



Natura Kuki Airani

Submission to the Agriculture Bill 2020

SEPT 2020

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Natura Kuki Airani (NKA) is the Cook Islands Organics movement formed under the guidelines of the **Pacific Organic and Ethical Trade Community** (POETCom). These guidelines are a pacific-wide, regional standard used by 22 member countries also recognised in Australia, New Zealand, the United States, and Canada.

The **Pacific Organic Standard** (POS) covers organic crops, livestock, aquaculture, and extends to secondary products and crafts. (Hydroponic methods are not considered organic.)

NKA members are licensed to manage a **Participatory Guarantee System** (PGS); and use the Pacific Organic certification marks. The PGS requires members to co-operatively certify fields, produce and production processes.

Executive Summary: The Agriculture Bill 2020

*An Act to repeal the Ministry of Agriculture and Fisheries Act 1978 and provide for the responsible Ministry to have adequate **powers to obtain information and prevent adverse effects on agriculture.***

-Agriculture Bill 2020

*The Agriculture Bill provides for the functions, powers, and administration of the Ministry of Agriculture under **modern reformed governance arrangements** and aims to ensure that the ministry can more effectively manage the agriculture sector and facilitate its sustainable development into the future.*

-Explanatory Notes, Agriculture Bill 2020

As it stands, the Agriculture Bill is divisive, punitive, and culturally-inappropriate.

The reading of bill drafted in 2018 seems untimely given the vision for agriculture in the Cook Islands that is described in the *Agriculture Sector Action Plan 2020-25* (published June 2020).

Legislative support could be used to reinvigorate agriculture, however it is difficult to see how the provisions of the Agriculture Bill will help to achieve this vision.

Budget appropriation

In isolation, the proposed legislation is unlikely to result in an increased annual appropriation (budget allocation) when the functions of data collection, inspection, and committees can be outsourced or co-opted.

When key roles and governance structures are staffed from outside of the ministry, the risk is also that institutional knowledge will be lost, and relationships with growers will be compromised.

The functions of the ministry have been extrapolated into fourteen separate clauses (a)-(p) — a significant increase from the three set out in the *Ministry of Agriculture and Fisheries Act 1978*. Despite the increased granularity, it is arguable as whether the sector will be better served. The earlier legislation was more inclusive by being less prescriptive; and also made mention of the marketing and sale of product; which the 2020 act omits.

Principles and merits

In the Cook Islands, agriculture is a cultural practice; and includes home gardeners and future farmers, alongside commercial growers.

Organic growers are seeking that the government make a long-term commitment to achieving and sustaining healthy soils; to minimise ecological impacts; and regenerate biodiversity.

It is unnecessary (and retrograde) for the ministry to seek to *regulate organic farming* when the Participatory Guarantee System and Pacific Organic Standard provides a model for sector self-regulation.

Natura Kuki Airani has not been consulted on the proposed regulations, and broadly rejects ministry involvement in regulating organics.

Adverse effects and agricultural offences

The concept of an **adverse effect** — on agriculture, or the agricultural sector requires further definition.

No historical, cultural or commercial imperative has been provided as to why the definition of an **agricultural offence** is required (now). The examples provided at the vaka consultations (fruit fly, rodents, chemical contamination, puaka), are all addressed by existing legislation relating to the environment, biosecurity, pesticides, or wandering animals.

Collectors and Inspectors

Conferring authoritarian powers to **agricultural data collectors** and **agricultural inspectors** is unnecessary. **The proposed fines are not just a deterrent; they punitive and crippling.**

- Under the previous act, the ministry was charged with surveying agricultural production by census.
- Data collection should always be with producer consent and voluntary.
- Casual staff should not have the right to access private land or structures; seize records; or install or retrieve data collection devices.
- A \$10,000 fine for refusing a request to provide information is unreasonable.

Restorative measures

In the case of an offense that impacts on agricultural production, provision should be made for an appeal process. The intent must be to resolve conflict, and restore or repair damages. This is more culturally appropriate than paying a fine or requiring individuals to mount a legal defence.

Legislative framework: cross-cutting strategy

It is unclear as to the work plan proposed for revising related acts (Pesticides, Biosecurity etc.). As these acts are inter-dependent and a clear cross-cutting strategy is required to direct any revision.

DETAILED ANALYSIS

3 Purpose

The purpose of this Act is to—

(a) provide for the development of sustainable agricultural practices.

Direction: A definition is required for *sustainable agriculture*.

Why?

The concepts of *sustainable agriculture*, and *sustainable agricultural practice* are central to interpreting the act and functions of the ministry — but have not been defined.

Sustainable does not simply mean ‘can continue’; or ‘ongoing’. Describing an activity as ‘sustainable’ requires that it continue to maintain a balance between social, economic, and environmental considerations.

The practices of *sustainable **organic** agriculture* differ to the practices of *sustainable **conventional** agriculture*.

In broad terms, an organic grower commits to working with locally-sourced materials, naturally-derived inputs, using water resources efficiently, being mindful of the environmental and cultural impacts of production and processing.

Pacific organic principles

Organic agriculture, whether in farming, processing, distribution or consumption, is aimed at sustaining and enhancing the health of ecosystems and organisms, from the smallest living entity in the soil to human beings.

-Pacific Organic Standard

8 Functions of ministry

The ministry has the following functions:

- (a) encouraging sustainable agricultural production, including—*
- (i) the production of crops, livestock, and pollinators; and*
 - (ii) managing crop and livestock genetic resources; and*
 - (iii) protecting the welfare of livestock and other farmed animals:*

Direction: Amend to:

- (a) encouraging sustainable agricultural production, **processing, and support services** including—
- (i) the production of crops, livestock, **locally produced inputs**, and pollinators;
 - (iv) support for agri-business services**

Why?

- For organic production to flourish, the sector requires assistance not only with production, but also with **processing and marketing**.
- Support for **local, naturally-derived inputs** will **reduce import dependence**. Locally produced inputs include fish emulsion, mulch, activated charcoal, vetiver grass.
- Use of **local inputs could be subsidised**; made available at a discounted rate. This would benefit input producers and growers and **enable the transition to organic practices**.
- Government support for agri-tech businesses will require **agri-tech support services**; to maintain specialist equipment, irrigation methods, data management, computer systems, etc. Specialist skills are likely to require financial or public sector support as standalone businesses may not be viable for small-scale enterprise.

8 (h) supporting the marketing and use of agricultural inputs, including—
(i) pesticides; and
(ii) crop seeds; and
(iii) fertilisers; and
(iv) in co-ordination with other relevant ministries, livestock medicines;

Direction: Redefine or delete (h)(i),(iii).

Why?

- There is a potential **conflict between the various roles of the ministry** as (concurrently) the importer, regulator, marketer and retailer of inputs.
- Organic **growers can be negatively impacted by man-made inputs**; fertiliser run-off, chemical contamination.
- There are **conflicting priorities** when regulating inputs: Sustainable organic production mandates the use of nature-derived inputs; conventional production is dependent on man-made inputs.
- The **bulk importation of inputs is currently necessary to achieve economies of scale / lower costs for growers**. Along with the man-made fertilisers and pest controls used by conventional growers; there are also organic inputs such as pest control oils, supplements such as black strap molasses, and efficient microbes.
- Significant support is needed to reduce import dependence / **enable import substitution**.

Discussion

Consideration of the future of *agricultural practices* in the Cook Islands - post Covid-19 - is necessary, given the end of tourism, realities of import dependence, food security concerns, climate resilience, etc. Although some of these issues are mentioned in the *Agriculture Sector Action Plan 2020-25*, there is little evidence that the Agriculture Bill itself has been drafted to support implementation of the initiatives detailed.

As one example, the (literal) boundary between organic and conventional fields:

- organic methods do not affect conventional production methods;
- **conventional growing methods pose a threat to organic production**.
Man-made inputs result in a gradual decline in agricultural production (long term damage to soil health), or directly compromises organic certification.

Large scale activities, such as bee-keeping, require a **whole-community commitment**. Honey production requires a substantial area to be actively managed (chemical use is prohibited) in order to achieve **organic certification**.

Chemicals in irrigation water can negatively impact plant growth and soil health.

- An **intervention step** may be necessary to remove chemicals before use. Pre-processing irrigation water requires capital investment and adds operational cost to organic production.
- Conventional growers will also be affected, as water treatment **chemicals increases water demand**, and water-use charges are currently proposed.
- Residual chemicals in irrigation water can **diminish the effectiveness of man-made inputs**.

If government is committed to growing the organics sector, **conventional growers must be supported to transition** to organic methods/products. **Subsidies** may be required to counter the financial losses arising from the initial decline in production due to **field conversion** and (2-3 years).

Community outreach will also be necessary, with the **prohibition** of specific man-made inputs necessary. For example banning the importation and use of persistent chemical herbicides and pesticides that risk environmental degradation and negative impacts on soil health.

Recommendation: The Pesticides Act proposed a **pesticides regulatory board**, the role of such a board should be acknowledged by the Agriculture Bill. Membership should include grower representatives.

A **agricultural inputs task force** may be required to **futurecast the sector** to identify the legislative supports that will **enable positive change**.

5 Interpretation

In this Act, unless the context otherwise requires,—

adverse effect on agriculture or the agricultural sector, in relation to any thing (including land) or activity,—

(a) means—

(i) the thing or activity, if left alone, will, or is likely to, decrease agricultural production;

Direction: Delete: (including land).

Why?

- **Land left alone will not impact agricultural production** in any common sense.
 - A *thing* on the land that might impact agriculture, such as an animal or invasive plant is defined under companion acts as a *pest* or *weed*.
 - For a field to achieve organic certification requires a buffer. The boundary must be *left alone*: planted in non-food crops as a safeguard against contamination from livestock, environmental pollutants, etc.
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5 Interpretation

Direction: Proposed refinement of definition for *adverse effect*:

5 Interpretation

In this Act, unless the context otherwise requires,—

adverse effect on agriculture or the agricultural sector, means any thing or activity that can be reasonably proven to negatively impact the **quality or quantity of agricultural production**

Why?

- An increase or decrease in production is a limited method of determining impact.
- In organic production emphasis is on sustaining soil health.
- Organic methods favour quality over quantity: nutritional value, diversity/intercropping, soil health, planting progression.
- Contamination of an organic field can compromise certification for a number of years. Contamination will prohibit organic production.
- The size of landholdings often precludes large-scale organic production in the Cook Islands.
- Quantifying impacts on production is more directly applicable to mono-cropping (which is counter to the POS).

*5(b) includes activities that have the effect set out in paragraph (a), even if they are **authorised by a licence or permit under another enactment***

*19(3)(a) overrides the **Official Information Act 2008**;*

*30(2) **Despite anything to the contrary in any other Act**, every prosecution of a minor offence may be commenced by an inspector or data collector against a person served with a minor offence notice by filing the notice in the High Court and without further service of any documents on the offender.*

Direction: Rewrite or delete clauses that seek to override the provisions of other legislation.

Why?

- If a license, permit, etc. is lawfully obtained for an activity, then the public should not be penalised under a conflicting regime; especially when this may result in a fine or conviction.
- Protections and processes provided under one law should not be removed by another (e.g. Official Information Act).

Discussion

The Ag Bill does not repeal related acts (Pesticides, Biosecurity, etc). The activities most likely to adversely impact agricultural production are mainly pesticide or biosecurity offences. There are also overlaps between acts managed by public health and environment services.

Conflict is likely. As an example, proposed Agriculture fines are in some instances less than those under the Biosecurity Act. The court would be required to determine which regime is applicable. For example, when a biosecurity offence affects agricultural production.

Recommendation: Improved **inter-agency cooperation** and legislation mandating a **formal resolution process to resolve regime/regulatory conflict**.

9 Guiding Principles

Direction: Remove *'the desirability of'* from all clauses.

Why?

- Principles must be stated plainly and directly.
 - Principles should not be discretionary (*'desirable'*).
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9(c) the desirability of carrying out statutory functions based on science and evidence-based decision making;

Direction: Rewrite

Proposed:

Decisions will be based on **local knowledge**, scientific theory, and relevant evidence.

Why?

- Each agricultural practice is adapted to the local context (including environmental conditions). There cannot be assumed to be a single *'correct'* understanding.
 - *Local knowledge* recognises the value of traditional/cultural understandings that may not have been published in a peer-reviewed journal.
 - Ministry staff may not have access to sufficient knowledge of a particular agricultural practice and in such cases should be required to defer to local practice.
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9(h) ensuring that agriculture practices are environmentally sustainable, including in relation to native plants

Direction: Rephrase; intent is unclear.

Why?

- How will the ministry – in practical terms — ensure that agriculture practices are **environmentally sustainable**?
- Such a function might require additional expertise/co-operation with National Environment Service.
- The functions of ministry do not include native plant growing, preservation of genetic diversity or replanting.

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 - Although there is specific mention of *native plants*, there is no mention of **native insects, animals, or ecosystems**.
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15 - Notice of establishment and dissolution

(3) The establishment or dissolution of a committee is valid even if a notice is not published under subsection (1).

Direction: Delete 15(3)

Why?

- Good governance includes transparency and accountability. The public must be informed when committees are formed or dissolved.
- Committees make decisions that affect the sector.
- Public notice is necessary to advise interested / affected stakeholders.
- The issuing of a public notice is basic administrative task.

Data collectors and Inspectors

The tone of the legislation is authoritarian and punitive. The public are required to comply - and will be fined if they refuse to comply.

There is no **provision for appeal, moderation/mediation**. Earlier acts allow for an appeal to the director/HOM — rather than requiring a grower to defend their rights through the High Court. The hourly rate of counsel is more than would be charged as a minor fine.

Culturally it is more appropriate to **support behavioural change through community outreach**, education/field officers, **product substitution**, and **research/extension projects**.

As defined in the bill, the data collector and inspector roles may be executed by non-ministry staff. **These roles should not be out-sourced**.

Data collectors and inspectors need to be suitable: competent, qualified, experienced, and trained. The agricultural sector employs specialist materials and machinery. Officers must be familiar with the sector or risk injury/damage to property and affect livelihoods.

Part 3 - Data collectors

Direction: Delete this Part.

Why?

- The need to grant broad and intrusive powers to enable agricultural data collection has not been determined.
- All data should be collected by the ministry with producer consent; reasonable requests and voluntary responses (by survey, questionnaire, census, etc).
- The right to seize private records, and install or retrieve data collection devices (without consent) is not necessary to the ministry documenting agricultural production.
- Private records are unlikely to provide the data required by the ministry in a form that can be used by ministry staff. Some growers use wall charts to plan crop rotation, other make notes in books, some have computer systems, other keep no formal records.
- A fruit fly trap was cited as a data collection device that might be installed without consent. Provision for this specific form of data collection device should be made under the Biosecurity Act.
(Noting that organic growers may still have grounds to refuse installation when the contents of a trap might compromise organic certification - e.g. beekeeping).

Recommendations

- The collection of agricultural production data should be listed as a function of the ministry.
 - Instead of a punitive regime, the ministry must **build relationship with growers**; work on **shared data standards** and reporting with **grower groups**, **demonstrate tangible benefits**, provide tools to **make data provision easier**, etc.
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Part 4 – Inspectors

Direction: Delete this Part

Why?

- The role and purpose of an inspector has been defined in other acts. The need for an **agricultural inspector** has not been determined.
- The rights and authorities of an agricultural inspector are currently too broad; and do not match likely contexts or offences.
- Proposed duties (e.g. the execution of a search warrant), requires specialist training. It is inappropriate/unsafe to allow this role to be out-sourced.
- Unsupervised inspection of organic properties risks contamination / compromising certification.
- Distinct agricultural practices require specialist knowledge and specialist investigative skills.

Recommendations

- Specialist inspectors should continue to be defined under each relevant act. Inspectors must be qualified and employed by the appropriate ministry (noting this responsibility is/was shared between Agriculture, Public Health, and Environment).
- If inspection is deemed necessary, it should be with producer consent.
- Grower groups and/or community leaders could function as mediators/facilitators if investigation is necessary.

28(3)(a) if there is no adverse effect on agriculture or the agricultural sector, to a fine not exceeding \$10,000:

Direction: Delete/redraft.

Why?

- The person or entity has only committed the offense of not complying with a notice.
 - If there has been no adverse effect on agriculture, then the notice may have been issued in error.
 - When there is no adverse effect, there should be no fine.
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*28(4)(c) knowingly acts in breach of the requirements of a notice issued under section 27, **whether or not that person or entity has been served with the notice.***

*30(2) Despite anything to the contrary in any other Act, every prosecution of a minor offence may be commenced by an inspector or data collector against a person served with a minor offence notice by filing the notice in the High Court and **without further service of any documents on the offender.***

Direction: Query.

Why?

- Oral advice can easily be misunderstood.
- A person or entity should be fairly informed that they have committed an offence by notice (in writing).
- The ministry should be required to serve documents to an offender before filing in the High Court.
- The bill should allow for an appeal and restoration process outside of High Court, for example by petition to HOM.
- Ensure that processing of an offence is according to existing acts (Criminal Proceedings?).

*28(6) If a company commits an offence under this Act, any **officer or agent** of the company who authorised, assented to, or participated in, or by his or her neglect or omission contributed to, the commission of the offence—
(a) is a party to and may be found guilty of the offence; and
(b) is liable to the penalty provided for the offence.*

Direction: Query / Delete.

Why?

- If the transfer of liability from company to an *officer or agent* is indeed company law (as advised at the Select Committee consultations), then it belongs in the act(s) that set out company definition and not in the Agriculture Act.
 - There is the risk of competing/contrasting provisions, where the prosecution of an *agricultural* offence is distinct from the prosecution of another type of offence.
 - If reference will be made to a company *officer and agent*, definitions for such should be added to Interpretation.
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37(2) A person referred to in subsection (1) is not civilly or criminally liable in respect of any loss or damage arising from an act or omission by that person in good faith (whether or not the act or omission was negligent) in the performance of a function or purported function, or exercise or purported exercise of any function or power, under this Act or any other enactment that the ministry, with the authority of the Prime Minister, for the time being administers.

Direction: Append.

Why?

- Although individual should be protected, the ministry itself should explicitly accept liability for loss or damage resulting from the action of those acting on its authority.
- Agricultural *loss or damage* will likely directly affect livelihood; restoration should be mandated.

Regulations

The draft regulations were required for discussion at public consultations, and should be provided at future consultations.

Why?

- The emphasis of the bill is on offences and fines, but these are only defined in regulations.
- Documenting common agricultural offences would likely reveal that most are not unique to agriculture and lie under other acts.
- Agriculture-sector specific offences that are not already described by existing legislation are likely to be minor.

Recommendations

- Regulations should be provided at future consultations.
- **The bill should not proceed to a third reading until public consultation has been undertaken on the Regulations.**

*38(2) Without limiting **subsection (1)**, regulations made under that subsection may—*

(e) regulate the requirements for organic farming:

Direction: Delete (e).

Why?

Natura Kuki Airani has a licensing agreement to implement the Pacific Organic regional standard for organic production and certification; including the collective management of the Participatory Guarantee System. At this time, **ministry regulation of the sector is an unnecessary duplication of effort**; one that will likely to frustrate a collective grower initiative.

NKA recognises the benefit of the **ministry continuing to provide secretariat services** (e.g. to enable to public to verify member organic status); and collaborating on **project-based initiatives to develop the organics sector**.

Legislative context

Drafting Instructions are helpful if they are provided at the same time as the bill, but those supplied 2 Sept have not been written for a general audience.

Phrases such as modern *governance arrangements* require explanation and examples specific to the ministry, and relevant to stakeholders.

Explanatory notes should provide sufficient context to support informed engagement. The reader is looking to understand why the clause is necessary; and how the change might affect them directly.

References

- Pacific Organic Standard. Secretariat of the Pacific Community, 2008.
 - Cook Islands National Water Policy 2016.
 - Cook Islands National Agriculture Policy 2017 -2021. Ministry of Agriculture, April 2017.
 - Instructions for the Drafting of a New Ministry of Agriculture Act. Ministry of Agriculture, Nov 2018.
 - Pacific Organic Standard Guideline: Chemically treated potable water in crop production. Secretariat of the Pacific Community, June 2020.
 - Agriculture Sector Action Plan 2020-2025. Ministry of Agriculture. June 2020.
 - Hansard of the Parliament of the Cook Islands: June 15-16 (Reading of the Agriculture Bill 2020).
 - Agriculture Bill 2020 (including Explanatory Notes), Parliament of the Cook Islands.
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