FEDERAL COURT OF AUSTRALIA

Gene Ethics Pty Ltd v Food Standards Australia New Zealand [2012] FCA 1137

Citation:	Gene Ethics Pty Ltd v Food Standards Australia New Zealand [2012] FCA 1137
Parties:	**GENE ETHICS PTY LTD (ACN 104 140 918) and THE SAFE FOOD INSTITUTE LTD (ACN 145 106 547) v FOOD STANDARDS AUSTRALIA NEW ZEALAND**
File number:	VID 835 of 2011
Judge:	**KENNY J**
Date of judgment:	19 October 2012
Catchwords:	**ADMINISTRATIVE LAW** — Judicial review of decision under the *Food Standards Australia New Zealand Act 1991* (Cth) — Approval of draft variation to Standard 1.5.3 of the *Australia New Zealand Food Standards Code* — Authority proposed additional amendments not requested in s 22 application — Extent to which s 30 draft variation must be responsive to application — Relevance of separate statutory pathway allowing Authority to prepare proposals on its own initiative — Authority not prevented from adding unrequested amendments — Sufficiency of s 31 public notice — Whether notice included a copy of the draft variation or stated how one could be obtained — Whether notice included a summary of the results of authority's assessment of the application or stated how one could be obtained — Relevance of potential for notice to mislead — Notice sufficient.
Legislation:	*Food Standards Australia New Zealand Act 1991* (Cth) *Administrative Decisions (Judicial Review) Act 1977* (Cth) *Judiciary Act 1903* (Cth) *Federal Court of Australia Act 1976* (Cth) *Acts Interpretation Act 1901* (Cth)
Cases cited:	*Cement Australia Pty Ltd v Australian Competition and Consumer Commission* (2010) 187 FCR 261 *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 *Nicholls v Australian Federal Police* (2009) 192 A Crim R 425 *Project Blue Sky Inc v Australian Broadcasting Authority*

(1998) 194 CLR 355
Momcilovic v The Queen (2011) 245 CLR 1
Roche Products Pty Ltd v National Drugs and Poisons Schedule Committee (2007) 163 FCR 451
RG Capital Radio Ltd v Australian Broadcasting Authority (2001) 113 FCR 185
Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321
Australian Conservation Foundation Inc v Commonwealth (1980) 146 CLR 493
Onus v Alcoa of Australia Ltd (1981) 149 CLR 27
Shop Distributive and Allied Employees Association v Minister for Industrial Affairs (SA) (1995) 183 CLR 552
Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd (1998) 194 CLR 247
Edwards v Santos Ltd (2011) 242 CLR 421
Big Country Developments Pty Ltd v Australian Community Pharmacy Authority (1995) 60 FCR 85
Sinclair v Mining Warden at Maryborough (1975) 132 CLR 473
Australian Institute of Marine and Power Engineers v Secretary, Department of Transport (1986) 13 FCR 124
Australian Conservation Foundation v Forestry Commission (1988) 19 FCR 127
United States Tobacco Co v Minister for Consumer Affairs (1988) 20 FCR 520
Alphapharm Pty Ltd v SmithKline Beecham (Australia) Pty Ltd (1994) 49 FCR 250

Date of hearing:	14 November 2011
Date of last submissions:	24 November 2011
Place:	Melbourne
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	143
Counsel for the Applicants:	Mr T V Hurley (Pro Bono)
Solicitor for the Applicants:	Shayne Daley and Associates
Counsel for the Respondent:	Mr C Horan
Solicitor for the Respondent:	Clayton Utz

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION **VID 835 of 2011**

BETWEEN:	**GENE ETHICS PTY LTD (ACN 104 140 918)** **First Applicant**
	THE SAFE FOOD INSTITUTE LTD (ACN 145 106 547) **Second Applicant**
AND:	**FOOD STANDARDS AUSTRALIA NEW ZEALAND** **Respondent**

JUDGE: **KENNY J**
DATE OF ORDER: **19 OCTOBER 2012**
WHERE MADE: **MELBOURNE**

THE COURT ORDERS THAT:

1. The applicants have leave to amend their application for an order of review in the terms of paragraph [1A] on page 2, paragraph [(d)] on page 4, paragraph [1A] with particulars on pages 4–5, and paragraph [1A] on pages 5–6 of their proposed amended application. Leave to amend is not otherwise granted.

2. The application is dismissed.

3. On or before 4:30 pm on 26 October 2012, the parties file any submissions on costs that they wish to make, having regard to the reasons for judgment delivered today.

Note: Entry of orders is dealt with in Rule 39.32 of the Federal Court Rules 2011.

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
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AND:	**FOOD STANDARDS AUSTRALIA NEW ZEALAND** **Respondent**

JUDGE:	**KENNY J**
DATE:	**19 OCTOBER 2012**
PLACE:	**MELBOURNE**

REASONS FOR JUDGMENT

INTRODUCTION

1 This is an application for judicial review of decisions made by Food Standards Australia New Zealand ("the Authority") on 22 June 2011 under the *Food Standards Australia New Zealand Act 1991* (Cth) ("the Act" or "the FSANZ Act"). The application is made under ss 5 and 6 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ("the ADJR Act") and s 39B of the *Judiciary Act 1903* (Cth) ("the Judiciary Act"). For the reasons stated below, I would dismiss the application on the basis that, although Notification Circular [5-11] was apt to mislead, it nonetheless conformed to the requirements of the Act.

2 The applicants seek review of the decision made by the Authority to approve a draft variation to Standard 1.5.3 (Irradiation of Food) of the Australia New Zealand Food Standards Code ("Standard 1.5.3") under s 33(1) of the Act; or alternatively, the decision made by the Authority on the same day to notify approval to the Australia and New Zealand Food Regulation Ministerial Council ("the Ministerial Council") under s 34(1)(a)(i) of the Act ("the challenged decisions"). The Authority sought to uphold the challenged decisions.

3 In their application as originally formulated, the applicants sought orders under s 16(1)(a) and (b) of the ADJR Act. In the alternative, under the Judiciary Act, the applicants

sought a constitutional writ to restrain the Authority from proceeding further with its proposed amendment to Standard 1.5.3. The applicants also sought declaratory relief that the draft variation was not notified as required by s 31 of the Act and, in consequence, the Authority's decision of 22 June 2011 was unlawful.

4 The applicants gave the following particulars of their claim that, in making the challenged decisions, the Authority failed to observe the procedures required by law to be observed (within the meaning of s 5(1)(b) of the ADJR Act):

> (a) The purported notice given by the respondent of the draft variation that was posted on its internet website on 15 March 2011 was not notice to the public as required by s 31(1) and s 7(a) of the FSANZ Act and such notice has not been given.
>
> (b) The purported notice of the draft variation under s 31(1) of the FSANZ Act of 15 March 2011 did not include a summary of the results of the respondent's assessment of the application as made by the Queensland Department of Primary Industries and Fisheries to include persimmons in the list of foods in the table to Cl 4 of Standard 1.5.3 that required the other major amendment of the Food Standard other than to include persimmons.
>
> (c) The purported notice of the draft variation under s 31(1) of the FSANZ Act failed to properly describe and, or, [sic] obfuscated the description of the application as amended that the respondent was processing and did not give notice of the matters in subsection 31(2) of the FSANZ Act as required by s 31(1) of that Act. In particular the notice failed to give a summary as required by s 31(2)(b)(ii) of the respondent's assessment of the application and why it called for an amendment of the Food Standard.

5 As the particulars indicated, the challenged decisions related to an application made to the Authority by the Queensland Department of Primary Industries and Fisheries ("QDPIF"). The Court was informed that the QDPIF had been notified of this proceeding and did not wish to participate in it.

6 The applicants relied on the affidavits of Andrew Scott Kinnear sworn on 27 July 2011 and Robert Errol Phelps sworn on 28 July 2011. The Authority relied on the affidavit of its Chief Executive Officer, Stephen Donald McCutcheon, affirmed on 7 October 2011. There was no cross-examination.

7 At the hearing, all parties were represented by counsel. The applicants were represented by pro bono counsel.

APPLICATION TO AMEND

8 At the conclusion of the hearing, the applicants indicated that they would seek leave to amend their original application. A proposed amended application for an order of review was filed shortly after the hearing.

9 By their proposed amended application, the applicants sought to provide the following further particulars of the Authority's alleged failure to comply with the procedures that the law required to be followed.

> (d) On 3 March 2011 the respondent accepted a draft variation of Food Standard 1.5.3 under s 30(1)(a) in Part 3 Div 1 of the FSANZ Act that contained a proposal for a variation of a food standard prepared by the respondent on its own initiative and in addition to responding to the application for irradiation of persimmons being matters that could only be considered under Part 3 Div 2.
>
> (e) On 3 March 2011 the respondent accepted a draft variation of Food Standard 1.5.3 under s 30(1)(a) in Part 3 Div 1 of the FSANZ Act that contained a major variation of a food standard (as described in Part 3 Division 1 Subdivision F) and that (if it was not properly considered under Part 3 Division 2 Part F) should have been considered under Part 3 Division 1 Subdivision F and not [under] the general procedure in Part 3 Division 1 Subdivision C as announced on 12 January 2010 in the notice under s 28(2)(f).
>
> (f) The respondent continued to process the application for the irradiation of persimmons with additional matters under Part 3 Division 1 Subdivision C when it, or the additional matters, should have been processed under Part 3 Division 2 Subdivision F.

10 At the same time, by their proposed amended application, the applicants also sought to challenge the **conduct** of the Authority in "accept[ing] on 3 March 2011 a draft variation of Food Standard 1.5.3 under s 30(1)(a) [sic] in Part 3 Div 1 of the FSANZ Act" and "assess[ing] the draft variation under s 29, prepar[ing] a draft variation under s 30; approv[ing] a draft variation under s 33 and [n]otify[ing] the Council under s 34 of a draft variation". A further ground was sought to be added, namely, that "[p]rocedures required by law to be followed in engaging in the conduct were not followed within s 6(1)(b) [of the ADJR Act]". With respect to this new ground, the applicants repeated the particulars set out in [4] and [9] above. To reflect this additional ground, the applicants also proposed consequential amendments to the relief that they sought.

11 With the leave of the Court, the parties made supplementary submissions concerning the proposed amended application and some other matters.

12 In its supplementary submissions, the Authority opposed the grant of leave to amend on the grounds that: (1) the original application did not raise issues concerning the power of the Authority to prepare a draft variation as a result of an application under Division 1 of Part 3; (2) no explanation was given as to why the proposed additional grounds were not included in the first place or in advance of the hearing; and (3) the additional grounds lacked merit and should be rejected.

13 For the following reasons, I would grant the applicants only limited leave to amend their application.

14 There is a broad discretion to permit an amendment of the kind sought, although regard must be had to the circumstances of the case and other relevant considerations, such as the overarching purpose of civil practice and procedure provisions set out in ss 37M and 37N of the *Federal Court of Australia Act 1976* (Cth): see *Cement Australia Pty Ltd v Australian Competition and Consumer Commission* (2010) 187 FCR 261 at 274 [43], referring to *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175.

15 In the present circumstances, although the amendments might have been sought earlier, it is clear enough that they did not come to mind until the hearing. The applicants sought leave to amend because the argument and discussion at the hearing led their pro bono counsel to consider that this was desirable.

16 The applicants wished to extend their challenge to the Authority's conduct (as discussed above) to meet a possible jurisdictional difficulty under s 5(1)(b) of the ADJR Act thought to arise from the definition of "decision to which this Act applies" in s 3(1). Section 6(1)(b) permits a challenge to conduct to be made on the same ground as a challenge to a decision under s 5(1)(b).

17 The Authority did not take any point about standing or jurisdiction at the hearing or in prior written submissions. Issues of this nature surfaced only in the course of discussion during the hearing. In the circumstances of this case, it cannot be supposed that the Authority would suffer any relevant detriment if the applicants were permitted to amend their application so as to invoke the ground in s 6(1)(b) of the ADJR Act as well as in s 5(1)(b), especially as the particulars with respect to both were the same.

18 Whilst the original application did not contain an equivalent to paragraph [(d)] of the particulars set out at [9] above, the written submissions filed by the applicants prior to the hearing advanced the argument that paragraph [(d)] was designed to express. At the hearing, the applicants' counsel developed this argument, which counsel for the Authority sought to meet without objection. In these circumstances, the amendment would do little more than regularise that which has already occurred.

19 The matters set out in paragraphs [(e)] and [(f)] of the particulars set out in [9] above stand in a different position. Counsel for the applicants made no secret of the fact that he thought of them only in the course of listening to the submissions of the Authority at the hearing.

20 These proposed particulars seek to support a submission that the introduction of the proposed additional amendments to the draft variation meant that the draft variation should have been considered under Subdivision F in Division 1 of Part 3, rather than under the general procedure: see s 25. Section 42 provides that Subdivision F in Division 1 of Part 3 applies to:

> (a) an application for the development of a new food regulatory measure; and
> (b) an application for the variation of a food regulatory measure that:
> (i) involves such scientific or technical complexity that it is necessary to adopt this procedure in considering it; or
> (ii) involves such a significant change to the scope of the food regulatory measure that it is necessary to adopt this procedure in considering it.

21 There are numerous objections to this argument. To name but two, even taking the proposed additional amendments into account (see [36] below), it is unlikely that there was in contemplation any major variation of the kind to which this subdivision is directed (see [41] below); and, in any event, as the Authority submitted, the assessment and the determination required by s 42(b) involve considerations most appropriately made by the Authority. The argument that these particulars were designed to support is not fairly arguable. For this reason, I would not grant leave to amend so as to include them in the applicants' application: compare *Nicholls v Australian Federal Police* (2009) 192 A Crim R 425 at 437–438 [66].

22 Accordingly, I would grant leave to the applicants to amend their application in the terms of paragraph [1A] on page 2, paragraph [(d)] on page 4, paragraph [1A] with particulars on pages 4–5, and paragraph [1A] on pages 5–6 of their proposed amended

application. I would not grant leave to amend with respect to paragraphs [(e)] and [(f)] on page 4 of their proposed amended application.

FACTUAL BACKGROUND

The Authority

23 The Authority is a body corporate that may sue and be sued in its corporate name: the FSANZ Act, s 12(2). The functions of the Authority include developing standards (defined in s 4) and variations of standards in accordance with the Act: ss 13(1)(a) and 16. A standard is a type of food regulatory measure: see the definition of "food regulatory measure" in s 4.

24 Pursuant to s 115(1) of the Act, the affairs of the Authority are conducted by the Board of Food Standards Australia New Zealand ("the Board"). Section 115(2) provides that:

> All acts and things done in the name of, or on behalf of, the Authority by the Board or with the authority of the Board are taken to have been done by the Authority.

25 The Authority publicises its work in various ways, including by Notification Circulars. These Notification Circulars are significant in this case. Notification Circulars contain notices about applications and proposals being dealt with by the Authority and other food regulatory matters. The Notification Circulars are published on the Authority's website and links to new Notification Circulars are sent to subscribers to the Authority's electronic mailing list. A Notification Circular is also sent to people who, according to the Authority's database, have an interest in a subject dealt with in the Circular.

26 The first applicant, Gene Ethics Pty Ltd ("Gene Ethics"), is a company limited by guarantee. Its executive director, Mr Phelps, described it as "a non-profit community organisation established to educate the public and give policy advice on novel foods including genetically manipulated foods, irradiated foods and other novel foods such as the use of nano-materials in the food supply". Gene Ethics is a subscriber to the Authority's electronic mailing list and in this way receives the Authority's Notification Circulars.

27 The second applicant, The Safe Food Institute Ltd ("Safe Food"), is also a company limited by guarantee. According to Mr Kinnear, a director and chair of the second applicant, Safe Food "was established to research into dangers arising from food production processes,

to promote public awareness of these dangers and to make representations to government and industry to improve their practices". Mr Kinnear deposed that Safe Food "commissions research into food quality and food safety". Mr Kinnear further deposed that Safe Food "is concerned that irradiation of food poses dangers to human health".

The application by QDPIF

28 Irradiation is the processing of food by subjecting it to the action of ionising radiation: Standard 1.5.3, cl 1. Standard 1.5.3 prohibits the irradiation of food save where permitted: cl 2(1). Standard 1.5.3 gives permission to irradiate certain foods listed in a table to cl 4. This table lists foods that may be irradiated, the relevant minimum and maximum doses of ionising radiation to be applied to them and any applicable conditions. Pursuant to s 22 of the Act, the QDPIF made an application, dated 17 November 2009, "to amend Standard 1.5.3 Irradiation of Food of the Food Standards Code to include persimmon (*Diospyros kaki*) using irradiation as a phytosanitary measure". Specifically, the application sought a variation to the table to cl 4 "by adding persimmon (*Diospyros kaki*), a fruit fly host fruit". No other variation to Standard 1.5.3 was sought.

29 In the Executive Summary to its application, the QDPIF explained that it sought a variation of Standard 1.5.3 in order to address the risk of fruit fly infestation in a commercially available persimmon species. The Executive Summary stated:

> There are other species, however, permission is requested only for *D.kaki*, which is the most common commercially available persimmon species.
>
> The minimum dose requested for the phytosanitary regulatory treatment is 150 Gy and the maximum dose requested is 1000 Gy.
>
> ... A 'generic' irradiation treatment at 150Gy minimum absorbed dose will prevent the emergence of adults of fruit flies for all fruits and vegetables. ...
>
> Persimmon (*Diospyros kaki*) is subject to plant quarantine regulatory treatments as a condition of entry and/or movement in certain plant quarantine jurisdictions in Australia and New Zealand.
>
> The addition of irradiation as a regulatory treatment for a phytosanitary purpose for persimmon will provide an alternative option to the currently used chemical treatments ...
>
> Irradiation is an approved phytosanitary treatment for many tropical fruit and vegetables elsewhere, and more recently with imports/exports in Australia and New Zealand. Commercially incorporating irradiation treatment into the persimmon supply chain, to access markets with quarantine barriers, can be achieved with

minimal impact on efficiency and profitability of the supply chain.

30 The Authority called the application "Application A1038 — Irradiation of Persimmons" ("Application A1038"). The Authority accepted Application A1038 pursuant to s 26 of the Act on 9 December 2009.

31 In compliance with s 28 of the Act, the Authority subsequently gave notice of Application A1038 in Notification Circular [1-10] dated 12 January 2010. Under the heading "Brief Description of Application", the Notification Circular stated:

> To provide permissions to irradiate persimmons (*Diospyros kaki*) as a quarantine measure.

The assessment report

32 Officers of the Authority prepared an assessment report of Application A1038 ("the assessment report"). Besides the Executive Summary, two attachments and the four supporting documents, the assessment report comprised some 26 pages, of which 23 consisted of detailed analysis.

33 The Executive Summary stated that the application was "being assessed under the General Procedure with one round of public consultation". The assessment report acknowledged that the application would be "of interest to a broad range of stakeholders". The report advised that "a general communication strategy" would be used and it contemplated provision for public comment.

34 The assessment report was accompanied by four supporting documents:

(1) Supporting Document 1 — Risk Assessment report;

(2) Supporting Document 2 — Overview of the food irradiation process and a glossary of technical terms;

(3) Supporting Document 3 — Summary of literature on consumers and food irradiation; and

(4) Supporting Document 4 — Proposed amendments to Standard 1.5.3 (marked up).

Supporting Document 4 clearly indicated the scope of the proposed amendments to Standard 1.5.3.

35 The assessment report recommended that the Authority accept the variation sought by the QDPIF. This was on the basis that the irradiation of persimmons at specified doses did not pose "a significant human health risk" and would provide "an efficacious treatment to reduce fruit fly infestation which is of quarantine concern". The assessment report stated:

> The proposed risk management approach is to approve the irradiation of persimmons subject to the following requirements under Standard 1.5.3:
>
> - irradiation of persimmons only for the purposes of pest disinfestation for a phytosanitary objective
> - adherence to a minimum dose of 150 Gy and a maximum dose of 1 kGy
> - retain the current mandatory labelling of irradiated persimmons.

36 Significantly for this case, the assessment report recommended additional amendments, which were not the subject of Application A1038 and had not been sought by the QDPIF. The report described these additional amendments ("the proposed additional amendments") in the following terms:

> Additional amendments are proposed to Standards 1.1.1 and 1.5.3 in order to provide improved clarity, interpretation, and operation of Standard 1.5.3. These do not change the intent of the Standard to permit irradiation of food on a case-by-case basis.
>
> The following amendments are proposed:
>
> - insertion of new units relating to dosage in the Glossary of symbols in Clause 8 of Standard 1.1.1 — Application, Interpretation and General Prohibitions as there is presently no listing for these
> - removal of extraneous material and provision of more clarity around the specific purpose of irradiating a food
> - deletion of the definition of a technological need and re-irradiation as both are covered under other requirements in the Standard
> - deletion of the clause relating to record keeping requirements and a specific clause relating to labelling of irradiated foods other than for retail. These clauses are either repetitive and unnecessary, potentially misleading to consumers, covered by other regulatory authorities, or by other provisions in the Code
> - deletion of all references to good manufacturing practice (GMP) as a condition for irradiating foods, as this is a duplication of an overall requirement currently in the Code to use GMP in the manufacture of any food
> - the condition that the minimum dose of irradiation necessary to achieve the technological purpose be used is deleted because a minimum dose is already

specified in Column 2 of the Table to clause 4

- structural changes and re-ordering and insertion of new clauses for foods permitted to be irradiated and conditions under which a food can be re-irradiated

- a new prohibition on irradiating food that is either unsafe or unsuitable has been inserted to more accurately and clearly reflect the intention that irradiation is only to be used for the specified purpose, and not to clean up food which is unsafe or unsuitable

37 The fact that the assessment report recommended more than permitting the irradiation of persimmons is revealed in the report's description of the "Preferred Approach (for Assessment)":

> **To prepare draft variations to Standards 1.1.1—Application, Interpretation and General Prohibitions and 1.5.3—Irradiation of foods to permit the use of irradiation of persimmons** (Bold in original)

38 Under the heading "Reasons for Preferred Approach", the assessment report explained:

> The development of an amendment to the Code to give approval to the sale of irradiated persimmons in Australia and New Zealand is proposed on the basis of the available scientific evidence, for the following reasons:
>
> - the safety assessment did not identify any public health and safety concerns
> - the use of irradiation is technologically justified
> - the proposed additional amendments are justified to provide improved clarity, interpretation, and operation of Standard 1.5.3
> - a regulation impact assessment process has been undertaken that fulfils the requirement in Australia and New Zealand for an assessment of compliance costs. The assessment concluded that the use of irradiation (Option 2) of Standard 1.5.3 provides a net benefit.
> - there are no other measures that would be more cost-effective than a variation to Standard 1.5.3 that could achieve the same end.

39 The assessment report disclosed the occasion for the proposed additional amendments on pages 14–15 in "Section 7 — Proposed amendments to Standard 1.5.3", which stated that:

> FSANZ recently engaged the Office of Legislative Drafting and Publishing (OLDP) to conduct a legislative audit of the Code, to identify areas in the Code which are unclear and to ensure that the Code reflects best practice drafting technique.
>
> The audit has identified areas for improvement and, while implementing all of the recommendations from the audit will take some time, FSANZ has already made some changes to the way we write and present our standards. ...

> In light of the legislative audit, and although OLDP did not make any specific recommendations about Standard 1.5.3, FSANZ has identified areas in Standard 1.5.3 which may be concurrently addressed with the assessment of A1038. This would provide clarity around interpretation and operation of the standard without changing the intent of the standard to maintain an overall prohibition of the irradiation of food, unless permitted on a case-by-case basis.
>
> To assist in understanding the proposed amendments in section 7.1 to 7.4 refer to a revised version of Standard 1.5.3 in **Supporting Document 4**. [See [34] above.]

40 The balance of section 7 gave a detailed explanation of the proposed additional amendments under the headings: (1) "Insertion of new units for dosage in the Glossary of Symbols"; (2) "Amendments to provide clarity to the purpose and definitions of Standard 1.5.3"; (3) "Structural Changes to Standard 1.5.3 and proposed new clauses"; and (4) "Removal of other unnecessary provisions".

41 In argument, the applicants specifically noted that the proposed additional amendments contemplated changes to record-keeping and labelling requirements. For instance, the proposed additional amendments included the removal of all examples of labelling of irradiated foods from Standard 1.5.3, as well as the deletion of the record-keeping requirements of cl 5, "with the view that State/Territory and NZ legislation and current irradiation facilities already require record keeping for irradiated foods" (assessment report, p 17). As to record-keeping, the assessment report stated that the Authority was "of the understanding that detailed records are also a requirement of licensing authorities ... which cover the ... requirements in cl 5 of standard 1.5.3 and are fully documented by licensed irradiation facilities". The assessment report continued:

> Advice FSANZ received from industry is that the records kept in relation to irradiated articles are basically the same whether or not it is food or medical or quarantine. In relation to food, there is always a record of the commodities irradiated, the dose they receive, date of treatment and a process for ensuring compliance with the process.
>
> FSANZ questions whether Clause 5 provides any additional value to Standard 1.5.3, because licensed irradiation facilities have existing records and traceability requirements which essentially cover all the current requirements. There is also various State/Territory and New Zealand regulation governing the use of ionising radiation which also requires record-keeping.

42 On 2 and 3 March 2011, the Board approved the assessment report in relation to Application A1038 and a draft variation of Standard 1.5.3 prepared under s 30(1)(a) of the Act, which included the proposed additional amendments.

Notification Circular of 15 March 2011

43 On 15 March 2011, the Authority published a media release and Notification Circular [5-11] on its website. It is not said that the media release contained any more information than the Notification Circular.

44 The introduction to Notification Circular [5-11] stated:

> This Notification Circular includes notices that are required to be given to the public, submitters and appropriate government agencies, under the *Food Standards Australia New Zealand Act 1991* (FSANZ Act). All references below to sections of legislation, are to the FSANZ Act unless otherwise indicated.
>
> Further information about the applications, proposals and other matters mentioned below, including assessment reports, processes and — where applicable — reasons for decisions, can be accessed on the FSANZ website at www.foodstandards.gov.au then <**Food Standards**>, then <**Changing the Code**>, then either <**Documents for Public Comment**> or. [sic] Persons may contact FSANZ at one of the addresses below to arrange alternative access to these documents:
>
> | | |
> |---|---|
> | The Information Officer | The Office Administrator |
> | Food Standards Australia New Zealand | Food Standards Australia New Zealand |
> | PO Box 7186 | PO Box 10559, The Terrace |
> | CANBERRA BC ACT 2610 | WELLINGTON 6143 |
> | AUSTRALIA | NEW ZEALAND |
> | Tel +61 2 6271 2241 | Tel +64 4 978 5636 |
> | Fax +61 2 6271 2278 | Fax +64 4 473 9855 |
> | Email: information@foodstandards.gov.au | Email: information@foodstandards.govt.nz |
>
> General questions on the work of FSANZ should be directed to the Information Officer at either of the addresses above. Queries concerning the matters in this Circular on assessment or submission processes should be directed to the Standards Management Officer at standards.management@foodstandards.gov.au.
>
> **PROGRESS ON APPLICATION AND PROPOSALS**
>
> Details on Ministerial Council notifications from the notice below were published on **15 March 2011** in *The Australian and The New Zealand Herald* newspapers, as well as on the FSANZ website.
>
> General information on progress on all current applications and proposals is available in the FSANZ Food Standards Development Work Plan which is available on the FSANZ website at:
> http://www.foodstandards.gov.au/foodstandards/changingthecode/standardsworkplan.cfm.

45 Under the heading "Call for Submissions", Notification Circular [5-11] relevantly read as follows:

CALL FOR SUBMISSIONS

GENERAL PROCEDURE

Assessment — Applications [s 31]
FSANZ has assessed and prepared a draft food regulatory measure for the following Application; will further consider the draft; and invites written submissions for the purpose of either approving, amending or rejecting the draft food regulatory measure **by 6pm (Canberra time) 27 April 2011**:

- Application A1038 — Irradiation of Persimmons: to permit the irradiation of persimmons (*Diospyros kaki*) as a quarantine measure

...

46 There was a hyperlink at "Application A308 — Irradiation of Persimmons" (see [45] above) to a page on the Authority's website. On this webpage, there were further hyperlinks in the period 15 March 2011 to 5 July 2011 to: (1) the assessment report; (2) the four supporting documents mentioned in [34] above; (3) Application A308; and (4) Notification Circular [1-10] dated 12 January 2010, referred to in [31] above.

47 An alert was emailed via the Authority's subscription service (referred to above) and to people listed on the Authority's database as having an interest in one or more of the matters in Notification Circular [5-11]. Gene Ethics received this alert.

48 By the end of the submission period on 27 April 2011, the Authority had received 74 submissions, including one from Gene Ethics. In its submission, Gene Ethics submitted that the Authority's assessment of Application A1038 "unacceptably conflates two entirely different matters — the irradiation of persimmons and a radical rewriting of Standard 1.5.3".

49 In his affidavit filed on behalf of Gene Ethics, Mr Phelps deposed that:

> Because the title and description of the application did not inform the reader that general changes to Food Standard 1.5.3 were proposed by Application A 1038 the applicant did not become aware of the full extent of the proposed changes until a few days before the date by which submissions were required. ...
>
> The first applicant lodged a submission dated 27 April 2011. ... The first applicant was not able in the time it had to []prepare a submission that addressed the full import of the change to the food standard that is proposed.

50 In a letter to the Authority dated 24 June 2011, Gene Ethics requested the Authority "to renotify the public at large of [the] application ... in a way that complies with sec 31 of the Act". The Authority declined this request.

51 On 15 March 2011, when the Authority published the Notification Circular [5-11] on its website, Safe Food was not a subscriber to the Authority's electronic mailing list. Safe Food did not know of the proposal to amend Standard 1.5.3 until Mr Phelps told Mr Kinnear about it on 8 July 2011. Safe Food was thus unable to make a submission to the Authority within the prescribed time.

Approval of the draft variation and notification to the Ministerial Council

52 On 22 June 2011, the Board approved a draft variation under s 33 of the Act. In so doing, the Board approved the addition of persimmon (*Diospyros kaki*) to the list of foods in the table to cl 4 of Standard 1.5.3 as sought by the QDPIF. The Board also approved some (but not all) of the proposed additional amendments. In particular, the record-keeping requirements of cl 5 of Standard 1.5.3 were retained. An approval report was prepared, in order to explain the draft variation as approved by the Board.

53 On 4 July 2011, the Authority gave written notification of the approval to the Ministerial Council under s 34(1) of the Act. The approval report accompanied this advice.

54 On 6 July 2011, the Authority published Notification Circular [13-11], which gave notice of the Authority's approval of the draft variation in relation to Application A1038.

55 On 2 September 2011, the Ministerial Council advised the Authority, pursuant to s 84 of the Act, that it did not intend to request the Authority to review the draft variation in relation to Application A1038.

56 The Authority subsequently agreed that it would not proceed with its publication requirements under s 92 of the Act pending the hearing and determination of the proceeding and it submitted to a restraining order to this effect.

THE RELEVANT LEGISLATION

Legislative aims

57 The overarching object of the Act, as set forth in s 3, is:

> to ensure a high standard of public health protection throughout Australia and New Zealand by means of the establishment and operation of a joint body [the Authority] to achieve the following goals:

(a) a high degree of consumer confidence in the quality and safety of food produced, processed, sold or exported from Australia and New Zealand;
(b) an effective, **transparent and accountable regulatory framework** within which the food industry can work efficiently;
(c) the provision of adequate information relating to food to enable consumers to make informed choices;
(d) the establishment of common rules for both countries and the promotion of consistency between domestic and international food regulatory measures without reducing the safeguards applying to public health and consumer protection.

(Emphasis added)

As will be seen, the applicants contested whether the Authority's processes leading to its approval of the draft variation in respect of Application A1038 advanced the goal of an "effective, transparent and accountable regulatory framework", as mentioned in s 3.

58 The specific objectives of the Authority in developing or reviewing food regulatory measures (including standards) and variations of such measures, set out in s 18(1), are (in descending priority order):

(a) the protection of public health and safety; and
(b) the provision of adequate information relating to food to enable consumers to make informed choices; and
(c) the prevention of misleading or deceptive conduct.

Food regulatory measures

59 Part 3 of the Act is concerned with food regulatory measures. Division 1 of Part 3 (consisting of ss 21–53) concerns applications by third parties for the development or variation of food regulatory measures. Division 2 of Part 3 (consisting of ss 54–79) concerns proposals for the development or variation of food regulatory measures prepared by the Authority on its own initiative. Save for minor differences, as indicated below, the two Divisions largely mirror one another.

60 Both Divisions are subdivided in the same way. Thus, Division 1 of Part 3 is subdivided into:

Subdivision A — Overview;

Subdivision B — Applications;

Subdivision C — Procedures for considering applications;

Subdivision D — General procedure;

Subdivision E — Modification of general procedure for minor variations;

Subdivision F — Modification of general procedure for developing new food regulatory measures and major variations; and

Subdivision G — Procedure for certain variations of the Nutrition, Health and Related Claims Standard.

Division 2 of Part 3 is similarly divided into:

Subdivision A — Overview;

Subdivision B — Proposals;

Subdivision C — Procedures for considering proposals;

Subdivision D — General procedure;

Subdivision E — Modification of general procedure for minor variations;

Subdivision F — Modification of general procedure for developing new food regulatory measures and major variations; and

Subdivision G — Procedure for certain variations of the Nutrition, Health and Related Claims Standard.

61 Two other Divisions of Part 3 were mentioned in argument: Division 3 (consisting of ss 84–94) and Division 4 (consisting of ss 95–106). Division 3 is concerned with "Council review of draft standards and draft variations of standards" and Division 4, with "Urgent applications and proposals".

Applications for the development or variation of food regulatory measures

62 Applications for the development or variation of a food regulatory measure may be made under s 22. Section 22 provides:

> (1) A body or person may apply to the Authority for the development of a food regulatory measure or the variation of a food regulatory measure.
> (2) The application must:
> (a) be in writing; and
> (b) if the form in which the application is to be made is specified in guidelines made under section 23—be in the form specified; and
> (c) include all of the information that, under guidelines made under

> section 23, is to be included with the application; and
> (d) include each thing that, under guidelines made under section 23, is to be included with the application; and
> (e) identify the procedure that, in the applicant's view, applies to the consideration of the application.

Section 23 makes provision for guidelines relating to applications under s 22.

63 There are a number of potentially applicable procedures for the consideration of an application under s 22. Section 25(1), which applies to applications under s 22, is in the following terms:

> (1) The Authority must adopt the general procedure in considering an application for the development of a food regulatory measure or the variation of a food regulatory measure, unless:
> (a) the application is one to which Subdivision E applies (application for a minor variation of a food regulatory measure); or
> (b) the application is one to which Subdivision F applies (application for the development of a new food regulatory measure or a major variation of a food regulatory measure); or
> (c) the application is one to which Subdivision G applies (application for a high level health claims variation); or
> (d) the application is declared to be an urgent application for the purposes of this Part under section 95.

64 In the present case, the Authority adopted "Subdivision D — General Procedure", constituted by ss 26–35 (inclusive) in Division 1 of Part 3. Section 26 required the Authority to accept or reject the application made the QDPIF within 15 business days of its receipt. Section 26 relevantly provides:

> (1) The Authority must, within 15 business days after an application is given to the Authority;
> (a) accept the application; or
> (b) reject the application.
>
> (2) In determining whether to accept or reject the application, the Authority must have regard to the following matters:
> (a) whether the application complies with subsection 22(2);
> (b) whether the application relates to a matter that may be developed as a food regulatory measure, or that warrants the variation of a food regulatory measure;
> (c) whether the application is so similar to a previous application or proposal for the development or variation of a food regulatory measure that it ought to be rejected;
> (d) any other relevant matter.
>
> ...

65 On acceptance of the application, s 27 required the Authority to notify the applicant immediately in writing of its acceptance and of certain other matters, including "the

procedure the Authority will adopt in considering the application". The Authority was also required to give public notice of the application in conformity with s 28 of the Act. Sections 28(1) and (2) relevantly provide:

> **Public notice of the application**
>
> (1) If the Authority accepts an application, the Authority must also give public notice of the matters mentioned in subsection (2).
>
> *Content of Notice*
>
> (2) The notice must:
>
> (a) state that the Authority has received an application for the development of a food regulatory measure or the variation of a food regulatory measure, as the case requires; and
>
> (b) state the date on which the application was received by the Authority; and
>
> (c) state the name of the applicant; and
>
> (d) give a summary of the application; and
>
> (e) state that the Authority has accepted the application; and
>
> (f) identify the procedure that the Authority will adopt in considering the application; and
>
> (g) indicate when the Authority proposes to undertake the key steps in that procedure; and
>
> (h) state how to obtain further information about the application.

66 Under s 29, the Authority is required to assess the accepted application. Section 29 provides:

> **Assessing the application**
>
> (1) If the Authority accepts an application, the Authority must assess the application.
>
> (2) In assessing the application, the Authority must have regard to the following matters:
>
> (a) whether costs that would arise from a food regulatory measure developed or varied as a result of the application outweigh the direct and indirect benefits to the community, Government or industry that would arise from the development or variation of the food regulatory measure;
>
> (b) whether other measures (available to the Authority or not) would be more cost-effective than a food regulatory measure developed or varied as a result of the application;
>
> (c) any relevant New Zealand standards;
>
> (d) any other relevant matters.
>
> Note: See also section 18, which sets out the objectives of the Authority in developing food regulatory measures and variations of those measures.

67 After assessing the application, the Authority is required by s 30 to prepare a draft food regulatory measure or a draft variation of such a measure, or to reject the application. Section 30(1) (again in Division 1) is in the following terms:

> **Preparing a draft variation**
>
> (1) After assessing an application, the Authority must:
> (a) prepare in writing a draft food regulatory measure or a draft variation of a food regulatory measure; or
> (b) reject the application.
>
> (2) **If**:
> (a) the Authority prepares a draft food regulatory measure or a draft variation of a food regulatory measure as a result of an application; and
> (b) **the draft measure or draft variation differs from that sought in the application, or was not sought in the application at all;**
> **the Authority must give the applicant notice in writing of that fact and state in the notice that the Authority will call for submissions for the purpose of assessing the draft measure or draft variation.**
>
> (3) The Authority must not give public notice under section 31 within 10 business days immediately after notice is given to the applicant under subsection (2) of this section.

(Emphasis added)

68 Pursuant to s 31, the Authority is obliged to call for submissions on the draft food regulatory measure or variation. Section 31 provides:

> (1) After preparing a draft food regulatory measure or a draft variation of a food regulatory measure as a result of an application, **the Authority must give public notice** of the matters mentioned in subsection (2).
>
> (2) **The notice must**:
> (a) state that the Authority has prepared a draft food regulatory measure or a draft food variation of a food regulatory measure, as the case requires; and
> (b) **include:**
> **(i) a copy of the draft food regulatory measure or draft variation; and**
> **(ii) a summary of the results of the Authority's assessment of the application;**
> **or state how a copy of those documents can be obtained; and**
> (c) call for written submissions, for the purpose of the Authority's consideration of the draft measure or draft variation, to be given to the Authority within the period specified in the notice (the ***submission period***).

(Save for "submission period", the emphasis is added.)

69 Section 32 provides that, if an application results in the development or variation of a standard, then the Authority must follow the steps set out in ss 33–34. Section 33 reads as follows:

> **Approving the draft standard or draft variation**
>
> (1) After the submission period, the Authority must:
> (a) do one of the following:
> (i) approve the draft standard or draft variation;
> (ii) approve the draft standard or draft variation subject to such amendments as the Authority considers necessary;
> (iii) reject the draft standard or draft variation; and
> (b) prepare a report under this section.
>
> Note 1: The Board must not delegate its powers to act on behalf of the Authority under paragraph (a)—see section 150.
> Note 2: The draft does not take effect except in accordance with a notice under section 92—see section 93.
>
> (2) The Authority must have regard to all submissions made during the submission period in making a decision under subsection (1).
>
> (3) The report must include each of the following:
> (a) the reasons for initially accepting the application;
> (b) a summary of the results of the Authority's assessment of the application;
> (c) a summary of the submissions received by the Authority in relation to the draft standard or draft variation;
> (d) the Authority's response to the issues raised in those submissions;
> (e) whether the draft standard or draft variation was amended after submissions were made and, if so, the reasons for those amendments;
> (f) the Authority's reasons for approving or rejecting the draft standard or draft variation;
> (g) a copy of the draft standard or draft variation on which submissions were received;
> (h) if the draft standard or draft variation was amended after submissions were made — a copy of the draft standard or draft variation as amended;
> (i) a Regulation Impact Statement.

70 Section 34 requires that notification of the approval be given to the Ministerial Council and that public notice of the approval be given. Section 34 reads as follows:

> **Notifying the Council**
>
> (1) If the Authority approves a draft standard or a draft variation of a standard, the Authority must, within 10 business days after the approval:
> (a) give the Council:
> (i) a written notification of the approval; and
> (ii) a copy of the report prepared by the Authority under section 33; and
> (b) give public notice of the approval, together with information about

where further information about the draft standard or draft variation may be obtained; and

(c) publish in a generally circulating newspaper, in each State or Territory and in New Zealand, a notice:

(i) stating that the draft standard or draft variation has been approved; and

(ii) stating that the Council has been notified that the draft standard or draft variation has been approved; and

(iii) stating that the Council may request the Authority to review the draft standard or draft variation under Division 3; and

(iv) stating where further information about the draft standard or draft variation may be obtained.

(2) If the Authority has notified the Council under subsection (1), the Council may direct the Authority to give the Council such information as the Council reasonably requires for the purpose of assisting the Council to make a decision about the draft under Division 3.

Note: The process followed by the Council after receiving notification under this section is set out in Division 3.

71 Section 84(1) of the Act relevantly provides that, if the Authority notifies the Council under s 34 that it has approved a draft variation, then the Council must, within 60 days after the notification:

(a) request the Authority to review the draft; or

(b) inform the Authority that the Council does not intend to request the Authority to review the draft.

72 Under s 85, if the Council informs the Authority under s 84(1)(b) that it does not intend to request a review, "then, as soon as practicable, the Authority must comply with the publication requirements set out in section 92".

73 Section 92 provides that:

The ***publication requirements*** for the purposes of sections 85 and 89 and subsection 90(3) are as follows:

(a) the Authority must prepare a notice stating that the draft or amended draft, as the case requires, is to come into effect on a day specified in the notice;

(b) the Authority must cause a copy of the notice to be published:

(i) in the *Gazette*; and

(ii) in the New Zealand Gazette; and

(iii) in a generally circulating newspaper, in each State or Territory and in New Zealand;

together with information about where a copy of the draft or amended draft may be obtained or inspected;

(c) the Authority must make a copy of:

(i) the notice; and

(ii) the text of the draft or the amended draft;

available for inspection by the public;

(d) the Authority must publish on the Authority's website a copy of:
(i) the notice; and
(ii) the text of the draft or the amended draft.

74 A standard, or a variation of a standard, takes effect on the day specified in the notice given under s 92: s 93.

Proposals for the development or variation of food regulatory measures

75 Proposals for the development or variation of food regulatory measures may be made by the Authority on its own initiative under s 55 in Division 2 of Part 3. Section 55 provides:

(1) The Authority may, on its own initiative, prepare a proposal for the development or variation of a food regulatory measure.

(2) The proposal must be in writing.

76 As for an application under s 22, there are a number of potentially applicable procedures for the consideration of a proposal under s 55. Section 57, which applies to proposals under s 55, is in identical terms to s 25(1) in Division 1, save that s 57 refers to "the proposal" in lieu of "the application" and to Subdivisions in Division 2, not Division 1, of Part 3.

77 The provisions for public notice in Division 2 are identical, or virtually identical, to those in Division 1 of Part 3. Where the Authority prepares a proposal, s 58 in Division 2 makes the same provision for public notice as s 28 in Division 1 does when the Authority accepts an application under s 22. Once the Authority prepares a draft food regulatory measure or draft variation under s 60, the Authority must give public notice under s 61(1) of the matters specified in s 61(2). Section 61 in Division 2 is in virtually the same terms as s 31 in Division 1 and requires the public notice given in accordance with s 61 to address essentially the same matters as the public notice given in accordance with s 31: compare ss 31(2) and 61(2).

78 Further, where the Authority prepares a proposal, s 59(1) in Division 2, like s 29(1) in Division 1, requires the Authority to assess the proposal. The matters to which the Authority must have regard in assessing a proposal or an application are the same: compare ss 29(2) and 59(2). Like s 30(1) in Division 1, s 60 in Division 2 requires the Authority, after assessing the proposal, to prepare a written draft food regulatory measure or draft variation of such a measure, or to abandon the proposal. Section 62, like s 32, makes provision for alternative

steps following the development or variation of a standard, or a code of practice. After the expiry of the submission period, in terms similar to s 33, s 63 requires that the Authority either approve the draft measure or variation, with or without amendments, or reject the draft measure or variation; and prepare a report on matters substantially the same as those in s 33(3): see [69] above. Section 64 of Division 2, which deals with notifying the Council, is in substantially the same terms as s 34 of Division 1. Sections 84, 85, 92 and 93 are applicable to a draft measure or variation originating under Division 2 as well as under Division 1: see [71]–[74] above.

79 There are some differences between Divisions 1 and 2 of Part 3, but these reflect the inherent differences between draft measures or variations originating with an application under Division 1 as opposed to a proposal under Division 2. Thus, there are no provisions in Division 2 equivalent to ss 26–27 in Division 1, but this reflects the need to provide for receiving and accepting applications by third parties, which is of course unnecessary for proposals made by the Authority itself. The differences between ss 30 and 60 reflect the differences between their subject-matters — applications from third parties on the one hand and proposals by the Authority on the other.

THE PARTIES' SUBMISSIONS

The applicants' submissions

80 The applicants' principal submission challenged the sufficiency of the notice given by the Authority under s 31. The applicants argued that "there has never been a proper discharge of the duty or the requirement in s 31 to call for submissions".

81 The applicants contended that:

> Parliament intended that all of the procedures set out in the "General Procedure" in Part 3 Division 1, Subdivision D of the FSANZ Act are required to be followed. Among these the provisions designed to inform the public are paramount.
>
> As the performance of the requirement of calling for submissions was defective the purported decision of the Authority under s 33(1)(a)(ii) to approve the draft variation with amendments on 22 June 2011 is a nullity or should be set aside. It can only occur after the close of the "submission period". That period can only commence when there has been an effective call for public submissions under s 31.

82 The applicants' original complaint was that the Authority failed to comply with the requirements of s 31 of the Act in that Notification Circular [5-11] failed to identify the full

extent of the draft variation. In particular, the applicants submitted that Notification Circular [5-11], which was given in purported compliance with s 31

> only informed the reader that the amendment related to persimmon. The reader would only be informed of the amendments additional to adding the word "persimmon" to the Table to Clause 4 of the Food Standard by reading the Assessment Report to Part 7 and beyond. The Authority had ample opportunities to [i]nform the public of the full extent of Application A 1038 as it had become but did not do so.

83 The applicants also submitted that the assessment report was "not an assessment that is required by s 31(2)(b)(ii)". In written submissions, they said:

> The only document that was placed before the public that contained any possible assessment of the amendments to the ... Standard beyond adding the word persimmon to the Table to Clause 4 was section 7 of the Assessment report [sic]. *And it was not an "assessment"* but a statement of the planned amendments. ...
>
> ...
>
> Insofar as the Assessment Report addresses the additional amendments to Standard 1.5.3 it states them; it does not assess them as in considering the pros and cons or alternatives that could be pursued. ...

(Emphasis in original)

84 According to the applicants, there were "serious changes in the Standard, particularly in relation to record keeping and particularly in relation to labelling"; "[a]nd these are matters that should ... have been assessed, considered, the pros and cons, rather than simply asserted" as was said to have been done in the assessment report. In the words of the applicants' counsel, Section 7 of the assessment report was "not an assessment of the application" but "an explanation of the proposal".

85 The applicants also challenged the power of the Authority to proceed under Division 1 of Part 3 when acting on its own initiative. In written submissions, the applicants submitted that:

> If the Authority desires to propound a development or variation of a food regulatory measure it should proceed under Part 3 Division 2 of the FSANZ Act (ss 54 to 57) which require it to adopt the "general procedure" [defined in s 4] under the FSANZ Act. By s 58(1) and 58(2)(c) the Authority is required to inform the public of a "*summary of the proposal*" where the proposal has been prepared by the Authority.
>
> The presence of a specific procedure whereby the Authority may propound changes means the general procedure should not be interpreted to allow the Authority to "piggy back" amendments so the host application becomes a "Trojan horse".

(Emphasis in original)

86 In subsequent submissions, the applicants said that the Act contemplated that ideas emanating from outside the Authority should be processed under Division 1 of Part 3, whereas ideas from within the Authority should be processed under Division 2 of Part 3. In this case, so the applicants said, the Authority ought not to have pursued its own proposals under Division 1 of Part 3.

87 The applicants contended that s 31(2)(b)(ii), which requires a Division 1 public notice to include "a summary of the results of the Authority's assessment of the application", "assumes [that] the draft measure or variation will be responsive to the application that has been accepted under s 26 and notified under s 28". The applicants referred to the words "as a result of the application" in s 29(2) and "as a result of an application" in ss 30(2)(a) and 31(1). The applicants maintained that this assumption was not met in this case. The applicants argued that s 31 "limits the authorised draft measures and draft variations to ones that are required by the application".

88 The applicants maintained that the Authority could not rely on s 30(2)(b) to justify the proposed additional amendments. Counsel for the applicants submitted that s 30 "enables a ... draft measure or draft variation to differ from that sought by the application albeit not sought in the application at all but still respon[sive] [to] and ... limited by the application". On the applicants' construction of Divisions 1 and 2 of Part 3, s 30 did not permit the Authority to introduce a change to a food regulatory measure that did not arise from the application made under s 22. Rather, on the applicants' analysis, the Authority was bound to prepare an unrelated proposal under Division 2. As the applicants' counsel put it, "[t]here should have been A1038 Irradiation of Persimmons and A1038B Amendments to the Standard Propounded by the Authority".

89 The applicants referred to the "statutory plan" as evidenced by Division 1, which dealt with applications from third parties, and Division 2, which dealt with proposals. At the hearing, counsel for the applicants submitted that:

> Parliament has created a scheme here which has two roads. One road is travelled by bodies or persons under s 22 ... and another road is travelled by the Authority on its own initiative under Division 2 ...

Relying on s 15AB of the *Acts Interpretation Act 1901* (Cth) (the applicability of which the Authority denied), the applicants sought to support this construction by reference to the Revised Explanatory Memorandum that accompanied the *Food Standards Australia New Zealand Amendment Bill 2007* ("Explanatory Memorandum"), noting that the *Food Standards Australia New Zealand Amendment Act 2007* introduced s 31 and new versions of ss 29 and 30.

90 The applicants sought to invoke the ADJR Act upon the basis that they were "person[s] aggrieved" within the meaning of s 3(4) and therefore entitled to apply for an order of review in respect of the challenged decisions on the grounds set out in ss 5(1)(b) and 6(1)(b). In written submissions filed before the hearing, the applicants stated:

> That the first applicant was fortuitously informed of the true extent of the proposed amendment and made an eleventh hour submission after it was refused an extension of time does not bar it from seeking relief. The second applicant was not able to make a submission as it was not aware of the general proposal. It is in the public interest that the amendment to the ... Standard proposed in Application A 1038 be made according to law. While the respondent apparently received some submissions there may be other members of the community who have been denied the opportunity to express their views.

91 The applicant filed submissions in reply to the Authority's supplementary submissions, but it is unnecessary to do more than note them here.

The Authority's submissions

92 The Authority denied that it gave insufficient notice of the draft variations to Standard 1.5.3. The Authority argued that Notification Circular [5-11] dealt sufficiently with the requisite matters to meet the requirements of s 31(2) of the Act. At the hearing, counsel for the Authority submitted that "the full draft measure or draft variation and the full assessment report were available to anybody who cared to look". Counsel went on to submit that there was "no express, or even ... necessarily implied, requirement to describe the application in the notice". It followed, so counsel said, that the applicant's presupposition that the notice itself must "flag" the content of the draft variation was misplaced.

93 Furthermore, the Authority denied that s 31(2) called for the public notice to "identify the full import or extent of the variation". Rather, s 31(2)(b)(i) required the notice to contain a copy of the draft measure or variation, or to state how a copy could be obtained. The Authority submitted that s 31(2) did not otherwise require the notice to describe, identify or

summarise the content of the draft measure or draft variation. The Authority also denied that s 31(2)(b)(ii) required the public notice to include a summary of the Authority's assessment of the application. Again, it was sufficient for the notice to state how a copy of such a summary of the results of that assessment might be obtained.

94 In any event, the Authority maintained that the assessment report contained a detailed explanation of the proposed amendments and invited public comment. Reference was made not only to Section 7 of the assessment report, but also to Section 9 (Impact Analysis) and Section 12 (Conclusion and Preferred Option).

95 The Authority submitted that there was no basis for confining s 30 of the Act to draft measures or draft variations that "respond to" or "arise from" an application under s 22. The Authority maintained that such a limitation would give rise to considerable uncertainty. The Authority argued that s 31(1) does not limit a draft measure or a draft variation to that sought in an application under s 22. Further, the Authority argued that the existence of analogous procedures under Division 2 of Part 3 pursuant to which the Authority could initiate proposals for the development or variation of food regulatory measures did not detract from the Authority's powers under Division 1 of Part 3.

96 In any event, the Authority argued that, if there was an implied limitation of the kind for which the applicants argued, in this case the draft variation did not exceed any such limitation. Whereas the QDPIF sought an amendment to Standard 1.5.3, the proposed additional amendments were made "in order to provide improved clarity, interpretation and operation of Standard 1.5.3". The Authority submitted that the proposed additional amendments were not intended to change the intention or policy of Standard 1.5.3 and were sufficiently related to the application.

97 Finally, in further submissions filed with leave after the hearing, the Authority submitted that steps in the preparation of a food standard by the Authority were unlikely to involve decisions to which the ADJR Act applied, either because they were not decisions of an administrative character or because they did not constitute a substantive determination that was final or operative and determinative in a practical sense. The Authority submitted that the jurisdictional difficulty was not avoided by treating the steps under Division 1 of Part 3 as "conduct". The Authority conceded, however, that, if the applicants had standing, then the

Court would have jurisdiction under s 39B(1A) of the Judiciary Act to determine whether the Authority had complied with any mandatory procedural requirements under Division 1 of Part 3 of the Act. With respect to standing, the Authority distinguished between the first applicant, whose standing it did not contest, and the second applicant, whose standing it did.

CONSIDERATION

The scope of the Authority's initiative under Divisions 1 and 2

98 I turn first to the applicants' submission that s 30 of the Act did not permit the Authority to prepare a draft food regulatory measure or draft variation that did not "respond to" or "arise from" an application under s 22.

99 A difficulty with this submission arose from the parties' failure to consider the procedure under Division 1 of Part 3 as a whole. It is clear enough that the Authority is not at large in assessing an application under s 29 or preparing a draft measure or draft variation under s 30 of the Act. The Authority did not argue to the contrary. In one sense, as explained below, a draft measure or draft variation must indeed respond to or arise out of the assessment of the application under s 29 and, in this very broad sense, respond to or arise out of the application. This is not, however, what the applicants intend by their submission. The applicants argue, in effect, that, in preparing a draft variation, the Authority is not permitted to act independently or "on its own initiative" with respect to the measure the subject of the application under s 22. Their argument is that the Authority can only act on its own initiative under Division 2 of Part 3. It is in this sense that the applicants maintain that the Authority cannot prepare a draft measure or draft variation that does not respond to or arise from an application under s 22. For the reasons stated below, I would reject the applicants' submission.

100 It may be accepted that, in preparing a draft measure or draft variation under s 30 of the Act, the Authority must take account of its assessment of the application previously made under s 29. After all, an assessment of the application must be made before the Authority can prepare a draft measure or draft variation: see s 30(1); it would make nonsense of the statutory process if the Authority were not obliged to consider its own assessment of the application. In making this assessment, the Authority is not at large. The Authority must

consider the matters stipulated in s 29(2)(a), (b), (c) and "any other relevant matters" as stated in (d).

101 The parties did not direct any argument to the words "any other relevant matters" in s 29(2)(d) of the Act. In the absence of argument to the contrary, I accept that, in the case of an application seeking a variation of a food regulatory measure, "other relevant matters" can cover other matters pertaining to that measure. These may occur to the Authority by reason of its own knowledge and experience. In this context, perhaps another relevant matter may be whether the Authority has adopted the general procedure with respect to the application, or some other procedure: compare s 25.

102 In the present case, the assessment report shows that, besides the matters in s 29(2)(a), (b) and (c), the Authority had regard to various other matters, including a perceived need "to provide improved clarity, interpretation, and operation" of the measure the subject of the application. This was something that was not raised as such by the application but it was not, for that reason, irrelevant. Indeed, at the hearing, no-one suggested that this was not a relevant matter for the Authority to consider in making its assessment under s 29 of the Act. With this in mind, I accept that perceived drafting improvements are capable of being considered relevant in this statutory context.

103 In preparing its draft variation, the Authority took into account, as it was required to do, its assessment of the application, including the perceived need "to provide improved clarity, interpretation, and operation" for Standard 1.5.3. In a broad sense, as indicated above, the whole of the draft variation, including the proposed additional amendments, can therefore be said to have arisen from the application initially made under s 22. The fact that the proposed additional amendments were independently introduced by the Authority does not gainsay this.

104 The applicants' argument is, as noted earlier, that it was not open to the Authority to act independently or "on its own initiative" in preparing a draft variation under Division 1. There are numerous reasons why I would reject this submission. First, as indicated above, this may entail a disregard for relevant matters forming part of the assessment report, which, as I have said, Parliament cannot have intended.

105 Secondly, the text of ss 30 and 31 and the structure and content of Divisions 1 and 2 of Part 3 do not support the implication for which the applicants argue.

106 Section 30(2)(b) expressly contemplates that the Authority might lawfully prepare a draft measure or a draft variation that "differs from that sought in the application, **or was not sought in the application at all**" (emphasis added). A limitation of the kind advanced by the applicants is incongruous when sought to be applied to a draft measure or draft variation that "was not sought in the application at all". Such a draft measure or variation must be the product of the Authority's acting independently or "on its own initiative".

107 This does not mean that the applicant's interests are set at naught. Section 30(2) recognises that the applicant stands in a special position. Thus, if the Authority acting under s 30(1) prepares a draft measure or draft variation that differs from that which the applicant sought or was not sought by the applicant at all, the Authority is required by s 30(2) to notify the applicant of "that fact". In this event, the applicant may withdraw the application under s 24(1). Thus, under Division 1 of Part 3, the applicant cannot be compelled to lend support to a draft variation that differs from that which the applicant originally sought. I return to this consideration below. In the event that the application is withdrawn, the Authority may wish to continue with the draft measure or draft variation but, in order to do so, the Authority must initiate the process under Division 2 of Part 3 and make the draft measure or draft variation the subject of a proposal under s 55.

108 If, however, the draft measure or draft variation is not withdrawn in the first 10 business days after the s 30(2) notification, the Authority is obliged to give the public notice required by s 31. Significantly, this is the same notice that would be required if the Authority had proceeded of its own initiative under s 55, because once the Authority prepares a draft measure or draft variation under s 60, the Authority must give public notice under s 61. As previously noted, the requirements for public notice are essentially the same under both ss 31 and 61.

109 Whilst, as the applicants noted, ss 30(2) and 31(1) contemplate that the draft measure or draft variation is one prepared "as a result of an application", it is plain enough that, read in their statutory context, these words do not introduce a limitation of the kind for which the applicants contend. Rather, the words "as a result of an application" in ss 30(2) and 31(1)

convey the notion of a temporal and causal "trigger" for the preparation of the draft measure or draft variation. Though these words are words of limitation, the limitation they import must be understood in this sense.

110 In a sense, the applicants' submission that Parliament created "two roads" when it created Divisions 1 and 2 in Part 3 is correct. Division 1 does not, however, create a road reserved exclusively for third party applicants upon which the Authority cannot also travel some way after the application has been made. Divisions 1 and 2 give rise to two alternate "roads" or, as the Authority would have it, "pathways", the effect of which is to allow for the initiation, assessment and approval of a draft measure or draft variation on the application of a person or body other than the Authority or on the initiative of the Authority.

111 The nature of these roads or pathways is manifest in the fact that Divisions 1 and 2 provide for virtually identical processes and procedures. Divisions 1 and 2 of Part 3 deal with essentially the same subject matter — the development or variation of food regulatory measures, the only material difference being how the process was begun. As already observed, the procedures under Divisions 1 and 2 of Part 3 for the development or variation of a food regulatory measure are practically identical. The provisions in Divisions 1 and 2 for assessment of a draft measure or draft variation are nearly the same. Thus, ss 29 and 59 provide that the Authority must have regard to essentially the same matters in assessing both an application and a proposal. The fact that the Authority is compelled by s 29 only to assess the application is of diminished significance when one considers the nature of the matters to which it must have regard and the fact that it must still consider public submissions on the whole of the draft measure or draft variation. The requirements for giving public notice and calling for written submissions are, moreover, virtually identical under both Divisions. Parliament did not provide that the public would receive different notification of a draft measure or draft variation prepared by the Authority under s 60 of Division 2 compared with notification under s 30 of Division 1.

112 Further, should the Authority approve a draft standard or draft variation, the processes in both Divisions 1 and 2 are identical and result in notifying the Ministerial Council. This has the same powers irrespective of whether the draft standard or draft variation was approved under s 33 in Division 1 or s 63 in Division 2. Passage through the Authority, whether via Division 1 or Division 2, does not end the process for a draft measure or draft

variation, which is then subject to Council review according to the procedures in Division 3 of Part 3 of the Act.

113 The structure and content of the Division provide no sensible reason to limit a draft measure or draft variation that the Authority might prepare under s 30 in the way the applicants urge. The practical equivalence of the processes for which Divisions 1 and 2 of Part 3 provide means that the public is neither advantaged nor disadvantaged by the fact that a draft food regulatory measure is developed or varied under one or other Division. Since an applicant can withdraw an application at any time between its acceptance and approval under s 33 (or notification of its rejection), the applicant is scarcely disadvantaged by the Authority's preparation of a draft measure or draft variation that is different from what was sought in the s 22 application.

114 On the other hand, so far as the Authority is concerned, there is a practical advantage in enabling it to prepare a draft measure or a draft variation that takes account of the recommendations that ensue from its assessment under s 29, even though they were not raised by the application as such. If the Authority was restricted by a s 22 application in the way for which the applicants contend, then the Authority might be obliged either to reject the application entirely and, if it nonetheless wished to proceed with the measure or variation, to initiate the process under Division 2; or, alternatively, to bifurcate its development or variation of a draft measure by dealing with that which was raised by the s 22 application under Division 1 and the balance under Division 2. Given that the processes in both Divisions are essentially the same, these steps would appear to be unnecessarily productive of confusion, labour, cost and loss of time.

115 The limitation for which the applicants contend, which would have prevented the Authority from including the proposed additional amendments in the draft variation prepared under s 30, could only arise by implication. If there were essential differences between the processes for which the two Divisions provide, these differences might have supported an implication that it was not open to the Authority to prepare a draft measure or a draft variation that included such matters since they were not raised by the application. The applicants have not, however, shown any essential difference between the processes for which the two Divisions provide.

116 The only suggested basis for the implication for which the applicants contend is the existence of the two Divisions, the one providing for a process initiated by third parties' applications and the other for a process initiated by the Authority. This provides an insufficient basis where, as discussed above, that implication would be inconsistent with the text and structure of the Divisions and lacks practical justification.

117 It is unnecessary to consider here the applicability of s 15AB of the *Acts Interpretation Act 1901* (Cth), since the Explanatory Memorandum referred to by the applicants did not in fact offer any significant assistance on the issue with which the Court is presently concerned.

The sufficiency of the notice

118 As noted above, the applicants' principal submission was that Notification Circular [5-11] did not give public notice of the matters mentioned in s 31(2) of the Act.

119 The Authority was required by s 31(1) to give public notice. Section 7 of the Act provides that:

> The Authority satisfies a requirement under this Act to give ***public notice*** of a particular matter by:
>
> (a) publishing notice of the matter on the Authority's website; and
>
> (b) giving written notice of the matter to each appropriate government agency; and
>
> (c) if the requirement to give notice arises in the course of considering an application to develop or vary a food regulatory measure—giving written notice of the matter to the applicant; and
>
> (d) if the Authority has called for submissions in the course of considering an application or proposal for the development or variation of a food regulatory measure—giving written notice of the matter to each of the persons invited to make a submission who made a submission within the relevant submission period; and
>
> (e) giving written notice to any other person or body whom the Authority considers appropriate.

The applicants do not contest that the Authority published notice of the matter on the Authority's website and otherwise complied with s 7.

120 The question is whether or not Notification Circular [5-11], as published on the Authority's website, gave notice of the matters mentioned in s 31(2) in accordance with s 31(1).

121 Section 31(2)(a) required that the notice "state that the Authority has prepared a draft food regulatory measure or a draft variation of a food regulatory measure, as the case requires". Notification Circular [5-11] relevantly advised readers that:

> FSANZ has assessed and prepared a draft food regulatory measure for the following Application; will further consider the draft; and invites written submissions for the purpose of either approving, amending or rejecting the draft food regulatory measure **by 6pm (Canberra time) 27 April 2011**:
>
> - Application A1038 — Irradiation of Persimmons: to permit the irradiation of persimmons (*Diospyros kaki*) as a quarantine measure

122 The applicants did not argue that Notification Circular [5-11] failed to comply with s 31(2)(a) because it did not specifically state that the Authority had prepared a draft variation as opposed to a draft measure. Perhaps this was clear enough from the title and accompanying description. Leaving this seemingly minor matter aside, Notification Circular [5-11] otherwise complied with s 31(2)(a).

123 Section 31(2)(b)(i) required that the notice include a copy of the draft measure or draft variation, or state how a copy could be obtained. In this case, the draft variation was set out in supporting document 4 which accompanied the assessment report. When the webpage reader of Notification Circular [5-11] clicked on the hyperlink "Application A1038 — Irradiation of Persimmons" (see [121] above) during the submission period, the reader saw a webpage that read as follows:

> **Application A1038 — Irradiation of Persimmons**
>
> **Opening or Downloading a document file including PDFs and zip files**
>
> Assessment Report 15 March 2011 – [**pdf**]
>
> | | |
> |---|---|
> | Supporting document 1: | Risk assessment report [**pdf**] |
> | Supporting document 2: | Overview of the food irradiation process and a glossary of technical terms [**pdf**] |
> | Supporting document 3: | Summary of literature on consumers and food irradiation [**pdf**] |
> | Supporting doc[u]ment 4: | Proposed amendments to Standard 1.5.3. (marked up) [**pdf**] |
>
> Administrative Assessment Report [**pdf**] 12 January 2010
>
> **Application [Zip]**

On this webpage, "supporting document 4" was described as "Proposed amendments to Standard 1.5.3". If the reader clicked onto supporting document 4, the reader would view a PDF document in which the proposed amendments to Standard 1.5.3 were clearly shown.

124 In this way, the notice "included" a copy of the draft variation in the sense that the webpage and PDF document were incorporated through hyperlinks into the Notification Circular [5-11] as displayed on the Authority's website. There was nothing impermissible about giving public notice via the website, since s 7 expressly required it. In this medium, providing links to a copy of the draft variation was an appropriate way to include it; alternatively, the webpages sufficiently stated, in ways customary to this kind of electronic medium, how a copy of the document could be obtained — that is, by clicking through to the requisite supporting documents. Indeed, as a practical matter, Notification Circular [5-11] gave ample advice about how further information and documents could be obtained, stating, for instance, that "further information about the applications … and other matters mentioned below … can be accessed" either via the Authority's website or by contacting officers of the Authority. There was no failure to conform with s 31(2)(b)(i) of the Act.

125 Section 31(2)(b)(ii) required that the notice include a summary of the results of the Authority's assessment of the application, or state how a copy could be obtained. If the reader clicked on the "Application A1038 — Irradiation of Persimmons" hyperlink (see [121] above), the reader would see that, by clicking on the link next to the words, "Assessment Report 15 March 2011" (see [123]), the reader might read the report, which was available in PDF format.

126 I reject the applicants' submission that the assessment report was not "a summary of the results of the Authority's assessment of the application" for the purposes of s 31(2)(b)(ii) because it did not weigh the competing considerations. In its relatively succinct way, the assessment report states the results of the Authority's evaluation of the application, which includes, as a relevant matter, its opinion on the desirability of the proposed additional amendments.

127 Accordingly, Notification Circular [5-11] "included" a summary of the results of the Authority's assessment in the sense that it was incorporated via hyperlinks into the Circular as displayed on the Authority's website. Alternatively, the webpages stated, in ways

customary to this kind of electronic medium, how a copy of the document could be obtained — by clicking through to the requisite document.

128 Finally, s 31(2)(c) required the notice to call for written submissions … to be given to the Authority within the period specified in the notice. This requirement was satisfied by the Notification Circular's advice that written submissions were sought "for the purpose of either approving, amending or rejecting the draft food regulatory measure **by 6pm (Canberra time) 27 April 2011**" (emphasis in original): see [121] above.

129 Accordingly, the Authority satisfied the requirement in s 31(1) to give public notice of the matters mentioned in s 31(2) of the Act. The applicants' submissions to the contrary are rejected.

130 Whilst the Authority met the statutory requirements set down in s 31 of the Act, there is one aspect of the notice given under s 31 that remains of concern. The heart of the applicants' complaint was that they were not informed in a timely way about the actual nature of the draft variation. In the case of Gene Ethics, this was at least in part on account of the way the matter was described on the initial webpage of Notification Circular [5-11]. The description of the matter with respect to which the draft variation had been prepared was "Application A1038 — Irradiation of Persimmons", which, without more, had the clear capacity to mislead members of the public about the content of the draft variation. A member of the public might reasonably have formed the impression that the draft variation only dealt with the irradiation of persimmons. One only has to consider the draft variation in supporting document 4 to appreciate that this was not the case. While it was easy enough to click through to the next webpage and then to supporting document 4, the assessment report and other documents, the description of the matter on the lead webpage in which the body of the Notification Circular [5-11] was set out made it likely that at least some readers would not take this step.

131 There was, for the reasons already stated, no error in the Authority taking into account the matters with which the proposed additional amendments dealt or in the Authority's determination to act upon the assessment report and include the proposed additional amendments in the draft variation. Further, Parliament has not expressly required the Authority to "flag" the content of a draft variation in an immediate and obvious way.

132 The applicants argued that the notion of a "matter" in s 7 of the Act "should be construed to require the Authority to err on the side of generosity in the content of documents whereby it informs the public of the 'matters' being proposed". As already noted, however, s 7 is devoted to **how** the Authority **satisfies** a requirement to give public notice of a particular matter. Section 7 does not define a matter in respect of which notice is to be given. Relevantly for this case, this task is done by s 31. As already noted, s 31(1) obliges the Authority to give public notice of "the matters mentioned" in s 31(2), which are the matters discussed earlier (at [121]–[128] above). Section 31(1) does not require the Authority to give notice of matters other than those mentioned in s 31(2). The principles in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 ("*Project Blue Sky*") at 381 [69] and *Momcilovic v The Queen* (2011) 245 CLR 1 at 175–176 [442] to which the applicants referred do not assist in this circumstance. Hence the applicants' argument that s 7 enlarges the Authority's obligation as to the matters to be notified must be rejected.

133 Section 31(2) does not require the webpage on which a Notification Circular is displayed to describe or summarise the content of the draft variation. Rather, s 31(2) only requires a Notification Circular to include a copy of the draft measure and a summary of the results of the Authority's assessment, or state how the documents can be obtained. As stated already, these requirements were met in what has become a customary way in the electronic web medium.

134 The misleading nature of the information displayed on the webpage containing the body of Notification Circular [5-11] was, on one view, partly a product of this medium. Had the Notification Circular taken a paper form that included the draft variation and assessment report (rather than stating where they might be obtained), then the room for error may have been less. The other, possibly more important, factor was that the matter with which the draft variation dealt continued to be described by reference to a description apposite only to the application as lodged by the QDPIF. There was nothing to indicate that the draft variation dealt with more than this.

135 It should be borne in mind that the object of the Act is to ensure a high standard of public health protection via, amongst other things, achieving the goal of "an effective, transparent and accountable regulatory framework within which the food industry can work efficiently". The public notice requirements in s 31 were presumably intended to promote

accountability and transparency in the regulatory framework. Two of the three specific objectives of the Authority in preparing variations of food regulatory measures were "the provision of adequate information relating to food to enable consumers to make informed choices" and "the prevention of misleading or deceptive conduct": s 18(b)–(c). In this context, the provision of a misleading notice by the Authority might be thought to detract from these objectives.

136 Naming the application "Application A1038 — Irradiation of Persimmons" was not of itself the occasion of difficulty. Rather, it was the failure to indicate in the body of Notification Circular [5-11] that the draft variation prepared as a result of this application covered a good deal more than the irradiation of persimmons. Although the alleged statutory breaches are not made out, the Authority's action in this regard neither furthered the statutory object nor the Authority's statutory objectives. It was not within the spirit of the Act. At the least, sound public administration in conformity with the spirit of the Act favoured a different course. Whilst the Authority was not obliged by its governing statute to flag the content of a draft variation in an immediate and obvious way, principles of sound public administration required that it not draft its notices under s 31 so as to obscure the significance of a draft variation.

137 The Authority's action in this regard may have consequences for the disposition of costs.

Other matters

138 The Authority did not file any notice of objection to competency and, as already stated, did not take any point as to jurisdiction or standing prior to or at the hearing. No substantive submissions were made in this regard until further submissions filed after the hearing, when the Authority challenged the existence of jurisdiction under the ADJR Act. Even so, the issue has not been fully argued. Accordingly, given my conclusion on the matters in fact argued, it is neither necessary nor appropriate to express any concluded view on this issue. It suffices to say that I entertain serious doubts as to the Court's jurisdiction under the ADJR Act. Amongst other matters, I note that the exercise of power by the Authority to prepare a draft variation probably has a legislative as opposed to an administrative character (see *Roche Products Pty Ltd v National Drugs and Poisons Schedule Committee* (2007) 163 FCR 451 at 458–461 [26]–[41]; and *RG Capital Radio Ltd v*

Australian Broadcasting Authority (2001) 113 FCR 185 at 194–202 [40]–[78]); and even if the associated steps, such as giving notice in accordance with s 31 or notifying approval under s 34(1)(a)(i), were capable of being characterised as administrative in nature, they may not constitute a substantive determination that is final or operative and determinative in a practical sense (see *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 337–338, 365, 369). The difficulty may not be avoided by treating the steps under Division 1 of Part 3 as "conduct" for the purpose of making a decision to which the ADJR Act applies, because the conduct is for the purpose of making a legislative decision, being the variation of a legislative instrument.

139 As the Authority noted, since s 39B(1A)(c) of the Judiciary Act confers jurisdiction on the Court in any matter "arising under any laws made by the Parliament", any lack of jurisdiction under the ADJR Act may not have a great deal of practical significance. Provided the applicants have standing, the Court would have jurisdiction under s 39B(1A)(c) to determine whether the Authority has complied with any mandatory requirements under Division 1 of Part 3 of the Act.

140 The position with respect to standing for relief, including the declaratory relief, sought by the applicants was not necessarily straightforward: see, for example, *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493 at 530–531, 539–540, 548–549; *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27 at 35–37, 41-42, 53, 74; *Shop Distributive and Allied Employees Association v Minister for Industrial Affairs (SA)* (1995) 183 CLR 552 at 558; *Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 265–266; and *Edwards v Santos Ltd* (2011) 242 CLR 421 at 436. As the Authority submitted, it may well be that Safe Food had no interest over and above any other member of the public and was without standing. This was scarcely the subject of argument, however, as the applicants were apparently content to rely on the Authority's concession that Gene Ethics "may stand in a different position", as someone who "has had a right to be heard at, or has otherwise been connected with or involved in, inquiries or procedures antecedent to the making of the decision impugned", referring to *Big Country Developments Pty Ltd v Australian Community Pharmacy Authority* (1995) 60 FCR 85 at 95, citing *Sinclair v Mining Warden at Maryborough* (1975) 132 CLR 473, *Australian Institute of Marine and Power Engineers v Secretary, Department of Transport* (1986) 13 FCR 124 at 133; *Australian Conservation Foundation v Forestry*

Commission (1988) 19 FCR 127 at 131; *United States Tobacco Co v Minister for Consumer Affairs* (1988) 20 FCR 520; and *Alphapharm Pty Ltd v SmithKline Beecham (Australia) Pty Ltd* (1994) 49 FCR 250 at 266. Whether or not the principles as to standing operated in Gene Ethics' favour was never in fact argued; and, as already indicated, it is unnecessary and, in the circumstances, inappropriate to decide this question here.

141 Had the applicants succeeded in establishing non-conformity with s 31 of the Act, two further questions would also have arisen. First, whether or not a failure to comply with the requirements as to public notice in s 31 infected the ensuing process so as to give rise to an entitlement to relief. This was not the subject of argument, although it does not necessarily admit of a ready answer. The authorities establish that the consequences of such a failure depend on whether, as a matter of statutory interpretation, it was the purpose of the legislation that an act done in breach of the relevant provision would be invalid: see *Project Blue Sky* at 388–389 [91]. Secondly, there would have been a question whether, as a matter of discretion, the relief sought should be granted. Difficult issues would arise in this regard. Although perhaps touched on by the Authority, they were not addressed by the applicants in argument. Again it is unnecessary to say anything further about these issues here.

142 The applicants raised various other matters at different stages of this proceeding, but ultimately these matters were not pursued. It is unnecessary to say more of them here.

DISPOSITION

143 For the reasons outlined, I would dismiss this application. Bearing in mind, however, the misleading impression that the Notification Circular was apt to give, I am provisionally of the view that there should be no order for costs. The parties will both have seven days to file written submissions on costs. If no submissions on costs are filed within this time, I would order that there be no order as to costs.

I certify that the preceding one hundred and forty-three (143) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Kenny.

Associate: GASLon

Dated: 19 October 2012