(a) Some differing views on the New Zealand (and Australian) legal regimes

"*Australia and NZ have one of the most comprehensive labelling regimes for GM in the world"*: FSANZ, Review of Labelling of Genetically Modified Food, May 2004.

"On the face of it, the Commerce Commission's stance is supportive of consumers … However, in reality it means that food producers … that voluntarily go the extra mile to keep GM ingredients out of their products by using Identity Preservation Systems and testing imported ingredients with Genetic ID testing will face legal action if inadvertent contamination occurs. This threat is likely to stop them using GM-free labelling altogether. Yet other companies that knowingly use GM ingredients will continue to get away with not declaring on a label that the food contains GM ingredients. It does not make sense to me that the consumer wanting GM-free food and the manufacturer who wants to provide it are unfairly penalised because of the current FSANZ GM Labelling Standard": a submission to NZ Commerce Commission's Draft Guidelines on the Labelling of GM Foods and Food Products.

(b) The New Zealand legal regime

This is to be found in (or critics would say it falls between) FSANZ Standard 1.5.2[1] and the Fair Trading Act 1986 ("FTA"). Standard 1.5.2 tells us when GM labelling is/is not mandatory. The FTA is the prohibition on false and misleading representations, in this case about GM.

(c) FSANZ Standard 1.5.2

This is in 2 parts. Division 1 is a mandatory pre-market safety assessment requirement for any food using gene technology. Division 2 [2] is the mandatory requirement to label "*genetically modified food*". This:

- Defines GM food as food that "*contains*" "*novel DNA and/or novel protein*" or "*has altered characteristics*".
- Applies to *"foods, ingredients, additives and processing aids"*.
- But does not apply to "*highly refined food*", or "*where the effect of the refining process is to remove novel DNA and/or protein*" (eg highly refined oils made from seeds of GM crops). The labelling requirement for these foods kicks back in if they have *"altered characteristics"* meaning different characteristics from their conventional counterpart. For example, different

[1] Food Standards Australia New Zealand (http://www.foodstandards.govt.nz/), Food Standard Code, Standard 1.5.2

[2] Food Standard 1.5.2 sections 4-7

nutritional values, different toxicants, different allergic responses, or different uses.

- Nor does the requirement apply to processing aids and additives where the novel DNA and/or protein has disappeared during processing. It only applies if the novel DNA/protein from the processing aid or additive "*remains present"* in the food.
- There are threshold exemptions where:
  - It is a *flavour* present in the food but the concentration is no more than 0.1% (1g/kg).
  - The manufacturer sought to source non-GM, but GM is unintentionally present in a *food, ingredient or processing aid*, at a level no more than 1% per ingredient.
- The mandatory labelling requirement applies to both packaged and unpackaged food. The latter must display a sign. But it does not apply to restaurant, takeaway, catered foods and the like. The Standard says these customers have the right to ask the proprietor if the food is from a GM source, although it does not actually say the proprietor has to answer that question.
- Compliance is by way of a "*genetically modified*" statement in the ingredients list. It need be in no larger print than the ingredients list.
- The Standard says nothing about negative (*GM-free/non-GM*) claims.

(d) In practice, when does GM food not have to be labelled?

Examples of GM scenarios that do not require labelling under Standard 1.5.2 are:

- Where GM ingredients, additives or processing aids were used, but none remains "*present*" in the final food, because the refining/processing removed the novel DNA/protein. For example the highly refined cooking oils, lecithin (emulsifier) made from GM soy.
- Where GM was in the production process, but never became part of ("*present*" in) the food. Eg:
  - Chicken fed on GM soy or maize, cheese from milk from cow fed on GM pasture
  - Animal was vaccinated with a GM remedy
  - GM detergents used in cow shed
  - Vitamins grown in a GM culture

  - GM bacteria or yeasts or proteins used in production of the food.

- The threshold exemptions, ie
  - Flavour at less than 0.1%
  - Unintentional" presence at less than 1%.
- The exemptions for restaurants, takeaway foods, the catered food situation.

It might be said there is an exception in practice where GM ingredients were used and novel DNA/protein does remain but not at detectable levels. But beware: this is not a legal exception, and detection procedures keep improving.

(e) The Fair Trading Act

The problem (or some might say the beauty) of the New Zealand regime is that, behind the Standard 1.5.2 mandatory labelling requirement, the Commerce Commission (armed with the Fair Trading Act) sits like a big cat monitoring the water hole.

Attendees will be familiar with sections 9, 10 and 13(a+e+h) Fair Trading Act 1986. Likewise the corresponding sections 52, 53(a+c+d) and 55 of the Australian Trade Practices Act 1974. These are the now very familiar prohibitions on misleading conduct in trade, including false and misleading representations about goods/services, in particular their:

- Nature
- Manufacturing process
- Characteristics
- Suitability for purpose
- Quality
- Kind, quality, composition
- Approval, endorsement, uses, benefits
- And the need for them

In the GM context, the FTA/ Commerce Commission becomes an issue only if the food producer/supplier has made some statement about the food, or given some impression (eg via the get up). It is very unlikely the Commerce Commission would/could take any action against a producer/supplier who simply shuts up about GM.

This was illustrated by the flap in 2004 in Australia over a number of brands of chicken which were labelled as "*not genetically modified*". In fact they were fed (or at least "*may be fed*") on GM soy or maize. As we have noted, no labelling is

required in this situation under Standard 1.5.2. However the ACCC said consumers would take the "*not GM*" to mean the feed was not GM, and that there was no GM in the production process. So the solution to the suppliers' legal problem was simply to stop using the "*not GM*" label[3].

It is the same in New Zealand. The Commerce Commission said in response to criticism over "*tiny lettering*" on some GM labelling - and it is equally relevant to the GM-fed chicken situation - that despite any likelihood of consumers being misled there is no breach of the FTA unless the product makes representations that it does not contain GM ingredients. The Commission (correctly) said it was "*powerless*" to require clearer labelling of GM ingredients.[4]

(f) The Commerce Commission's Draft Guidelines

The Commerce Commission does not generally consult before acting, but in September 2004 it expressed its views about GM claims by way of issuing its *"Discussion Paper on Proposed Draft Guidelines on the Labelling of Genetically Modified Foods and Food Products"* [5]. The Commission invited submissions.

From the Commerce Commission's viewpoint, the background to that Discussion Paper was:

- Since being upheld in the 1990s in the "free" giveaways and "interest free" cases [6], it has always said "free" was a claim that allowed "no ambiguity".
- The Royal Commission on Genetic Modification had proposed a voluntary GM-free labelling system. However a voluntary labelling standard was clearly a long way off and the Commerce Commission needed to make its position clear meanwhile.
- The ACCC was to update its GM guideline [7].
- The Commerce Commission's job was to enforce the FTA: it was not in much of a position to influence FSANZ Standard 1.5.2

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[3] Australian Competition & Consumer Commission (ACCC) "News Release" 6 December 2004 – "Changes to GM-Free chicken labelling under way:http://www.accc.gov.au/content/index.phtml/itemId/553031/fromItemId/2332/pageDe

[4] Brookers Legal News 02/02/2005

[5] www.comcom.govt.nz/FairTrading/LabellingofGeneticallyModifiedFoodsandF/discussionpaperonproposeddraftguid.aspx

[6] eg, *Commerce Commission v Adair* (1995) 6 TCLR 655 (CA)

[7] The current ACCC guideline is contained in its publication "News for Business - Genetically Modified Organisms and Foods", ACCC Publishing Unit, December 2001

- Stakeholders might be able to point to some new perspectives that needed to be taken into account.

The Commission's view expressed in the Discussion Paper is:

- Not expressly stated, but: no claim, no problem. Silence and "*tiny lettering*" will not result in a FTA breach.
- "*GM-free*" means the same as "*non-GM*", means: complete absence of GM, "*no room for ambiguity*". This rejects the view of many industry and consumer sources that "*non-GM*" means (or should mean) that: every effort has been made, using best industry practices, to source non-GM ingredients at all times.
- "*No ambiguity*" means not even .0001% GM DNA/novel protein, if a non/free of GM claim is used.
- And GM should not have formed part of the production "*process*" if a non/free of GM claim is used. This covers the "*cheese from milk from cow fed on GM pasture*" and the "*GM soy fed chicken*" situations, where no GM material is (or ever was) present in the food or ingredients.
- Threshold levels: if GM is present at levels less than 1%, unintentionally, so that no labelling would be required under Standard 1.5.2, it would still breach the FTA to make a non-GM/GM-free claim. Subject to the defences in section 44 FTA, that is.
- Some GM food or food products may fall within the Commission's definition of "*natural*" foods, but use of "*natural*" may imply "*GM-free*" so may be misleading.

The Commission did not offer any definition of the terms "*GM*" or "*gene technology*".

(g) Consequences for industry of FSANZ 1.5.2 and Commerce Commission's approach to GM-free/non-GM claims

Obviously there is no single industry viewpoint. If there was anything like a consensus, then some progress would have been made in developing the voluntary GM-free label the Royal Commission on Genetic Modification recommended.

The Commission received 74 submissions, 32 of which they have permission to post on their website [8]. The submitters can generally be divided into:

- Consumer/environmental
- Industry/producers
- Scientific.

[8] see fn 5. The submissions are accessed from the same page as the Discussion Paper itself

The majority of the published submissions are from the consumer/environmental viewpoint. Commercial confidentiality no doubt made many industry submitters reluctant to consent to publication. However it is interesting that, of the industry/producer submissions published, a fair number join hands with the consumer/environmental viewpoint in criticising our cut and paste regime of mandatory labelling (with exceptions) plus FTA. This particular industry take is that our unique NZ clean green producers who have made every technologically possible effort to eliminate GM content and processes, should be able to say "*non-GM*", without fear of investigation and prosecution by the Commerce Commission if any GM contamination is found.

Clearly there is a strong voice in the New Zealand industry, consisting of companies that want to gain a competitive advantage by making some form of non/free of GM claim. This is consumer driven: consumers want to know. The cost of putting in place a best practice identity preservation system is high. Food suppliers need to gain a competitive advantage simply in order to recoup the cost. These companies know that consumer messages about food have to be accurate and not misleading, but at the same time need to be clear and simple.

Clearly the Commerce Commission's stance has made these players within the New Zealand industry hesitant to make non/free of GM claims. The publicity around the *Bean Supreme* case as it progressed, has no doubt had the "*chilling*" effect that critics have claimed.[9] It is not just the risk of prosecution. More important is the associated risk of losing credibility.

On the other hand it is fairly clear that many industry stakeholders are relieved that Standard 1.5.2 does not apply to "processes" as such (the GM-fed-corn situation) nor to foods where no novel DNA/protein is left after refining/processing. This is not simply a matter of industry wanting to hold back information from consumers. Many food products consist of a vast number of ingredients, additives and processing aids. There is a substantial cost in obtaining GM certification around such a wide range of inputs. To require labelling where there was any GM in the "process" (even if none is left at the end of the process) would be to open up a whole new set of costs. And how far does it go? What about detergents used in cow sheds? GM animal remedies? And spare a thought for the bee keepers: how can they stop the bees from inadvertently spreading pollen from GM crops?

No doubt it is also true that there are industry stakeholders who are not unhappy that their competitors (those who are "*…totally*

[9] eg, see GE-Free New Zealand Press release 28/11/03: www.gefree.org.nz/press/28112003.htm

opposed to genetic modification in food …"[10]) may be afraid to make non-GM claims. However, the flipside is that these stakeholders have lived for many years now with the Commerce Commission's expressed view of "*free of*" claims, not just "*GE-Free*" but "*fat free*", "*gluten free*", "*interest free*" and others. They would say the "*GE-Free*" stance is just part of the level playing field: get used to it!

GM is a field on which the goalposts are constantly moving. The Commerce Commission's stance has probably been a constant, at least in the legal sense. But even food manufacturers who have IPS in place face the prospect of receiving a message one day from one of their numerous overseas ingredient suppliers, that x ingredient can no longer be certified GM-Free. As contamination increases, and the sensitivity of DNA and other testing procedures to detect GM improves, suppliers cease to be willing and able to certify. Thus the New Zealand food manufacturer faces a choice: find a new supplier that can certify, or drop the non-GM claim, with resulting risk of damage to credibility.

From industry's perspective there is a need for a threshold that is clear, scientifically based, verifiable and has wide acceptance.

If (say) there is no scientific basis for saying that feeding GM fodder would lead to any GM material being present in the meat of that animal, the argument is that a GM-Free/non-GM label should be available to be used in New Zealand. And that if it is not available to be used here, but could be (and is) used in an export market like the EU, consumers will be confused and damage will result. As Meat & Wool New Zealand's submission to the Commerce Commission said: "*Such a situation could be used to intimate that New Zealand product contained "GM" material when in fact it did not"*. [11]

It can get a lot murkier. Now that trace levels of GM corn varieties have been found in corn seeds imported into New Zealand, is it possible to say the eggs of chickens fed on New Zealand grown maize are GM-Free?

In light of the need for scientifically verifiable and widely acceptable benchmarks for non-GM labelling, the Commerce Commission's "*no room for ambiguity*" is a very blunt instrument. It is based on consumer perceptions, eg a perception that GM in the "*process*" means it is "*genetically modified*". But that perception may simply be wrong. And that could be a very costly error for a New Zealand producer seeking to carve out a non-GM position in an export market.

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[10] eg see Bean Supreme website www.beansupreme.co.nz/info/whatsNew.htm
[11] See fns 5 and 8

(h) Where is the Commerce Commission going with the Discussion Paper?

You would have to ask them, but expect their new guideline will be exactly as set out in the Discussion Paper.

They will confer with the ACCC, but despite a perception that the New Zealand Commerce Commission is more purist on "*free of*" claims than their Australian counterpart, the ACCC also uses the "*no ambiguity*" terminology and has done so for years. [12]

It might have been a different outcome if amongst the submissions was some brilliant new perspective. Alas it seems there was none.

(i) Approach of our trading partners

Their legal regimes are important for industry. Obviously, our exports must comply with their laws. We have observed that if a manufacturer can make a claim in the export market but not here, that could be used to discredit the product - in both markets. In the export market it might also be used to raise a technical trade barrier.

However, our trading partners have wildly varying rules.

The European Union has (since 18 April 2004) the most stringent regime in the world, covering GM "*food and feed*" [13] and "*traceability and labelling*" [14]. In brief:

- Mandatory labelling of all foods "*from*" GMOs, regardless of whether there is GM DNA/protein in the final product. Thus (eg) the highly refined oils from GM crops must be labelled.
- Mandatory labelling of all GM animal feed.
- But products from animals fed on GM feed do not have to be labelled.
- Intentional use of GM ingredients at any level must be labelled.

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[12] See fn 7

[13] Regulation (EC) No 1829/2003 of the European Parliament and of the Council, of 22 September 2003, on genetically modified food and feed

[14] Regulation (EC) No 1830/2003 of the European Parliament and of the Council, of 22 September 2003, concerning the traceability and labelling of genetically modified organisms and the traceability of food and food products produced from genetically modified organisms and amending Directive 2001/18/EC

- But a 0.9% threshold for unintended and technically unavoidable presence of EU-approved GM material in foods, and 0.5% threshold for unapproved varieties that have not received a favourable EU scientific risk assessment.
- Restaurant etc food: labelling is supposed to be required, but there is disagreement between EU institutions, so for now it is optional.
- Form of disclosure: in the ingredient's list is enough. For unpackaged food: on a clear sign next to the food.
- Businesses must take "*all reasonable precautions and exercise all due diligence*" to comply.
- Producers can comply by use of paper audit trail, ie when (as likely) products cannot reliably be analysed.
- There is no "*may contain GM*" option, but no liability if you say "*contains*" when in fact it does not.
- No provision for "*non-GM/GM-Free*" labelling, which remains voluntary.

Moving to the other side of the ditch from the cheese eating surrender monkeys: The **US**:

- GM food not required to be labelled, provided the FDA has established substantial equivalence.
- However, a label is required to alert consumers to any safety issue, eg special dietary needs.

Canada:

- No rules governing GM labels unless there is a significant health/safety risk or compositional change.
- But Canada's standards organisation has produced a voluntary labelling standard for non-GM food [15]. This has a 5% threshold for unintentional GM material.

Japan:

- Since April 2004:
- Mandatory labelling if GM DNA/protein detectable in the finished food product and accounts for 5% + of total weight of the top 3 ingredients.
- Non-GM label can be used if produced with IPS and the 5% threshold not exceeded.

[15] National Standard of Canada, Voluntary Labelling & Advertising of Foods that are and are not products of genetic engineering, April 2004

- Exemptions for alcoholic beverages, processed foods, eg soy sauce, cornflakes, vegetable oils.

China:

- After July 2002:
- Products containing GM ingredient to be labelled.
- Includes seeds, feeds, food products.
- If not labelled, illegal to sell.
- Concern over enforcement [16].

Codex:

- Is the United Nations backed organisation that sets international foods standards.
- In the report of its 10-14 May 2004 meeting in Montreal, recommended procedures for labelling food and ingredients obtained through GM [17].
- These techniques would be:
  - (1) Where the composition, nutritional value, intended use (eg mode of storage, cooking) of the GM food is different from its conventional counterpart.
  - (2) Where they are composed of or contain a GM organism or protein or DNA.
  - (3) Where they are produced from but do not contain GM organisms, protein or DNA
- Exceptions should be considered for highly processed foods, ingredients, processing aids, additives, flavours.
- However this "*recommendation*" was only for comment and consideration at Codex's next session. This is the United Nations, not the New Zealand Commerce Commission, do not expect rapid progress.

(j) Back to New Zealand

The Ministry of Consumer Affairs produced its "Discussion Paper - Voluntary GM-Free Labelling" in April 2003 [18].

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[16] Institute of Science in Society, www.i-sis.org.uk/FPICGGMF.php

[17] Codex "Proposed Draft Guidelines for the labelling of food & food ingredients obtained through certain techniques of genetic modification/genetic engineering", see Appendix VI (page 53) of Codex Alimentarius Report of the 32nd session of the Codex Committee on Food Labelling, Montreal 10-14 May 2004

[18] www.consumeraffairs.govt.nz/policylawresearch/discussionpapers/dp-vol-gm-free-lab/index.html

This identified three options for voluntary labelling: [19]

- A national standard - "*a standards committee would develop technical specifications around identity-preservation and product-tracing mechanisms to support GM-Free claims and the use of an identifying label"*.
- Code of practice - "*developed by stakeholders or a standards organisation and setting out industry best practice, including mechanisms for identify preservation, product tracing, labelling, publicity, and (possibly) disputes resolution.*"
- Third party certification - "*carried out by a stakeholder organisation or a specialist certification organisation to provide independent verification of a supplier against a set of specifications"*.

Meanwhile …

A voluntary non-GM/GM-Free labelling system for New Zealand would appear to be some way off, so meanwhile, industry (and consumers) are left with Standard 1.5.2 and the Commerce Commission's blunt instrument, the FTA.

It therefore appears that the "*non-GM*" industry interests in New Zealand (and Australia) will have to paddle their own canoes through treacherous waters for some time yet.

The key to success in this is to produce a claim that is on the one hand accurate, and on the other hand simple and clear, in the face of widely varying consumer and scientific viewpoints of what is/not GM.

I think this leads us inevitably into the realm of qualified claims. The Commerce Commission plainly does not like "*unambiguous claims*" that are qualified by "*small print*". However, it would be a mistake to say that the opposite of an "*unambiguous*" claim is an "*ambiguous*" claim. There can be no prohibition under the FTA of a claim that accurately states the steps the producer/manufacturer has taken to eliminate GM.

As AgriQuality said in its submission to the Commerce Commission [20]: "*it is difficult to imagine a product that could be traced to such an extent a GM-Free claim could be made with absolute confidence*".

Bean Supreme's sausage had, according to them, 0.008% GE (soy) content.

[19] ibid, para 7
[20] See fns 5 and 8

If New Zealand industry players are to market their products as non-GM for the "meanwhile" until an acceptable non-GM labelling regime can be put in place, they are going to have to concentrate on developing "*accurate claims*", or what the Ministry of Consumer Affairs "MCA" called "*alternative terminology*" [21].

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[21] See fn 18, para 5.2.1