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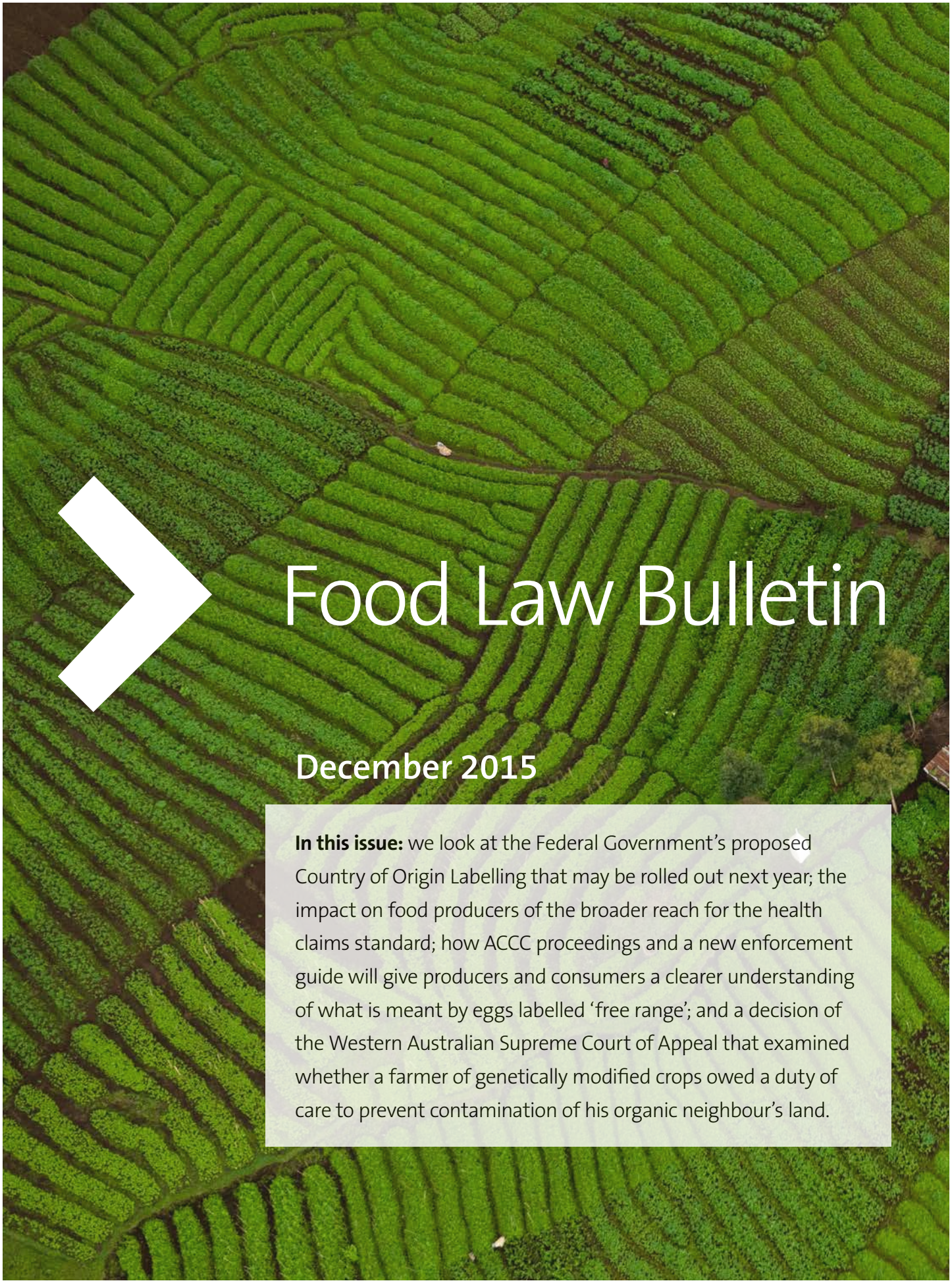

Food Law Bulletin

December 2015

In this issue: we look at the Federal Government's proposed Country of Origin Labelling that may be rolled out next year; the impact on food producers of the broader reach for the health claims standard; how ACCC proceedings and a new enforcement guide will give producers and consumers a clearer understanding of what is meant by eggs labelled 'free range'; and a decision of the Western Australian Supreme Court of Appeal that examined whether a farmer of genetically modified crops owed a duty of care to prevent contamination of his organic neighbour's land.

A CoOL Change: New Country of Origin Labelling Laws may take effect in 2016

In brief: Managing Associate Alison Beaumer and Lawyer Kaelah Ford report on the Federal Government's proposed Country of Origin Labelling (***CoOL***) system, which would require companies to disclose the extent to which their food products are made in Australia.

How does it affect you?

- The new system is expected to be rolled out by mid-2016, provided agreement can be reached with state and territory governments. There will be a transitional period to allow manufacturers time to implement the new labelling requirements.
- The new laws will impact on the definition of 'Made in Australia', requiring manufacturers to provide more detail about the extent to which their products contain Australian ingredients.
- While specific enforcement provisions for the new regime are not yet available, labels that do not comply may be misleading and deceptive in breach of the Australian Consumer Law. The Australian Competition and Consumer Commission (the ***ACCC***) has indicated that credence claims, which include country of origin claims, are a priority area of enforcement.

The existing regulatory landscape

CoOL for food is currently regulated by:

- the Australian Consumer Law (***ACL***), which precludes companies from labelling food products in a manner that may mislead or deceive consumers as to their origin. Breaches of the ACL give rise to civil proceedings and remedies can include pecuniary penalties, injunctions, enforceable undertakings, corrective advertising and the implementation of compliance procedures.
- the Australia New Zealand Food Standards Code (***Food Standards Code***), which requires country of origin labelling for most packaged and some unpackaged foods sold in Australia. Each state and territory has legislation that mandates compliance with the Food Standards Code.
- the *Commerce* (*Trade Descriptions) Act 1905* (Cth) and the *Commerce (Imports) Regulations 1940* (Cth). These laws require that a trade description of an imported good must be marked with the name of the country in which the goods were made or produced.

In early 2014, the Australian Government ordered an inquiry into the food labelling framework. The outcome was announced in July 2015, with the government recommending that CoOL for food be regulated through a mandatory information standard under the ACL. Below we look at some of the requirements under the new system.

Change on the horizon

The new system will require labels for food products made in Australia to carry a country of origin symbol with the well-known kangaroo logo, with the addition of a bar graphic. The shading in the bar will indicate the amount of Australian ingredients present in the product.

Made in Australia

For products made in Australia, the yellow shading of the bar will indicate the amount of Australian ingredients present in the product. For example:

Grown in Australia

For products grown in Australia, the symbol will appear with a fully shaded bar:

Grown in Australia

Where products include imported ingredients, it will not be mandatory for manufacturers to specify the country or countries from which they have been sourced, although they will be encouraged to do so voluntarily (at least online if not on the product label). Examples of product labels providing details beyond the mandatory requirements would be '*Made in Australia from Canadian pork*' and '*Made in Australia from Australian carrots and French peas*'.

If manufacturers choose to use a 'Packed in Australia' claim, they will be required to specify a separate country-of-origin (made in or grown in) claim with respect to imported ingredients:

If a product is made from ingredients sourced from more than one country, it may be described as '*Packed in Australia from imported ingredients*'.

Earlier this year, Supabarn Supermarkets Pty Ltd and the Real Juice Company Pty Ltd each paid penalties of more than $20,000 to the ACCC in relation to representations made about two juice products manufactured by the Real Juice Company and sold by Supabarn. The ACCC considered that the following claims made on the product label made the false or misleading representation that the product was made from apples grown in Australia:

- *'It's produced locally using the freshest quality apples'*
- *'Made in Griffith'*
- *'Straight From a Farm'*

In fact, the product was made from reconstituted apple juice concentrate imported from China. Under the new laws, depending on the level of 'transformation' of the product, it is likely that a '*Made in Australia from 0% Australian ingredients*' or '*Packed in Australia, Made in China*' label would apply to that kind of product.

Seasonal ingredients

Companies will have three options for labelling products that have significant seasonal variability:

1. Re-label seasonally.
2. Make an 'at least' claim – ie if the product is 70 per cent Australian ingredients in summer and only 20 per cent in winter, the label would read '*Made in Australia from at least 20% Australian ingredients*'.
3. Use a seasonal average and carry a barcode that can be scanned by a consumer for further details about the ingredients used in each season.

Conclusion

Aside from the practical consideration of adopting the new labels, businesses should continue to ensure that all country of origin claims can be substantiated. Bear in mind that this obligation extends beyond direct claims such as 'Made in Australia', and other more generic claims about location or freshness could potentially create a false impression that a product is made or grown in Australia. Under the new system, the ACCC will retain its power to issue substantiation notices where it suspects a claim may be false or misleading, and businesses should continue to be vigilant in their labelling practices.

Sample product labels sourced from the Department of Industry, Innovation and Science, available at www.industry.gov.au/cool

Broader reach for health claims standard

In brief: As we stand on the doorstep of the modern era of food health claim regulations, food producers will be well advised to carefully consider how their claims line up with the substantially broadened reach of the health claim standard. Partner Richard Hamer and Associate Adrian Chang report.

How does it affect you?

- Standard 1.2.7 now reaches to any claim that a food has 'an effect on the human body'.
- We don't expect claims relating to the satisfaction of hunger or thirst to be targeted by regulators, but the breadth of the regulation creates a large grey area of potential risk.
- Food producers should consider the impact of standard 1.2.7 for all existing packaging and advertising, particularly where a product is marketed as 'healthy'.
- If the claim is caught there is a highly prescriptive regulatory scheme set out in the standard as to what can and cannot be said.

The new form of Food Standards Code Standard 1.2.7, which comes into effect on 18 January 2016, is notable for several reasons, including the introduction of a much broader regime for the regulation of health claims as they are used with respect to food products.

Nutrition claims are now, save for the handful of approved statements annexed to the standard, restricted to simple statements about the presence or absence of a particular nutrient in the food to which it is applied.

The definition of health claims, on the other hand, has been greatly expanded. Health claims are defined as a claim which states, suggests or implies that a food or a property of food has or may have a health effect, where 'heath effect' means, 'an effect on the human body…'.

The new definition of health claim is very broad. Now, almost any claim which identifies a link between food and a bodily response is, on a strict reading of the definition, a health claim under Standard 1.2.7 and accordingly falls within the scope of regulation by that standard.

Conceivably, references to the satiation of hunger or the quenching of thirst are now health claims. On this reading, claims that a food 'satisfies', is a 'hunger buster' or even that the food has a pleasing taste would now be regulated under Standard 1.2.7 and need to comply the Nutritional Profile Scoring Criteria and similar requirements.

The effect of the definition is even greater when it is considered that the claim need not be applied directly to the packaging of the food to which it relates. Therefore, on a literal reading, brand-level advertising such as 'Snickers really satisfies' or 'Red Bull gives you wings' would also be caught.

We do not believe that this is the intended outcome of the new form of the standard and do not expect to see regulators taking action against references to hunger, thirst or similarly basic (and uncontroversial) statements. However, if the claim is expressed in clearly physiological terms, such as 'enhances hydration' or 'provides sustained energy', it should be expected the claim will be caught.

Between the extremes of circumstances caught by the wide definition of health claims lies a grey area that creates risk for food producers and their marketers. In particular, any food that is marketed as 'healthy', 'nutritious' or 'better for you', whether or not those specific claims are made in relation to the product, should be examined carefully for compliance with the standard.

Free range hen egg labelling guidance

In brief: A series of ACCC proceedings and the release of the ACCC enforcement guide are giving producers and consumers a slightly clearer understanding of what is meant by 'free range' in relation to the labelling of eggs. Partner Andrew Wiseman, Associate Amanda Richman and Lawyer Christopher O'Yang look the current state of play in relation to this problematic area of food marketing.

How does it affect you?

- There is currently no national, legal definition of the term 'free range'.
- The ACCC considers that free range means that animals are able to move freely on an open range, on post ordinary days, and actually do so.
- Producers need to look at their production methods to see whether they can continue to label their products 'free range'.
- A national consultation into free range egg labelling may see the introduction of an information standard which sets out minimum welfare requirements for free range egg products.

The background

The 'free range' label is used prolifically in Australia. In June 2015, CHOICE reported that the grocery volume of eggs sold in Australia last year under the label 'free range' was approximately 696 million.[1] The term is also used on the packaging of other animal-derived products including pork, poultry, beef and lamb.

In Australia there is currently no national legal definition of the term 'free range'. Instead, there is a myriad of mandatory and voluntary requirements stipulating conditions in which hens must be kept in order for eggs (and in some cases, chicken meat) to be labelled 'free range'. This includes a number of different voluntary certification standards, set by different industry bodies, which vary considerably in their requirements; ACT legislation concerning the sale of eggs; and a voluntary national model mode of practice for domestic poultry.

However, a common law definition of the term 'free range' has begun to emerge, following recent proceedings brought by the ACCC under the false and misleading representation provisions in the Australian Consumer Law (***ACL***).

The ACCC proceedings were brought with respect to the labelling of free range eggs; however, the decisions are likely to have application to other free range labelled products. The decisions provide that the term 'free range' represents to consumers that animals are able to move freely on an open range on most ordinary days, and actually do so.

Following these decisions, the ACCC has issued a guidance to producers on free range egg claims and the Consumer Affairs Ministers have commenced a national consultation on free range egg labelling. This consultation may see the introduction of an information standard which defines the term 'free range', at least with respect to eggs

The ACCC proceedings

In recent years, the ACCC has considered 'credence claims' an enforcement priority. The term 'credence claims' refers to claims made by a producer or supplier that a consumer cannot independently verify. The ACCC considers 'free range' claims to be a type of credence claim. Since 2011, the ACCC has commenced six proceedings relating to free range labelling. However, it was not until the 2014 *ACCC v Pirovic Enterprise* decision that the current common law definition of 'free range' emerged.

In the *Pirovic* case, the Federal Court found that Pirovic engaged in false and misleading conduct, and made misleading representations, by labelling and promoting eggs as free range. The court found that by labelling and promoting the eggs as 'free range', Pirovic represented to consumers that the eggs were produced by hens that were able to move about freely on an open range each day, and that most of the hens did in fact do so on most days. In fact, as Pirovic admitted, most of its hens did not move about freely on an open range on most days.

Importantly, the court considered that there were factors which reduced the ability and propensity of hens to exit the barn and access the range. These factors included stocking densities of the barn, flock sizes, and the number, size, placement and operation of physical openings to the range.

The court made its finding despite the fact that:

- Pirovic's labelling practices were deemed to comply with the Australian Egg Corporation Limited's (***AECL***) Egg Labelling Guide;
- Pirovic met the criteria under the AECL's Egg Corporation Assured National Egg Quality Assurance Program Trade Mark Certification Scheme;
- Pirovic's farming conditions were consistent with the practices of most other competitors that sold and promoted eggs as 'free range'; and
- the NSW Food Authority deemed the Egg Corporation Assured Scheme to be compliant with the model code of practice for domestic poultry.

1 CHOICE, Free Range Eggs: Making The Claim Meaningful, June 2015

Following this decision, the ACCC has been successful in bringing proceedings against other egg producers, also on the basis that those producers engaged in false and misleading conduct, and made misleading representations, by representing their eggs as free range in circumstances where the hens were not able to move freely on most days.

The ACCC has also investigated free range claims in the pork industry. In September 2015, the ACCC accepted court enforceable undertakings from three pork businesses following an investigation into claims such as 'free range', 'bred free range' and 'bred outdoors'. The ACCC considered that these claims would give consumers the overall impression that pigs were able to move freely in an outdoor paddock on most ordinary days. The outcome of this investigation suggests that the ACCC will continue to be vigilant in respect of free range claims and considers that the *Pirovic* decision applies outside the egg industry.

ACCC Enforcement Guidance – free range hen egg claims

The ACCC's guide is designed to inform hen egg producers of their fair trading rights and obligations when promoting or selling free range eggs. The ACCC's position is consistent with the case law. The guide provides that the descriptor 'free range' requires at least that most of the hens move around freely on an open range on most days.

The guidance also provides that a person may be making a 'free range' claim by using words that mean the same thing as free range on packaging or advertising material, or even by using pictures of hens ranging freely in a grassy field.

Position in Europe

Since 1 January 2004, mandatory labelling of eggs according to the production method has been required in the European Union. This regulatory framework is targeted at ensuring customers can make an informed choice on the basis of how the egg is farmed. Under this regime, free range eggs are classed as being produced from hens that have continuous daytime access to vegetated open-air runs. On one view, this is different to the Australian common law definition of free range, as there is no requirement that the hens actually use the open-air runs.

Government consultation

In October 2015, the Australian Treasury released a consultation paper *Free Range Egg Labelling*. The consultation paper sets out three policy options:

- maintaining the status quo. Under this option, the term 'free range' with respect to eggs will continue to be used in accordance with the ACL and related case law, the model code for poultry welfare, state and territory laws and voluntary industry accreditation schemes;
- issuing a national basic information standard under the ACL for free range egg labelling. Information standards prescribed under the ACL are enforced by the ACCC and state and territory consumer agencies. The proposed information standard would establish requirements that must be met if eggs are to be labelled as free range; and
- issuing an information standard under the ACL for all categories of eggs. Under this proposal, producers would be required to label theirs eggs as 'cage', 'barn' or 'free range'. However, additional categories 'premium free range' and 'access to range' are also being considered.

A potential outcome of this consultation is that the meaning now attributed to the term 'free range' could be watered down. This will make it easier for producers to be able to label their eggs 'free range' but could mean that consumers are more likely to be misled by the label.

Freedom to choose harvesting methods for genetically modified crops

In brief: The WA Supreme Court of Appeal considered an application by an organic cereals farmer seeking damages caused by that farmer's loss of organic certification due to contamination of his property by genetically modified (***GM***) canola from his neighbour's farm. In rejecting the application, the decision affirms the position that farmers of GM crops are not acting negligently merely by growing and harvesting their crops via conventional methods. The applicant has now lodged a special leave application to the High Court. Partner Richard Hamer and Vacation Clerk David Bennett report.

How does it affect you?

- Growers of GM crops have been held to not owe a special duty of care to their organic neighbours where the GM farmer engages in standard farming practice.
- The High Court will consider a special leave application by the organic farmer party early next year.
- The decision highlights the extremity of the 'zero tolerance' policy adopted by some Australian organic certification bodies as compared to the more tolerant US and EU regimes.

The background

In 2004, the *Genetically Modified Crops Free Areas Act 2003* (WA) was enacted to place a moratorium on the commercial cultivation of GM crops in that state. In 2010, the WA Minister for Agriculture and Food, Terry Redman, made an order under section 6 of that Act to exempt some farmers, such as Michael Baxter in Kojonup (250km southeast of Perth), from the general prohibitions of the Act, to allow them to grow GM canola. On the advice of his agronomist, Mr Baxter planted Monsanto's Roundup Ready GM canola in accordance with Monsanto's guideline suggesting that seeds be planted in a way that created a 5-metre GM free 'buffer zone' around his property.

Mr Baxter's neighbour, Steve Marsh, subsequently alleged that after Mr Baxter swathed the crop (a standard practice for canola, whereby the crop is cut and then laid out to dry) some of the drying GM plants were blown across the 20-metre road that separates their properties and onto Mr Marsh's organic farm. As a result, in 2010 Mr Marsh lost organic certification from the National Association of Sustainable Agriculture Australia (***NASAA***) via its certifying organisation NASAA Certified Organic Pty Ltd (***NCO***), for 70 per cent of his property. This led Mr Marsh to claim that Mr Baxter was negligent in planting and harvesting GM canola, and he claimed damages of $85,000 for his loss of income, given he could no longer sell his produce under NASAA certification and therefore attract a premium. Mr Marsh also claimed the Mr Baxter had committed a private nuisance.

At first instance: *Marsh v Baxter* [2014] WASC 187

The high-profile trial in the WA Supreme Court lasted 11 days in February 2014, with Justice Kenneth Martin's judgment handed down on 28 May last year, in which his Honour comprehensively rejected Mr Marsh's claims, in common law negligence and private nuisance, and refused to grant a permanent injunction to prevent Mr Baxter from planting and swathing GM canola on his land.

His Honour held that Mr Baxter, a broad-acre farmer, could not be held responsible merely for growing lawful GM crops in a conventional manner and utilising an orthodox harvesting method. In part, this was based on the assessment that the blowing of the swathes over the boundary of his property had not been an outcome intended by Mr Baxter. As for the nuisance claim, his Honour found Mr Baxter had not unreasonably interfered with Mr Marsh's use and enjoyment of his organic property. Nor could Mr Baxter be held responsible, in law, for the reaction of Mr Marsh's organic certification body.

Certification standards and practice

In his judgment, Justice Martin was highly critical of NCO, which decertified Mr Marsh's property, denying him the contractual right to apply the label 'NASAA Certified Organic' to his produce, on the premise that the airborne swathe incursion posed an 'unacceptable risk' of contamination. His Honour held that NCO had erroneously applied the NASAA Standards, as these required that the end products of organic farming, rather than the land itself, be free of GM material. Mr Baxter argued that Mr Marsh's property would only be contaminated if his crops had become genetically modified or there was GM material mixed in with the end product. Justice Martin found there was zero potential for a pollen-mediated transfer from a GM canola crop to another plant species, and therefore no risk to Mr Marsh's wheat, barley or oats. Accordingly, with no contamination that justified removing Mr Marsh's certification, NCO was criticised for having acted beyond the scope of its rights.

Injunction

Mr Marsh initially sought to permanently restrain Mr Baxter from planting GM canola on his land within cascading distances of 2km, 1.5km and 1.1km of Mr Marsh's land and to permanently restrain Mr Baxter from swathing any GM canola that he did plant within 2km, 1.5km and 1.1km of Mr Marsh's land. However, Mr Marsh progressively narrowed the scope of the injunction, first to restrain Mr Baxter from planting or swathing GM canola on his land within 1km of Mr Marsh's land, then finally to restraining Mr Baxter from engaging in swathing in the paddocks that abutted Mr Marsh's property.

However, as Mr Marsh led no evidence to support the efficacy of any of the restraints applied for, the injunction was denied and Mr Marsh did not raise the point on appeal.

Appeal

Mr Marsh's appeal was dismissed in a majority decision handed down this September in *Marsh v Baxter* [2015] WASCA 169. The alleged conduct at issue was the manner in which the respondent harvested his GM crop, with Mr Marsh seeking a finding that Mr Baxter should have applied a harvesting technique that did not include swathing. Justice David Newnes and Justice Graeme Murphy upheld the original decision to dismiss all of Mr Marsh's claims in relation to foreseeability, duty of care, breach of duty and nuisance.

Negligence

The majority held that a reasonable person would not have foreseen that there was a risk of any economic loss to the appellants by swathing.

The court then went on to consider duty of care, breach and causation. Despite the short physical distance between the neighbouring properties, had the risk of harm been foreseeable, the majority held that the circumstances did not give rise to a duty of care. The court was also not persuaded that Mr Marsh had established that a reasonable person in the position of Mr Baxter would have taken the precaution, for the benefit of Mr Marsh, of direct heading (a farming practice that eliminates the need for swathing) rather than swathing his GM canola crop. As to causation, no final determination was made.

Nuisance

In addition, the majority concluded that Mr Marsh's choice to operate organically could not render Mr Baxter's lawful use of his own land as 'constituting a wrongful interference with Marsh's use or enjoyment of his land'. The majority further considered that Mr Marsh had 'put his land to an abnormally sensitive use' and could not 'unilaterally enlarge his own rights', nor impose interminable limitations on his neighbours.

Dissent on negligence and pure economic loss

In dissent, the President Carmel McLure, considered that 'the appellant's negligence claim does not neatly fit into any recognised category or case in which a duty of care to avoid pure economic loss has been upheld.'

In the most closely analogous case, *Perre v Apand Pty Ltd* (1999) 198 CLR 180, a majority of the High Court held that the defendant owed a duty of care to all the plaintiffs. In that case, the respondent negligently supplied infected seed potatoes, which resulted in an infected crop that saw produce within a 20km radius of the applicant's farm being banned from sale in the WA potato market.

Her Honour found that the harm to Mr Marsh was reasonable, foreseeable and that Mr Baxter owed a duty of care, 'the scope of which required him to exercise reasonable care to avoid or minimise the risk to Marsh of pure economic loss from the windborne escape of GM canola.' Justice McLure concluded that 'Baxter ought to have known of the risk that GM canola swaths could be blown by strong winds, and knew of the consequential risk to the Marsh's organic certification.'

Furthermore, her Honour considered 'it was relevant that the Monsanto agreement and Monsanto Management Plan recognised that care was required by GM growers because of the probability of harm'.

In upholding a breach of this duty, her Honour found that 'NCO's decision to decertify 70% of the property was open to it under the NASAA Standard and further that the decision was based on reasonable grounds'. Thus her Honour found Mr Marsh's claims in negligence should be upheld, as Mr Baxter 'had actual knowledge of the risk of decertification' at the time 'he engaged in the conduct which caused harm'.

Dissent on nuisance

President McLure also found the interference with Mr Marsh's use and enjoyment of the property was both 'substantial and unreasonable' and 'constituted a private nuisance'. Based on the fact that GM canola was being grown in WA for the first time, her Honour considered the 'correct finding to be that in 2010 the harvesting of GM canola, by swathing or otherwise, was not among the ordinary usages of broadacre farming in Kojonup'.

High Court application

Perhaps fortified by the substance of the dissenting judgment, on 1 October Steve Marsh filed a High Court application in the Sydney registry, seeking special leave to appeal the WASCA decision. The applicant's summary of argument and draft notice of appearance, along with the respondent's summary of argument, have all been filed, with the hearing likely to be 12 February or 11 March next year. As there is no test or general principle for determining whether or not a defendant owes to a plaintiff a duty of care to avoid causing pure economic loss, this may entice the High Court to give special leave to appeal.

If special leave is granted, in 2016 the media spotlight will return to Kojonup, and, if the appeal is upheld, it could have serious implications for the WA Government's plans to repeal the laws that currently allow it to prevent the growing of GM crops. The repeal Bill is due to be tabled in Parliament shortly, but may not be debated until next February.

The significance of the issue is growing, as figures provided by Monsanto have the amount of GM canola in WA increasing steadily from 86,000 hectares in 2010 to 337,000 hectares this year. Although only GM cotton and canola are currently grown commercially in Australia, this matter assumes even greater pertinence, given many other crops such as bananas, grapes, pineapples, wheat, barley, maze, mustard and sugar are currently being tested at sites in New South Wales, Queensland and Victoria.

Policy

That Australia's organics industry has 'a zero tolerance policy for the presence of any GM material in certified products' was described by Justice Kenneth Martin at trial as 'unjustifiable'. A more practical approach incorporating standards in line with the 5 per cent tolerance threshold in the United States or the 0.9 per cent standard in Europe, where anti-GM sentiment is stronger, would provide for organic, conventional and GM crops to co-exist more amicably in farming systems.

Notably, the Organic Industry Standards Certification Council has already rejected an application from the WA Department of Agriculture seeking to lift the standard to a 0.9 per cent threshold. However, NCO has since adjusted its standards in light of the Marsh v Baxter litigation, to more clearly define the term 'contamination' and have adopted an internationally accepted definition for consistency

Conclusion

The WASCA's decision maintains the status quo by refusing to recognise a duty of care owed by farmers of GM crops to their organic neighbours.

If Mr Marsh's application for special leave is granted, the scene will be set for a very interesting examination of use-of-land rights in Australia and the High Court's appetite for entertaining negligence claims based on pure economic loss.

We will watch this space with interest.

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