JOHN BARKER LAW

THE FOOD AND BEVERAGE AGENDA

EDITION 1 MARCH 2016

Welcome to the first edition the Food and Beverage Agenda: John Barker Law's update on legal and trade issues in the food and beverage sector.

2016 is going to be a busy year for food and beverage law, with many new rules and regulations coming into effect. In this newsletter, we preview some of the key developments that will play out over the next 12 months.

FOOD ACT 2014 IMPLEMENTATION GETS UNDERWAY

With food safety assuming ever greater social and economic importance, many countries are in the process of modernising their food laws – including USA and China.

New Zealand is no exception and 2016 will see the implementation of the Food Act 2014 begin in earnest. Long-awaited regulations and statutory notices were issued in December last year, setting out the detail on what food businesses and verifiers will need to do in their day-to-day activities. You can find the legal texts *here*.

By and large, there are not too many surprises or changes from the direction outlined in MPI's consultations last year. For some businesses, the new legislation may be a source of additional cost and complication – in particular, smaller businesses required to operate under a food control plan for which there is no approved template. For other businesses, compliance could become simpler – for example, businesses currently operating under a food safety plan that will transition to a national program.

MPI has provided on its *website* tools and guidance materials to help food businesses to navigate a path through the complexities of the legislation.

Inevitably there will be unforeseen issues and special cases that emerge during the implementation period. We anticipate that one of the more problematic areas will be the interface between verifiers and food businesses.

Experience from Wine Act and the Animal Products Act suggests that shortages of qualified verifiers, differences of opinion over the scope of verification and over the decisions of verifiers are likely to be encountered as all parties involved learn the ropes in their new regulatory environment.

The introduction of a *Food Safety Reform Bill* – implementing findings from the Report on the whey protein concentrate botulism incident - is also anticipated in 2016. Along with a number of technical tweaks, expect to see obligations around traceability and recall procedures stepped up.

NEW RULES FOR NUTRITION AND HEALTH CLAIMS

By now most NZ and Australian food businesses will hopefully be aware that *Standard 1.2.7 Nutrition, Health and Related Claims* came into full effect on 18 January 2016 after a three-year transition period. I say 'hopefully' because there are no stock in trade provisions so all products on the market must be compliant as of that date.

Even for businesses that have been working on getting up to speed on Standard 1.2.7 for some time, the process of reviewing labels to determine whether they are using: a nutrition content claim; a general level health claim; a high level health claim; or a therapeutic claim can be tricky and expert advice is often required.

On the up side, Standard 1.2.7 sets out a list of approved nutrition and health claims that are available for food businesses to use qualifying foods. Using such claims can potentially be a valuable element of food marketing that businesses should look to take advantage of.

One interesting aspect of Standard 1.2.7 that has yet to be fully exploited is the provision for self-substantiation of general level health claims. While self-substantiation is a relatively costly and time consuming exercise, if successful food business can gain exclusive rights to a particular claim unless and until a competitor goes through the same process – giving at the very least a serious head start on the market with respect to that claim.

FOOD STANDARDS CODE CHANGES

The wholesale revision of the Food Standards Code, intended to clarify the structure and definitions of the existing version, will come into effect on 1 March 2016 with no stock in trade provision. *(See here.)* While the intent was not to change the substance of the Code, inevitably there are instances where a "clarification" alters the way that a provision is interpreted in practice.

FSANZ also has a number of proposals or applications to change the Code under consultation at the moment.

Most significantly, Proposal P1024 sets out options to amend the existing rules on nutritive substances and novel foods. *(See here.)* The intent of the proposal is to remove the ambiguity that currently exists around whether a novel food or nutritive substance requires pre-approval, as well as the process for gaining approval. The current regime creates a lack of certainty for food businesses as well as difficulties in enforcement. 3 options are proposed, from retaining the status quo, to clarification of some definitions, to a complete overhaul of the pre-approval requirements. The consultation closes on 24 March 2016.

NATURAL HEALTH PRODUCTS TO GET THEIR OWN SYSTEM?

Natural health and supplementary products inhabit a rather confusing legal territory in-between food regulation and medicines regulation.

A *Bill* to define such products and to give them their own regulatory framework has been before Parliament for nearly 5 years. The Bill has passed its second reading, but its scheduled third reading continues to languish near the bottom of the Parliamentary Order Paper.

Nevertheless, the Ministry of Health is clearly anticipating that the Bill will be passed into law sometime this year because it is currently in the process of consulting on regulations to bring the new law into effect. *(See here.)*

The Bill defines natural health and supplementary products as products that are for the primary purpose of bringing a health benefit other than foods, medicines, products where the active ingredient is less than 20 ppm, and homeopathic remedies.

Once passed into law, the Natural Health and Supplementary Products Act (as it will be known) will introduce a regime under which manufacturers of such health products will need to be registered and operate under a Code of Manufacturing Practice.

The products themselves will in most cases need to be made only from permitted substances and notified to the regulator. Labelling rules are set out and health benefit claims will need to be supported with suitable evidence (which may include traditional evidence).

The proposed regulations set out the detail of what the registration system and the Code will look like, as well as the content of labelling rules and a draft list of permitted substances.

The consultation period for the regulations closes on 4 March 2016. However, the Ministry of Health will be continuing to accept submissions on permitted substances for use in natural health and supplementary products until 31 May 2016.

All manufacturers of such products should review the consultation papers. At the very least, it will be important to check that any important active ingredients in your products are included on the draft list of permitted substances. *(See here.)*

AUSTRALIA GOES SUPER-COOL

Consultation has just ended on Australia's proposed new country of origin food labelling requirements. *(See here.)* The new standard under the Australian Consumer Law will require that the majority of products grown, made or packaged in Australia to display the prominent 'kangaroo' logo indicating the extent of production in Australia.

There are some 'non-priority' products for which this requirement is voluntary, including alcoholic beverages, soft drinks and bottled water, confectionary and snacks, and seasonings.

Imported products (other than non-priority products) that are not packaged in Australia will now need to place the country of origin information in a box in a prominent on the label. The way in which origin is determined for some products may change as well.

New Zealand exporters of packaged product might expect be exempted from any changes due to the *Trans-Tasman Mutual Recognition Agreement*. However, there is a TTMRA carve out for country of origin labelling in the *Customs (Import) Regulations 1940*, and the Australian government is proposing to change those regulations so that the COOL proposals will apply to New Zealand products.

For New Zealand and other exporters of priority goods to Australia, there are likely to be significant costs in adjusting their labelling – particularly where country of origin changes on a seasonal basis. Given that country of origin labelling has proven to be highly contentious in the WTO context, it will be interesting to see if this new standard goes unchallenged.

WINE AND SPIRITS TO GET GI REGISTRATION

After a delay of nearly 8 years, the *Geographical Indications (Wine and Spirits) Registration Act 2006* is scheduled to come into force in 2016. A *Bill* is has been introduced to Parliament that will make a number of amendments necessary for implementation of the Act. This is a significant development for New Zealand, which is currently the only major wine exporting country that does not have some sort of GI registration system or equivalent.

The Act 2006 establishes a system by which interested parties can apply to register a geographical indication for wines or spirits – either NZ of foreign - on a government register. Once registered, a GI will be protected against the misuse of the GI on wines that do not originate in the GI area.

Misuse of a GI will be deemed to be a breach of the Fair Trading Act 1986. This protection will apply even if infringing product also indicates its true origin of the wine or spirit; if the registered geographical indication is used in translation; or if the GI is accompanied by words like "kind", "type", "style" or "imitation.

The Bill has not yet had its first reading, although indications are that it will be passed into law in 2016. In the meantime, work is underway in MBIE and the Intellectual Property Office of New Zealand to develop the regulations and administrative systems needed to support to Act.

SSAA CHALLENGES CONTINUE

The Sale and Supply of Alcohol Act 2012 continues to be a challenging law for both businesses and regulators. Two High Court appeals in late 2015 highlight the ongoing process of working out precisely who is responsible for what under the SSAA.

In *Christchurch Medical Officer of Health v Vaudrey and others* the key legal issue related to the role of District Licensing Committee and/or the Alcohol Regulatory and Licensing Authority in determining a license application. It was found that the role is an evaluative one, requiring a merits-based determination of the application. In making a determination, the DLC/ARLA can impose, not only the mandatory and voluntary conditions specified in the SSAA, but also any further conditions which are reasonable and that are "not inconsistent" with the Act.

The much publicised case of *Auckland Medical Officer of Health v Birthcare Auckland Ltd* centred around the question of whether ARLA had given insufficient weight to evidence about harms attributable to alcohol consumption by pregnant or breastfeeding mothers in renewing Birthcare's license. The High Court found that ARLA had not erred in law in granting a renewal of Birthcare's license and concluded that there was not a sufficient causal nexus between the evidence presented by the MOH and the way in which Birthcare operated its license.

Meanwhile, there remain many more aspects of the SSAA and its implementation to be worked through, not least of which will be the appeals to Auckland Council's *Provisional Local Alcohol Policy* which should be heard this year. The government is also proposing an *adjustment* to the SSAA to accommodate the display of alcohol-free beer in grocery single-areas. Plus, there is the ongoing uncertainty surrounding restrictions on advertising and promotion of alcoholic beverages.

GRAPE SUPPLY CONTRACTS UNDER SCRUTINY

The grape oversupply of the late 2000s has given rise to a number of cases about grape supply arrangements that have been working their way through the courts for several years. The latest case to be heard by the Court of Appeal – *Savvy Vineyards 3784 Ltd V Arck Ltd* – turns on a quite specific question of law, but it holds a general lesson for all parties to grape supply agreements.

The point at issue was whether an option to purchase grapes had been exercised, and consequently whether there was a liability for grapes that were not supplied under the option. Even though the formal notice to exercise the option to purchase was not served, the Court of Appeal found that the parties had agreed to the option by their conduct.

The lesson here is that the conventional wisdom that the best grape supply agreement is the one that is left in the bottom drawer does not always hold true. As soon as difficulties appear on the horizon parties need to open the bottom drawer and make sure they understand clearly the contractual implications of their actions.

MINIMUM PRICING IN THE SPOTLIGHT

The European Court of Justice recently found that, while Scotland's minimum unit pricing for alcohol was an effective measure to achieve the objective of protecting human health, it would also be trade restrictive because it forced cheaper imported products to be more expensive. The ECJ suggested that taxation policies were considered to be a less trade restrictive option than minimum pricing. The matter has been referred back to the Scottish Courts. *(See here.)*

TRANS-PACIFIC PARTNERSHIP TO BE SIGNED

The negotiating text of the TPP has been finalised *(see here)* and a signing ceremony was held in New Zealand on 4 February 2016.

From a food and beverage business perspective, while the TPP fell short of its ambitions for some key New Zealand sectors, there will still be important gains. $311 million out of a projected $334 million eventual annual tariff reductions will go to the food exporting primary industries.

Some tariff reductions or eliminations will take effect immediately, but others will take up to 16 years. Over time, these reductions will re-set markets and price expectations; so the TPP gains may be as much about avoiding the commercial disadvantage of being outside the agreement, as they are about any sort of commercial advantage from lower tariffs.

Other key trading economies outside the agreement - such as China and the EU – will no doubt respond to the challenge of the TPP in their own free-trade discussions with TPP parties e.g. by seeking equivalent or better reductions or timetables.

The TPP is not just about tariff reductions, and for some sectors gains made in other areas are more important. For example, the Wine and Spirits Annex to the chapter on Technical Barriers to Trade extends existing industry initiatives to simplify labelling across multiple markets and provides a platform for ongoing dialogue on other technical trade issues.

FOREIGN SUPPLIER VERIFICATION ON THE HORIZON

Both the USA and China are in the process of implementing new food safety laws, which include new rules for imports of foreign food products and ingredients.

In the case of China, along with the *Registration System for Importers and Exporters of Imported Food*, there will be a requirement for importers to carry out compliance audits of compliance and the "quality safety control system and food defence system" for imported products. These may be paper audits, but importers are encouraged to conduct on-site audits of facilities for manufacturing imported goods.

For certain products, on-site inspections will be mandatory at least once every 3 years – specifically infant formula, food for special medial purposes, health food, meat, raw and chilled aquatic products, rice and bulk vegetable oil. Infant formula producers have already had a taste of what foreign supplier verification means for China!

In the USA, the Food and Drug Administration has issued its Final Rule under the Food Safety Modernisation Act on Foreign Supplier Verification Programs (FSVP) for Importers of Food for Humans and Animals. *(See here.)* An FSVP is a program that importers must have in place to show that imported foods are safe and have accurate allergen labelling.

Among other things, an importer will be required to carry out a hazard analysis, evaluate the food safety risk and the supplier's performance, and conduct some form of supplier verification. For higher risk products, this may include on-site verification – although this can be conducted by an appropriate third party rather than the importer itself.

Modified requirements will apply to dietary supplements, to small importers (less than US$1 million), and where the food comes from a country whose food safety systems are recognised by FDA. New Zealand's MPI already has agreements in place with the FDA over recognition of food safety systems, so it is possible that New Zealand exports could fall within this last exception. Certain products are exempted from the FSVP required – such as juices, fishery products and alcoholic beverages. For many businesses, an FSVP will need to be in place within 18 months.

CORRUPT PRACTICES IN OFFSHORE MARKETS

A recent NZ legislative amendment that passed largely unnoticed was the Organised Crime and Anti-Corruption Legislation Bill which, among other things, beefed up the Crimes Act provisions on bribery and corruption.

This is relevant to food businesses operating in markets where bribery is a particular problem. Bribery is now a criminal offence in New Zealand even if it occurs overseas, and there is provision for both and individuals and their employers to be prosecuted. *(See here)*

ADVERTISING TO CHILDREN

Advertising to children will be in the spotlight this year with the Advertising Standards Authority's review of the Code for Advertising to Children and the Children's Code for Advertising Food. *(See here.)* The review covers a broad range of issues relating to the operation and content of both codes and is intended to coincide with work being undertaken across a number of sectors as part of the childhood obesity plan.

This issue is very topical internationally with the World Health Organisation's Committee on Ending Childhood Obesity recently presenting its report *(See here)*. There is also a draft proposal before the WHO on Inappropriate Promotion of Foods for Infants and Young Children before the WHO *(See here)*.

ABOUT JOHN BARKER LAW

John Barker Law is New Zealand's only specialist food and beverage law firm. We focus exclusively on the food, beverage and related sectors so as to provide practical advice with an understanding of your business environment. Our Principal, John Barker has more than 18 years' experience in food and beverage law, with a particular specialty in alcoholic beverages.

We offer a range legal and strategic services from "black letter" law to policy and trade advice and representation. Our goal is to provide our clients with a clear regulatory pathway from production to the global market.

If you have any questions about any of the stories above, or if you have any questions about food and beverage law, give John a call on 021 798 353 or drop him a line at john@johnbarkerlaw.com.