Foul Play and the Case of the Organic Eggs

John Paull, ANU Fenner School of Environment and Society, examines ACCC v G.O Drew: a recent decision of the Federal Court challenging organic food labelling claims

The demand for organic food is often reported as exceeding supply (e.g. Willer & Yussefi, 2007). When faced with just such a shortfall in supply, Victorian egg supplier G. O. Drew Pty Ltd substituted non-organic eggs to fill the supply gap. That deception has cost the company $295,000, the egg business has been sold, and the owners are no longer egg suppliers or packers.

The case of *ACCC v G. O. Drew Pty Ltd* is a milestone for the Australian organic sector - it is the first Australian case where the Australian Consumer & Competition Commission (ACCC) has publicly challenged organic food labeling claims. This compares to at least 16 cases where the ACCC has successfully challenged false and/or misleading Country of Origin labeling (CoOL) (Paull, 2006).

The Case

G.O. Drew "was a family egg farming business located at Marshall near Geelong, from 1937 until recent times" (Gray, 2007: 13). The company came to the attention of the ACCC in 2003 on the separate matter of using a logo "confusingly similar" to the National Heart Foundation "tick" logo (Gray, 2007: 14). Undertakings were made by the company, in February 2004, to refrain from the misleading and unauthorised use of others' logos, and Timothy Drew, the son of the owner, became the trade practices compliance officer for the company.

Coincident with this attention from the ACCC regarding misleading labeling, the company, from June 2002 to March 2005 sold eggs labeled as NASAA certified organic. The organic eggs were supplied by an independent egg supplier, which produced organic eggs certified by the National Association for Sustainable Agriculture Australia (NASAA). From March 2003 to March 2005 the packing company G. O. Drew sold 60,180 dozen eggs labeled as NASAA certified organic. Of this total, 32,205 dozen (53.5%) were falsely labeled, and were in fact not NASAA certified organic eggs. The company thus misled customers, and fraudulently attracted a price premium. At the time, organic eggs represented a small fraction (2.45%) of the company's egg business.

On 8 or 9 March 2005 the company notified its NASAA-certified egg producer that it would cease purchasing organic eggs. On 9 March G. O. Drew received a fax from NASAA stating that NASAA believed eggs being sold under the brand *Essential Foods,* and claiming to be NASAA certified organic, were not as described. In March 2005 G. O. Drew ceased its organic egg business and met with the ACCC.

On 4 November 2005 the ACCC instituted proceedings in the Federal Court, Melbourne, against the company G. O. Drew and Timothy Drew, for misleading and deceptive conduct and false or misleading representations under the Trade Practice Act 1974 (Cth), sections 52, 53(a), 53 (c) and 55 (ACCC, 2006). On 21 November 2005 there was a directions hearing. On 23 December 2005, the parties filed a statement of agreed facts. On 26 April 2006, Justice Gray granted the ACCC leave to file an amended application and statement of claim, which was subsequently filed on 17 May 2006. On 25 May 2006 the defendant submitted further asserted facts. On 30 June leave was granted, and the respondents filed an amended defence on 6 July 2006, admitting all allegations. The ACCC "filed four versions of the application and the statement of claim" (Gray, 2007: 3). On 16 August 2007, Justice Gray handed down consent orders together with reasons for judgment.

The "voluntary penance" paid by G. O. Drew amounted to $54,000 to NASAA and $216,000 to the Organic Federation of Australia (OFA). The stated purpose of these funds is "to assist the organic industry to review its certification procedures, to develop a uniform industry code, and otherwise to support organic food producers. It is intended that the development of a uniform code and the review of certification procedures should benefit consumers by enabling the promotion of organic produce that is clearly identified and of certifiable quality, thereby increasing consumer confidence for the benefit of the organic industry" (Gray, 2007: 29). In addition, costs of $25,000 were awarded against G.O. Drew (Gray, 2007: 44).

Discussion

This case is a milestone, albeit a straight forward case of passing off - of non-certified, non-organic eggs as certified organic eggs, and the admission thereof by the offender. There is an unstated lesson that certifiers need to exercise extra vigilance where a food packer holding organic certification is running parallel organic and non-organic food lines. The loop of interest in this case would then appear to be closed - however the judgment ventures, seemingly gratuitously, into two contentious areas. And comments therein deserve attention, lest they be repeated in future as uncontested statements of fact.

Firstly, the judgment declares that:

> "*organic has acquired a colloquial meaning, used to distinguish foods produced without inputs that are regarded as artificial, particularly chemicals. The acquisition of this meaning is reflected in an additional meaning in the fourth edition of the Macquarie Dictionary: of or relating to farming and the produce of such farming which does not use chemical fertilisers or pesticides. The colloquial meaning and even the new definition, are imprecise, however, in that there is no general agreement*

on precisely what inputs are to be regarded as artificial, or as chemical, and to be avoided in the production of organic foods. This is certainly the case for eggs" (Gray, 2007: 40).

The judgment goes on to refer to the "absence of any recognised norm" (Gray, 2007: 41).

The Oxford Dictionary disambiguates "organic"; it provides six meanings of "organic", the second of which is: "**2** not involving or produced with chemical fertilizers or other artificial chemicals" (OUP, 2005). Neither the Oxford nor the Macquarie dictionaries describe this meaning as "colloquial", and a check of the Macquarie Dictionary indicates that this usage has never been attributed therein as a *colloq*. usage.

The statements in the judgment are additionally problematic in that they ignore more than six decades of definition and scholarship relating to this usage of organic as related to food production. The term was first used thus by Northbourne in his 1940 book *Look to the Land* (Paull, 2006). Since that time, this usage has been in play continuously. Organic is defined by the International Federation of Organic Agriculture Movements (IFOAM, 2005) and in the *Codex Alimentarius* by the United Nations' Food and Agriculture Organization and the World Health Organization (FAO/WHO, 2001). There are organic standards in Australia, including the National Organic Standard (AQIS, 2007) and NASAA's certification standard. These various documents each elaborate the concept and practice of "organic", they are all essentially in harmony, and there is no suggestion in the worldwide organic enterprise, now encompassing agriculture in 121 countries (Willer & Yussefi, 2007), that this is in any sense, a "colloquial" exercise.

Secondly, the ACCC v G. O. Drew judgment states that:

> "*There is currently no mandatory certification for organic produce for the domestic market. The Organic Federation of Australia, which represents all sectors of the organic industry, is working on remedying this deficiency*".

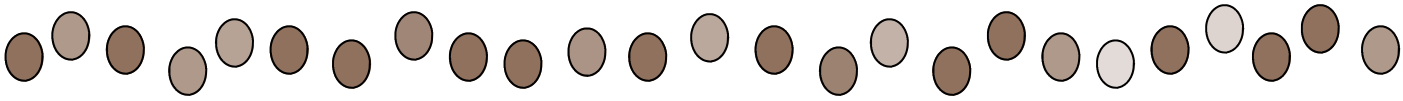
Such a "deficiency" is an unsubstantiated political assertion which goes far beyond any requirement to state the facts. To characterise certification not being mandatory, as a "deficiency", assumes a proposition that is in contention, and under active discussion in the local organics discourse. Most goods and services, of whatever type, and including foodstuffs, in all jurisdictions, are not certified by a third party. This is not thereby a "deficiency", but is rather a fact. To argue that it is a deficiency, and hence to argue for compulsory, i.e. mandatory, third party certification is not a deduction that follows from the facts of the present case.

Compulsory certification is perhaps an attractive proposition for certifying agencies, and also perhaps for those with a "command and control" disposition. However the organic sector has grown and developed in Australia without such compulsion, and without a clamoring for such compulsion until recently, and then only by a few parties.

The term "organic" with the meaning "not involving or produced with chemical fertilizers or other artificial chemicals" has been in the public domain for more than six decades, and in use in Australia since at least 1944. To proprietarise the term now, has some correlation with US company RiceTec patenting basmati rice that has likewise been gifted to the world long ago by the dedicated labour of past public benefactors (Tata, 2001).

It is not a deficiency that "organic" is in the public domain. This serves well the family or the farmer who share or sell their "organic" produce, and who for reasons of scale or disposition or otherwise, may have no taste or need of certification. If lack of third party certification is a "deficiency" then all goods and services sectors suffer from just such a deficiency.

The extension, rather than the stultification, of the organic meme relies on it staying in the public domain rather than being appropriated. Taiwan has developed an organic university, a university managed without artificial fertilisers and pesticides (Chen, 2006). This and further extensions of the organic meme rely on the term being a free and open-access term - and while that does make for a certain amount of messiness, it ought in no way to be characterised as a "deficiency".



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