**Question: AQIS 11**

**Topic: Citrus Canker Eradication**

**Hansard Page: 41**

Senator O'Brien asked:

Is there a judgment that the committee can see which would give us insight into the reasons of the court?

Answer:

A copy of the Reasons for Judgment of the Federal Court of 17 August 2001 (Justice Keifel) is attached.

A copy of the Reasons for Judgment of the Full Federal Court of 12 October 2001 (Justices Whitlam, Dowsett, and Stone) is attached.

# FEDERAL COURT OF AUSTRALIA

## Pacific Century Production Pty Ltd v Watson [2001] FCA 1139

ADMINISTRATIVE LAW - Judicial Review - Quarantine - citrus and grape plants ordered into quarantine - opinion of quarantine officer that plants likely to be infected with imported diseases - quarantinable diseases - nature of opinion to be formed - whether absence of evidence before quarantine officer - whether risk of infection remote - must be a real possibility of the existence of disease - latency of diseases - underlying premise that plant material imported - whether requirements of procedural fairness met - whether requirements of procedural fairness should be limited

STATUTES - meaning to be given to a word will be affected by its statutory context - consideration of objects of statute

WORDS AND PHRASES - "likely"

Statutes

*Administrative Decisions (Judicial Review) Act 1977(Cth)* ss 5(1)(h), 5(3)(b)
*Quarantine Act 1908 (Cth)* ss 4(b), 5, 16A, 35, 55A, 67(1)
*Quarantine Proclamation of 1998* s 58

Cases

*Annetts v McCann* (1990) 170 CLR 596
*Australian Telecommunications Commission v Krieg Enterprises Pty Ltd* (1975) 14 SASR 303
*Bailey v Forestry Commission of New South Wales*(1989) 67 LGRA 200
*Boughey v The Queen* (1986) 161 CLR 10
*Drummoyne Municipal Council v Roads and Traffic Authority of New South Wales* (1989) 67 LGRA 155
*Fares Rural Meat and Livestock Co Pty Ltd v Australian Meat and Live-Stock Corporation & Ors* (1990) 96 ALR 153
*Jarasius v Forestry Commission of New South Wales (No 1)* (1988) 71 LGRA 79
*Kioa v West* (1985) 159 CLR 550
*Sheen v Fields Pty Ltd* (1984) 58 ALJR 93

**PACIFIC CENTURY PRODUCTION PTY LTD v STEPHEN RONALD WATSON**
**Q 169 OF 2001**

**KIEFEL J**
**17 AUGUST 2001**
**BRISBANE**

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY Q 169 OF 2001

| | |
|---|---|
| BETWEEN: | PACIFIC CENTURY PRODUCTION PTY LTD<br>APPLICANT |
| AND: | STEPHEN RONALD WATSON<br>RESPONDENT |

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|---|---|
| JUDGE: | KIEFEL J |
| DATE OF ORDER: | 17 AUGUST 2001 |
| WHERE MADE: | BRISBANE |

THE COURT ORDERS THAT:

1. The amended application for an order of review is dismissed.

2. The respondent pay the applicant's costs in the proceedings up to and including 7 August 2001.

3. The applicant pay the respondent's costs of the proceeding after 7 August 2001.

4. Liberty to the applicant to file and serve further submissions concerning the basis for taxation of the costs under Order 2, within three (3) days in which case the respondent is to respond within a further three (3) days.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

GENERAL DISTRIBUTION

**IN THE FEDERAL COURT OF AUSTRALIA**
**QUEENSLAND DISTRICT REGISTRY** **Q 169 OF 2001**

| | |
|---|---|
| **BETWEEN:** | **PACIFIC CENTURY PRODUCTION PTY LTD**<br>**APPLICANT** |
| **AND:** | **STEPHEN RONALD WATSON**<br>**RESPONDENT** |

| | |
|---|---|
| **JUDGE:** | **KIEFEL J** |
| **DATE:** | **17 AUGUST 2001** |
| **PLACE:** | **BRISBANE** |

## REASONS FOR JUDGMENT

1 The applicant is a company which owns a large fruit-growing property near Emerald, Queensland called "Evergreen Farms". It is owned by a company in which Mr Phillip Cea holds one-half of the issued shares. Mr Cea and his two children, Mr Darwin King and Ms Michelle King, appear to have had the management and control of the applicant at relevant times. The respondent is a quarantine officer with the Australian Quarantine and Inspection Service ("AQIS"). On 26 and 27 July 2001 the respondent made two quarantine orders with respect to the applicant's property. These orders followed the receipt of information from a recent employee, Mr Gillies, and inspections of the property and crops growing on it by AQIS officers and others on those dates and in the company of Mr Gillies. Judicial review of those decisions was urgently sought, one of the bases for review being the width of the orders, which were unlimited in time. When the matters first came on for hearing, on 7 August 2001, it was conceded that the orders were liable to be set aside and that course was taken. On the same day however the respondent had made and given notice to the applicant of another order into quarantine. It identified as the subject of the order the following goods:

> *"1. All citrus and grape plants, and all plant material and plant products derived from those plants located on the property known as Evergreen Farms, Gregory Highway, Emerald, Queensland.*
>
> *2. All machinery and equipment located on that property that:*

> *(a) has come into contact with any plants, plant material or plant products referred to in Clause 1; or*
>
> *(b) has traversed fields or blocks on that property used for citrus or grape production."*

It ordered that the goods be detained and held under quarantine control at the applicant's property until a time six weeks from the date of the order. A further direction was given that no goods subject to the order were to leave the property.

2 Section 35 of the *Quarantine Act 1908 (Cth)*, which appears in *"Part IV - Quarantine of vessels, persons and goods"*, provides in relevant parts:

> *"35(1) A quarantine officer may, by order in writing, order into quarantine any ... goods (whether subject to quarantine or not), being or likely to be, in his or her opinion, infected with a quarantinable disease or quarantinable pest or a source of infection with a quarantinable disease or quarantinable pest."*

3 *"Goods"* is defined, in s 5, to include plants. Section 16A also confirms that, notwithstanding Part V (which relates to quarantine of animals and plants), Part IV applies in relation to plants as well as other goods. It is not suggested that Part V (and in particular s 55A of it) is applicable in this case. It concerns, and may be seen as limited to, imported plants. The orders here relate to both those plants which are thought to contain imported budwood or cuttings and plants which might not contain such material but to which infection may have spread. Section 58 of the *Quarantine Proclamation of 1998* provides that the diseases mentioned in a Schedule to the Proclamation are quarantinable diseases.

4 Mr Gillies had been employed by the applicant since late May 1999 as Production Manager and was responsible for citrus and grape plants, although there is some controversy about the extent of his involvement with grapes. On 12 June 2001 Mr Gillies telephoned a *"Redline"* service operated by AQIS and provided information concerning the alleged importation of budwood or cuttings to the applicant's farm by Mr Cea. This was later reduced to writing by Mr Watson, who interviewed Mr Gillies by telephone on 13 July 2001. Mr Watson had assumed the conduct of the investigation on 25 June 2001 and had made his initial enquiries into the ownership of the property identified by Mr Gillies, the persons associated with it and their travel movements into and out of Australia. The statement by Mr Gillies was signed on 17 July 2001, which is said to coincide with the date his employment

was terminated. In it Mr Gillies advised that the property was made up of a number of orchard areas of various fruit trees - approximately eighty acres of lychee trees, half an acre of paw paw trees, five hundred acres of citrus and seven hundred acres of grape vines. Mr Gillies alleged that between September and November 2000 Mr Cea, whom he described as the owner of the property, told him that he had imported a large amount of budwood and seeds without quarantine approval. In particular he had informed Mr Gillies that he had imported budwood in the form of two red varieties and one white variety of grape cuttings (of which some six hundred cuttings were grafted onto vines and approximately forty of which were still growing); fifteen hundred lychee cuttings; and mandarin cuttings (of which five hundred cuttings of budwood had survived). The lychee and mandarin cuttings came from China and the grape vine cuttings from California. The lychee cuttings were no longer alive at the time of the quarantine order. Mr Gillies went on to say that Mr Cea also told him that he had brought in six thousand paw paw seeds from the Philippines, some of which had been planted and some stored in the nursery, and a quantity of watermelon seeds from China. Mr Cea is alleged to have said that the cuttings were smuggled in bags of tea. Mr Cea had advised Mr Gillies that he would worry about quarantine if and when quarantine discovered the importation and that he would then pay the fine and let the plants grow out of their quarantine time. Mr Gillies himself supervised the grafting of the cuttings and the planting of seeds that Mr Cea had advised had been brought into the country.

5 After Mr Watson first undertook the investigation and after he had spoken to Mr Gillies, he contacted various experts and enquired whether there were any mandarins of the variety in question in commercial production in Australia and was advised that there were not. He also sought advice from Dr Brake, a quarantine plant pathologist, who provided a "*Statement of Disease Risk in the matter of Evergreen Farm [sic]*". The Statement lists a number of pathogens and diseases relating to citrus, mandarin, grape and lychee plants unknown to Australia. Dr Brake went on to point out a particular concern to the grape industry as being Pierce's disease, which presently threatens the Californian grape industry. Control of the insect vectors was said to be extremely difficult and there was no known cure for the disease. Different strains of the pathogen could infect other crops such as citrus. All of the diseases listed might affect other plant species, other agricultural crops and native floras. There is no issue taken about the matters referred to in the Statement.

6 Mr Watson gave evidence:

> *"As a result of receiving the information from Mr Gillies and receiving advice from Dr Vanessa Brake and from the enquiries which I had made, I formed the opinion that there may have been prohibited plants at the Applicant's Farm at Emerald and, furthermore, that the presence of these plants meant there was a high risk that exotic disease may also be present which would potentially threaten Australia's agricultural industry."*

7 As a result, he applied for and obtained an "Offence Related" search warrant. He attended at the property in the presence of Dr Brake, two entomologists and three AQIS officers, together with Mr Gillies. They had with them a map drawn by Mr Gillies indicating the location of certain plantings. Cuttings were taken and areas including packing sheds and part of a house were inspected. Nothing in these areas is said to have thrown further light on the matter so far as Mr Watson was concerned, save for an area where the soil had been disturbed around the base of some grape plants. This area was one identified by Mr Gillies. Mr Watson noticed that some soil had been moved around the base of grape plants and some stays moved. Its appearance suggested the possible removal and relocation of plants. The explanation given by the applicant's employees was that some weed eradication had been undertaken in these areas. Mr Watson was not satisfied with the explanation.

8 Mr Watson supplied Ms King with a copy of the search warrant, which appeared to her to relate to illegally imported plant material. She made a general denial which she said was ignored. She was not told of the specific allegations made by Mr Gillies, although she observed him directing the AQIS officers to specific parts of the farm. There is nothing to suggest that she was told that she could not attend during the inspections and it would appear that she did so, or at least for part of them. Ms King says that AQIS officers accused her, on more than one occasion, of causing *"harm to the industry"*, as if the allegations against her and others connected with the farm were considered to be true. She found this particularly offensive.

9 After 27 July 2001 (and prior to swearing his affidavit on 7 August) Mr Watson also spoke to those persons whose task it had been to introduce the budwood to root stock on the property, Mr Miller and Mr Richards. Mr Miller said that he had collected bunches of budwood from the residence on the property and that there was some black leaf material amongst the cuttings. There was also a peculiar smell which seemed to come from the leaf material. One of them said that it may have been like tea. Mr Miller said that the cuttings were unusually short in comparison with normal grafting budwood. Mr Miller has since

sworn an affidavit to this effect.

10 At the time of the third order into quarantine, which is the subject of the present application for review, Mr Watson said that he had taken into account evidence put forward by the applicant up to that time in forming his view:

> *"... that the citrus and grape plants at the Applicant's Farm at Emerald are likely to be infected by a quarantinable disease or diseases, namely:*
>
> *(i) Citrus Greening*
> *(ii) Citrus canker*
> *(iii) Satsuma dwarf virus*
> *(iv) Tristeza virus —*
> *(v) Pierce's disease"*

and that this view was reached having regard to:

> *"(a) the observations which I made whilst at the Applicant's Farm;*
> *(b) the investigations which I have undertaken;*
> *(c) the advice which I received from Dr Brake;*
> *(d) the affidavit of William Phillip Roberts."*

11 Dr Roberts' opinion had been sought on 2 August 2001 *on the likelihood of the seized material and of plants, goods or equipment on the farm being infected with a quarantinable disease or being a source of infection with such a disease"*, by AQIS officers who had informed him of the quarantine order and that plant material had been seized. He was also asked to give his opinion on the diseases which had been nominated and the extent of any dangers they posed to the Australian horticultural industry. It is not necessary to detail the latter discussion. There is no dispute that the diseases nominated are quarantinable pursuant to the Quarantine Proclamation. As to the *"likelihood of infection"* Dr Roberts said that because of the range of serious exotic diseases of citrus in China, which are absent from Australia, legally imported citrus material from China undergoes a post-entry quarantine period of at least eighteen months during which extensive testing is undertaken. In most cases, only material derived from the original matter and not the primary material itself is released to the importer. He concluded:

> *"In my opinion citrus material sourced from China that does not pass through the normal quarantine system is likely to be infected with quarantinable diseases because of the widespread nature of these diseases in China."*

12 In relation to diseases of grape vines absent from Australia but present in California, planting material legally imported also undergoes a post-entry quarantine period of at least eighteen months and usually secondary material only is released. He likewise concluded:

> *"In my opinion grapevine material sourced from California that does not pass through the normal quarantine system is likely to be infected with quarantinable diseases. In particular, Pierce's disease is widespread in California and material sourced from there is likely to carry the disease."*

13 The likely effect on the applicant, and its business, of the order into quarantine was said to be extremely adverse, in particular because it was unable to continue its negotiations with buyers at a critical point in the growth of the plants and it had to scale down its harvesting. On that basis the matter was set down for urgent hearing. Clearly quarantine orders have the potential to cause serious damage to the reputation of a business and for that reason alone there is a valid claim to urgency. Evidence however revealed that some of the other concerns expressed were likely to have been overstated, but nothing turns on this now.

14 Evidence was gone into by the applicant, it was explained, in order that it might be shown that its claims to lack of procedural fairness had some basis. There were many questions which might have been asked and which may have thrown light upon the veracity of an acceptance of Mr Gillies' allegations. In particular, it could have been explained that Mr Gillies was a disgruntled employee whose employment had been recently terminated and that he harboured a malicious disposition towards the applicant and Mr Cea. The allegations could have been shown to have been unsustainable because Mr Cea was absent from the property in November 2000, when the budwood is said to have arrived. The weather was inappropriate for planting in April or May 2001, when it was alleged to have taken place and there was insufficient irrigation. Ms King, then the managing director of the applicant, also contended that she could have shown that all plants on the property were derived from local sources. Insofar as this may assume any relevance it seemed to me plain, on examination, that this evidence did not go that far.

15 A local agronomist, it was said, could also have explained that no disease was evident upon inspection, although I did not understand any of the experts called by AQIS to suggest that it was. Indeed that was part of the problem. It was said that had Mr Watson spoken to Mr Cea, his son or his daughter, they would have strongly denied any importation and told him of the applicant's capital investment of some $80M, to make the point that the applicant

would hardly be likely to want to jeopardise such an investment where there was no obvious advantage accruing to it either in economies of planting or future sales.

16 Mr Gillies' credibility was directly attacked. In this respect, it was pointed out, and put to him, that he had himself been guilty of an offence in directing the budding and planting from the material in question. The relevance of this and the other evidence summarised above on an application for judicial review is doubtful. For completeness however, I should note that Mr Gillies' acknowledged the wrongfulness of his own actions, denied that he was motivated by a desire to harm the applicant, and asserted that he had tried to explain the requirements of quarantine and what might occur if plants were illegally imported, but said that Mr Cea did not appear to take it seriously. He said that he made the call to AQIS prior to his employment being terminated and that his employment was terminated only after he had refused to sign a false affidavit in other litigation which Mr Cea was intending to bring on behalf of the applicant against a supplier. Coincidently, these events and the signing of his statement for Mr Watson occurred on the same day.

17 The applicant also points to matters which, it was submitted, could not be taken by Mr Watson to corroborate the information he had received. With respect to the freshly turned soil which had aroused his suspicion, it is pointed out that there was nothing to suggest anyone at the property had notice of the search. He had alluded to a "locked room", from which reference it had been inferred that he was also suspicious, but it was plain, on examination, that this was not taken into account by him in forming his opinion.

18 It was not suggested by Senior Counsel for the applicant that it was open to the Court to itself form a view about the parties' actions or motivations or to consider whether Mr Watson should have weighed one factor over another to come to a different view. The calling of and examination of evidence was persisted in, it was said, to show that there was information which could have been put forward, but this does not explain all of the factual analysis that took place. It was further submitted that the mere holding of an opinion by Mr Watson was not conclusive of his power to make the order. So much may be accepted. It was then sought to show that there was no basis in fact for the making of the order. Properly understood this ground is simply that there was no evidence, but such a contention is quite different from one which depends upon the rejection or acceptance of evidence which, it seemed to me, was the course the applicant largely undertook in pursuing its ground of

"unreasonableness".

19 Before turning to the grounds of review stated in the Amended Application, it is necessary to set out one particular factor which was listed in written submissions as relevant to Mr Watson's opinion, since it assumes some importance in connexion with further submissions made at the conclusion of the hearing. It was said:

> *"He [Mr Watson] knew that the diseases concerned had a degree of latency of unspecified duration (Roberts: 23), but had no evidence as to whether, relative even to the last budding, that the latency period was such that neither in the grape nor citrus crops was it 'likely' that there would still be no symptoms visible to the trained eye."*

20 The grounds upon which review of the decision of 7 August 2001 are sought are:

> *"7. A breach of the rules of natural justice occurred in relation to the making of the decision in that:*
>
> *(a) the decision to issue the order involved, inter alia, the reliance by the respondent on a complaint by one Wayne Gilles [sic], a former production manager of the applicant, made in excess of six weeks prior to the making of the order that Phillip Medina Cea, a principal shareholder of the applicant, had, between September and November 2000, made admissions to Mr Gillies of breaches of s. 67(1) of the Quarantine Act 1908 ("the Act");*
>
> *(b) more than 6 weeks elapsed after the making of the complaint by Mr Gillies until the obtaining of an offence related warrant on 23 July 2001 and a subsequent search of the property;*
>
> *(c) thereafter, on 7 August 2001, but only after challenge by judicial review application in this Honourable Court, the respondent has signified that it will not oppose the setting aside of two earlier quarantine orders made by him on 26 and 27 July 2001;*
>
> *(d) on 7 August, prior to giving that signification, but without prior notice to the applicant of the material upon which he proposed to act and conclusions he thought open on that material, and without affording the applicant an opportunity to be heard as to whether an order should be made, the respondent made, or at least purported to make the further order under the Act the subject of this amended application.*
>
> *(e) in these premises, the respondent was obliged to afford the applicant an opportunity to be heard prior to making the decision of 7 August 2001;*
>
> *(f) further or alternatively, that obligation arose from the foregoing.*

*together with the published policy known as the "AQIS Service Charter" of the Service of which the applicant was a member of "ensuring people get a fair go".*

8. *the decision was so unreasonable that no reasonable person could have made the decision in that the decision is made on material that does not logically admit of the formation of the opinion required to be formed by s. 35 of the Act prior to the making of the order that the respondent has purported to make.*

9. *there was no evidence or other material to justify the making of the decision.*

10. *the decision was based on an opinion as to a fact namely, that the goods the subject of the order were likely to be infected with a quarantinable disease having its origins in plant material unlawfully imported from China or, as the case may be, California in the United States of America, when in fact no such material had been so imported."*

21 Apart from the ground referable to procedural fairness, it would seem to me that the main issues are as to the nature of the opinion to be formed under s 35 and as to whether there was an absence of evidence to found that opinion. In turn it is necessary to consider the critical fact relied upon, namely the importation of plant material.

22 Section 35 provides some discretion in a quarantine officer with respect to ordering the plants, persons and premises, into quarantine. This is dependant upon the officer forming an opinion that the potential object of the order, here plants, was *"likely to be ... infected with a quarantinable disease"*. The first question which arises is what level of satisfaction is necessary about the prospect of infection. Subject to that, it may be said here that there is at least a prospect if citrus and grape cuttings have been brought in from China and California.

23 The applicant submits that for an infection with a quarantinable disease to be *"likely"* the officer must hold an opinion that it is *"probable, more likely than not, an 'odds on chance'"* and refers to the discussion by Bray CJ in *Australian Telecommunications Commission v Krieg Enterprises Pty Ltd* (1975) 14 SASR 303, 309-13.

24 It is clear, and the applicant accepts, that the meaning to be given to the word *"likely"* will be affected by its statutory context. Its ordinary meaning has however been taken to be a *"'real and not remote' chance regardless of whether it is less or more than 50 per cent"*:

*Boughey v The Queen* (1986) 161 CLR 10, 21 per Mason, Wilson and Deane JJ. Gibbs CJ in *Sheen v Fields Pty Ltd* (1984) 58 ALJR 93, 95 endorsed the description of a *"likelihood"* as *"something less than probability but more than a remote possibility"*.

25 The object of quarantine measures, by s 4(b) of the Act, is said to be:

> *"... the prevention or control of the introduction, establishment or spread of diseases or pests that will or could cause significant damage to human beings, animals, plants, other aspects of the environment or economic activities."*

26 The degree of harm that can be inflicted by the spread of diseases brought into the country can be readily appreciated, as can the high level of risk of infection that many imported diseases pose. In some cases the existence of a disease will not be apparent and examination or testing required. The prevention or control of diseases would, it seems to me, be rendered difficult and in some cases not possible if a quarantine officer in every case needed evidence to support a probability of the existence of disease in imported plants or goods. No basis for such a level of satisfaction can be found in the Act and its objects. *"Likely"* in my view is here to be understood in its ordinary sense. The cases, to which Senior Counsel for the respondent has referred me, support the interpretation in an analogous context of environmental legislation, of *"likely"* as involving a *"real chance"* of pollution or affect (*Jarasius v Forestry Commission of New South Wales (No 1)* (1988) 71 LGRA 79; *Bailey v Forestry Commission of New South Wales*(1989) 67 LGRA 200; *Drummoyne Municipal Council v Roads and Traffic Authority of New South Wales* (1989) 67 LGRA 155).

27 It is of course obvious that quarantine orders may be productive of great harm to individuals and businesses. The prospect of the existence of the disease must therefore be real and not only a remote possibility. To require more however would seem to me to put the individual above the wider stated objects of protection from disease which may affect many persons and enterprises, and perhaps the environment itself.

28 The risk of infection from a disease here is real and not remote in the case of importations of citrus plants from China or grape vines from California, or cuttings from such plants which might be used in cultivation. The information founding such an opinion was before the officer.

29 A further point, not readily apparent from the grounds of review, was also raised in

submissions by the applicant, namely that the officer could not found any opinion, not even to the level of a real but not remote chance, as to the currency of any infection at the time the order into quarantine was made on 7 August 2001. Whilst it was explained that the disease was latent, it had not been said that it was likely to be in existence some nine months or more after its alleged introduction into Australia and when nothing had become apparent on a visual examination. This ground was not in my view squarely raised in the Amended Application nor is it apparent from a reading of the submissions. Were it not the fact that no issue has properly been raised on the evidence concerning this ground, I would not be inclined to permit it to be raised in final submissions. In any event, it seems to me something of a false issue. The opinion stated by the officer implies currency of the disease. The opinion of Dr Roberts, upon which Mr Watson relied, implied that the disease might be present for eighteen months or more because that is the period nominated for quarantine and even then the original material is usually withheld. If it was desired to establish that a plant once affected might not remain so after a particular period, or that an absence of symptoms on visual explanation in July 2001 might bear upon the question, it was incumbent upon the applicant to produce evidence to that effect. It did not do so.

30 The applicant also attacks the underlying premise upon which the officer acted, namely that the goods were likely to be imported. Much of its case however seeks to challenge the veracity of Mr Gillies' information, which was the only real source for the officer's belief. Whether or not the officer was obliged to give the applicant an opportunity to put forward information to counter Mr Gillies' allegations is a separate matter, which I shall deal with shortly. For present purposes, Mr Gillies' information stands as evidence to support Mr Watson's conclusion as to the fact of importation. Beyond that it is for Mr Watson to weigh the possibilities of the truth or untruth of the statements and not the Court (albeit that he has gone into evidence to explain how, in some minor respects, he considers it was corroborated). If the applicant challenges the finding of fact as to importation as having no basis the *Administrative Decisions (Judicial Review) Act 1977(Cth) (the "ADJR Act")* requires that it show that the fact did not exist: s 5(1)(h) and s 5(3)(b). In cases such as these proof that there had been no importation will be exceedingly difficult as Senior Counsel for the applicant conceded. The applicant has not been able to do so here. I should add that, in oral submissions, the respondent accepted that in this case it could be assumed that the fact of importation must be capable of being determined on balance of probabilities. It does not seem to me that that adds to the enquiry.

31 The remaining ground alleged, want of procedural fairness, requires further consideration of the legislation and the circumstances in which orders into quarantine are likely to be made and the consequences which would follow.

32 If procedural fairness is not to be afforded there must be a strong manifestation in the statute of an intention to effect that exclusion: see *Annetts v McCann* (1990) 170 CLR 596, 598; *Kioa v West* (1985) 159 CLR 550, 585. In my view there is nothing in the Act from which one could conclude that procedural fairness was to be excluded altogether and on every occasion, although one might infer that in some circumstances it may be limited in some respects. Given that there will be interests which may be seriously affected by an order into quarantine, and given that the order might be made on unproven allegations, the prospect that some form of procedural fairness might be required is raised. Balanced against that are the circumstances in which such orders will often be made. Sometimes prompt action will be required, when the requisite opinion is formed, to prevent movement of potentially infected plants. Nevertheless, unless real urgency is involved, there seems no practical reason why persons likely to be affected should not be given some opportunity to put forward any explanation or facts that they have and which may bear upon the decision to be made. Procedural fairness after all conveys the notion of a flexible obligation to adopt the procedures which are appropriate to the circumstances of the particular case: *Kioa v West*, 585.

33 Here, prior to the making of the first two orders, the allegations came from one source and were not independently verifiable. In some cases there will need to be a decision made, having regard to the stage reached in an investigation, whether a source of information should be identified. Here however Mr Gillies was obviously that source when Mr Watson and the others came to the property. It is not plain that Ms King was denied any opportunity to confirm him as the source, nor to explain what his motives against the applicant might be, although it is possible that she was dissuaded from this course by an apparent acceptance, on the part of the AQIS officers, of the truth of the allegations, without hearing from her or others. It was clear to Ms King that a general allegation, that plant material had been imported and used or stored on the property, had been made. There seems to me no reason why she could not have been made aware of the detail of the allegations and given an opportunity to put forward any facts which might show them to be wrong or unlikely, for example the fact that an illegal importation of this kind would involve great risk to the

applicant's investment without a corresponding benefit. I do not however consider that this obligation equates with one to ask particular questions of the applicant and its employees, as the applicant contended.

34 The pressures of time and the effect this might have on the opportunity to be afforded to those who would be affected by an order was adverted to in submissions. It would not however seem to me that an opportunity was therefore to be denied in every case. Further, at a practical level, whilst I can understand that an AQIS officer might not wish to alert persons to the prospect of an order and then allow time to pass, during which plants might be moved before they could be examined and samples taken for testing, in the present case these procedures were carried out at the same time as Ms King was made aware of the allegation of importations of some kind. In my view a more meaningful opportunity could have been afforded on 26 July to the applicant to identify factors which it hoped might weigh against the making of an order and the acceptance that an importation may have occurred.

35 In the present case however the matter proceeded beyond the first two orders. By the time the third order was made Mr Watson had had the benefit of the matters put forward by the applicant and says that he took them into account. In these circumstances it does not seem to me possible to say that procedural fairness required more. The applicant's case, which was probably higher than could have been put forward in the time available prior to the making of the original orders, was presented. The fact that the additional exercise by Ms King, in an endeavour to show the plantings were derived locally, had not yet been put forward does not alter my view of the obligation with respect to procedural fairness as at 7 August 2001.

36 Whilst I am of the view that the obligation to afford procedural fairness is likely to remain in cases involving prospective quarantine orders, subject to the exigencies of the particular case, it does not necessarily follow that the Court would set aside a quarantine order aside on the ground that the obligation had been breached. As Gummow J pointed out in *Fares Rural Meat and Livestock Co Pty Ltd v Australian Meat and Live-Stock Corporation & Ors* (1990) 96 ALR 153, 170, the remedial powers of the Court under s 16 of the *ADJR Act* are couched in the terms of discretion. They may be contrasted with the narrow discretion sometimes attributed to some administrative law remedies under the general law, such as mandamus. If a quarantine order was otherwise not liable to be set aside, there being some

basis for it, there may be concerns about setting aside an order of this nature. In the present case I would not have been minded to do so. I add that this does not affect the expectation that procedural fairness be observed. Other consequences might follow a failure to do so.

37 For these reasons the application will be dismissed with costs. My present view in relation to the question of costs in the proceedings up to and including 7 August 2001 is to award them in favour of the applicant but on the ordinary basis. It does not seem to me that the circumstances warrant a position of indemnity costs. I will however allow counsel to provide further submissions if they are instructed to pursue a contrary order.

I certify that the preceding thirty seven (37) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Kiefel.

Associate: Richard Boyd

Dated: 17 August 2001

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|---|---|
| Counsel for the Applicant: | Mr J Hogan SC with Mr M Plunkett |
| Solicitor for the Applicant: | Hickey Lawyers |
| Counsel for the Respondent: | Mr D Jackson QC with Ms S Brown |
| Solicitor for the Respondent: | Minter Ellison |
| Date of Hearing: | 7, 13, 14 August 2001; 16 August 2001 (Further Submissions) |
| Date of Judgment: | 17 August 2001 |