IN THE SUPREME COURT OF NEW ZEALAND

SC 57/2009
[2010] NZSC 46

BETWEEN	WYETH (NZ) LIMITED Appellant
AND	ANCARE NEW ZEALAND LIMITED First Respondent
AND	THE ENVIRONMENTAL RISK MANAGEMENT AUTHORITY Second Respondent

Hearing: 8 February 2010

Court: Elias CJ, Blanchard, McGrath, Wilson and Anderson JJ

Counsel: B W F Brown QC and G Hazel for Appellant
J O Upton QC for First Respondent (given leave to withdraw)
D J Goddard QC and C Gregorash for Second Respondent
H M Aikman QC as Amicus Curiae

Judgment: 23 April 2010

JUDGMENT OF THE COURT

The appeal is dismissed with no order for costs.

REASONS

(Given by McGrath J)

Introduction

[1] Ancare New Zealand Ltd, the first respondent, applied to the Environmental Risk Management Authority under the Hazardous Substances and New Organisms

Act 1996 for approval to import or manufacture a veterinary medicine. The Act requires the Authority to keep a register of all applications made to it which is available for public inspection.[1] The register must specify "a sufficient description" of substances the subject of application "to uniquely identify" them.[2]

[2] In the public section of its application Ancare used the alphanumeric codeword MEP 600 to refer to its substance. Details of the chemical composition were provided in a confidential section. The Authority referred to the substance on its register using the same codeword. It took the view that this sufficiently described the substance to meet the requirements of the Act. No specific information concerning the composition of MEP 600 was included on the register.

[3] Wyeth (NZ) Ltd, the appellant, is a competitor of Ancare which wished to make a submission to the Authority on Ancare's application. Wyeth sought information from the Authority concerning the identity and chemical composition of MEP 600. The Authority decided that disclosure of this information would unreasonably prejudice Ancare's commercial position and refused Wyeth's request.[3] The Authority then proceeded to a hearing following which it granted Ancare's application. Wyeth appealed against that decision to the High Court,[4] which held that the Authority had misinterpreted the legislation and should reconsider both the application and whether Wyeth should be provided with information concerning the make-up of MEP 600. The High Court quashed the Authority's decision approving the application and directed the Authority to rehear it. Ancare appealed to the Court of Appeal, which allowed the appeal and reinstated the Authority's approval of the application.[5]

[4] Wyeth now appeals, with leave, to this Court against the Court of Appeal's judgment. The approved ground of appeal is whether the Act requires that the Authority include on its register of applications details of the composition and active ingredients of all substances concerned. Ancare was named as respondent to the

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1 Section 20(1) and (5) of the Act.
2 Section 20(2)(b).
3 Under s 9(2)(b)(ii) of the Official Information Act 1982.
4 *Wyeth (New Zealand) Ltd v Ancare New Zealand Ltd* HC Wellington CIV-2006-485-2596, 18 June 2007.
5 *Ancare New Zealand Ltd v Wyeth (NZ) Ltd* [2009] NZCA 211, [2009] 3 NZLR 501.

appeal but, for reasons which are unrelated to this proceeding, decided not to participate. In those circumstances we appointed Ms Aikman QC as amicus to advance argument to us in opposition to the appeal.

Statutory scheme

[5] The long title of the Hazardous Substances and New Organisms Act states that it is:

> An Act to restate and reform the law relating to the management of hazardous substances and new organisms.

[6] Part 2 contains provisions in relation to the purpose of the Act. Section 4 provides:

> The purpose of this Act is to protect the environment, and the health and safety of people and communities, by preventing or managing the adverse effects of hazardous substances and new organisms.

In order to achieve that purpose, s 5 requires that all persons acting under the Act must recognise and provide for these principles:

> (a) The safeguarding of the life-supporting capacity of air, water, soil, and ecosystems:
>
> (b) The maintenance and enhancement of the capacity of people and communities to provide for their own economic, social and cultural wellbeing and for the reasonably foreseeable needs of future generations.

[7] The Act also requires those acting under it to take into account matters which include the intrinsic value of ecosystems and public health.[6] As well, they are required to exercise caution in managing adverse effects where there is scientific and technical uncertainty about them.[7]

[8] Part 3 of the Act provides for certain powers, functions and duties of those acting under it. In relation to the Environmental Risk Management Authority these include powers to keep registers relating to hazardous substances and new organisms

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6 Section 6(b) and (c).
7 Section 7.

which are required by the Act, or are necessary to administer it, and generally to carry out its statutory powers, functions and duties.[8]

[9] Part 4 of the Act contains provisions relating to the Authority. They deal with its establishment and membership, its freedom from Ministerial direction in respect of certain of its functions, and various administrative matters. Among these provisions is s 20 which imposes the obligation to keep a register of all applications. Insofar as is relevant to the issues in this appeal, s 20 provides:

> **20 Obligation to prepare and maintain register**
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> (1) The Authority shall keep a register of all applications made to the Authority.
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> (2) The register shall specify—
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> (a) the name and address of the applicant:
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> (b) a sufficient description of the substance or organism to uniquely identify that substance or organism:
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> (c) the purpose of the application:
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> (ca) if applicable, the project concerned:
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> (d) whether the application was approved or declined:
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> (e) any controls attached to the approval by the Authority, including any associated permissions granted under section 95A and any associated licences granted under section 95B:
>
> (f) all the controls on a hazardous substance, whether the controls are imposed under this Act or any other Act.
>
> ...
>
> (5) Every person shall have the right to inspect the register during the ordinary office hours of the Authority.

[10] Part 5 of the Act is headed "Assessment of hazardous substances and new organisms". It contains the central provisions of the Act's regulatory scheme in relation to hazardous substances. The first group of provisions in this Part appears under the subheading "Prohibition of import, etc, and types of approval". Section 25(1) prohibits the import or manufacture of any hazardous substance otherwise than in accordance with an approval under the Act or its specified

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[8] Section 11(1)(f) and (g).

transitional provisions. The types of approval that may be obtained are listed and include an approval to import or manufacture a hazardous substance for release.[9] The next group of provisions in Part 5 is headed "Approvals for hazardous substances". Insofar as it is relevant for present purposes, s 28 provides:

> **28 Application for approval to import or manufacture hazardous substances**
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> (1) Unless an approval under section 28A or section 29 applies to the importation or manufacture of the substance, every person intending to—
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> (a) import; or
>
> (b) manufacture—
>
> a hazardous substance otherwise than in containment shall, before importation or manufacture, apply to the Authority for approval to import or manufacture that substance.
>
> (2) Every application shall be in an approved form and shall include—
>
> (a) the unequivocal identification of the substance and its properties; and
>
> (b) information on all the possible adverse effects of the substance on the environment; and
>
> (c) information on the intended uses of the substance throughout the life cycle of the substance; and
>
> (d) information on methods for disposal of the substance; and
>
> (e) information on all occasions where the substance has been considered by the government of any prescribed State or country or any prescribed organisation and the results of such consideration; and
>
> (f) such other information as may be prescribed.

[11] The Hazardous Substances (Forms and Information) Regulations 2001 elaborate in detail on information about assessment of risks, costs and benefits required in an application. Sufficient information to enable the Authority to carry out its powers, functions and duties is required.

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[9] Section 27(a).

[12] After considering an application for approval made under s 28, the Authority has the power to approve or decline the application.[10] It must take into account any controls that may be imposed on the substance, all its effects during its life cycle and the likely effects of the substance being unavailable. The decision is to be made according to whether the positive effects of the substance outweigh its adverse effects or vice versa. The Authority may decline the application if insufficient information is available to enable it to determine the adverse effects of the substance. If the application is approved the Authority has power to impose as controls any obligations or restrictions it thinks fit.

[13] The Authority's decision-making processes are further regulated by closely prescribed subordinate legislation in relation to recognising and taking into account risks, costs and benefits, the nature and probability of risks and how to manage them.[11]

[14] Part 5 also includes provisions setting out the "Procedure for assessment" of applications. Certain applications, including those under s 28, must be publicly notified by the Authority.[12] Under s 54 any person may make a written submission on any publicly notified application to the Authority and if such a person so requests, a public hearing must be held by the Authority.[13]

[15] Provisions in this group of sections also address how the Authority is to deal with information supplied to it. The Authority is subject to the provisions of the Official Information Act 1982, but the Act prescribes a procedure for how it is to deal with requests for information that might be withheld.

[16] So far as is relevant, s 57 of the Hazardous Substances and New Organisms Act provides:

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10 Section 29.

11 Hazardous Substances and New Organisms (Methodology) Order 1998.

12 Section 53. Clause 7 of the Methodology Order requires the Authority, in the public notice, to summarise the application and its assessment of risks, costs and benefits but excluding any information withheld under the Official Information Act.

13 Section 60.

57 Authority to withhold information

(1) Where, in the Authority's opinion, any information which has been supplied to the Authority in respect of any application may be able to be withheld under section 9(2)(b) of the Official Information Act 1982, that information shall not be released to any person when any application is publicly notified.

(2) Where—

(a) the Authority receives a request to release any information held by the Authority under the Official Information Act 1982; and

(b) the information to which the request relates,—

(i) in the Authority's opinion, may be able to be withheld under section 9(2)(b) of that Act; or

(ii) has been classified as commercially sensitive by the person who gave the information to the Authority,—

the Authority shall make all reasonable efforts to contact and notify immediately the person who gave the information to the Authority that a request to release the information has been received.

(3) Where a person receives notice from the Authority under subsection (2), that person shall, within 10 working days of receipt of the notice, respond to the Authority stating whether that person believes that the information should be withheld under section 9(2)(b) of the Official Information Act 1982 and give reasons for that person's belief.

(4) The Authority may release the information or withhold the information in accordance with the Official Information Act 1982 if—

(a) the Authority has complied with subsection (2); and

(b) the time limit specified in subsection (3) has expired.

[17] The Authority's decision is subject in the normal way to review by the Ombudsman. Information that is withheld from release under s 57 may still be considered by the Authority in determining applications.[14]

[18] Under s 60, where any person making a submission on an application wishes to be heard, the Authority has an obligation to hold a hearing. The hearing of a publicly notified application must be held in public and the Authority is required to

[14] Section 56.

establish a procedure that is "appropriate and fair in the circumstances".[15] Cross-examination and questions in clarification may be permitted but this is within the discretion of the Authority, which has power to permit only its members to ask questions.[16] The applicant and any person making submissions may speak personally or through a representative at the hearing and have the right to call evidence.[17]

Ancare's application

[19] Ancare's application to import or manufacture MEP 600 was filed on 19 June 2006. The application was made on a standard form approved by the Authority. The form requires applicants to include a summary which identifies the substance, its hazardous properties and intended uses. They are also required to make an assessment of risks, costs and benefits and methods implemented to manage them, particularly in relation to emergency management and disposal.

[20] Ancare summarised its application as follows:

> This application is being made to gain approval for *MEP 600* to be manufactured and released in New Zealand. Products containing the same active ingredients are already on the market, however this formulation has not been notified as a hazardous substance and therefore requires assessment according to the HSNO Act. *MEP 600* triggers some of the HSNO thresholds for toxicity and ectoxicity.
>
> The main risks associated with this product are during transport and to the user if not handled or stored appropriately, or to aquatic organisms or terrestrial vertebrates in the case of accidental spills or inappropriate disposal. The magnitude of these risks are judged to be minimal as these events are unlikely and in the event that they did occur would be localised and of short duration. These risks will be further controlled by the product labelling including information on the administration to animals (topical and/or internal) and the method of disposal. Therefore the risks resulting from this product will be insignificant.
>
> *MEP 600* will not pose any economic, social or environmental cost. The introduction of this product to the market will not increase volumes sold, it will simply increase market choice. This increased choice may translate into cheaper prices for the farmer and *MEP 600* will also have a number of benefits in terms of animal welfare and increased production.

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15 Section 61(7).
16 Section 61(7).
17 Section 61(8).

[21] The application form indicated that commercially sensitive information should be attached as an appendix. Cross-reference should be made in the application to the appendix but the application as a stand-alone document would be publicly available. The form required the applicant to "include all information necessary to unequivocally identify the substance(s)". Where there were commercial reasons for not supplying full information in the main part of the form, an applicant could seek agreement of the Authority to a different approach. The applicant, however, had to include the provision of a unique identifier of some kind. Ancare's response to that direction was:

> The composition of the mixture *MEP 600* is confidential. Details of the formulation and components are provided in Appendix 1.

In response to a direction to provide information on the hazardous properties of the substance, Ancare referred to toxic and ecotoxic properties triggered and said:

> The methodology for determining this status contains confidential composition details and is therefore included in Appendix 1 (Confidential).

[22] In response to an instruction to identify all potential risks, costs and benefits associated with the substances, Ancare gave a detailed answer in terms which reflected underlying regulations.

[23] In a section of the form that sought information that the Authority might use on the public register, Ancare identified the substance for that purpose as "MEP 600" and stated that the purpose of its application was:

> To manufacture and release for use an anthelmintic for ruminants, in a liquid form. Products containing the same active ingredients are already approved in New Zealand for this purpose, however, this formulation is not a notified toxic substance and therefore requires assessment according to the HSNO Act.

Wyeth's request for information

[24] On 5 July 2006 the Authority published a public notice calling for submissions on the application as required by the Act. The application was summarised as follows:

> Application HSR06071 by Ancare New Zealand Limited to manufacture and release MEP 600 for use as an anthelmintic for ruminants in liquid form. Date of public notification 5 July 2006, closing date for submissions 16 August 2006.

The advertisement indicated that further information could be obtained by contacting the Authority or from its website.

[25] On 17 July 2006 Wyeth's solicitors requested information about MEP 600 from the Authority under the Official Information Act. In particular it sought information about the active ingredient and its chemical structure. As this information had only been included in the application in the confidential appendix, the Authority asked Ancare either to authorise its release or to provide a detailed justification under s 9(2)(b) of the Official Information Act for the Authority to withhold information.

[26] Ancare responded on 27 July 2006 saying that release of the information sought would disclose a trade secret and unreasonably prejudice Ancare's commercial position. It added:

> There are a number of common excipients and a limited number of actives used in the formulation of veterinary medicines. By revealing the identity of the components in the substance, or by revealing any indirect information that leads to the identity of the components, it is possible to deduce the formulation, and in effect, to release the formulation of this particular substance. Therefore, the release of this information would disclose a trade secret.
>
> A significant amount of time, money and effort is invested in the development of this substance. Release of the requested information will result in an unfair advantage to the recipient and jeopardize Ancare NZ Ltd's commercial position.

[27] In a supplementary statement Ancare said that release of any detail or information leading others to deduce the identity of the ingredients would inform Ancare's competitors exactly what it intended to bring to the market. That would allow those competitors to take marketing initiatives to bolster the marketing of their own products in the sector or to block entry of Ancare's product in various ways. They might also develop copycat products and take other steps to impede Ancare's entry into the market. Ancare argued that it was extremely likely that its competitors would seek the information in order to limit the impact of any new Ancare products,

pointing out that normally competitors would not have information concerning formulation ingredients until after the product launch. That would allow Ancare a reasonable timeframe to establish a market and brand. Early access to the information would cut the timeframe resulting in an unfair advantage to competitors and a concomitant prejudice to Ancare.

[28] On the same day the Authority decided to decline Wyeth's request for the information it had sought. The information was withheld because its release was likely to prejudice Ancare's commercial position unreasonably in terms of s 9(2)(b)(ii) of the Official Information Act. The Authority did not uphold the ground that release of the information would disclose a trade secret.

The Authority's hearing

[29] On 16 August 2006 Wyeth made written submissions to the Authority on Ancare's application and indicated that it wished to be heard in support at a public hearing. Subsequently Wyeth sought a review by the Ombudsman of the Authority's decision to withhold the information,[18] and asked that the hearing be postponed pending either the outcome of the review or the release of the information.

[30] The Authority refused the request for an adjournment and the matter proceeded. The parties were provided with an Evaluation and Review Report prepared by the staff of the Authority concerning the application. Ancare received the full report but Wyeth's solicitors were not provided with appendices which addressed the confidential information. Nevertheless, the report provided information concerning the classification of the substance and intended uses during its life cycle. It also included the Authority's internal assessment of the costs and benefits of approving the application.

[31] There was correspondence between the Authority and Wyeth over a proposal from Wyeth that the information be provided on the basis of a draft confidentiality undertaking Wyeth submitted and proposed restrictions on use of the information by

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[18] Under s 28 of the Official Information Act.

Wyeth's solicitors. Under this proposal the solicitors would convey the import of the reports to Wyeth, to the extent necessary for it to instruct its solicitors, but not to the extent that any confidential information would be revealed. Wyeth's solicitors requested once more that the hearing be postponed, contending that it would be impossible for them to represent Wyeth effectively at the hearing without having the confidential information. These requests were rejected by the Authority.

[32] A committee of the Authority proceeded to hear the application on 27 September 2006. At the hearing Wyeth's counsel once more requested an adjournment and provision of the information in exchange for the confidentiality undertaking. The request was again refused by the committee. Wyeth proceeded to make written and oral submissions of a procedural kind at the hearing. It emphasised the difficulties that it faced from the lack of access to key information.

[33] On 17 October 2006 the committee approved the application "with controls in accordance with the relevant provisions of [the Act and applicable regulations]". One of these controls stipulated that there be additional details identifying toxic substances on the label for MEP 600.[19] These included the name and concentration of "components A and C". This was information for which confidentiality had been accorded. Subsequently the Ombudsman upheld the decision of the Authority to withhold the information sought by Wyeth.[20]

High Court and Court of Appeal judgments

[34] The High Court Judge decided that the Authority had misinterpreted the legislation and as a result failed to establish a procedure that was "appropriate and fair in the circumstances" as required by s 61(7). The Judge considered that the Authority had read that provision as being "entirely subject" to the duty under s 57 to withhold information that was likely unreasonably to prejudice the commercial position of the person who supplied it under s 9(2)(b) of the Official Information

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19 Being additional to the toxic substance identifiers required by reg 25 of the Hazardous Substances (Identification) Regulations 2001.

20 Under s 9(2)(b) of the Official Information Act.

Act. This was an incorrect reading of the legislation.[21] The Authority was required to strike a proper balance between the two provisions and had not approached the matter on that basis.

[35] The High Court emphasised that, regardless of the commercial motives that it might have in relation to Ancare's application, in the context of legislation having the purpose of facilitating public scrutiny, Wyeth had a legitimate interest in the application and right to participate in a process that was appropriate and fair in the circumstances.[22] The Judge also rejected the argument of counsel for Ancare that the Act provided a special regime in relation to natural justice which made comparisons with courts' application of the rules of natural justice inappropriate. He saw the requirement for a public hearing under s 61(7) as making such a comparison valid.[23] The Judge concluded that withholding the key information concerning the substance in issue was in breach of the requirement to establish an appropriate and a fair procedure in the circumstances fit for the hearing of the application. Wyeth's appeal was allowed.

[36] Ancare appealed. The judgment of the Court of Appeal is based on a detailed analysis of the relevant statutory provisions. The Court concluded (as had the High Court) that under s 28 the Authority could receive applications which set out confidential information only in an appendix which was not made available to the public. The Court gave four reasons.[24] First, s 56 made plain the Authority was able to consider information withheld under s 57 in reaching its decisions. Implicitly, therefore, those making submissions would not always have access to all information being considered by the Authority if it withheld the material under s 57. Secondly, the Court did not consider that the context justified giving "identified" an extended meaning in s 20(2)(b). Thirdly, completing the Authority's form ensured that Ancare provided important information relevant to the inquiry about MEP 600 in relation to the purpose of the substance, being a drench, its hazardous properties and relevant default controls, all of which was expressed by reference to categorisation in the relevant regulations. The Court of Appeal considered this sufficient for

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21 At [95] and [96].
22 At [83]–[85].
23 At [97].
24 At [60]–[64].

meaningful submissions to be made to the Authority by the public. The Authority's Evaluation and Review Report contained a detailed discussion of matters which included a discussion of potentially significant risks to the environment, human health and safety, society, community and economic interests. The report also addressed the types of controls that should be imposed and made an overall evaluation of risks, costs and benefits. Fourthly, the composition of a formulation is likely to be valuable confidential information and it is unlikely Parliament intended to compel its release at the time of application.

[37] For these reasons Ancare's appeal was allowed and the Authority's decision reinstated. Wyeth now appeals against the Court of Appeal's judgment. The central issue is whether a codename reference to a hazardous substance is a "sufficient description" of that substance in order for it to be "uniquely identified" for the purposes of s 20(2)(b), or whether the details of the composition of the substance are required.

Procedural requirements at Authority hearings

[38] The appellant puts s 20 at the forefront of its argument. Mr Brown QC emphasised that it requires the Authority to keep a register of applications that includes a sufficient description of the substance or organism to uniquely identify it. The logical starting point, however, for determining the rights of members of the public to information concerning the substance which Ancare has applied to import is the provisions in Part 5 of the Act. They set out a regime for approval of applications which specifically addresses the rights of the public to participate in the process, and the availability in that context of relevant information that an applicant regards as confidential.

[39] Mr Brown submits that it is of fundamental importance that any person making a submission to the Authority on a s 28 application know the nature of the substance in issue. Without such information, counsel says, members of the public cannot participate meaningfully in the Authority's hearing. Permitting description of the substance by reference to a meaningless codeword is in breach of the Authority's duty under s 61 to follow an appropriate and fair procedure at the hearing.

[40] The argument raises the question of what the Act and common law principles of natural justice together require in relation to the Authority's hearing and process.[25] Natural justice is a common law principle and what it requires will reflect any relevant statutory provisions.[26] As Cooke J said in *Daganayasi v Minister of Immigration*,[27] it has become "fairly elementary" that:

> The requirements of natural justice vary with the power which is exercised and the circumstances. In their broadest sense they are not limited to occasions which might be labelled judicial or quasi-judicial. Their applicability and extent depend either on what is to be inferred or presumed in interpreting the particular Act ... or on judicial supplementation of the Act when this is necessary to achieve justice without frustrating the apparent purpose of the legislation ...

[41] Appropriate and fair proceedings for a statutory tribunal, such as the Authority, will not always equate to those of a court. Such bodies are often established for administrative reasons to provide a less formal decision-making mechanism with an emphasis on greater accessibility, less cost and greater speed in decision-making. Often, as with the Authority, they are structured to include members with expertise in relation to their special area of jurisdiction.[28] Legislation establishing tribunals sometimes also recognises that in reaching administrative decisions they often must take into account conflicting interests in a pragmatic way. Parliament's purpose in establishing a tribunal is often not necessarily to provide the highest standard of process but a standard that is consistent with efficient administration of matters over which they are given jurisdiction.[29] These features of the statutory process are all relevant to the requirements for participants to enjoy an appropriate and fair hearing.[30]

[42] Also of relevance to the requirements of natural justice under the Act is the nature of the public submitter's interest in the proceeding before the Authority.

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25 The common law principles are affirmed by s 27(1) of the New Zealand Bill of Rights Act 1990 in relation to decisions of tribunals affecting rights.

26 Philip Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Brookers Ltd, Wellington, 2007) at 957–958.

27 *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130 (CA) at 141.

28 See the discussion on tribunals in New Zealand Law Commission Report *Delivering Justice for All* (NZLC R85, 2004) at 286.

29 HWR Wade and CF Forsyth *Administrative Law* (10th ed, Oxford University Press, Oxford, 2009) at 773.

30 A further relevant feature is that those appearing at the Authority's hearing do not have the right to cross-examine: s 61(7).

Public powers exercised on a large scale must be distinguished from those relating solely to the treatment of an individual.[31] In *Public Disclosure Commission v Isaacs*,[32] members of the public were entitled to make submissions to the Commission. The Privy Council observed that such persons were not personally affected by the Commission's decision:[33]

> [T]he complainant is not liable to be subjected to any pains or penalties or exposed to prosecution. He is not seeking to enforce any private right, so there is no question of depriving him of any remedies or redress to which he may be entitled. He is acting as a public spirited citizen in giving information to the commission to assist them in the performance of their public duty. Any personal or political interest he may have in the outcome is irrelevant. He cannot be "told the case made against him and be afforded a fair opportunity of answering it" because no case is made against him; it is he who makes a case against the declarant.

[43] Wyeth was entitled to make a submission on Ancare's application and to be heard in support of it at a public hearing where it could make representations and call evidence. That did not, of course, mean that the Authority would become concerned with any effect on Wyeth of granting or refusing Ancare's application. Wyeth was confined in putting its perspective to matters that were relevant to and might assist the Authority in performance of its functions under the Act. That was also a relevant consideration for the Authority in assessing what procedure would ensure Wyeth had an appropriate and fair hearing in the circumstances. This is not to diminish the importance of the right Wyeth had, in common with other members of the public, to make submissions. The statutory scheme recognises that public participation in hearings is an important means by which the Authority becomes informed of relevant matters to the standard required by the Act for its decision-making. It is not, however, the only, nor in any case necessarily the principal, means by which it does so.

[44] The Act expressly contemplates that the Authority will have access to more complete information than the public. The Authority must, where appropriate, engage expert bodies to provide additional information, or to review and verify information or submissions received "so that the Authority may be expertly informed

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31 *Ridge v Baldwin* [1964] AC 40 (HL) at 71–76 per Lord Reid.
32 *Public Disclosure Commission v Isaacs* [1988] 1 WLR 1043 (PC).
33 At 1050.

for the purposes of decision-making".[34] If further information is required, the Authority may notify the applicant that this is required[35] or obtain information itself, including commissioning expert reports and reviewing information from any source.[36] Confidential information that is withheld from the public[37] may be considered by the Authority.[38]

[45] The Act incorporates aspects of the regime under the Official Information Act in relation to confidential information. Under s 9(2)(b) of that Act, there is good reason for withholding official information if making it available would disclose a trade secret or unreasonably prejudice the commercial position of the person (applying to the Authority) or the subject of the information. This is subject to the overriding provision in s 9(1) that good reason for withholding the information will not exist if in the circumstances of the particular case the reasons for withholding are outweighed by other considerations which make it desirable in the public interest to make the information available. The purpose of the Hazardous Substances and New Organisms Act is relevant in determining what that public interest entails.[39]

[46] There is a procedure in the Hazardous Substances and New Organisms Act for dealing with requests for release of information held by the Authority which has been classified as commercially sensitive by the person providing it, or which in the Authority's opinion is able to be withheld under s 57(2)(b).[40] The person who provided the information is to be given the opportunity to say why it should be withheld. The Authority then has power to release the information in accordance with the Official Information Act's provisions.[41] As previously indicated, the Authority's decision is subject to review by the Ombudsman.

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34 Clause 2 of the Schedule to the Hazardous Substances and New Organisms (Methodology) Order 1998.
35 Section 52 of the Act.
36 Section 58(1) of the Act.
37 See ss 53(3)(c), 57(1) and 58(2).
38 Section 56 of the Act.
39 See GDS Taylor and JK Gorman *Judicial Review: A New Zealand Perspective* (2nd ed, Lexis Nexis, Wellington, 2010) at 304.
40 Section 57(2).
41 Section 57(4).

[47] There is, of course, a conflict between allowing participants in the Authority's hearings sufficient information to fairly present their case and respecting the confidentiality of some of the material supplied to the Authority for the purposes of the application. The mechanism in the Act for resolving this conflict when it arises is to require the Authority to weigh the claims for confidentiality against the public interest considerations that make release of information desirable. This, of course, is the test specified in the Official Information Act.[42] It is supplemented in the Hazardous Substances and New Organisms Act with special provisions giving the persons providing the information to the Authority, or who are the subject of it, the right to make submissions on whether the information should be withheld.[43] As well, information held on behalf of an applicant must be returned if it decides not to proceed to make an application.[44] These provisions indicate the significance the Act attaches to due protection of confidential information in achieving its purpose.

[48] It is by this means that the Authority determines what a fair and appropriate hearing that is consistent with natural justice requires in the particular circumstances. Matters weighed will include the relevance and importance of the information that is sought to the fair determination of the issues before the Authority on the one hand and the nature and degree of confidentiality that is involved on the other.[45] Where withholding relevant information may impact on effective participation, the likely degree of intrusion on that right should be assessed by the Authority along with measures it may take to minimise the effects of that intrusion. As already indicated, the nature of the interests of the participants involved will also often be relevant, including whether or not the decision may affect a participant's own interests.

[49] The Act states that information withheld from a party may be considered by the Authority in reaching a decision on an application.[46] This recognises that the Authority will at times be able to accord participants a fair and appropriate hearing in the circumstances, despite withholding information from them that it takes into

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42 Under s 9.
43 Section 57(2).
44 Section 55(2).
45 *Re AC Hatrick Chemicals Pty Ltd* (1977) 16 ALR 255 (TPT) at 259–260 per Deane J.
46 Section 56.

account.[47] The Authority is not required to follow any specific procedures just because a court might apply them in litigation. In particular, it was not required in this case to release information on the basis of counsel's undertakings as to confidentiality being provided to the Authority.

The public register

[50] This brings us to s 20, which stipulates that the Authority must keep a public register of all applications on which there is specified a sufficient description of the substance or organism to uniquely identify it. We do not, however, consider that, in so providing, Parliament's purpose was to require public disclosure of information additional to what was made available under the provisions of Part 5. We reach this conclusion for three reasons.

[51] First, s 20 appears in a part of the Act that provides institutionally for the Authority's establishment, its membership and operation. These are machinery provisions. As Ms Aikman submitted, they simply suggest that keeping a public register showing all applications received, and what had happened to them, was seen as a desirable part of the Authority's administrative operations. The register does not provide a comprehensive record of all hazardous substances lawfully present in New Zealand, only those which are the subject of applications made to the Authority. The location of s 20 in this part of the Act makes it unlikely that Parliament intended that the register should assume significance in relation to making information available for participants in the hearing of applications or more generally. Secondly, as Mr Goddard QC for the Authority pointed out, the Act establishes a nuanced balancing regime for providing access to information for participants in the hearing of applications while giving protection for confidentiality. It is highly unlikely that Parliament intended to bypass this regime by giving an independent right to have a full description of the makeup of the substance regardless of the extent of the confidentiality of that information. Finally, s 57 specifically directs the Authority not to release any information supplied to it in

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[47] At common law, natural justice recognises that the need to protect confidential information may in some circumstances justify withholding relevant information: Philip Joseph *Constitutional and Administrative Law in New Zealand* at 972–975.

respect of any application if, in the Authority's opinion, it may be able to be withheld under s 9(2)(b) of the Official Information Act. The restriction applies at the time an application is publicly notified. Its purpose is to give interim protection for an applicant's confidential information from the time an application is made until the applicant having been consulted,[48] a decision is made by the Authority on what information is to be released.

[52] Mr Brown argued that this direction could not apply to material that s 20 required be disclosed to the public on the register. But ss 20 and 57 must be read together and, so read, a more natural reading is that all confidential information coming to the Authority prior to public notification is protected by s 57. It is not to be disclosed on the register unless and until it is released pursuant to the Act.

Conclusions in this case

[53] Wyeth was not informed of the composition of the substance described as MEP 600 or otherwise told what the substance was. It did, however, have access to the public version of the application and accompanying information. It also had access to the Evaluation and Review Report prepared by the Authority's staff. Wyeth also was made aware of default controls proposed by the applicant. The Authority's Evaluation and Review Report made an assessment of costs and benefits of the application. Overall, while it is true that Wyeth did not have information concerning the composition of the substance, as Mr Goddard pointed out, Wyeth did have access to the classification as put forward by the applicant and reviewed by the Authority. It was given information enabling it to ascertain the effects of the substance and identify controls. On this basis Ms Aikman submitted that, despite being unaware of its precise makeup, Wyeth was adequately informed as to the risks involved in the substance and the ways in which they could be mitigated to meet the requirements of the Act and natural justice as we have explained them.

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[48] The interim protection would extend to information that an applicant must provide under s 28(2) identifying the substance the subject of application and its properties.

[54] That was also the view of the Court of Appeal which considered that the information provided to Wyeth enabled meaningful submissions to be addressed to the Authority. The Authority's decision on the application was reinstated. The Court of Appeal based its decision solely upon an analysis of the relevant statutory provisions. As indicated, however, the requirements of natural justice must also be taken into account in applying those provisions.

[55] As already indicated, we heard this appeal without the participation of Ancare. In those circumstances, and appropriately, the argument we heard was not so much concerned with the position of the parties specifically, but with whether the Authority had been in error in applying the Act generally. For the reasons given, we perceive no error in this respect in the Authority's approach. The Authority is not bound by the Act to disclose details of the composition and active ingredients of all substances that are the subject of application. The Act clearly contemplates that in appropriate cases a proper hearing can take place while preserving the confidentiality of the composition of the hazardous substance. The Authority must, however, disclose such confidential information if a fair and appropriate hearing, consistent with the scheme and purpose of the Act and the principles of natural justice, so requires. The Act itself provides a mechanism for resolving tensions between commercial confidentiality and the need to be informed in a manner that is consistent with this standard. The competing interests, which will usually be those of applicants in confidentiality and submitters in being fully informed, are to be reconciled on Official Information Act principles. The public register, under s 20, cannot have been intended to subvert allowing the degree of confidentiality compatible with that process, by requiring incorporation of full details of the composition of hazardous substances on the public register of applications.

[56] We do not need to decide whether the Authority's decision correctly applied the requirements of natural justice in the manner required by the legislation and common law. Indeed we are not sufficiently informed of the facts to do so. We wish, however, to say that there was material before us that indicated that the Authority was concerned that submitters such as Wyeth were informed on crucial matters of risk, costs and benefits of the substance in question. The record of the

proceedings also includes a statement of the Authority's practice and policy in relation to handling confidential information and meeting the requirements of the Act. It recognises the likelihood of conflict between the confidential nature of information concerning new hazardous substances and organisms, which is needed by the Authority for proper assessment of risks, and the statutory objective of providing for full and informed public participation in the approval process.

[57] The statement includes the following guidance on the Authority's policy:

> Within the bounds of the above statutory provisions, the Authority will require the release of sufficient information to enable submissions on publicly notified applications to be made on an informed basis and, more generally, for the Authority to be able to give reasons for its decisions.
>
> Applicants should provide a draft summary of information on the application that is suitable for release, and a version of the application and supporting information to which the public may have access, from which the confidential information has been excised. This information must be sufficient so that it is clear what the application is for, what are the likely risks, costs and benefits, and what effects the hazardous substance or new organism might have.
>
> Similarly, any person making a submission that includes confidential information should supply a publicly available version of that submission which identifies the existence of that separate confidential information, and which is sufficient to clearly indicate the reasons for the submission, and the decision sought.

[58] This statement of policy appears to be in accord with what is required for the proper administration of s 57 of the Act as explained in these reasons.

Outcome

For these reasons, the appeal is dismissed. As Ancare did not participate, and it is not appropriate for an order for costs to be made in favour of the Authority, there will be no order for costs.

Solicitors:
Baldwins, Auckland for Appellant
Lowndes Associates, Auckland for First Respondent