

## RESPONDENT'S SUBMISSIONS

### **The Administrative Appeals Tribunal Act 1975 (the AAT Act) - Jurisdiction**

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.
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.*

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.

### **Reviewable under an enactment**

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).
5. A decision under subsection 33(1) is not a reviewable decision under the FSANZ Act.
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.
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

8. Paragraph 143(1)(b)(ii) refers to a decision by the Authority under 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. Only the Authority can prepare a proposal. The FSANZ Act provides an alternative

mechanism for any other body or person to apply for a variation to the Code. This alternative mechanism is the application process, beginning at section 22 of the FSANZ Act.

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 the FSANZ Act.
10. The decision of the Authority to approve a draft variation under subsection 33(1) cannot be considered a decision to abandon a proposal.

#### Paragraph 143(1)(c) of the FSANZ Act

11. Paragraph 143(1)(c) refers to decisions under section 112 of the FSANZ Act.
12. Section 112 allows the Authority to decide, in writing, not to do something that it is required to do under Part 3 of the FSANZ Act in relation to an application made under section 22, or a proposal prepared under section 55 of the FSANZ Act, 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. It is clear that the reference to a proposal refers to a proposal prepared under section 55.
13. The Authority's decision to approve a draft variation under subsection 33(1) cannot be considered a decision not to do something under section 112.
14. Further, section 112 was not invoked by the Authority in the assessment of either application A1042 or A1046, or in relation to its decision to approve either draft variation to Standard 1.5.2. Rather, the Authority did everything it was required to do under Part 3 of the FSANZ Act in relation to these applications.

#### **Applicant's interests**

15. 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 variation of a food regulatory measure does not automatically become law in New Zealand when a decision has been made by the Authority to approve it.
16. Rather, section 34 of the FSANZ Act requires the Authority to, within 10 business days of the approval, give the Australia New Zealand Food Regulation Ministerial Council (the Council—a body established by the Food Regulation Agreement and defined in section 4 of the FSANZ Act) written notification of the approval of the draft standard or draft variation. If it has been notified, the Council can 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 standard or draft variation in the Australian and New Zealand Gazettes, to comply with the publication requirements in

section 92 of the FSANZ Act. In Australia, the variation would then take effect on the day specified in the Gazette notification—section 93.

17. However, in New Zealand, a variation does not take effect on its gazettal by the Authority. Instead, in order for the variation to become law, the New Zealand Minister for Food Safety is required to make an amendment of 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*.
18. Because the respondent's decisions to approve the draft variations did not, in and of themselves, result in a change to the law in New Zealand, the decisions could not affect any interests of the applicant.