



# GE Free New Zealand

*In Food And Environment Inc.*

PO Box 13402, Wellington, NZ

4 May 2022

Complaint under Fair Trading Act

RE: Non-disclosure of a main ingredient of significant consumer interest that is likely to mislead or deceive in breach of the Act.

To Commerce Commission,

This complaint relates to trade practice likely to mislead or create deception of consumers.

The complaint regards the non-disclosure of GMO soy as a main ingredient in the production of Impossible Burger, which is now being sold in Countdown supermarkets.

## **The Commerce Commission is asked to recognise**

- The significant public interest in the honest labelling of GMO and non-GMO foods and should be investigated.
- That the intention for consumer labelling of GMO products is as legitimate information for consumer choice.
- The current Standards (referenced below) are the outcome of major public protest for honest disclosure of information about use of GMOs.
- The intention is to meet the public expectations for labelling that allows consumer choice for ethical and principled reasons, e.g supporting sustainability or avoiding perceived negatives.
- The failure to meet expectation of honest disclosure on labelling in this case is likely to be misleading to consumers and a breach of the Fair Trading Act
- The principle for fair trading practice is that intentional use of GMO ingredients should be disclosed where possible, specifically on labelling. This is not the case with Impossible Burger that does not disclose the GMO ingredient on the product label.
- It is only openly stated that Impossible Burger has 2 main ingredients sourced from GM on their US website, thus leaving the average supermarket shopper in the dark.
- Consumers are likely to be misled by non-disclosure on pack of the deliberate use of GMO soy as a main ingredient in Impossible Burger *at the same time as overt on-pack claims of sustainability*. Consumers would reasonably see a contradiction with the use of GMO soy that consumers understand not to be sustainable.
- That NZ consumers have a greater interest than may be the case in some other countries in wanting to know the provenance of food. This includes values-based choices based on not wanting to support some forms of production that are environmentally dubious, cruel to animals, damaging to biodiversity etc. (Examples include Free Range vs. caged, products of damaging or unsustainable intensive agriculture e.g. palm oil/deforestation).

## **Request of the Commission**

The need to address the breach of the Act by the Commerce Commission requiring disclosure of the main ingredient of the Impossible Burger as being *Made From GMO soy/ Made From GE soy* by retailer

## Countdown and the importer of Impossible Burger into New Zealand

The non-disclosed use of GMO soy is misleading/deceptive to consumers and the Commerce Commission is asked to direct that the information be **clearly visible and disclosed** on pack and online (including disclosure in 'ingredients' and 'product claims' sections of the Countdown website)

There is a need for the GMO soy disclosure not to be hidden in small print or by 'confusion marketing' with other claims used to obscure the contradiction that consumers see in unsustainable GMO soy.

### Other key points

- Note the consumer context that all other brands of alternative meat sold in New Zealand supermarkets until now have built a trust in the 'alternative meat sector' because they all have sustainability and ethical policies and secure Non-GMO ingredients. (CF Sunfed, Bean Supreme, Tonzu, Bird's Eye Plant Based et al).
- So, the New Zealand consumer landscape is one of trust that has largely created this expectation of a non-GMO supply chain as a given.
- Note this complaint is under the Fair Trading Act for non-disclosure of material information relevant to many New Zealand consumers. It is not about food safety standards of FSANZ or vat-produced GMO haem, which is disclosed on the back of pack but not the front. The type size is small and not in line with the Commerce Commission criticism of 'small print' as a form of deception.

## Context & Background to consumer labelling: intentions, purposes and exemptions

The intention of best efforts for labelling GMO ingredients to inform consumers under FSANZ also necessarily includes some *compromises* on mandatory disclosure.

Exemptions were for practical reasons faced by industry but do not absolve parties from complying with the Fair Trading Act when knowingly sourcing GMO as a main ingredient.

Mandatory labelling was established for GMO products sold in supermarkets as *consumer information*.

The supermarket is a primary source of such information through product labelling, advertising, point of sale and online listings.

The legislative intention for consumer information and choice is not about food safety per se (all GM products being deemed safe before approval) but a principle for as *fair as possible* disclosure that GMO is used.

## Labelling of food produced from Gene Technology

The Food Standards Australia New Zealand Code – Standard 1.5.2 clearly states that all food that contains a **genetically modified food ingredient** must be labelled.

### Standard 1.5.2 Food Produced from Gene Technology

This Standard is Australia New Zealand Food Standards Code – Standard 1.5.2 – Food produced using gene technology.

- Food produced using gene technology means a food, which has been derived or developed from an organism, which has been modified by gene technology.
- Requirement to label food as 'genetically modified'

- 1.5.2 -4: This section applies to a food for sale that consists of, or has as an ingredient, food that is a genetically modified food.<sup>1</sup>

In developing the standards some practicalities required labelling exemptions.

However in the situation of deliberate use of GMO soy as a main ingredient, the exemptions for accidental contamination or for highly processed oils does not provide an excuse for non-disclosure or to allow a breach of the Fair Trading Act.

The principle for fair-trading is the intention that GMO ingredients are disclosed where possible, specifically on labelling. However this is not the case with Impossible Burger that does not disclose the GM soy information anywhere on pack. It is only openly stated that Impossible Burger has 2 main ingredients sourced from GM on their US website.

The exemptions made for these reasons of practicality include additives and processing aids, accidental and inadvertent contamination, processed oils with little DNA left for tracing with the then limited capacity to test for by-products after GMO ingredients are processed. GMOs in food at cafes, restaurants and point of preparation were exempted from mandatory disclosure but should disclose it if asked.

But the retail of Impossible Burger in Countdown takes it back into the main location of consumer expectations for honest ingredients and process labelling to allow consumer choice.

### **Rebuttal of arguments that may aim to justify the breach of fair trade and non-disclosure**

- **Countdown may believe and argue that they cannot be required to be policing all sustainability claims** of the products they carry. But this is a generalisation that has no merit in regard to the specific case. There is clearly identified risk – we argue a clear likelihood - of deception arising from non-disclosure of a supply chain chosen by the Impossible Burger makers to be GMO soy.
- Under the Fair Trading Act there is no excuse for deceptive or misleading practice when the deliberate non-disclosure of the information is known to be of material concern for consumer choices and something people want to know! This consumer expectation, not food safety is the basis of the FSANZ labelling rules and exemptions.
- Impossible Burger are abusing the rule that exempts the GMO soy being mandatorily labelled, even though it is a main ingredient and deliberately used, on the basis that it is 'highly processed' so they are not required by FSANZ to disclose it to consumers. Countdown is compromised in the same breach if they do not voluntarily provide honest disclosure to their customers.

**Countdown may argue consumers who care about GMO Free wont buy into the product and wont mind the non-disclosure** of GM Soy source as a main source ingredient.

- They may argue the buyers of sustainable meat alternatives would already know about the GMO Haem made in microorganisms in vats. This has been widely publicised, and is labelled (albeit to the minimum in small print to meet FSANZ rules for labelling).
- The use of GMO in vats is very different from open field use of GMO Soy heavily sprayed with Glyphosate Based Herbicides (GBH).
- One is contained in labs the other is produced outside.

<sup>1</sup> <https://www.foodstandards.gov.au/code/Documents/1.5.2%20GM%20foods%20v157.pdf>

- One may be considered by consumers as replacing the blood-appeal of meat to be more ethical and the other to be an industrial intensive farming process impacting the open environment, soil health and biodiversity.
- One is disclosed and could be argued as 'a good thing' the other is not disclosed and IS widely recognised in published research as more of a problem for sustainability than alternatives. The substantive issues of concern for consumers include resistance in weeds leading to increased use of and exposure to glyphosate based herbicides in the US and deforestation of the Amazon to grow GE soy.

**Today, informed consumers could quite reasonably support one but NOT the other.**

- The two GMO ingredients raise different ethical and principled responses. **Transparency of both is needed** to allow informed consumer choices.
- It is misleading to trumpet one (as ethically made in containment to replace animal blood) but cover up the other (ethically doubtful because of intensive herbicide use in the environment)
- *Absence of disclosure* of the main ingredient coming from GMO soy (widely considered unsustainable and therefore an ingredient that should be open for consideration by consumers through disclosure labelling) is misleading and deceptive.
- Non-disclosure would also suggest to consumers that the product complies with the established 'sector norms' in New Zealand of being GMO-free and would not be associated with environmentally dubious production of GMO crops.

**Countdown may believe they have no responsibility in preventing consumer deception because the labelling is compliant with FSANZ standards.**

- Countdown may argue the product labelling sufficiently complies with FSANZ rules and exemptions in supermarkets so is of no concern.
- This would continue the breach of the Fair Trading Act: they are fully aware that consumers want to know the information being denied them. This is the situation now.

**Countdown may believe that the Fair Trading Act does not apply in the case of Impossible Burger because GMO soy is now so ubiquitous in the food chain it is unfair to require them to disclose it when other products may also not.**

- Unlike any other cases of contamination, Impossible Burger are not using GMO soy accidentally or in trace amounts.
- Soy is a globally-traded commodity and contamination by GMO soy of conventional soy does occur. Estimates for contamination are likely exaggerated but because lecithin is derived from soy and is a trace ingredient in processed food, it may be up to 70% in USA products.
- Analysis of brands on the Countdown website indicates that **All** other plant based meat-alternatives marketing sustainability claims in New Zealand actively exclude GM ingredients. This is part of their kaupapa for authentic environmental and ethical sourcing of ingredients.
- These brands have built trust in GMO-free plant based meats because they have worked hard to remove GMO ingredients from their supply chain. This sense of trust in the whole sector is harmed by deception, confusion marketing of contradictory claims along with non disclosure by Impossible Burger

- The consumer demand for GMO soy to be segregated to allow a choice was the trigger for the mass public protests about Genetic Engineering in New Zealand and led to development of food standards GMO labelling regime and the Royal Commission on Genetic Modification.
- The basic principle for labelling disclosure is to allow consumer choice whether to support GMO crops on an ethical, environmental or values basis.

**Countdown may believe that the Fair Trading Act does not apply in this case because many forms of GE soy have been deemed 'substantially equivalent' to all other soy and do not require mandatory labelling.**

- The idea of 'substantial equivalence' is a technical concept that seeks to define no difference between protein isolate from GMO soy and conventional Soy. This technical concept is questioned by independent science but for practical reasons has been used as the basis for exemption from mandatory labelling under food standards.
- However, this does not relate to the other values-based, sustainability and ethical concerns of consumers that retailers and manufacturers have responsibilities to ensure are not used to deceive or mislead.
- Consumer law and expectations of authentic claims and honest disclosure in these regards is not made redundant by technical definitions, but are material for fair information for consumer choice under Fair Trade Act. In the case of Impossible Burger non disclosure of information most consumers would want to know and reasonably expect to be disclosed is misleading and deceptive.

## Summary

1. Many consumers hold reasonable concerns about the environmental impact of GMO soy. The act of non disclosure on the Impossible Burger Packing at the same time as making *other* sustainability claims is likely to be deceptive and misleading to many consumers.
2. Honesty in the disclosure of GMO ingredients is being undermined. Any exemption from mandatory labelling of the GMO soy ingredient in Impossible Burger is an *unintended loophole* from practical compromises made in Food Standards.
3. For the purpose of the Fair Trading Act a technical exemption is not a justification for deceptive practice where the deliberate use of processed GMO soy as the main ingredient is not disclosed.
4. The situation is against the intent of the regime for labelling GMO to provide *as fair as possible* disclosure to allow consumer choice, and under the Fair Trading Act constitutes a breach.
5. It is not a defense for Countdown to allow a likely breach of the Fair Trading Act on the basis that Countdown cannot be expected to 'police' all other unidentified potential breaches by users of GMO soy.
6. There is likely consumer deception from non-disclosure of GMO soy by the Impossible burger because their packaging carries explicit claims of sustainability used to appeal to consumers who are concerned with authentic sustainability.
7. These same consumers are as likely to reject GMO soy for environmental reasons, albeit if disagreed with by the Impossible Burger manufacturer.
8. Consumers would reasonably expect it to be disclosed because it is known by Countdown and the importer to be a main ingredient of consumer interest that many seek to avoid.
9. **The Commerce Commission is asked to direct that the information be disclosed and clearly visible on pack and online sections of the Countdown website. This should not be hidden in small print, which the Commerce Commission has elsewhere identified as a problem of compliance under the Act.**

Yours sincerely

Jon Muller,  
Secretary GE Free NZ in Food and environment

## References

### Legislation references from:

<https://www.consumerprotection.govt.nz/general-help/consumer-laws/fair-trading-act/#intent-of-the-act>  
**(Bold added)**

### Intent of the Act

#### The Fair Trading Act (FTA) exists to:

- **promote fair competition**
- **make sure consumers get accurate information before buying products and services**
- promote product safety.

The FTA makes it **illegal for businesses to mislead or deceive you**, and requires them to make sure the information they provide is accurate, and that they **don't withhold important information**.

#### The Fair Trading Act makes these types of trader behaviour illegal:

##### Deceptive or misleading conduct and false representations

**Businesses must not mislead or deceive you about the things they sell. This covers anything written or said about products or services, including:**

- **advertising**
- **any impressions from images**
- **information that's left out if this may create a false impression.**

**It doesn't matter if a trader didn't intend to mislead, and they can't rely on fine print in advertising or contracts to correct a misleading overall impression or hide important conditions.**

**This includes statements or conduct that's liable to mislead or deceive about:**

- **the nature, manufacturing process, characteristics, quantity, price, standard, quality, origin or history of a product or service**
- **suitability for a particular purpose, benefits, endorsements or approval**  
**the availability, nature, terms or conditions of a job in an offer of employment**

