



Biosecurity (Readiness and Response—Fresh Tomatoes Levy) Order 2019

Patsy Reddy, Governor-General

Order in Council

At Wellington this 16th day of December 2019

Present:

Her Excellency the Governor-General in Council

This order is made under section 100ZB of the Biosecurity Act 1993—

- (a) on the advice and with the consent of the Executive Council; and
- (b) on the recommendation of the Minister for Biosecurity made after being satisfied of the matter described in section 100ZB(6) of that Act.

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Order

1 Title

This order is the Biosecurity (Readiness and Response—Fresh Tomatoes Levy) Order 2019.

2 Commencement

This order comes into force on 3 February 2020.

3 Interpretation

In this order, unless the context otherwise requires,—

Act means the Biosecurity Act 1993

agreement—

- (a) means the deed; and
- (b) includes any operational agreement of the kind referred to in section 100Z(3) of the Act that is made between—
 - (i) the Director-General; and

(ii) TomatoesNZ

annual general meeting means an annual general meeting of TomatoesNZ held in accordance with its rules

collection agent means a person whose business is, or includes,—

- (a) buying fresh tomatoes from a grower for resale or for export; or
- (b) selling or exporting fresh tomatoes on behalf of a grower

commercial processing means artificial drying, bottling, canning, evaporating, freezing, juicing, or preserving for commercial purposes

deed—

- (a) means the Government Industry Agreement for Biosecurity Readiness and Response deed signed by TomatoesNZ on 7 September 2016 (as may be revised or amended from time to time); and
- (b) includes a deed of the kind described in section 100Z(2) of the Act that replaces the deed referred to in paragraph (a)

direct sale means a sale made by a grower other than through an agent, and includes—

- (a) the grower supplying to retail outlets such as supermarkets; and
- (b) the grower making online sales; and
- (c) the grower's own roadside sales; and
- (d) sales by the grower at farmers' markets

export means the sale of fresh tomatoes—

- (a) by a grower to a market other than one in New Zealand; or
- (b) by a grower to a collection agent for sale to a market other than one in New Zealand; or
- (c) by a collection agent to a market other than one in New Zealand

fresh tomatoes—

- (a) means tomatoes grown in New Zealand for commercial purposes (including for export); but
- (b) excludes tomatoes grown for commercial processing

grower means a person whose business is, or includes, the commercial production of fresh tomatoes

GST means goods and services tax payable under the Goods and Services Tax Act 1985

levy means the levy imposed by clause 4

levy money means the money paid or payable under this order as a levy

levy rate means the levy rate set under clause 9 or the levy rate varied under clause 10

levy year means,—

- (a) for the first levy year, the period that begins on 3 February 2020 and ends on 30 September 2020; and
- (b) for every subsequent levy year, the period of 12 months that begins on 1 October and ends on 30 September of the following year

readiness activity has the meaning given in section 100Y(2) of the Act

response activity has the meaning given in section 100Y(3) of the Act

TomatoesNZ means Tomatoes New Zealand Incorporated.

4 Levy on fresh tomatoes

- (1) A levy is imposed on fresh tomatoes.
- (2) The levy must be paid to TomatoesNZ.

5 How levy may be spent

- (1) TomatoesNZ must spend all levy money paid to it to meet its commitments to readiness and response activities under the agreement.
- (2) TomatoesNZ may invest levy money until it is spent.

Determining levy

6 Basis for calculating levy

- (1) The levy must be calculated on the basis of the gross sales value at the first point of sale.
- (2) However, if the fresh tomatoes are exported, the levy must be calculated on the basis of the price received by the grower after deduction of all offshore costs (including international freight).
- (3) A value referred to in subclause (1) is the value before the deduction of any costs or charges and is exclusive of GST.

7 Levy must be paid at single rate

The levy must be paid at a single rate.

8 Maximum levy rate

- (1) The maximum rate of the levy is 0.25% of—
 - (a) the price received at the first point of sale for domestic sales; or
 - (b) the price received by the grower after deduction of all offshore costs (including international freight) for export sales.
- (2) The maximum levy rate is exclusive of GST.

9 Rate of levy payable

- (1) The levy rate for the first levy year is 0.10%.

- (2) For each subsequent year, TomatoesNZ must set the levy rate before the start of the levy year at an annual general meeting or at a special general meeting after consulting growers and collection agents in accordance with its constitution.
- (3) As soon as is practicable after setting the levy rate, TomatoesNZ must notify both the levy rate and the levy year to which it applies—
 - (a) in the *NZGrower*; and
 - (b) by direct mail to all growers and relevant collection agents known to TomatoesNZ.
- (4) If the *NZGrower* ceases to be published, the Minister of Biosecurity may, by notice in the *Gazette*, specify another publication for the purposes of this order.
- (5) If TomatoesNZ does not set the levy rate before the start of a levy year, the levy for that year is the rate most recently set under this clause.

10 Power to vary levy rate for response activity

- (1) TomatoesNZ may vary the levy rate in accordance with this clause without consulting growers and collection agents.
- (2) TomatoesNZ may vary the levy rate with the approval of its board if, under the agreement, TomatoesNZ is required to contribute to the costs of a response activity.
- (3) As soon as is practicable after setting the levy rate, TomatoesNZ must notify both the levy rate and the levy year to which it applies—
 - (a) in the *Gazette*; and
 - (b) in the *NZGrower*; and
 - (c) by direct mail to all growers and relevant collection agents known to TomatoesNZ.
- (4) If the *NZGrower* ceases to be published, the Minister of Biosecurity may, by notice in the *Gazette*, specify another publication for the purposes of this order.
- (5) The earliest date that the rate or varied rate may come into effect is the day after TomatoesNZ has given notice of the new rate.

Paying levy

11 Grower responsible for paying levy

- (1) Growers are responsible for paying the levy.
- (2) No grower is exempt from paying the levy.

12 Collection agent responsible for collecting and paying levy

- (1) A collection agent is responsible for collecting the levy unless the grower pays the levy money directly to TomatoesNZ or to the Director-General.
- (2) A collection agent must, at the first point of sale, pay the levy, and any GST payable on it, if the collection agent—

- (a) buys fresh tomatoes from a grower; or
 - (b) sells or exports fresh tomatoes on behalf of a grower.
- (3) A collection agent may recover a levy (plus GST, if any) from a grower—
- (a) by deducting the amount of the levy (plus GST, if any) from the payment made to the grower; or
 - (b) by recovering the amount of the levy (plus GST, if any) as a debt due from the grower.
- (4) A collection agent must inform the grower of the amount of levy money deducted under this order.

13 Collection fees

- (1) A collection agent who pays a levy to TomatoesNZ may deduct from the levy—
- (a) a collection fee of not more than 4% of the amount of levy collected (exclusive of GST); and
 - (b) the GST payable on the fee before the levy is paid to TomatoesNZ.
- (2) A grower who pays the levy directly to TomatoesNZ or to the Director-General is not entitled to charge a fee.

14 When levy payable by growers

- (1) If a grower sells fresh tomatoes directly to the public or exports them, the due date for payment of the levy is 30 June.
- (2) The levy payable by growers must be paid annually for the preceding 12 months.
- (3) The last date for payment of the levy by growers is 30 September in the same calendar year.

15 When levy payable by collection agents

- (1) The due date for payment of the levy by a collection agent is the date on which the collection agent recovers the levy from the grower.
- (2) The last date for payment of the levy by the collection agent is the 20th day of the month after the month in which the levy is recovered from the grower.

16 Penalty for late payment

If a grower or a collection agent does not pay an amount of the levy (or GST payable on that amount) by the last date for payment, they must pay TomatoesNZ—

- (a) an additional levy of 10% of the amount of the unpaid levy money; and
- (b) for each whole month that the amount (or part of the amount) remains unpaid after the last date for payment, a further 2% of the unpaid amount.

17 Conscientious objectors

- (1) A grower or a collection agent who objects on conscientious or religious grounds to paying the levy in the manner provided for by this order may pay the amount concerned to the Director-General.
- (2) The Director-General must pay the amount to TomatoesNZ.

*Returns***18 Returns**

- (1) A payment of levy money to TomatoesNZ by a grower or a collection agent must state—
 - (a) the value of fresh tomatoes to which the payment relates, broken down by domestic and export sales; and
 - (b) in the case of a return by a collection agent, the full name, postal address, email address, and telephone contact details of the grower.
- (2) TomatoesNZ may, in writing, request from a grower or a collection agent any information that TomatoesNZ reasonably requires for the purpose of determining the amount of levy payable by the grower.
- (3) Each grower and each collection agent must, as soon as is reasonably practicable after receiving a request from TomatoesNZ, supply TomatoesNZ with a written return of the information requested.

*Records and confidentiality***19 Growers must keep records**

- (1) A grower who pays a levy directly to TomatoesNZ must keep records of the following for each levy year:
 - (a) the amount of levy money paid; and
 - (b) the sales that the levy money was deducted from.
- (2) A grower whose levies are paid by collection agents must keep records of the following for each levy year:
 - (a) the amount of levy money paid; and
 - (b) the sales that the levy money was deducted from; and
 - (c) the names and addresses of the collection agents.
- (3) A grower who keeps records under this clause must—
 - (a) keep the records for at least 2 years after the levy year to which the records relate; and
 - (b) provide TomatoesNZ with information from the records as soon as is reasonably practicable after receiving a request for the information, by post or email, from TomatoesNZ.

20 Collection agents must keep records

- (1) A collection agent must keep records of the following for each levy year:
 - (a) the amount of levy money paid; and
 - (b) the sales that the levy money was deducted from; and
 - (c) the details of each grower from whom the agent has collected levies (including the grower's name, trading name, and postal address).
- (2) A collection agent who keeps records under this clause must—
 - (a) keep the records for at least 2 years after the levy year to which the records relate; and
 - (b) provide TomatoesNZ with information from the records as soon as is reasonably practicable after receiving a request for the information, by post or email, from TomatoesNZ.

21 TomatoesNZ must keep records

- (1) TomatoesNZ must, for each levy year, keep records of,—
 - (a) for each amount of levy money paid to it in that year, and in relation to each amount,—
 - (i) the date on which the levy money is received; and
 - (ii) the person who pays the levy money in each case; and
 - (b) how the levy money was spent or invested (if at all).
- (2) TomatoesNZ must keep records under this clause for 10 years after the levy year to which the records relate.

22 Confidentiality of information

- (1) This clause applies to information obtained—
 - (a) under or because of this order; or
 - (b) under the Act in relation to this order.
- (2) A person must not disclose information to anyone other than an officer or employee of TomatoesNZ unless the disclosure is—
 - (a) the giving of evidence in any legal proceedings taken in relation to this order; or
 - (b) required by law; or
 - (c) the production of records or accounts under section 100ZG of the Act.
- (3) TomatoesNZ may disclose information—
 - (a) for statistical or research purposes that do not require the disclosure of personal information; or
 - (b) for the purpose of invoicing or collecting the levy; or

- (c) for communicating with and supporting a levy-paying grower, provided the information relates only to that grower; or
- (d) if every identifiable person to whom the information relates consents; or
- (e) as required by law.

23 Remunerating auditor

- (1) An auditor appointed under section 100ZF of the Act is entitled to receive remuneration (as provided for under section 100ZF(8) of the Act) for the auditor's fees and allowances.
- (2) The fees and allowances are payable by TomatoesNZ at a rate agreed by the Minister and TomatoesNZ.

Arbitration in case of dispute

24 Appointing arbitrators

- (1) This clause applies to a dispute about—
 - (a) whether any person is required to pay the levy; or
 - (b) the amount of the levy payable.
- (2) The parties to a dispute may agree to submit the dispute to arbitration.
- (3) If the parties to a dispute are unable to agree on the appointment of an arbitrator, the arbitrator must be appointed in accordance with Schedule 1 of the Arbitration Act 1996.
- (4) For the purposes of the Arbitration Act 1996,—
 - (a) an agreement under subclause (2) is an arbitration agreement; and
 - (b) the arbitrator (whether appointed by agreement or under subclause (3)) is an arbitral tribunal.

25 Application of Arbitration Act 1996 to dispute

- (1) Subject to clause 27, the provisions of the Arbitration Act 1996 (including the provisions for procedures to be followed by an arbitral tribunal) apply to the resolution of a dispute submitted to arbitration under this order.
- (2) However, the provisions of this order prevail if there is any inconsistency between those provisions and the provisions of the Arbitration Act 1996.

26 Payment of arbitration costs

The costs of the arbitration (including the arbitrator's remuneration) must, unless the parties agree otherwise, be determined under Schedule 2 of the Arbitration Act 1996.

27 Appeal to District Court

- (1) A party to a dispute who is dissatisfied with the arbitrator's decision may appeal to the District Court against the decision.
- (2) The appeal must be brought by filing a notice of appeal—
 - (a) within 28 days after the making of the decision concerned; or
 - (b) within any longer time that the District Court Judge allows.
- (3) The Registrar of the court must—
 - (a) fix the time and place for the hearing of the appeal; and
 - (b) notify the appellant and the other parties to the dispute; and
 - (c) serve a copy of the notice of appeal on all parties to the dispute.
- (4) Any party to the dispute may appear and be heard at the hearing of the appeal.
- (5) On hearing the appeal, the District Court may confirm, vary, or reverse the decision appealed against.
- (6) The filing of a notice of appeal does not operate as a stay of any process for the enforcement of the decision appealed against.

Michael Webster,
Clerk of the Executive Council.

Explanatory note

This note is not part of the order, but is intended to indicate its general effect.

This order, which comes into force on 3 February 2020, imposes a levy on fresh tomatoes that are grown in New Zealand for commercial purposes and sold in New Zealand or exported. Fresh tomatoes grown for processing are excluded from the order. The grower is responsible for paying the levy on fresh tomatoes. The levy must be paid by a collection agent and paid to Tomatoes New Zealand Incorporated (**TomatoesNZ**), unless the grower pays the levy to the Director-General or TomatoesNZ.

TomatoesNZ is the tomato industry sector organisation under Part 5A of the Biosecurity Act 1993 (the **Act**). Part 5A concerns agreements between government and industry organisations to deal with unwanted organisms, including agreements for jointly funding the costs of readiness and response activities.

TomatoesNZ must spend the levy money paid to it to meet its commitments in contributing to the costs of readiness and response activities under the Government Industry Agreement for Biosecurity Readiness and Response deed signed by TomatoesNZ on 7 September 2016 and any operational agreement of the kind referred to in Part 5A of the Act that is made between the Director-General and TomatoesNZ.

Clause 9 sets the levy rate for fresh tomatoes at 0.10%. This rate may be varied under *clause 10* if TomatoesNZ is required to contribute to a response activity.

This order is a confirmable instrument under section 47B of the Legislation Act 2012. It is revoked at the close of 31 December 2020, unless earlier confirmed by an Act of Parliament. That stated time is the applicable deadline under section 47C(1)(b) of that Act.

Issued under the authority of the Legislation Act 2012.

Date of notification in *Gazette*: 19 December 2019.

This order is administered by the Ministry for Primary Industries.