Court of Appeal overturns ban on GE applications

Posted on 24/03/2010 by Gus Hazel, and Vineetha Veerakumar

The Court of Appeal yesterday overturned a High Court decision banning the Environmental Risk Management Agency (ERMA) from considering 4 applications made last year by AgResearch Limited. The applications dealt with laboratory testing of human and monkey cell lines and smaller species of GE laboratory animals, as well as the development of other GE animals.

Clifford J at the High Court found that AgResearch's applications did not comply with the requirements of section 40 of the Hazardous Substances and New Organisms Act (HSNO) and were too generic to enable ERMA to undertake the risk assessment that it is required to undertake under the HSNO Act. ERMA was directed to take no further steps towards hearing and assessing AgResearch's applications.

The High Court proceedings were brought by GE Free NZ Limited, requesting a judicial review on the basis that the lack of specificity in AgResearch's application meant that ERMA could only comment on genetic engineering generally, rather than on the risks and benefits of genetic modification of particular organisms by particular techniques.

AgResearch challenged the High Court decision at the Court of Appeal, which resulted

in the High Court decision being overruled and ERMA being allowed to continue its process of assessment of AgResearch's applications.

At the Court of Appeal, both AgResearch and ERMA argued that ERMA's acceptance of the applications did not amount to a "decision" and as such there was no statutory power of decision to which a judicial review, as requested by GE Free NZ Limited at the High Court, could apply.

AgResearch and ERMA further argued that the power to impose controls granted to ERMA by section 45(2) of the HSNO Act meant that the wide scope of generic applications (such as AgResearch's) were not a matter of concern: the controls imposed by ERMA would limit the scope of those applications and the activities authorised by it.

The Court of Appeal determined that ERMA's process of assessment was "essentially mechanical" and its acceptance of genetic engineering applications did not involve any kind of "seal of approval". While the Court accepted that generic applications raised challenges for ERMA, it declined to prescribe guidance on the process generally.

The Court of Appeal also stated that in the absence of any specific provisions prescribing what ERMA is to do when it receives an application which may not comply with the specific requirements of section 40 it would have to satisfy itself that the applications are the type to which approval can be given under section 45. On this basis, a generic application could still ultimately be dismissed because it did not allow

ERMA to conduct an assessment of the risks and benefits to its satisfaction.

The parties have until 20 April 2010 to seek leave to appeal to the Supreme Court.

For advice in relation to regulatory issues please contact Gus Hazel or Vineetha Veerakumar.