



[2012] AATA 284

Division **GENERAL ADMINISTRATIVE DIVISION**

File Numbers **2012/0145**
2012/0177

Re **G E FREE NEW ZEALAND IN FOOD & ENVIRONMENT**

APPLICANT

And **FOOD STANDARDS AUSTRALIA NEW ZEALAND**

RESPONDENT

DECISION

Tribunal **The Hon. B Tamberlin, QC, Deputy President**

Date **11 May 2012**

Place **Sydney**

The applications for review by G E Free New Zealand are dismissed for want of jurisdiction.

.....[sgd].....

The Hon. B Tamberlin, QC, Deputy President

CATCHWORDS

PRACTICE AND PROCEDURE - Application for review - jurisdiction question - decisions in respect of which review is sought do not come within s 143 of the relevant act - no jurisdiction

LEGISLATION

Administrative Appeals Tribunal Act 1975

Food Standards Australia New Zealand Act 1991

Food Act 1981 (NZ)

New Zealand (Australia New Zealand Food Standards Code) Food Standards 2002

Australia New Zealand Food Standards Code

REASONS FOR DECISION

The Hon. B Tamberlin, QC, Deputy President

1. The issue is whether the Tribunal has jurisdiction pursuant to s 143(1)(b) or (c) of the *Food Standards Australia New Zealand Act 1991* (the Act) to hear applications for review of two decisions made by Food Standards Australia New Zealand (the Authority) to approve two genetically modified food lines. The decisions relate to soybean and corn.

AGREED STATEMENT OF FACTS

2. Parties have agreed on factual background in the following terms.
3. In Australia (and New Zealand), food is regulated by:
 - (a) the *Australia New Zealand Food Standards Code* (the Code)

- (b) the Commonwealth *Food Standards Australia New Zealand Act 1991* (the Act), which provides for the establishment of the Authority
 - (c) a treaty made by the Governments of Australia and New Zealand which establishes uniform standards-setting arrangements
 - (d) Australian State and Territory Food Acts, which give uniform legal effect to the Code by adopting the Code by reference
 - (e) The *Food Act 1981* (NZ) which provides for the making of New Zealand food standards by the New Zealand Government. Under the terms of the treaty New Zealand will make a standard in the same terms as the standard approved by the Authority unless New Zealand has notified its intention to opt-out. The provisions for opting-out are set out in Annex D to the treaty
4. Standard 1.5.2 of the Code which regulates the permission and conditions for the sale and use of foods produced using gene technology, including labelling and other information requirements. The Schedule to the Standard lists the foods produced, using gene technology, which are permitted for sale and use in food in Australia and New Zealand.

Application A1042 – Food derived from herbicide-tolerant Corn Line DAS-04278-9

5. On 21 January 2010, Dow AgroSciences Australia Ltd (Dow AgroSciences) lodged an application with the Authority to seek an amendment to Standard 1.5.2 of the Code to include a permission for food derived from herbicide-tolerant corn line genetically modified to provide resistance to broadleaf herbicides such as 2,4-D and other related chemicals.
6. The Authority accepted the application on 11 February 2010 under paragraph 26(1)(a) of the Act and decided that the application conferred an exclusive capturable commercial benefit on Dow AgroSciences. Fees were therefore payable under paragraph 146(6)(a) of the Act. The application was to be assessed

under the Major Procedure. Dow AgroSciences paid the required fee on 10 March 2010.

7. The Authority assessed the application under s 29 of the Act and called for public comment under s 44 of the Act from 15 December 2010 to 9 February 2011.
8. Following the call for public comment, the Authority prepared a draft amendment to Standard 1.5.2 under paragraph 30(1)(a) of the Act. Public comment was invited on 22 March 2011 for four weeks. Jon Muller of G E Free New Zealand made a submission on the draft variation.
9. The Food Standards Australia New Zealand Board decided on 4 August 2011 to approve the draft variation to Standard 1.5.2 under subparagraph 33(1)(a)(i) of the Act and that decision was notified to the then Australia and New Zealand Food Regulation Ministerial Council (Ministerial Council) on 18 August 2011 for its consideration.
10. The Ministerial Council subsequently advised the Authority on 6 October 2011 that it did not intend to request the Authority to review its decision.
11. The Authority registered the amendment to Standard 1.5.2 on the Federal Register of Legislative Instruments and also gazetted the amendment in both Australia and New Zealand on 13 October 2011 under s 92 of the Act. The amendment took effect on that date.
12. The New Zealand Minister for Food Safety subsequently gazetted an amendment (No. 40) to the New Zealand (Australia New Zealand Food Standards Code) Food Standards 2002 under s 11L of the *Food Act* 1981 (NZ) on 10 November 2011, to give effect to the amendment in New Zealand. The date of effect in New Zealand (28 days following gazettal) was 8 December 2011.

Application: A1046 – Food derived from Herbicide-tolerant Soybean Line DAS-68416-4

13. On 5 May 2010, Dow AgroSciences lodged an application with the Authority to seek an amendment to Standard 1.5.2 of the Code to include a permission for food derived from soybeans genetically modified to provide tolerance to the herbicides, 2,4-D and glufosinate ammonium.
14. The Authority accepted the application on 26 May 2010 under paragraph 26(1)(a) of the Act and decided that the Application conferred an exclusive capturable commercial benefit on Dow AgroSciences. Fees were therefore payable under paragraph 146(6)(a) of the Act. The application was to be assessed under the Major Procedure. Dow AgroSciences paid the required fee on 11 June 2010.
15. The Authority assessed the application under s 29 of the Act and called for public comment under s 44 of the Act from 14 February 2011 to 28 March 2011.
16. Following the call for public comment, the Authority decided to prepare a draft amendment to Standard 1.5.2 under paragraph 30(1)(a) of the Act. Public comment was invited on 6 July 2011 for four weeks. Jon Muller of G E Free New Zealand made a submission on the draft variation.
17. The Authority Board decided on 22 September 2010 to approve the draft variation to Standard 1.5.2 under subparagraph 33(1)(a)(i) of the Act and that decision was notified to the then Australia and New Zealand Food Regulation Ministerial Council (Ministerial Council) on 29 September 2011 for its consideration.
18. The Ministerial Council subsequently advised the Authority, on 10 November 2011, that it did not intend to request the Authority to review its decision.
19. The Authority registered the amendment to Standard 1.5.2 on the Federal Register of Legislative Instruments and also gazetted the amendment in both Australia and New Zealand on 17 November 2011 under s 92 of the Act. The amendment took effect on that date.

20. The New Zealand Minister for Food Safety subsequently gazetted an amendment (No. 41) to the New Zealand (Australia New Zealand Food Standards Code) Food Standards 2002 under s 11L of the *Food Act 1981 (NZ)* on 22 December 2011 to give effect to the amendment in New Zealand. The date of effect in New Zealand (28 days following gazettal) was 8 December 2011.

THE RELEVANT PROVISIONS

21. Section 143 of the Act is relevant in the following terms:
- (1) *Subject to the Administrative Appeals Tribunal Act 1975, application may be made to the Administrative Appeals Tribunal:*
- (a) *by an applicant for the development or variation of a standard, for a review of:*
- (i) *a decision by the Authority under paragraph 26(1)(b) to reject an application, other than a decision to reject the application because it does not comply with subsection 22(2); or*
- (ii) *a decision by the Authority under paragraph 30(1)(b) to reject an application; or*
- (iii) *a decision by the Authority under paragraph 47(1)(b) to reject an application, other than a decision to reject the application because it does not comply with subsection 22(2); or*
- (iv) *a decision by the Authority under paragraph 96(1)(b) to reject an application; or*
- (b) *by a person whose interests are affected by one of the following decisions, for a review of that decision:*
- (i) *a decision by the Authority under subsection 56(1) to abandon a proposal;*
- (ii) *a decision by the Authority under paragraph 60(b) to abandon a proposal;*
- (iii) *a decision by the Authority under paragraph 96(2)(b); or*
- (c) *for review of a decision under section 112 not to do something.*
- (2) *In subsection (1), decision has the same meaning as in the Administrative Appeals Tribunal Act 1975 (emphasis added).*

REASONING

22. Under s 25(4) of the *Administrative Appeals Tribunal Act 1975* (the AAT Act) the Tribunal has power to review any decision in respect of which application is

made to it under any enactment. In the present case the power of review is found in s 143 of the Act.

23. The Tribunal is of opinion that the decisions in respect of which review is sought are not within s 143 of the Act and accordingly there is no jurisdiction.
24. There is no decision by the Authority under s 143(1)(a) because that provision concerns applications made by Dow AgroSciences for the development or variation of the standard. In this case, the Applicant, G E Free New Zealand, is not an applicant for development or variation of a standard but claims to be an interested third party.
25. Nor does the Tribunal have jurisdiction by reason of s 143(1)(b) because there is no decision by the Authority to abandon the applications under any of the specified subsections.
26. G E Free New Zealand submits that the appeal is within s 143(1)(c) of the Act. It says that the Authority did not follow its legislative responsibilities under ss 18 and 22 of the Act in that it failed to consider vital relevant information with respect to the proposals. The Authority and the Ministerial Council it is said did not consider submissions detailing the absence of proper scientific risk analysis on the effects of genetically modified foods and in failing to take account of relevant studies. It also submits that the Authority is the first Food Standards Authority in the world to receive such applications and that the foods have never been eaten before. There is therefore no data provided on how genetically modified foods would affect public health because there are no relevant animal or human feeding studies.
27. G E Free New Zealand also submits that there has been no possibility of duplication of work already done or process gone through by another Government Agency within the meaning of s 112 because the Authority was the first agency to consider the approval. Accordingly, it concludes that where there is insufficient information the Authority is required to take all reasonable steps to obtain the

necessary information for a more objective risk analysis for public health study and it has failed to do so.

28. The basis for this submission is s 112 which relevantly provides:

112(1) The Authority may decide, in writing, not to do something that it is required to do under this Part in relation to an application made under s 22 or a proposal prepared under s 55, if the Authority considers that doing the thing would be a duplication of work already done or a process already gone through by another government agency.

29. A decision under s 112(c) is reviewable in this Tribunal because the application is for a review of a decision not to do something, namely a decision not to take into account that there is a lack of sufficient information.

30. In the opinion of the Tribunal s 112(1) does not apply because G E Free New Zealand has not established that the Authority considers or ought to have concluded that there is any duplication of work already done or a process has been previously gone through by another Government Agency. The Tribunal considers that s 112(1)(c) does not apply. It has not been established that the Authority has failed to take into account or consider relevant sufficient information required to make a decision.

31. There is no evidence that the Authority has decided not to have regard to any submissions. It has not accepted the submissions but that does not mean that it has failed to have regard to them as required by step seven of the table to s 21 of the Act. The Applicant concedes that there has been no duplication of work already done or process gone through by another government agency because it is the first Food Standards Authority in the world to receive these corn and soy food applications and since these foods have never been eaten before there is no data provided on how the foods would affect public health.

32. Accordingly, the Tribunal concludes that there is no jurisdiction to review the decisions in this matter under s 143 of the Act and hence the application for review must be dismissed for want of jurisdiction.

33. An alternative and independent reason advanced by the Authority for dismissal of the application is that each of the decisions sought to be challenged are decisions to approve a draft high level health claims variation. Under s 79 of the Act if the Authority approves a draft high level claims variation it must notify the Ministerial Council. Under s 84 the Council must notify the Authority within 60 days after notification that it requires the Authority to review the draft or it must inform the Authority that the Council does not intend to request a review of the draft.
34. If the Council informs the Authority that the Council does not intend to request a review then the Authority must publish a notification that the draft will come into effect on a certain day.
35. On the other hand, if the Ministerial Council requests a review by the Authority then further steps must be taken under ss 86-91 of the Act before the decision has legal effect.
36. Accordingly, the view of the Tribunal is that the decision sought to be reviewed in the present matter, having been made before consideration by the Ministerial Council, lacks the necessary operative effect and immediacy to constitute a reviewable decision.
37. The Authority also raised the issue as to the locus standi of G E Free New Zealand for review to commence these proceedings on the ground that it has not been demonstrated that G E Free New Zealand is a person or a body whose interests are “affected” by the decision in a substantive and significant way. It is submitted that before the challenged decisions affect the interests of the New Zealand body, further necessary legislative or executive steps have to be taken to implement the decisions so that they apply in New Zealand before G E Free New Zealand is affected.

38. In view of the conclusions which are reached in relation to the absence of jurisdiction on other grounds set out above, it is not necessary, nor appropriate, to decide this further ground of objection.

CONCLUSION

39. The decision of the Tribunal is that applications for review by G E Free New Zealand are dismissed for want of jurisdiction.

I certify that the preceding 39 (thirty nine) paragraphs are a true copy of the reasons for the decision herein of The Hon. Brian Tamberlin QC, Deputy President.

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Associate

Dated 11 May 2012

Date of hearing	29 February 2012
Counsel for the Applicant	Ms C. Bleakley
Solicitors for the Applicant	G E Free New Zealand Pty Ltd
Counsel for the Respondent	Mr P. May, Ms N. Power
Solicitors for the Respondent	Food Standards Australia New Zealand