Forum

Accuracy in the labelling of genetically modified foods

This article summarises presentations by former Deputy Chairman Allan Asher and Commissioner Sitesh Bhojani at the conference GM foods: trends, labelling and detection, *hosted by GeneScan Australia and the Australian Institute of Food Science Technology in Melbourne and Sydney in November 2000.*

Sitesh Bhojani

Allan Asher

This paper will provide the basis for the Commission's forthcoming work in providing guidance on GM food claims and the Trade Practices Act. It invites comments on the full discussion paper.

Labelling of genetically modified (GM) foods is a new issue for the marketplace in Australia. Consumer concerns encompass health, food quality, environmental, ethical, and religious ones. Some producers and suppliers will try to gain an advantage by promoting the GM status of their products to concerned consumers.

Consumers are vulnerable to misinformation because of the complexity of the technology. Biotechnology Australia suggests that more than 90 per cent of Australians want labelling of GM foods.[1] Eventually it will be the consumers who decide if GM products survive in the market.

The Commission recognises there is potential for misleading claims and that it will have an important role in preventing this.

Regulation of GM foods in Australia

GM foods currently must undergo a safety assessment by the Australia New Zealand Food Authority (ANZFA) under Standard A18 before being made available for human consumption. ANZFA's assessment gives primacy to safety issues (Division 1 of the standard).

As well they are required only to carry a positive disclosure of their GM status if the nature of the modification is substantially different from its non-GM equivalent.

On 28 July 2000 the Australia New Zealand Food Standards Council (ANZFSC) decided to implement a mandatory labelling regime for GM foods.

The current standard allows for up to 1 per cent unintended contamination of foods (with GM content). The rationale for the 1 per cent limit is based on current reliable testing techniques. The standard will be amended to include the new labelling division (Division 2).

On 24 November 2000 ANZFSC adopted the new Joint Australia New Zealand Food Standards Code which will have a two-year implementation period. The standard will be added to the existing code and will probably apply from late 2001.

State and Territory health agencies have primary responsibility for enforcing the standard. In New South Wales, for example, the existing Food Standards Code is prescribed for the purposes of the *Food Act 1989*.

Claims about the GM status of foods (or their absence) have the potential to breach the standard under the Trade Practices Act as well as State and Territory consumer protection legislation.

1 Biotechnology Australia media release, 28 July 2000, based on regular market research.

Application of the Trade Practices Act to GM foods

The Act might apply to:

- misleading and deceptive claims (s. 52) and false and misleading claims (s. 53);
- misrepresentations as to the nature of any goods (s. 55); and
- product liability (part VA).

False, misleading and deceptive conduct

False, misleading and deceptive conduct may include:

- positive statements;
- an inference that leads consumers to conclude that the product has a particular GM status;
- silence about facts that the consumer ought to be made aware of; and
- fine print, disclaimers and qualifications that limit the expectations of consumers.

The Commission has investigated several complaints about GM foods, but has not yet identified any breach of the Act.

However, the Commission has investigated claims about the sugar content of an ice confection product. The nutrition information panel claimed there was no sugar in the product when scientific testing showed otherwise. There was no added sugar, but the product contained fruit that has naturally occurring sugars. It was a potential health risk to diabetics, a group dependent on accurate labelling of food products.

Product liability

The Act's product liability provisions make manufacturers, importers and sometimes retailers strictly liable for the harm caused by defective goods. In 1998 the Federal Court found that a chemical company was liable for damage caused by a caustic shower drain-cleaning product to a user who incurred severe facial injuries after adding hot water to the product.[2]

The product was found to be inadequately labelled as it contained no warning that adding hot water would cause a chemical reaction resulting in heat and splashing. The same issue could arise for GM foods if, for example, a food has increased allergenic properties that could lead to a loss or damage to a consumer.

Misleading claims and the Act

Voluntary claims

As discussed above, some manufacturers and suppliers will make voluntary claims to capture the attention of consumers disaffected with the notion of GM foods. They could include reference to:

- 'GM free' (negative claims);
- 'purity', 'natural', 'organic', 'traditional', '100%' etc. (premium claims); and
- fine print disclaimers, or other sources of information.

Producers and suppliers who wish to make voluntary claims should be able to verify them. ANZFA has recommended identity preservation systems on the principle of due diligence. The misleading and deceptive provisions of the Act impose strict liability, meaning a breach of the Act can occur regardless of the intent of the manufacturer or supplier.

The above type of claims have always been subject to the Act. But given the novel nature of GM foods we are likely to see an increase in them.

Silence

The Act does not impose a general duty of disclosure on corporations. However, silence may constitute misleading and deceptive conduct.

Once the standard is fully implemented, GM foods are likely to gain a high profile in the Australian media, leading to a heightened awareness of the new labelling requirements. Consumers could interpret a label that is silent on the GM status of a food as having no GM content.

2 (1998) ATPR 40-961

Whether or not this may constitute a breach of the Act (if the product does contain GM product) will depend on many factors including consumer or community expectations of labelling.

Second grade claims

Manufacturers and suppliers are already using second grade claims where the GM status of a food cannot be guaranteed or to convey that they try to avoid the use of GM product. Such claims may include:

- 'may contain GM ingredients';
- 'sourced from non-GM ingredients';
- 'every effort made to use non-genetically modified ingredients'; or
- 'best endeavours made to use non-genetically modified ingredients'.

Second grade claims leave some ambiguity about whether the product does in fact contain GM ingredients. Consumers may be misled if they are led to believe they are purchasing a product superior to one with confirmed GM content (particularly if they are paying a premium). These claims must accurately represent the product.

Such claims are likely to not meet the standard, which aims to provide certainty for consumers. Manufacturers and suppliers will need to know the GM status of the product and any statements (or their absence) would need to reflect that knowledge.

Fine print, disclaimers and qualifications

Some advertisers appear devoted to using the 'asterisk', 'conditions apply' and other cliches that limit the expectations of the intended audience. These qualifications usually appear close to the lead selling point. For example, where an asterisk appears near the word 'Free', the copywriter may be trying to trade on positive reactions to the selling point, while endeavouring to keep within the law by putting conditions in the fine print. They may not succeed in avoiding a breach of the Act, for example if a product were labelled 'GM Free*', and the disclaimer suggested 'subject to seasonal availability and market fluctuations'.

Here the main representation is clear and unambiguous and does not suggest that the consumer needs to read further. And the fine print does not simply qualify the main statement, it substantially detracts from it.

The main selling point used for a product may make such a strong impression that no number of asterisks and amount of fine print can dispel it. It is not acceptable for the advertiser to put the important facts — the real terms and conditions of the offer — at obscure locations in the marketing documents or presentation.

Whether something misleads an audience depends on the overall impression created, and not the relationship between this and the actual facts of the matter. The consumer is not required to exhaustively search for those facts.

Self-regulatory certification schemes

Logos or symbols could be useful in conveying a message about GM status. However, consumers would need to look beyond the logo to properly understand what it means. An important issue would be the overall message conveyed by it; that is, that the logo was not used in a misleading way to create a firm, but incorrect, impression that the product was of a particular GM status. Such logos are generally supported by a set of rules that ensure that the product meets prescribed standards.

A certification scheme is generally used to ensure that users of a logo adhere to the rules either through self-assessment or third party verification, and the operators of the scheme would need to ensure that the logo is used properly.

The promoter of such a scheme may need to seek authorisation under the Act because of potential anti-competitive implications.

Commission education and liaison activities

The Commission will soon start on a guideline to alert producers and suppliers of appropriate considerations in making voluntary claims.

The Commission is also working with ANZFA to develop appropriate guidance on the Act, the standard and on enforcement issues.

Who will ensure truth and accuracy in labelling?

It is anticipated that the mandatory labelling regime will be enforced jointly by Federal and State health and fair trading agencies under the prohibitions of misleading and deceptive conduct within their jurisdiction (fair trading acts, food acts and the Trade Practices Act).

Not all complaints will make it through the Commission's selection process for enforcement actions and many matters will be better handled by relevant State and Territory food authorities or through private action.

There are many stakeholders in the community that have diverse interests in ensuring accurate labelling. Competitors in the food industry have specific technical information, such as on sources of ingredients and manufacturing processes to support action under the Act. Community groups such as consumer, environmental or religious groups may pursue representative actions.

Conclusion

Australian governments have recognised that the GM status of foods is important to consumers by creating a mandatory standard on food safety and labelling. The Commission and the Trade Practices Act support the right of consumers to base their purchasing decisions (for whatever reason) on accurate information.

Manufacturers and suppliers will need to be able to substantiate any labels or marketing claims on the GM status of their products. Industry participants should be aware that action under the Act might come from many different fronts if they are gaining an unfair advantage by breaking the law.

The Commission will continue to work with other agencies, consumers and the food industry to provide guidance and to pursue representations that breach the Act.

The full version of this paper will be available soon on the Commission's website at: <http://www.accc.gov.au>.

Compliance, maturing as a discipline

This is an introduction by Commissioner Sitesh Bhojani to the following article, a transcript of a speech by Justice Alan H Goldberg.

The Association for Compliance Professionals of Australia Incorporated (ACPA) held its fourth annual conference in Melbourne on 23–24 November, 2000. The conference attracted more than 180 delegates. ACPA now has more than 7000 members including ones from throughout Australia, New Zealand, Japan, Fiji, Indonesia, the Republic of South Africa and the United States. The association has come a long way in its four short years. In my view APCA can accurately profess to be at the cutting edge of compliance. By focusing on the business case for compliance as the rationale for compliance it is ensuring that its members and true compliance professionals will be valuable assets of any corporation.

The Commission has been a strong supporter of compliance programs and the need for professionals with expertise in compliance. Indications of this include producing *Best and fairest*, an interactive trade practices compliance tool, its role in the creation of the Australian Standard AS 3806-1998 on compliance programs, its support of the establishment of ACPA, and its publishing of corporate trade practices compliance programs.

Joe Murphy, Executive Vice President, Compliance Systems Legal Group in the USA, was ACPA's guest speaker at the conference. With his tremendous expertise on compliance issues Joe's skills were in high demand for a pre-conference workshop and conference presentations on 'International Compliance Review' and 'Compliance tools — do electronic tools work'.

ACPA's conference was officially opened by the Honourable Justice Alan H Goldberg, from the Federal Court of Australia. I found his Honour's opening address to be insightful. It makes a valuable contribution to the debate about the role and need for compliance systems.