Case Commentary: Wyeth vs Ancare and ERMA

Posted on 21/05/2010 by Gus Hazel, and Vineetha Veerakumar

The Supreme Court in a recent decision clarified the basis on which ERMA could withhold information from the public in relation to hazardous substances.

Wyeth (NZ) Limited v Ancare New Zealand Limited and The Environmental Risk Management Authority [2010] NZSC 46 (see here)

Under the Hazardous Substances and New Organisms Act 1996, parties wishing to manufacture or import into New Zealand hazardous substances must first obtain the approval of ERMA. Applications to ERMA are publicly notified and interested parties have the opportunity to file submissions with respect to applications, and be heard on these at a public hearing.

This appeal concerned one such application by Ancare New Zealand Limited to manufacture and import a drench. Ancare used the codeword MEP600 for its application, and withheld all technical information regarding its ingredients from the public. Wyeth, wishing to make a submission on Ancare's application, sought information regarding the ingredients of the drench. Ancare contended this information

was confidential and would unduly prejudice its commercial position and ERMA refused to disclose the information to Wyeth. The Ombudsman, upon appeal by Wyeth, upheld ERMA's decision. Wyeth appealed to the High Court, which found that ERMA had not complied with the requirements of the Act and directed it to rehear the matter. Ancare successfully appealed to the Court of Appeal, and Wyeth in turn appealed to the Supreme Court . The hearing before the Supreme Court focussed upon what the Act required ERMA to disclose to the public, and specifically whether a codename alone would suffice (as opposed to the active ingredient(s) for example) .

The Supreme Court held that the statutory regime under the Act did not require ERMA to reveal confidential information to the public, and that a codename could suffice. When an application is made ERMA (privvy to the confidential information about the ingredients) is in possession of all the information it requires to make a decision and has the authority to request the applicant for any further information it requires. The Act further incorporates the principles of the Official Information Act in relation to confidential information and stipulates that where there is a request for the release of confidential information, the proprietor of that information has the opportunity to say why it should be withheld. With respect to the register of Hazardous Substances administered by ERMA, the Court found that although the Act stipulates that ERMA maintain such a register, it was not intended to be a comprehensive record of all hazardous substances in New Zealand and the statutory requirements were met where codenames were used by applicants and informaton regarding the identity of the ingredients withheld.

The Court also found that while Wyeth may not have known the active ingredient or composition of the drench, it has sufficient information by way of the classification of those substances provided by Ancare and approved by ERMA to make any submissions.

The Court dismissed the appeal without order for costs.

Recent amendments to the Hazardous Substances and New Organisms Act have now changed the language of provisions dealing with ERMA's public notification duties such that notification of new applications to release hazardous substances is no longer mandatory, but is now a matter for ERMA's discretion.

Baldwins acted for its client Wyeth throughout this litigation.

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