

Commentary

David Leyonhjelm

Crossing the line

An agricultural chemical company has won a decision in the Federal Court with similarities to the Pan Pharmaceuticals case that led to the payment of \$55 million in damages. Like the Pan case, it involved a regulator overreaching its authority.

Imtrade Australia was accused of giving a fictitious name and address in China as the manufacturer of certain active constituents. The company does not dispute the accusation, saying it did so because it did not want the information made available to its competitors and considered it irrelevant to the regulator, the Australian Pesticides and Veterinary Medicines Authority (APVMA).

In early May, the APVMA enlisted the Australian Federal Police to raid Imtrade's Perth premises. Criminal sanctions were threatened plus cancellation of the approval of active constituents and products associated with the false details. Two weeks later the APVMA imposed a compulsory recall of the affected products, some 47 in total, and notified Imtrade that the products were no longer registered.

Imtrade appealed to the Administrative Appeals Tribunal, which promptly ordered the recall stayed. The APVMA took it to the Federal Court, which handed down its decision last week.

The APVMA argued it was entitled to regard Imtrade's approvals and registrations as invalid from the beginning because they were based on fraudulent information. As a consequence, it believed it had no need to go through the formal process of cancelling the approvals and registrations.

The court disagreed, finding that the APVMA had acted unlawfully by removing the products from the approved products register, and ordered their reinstatement.

It said false information had not been relied upon to approve the products but was merely collected as required. It also criticised the APVMA for resorting to "self help" rather than seeking remedies in the court. Even if there had been safety considerations, which there were not, it said only a court could decide whether an administrative decision could be nullified in this manner.

It pointed to the need for the rights of innocent third parties affected by the decision to be considered since they were exposed to criminal liability, forfeiture of property, plus injunctions and search warrants. The APVMA already had the power, it said, to correct particulars as well as to suspend or

cancel approvals and registrations, allowing time for affected third parties to dispose of unapproved products.

The APVMA is understood to be unhappy with the decision and would like to appeal, but is reluctant due to financial constraints. It is entirely industry-funded, based on registration fees plus a levy on sales which have been hurt by the drought.

But without a successful appeal it is exposed to damages like the Therapeutic Goods Administration in the Pan case. A regulatory agency has exceeded its authority and acted peremptorily, contrary to the law. While it took great umbrage at the AAT's stay on the recall, that decision may have actually saved it from substantial damages. Imtrade's products were only off the market for two weeks.

On the broader front, the case raises all sorts of doubts about the regulator. The chemical industry is asking why the APVMA is using its money to defend itself against unlawful actions and perhaps to pay compensation.

And some are asking whether Imtrade has a point. Why does it require the name of manufacturers anyway? It's not as if it can afford to go to China and inspect the plant against Australian standards. Again, consumer interests seem to have been overlooked.

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