
Medical law reporter

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RECENT LEGAL DEVELOPMENTS AND THE AUTHORITY OF THE AUSTRALIAN THERAPEUTIC GOODS ADMINISTRATION

Recent legal developments have highlighted the need for greater support from the Federal Government for the authority of the Therapeutic Goods Administration (TGA) to ensure, by pre-approval assessments and post-approval regulation, the safety of listed medicines in Australia. One of these developments concerns the impact of ongoing civil litigation in Australian courts led by Pan Pharmaceuticals stakeholders to recover compensation from the government for the losses they incurred following the TGA's post-listing shut-down of that pharmaceutical manufacturing company in 2003. Another factor is the recently announced governmental policy to outsource to the United States Food and Drug Administration (FDA) and the European Medicines Agency (EMA) safety assessments of foreign drug manufacturers whose products will be used in Australia.

INTRODUCTION

The Therapeutic Goods Administration (TGA) plays an important role in protecting Australians against the risks posed by unsafe, poor-quality and low-efficacy pharmaceuticals. The TGA administers the *Therapeutic Goods Act 1989* (Cth) (the Act), and operates to ensure the quality, safety and efficacy of any therapeutic good supplied or produced in Australia (s 4 of the Act). As part of this mandate, the TGA is responsible for licensing manufacturers (including conducting assessment checks on factory premises), for approving therapeutic products prior to their supply on the Australian market, and for regulating such products once they enter the market. Recent developments in Australian law, arising from both political policy and adjudicative determinations, may potentially erode the ability of the TGA to uphold this mandate.

Ongoing civil litigation in Australian courts concerning the TGA has followed the collapse of Pan Pharmaceuticals in 2003. One possibility, examined here, is that this litigation may threaten to undermine the ability of the TGA to regulate therapeutic products post-approval where such regulation may cause financial losses for industry stakeholders.

The Australian Government also recently announced that the TGA would begin a trial policy of outsourcing safety assessments of foreign pharmaceutical factories to foreign regulators such as the United States Food and Drug Administration (FDA) and the European Medicines Agency (EMA). This policy allows the TGA to outsource to these bodies the quality and safety assessments of factories that produce medicines for import into Australia which it is currently tasked with undertaking in countries such as China and India. The policy switch is significant because it affects a large proportion of medications available in Australia – currently approximately 85% of listed medicines source their active pharmaceutical ingredients or are manufactured (to some extent) overseas. In the long term this initiative may erode the TGA's domestic and international regulatory authority, as well as its capacity to train and retain staff with requisite expertise.¹

BACKGROUND TO THE PAN PHARMACEUTICALS LITIGATION

In 2003, the TGA made a decision to suspend the licence of therapeutic manufacturing giant Pan Pharmaceuticals and to recall around 1,600 Pan-produced vitamins and health supplements from the

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¹ Ryan S, "Safety Fears over Outsourced Third World Drug Checks", *The Australian* (Sydney) (13 January 2009).

market.² TGA interest in Pan Pharmaceuticals arose after 19 people were hospitalised because they were suffering from hallucinations, nausea, heart palpitations and psychotic episodes after taking the Pan-produced anti-nausea medication *Travacalm*. There were also 100 additional reports of people suffering from other adverse reactions after taking this drug.³

At the time of the recall and licence suspension, Pan Pharmaceuticals was the supplier of over 70% of Australia's vitamins, minerals and herbal medicines market and had an Australian Stock Exchange trading value of over \$300 million.⁴ Following the recall of Pan products, which resulted in significant losses for retailers, the company went into liquidation, forcing the redundancy of its employees.

The Pan Pharmaceuticals company pleaded guilty to numerous charges relating to the supply of defective medication and to inflicting grievous bodily harm,⁵ with one judge commenting that the company could not "claim that it is a good corporate citizen".⁶

The TGA decision, however, has been the source of ongoing civil litigation by company stakeholders seeking compensation for their subsequent losses.

In August 2008, company founder, Jim Selim, successfully brought a claim against the government alleging that the TGA had breached its duty of care and engaged in misfeasance in public office. Selim was awarded an in-court settlement (with governmental agreement) of A\$55 million in August 2008.⁷ The August settlement in Selim's favour did not involve any Commonwealth concession to his allegations and was followed by rejection of his request for a further Commonwealth inquiry into the TGA action.⁸ However, Selim's legal team called the settlement a "landmark" decision, saying it would open the door for further class action against the Commonwealth over the company's collapse.⁹ The settlement did not send the right signal about the Federal Government's support for the TGA and its powers to ensure the safety of medicines in Australia.

These predictions appear to have been at least partially fulfilled by the announcement in late 2008 that 165 affected former employees, creditors and customers will launch a class action against the Commonwealth Government.¹⁰ The class litigants are seeking a compensation payment of over A\$120 million from the Commonwealth Government to recover the losses they incurred following the 2003 action against the company. The notified class action alleges that the TGA lacked sufficient grounds for the 2003 recall and cancellation of the company's licence. It alleges that the recall went ahead despite lack of product-testing and in spite of contrary evidence from audits and the advice of an expert advisory group.

The firm leading the class action, McLachlan Thorpe Partners, has expressed confidence in obtaining a favourable ruling following the success of Selim's claim earlier in 2008.¹¹

² TGA, *Pan Pharmaceuticals Limited – Regulatory Action and Product Recall Information*, <http://www.tga.gov.au/recalls/2003/pan.htm> viewed 19 January 2009. See further TGA, "National Medicines Regulator Suspends Drug Company's Manufacturing Licence", *Media Release* (28 April 2003), <http://www.tga.gov.au/media/2003/030428pan.htm> viewed 19 January 2009. See also TGA, "Extra 449 Products Added to Recall", *Media Release* (30 April 2003), <http://www.tga.gov.au/media/2003/030430pan.htm> viewed 19 January 2009.

³ Dove V, Department of Health and Ageing, "Commonwealth Government Settlement with Pan Pharmaceuticals and its Former Chief Executive", *Media Statement* (14 August 2008), <http://www.tga.gov.au/media/2008/080814pan.htm> viewed 19 January 2009.

⁴ Norington B, "Pan Class Action Seeks \$120m Compensation", *The Australian* (Sydney) (24 December 2008).

⁵ Dove, n 3.

⁶ *R v Pan Pharmaceuticals Pty Ltd* [2008] NSWDC 221 at [50].

⁷ Moran S, "Legal Therapy Gets Pan Founder Jim Selim \$55m", *The Australian* (Sydney) (15 August 2008).

⁸ Dove, n 3.

⁹ Thorpe A, quoted in Moran, n 7.

¹⁰ Norington, n 4.

¹¹ "Class Action Launched Over Pan Collapse", *The Australian* (Sydney) (5 September 2008), <http://www.news.com.au/adelaidenow/story/0,,24298168-5005962,00.html> viewed 19 January 2009.

THE TGA'S POWERS OF PRODUCT RECALL AND LICENCE SUSPENSION

The importance of the Federal Government supporting the TGA is underscored by the fact that the TGA is only empowered to act in situations of serious and imminent risk to public health. A recall of therapeutic products, eg, can occur only where their registration or listing is cancelled by the TGA under s 30 of the Act. Although the TGA can take this action in a number of circumstances, in the majority of cases a recall will occur under s 30(1)(a) which requires satisfaction that the goods, if not recalled, would pose an "imminent risk of death, serious illness or serious injury". However, under s 30(2), the registration or listing of the therapeutics can also be cancelled where:

- (a) ... the quality, safety or efficacy of the goods is unacceptable; or
- (b) the goods have changed so that they have become separate and distinct from the goods as so included

Where invoking s 30(2) as ground for a product recall, the TGA must provide the company with notification of the decision and give it reasonable opportunity to make submissions in relation to the proposed action (s 30(3)), which must then be taken into account prior to action being taken (s 30(4)).

To effect a suspension of a therapeutic manufacturer's licence, it is sufficient that the licence-holder has breached a condition of the licence (s 41(1)(b)) or has failed to observe the manufacturing principles (s 41(1)(c)) as enacted under s 36 of the Act.

Following reports of adverse reactions linked to consumption of the Pan-produced *Travacalm* drug, an unannounced audit of the company's manufacturing premises was undertaken by the TGA in 2003. This audit allegedly revealed widespread failures in the company's manufacturing and quality control processes, which included systematic (and deliberate) manipulation of quality control data.

An Expert Advisory Committee (EAC) was convened to review the reports from the audit, and advised that Pan's manufacturing deficiencies posed imminent risks of death and serious illness/injury which needed to be addressed.¹² Particular deficiencies in Pan's manufacturing processes which the EAC identified included:¹³

- variations in composition of products (testing of the *Travacalm* product, eg, revealed that dosages of the active chemical composition varied between different tablets from 0 to 700% of that listed on the label);
- cross-contamination and substitution of ingredients (including substitution of shark cartilage for bovine cartilage which could cause severe allergic reactions in individuals sensitive to fish protein); and
- poor hygiene practices and inadequate compliance with operating procedures (including use of bovine cartilage which had been sourced without assurance that it was TSE-free and where the country of origin was unrecorded).

The quality, safety and efficacy of Pan-produced goods were therefore unascertainable and unacceptable. In some cases, the substitution and cross-contamination of active ingredients would also cause the product to be distinct from that for which listing had been granted. Thus a recall was unambiguously supported under s 30(2), although the TGA was concerned that the notice requirements imposed under that section would prolong the threats to public health and safety posed by the Pan products.

Faced with this evidence, the TGA decided to suspend Pan's manufacturing licence and recall potentially affected products.¹⁴ Because the manufacturing deficiencies were widespread and the nature of the risk was substantial, it was arguably unnecessary for the TGA to test all recalled products individually.

¹² TGA, "TGA Reminds Australians of the Potential Danger of Pan Pharmaceuticals", *Media Release* (24 August 2003), <http://www.tga.gov.au/media/2003/030824pan.htm> viewed 19 January 2009.

¹³ TGA, n 12.

¹⁴ TGA, n 2.

REGULATORY IMPLICATIONS OF THE LITIGATION

The settlement and resultant ongoing litigation surrounding the 2003 suspension of Pan's licence and recall of its products threatens to undermine the authority of the TGA in ensuring the quality, safety and efficacy of therapeutics manufactured and sold in Australia. If the class action succeeds, a situation could be created where the TGA is, in effect, perceived to owe a higher duty of care to pharmaceutical companies and their stakeholders than to the consumers of therapeutic products or the Australian public at large.

Challenges to TGA action which are connected to industry demands for major compensation payouts from the government are likely to influence the manner in which the TGA conducts its operations. Ever mindful of the need to preserve public funds in the current unstable economic climate, the Federal Government will be anxious to encourage the TGA to operate in a manner which poses the least danger of provoking industry fallout. Coupled with this, the fact that the TGA is funded in large part by fees from industry submissions means that it is more vulnerable to industry pressure than many other executive bodies.

It is conceivable that these pressures will increasingly influence TGA policy such that decisions will be made in a context in which the concerns of public safety will come to be balanced equally against consideration of the financial impact of the decision on companies and industry. The creation of these conflicting considerations could undermine the TGA's ability to pursue actions which protect the health of the Australian public yet cause detriment to the company against which they are taken.

Indeed, the Commonwealth's settlement of Selim's claim in 2008 has given Pan litigants (and potential future litigants associated with other companies) an unfortunate message regarding the manner in which to settle disputes with administrative decision-makers. The settlement of the claim brought by Selim has provided an indication that government (and the courts) will support industry cost-recovery from public funds where TGA action results in loss to the particular company. It creates the appearance of a policy to move disputes concerning administrative decision-making into the civil arena and signals a diminished willingness of the government to back the ability of the TGA to conduct its decision-making processes independent of consideration of their potential financial cost to the public purse.

From the point of view of the agency's mandate to protect public safety, it may be that the appropriate channels for challenge to the legislative validity of the TGA's decisions lie in administrative review. Alternatively, should a stakeholder take issue with the actions of a particular TGA staff member, the tort of misfeasance in public office exists to provide remedy for any wrong caused.

Deciding to settle the Pan litigation may have the positive effect of encouraging the Commonwealth Parliament to more formally encourage the precautionary principle as a less easily challenged component of TGA decision-making. The adoption of such a principle would safeguard the TGA from actions similar to those involved in the Pan litigation and would support it in the fulfilment of its primary commitment to the maintenance of public health and safety.

The precautionary principle is a risk management tool which justifies action taken to prevent potential risks, even where the existence of such risks has not been conclusively ascertained.¹⁵ The TGA has made no official statement regarding the use of the precautionary principle in its decision-making process relating to licence suspensions and recalls. Although the courts have recognised the utility of the precautionary principle in executive decision-making,¹⁶ formal adoption of the principle would make immune from challenge any good-faith action of the TGA designed to protect public safety where it was not acting on conclusive evidence of risks.

The formal adoption of such a principle (and its associated agency immunity from liability when acting in good faith in the public interest) would allow the TGA to take action in relation to

¹⁵ See further, Faunce T et al, "Sunscreen Safety: The Precautionary Principle, the Australian Therapeutic Goods Administration and Nanoparticles in Sunscreens" (2008) 2 *Nanoethics Journal* 231.

¹⁶ See eg *Leach v National Parks and Wildlife Service* (1993) 81 LGERA 270 (Stein J).

therapeutic products suspected of being unsafe prior to the materialisation of harm. It would ensure that action could be taken in the public interest without the need for lengthy inquiries and notification procedures which could have the effect of leaving potentially unsafe therapeutics on the market to exacerbate the risks they may pose to public health and safety.

In the context of the Pan litigation, the application of the precautionary principle would have meant that the TGA recall of Pan products, though unsupported by conclusive testing and expert advice, was legitimate (and immune from agency liability) because it was a response to a perceived imminent and significant danger of the products to public health. The adoption of such a principle would thus flesh out existing legislative requirements to ensure that the TGA is supported in erring on the side of caution so as to better uphold its mandate to protect the public from dangerous therapeutics.

The Pan litigation also highlights the dangers posed by market monopolies and corporate interdependencies. At the time of the 2003 TGA action against Pan Pharmaceuticals, Pan was supplying over 70% of Australia's complementary medicines market. It was therefore inevitable that its collapse would cause stakeholders significant losses. Such stakeholders should not have a right to claim against the government merely because it contributed through responsible regulatory decision-making to the collapse of the company. Pan stakeholders should instead find recourse in company and administrative law, and the collapse of the company should be instructive for all stakeholders in the health care industry of the dangers of allowing one company to monopolise a market or provision of services.

Finally, the Pan litigation demonstrates a growing rift between the resources and values of the public and private sectors in the area of regulation of medicines and medical devices. In particular, the use of litigation-funding companies threatens to allow private litigants increasing ability to pressure government to vary its values and policy focus with regard to supporting regulators. Litigation-funding companies, which pay the costs of the litigation and share in the proceeds should it succeed, facilitate litigation against executive regulatory bodies to be used as a form of pressure to promote private agendas. In the case of the Pan litigation, the private litigants have all been funded by a litigation funding company (IMF), with ongoing litigation having the potential to encourage a shift in government policy to value private financial interests over public health.

OUTSOURCING TO FOREIGN REGULATORS

The TGA has traditionally conducted all assessments of foreign manufacturing premises itself and generally only accepts local regulatory recommendations as to the quality and safety of manufacturing practices and premises where the regulator concerned upholds equivalent regulatory standards to the TGA. On 7 January 2009, however, the TGA entered an agreement with the United States Food and Drug Administration (FDA) and the European Medicines Agency to trial a program to allow the regulators to perform assessment functions in foreign countries for each other.¹⁷ Such an initiative may be yet another adverse outcome to Australian medicines regulation from the *Australia-United States Free Trade Agreement (AUSFTA)*, as Annex 2C.4 of that agreement contained a provision requiring the Australian TGA and the United States FDA to have talks which were no doubt designed to initiate such developments.

Under the program, the regulators each retain the right to carry out independent assessments of foreign factories which produce medications for import into their jurisdiction, but are now able to ask the other parties to the agreement to do so on their behalf. The program applies only to inspections of those sites which are producing goods that have previously been approved for import. The new program seeks to allow the TGA to target assessments of foreign premises and utilise foreign regulatory infrastructures to make these assessments more efficient. The program is thus expected to

¹⁷ Ryan S, "Safety Fears Over Outsourced Third World Drugs Checks", *The Australian* (Sydney) (13 January 2009). See further Hon Jan McLucas, *Future Directions in Therapeutic Regulation*, speech delivered at the Australian Self-medication Conference, Australian Technology Park Conference Centre, 19 November 2008.

allow “greater cooperation in international planning of inspections and the sharing of information” and will reduce “unnecessary duplication of inspections by regulators”.¹⁸

Although the program will likely deliver on these policy goals, such delegation of regulatory responsibilities entails significant risks. The FDA has been severely criticised recently for inadequacies in both seeking information about and acting upon disclosures of financial conflict of interest issues in drug manufacturers making product submissions.¹⁹ Secondly, the new program is likely to undermine the ability of the TGA to maintain and improve high-level assessment and testing experience and expertise. By outsourcing assessment functions, the TGA will erode its need to finance and develop expertise in assessment of foreign manufacturing premises and will become more dependent upon the determinations of foreign regulators as to the safety and quality of any imported goods. Ultimately, the program has the potential to transform TGA regulation into mere rubber-stamping of another regulator’s investigations into the quality and safety of the manufacturing practices and premises of importers of therapeutic goods.

Such reliance upon foreign regulators poses significant risks where the objectivity and scientific rigour of partner organisations is questionable. Recent reports, eg, suggest that the FDA’s links to industry, coupled with unsatisfactory documentary practices, may make doubtful the adequacy of the regulatory activities of the organisation.²⁰ Given that the Australian Government has little influence over the practices of foreign regulatory bodies such as the FDA and given the criticism of their lack of objectivity and thoroughness in recent times, it is extraordinary that the Australian Government should now permit such bodies to have substantial control in determining whether products entering Australian markets meet Australian health and safety standards.

The program of outsourcing TGA overseas regulation to foreign regulators could provide significant benefits and increase the efficiency (by decreasing duplication) of assessment processes. However, greater transparency, cooperation and partnership need to be achieved to ensure that the TGA is not merely abdicating its assessment role or, worse still, abdicating this role to mismanaged or substandard regulatory bodies.

CONCLUSION

With manufacturers making heightened claims of innovation concerning technologies and treatments and utilising a variety of new strategies to lobby for expedited marketing approval, it is imperative that a strong regulator exists to protect the public against potential threats to their health and safety. The outsourcing program and the Pan Pharmaceuticals litigation demonstrate increasing pressures on regulatory agencies to cut costs and to consider industry interests and international cooperation to the potential detriment of public health concerns.

In order to fulfil its mandate, the TGA must be left free to make regulatory decisions chiefly via reference to their value for the protection of public health. The Pan Pharmaceuticals litigation and the outsourcing of regulatory approvals exemplify a growing pressure on executive regulators to consider the financial interests of industry alongside the interests of the public in decision-making processes. It appears to indicate an increasing assumption that companies can cost-recover from government where they suffer as a result of government regulation, even where they are manufacturing or marketing products which pose unacceptable health risks to the population.

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¹⁸ Ian Chalmers (Chief Executive of Medicines Australia), quoted in Ryan, n 17.

¹⁹ Department of Health and Human Services, Office of the Inspector General, *The Food and Drug Administration’s Oversight of Clinical Investigators’ Financial Information* (Washington DC, January 2009).

²⁰ Department of Health and Human Services, Office of Inspector General, n 19.