

SUBMISSION ON

Modern Slavery and Worker Exploitation – Legislative Response

7 June 2022

To: MBIE

Name of Submitter: Horticulture New Zealand

Supported by:

Onions NZ

Tomatoes NZ

NZ Asparagus Council

Processed Vegetables NZ

Vegetables NZ

NZ Kiwifruit Growers

NZ Apple and Pears

Summerfruit NZ

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OVERVIEW

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Our submission

Horticulture New Zealand (HortNZ) is an industry good organisation working in the interests of its members (commercial fruit and vegetable growers). HortNZ thanks MBIE for the opportunity to submit on the Modern Slavery and Worker Exploitation Consultation. We welcome any opportunity to discuss our submission and to continue to work with officials.

The details of HortNZ's position are set out in our submission below.

HortNZ's Role

Background to HortNZ

HortNZ represents the interests of approximately 5,500 commercial fruit and vegetable growers in New Zealand who grow around 100 different fruit, and vegetables. The horticultural sector provides over 40,000 jobs.

There is approximately, 80,000 hectares of land in New Zealand producing fruit and vegetables for domestic consumers and supplying our global trading partners with high quality food.

It is not just the direct economic benefits associated with horticultural production that are important. Horticulture production provides a platform for long term prosperity for communities, supports the growth of knowledge-intensive agri-tech and suppliers along the supply chain; and plays a key role in helping to achieve New Zealand's climate change objectives.

The horticulture sector plays an important role in food security for New Zealanders. Over 80% of vegetables grown are for the domestic market and many varieties of fruits are grown to serve the domestic market.

HortNZ's purpose is to create an enduring environment where growers prosper. This is done through enabling, promoting and advocating for growers in New Zealand.



Executive Summary

HortNZ supports the intention of the proposed Modern Slavery and Worker Exploitation legislation and provides the following comments to assist in the development of the legislation.

Our members are committed to respecting and supporting the dignity, well-being and human rights of their employees and all those who we engage with and whose lives we impact through our supply chain.

Most horticultural businesses will have revenue in the small entity category. There will be a small number of horticultural businesses that exceed the small and medium categories.

It is essential the proposal is reasonable and proportionate in terms of the effort that is required of business compared with the likely outcomes the effort will achieve.

HortNZ encourages MBIE to consider the recommendations outlined in this submission and summarised below:

- The legislation should operate consistently with comparable legislation applicable to our major trading partners.
- To support any behaviour change needed we need the system to be efficient and well as effective. We support responsible and appropriate measures, supported by unambiguous definitions.
- The aspect of operations that growers have most influence on is labour - both employees and contracted labour through third parties.
- The definition of worker exploitation must *only* relate to non-minor breaches of NZ employment standards, and where, "non-minor" is defined.
- There needs to be a proportionate and risk-based approach that means that effort for small businesses with limited influence on their supply chains is right sized, practical, and sensible so it is achievable without duplicating, what is already being done to meet market demands and industry compliance standards.
- We seek a process for regulatory equivalence for schemes such as the GAP add-ons that provide assurance for social practice for employees and contractors.
- Key to the success of the process will be a clear link between this process through to investigations and enforcement action. We support enforcement of any party found to be involved with modern slavery or worker exploitation.

The Horticulture Sector

1. Horticulture in New Zealand

The horticulture sector provides essential work in the regions with on-the-job training and skills development, which help shape the lives of thousands of New Zealanders every year.

The following are some key findings about the horticulture industry workforce from work done by the Ministry for Primary Industries:¹²

- Horticulture has a high number of new entrants; in 2016 there were 19,200. This included 13% inflow from 'other' (which refers to a group of people who have no evidence of earning any income), 4% from beneficiaries, 41% from overseas absence, 14% from education, the balance being from other primary industries or other industries. Data from 2013 indicated that a large proportion (28%) of new entrants to the horticulture industry were temporary migrants.
- Horticulture has the largest proportion of workers identifying as Pacific relative to other primary industries, in part due to the Recognised Seasonal Employer (RSE) scheme. Government sets the standards (e.g. minimum wage), for this accredited scheme.
- The production workforce has a very young profile - 57% of this workforce are aged under 35 (compared to 43% for the food and fibre sector workforce. A total of 16% of the workforce is aged 55 years and over.
- Self-employment in horticulture was reported as 10.4% (in the Horticulture Industry Workforce factsheet).
- There are seasonal workforce peaks associated with specific activities (e.g. picking fruit). The 2020 Recognised Seasonal Worker survey described that while the majority of employees in horticulture are New Zealanders, RSE scheme workers make up approximately a third of the seasonal workforce. Work visa holders also make a contribution.³

¹ <https://www.mpi.govt.nz/dmsdocument/29273-primary-industries-subsector-workforce-infographics> (published March 2019)

² <https://www.mpi.govt.nz/dmsdocument/50932-Food-and-fibre-workforce-Snapshot>

³ Recognised Seasonal Worker Survey 2020 (www.nzkgi.org.nz/wp-content/uploads/2020/07/RSE-Doc-June-2020-WEB-FINAL.pdf)

2. Horticulture has a valuable role in providing entry level employment

Horticulture is an industry that offers a high proportion of roles that are suited to those starting their careers, offering an entry point to gain experience and skills. These people often move out of these jobs into more skilled roles within or outside of the sector. This is natural progression, and one that must be recognised and valued.

The horticulture sector works closely with Work and Income to provide opportunities, for example the Mana in Mahi⁴ programme provides the opportunity for people to train and work at the same time and provides support to employees and employers to be successful.

3. A diverse sector

Horticulture is a diverse sector, encompassing many different crops. The type of work varies depending on factors such as crop type, location, type of role, differing technology etc. Different remuneration structures (including piece rates) and working arrangements and benefits exist for different roles to cater to this diversity.

4. The industry provides competitive pay rates

Working in horticulture offers fulfilling career opportunities with pay progression. There are a range of opportunities across the value chain, from production through to processing/commercialisation.

The horticulture industry promotes diversity and inclusion and equality.

In the horticulture sector salary and wages are competitive and market based and have progressively increased even for the lower skilled occupations as was reported by NZIER.⁵

⁴ <https://www.workandincome.govt.nz/products/a-z-benefits/mana-in-mahi.html>

⁵ NZIER (2019). 'Horticulture labour supply and demand 2019 update'. NZIER report to Horticulture NZ, NZ Kiwifruit Growers, NZ Apples and Pears and NZ Wine.

Submission

1. International alignment

It is important to align New Zealand legislation that relates to modern slavery and worker exploitation with Australia and UK legislation. This is especially important for many larger businesses operating within multiple country jurisdictions.

The proposed thresholds for the large entity size for the NZ legislation is considerably smaller than the thresholds in similar legislation overseas. We seek better alignment for the thresholds for different sized entities.

The Australian Modern Slavery Act, which mandates a 'prescribed disclosure' approach, is more efficient than the disclosure approach proposed. We seek that the disclosure approach is more closely aligned with Australian requirements.

Requirements proposed by MBIE that go further than overseas legislation include:

- the inclusion of worker exploitation;
- the requirement to take reasonable action if the business becomes aware of modern slavery in its global supply chains; and
- mandatory due diligence.

These elements of the proposal might be better included in guidance. If these elements are included the legislation they should be supported with very clear definitions, and systems that enable entities to respond efficiently and proportionately.

Outcome sought

- We recommend greater alignment between the proposal and similar legislation in Australia and UK

2. Influence on supply chain

Our members operate within complex, multi-tiered supply chains and to undertake due diligence of the full supply chain will be disproportionate to the risk.

The majority of horticulture businesses fall within the small entity threshold. The aspect of operations that growers have most influence on is labour - both employees and contracted labour through third parties.

Clarity is needed in the definition of “significant contractual control”, to reduce the likelihood of complex contractual arrangements being used as a method to reduce scrutiny of employment practices. This issue may be better resolved through existing legislation than through this proposal.

Small horticultural companies will have limited influence on their supply chains outside of labour. They are likely to purchase from entities much larger themselves for example, fertiliser, fuel and machinery. HortNZ would support a risk-based approach where a limited assessment is required for businesses within the supply chain that are deemed “low risk”.

We seek a system that supports downstream customers like our growers to prove they have undertaken appropriate due diligence by sighting relevant assurance scheme accreditation from their upstream suppliers e.g., chemical suppliers. For example, if a chemical supplier was certified as part of an assurance scheme that assessed issues within scope of this policy, and the assurance scheme was recognised through an equivalency process, then growers should only need to verify that the supplier had up to date certification.

The emphasis of the proposal is on upstream elements of the supply chain. This process may empower some downstream assessment, for example to assist growers in negotiation where their wholesaler or retailer will not pay enough to cover the cost of production and supply.

Outcome sought

- There should be a process for determining the threshold for the degrees of separation in the supply chain.
- Small businesses are likely to have limited influence over large companies they purchase from. A system which enables due diligence to be satisfied by the use of certification by accredited assurance systems is vital
- The risk associated with complex contractual arrangements obfuscating employer responsibilities is best dealt with by enforcement and changes to legislation rather than through this proposed new legislation

3. Worker exploitation

We seek that the definition for exploitation is linked to NZ employment law and is not defined to have a broader meaning associated with wellbeing that may be subjective. We think it is essential that the definition is simply defined as: non-minor breaches of employment standards and has no additional aspects.

The definition of “worker exploitation” included in the Discussion Document is broad given the large number of mandatory employment standards in New Zealand. As currently drafted, this could include issues such as incorrect calculation of holiday pay for employees who work variable hours. We seek clarity on the definition of “non-minor”.

Outcome sought

- The definition of worker exploitation must *only* relate to non-minor breaches of NZ employment standards, and “non-minor” must be defined.

4. Reasonable and proportionate action

What might be viewed as reasonable and proportionate by one organisation in one sector at one point in time might be very different in another context.

HortNZ seeks clarity on what a reasonable and proportionate action would be for a small business if they become aware of modern slavery in their international supply chain or worker exploitation in their domestic supply chain.

HortNZ would support the draft legislation specifically including reasonableness and proportionality considerations which take into account the factors listed in the discussion paper i.e. the entity’s size and resources; the nature of the control or influence the entity has over its supplier, good practice in the entity’s sector, sector-specific risks, and the degree and type of harm that could result if no action is taken.

Outcome sought

- HortNZ seeks clarity on what a reasonable and proportionate action would be, in particular for a small business.

5. Facilitate lasting cultural change and encourage best practice

This proposal is focused on behaviour change and using procurement to achieve positive outcomes. To achieve behaviour change, the process needs to be streamlined and efficient for growers.

Existing industry schemes are an efficient method of demonstrating that growers are meeting their social practice requirements. Many growers export or sell through international companies operating in NZ where they are already required to demonstrate compliance with similar overseas legislation.

There needs to be a simple approach to meeting due diligence requirements. We seek clarity on the steps back into the supply chain, on the frequency of 'due diligence' (we note the text says 'regular'), and what 'evidence' is expected.

We seek guidance material on how to implement this in a practical and sensible way - growers cannot audit suppliers due to privacy laws. We request worked examples of MBEs expectations. HortNZ would be happy to assist with guidance drafting.

5.1. Equivalence for Industry Assurance

The horticulture sector is serious about supporting growers and contractors to operate ethically and within the law. The most effective way to address worker exploitation is with minimum standards and industry certification. Industry certification enables good employers to demonstrate compliance and enables targeting of employers that are falling below the standard.

The horticulture sector has a number of existing schemes that are already used by growers and are recognised by regulators and markets for providing assurance that social practice standards are being met.

The core NZ GAP and Global GAP standards include aspects of social practice and supply chain due diligence. For example, NZGAP requires growers to buy products from approved resellers. This gives reassurance that growers are using legitimate supply chains.

In addition, there are existing add-ons, Global G.A.P GRASP and NZ GAP Social Practice add on. These add-ons have increasingly required by customers. For example, 100% of Apple and Kiwifruit growers have the Global G.A.P GRASP add on. All growers selling to Countdown are required to demonstrate they meet Countdown's responsible sourcing requirements. The NZGAP Social Practice add-on is recognized as meeting this standard for Countdown.

We seek a process for regulatory equivalence for schemes that provide assurance for social practice for employees and contractors.

NZGAP SOCIAL PRACTICE ADD-ON

This is an optional add-on for businesses that are NZGAP, NZGAP GLOBALG.A.P. equivalent or GLOBALG.A.P. certified. This enables growers to demonstrate they meet both locally and globally recognised social practice standards for markets and regulators and has been developed to include all relevant New Zealand regulatory requirements, with support from MBIE who have assisted in interpretation of legislation. NZGAP Social practice add-on requires that employers must provide evidence of employment agreements, job descriptions etc.

The NZGAP Social Practice Standard also includes globally recognised social practice requirements that are included in other social practice standards such as GRASP (GLOBAL G.A.P. Risk Assessment on Social Practice). NZGAP has internally

reviewed the NZGAP Social Practice add-on against GRASP to ensure that the standards are aligned. NZGAP plans to attain formal benchmarking and recognition of the Social Practice add-on as equivalent to other global social practice standards when those recognition pathways become available (e.g., GRASP). Certification enables employers to demonstrate that they have good social practices in place for their workers, and enables them to supply product to multiple wholesalers, retailers, and markets.

NZGAP have assurance processes in place to ensure workers are paid what they should be, and social practice standards ensure workers are well looked after. This is not just about hourly rates but also working conditions. This is in early stages of the roll out but is being rapidly taken-up by growers.

GLOBAL G.A.P. GRASP ADD ON

GRASP is the GLOBALG.A.P. Risk Assessment on Social Practice. It is a voluntary, farm-level social/labour management tool for global supply chains.

Growers can assess, improve, and demonstrate their responsible social practices through a simple but robust evaluation checklist of four main topics: workers' voice human and labour rights information, human and labour rights indicators, and child and young workers protection. Legal labour requirements such as minimum wage, age of legal employment, or working hours differ from country to country. National interpretations guidelines are developed in New Zealand by the GAP National Technical Working Group.

NZGAP CONTRACTOR STANDARD

This has been developed specifically for contractors providing services to NZGAP, Social Practice add-on, GLOBALG.A.P. and GRASP certified growers or supply chain operators. Using NZGAP certified contractors is a means for growers and other supply chain operators to demonstrate the contractors they engage have met the requirements of these standards at both a production and social practice level.

The common practice of using contractors, especially for seasonal tasks, means that certification is an effective pathway for contractors to demonstrate compliance to growers, and for growers to engage the services of contractors with confidence.⁶

If growers are using contractors with appropriate certification, then this should be sufficient evidence that they have met due diligence requirements.

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https://www.nzgap.co.nz/NZGAP_Public/News/Contractor_Standard/NZGAP_Public/News/Contractor_Standard.aspx?hkey=cd558d15-cf00-4dab-8f4a-2df446816e75

RECOGNISES SEASONAL EMPLOYERS

The RSE⁷ scheme is New Zealand's world class temporary migration scheme which encompasses pastoral care and accommodation.

The RSE scheme was launched in 2007 to help the NZ horticulture and viticulture sectors supplement its local workforce when vacancies were unable to be filled. Employers apply to Immigration NZ to be granted RSE employer status, and following this, apply for an ATR allowing them to recruit workers from offshore to perform planting, maintenance, harvesting and packing. Immigration NZ oversees and manages the RSE scheme.

Outcome sought

- We seek a process for regulatory equivalence for industry assurance schemes that enable good employers to demonstrate they are meeting the regulations.
- Clarity on due diligence requirements

6. Enforcement and rehabilitation

The proposed legislation must be designed to complement the legislation already in place, to build on existing legislation where necessary and should avoid any duplication.

In this regard, and in addition to the existing suite of minimum employment standards, account should be taken of current Crimes Act section 98, and sections 98A to F (of which sections 98C and 98 D relate respectively to migrant smuggling and trafficking), recognising the problem of enforcement even where legislation of this kind exists.

HortNZ submits that the risk associated with complex contractual arrangements obfuscating employer responsibilities is best dealt with in enforcement and changes to existing legislation rather than through this proposed new legislation.

6.1. Enforcement

There is a need to consider the links between this process and enforcement. For example, what does the process look like from initial identification of an issue to a complaint, through to investigation and eventual enforcement.

The proposal suggests that penalties similar to those contained in the Financial Markets Conduct Act 2013 would be imposed for breach of modern slavery legislation, including director liability. HortNZ echoes calls for a supportive approach that focusses on encouraging high quality disclosure obligations

⁷ [About the RSE scheme | Horticulture New Zealand – Ahumāra Kai Aotearoa \(hortnz.co.nz\)](https://hortnz.co.nz/about-the-rse-scheme)

rather than focussing directors and management on legal risk associated with those disclosures.

HortNZ seeks clarity on what support will be offered to companies that are identified through investigations and enforcement. In HortNZ's view, there should be a rehabilitation and resolution process built into the regime.

Outcome sought

- Clarity on how the legislation complements and avoids duplication of existing legislation
- Clarity of how the identification process that occurs through these regulations flow through to investigations and enforcement, and how companies investigated are managed during investigations and following enforcement processes.
- Seek a supportive approach that focusses on encouraging high quality disclosure obligations rather than focussing directors and management on legal risk associated with those disclosures.

7. Measuring the effectiveness of the proposal

We encourage MBIE to think carefully about the resourcing that would be required to effectively support the proposed system.

We do not think the current approach to resourcing, intelligence sharing, or collaboration between departments is sufficient to deliver objectives.

MBIE needs to resource compliance inspectors and the judicial system to operate effectively and efficiently. The NZ court system currently struggles to deal with cases and is running behind schedule due to under resourcing and covid impacts. If this legislation were to come into force with no transitional period - NZ would need the ability to deal with reported issues and escalate enforcement action more quickly.

Thought needs to be given to appropriate metrics for measuring success. Measuring the number of people that are managed under accredited schemes will provide confidence that if only a very small number of modern slavery or worker exploitation cases are discovered, it is not for lack of scrutiny.

Outcome sought

- Investment in resourcing will be required.
- Metrics that measure the coverage of robust assurance systems as well as investigations and enforcement would add value.

8. Transition period required.

We support a transition period. The initial focus should be on those elements that align with similar legislation overseas.

Our own industry experience is that it takes time to build an eco-system of providers to support businesses to meet market and regulatory requirements. We want our businesses to be successful so we will want to support them through any transition to best practice.

HortNZ recommends resources are created by MBIE to assist small to medium businesses meet their obligations under the regime (for example, risk assessment templates, due diligence questionnaires and examples of “reasonable and proportionate” action).

Outcome sought

- A transition period is required
- Initial focus should be on those elements aligned to similar international legislation
- Support for smaller businesses will be required.

9. Recommendations

- The legislation should operate consistently with comparable legislation overseas.
- The legislation should complement the legislation already in place that deals with worker exploitation and should avoid any duplication.
- Legal obligations resulting from the introduction of modern slavery legislation should apply commensurately to the size and influence of supply chain businesses.
- The legislation should provide regulatory equivalence system to enable growers and suppliers to demonstrate compliance with minimum standards through industry assurance schemes such as GAP.