

SUBMISSION ON THE QUESTION OF JURISDICTION

Regarding the application under the Administrative Appeals Tribunal Act 1975 (“the AAT Act”) by GE Free NZ in Food and Environment Inc. (“the Applicant”).

9 March, 2012

Purpose: This submission is a response to a request made during a conference call on 29th February, 2012, between the Administrative Appeals Tribunal (AAT) Deputy President Tamberlin (“the Tribunal”), Food Safety Australia and New Zealand (FSANZ) (“the Respondent”), and GE Free NZ in Food and Environment Inc. (“the Applicant”). The Applicant makes the following arguments in response to the Respondent’s Submissions (represented in grey text box) on the Question of Jurisdiction. There is no New Zealand court to which the New Zealand public can appeal under either the mutual Trans-Tasman recognition Arrangement or the Food Standards Australia New Zealand Act, and it is under section 143 (1) (c) of the FSANZ Act that this application to the Administrative Appeals Tribunal is made.

About: GE Free NZ in Food and Environment is an Incorporated Society, established 1998. It is a non-political voluntary community organisation providing information to its members and the public on issues concerning genetic modification. It also participates in National and International fora and educational seminars and has representation on government committees. GE Free NZ membership includes Australian citizens and works closely with similar organisations in Australia.

Applications A1042 and A1046 made under Standard 1.5.2

The issue of the main proceedings relate to Applications A1042 and A1046 made under Standard 1.5.2. Standard 1.5.2 and consumer information on GM Food Standards takes a precautionary approach to GM food application as stated in the consumer information guidelines. GM food is always processed as a major variation of a food regulatory measure under section 25 (1)(b) of the Food Standards Australia New Zealand Act 1990 (“the FSANZ Act”). This is because it requires scientific and technical complexity involving a mandatory pre-market risk review that includes a food safety assessment, individual case-by-case assessments, and allergenicity and toxicity studies (Subdivision F: Section 42). We take this appeal under section 27 of the AAT Act to review the decisions to approve the applications under section 143 (1)(c) of the FSANZ Act. The Authority has failed to uphold the principles and processes required for a major variation in regards to the two applications. This poses a risk to public health safety and the provision of adequate information to make an informed choice as to the food they consume. This directly affects their interests, which are detailed in the **Summary** of our letter to the Ministerial Council.

The Respondent argues:

1. Section 25 of the AAT Act provides the Administrative Appeals Tribunal (the AAT) with the power to review certain decisions. Under paragraph 25(1)(a), an enactment may provide that applications may be made to the Tribunal for review of decisions made in the exercise of powers conferred by that enactment. Subsection 25(4) provides that the AAT has power to review any decision in respect of which application is made to it under any enactment.
(Respondent's Submissions on the Question of Jurisdiction, 2 March, 2012)

GE Free NZ (the Applicant) replies:

We agree.

The Respondent argues:

2. Section 27 of the AAT Act specifies the persons who may apply to the AAT for review of a decision. Subsection 27(1) states:
Where this Act or any other enactment (other than the Australian Security Intelligence Organisation Act 1979) provides that an application may be made to the Tribunal for a review of a decision, the application may be made by or on behalf of any person or persons (including the Commonwealth or an authority of the Commonwealth or Norfolk Island or an authority of Norfolk Island) whose interests are affected by the decision.
(Respondent's Submissions on the Question of Jurisdiction, 2 March, 2012)

GE Free NZ (the Applicant) replies:

We agree.

The Respondent argues:

3. There are therefore two criteria for an applicant seeking review of a decision by the AAT to satisfy:
 - i. the decision must be reviewable under an enactment; and
 - ii. the applicant's interests must be affected by the decision.*(Respondent's Submissions on the Question of Jurisdiction, 2 March, 2012)*

GE Free NZ (the Applicant) replies:

We agree.

The Respondent argues:

4. The decisions which are the subject of this appeal are both decisions by the Authority to 'approve a draft variation' under subsection 33(1) of the Food Standards Australia New Zealand Act 1991 (the FSANZ Act).
(Respondent's Submissions on the Question of Jurisdiction, 2 March, 2012)

GE Free NZ (the Applicant) replies:

We disagree.

This appeal is about section 143 (1)(c) & 112 (1) of the FSANZ Act not section 33(1).

Section 33(1) is reviewable by the Ministerial Council. That is why we wrote to the Ministerial Council asking for a review of the recommendation to approve the variation of a food regulatory measure made under 33(1), as it was not consistent with the objectives of the legislation principles the Authority follows. The letter of appeal asked all Member State Ministers to review the FSANZ Authority recommendation to approve the GM 2,4-D corn (A1042), under the Agreement between the Government of Australia and the Government of New Zealand concerning a joint Food Standards System (5.12.1995). (Annex A (1) (a) (b) (c) & (e)), Annex C (1) (b) (c) (d) (e)). The letters from Kate Wilkinson to consider our application were made whilst the draft food regulatory measure or draft variation was still being assessed. We had no reply from the Ministerial Council and received no written reason as to how they had addressed our concerns or any scientific risk analysis to justify their decision to turn down our appeal application.

The Ministerial Council was the first avenue for appeal as the application was still under review.

The Respondent argues:

5. A decision under subsection 33(1) is not a reviewable decision under the FSANZ Act. (*Respondent's Submissions on the Question of Jurisdiction, 2 March, 2012*)

GE Free NZ (the Applicant) replies:

We agree.

The Respondent argues:

6. Section 143 of the FSANZ Act identifies which decisions under the FSANZ Act are reviewable by the AAT. The decision to approve a draft variation is not one of the decisions listed under section 143.

(*Respondent's Submissions on the Question of Jurisdiction, 2 March, 2012*)

GE Free NZ (the Applicant) replies:

We disagree; see points 7, 8, 9.

The Respondent argues:

7. At the interlocutory hearing, the Applicant argued that the AAT had jurisdiction to review the decisions by virtue of paragraphs 143(1)(b)(ii) and 143(1)(c) of the FSANZ Act. However, neither of these paragraphs refers to a decision by the Authority to approve a draft variation.

Paragraph 143(1)(b)(ii) of the FSANZ Act.

(*Respondent's Submissions on the Question of Jurisdiction, 2 March, 2012*)

GE Free NZ (the Applicant) replies:

We disagree.

Under section 143 (1) (c) the Authority did not follow legislated responsibilities and chose not to do something that it is required to under section 18 (1) (2) (a) & (4) and 22 of the FSANZ Act. It would have been premature to appeal straight to the AAT before going to the Ministerial Council on this matter.

The Respondent argues:

8. Paragraph 143(1)(b)(ii) refers to a decision by the Authority under 3 paragraph 60(b) to abandon a proposal. The reference to a 'proposal' in section 143 and paragraph 60(b) means a proposal of the Authority to develop or vary a food regulatory measure in accordance with section 55 of the FSANZ Act.
(Respondent's Submissions on the Question of Jurisdiction, 2 March, 2012)

GE Free NZ (the Applicant) replies:

We agree.

The Respondent argues:

9. A letter from the applicant to the Australia and New Zealand Food Regulation Ministerial Council (the Council), or to the Authority, requesting action in relation to an application is not a 'proposal' for the purposes of section 143 of the FSANZ Act.
(Respondent's Submissions on the Question of Jurisdiction, 2 March, 2012)

GE Free NZ (the Applicant) replies:

We disagree.

'Proposal' is not defined under the FSANZ ACT. Webster's Dictionary defines "proposal" as a request or application. The Ministerial Council decided not to refer our request to review the Authority decision back to the FSANZ Authority. This we deem to have abandoning the proposal. Under the Joint Food Standards Government Agreement community stakeholders are equal participants in the consultation process. (AANZJFSS, Annex B (4))

The refusal to take the pre-market scientific safety assessment steps that the FSANZ Authority have followed in prior major procedure applications under FSANZ Act section 42 and further defined in FSANZ Regulations 1994, namely animal feeding tests, that are necessary in the light of insufficient information for an objective scientific risk analysis to protect human life or health (FSANZ Act 18 (1), (2)(a), & (4)). The lack of Natural Justice to protect our health and have information to make choices has affected our ability to make informed choices, thereby affecting our interests.

The Respondent argues:

10. The decision of the Authority to approve a draft variation under subsection 33(1) cannot be considered a decision to abandon a proposal in accordance with section 143.
(Respondent's Submissions on the Question of Jurisdiction, 2 March, 2012)

GE Free NZ (the Applicant) replies:

We agree.

The Respondent argues:

11. Paragraph 143(1)(c) refers to decisions under section 112 of the FSANZ Act.
(Respondent's Submissions on the Question of Jurisdiction, 2 March, 2012)

GE Free NZ (the Applicant) replies:

We agree.

The Respondent argues:

12. Section 112 allows the Authority to decide, in writing, not to do something that it is required to do under Part C of the FSANZ Act in relation to an application or proposal, 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.
(*Respondent's Submissions on the Question of Jurisdiction, 2 March, 2012*)

GE Free NZ (the Applicant) replies:

We agree.

The Respondent argues:

13. The decision to approve a draft variation under subsection 33(1) cannot be considered a decision not to do something under section 112. (*Respondent's Submissions on the Question of Jurisdiction, 2 March, 2012*)

GE Free NZ (the Applicant) replies:

We agree, however this is not an appeal under section 33 (1).

This is not an appeal against subsection 33(1), it is an appeal on Section 143 (1) (c)/112 (1) of the FSANZ Act. The Authority decision not to do something that it is required to do in relation to section 22 (2) (c), (d) & (e). This led to the absence of vital information when the applications A1042 and A1046 procedures were developed for processing as set out in section 21 Step 1 of the FSANZ Act. Public submissions were made under section 21, step 7 & 9. The appeal to the Ministerial Council was made under step 9/10. The Appeal to review the decision AAT was made because the FSANZ Authority and Ministerial Council chose to not consider our submissions detailing the absence of scientific risk analysis on the whole GM foods namely feeding studies. The failure in due process started in section 22 and carried over into section 21. We refer you to our appeal letter to the Ministerial Council about the concerns we had raised.

FSANZ is the first Foods Standards Authority in the World to receive the 2,4-D herbicide resistant GM corn and soy food applications. (A1042, A1046).

These foods have never been eaten before and there is no data provided on how the GM foods will affect public health, as there are no animal or human feeding studies (Dow Agro-Sciences Application DAS-40278-9, p. 113 and DAS-68416-4, p. 148).

There has been no possibility of duplication of work already done or process gone through by another Government Agency, as FSANZ was in the group of the first agencies to consider this approval. In such cases where there is insufficient information, the Authority is required in the absence of any scientific risk data (feeding studies) to take all reasonable steps to obtain the information necessary for a more objective risk analysis for public health safety (FSANZ Act 18 (4)).

This is still the case, as of Feb 23rd 2012 GE Free NZ received a letter from the USDA to saying there are no animal feeding data conducted on these GM foods. FSANZ has moved away from accepted expert due process, as prior GM applications have provided data on animal feeding studies.

The Respondent argues:

14. Even if the decisions by the Authority to approve the draft variations to Standard 1.5.2 were reviewable decisions under an enactment, the AAT would not have jurisdiction to review them in this case because the decisions did not affect the interests of the applicant, an organisation incorporated in New Zealand. This is because a draft variation to a food regulatory measure does not automatically become law in New Zealand once a decision has been made by the Authority to approve it.
(Respondent's Submissions on the Question of Jurisdiction, 2 March, 2012)

GE Free NZ (the Applicant) replies:

We disagree. See our response to point 17. These applications are no longer draft variations but have been passed into law in Australia and New Zealand.

Australia New Zealand has a joint food assessment that is carried out in Australia on behalf of New Zealand. This Trans Tasman understanding legislated under the "Agreement Between The Government Of Australia The Government Of New Zealand Concerning A Joint Food Standards System"

New Zealand is considered a "member state" in relation to the agreement between the Government of Australia and the government of New Zealand concerning a Joint Food Standards system.

Article 2 outlines the joint system for the development and promulgation of food standards, and the facilitation and sharing of information between the member states on food matters. The Member States are given a scope that includes the joint assessment and co-operation in relation to expertise between both countries of GM foods.

Consultation between Member States (Article 4, (4) (5)) is seen to have equal weight as that of industry, government and community stakeholders in both Australia and New Zealand (Annex B (4)), in the joint development of standards that are introduced by both Countries and sets out clear guidelines for when a Member State wants to make a variation to the standard. There is specific mention of the inability of a Member State to amend a food standard falling within the scope of this Agreement. (Article 5, (3))

The Respondent argues:

15. Rather, section 34 of the FSANZ Act requires the Authority to, within 10 business days of the approval, give the Council a written notification of the approval. Once it has been notified, the Council has the power to do one of two things. It can request the Authority to review the draft, or it can inform the Authority that the Council does not intend to request a review of the draft (section 84 of the FSANZ Act). It is not until the Council has made a decision to not request a review of the draft that the Authority is able to publish the draft in the Australian and New Zealand Gazettes under section 92 of the FSANZ Act. In Australia, the variation would then take effect on the day specified in the Gazette notification.
(Respondent's Submissions on the Question of Jurisdiction, 2 March, 2012)

GE Free NZ (the Applicant) replies:

We agree partially; the decisions to approve the applications have been enacted and we refer you to the answer in points 14 & 17.

The Respondent argues:

16. However, in New Zealand, a variation does not take effect upon its gazettal by the Authority. Instead, in order for the variation to become law, the New Zealand Minister for Food Safety is required to take the further step of making an amendment to the New Zealand (Australia New Zealand Food Standards Code) Food Standards 2002 under section 11L of the *Food Act 1981*. If the Minister makes an amendment under section 11L, the variation will have effect 28 days later. The amendment is subject to the New Zealand *Regulations (Disallowance) Act 1989*.
(Respondent's Submissions on the Question of Jurisdiction, 2 March, 2012)

GE Free NZ (the Applicant) replies:

We agree; however, the decisions to approve the applications have been enacted and we refer you to the answer in points 14 & 17.

The Respondent argues:

17. Because the respondent's decisions to approve the draft variations did not, in and of them, result in a change to the law in New Zealand, the decisions could not affect any interests of the applicant.
(Respondent's Submissions on the Question of Jurisdiction, 2 March, 2012)

GE Free NZ (the Applicant) replies:

This is an error of fact –

The Hon Kate Wilkinson tabled Amendment 40 that approved an amendment to the Food Standards Code under section 11F of the Food Act 1981 to permit GM Corn line DAS-40278-9 entry into the food chain that would take effect on the 8th December 2011. It was also tabled in the Australian Senate on the 31/10/11. Amendment 41 approving soybean line DAS-68416-4 into the food chain on the 19th December to take effect on the on 19th January 2012. This was also tabled in the Senate on the 21/11/11.

Summary of the Applicant's submission:

We are taking the appeal under s 143 (1)(b)(i) and s 143(c). The process around the approval of these applications has not been observed as required by the FSANZ Act rules and regulations and Joint Standards Agreement between both Australia and New Zealand. The failure to follow due process by not requiring the required scientific and technical risk analysis on a GM food never before been eaten by the public, which legislation recognizes may have health risks, affects the outcome of health assessments. Further, FSANZ has been unable to rely on a scientific risk assessment informed by scientific and technical feeding data that has been undertaken by other jurisdictions because there have been no prior international food agency approvals. The issues of GM foods are still very controversial and many consumers would like to avoid them. This absence of information affects the interest of people from all Member States and our ability to obtain adequate information enabling us to make informed choices about the safety of the food and its effects on our health.

Attachments:

1. GE Free New Zealand in Food and Environment Inc., Letter to Ministers for Food Regulation, 20 September 2011
2. Agreement Between the Government of Australia and the Government of New Zealand Concerning a Joint Food Standards Systems, see:
http://www.foodsafety.govt.nz/elibrary/search.htm?audience=industry&keywords=agreement+between+government+of+australia+and+government+of+new+zealand+establishing+system&publication_type= [retrieved 8 March, 2012]
3. Wilkinson, K., Letter to Jon Muller, 31 August 2011 4. Food Standards Australia New Zealand Regulations 1994, *Statutory Rules 1994 No. 286 as amended* made under the *Food Standards Australia New Zealand Act 1991*, 1 October 2007
5. United States Department of Agriculture, Letter to Claire Bleakly from Director for Freedom of Information & Privacy Act Tonya Woods, 23 February 2012
6. Standard 1.5.2 Food Produced Using Gene Technology
7. Genetically Modified (GM) Food Standards Consumer Information
www.foodstandards.gov.au/consumerinformation/gmfoods/
8. New Zealand (Australia New Zealand Food Standards Code) Food Standards 2002, Amendment No. 40. Retrieved from http://www.parliament.nz/en---NZ/PB/Presented/Papers/2/e/e/50DBHOH_PAP22423_1---New---Zealand---Australia---New---Zealand---Food---Standards.htm
9. Food Standards Australia New Zealand, *Food Standards Notification Circular*, 18 October 2011
10. Food Standards (Application A1042 - Food derived from Herbicide - tolerant Corn Line DAS - 40278 - 9) Variation. 11 November 2011. Retrieved from <http://www.comlaw.gov.au/Details/F2011L02065>
11. Food Standards (Application A1046 - Food derived from Herbicide - tolerant soybean Line DAS - 68416-4) Variation. 11 November 2011.
<http://www.comlaw.gov.au/Details/F2011L02370>
12. Dow Agro Sciences Application to amend the Food Standards Code DAS- 40278-9 January 2010
13. Dow Agro Sciences Application to amend the Food Standards Code DAS - 68416-4 December 2010

New Zealand Parliament - New Zealand (Australia New Zealand Food Standards Code) Food Standards 2007, Amendment No 40, issued under section 11L of the Food Act 1981, effective 8 December 2011, dated 31 October 2011 Mozilla Firefox

http://www.parliament.nz/en-NZ/PB/Presented/Papers/2/4/5/50C8B3KH_PAP22423_1-New-Zealand-Australia-New-Zealand-Food-Standards.htm

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Food Standards (Application A1042 - Food derived from Herbicide-tolerant Corn Line DAS-40278-9) Variation

- F2011L02065

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Food Standards as made	Made
This instrument amends Food Standards in the Australia New Zealand Food Standards Code.	Registered
Administered by: Health and Ageing	Tabled HR
	Tabled Senate

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FOOD STANDARDS
Australia New Zealand
To Mana Kōwhiri Kōi - Awhiriwhiri me Awhiriwhiri

Food Standards (Application A1042 - Food derived from Herbicide-tolerant Corn Line DAS-40278-9) Variation

The Board of Food Standards Australia New Zealand gives notice of the making of this variation under section 92 of the Food Standards Australia New Zealand Act 1991. The Standard commences on the date specified in clause 3 of this variation.

Dated 7 October 2011



Standards Management Officer
Delegate of the Board of Food Standards Australia New Zealand

- 1 **Name**
This instrument is the Food Standards (Application A1042 - Food derived from Herbicide-tolerant Corn Line DAS-40278-9) Variation.
- 2 **Variation to Standards in the Australia New Zealand Food Standards Code**
The Schedule varies the Standards in the Australia New Zealand Food Standards Code.
- 3 **Commencement**

Done

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New Zealand Parliament - New Zealand (Australia New Zealand Food Standards Code) Food Standards 2002, Amendment No 41, issued under section 11L of the Food Act 1981, effective 19 January 2012, dated 19 December 2011 - Mozilla Firefox

http://202.68.89.03/en-AU/PB/PresentedPapers/1/3/50006CH_PAP2516_1-New-Zealand-Australia-New-Zealand-Food-Standards.htm

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Food Standards (Application A1046 - Food derived from Herbicide-tolerant Soybean Line DAS-68416-4) Variation - F2011L02370

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Food Standards as made
This instrument amends Food Standards in the Australia New Zealand Food Standards Code.
Administered by: Health and Ageing

Made: 11 Nov 2011
Registered: 15 Nov 2011
Tabled HR: 21 Nov 2011
Tabled Senate: 21 Nov 2011

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FOOD STANDARDS
Australia New Zealand
Te Mana Kaitiaki Kāi - Aotearoa ki te Atahura

Food Standards (Application A1046 - Food derived from Herbicide-tolerant Soybean Line DAS-68416-4) Variation

The Board of Food Standards Australia New Zealand gives notice of the making of this variation under section 92 of the Food Standards Australia New Zealand Act 1991. The Standard commences on the date specified in clause 3 of this variation.

Dated 11 November 2011

CAH
Standards Management Officer
Delegate of the Board of Food Standards Australia New Zealand

1 Name
This instrument is the Food Standards (Application A1046 - Food derived from Herbicide-tolerant Soybean Line DAS-68416-4) Variation

2 Variation to Standards in the Australia New Zealand Food Standards Code

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