SUPREME COURT OF QUEENSLAND

CITATION:	*Colbran & Ors v State of Queensland* [2006] QCA 565
PARTIES:	**BENJAMIN JOHN COLBRAN and NORMA VIOLET COLBRAN Trading as Tablelands Coffee** (plaintiffs/respondents) **v** **STATE OF QUEENSLAND** (defendant/appellant) **HATMILL PTY LTD** ACN 010 818 327 (first plaintiff/first respondent) **JAQUES AUSTRALIAN COFFEE PTY LTD** ACN 097 895 531 (second plaintiff/second respondent) **v** **STATE OF QUEENSLAND** (defendant/appellant) **MARIA MALOBERTI, BRUNO MALOBERTI and LUISA MALOBERTI** (first plaintiff/first respondent) **NORTH QUEENSLAND GOLD COFFEE PTY LTD** ACN 010 436 334 (second plaintiff/second respondent) **v** **STATE OF QUEENSLAND** (defendant/appellant)
FILE NO/S:	Appeal No 9306 of 2006 Appeal No 9414 of 2006 Appeal No 9413 of 2006 SC No 441 of 2002 SC No 437 of 2002 SC No 458 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	22 December 2006
DELIVERED AT:	Brisbane
HEARING DATE:	28 November 2006
JUDGES:	Williams and Jerrard JJA and Philippides J Separate reasons for judgment of each member of the Court, each concurring as to the order made

ORDER: **Appeal dismissed with costs**

CATCHWORDS: STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – RULES OF CONSTRUCTION – GENERALLY – construction of a statutory immunity – officers of the Department of Primary Industries (DPI) sprayed respondents' coffee trees with chemicals as part of its papaya fruit fly eradication program – respondent crop owners consented to the "DPI and its officers" undertaking the spraying – respondents allege that spraying was performed negligently and resulted in damage to their coffee trees and coffee production – appellant purported to rely in its amended defence on an immunity under s 28(1)(a) *Plant Protection Act 1989* (Qld) ("the Act") – amended defence did not plead that the spraying was specifically authorised by the Act – trial judge struck out paragraphs of amended defence that purported to rely on s 28(1)(a) immunity because the immunity did not arise on the pleaded conduct – whether an immunity for "acts or omissions done pursuant to the Act" extends to acts or omissions which happen in the course of a consensual dealing between the DPI and crop owners that does not require a special statutory authority

Plant Protection Act 1989 (Qld), s 2, s 4, 6A, s 11, s 13, s 14, s 16, s 19, s 21M, s 28(1)(a), s 28(1)(b)

Australian National Airlines Commission v Newman (1987) 162 CLR 466, considered
Benning v Wong (1969) 122 CLR 249, considered
Board of Fire Commissioners (NSW) v Ardouin (1961) 109 CLR 105, considered
Coco v The Queen (1994) 179 CLR 427, considered
Griffith University v Tang (2005) 221 CLR 99; [2005] HCA 7, considered
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355, followed
Puntoriero v Water Administration Ministerial Corporation (1999) 199 CLR 575; [1999] HCA 45, considered

COUNSEL: P Freeburn SC, with D K Grigg, for the appellant
M S Stewart SC, with A J P Collins, for the respondent

SOLICITORS: Crown Law for the appellant
Williams Graham & Carman for the respondent

[1] **WILLIAMS JA:** The background to this appeal is fully set out in the reasons for judgment of Jerrard JA. The essential task for the Court is to construe s 28 of the *Plant Protection Act 1989* (Qld) ("the Act"). That section relevantly is in the following terms:

> "(1) Liability at law shall not attach to the Crown, the Minister, the chief executive, an inspector or any other person acting in aid of an inspector on account of any act or thing -

(a) done or omitted to be done pursuant to this Act; or

(b) done or omitted to be done bona fide for the purposes of this Act and without negligence.

. . .

(2) Notwithstanding the provisions of subsection (1), where a person suffers damage through compliance with this Act, whether by himself or herself or another person, no compensation shall be payable to the person except in a case where the person is entitled to compensation pursuant to section 14(3)."

[2] Prima facie the section distinguishes between an act done pursuant to the Act and an act done bona fide for the purposes of the Act. It follows, in my view, that unless the language clearly requires another conclusion, the intention of Parliament must have recognised that there were two distinct factual situations being addressed. It would be a surprising conclusion to say that each limb of the section was directed to the same conduct. In my view the approach to the construction of the section should be to ensure that each limb has work to do.

[3] In *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 McHugh, Gummow, Kirby and Hayne JJ said at 381:

> "The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined 'by reference to the language of the instrument viewed as a whole'. In *Commissioner for Railways (NSW) v Agalianos* (1955) 92 CLR 390, Dixon CJ pointed out [at 397] that 'the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed.' Thus, the process of construction must always begin by examining the context of the provision that is being construed."

[4] That passage, in my view, supports the approach I adopt to the construction of s 28. The legislature must have intended there to be a distinction between an act done pursuant to the Act and an act done bona fide for the purposes of the Act.

[5] Statutes routinely refer to "powers conferred by this Act", to "anything done or purporting to have been done under this Act", to an act or decision made "under an enactment", and to a "matter or thing done in good faith for purposes of executing the Act". Over the years the courts have adopted a well defined approach to the construction of such provisions. A good starting point is *Board of Fire Commissioners v Ardouin* (1961) 109 CLR 105. The statute in question there afforded protection to certain persons "exercising any powers conferred by this Act". Dixon CJ at 109 considered that the statutory provision referred "primarily to the exercise of powers which of their nature will involve interferences with persons or property." The example he gives is the "exercise of statutory power to do what would otherwise be illegal acts." He then went on at 110:

> "But it may be said generally that once a power is found which depends upon the statute and involves detriment or disadvantage to

> others, either necessarily or in consequence of its improper or faulty exercise, it appears to me that s 46 is capable of applying: it is not, however, expressed in terms which make it applicable to the doing of things in the course of performing the functions of the Board, which are of an ordinary character involving no invasion of private rights and requiring no special authority."

[6] Kitto J in that case at 116 spoke of a presumption "that the Legislature, in enacting it, has chosen its words with complete precision, not intending that such immunity, granted in the general interest but at the cost of individuals, should be carried further than a jealous interpretation will allow." He then went on [at 117] to draw a distinction between an act which could only be done because of a power conferred by the Act and the doing of an act which was merely incidental to, or done by the way in the course of, the exercise of a power. To similar effect are passages in the judgment of Taylor J at 124 and Windeyer J at 127.

[7] The statute considered by the High Court in *Australian National Airlines Commission v Newman* (1987) 162 CLR 466 provided a limitation period for actions "arising out of anything done or purporting to have been done under this Act". As Brennan J pointed out therein at 477 the "statute does not affect liability for things which are and can be done without reliance on a statutory power to do them."

[8] The next relevant case is *Puntoriero v Water Administration Ministerial Corporation* (1999) 199 CLR 575. The statute there under consideration provided protection to the Commission where damage was suffered in consequence of the exercise of a right exercised pursuant to the powers conferred by the statute. The judgments referred extensively to the reasoning in *Board of Fire Commissioners v Ardouin* and adopted the approach approved therein. Significantly for present purposes Gleeson CJ and Gummow J said at 585: "The supply of water by the Corporation to the appellants was not the exercise of a function which of its nature involved any interference with the rights of irrigators such as the appellants. Rather, it was a consensual dealing."

[9] The High Court had to consider the construction of the expression "made under an enactment" in *Griffith University v Tang* (2005) 221 CLR 99. At 130 Gummow, Callinan and Heydon JJ said:

> "The determination of whether a decision is 'made . . . under an enactment' involves two criteria: first, the decision must be expressly or impliedly required or authorised by the enactment; and, secondly, the decision must itself confer, alter or otherwise affect legal rights or obligations, and in that sense the decision must derive from the enactment. A decision will only be 'made . . . under an enactment' if both these criteria are met."

[10] The pattern emerges that there is a distinction between an act which can only lawfully be done if done pursuant to an expressed power conferred by an Act, and an act done in furtherance of the purposes of the legislation which does not require the conferral of power in order for it to be done lawfully. One of the underlying considerations is undoubtedly the principle referred to by the High Court in *Coco v The Queen* (1994) 179 CLR 427 at 436. There it was said:

> "Statutory authority to engage in what otherwise would be tortious conduct must be clearly expressed in unmistakable and unambiguous language. Indeed, it has been said that the presumption is that, in the absence of express provision to the contrary, the legislature did not intend to authorize what would otherwise have been tortious conduct. But the presumption is rebuttable and will be displaced if there is a clear implication that authority to enter or remain upon private property was intended."

[11] All of that is well summarised in the passage from the judgment of Barwick CJ in *Benning v Wong* (1969) 122 CLR 249 at 256 quoted by Jerrard JA in his reasons.

[12] It is against that background that I return to consider s 28 of the Act. All of the words of the section can be reconciled if (a) is taken to be referring to acts requiring specific authorisation pursuant to the Act to be lawful, and (b) is read as applying to acts, not requiring such authorisation, and which are done in order to achieve the purposes of the Act. Such a reading reflects the various principles underlying the High Court decisions referred to above.

[13] Read together s 14 and s 16 of the Act permit an inspector to destroy crops that are not infected with pest if it is considered necessary to do so in order to prevent, control or remove pest infestation. That destruction would, of course, be unlawful but for specific authorisation pursuant to the Act; the act of destruction would be an act done pursuant to the Act. Section 19 of the Act confers powers on inspectors. They are empowered to enter places, including breaking open places, to conduct searches, to detain vehicles, and to seize objects. All such conduct would be unlawful without authorisation pursuant to the Act; such acts when done by an inspector would be done pursuant to the Act.

[14] An inspector is given, pursuant to s 13 of the Act, power to give directions to the owner of land for the destruction of pests, the treatment of land or any plant, and to take such other measures as may be prescribed. If not done by the owner then such acts may be done by an inspector or other person acting in aid. An inspector is not given specific power to spray crops. Reading the Act as a whole the spraying of crops with chemical in order to kill pests would be an act done bona fide for the purposes of the Act. If that act was done without negligence then no liability would attach to the inspector or other person acting in aid for any loss occasioned to the crop owner.

[15] That is where s 28(2) of the Act comes into play. Where there is compliance with the Act, and that includes doing an act bona fide for the purposes of the Act without negligence, and damage is sustained to a crop, then the crop owner has no right to compensation unless s 14(3) applies. Clearly an act done in compliance with the Act would include an act done pursuant to the Act and an act done bona fide for the purposes of the Act without negligence.

[16] On that reading of the section as a whole, if an act was done for the purposes of the Act but negligently, the crop owner would not be deprived of his right to recover damages in tort.

[17] Here, as the reasons of Jerrard JA indicate, the act of spraying with chemicals was an act done bona fide for the purposes of the Act. If that act was done negligently

then the appellant would not be entitled to rely on the limitation of liability provided for by s 28(1)(a).

[18] It follows that the learned judge at first instance was correct in not permitting the appellant to plead a defence relying on s 28(1)(a).

[19] It follows that the appeal should be dismissed with costs.

[20] **JERRARD JA**: This appeal is against an order refusing the State of Queensland leave to amend its defence in claims brought against it. Those claims arise out of a Papaya Fruit Fly eradication program relevantly being carried out in 1996 by the Department of Primary Industries (DPI), which led to department officers spraying the plaintiffs' coffee trees with chemicals. Put broadly, the plaintiffs say this was done negligently and that the spraying led to extensive and long lasting damage to the coffee trees and to coffee production from them. The respondents in this appeal are three sets of farm owners, claiming some millions in damages.

[21] A learned judge in the Trial Division of this Court struck out para 17 of the State's pleaded defence in orders made on 20 September 2006, giving leave to replead it, but on 18 October 2006 refused leave to amend by substituting a new para 17. The originally pleaded para 17 purported to plead defences arising out each of s 28(1)(a) and (b) of the *Plant Protection Act 1989* (Qld) ("the Act"), and the proposed repleaded para 17 purported to plead a defence under s 28(1)(a) of that Act. The learned judge held that on the proper construction of that subsection, the immunity given by it did not arise in the circumstances pleaded in the proposed new paragraph 17, and that the claim intended to be made by the proposed new para 17 was untenable.

[22] Section 28 of the Act relevantly provides as follows:

> "**28.(1)** Liability at law shall not attach to the Crown, the Minister, the chief executive, an inspector or any other person acting in aid of an inspector on account of any act or thing -
>
> (a) done or omitted to be done pursuant to this Act; or
>
> (b) done or omitted to be done bona fide for the purposes of this Act and without negligence.
>
> …
>
> **(2)** Notwithstanding the provisions of subsection (1), where a person suffers damage through compliance with this Act, whether by himself or herself or another person, no compensation shall be payable to the person except in a case where the person is entitled to compensation pursuant to section 14(3)."

Other provisions of the Act

[23] The main objectives of the Act, declared in s 2, include to prevent, control or remove pest infestation of plants in Queensland. Section 4(1) provides that if the Governor in Council is satisfied that an organism, virus, etc., (an "undeclared pest") is harmful to the growth or quality of crop plants (defined in s 3 as plants intentionally grown for consumption as food or for resale), then the Governor in

Council may, by regulation, prescribe the undeclared pest to be a pest for the purposes of the Act. Section 4(2) gives the like power to the Minister, where circumstances require that urgent action be taken.

[24] Section 6A of the Act empowers the Chief Executive to appoint a person as an inspector, and s 11(1) provides that the Governor in Council may by regulation, or if the Minister considers urgent action is needed, the Minister may by notice, declare any area to be a pest quarantine area and may define the boundaries of the quarantine area so declared. Section 11(2) provides that the Minister may by notice declare the objects and nature of the quarantine imposed in respect of a pest quarantine area, including the duties and obligations imposed on owners of land within the pest quarantine area. Section 11(4) provides that in lieu of declaring particular land to be a pest quarantine area, the Minister may accept an undertaking given by the owner that the owner shall comply with conditions imposed by the Minister in respect of the undertaking, and s 11(7) provides that an inspector may give such directions and take such action as may be necessary or convenient to ensure compliance with the provisions of a notice or undertaking given under s 11.

[25] Section 13 empowers an inspector to give directions to the owner of land for the purposes of controlling or removing a pest existing in or upon it, or for preventing the spread of any existing pest to any land. Those directions can include requiring the owner to take measures including quarantining all or any part of the land, destroying pests on it or on any plants, and treating as directed any part of the land or any plant or appliance. The Act does not define how to "treat" plants, but it would include spraying. Section 13(2) empowers an inspector, for the purpose of controlling or removing existing pests or an existing pest infestation of any appliance, plant, harvested crop, produce, container or other thing, to give directions to the owner of those, including directions to destroy or treat the appliances, the plants, or quarantine them. Section 14 empowers the Chief Executive to give directions to the owner of land ordering the destruction of crops growing on land that is not infested with pests, if the Chief Executive considers that necessary to do in order to prevent pest infestation. Section 14(3) gives the owner of such a crop who receives such directions a right of compensation.

[26] Section 16 provides that where any person to whom directions have been given pursuant to the Act by the Chief Executive or an inspector, to carry out any destruction or treatment or other act, fails to comply with the directions, then an inspector may take all measures the inspector considers necessary or convenient to carry out the destruction, treatment or act in question. Section 19 gives inspectors power to enter places to ascertain whether the provisions of the Act have been complied with, to search, to stop and detain vehicles, to seize things, and the like.

[27] Section 21M provides that a person aggrieved by the making, or the failure to make, a decision of an administrative character under the Act can apply to the Chief Executive for reconsideration of the decision. Section 21O gives a right of appeal to a Magistrates Court where there is dissatisfaction with the decision made by the Chief Executive on that reconsideration

Comments on the Act and pleadings

[28] The Act makes very limited provision for the role of inspectors, other than that of giving the described directions under ss 11 and 13, and exercising the powers given by ss 16 and 19. It gives the Governor in Council and the Minister a specific role in

declaring something a pest, or an area a pest quarantine area, but it provides no statutory role for inspectors or the Chief Executive in causing the Governor in Council or the Minister to make those declarations, by regulation or notice respectively.

[29] The limited statutory role described in the Act for inspectors, that of giving directions under ss 11 and 13, or taking the necessary steps under s 16 on non-compliance with directions, or exercising powers under s 19, is relevant to the amended pleading upon which the State of Queensland unsuccessfully sought to rely. It read:

> "17A. Further or alternatively:
>
> (a) from on or about October 1995 DPI conducted the PFF Eradication Program (as pleaded in paragraph 3 of the statement of claim herein and as admitted paragraph 3(a) and (b) of this defence);
>
> (b) the PFF Eradication Program included the conduct pleaded in this paragraph;
>
> (c) on or about 20 October 1995 the Governor in Council by *Plant Protection (Prescription of Pests) Amendment Regulation (No 1) 1995* (Subordinate Legislation 1995 No 293) prescribed PFF as a pest for the purposes of the PPA, in accordance with s 4(2) of the PPA;
>
> (d) that prescription was obtained at the instigation and request of DPI and its officers;
>
> (e) on or about 26 October 1995 the Governor in Council by the *Plant Protection (Papaya Fruit Fly) Quarantine Regulation (No 2) 1995* (Subordinate Legislation 1995 No 301), in accordance with s 11 of the PPA, declared an area to be a PFF pest quarantine area ("PQA");
>
> (f) the plaintiffs' coffee crops were located within that PQA;
>
> (g) that declaration was obtained at the instigation and request of the DPI and its officers;
>
> (h) from on or about September to December 1996 DPI, by its officers, sprayed coffee crops including the plaintiffs' coffee crops (as pleaded in paragraphs 8 and 9 of the statement of claim and paragraphs 8 and 9 of the defence);
>
> (i) appointed inspectors, namely James Cunningham, John Thomson and William McDonald in accordance with s 6A of the PPA;

(j) DPI and its inspectors, did not issue the plaintiffs with a direction under s 13 of the PPA requiring the plaintiffs to spray their coffee crops;

(k) DPI and its inspectors omitted to take any steps pursuant s 13 of the PPA because it was unnecessary as the plaintiffs acquiesced in DPI and its officers undertaking the task of spraying the coffee crops;

(l) DPI and its officers thereafter from September to December 1996 undertook the spraying of the plaintiffs' coffee crops in order to treat those coffee crops for the purpose of preventing, controlling or removing PFF from the plaintiffs' crops, and from PQA.

17B. The conduct pleaded in paragraph 17A was done or omitted to be done 'pursuant to (the PPA)' on the proper construction of that expression in the PPA.

17C. In the premises, liability cannot attach to the defendant for that conduct.

17D. Further or alternatively, the conduct pleaded in paragraph 17A was done or omitted to be done:

(a) bona fide for the purposes of the PPA; and

(b) without negligence.

17E. In the premises, liability cannot attach to the defendant for that conduct."

[30] The important pleadings are in 17A to 17C. Regarding 17D, and as the learned judge remarked, the provisions of s 28(1)(b) arise only if the plaintiffs fail to prove their pleaded case in negligence, and accordingly there is nothing to be gained by pleading that subsection. Returning to s 28(1)(a) and para 17A as sought to be amended, in that draft PFF refers to the Papaya Fruit Fly, and PPA to the Act. The issue is whether, as 17B pleads, the matters or conduct pleaded in para 17A are capable of answering the description in s 28(1)(a) of acts or things done or omitted to be done pursuant to the Act. As to that, nothing in the Act required the Chief Executive or any inspector appointed under the Act by the Chief Executive to instigate or request the prescription of the Papaya Fruit Fly as a pest for the purposes of the Act, or to instigate or request the declaration of the area in which the plaintiffs' coffee crops were located as a pest quarantine area. Likewise, no provision of the Act authorised or required the Chief Executive or any inspector appointed under the Act to treat by spraying or undertake the spraying of the plaintiffs' coffee crops, in order to treat those coffee crops for the purposes of preventing, controlling or removing Papaya Fruit Fly from them and from the pest quarantine area.

[31] If the area had not been declared a pest quarantine area and the Minister instead had accepted undertakings in the approved form pursuant to s 11(4) of the Act, the

Minister could have imposed conditions in respect of those undertakings. Those conditions could have included that the owners either spray or cause coffee crops to be sprayed as required by the Minister, or that the owners agree to DPI staff conducting the spraying. Had the latter agreement been a condition of an undertaking accepted by the Minister rather than the land being declared to be a pest quarantine area, then the spraying which was conducted would be an act or thing done pursuant to the Act. It would be done pursuant to conditions imposed in an undertaking given and accepted under s 11(4), and accordingly would be something specifically authorised by the Act. Inspectors appointed under the Act would be under an obligation to ensure compliance with the conditions imposed in such an undertaking.

[32] But that did not happen, as pleaded. Instead the pleading specifically asserts that no steps were taken pursuant to s 13 of the Act, because the plaintiffs agreed to the "DPI and its officers" undertaking the task of spraying. That is, the proposed defence pleads that the plaintiffs consented to DPI staff taking steps which the Act empowered inspectors to direct the plaintiffs to do, or the Minister to accept an undertaking by the plaintiffs to do.

[33] The Act only gives inspectors a statutory power or duty to take action if an owner does not comply with a notice. A pleading that alleges that no notice by the Minister or direction by an inspector was given to the plaintiffs, because the plaintiffs agreed to DPI officers spraying their crops, does not plead any statutory power or duty in anyone to spray or treat those crops. The circumstances that would give rise to that power or duty are not pleaded, and are pleaded not to have happened. The defence pleads only that the plaintiffs agreed to that treatment by spraying being done, and that is all it pleads. It does not plead the exercise, by the employees of the appellant, of a power or authority granted by the Act.

[34] If, as I consider correct, the ordinary meaning of "acts or omissions done pursuant to the Act", in the context of legislation like this, is a description of acts or omissions directly or expressly authorised or required by the terms of the Act, then this defence failed to plead acts done pursuant to the Act. Having the plaintiffs agree to their coffee crops being sprayed, and spraying those crops - if done properly - might well advance the objective of the Act to prevent or remove pest infestation of plants in Queensland, if those crops were so infested or at serious risk of being so infested. It follows that making agreements of that type with land or crop owners, and carrying them out, would be acts done bona fide for the purposes of the Act, but that is a different matter.

[35] The High Court has consistently held for at least the last 50 years against construing an immunity granted when exercising power to take steps "under" an enactment, or an immunity granted when exercising powers conferred by an act or exercising the functions of a statutory body, to include an immunity for acts or things done or able to be done without any need for the exercise of a statutory power. In *Board of Fire Commissioners (NSW) v Ardouin* (1961) 109 CLR 105 the High Court heard an appeal involving a case where damage had resulted from the allegedly negligent driving of a fire engine upon a public highway, when on the way to the scene of a fire. Section 46 of the *Fire Brigades Act 1909-1956* (NSW) provided that the Board, the Chief Officer, or an officer of the Board exercising any powers conferred by that Act:

> "... shall not be liable for any damage caused in the bona fide exercise of such powers."

Dixon CJ wrote that:

> "... s. 46... does not cover the use of the roadway by fire brigade vehicles for the purpose of proceeding to a fire ... When s. 46 speaks of the bona fide exercise of the Board's powers it appears to me to be referring primarily to the exercise of powers which of their nature will involve interferences with persons or property."[1]

His Honour went on to observe of the section:

> "But it may said generally that once a power is found which depends upon the statute and involves detriment or disadvantage to others, either necessarily or in consequence of its improper or faulty exercise, it appears to me that s. 46 is capable of applying: it is not, however, expressed in terms which make it applicable to the doing of things in the course of performing the functions of the Board, which are of an ordinary character involving no invasion of private rights and requiring no special authority."[2]

[36] Kitto J wrote that the protection given by s 46:

> "is intended only in respect of damage caused in doing things actually within the direct authorization of the Act or the by-laws."[3]

and His Honour went on:

> "There is no difficulty in finding in the creation of a duty an implied grant of power. But the implication, arising as it does from necessity, must be limited by the extent of the need. There can be no implication of a grant of power to do, in the performance of the duty, what is in any case lawful. To drive a vehicle on a public street, for the purpose of dealing with a fire or for any other purpose, needs no grant of power."[4]

[37] Taylor J wrote to like effect, that:

> "Clearly enough the Board had sufficient corporate capacity, quite apart from s. 28, to operate vehicles and employ drivers; its drivers needed no statutory authorization to drive its vehicle on the public street and it would be quite artificial to treat s. 28, even though it may be taken to exempt fire brigades from the operation of some unspecified motor traffic regulations, as inferentially conferring a power recognizable as one of the 'powers conferred by this Act' within the meaning of s. 46."[5]

Windeyer J wrote that:

> "... any citizen may go to a fire; and, subject to the directions of fire officers and police, he may endeavour to put it out. No special power is conferred by the Act and none is needed to enable members

---

1 (1961) 109 CLR 105 at 109.
2 (1961) 109 CLR 105 at 110.
3 (1961) 109 CLR 105 at 117.
4 (1961) 109 CLR 105 at 118.
5 (1961) 109 CLR 105 at 124.

> of a fire brigade to go to a fire or to enable a fireman to drive a fire engine upon a highway to the place of a fire."[6]

His Honour added a little later:

> "The general rule may be stated as Starke J expressed it in *Metropolitan Water Sewerage & Drainage Board v O. K. Elliott Ltd.* He said: 'Statutory powers must be exercised with reasonable regard to the rights of other people and if an act is done in excess of the statutory power, or carelessly or negligently, then the person injured can put in force the ordinary legal remedy by action in the courts of law'."[7]

[38] In *Australian National Airlines Commission v Newman* (1986-1987) 162 CLR 466 the High Court considered s 63(1) of the *Australian National Airlines Act 1945* (Cth), which relevantly provided that:

> "All actions against the Commission or against any person for or arising out of anything done or purporting to have been done under this Act, shall be commenced within two years after the act complained of was committed."

[39] The case concerns a limitation period, but the headnote in the CLR report reflects the thrust of the joint judgment of Mason CJ, Deane, Toohey, and Gaudron JJ, although it actually quotes from the separate, concurring judgment of Brennan J. His Honour wrote that:

> "Freedom under the common law to engage in conduct requires no grant of statutory power to confirm it, and a limitation provision which affects liability for things done or purportedly done 'under' the statute does not affect liability for things which are and can be done without reliance on a statutory power to do them."[8]

[40] That same approach is evident in the judgment of the High Court in *Puntoriero v Water Corporation* (1999) 199 CLR 575, where the High Court was considering the terms of s 19(1) of the *Water Administration Act 1986* (NSW), which relevantly read:

> "(1) Except to the extent that an Act conferring or imposing functions on the [Corporation] otherwise provides, an action does not lie against the [Corporation] with respect to loss or damage suffered as a consequence of the exercise of a function of the [Corporation], including the exercise of a power:
>
> (a) to use works to impound or control water, or
>
> (b) to release water from any such works.
>
> (2) Subsection (1) does not limit any other exclusion of liability to which the [Corporation] is entitled.

---

6 (1961) 109 CLR 105 at 127.
7 (1961) 109 CLR 105 at 127-128.
8 (1987) 162 CLR 466 at 477.

> (3) No matter or thing done by the [Corporation] or any person acting under the direction of the [Corporation] shall, if the matter or thing was done in good faith for the purposes of executing this or any other Act, subject the Minister or a person so acting personally to any action, liability, claim or demand."

[41] The High Court was considering a claim by a potato farmer made against the Water Authority; the farmer alleged that it had supplied him (under a contract between them) with water that was contaminated and which had caused his crop to fail. Gleeson CJ and Gummow J supported what their Honours described as a "jealous construction of s 19(1) to limit what otherwise would be the rights of plaintiffs and to immunise the Corporation from action only in respect of those positive acts in the exercise of functions 'which of their nature will involve interferences with persons or property.'"[9]

[42] Their Honours went on:

> "The supply of water by the Corporation to the appellants was not the exercise of a function which of its nature involved any interference with the rights of irrigators such as the appellants. Rather, it was a consensual dealing. Further, the gist of the complaint by the appellants was, as pointed out, the failure to warn of danger of which the Corporation knew or ought to have known. In those circumstances, s 19(1) did not operate to deny the action brought by the appellants." [10]

[43] Those remarks and that construction are readily applicable in this matter. McHugh J took a similar view. He wrote:

> "In a number of cases, this Court has read limitation provisions such as s 19 as not covering a governmental function of 'an ordinary character involving no invasion of private rights and requiring no special authority.'"[11] [Footnotes and citations omitted].

Later he wrote:

> "It is one thing to read provisions such as s 19, expressed in general language, as intended to protect a government authority from actions in respect of conduct which might be unlawful even when carried out without negligence. ... Understandably, the legislature might wish to protect the authority from actions which the statute would otherwise have authorised. It is another matter to read such provisions as protecting ordinary actions for breach of contract or negligence where the actions can be carried out without the need for specific legislative authority."[12]

[44] His Honour wrote a little later that:

> "... the principles of statutory construction to which I have referred require that the general words of the sub-section be read down so that

---

9 Their Honours cited from *Board of Fire Commissioners (NSW) v Ardouin* (1961) 109 CLR 105 at 109. This passage is at (1999) 199 CLR 575 at 583-584.

10 (1999) 199 CLR 575 at 585.

11 (1999) 199 CLR 575 at 587, also citing from *Board of Fire Commissioners (NSW) v Ardouin*.

12 (1999) 199 CLR 575 at 588.

> they do not apply to functions of an ordinary character performed by the respondent and which are done pursuant to agreements with the consent of private citizens."[13]

Callinan J applied a similar construction, noting that the appellants had pleaded, and that the respondent had admitted, that there was an agreement between the parties that the respondent corporation would supply water to the appellants pursuant to a contract between them at prices fixed by the respondent.

[45] The State of Queensland thus urges a construction of s 28(1)(a) of the Act which is contrary to the strong trend of authority on the proper construction of immunising sections or limitation provisions, consistently declared by the High Court since *Board of Fire Commissioners (NSW) v Ardouin*. The appellant contends that its construction relies on the ordinary and literal meaning of "pursuant to the Act." It argues that the words describe conduct which is "in accordance with the Act", or which "proceeds conformably with" the Act. The latter submission relies on an *Oxford English Dictionary* (second edition) definition of "pursuant", as including "Following upon, consequent and conformable to; in accordance with". Mr Freeburn also argued for the appellant State that the learned judge erred in narrowing or qualifying that asserted ordinary and literal meaning by "distinguishing and reconciling the roles of ss 28(1)(a) and 28(1)(b)."

[46] With respect to those submissions, the decisions cited earlier reveal that the ordinary meaning of a statutory provision giving public officers immunity for acts done or omitted to be done "pursuant to" the statute, is that it describes acts or omissions which affect the rights and interests of others, done under or pursuant to an authority given by the statute; those being acts or omissions directly or expressly required or authorised by the Act. The expression does not describe acts or omissions which happen in the course of a consensual dealing and which therefore require no special or statutory authority. That construction accords too with the approach the High Court has taken in administrative law, in construing decisions made "under an enactment". In *Griffith University v Tang* (2005) 221 CLR 99, the joint judgment held[14] that such a decision must be expressly or impliedly authorised or required by the enactment, and also itself confer, alter, or otherwise affect legal rights and obligations.

[47] A further difficulty for the appellant is that the test suggested by Mr Freeburn SC, of conduct "in accordance with" the Act or which is "conformable" with the Act, merely states a description which is not easy to apply and potentially ambiguous. Mr Freeburn was unable to suggest in argument any further test a court could apply, when assessing whether conduct was conformable or in accordance with the Act. He frankly conceded that it would not suffice for his purposes if those expressions which he introduced were understood to mean "authorised" or "required by" the Act. His submission appeared to be that it was sufficient for conduct to be conformable with the Act, or in accordance with it, if that conduct was engaged in bona fide for advancing the purposes or objectives of the Act. That construction takes the meaning of the phrase in s 28(1)(a) only from the objectives of the Act declared in s 2, and takes no heed of any other provisions of the Act.

---

13 (1999) 199 CLR 575 at 589.

14 At 130, [89].

[48] The appellant State did not seek to rely at all on s 28(2), and instead Mr Freeburn SC suggested that s 28(2) was so worded from an excess of caution, to ensure that claimants entitled to compensation under s 14(3) were not met with an argument based on s 28(1). Since the State did not suggest that s 28(2) is relevant to the construction of s 28(1)(a) or (b), it is unnecessary to construe 28(2). Various of the earlier provisions of the Act require compliance with notices by the Minister (for example, ss 10(3) and 11(7)), or with directions by an inspector (ss 13(4) and 19(6)), or with conditions imposed in undertakings to the Minister (s 11(4)), or with directions given by the Chief Executive (ss 14(2) and 14(3)). Compliance with such notices, directions, and undertakings would almost always cause considerable loss and damage to the recipients; accordingly "compliance" with the Act should be understood as compliance with a direction, notice, or undertaking, lawfully given or demanded. There were none pleaded as given or demanded in these matters.

[49] The Act also uses the expression "pursuant to this Act" in s 16, with reference to directions given by the Chief Executive or inspector, regarding the carrying out of destruction or treatment of plants or crops. When used in that section "pursuant to" means authorised or required by the Act, and describes conduct which does otherwise infringe the rights of others. Likewise in ss 19(2) and 19(3), where the Act uses the expressions "pursuant to subsection (1)(k)" and "pursuant to subsection (1)(l)" respectively, "pursuant to" is again used to describe directions given under or required by a specific power granted by the Act, affecting the rights of others. Construing the expression "pursuant to the Act" in s 28(1)(a) as I have suggested accords with its usage in those other sections of the Act.

[50] Regarding the argument that the learned judge was in error in having regard to the contents of s 28(1)(b), the learned judge was obliged to construe s 28(1)(a) not in isolation, but consistently with the language and purposes of all of the provisions of the Act. Doing that complied with the instruction in the joint judgment in *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355, in the well known passage cited by the learned judge, and which reads:

> "The primary object of statutory construction is to construe the relevant provisions so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined 'by reference to the language of the instrument viewed as a whole'... the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed. Thus, the process of construction must always begin by examining the context of the provision that is being construed."[15] (Footnotes and citations omitted).

[51] The learned judge was correct in observing that s 28(1)(b) was of a much wider scope than s 28(1)(a). On Mr Freeburn's argument, s 28(1)(a) is sufficiently expansive to include within it all conduct that would fall within s 28(1)(b). That construction would run against both the more obvious interpretation of both subsections, against the use of "pursuant to" in other sections, and against the construction approved by the High Court. In that regard, the statements of principle by Barwick CJ in *Benning v Wong* (1969) 122 CLR 249 are still authoritative. His Honour wrote:

---

15 (1998) 194 CLR 355 at 381.

> "In the construction of statutes authorizing the performance of works, there are cardinal rules, the observance of which is fundamental to our system of law. Firstly, the statute will not be construed to authorize an interference with common law rights without compensation without unambiguous and compelling language. It is for the Parliament to make its will in this respect plain. It is not for the courts to search out implications which so displace or reduce common law rights. Secondly, a statute only authorizes those acts which it expressly nominates and those acts and matters which are necessarily incidental to the acts so expressly authorized or to their execution. Thirdly a statute which authorizes the doing of an act or the performance of a work in general only authorizes it to be done in a careful manner. If the authority is to extend to a careless execution of an authorized act, the plainest of language must be used.
>
> The third proposition has two aspects: firstly, a person who has to justify his otherwise tortious act by an assertion of statutory authority must show as part of his justification in defence that he did the authorized act skilfully and carefully: secondly, the statutory authority to do the authorized act imports a duty of care towards persons who are, or whose property is, likely to be affected by the performance of the act. But a person injured in his person or property by such an act who has no other cause of action than the breach of this duty of care must establish that breach."[16]

[52] The learned trial judge was correct in ruling that the appellant's pleading in para 17 did not describe, and was not capable of describing, acts or omissions by its employees pursuant to the Act. Accordingly, I would dismiss the appeal.

[53] **PHILIPPIDES J:** I agree for the reasons stated by Jerrard JA that the appeal should be dismissed. The case turns on the proper construction of s 28(1)(a) of the *Plant Protection Act 1989*. A distinction is made in s 28(1) between protection which is afforded where "an act or thing" is done or omitted to be done "pursuant to" the Act (s 28(1)(a)) and where it is done or omitted to be done bona fide "for the purposes" of the Act (s 28(1)(b)). In the latter case, protection is afforded only where there is an absence of negligence.

[54] The appellant's submissions as to the ambit of s 28(1)(a) require an approach to the interpretation of that provision which is contrary to the well established principle of construction enunciated by the High Court in a number of decisions concerning limitation or immunity provisions. The Court has emphasised that limitation provisions, such as s 28(1)(a), require a strict and jealous construction given that they derogate from the ordinary rights of individuals (*Board of Fire Commissioners (NSW) v Ardouin* (1961) 109 CLR 105 at 116; *Australian National Airlines Commission v Newman* (1987) 162 CLR 466 at 471, 476; *Puntoriero v Water Administration Ministerial Corporation* (1999) 199 CLR 575 at 583-584, 588, 593-594, 612-613). Consistently with that approach, provisions such as s 28(1)(a) have been read as not covering a governmental function "of an ordinary character

---

16 (1969) 122 CLR 249 at 256.

involving no invasion of private rights and requiring no special authority" (*Puntoriero* per McHugh J at 587).

[55] The following statements from Kitto J's judgment in *Ardouin* (at 117) made with reference to the immunity provision there under consideration, s 46 of the *Fire Brigades Act 1909-1956* (NSW), are also apposite in construing s 28(1) and apt to describe the distinction between s 28(1)(a) and s 28(1)(b):

> ".. the immunity attaches in respect only of damage resulting from an act which, if it had not been negligent, would have been the very thing, or an integral part of or step in the very thing, which the provisions of the Act … gave power in the circumstances to do, as distinguished from an act which was merely incidental to, or done by the way in the course of, the exercise of a power."

[56] Kitto J concluded that the protection of the provision in question in *Ardouin* was only intended to extend to the doing of acts or things "actually within the direct authorisation" of the relevant Act. Likewise Taylor J (at 124) considered that the expression "powers conferred by this Act" appropriate "only to specify what may be described as the extraordinary powers conferred upon the Board in order that it may properly and effectively fulfil its functions". Windeyer J identified the ambit of the relevant provision as providing protection in respect of persons referred to for acts that they were "expressly empowered to do" (at 128).

[57] The narrow approach to the construction of limitation provisions in the decisions referred to finds a parallel in the approach taken in *Griffith University v Tang* (2005) 221 CLR 99, where the High Court recently considered the breadth of the expression "made under" an enactment. Gummow, Callinan and Heydon JJ (at 130) stated the dual criteria required before a decision, could be said to be made under or derived from an enactment; firstly, it must be expressly or impliedly required or authorised and secondly, the decision itself must affect legal rights or obligations.

[58] A statute only "authorises" those acts which it expressly nominates and those acts and matters which are necessarily incidental to the acts so expressly authorised or to their execution (*Benning v Wong* (1969) 122 CLR 249 per Barwick CJ at 256). There are sound policy considerations for restricting the broader protection afforded by s 28(1)(a) to acts or omissions which are specifically authorised (see *Puntoriero* at 588).

[59] Although it may be accepted that the pleaded conduct of the appellant was done for the purposes of the Act, as conceded by counsel for the appellant, it was not specifically authorised by any provision of the legislation in question. Section 28(1)(a) cannot therefore have any application and the learned primary judge was correct to have so determined and to have refused the appellant leave to amend its defence.