

# Chapter 2

## Existing framework and issues

### Existing legislative framework

2.1 Labelling for GMM in food has been mandatory in Australia since 2001 under Standard 1.5.2 of the Australia New Zealand Food Standards Code (the Code). However, the legislative framework that underpins food regulation is complex and contains many interrelated agreements. Ms Catherine Gay, Acting Assistant Secretary of the Department of Health and Ageing, provided the committee with a detailed explanation of the agreements that structure the food regulation system:

- The Commonwealth and state and territory governments have a commitment through the Food Regulation Agreement to take a cooperative approach to food regulation within Australia.
- Food Standards Australia New Zealand (FSANZ) is established as an independent statutory authority through the *Food Standards Australia New Zealand Act 1991*. FSANZ has responsibility for developing and maintaining the food standards that make up the Code.
- As part of the Food Regulation Agreement, states and territories have agreed to adopt or incorporate the Code into state and territory law.
- The Food Regulation Agreement also establishes the Australia New Zealand Food Regulation Ministerial Council (the Council). The food standards that are developed by FSANZ do not have direct legal effect; rather, the Council oversees draft food standards developed by FSANZ which are subsequently given effect in state and territory legislation.
- Enforcement of the food standards is undertaken by the state and territory governments and in some cases by local government. The Commonwealth has no role in enforcing the food standards except in regard to foods at the border through the Australian Quarantine and Inspection Service.
- The Australian and New Zealand governments have formalised a bi-national food regulation system via treaty.<sup>1</sup>

2.2 The relevant regulatory framework, as it applies to food produced using gene technology, has two main components. The first element is a pre-market safety assessment of food produced using gene technology. Foods approved by FSANZ following the safety assessment are listed in schedule (3) of Standard 1.5.2 of the Code.

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1 Ms Catherine Gay, Acting Assistant Secretary, Department of Health and Ageing, *Committee Hansard*, 18 April 2011, p. 3.

2.3 The second element is labelling. Under Standard 1.5.2, food and food ingredients, additives or processing aids which contain GMM (novel DNA and/or novel proteins) or have altered characteristics when present in a food product, are required to be labelled with the words ‘genetically modified’.

2.4 There are several exemptions to these labelling requirements, which cover:

- Highly refined food, other than that with altered characteristics, where the effect of the refining process is to remove GMM;
- A processing aid or food additive, except where GMM remains present in the food;
- Flavours, provided they do not exceed 1 g/kg (0.1 per cent) in the final food; and
- The presence of unintentional traces of GMM of less than one per cent per ingredient (FSANZ has stated that this only applies in circumstances where the manufacturer has actively sought to avoid GM food or ingredients, but there is an inadvertent presence of GM material).<sup>2</sup>

2.5 The standard does not apply to foods produced from animals fed on GM products, provided the animals themselves are not products of gene technology.

2.6 The Bill aims to extend the scope of the labelling of GMM, requiring GMM to be listed as an ingredient on the foods label irrespective of:

- The amount of genetically modified material in the food;
- The manner in which the genetically modified material made its way into the food; and
- The fact that the food was not intended to contain genetically modified material.<sup>3</sup>

## **Health and safety**

2.7 The committee notes that GMM approved for use in Australia is safe to consume, and that it is labelled for the purpose of enabling consumer choice. Reinforcing the safety of GMM, Mr Steve McCutcheon, Chief Executive Officer, FSANZ, told the committee that:

FSANZ does not approve any food, including GM food, that is unsafe. FSANZ has a track record of transparency and caution in the area of GM food approvals. For example, FSANZ has reviewed the scientific evidence

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2 FSANZ, Australian and New Zealand GM food labelling standard one of the most comprehensive in the world, 28 May 2004, <http://www.foodstandards.gov.au/scienceandeducation/scienceinfsanz/updates/updates2004/nzgmfoodlabellingst2461.cfm>

3 Section 16C, subsection (1).

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when new claims have been made about the safety of previously approved GM ingredients.<sup>4</sup>

2.8 Mr McCutcheon also indicated that the labelling of GMM is for consumer choice and not for any reasons of safety or nutritional information.<sup>5</sup> CropLife Australia agreed, noting that when the GM food labelling system was agreed to in 1999, the then Parliamentary Secretary to the Minister for Health and Aged Care, Senator Grant Tambling, stated:

Ministers chose to fully label not because they had any safety concerns – they certainly did not – but to acknowledge consumers wanting more information about genetically modified foods.<sup>6</sup>

2.9 The committee heard concerns over a perceived lack of long-term safety assessments into whether GMM causes harm in people.<sup>7</sup> Gene Ethics stated that the labelling of GMM is especially important, as it believes the safe use of GMM has not yet been proven. It argued that 'substantially more independent research must be done to confirm GM foods are safe for the environment and public health'.<sup>8</sup>

2.10 The committee notes that the explanatory memorandum (EM) to the Bill does not raise concerns of health and safety. Its focus is to require:

[t]he truthful and accurate labelling of products containing genetically modified material, no matter what amount or how the GM material came to be present in the product, will enable consumers to make an informed choice.<sup>9</sup>

## Issues

### *Product based or process based?*

2.11 In their submission, Mothers Are Demystifying Genetic Engineering (MADGE) notes that food labelling for GMM can take one of two forms, 'product based' or 'process based':

- Product based: labelling is required if an ingredient derived from a GM plant or GM process is used and, as a result, GM residues are able to be detected in the final product.

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4 Mr Steve McCutcheon, Chief Executive Officer, FSANZ, *Committee Hansard*, 18 April 2011, p. 2.

5 Mr Steve McCutcheon, Chief Executive Officer, FSANZ, *Committee Hansard*, 18 April 2011, p. 2.

6 CropLife Australia, *Submission 8*, p. 3.

7 Dr Judy Carman, Director, IHER, *Committee Hansard*, 19 April 2011, p. 6.

8 Gene Ethics, *Submission 14*, p. 6.

9 Explanatory memorandum, *Food Standards Amendment (Truth in Labelling—Genetically Modified Material) Bill 2010*, p. 1.

- Process based: labelling is required if an ingredient derived from a GM plant or via a GM process is used anywhere along the production line, regardless of whether or not GM residues are able to be detected in the final product.<sup>10</sup>

2.12 The current labelling requirements are more closely aligned with a product based system. Through the due diligence guidelines, the Bill would move GM-free producers to a process based system to ensure the prevention of contamination by GMM. These guidelines would require verification of the chain of custody for each ingredient used in the product; procurement or supply contract requirements for ingredients used in the product; and capability to verify testing of GM-free food from, or containing ingredients from, high risk countries.

2.13 MADGE considers that to achieve a process based labelling system, the Bill would need to be reworded to include the words 'genetically modified organisms or ingredients' instead of 'genetically modified material'. MADGE's suggested that the wording should include 'ingredients produced through GM crops or processes, or animal products derived from GM feed, regardless of whether known GM DNA and protein residues are readily detectable'.<sup>11</sup>

2.14 While the proposed due diligence guidelines are clear that the development of a process based system would need to occur for GM-free producers, the removal of the current labelling exemptions would have a similar effect for producers of food containing GMM. This is because in order for producers and manufacturers to label their products correctly, they will need to ensure whether or not GMM has been used anywhere in the production line, rather than the current system of labelling if GMM is detectable in the end product.

2.15 The committee heard concerns about the effects of the proposed due diligence guidelines from food producers and agricultural representatives. They argued that, as all GMM used in food is deemed to be safe, and the proposed labelling requirements in the Bill are designed to facilitate greater consumer choice, the likely costs of implementing such a system would be far greater than any consumer benefit. CropLife Australia suggested that a regulatory impact assessment should take place if the Bill is successful, as it believes 'regulations should not impose costs greater than the benefits derived from the regulation'.<sup>12</sup>

2.16 Bayer CropScience argued that a process based method would not be consistent throughout the industry, pointing to other processes used to produce food that are not required to be labelled, such as chemical treatment, wine making processes and heat treatment.<sup>13</sup>

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10 MADGE, *Submission 12*, p. 2.

11 MADGE, *Submission 12*, p. 3.

12 CropLife Australia, *Submission 8*, p. 9.

13 Bayer CropScience, *Submission 6*, p. 3.

2.17 A large number of submitters told the committee that the Bill gives a weight to consumer choice that is not worth the likely additional costs involved.<sup>14</sup> The committee's particular concern is that it seems likely that it would increase costs for both GM-free labelling *and* GMM labelling. This will clearly create an additional burden for producers, and it is not clear how this will benefit consumers.

### ***Substantially equivalent products***

2.18 The committee heard conflicting evidence in regard to highly refined products such as oils, flour and sugars. Currently, labelling is not required for highly refined products that use gene technology, provided the processing has removed the GMM and the food has no altered characteristics.<sup>15</sup>

2.19 The committee heard from food producers that highly refined products made from GM crops are compositionally identical to their counterparts made from non-GM crops. Bayer CropScience state that, as a result, 'no scientific test can be performed to distinguish them.'<sup>16</sup> The Institute of Health and Environmental Research Inc (IHER) disagreed, noting that while testing for novel protein or GM DNA can be difficult, it is not impossible to find. IHER cited several peer-reviewed studies that had found DNA, including GM DNA, in highly refined products. IHER explains that extraction methods used, detecting techniques, and the quantity of material tested all play vital roles in preventing false-negative results.<sup>17</sup>

2.20 IHER argued that the Code already requires highly refined food to be labelled, as residues are detectable, and that FSANZ wrongly interprets the Code.<sup>18</sup> FSANZ disagree with this argument and explained to the committee that labelling is required when genetic modifications have altered the characteristics of the product, such as a change in the nutritional components, restating the view that:

Foods that do not contain novel DNA or protein do not have to be labelled, for example, highly refined or processed food such as vegetable oils or sugars.<sup>19</sup>

2.21 CropLife Australia point to a lack of clarity in the Bill regarding its application to the unintentional presence of GMM in highly refined products, noting:

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14 For example submissions 4, 5, 6, 8, 9, 10 and 11.

15 Standard 1.5.2, *Food produced using gene technology*, Food Standards Code.

16 Bayer CropScience, *Submission 6*, p. 4.

17 IHER, *Submission on GM foods to the Review of Food Labelling Law and Policy*, May 2010, pp 14–16.

18 IHER, *Submission 15*, p. 3.

19 Mr Steve McCutcheon, Chief Executive Officer, FSANZ, *Committee Hansard*, 18 April 2011, p. 2.

It is not even entirely clear how it would be possible to comply with, or regulate this provision, particularly with highly refined products where the GM and non-GM final products are identical.<sup>20</sup>

2.22 The committee believes there was some confusion regarding the labelling of highly refined products where the processing has removed the GMM and the food has no altered characteristics. Some submitters expressed criticism of the Bill in relation to the labelling of highly refined products.<sup>21</sup> However, as far as the committee can ascertain, the Bill does not change the regulatory situation regarding labelling of these foods. Rather, there appears to be a disagreement amongst stakeholders about whether there is detectable GMM in these products. The Bill cannot resolve that debate.

### *Unintentional one per cent*

2.23 The committee queried FSANZ on the definition of 'unintentional' with respect to the current exemption from labelling when unintentional traces of GMM of less than one per cent exist. Mr McCutcheon explained that while FSANZ is responsible for developing food labelling standards, these standards are enforced under state and territory law. As a result, it is the role of state and territory law enforcement officers, rather than FSANZ, to interpret the meaning of 'unintentional'.<sup>22</sup>

2.24 A number of submitters were concerned about the application of the term 'unintentional', suggesting food producers are able to misuse it by claiming the presence is unintentional. Greenpeace, for example, suggested that if a food producer was found to have an unintentional presence of GMM repeatedly, the claim that it is unintentional becomes questionable.<sup>23</sup> FSANZ emphasised to the committee that regardless of the amount of GMM contained and whether the presence is unintentional or not, it must be GMM that has been approved for sale on the Australian market by FSANZ, otherwise the producer would be noncompliant.<sup>24</sup>

2.25 FSANZ told the committee that the current one per cent threshold was derived from a need to set a level that can provide positive test results, noting that any less than one per cent can produce variable test results.<sup>25</sup> CropLife Australia added to this, informing the committee of the complexities and costs involved in testing, noting that:

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20 CropLife Australia, *Submission 8*, p. 9.

21 For example, Bayer CropScience, *Submission 6*, p. 4.

22 Mr Steve McCutcheon, Chief Executive Officer, FSANZ, *Committee Hansard*, 18 April 2011, p. 7.

23 Mr Claire Parfitt, GM Wheat Campaigner, Greenpeace Australia Pacific, *Committee Hansard*, 18 April 2011, p. 13.

24 Mr Steve McCutcheon, Chief Executive Officer, FSANZ, *Committee Hansard*, 18 April 2011, p. 4.

25 Mr Steve McCutcheon, Chief Executive Officer, FSANZ, *Committee Hansard*, 18 April 2011, p. 6.

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If something is at a very low level you might sample a part of your consignment and not find it, but when it gets to the other end and someone tests that consignment again they might hit upon that little bit that is there. So, sampling also adds some uncertainty into it. That is where the costs are associated, in producing the end analysis method in sampling. That is where the cost is associated—the complexity of it.<sup>26</sup>

2.26 The Bill would effectively remove this exemption, as section 16C, subsection (1) would require labelling for any amount of GMM, regardless of whether or not the food was intended to contain GMM, and the manner in which the GMM made its way into the food.

2.27 A number of submitters noted that thresholds currently apply to the amount of allowable unhealthy and in some cases dangerous substances, such as trans fats, microtoxins in grain and heavy metals in organic food, before such substances must be listed on the label. These submitters argued that to require a product to be labelled as containing GMM, regardless of the quantity present, would be inconsistent with the thresholds applicable to unhealthy or dangerous substances.<sup>27</sup> As FSANZ deems all GMM present in Australian food to present no health or safety issues, it would be inappropriate that this particular category of foods be subject to more stringent labelling requirements than unhealthy or dangerous substances.

2.28 A number of submitters, including those who supported the Bill, raised concern over the removal of the one per cent exemption. These submitters cite the possibility of prosecution for food producers who undertake to source GM-free ingredients, but whose products are found to contain GM.<sup>28</sup>

2.29 The committee also heard that the one per cent threshold is necessary due to variables that cannot be controlled. These variables include cross-pollination from GM crops to neighbouring GM-free crops and the transportation of GM-free products in devices previously used to transport products containing GMM.<sup>29</sup> CropLife Australia told the committee that many agricultural supply chains rely on shared harvesting, transport and storage devices.<sup>30</sup>

2.30 The committee notes that the Bill provides a defence if a person is found to have breached the labelling provisions, but is able to prove they complied with, or took reasonable steps to ensure compliance with, the due diligence guidelines.<sup>31</sup>

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26 Mr Kay Khoo, Member, CropLife Australia, *Committee Hansard*, 18 April 2011, p. 23.

27 BayerCropScience, *Submission 6*, p. 3; CropLife Australia, *Submission 8*, pp 5–6.

28 Dr Judy Carman, Director, IHER, *Committee Hansard*, 19 April 2011, p. 3.

29 Mr Steve McCutcheon, Chief Executive Officer, FSANZ, *Committee Hansard*, 18 April 2011, p. 8.

30 CropLife Australia, *Submission 8*, p. 8.

31 Section 16D, subsection (3).

2.31 However, CropLife Australia told the committee that food manufacturers would be more likely to label their product as containing GMM than risk violating the zero per cent threshold.<sup>32</sup> Other submitters pointed out that with no way of guaranteeing a zero per cent presence of GMM, food producers and manufacturers would be more likely to label a product as 'may contain GMM' to avoid costly testing, thus reducing the level of consumer choice.<sup>33</sup> The committee also heard that with the removal of this exemption, there is the potential for several products to become completely unavailable as GM-free.<sup>34</sup>

### ***Testing and enforcement***

2.32 The testing and enforcement of incorrectly labelled products found to contain GMM is the responsibility of the states and territories. Ms Gay explained:

As part of the Food Regulation Agreement, states and territories have agreed to adopt or incorporate into the state and territory laws the Food Standards Code. Enforcement of the food standards is undertaken by the states and territory governments and in some cases by local government. The Commonwealth has no role in enforcing the food standards except in regard to foods at the border through the Australian Quarantine and Inspection Service.<sup>35</sup>

2.33 However the committee heard evidence that suggests states and territories carry out this testing infrequently, and in some cases, have not conducted any tests since 2005.<sup>36</sup> Mr McCutcheon explained that the frequency of testing between states may vary depending on the resources of each state. Mr McCutcheon notes that New South Wales, for example, appears to be more active in the area of compliance as they have significantly more resources available to do so.<sup>37</sup>

2.34 The Bill aims to address this through section 16E of the Bill, which requires FSANZ to develop guidelines to assist agencies involved in the compliance testing and enforcement in relation to GM food labelling. Furthermore, the due diligence guidelines will place responsibility on the producers, manufacturers and distributors of GM-free food to prevent contamination of food by GMM.

2.35 Section 16E of the Bill, the due diligence guidelines, and the labelling requirements as set out in subsection (1) of the Bill aim to ensure the validity of

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32 CropLife Australia, *Submission 8*, p. 9.

33 Infant Nutrition Council, *Submission 10*, p. 4.

34 CropLife Australia, *Submission 8*, p. 6.

35 Ms Catherine Gay, Acting Assistant Secretary, Department of Health and Ageing, *Committee Hansard*, 18 April 2011, p. 3.

36 Greenpeace, *Submission 13*, pp 7–10.

37 Mr Steve McCutcheon, Chief Executive Officer, FSANZ, *Committee Hansard*, 18 April 2011, p. 9.

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products labelled as GM-free and provide assurance that all other products containing GMM have it listed as an ingredient on the food's label.

2.36 A number of submitters told the committee that the existing legislation already covers the amendments proposed in the Bill, making the proposed amendments redundant. They noted that, amongst other legislative measures,<sup>38</sup> the Code requires the labelling of any intentionally present GM ingredients, and the *Australian Competition and Consumer Act 2010* (formerly, *Trade Practices Act 1974*) requires accurate labelling and prevents manufacturers from engaging in conduct that is misleading or deceptive.<sup>39</sup>

2.37 In support of the current legislative framework, the Australian Food and Grocery Council told the committee that:

The regulations also recognise, however, the need for flexibility through exemptions and thresholds, in a way which does not undermine the effectiveness of providing for informed consumer choice.<sup>40</sup>

It noted that regardless of the recognition that accidental presence of GMM does occur, the management systems proposed in the due diligence guidelines would be 'extremely costly for industry to introduce'.<sup>41</sup>

2.38 The committee is concerned that the Bill would override existing flexibility in the regulatory system, thus driving up costs without significantly improving risk management for consumers.

### **Difficulties in implementing the Bill**

2.39 The Bill as currently drafted appears to take an approach that is inconsistent with the existing processes for developing food standards. Under that process, the Commonwealth takes a cooperative approach which incorporates states and territories under the Food Regulation Agreement; the New Zealand Government; and the FSANZ Act. The Bill is based on the Commonwealth taking a leading role rather than being part of a cooperative partnership. The Bill appears to envisage removing Australia and New Zealand Food Regulation Ministerial Council from review processes of which they would normally be part under the Act in relation to the development of the new GM food labelling standard.

2.40 The committee notes the Bill uses the term "genetically modified material" without defining that term, which is not used in either the Act or the Code. This could

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38 Submitters also mentioned the *Freedom of Information Act 1982*, Trade Practices Legislation and all regulatory Acts such as the *Gene Technology Act 2000* and the *Agricultural and Veterinary Chemicals Code Act 1994*.

39 CropLife Australia, *Submission 8*, p. 1; Bayer CropScience, *Submission 6*, p. 2.

40 The Australian Food and Grocery Council, *Submission 9*, p. 3.

41 The Australian Food and Grocery Council, *Submission 9*, p. 3.

present problems in interpretation of the Bill's provisions by FSANZ and the state and territory regulators.

### **Committee View**

2.41 The committee believes that consumers should be able to make informed choices with respect to purchasing food. However, the committee considers that the current system for labelling of GMM presents an appropriate level of information to consumers, provided there is active compliance testing.

2.42 The committee notes that the Bill may be intended to ensure more extensive labelling of foods containing GMM, but it is likely to have the unintended effect of increasing the costs for those producing GM-free products. This is because the Bill requires thorough procedures to label a product as GM-free through the due diligence guidelines.

2.43 The committee notes there are disagreements amongst stakeholders about the science of product testing, and the adequacy of its use in compliance regimes. However, it does not believe it was presented with evidence that the Bill would have a bearing on these debates.

### **Recommendation 1**

**2.44 The committee recommends that the Bill not be passed.**

**Senator Claire Moore**  
**Chair**