



# Domestic organic regulatory framework

ACCC submission in response to  
consultation RIS

March 2022

## 1. About the ACCC

The Australian Competition and Consumer Commission (**ACCC**) is an independent Commonwealth statutory agency that promotes competition, fair trading, and product safety for the benefit of consumers, businesses, and the Australian community.

The primary responsibilities of the ACCC are to enforce compliance with the competition, consumer protection, fair trading, and product safety provisions of the *Competition and Consumer Act 2010* (Cth) (**CCA**), regulate national infrastructure, and undertake market studies.

## 2. Current ACL protections

The Australian Consumer Law (**ACL**) contains prohibitions against misleading or deceptive conduct and false or misleading representations. These protections have been in place for many years and have been the subject of extensive judicial consideration.

Section 18 of the ACL prohibits misleading or deceptive conduct in trade or commerce. Businesses or individuals who fail to comply with Section 18 of the ACL are liable to having to reimburse others for loss or damage caused by their conduct. They are also liable to a series of other potential court orders, such as injunctions, community service orders, and orders requiring a business to implement a compliance program.

Section 29 of the ACL prohibits multiple categories of false or misleading representations in connection with the supply or promotion of the supply (e.g., advertising) of goods or services. These categories include representations that goods are of a particular standard, quality, value, grade, or composition (e.g., are organic), or have particular approval (e.g., from an organic certifier). Significant penalties can be imposed for a contravention of section 29 of the ACL.

The ACL does not contain a legislative definition of what constitutes an organic good. Some industry stakeholders consider that this can create challenges for businesses seeking to comply with the ACL, for consumers seeking to understand the characteristics of the good they are purchasing, and for ACL regulators investigating non-compliance.

## 3. The ACCC's experience with organic-related claims

The ACCC has not received many complaints of misleading organic claims. For example, over a three year period from 24 February 2019 to 24 February 2022, the ACCC received 118 complaints regarding potentially misleading organic claims out of a total of 337,600 complaints received (excluding scam complaints). These complaints were primarily made by competitors and certifiers, with a slightly smaller percentage of complaints made by consumers.

However, a low level of complaints to the ACCC and other ACL regulators is not indicative that there is not harm or potential harm in the market. Consumers are generally less likely to complain about claims that they are unable to easily test or substantiate for themselves. In particular, these information asymmetry issues commonly arise with respect to 'premium' or 'credence' claims on products, given that these types of claims are difficult for consumers to verify despite a premium price being charged for that product. Other examples include environmental benefit claims (e.g., '100 percent recyclable' or '100 percent biodegradable') or nutritional benefit claims (e.g., 'no added sugar'). In this respect, organic claims are just as difficult for consumers to verify as other types of premium claims.

Despite these difficulties, the ACCC has investigated allegations received from certifiers and competitors that some businesses have made false or misleading representations in relation to organic claims. Generally, these allegations have been made against smaller local businesses. In these instances, given the localised nature of the conduct, these matters have been referred to State and Territory ACL regulators for investigation. In other instances, the ACCC has taken enforcement action for misleading or deceptive conduct in relation to organic claims. For example, the ACCC issued three infringement notices to [Dreamz Pty Ltd](#) for alleged false or misleading organic representations on various baby skincare products. However, in the majority of matters reported to it, the ACCC has not found conduct that a court would find contravenes the ACL. This is due to a number of factors, including there being a general lack of evidence of misconduct, as well as difficulties in pursuing misconduct even where there is evidence due to no clear definition of 'organic'.

#### 4. The potential benefits of a mandatory framework

Despite some of the complications noted above, the ACCC considers that a clear definition of what constitutes an organic good may present some advantages for consumers. Better practices along the supply chain should enhance consumer confidence and support businesses that are already engaging in good practice.

Firstly, a clear definition may reduce potential consumer confusion and reduce the potential harm posed to genuine organic producers by counterfeit organic producers. Increased consumer confidence that organic products are accurately described may also assist in the development of organic markets.

Secondly, a clear definition may increase industry compliance by providing clarity for both businesses and regulators. The mandatory framework proposed in the consultation RIS, with enforcement and compliance responsibility under the Department of Agriculture, Water and the Environment (**DAWE**), would provide a bright-line, industry-wide test for covered organic goods or producers. Depending on the interaction with existing legal requirements, this would ideally provide businesses with greater certainty over their obligations.

In addition, a clear definition would likely enhance the ability of the ACCC and other ACL regulators to take enforcement action where there is evidence that a business is making misleading organic claims. Compared to the current framework, under which there is only a voluntary domestic organic standard, the introduction of a mandatory standard would give the ACCC more guidance as to whether goods can be said to be 'organic' or not, which may lay the foundation for more definitive enforcement action. This may increase the ACCC's ability to pursue misleading organic claims cases in future.

#### 5. Issues to consider in a new mandatory framework

In the event that the Government prefers the regulatory option in the consultation RIS, there are three issues in particular that ought to be considered in the design of that option:

- The competition implications of any regulatory response
- The interaction of a mandatory framework with the CCA, and
- The importance of clear responsibility for enforcing compliance with the mandatory framework.

## 5.1. Competition implications should be considered

A key function of the ACCC is to promote competition to make markets work. We therefore recommend that the Government consider the competition implications of any regulatory response.

If an existing domestic standard is adopted as a mandatory standard, there are some potential benefits to competition. In particular, it may help level the playing-field for organic producers. While the introduction of such a framework can be viewed as raising barriers to entry to the organic industry, it can also be viewed as removing an unfair competitive advantage enjoyed by counterfeit organic producers. The ability of organic producers to unfairly cut costs by not following organic production methods would be curtailed.

In addition, it is costly and burdensome for legitimate organic producers to maintain ongoing compliance with an organic standard. This cost can be recovered by producers by charging a premium price that is above the non-organic alternative. Some consumers are prepared to pay this premium because they believe there are environmental and health benefits associated with organic claims. They must however place their trust in producers to make truthful and accurate organic claims given they cannot easily verify these claims themselves.

This process may be undermined where producers take advantage of consumer trust to charge premium prices for goods which are not organic. This has adverse consequences for both consumers, who have paid a premium price for no additional benefit, as well as for legitimate producers who experience a competitive disadvantage in incurring additional costs to produce authentic organic goods.

On the other hand, there may also be some negative competition implications which may arise from the introduction of a mandatory domestic standard. For example, the introduction of such a framework is likely to provide a clear competitive advantage to those businesses that are already certified to that standard or are otherwise meeting the requirements of that standard. These businesses will be able to continue producing goods as per usual, with any initial costs they may have incurred to align their practices with that standard already absorbed into their business. Comparatively, businesses that are making genuine efforts to produce organic goods, but whose practices do not align with the new mandatory standard, will face additional hurdles and costs to continue making organic claims.

In addition, mandatory certification against the chosen standard may also create competition risks, including:

- If all producers wanting to make organic claims must be certified against the standard, when previously certification was voluntary, it may create an imbalance in bargaining power between producers and certifiers in favour of the certifiers. For example, it may result in certifiers negotiating higher prices for certification, or unfavourable terms for businesses seeking certification.
- There are also currently some certifiers that provide certification against both the AS 6000 and the National Standard. If the National Standard is chosen as the mandatory domestic standard for certification, the AS 6000 will then become largely redundant. This will have financial implications for dual certifiers, and give a greater competitive advantage to those certifiers which only certify against the National Standard.
- Further, in the event that a single certification logo is mandated to be used on all organic certified products going forward, this would give the certifier that owns that logo a position of market power. This market power could be used unfairly against other certifiers in licensing agreements to use that approved logo.

## 5.2. Interaction with existing consumer protection legislation

If the Government prefers the regulatory option in the consultation RIS, consideration will need to be given to the interaction of the mandatory framework with existing consumer protection legislation. The heart of this interaction will be any 'safe harbours'.

An example of an ACL safe harbour concerns the regulation of country of origin claims in Australia. If a business satisfies the terms of the safe harbour, then the ACCC's or a third party's ability to take action against them for that country of origin claim is restricted. In effect, those claims will be deemed not to be false, misleading, or deceptive. This safe harbour provides clarity to businesses about the extent to which consumer protection legislation applies to country of origin claims.

A mandatory standard for organic claims raises similar issues about its interaction with existing legislation, as options adopted may restrict the scope of the mandatory standard, for example exempting particular products or businesses.

For example, a business may make an organic claim about a food product that is covered by the mandatory standard, but the business is exempt from compliance because it is a small producer. The food product may not conform to the requirements of the mandatory standard.

Any regulatory design will need to consider the overlap between the economy-wide prohibitions under the ACL and the mandatory standard, particularly if certain conduct or categories of business are exempt from the mandatory standard. If the ACL continues to apply, it will be necessary to consider whether there is any divergence between the existing provisions of the ACL and the mandatory standard. If there is a difference, then a safe harbour may be required.

Exemptions from certification against the mandatory standard raise different but related issues. These are discussed in section 5.3 below.

## 5.3. Clear responsibility for enforcing compliance

If a new domestic organic regulatory framework is introduced, a compliance and enforcement model will be needed. This is integral to maintaining the integrity of the framework and giving businesses and consumers confidence in certification processes.

The ACCC is aware that there are certifying bodies which currently provide certification against the National Standard and/or AS 6000. However, we consider that responsibility for monitoring compliance with the requirements of a mandatory standard should not fall entirely to these certifiers. It is also necessary that there is regulatory oversight and review by Government of the conduct of certifiers as well as audits of organic producers. This would ensure that certification does not become a 'rubber stamp' for businesses to rely on and avoid responsibility for having to substantiate their claims.

Similarly, the Government will also need to maintain strong regulatory oversight over the practices of certifiers. For example, by conducting audits of their certification processes to ensure these are robust and are equitably applied. This oversight is also important to check on the power that may be created in favour of certifiers over producers as a result of introducing a mandatory standard and/or a mandatory certification requirement. It is also necessary to consider whether there are appropriate sanctions available to Government to address misconduct by certifiers.

The ACCC is not best placed to enforce a mandatory domestic standard. As an economy-wide regulator, the ACCC enforces the ACL and CCA across all industries. Its role in regulating the organic sector should therefore be confined to its current function of enforcing

the ACL against businesses which make false or misleading organic claims. It is therefore important that there are no regulatory gaps created by a mandatory standard. For example, if small businesses are required to meet a mandatory standard, but are exempt from having to be certified against this standard, their practices will still need to be regulated to ensure compliance with the standard. This regulatory role should not fall to the ACCC, as it is better suited to an agency that has the necessary technical expertise to investigate and enforce organic standards at the production stage. The ACCC will continue to enforce the ACL in relation to any misleading or deceptive claims made by businesses about their compliance with a mandatory standard or certification.

Further, the consultation RIS also suggests the option of having multiple regulators responsible for enforcing different aspects of the framework. For example, this could occur by splitting out production from labelling so that one regulator has responsibility for ensuring compliance with organic production standards, and another entity having responsibility for organic labelling standards. The RIS further suggests that the regulation of labelling requirements could be administered by a regulatory body with expertise in these matters or regulated under the ACL.

The regulation should not be split in this way, as this is likely to reduce the efficiency and effectiveness of the new framework particularly as any labelling standard would need to refer back to the production or supply chain standard. Rather, responsibility for ensuring compliance with the standard should sit with one agency which has accountability for enforcing all aspects of the framework. The ACCC's role in this framework would remain unchanged, and involve continuing to enforce Sections 18 and 29 of the ACL against businesses making false or misleading organic claims.

## 6. Next steps

The ACCC is grateful for the opportunity to make a submission to the consultation RIS on Australia's domestic organic regulatory framework.

We are happy to provide such further assistance and advice to DAWE as would be useful. Please do not hesitate to contact us if you have any questions about this submission.