IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2018-485-577
[2018] NZHC 2183

UNDER	the Judicial Review Procedure Act 2016
IN THE MATTER	of an application for review
BETWEEN	WAIMEA NURSERIES LIMITED Applicant
AND	DIRECTOR-GENERAL FOR PRIMARY INDUSTRIES First Respondent
	LAURA WILLIAMSON, INSPECTOR Second Respondent
	VERONICA HERRERA, CHIEF TECHNICAL OFFICER Third Respondent

CIV-2018-485-590

UNDER	the Judicial Review Procedure Act 2016
IN THE MATTER	of an application for review
BETWEEN	JOHNNY APPLESEED HOLDINGS LIMITED First Plaintiff
	MCGRATH NURSERIES LIMITED Second Plaintiff
	NEW ZEALAND FRUIT TREE COMPANY LIMITED Third Plaintiff
	PATTULLO'S NURERIES LIMITED Fourth Applicant
	ZEE SWEET LIMITED Fifth Plaintiff

AND	THE DIRECTOR-GENERAL OF THE MINISTRY FOR PRIMARY INDUSTRIES First Defendant
	CERTAIN INSPECTORS OF THE MINISTRY FOR PRIMARY INDUSTRIES Second Defendants
	A CHIEF TECHNICAL OFFICER OF THE MINISTRY FOR PRIMARY INDUSTRIES Third Defendant

Hearing:	16 and 17 August 2018
Appearances:	G D Pearson and J K Scragg for applicants in Waimea Nurseries Ltd A M Glenie for plaintiffs in Johnny Appleseed Holdings Ltd J Catran and N Fong for respondents/defendants
Judgment:	23 August 2018

JUDGMENT OF COOKE J

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[1] The applicants for judicial review in these two proceedings are entities involved in the commercial production of fruit in New Zealand.[1] They are fruit producers or orchardists who supply fruit trees to producers. The development of new varieties is an important part of the commercial development of the industry. There are two main categories of new varieties in issue in this case, being apple varieties (referred to as *malus*), and stone fruit varieties (referred to as *prunus*).

[2] The development of new varieties usually requires the importation of new plant material from overseas suppliers. Such importation involves significant biosecurity issues. The regime for managing those issues is established under the Biosecurity Act 1993 (the Act). Section 22 empowers the making of import health standards (IHS). These set out the requirements that any goods which are classified as "risk goods" must meet before they can be imported into New Zealand and obtain biosecurity clearance. Such plant material is classified as risk goods.[2]

[3] This regime involves a restriction on international trade, and the implementation of IHS is subject to international law. The WTO Agreement on the Application of the Sanitary and Phytosanitary Measures (the SPS Agreement) involves an international agreement on the measures that may be so applied by states. Under the SPS Agreement, New Zealand sets its own "appropriate level of protection" (ALOP), which identifies the level of risk that New Zealand is prepared to accept. New Zealand has comparably high standards of biosecurity because of the importance of biosecurity to our national economy. The development of IHS can involve a very extensive exercise, where a number of factors are taken into account, and the appropriate level of risk is assessed.[3] The applicable IHS in the present case is IHS155.02.06: *Importation of Nursery Stock*.[4]

[4] The applicants require the importation of material containing a new variety, which can then be grafted onto root stock in New Zealand, with the fruit trees grown,

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1 I will refer to the plaintiffs in the Johnny Appleseed Holdings Ltd proceeding also as applicants – see s 8(2)(a) of the Judicial Review Procedure Act 2016.

2 Biosecurity Act 1993, s 2.

3 See, for example, *New Zealand Pork Industry Board v Director-General of the Ministry for Primary Industries* [2013] NZSC 154, [2014] 1 NZLR 477.

4 A more comprehensive description of the regime is set out in *Strathboss Kiwifruit Ltd v The Attorney-General* [2018] NZHC 1559 at [163]–[186].

and the produce then made commercially available. This usually takes the form of short lengths of branch with buds attached (stem stock). The relevant stem stock is imported under the regime in accordance with the IHS. The Ministry for Primary Industries (the Ministry) is empowered to issue import permits under s 24D(2). They are issued to allow importation that conforms with the relevant IHS. The stem stock is grown at facilities based overseas that are accredited by the Ministry in accordance with the IHS and a permit so issued. The facilities are referred to as clean plant facilities. There is an agreement between the Ministry and each clean plant facility. A "mother plant" stays at the clean plant facility for a period of two to three years where the stem stock is grown and tested.

[5] Once they have completed the growth and testing stage phytosanitary certificates are issued to allow transportation to New Zealand. The certificates are issued by government organisations. The International Plant Protection Convention identifies official functions and powers to inspect and certify exports and imports. The Ministry is New Zealand's representative, and in the United States the relevant representative is the United States Department of Agriculture (USDA). After the goods are certified by the USDA they are then transported to New Zealand. When they arrive in New Zealand they are placed in another quarantine facility known as a Post-Entry Quarantine Facility (PEQ). At this facility, the stem stock is grafted onto root stock, and further nursery stock is created and tested under the supervision of a biosecurity officer over a period of at least one year. After this process, the young trees are granted biosecurity clearance under ss 26 and 27, and they leave the PEQ. These trees are then used as the initial stock to create trees in commercial quantities.

[6] Since 2012, consignments of malus and prunus cultivars were tested at a Ministry accredited facility called the Clean Plant Centre Northwest, which is based at Washington State University in Washington State (the Clean Plant Centre). In March 2018, MPI conducted an audit of the Clean Plant Centre to assess it for the purposes of re-accreditation. It had previously been audited for the period to 30 May 2012. The 2018 audit identified a series of significant deficiencies in the operation of the Clean Plant Centre. Many testing records were missing, and in some cases test results had records suggesting that the material had failed the relevant tests. The audit identified 10 critical non-compliances. As a consequence, the Clean Plant Centre's

accreditation was immediately withdrawn. The USDA then themselves conducted an audit of the Clean Plant Centre, and concluded that there had been a "systemic breakdown in record-keeping and adherence to New Zealand's requirements for maintaining approval as an off-shore plant quarantine facility".

[7] Two significant decisions were then made by the Ministry that underpin the challenges advanced by the applicants in this case. First, on 27 July 2018, a Chief Technical Officer, Mr Peter Thomson, determined that the relevant trees that had been subject to biosecurity clearances granted under s 26 for all material imported after 1 June 2012 were no longer reliable, and as a consequence the goods that had received biosecurity clearance were now "unauthorised goods" within the meaning under the Act. Mr Thomson considered whether or not equivalent measures could be applied so the goods could be given biosecurity clearance under s 27(1)(d)(iii) of the Act, and he determined that they could not be.

[8] Following Mr Thomson's decision, decisions were made to seize the relevant goods under s 116 of the Act. Dr Veronica Herrera, who is also a Chief Technical Officer, then considered the exercise of power under s 116 in relation to all trees so seized. She was responsible for deciding which directions should be made in relation to the seized trees under the terms of s 116(2). After considering a number of alternatives, she decided upon the option that effectively required the containment or destruction of all the trees. This captures all trees that have been imported into New Zealand through the Clean Plant Centre since 1 June 2012, and trees propagated from such trees.

[9] The directions made in s 116 notice require action by 22 August 2018. That date was chosen because the prunus varieties break dormancy and begin growth in late August to early September, and the malus do so from September to October. Accordingly, action was required before that time. Whilst this decision was made in a single decision paper, it effects many different producers and nurseries in different circumstances. Each of those producers and nurseries received a separate notice in relation to the actions required by them. A total of 47,827 trees are subject to the decisions under s 116. The applicants for judicial review own 45,821 of these trees.

Applicants' key arguments

[10] The relevant notices of seizure, and directions for destruction were given under s 116 of the Act. It provides:

> **116 Power to seize and dispose of unauthorised goods**
>
> (1) Any inspector lawfully exercising a power under any of sections 19(2), 30A, 31, 34(5), 109, 111, 113, 114, or 120 may seize—
>
> (a) any unauthorised goods:
>
> (b) any goods where an inspector has reasonable grounds to suspect—
>
> (i) those goods are in contact with, or have been in contact with, unauthorised goods; and
>
> (ii) pests or unwanted organisms could have been transmitted from the unauthorised goods to those goods.
>
> (2) A chief technical officer may, either generally or in any particular case, give any reasonable directions as to the disposal of, the treatment of, or any other dealing with, any goods seized in accordance with subsection (1); and any person may dispose of, treat, or otherwise deal with any such goods accordingly.
>
> (3) A chief technical officer may offer the importer or owner of any goods imported into New Zealand and seized under subsection (1) the option of exporting or returning the goods to their place of origin provided that the importer or owner undertakes the payment of any costs associated with the export or return of the goods.
>
> (4) A chief technical officer may permit goods seized under this section to be held in the custody of the Director-General for so long as is necessary for the importer to obtain a biosecurity clearance and in such a case the estimated costs and expenses of the custody and maintenance of the goods must be paid in advance to the Director-General.
>
> (5) If an organism seized in accordance with subsection (1) is an endangered species, as defined in section 3 of the Trade in Endangered Species Act 1989, a chief technical officer must, after consulting the Director-General of Conservation concerning the disposal of the organism, dispose of it as he or she thinks fit.
>
> (6) In exercising the powers of a chief technical officer in accordance with subsections (2), (3), and (4), a chief technical officer must, so far as is practicable while achieving the purpose of Part 3, act in a manner that is consistent with avoiding or minimising loss

to the importer or owner of goods seized in accordance with subsection (1).

[11] A key issue raised by the applicants is whether the trees subject to the seizure and destruction decisions are in fact "unauthorised goods". Such goods are defined in s 2 of the Act. It is appropriate to set out the full definition, although I highlight the particular part of the definition that is relied upon here:

> **unauthorised goods** means any goods that are—
>
> (a) uncleared goods in a place that is not a transitional facility or a biosecurity control area (other than goods that, in accordance with the authority of an inspector, are—
>
> (i) proceeding from a transitional facility or a biosecurity control area to a transitional facility, biosecurity control area, or a containment facility; or
>
> (ii) being exported from New Zealand); or
>
> (b) uncleared goods that are in a transitional facility or a biosecurity control area to which those goods proceeded, other than in accordance with the authority of an inspector, from some other transitional facility, or biosecurity control area, and have not later received the authority of an inspector to remain there; or
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> *(c) goods which have been given a biosecurity clearance by an inspector following receipt by that inspector of false, incomplete, or misleading information concerning the goods; or*
>
> (ca) goods that—
>
> (i) are subject to post-clearance requirements in an import health standard; and
>
> (ii) do not comply with the requirements; or
>
> (cb) goods that—
>
> (i) are subject to post-clearance conditions under section 27A; and
>
> (ii) do not comply with the conditions; or
>
> (cc) goods that—
>
> (i) are subject to regulations made under section 165(3); and
>
> (ii) do not comply with the regulations; or
>
> (cd) goods in relation to which a person is subject to post-clearance requirements in an import health standard and does not comply with the requirements; or

(ce) goods in relation to which a person is subject to post-clearance conditions under section 27A and does not comply with the conditions; or

(cf) goods in relation to which a person is subject to regulations made under section 165(3) and does not comply with the regulations; or

(d) a restricted organism in a place that is not a containment facility (other than an organism that,—

(i) in accordance with the authority of an inspector, is proceeding from a transitional facility, biosecurity control area, or a containment facility to another transitional facility, biosecurity control area, or containment facility; or

(ii) is in a transitional facility or biosecurity control area to which it has proceeded in accordance with the authority of an inspector; or

(iii) in accordance with the authority of an inspector, is being exported from New Zealand); or

(e) a restricted organism that is in a containment facility to which it proceeded other than in accordance with the authority of an inspector, and has not later received the authority of an inspector to remain there

[12] The decision that the trees here were unauthorised goods was made by Mr Thomson in his decision dated 27 July 2018. His decision stated:

Goods unauthorised

16. The Biosecurity Act defines "unauthorised goods" to include goods which have been given a biosecurity clearance by an inspector following receipt by that inspector of false, incomplete, or misleading information concerning the goods. Among other things, a clearance is given by an inspector once all the requirements of the IHS are met. To that end, as part of giving a biosecurity clearance, an inspector will receive and rely on the relevant phytosanitary certificates to ensure compliance with the IHS.

17. Due to the audit findings, the phytosanitary certificates issued by the USDA (which certified that the required pre-export measures (including inspection and testing) had been carried out) provided at the time the goods were given biosecurity clearance cannot be relied on (Appendix A.1). Accordingly, the plant material was provided biosecurity clearance based on false, incomplete, or misleading information (phytosanitary certificates) and is therefore unauthorised goods.

18. Therefore I agree that the plant material is unauthorised because the phytosanitary measures applied at CPCNW cannot be relied on.

[13] Appendix A.1 is the Ministry's audit report concerning the Clean Plant Centre. When Dr Herrera made her decision under s 116 on 30 July, it essentially repeated this approach.[5]

[14] I will address the submissions made by the parties in greater detail below, but by way of summary Messrs Pearson and Greig for the applicants in the Waimea proceeding contended that s 116 did not apply as the trees subject to the s 116 decisions here were not "unauthorised goods" for a number of reasons. They argued that there was no evidence that the inspector that gave biosecurity clearance received the phytosanitary certificates, and that in any event the systemic concerns concerning the Clean Plant Centre did not mean information contained in those certificates concerning any particular consigned goods was false, incomplete or misleading. Further they argued that the trees subject to the notice of destruction could no longer be regarded as the goods receiving biosecurity clearance, as they were the propagated product of those goods not the goods themselves. Moreover, most propagated product was planted in the ground so that they were no longer "goods" as defined, but had become part of the land.

[15] Mr Pearson emphasised that Waimea Nurseries Ltd did not challenge the need for biosecurity action. Rather it challenged the use of s 116. The use of this provision prevented his client and the other affected industry members from having access to compensation for the relevant biosecurity action, as statutory compensation is excluded for actions taken in relation to unauthorised goods.[6] He said that there were other provisions that could be used by the Ministry to address all relevant biosecurity issues, and which could potentially lead to the destruction of the trees, but which would allow the affected industry members to receive statutory compensation. He said that it was these powers that should have been used to deal with all biosecurity issues, whilst at the same time not doing immense harm to the industry.

[16] Mr Glenie, for the applicants in the Johnny Appleseed proceeding, supported the arguments that had been made by Messrs Pearson and Greig. He added a number of other technical arguments in his written submissions, but in his oral argument

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5 See, for example, [4] and [9], Option 1, (a)(iii).
6 Biosecurity Act 1993, s 162A(3)(a).

focussed one other major argument – that is that the notice requiring destruction of all the trees was not a reasonable direction under s 116(2) in all the circumstances of this case. That was because of a number of factors which I will address in greater detail below.

[17] Ms Catran and Mr Fong, for the Ministry, refuted the arguments advanced by the applicants. Mr Fong emphasised that the officer giving biosecurity clearance was relying on the pivotal information concerning the testing undertaken overseas, which was the subject of the phytosanitary certificates; that the testing results were now plainly unreliable given the breakdown in the Clean Plant Centre; and that this rendered the information concerning the testing misleading. He argued that the trees that were the genetic product of the imported goods were unauthorised goods, even when planted in the ground. He said the definition of goods needed to be considered given the context of this Act, particularly in circumstances where the trees were able to be dug up following sale for the purposes of transportation to a new orchard. Ms Catran responded to the claims of unreasonableness emphasising the significant biosecurity concern arising from the breakdown in the Clean Plant Centre, the imperative need to take a precautionary approach, and the extensive work undertaken by the Ministry to assess whether there was any other solution to the position that presented itself.

Approach to interpretation

[18] In approaching the interpretation issues that arise, I adopt the approach set out by the Supreme Court in *Commerce Commission v Fonterra Co-operative Group Ltd*.[7] Text and purpose are the key drivers of statutory interpretation. Text should always be cross-checked against the purpose, and regard should be had to the immediate and general legislative context. The overall scheme of the Act is important. Applying that approach in this context, where there are a range of powers as part of an overall regime, means that I should seek to "make the Act work as Parliament must have intended".[8]

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7 *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22].

8 *Northland Milk Vendors Association v Northern Milk Ltd* [1988] 1 NZLR 530 at 538 (CA). See Douglas White "A Personal Perspective on Legislation, *Northern Milk* Revisited – Soured or Still Fresh?" (2016) 47 VUWLR 699.

[19] The applicants contended that the interpretation of the provisions should be influenced by the New Zealand Bill of Rights Act 1990 (NZBORA), particularly the right to be secure against unreasonable search or seizure under s 21. Such rights may have reduced significance in a commercial context,[9] particularly when dealing with legislation to protect biosecurity concerns. Such concerns might justify quite significant measures. But NZBORA may nevertheless still influence how the legislation is to be interpreted.

[20] Reference has also been made to the international instruments and practices. That material can be important to understand the place of the relevant IHS, and the phytosanitary certificates. Such steps are part of the international regime to which New Zealand is a party. But it is not simply a matter of interpreting New Zealand provisions so that they coincide with the international instruments. As the Court of Appeal indicated in *New Zealand Airline Pilots' Association Inc v Attorney-General*, international obligations and standards can contemplate individual states applying such obligations and standards in different ways domestically.[10] Again, in the end, it is a matter of making the Act work as Parliament must have intended, albeit against the backdrop of the international materials. In any event, in the present case I do not think anything turns on this subtlety.

Are the trees unauthorised goods?

[21] Three key arguments were advanced to say that the trees subject to the notices and directions were not "unauthorised goods", and accordingly that the exercise of powers under s 116 was unlawful, namely:

(a) That there was no evidence that the officers that gave biosecurity clearances ever received the phytosanitary certificates the Ministry relied upon. The certification process was dealt with at an earlier stage of the process when the permit was granted, and was not relevant to the biosecurity clearance subsequently given in New Zealand by an officer.

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9 See, for example, *R v Grayson & Taylor* [1997] 1 NZLR 399 at 407 (CA).

10 *New Zealand Airline Pilots' Association Inc v Attorney-General* [1997] 3 NZLR 269 (CA) especially at 284–285.

(b) That in any event the conclusion that the results from the Clean Plant Centre could no longer be relied upon did not mean that there was any false, incomplete or misleading information concerning any particular consignment of goods given clearance. The Ministry had no evidence that the tests had not been conducted on the goods, or that the information that the goods had passed those tests was necessarily incorrect.

(c) Finally, that the trees that were the product of the trees grown from the initial stem stock could not now be regarded as unauthorised goods. They were now generations removed from the original trees that obtained biosecurity clearance, at least for most of the trees. And all, or nearly all, such trees were now planted in the ground, and were no longer moveable property meeting the definition of "goods" under the Act.

[22] I will address each ground in turn.

Following receipt by that inspector

[23] Mr Pearson argued that there was no evidence that the relevant biosecurity officer who issued the biosecurity clearances, Mr Mason in his client's case, had ever even seen the relevant phytosanitary certificates relied upon by the Ministry to establish the requirement that the trees were unauthorised goods. He said that that certification process arose at an earlier stage, and was handled by different Ministry officials dealing with the original importation permits. The biosecurity officer giving clearance did so in New Zealand some years later after the stem stock had been grafted onto plants in the quarantine facility in New Zealand, and grown into trees. This was a process that usually took at least one year. The biosecurity clearance was then given without any reference to the original phytosanitary certificate issued years earlier. The certificate is not mentioned in ss 26 and 27 under which the clearance is given. Mr Pearson referred to the lack of any evidence from the officer who actually gave the

biosecurity clearance, and he placed reliance on the general proposition that a failure to call a witness can lead to appropriate adverse inferences.[11]

[24] In response to the last point, the Ministry filed further affidavit evidence from Mr Stephen Gilbert. He explained that information arising from the certification process was entered into one of the Ministry's key databases, called QuanCargo. Mr Gilbert said that all inspectors who normally gave biosecurity clearance were able to access the full history of each consignment to satisfy them that the previous steps had been met. Mr Pearson argued in response that this evidence did not confirm that the relevant inspectors themselves viewed any of the certificates.

[25] I do not accept the applicants' challenge on this issue. As Mr Fong emphasised it is important to interpret the definition of unauthorised goods in s 2 in light of the purpose of the provision. The definition in para (c) may have been initially formulated with a more simplistic scenario of an officer giving biosecurity clearance at the border in mind. That compares with the more elaborate definitions that were added in paras (ca)–(cf) by the Biosecurity Law Reform Act 2012. The amended provisions appear to have squarely addressed the more sophisticated processes that are involved in giving biosecurity clearance, and to identify when goods subject to these processes could become unauthorised goods when post clearance requirements are not met. The definition was not changed to deal with pre-clearance requirements in the same way. It appears that para (c) is still intended to do all of the work for a range of circumstances involved in the steps before clearance is given under ss 26 and 27. It accordingly covers all circumstances leading to the grant of biosecurity clearance, including when it is given as part of the more sophisticated steps such as those in issue in the present case.

[26] In these circumstances, it would be appropriate to interpret para (c) in a way that reflects its possible application to the more complex pre-clearance processes contemplated by the Act, as well as the simpler situations. Approached in that way, it can be seen that it covers the present situation. The essential facts here are not in issue. The officers giving biosecurity clearance here are unlikely to have actually looked at

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[11] *Ithaca (Custodians) Ltd v Perry Corporation* [2004] 1 NZLR 731 at [153]–[154].

the phytosanitary certificates. It is not something that such officers would be required to check at that stage. The goods would not be in New Zealand at all in the absence of the goods having been through the overseas requirements for testing and certification. But whilst the officer would probably never have seen the certificate, he or she will know that the goods have been tested and certified. If it is ever necessary the officer can check that. The words "following receipt by that inspector of … information" can be interpreted to encompass circumstances where the information is received by the Ministry and known to the relevant inspector, particularly when it is information that is a pre-requisite to the grant of biosecurity clearance by him or her.

[27] This approach is consistent with the purpose of the provisions. If a clean plant facility overseas provides information to the effect that goods have passed the required tests, but this is false, it seems clear that it would be intended that such goods would be addressed as unauthorised goods. Clearance has been given as a consequence of the false information. Such clearance would never have been given if the true position had been known. The reference to the receipt of the information by the officer is directed to a requirement that the information be material to the clearance granted by that officer. One of the purposes of the powers in s 116, as defined, is to allow the Ministry to address precisely this type of situation.

[28] I accordingly reject the applicants' argument that the trees in issue were not unauthorised goods for this reason.

False, incomplete, or misleading information concerning the goods

[29] The second issue is whether the Ministry's concerns about the reliability of the Clean Plant Centre mean that there was false, incomplete or misleading information concerning the goods that were given biosecurity clearance. The applicants say that the general concerns about the reliability of the Clean Plant Centre do not mean that information provided in relation to any particular consignment of goods that were given clearance was either false, incomplete or misleading.

[30] The Ministry relied on the certification provided by the USDA in the phytosanitary certificates. These certificates certify certain matters in relation to the particular consignments specified in the certificates. For example, they state:

> This is to certify that the plants, plant produce or other regulated articles described herein have been inspected and/or tested according to appropriate official procedures and are considered to be free from the quarantine pests, specified by the importing contracting party and to conform with the current phytosanitary requirements of the importing contracting party including those for regulated non-quarantine pests.

[31] More elaborate statements are made later in the certificates relating to each of the consignments.

[32] There appear to be two important elements of the definition of "unauthorised goods". The first is that the definition focuses on "information". Here the USDA has relied on information provided to it by the Clean Plant Centre, and then given its certification. The relevant information itself is also provided by the Clean Plant Centre to the Ministry for the purpose of obtaining the export permit. There does not seem to me to be any information – that is facts – that are contained in the certificates that are not also directly conveyed to the Ministry itself by the Clean Plant Centre. And it is important to focus on what the relevant information here is. It seems to me that it is that the relevant goods have been tested in accordance with the testing requirements, and that they have met all the testing requirements. That is the "information" in issue.

[33] The next important factor is that the information must be "concerning the goods". Given the purpose of the provisions, the reason for this is apparent. What the sections are focussing on is the biosecurity clearance given with respect to particular goods, and the fact that the clearance was given when there was a deficiency (of the kind specified) in the underlying factual information about those goods.

[34] The apparent problem with the Ministry's approach arises from the fact that the Ministry does not contend that any information provided with any of the consignments was untrue. All it says is that it now has very serious concerns about the reliability of the outputs from the Clean Plant Centre generally. The challenged decisions proceeded on the basis that the goods are unauthorised goods because the audit has shown that the certificates can no longer be relied upon. The Ministry contends that the information provided was misleading. The Ministry's written submissions put it in the following way:

> The certification creates "an incorrect impression or belief" that the correct tests had been undertaken, the correct methodology had been used and the underlying testing results were reliable and verifiable. The audit and the investigation have, in fact, shown there is no proper basis for giving MPI such impression or belief. Such incorrect impressions are liable to lead inspectors astray when giving clearance.
>
> The misleading impression stems from the systemic breakdown at [the Clean Plant Centre]. Systemic issues, by their very nature, permeate and impugn the entire system. The systemic breakdown here goes to the heart of the reliability of [the Clean Plant Centre]'s testing. The lack of records, and the inconsistent results, mean that the testing data as a whole can no longer be properly relied upon by MPI. And, accordingly, the phytosanitary certificates – for every consignment – that certified that the required pre-export measures had been carried out by [the Clean Plant Centre] are impugned. That is why MPI had to withdraw accreditation from [the Clean Plant Centre]. That is also why the USDA advised "certifying officials not to certify *Malus* and *Prunus* budwood from this facility for export to New Zealand until changes are made to MPIs and APHIS PPQ's satisfaction".

[35] It seems to me that the reliance on the information being "misleading" demonstrates the problem with this approach. There may be reduced room for the concept of misleading information in this context. There are very tightly prescribed procedures, and the definitive requirements that are established for the information required for the goods. The facts that are to be established are required to be certified. The real question is whether the certified information is correct or not. Both the Clean Plant Centre, and the phytosanitary certificates from the USDA state underlying facts – that the relevant goods subject to the consignment have been subjected to all the required tests, and the goods have all passed all those tests. Either that is true, or it is not.

[36] I do not accept that the information becomes misleading because it is said there was an implied representation going to the reliability of the results. This moves away from the information concerning the goods that are subject to the certification process. In effect, it is suggesting that there are implied representations about the integrity of the processes at the Clean Plant Centre. But the relevant information must relate to the goods, not the facility. The Ministry has recognised an issue concerning the integrity of the work of the facility going back to 2012. But to say that every single certificate for each and every consignment going through that facility for the last six years was misleading on this basis does not conform with the text or purpose of the provision.

[37] It is also relevant that the words in issue in the definition of unauthorised goods correspond to the duty set out at the beginning of Part 3 of the Act in the following terms:

> **16A General duty relating to importation**
>
> A person must not—
>
> (a) provide an official or an automated electronic system with false, misleading, or incomplete information about goods to be imported or uncleared goods; or
>
> (b) take steps that are likely to hinder the detection by an official of uncleared goods.

[38] Under s 154N(6) a person commits an offence against the Act if it fails to comply with this duty. The offence is one of strict liability, although there is a defence under s 154N(3)(a)(i) if the action was due to the act or omission of another person. That may give the USDA a defence for the suggested offence that would arise on the Ministry's interpretation. It may not give the Clean Plant Centre such a defence.[12] These implications suggest an approach to interpretation requiring a clear and certain approach. The fact that "unauthorised goods" are excluded from statutory compensation under s 162A(3)(a) further illustrates the intended nature of "unauthorised goods". They are goods with respect to which biosecurity clearance has been improperly obtained as a consequence of behaviour that is prescribed as an offence.

[39] An illustration of how the definition could well apply in the present situation is provided by one set of consignments that was focused on as a consequence of the Ministry's audit findings. The letter from the Ministry to the Clean Plant Centre dated 26 March 2018 set out the deficiencies associated with the consignments under five permits issued between 2013 and 2017. Many of the deficiencies identified related to a lack of retention of the underlying testing information. The applicants pointed out that the Ministry's agreement with Clean Plant Centre only required the records to be kept for two years, albeit the Ministry indicated that it had stated in the audit report in 2011 they should be kept for a longer period of time. But irrespective of that debate, the concern is with the lack of retention of records. I do not see how that can mean

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[12] I put aside any questions about extra-territoriality.

that the information provided by the Clean Plant Centre, and then made subject to the certificates is false or misleading. What was stated was that all the relevant tests had been done for the consigned goods in question, and all the relevant requirements had been met. A lack of records does not mean this was not true.

[40] There is a much more significant issue identified with two of the permits. The Ministry's letter stated:

> • **Permit 2015059098 (*Prunus* spp. For Pattullo's Nurseries Ltd):**
>
> - Negative results for *Hop stunt viroid* (regulated pest) were reported to MPI; but [Clean Plant Centre] records showed five cultivars were positive (1C116; 1P708; 31C758; 363LN189; and 9P89).
>
> • **Permit 2017063917 (*Prunus* spp. For Bloomz New Zealand Ltd):**
>
> - Negative results for *Apple stem grooving virus* – [*Prunus* infecting strain] (regulated pest) were reported to MPI; but [Clean Plant Centre] records showed two cultivars were positive (Penny and Tamara).

[41] The first of these relates to a permit issued to the fourth applicant in the Johnny Appleseed proceeding. I understand that the material subject to this second permit had not received biosecurity clearance, and was still in PEQ when the Ministry made its decisions.

[42] This material gives rise to a question whether the information provided in relation to the relevant tests was false. By an earlier email dated 14 December 2017 the relevant representative of the Clean Plant Centre stated in relation to the second permit:

> Due to a lack of record keeping by previous staff all we have are the test dates for the herbaceous and wooding indexing for the varieties you listed below. Since they were upgraded to full release, we are confident that the tests would have been negative.

[43] Mr Glenie also took me through the documentation that showed that the Ministry had followed up the material subject to the first permit by conducting testing for *hop stunt viroid*, and it has been established that the trees in New Zealand do not have this pest. I gave Ms Catran leave to file a memorandum following the hearing to confirm the Ministry's stance on this issue. In the memorandum she filed, she confirmed that the Ministry had conducted the tests, and the results were negative, and

that they were confident that these results were accurate. The Ministry says, however, there remained a possibility that *hop stunt viroid* was unevenly distributed, and that resampling at the end of summer 2019 may be required. In response, Mr Glenie filed a further memorandum indicating that his clients objected to this suggestion. So there may still be a question about whether the test result provided to the Ministry, and certified by the USDA, was false.

[44] The above situation illustrates what seems to me to be required to meet the definition of "unauthorised goods". There must be some false, incomplete or misleading information about the goods themselves.

[45] The Ministry argued that the adoption of the interpretation outlined above would mean there was a lacuna in the Act. I do not accept that. Indeed, I am reinforced in these views by a consideration of the overall statutory scheme. As I will explain below,[13] in my view the position currently confronting the Ministry is dealt with in other provisions of the Act, which regulate biosecurity concerns arising from material that is already in New Zealand, rather than the provisions that regulate goods that have improperly obtained biosecurity clearance, and which can be seized under s 116.

[46] I am satisfied for this reason alone that the Ministry's decisions cannot stand. It is unrealistic to say that all 47,827 trees in issue are unauthorised goods because over the last six year they came through a facility in relation to which the Ministry now has very significant doubts. More particularity is required in relation to the goods actually given clearance before they can be identified as unauthorised goods.

Are all the trees unauthorised goods?

[47] The final issue concerns the reach of s 116 in relation to the trees subject to the s 116 notices. Most of the 47,827 trees subject to the s 116 decisions were not themselves given biosecurity clearance under s 26 as trees leaving the PEQ. Rather the majority of them are further trees that have been propagated from those trees. Moreover, the majority of them are now planted in the ground. This gives rise to two issues, which can be seen as related.

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13 [69]–[86].

[48] First, the majority of the trees subject to the decisions under s 116 never themselves obtained biosecurity clearance under s 26. The biosecurity clearance was given in relation to a more limited number of trees that have been grown in the New Zealand quarantine conditions. These trees were then released from PEQ after obtaining the biosecurity clearance, and used as the base stock for the propagation of commercial quantities of trees. That propagation involved the process of taking cuttings from the trees that had obtained the biosecurity clearance and grafting them onto other root stock, or other trees. The appellants accordingly argue that s 116 cannot apply to the majority of the trees, as they are not "unauthorised goods" as they are not goods that "have been given a biosecurity clearance" under the definition.

[49] I accept that point, at least so far as it goes. It seems to me that this situation is contemplated by s 116(1)(b), which extends the ability to use the necessary powers to include other goods that have been in contact with "unauthorised goods", where there are reasonable grounds to suspect that pests or unwanted organisms could have been transmitted. There might be no more clearer example of such "contact" than grafting the unauthorised goods onto root stock to create new trees.

[50] As the applicants say, however, this has not been part of the Ministry's decision-making. It is not referred to in either of the two decision papers. Neither is it referred in the Ministry's evidence, including the evidence of Dr Herrara who made the s 116(2) decision. I am conscious that s 116(1)(b) requires a separate set of questions to be asked and answered by the relevant statutory officer, and on the face of the record they have not been addressed. There is also another issue, not mentioned at the hearing, which is the prospect of s 116(1)(b) applying to other trees in the vicinity of the trees receiving clearance over the last two or more years. This may further illustrate the difficulty with the Ministry's approach.

[51] As a general proposition, a statutory decision-maker is not able to rely on alternative statutory powers to justify a decision, particularly when there are additional requirements.[14] The position appears to be different in Australia.[15] But in

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[14] See Philip Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, 2014) at [23.2.2 (3)].

[15] *Lockwood v Commonwealth* (1954) 90 CLR 177 (HCA).

New Zealand these issues can be addressed under the discretion as to relief. Where another power is relied upon to save a challenged decision and it seems clearly to apply, and when what is involved is a potential biosecurity risk, a Court can exercise its discretion in relation to relief so that the new power can be exercised. If this was all that were involved in this case, I would have so exercised the discretion as to relief here. Given the conclusions I have already reached, however, these are not unauthorised goods at all. So the need to fashion appropriate orders in light of these issues does not arise.

[52] There is a further significant issue. The vast majority of the trees that are subject to the s 116 notice are now growing in the ground. Some have reached their second or third season. This calls into question whether they can be now subject to the exercise of power under s 116. The unauthorised goods, or goods that have been in contact with other authorised goods, must be "goods" as defined. The definition in s 2 is:

> **goods** means all kinds of moveable personal property.

[53] As Mr Greig submitted, s 116 should be contrasted with other terminology used in other sections of the Act. For example, the powers of examination in s 121 covers organisms, organic material, as well as other goods or material. The words "organic material" and "organism" are subject to their own clear definitions in s 2. The more restricted use of the concept of "goods" in s 116 is significant. It shows that the text, in light of the scheme and purpose of the Act, is intended to have its limits.

[54] The distinction between personal property and real property is subject to a rich vein of case law. As a general proposition, trees planted in the ground are not treated as moveable property.[16] On this basis any trees that remained in pots, or in other equivalent containment, would be goods but any such trees that had been planted would not be. There is the further complexity here that some of the trees in the ground are dug up and transported once sold by a nursery.

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[16] *Windermere Forests Ltd v Commissioner of Inland Revenue* (1993) 18 TRNZ 283 (HC); *Fisk v C R Grace Ltd* (2009) 6 NZ ConvC 194,707, (2008) 10 NZCPR 12 (HC); and *Halliday v Bank of New Zealand* [2012] NZHC 3099, [2013] 1 NZLR 279.

[55] I accept the argument of Mr Fong that the meaning to be given to "goods" or "moveable property" will be highly dependent on the context.[17] He challenged the idea that the reach of s 116 could turn on the arbitrary actions of the owner of the tree. But Parliament has provided limits on when property can be traced from unauthorised goods for the purposes of s 116. Here a large number of trees are now planted in the land and producing fruit. In some cases, those trees have been in the environment for years. There may have been other trees in the vicinity of these trees. In most cases the situation here seems to be beyond the outer limits of the reach of s 116. So I do not accept that the point made by the applicants is a technicality. Rather it goes to the heart of the intended reach of s 116. It is the Ministry that is pushing its application beyond its technical limits.

[56] Again, the Ministry argued that adopting this interpretation would mean there was a lacuna in the Act. I do not accept this. As with the question concerning whether there was false, incomplete or misleading information concerning the goods, I am reinforced in my view by the overall scheme of the Act. As I will explain, in my view different provisions apply to regulate the current problem.[18]

[57] For this reason also, I conclude that the decisions under s 116 were unlawfully made. The majority of the trees that are subject to the s 116 notice are no longer within the scope of the section.

Unreasonableness

[58] Given the conclusions I have reached above, it is unnecessary for a concluded view to be reached on the claims of unreasonableness that were advanced by the applicants in the Johnny Appleseed proceeding. I would have rejected the challenge on these grounds, however. In the circumstances, I will seek to summarise my reasons notwithstanding the reasonably extensive material that was traversed in argument.

[59] I should first say that I have not found it of assistance to address the debate concerning intensity of review, and variable standard *Wednesbury* unreasonableness.

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17 *The Noordam (No 2)* [1920] AC 904 (PC).
18 [69]–[86].

The question here does not involve application of this ground of judicial review. Rather the requirement for reasonableness is in the section itself. I accept Ms Catran's point that some of the rationale for respecting the expertise of the decision-maker with respect to challenges based on unreasonableness may apply. But when the word "reasonable" is used in the statute itself as a requirement of the law the Court must ensure that it has been met. An illustration of this point in a different statutory context is provided in *Canterbury Regional Council v Independent Fisheries Ltd*, which involved a statutory requirement that a Minister exercise a power when he or she "reasonably considers it necessary".[19] The Court of Appeal addressed the standard to be applied when a Court reviewed such a decision and said:

> [22] We agree with Mr Goddard that a review of the merits of the decision, as on an appeal, is to be avoided. We also accept that the decision should not be reviewed on the basis of Wednesbury unreasonableness or irrationality because the requirement to consider "reasonably" imports a higher standard. Indeed it was not argued that the decision was so unreasonable that no reasonable person could have made it. The Court must be satisfied that the Minister's consideration of necessity was reasonable. This will involve the Court being satisfied that the Minister did in fact consider that the exercise of the particular power was necessary to achieve a particular purpose or purposes of the Act at the time the power was exercised, taking into account the nature of the particular decision, its consequences and any alternative powers that may have been available. In making this assessment, the Court will give such weight as it thinks appropriate to the Minister's expertise and opinion, while recognising that Parliament has enacted s 10(2) as a constraint on the exercise by the Minister of his powers under the Act.
>
> (footnotes omitted)

[60] The decision in that case was that the statutory requirement had not been met, and it was held to be invalid. So the more straightforward question here is whether the statutory requirement is met.

[61] Ms Catran for the Ministry took me through the decision-making processes that had been followed by Mr Thomson and Dr Herrera. In the case of Mr Thomson, he gave consideration to the question whether the goods in question could be re-authorised under s 27(1)(d)(iii) of the Act on the basis that measures could be taken that were equivalent to those set out in the IHS. There were a number of inputs to that decision in the form of other opinions and assessments, which were annexed to the

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19 *Canterbury Regional Council v Independent Fisheries Ltd* [2012] NZCA 601, [2013] 2 NZLR 57.

decision. For example, there was a reasonably detailed analysis undertaken on the risks of pests or diseases being latently present in the trees notwithstanding the lack of any manifestation of such pest or diseases while they had been in the New Zealand environment. There were a number of other such analyses on other issues.

[62] Following the completion of that exercise, and the release of Mr Thomson's decision on 27 July 2018, a different biosecurity officer, Dr Herrera made her decision under s 116(2). Her decision was similarly based on extensive input in the form of other opinions and reports. For example, advice was sought from Dr Mike Rott based in Canada, who Ms Catran described as a world-leading expert. He gave urgent advice on diseases of unknown aetiology – that is diseases which have a cause or origin that is unknown. Having considered those various papers, Dr Herrera made her decision under s 116(2) on 30 July.

[63] In my view, the diligence and care demonstrated in these decision papers cannot be faulted. What they demonstrate is that the Ministry has been very careful to thoroughly research the situation, and then determined what action it should take. Put another way, the decisions demonstrate that the Ministry has acted reasonably.

[64] What may be significant is that these decisions proceed on the basis that the level of risk that is regarded as acceptable is that identified in the original IHS. To initially create an IHS, a formal ALOP is established. The decisions proceed on the basis that this is what needed to be achieved in the further decisions. Ms Catran submitted that this was the correct approach, as a decision under s 116 needed to provide for the effective management of risks under Part 3 of the Act, and the effective management of the risks for this material had been determined in the IHS earlier established under Part 3. Ms Catran noted that s 116(6) refers to the decision achieving the purpose of Part 3.

[65] I accept that it is permissible for the decision-makers under s 116 to proceed on the basis that it is appropriate to achieve the same level of protection that was contemplated in the original IHS. But I do not accept that that is mandated as a matter of statutory interpretation. Decisions under s 116 can achieve the purpose of the Act – the effective management of risks associated with importation – even if the level of

protection involved is no longer as great as contemplated by the original IHS. What is required is the effective management of risks more generally. The circumstances that decision-makers are confronted with may involve a different assessment of the risk balancing exercise. But as I say, it was open to the decision-makers here to proceed on the basis that they wanted to achieve the same level of protection contemplated by the HIS. As such, the directions given under s 116(2) to achieve this outcome cannot be categorised as not reasonable.

[66] In advancing the case for the applicants, Mr Glenie identified a number of factors that individually, or in combination, demonstrate why Dr Herrera's direction was not reasonable. I am not satisfied that any of the factors relied upon lead to that conclusion given the above matters. By way of summary:

(a) Mr Glenie pointed out that there had been a failure by the Ministry in not auditing the Clean Plant Centre until 2018. He pointed to the fact that the Ministry's Accreditation Standard required an annual desk audit at such facilities by either MPI or the USDA, and that the 2011 audit report recommended a MPI audit in 2015. There had been no audit activities by MPI between 2010 and 2018. But whether the Ministry can be criticised in this context is irrelevant. The decision-makers in 2018 were required to deal with the biosecurity issue confronting them irrespective of the reasons why it had arisen. It would have been quite wrong for them to take less demanding action because they thought the Ministry must bear some responsibility for what had developed.

(b) Mr Glenie also criticised the audit report itself, and the actions taken by the Ministry during the audit, including the auditors action in leaving the facility after the first day of work, and not going through more records at the time. This criticism has little relevance for the same reasons. What matters is the information that was available to the decision-makers, who were required to make their decisions on the basis of what information they had.

(c) Thirdly, Mr Glenie relied on the fact that there was low residual biosecurity risk, relying on evidence filed from Dr Cohen, an independent expert, and the tests that had been done and could be done on the trees here. I accept that this material might now be relevant to the Ministry's consideration of other powers, as I will address below. But as indicated above, I also accept that a decision made under s 116 can properly proceed on the basis that the level of risk that can be accepted is that contemplated by the original IHS.

(d) Next, Mr Glenie complained of what he described was a disregard for the plaintiffs' losses. He identified that the losses would vary depending on factors such as the commercial significance of particular cultivars, and the different circumstances – for example a tree that had been planted in the New Zealand environment for two to three years was in a different situation from one that had just been released from containment. Whilst that is true, the relevant assessment of loss is addressed under s 116(6). Dr Herrara's decision carefully applied the requirements of this section. Given the large number of trees, owned by different producers or orchardists in different situations, it was unrealistic to expect a decision to be made on a more particular basis, particularly given the impending spring conditions referred to below. In the words of s 116(6), such greater refinement in the assessment was not "practicable".

(e) Finally, Mr Glenie complained about the timing, and impact of the s 116 notices. He said that the Ministry had identified the relevant problems back in December 2017, but had now made decisions on 30 July 2018 requiring action by 22 August 2018. Moreover, the containment option was largely unrealistic, such that destruction was the only real way of complying with the directions. He also said that burning of the trees would be very difficult because the trees are wet wood. I accept, however, that a very significant amount of work has occurred between December and the decisions made in July 2018. I also accept that the urgency of the directions is associated with the

> arrival of spring, and the risk of pests and unwanted organisms spreading in the spring period. Moreover, considerable work has gone into establishing new equivalent quarantine areas that will satisfy the containment requirements. I do not accept there has been unreasonableness for this reason.

[67] The claim for unreasonableness only arises in the alternative. I assess it on the assumption that these are unauthorised goods within the scope of s 116, contrary to the conclusions I have reached above. On that basis, I reject the unreasonableness claim. But it may well be that many of the sentiments that underlie that claim arise because the Ministry has not lawfully used the s 116 powers for the reasons I have already found.

[68] For all these reasons, I would have declined the challenge based on the claim the directions were not reasonable under s 116(2).

Alternative powers

[69] As indicated above, the Ministry contended that the interpretation of the provisions advanced by the applicants would result in there being a lacuna in the Act as it would mean that the very real biosecurity problem confronting the Ministry would not have an appropriate legislative response.

[70] I do not accept that this is so. Indeed, a consideration of the wider scheme of the Act suggests to me the problem that currently presents itself is properly dealt with by other legislative powers that apply when biosecurity risks become apparent in relation to material already present in New Zealand. These provisions apply not only with respect to "goods", but rather apply to anything that gives rise to a biosecurity risk. Neither do they turn on whether the original biosecurity clearance has been given as a result of false, incomplete or misleading information. They turn on relevant biosecurity risks existing in relation to something in the New Zealand environment.

[71] The other relevant statutory provisions addressed below seem to me to contemplate the legislative response to the current circumstances. I agree that these provisions may not allow the Ministry to immediately require the destruction of all of

the trees. The better view may be that there are additional legislative requirements before such steps may be taken. But I refrain from reaching any concluded view on that point given that I do not have the full facts, or reasoned decisions on these other provisions.

[72] The fact that there are additional requirements for taking actions of this kind does not mean that there is a lacuna. Rather it means that Parliament has directly considered when steps, such as destruction, can be undertaken in relation to material that may contain pests or unwanted organisms within New Zealand, and concluded that such additional requirements are appropriate in those circumstances. My view that these provisions are the appropriate ones to apply rather than s 116 is also consistent with the interpretive influence of NZBORA given the right in s 21, and the greater protections and remedies available under these provisions.

Sections 121 and 122

[73] The first powers are those contained in s 121. This provides:

> **121 Power to examine organisms**
>
> (1) An inspector or authorised person may exercise any or all of the powers in subsection (1B) on—
>
> (a) organisms:
>
> (b) organic material:
>
> (c) any other goods or material.
>
> (1A) The purposes for which the inspector or authorised person may exercise the powers are—
>
> (a) taxonomical identification of an organism:
>
> (b) diagnosing a disease:
>
> (c) determining whether imported goods may be given a biosecurity clearance:
>
> (d) ascertaining the presence or absence of any pest or unwanted organism:
>
> (e) making an assessment of measures taken to eradicate or manage any pest or unwanted organism.
>
> (1B) The powers are to—

(a) autopsy:

(b) destroy:

(c) examine:

(d) inspect:

(e) sample:

(f) section:

(g) take specimens:

(h) test:

(i) apply any other treatment or procedure.

…

[74] This gives the Ministry very broad powers to conduct a wide range of tests and other processes to identify the presence or absence of any pest or unwanted organism. Whilst it refers to destruction in s 121(1B)(b), in context that seems to me to be contemplating destructive testing or similar processes.

[75] If there are any such pests or unwanted organisms, the powers under s 122 can be exercised. It provides:

122 Power to give directions

(1) An inspector or authorised person may, whenever that inspector or authorised person considers it to be necessary, direct the occupier of any place or the owner or person in charge of any organism or risk goods—

(a) to treat any goods, water, place, equipment, fitting, or other thing that may be contaminated with pests or unwanted organisms; or

(b) to destroy any pest or unwanted organism or any organism or organic material or thing that there are reasonable grounds to believe harbours a pest or unwanted organism; or

(c) to take steps to prevent the spread of any pest or unwanted organism.

…

[76] Again, these are broad powers. It includes a power of destruction. I accept Ms Catran's submission that destruction under s 122(1)(b) can only occur when there

are reasonable grounds to believe that a tree harbours a pest or unwanted organism. But I also accept Mr Pearson's submission that it is arguable that s 122(1)(c) might be broad enough to encompass powers of containment, and also powers of destruction if they were necessary for containment. Such destruction could be part of the required action to control the spread of any pest or unwanted organism, even if a tree is not itself harbouring the pest or unwanted organism. The statutory pre-requisite for the exercise of power is that the action proposed under (a)–(c) is considered necessary by the officer exercising the power. Some degree of particularity is anticipated – there would need to be a particular pest/unwanted organism or pests/unwanted organisms in mind.

[77] I go no further than saying that the point is arguable when addressing the correct interpretation and application of the section for the reasons I explain in greater detail below in relation to s 114.

Section 114

[78] Section s 114 provides:

> **114 General powers**
>
> An inspector or authorised person who has lawfully entered a place under section 109 or 111 may do anything in, on, or in relation to the place that the inspector or authorised person considers necessary or expedient to—
>
> (a) eradicate or manage a pest or unwanted organism on the place:
>
> (b) prevent the spread of a pest or unwanted organism from or to the place:
>
> (c) avoid, remedy, or mitigate any effect on the place of non-compliance with a pathway management plan

[79] Ms Catran submitted that this power would only be available if there were known to be pests or unwanted organisms in existence. Mr Pearson submitted the section was of wider application, and also that it could apply to destroy trees if that was thought necessary to manage the spread of any pest or unwanted organism that was suspected to be in existence.

[80] Whether s 114 is as broad as Mr Pearson contended is a matter for debate. The express requirements of this section are clear. First, the officer must be exercising the other powers referred to, which includes the power under s 109 to enter to inspect any place for the purpose of "confirming the presence, former presence, or absence of" a pest or unwanted organism. Second, the officer can then do what is "necessary or expedient" to achieve what is referred to in paras (a)–(c), which generally include matters for the eradication, management or prevention of the spread of unwanted pests or organisms.

[81] I accept Ms Catran's submission that the section would most naturally apply when it has been established that the pest or unwanted organism is on the place in question. The general scheme of the provisions referred to above suggests that at least some initial testing will be undertaken to establish whether there are any pests or unwanted organisms, and that containment can occur to prevent the spread, including in the meantime. But it is arguable that it might apply also when it is only suspected that a pest or unwanted organism is on that place, and steps are considered necessary or expedient to manage, eradicate, or prevent the spread of such an organism. If that is the case, it seems to me that s 114 might contemplate the destruction of materials such as trees to achieve these purposes. Even if that is so, however, the section also has a degree of particularity about it in terms of the suggested pests or organisms in question. It also needs to be interpreted in the context of the other powers, including the power of entry under s 109 to establish whether they are present or not, and the significant powers of examination under s 121.

[82] Before reaching a view on the reach of s 114 it would be first appropriate for the Court to have a concrete example where the level of risk or suspicion of the presence of such a pest or organism has been identified, and the decision maker had articulated why it was necessary or expedient to take the particular action to manage, eradicate or prevent the spread of that pest or organism. I presently do not have the advantage of a detailed assessment of this kind. The Ministry's analysis thus far has focused on the level of risk assessed in the original IHS. It has not squarely conducted a separate risk assessment of the level of risk that arises now in relation to the trees in question. So I go no further than saying that the correct interpretation is arguable.

[83] For example, as I understand the position, one of the present difficulties is that a particular type of testing that is usually undertaken at the Clean Plant Centre – namely woody indexing[20] – is not able to be conducted in New Zealand. There are other tests that can be undertaken, such as the NGS test referred to by the applicants.[21] But they are not as complete as the woody indexing. I am not well placed to reach any conclusion on what that means in terms of assessments as to the presence or absence of pests or unwanted organisms.

A different biosecurity response

[84] Standing back from the case as a whole, and the findings above, it can be seen that the Ministry has used the wrong set of provisions. There are available powers to address a biosecurity risk within the environment. But the Ministry has used its powers to seize and potentially destroy goods that have improperly obtained biosecurity clearance as a consequence of conduct defined as an offence. To use these powers to cover every import from a particular facility for the last six years because of a general concern relating to the reliability of its work goes beyond their legitimate scope. That approach might be seen as inconsistent with s 21 of NZBORA.

[85] The provisions that deal with possible biosecurity risks already present in the environment involve greater recognition of the interests of the owner of the materials in issue. That is reflected in the statutory requirements for taking action, and the availability of statutory compensation. For that reason, they strike a different balance in the effective management of risks than that involved in the establishment of a IHS. It is this new balance that now needs to be addressed. What is relevant now is the biosecurity response in relation to material that is already in the New Zealand environment, not the biosecurity regime that applies to what goods can enter the environment in the first place. An adjustment is required. The point is illustrated by the email from Dr Rott, who in response to the request from the Ministry for his advice in relation to diseases of unknown aetiology, appears to suggest that one response to the current position is to remove some of the diseases so contemplated by the IHS. He

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20 A biological test that involves grafting parts of the candidate plant onto an indicator plant, which is then examined over a period of several years.

21 A new type of molecular testing, not yet accepted by the Ministry as suitable for routine testing. This testing could apparently be completed by the end of 2018.

indicated that in Canada his approach has been to re-look at what diseases were on the list, stating: "I make the decision primarily on whether the disease has been detected recently or it has been detected in multiple countries, if not, I would tend to remove it".

[86] It may well be that the new exercise can be done with a level of cooperation with the industry, now that the position has been before the Court and the statutory provisions that allow for compensation have been identified as relevant. It is quite clear that nobody wants any pests or unwanted organisms within New Zealand. The Ministry will need to address what containment/testing/destruction powers they really think are necessary. It may also be, for example, that owners may prefer the exercise of destruction powers rather than a long period of containment and testing. Both sets of powers involve compensation. It may also be that a level of agreement can be reached without any question of further challenge, with the issue of compensation being resolved under the statutory provisions. Part of the reason for the compensation provisions is the incentives they create.[22] The level of cooperation that was demonstrated with respect to the interim orders that I refer to below can now be employed going forward.

Relief

[87] Given the findings I have made above the applicants are entitled to relief.

[88] There has been a degree of debate in recent years relating to the scope of the discretion in relation to relief, including when it would be appropriate to exercise the discretion not to set aside a decision. In *Air Nelson Ltd v Minister of Transport* the Court of Appeal indicated that extremely strong reasons would be required to decline relief.[23] Later, however, in *Rees v Firth*, the Court suggested a more nuanced approach may be necessary in the generality of cases.[24]

[89] The Judicial Review Procedure Act 2016, like its predecessor, has detailed provisions concerning the discretion as to relief in ss 16–19. Whilst the Court of

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22 See *Strathboss Kiwifruit*, above n 4, at [446]–[449].
23 *Air Nelson Ltd v Minister of Transport* [2008] NZCA 26, [2008] NZAR 139 at [60]–[61].
24 *Rees v Firth* [2011] NZCA 668, [2012] 1 NZLR 408 at [48].

Appeal in *Air Nelson* suggested that similarly strong reasons are necessary before the provisions allowing relief as an alternative to setting aside a decision are applied,[25] in my view the more nuanced approach referred to in *Rees v Firth* is to be preferred in relation to such powers. In particular, s 17 provides:

> **17 Court may direct reconsideration of matter to which statutory power of decision relates**
>
> …
>
> (2) The court may make a direction under subsection (3) in addition to or instead of granting any relief under section 16.
>
> (3) The court may direct any person whose act or omission is the subject matter of the application to reconsider and determine, either generally or in respect of any specified matters, the whole or any part of any matter to which the application relates.
>
> (4) In giving a direction to any person under subsection (3), the court must—
>
> (a) advise the person of the reasons for the direction; and
>
> (b) give the person such directions as it thinks just as to the reconsideration or otherwise of the whole or any part of the matter that is referred back for reconsideration.
>
> (5) If the court makes a direction under subsection (3), it may make an interim order under section 15, and that section applies so far as it is applicable and with all necessary modifications.
>
> …

[90] This means that instead of setting aside a decision under s 16, the orders contemplated by s 17 can be made. Such powers are consistent with the general discretion the Court has at common law in relation to its judicial review jurisdiction.

[91] In the present case, it seems to be appropriate to formulate relief in light of such powers. They can be utilised so that there is a period given to the Ministry to enable it to consider the application of other powers in the Act to manage any relevant biosecurity issues. In effect, I have found that the Ministry applied the wrong set of provisions to the present circumstances, and the other provisions may now need to be considered. In the meantime, the position should be preserved so that the biosecurity issues relevant to the further exercise of power are not inappropriately compromised.

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[25] At [73]–[74].

This involves a direction under s 17 to reconsider the exercise of powers under the Act in light of this judgment.

[92] In the present case, at the hearing of the action, the parties were able to agree on interim orders under s 15 pending release of the Court's judgment. Those orders have the effect of preventing the Ministry taking further action under its directions under s 116, but on conditions that effectively preserve the situation relating to the trees in a manner satisfactory to the Ministry. The interim orders agreed to at the hearing (as subsequently varied) were as follows:

(a) The interim orders shall be in force from today until 5pm on the day five working days following the date of judgment.

(b) In respect of the plant material in issue in the proceedings.

(i) The plant material that the applicants/plaintiffs elect to contain is to be contained by 22 August 2018.

(ii) All other plant material is to remain in situ and be subject to a spraying and/or netting programme agreed between the parties. By consent, any applicant may destroy material during the interim orders period with MPI's agreement. All parties reserve their position on the effect of such destruction for any future claims (including for tortious or statutory compensation).

(c) The parties have leave to apply to the Court for any reason until 5pm on the day five working days following the date of judgment.

(d) The Ministry will not prosecute and will not take any steps to destroy the plant material or otherwise take enforcement action for the period until 5pm on the day five working days following the date of judgment.

[93] The above orders last until five days following the judgment. It may be that the five-day period provides a sufficient period of time for the Ministry to exercise further powers that have the effect of preserving the status quo in a manner equivalent

to the conditions of the interim orders. I proceed on the basis that that period is sufficient, while observing that the Ministry is free to apply to the Court for an extension of time.

[94] I am also conscious that some of the relevant trees are owned by parties that are not represented in these proceedings. A delay in setting aside the decisions will also allow the Ministry time to regulate the position with respect to those trees as well.

[95] Had the interim orders not been agreed, I would have made orders under s 17(2)–(5), which would have had the same effect. Given the interim orders, I determine that the challenged decisions were unlawfully made, and I order that the decisions under s 116 are set aside. But the setting aside order shall only take effect at 5 pm five working days following the release of this judgment. I also give further leave to apply in relation to any particular issues concerning the precise form of relief.

[96] The applicants are entitled to costs. My provisional views are that this is a category 3 proceeding, that allowance should be made for two counsel (but not three), and that there should be one award of costs for each set of proceeding. If costs cannot be agreed I will receive memoranda. Memoranda from the applicants should be filed within 15 working days of release of the judgment, and any memoranda from the Ministry should be filed 10 working days thereafter.

Cooke J

Solicitors:
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