Victoria Casey
Thomas More Chambers

Kahui Legal
PO Box 1654
Wellington 6011

Attn: Kiritapu Allan
By email: Kiritapu@kahuilegal.co.nz

12 May 2014

Preliminary advice for GE Free New Zealand: New Zealand (Australia New Zealand Food Standards Code) Food Standards 2002, Amendment No 53

1. You have asked for a brief note on the potential for judicial review proceedings to challenge Amendment No 53. As discussed, I have to date undertaken only a very preliminary review of some of the relevant material, and the views that follow are therefore tentative only. However, I understand that it would be useful to provide a summary of our discussion on Friday.

2. As set out below, my tentative view is that there may be an argument that the Minister has misconstrued her obligations under s 11E of the Food Act 1981. This could form a platform for a judicial review challenge, but at this stage I would have real concerns that the factual context is such that even if the Court accepted the legal argument, it would reject the claim on the facts.

Minister's obligation to protect public health

3. It appears that MPI (and therefore presumably the Minister) views s 11E(1)(a) of the Food Act 1981 as of equal importance to the other factors listed in that section.[1] However, on the words of the statute "the need to protect public health" is clearly rated higher than "the desirability" of avoiding unnecessary trade restrictions and maintaining consistency with international standards (ss (b) and (c)).

4. Further, in s 11E(d) the reference to New Zealand's obligations under the Australia-New Zealand Joint Food Standard Agreement does not use the word "need" as it does in s 11B(a)(iv), suggesting that it also carries less weight than the protection of public safety.[2]

5. These factors indicate that the need to protect public health has a primary role that is at least equal to, and possibly overrides, the obligation to comply with the Agreement, and certainly overrides the other factors listed.

6. I note that the 2 May 2014 Select Committee report back on the Food Bill appears to address this issue directly. The Committee has recommended that proposed s 14, which sets out the "principles to be applied in performing functions or duties, or exercising powers, under this Act" include a new subsection (2) in the following terms:

---

1 For example, MPI's report to the Regulation Review Committee of 6 September 2013 states "The protection of public health is one of several considerations that were taken into account when making the agreement."

2 Noting however that this may be a drafting error: the equivalent provision in the current Food Bill (cl 359) has added "need" back in.

> If there is a conflict in any case between the need to achieve the safety of food and any other principle in subsection (1), greater weight must be given to the need to achieve the safety of food.

7. To reach a clearer view on the strength of this argument under s 11E, I would need to review the legislative history of these provisions and the background to the Agreement, and any relevant case law. I would also wish to consider further the implications of the Food Bill currently before the house.

Scope of the Minister's obligation to protect public health

8. Even if it is established that the protection of public health is a, and possibly the, primary obligation under s 11E, the key question in a judicial review is what that then requires of the Minister in terms of process. The Court will not of course engage in considering whether the Minister's assessment of safety is correct (unless it is irrational), only whether she has failed to discharge her obligation to properly consider the need to protect public health.

9. There is an argument that the Minister is obliged to turn her mind to the issue of public safety, separately and independently from the Agreement Amendment approval process: s 11E(1) does not contemplate that she will be a mere rubber stamp. The importance of the Minister's role in protecting public health is reinforced by what I understand to be the unusual appeal rights under the Australian legislation. If (as appears to be the case) the amendment decision is only appealable by an unsuccessful applicant, then consumer and public interest groups have no opportunity to challenge the decision except through the Minister's consultation process.

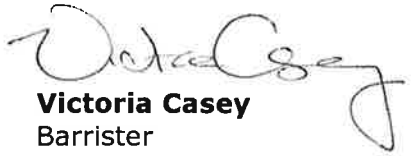
10. However, the Agreement allows New Zealand to adopt a different standard only in exceptional circumstances, which indicates that the Minister would need to have very strong grounds to even consider rejecting an approved amendment. This will in turn limit the scope of the inquiry that could be expected of the Minister: it is likely that a Court would consider that even if there was an obligation to reach an independent view, the Minister would be justified in relying on the approval process unless a very serious issue, *that had not been properly considered during the approval process*, was raised in the consultation process under s 11E(2).

11. To reach a clearer view on that argument I would like to have a better understanding of the approval process undertaken by the Agreement agencies, and at what point(s) and to what extent independent New Zealand agencies engage on safety issues in a substantive way. I note for example that MPI refers to ESR undertaking an assessment at some stage.

12. Even if the argument can be established in principle, a key issue for GE Free will be whether it can convincingly show that its concerns were not properly considered through the approval process. Essentially it will need to show that there has been total disregard of a significant safety concern: mere differences of view or disagreements between experts will not be sufficient.

13. Thank you for your instructions. I would be very happy to look into these issues further if that would be of assistance to GE Free.

Yours sincerely



Victoria Casey
Barrister