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 1424

ADMINISTRATIVE LAW – judicial review – order into quarantine – goods likely to be infected with quarantinable diseases – meaning of "likely" – content of procedural fairness in circumstances of case.

WORDS AND PHRASES – *"likely"*

Quarantine Act 1908 (Cth) s 35

Kioa v West (1985) 159 CLR 550 applied.

PACIFIC CENTURY PRODUCTION PTY LTD v STEPHEN RONALD WATSON
Q 178 OF 2001

WHITLAM, DOWSETT & STONE JJ
12 OCTOBER 2001
BRISBANE

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA **Q 178 of 2001**
QUEENSLAND DISTRICT REGISTRY

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	**PACIFIC CENTURY PRODUCTION PTY LTD** **APPELLANT**
AND:	**STEPHEN RONALD WATSON** **RESPONDENT**
JUDGES:	**WHITLAM, DOWSETT & STONE JJ**
DATE OF ORDER:	**12 OCTOBER 2001**
WHERE MADE:	**BRISBANE**

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the respondent's costs.

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 178 of 2001**

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN: **PACIFIC CENTURY PRODUCTION PTY LTD**
APPELLANT

AND: **STEPHEN RONALD WATSON**
RESPONDENT

JUDGES: **WHITLAM, DOWSETT & STONE JJ**
DATE: **12 OCTOBER 2001**
PLACE: **BRISBANE**

REASONS FOR JUDGMENT

WHITLAM J:

1 This is an appeal from a judgment of Kiefel J dismissing with costs an application for an order of review under the *Administrative Decisions (Judicial Review) Act 1977* ("the ADJR Act"). The subject of the application was an order into quarantine given to the appellant on 7 August 2001 by the respondent, Steve Watson, under s 35 of the *Quarantine Act 1908* ("the Act").

2 Mr Watson is a Brisbane-based officer of the Australian Quarantine and Inspection Service ("AQIS") in the Department of Agriculture, Fisheries and Forestry ("the Department"). He is also a quarantine officer under the Act. Mr Watson ordered into quarantine goods described as follows:

> *"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."

He also directed that such goods be detained at Evergreen Farms for a period of six weeks from the date of the order and that they not leave the property.

3 Events leading up to the making of that order on 7 August 2001 are important because the appellant complains that it was not afforded procedural fairness. Those events commenced in June 2001. AQIS provides a toll free telephone number called the AQIS Redline Service so that members of the public can provide confidential reports of incidents of suspected non-compliance with quarantine laws. On 12 June a telephone call was received on the AQIS Redline in Canberra from a person named Wayne who left his home telephone number. Wayne said that the owner and employees of the appellant were involved in smuggling plant cuttings into Australia and that the cuttings had been grafted to plants on a property at Emerald in Queensland. Wayne said that he could show AQIS staff where those plants were located and that he was prepared to give further information. The officer who took the call in Canberra e-mailed details of his conversation with Wayne to the Brisbane office of AQIS.

4 Mr Watson assumed responsibility for investigating Wayne's allegations. He made some preliminary inquiries, including obtaining information about the appellant, its officers and shareholders. On 13 July Mr Watson spoke by telephone with the informant, who, by this time, had been identified as Wayne Donald Gillies. Mr Gillies told Mr Watson that he was employed as production manager of Evergreen Farms at Emerald. He said that this business produced citrus products, grapes, lychees, melons and pawpaws; that between September and November 2000 "the owner of the property Philip Cea" had, without quarantine approval, imported grape cuttings from California, citrus and lychee cuttings from China, pawpaw seeds from the Philippines and water melon seeds from China; and that the cuttings had been grafted to vines and trees at Evergreen Farms. Mr Gillies sent Mr Watson a sketch plan of the property.

5 On 20 July Dr Vanessa Brake, a plant pathologist employed by AQIS in Brisbane, furnished Mr Watson with a statement of disease risk in respect of Evergreen Farms. She stated that quarantinable diseases could be introduced into Australia on citrus, grape and lychee cuttings. On 23 July Mr Watson applied to a magistrate for a warrant under s 66AF of

the Act in relation to Evergreen Farms and a warrant was issued to him that day.

6 The warrant was executed on 26 July. Mr Watson gave a copy of the warrant to Michelle King, the appellant's managing director. He was assisted by a number of AQIS officers in executing the warrant. Mr Gillies was also present during the search. Citrus cuttings and plants were taken for further inspection. However, Mr Watson was unable to locate the vines to which the imported grape clippings had allegedly been grafted. He became concerned that they had been moved from the site where Mr Gillies indicated they had been planted. At about midday Mr Watson handed Ms King an order into quarantine purportedly made under s 55A of the Act. The subject of the order was described as "Property known as Evergreen Farms – excluding an area adjacent where cotton is grown." Mr Watson then examined the lychee graftings which (as Mr Gillies had previously informed him) had all failed. Samples of the lychee plants were taken.

7 Mr Watson returned to Evergreen Farms on 27 July. He handed Ms King a further order purportedly made under s 55A of the Act. This order was described as supplementary to that given the day before. Mr Watson specifically directed that (1) quarantine signs and markers were not to be removed, interfered with or concealed, and (2) all citrus plants or plant parts within the block designated as 182 were not to be removed or interfered with. He also directed that the "goods" be detained and held under quarantine control "until further advised by AQIS in writing".

The appellant's solicitors faxed a letter to Mr Watson on 27 July. They complained about the indefinite period of the quarantine of Evergreen Farms and of an estimate given by Mr Watson of the time likely to be required for examination of the samples taken from the property. The letter questioned Mr Gillies' motives in making his allegations in the light of what the solicitors described as the deterioration of his employment relationship with the appellant. (That letter was acknowledged by a letter from Jenni Gordon, the National Manager of AQIS's Animal and Plant Program Group at the Department's office in Canberra. She provided specific information on the time likely to be taken in testing the citrus and grape samples removed in the execution of the search warrant. Ms Gordon's letter was not faxed to the appellant's solicitors until 1 August.)

9 In any event, on 31 July the appellant's solicitors faxed a further letter to Mr Watson.

It stated:

"We refer to our facsimile of 27 July 2001, and note we have not received a response.

We make the following comments:

1. *Our facsimile of 27 July 2001 provided details of Mr Gillies' motivations for making a false statement to you. You have not sought to investigate these motives, notwithstanding the severe ramifications;*

2. *Our facsimile of 27 July 2001 put you on notice that our client is suffering substantial losses by reason of the indefinite quarantine. An 'indefinite' quarantine gives a substantially different impression to third parties than a quarantine with appropriate limitations;*

3. *Our client has now been informed by a supplier that it is not prepared to deliver supplies to the farm because it is concerned that the truck may become contaminated. Additionally, contractors engaged by our client are demanding the immediate payment of invoices due to a belief that the indefinite quarantine means our client will* ***never*** *re-open. These are merely two examples of the severe impact of the quarantine;*

4. *Despite request, you have given no further indication as to when the testing of samples will be completed, nor when the quarantine will be lifted;*

5. *Gillies alleged that the relevant comments by Mr Cea were made between September and November 2000. Gillies' complaint was made approximately eight months later, in June 2001. It was then some six weeks before the warrant was obtained. The matter was obviously not urgent and there was nothing preventing you from undertaking a due and proper investigation of the allegations.*

6. *It was unreasonable for you to rely solely upon the allegations of Gillies in seeking to obtain the warrant. At no time was Mr Cea or any other employee of Evergreen Farms requested to respond to Gillies' allegations. At no time have you taken any steps to confirm or substantiate the allegations made by Gillies, other then* [sic] *to conduct a search of the property under warrant;*

...

We are instructed to apply to the Federal Court for orders lifting (or at least limiting) the quarantine, under the Administrative Decisions (Judicial Review) Act. Counsel has been instructed to draw the initiating application and we are in the process of securing affidavit evidence from our client. We anticipate having the application listed on 3 August 2001. Please advise your preferred address for service of the application and the supporting material.

Our client may consider withdrawing the application in the event the quarantine is lifted on or before 2 August 2001."

10 On 1 August the appellant commenced proceedings under the ADJR Act challenging the orders made by Mr Watson on 26 and 27 July. The appellant filed with its originating application an affidavit by Mr Cea, the person whom Mr Gillies alleged to have imported the cuttings into Australia. Mr Cea is a Filipino and resides in Manila. The appellant is a wholly-owned subsidiary of a company, which holds the freehold title to Evergreen Farms, and Mr Cea holds fifty percent of the shares in that company. In his affidavit Mr Cea said that he had read Mr Watson's application for a search warrant containing Mr Gillies' allegations. He went on to deny those allegations, to give details of his visits to Australia in 2000, to allege that Mr Gillies had illegally imported cuttings into Australia, and to impugn Mr Gillies' motives. He concluded:

> *"At no time have I been asked by AQIS to respond to all allegations made by Gillies, nor was I given any opportunity to discuss or answer the terms of* [sic] *reasons for the quarantine. I have not been asked by AQIS to assist in its investigations and no statement or comment has been sought from me."*

11 The appellant filed five other affidavits in support of its claim: one of its solicitor annexing copies of the correspondence that I have mentioned above and a copy of AQIS's service charter (which undertook to provide its quarantine services with "openness" and "fairness"), two of Ms King, one of a plant molecular biologist at the University of Sydney commenting on the timing suggested in Ms Gordon's letter, and one of a consulting agronomist reporting on his inspections of the citrus and grape crops at Evergreen Farms in May and June 2001. In her affidavits Ms King described the corporate set-up and physical layout of Evergreen Farms, the visits by Mr Watson and his party on 26 and 27 July, the impact of the quarantine on the appellant's business and impugned the motives of Mr Gillies. In her main affidavit Ms King concluded:

> *"31. At no time have I been asked by AQIS to formally respond to the accusations made by Gillies on 12 June 2001. Had I been asked to respond, I would have informed AQIS that:*
>
> *31.1 Neither I nor the company ever imported into Australia any plant material;*
>
> *31.2 Gilles has motive for providing a false statement;*

31.3 the accusations on their face are unbelievable and unlikely, given that:

(a) Phillip Cea was only at the farm for a short period of time in early September 2000 and had no other opportunity (between September and November 2000) to bring to the farm the plant material alleged;

(b) our irrigation system was not sufficiently completed between September and November 2000 to enable planting of the plant material alleged;

(c) the months of October and November are too hot to plant cuttings or seeds, and it would be pointless to import anything at that time (if at all);

(d) all of the company's crops are available and obtained locally and this can be confirmed by the company's written records copies of which have been supplied to Hickey Lawyers and are available for inspection. AQIS did not request copies of these purchase orders and invoices during their search;

(e) the major supermarket chains (with whom the company hopes to contract for the supply of fruit this season) are very specific about the types and varieties of crops to be purchased and accordingly there would be no point in introducing a new or hybrid variety to the crops;

(f) any cuttings or seeds planted in September to November 2000 would be considerably bigger in size than all crops currently on the property."

12 Mr Watson filed two affidavits in reply to the appellant's claim: one of Dr W P Roberts made on 6 August and one of his own made on 7 August. Dr Roberts was the Department's Chief Plant Protection Officer. He expressed his opinion on the likelihood of the seized material and of plants, goods or equipment on Evergreen Farms being infected with a quarantinable disease or being a source of infection with such a disease. In particular, Dr Roberts gave details of those diseases declared by s 58 of the *Quarantine Proclamation 1998* to be quarantinable diseases that might exist in citrus cuttings from China and in grape cuttings from California.

13 In his affidavit Mr Watson recounted the course of his investigation leading up to the execution of the warrant at Evergreen Farms on 26 and 27 July. He also deposed that since that date he had spoken to two men known as "budders" who had been responsible for grafting of cuttings on to root stock at the property between June and November 2000. One

of those men confirmed to Mr Watson that cuttings used for grafting had been collected from a refrigerator in the residence at Evergreen Farms and that they had a peculiar smell. Mr Watson thought this was consistent with Mr Gillies' information that the cuttings had been smuggled into Australia in bags of tea. Mr Watson also deposed that he had put to Mr Gillies the statements about his motives made by Mr Cea and Ms King in their affidavits and that Mr Gillies had confirmed that the information he had provided was true "in every respect". Mr Watson concluded his affidavit by saying:

> *"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;*
>
> *I have the 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 ...".*

He also said that in forming that view he had read and taken into account the affidavits filed by the appellant in support of its claim.

14 On the morning of 7 August Mr Watson's solicitors faxed to the appellant's solicitors a letter indicating that the setting aside of the orders made on 26 and 27 July was not now opposed. They continued:

> *"However, having considered all the material, the decision-maker remains of the view that the citrus and grape plants at your client's farm at Emerald are likely to be infected by quarantinable diseases.*
>
> ...
>
> *Mr Watson, the relevant decision-maker, has now considered the information he obtained whilst on your client's farm, the investigations which he has undertaken, the advice which he has received from Dr Brake, the affidavit of Dr William Roberts and the information you have made available in these proceedings, and has decided to issue a further Order into Quarantine."*

The solicitors enclosed with their letter a copy of the order made on 7 August.

15 Later that day the appellant was given leave to amend the proceeding already on foot in order to challenge the new order. The hearing of the appellant's claim for final relief was expedited to commence on 13 August. The application was amended on 9 August. The grounds of the amended application were:

> "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 six 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 know 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."*

16 The hearing before Kiefel J took place on 13 and 14 August when the affidavits I have mentioned were read. Also read in the appellant's case were a further affidavit from each of Mr Cea and Ms King and an affidavit from Mr Darwin King, who was the other managing director of the appellant. Each of these three deponents was cross-examined. Mr Watson also read in reply to the amended claim an affidavit made on 9 August by one of the "budders", Gerard Millers, and a long affidavit made on 10 August by Mr Gillies. Mr Gillies and Mr Watson were cross-examined.

17 Kiefel J gave judgment on 17 August. She observed in her reasons for judgment that much of the evidence was of doubtful relevance in an application for judicial review. (This appears to me to have been something of a polite understatement.) In any event, Ms King had given evidence intended to show that all the grape plants on Evergreen Farms were sourced from Australian sources. Her Honour found that, in so far as this was relevant, Ms King's evidence did not establish that proposition. In this appeal there has been no challenge to any of the primary judge's findings of fact.

18 Referring to the grounds of the application, her Honour described the issues this way (at [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."

19 Section 35(1) of the Act relevantly provides:

"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."

20 Kiefel J said that this provision posed a question as to the necessary level of satisfaction about the prospect of infection. On this construction issue, her Honour said (at [23] – [28]):

> *"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.*
>
> *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'.
>
> *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.'
>
> *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).*
>
> *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.*
>
> *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."*

Her Honour had earlier noted the view expressed by Mr Watson in his affidavit which I have reproduced at [13] above. (It may also be remarked that, in cross-examination, Mr Watson said that, when he made the order on 7 August, he thought the word "likely" in s 35 meant "a better than even chance".)

21 A "no evidence" ground of review was also pressed in the court below. This concerned Mr Watson's opinion as to the currency of any infection at the time the order was made on 7 August. The appellant's submission was, apparently, to the effect that, whilst there was evidence that the relevant quarantinable diseases could show some degree of latency in symptom expression, there was no evidence that such a disease was likely to be in existence nine months or more after alleged introduction into Australia when nothing had become apparent on visual examination. In her Honour's view, this point was not squarely raised in the amended application, and she said (at [29]):

> *"...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."*

22 So far as the alleged breach of the rules of natural justice was concerned, her Honour held that, unless real urgency is involved, persons likely to be affected by orders into quarantine under the Act should be given "some opportunity to put forward any explanation or facts that they have and which may bear upon the decision to be made." She concluded on this issue (at [34] – [35]):

> *"... 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.*
>
> *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. ..."*

Her Honour also said that in the present case, had the obligation to afford procedural fairness been breached "as at 7 August 2001", she would not have exercised the power of the Court under s 16 of the ADJR Act to set aside the order made by Mr Watson on that day.

23 Counsel for the appellant submit that Kiefel J erred in her holdings on all three issues. First, on the meaning of the word "likely" in s 35(1) of the Act, they point to various expressions used in other provisions of the Act which, it is submitted, are more apt to convey a "real chance" test than the word "likely". Such a submission invites, in my view, an entirely futile exercise. The Act has been amended many times over the years, but the word "likely" has always been present in s 35. I need only say that I respectfully agree with everything the primary judge said on this point of construction.

24 On appeal, the "no evidence" ground was re-cast so as to depend on the alleged absence of logically probative material for Mr Watson's opinion under s 35 of the Act. Counsel for the appellant rely on what Gummow J said in *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 657 [145] about reviewing the opinion of a decision-maker "based on findings or inferences of fact which were not supported by some probative material or logical grounds". This strikes me as an attempt to avoid the requirements of s 5(3) of the ADJR Act, to which her Honour referred. In my view, whatever may be the scope of review permitted under s 75(v) of the Constitution, if the jurisdiction of Mr Watson to make the order was to be challenged in the present case, par (c) of s 5(1) of the ADJR Act should have been expressly invoked in the amended application. This was not done. In any event, I agree with Kiefel J that Dr Roberts' affidavit provided material for Mr Watson's opinion that the likelihood of infection was a current risk. No ground of review under s 5(1) of the ADJR Act has been made out on this aspect of Mr Watson's decision.

25 Counsel for Mr Watson do not dispute that he was obliged to afford procedural fairness to the appellant. So much may be assumed for the purposes of this appeal. (However, I may say that I can conceive of many occasions when a quarantine officer, acting on information received, could not reasonably be required to give a person any opportunity to be heard before making an order under s 35 of the Act. Furthermore, as a safety valve, there is an express power conferred by s 6B to revoke any order made under the Act.) In the present case, counsel for the appellant singled out for criticism the fact that their client had no opportunity to comment on the contents of Dr Robert's affidavit, which Mr Watson took into account prior to making his order on 7 August.

26 It is trite that procedural fairness is a flexible concept and that what is appropriate in terms of natural justice depends on the circumstances of the case. I agree with Kiefel J that no more was required of Mr Watson in the present case. As a result of the proceedings it instituted, the appellant had the opportunity to make the response to Mr Gillies that its solicitors, Mr Cea and Ms King complained they were originally denied. Furthermore, the appellant was at liberty to tender whatever evidence it chose about the crops at Evergreen Farms and the diseases mentioned by Ms Gordon. It is not necessary to describe in any detail the material in the affidavits filed by the appellant prior to 7 August. It may be taken to have put its best foot forward. The order ultimately made by Mr Watson that day took into account all the information available to him at the time. Unlike the earlier orders, it did not extend to the lychee plants and was expressed to operate for a finite period.

No ground of appeal has been made out. The appeal should be dismissed with costs.

I certify that the preceding twenty-seven (27) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Whitlam.

Associate:

[signature]

Dated: 11 October 2001

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY Q 178 of 2001

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN: PACIFIC CENTURY PRODUCTION PTY LTD
APPELLANT

AND: STEPHEN RONALD WATSON
RESPONDENT

JUDGES: WHITLAM, DOWSETT & STONE JJ
DATE: 12 OCTOBER 2001
PLACE: BRISBANE

REASONS FOR JUDGMENT

DOWSETT J:

28 I have had the opportunity of reading the reasons prepared by Whitlam J and am in substantial agreement with them. However I wish to make some observations concerning the question of procedural fairness.

29 The appellant complains that it was not told that the respondent proposed to make the order made on 7 August and had no opportunity to comment upon certain of the material upon which he acted. As pointed out by Whitlam J, the orders made on 26 and 27 July were made pursuant to s 55A of the Act. This appears to have been inappropriate as they purported to relate to real property. The section authorizes orders with respect to goods. This was one of the grounds urged by the appellant in its application for judicial review of the earlier decisions. The decision of 7 August was made pursuant to s 35.

30 Prior to the order made on 26 July, the appellant was aware of the substance of the case being advanced against it. Quite apart from the content of any conversation during the search of the premises, Ms King received a copy of the material upon which the respondent relied to obtain the search warrant, apparently prior to the first order into quarantine, or at

least this is an available inference from pars 9 and 10 of her affidavit sworn on 2 August 2001. That material set out in some detail the nature of the allegations and included a report by Dr Brake which outlined the various diseases likely to be derived from the plant material in question. The relevant warrant also outlined much of that material. The possibility of a quarantine order was contemplated both in the warrant and in the supporting material. The appellant therefore had an opportunity to put its case to the respondent, although the opportunity was very limited.

31 As to the order of 7 August, it is true that the appellant was not told in advance that it was to be made, nor was it given an opportunity to be heard prior to its being made. It seems that the respondent had formed the view that the earlier orders were invalid, perhaps for the reason which I have referred to above, and so agreed to their being set aside. He sought to maintain the status quo by making the further order. It is also true that the respondent acted on material other than material which had previously been made available to the appellant, namely the affidavit from Dr Roberts. However this really only dealt further with issues previously raised in Dr Brake's report and in a letter from Ms Jenni Gordon which appears to have been sent on 1 August. There is some suggestion that Dr Roberts' affidavit was designed to reply to certain matters which had been raised by the appellant in response to that earlier material.

32 The appellant also complains in its notice of appeal that it had no opportunity to challenge the information supplied by Mr Gillies. This matter was not pursued in oral argument, perhaps because Mr Gillies was present at the search on 26 July. There can be little doubt that the appellant would have inferred from his presence that he was the source of the respondent's information concerning the alleged importation.

33 The respondent accepts that there may be some requirement of procedural fairness incidental to the exercise of the power conferred by s 35, although the extent of any such requirement is unclear. As Whitlam J has observed, it is not difficult to imagine circumstances in which it would be quite inappropriate for notice to be given to a suspected illegal importer of plant material. Such a situation was contemplated in a different context in *Kioa v West* (1985) 159 CLR 550, per Mason J at 586, Brennan J at 629 and Deane J at 633. However, assuming that the circumstances of the present case were not of that kind, it is necessary to determine the requirements of procedural fairness for present purposes. In

considering that question it is important to keep in mind the protective nature of the process prescribed by s 35. The evidence in this case demonstrates the potentially severe risk to Australian agriculture from illegal importation of plant material. It is difficult to imagine any sensible alternative to immediate quarantine once such a risk has been identified. The condition precedent to making an order pursuant to s 35 is an opinion held by a relevant officer that particular material is, or is likely to be, infected with a quarantinable disease. If such opinion is formed, then the decision-maker has a residual discretion as to whether or not to make an order. It is a little difficult to conceive of circumstances in which he or she would not do so.

34 Keeping in mind both the protective nature of the process and the fact that the condition precedent is the formation of an opinion as to likelihood, it seems unlikely that the decision-maker is to enter into a careful consideration of conflicting evidence, whether it be as to the alleged importation or as to risk of disease. It follows that a "hearing" or "cross-examination" of "witnesses" is not contemplated. For this reason it is of little assistance to the appellant to point to the very short opportunity given to it to respond to the allegations made prior to the order on 26 July. As Whitlam J has pointed out, there is power to revoke an order once made. In most cases the protective purpose of the s 35 procedure and the interests of the alleged importer will be reasonably well served by making an appropriate quarantine order promptly and then permitting the relevant person to demonstrate an alleged basis for revocation. This is not to exclude the possibility that in some cases an importer may be able to demonstrate decisively and quickly that the information upon which an officer proposes to act is without foundation, but that would be a rare case. How an officer should respond in the face of such material is a matter for determination upon the facts of the case in question.

35 The order made on 7 August was clearly foreshadowed by the warrant and the material supporting the warrant. It is, in effect, a narrower version of the orders made on 26 and 27 July. Although it was made under a different section from those orders, the relevant opinion and the effects are substantially the same. Brennan J (as his Honour then was) observed in *Kioa* at 628-9:

> *"Administrative decisions are not necessarily to be held invalid because the procedures of adversary litigation are not fully observed."*

36 I do not consider that the proposal to make the order on 7 August itself necessitated

further notice to the appellant. The material upon which the respondent relied did not go much beyond that which had been communicated to the appellant on 26 July and 1 August. It is true that the appellant had little opportunity to respond on 26 July and by 1 August, the earlier orders were in place. The detailed material filed in support of the judicial review application was not specifically designed to resist any further proposed order. As was observed by Kiefel J at first instance and as Whitlam J has observed, it may have reflected a misconception as to the nature of the judicial review process. It is curious that steps taken under such a misconception should be treated as submissions in connection with a proposed order, but this is what has happened.

37 It is relatively clear that the appellant had no material to advance which was relevant to the making of the order on 7 August other than that in the affidavits filed in support of the judicial review application. At first instance the appellant indicated that it would have wished to give evidence of certain invoices and planting schedules and of the fact that both Michelle and Darwin King were lawyers. It is impossible to imagine how invoices and planting schedules could, for present purposes, have answered the allegations made by Mr Gillies. That the Kings were lawyers was quite beside the point. The decision made on 7 August was made having regard to the material which had been filed by the appellant, albeit pursuant to a misconception. There was nothing more which it had to say which could conceivably have been relevant to the formation of the respondent's opinion or to the making of the order.

38 Had the proceedings leading to the order of 7 August been judicial in nature the appellant's criticisms may well have been persuasive. Courts do not usually make orders without formal notice to parties who may be affected. Such a party is entitled to know the case which he or she must answer and the evidence which is to be led. Cross-examination of witnesses is often necessary. However these were not judicial proceedings, and that distinction has the consequences referred to by Brennan J in *Kioa*.

39 I concur in the orders proposed by Whitlam J.

I certify that the preceding twelve (12) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Dowsett.

Associate: 

Dated: 12 October 2001

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY **Q 178 of 2001**

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN: **PACIFIC CENTURY PRODUCTION PTY LTD**
APPELLANT

AND: **STEPHEN RONALD WATSON**
RESPONDENT

JUDGES: **WHITLAM, DOWSETT & STONE JJ**
DATE: **12 OCTOBER 2001**
PLACE: **BRISBANE**

REASONS FOR JUDGMENT

STONE J:

40 I have had the advantage of reading in draft the reasons of Whitlam J. I agree with his Honour's reasons and concur in the orders he has proposed.

41 I also agree with Dowsett J's comments about procedural fairness. The history of this matter is such that by 7 August 2001, when the orders under review here were made, the appellant had had ample time in which to make relevant submissions. In any event, as both Whitlam and Dowsett JJ have indicated, the nature of the mischief addressed by the *Quarantine Act 1908* (Cth) is such that there may well be circumstances of such urgency that it is inappropriate to give notice of an impending quarantine order. In *Kioa v West* (1985) 159 CLR 550, Mason J (at 585), Brennan J (at 612) and Deane J (at 633) emphasised that the content of procedural fairness may vary with circumstances. Brennan J (at 629) expressly conditioned his conclusion that a failure to give Mr Kioa an opportunity to deal with an

adverse allegation was a breach of procedural fairness on there being no need for secrecy or speed in making the decision.

I certify that the preceding two (2) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Stone.

Associate:

Dated: 12 October 2001

Counsel for the appellant:	J A Logan SC with M O Plunkett
Solicitor for the appellant:	Hickey Lawyers
Counsel for the respondent:	D J S Jackson QC with S E Brown
Solicitors for the respondent:	Minter Ellison
Date of hearing:	6 September 2001
Date of judgment:	12 October 2001