amendments to the food safety legislation.
105. Consultation on the document proposals was web-based, distributed to a list of key industry contact points and available publicly on the MPI website. MPI notified over 170 listed industry contacts, and alerted members of existing MPI forums about the consultation and requested that they notify their members.
106. MPI sent a further email to 11 key industry chief executives notifying them of the consultation and offering to discuss the proposals if desired. In addition, an automatic notification message was circulated to over 3,400 individuals who signed up to receive MPI alerts.
107. Fifty submissions were received, covering most key industries and representing a range of sectors.
108. I propose to keep stakeholders informed about decisions on the Bill by posting a copy of this Cabinet paper, along with the Regulatory Impact Statement, on the MPI website.

Departmental consultation

109. The following government agencies were consulted on this paper: the Ministries: for Business, Innovation and Employment; Foreign Affairs and Trade; Health; and Justice; the Department of Internal Affairs; New Zealand Customs Service; State Services Commission; Te Puni Kōkiri; The Treasury. The Department of the Prime Minister and Cabinet and the Parliamentary Counsel Office were informed.

Financial implications

110. There are no direct financial implications from the proposals in the Bill. Any financial implications and all costs for MPI and business from implementing the proposals will be identified and considered during the regulation-making process following passage of the Bill.

Human rights implications

111. None of the proposals in this paper appear to be inconsistent with the New Zealand Bill of Rights Act 1990 or the Human Rights Act 1993. The Ministry of Justice has been consulted on the proposals. Formal Bill of Rights vetting will be undertaken as part of the process of developing the amendment Bill.

Legislative implications

112. Once Cabinet approves the policy, drafting by the Parliamentary Counsel Office will commence, with introduction of the Bill planned for later in 2015. The Bill is category 5 on the Government's Legislation Programme 2015 (to be referred to a select committee in the year). The Bill is estimated to be likely to comprise up to 100 clauses of medium complexity.
113. The Acts that would be amended by the Bill all bind the Crown.

Regulatory impact analysis

114. A regulatory impact assessment has been carried out and a regulatory impact statement (RIS) is attached in Appendix 2 of this paper. Proposals that either have only minor or no impacts on businesses or individuals and/or are technical revisions to improve legislative clarity are not included in the RIS.
115. The Ministry for Primary Industries' independent RIS review panel has reviewed the RIS and considers that the information and analysis summarised in the RIS meets the quality assurance criteria.

Recommendations

116. I recommend that the Cabinet Economic Growth and Infrastructure Committee:
- 1 **Note** that in December 2013 Cabinet agreed that the recommendations of the Government Inquiry into the Whey Protein Concentrate Contamination Incident (WPC Inquiry) that have legislative implications would be progressed through an omnibus bill (the Food Safety Law Reform Bill) amending the Animal Products Act and other food legislation as required [CAB Min (13) 43/31];
 - 2 **Note** that in December 2014 Cabinet agreed the primary focus of the Food Safety Law Reform Bill (the Bill) should be on implementing the recommendations of the WPC Inquiry and that the Bill would include other enhancements to the food safety legislation that could be developed and consulted on within the timeframe agreed [EGI Min (14) 20/9 refers];
 - 3 **Note** that public consultation on proposals for inclusion in the Bill was undertaken from March to May 2015 and the proposals below take account of feedback received;

Objectives

- 4 **Agree** that the objectives of the Bill are to:
 - a. protect human health;
 - b. maintain New Zealand's reputation as a supplier of safe and suitable food both domestically and internationally;
 - c. ensure all steps have been taken to address the recommendations of the WPC Inquiry;
 - d. harmonise implementation of the WPC Inquiry recommendations across the three food safety Acts (Animal Products Act 1999, Wine Act 2003, and Food Act 2014) and make other minor enhancements so that similar requirements apply across the system;

Risk management programmes and plans

- 5 **Agree** to enable regulations to be made under the three food safety Acts to:
 - a. set the required content, form and manner of a risk management plan or programme that must be provided, and how food safety matters and related regulatory requirements must be differentiated from other matters;
 - b. require food business operators to provide a copy of their risk management plans or programmes to the regulator both at their initial registration and when significant amendments are made;
 - c. require food business operators to provide copies of all amendments to risk management plans or programmes to their verifying agency within a set timeframe;

- 6 **Agree** to amend the three food safety Acts so that (once regulations are in force) operators may no longer provide only an outline of their risk management plans or programmes to the regulator;
- 7 **Agree** to amend the three food safety Acts to require verifiers to hold up-to-date versions of the risk management plans or programmes of the food businesses for which they provide verification services;
- 8 **Agree** to amend the three food safety Acts to permit the Director-General to:
 - a. decline to register new risk management plans or programmes on a case-by-case basis where the regulatory requirements are not easily identifiable or readily understood;
 - b. require operators to amend existing risk management plans or programmes on the same grounds;

Improving responses to food safety incidents

- 9 **Agree** to amend the Food Act 2014 to:
 - a. allow the Chief Executive to require the disclosure of relevant information held by parties providing services to a food business where there is a reasonable suspicion the information is held by the party, and
 - b. state that information acquired under the new provision will be used for the purpose of identifying or responding to a food safety incident;
- 10 **Agree** to align the purpose for privileged statements in the Animal Products Act with those currently in the Wine Act and Food Act 2014 so that these statements may 'inform' as well as 'protect' the public;
- 11 **Agree** to amend the Food Act 2014 to clarify that the Ministry for Primary Industries has a statutory role in contingency planning for food safety incident responses;

Alignment of enforcement and compliance tools

- 12 **Agree** to standardise the availability of four compliance and enforcement tools across the system by including the Food Act 2014 tools of improvement notice, infringement regime, and commercial gain penalty in the Animal Products Act, and these three tools plus a compliance order in the Wine Act;
- 13 **Agree** that maximum penalties for breach of improvement notices or compliance orders will be set consistent with the penalties for similar types of offending under the Animal Products Act and Wine Act;

Traceability and recall

- 14 **Agree** to amend the three food safety Acts to explicitly reference traceability obligations on food businesses, including for risk-based plans or programmes, operator duties, records and returns, duties of importers and exporters, and other purposes where applicable;
- 15 **Agree** to amend the regulation and notice-making provisions under the three food safety Acts to allow for the development of traceability requirements, simulated traceability and recall exercises that can be independently verified, and the setting of circumstances for voluntary recalls;

Verification

- 16 **Agree** to amend the three food safety Acts to, for the avoidance of doubt, clarify that when performing verification and evaluation services the first duty of recognised agencies and persons is to the relevant regulator;
- 17 **Agree** to amend the regulation-making power in the three food safety Acts to permit a requirement to be set that an agency applying to the Ministry for Primary Industries for recognition, or to maintain such recognition, must either provide, or authorise the accreditation body that assesses the agency against international standards to provide, all the agency's accreditation reports directly to the Ministry;

Legislative design

- 18 **Agree** to amend the delegated legislation provisions in the three food safety Acts as necessary to:
 - clarify the relationship between the regulation-making and notice-making powers
 - specify which notices are subject to disallowance;

Electronic transactions

- 19 **Agree** to include in the Animal Products Act and Wine Act the provisions in the Food Act 2014 related to the use of automated electronic systems so that the Director-General may use these systems to undertake statutory functions, including decision-making, across the food sectors;
- 20 **Agree** that, consistent with the maximum penalties for similar types of offending under the Animal Products Act and Wine Act, maximum penalties for offences involving automated electronic systems will be \$250,000 for a body corporate and \$50,000 for an individual;
- 21 **Agree** to amend the three food safety Acts to permit the Director-General to require information to be provided in a specified form and manner, namely electronically;

Technical amendments

- 22 **Agree** to include the following technical amendments in the Bill:

Amendments to both the Animal Products Act 1999 and the Wine Act 2003

- a. align the relevant two year limitation period for bringing criminal proceedings under the Animal Products Act and Wine Act with the four year period set in the Food Act 2014;
- b. provide for consistent references to "part-business" within the Animal Products Act sections 28A and 162, and the Wine Act sections 26 and 114;
- c. clarify that overseas market access requirements notices under the Animal Products Act or the Wine Act can be made either under the specific provisions or under the general empowering provisions for notices;
- d. to align with the provision in the Food Act 2014, provide in the Animal Products Act and the Wine Act that when taking compliance action compliance officers may rely on the reasonable belief of a superior officer or the Director-General when forming a reasonable belief;

- e. to align with the provision in the Food Act 2014, provide in the Animal Products Act and the Wine Act that matters started by one compliance officer may be completed by another compliance officer;
- f. to address a drafting inconsistency, clarify in the Animal Products Act and the Wine Act that no 'right of review' exists in relation to a decision to suspend an export operation made by a person acting under delegated authority;
- g. amend the provisions in the three food safety Acts allowing "incorporation by reference" so that the obligations to provide access to the incorporated material are better aligned;
- h. clarify that the Director-General decides whether a review of a decision made under delegated authority is to be undertaken by a person designated by him or her;
- i. clarify that where a review of a decision made under delegated authority is undertaken by a person designated by the Director-General, the decision made by that designated person is final;
- j. provide a notice-making power so that the Director-General may notify the specific amount of the component of a levy formula on which a levy is calculated;

Amendments to the Animal Products Act 1999 only

- k. clarify in section 71 that the Food Act regulatory regime may apply in relation to a non-animal product business operating in the same premises as a dual operator butcher;
- l. clarify the scope of "dairy processor" in section 4 so that small retailers carrying out activities that should more properly be subject to the Food Act are not inadvertently covered by the Animal Products Act;
- m. clarify the scope of section 60B so that the Director-General may exempt exporters from certain requirements whether those requirements are specified by regulation or by notice;

Amendment to Food Act 2014 only

- n. amend the Food Act 2014 to provide that the current version of the joint Australia New Zealand Food Standards Code will apply to infringement offences;

- 23 **Agree** to any commencement or transitional provisions, and any regulation or notice-making powers required to give effect to the proposals in this paper;
- 24 **Invite** the Minister for Food Safety to issue instructions to the Parliamentary Counsel Office to draft a Food Safety Law Reform Bill to implement recommendations 4-24 above,
- 25 **Authorise** the Minister for Food Safety to make final decisions on detail and to make changes, consistent with the policy intent outlined in this paper, on any issues that arise during the drafting of the Bill;
- 26 **Note** that the Bill is category 5 on the Government's Legislation Programme 2015 and its introduction and first reading is therefore planned for late 2015;

- 27 **Agree** that the Ministry for Primary Industries may post a copy of this Cabinet paper on its website having regard to the objectives of the Official Information Act 1982.



Hon Jo Goodhew
Minister for Food Safety

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Appendix 1: Summary table of final policy proposals for inclusion in the Bill

Section of paper	Proposed amendment	Acts amended
A. Risk management programmes and plans Inquiry recommended: - limit the content of RMPs to food safety matters [pp 3-4] - Ministry receives full up-to-date RMPs [pp 4-5]	<ul style="list-style-type: none"> Remove the ability to provide MPI only an outline of a risk-based plan or programme Enable regulations to be made to: <ul style="list-style-type: none"> set the content, form and manner of a risk management programme or other risk-based plan, including requirements for differentiation of food safety matters from non-food safety material require food business operators to: <ul style="list-style-type: none"> provide a copy of their risk management plans or programmes to MPI for registration (once the regulations are in place) provide copies of all amendments to risk management plans or programmes to their verifying agency within a set timeframe Permit the Director-General to: <ul style="list-style-type: none"> decline to register risk management plans or programmes where the regulatory requirements are not readily identifiable and easily understood require operators to amend their risk management plans or programmes at any time on the same grounds Require verifiers to hold copies of the risk management plans or programmes (and any amendments) of the food businesses to whom they provide verification services 	Animal Products Act Wine Act Food Act 2014
B. Food safety incident responses Inquiry recommended: - give MPI specific statutory power to compel disclosure of relevant information [pp 5-6] - give MPI statutory responsibility for contingency planning [p 6] - clarify circumstances for making privileged statements [p6]	<ul style="list-style-type: none"> Give the Chief Executive a specific power under the Food Act 2014 to compel the disclosure of relevant information held by parties providing services to a food business and needed to identify or respond to a food safety incident, and: <ul style="list-style-type: none"> stating that there must be a reasonable suspicion the business holds the information, and information acquired under the new provision will be used for the purpose of identifying or responding to a food safety incident 	Food Act 2014
	<ul style="list-style-type: none"> Clarify that MPI has a statutory role in contingency planning for food safety incident responses 	Food Act 2014
	<ul style="list-style-type: none"> Allow the use of privileged statements for the purposes of 'informing' as well as 'protecting' the public 	Animal Products Act
C. Alignment of enforcement and compliance tools Inquiry recommended: align compliance and enforcement tools with wider Food Act tools [pp 6-7]	<ul style="list-style-type: none"> Provide a wider range of compliance tools by including the following tools already in the Food Act: <ul style="list-style-type: none"> improvement notice infringement regime commercial gain penalty 	Animal Products Act Wine Act
	<ul style="list-style-type: none"> - and compliance order 	Wine Act

Section of paper	Proposed amendment	Acts amended
D. Traceability and recall Inquiry recommended establishing dairy traceability working group; enables implementation of the working group recommendations [pp 7-8]	<ul style="list-style-type: none"> • Make food businesses' traceability obligations more explicit • Ensure regulation and notice-making provisions allow for the development of traceability requirements, simulated traceability and recall exercises that can be independently verified, and the setting of circumstances for voluntary recalls 	Animal Products Act Wine Act Food Act 2014
E. Verification Inquiry recommended: - clarify verifier's role as agent of the Ministry [p 8] - provide verifiers' accreditation reports directly to the Ministry [pp 8-9]	<ul style="list-style-type: none"> • For the avoidance of doubt, clarify that the first duty of Recognised Agencies and Persons is to the relevant regulator • Amend the regulation-making provisions to allow a requirement to be set on an agency applying to MPI for recognition, or to maintain such recognition, either to provide, or to authorise the accreditation body that assesses the agency against international standards to provide, all the agency's accreditation reports directly to the Ministry 	Animal Products Act Wine Act Food Act 2014
F. Legislative design Relates to Inquiry recommendations on improving delegated legislation [pp 9-10]	<ul style="list-style-type: none"> • Amend the delegated legislation provisions as necessary to: <ul style="list-style-type: none"> ○ clarify the relationship between the regulation-making and notice-making powers ○ specify which notices are subject to disallowance 	Animal Products Act Wine Act Food Act 2014
G. Electronic systems [pp 10-11]	<ul style="list-style-type: none"> • Allow (as in the Food Act 2014) the use of automated electronic systems to undertake statutory functions including decision-making, across the food sectors 	Animal Products Act Wine Act
	<ul style="list-style-type: none"> • Permit the Director-General to be able to require information to be provided electronically (in a specified form and manner) 	Animal Products Act Wine Act Food Act 2014
H. Technical amendments [pp 11-13]	<ul style="list-style-type: none"> • Align the relevant two year limitation period for bringing criminal proceedings to allow for a four year period as is currently in the Food Act 2014 • Provide for consistent references to "part-business" within the Animal Products Act sections 28A and 162, and the Wine Act sections 26 and 114 • Clarify that overseas market access requirements notices can be made either under the specific provisions or under the general empowering provisions for notices • Allow that when taking compliance action compliance officers may rely on the reasonable belief of a superior officer or the Director-General when forming a reasonable belief • Provide that matters started by one compliance officer may be completed by another compliance officer • Clarify that no 'right of review' exists in relation to a decision to suspend an export operation made by a person acting under delegated authority 	Animal Products Act Wine Act
	<ul style="list-style-type: none"> • Amend the "incorporation by reference" provisions so that access to incorporated material provisions are better aligned across the Acts. This would include: 	Animal Products Act Wine Act

Section of paper	Proposed amendment	Acts amended
Technical amendments (contd)	<ul style="list-style-type: none"> ○ including in the Wine Act provisions related to standard works of reference similar to the Food Act 2014 and Animal Products Act ○ including in the Animal Products Act and Wine Act the definition of “standard work of reference” currently in the Food Act 2014 ○ including in the Animal Products Act and Wine Act provisions similar to those in the Food Act 2014 related to: <ul style="list-style-type: none"> - making incorporated material available electronically, - copyright, - proof of material that is incorporated by reference ○ setting out in the Animal Products Act and Wine Act how the Legislation Act applies to material incorporated by reference 	Animal Products Act Wine Act
	<ul style="list-style-type: none"> ○ providing in all three food safety Acts that the requirement to certify an update of material as a correct copy does not apply to standard works of reference 	Animal Products Act Wine Act Food Act 2014
	<ul style="list-style-type: none"> • Clarify that the Director-General decides whether a review of a decision made under delegated authority is to be undertaken by a person designated by him or her • Clarify that where a person is designated by the Director-General to review a decision made under delegated authority, the decision made by that designated person is final • Provide a notice-making power so that the Director-General may notify the value of a component of a levy formula on which a levy is calculated 	Animal Products Act Wine Act
	<ul style="list-style-type: none"> • Clarify that the Food Act regulatory regime may apply in relation to a non-animal product business operating in the same premises as a dual operator butcher • Clarify the scope of “dairy processor” so that retailers carrying out activities that should more properly be subject to the Food Act are not inadvertently covered by the Animal Products Act • Clarify that the Director-General may exempt exporters from certain requirements whether those requirements are specified by regulation or by notice 	Animal Products Act
	<ul style="list-style-type: none"> • Clarify that the current version of the joint Australia New Zealand Food Standards Code will apply to infringement offences set in regulations 	Food Act 2014

