IN THE SUPREME COURT OF NEW ZEALAND SC 36/2013

[2013] NZSC Trans 9

BETWEEN **THE NEW ZEALAND PORK INDUSTRY BOARD**

Appellant

AND **THE DIRECTOR-GENERAL OF THE MINISTRY OF PRIMARY INDUSTRIES**

First Respondent

THE CHIEF TECHNICAL OFFICER AND BIOSECURITY NEW ZEALAND

Second Respondent

NATIONAL BEEKEEPERS ASSOCIATION OF NEW ZEALAND INC

Intervener

Hearing:	26 June 2013
Court:	Elias CJ McGrath J William Young J Glazebrook J Arnold J
Appearances:	F M R Cooke QC and J B Kaye for the Appellant C R Gwyn and K M Muller for the First and Second Respondents M S R Palmer and M Smith for the Intervener

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CIVIL APPEAL

MR COOKE QC:

May it please the Court, I appear with Mr Kaye for the appellant.

ELIAS CJ:

Thank you Mr Cooke, Mr Kaye.

MS GWYN:

May it please the Court, I appear with Ms Muller for the respondents.

ELIAS CJ:

Thank you Ms Gwyn, Ms Muller.

MR PALMER:

Tena koutou katoa. May it please the Court, I appear for the National Beekeepers Association and with me is Mr Smith.

ELIAS CJ:

Thank you, Mr Palmer and Mr Smith. Yes, Mr Cooke.

MR COOKE QC:

Thank you, your Honours. I've passed to the registrar a one pager of the appellant's argument which I will ask the registrar to pass up. Perhaps I can begin by saying that the possibly obvious point that effective biosecurity is critical to the New Zealand economy and the Biosecurity Act [1993], in pt 3 in particular of the Act, is a regime for effective border control including the effective management of risks involved in the importation of risk goods. And in 2008, Parliament introduced a procedure which is really at the heart of the issue in this case for an independent review which strengthened the process for ensuring that there was transparent and robust biosecurity protection by introducing an independent review of the concerns about the consideration of the science that underpins an import health standard. In this case our key proposition is that the Court of Appeal's interpretation of the new provisions undermines the very purpose of the independent review process and has wider significance as it diminishes the meaningfulness of the independent check on that protection and has implications beyond the pork industry, or the honey industry, to the New Zealand agricultural sector more broadly, because it concerns the procedures that are to be followed but not only the import health standards an issue for those two industries but import health standards more generally.

Now as I indicate in the first paragraph of the one page I've handed up, this case is not a challenge to the merits of the proposed import health standards but a challenge to the compliance with the preceding mandatory statutory processes and for that reason the case turns on three key matters, as perhaps all judiciary cases ultimately do. The correct interpretation of the legislation; the report of the panel in this case; and the s 22A decision itself, and I need to make that point because many of the criticisms in the Ministry's submissions suggests that this is a challenge to the merits of the import health standards advanced by a partisan body and with respect that mis-describes the essence of the challenge that is advanced. It is about compliance with the statutory requirements in ss 22A and 22. It doesn't matter who advances the argument. The arguments that we advance could be equally advanced by an amicus. They all turn on objectively verifiable requirements of the section.

ELIAS CJ:
Well, in any event you'd say that the statute envisages partisan participation.

MR COOKE QC:
Yes, because it involves consultation with those affected by the import health standards. But I needed to make the point because so much of my learned friend's submissions were in fact a criticism of the so-called partisan standing of the Board, even to the point that it would appear that any expert retained by the Board, is treated as not independent because they've been retained by the Board, in the case of Professor Morris. In the same context a particular outcome in terms of the import health standard is not mandated by the Board's argument. We're not asking the Court to decide what the import health standards should be. We're not saying that it follows from our argument that a particular outcome must arise but we do say that the statute needs to be applied in its terms and that is at the heart of the case and if you look at the one page I've handed up, what I intend to do is really advance the argument of three headings.

First, I want to address the interpretation of s 22A, and I'll do that by first looking at the purpose of that provision, and then look at the two key provisions, s 22A, which is about the process and one, which is the process, and s 22A(3) which is the decision.

ELIAS CJ:
At the end of the day your complaint is the reassessment of risk wasn't itself submitted to the statutory process, isn't it?

MR COOKE QC:

Yes. It's two-fold that the decision under s 22A(3) wasn't the determination called for by the section. It was a determination based on whether the new EpiX Analytics model was fit for purpose under s 22. That wasn't the question that s 22A had to address. Section 22A(3) had to address the sufficiency of the consideration of the scientific evidence in the Ministry's proposal which had been consulted upon. So the determination did not address the right question and the new model, the new assessment of the risk, and the effective management of the risk, wasn't subject to consultation, wasn't subject to the statutory procedures.

ELIAS CJ:

Is it part of your argument that in fact the determination was a determination that the model on which there have been the input was not fit for purpose? Is that part of your argument?

MR COOKE QC:

When I take your Honours to the determination, that's not quite how the determination is framed. The determination is framed on the basis of describing the background, including the first iteration of the model that Dr Neumann had produced during the panel's procedures, and then the determination describes what happens through to the EpiX Analytics remodelling, describes the risk as being in 1 in 1,227 years, and then says that is accepted by the Ministry as fit for purpose for making decision under s 22, because it effectively manages the risk, and then determines the issues in dispute under s 22A(3) on the basis of the analysis in that model, and I say wrong question, wrong answer, and the model's never been subject to the verification procedures prescribed by Parliament.

McGRATH J:

At some stage, Mr Cooke, will you be taking us to what indicates this was a new model, to use your phrase, as opposed to the development of an existing model, and I can see that on those two concepts there might be a spectrum?

MR COOKE QC:

Yes.

McGRATH J:

I'm really pleased you're starting on the statute, and I don't want to distract you into that, but will at some stage you will be explaining why the correct analysis is that it's a new model that we're looking at?

MR COOKE QC:

Yes, well in a way whether you give it the label a new model or a substantially revised model doesn't really matter in a sense because it's not been subject to the panel's, it was not the proposed way in which the Ministry sought to assess the risk in the import health standards that were consulted upon because it wasn't a modelling risk analysis at that point it was a quantitative risk analysis –

WILLIAM YOUNG J:

Qualitative, the Ministry's original approach was qualitative, wasn't it?

MR COOKE QC:

It was.

WILLIAM YOUNG J:

And the panel suggested that they should, one way of summarising their views is that there should be a quantitative exercise.

MR COOKE QC:

Yes.

WILLIAM YOUNG J:

And that was – the basis of that was Dr Neumann's model –

MR COOKE QC:

Yes.

WILLIAM YOUNG J:

Which, as I understand it, there are four versions of.

MR COOKE QC:

Yes, I think there are one, two, three – if you call EpiX Analytics –

WILLIAM YOUNG J:

Yes, I'm counting the EpiX one, so there are four iterations of it.

MR COOKE QC:

Of the model, yes.

WILLIAM YOUNG J:

And does more change, I want to see it later, but does more change than just the figures in it or is it – I'm really interested in the transition between the third and the fourth model.

MR COOKE QC:

Well that's quite a technical area, it's not –

ELIAS CJ:

Is that what you were criticised in the Court of Appeal majority judgment for undertaking? There was some suggestion that you had got into the facts. Was that in an effort to show the difference between the two?

MR COOKE QC:

Yes it was to the extent that Professor Morris in his affidavit explained how what had been changed in the models had resulted in a very significant –

ELIAS CJ:

Yes.

MR COOKE QC:

– difference –

WILLIAM YOUNG J:

Is that more than just a changing of a number, the changing of the values, or is it a more structural change in the model?

MR COOKE QC:

I'm not sure how clear the evidence about that is to the extent to which it's structural because EpiX Analytics did change some of the structures of the model but probably

more importantly is the inputs into the model because it's the inputs that cause the output and the –

WILLIAM YOUNG J:
That's what my sort of intuitive sense was in reading the material.

ELIAS CJ:
There's indication that there were significant changes to some of the assumptions, weren't there?

MR COOKE QC:
Yes.

ELIAS CJ:
Yes.

MR COOKE QC:
And that's why I answered his Honour Justice McGrath in the way that I did. In a sense it doesn't really matter if you call this a new model or an iteration of a model that has different inputs in it that lead to a different result.

McGRATH J:
Well, I did suggest that this might be looked at as a spectrum –

MR COOKE QC:
Yes.

McGRATH J:
– and that there would be positions in-between but in the end there must be some capacity to adapt a model that would be purely incidental if you're looking at one extreme –

MR COOKE QC:
Yes.

McGRATH J:
– that arguably would not give rise to a duty to –

MR COOKE QC:
Re-consult.

McGRATH J:
– start the consultation again.

MR COOKE QC:
Yes, I accept –

McGRATH J:
That's why I think in the end, when we get to that part of the case, looking in particular how the High Court and Court of Appeal saw this, that maybe important and I'm not yet clear on it myself, I can assure you.

MR COOKE QC:
All right, well, that does mean that we'll need to go to Professor Morris' description of it to see – he's focused on three of the parameters and explained how the changes to Dr Neumann's model on three of the parameters makes such a significant decision to the output.

WILLIAM YOUNG J:
But you see, if the parameters themselves had been the subject of consultation, then that may take some of the sting out of the argument. If they hadn't been then it may add some force to the argument.

MR COOKE QC:
Yes.

GLAZEBROOK J:
Can I just check whether the argument can be put in this way, that if you have a panel recommendation that says effectively that the science hasn't been done properly because they haven't applied a quantitative model and just applied a qualitative model, then by agreeing to do a quantitative model, even based on a model that had been, as I understand it, because I think Dr Neumann's model had been given to the Ministry beforehand, must have been accepting that the science wasn't adequate.

MR COOKE QC:

Yes.

GLAZEBROOK J:

And therefore the new process of relying on the new model, albeit revised, because obviously there had been no reliance on Dr Neumann's model at all before, because they hadn't done a quantitative analysis themselves –

MR COOKE QC:

Yes.

GLAZEBROOK J:

– even based on that, or based on something different, then necessarily that's new science and necessarily the process starts again.

MR COOKE QC:

Yes, because –

GLAZEBROOK J:

Is that the –

MR COOKE QC:

That's part of it.

GLAZEBROOK J:

Is that a way of putting the argument?

MR COOKE QC:

Because the very, the whole –

GLAZEBROOK J:

Whole basis.

MR COOKE QC:

Whole basis of the risk assessment has been moved to the quantitative modelling exercise.

GLAZEBROOK J:
And that's new science –

MR COOKE QC:
New science.

GLAZEBROOK J:
– effectively because it's a new methodology for assessing risk.

MR COOKE QC:
Yes.

GLAZEBROOK J:
And so it doesn't really matter that the Neumann model was before them because they took no notice of it which is what the independent panel had said, or hadn't had another model because one didn't have to take the Neumann model, one could have had a totally different quantitative model.

MR COOKE QC:
Yes, yes that is part of the case. And of course all of this discussion is only actually in the second part of the Board's case, it's all about the consultation part of the Board's case.

GLAZEBROOK J:
Is it really consultation that because that's the question I was asking because it seems to me that the argument could be better put by, or put as well, by saying that in fact the statutory process has to start again because in fact by implication, by deciding on a totally different methodology, you actually are starting the process again –

MR COOKE QC:
Yes.

GLAZEBROOK J:
– and then fall within the independent review panel procedure, so it's not merely consultation that could save it.

MR COOKE QC:

That's true because it's not just consultation the statute contemplates but also verification by –

GLAZEBROOK J:

Exactly.

MR COOKE QC:

– the process.

GLAZEBROOK J:

And I mean I would have thought that was relatively important even with a quantitative model that you had that ability to have independent scientific verification.

MR COOKE QC:

Yes, yes.

GLAZEBROOK J:

Because that is the process and of course there is, as the Crown says, a lot of independent verification outside in the process itself but the statute itself says that's not enough.

MR COOKE QC:

Yes. That's quite correct in terms that it's not just consultation because of the additional procedures that are changing the whole methodology and therefore we say a re-triggering of the statutory requirements. But the other point I was making is that really is in the second part of the Board's case which is –

ELIAS CJ:

Well it may be, but is there really only one argument here? That is one question I had reading the materials and in particular reading the analysis of the way your case was presented in the Court of Appeal. It seemed to me that there really was only one argument.

MR COOKE QC:

Well, with respect, there are two because the preceding determination as to whether the first methodology in the first analysis of risk paid significant regard to the scientific

evidence. The findings of the panel in their determination is then important for working out whether the new methodology in the model, what it needs to address. So part of this process was to increase the transparency of the process and until you've got a determination of what's wrong with the first go, then you don't, then without that you don't know what you're looking at in terms of how a model might address the deficiencies that the determination process has thrown up. and here what has happened is we've moved to a completely different basis for assessing the risk and at the same time the Director-General has decided, under s 22A(3), to reject all of the concerns raised by the Board in the consultation process so – and that's a fundamental problem because we've missed quite an important statutory step determining what is, in fact, wrong by transparent determination with reasons to which we then look to the model to see what should happen next.

GLAZEBROOK J:

You agree though that the Director-General could reject all of those? That he would be entitled to reject them, so is the concern in the particular – because these are – because he accepted the quantitative/qualitative, because they did that extra work, that seems to be a given. In relation to the other issues, isn't the, isn't your – well, maybe we need to go to the report but it seems to me that the concern is that he didn't give reasons rather than that he didn't address them.

MR COOKE QC:

Well, even on the question about modelling submitted to the panel, where the panel didn't really just say you had to do a model, it said that both ways of assessing risk were valid ways of assessing risk, but made recommendations that a modelling approach be considered. Even on that one the Director-General would determine the question on the basis that there had been sufficient regard to the scientific evidence. So we don't have the transparency to know what it is that is wrong, and what it is that needs to be fixed, and this is – all of this has become fudged, that's the problem, and that's why there are two parts to the argument. One, have we got what Parliament contemplated, a determination of the question, has there been sufficient regard to the scientific evidence in the areas of concern and then two, if you're now saying you've fixed these problems up, let's consult on the new rationale for written assessment, judging it against the formal, the determination that identifies what the problems are. I don't know if that answers the Chief Justice's –

ELIAS CJ:

Yes. Perhaps you should start where you meant to start but that's been very helpful, at least for me. Just though, to finish it off, why do you need the first step because the decision to undertake the further work implicitly indicates that the science is not being accepted, so once you go ahead and do it, why isn't it simply sufficient for your case that you don't start the statutory process again?

MR COOKE QC:

Because we don't have the transparency required to know what the model now needs to address. We don't know firmly which of these panel's criticisms of the risk analysis –

ELIAS CJ:

You haven't had your decision?

MR COOKE QC:

Yes.

ELIAS CJ:

I see, yes, I see.

MR COOKE QC:

It's not necessary for the success or failure of the claim but it is, in my view, essential for –

ELIAS CJ:

Well that's part of the process, isn't it, that there has to be a determination of the issues?

MR COOKE QC:

Yes.

ELIAS CJ:

Yes.

MR COOKE QC:

Yes, and that's why it's important, because we need to know what the problems are and what's accepted as being deficiencies in the first go to know how we move to –

WILLIAM YOUNG J:

Part of the problem is the diffuseness of the panel's report. I mean plainly they did find that there had – that there were respects in which sufficient regard had not been had to the science but you've really got to sort of read the report pretty carefully to get a real idea as to what respects that finding related to.

MR COOKE QC:

Of course but when I take your Honours through both the statute, and I'll go to the panel's report on that, the suggestion that they strayed outside their terms of reference I don't think is justified because they actually did seek to identify in as comprehensive a way as possible what the problems were and what needed to be done to fix them. So I will address whether it can be said they were going too far because I don't, with respect, think they were.

WILLIAM YOUNG J:

It doesn't matter, does it?

MR COOKE QC:

No.

WILLIAM YOUNG J:

Whether they did –

MR COOKE QC:

And, and –

WILLIAM YOUNG J:

– go too far.

MR COOKE QC:

Yes of course it needs to be carefully read and the problems carefully considered, which is the whole point of determination really. That's why you need a determination with reasons addressing the findings and recommendations. If that's

helpful so that identifies the Court's one pager as well as my one pager. So perhaps I can deal first with my point 2, the interpretation of the provision and perhaps just if we could just go to the statute which is the appellant's bundle of authorities behind tab 1. The first point I make there is we're talking about the effective management of risk goods and identify the definition of risk goods, page 16 of the Act.

GLAZEBROOK J:
I'm sorry.

MR COOKE QC:
Tab 1 of the appellant's bundle.

McGRATH J:
Section 16?

MR COOKE QC:
No, I'm going first to page 16 of the Act, definition of risk goods, on the left-hand side, near the top.

McGRATH J:
I'm sorry did you say that was page 16?

MR COOKE QC:
Yes, definition of "risk goods".

ELIAS CJ:
Definitions?

MR COOKE QC:
Yes. So the definition of "risk goods", page 16 is, "Any organism … is reasonable to suspect constitutes … or contains an organism that may cause unwanted harm." So it's reasonable to suspect may cause unwanted harm and the definitions, if you follow them through, identify harm through New Zealand's natural resources as including farming resources and then – so in a sense there's a double "may" there. Reasonable to suspect may contain an organism that may cause harm.

ELIAS CJ:

And you're emphasising the "may" why, because of the prudential thrust?

MR COOKE QC:

Because of the protective nature of import health standards really.

ELIAS CJ:

Yes.

MR COOKE QC:

And then if you go through to what, on page 33 of the statute, section 16, page 33, "Purpose of Part 3 … is to provide for the effective management of risks associated with the importation of risk goods," and they, of course, have to accept that effective management doesn't mean elimination of risk but, in my submission, what we're talking about there is, "effective management of risks" so measures that effectively prevent the unwanted harm from occurring within New Zealand. And then the only other provision to look at to identify its protective character is perhaps s 22(3), which is on page 37 of the statute, "Nothing, in fact, obliges the Director-General to have an import health standard to enforce the goods of any description if, in his opinion, the requirements that could be imposed on the importation of those goods would not be sufficient to enable the purpose of this part of the Act to be met if the importation was permitted." So there's no need to import goods or no presumption to import goods so its protective quality is clear, in my submission.

Now s 22A was introduced –

ELIAS CJ:

So the effect of that is that you can't bring them in, is it? Is that what –

MR COOKE QC:

You don't –

ELIAS CJ:

– subs (3) is saying, that –

MR COOKE QC:

You don't need to have an import health standard allowing –

ELIAS CJ:

Yes.

MR COOKE QC:

– risk goods to be produced if you're not satisfied that it's effectively managed, yes.

ELIAS CJ:

Yes.

MR COOKE QC:

Now s 22A was introduced as we say to increase the transparency and reliability when there was a dispute and there are two passages of the – well, first of all the select committee report that is behind tab 2 of the bundle of authorities. On the second page of that the select committee indicated that, "We agreed with submitters that the process for assessing the evidence should be transparent and trustworthy. We note that most import health standards are developed in co-operation and collaboration with the appropriate sector. We recommend the insertion of new clause 5A," which is s 22A, "requiring the Ministry to develop a process for an independent review panel, whether MAF has had adequate regard to the scientific evidence in cases where significant concerns have arisen during the consultation process and advanced import health standards," and the end of that section under that heading, "We believe that the establishment of an independent review panel should allay submitters' concerns," which had obviously been raised during the passage of the legislation.

Then if I can take your Honours to behind tab 3 to what was said by the Minister and the chair of the select committee, the chair was an opposition party member, the Hon Mr Carter, but first the Minister behind tab 3, second page in, page 15143 –

ELIAS CJ:

Are you taking us to this for anything more than appears in your submissions?

MR COOKE QC:

No I'm not.

ELIAS CJ:

I'm just wondering really whether it's necessary to – I mean others may like you to go through it but we have read these in your submissions and there were fairly extensive references to the legislative history.

MR COOKE QC:

Yes, well I'll just do this very briefly and I'm sorry if it's taking us away from the more important points in that sense but you'll see there on page 15143, just after the middle of the page, "This Bill was introduced as a measure specifically to address the problems resulting from the Court of Appeal's decision, and it needs to be passed promptly. Therefore, I am pleased that the committee has maintained a focus on those essential elements. However, the select committee has recommended the Act be amended to make provision for an independent review process that can be used in cases where there are significant or supposedly controversial concerns, and when those have arisen during the consultation. The Ministry already seeks independent peer review of its risk analysis. However, it believed that the new provision recommended by a committee will be of value in helping to move forward in relation to those few import health standards that become contentious. Details will have to be promulgated," etcetera.

And then Mr Carter, just over the page, page 15145, he's the chair of the committee, second paragraph down from the top of the page, "I will also talk later about the two difficult cases that have received a lot of attention through the select committee process; both the beekeepers' concerns around the import standards for honey, and the pork industry's concerns … to express my concern around a comment I made in the first reading debate on this Bill. At that stage I felt a lot of the developments in terms of those two import health standards in particular were almost erring towards a gung-ho approach – I think that was the word I used – towards the importation of other products. Having had the opportunity to liaise with the officials, I now no longer hole that view. I think the Ministry has done a very creditable job in talking to the industries concerned as it has developed the import health standards in those two particular cases. But where I think the difficulty arises is that, as the Minister alluded to a minute ago, an independent review process is utilised by the Ministry in the development of import health standards, but it appears to be judge and jury on the issue. Therefore, I think the improvement that we came up with – the insertion of the amendment into the bill – now means there is more independent than there was previously."

So that's, well in my note I emphasise, that's the response to the Chief Justice's comment, the only reason we're going to this, that there are the two key features of this, so the Ministry are not to be judge and jury on contentious import health standards, there had to be an independent review, and it was in addition to the usual peer review from external advisors that the Ministry usually engaged in. So it's not just an advisory process it is, indeed, supposed to provide a process for resolving these contentious import health standards. So against that background –

McGRATH J:
You see the panel as the decision-maker, don't you?

MR COOKE QC:
No, I – well, it's not –

McGRATH J:
In this sort of sub-issue.

MR COOKE QC:
It's not critical to the Board's case that it be given a label that this is a dispute resolution process. It's not an adjudication or an arbitration, there's no miss in that sense, but there are elements of this sixth section that do have dispute resolution aspects of it. There are issues in dispute. There's a determination. There are reasons. But it's not essential to our case that you give it that label. We're content to rely on what the statute actually says so it says –

McGRATH J:
That's fine.

MR COOKE QC:
– it should be a determination of the issue in dispute, given reasons, so – and if you do call it a dispute resolution process you do have to recognise it's not a particular kind, it's an issue about science, so you don't, it's not like a Court case or an adjudication but it is –

McGRATH J:
But what I asked you was whether you see the panel is making a decision but it's – the overall process is an inquisitorial process –

MR COOKE QC:

Yes, yes.

McGRATH J:

But there is this component involving the function of the panel.

MR COOKE QC:

Yes.

McGRATH J:

Now, never mind the dispute resolution aspect, but do you see the outcome of that, in the terms of the panel's report, as a decision on that issue which has to be taken aboard by the Director-General eventually as that?

MR COOKE QC:

Yes although the word of the statute –

ELIAS CJ:

It's advice, isn't it, really.

MR COOKE QC:

Well its "findings" is the word actually. Findings and recommendations is the words in the statute.

ARNOLD J:

But the Director-General only has to take them into account.

MR COOKE QC:

Yes, yes.

ARNOLD J:

He's not bound by them.

MR COOKE QC:

No and for that reason – but he still must, he must make the determination.

ARNOLD J:
Yes.

McGRATH J:
But he makes all decisions really, at the end.

MR COOKE QC:
Yes and he has to. He has the responsibility for the implementation of pt 3 measures so it's ultimately he has statute responsibilities so – and it wouldn't make any sense for a panel to make these decisions when he had to make the s 22 decision so obviously he ultimately has to have the responsibility but it is a determination process. The panel, does the panel make a decision, it makes findings on the disputed questions about the sufficient regard to the scientific evidence. He makes recommendations in association with those findings so there is a degree of formality. Do you call that a decision? Maybe. And then the Director-General must make a determination of the question.

All of that is helpful foreshadowing to actually go to the wording of the statute –

ELIAS CJ:
But you do resist the characterisation of your submissions adopted by the majority in the Court of Appeal I take it saying that you are arguing for an adjudicative process?

MR COOKE QC:
I think it's unfair to label the submission with that label and say therefore the Board's case can't succeed because what matters is the actual substance of the arguments, not the label attached to the process.

ELIAS CJ:
Yes.

MR COOKE QC:
If we go to s 22A itself on page 38 of the statute. First, s 22A(1), I suppose I'm highlighting some of the expressions used in the Act. The first thing is it's the development of a process. So in other words a formal procedure must be set out and the nature of that process must encompass the matters identified in s 22A(2) so there is to be a formal procedure meeting the requirements of s 22A(2) proscribed by

Gazette notice. The subject matter of the independent review panel work is the significant concerns raised by the consulted party and so it follows from that that the subject matter of the panel's inquiry, and the ultimate determination under s 22A(3), is what is being consulted upon. That follows from s 22A(1).

ARNOLD J:
But it's the scientific evidence and if you go back to s 22(5) which identifies the range of matters that the Chief Technical Officer has to take account of, the scientific evidence, I guess, would go to either (a) or (b) but not to (c) or to (d) necessarily.

MR COOKE QC:
Certainly (a) and (b). (c) it might do to because the international obligations do contemplate in the SPS agreement [Agreement on the Application of Sanitary and Phytosanitary Measures], for example, that these decisions will be based on a sound scientific basis. The SPS agreement doesn't tell New Zealand or any other country what its level of protection should be, but what it does say is, your decisions have to be based on a proper scientific foundation and you're entitled to have precautionary import health standards if the evidence is uncertain but you need to try and go out and get the science so I think international obligations would also come into the scientific evidence that's being consulted on and which underpins the import health standard that's being consulted on and one would have thought that (d) might, because it's so flavoured by (a), (b) and (c) be related to that in some way.

And going back to s 22A(1), it's the significant concerns raised in the import health standard but it's also in development the import health standard, or the proposed import health standard, so the focus is on the Ministry's work that has led up to the formal import health standard that is being consulted on and I suppose the other thing about that is, it is the import health standard, and the import health standard, which actually is defined in the Act as being an import health standards promulgated under s 22(1), that's the measure for the effective management of risks associated with the importation of risk goods so what the subject matter of the inquiry is, is the risk management measure that the Ministry are proposing, and which they have consulted on, and consideration of the adequacy of the scientific evidence when concerns have been raised about what's been consulted on. Then, of course, the expression whether there has been sufficient regard to the scientific evidence involves not just awareness of the science, but whether it's been adequately applied in the proposed measure and I say that because here, for example, the panel

address not just whether papers and scientific studies have been cited, but the application of them in the proposed import health standard and perhaps I can just illustrate that by taking your Honours to the actual panel report which is in bundle E and invite your Honours to page, to tab 70.

McGRATH J:
Are you finished with the statute?

MR COOKE QC:
Keep the statute open because I'll come back to it. I'm sort of going off on a panel diversion as a mechanism to explain the meaning of the statute. So I'm not clever enough for my pages to have boxes to the side but that's what I'm doing and what I'd invite your Honours to do is behind tab 70 in bundle E is just go through the page 1468 to illustrate – perhaps, yes, 1468, and just by way of background what we have here is a situation where studies have established that pigs can contract PRRS, that's the way you pronounce the disease, PRRS by consuming contaminated meat and of course there are scientific studies about how that comes about, the level of infectiousness of the meat, that sort of thing. But what this issue in terms of reference E is addressing is the quantity of waste that contained pig meat, that might end up being consumed by New Zealand pigs, and I just want to illustrate that because it shows the kind of – both when you have studies and then how you apply them.

So, for example, in this question if you look at paragraph 3, where we're dealing with household waste, there's a reference to a particular survey on household waste England and Wales and you'll see, and then paragraph 5 the panel says, "MAF considered that this estimate (7%) – which is of key significance in its risk assessment, should be reduced to at least 3.8%." Then further down in that paragraph, about five lines from there, "More importantly the reduction was based on the unsubstantiated assumption that the production of the UK pork waste will be from cuts greater than three kilograms. The panel believe this is questionable because in the UK 76% of retail sales of meat are from the four largest supermarkets." And then on the next page there's the reference to commercial waste, paragraph 7, and there's the reference to the proportion of uncooked meat discarded in the UK and the particular study by, "Gale and used in the IRA … and it derives from a small, unstructured and therefore an unrepresentative study of restaurant (and household) waste."

And then you see, down the bottom of the page, disposable pathways for waste meat and over the page, page 29, paragraphs 11 and 12, “In the suggested IHS [import health standard], the restriction to a maximum size of three kg joints of uncooked/uncured pork was clearly considered a significant and critical risk reduction measure. The panel’s interpretation of the IRA [import risk analysis] and the accompanying responses by the Ministry to comments from outside organisations and individuals is that it was assumed this limitation would result in the generation of minimal uncooked waste from such imported cuts. This assumption was used to limit the risk presented by uncooked food waste that contains pig meat. The panel was concerned that there is no reliable estimate presented on the amount of uncooked pork pig meat which is likely to be discarded from the various sources in New Zealand.”

And the point about that is to demonstrate how it’s not just looking at the – knowing about the papers but how you apply them. So the panel’s put its finger on a key problem with this because the whole rationale of this import risk analysis, if we confine it to three kilogram lumps of meat and we cut the lymph nodes off them, we appropriately manage the risk and the panel is saying well look at the papers that are available, we’re concerned that you’ve got no substance to that assessment and equally if your Honours go back to page 1465 of the case, which was dealing with the volumes of trade, what the panel says in numbered paragraph 2, it says look we’re not experts in trade but then it goes on to paragraph 3, “The panel does, however, recognise the importance of this issue as part of the risk assessment and the sensitivity of the risk estimate towards trade volume. It is good practice in IRAs to include an analysis of the effect of a range of projected changes in the volume of trade (based on the best estimates available) and on the risks associated with importation. This is simply because if the volume of trade from endemically infected countries increases, so too will the likelihood of the introduction of infection. A change in volume and sources of imports, during a prescribed period, is therefore directly correlated with risk.”

And then the next paragraph 4, “Does not address impact of trade volume directly, with an evaluation of historical imports. None of these references quoted provide a robust analysis of this aspect.”

And then paragraph 5, “There is a lack of supporting evidence for the scenarios and assumptions on the relative quantities of chilled and frozen meat that are likely to be

imported. It is unlikely that chilled meat will be freighted from the northern hemisphere countries. The panel is, however, aware that there is a significant trade in chilled pork from USA to Japan."

So the point about that is gong really a topic that your Honour Justice Young raised which how – you know, all of these comments are obviously directly related to the application of the science in the risk measure. The panel are saying there are problems with both your three kilogram assumption in terms of minimising output. There are problems in terms of you not having got the data on the quantity of trade and although there are comments in some of the Ministry's material to the effect that these kind of findings were outside the terms of reference, with respect they plainly aren't.

WILLIAM YOUNG J:
Well, are they? I mean a decision as to likely trade, is that a scientific matter?

MR COOKE QC:
What is a scientific –

WILLIAM YOUNG J:
I know it's material obviously because it's going to find its way into the risk assessment.

MR COOKE QC:
But that's the point. The purpose of the panel isn't to enquire into the adequacy of the Ministry's consideration of the scientific evidence and as I say that includes how it is applied in the risk assessment and if there are deficiencies in the risk assessment because you haven't applied the science appropriately because you haven't got the data you need to do to apply it.

WILLIAM YOUNG J:
Say the reason you haven't applied appropriately is a factual error that is not of a scientific nature.

MR COOKE QC:

That can still result in the panel concluding you haven't had adequate regard to the scientific evidence because the scientific evidence demonstrates that you need to get this kind of data, given that we now know that –

WILLIAM YOUNG J:

Isn't the problem not that you didn't try to do it but that you got it wrong?

GLAZEBROOK J:

Well this isn't an error in the assumptions, an error in the science because if you have nonsense assumptions, then you're going to have a nonsense answer at the end of it. So you can, whatever you do, you're not going to have proper regard to the science because you've got nonsense answers because your assumptions are wrong. Isn't that the point that's being made?

MR COOKE QC:

That's the point and that's the point of the panel's –

GLAZEBROOK J:

Well, not nonsense assumptions in this particular case but –

MR COOKE QC:

Yes, yes but well, there might be some might argue.

GLAZEBROOK J:

Incomplete data upon which you are – that's the assertion in relation to trade volumes, as I understand it.

MR COOKE QC:

And my point is the panel is – the purpose of the panel's enquiry is to look not just at whether you sighted a paper on pigs eating –

WILLIAM YOUNG J:

Well I don't think anything one's going to suggest that. I mean you'd have to understand and apply the paper properly. It's just the trade – I mean the trade volumes is quite an interest point because it's not actually within the expertise of the panel.

MR COOKE QC:

But what is within the expertise of the panel is the extent to which you would need to have verifiable data on trade volumes, if you are going to do a risk analysis. Knowing what we do know about contracting diseases by pigs eating waste, you need, the panel says, to get your data to be able to properly assess in your risk analysis, that keeping lumps of three kilogram lots of meat is going to effectively manage this risk, because you've got to know well how much meat is coming in. If you don't know how much meat is coming in, the three kilogram lump assumption is almost meaningless. You need to know, have proper verifiable basis for that assumption as well as knowing what impact keeping it to three kilogram lumps will have because presumably it's accepted that just allowing this meat into New Zealand per se doesn't manage the risk. What's been proposed is if we keep it to three kilogram – because that New Zealand –

ELIAS CJ:

Is that to cut down the risk? Is that the idea of the higher quality and smaller cuts, there'll be less waste?

MR COOKE QC:

That's right.

ELIAS CJ:

Yes.

MR COOKE QC:

Reducing it to the point that we now are satisfied it is effectively managed because it's accepted that in New Zealand the amateur and para-commercial pig holders feed waste to pigs, it's well-established. We're different from many countries around the world in that sense, because in Europe they would never do that sort of thing because of the sort of diseases they have but New Zealand culture is different. So this happens in New Zealand. So it seems to be accepted that just allowing this meat in won't effectively manage the risk. So what's proposed is, let's keep them to smaller lumps of meat, the amount of discard from the meat will be minimise, the risk will be effectively managed by that technique.

Now that is why these aspects are critical to effective management of that risk and also critical to the adequacy of the application of the scientific evidence that we have about pigs contracting the disease by consuming quantities of pig meat.

ARNOLD J:
It's an interesting point, isn't it, the extent to which, in an analysis of this sort one proceeds on the basis that people will not – will act unlawfully or not adhere to the regulations which tell you, you can't feed raw pig meat to pigs?

MR COOKE QC:
It is interesting but it is – it's just inevitable, that's just what happens and –

ARNOLD J:
Well, what it means for an analysis like this, though, is that it's going to be very difficult to draw assumptions in a whole lot of areas because you tend to assume that people will follow the law.

MR COOKE QC:
It certainly makes it a difficult exercise but that's a difficult exercise that the theory of three kilogram lots really illustrates.

ELIAS CJ:
Is that the purpose of looking at the survey in England and Wales to show that people do do that? Is that what that's about?

MR COOKE QC:
Well that survey just talked about disposal of waste.

ELIAS CJ:
I see.

MR COOKE QC:
Not feeding of it to pigs.

ELIAS CJ:
I see. Can I just ask where are the, don't take us to it but just give me the reference to where we find the terms of reference for the panel?

MR COOKE QC:

You can actually find them in the panel's report, that's because they're quoted, if that's a convenient place for now, is it starts at 1451. But also the actual terms of reference itself can be found at D68.

ELIAS CJ:

Thank you.

MR COOKE QC:

If I have time I will take your Honours to it.

ELIAS CJ:

Yes that's fine, you don't need to.

MR COOKE QC:

And can I also just while we're at the panel's report, take your Honours to the page 1483 and can I just explain about this, the Board when it sought the panel's enquiry, put up nine proposed questions in which has concerns. The Director-General under the *Gazette* notice accepted eight but not the nine, the ninth issue but the Director-General also added a question and the question the Director-General added was an overall question, that is overall whether we've had sufficient regard to the scientific evidence and that's – the panel addressed that beginning at page 1483 and you'll see paragraph 1, top of the page, previous sections devoted the specific issues raised for consideration where the panel has drawn attention to aspects which the scientific evidence is not considered to have due regard.

And then in paragraph 3 you'll see there's this start of this protracted nature of the process, in the second sentence of paragraph 3, "The panel is concerned that the modus operandi employed was not conducive to achieving agreement between MAF and the stakeholders in a timely and agreeable manner." And over the page.

ELIAS CJ:

Sorry, what page are we at?

MR COOKE QC:

That's paragraph 3, second sentence.

ELIAS CJ:

What page?

MR COOKE QC:

Page 1483 of the case, 42 of the panel report. Just highlighting some of the comments of the panel, paragraph 11 on page 1484, "A number of aspects in the risk analysis for which no evidence was available. One example is the amount of uncooked pork waste that is generated from the various sources and the relative amounts that enter the range of available disposal pathways in New Zealand. The panel's experience with risk analysis is that it is unusual not to make some effort to fill gaps in the necessary information base."

And then perhaps paragraph 16, "Comprehension of the reviewer's comments was made difficult in the piecemeal way that extracts of the reviewer's responses were presented in the review of submissions. The panel believes that MAF was too hasty to dismiss solicited comments. MAF did not apparently reconsider aspects of the IRA despite a number of valid and constructive comments from Professor Hurd and other peer reviewers. The panel believes there is scope for a more open minded approach to these expert views which should have been sorted in a more structured way. Related to this issue, the panel noted inconsistency in MAF's practice of accepting and acknowledging validity of evidence," and then goes on to address that.

And then paragraph 18, "The panel stresses the need for MAF to express and utilise levels of uncertainty in conducting the IRA and in drawing conclusions. Data and information, with a known basis and source, provide logical resources to enable a consensus to be reached between all parties. MAF made assumptions for which there was considerable uncertainty and for which no or limited effort was reported to substantiate or refute in the course of conducting the IRA. The panel suggests that MAF review this inconsistency in its consideration of evidence and in the acquisition of data and information to fill gaps in the knowledge base essential for the risk assessment."

Now that was my diversion into the panel's report and can I briefly go back to the statute before going to the decision paper. And the reason why I diverted onto it is just to explain why these findings are precisely the kind of findings that s 22A(1) contemplated a panel conducting an inquiry of this kind, could make and I know there's the question about findings and my learned friends have suggested that

should be given some technical meaning. It can be no more than the conclusions and views expressed by the panel on the questions set out in the terms of reference for that panel.

So going back to s 22A(3), so we've now got the panel's report and looking at the chronology of this section, s 22A(3), "The Director-General must receive any report from an independent review panel and as soon as is reasonably practical, determine the issue in dispute after taking into account the findings and recommendations, giving reason for that determination." So what I say about that is we need a determination of the issue in dispute which is whether the risk management measure consulted on under s 22 involves sufficient regard to the scientific evidence and that requires determination of the issue where there has been sufficient regard to the scientific evidence in the areas of significant concern set out in the terms of reference established under the *Gazette* notice.

After taking into account the findings and recommendations, giving reasons. So the reasons must address what the panel has said about whether there has been sufficient regard to the scientific evidence. So the reasons and the findings and the determination all inform one another in terms of what the statute contemplates. So the findings of the panel on each of these areas of significant concern would need to be addressed and the reasons.

McGRATH J:
Can you just take us back to the language in the Act that you say the words "issue and dispute" are referring to?

MR COOKE QC:
So the Director-General must determine the issue in dispute. So what is the issue in dispute? That is whether there has been sufficient regard to the scientific evidence about which the person consulted under s 22(6) has raised significant concerns as identified in the terms of reference for that panel. So there's the process established under subs 1 and 2, involve the Director-General deciding whether to accept significant concerns should go to a panel and I'll take your Honours briefly to the terms of reference. He did so here, well the previous D-G did so here. They are the areas of significant concerns which are disputed.

WILLIAM YOUNG J:

I mean there's the debate as to what the issue in dispute is. Is it the general issue whether sufficient regard was had to the science or was it the nine issues?

MR COOKE QC:

Overall, yes.

WILLIAM YOUNG J:

And that's only really material probably in relation to one or two of the issues which you say weren't addressed, the other risk factors and perhaps the aerosol spread issue.

MR COOKE QC:

Yes.

WILLIAM YOUNG J:

Otherwise it doesn't matter does it?

ELIAS CJ:

Well, except don't you say that there's no decision on any of them.

WILLIAM YOUNG J:

Yes but your argument is unaffected, except in two respects, it doesn't matter to your argument whether it's the issue in dispute as the general one or the atomiser one.

ELIAS CJ:

Yes.

MR COOKE QC:

There are two issues where the D-G was advised there is no – you don't need to determine this.

WILLIAM YOUNG J:

Yes.

MR COOKE QC:

And even if you say there's only one issue in dispute, whether overall there's been significant regard for the scientific evidence, it's slightly artificial reading of this, but I think if you accept that, you've still got to address the findings of the panel. So you would still have to, both the findings and the significant – the findings of the panel about the significant concerns in the questions. So the findings would still have to address that. So you can't just say there's no issue to be decided on either view of it. Whether there are nine issues in disputes or one issue in dispute with nine questions.

WILLIAM YOUNG J:

Unless it doesn't bear on – it's not relevant to whether sufficient regard was had to the sum of the evidence.

MR COOKE QC:

Yes but –

WILLIAM YOUNG J:

I mean, I suspect that might be true of the first of the issues you're troubled by.

MR COOKE QC:

Possibly, except even on that issue the panel said that they had concerns about the continuing validity of the initial risk assessment, so that there are findings about that question.

WILLIAM YOUNG J:

But there's nothing, no risk that has to be addressed other than PRRS, have I got that wrong?

MR COOKE QC:

Why would you assume that? There's just the –

WILLIAM YOUNG J:

Because the whole – you might assume it and I don't know because the import health standards is addressed and only justified by a perceived PRRS risk.

MR COOKE QC:

Well, that was the question. The Board said, "Hold on you're lifting – you're going to allowing pork meat to come in from these countries, we're concerned that your hazard identification, not just PRRS but your overall hazard identification has identified all the diseases that might come in by doing that" and so that was accepted by the D-G as an area of significant concern which should be enquired into by the panel and the panel –

WILLIAM YOUNG J:

And if he was wrong on that, then he's wrong on it. I mean we'll have to get to it later but I'm not particularly persuaded that that question anyway is material to the science issue contemplated by the section.

MR COOKE QC:

Well, it is a question posed to the panel, it does relate to the scientific evidence about diseases, other than PRRS. The panel said it didn't have the information to address all those diseases but had concerns about the original hazard identification and the D-G said – was advised he didn't have to make a decision on it and with respect whether you treat it as a question under one issue or one of the nine issues in dispute, either way the findings of the panel have to be addressed when the determination is made.

ARNOLD J:

Can you just explain on your construction of these provisions, what the role of the recommendations referred to in s 22A(3) is because on the interpretation that you've advanced, when you look at s 22A(1), that's a sort of historical question. Did the Ministry have sufficient regard to the scientific evidence? So it's a matter of historical analysis.

MR COOKE QC:

Yes and that's what findings would presumably be about.

ARNOLD J:

But then the panel, it's contemplated that the panel will make findings and recommendations which the Director-General is obliged to take into account and the recommendations of course will be forward looking.

MR COOKE QC:

They would.

ARNOLD J:

And so what role do you see the recommendations as playing in the process under s 22A(3)?

MR COOKE QC:

Well, the recommendations would be helpful to the Director-General to see why the panel had made the findings that it had made, but also it just reflects that this provision was supposed to be in a sense remedial, that the idea of this was to resolve issues of contention about import health standards, and if you're going to get the experts to conduct an inquiry as to the adequacy of the Ministry's work, it's prudent to get them to say what you should do about it to resolve the problems that we've identified in the findings and then the Director-General, whose ultimate statutory function is to decide whether there has been sufficient regard to the scientific evidence, has the benefit of not only the findings on that question but what the panel says is the best way of going about dealing with those issues. So it does have the additional assistance that those recommendations will be helpful in making the determination but the most important thing is the panel's conclusions about whether there has been sufficient regard to the scientific evidence in the IHS that's been consulted on. Does that answer your Honour's …

ARNOLD J:

Yes, thank you.

GLAZEBROOK J:

It is actually a slightly oddly-worded section because subs (3) doesn't really refer back to subs (1).

MR COOKE QC:

Well, not in any elegant way.

GLAZEBROOK J:

No, but you'd say the issues in dispute are the significant concerns effectively, wouldn't you?

MR COOKE QC:

Yes, yes.

GLAZEBROOK J:

And the only question is whether there was sufficient evidence in respect of those, not whether they got it right or not. That's not what the independent …

MR COOKE QC:

The review is of the Ministry's assessment of the scientific evidence, consideration of, the adequacy of the consideration of the evidence.

GLAZEBROOK J:

Yes.

MR COOKE QC:

Not the site itself.

GLAZEBROOK J:

Yes.

MR COOKE QC:

So the subject of the inquiry is looking at what the Ministry did, which is why, sort of why I took you to the panel's report because it was looking at what the Ministry did which was to come with its theory, three kilograms keep the lymph nodes off, so that's the effective management measure, and the panel said, "Well, there's some problems with this," and made findings about the problems.

ARNOLD J:

One of the oddities about this structure, particularly in relation to the further consultation point, is that the Chief Technical Officer makes his or her recommendations to the Director-General. You then trigger off this process under s 22A and the Director-General determines that as well. So it's going to the same person in different contexts, and it does seem to me slightly odd just intuitively that the Director-General, who is charged with making a decision under s 22A(3), may reach a conclusion that then sort of starts off the whole the recommendatory process to him or her again.

MR COOKE QC:

Well, it might be odd but I think the reason why it's structured in that way is to preserve, and presumably the Ministry thought this was important, to preserve the ultimate domestic and international responsibility that the Director-General had for the biosecurity issues. So he or she would ultimately be the person who has the responsibility and the accountability for it.

McGRATH J:

That's what Parliament really thought, isn't it?

MR COOKE QC:

Yes, I think so.

ELIAS CJ:

If the – it's hard to see in the context of these provisions that the recommendations could be directed at anything other than further inquiry or further consideration. If there are no recommendations for further consideration, presumably the Director-General just has to make up his mind whether –

MR COOKE QC:

What to do about it.

ELIAS CJ:

Yes, but if there are recommendations and they – would you say that they must, in order to restart that process in which there is opportunity for input, is there a measure of significance about any further consideration?

MR COOKE QC:

I think that goes to the point I tried to make earlier about the importance of the transparency of the process, so when the D-G makes the determination the key thing will presumably be the findings of the adequacy of the consideration of scientific evidence.

ELIAS CJ:

Yes.

MR COOKE QC:

But the panel is also going to recommend to the D-G, "We suggest that what is done is this and that," and the D-G in his determination, his or her determination, will have to deal with what s 22A(3) requires of himself or herself and there will but reasons which will then guide the future steps, and the reasons would presumably incorporate, to some degree at least, an assessment of the recommendations, although that – whether he or she would have to address each and every recommendation, I am not sure. It would depend on what he was doing. If he was saying, "Look, this panel's report is a pretty comprehensive criticism of what we've done. I accept the findings of the panel and suggest that each of their recommendations be looked into," that might be sufficient in itself because the reasons for the determination really adopts the panel's reasoning. But if he doesn't, if he actually decides not to accept what the panel has found, there is a greater obligation on him to then explain, "Well, I haven't accepted those findings and this is why," and I accept there must be room for him to form a different view from that of the panel because the section plainly contemplates that. The extent to which Parliament really contemplated he would, it's supposed to have been a process by which these results, these disputes, were resolved, and the Director-General is not a Minister, doesn't bring into play policy considerations, and neither is he likely to be a scientist with the expertise that their panel have. So perhaps the capacity for him to disagree with the findings of a panel is reasonably limited. I don't have to confront that issue in this case because in this case the Director-General rejected all of the findings of the panel.

WILLIAM YOUNG J:

Well, arguably, but we might come to that later, but say – I mean, my impression, my impression is that a tenable view of what happened is that the Director-General accepted the findings of the – and of the panel that there'd been insufficient regard to the evidence in particular as to the absence of a quantitative assessment, accepted the recommendation that such a quantitative exercise be carried out, and then, when that exercise was carried out, issued the or finalised the decision. Now that's, I think, pretty much what the Court of Appeal said, isn't it?

MR COOKE QC:

I'm not entirely sure. What the Court of Appeal said, you've got to read ss 22 and 22A together.

WILLIAM YOUNG J:

It also said you had to read the two, the two decision papers together.

MR COOKE QC:

Yes.

WILLIAM YOUNG J:

Now say – what I'm interested in is just teasing out a slightly different issue, although it's related. Say the Director-General accepts the finding that there has been insufficient regard to the evidence, the proposition that's been put is that the Director-General has to start again, new risk assessment, new consultation and, if necessary, a new independent panel. But what does it mean to start the process again? I mean, the process is a pretty open-textured one under the statute. I don't think there is – is there a statutory requirement for an import risk assessment?

MR COOKE QC:

No, though the –

WILLIAM YOUNG J:

It's contemplated that –

MR COOKE QC:

Yes.

WILLIAM YOUNG J:

– that there probably will be one.

MR COOKE QC:

Yes, but by normal best practice, and –

WILLIAM YOUNG J:

Yes, and it's referred –

MR COOKE QC:

– s 22(7) refers to a document analysing the risk.

WILLIAM YOUNG J:

Yes, but what does it mean to start again?

MR COOKE QC:

Well, it all depends, doesn't it, because presumably – one of the difficulties with rolling out the two decision papers is we're losing the transparency required here because one lot of things that a Director-General might have to consider would be really whether this three kilogram theory really works when we don't have the data for it, because it's pretty comprehensive comments from the panel about the problems with this approach. So what does it mean to start again? It will depend. They might want to rethink.

WILLIAM YOUNG J:

I mean, the real question, which I suppose you're leading to, is there should have been a further consultation process and perhaps a further independent review panel.

MR COOKE QC:

It's possible there might have been a further independent – it would all depend on –

WILLIAM YOUNG J:

But there's no entitlement to a further one. I mean that's –

MR COOKE QC:

No.

WILLIAM YOUNG J:

– reasonably clear from the *Gazette* notice that a reason for not …

MR COOKE QC:

Is that the matter has already been the subject to an inquiry.

WILLIAM YOUNG J:

Been – yes.

MR COOKE QC:

But because we're moving from, into a model situation there is a capacity for there to be new issues about modelling –

WILLIAM YOUNG J:

Yes, I understand that.

MR COOKE QC:

– so that there's no entitlement to a panel. All there is an entitlement for consultation on a new methodology for assessing the risk. So to answer your Honour's question before, first you would expect him to consider are we still running with this measure to effectively manage the risk through the three kilogram loss? Then, if you are, you want to analyse how that was an effective management and now they're moving to a different, potentially moving to a different methodology for assessing that risk which is a modelling methodology, and because you're changing your methodology and you, you then would have to go out and consult under s 22 with those who are affected by this new basis of risk assessment.

WILLIAM YOUNG J:

Well, that's assuming that – I mean, there are sort of interpretation issues about s 22(6) and (7).

MR COOKE QC:

Yes although neither of them, neither s 22A or s 22 actually explicitly say what happens when, as a consequence of a panel's finding or a s 22A finding, the risk analysis is revised and so you just, in my submission, revert to normal principles that, if there's a duty to consult, consultation must be meaningful, people must have the documentation that they need to, or the information they need to give informed views that will inform the decision making process. There are substantial changes in proposals that they should be re-consulted on, those types of principles. That is why here changing, I'm leaping ahead of my argument, changing the whole methodology for assessing the risk and producing a new external consultants model which changes inputs into the model, producing this quite striking outcome one in 1227 years, would require further consultation.

ELIAS CJ:

And so do you rely in that submission on s 22(6) and the indication there that's there's to be consultation unless it's –

MR COOKE QC:

Yes, urgent or minor.

ELIAS CJ:

Or minor?

MR COOKE QC:

Yes.

ELIAS CJ:

And you'd say – your argument is that this was not minor?

MR COOKE QC:

No, it was obvious that –

WILLIAM YOUNG J:

The different point though is that presumably on the Director-General's argument, they've said the recommendation has already been made, the consultation has occurred. That's the argument isn't it?

MR COOKE QC:

That's the argument but that's – and you responded by conventional authority on consultation that to have – to be consulted on something you've got to have meaningful input and you can't –

WILLIAM YOUNG J:

So if it's a moving target you've got to be consulted each time it moves?

MR COOKE QC:

Sorry?

WILLIAM YOUNG J:

If the target is moving, you've have to be consulted.

MR COOKE QC:

Yes, if it's a meaningful move.

ELIAS CJ:

Unless it's minor, perhaps arguably.

WILLIAM YOUNG J:

Well, arguably. On the other hand if, at the end of the consultation process, a decision has to be made then, you know, there has to come a time when the music stops.

MR COOKE QC:

Yes it's a matter of degree in the end, it has to be and the conventional authorities have always treated that as a matter of degree, that whether the changes you've made are sufficiently of sufficient moment for it to require re-consultation and the nature of the panel findings, the instruction of a new external expert to revise a model, the output of that model, the controversy that has surrounded it, are all factors that obviously illustrated that the Board had to be re-consulted. That's particularly important when there are additional rights to at least seek a panel if there are further issues of new scientific evidence in dispute.

WILLIAM YOUNG J:

But doesn't that mean that we're going to have to look at it pretty closely and this isn't – I don't have much appetite for this but very closely at the extent to which the model in substance changed, so that there was a different risk assessment, as opposed to simply a decision on what the risk was?

MR COOKE QC:

The first risk assessment wasn't a model at all.

WILLIAM YOUNG J:

Yes I understand that. Well –

MR COOKE QC:

What was consulted on was not a model.

WILLIAM YOUNG J:

Yes.

MR COOKE QC:

The Board, as one of its issues of concern was you haven't modelled this and Dr Neumann came along and said, "Look I've done a model". Now the work that was done after the panel's report on the modelling –

WILLIAM YOUNG J:
Isn't that consultation?

MR COOKE QC:
No, no, that wasn't consultation. There was an expert working group formed and Dr Neumann was an expert, the Board was able to nominate an expert that went onto that working group.

WILLIAM YOUNG J:
Why wasn't that consultation?

MR COOKE QC:
Because it's just an expert on an expert working group, it's not consultation with the Board and even if you did regard that as consultation with the Board itself under s 22, what happens, the ultimate output of that expert working group, their conclusion was the EpiX Analytics model. So EpiX Analytics took the views expressed in the expert working group and created a new model, with new inputs and that was not provided to the Board and in fact when the Board asked for it under the OIA [Official Information Act 1982], they were declined access to it. Now if the conclusion of that expert working group process is not going to be subject to any meaningful engagement with the affected parties, it can't be regarded as consultation.

McGRATH J:
Is one way of looking at this, Mr Cooke, that consultation applies at the earlier stage but there being no specific provision in the Act, subsequently you fall back on natural justice and you look at all the circumstances to find out what the extent of natural justice is, what is required, bearing in mind in particular the consultation requirement at the earliest stage.

MR COOKE QC:
Yes.

McGRATH J:
But that there may be no, perhaps no requirement of direct consultation if by some other means the Board's perspective is introduced into further consideration.

MR COOKE QC:

Well, I suppose that might be one avenue for considering that but in considering the natural justice obligations, what sort of particular moment does the statutory scheme and not only the statutory obligation to consult but the statutory right to seek a panel, independent panel, if there are issues of contentious scientific concern and those all inform what Parliament would have contemplated and what the Court appropriately requires by way of fairness and this kind –

McGRATH J:

I think the Board did seek – wasn't it the Board did seek that the matter start again, didn't it, as I recall? I'm just thinking of the –

MR COOKE QC:

Well, after the panel report the Board –

McGRATH J:

And the Chief Technical Officer has a paper that discusses this I think.

MR COOKE QC:

The Board said after the panel's report that it anticipated that the Ministry would start again.

McGRATH J:

Yes, so that was put into the mix wasn't it?

MR COOKE QC:

Yes. But the key thing is the punch line, which is the EpiX Analytics model. We've taken into account the panel's findings, we've taken into account what occurred in this expert working group, we've changed parameters in the model when we don't think that they're appropriate and the outcome of that is that the risk is really low, it's one in 1,227 years and that's an issue that the Board's scientist, Professor Morris, in particular, Dr Neumann strongly disagreed with. They say there are real problems with what EpiX Analytics have done to the model and those are the kinds of things that they would have had the opportunity to say had a fair process been followed as a consequence of the EpiX at work.

Now I might just briefly, we've moved off the consultation and I was seeking to explore the first determination first. Before we do that could I just briefly go to the *Gazette* notice. Your Honour Justice Young has already identified aspects of that of significance but I think it's probably helpful just to look at it. That's at C58. So this is the *Gazette* notice, it's promulgated under s 22A(1) and (2) and just identify some aspects of that, clause 6 requests review, person consulted, "May request the establishment of an independent review panel to review whether in developing an import health standard a Chief Technical Officer has had sufficient regard to the scientific evidence" and you'll see under subs (3), the request must be in writing, "Identify the parts so the person can explain the concern, (b) explain why the person considers there's been insufficient regard, (c) include any additional scientific evidence" and then the D-G makes a decision under clause 9 and when making that decision has to consider the extent which the scientific evidence may be material, whether it's based on credible scientific evidence, whether it's been subject to an earlier review. That's an interesting point that contemplates that it might be more than one. Any other relevant matter.

Over the page, clause 12, contemplates, must set terms of reference for the independent review panel, that's 12(1) and then 12(4), "The terms of reference may specify the scope of the review, the questions to be addresses, the timetable" and I think my learned friend's distinguished between the questions to be addressed and the issue in dispute but in my submission they essentially fall into the same sort of concept, once they are specified under the terms of reference and then clause 15 I think perhaps reporting. And interestingly under 15(3), "Must be in writing, must include reasons, indicate whether the recommendations are unanimous or agreed by a majority." So that's the *Gazette* notice.

And just also if I could take your Honours to the terms of reference, that's in volume D.

ELIAS CJ:

Sorry, I'm just thinking about these provisions and what s 22A rather envisages. I mean, is it your case that s 22A envisages that there will be a right under a process to be gazetted for someone consulted under s 22(6) who has serious significant concerns which have not been determined to seek a review?

MR COOKE QC:
Section 22A contemplates that.

ELIAS CJ:
Yes.

MR COOKE QC:
But contemplates there will be a process for that.

ELIAS CJ:
Yes.

MR COOKE QC:
I think your Honour's question may be going to the extent to which the Director-General could decline a request for a review under the *Gazette* notice if it was indeed a significant concern that had not been previously subject to a …

ELIAS CJ:
Well, presumably the Director-General can resolve it by determining it. It's only if there is a significant concern which has not been determined that –

MR COOKE QC:
Yes.

ELIAS CJ:
– the person who qualifies under s 22(6) who has a significant concern would be entitled to obtain a review.

MR COOKE QC:
Yes.

ELIAS CJ:
That is – is that what the statute –

MR COOKE QC:
If it's, it had already been asked and answered, you couldn't ask it for again so have to be –

ELIAS CJ:

Yes.

MR COOKE QC:

– not subject to a previous determination.

ELIAS CJ:

Yes.

GLAZEBROOK J:

What other grounds would there be to refuse but it's not a significant concern? I mean, a "significant concern" is a slightly odd term really in any event because there can be significant – well, there can be a different view on significance and there can be concerns that are based on no valid –

MR COOKE QC:

Yes.

GLAZEBROOK J:

– an emotional rather than a scientifically valid concern, I suppose you'd interpret that as being a scientifically valid concern, or potentially a scientifically valid concern.

MR COOKE QC:

I was about to answer your question, whether it was material or not, but of course that might become – it's hard to imagine a significant concern about something that wasn't material so it is difficult to imagine a true discretion not to have a panel if there was a genuine significant concern.

GLAZEBROOK J:

Well, paragraph 9, I suppose, of the *Gazette* notice indicates the extent at least that the Director-General thinks in terms of the *Gazette* notice that he or she may refuse the request.

MR COOKE QC:

Yes.

GLAZEBROOK J:

And actually it probably looks as though it fits relatively well into the statutory context.

MR COOKE QC:

Yes, it does.

ELIAS CJ:

I'm rather more concerned about the sort of Groundhog Day syndrome and wonder whether on the statutory scheme the Director-General can't actually bring it to an end but has to make a determination and give reasons.

MR COOKE QC:

Well, if he's going to decline a review.

ELIAS CJ:

No, I mean before that application is made, if there is a – if a significant concern has been raised, the Director-General can surely determine it and give reasons –

MR COOKE QC:

Before the panel is –

ELIAS CJ:

No, no, after a panel. I'm talking about we've had a panel and it's made a recommendation and there's a change, how often do you go back and say, "I want another review"?

MR COOKE QC:

But s 22A –

ELIAS CJ:

I'm just wondering whether your concern really is that the, and it is part of your argument, that the Director-General has not –

MR COOKE QC:

Determined the –

ELIAS CJ:

– determined it –

MR COOKE QC:

Yes.

ELIAS CJ:

– because if he'd determined it and given reasons then they'd know where they stood –

MR COOKE QC:

Yes.

ELIAS CJ:

– and they might have other remedies.

MR COOKE QC:

And the determination must be as soon as reasonably practicable so it suggests when we should get – things shouldn't get obfuscated by additional steps that are taken, that the Director-General receives the report and makes a determination and everyone knows where they stand, and if the remedial work calls for a new rationale for the risk assessment there'd be further consultation and if, on further consultation, the parties sought another review, the D-G could decline it if it was essentially the same matter again that had already been subject to the determination.

ELIAS CJ:

Mmm.

MR COOKE QC:

But if it wasn't, if it was a new matter, then it's possible it could be off to the panel, and the problem with the present case is that we actually really don't even have even the determination in a way that is transparent so that everyone knows where they stand, let alone the lack of consultation, because a determination on the face of it just doesn't do what the section requires it to do and the required transparency in the process has been avoided. If I could just briefly go to the terms of reference.

ELIAS CJ:
You'll take us to the determination when –

MR COOKE QC:
Yes, yes.

ELIAS CJ:
– you get a moment, won't you?

MR COOKE QC:
It's all foreshadowing almost, isn't it? It's – and maybe there'll be a cup of coffee before we get there but if I could take your Honours to the terms of reference, it's D68.

One of the things that's interesting about the terms of reference is that in them, and I'm talking there about paragraph – beginning at paragraph 8 of the terms of reference, there is a genuine attempt to ensure that the panel understands the context which applies in relation to the decision making. So you'll see on page 1404 of the case, in paragraphs 13 and 14, there's a reference to there being no, just no one, there's never one single right answer to scientific issues. It's a matter of interpretation.

McGRATH J:
Sorry, what paragraph in the 1404 are you at?

MR COOKE QC:
1404, paragraphs 13 and 14.

ELIAS CJ:
Sorry, what volume are we in?

MR COOKE QC:
You're in volume – hopefully everyone's in volume D, tab 68.

So the Director-General was very careful to ensure that the panel understood the context in which they were to conduct their inquiry and I've drawn particular attention to paragraphs 13 and 14, and 15, purpose, "The panel is appointed to consider

whether MAF, in developing the provisional report still had sufficient regard to the scientific evidence … assess whether MAF's treatment of the issues, given all the evidence, was reasonably open to it and whether there is a reasonable train of logic, linking the science to the provisional import health standards. Issues outside the scope of the group. It is not the role of the panel to determine what is an appropriate level of protection against which the import health standards should be assessed." Compliant on the – "Comment on New Zealand's compliance with the SPS agreement," etcetera. So it's not the panel's function to determine the appropriate level of protection.

Page 1405, paragraph 18, "Issues to be considered. The panel is requested to consider whether MAF has had significant regard to the scientific evidence in the following areas." And as I mentioned, then all the areas are listed. And then on page 1407 there's the one the D-G added, "Overall assessment of risk. Taken collectively, all of your findings are there any deficiencies in the regard MAF has given to the science that should cause MAF to reconsider the provisional import health standards," and I took your Honours to the findings of the panel in that matter.

So there was obviously a real effort to make sure that in a sense the panel didn't lose the wood for the trees. That the analysis of the Ministry's assessment of the evidence all came back to in the end to make sure that it's understood, or overall is this a reasonable sufficient consideration of the scientific evidence, and that's particularly demonstrated by the additional question the D-G added to those being raised as significant concerns.

So I was going to take your Honours now to the actual s 22A decision paper. Bearing in mind the time, it might be that that can just be foreshadowing.

WILLIAM YOUNG J:
Which one?

MR COOKE QC:
I'm going to go to the official one, which is the later one, and then I'll go to the earlier paper to see whether that changes things, because that's the one – the s 22A decision is the one the Ministry rely on.

WILLIAM YOUNG J:

But they both describe themselves as s 22A decision papers, don't they?

MR COOKE QC:

I don't think the first one does and the –

WILLIAM YOUNG J:

I thought it did, actually.

ELIAS CJ:

What's that? The 1st of September.

MR COOKE QC:

Yes, the 30 August, 1st September paper. So I'm going to deal with that second –

ELIAS CJ:

Yes.

MR COOKE QC:

– because, as I understand the Ministry's case, it is the second one that they rely on as the s 22A(3) decision determination.

WILLIAM YOUNG J:

We'll just have a look at, while you have a cup of coffee, have a look at page 1569 –

MR COOKE QC:

I know –

WILLIAM YOUNG J:

– and 1570.

MR COOKE QC:

I know there are comments in it but if you –

WILLIAM YOUNG J:

Which suggest that it's a decision under s 22A(3).

MR COOKE QC:

I accept there are suggestions in the pre-ambling document. When it actually comes to the decision, it's not 22A decision.

ELIAS CJ:

All right, we'll take the adjournment now, thank you.

COURT ADJOURNS: 11.30 AM
COURT RESUMES: 11.51 AM

MR COOKE QC:

The foreshadowing is now over and we come to the decision, volume F, tab 101 and as I indicated I will go through the other decision paper after I've dealt with this one but this is the Director-General's decision under s 22A(3) of the Act as it is headed up and I wanted to start on the first page of that document 1977 of the case one appeal, at the bottom of the text on that page.

ELIAS CJ:

Sorry where are we on line –

MR COOKE QC:

F101, first page at 1977 and you'll see at the bottom of the text in August '09, following requests the Director-General appointed an independent review panel in accordance with required process, outlining the matters in dispute. The panel made its report in March 2010 and then Director-General agreed to a work programme in response to the report. It goes to the Honourable Justice Young's question to me about the categorisation of that earlier decision. "The major component of work was an updated quantitative risk analysis, building on the earlier analysis commissioned by NZ Pork and developed with the assistance of an expert working group of experts nominated by domestic and international stakeholders. That work programme has now been completed. The development of the quantitative risk model has been a long process involving several levels of peer review, including through the EWG process, and various structural changes to incorporate recommendations. The model described in the report of the expert consultants, EpiX Analytics (an independent consultancy specialising in quantitative risk analysis) is accepted by MAF as fit for purpose to support a decision on whether import health standards issued under the Biosecurity Act section 22 provide for effective management of biosecurity risk."

So they're deciding that this new model provides for effective management under s 22(5). "The model supports the conclusions of MAF's earlier qualitative risk analysis in that respect. The model reports a mean of 0.0038 PRRS virus primary introductions per year if the importation of pig meat in the proposed consumer-ready form were permitted. This model output can be considered to be equivalent to an average of 1,227 years between outbreaks, given the current conditions and parameters assumed in the model. The expert consultants EpiX Analytics have offered their view that the model provides a conservative estimate of risk, in that the selection of parameters for several variables are likely to over-state the risk." So very low risk and they say it's conservative.

Then we have the heading "Matter in Dispute". "The matter in dispute can be described at two levels. Overall, the matter in dispute is whether MAF has taken appropriate account of the available science in determining that the provisional import health standards provide for effective management of biosecurity risk, considering the legal obligations of s 22(5) of the Biosecurity Act 1993." Now that is not a correct formulation of the issue in dispute under s 22A(3). It's talking there about a determination that the provisional import health standards provide for effective management. Where do we find that determination? We find it in the paragraph I took your Honours to before, the model described in the report of EpiX Analytics is accepted by MAF as fit for purpose to support a decision on whether import health standards issued under the Act provide for effective management of biosecurity risk. So we get the wrong question. They're here asking, does the updated EpiX Analytics quantitative model provide for effective management of the risks under s 22(5). That's the wrong question.

GLAZEBROOK J:
What's the right question?

MR COOKE QC:
Whether in developing in import health standards.

GLAZEBROOK J:
You're just going back, sorry you're just going back to the statutory question.

MR COOKE QC:
To the provision, that's right.

WILLIAM YOUNG J:

So you're saying they should have asked a question framed by reference to what the position was at the time of the panel.

MR COOKE QC:

Yes.

WILLIAM YOUNG J:

Rather than looking forward.

MR COOKE QC:

Yes, because that's what the panel was enquiring into and that's what s 22A was directed to, whether the development of the work consulted on has had sufficient regard to the scientific inputs. Not whether a new updated quantitative risk analysis by an expert, consultants instructed after the panel's report, a report that's never been before the panel. We don't know whether the EpiX Analytics' report has had adequate regard to scientific evidence because it hasn't been considered by a panel, it hasn't even been consulted on.

MCGRATH J:

Isn't this passage really neutral of whether they are looking at the matter in current terms or historical terms?

MR COOKE QC:

Well it does, well let's go and see, on my next page 1979, where there's actually the determination based on – first of all notice –

WILLIAM YOUNG J:

Sorry what page, I'm sorry?

MR COOKE QC:

Let's stay on 1978. Just note that before I go on, it then says, "In detail, the matters in dispute are effectively summarised as each of the individual matters in the terms of reference." And then on page 1979 –

ELIAS CJ:

Sorry before do you – s 22(5) what do you say about the invocation of that?

MR COOKE QC:

That is obviously irrelevant. In fact you might recall in the terms of reference the panel was told not to pay any attention to matters other than about what the level of required bio security protection was, the compliance of the SPS agreement to steer clear of those matters.

ELIAS CJ:

Those are the ones that the technical officer has already reported.

MR COOKE QC:

We he – at this stage it will be proposed.

ELIAS CJ:

Yes.

MR COOKE QC:

And then there will ultimately be a s 22 decision which will address the s 22(5) considerations but the s 22A enquiry is about something different than s 22(5) considerations. And then on 1979, "Decision relating to the matters in dispute. In accordance with s 22A(3), as Director-General I determine the overall matter by making the following decisions. The final import health standards, and MAF'S process to develop them (including the additional work undertaken in response to the panel) has taken appropriate account of the available science and will provide for effective management of biosecurity risks, considering the legal obligations under 22(5) of the Biosecurity Act." Again wrong question. In classic or judicial review terms, there's an error in law on the face of the record, to use the old fashioned language and then interestingly there's a minor amendment to the PHQ Report in the final import health standards in the next bullet point which is reported, "Thereby meeting the principle of being least trade restrictive in accordance with the World Trade Organisation Agreement on Application for Sanitary Phytosanitary Measures, so it's the SPS.

WILLIAM YOUNG J:

So what was the extent of the PH variation?

MR COOKE QC:

I just don't know.

WILLIAM YOUNG J:

Because the lower the PH the better.

MR COOKE QC:

It's a minor change in the cured, cooked and cured aspects.

WILLIAM YOUNG J:

Yes.

MR COOKE QC:

So wrong question, irrelevant considerations and it's been a decision based on material that was not submitted to the panel or consulted on and then if we look at how each of the individual terms of reference are dealt with, same problems. So for example if we go – I took your Honours to the panel's report on likelihood of pigs being fed waste meat. The determination of that is on page 1989 and at 1989, you have at the top of that box the questions from the terms of reference. You then have the panel recommendations quoted but none of the findings. So just the recommendations as to future work. You have Ministry's response to the recommendations and then you have on page 1990 the decision. "Decision in relation to this matter providing rationale. In accordance with s 22A(3) as Director-General, I determine this matter by making the following decisions (bullet points), with supporting rationale following each decision." So what are the bullet points? "The development of the updated quantitative risk assessment", that's the EpiX Analytics model.

GLAZEBROOK J:

Sorry, whereabouts are you?

MR COOKE QC:

1990, middle of the page, heading, "Decision in relation to this matter providing rationale."

GLAZEBROOK J:

You were talking about bullet points.

MR COOKE QC:

There's a bullet point –

GLAZEBROOK J:

I see, sorry.

MR COOKE QC:

It's a quote from the first sentence there making the following bullet points. So the bullet points are the decisions with the supporting rationale. So the bullet point. "The development of the updated quantitative risk assessment has appropriately utilised the available data on the likely generation of uncooked pig meat scraps arising from pork imported in accordance with the proposed requirements." Entirely focused on the updated model. Hasn't paid any attention to the panel's findings in relation to the adequacy of the Ministry assessment. The next bullet point on page 1991, this one is interesting, this is the middle of the page, "The three kilogram limit for import of fresh/frozen pork is a readily verifiable requirement that is considered least trade restrictive in the context of the risk management objective." Now that obviously –

McGRATH J:

Sorry, where are you on that page?

MR COOKE QC:

In the middle of that page, 1991, remember the –

McGRATH J:

Thank you.

MR COOKE QC:

The rationale for that one is interesting. "The risk management objective from the MAF risk analysis, embodied in the definition of 'consumer-ready cuts' is to restrict the volume of any individual piece of imported pork that is likely to be utilised in a single meal in order to restrict the accumulation of any resulting uncooked pork disposed of during the preparation process." That means you won't cut many bits of when you cook. "An underlying assumption is that there is a direct relationship between the size of a piece of uncooked pork and the volume of scrap generated by trimming prior to cooking. No contrary arguments or evidence has been presented to refute the assumption." Now you'll remember the panel said it had considerable concerns that this was an assumption without verifying data. All this doing is saying it's an assumption and no one's refuted it. So it doesn't – it's not addressing the findings of the panel, it's just asserting this is an effective management –

ELIAS CJ:

Well, is there anything wrong with that approach, however?

MR COOKE QC:

Well, it's not asking –

ELIAS CJ:

Is it not open to the Director-General to say this hypothesis hasn't been refuted?

MR COOKE QC:

But he might make those sort of decisions under s 22 in deciding whether to impose an import health standards. What we're dealing with here is a s 22A(3) determination of the issue in dispute. Whether there's been significant regard to the scientific evidence in relation to a matter of significant concern raised by the Board, which related to the volume of waste fed to pigs, taking into account the panel's findings and recommendations and we're not addressing the panel's findings at all. The panel made findings about this –

ELIAS CJ:

Well, the panel said it hasn't been established.

MR COOKE QC:

There are concerns that there hadn't been –

ELIAS CJ:

Yes.

MR COOKE QC:

– any verification for the assumption, which was an important assumption for the validity of the – for the import risk assessment.

McGRATH J:

This is what Justice Williams was calling – indicating was a case of the panel identifying the gap and the Ministry then going on in this report saying well we've filled the gap.

MR COOKE QC:

Well they haven't said they've filled the gap there.

McGRATH J:

No, but –

ELIAS CJ:

There is no gap shown to exist.

McGRATH J:

Isn't it implicitly the case that that's what they're saying?

MR COOKE QC:

Well –

McGRATH J:

Is that the way you can read the report? I mean taking, accepting your point of view, where's the decision that they say they're going to make under the section? They don't do that. Implicitly what they're saying is, well there was a gap, we've filled it.

MR COOKE QC:

Well, whether there's room for reading between the lines in that way when s 22A(3) requires a formal determination taking into account the findings giving reasons is the problem, is the lack of transparency about – which is the whole point of this provision s 22A(3), was to ensure that we had a determination with a transparent finding.

GLAZEBROOK J:

Well you could have said, couldn't you, the panel – if you said the panel said this but I don't think it's right because I think the assumption's right but nothing's been put forward to suggest it's not.

MR COOKE QC:

Well remember the panel's –

GLAZEBROOK J:

The panel had use by dates and matters of that kind, I know.

MR COOKE QC:

And remember the panel is enquiring into whether the Ministry has had sufficient regard to the scientific evidence. The panel is not enquiring into whether three kilogram assumption is a good one or not. So the determination must be addressed to whether the Ministry's work in developing this proposed import health standard has paid adequate regard to the science that underlies it.

GLAZEBROOK J:

Well I gather the difficulty is there isn't any evidence on that and the panel was suggesting that they needed to –

MR COOKE QC:

Get it.

GLAZEBROOK J:

– look more closely at the assumptions and I'm not sure what they were suggesting to fill that gap but it isn't as if there is scientific evidence that the panel said they weren't taking account of on that particular issue, was it? Wasn't it just that they weren't – I suppose that some of the assumptions they were making were didn't take account of things like use by dates and matters of that kind.

MR COOKE QC:

And the studies that have been identified –

GLAZEBROOK J:

The other ones, yes.

MR COOKE QC:

So it was directing its attention to particular matters of scientific evidence. Why the Ministry's work had paid insufficient regard to that and none of this is addressed. It's just an assertion that the three kilogram lot assumption is okay and no one's refuted it. So it's non-responsive to the question – the issue in dispute, hasn't addressed the panel's findings. I suppose you could go on where I was reading, "To meet obligations to ensure measures are applied in the least trade restrictive manner to achieve this risk management objective, a simple and readily verifiable threshold value (three kilograms) was selected." So it goes on to say the reason why we chose three kilograms is it was least trade restrictive. Then you see the bullet point at the

bottom of 1991. "The likelihood of freezer failure or inventory management practices resulting in significant quantities of imported raw pork being directed into waste streams where it may be fed to commercial or non-commercial pigs and the result and the introduction of PRRS is considered to be negligible." Again, just an assertion, haven't addressed the findings of the panel about whether the Ministry's development of the IHS has had sufficient regard to the scientific evidence. It's simply an assertion and not responding to the question that the determination is supposed to address.

Then the final one, "A compliance programme for the Biosecurity (Waste Feeding) Regulations target both pig farmers/pig keepers in the para-commercial and non-commercial sectors and the distribution supply chain for imported pork with education and enforcement components should become an ongoing source of co-operation between the Ministry and New Zealand Pork." So all of these points are not addressed to the question in s 22A(3), they're address to 22A(5). That is does the hypothesis involve effective management of the risk rather than addressing the question which is whether the Ministry's work has had regard to the scientific evidence. Again,wrong question.

McGRATH J:
Do you have any complaint about the adequacy of the summary of the panel recommendations on page 1989?

MR COOKE QC:
They're just quoting the recommendations so the formal recommendations as quoted. So I can't complain about that but what I do complain about is that none of the findings of the panel –

McGRATH J:
Yes, no. I certainly understand the argument.

MR COOKE QC:
Sorry. You always emphasise your best points. And each of the individual terms of reference questions are answered on that basis, not on the basis – so each of them relies on the updated quantitative risk assessment report. Make no reference to the analysis, the findings of the panel on those questions. So we can go through each of them but the same format is followed. The updated quantitative risk analysis

provides the answer, is effectively what they're saying. So you can see, for example, the overall assessment of the risk that's on page beginning at 2002, 2003, and you see the bullet points at the beginning of 2003, this is the bottom of 2003, "The development of the updated quantitative risk assessment is drawing on identifying sources of data when that is available. Where new evidence was provided during the EWG process," et cetera. Over to page 2004, middle of the page, "The updated quantitative risk assessment provides a conservative estimate of risk introducing PRRS." Bottom of 2004, "The updated quantitative risk assessment and subsequent EWG process has facilitated input from affected stakeholder groups in the spirit of collegiality." So it's all about the updated EpiX Analytics report. So wrong question. The question is not whether the EpiX Analytics report provides for effective management. It's whether, if I can just read the words of 22A(3) again, "Sufficient regard has been had to the scientific evidence."

So, both in terms of the overall question and the sub-questions there is an obvious error of law in my submission and just on the two terms of reference where there is no answer at all which really does just demonstrate this was an attempted s 22(5) decision. If your Honours just look at page 1980 you see the question of, "Was the original hazard identification," that is, whether there were diseases other than PRRS that would be involved in this import health standard, bottom of the page, the decision in relation to this matter providing rationale, "There are no specific matters requiring a decision related to the pork import heath standard in this issue," and then there is a description of the border change programme and its multifaceted initiative. It can't be right that that was not a matter to be requested to be determined in accordance with the terms of reference. A similar comment is made at 1996.

McGRATH J:
Sorry, I'm just trying to gift wrap it but your complaint here is of a failure to take into account a panel recommendation.

MR COOKE QC:
No it's not a panel recommendation, it's a failure to determine a question in the terms of reference in relation to the adequate consideration of the scientific evidence.

WILLIAM YOUNG J:
But was there a finding that the science hadn't been adequately –

MR COOKE QC:

There was a finding by the panel that they had significant concerns, they had concerns about the continued validity of the original hazard identification. So very –

McGRATH J:

Just give me a page reference to that panel finding, don't bother to go to it but I just – can look at it later.

ELIAS CJ:

I think it may be necessary for you to take us back to the findings in light of this submission, just briefly.

MR COOKE QC:

It's at volume E70. I have of course summarised these in the written submissions but if E70 at page 1457 and 1458.

GLAZEBROOK J:

1458?

MR COOKE QC:

1457 and 1458, and those findings begin but a panel noting that it hadn't been given sufficient time to consider these questions and it wasn't sure what the Board, why the Board had selected the additional diseases it did but on page 1458 it then goes into the areas of concern, paragraph 8 it describes, "The documents provided to the panel do not contain detailed information on MAF'S reassessment of hazards since 1991," and then goes on in 9, "The panel members are not aware of the outcome of these assessments or reviews that have been published in the past, a practice which the panel thinks will be very helpful." And 10, "The panel's concerns regarding the continued validity of the original hazard identification is accentuated in this case by the delay between the conduct of the risk assessment and the drafting of import health standards," etcetera.

So it has identified it has concerns about the validity of the original hazard identification.

WILLIAM YOUNG J:

But how's that referable to s 22A?

MR COOKE QC:

Because a significant concern has been raised by New Zealand Pork as to the adequacy of the consideration of the scientific evidence. That's been accepted as being within –

WILLIAM YOUNG J:

But that's in relation, sorry, that has to be in relation to –

MR COOKE QC:

The import health standards.

WILLIAM YOUNG J:

– the development of an import health standard?

MR COOKE QC:

Yes, and the import health standard relaxes the requirements in relation to foreign ports. It's not particular to PRRS it's just PRRS is the most obvious disease that will come from such relaxation –

WILLIAM YOUNG J:

But the restriction was only because of PRRS?

MR COOKE QC:

That was the reason for it in the first place but now the Pork Board has said but your new import health standard, you haven't properly identified what other risks are involved in the importation of this pork.

WILLIAM YOUNG J:

Where's the finding that there hadn't been, had sufficient regard –

MR COOKE QC:

Well I can't go any further than identifying what it says in paragraph 10 but the panel has –

WILLIAM YOUNG J:

Has a concern.

MR COOKE QC:

– concerns that are accentuated by the particular circumstances in this case. Now at the very least, it can't be right to say there's no matter for determination. A Director-General would need to address the findings of the panel. There is no specific matter requiring a decision in relation to the pork –

WILLIAM YOUNG J:

Well, there isn't a finding though.

MR COOKE QC:

Well, there's –

WILLIAM YOUNG J:

It depends what you mean by a finding, because a finding is only a conclusion that sufficient regard hasn't had to be had to this – hasn't been had to the science and there isn't a finding.

MR COOKE QC:

Well that's a very technical approach to the conclusions expressed by the panel. The point may be better made – I mean this is, probably of all the findings or conclusions of the panel this is my weakest one, if I could put it that way. Let's look at the other determination, we can keep both the panel's findings and the determination if you look at page 1996 of the determination. "Area Spread," and again if you look at the conclusion of the bottom of the page you will see a similar statement that there is no specific matters requiring a decision in relation to pork import health standards and the likelihood of infection of PRRS in New Zealand pigs arriving from imports of pork is so low there is little value in undertaking further studies.

WILLIAM YOUNG J:

Well, again it may depend on whether you take a sort of technical view or not as to whether there was a finding, a sufficient –

MR COOKE QC:

Well the panel is more critical on page 1477, tab E – bundle E, tab 70, 1447. And you will see paragraph 7, "Clinical experiences in the US and elsewhere since 1985 indicate that movement limitations and biosecurity activities described above may not be completely protective. Based on these experiences MAF's reliance on biosecurity

to obviate virus movement between production sites the following an introduction of PRRS may be overly optimistic."

GLAZEBROOK J:
What –

MR COOKE QC:
That's paragraph 7 on page 1478.

WILLIAM YOUNG J:
How – where does figure feature in the model? Is there sort of a, an allowance for an assumption that if there is an incursion of PRRS it might not become endemic because of limitations in areas where –

MR COOKE QC:
It's not dealt with in the model. The model is only about it coming in.

WILLIAM YOUNG J:
Well, is that – that's so if they're saying the risk of it coming in is sufficient slight to be ignored then we don't need to worry about how it might spread once – if it did get in?

MR COOKE QC:
That would be –

WILLIAM YOUNG J:
That's the reasoning, isn't it?

MR COOKE QC:
Yes, but the s 22A(3) determination is about a preceding question, it's not about the ultimate decision under s 22.

GLAZEBROOK J:
But surely what's being said here, I mean I would see this as exactly the sort of s 22A(3) determination because what it's saying is, this is actually, you don't need to take account of this because it only would be significant if the virus comes and as the risk is so slight there is no point doing any further study –

MR COOKE QC:

Well again –

GLAZEBROOK J:

– so, therefore, they've taken full account of the scientific evidence because this would actually not be anything that could possibly change the decision, because even if it had a 95 percent chance of spreading if it did come in, the risk of it coming in is so low in the first place that that couldn't possibly change the decision?

MR COOKE QC:

That's why it's important to realise that s 22A(3) is the preceding question because –

GLAZEBROOK J:

But that is the preceding question, has adequate account been taken of the scientific evidence? Well, yes it has because you don't need to consider that.

MR COOKE QC:

What the s 22A(3) process is to enquire into matters that have been raised as significant concerns by a person who has been consulted under s 22 and the Board has said we've got a significant concern that you haven't addressed the spread of the disease once it's arrived. The panel has made findings to say actually the Ministry's reliance on biosecurity maybe insufficient to deal with this issue. Now that's the question that s 22A requires to be addressed and you would ask and answer that question before you then take the next steps about how you remedy it. What's happened here is they've got a new model. They've said, "As a consequence of the new model, we say the risk is very low, and in consequence of it being very low we can say it's now irrelevant to consider spread, onward spread," and that puts the ultimate s 22(5) conclusion before the s 22A(3) determination as to whether there's been sufficient regard to the scientific evidence that underpins the IHS. So you can't just say, "Because this model we've got says it's low risk then we can just say all the concerns are dismissed." You could actually do that on that analysis. You could say, "This model says that it's all irrelevant now. The risk is only one in 1,227 years so therefore we can dismiss all the concerns, all the findings of the panel, because it's a very low risk." That puts the cart before the horse. The whole objective of this was to scrutinise the science underpinning these risk analyses to ensure that they could be relied on to make that conclusion.

WILLIAM YOUNG J:

But doesn't this just lead nowhere, because say the Court was satisfied that there had been a failure to make determination on this issue, but a determination anyway, and any determination that could have been made would have made no difference given the approach the Director-General eventually took. It doesn't provide a basis for relief.

MR COOKE QC:

I can't accept that it would have made no difference. I'm saying that when the Director-General had lawfully applied his s 22A(3) determination of the function he would have worked out what the deficiencies were in the original work done by the Ministry.

WILLIAM YOUNG J:

Well, let's say the –

MR COOKE QC:

That's the point of it.

WILLIAM YOUNG J:

Let's say the Director-General said, "The aerosol assumption was too light. We were wrong."

MR COOKE QC:

Yes.

WILLIAM YOUNG J:

"However, the new quantitative model shows there aren't going to be any incursions, therefore this is irrelevant. We don't need to do any more work."

MR COOKE QC:

The problem is with that second bit because that new quantitative model is not before the panel.

WILLIAM YOUNG J:

I know, but that's your old argument. That's what we've been – that's a different argument.

GLAZEBROOK J:
Yes, I understand that argument.

WILLIAM YOUNG J:
I understand that you're unhappy that the quantitative model finally acted on by the Director-General hadn't been consulted on, so that's perhaps an argument we've got to get to in a bit more detail later, but this is, you're putting up, as I understand it, as a separate argument.

MR COOKE QC:
Yes.

WILLIAM YOUNG J:
But it's not, is it?

MR COOKE QC:
It is a separate argument because s 22A(3) requires a separate determination from the s 22(5) decision.

WILLIAM YOUNG J:
Yes, but if –

MR COOKE QC:
And it's –

WILLIAM YOUNG J:
If it's on a point that's irrelevant to the ultimate outcome, what would be the basis of relief? We might say, "Okay, well, they've done it wrong but it doesn't matter."

MR COOKE QC:
Well, you can't assume that the s 22A(3) decision would be identical if it had been addressed to the right material, asked the right question, and that's why it's important to have transparency in the process. It identifies what the remedial work would need to be. Then we could work out whether the EpiX Analytics model sufficiently responded to the concerns identified by the panel. You can't just say, "EpiX Analytics are right therefore we dismiss the panel or its findings."

GLAZEBROOK J:

Well, what say that part of the scientific evidence that the panel looked at was that model –

MR COOKE QC:

Well, then –

GLAZEBROOK J:

– and they still made a comment that they hadn't done enough work on spread, couldn't the Director-General, if, come to exactly the same decision that he did there, that, yes, they said we shouldn't have done any work on spread but frankly it wouldn't have made any difference to any decision and therefore adequate …

MR COOKE QC:

I accept that the –

GLAZEBROOK J:

So, really just saying isn't your complaint that they're taking into account the new risk model that hadn't been consulted on? I suppose it's just another way of putting the Justice Young point.

MR COOKE QC:

It's this – they're really two sides of the same coin. I'm saying wrong question, considering wrong material, haven't got the determination the statute requires and that – and the other way of putting that is it's been based on a model that's not been consulted on, not been put before the panel. They're just two ways of describing the same essential complaint.

McGRATH J:

Was the Court of Appeal with you in accepting that they'd asked the wrong questions?

MR COOKE QC:

No, because the Court of Appeal said that you needed to read ss 22A and 22 together, and the process wasn't, was iterative and they didn't have the distinct roles that I contend that it's obvious the sections do have, and that's the – really this

argument comes down to that. Was the audit of the science a preceding step before the ultimate decision?

Now – so for those reasons I say that – and you can go to each of the decisions and see how it doesn't, in my submission it doesn't address, doesn't ask the right question, it doesn't address the right findings.

I do have to respond to the submission that the earlier, well really the proposition by Justice Young, that the earlier decision can be treated as the 22A determination and that earlier decision –

WILLIAM YOUNG J:
Ah, part.

MR COOKE QC:
Part. That's behind E80. Now this is a decision of the previous Director-General in early September, following this report which is dated 30 August, which the s 22A determination records as the commissioning of a new work programme. Now the actual decisions that this paper makes are set out on pages 1590 and 1591 and you can't treat this as either a s 22A(3) determination or part of it. It is a decision on the recommendation of the Chief Technical Officer to commence a work programme. So all of these decisions, 1 to 10, are all decisions to embark upon a new work programme.

WILLIAM YOUNG J:
But isn't there, at 1590, in substance an acceptance of the criticism that there should have been a quantitative model?

MR COOKE QC:
You can treat that one recommendation of the panel as being addressed in three, if you had somewhere in this paper have the Director-General analysing the findings of the panel on the benefits of modelling, accept those findings and then, in the determination, and then follow the recommendation by commissioning the work.

WILLIAM YOUNG J:
Part of the problem is –

MR COOKE QC:

But that's not what this does. It just –

WILLIAM YOUNG J:

Well this is the Chief Technical Officer's document which the Commissioner has adopted, effectively, isn't it?

MR COOKE QC:

Yes. As the ultimate determination was.

WILLIAM YOUNG J:

Yes.

MR COOKE QC:

So none of these purports to be a s 22A(3) determination.

WILLIAM YOUNG J:

Well it sort of does, if you look at 1570.

MR COOKE QC:

It certainly sets out s 22A(3).

WILLIAM YOUNG J:

And then it says, "You must take into account the findings and recommendations of the panel and give reasons for your determination."

MR COOKE QC:

That's what – it's describing what s 22A(3) requires but when it comes to the decision it is not purporting to be a s 22A(3) decision. In fact it's not being suggested in the affidavits or the argument that this was a s 22A(3) decision. It is just – what's happened here is that in response to the panel's findings, apparently in contemplation that a determination will ultimately need to be made, a work programme has been –

WILLIAM YOUNG J:

Well look at 1572, in the middle of the page, the author says, "MAF could dispute the assumptions and interpretations but the general tenor of the report is clear."

MR COOKE QC:

Yes.

WILLIAM YOUNG J:

In some areas, however, there have been developments in the science –

MR COOKE QC:

That's the quote from –

WILLIAM YOUNG J:

That make it clear, that says, "Make it clear the panel considers that MAF did not have sufficient grounds on the available science."

MR COOKE QC:

Yes.

WILLIAM YOUNG J:

So there's an acceptance of that and the whole paper is a building on of that acceptance, isn't it?

MR COOKE QC:

What the paper is, is the Chief Technical Officer's recommendations on how to respond to the panel's recommendations and in doing so a – and I'm going to the decisions actually called upon and made as a consequence at 1590 and 1591. Introducing new processes which are not in the processes set out under the s 22A *Gazette* notice. So we're going to send some of the recommendations, this is two, off to the border control programme and one, that you should use materiality to decide which recommendations you'll follow. Three is let's work on – start work on the modelling programme.

WILLIAM YOUNG J:

Can I go back, and this is just a very open question, is there any finding or recommendation of the panel, which could not be accommodated by an appropriately developed quantitative model?

MR COOKE QC:

Yes. Well, depends. If the evidential wholes, the panel identified, have been gathered –

WILLIAM YOUNG J:

Yes, that's what I mean.

MR COOKE QC:

But, yes, it's possible that the panel's findings and recommendations could have been addressed by conducting further work but that was then expressed in a model.

WILLIAM YOUNG J:

So if the substance of it is you haven't done a proper quantitative assessment –

MR COOKE QC:

Well that's not a fair characterisation. When it comes to the panel's findings it just said modelling is one way, both ways are legitimate ways of going about it.

WILLIAM YOUNG J:

Okay, but there is a general concern that there wasn't a quantitative assessment.

MR COOKE QC:

As I said, the panel found that both ways were legitimate ways of going about it. Its concern – the panel's key concern was not there is no model. The panel's key concerns were the ones that I've identified that there are these assumptions, lack of evidential foundation, etcetera. So it's unfair to characterise the panel's conclusion as naff, you've done it wrong, you haven't modelled this. It's said there was utility in doing modelling but that both approaches were valuable ways of going about it, but I do accept that if there had been a proper determination of the issues in dispute one possible response that could be legitimate would be to develop a model that got the evidence and analysed the risk properly, but I can't accept that this paper is a s 22A determination. It is the commencement of a series of work programmes that's actually, that precede the s 22A(3) determination which are not in the process established under the *Gazette* notice established under s 22A(3) and end up obscuring the appropriate transparency in the decision making process, because we don't actually know which of the findings of the panels have been accepted or not and that goes to the inputs in the model. If we don't know which inputs in the model

are important and which have been revised in accordance with the panel's determinations and the whole process becomes obscured.

ARNOLD J:
Part of this series of recommendations, if you go back to 1590, is that the Director-General consider setting out a process whereby stakeholders can comment on the model design and that's dealt with in 3B and 4B. Now is that the experts' working group, what became the experts' working group?

MR COOKE QC:
Yes and process surrounding that expert working group.

ARNOLD J:
Right. So the stakeholders were given the opportunity through this process to comment on model design. You said earlier that you did not accept that that was, met the requirements for consultation?

MR COOKE QC:
No that's because the – what happened was the, the key thing was the expert working group because that's where the experts of various parties got together but – and the Board was able to nominate an expert on that group which was Dr Neumann, but that wasn't engagement with the Board itself through that process and most importantly –

ARNOLD J:
Well, I don't follow that. I mean what, when you look at that consultation provision there are two things that you can be consulted about and, you know, they are either/or and the first one is the broader one and the second one is the risk assessment basically. Now here you've got work being undertaken on a quantitative model and the stakeholders have been given the opportunity to nominate an expert to be involved in the process of developing that model.

MR COOKE QC:
Yes.

ARNOLD J:
Why – I just don't understand –

MR COOKE QC:

Well I –

ARNOLD J:

– why that's not consultation?

MR COOKE QC:

I can accept that that is a form of engagement and, therefore, a form of consultation I have to – but the key problem with that is that there ended up being disagreement in the expert working group and then the Ministry commissioned EpiX Analytics to work up a model, putting in what parameters they thought appropriate to assess the risk and it was that output of that process that the Board never got to see and it was that output that turned – it is in the end critical because it was that output that led to the model having a risk of one in 1,227 years.

McGRATH J:

We're just looking at the matter of – at page 1996 and there was a statement that there were no specific matters requiring a decision.

MR COOKE QC:

Yes.

McGRATH J:

Now that I, in relation to pork, that I think can be seen as a reference back, if we're going back now to the Chief Technical Officer's paper to the Director-General you've just been looking at, to paragraph 5.1, "Materiality".

MR COOKE QC:

Yes.

ELIAS CJ:

Now what page are we at?

McGRATH J:

1573.

ELIAS CJ:

Thank you.

McGRATH J:

Now in the section on materiality it seems that the advice that's given is that you don't have to have regard to the recommendation if it's not material, meaning it's not contributing to determining the effectiveness of risk management measures for importation of pork. Now that looks a bit to me like a decision in relation – which in conjunction with the matter back on 1996, a s 22A decision?

MR COOKE QC:

Well it is, I agree that it is an important decision that then flow through to what happened the following year but I don't accept that that's compliant with s 22A(3). In fact what I think has happened is that this materiality sieve that the panel's findings and recommendations – well, actually just their recommendations, not their findings, just their recommendations are put through, it's only the recommendations then results in the misdescription of the question and the wrong answers in the later decision but it's been put through really an alternative process. We're going to go from the recommendations, were going to assess what we say are relevant recommendations and then we'll make a final determination based on whether there is effective management of the risk and that's not what s 22A and 22 require. Section 22A required free – required a transparent determination about the adequacy of the – consideration of the scientific evidence and through that process the required transparency has been obscured.

McGRATH J:

Yes, the Director-General did make a – or the Acting Director-General did make a decision on recommendation 7.1 –

MR COOKE QC:

Yes.

McGRATH J:

– by accepting that materiality was to be the primary criteria.

MR COOKE QC:

Yes, that's really picking up 5.1 than 7.1.

McGRATH J:

Yes, that's giving effect to 5.1 which gives the reasons for it and is really a decision in principle, isn't it, that you don't have to go any further with matters that aren't going to help you decision the pork IHS?

MR COOKE QC:

Yes, which means, and this has been done without any reference to the findings of the panel and is being done in a way that ultimately limits what happens as a consequence of a panel's report.

McGRATH J:

But he does say first that, "All findings and recommendations of the panels must be given consideration but here's a principle you can apply," and he's decided to apply that principle. What I'm wondering is whether that's not a determination of the issue in dispute in respect where that principle applies.

MR COOKE QC:

Well it doesn't purport to be it's just, it is a decision to apply materiality as a guide to which recommendations will be followed and –

WILLIAM YOUNG J:

Some are identified aren't they?

MR COOKE QC:

Yes there are in the tabulated form at some point in the decision paper –

WILLIAM YOUNG J:

Yes.

MR COOKE QC:

– but not findings just the recommendations. So the later decision described this as commissioning a work programme and, with respect, that's what it was. It was a programme of work developed by the Chief Technical Officer consequential on the panel's report, rather than being what the statute required which was, as soon as practicable after the panel's report you should determine the issue in dispute and this work progress commissioned under this decision delayed the ultimate determinations so that was a year after the panel had reported. So rather than it being compliant

with s 22A(3) in my submission it obscured the required determination and obscured the required transparency and the process that s 22A(3) was all about.

So that maybe an appropriate point to turn to the consultation aspect of the case although we have debated it already to some extent with your Honours and also I think we've debated the key aspects of consultation and identified that. In the end it's a matter of degree about whether further the changes made to the Neumann model, the previous models would have led to an obligation to re-consult and I've been asked to identify the extent of those changes.

I suppose the best place to do those is by going – picking up the written submissions of the Board where I've sought to summarise the evidence that Professor Morris gave in terms of the changes that have been made to the earlier Dr Neumann model.

WILLIAM YOUNG J:
There is a table given by Mr Zagmutt –

MR COOKE QC:
Sorry, Sir?

WILLIAM YOUNG J:
Mr Zagmutt gave a table in his affidavit.

MR COOKE QC:
Yes.

WILLIAM YOUNG J:
575, is that challenged, or not?

MR COOKE QC:
Which tab is your Honour under?

WILLIAM YOUNG J:
He is tab 40.

GLAZEBROOK J:
Which volume is that?

WILLIAM YOUNG J:
Tab 40, it's volume B. I think this is the right one.

ELIAS CJ:
Do you want to take us first to your submissions and then you can comment on –

MR COOKE QC:
I don't understand that to be a disputed table of the changes made to the model if it helps.

ELIAS CJ:
Right.

MR COOKE QC:
It's not always easy to understand what the table means, which is why I was –

WILLIAM YOUNG J:
Okay, well, whatever way – that was the one I looked at, that's all.

MR COOKE QC:
What Professor Morris did was focus on what he regarded as the key changes to the model and in our written submissions on page 27 I've set that out at paragraph 76 and Professor Morris' affidavit in question is the one behind tab 44 in bundle B. So – and we focus there on, well, Professor Morris focuses on three parameters. So one of the key ones, and your Honours will recall that from the panel's conclusions, was the volume of trade and –

GLAZEBROOK J:
Which Neumann model are we talking about?

MR COOKE QC:
The latest version of it so that was the Neumann model presented in the expert working group at the end of –

GLAZEBROOK J:
Right. I'm just clarifying, thank you.

MR COOKE QC:

And in my 76.1 Professor Morris explains that the Ministry had used historic data for the volume of trade and that in the export working group process Mr Glass had put forward evidence that the trade would increase to 60% of pork consumed. And Professor Morris explains by altering that parameter alone you significantly reduce the risk from 1,227 years to 350 years. And then possibly more significantly within that volume of trade assessment within the model there is a figure 2.6%. The effect of the 2.6% parameter is whatever the volume of imports that you put into the model, only 2.6% of the foreign imports will be regarded as being consumer-ready cuts of the type that's subject to the debate in this case. And the Ministry have reached the 2.6 figure on the basis that currently with imports of cured and cooked pork, only 2.6% of it would be capable of being released as consumer-ready cuts. So the current proportion of the imports cooked or cured that could be released as consumer-ready cuts is 2.6% of total foreign pork imports. And so that's the figure that the EpiX Analytics model has used in predicting the risk and Professor Morris said well the other information that's available if you put in the information as to what is likely to happen to imports if this new import health standard and you include Mr Glass' data, the median incursions reduce to once in 25 years. That's in my paragraph 76.2.

And then finally viral persistence. Again, if you alter the parameters about viral persistence you come down to a position where Professor Morris says the risk is once or twice a decade. So what this evidence demonstrates is the significance of the changing of the parameters which is why Justice White in his dissenting judgment said, "You can't just take EpiX Analytics as the final word on these matters because "–

WILLIAM YOUNG J:

Were any of these parameters not consulted on in the expert working group?

MR COOKE QC:

Well the – Mr Glass' input wasn't input in the expert working group so that evidence came out in that expert working group but what hasn't been consulted on is the way that EpiX Analytics has chosen particular parameters, stuck that in the model, and said here's the result. In other words we don't – the Board hasn't been consulted on the very critical conclusion of the EpiX working group process.

WILLIAM YOUNG J:

But were each of the parameters the subject of consultation?

MR COOKE QC:

Only to the extent they were discussed within the group.

WILLIAM YOUNG J:

Yes, sorry, that's what I meant. So each of them would have been discussed within the group?

MR COOKE QC:

Well, issues such as Mr Glass' view on the quantity of foreign pork would have been discussed in the expert working group process. What wasn't debated in the expert working group process is how those collectively are put together in the prediction in the model. And the other point Professor Morris makes about the model is that all this demonstrates the importance of a multi-point sensitivity analysis to see which of your parameters are sensitive in terms of the assumptions you make and they're critical of the EpiX Analytics model and would have been consulted upon it but there's been no multi-point sensitivity analysis of the EpiX Analytics report as there currently was on the earlier models but not of the EpiX Analytics report. So that's why the changings to these parameters in the remodelling exercise are pivotal because they bring the risk down from 1,227 years down to twice a decade so they're pivotal assumptions.

ELIAS CJ:

You said bring the risk down, put the risk up?

MR COOKE QC:

Yes, yes.

WILLIAM YOUNG J:

I've found Mr Zagmutt's table which is at 5, sorry, 387, tab 40.

MR COOKE QC:

It's 587 I think it is.

WILLIAM YOUNG J:

587, sorry.

MR COOKE QC:

I don't think there's any dispute about them being the changes.

WILLIAM YOUNG J:

Okay so as I read what he says, and it's not absolutely clear, he says there was a mistake in Dr Neumann's table because some cells weren't properly linked but that – was that that, and conceivably other minimal structural changes, all they put in was – he says, "The modelling changes were largely restricted to the mistakes that we found after reviewing Neumann's reworked model," which I take it to be cell linkages or whatever. And then I assumed at para 49 that they were, from what's said at para 49, they simply put in their assessment of values based on what had previously been discussed.

MR COOKE QC:

Well, all I can say –

WILLIAM YOUNG J:

That may be a different way of saying the same thing as you.

MR COOKE QC:

It's – the ultimate choice of all parameters go together to produce a number that spreads out and it's what you choose that is critical. Your model's only as good as what you stick in so – and the problem with this is that the decisions have all been made on a model where significant parameters have been chosen in the way that they have to produce the number that's very low and the Board's experts say those are improper assumptions to make and you haven't done a multi-point sensitivity analysis and from the Board's perspective it wasn't consulted on this version of the risk assessment which ultimately guided the whole thing. Not only that but it was declined under the OIA, so the Board sought to get a copy of the model and was declined under the OIA.

WILLIAM YOUNG J:

Say the Board had been consulted on this.

MR COOKE QC:

Yes.

WILLIAM YOUNG J:

And it put in submissions and Mr Zagmutt and his colleague had then repopulated the model, would that have to consult on that?

MR COOKE QC:

Well it's hard to know without knowing exactly what –

WILLIAM YOUNG J:

Yes, but I mean this is the music stopping somewhere argument.

MR COOKE QC:

Yes. I mean the music does have to stop at some point but the point here is that the Board has not had a proper opportunity to respond to this model at all, full stop, and its experts do have significant issues they say, they raise about it.

WILLIAM YOUNG J:

A lot of the issues are simply that it's wrong.

MR COOKE QC:

Yes.

WILLIAM YOUNG J:

Which is, in a sense, a bit confusing. I know it was relevant particularly to interim relief.

MR COOKE QC:

Yes.

WILLIAM YOUNG J:

And it might be relevant to relief anyway but it's slightly distracting at a process level.

MR COOKE QC:

Yes, but many of the assertions that it's wrong are backed up by what the panel has said, for example, the –

WILLIAM YOUNG J:
Yes, I understand –

MR COOKE QC:
– panel said you need to go get data from, about foreign trade to properly verify this and we've just got an assumption and the panel was critical about it being an assumption.

GLAZEBROOK J:
Well of course in s 22A(1) the significant concerns are bound to be concerns that the model is wrong otherwise they're not going to – or the decision or the science is wrong –

MR COOKE QC:
Yes.

GLAZEBROOK J:
– because otherwise they're not going to be significant concerns.

MR COOKE QC:
Correct.

GLAZEBROOK J:
So the Board in fact has to say things are wrong, doesn't it, in order for it to be a significant concern?

MR COOKE QC:
Yes it does.

GLAZEBROOK J:
I mean it doesn't, i.e., if it didn't say things were wrong then it couldn't be a significant concern and you couldn't trigger any process.

MR COOKE QC:
And it would also need an independent scientist to raise a concern for it to be able to – I mean the Board couldn't just assert there’s a problem –

GLAZEBROOK J:

Yes, exactly.

MR COOKE QC:

– it would have to consult with independent experts such as Professor Morris who would raise his concerns and that could be subject to a panel process. So –

GLAZEBROOK J:

I just – didn't the panel make recommendations about sensitivity analysis or am I imagining it?

MR COOKE QC:

Yes.

GLAZEBROOK J:

I think – can you tell me where that is?

MR COOKE QC:

That's probably in the section about quantitative models. If we go back to that 1MF and I – sorry, wrong volume. It's volume E, tab 70.

WILLIAM YOUNG J:

I'm sorry, paragraph 70 – tab 70 did you say?

MR COOKE QC:

Tab 70, yes and looking at determined reference H, page 1480, and you will see, perhaps on 1481, paragraph 12 over to 13, "New additional data, notably on movement of pigs … likely amount of uncooked pork was obtained. The findings have not been used to update the models. The panel believes that the two parties have become unduly polarised in their views on the use of modelling. Risk managers must base their decisions on all available evidence, including quantitative models, if available and of sufficient quality. A more extensive investigation of qualitative results was earlier suggested by one of the external reviewers … whilst the validity of input values may be critical, the use of sensitivity analysis offers a possibility to identify influential parameters. This can be used to set priorities for additional data collection."

GLAZEBROOK J:
So I thought there were more specific recommendations that they may have been in conjunction with specific variables rather than – that I'm thinking of rather than the –

MR COOKE QC:
Yes, there is that and I'm just trying to think about the overall issue whether it has – yes, in the overall issue, page 1484, paragraph 11, the very end of that. "Data gaps create uncertainty especially when there are no assessments of the sensitivity of the analysis and the assumptions made on estimates." That's probably what your Honour had in mind.

So to bring the Board's two key points together in this case. What we say is that in terms of the analysis of the risk and the application of the scientific evidence in the materials that were consulted on, the panel found that there were deficiencies in the consideration of the finding – of the scientific evidence and made a number of findings. That was never the subject of a s 22A determination and that is what s 22A(3) requires. Then what did happen was that in response to the report the Ministry embarked upon a new process which resulted in the EpiX Analytics model. The EpiX Analytics model was not consulted on and is not being subject to review a panel. So we can't know, you don't have the veracity that this process was inserting to ensure that the consideration of scientific evidence underpinning the IHS is transparent and robust because it hasn't been checked against the statutory procedures.

GLAZEBROOK J:
So you do seem now to be saying that it should have gone to an independent panel – well the first process is, it should have been consulted on –

MR COOKE QC:
Yes.

GLAZEBROOK J:
– and if significant concerns were raised with it, which they may or may not have been depending upon what the model did but likely were given that the working group couldn't come to a view on that, a united view on that, then there should have been an independent panel and do you want to explain the statutory way round on

that. Is it just going back to that this was so new and the decision was going to be based on it –

MR COOKE QC:
Yes.

GLAZEBROOK J:
– and if the decision was going to be based on that and not the earlier analysis or at least if it was based on the earlier analysis it was very much influenced by the new analysis as per the report, that final report.

MR COOKE QC:
Yes.

GLAZEBROOK J:
Then, in fact, it was a starting again –

MR COOKE QC:
Yes.

GLAZEBROOK J:
– is that the –

MR COOKE QC:
Yes, that's it and the Director-General, if called upon to say that this needs to be subject to a further panel would apply that provision in a *Gazette* notice saying, well has it already been subject to analysis by a previous panel or not. Of course, the issue here and the previous panel, the risk analysis wasn't based on a modelling exercise and the issues that we now have with the model, things like the sensitivity analysis that's been applied would raise new issues we would say, but the reality is we need to get first things first because we would say if the s 22A determination is made properly it may be that the appropriate course is for the Ministry to change its proposals in light of it now knows what the concerns the Board's experts have with the EpiX model. There's going to be the preceding step first, what does the Ministry do? It might fix things up properly before it then consults on what it finally comes up with having now known what the concerns are.

Now one thing I haven't done in the submissions is gone to the Court of Appeal's analysis although I've mentioned it on the way through in terms of the way the Court of Appeal interpreted ss 22A and 22 together as one provision. I'm – it depends on the enthusiasm the Court has for me to address on that point. There are paragraphs in the judgment which, in my view, collapse together ss 22 and 22A in the way that isn't legitimate in my submission, it actually undermines the very purpose of s 22A as anindependent process and the analogy I've drawn in the submissions is with *Discount Brands Limited v Westfield (New Zealand) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597 and sometime ago in this Court's jurisprudence but what *Discount Brands* says is you don't apply Wednesbury unreasonableness to this, to a challenge to procedural protection surrounding ultimate decisions. You give full effect to those procedural protections and regard them as significant and independent and different from the substantive decision. It seems to me that the Court of Appeal's decision collapses the two together in a way that deprives it of its protective character.

That's all I need to say unless your Honours want me to go to the passages of the judgment?

ELIAS CJ:
No I think that's – unless anyone has got any questions on that? No. So that completes your submissions, Mr Cooke?

MR COOKE QC:
Yes, your Honour.

ELIAS CJ:
Thank you.

COURT ADJOURNS: 1.00 PM
COURT RESUMES: 2.13 PM

ELIAS CJ:
Yes, Mr Palmer.

MR PALMER:

Thank you, your Honour. In the brief few minutes that I have to address the Court for which, on behalf of the National Beekeepers Association I thank the Court sincerely. I want to leave two points in your consciousness. The first is about purpose and the second is about precaution. Both of these points are important in the National Beekeepers Association's view to the Court's judgment in this case irrespective of the outcome, because what the judgment says about these two matters, purpose and precaution, in general, with affect the future decisions of the Ministry of Primary Industries (MPI) and including those regarding honey which of course is a key concern of my client.

So in relation to purpose, the National Beekeepers Association's core concern is that the purpose of the Act ought to be an important influence on MPIs application and interpretation of biosecurity law. To date the NBA does not consider that that has been the case in a general way and subs record that view. Submissions record that view that in the NBAs view MPIs attitude is too oriented towards free trade and insufficiently concerned to uphold the effect of biosecurity of New Zealand. It is that attitude to biosecurity which is crucial to informing the decisions of MPI under the Biosecurity Act and its decisions that are at issue in this case.

In the submission of the NBA, MPI's attitude to biosecurity should have, at its heart, the purpose of the Act. The purpose of the Act in this regard relates to the effective management of risks as per s 16 and also as hinted at in the long title of the Act. The effective management of risks relies on robust science. It must be consistent with New Zealand's international obligations but they are not the starting point and in the submission of the NBA it should include a precautionary approach to the management of risks.

So in the submission of NBA here MPI may only relax the preventative biosecurity measure of an import health standard on the basis of robust, independent, scientific analysis which is transparent and which the affected industry has the opportunity to test on the basis of a precautionary approach to the biosecruity risks. "As the precautionary approach" which is the second point I want to emphasise.

In MPI's written submissions which respond to the NBA's submissions on this point, there is what I think can fairly be characterised as some dancing around the question of whether and how a precautionary approach applies. I think that MPI in its

submissions acknowledges that it relies on a precautionary approach in general and those, I take that from – I won't take you to them, but from paragraphs 166 and 169 of their submissions, I think that is the acknowledgement but I confess that I don't understand quite how MPI says it has applied that approach in this case and, no doubt, that is something that the Court can take up with my learned friend, Ms Gwyn, if it wishes.

What MPI does say is that the National Beekeepers Association wants to eliminate all risks and that is simply not correct. What the National Beekeepers Association says is that a precautionary approach to biosecurity risks is inherent in the SPS Agreement and other international instruments and in MPI's own guidance documents, and it should be deployed by the Chief Technical Officer and the Director-General in making decisions under ss 22 and 22A. In the Association's view a precautionary approach was not taken in what the panel here described as MPIs assumptions about the amount of uncooked pork that was likely to be discarded. Assumptions which were the subject of concern by the independent panel. Those concerns MPI refused to address.

So when you stand back from this case, and this is really my final comment, when you stand back from this case you have here a situation where MPI is proposing to relax biosecurity on the basis of an assumption that a three kilogram restriction on uncooked pork will mitigate the biosecurity risks that meant that it needed to restrict imports before that. Those risks could have potentially serious consequences for the pork industry and if the same approach is applied in other industries serious consequences are for New Zealand biosecurity and economy as a whole, and the assumptions were questioned by an independent panel and the concern is not addressed.

GLAZEBROOK J:

Mr Palmer, are you suggesting that every assumption you look at on a precautionary approach rather than merely taking the definitions in the Act itself which encompasses a precautionary approach but also reasonable to suspect that it may, and that seems to me to encompass a precautionary approach to the general decision making. It doesn't mean – and I wouldn't even have thought that the precautionary approach in general environmental laws that you have to take a precautionary approach to each individual assumption that you're making.

MR PALMER:

No, I agree –

GLAZEBROOK J:

It's an overall assessment –

MR PALMER:

– I agree with that.

GLAZEBROOK J:

– taking a precautionary approach, isn't it?

MR PALMER:

Yes I agree with that, your Honour, but the point is that in the previous Beekeepers case, *National Beekeepers Association of New Zealand v Chief Executive of the Ministry of Agriculture and Forestry* [2007] NZCA 556, the Court of Appeal stated, made a statement which suggests that precaution is not so relevant in biosecurity decisions. That is a key point which I think it would be helpful if this Court were to clarify.

GLAZEBROOK J:

Well wouldn't we just clarify by saying – if we were going to clarify it by saying, look at the definition that the Act provides?

MR PALMER:

Yes that would be helpful.

GLAZEBROOK J:

All right.

MR PALMER:

But then the submission of the Beekeepers Association, what was decided here was not consistent with a precautionary approach and was not consistent with the purpose of the Act and that's all I had to say.

ELIAS CJ:

Thank you, Mr Palmer. Yes, Ms Gwyn.

MS GWYN:

Sorry, your Honour, this case has generated quite a lot of paper.

ELIAS CJ:

Yes, just set it up.

MS GWYN:

What I'd like to do, your Honour, in the relatively limited time available is to take the Court to the key documents, some of which have not yet been discussed this morning. Before I do that I wanted to touch briefly on the statutory definitions and I appreciate that they are key to this case but I think they have been traversed this morning and are well traversed in the written submissions, and the key points I want to make about ss 22 and 22A are, or starting with s 22A. The first point is that it's not about setting up a dispute resolution process. Now this has been a feature of, or this discussion has been a feature of the case to date but as I understand the way my friend, Mr Cooke, put his case this morning the appellant is perhaps not now so focused on characterising the s 22A process.

ELIAS CJ:

Well, I wondered really whether it was a mischaracterisation in the Court of Appeal judgment in any event because it really seems forlorn to suggest that it is something like a disputes resolution process.

MS GWYN:

I don't want to be ungenerous –

ELIAS CJ:

Yes.

MS GWYN:

– your Honour, but I don't think it was a mischaracterisation that –

ELIAS CJ:

All right, okay.

MS GWYN:

– that certainly was the way in which the argument was cast in the High Court and in the Court of Appeal.

The second general point is that throughout the ss 22 and 22A process the Director-General remains the decision-maker. The panel is not constituted as a decision-maker, it informs, the review process informs the Director-General's decision but throughout he remains the decision maker and that's evidenced not only by the provisions of ss 22 and 22A but it's also very clear when one looks at the *Gazette* notice in relation to the setting up of the panel, many of the provisions in that make it clear that it's the Director-General's choice, not unconstrained of course but his choice whether or not to accept a request for a panel. He ultimately selects the panel members, although he calls for nominations, he sets the terms of reference although he consults and ultimately he receives the panel report and makes a decision on it. So throughout the Director-General remains the decision-maker.

GLAZEBROOK J:

And would you say that the decision to have a panel is constrained by internally within the *Gazette* notice by, is it s 9 of that or is that –

MS GWYN:

Yes, your Honour, it's constrained in the sense that the Director-General must assess whether there is – a matter has been raised which is a significant concern, so there's an evaluation there –

GLAZEBROOK J:

Yes.

MS GWYN:

– there's a significant concern, is it something that hasn't been dealt with before. So he's constrained in that sense and I suppose, ultimately perhaps, constrained by the possibility of judicial review of his decision not to set up a panel. But, yes, we say it's implicit in the *Gazette* notice that there is, there are those elements.

McGRATH J:

You characterise the *Gazette* notice as subordinate legislation, do you, in effect?

MS GWYN:

Yes, your Honour, and –

McGRATH J:

As to the process to be followed?

MS GWYN:

That's right. That's the one document I can't find. The second general point that I'd like to make about section – about the statutory provisions is, and this is a point that comes through very strongly in both the High Court judgment and the Court of Appeal judgment is that the two provisions link together. They operate together in, as Justice Williams said, "In a flexible way," and the Court of Appeal said, well it's axiomatic that the two sections have to be read together and I think that must be so and in my thinking of it, if I were a whiteboard person I would draw on the whiteboard the s 22 decision tree with an arrow out to the side with the s 22A process. So the s 22 process is commenced at a certain point, a stakeholder expresses a significant concern, a panel is convened and reports and then it reports back to the Director-General and in turn informs his s 22 decision.

So the key point is that s 22A is not a discrete process. It's for a purpose and its purpose is ultimately to inform the setting of import health standards under s 22 and that is –

GLAZEBROOK J:

All right, sorry, just to check. They report back to the Director-General and the Director-General, you accept, has to make a decision under s 22A(3). So there's a double stage to that process, isn't there?

MS GWYN:

Yes I do accept that your Honour, yes. And in, as a general point when one looks at these two provisions and how they operate in practice it's important, as the Court of Appeal said in, and this is not in the submissions but in *SMW Consortium (Golden Bay) Ltd V Chief Executive of the Ministry of Fisheries* [2013] NZCA 95 case that I guess brought together the threads of authority on statutory interpretation. What the Court said there is that, "The legislation should be interpreted in a realistic and practical way in order to make it work," and that's certainly our submission here

but one must look at the total picture to see how these two provisions fit together and what the practical consequences are of the way in which they operate.

I wanted now to turn to some of the documents that we haven't looked at already and I wanted to go first to the import risk analysis and this is at volume C, tab 53, and this if you like is the document that has kicked off this process and as your Honours will have seen from the evidence and from looking at the report itself, prior to 2001 the scientific view was that it wasn't possible to transmit PRRS by feeding raw PRRS infected meat to pigs. There were two studies, one commissioned by the Australian government and a Canadian study that reached the view that it may in certain conditions be possible to do so, and as the evidence notes the conditions in which those studies were conducted were highly artificial and a number of experts questioned their relevance to practical, a practical situation, highly artificial and experimental conditions that perhaps bore little relevance to practicalities of commercial pig farming.

ELIAS CJ:
Sorry, is that something that you're saying or is this in the –

MS GWYN:
It's in the written submissions, your Honour, I'm trying to truncate –

ELIAS CJ:
Yes.

MS GWYN:
– I'm at –

ELIAS CJ:
Sorry, it's not in this report that you've just taken us to?

MS GWYN:
No it's not –

ELIAS CJ:
No.

MS GWYN:

– it's, if you like, the precursor to the report –

ELIAS CJ:

Yes.

MS GWYN:

– so these studies came along and as a result the Ministry promulgated some provisional import health standards and they were provisional in the sense mentioned under article 5(7) of the SPS Agreement in that, that they could remain in place until the science necessary had been produced but they were time bound in that sense. So the Ministry promulgated these new provisional import health standards which required all imports of pig meat from countries where PRRS is known to be endemic to be cooked or treated. And then in compliance with New Zealand's obligations under the SPS Agreement it set out to undertake a risk analysis in order to decide whether those protective measures should stay in place or whether some other form of import health standard would be appropriate and the import risk analysis is that analysis of the risk and I want to go very briefly through the document to give an idea of how the process was conducted and you'll note at the beginning of the report, at page 809, note that it follows the guidelines in the World Organisation for Animal Health, the OIE handbook, their risk analysis methodology and then it works through each stage of that methodology so first there's the identification of the hazard at page 813 and the hazard here is PRRS and this is relevant to a question that came up this morning about why the Ministry and the panel itself was focused only on PRRS, this whole process, right from the outset was about PRRS it wasn't about other potential risks. So there's the risk – the hazard identification at 813 and then over at 838 the conclusion on the release assessment –

GLAZEBROOK J:

838?

MS GWYN:

838, and the conclusion there is considering the models show there's a moderate to high likelihood of infectious PRRS being present in some tissue at the time of slaughter. Low likelihood of it being present in meat at the time of slaughter. Likely that significant levels of infectivity will survive chilling and freezing. Therefore it is considered that there is a non-negligible likelihood that chilled or frozen pig meat

from a country with endemic PRRS will harbour infectious PRRS virus. So it's necessary for the risk analysis then to go on to the next steps and the next step is the exposure assessment at the top of page 839. "Examines the likelihood that any PRRS virus present in imported meat will come into contact with, and result in infection in, susceptible species in New Zealand," and its own pigs that it's concerned with. And then over at page 846 the exposure assessment conclusion and the first point is significant. The PRRS virus will be inactivated by normal cooking so the only exposure pathway of relevance is the feeding of raw pork.

GLAZEBROOK J:
Sorry, I missed out on finding out what that page was?

MS GWYN:
Sorry, 846. It talks about the studies. Low – then three, low likelihood that scraps of raw pork in quantities similar to those used in transmission studies will be present in kitchen waste. Moderate likelihood scraps of raw pork will be generated from restaurants et cetera. Five, the form of pig meat likely to be imported into New Zealand, and the likely processing that it is submitted to prior to being sold, means that it is very unlikely to contain infectious PRRS virus. Illegal to feed raw meat scraps to pigs in New Zealand but then noting compliance with the garbage feeding regulations is high in the commercial sector but probably low in other sectors and then the conclusion on the exposure assessment, "It's considered that for piggeries complying with the garbage feeding regulations the likelihood of exposure to infective PRRS in pig meat is essentially zero. For other piggeries the likelihood of exposure is very low."

And then over at page 852 there's a consequence assessment conclusion and noting that second paragraph, "If PRRS were introduced as a result of the illegal feeding of raw imported pig meat to pigs, the majority of impacts of PRRS virus would be the direct disease effects on small non-commercial breeding herds. Spread from such herds to commercial herds would be likely in the case of lapses in biosecurity," although the evidence – or a study after the panel report noted that there was no record of pigs being shifted from non-commercial herds to commercial herds. Then, "Apart from the direct losses on affected farms, the consequences of PRRS introduction on the economy... are considered to be negligible." And then 853 the risk estimation and then having gone through that process the analysis looks at how do we manage this risk and at page 855 the risk estimate is set out. "In this situation

risk management measures could be applied," and then it sets out some options available and at the foot of that page, measures the reduced likelihood of release, removal of high risk tissues.

Over the page, stabilised herds, and the bottom of the page, treatment of pig meat and then on page 857, measures that reduce the likelihood of exposure, "Any form of meat that minimises trimming or cutting during its preparation prior to cooking can be expected to pose a lower risk than whole carcasses because of the lower likelihood that scraps will be generated prior to cooking. For example, in the case of consumer-read cuts it's considered there is a negligible likelihood of meat scraps being generated prior to cooking." And then the recommended sanitary measures, in effect cooking, curing or in the form of consumer-ready high value cuts.

Now that risk analysis was the subject of extensive peer review. At the front of the risk analysis there's a list of those who were involved, both in its preparation and its review, that's at pages 801 and 802, and Mr Pharo's evidence in particular describes in some detail the very detailed process. He described it as unprecedented the degree of consultation and peer review that the Ministry adopted during the course of adopting the risk analysis but also subsequently.

That peer review went out for public consultation. There was a review of the submissions and while they are not in the evidence because they are hundreds of pages there was published a full review of the submissions made on the risk analysis and the Ministry's response to each of those submissions and then as a result, this is at paragraph 22 of the submissions, draft imported health standards were released containing those risk management measures that I took you to in the risk analysis and again they were publicly consulted on.

And one of the things that is significant about this case, and it is noted at paragraph 23 of the submissions, is both at the stage of the risk analysis but in fact throughout there has been sharp divergence of views on the science if you like. Mr Pharo notes, and this is particularly at 106 of his evidence, and he's at volume B, tab 22, talking about the review of submissions on the draft IHSs, says, "Submissions could broadly be divided into two groups, those from overseas pig producer groups or regulatory agencies and those with an interest in importing pork were supportive of the general outline of the draft import health standards, notwithstanding that some submitters strongly challenged the basis for MAFs conclusion." And then the second paragraph

that he sets out the other group of submissions was from those associated with the New Zealand Pork Industry.

These submissions generally reject the draft import health standards on the grounds they don't adequately manage the risk." And as I say, that is a theme throughout this process that there is quite strong divisions between the experts on the scientific conclusions and that's significant because what it indicates is this is highly unlikely ever to be a situation where there will be consensus on the science. Given the unprecedented nature of the consultation in review here and the fact that as Mr Pharo notes, two of the world's experts in this area reached a different view on whether there was any risk of there being, any risk at the very first limb of the risk analysis. I think it indicates that it's a forlorn hope to think that there will ever be consensus on the science and, indeed, that's not what the statute requires. It requires the Director-General to consult but it doesn't require him to reach consensus.

I'd like to go to, and I realise that I'm skipping through parts of the submissions, but in the interests of time I'd like to take –

ELIAS CJ:
We thought that we would probably sit until 5pm and take an adjournment at 3.30pm for 15 minutes.

MS GWYN:
Thank you, your Honour, that's helpful. If we could look then at the panel report and that's at volume E70 and the first point to make about the panel's report is that while it was no doubt intended to be helpful it was as Justice Williams said very discursive and in fact reads more like a scientific peer review than a statutory report. It doesn't clearly distinguish findings from general observations and nor does it link those observations necessarily to recommendations and the issue there is not just one of terminology, whether or not things were labelled findings or not. It is a matter of substance because when one looks at the report, and I will go to particular parts of the report, it's very difficult to say what the Director-General could have pulled out of the report as findings to put in his decision document, as the appellant says he should. The appellant says well the findings should have been listed but the difficulty is, in most cases, to actually locate what are the findings. The recommendations were clear, and those were set out in the decision document, but the findings are not.

Reading the appellant's submissions it becomes clear that, and this is particularly at paragraphs 50 and 52 of the appellant's submissions, it becomes clear that the appellant equates criticisms, or what it reads as criticisms, with findings.

If I could take your Honours to some particular aspects of the panel report perhaps starting with question A on page 1457 and the appellant is critical of the Ministry in relation to this finding but when one – in relation to this question, but when one reads what the report says in my submission it is very difficult to discern anything in the nature of a finding. At paragraph 3, "The panel limited its consideration to PRRS. This was because the scope of a complete review of all animal and public health hazards wasn't feasible in the available time and also because the documents currently provided are limited to PRRS. Also, PRRS is the present focus of the IHSs," and so on.

Then at 4 it says, "However, the panel thought that some general comments regarding the process of hazard identification would be of assistance as this process relates to PRRS as well as other animal and public health hazards." And then it goes on to provide what it has called itself some general comments and in my submission there is nothing really in there that one could say was a finding. Notwithstanding that, and I will come back to this, the Ministry does act on the recommendations here. The appellant says it doesn't but I'd like to take your Honours a little later to both the first Director-General's decision and the second and when one has them alongside each other you see very clearly that the Ministry didn't disregard this recommendation at all.

And then perhaps if – looking at question C at page 1465, again, in my submission, there is nothing in this question that one could seize on as a finding. At paragraph 2, "The panel claims no expertise in the factors influencing the dynamics of international trade in meat products nor does it have ready access to relevant data." Three, "It does recognise the importance of this issue as part of the risk assessment," and then at four, "The risk analysis doesn't address the impact of trade volume directly although it refers to an evaluation for historical imports. There is some benefit in investigating this aspect but if this is not done the panel's recommendation in section 2.4 is relevant here." And again, in my submission, there's little that the Director-General can grip onto as a finding. Certainly there were recommendations

and he does act or have regard to those recommendations, but it's very hard to find a finding.

WILLIAM YOUNG J:
Like a judgment, sometimes.

ELIAS CJ:
Speak for yourself.

MS GWYN:
Likewise at question D on –

GLAZEBROOK J:
Well, you say the recommendation picked up any finding there might be, the finding being that it would be perhaps that it would be good to do something about getting some more information.

MS GWYN:
Well, in that one perhaps it does, your Honour. In some of the others I'm not sure that there is even –

GLAZEBROOK J
No, no.

MS GWYN:
– even a link. Yes.

GLAZEBROOK J:
But there it seems to be a reasonable –

MS GWYN:
Yes.

GLAZEBROOK J:
– correlation between those two, doesn't it?

MS GWYN:

Yes.

ELIAS CJ:

Isn't the recommendation, doesn't it implicitly contain a finding that the science referred to is not sufficient?

WILLIAM YOUNG J:

I think some do and some don't.

ELIAS CJ:

Yes.

MS GWYN:

Not necessarily, your Honour, because many of the panel's recommendations are not about what was the state of the science at the time the risk analysis was conducted, it's about saying, well, in a couple of cases it says, well, there have been subsequent studies you should have regard to those, and in other situations it says, well, this is an area where it may be useful to think about generating more data or going out and doing another study, so they're not necessarily criticisms of the adequacy of the Ministry's regard to the science at the time, and I think that's captured –

GLAZEBROOK J:

Although the point is though, isn't it, that if you should have done another study in order to come to a reasonable risk analysis then that is a criticism – I'm not being specific about anything here although possibly that trade volumes might be an indication of one where it says, well, you should have done that at the time because that was an important aspect of what the risk might be because if the volumes were to increase 200-fold, for instance, then it has an obvious effect on risk I would have thought.

MS GWYN:

One might read it that way but on that particular issue of course what the Ministry did was to, looked at historical volumes and it looked at whether it could realistically and usefully predict what future volumes would be and made an assessment about

whether that would be useful or not. Of course, and I will come to this, of course there was Mr Glass' data on import volumes.

GLAZEBROOK J:
Yes I'm probably not interested in whether it was right or not –

MS GWYN:
Yes.

GLAZEBROOK J:
– it's just what you could infer from the –

MS GWYN:
Perhaps in relation to some of the issues, your Honour, but in others the comments are much more discursive –

GLAZEBROOK J:
That's certainly true.

MS GWYN:
– and, yes, yes.

Looking at question D at page 1467. In the appellant's submissions it characterises this as a criticism by the panel at paragraph 3 on that page, when in fact what the panel says is, "It's not within the terms of reference of the panel to assess the capacity of MAF to monitor compliance, maybe an area that warrants further investigation." Again a question of, is that a finding or is that an observation that the Ministry can act on or not. Question F at page 1473. Again it's – while it's useful commentary from the panel it is difficult to discern the nub of what it's saying. So at 7, "The panel is very aware of the considerable difficulties in obtaining and maintaining the currency of animal population data." Some general concerns at 8. 10, the panel concludes that, "It is necessary to obtain the current population data and ensure its availability." And then it looks at what information is available and then over at 15 it talks about some data collected by Pearson in 2008 so that's after the risk analysis and talks about the simulation model, the Neumann model. These could be used by the Ministry and so that follows through into the recommendations but again it's difficult to characterise it as a finding.

And I think this – I won't go through all of the questions, but I think when one looks at what the panel said in relation to each question it is a discursive document, it's useful but it is as Justice Williams said, “More like a scientific peer review perhaps than a report required under a statutory provision,” and it doesn't fit into the kind of neat legal framework which my friend disclaimed but in fact that's what he’s trying to impose on this situation, is a neat model where the panel makes clear findings, those findings should be set out verbatim in the Director-General’s decision document and then his reasoning and recommendation follow, and my point is that at a practical level that simply wasn't possible which is not to say that he didn't have regard to everything that was in the panel report, and I will come back to that question of what the Director-General had in front of him when he made his decision.

I’d like to go next to the first Director-General decision and that's at volume E, tab 80.

WILLIAM YOUNG J:
Do you treat this as a part of the decision or not?

MS GWYN:
I don't want to fudge but I don't – I think the two decisions have to be read together. The second decision made by Mr McNee is, clearly on its face, the s 22A decision but it is informed by the earlier decisions taken by Mr Sherwin in this first document, and issues A and G are a case in point where this first document makes decisions about the recommendations in relation to questions A and G and those decisions are set out in the document that Mr McNee had in front of him, and presumably he could have decided to do different or further work but I think the two documents do have to be read together and in my submission that's not a difficulty if one steps away from seeing this as a formal dispute resolution process if –

ELIAS CJ:
Well, you don’t have to think of it as a dispute resolution process. What do you characterise – how do you describe this document? Is it in response – is it the determination or is part of a determination?

MS GWYN:
It’s a part of the determination, your Honour, because, as I say, it does, it – as your Honour’s noted this morning, it makes decisions as to, well, issues A and G but

also decisions as to materiality in respect of the recommendations, which of the recommendations for further work should be followed up on. There are decisions made about that and two work streams set in train. So it's certainly a part of the overall s 22A decision. And to the extent that my friend says, "Well, the important thing here is transparency about what the Director-General decided and why." This – regarding the decision as being in two parts doesn't detract from that because each of the documents is clear on its face, in my submission, as to what was had regard to, what decisions were taken and why, and the two decision documents dovetail together.

ELIAS CJ:
I don't suppose you've got anything like a schedule of what's determined in this one and what's determined in the other one?

MS GWYN:
The second decision, your Honour, I think is, effectively has a consolidated –

ELIAS CJ:
I see.

MS GWYN:
– version so that's –

ELIAS CJ:
Well, is it necessary to go behind that then?

MS GWYN:
It may not be, your Honour.

WILLIAM YOUNG J:
Well, the advantage for you with the first one is that it does seem to contain a determination that the Director-General accepted the findings that there had not been sufficient regard to the science.

GLAZEBROOK J:
And then went ahead with a work programme –

WILLIAM YOUNG J:

And then went ahead with what followed.

GLAZEBROOK J:

– to rectify it.

MS GWYN:

He commissioned certain work, yes. Yes, that's correct, your Honour. One of the reasons too why it's useful, when my friend took you to the second decision document this morning, and this is particularly in relation to issues A and G, he looked only at the specific response in this document and didn't take your Honours to what's set out about the earlier decision so – for example, in relation to issue A, and that's at page 1980, my learned friend took you to the decision at the bottom of the page, decision in relation to this matter providing rationale.

ELIAS CJ:

Sorry, 1980?

MS GWYN:

1980. So my friend took you to that sentence, "There are no specific matters requiring a decision," and his submission on that basis was that this was an issue on which the Director-General simply made no decision, but when one reads that as a whole, if you go up to the box where it sets out the panel recommendations, then underneath is the MAF response to panel recommendations and that is derived from the first Director-General decision, so both recommendations were noted and passed to the Board a change programme for consideration, and then there's a bit of explanation of that at the bottom of the page. So it's quite incorrect to say that the Director-General failed to make a decision on issue A. And –

GLAZEBROOK J:

Well, the decision was more generic, I suppose, wasn't it, rather than specifically related to hazards related to pork but I suppose you would say, well, that was a reasonable –

MS GWYN:

The recommendation was more general.

GLAZEBROOK J:
– response to it, yes.

MS GWYN:
Yes, the recommendation was make your process of hazard identification generally more explicit and specify events that would trigger it. So the recommendation wasn't specific to PRRS and so the response in that situation is to say, well, this is a generic issue, we will pass it to our border change programme which deals with these generic issues. So in my submission, a perfectly reasonable response to that recommendation.

And then likewise with issue G, and this is on page 1996 about aerosol spread and my learned friend –

ELIAS CJ:
What is aerosol spread, is that just by air?

MS GWYN:
Yes. I don't think it means anything more than that but I –

WILLIAM YOUNG J:
Like a cold.

ELIAS CJ:
And area, what, is sort of on the ground or something? It doesn't matter.

WILLIAM YOUNG J:
I think it really relates to how one pig might affect another pig without physical contact.

MS GWYN:
Yes, yes, and –

WILLIAM YOUNG J:
Or one eating the other.

MS GWYN:

– there's interesting material in the evidence comparing the New Zealand pig industry where, at its most concentrated which is in the Canterbury area, there is still a very low density of pigs and, therefore, a much lower risk of area spread than there is in, for example, Minnesota where there is a very dense pig population.

In relation to G, again my learned friend took you to the decision at the bottom of the page which says there are no specific matters requiring a decision but in fact if one looks at the bottom of the box, the MAF response to panel recommendations, and this is lifted from the first decision document, they have made an assessment of the recommendation and what to do about it. "It would be possible but expensive to carry out surveys of this nature, such information would quickly become outdated." And then the second bullet point, "Documents published by MAF after the risk analysis, for example, the – after the 2006 risk analysis, for example, the reviews of submissions on both the risk analysis and the IHS discuss in detail new information about area spread. MAF has also discussed this issue with recognised international experts and will take into account any new information as it comes to hand."

So it's simply not correct to characterise that as an issue where the Director-General has ignored the panel recommendation and made no decision on it.

The other, or one of the other aspects of this second – perhaps I'll come back to the Director-General's decision and try and deal with things sequentially. After the first Director-General decision there was, as we've seen, two streams of work set up and much of the further work was concentrated in the expert working group, and I think it's useful to go to the report of the expert working group which is at E88. And in fact there is an earlier, slightly earlier document which I need to locate but there is a – before the formal setting up of the expert working group there was a meeting of stakeholders called by the Ministry to discuss how it was proposed to take the issues forward following the panel report. That early document is at tab 73 in volume E and you'll see there it notes at 1515 of pork stakeholders meeting and then sitting on top of that is a summary of the meeting and on page 1527 there's a list of attendees at the meeting and you'll see there [that] there are three representatives from New Zealand Pork, Mr McIver, Ms Clement, and Mr Kay. And then going back to page 1513, the summary of the stakeholders meeting. The penultimate paragraph on that – first, the paragraph in the middle. Jonathan Kay, representing the Pork Board, outlined an alternative view. He believed any attempt to backfill existing import

health standards was flawed. Then the last sentence there, “Should conduct a new hazard analysis and work through the risk assessment process again from the start,” so that was the Pork Board’s immediate response at that point.

Then the penultimate paragraph on that page, “New Zealand Pork strongly supported formation of a stakeholder working group to progress panel recommendations. The role of such a group would be to provide advice to the D-G rather than decision-making which is the role of the D-G. The purpose of the group would be to step through the risk analysis process, assessing where there was a need for new or further information, but moving on where existing risk analysis information was complete. New Zealand Pork sees the key advantages of such a process as transparency, which in its view would reduce consultation time significantly, as all relevant players would be around the table. Other stakeholders were also supportive.”

Then if we go to the report of the DWG itself at tab 88, and there’s an executive summary and then a Chair’s summary of the process and findings. At page 1643 paragraph 7 the Chair – it was Mr Matthew Stone, he notes at paragraph 7 MAF’s approach to facilitate the discussion rather than advocate or defend the revised analysis. Several sentences down, “Polarisation became readily apparent with respect to the overarching consideration of the risks and risk management for importation of pork between some experts representing domestic stakeholders and some experts representing international stakeholders,” so again the theme, if you like, there isn’t a consensus on the science.

It’s useful to look – I should have taken you to the composition of the expert working group, and that’s in the terms of reference which start at page 1657. Perhaps while I’m on that page, it sets out in the second paragraph there the risk question considered by the risk assessment, “What is the likelihood expressed in the frequency of PRRS being introduced into pigs in New Zealand as a result of importation of fresh frozen pig meat in accordance with the commodity definition within the provisional import health standards?” So imported pig meat which isn’t subject to cooking or pH curing, and then the purpose of the working group, consider the validity of the risk assessment model in relation to model design and structure. The input parameter distributions use the outputs. Consider whether the risk assessment model and report can be considered to have appropriately addressed the panel’s recommendations in relation to undertaking qualitative modelling using

the Neumann model adjusted to take into account the dose response information. Then the composition of the group is over at 1659, so the MAF representatives and the independent experts, Drs Groenendaal and Zagmutt, and then over on page 1660, the stakeholder nominated experts and you'll see there Dr Eric Neumann, who's nominated by New Zealand Pork, and then some others, for example, Mr Steve Glass, who's nominated by various pork industry bodies.

The bottom of the page, the expectations of the stakeholder nominated experts, they'll participate in all three working group teleconferences. They'll identify issues for discussion. They'll submit a draft review for discussion within the working group third teleconference, and they'll submit a final review by 20 October. So clear expectations around what they were there to do and then over at the foot of page –

McGRATH J:

That was individually, doing all those things?

MS GWYN:

Well, as your Honour will see from the full report, each individual member presented – identified issues for discussion and presented a draft review for discussion. As it happened, I think three of the members of the expert working group were in agreement and collaborated and produced one report, but the expectation was – I mean, presumably there may have been a hope that they would end up with one report, but as the executive summary makes clear, polarisation from almost the outset meant that was unlikely, but the point there is that the expectation on the members was clear. They'd submit a draft for discussion and they'd submit their final review before the completion of the process.

Then over at page 1661, the foot of the page, the report of the expert working group will be considered by the CTO [Chief Technical Officer] during the formulation of his advice to the Director-General. The Director-General will consider this advice prior to his final determination of the issue in dispute, so it was clear what was expected of the stakeholders and what the purpose was of this exercise.

In the written submissions, we set out in some detail the history, if you like, of quantitative risk modelling on this issue and that starts at paragraph 103 of the written submissions, or 104. We summarise there how the quantitative risk modelling, when and how it was part of this process, and what isn't mentioned there is that in fact the risk analysis itself appends a quantitative assessment. Now, it

wasn't a complete assessment. It was only a release assessment. But you can see from the risk analysis that – and this is at page 869 – that to some extent at least a quantitative assessment of the risks was apparent from the beginning of the process.

GLAZEBROOK J:
Perhaps slow down a bit, because I think this is relatively important.

MS GWYN:
Sorry, your Honour. That's at volume C tab 53, which is the risk analysis that I took your Honours to earlier, and it's an appendix to that document, starting at page 869. The point of that really is just to show that quantitative modelling wasn't something that came late in the piece. There was a limited quantitative assessment early on, but then as detailed in the written submissions, Dr Neumann and Professor Morris' new science report, with its quantitative model, was first produced to MAF in August 2007 and then at 105 of the submissions that –

GLAZEBROOK J:
You don't suggest it was taken into account in any sense, do you? Any real sense at that stage? Or do you. I'm sorry, I should have phrased that as a question.

WILLIAM YOUNG J:
I think it's rejected, isn't it?

GLAZEBROOK J:
Once it's taken into account and rejected, yes.

WILLIAM YOUNG J:
I mean it's a value, it's 109, 1097 there's a discussion of it.

MS GWYN:
Yes, your Honour and certainly in Mr Pharo's evidence he goes in some detail through the Ministry's analysis of that first Neumann model.

WILLIAM YOUNG J:
It's actually quite a substantial evaluation of it.

MS GWYN:

Yes.

ELIAS CJ:

Have we got that somewhere?

WILLIAM YOUNG J:

It starts at 1097, volume D.

MS GWYN:

Yes, your Honour and this is in the review of submissions on the draft import health standards that I mentioned before. So the draft standards were issued for public consultation and then the Ministry compiled this review of the submissions which sets out each submission and the response and as your Honour Justice Young says, there is an evaluation of what was called the new science report in this review of submissions. And then when the appellant made its submission to the review panel it again put forward this model, this quantitative model, in support of its submission and as we note in the written submissions at 107 the panel was critical of the model and then of course the panel recommended that it would be useful, or might be useful to do further quantitative modelling and so what the Ministry did, and this is at 108 of the written submissions, was to revise the Neumann model. It had the work it did on the model reviewed by Dr Katharina Stark who had been one of the members of the review panel and then that revised and reviewed model was what was put to the expert working group. So there's a substantial history to the quantitative modelling aspect of it and as well as that it's, I think it's important to note that while the quantitative modelling can be useful, as the panel observed, it's not a completely different beast from what had gone before in terms of the qualitative risk analysis and there is a useful summary in the authorities, and this is a supplementary bundle that I hope your Honours have from the respondents. It's not really a bundle in that it contains only one authority but it's pages from the handbook on import risk analysis from the OIE and at page 32 of that document – sorry it's a very slim volume. At page 32 there's a box there that's headed, "Summary qualitative and quantitative methods."

McGRATH J:

The last page?

MS GWYN:

Yes. It says, "A qualitative risk assessment is a reasoned and logical discussion of the relevant commodity, epidemiology and economic factors associated with the hazard where likelihood estimates are expressed in non-numerical terms such as high, medium, low or negligible. It is suitable for the majority of risk assessments and, in fact, the most common type undertaken for routine decision-making. In some situations it may be useful to adopt a quantitative approach as an adjunct to a qualitative assessment to gain further insights, identify critical steps," etcetera. Quantification which a mathematical model is developed that links the very steps and the risk pathway is a specialised tool. Although both the inputs and outputs are expressed numerically it's not necessarily more objective or precise in a qualitative approach."

The point really is that the quantitative modelling was putting in numbers what the qualitative assessment had put in words. So it wasn't looking at different issues, or different parameters, it was modelling them in a numerical sense.

So just coming back to the expert working group report at E88. The process, as I have said, started on the basis of certain expectations on the stakeholder representatives and the report itself appends the minutes of all of the discussions and it also appends the reports produced by each of the members of the expert working group. As I have mentioned there is one joint report from Drs Alban, Aubrey, Depner and Rowland and the report includes Dr Neumann's report but as the evidence notes Dr Neumann tabled his report – well, he tabled his model, his reworked model, at the very end of the expert working group process, so at the completion of the discussion. He didn't table it in time for the other participants in the expert working group to discuss it, comment on it, ask questions. He tabled it at the very end in what I think is not unfairly characterised as a tactical move and –

ELIAS CJ:

What's the basis for that suggestion?

MS GWYN:

The working group had extended its timeframe already to accommodate an illness by Dr Neumann early in the process and I think it had been plain throughout that the expectation was that – the point really of the expert working group was to enable discussion of the issues and sharing of information.

GLAZEBROOK J:
Couldn't it just be the normal, sort of, last minute issue that happens to a number of us?

MS GWYN:
Well –

GLAZEBROOK J:
Does one have to infer a bad motive as against a –

MS GWYN:
No, perhaps I am being uncharitable your Honour although all of the other participants chose to table reports only, and that was what was expected of them, whereas Dr Neumann chose to table both a report and a reworked model.

GLAZEBROOK J:
And in fairness a reworked model takes longer than a report?

MS GWYN:
That may be true, your Honour. What – where it, in fact, left the Ministry was they had reports of all of the other participants that had been discussed during the course of the expert working group. They had Dr Neumann's model that hadn't been discussed and hadn't been tested. The EpiX Analytics representatives on the expert working group, Drs Zagmutt and Groenendaal, in fact at the Ministry's request did an initial review of the Neumann model and their review is also included in the EWG report at page 1833. And, I'll come back to this, but they raised some questions about the model's validity and because there was no further opportunity, I meant the Ministry could, at this point, have said, well, we've got the reports, we've got Dr Neumann's model, we'll put, we'll summarise all of that and put that to the Director-General now. Instead the Ministry, and perhaps it runs the risk of being hung by its own extended and collaborative process, instead the Ministry said, well, we've got the reworked model now, let's have a look at it and see what it says, and on that basis the Ministry contracted Drs Zagmutt and Groenendaal to do a further specific review of the Neumann EWG model. And that's their, the report on it is at F92.

GLAZEBROOK J:

What would they have summarised at the point that you suggest they could have summarised?

MS GWYN:

Well –

GLAZEBROOK J:

Just that nobody agreed on anything or what would it be?

MS GWYN:

Well essentially as the report does to some extent it – in the –

GLAZEBROOK J:

Sorry I was not meaning to …

MS GWYN:

No it's an appropriate question, your Honour. The report to some extent talks only about the process but what it could have done was go further and say, here are the products of the expert working group. Here are the various reports presented by the participants. It would have concluded that there wasn't a consensus view and – but could then have gone to the Chief Technical Officer to make a recommendation to the Director-General at that point, on the basis of the work of the expert working group on the day it concluded.

COURT ADJOURNS: 3.33 PM

COURT RESUMES: 3.51 PM

MS GWYN:

If I could ask your Honours to have three documents open in front of them. The first is the initial EpiX report on the Neumann EWG model and that's in volume E88 at page 1833 and that needs to be read alongside their subsequent report which is in volume F, tab 92, and then if I could also ask you to look at the affidavit of Dr Zagmutt, and that's in volume B, tab 40.

ELIAS CJ:

Can you tell us just so that we know what to look out for what you're taking from these?

MS GWYN:

What I wanted to do, your Honour, was to briefly go through what EpiX Analytics did with the Neumann EWG model.

ELIAS CJ:

Right, thank you.

MS GWYN:

And it's explained, the explanation begins in their report that's included in the EWG materials and then it's summarised and some of it repeated in the December report, and Dr Zagmutt's affidavit really sits alongside as an explanation of what they did with the report.

ELIAS CJ:

I think I got the wrong reference for the first one.

MS GWYN:

That's –

ELIAS CJ:

F?

MS GWYN:

Yes.

McGRATH J:

He's called Dr Zagmutt, is he not Dr Vagara?

MS GWYN:

No, your Honour, and I don't understand the –

ELIAS CJ:

He's Spanish.

MS GWYN:

He's Spanish but I don't understand why the last name isn't – but, no, he is Dr Zagmutt.

GLAZEBROOK J:

Isn't the maiden name, one of them is the –

MS GWYN:

Yes.

GLAZEBROOK J:

– one of them is the maiden name of the mother.

McGRATH J:

Thank you.

GLAZEBROOK J:

And they are always called the father's name.

MS GWYN:

Yes it is, it's –

ELIAS CJ:

Sorry, where in F?

MS GWYN:

Your Honour the Chief Justice it's, the December report is tab 92, volume F.

ELIAS CJ:

Yes.

MS GWYN:

And perhaps starting with the affidavit at page 583, paragraph 38. And he says there, MAF asked EpiX Analytics to review the reworked Neumann model, due to the late tabling of the model there being no time for a full EGW peer review.

GLAZEBROOK J:
Sorry –

MS GWYN:
So paragraph 38.

GLAZEBROOK J:
Thank you.

MS GWYN:
And then in the paragraphs that follow he details what they were provided with. So the spreadsheet model and report and Mr Stone, paragraph 40, Mr Stone also sent us Mr Glass' final EWG report which Dr Neumann had drawn from in devising the reworked model. The Glass report data was used to model a number of parameters in the reworked Neumann model. So this responds to a question that your Honour I think Justice Young had this morning, the data that they're looking at was all data that was presented to and discussed within the EWG, although this particular report and model was not.

At paragraph 42 of the affidavit, after receiving the report, that's the EpiX report to the EWG group, MAF asked us whether it would be possible for EpiX to amend the reworked Neumann model along the lines of the 6 November report in order to fix the identified problems. Then he talks about the terms of reference at paragraph 43 and at 44 the EpiX revision of the reworked Neumann model was not intended to depart significantly from the reworked Neumann model. We took a minimal change based approach to revising the model. This work focused on fixing modelling mistakes in the reworked Neumann model while not proposing any significant changes to the model structure that had already been discussed during the EWG. Modelling changes were largely restricted to the mistakes that we found after reviewing Neumann's reworked model. In terms of reference we agreed that we would not make any significant structural changes to the model and that model changes would be both neutral and consistent with structure of the preceding models.

GLAZEBROOK J:
Sorry, I've lost where you were reading from?

MS GWYN:

I'm sorry your Honour, that's at paragraphs 44 through to 46.

GLAZEBROOK J:

I was taking notes of what you were saying.

MS GWYN:

Sorry. And then if you go to the first report, so that's volume F, no, sorry, it's not.

GLAZEBROOK J:

Volume E, isn't it, page 833?

MS GWYN:

Volume E, yes, and you'll see at 1836 under the heading, "Model verification" talking about the Neumann model. "The model is conceptually simple as it just adds new pathways to the current MAF model. However, for the brief period of time we had to review this model we found multiple mistakes that questioned the validity of the model," and then it refers to what's a mechanical mistake, if you like, in terms of preparing a model, "but one that highly influences the model results. Also the model contains an error in the linking of the parameters used to model the weight of scrap being consumed in non-commercial herds. This mistake was likely caused by the wrongly copying a cell with a fixed reference." Then down at the bottom of the page, "More importantly the model makes two fundamentally flawed assumptions. First, all scraps fed by one producer are eaten by one pig. This represents a gross departure from reality as for example the assumed average number of pigs per herd, as reported in the model, is 62 for para-commercial farms and 14 pigs for non-commercial farms." And then the second bullet point, "The model predicts outbreaks even though the dose response received by each individual pig is much lower than the lowest doses reported in the literature that did not cause infection including the Herman study itself." And then further down on page 1837, "Model validity. In addition to the modelling and parameter estimation flaws described elsewhere the model fails to pass a simple validity test. Key criteria to establish the validity of any model is whether its predictions can match reality." Then it goes on to say, "Since New Zealand is free of PRRS and does not import fresh pig meat from PRRS positive countries, the model predications cannot be compared against actual outbreaks. However, the inclusion of a fully cured pathway has allowed us to make a valid comparison against empirical evidence as New Zealand currently imports fully

cured meat. It is known that New Zealand is free of PRRS yet we are looking only at the fully-cured scenario, the current scenario in New Zealand. The model predicts on average almost two outbreaks per year. This, of course, is an impossibility. Then at the foot of the page, other relevant observations. First, the majority of the changes were based on the expert estimates presented within the Glass report. As also mentioned in the Glass report, the forecasted numbers provided in the report are mainly based on expert opinion of one individual with frequently no data sources to back up the figure proposed. While Mr Glass presents himself as an expert, it's important to keep in mind that they are at best forecasts by an expert and inherently have a lot of uncertainty and possible biases attached."

And then over the page they set out further observations of and criticisms of the model, and in particular of the Glass data. They note there – that's on page 1838, and this is commenting on Mr Glass' estimates of what imports of uncooked pork would be – "in the three year period when the New Zealand market was open for imports of uncooked pork, the market did not see the changes that Mr Glass presents in his report. While consumption patterns of pork may have changed, the changes that are presented in the Glass report differ much from what has been observed in the past. Fourth, it's surprising that in the original peer review from Neumann et al the food service and retail sectors were not at all taken into account as a separate route. While the current Neumann analysis estimates the food service and retail sectors contributed the far majority of the risk of outbreaks." Then the last paragraph above the bottom heading, "given the above observations the changes made to the original MAF model is they relate to the different infection routes seen to be based entirely on expert opinion that was not considered important by Neumann three years ago". Then at the bottom some further criticisms.

ELIAS CJ:

But these are – I might be totally astray here but these criticisms do suggest that the changes actually were significant. They're not minimising them in this. They're saying – they're explaining why they changed them, because they say it's wrong. Is that right?

MS GWYN:

Yes, in essence, your Honour. They're saying first there are some basic modelling mistakes which we'd corrected and secondly we've – there are some fundamentally flawed assumptions which we've corrected, such as that all scraps will go to one pig

and then we've looked at the data offered by Mr Glass to the expert working group, upon which Dr Neumann relies very heavily, and they've said, well, and this becomes – it's made more explicit in their final report.

GLAZEBROOK J:
Sorry, can I just check – sorry, just so I'm totally up with this, this first report certainly went out publically because it was attached to the working group submissions.

MS GWYN:
Yes.

GLAZEBROOK J:
The second report?

MS GWYN:
Not initially. It was eventually.

GLAZEBROOK J:
Because the revised model didn't go to any sort of comment, did it?

MS GWYN:
No, it didn't. No, it didn't go out for consultation, your Honour.

GLAZEBROOK J:
So that and the second report were effectively – sorry, I don't want to say secret reports but I'm trying to think of the word. They were internal reports.

MS GWYN:
It was at the conclusion of the expert working group process, or after that had concluded.

GLAZEBROOK J:
So they were internal reports, only seen internally rather than seen by –

MS GWYN:
You're right, your Honour. The first report was part of the working group.

ELIAS CJ:

Is this the one at 1833?

MS GWYN:

Yes. So that was provided as part of the EWG report to all of the participants.

GLAZEBROOK J:

And so if there had wanted to be comment on it, they could have commented on it?

MS GWYN:

They could, your Honour, and as I've endeavoured to show, most of the criticisms and changes are set out in that first report, but as the authors note –

GLAZEBROOK J:

Well, are you going to show us the differences, maybe, between the first and second, are you?

MS GWYN:

Well, there aren't differences in substance. It's more that –

GLAZEBROOK J:

They're just putting figures on the changes that they've made?

MS GWYN:

The second report is a more considered analysis because as Dr Zagmutt says in his affidavit, we had only a very limited time to look at this before we submitted that first report.

GLAZEBROOK J:

But your submission, basically, is that all of the flaws that were identified have just been numerically – there's been numerical figures put on those?

MS GWYN:

Yes, but the essence of the criticism hasn't changed. What the final December report does is contain some more detail around the EpiX analysis of Mr Glass' data, so that's at page 1913. What this makes clear is Mr Glass had produced data in relation to two aspects. One is what's the likely volume of pork that will be imported under the proposed import health standards, so he makes some estimates as to the

likely volume, and what the EpiX experts say is, “Well, he doesn’t verify that data. He doesn’t give any reference for it other than himself and we don’t think it’s” –

GLAZEBROOK J:
They said that in the first report, didn't they?

MS GWYN:
Yes, they did.

GLAZEBROOK J:
And just reiterated?

MS GWYN:
Yes, but in contrast the Ministry’s data or estimates of the volume of pork that will be estimated is referenced and does have some research report for it, so we prefer that data. But on the second category of information produced by Mr Glass, and this is modelling the scraps from the food sector, what they say, and this is at page 1913, they again note that there are no data sources for it but nevertheless they’ve left it unmodified, so despite the criticism in the appellant’s evidence, in fact the EpiX report didn't modify those figures, and you’ll see the last sentence in that penultimate paragraph, “We consider that even with the large numbers proposed by Mr Glass and used in Neumann’s revision the estimation of the risk was already represented in the model in its present form, so it may not be relevant to further refine these parameters.”

ELIAS CJ:
Does that mean they’re not –

MS GWYN:
Well, they’re saying even if you use Mr Glass’ data we think you don’t need to refine the model.

So the short point in relation to the EpiX reports is that as Dr Zagmutt notes they didn't change the structure or the basic inputs of the model. They took the material that had been presented to the expert working group and corrected modelling mistakes, corrected some obvious assumptions, and then made some choices where the data was contested. That was the Glass data. In one respect, they said, well, it’s

not supported but we'll include it anyway. In the other case in relation to the volume of the imports, they said, well, Mr Glass hasn't verified his data. The Ministry has. We'll put in the Ministry data.

The evidence of Professor Morris is –

ELIAS CJ:
I suppose there is an issue as to how significant that deviation was, the substitution of the Ministry data.

WILLIAM YOUNG J:
Well they're all very significant. In totality, they're extremely significant. The proposition I think is that each one had been the subject of debate.

MS GWYN:
Yes, your Honour and none of it was new.

GLAZEBROOK J:
And it was referenced in that first report that there were concerns about those figures.

MS GWYN:
Yes.

GLAZEBROOK J:
There wasn't an indication as to what figures were going to be used but there was an indication that there was a concern.

MS GWYN:
Yes.

GLAZEBROOK J:
The first public report sorry.

MS GWYN:

So as your Honour says the inclusion of the different parameters certainly resulted – meant that you had a different result but the structure wasn't new and the information –

ELIAS CJ:

Had been debated.

MS GWYN:

Had been debated and the variables – so none of it was new and that's the point that both the High Court and the Court of Appeal made, that there was nothing new or novel here. That this was a reworking of material that had already been discussed to quite some considerable degree. And the appellant relies heavily on

Professor Morris' evidence and the evidence it points to was actually filed after the substantive High Court hearing in support of an application for renewal of interim relief and the respondent's opposed that evidence going in on the basis that although it purported to be new, it wasn't new, it was simply Professor Morris' further thoughts, if you like, on the EpiX model and for that reason it hasn't been responded to but as I say in substance there is nothing new in Professor Morris' evidence that hasn't already been raised.

GLAZEBROOK J:

Do you want to take us to the – or say anything about the three points in the appellant's submissions that were said to be new and I think they were paragraph 76.1.

MS GWYN:

Yes, your Honour and to some extent I think I covered –

GLAZEBROOK J:

Covered one, the first and second I think.

MS GWYN:

– import_P, which is the proportion of pork consumed in New Zealand that's imported, so that was the Glass data on that question.

GLAZEBROOK J:

I must confess I didn't quite understand paragraph 76.2 anyway. I think that, no, the third one, is that the use by date issue?

MS GWYN:

The –

GLAZEBROOK J:

So that's indicated in that first report.

MS GWYN:

Yes it was, your Honour.

GLAZEBROOK J:

And I'm assuming that second one is the other one we were discussing?

MS GWYN:

Yes, your Honour and –

GLAZEBROOK J:

In the service industry material, is it?

MS GWYN:

The –

GLAZEBROOK J:

Your friend is shaking his head so – or maybe he can explain what the – it's paragraphs 76.1, 2 and 3 which were what Mr Cooke took us to as being the three differences or parameters.

ARNOLD J:

I think Mr Cooke accepted that these parameters were discussed at the EWG process. I have that note anyway so if I'm wrong he'll tell it.

MS GWYN:

I think that's right, your Honour, the parameters weren't new. The issue is primarily around – well in relation to two of those, primarily around the Glass data, whether

that was accepted or not. And the point to note about Professor Morris' evidence is he, what he does is explore the effect on the output of the model if you amend those three variables to values which he says are more appropriate and his preferred values for import_P and consumer ready_P are the data derived from Mr Glass, which is, as we've said, had been discussed in the expert working group. He uses a different value for viral persistence but he doesn't explain where he gets his figures from and that's the criticism made in the respondent's written submissions in 133. So he varies those figures used by EpiX Analytics but he doesn't explain why he's chosen the values he's chosen and then he jointly varies all three parameters and in a sense that's one of the key points, that all of the changes made by EpiX Analytics to the model are explained and justified in their report whereas Professor Morris in his fourth affidavit doesn't explain how he arrives at the different – at his changes.

Just one other thing that I wanted to note too in Professor Morris' evidence and in the appellant's submissions this morning, the submission is that the EpiX Analytics model doesn't undertake any comprehensive sensitivity analysis and if I could just point you in Dr Zagmutt's affidavit at tab 40, page 598, and this is actually responding to an earlier affidavit from Professor Morris, paragraph 91, Professor Morris says, "That he considers the sensitivity analysis in the EpiX Analytics 14 December report was inadequate." 92, "In making these criticisms Professor Morris overlooks the following points. The report of 14 December showed only the sensitivity analysis of the output to main drivers in the model. However, our earlier reports on the MAF revised model and reworked Neumann model devote entire sections to a detailed discussion of multiple sensitivity and scenario analyses of the effect that parameter changes would have in the model results," and it sets out there the relevant portions of the model and makes the point that, of course, Professor Morris wasn't part of the EWG. Then concludes, "We were the only participants in the EWG to present such comprehensive sensitivity analyses."

I'm very conscious of time and I thought if I could just come back to one point I want to make about the Director-General's final decision and then very briefly address the intervener's submissions.

WILLIAM YOUNG J:

Could you just tell me, is there an instruction to EpiX as to the – that preceded their final report? Was there a Ministry instruction?

MS GWYN:

Yes there is and I'll find the reference but certainly part of it is set out in Dr Zagmutt's affidavit at tab 40, starting at paragraph 38 on page 583.

ARNOLD J:

43, is that the –

MS GWYN:

Yes, 43 sets out part of the terms of reference and so it's F92.

GLAZEBROOK J:

Page 92, so that second report which – perhaps in terms of reference –

MS GWYN:

I'll come back to that your Honour because there was obviously an instruction to EpiX. As you'll see there –

GLAZEBROOK J:

That would have been an internal, if I'm just using the term internal rather than a public instruction presumably?

MS GWYN:

Yes, yes. Turning back now to the decision document, and this is volume F tab 101, and I wanted to specifically address the question that the Director-General asked himself the wrong question and answered the wrong question, and the relevant page is 1978. You'll see under the heading "the matter in dispute" it sets out the overall question. "The matter in dispute is whether MAF has taken appropriate account of the available science in determining that the provisional import health standards provide for effective management of biosecurity risk." In my submission, that is the – it might not be framed in the way that a lawyer would frame it but that is the right question when one looks at the wording of s 22A and the purpose of s 22A, so s 22A poses the question whether in developing an import health standard there has been sufficient regard to the scientific evidence about which a person consulted raised a significant concern. So that's framed in the decision paper. Whether MAF has taken appropriate account, so sufficient regard of the available science, and then it links it back – well, s 22A itself refers to the fact that it's about developing an import health standard. That's what the issue's focused on, so it captures those words.

Then the second part of the question that he's posed links it back into s 22(5), and in my submission that's an entirely appropriate question for him to be asking. He's posing the s 22A question but it puts it in context of the overall process which is that ultimately he has to make a decision under s 22 and then at page 2006 under the heading "summary of decisions" he answers the question, "The final import health standards and MAF's process to develop them including the additional work undertaken in response to the panel have taken appropriate account of the available science," and then links it back to the purpose and will provide for effective management of biosecurity risks considering the legal obligations under s 22(5).

It's also clear that there were two decision documents. There was the s 22A decision document and then there was the s 22 decision to issue the import health standards. Finally, I wanted to very briefly address the National Beekeepers Association submission and in summary the respondent's submission on this issue is in relation to the precautionary principle is that precaution isn't defined in the Biosecurity Act and it's not expressed in any provision of the Act in contrast to the HSNO Act [Hazardous Substances and New Organisms Act 1996] and that's the point that the Court of Appeal made in the Beekeepers' case, and it didn't just suggest it. It explicitly said it's raised in the HSNO Act but not in the Biosecurity Act.

GLAZEBROOK J:

But isn't that – as I put to your friend, just because the definition of risk itself effectively takes a precautionary approach because of the suspicion in the May – I mean, it might not be a classic precautionary approach and it mightn't call it that but …

MS GWYN:

I think your Honour's correct. I suppose I have two points. One is that the precautionary principle isn't explicit in the Act and just on that in the second reading speech of the amendment Bill, and this is in the authorities at tab 3, the then Minister for Biosecurity, Mr Jim Anderton, and I might just briefly take your Honours to that. It's tab 3 of the appellant's authorities at page 15143. The second paragraph, if your Honours have it. This is the second reading speech of Mr Anderton, then the Minister for Biosecurity. In the second paragraph on that page, a number of submitters considered that the Bill should make more substantial amendments to the Biosecurity Act. The common theme behind these submissions was the view that

there needs to be more statutory process, etcetera. Some of the suggested amendments to the Biosecurity Act proposed that elements of the Hazardous Substances and New Organisms Act be adopted such as the precautionary principle in the minimum standards, and then the next paragraph, "I would have been concerned if the select committee had sought to make major amendments of this kind to the Biosecurity Act, adopting elements of the Hazardous Substances and New Organisms Act into the Biosecurity Act could have significant implications to the way those decisions are made under the Biosecurity Act." So not only is there no explicit reference in the Act but the Minister had that in mind at the time of the amendments, but then to come back to your point, your Honour, you're right in that –

GLAZEBROOK J:
Well, it would effectively be a doubling-up, wouldn't it, and make it much more of a precautionary approach than was even something under the international and environmental law, I would have thought, because you already have a suspicion and then you take a precautionary approach to whether there's a suspicion.

MS GWYN:
Well, you have, and I think it's the essential precautionary nature of the regime is demonstrated by the fact that an import health standard is required for all risk goods and risk goods is very broadly defined. So virtually everything could potentially be a risk good. So right at the outset, if you like, there's a kind of "assume the worst" until you've produced the risk analysis or there's some international standard against which you can judge it, and that's in contrast with other regimes such as the Food Act, for example, where food is presumed to be safe unless it's known to be unsafe, so the Biosecurity Act really takes the opposite approach, so I think your Honour's right that implicitly there is that precautionary or that cautious approach in the way that that whole process for issuing import health standards is set out.

The only other point in relation to the Beekeepers' submissions is really that although their written submissions refer to many international agreements, none of those have direct relevance to the situation and the WTO appellate body decision in the EC beef hormones case explicitly looks at whether the precautionary approach should be recognised as a principle of customary international law and explicitly looks at how it applies to the SPS agreement, and in the interests of time I won't take your Honours to that, but that's at tab 29 of the respondent's authorities in paragraph 124 of that WTO appellate body decision.

Of course, article 5.7 of the SPS agreement does recognise the precautionary principle in that it allows – that's at tab 12 of the appellant's authorities, and article 5.7 does allow a departure from the general principle which is set out in article 2 that you apply sanitary or phytosanitary measures only to the extent necessary to protect human, animal or plant life and based on scientific principles, so that's the general principle. Article 5.7 allows for a departure from that in cases where relevant scientific evidence is insufficient. You can provisionally adopt measures on the basis of the available information but you must seek to obtain the additional information necessary for a more objective assessment within a reasonable period of time. The 2001 import health standards were provisional health standards in the sense contemplated under article 5.7. So they can't endure – what the appellant asks is that either the Director-General go back to a new risk analysis or go back to those provisional import health standards, and what we say is, well, that simply isn't feasible. They are provisional and the science has moved on and there's an obligation on New Zealand under the SPS agreement to move on.

The only other point in relation to the Beekeeper's submission is there's considerable material around varroa and Psa but as set out in our written submissions the circumstances of those incidents are quite different from what we're concerned with here, and really don't add anything to this situation.

I don't have any further submissions, thank you, your Honour.

ELIAS CJ:

Thank you, Ms Gwyn. Yes, Mr Cooke.

MR COOKE QC:

Thank you, your Honours. I wanted to focus on what I apprehend to be the key issues in the case by way of a reply, and I hope I will be brief. I wanted to start with the submission my learned friends made that the s 22A(3) process doesn't have within it a neat legal framework of a kind that we have advocated for and the submission in that context that the conclusions of the panel could not be characterised as clear findings that would allow that kind of clear legal determination. In association with that I want to respond to the submission that if you read the two decisions of the Director-General together, the August or September 2010 decision and the April 2011 decision together, you can find the s 22A determination as Parliament contemplated.

But can I begin with the suggestion that the panel did not make sufficiently clear findings that would enable a clear determination in the manner that we have suggested, s 22A(3) suggested and just illustrate that by one of the sets of conclusions that my learned friend took the Court to and if I invite your Honours to go back to the panel's report, which is in volume E tab 70, and my learned friend illustrated this point by going to the conclusions that one finds at page 1474. This is in relation to the knowledge and obtaining of information about the commercial and non-commercial pig industries within New Zealand and the consequent risk of spreading the PRRS is introduced. With respect, you cannot say that the panel's conclusions on this issue did not involve findings that there had been insufficient regard to the scientific evidence, because if one looks at paragraph 10, for example, on page 1474, what the panel concludes is that it is necessary to obtain the current population data and ensure its availability. There is a need to resolve this issue together with the specific aspects discussed in the following paragraphs.

Then in paragraph 11 the basic structure of the pig industry is identified and one looks at 11F. In order to reduce – on page 1475 – the uncertainty of the epidemiological and economic consequences of potential PRRS introduction, better data are needed on farm, size, type and location. Surveys as described by Pearson are a good starting point, door to door surveys, for example, to identify non-commercial producers and their practices in selected areas relevant to commercial pig production may be particularly informative. So those are the kind of findings that would require the Director-General to make the determination s 22(3) called for, and if there is criticism that this report is a report primarily by scientists, the objective of the determination under s 22A(3) is to make it a formal, comprehensive or legal determination by the Director-General on the issues in dispute.

That leads me on to the submission that if one looks together at the August or September 2010 decision and the April 2011 decision, you can see together they amount to an adequate determination under s 22A(3) that Parliament contemplated. The difficulty with that is understanding what the determination of the Director-General is, because if we take the August/September 2010 paper as in effect implicitly accepting the findings of the panel that the consideration of the scientific evidence is inadequate, the difficulty we then have is the later decision has the opposite effect, so which is it? Was the determination that the scientific evidence consideration was inadequate or was the determination that it was adequate? So, for

example, if we look at the issue that I've just taken your Honours to in relation to the makeup of the pig industry.

Can I take your Honours to the actual determination which is in – behind tab F at 101 and see how the actual determination deals with that issue? We get that at page 1994. The decision in relation to this matter, providing rationale, in accordance with 22A(3). "As Director-General I determine this matter by making the following decisions." The bullet-points, the results of the quantitative assessments do not support our requirement to collect further data regarding pig population size, location, and movements beyond that reported in MAF's primary survey. Now, two things about that. Was the issue determined in that there had been insufficient regard as it is said is implicit in the August/September paper, or is it that the Director-General has determined that there has been sufficient regard to the scientific evidence which this purports to say? The uncertainty and confusion and the lack of transparency about knowing what the answer is, are not a consequence of an uncertainty about the panel's findings. It's because of the way the decision-making process has been followed, and the further point about this is that this bullet point, as I submitted earlier today, asks and answers the wrong question. What this asks and answers is whether the quantitative assessments, that's the new EpiX model, supports the conclusion that it's unnecessary to get further information. That is why the earlier initial determination that it is fit for purpose meets s 22(5) illustrates how the wrong question has been asked and answered. This is simply working on the presumption that provided we've got the new model that gives us what we say is the s 22(5) decision on effective management we can forget about what the panel held about the deficiencies of our earlier work and that's the wrong question asked and answered.

In that context the confusion is also illustrated in my submission in the report of the expert working group which it is said involves the process by which the s 22A determination was properly met and if I can invite your Honours to go back to the report of the group, that's in volume E behind tab 88, and invite your Honours to go back to where my learned friends took you on page 1661. Your Honours will recall that on page 1660 the deliverables of the various members of the expert working group were outlined and then my learned friends addressed what's on page 1661, which is the legal context noting at the end at the bottom of that page that the report of the group would be considered by the CTO during the formation of his advice to the D-G and the Director-General would consider this advice prior to his final determination of the issue in dispute. What's even more interesting though is what's

up the page a bit further under the heading legal context third paragraph down, how the issue in dispute is described. The Director-General must now determine the issue in dispute and provide reasons for that determination. The issue in dispute is whether the provisional import health standards effectively manage the biosecurity risks. If the Director-General considers they do the import health standards will be made final and issued for trade. Wrong question. That's the question that carried across into the s 22A determination. It is the wrong question. It's not whether sufficient regard has been had to the scientific evidence in the development of the IHS consulted on, but whether the updated risk analysis by EpiX provides for effective management of the risk in terms of s 22. And that brings me on to the suggestion that the changes made by EpiX Analytics and the remodelling they did were not sufficiently significant to trigger any requirement to –

WILLIAM YOUNG J:
I think the proposition is not that they're not significant but that they –

MR COOKE QC:
Were debated.

WILLIAM YOUNG J:
– reflected items that had been debated.

MR COOKE QC:
Yes and I accept that the expert working group did discuss the inputs, let's call them, that subsequently were put into the model, but what I submit must be significant is that what then is done to a model to bring those various items together to produce a result is in itself of significance. So it maybe that in an expert working group process there has been discussion about the various matters that will be relevant to an ultimate modelling exercise, but what is ultimately going to be decisive, and what these documents treat as decisive because they say this model now gives us the effective management of the risk, is how you bring it all together because Dr Neumann's model predicted 16 incursions per year. The EpiX Analytics model predicted a risk of 1,227 years between outbreaks. So how you bring all those matters together is significant in terms of what you're ultimately proposing to do.

WILLIAM YOUNG J:

Can I just go back a little. The expert working group did look at the MAF, the second iteration of the model prepared by MAF.

MR COOKE QC:

Yes.

WILLIAM YOUNG J:

Which so far as I can see is, leaving aside some mechanical problems, is the same structure as the third and fourth models.

MR COOKE QC:

They're all very similar structurally but it's not the MAF model that was adapted by EpiX, it was Dr Neumann's.

WILLIAM YOUNG J:

Yes, that's right, I understand that. But the same, these variables, or similar variables are common to all these three models because each of them has to accommodate somehow or other in a different way.

MR COOKE QC:

Yes but the way in which they do that, and the output that results, is, of itself, of significance and not only of significance, it's of obviously prime significance because if you get an output of a model that's one in 1,227 years, and you get a decision that follows from that that provides for effective management, it's obviously decisive. So the very fact, the way you bring it all together in a model is significant and that is why if you look at these procedures that are set out in the Act, it's quite obvious it should have been consulted upon.

WILLIAM YOUNG J:

Say MAF instead of getting EpiX to do another model it simply said, we prefer our model to the Neumann model, that is we prefer model 2 to model 3, would there have been a need to consult on that?

MR COOKE QC:

Well, because it had already been provided the parties we couldn't say they haven't been consulted on but what MAF wouldn't have been able to say about that model was that it was claimed to effectively manage the risk.

WILLIAM YOUNG J:

Because there were errors in that.

MR COOKE QC:

Yes.

WILLIAM YOUNG J:

Or there were values in it to which it no longer prescribed.

MR COOKE QC:

It was subject to debate as it had been, as the EpiX Analytics model is, it's just that no one has had the opportunity to explain why.

WILLIAM YOUNG J:

Say the Director-General had been a mathematically and scientifically inclined to chat and he just took these two models and went through it and put, and redid the model himself as part of this decision.

MR COOKE QC:

Well, if that had involved, it sounds like it would have, a reasonably substantial change to what people have had an input into with respect that would have required it to have been put to the parties for their comment.

WILLIAM YOUNG J:

See I've heard cases which turned on required effectively to populate models. It wouldn't have occurred to me to go back to the parties once I've made my decision as to the inputs that were to go in.

MR COOKE QC:

But think of the context of this case where there has been considerable controversy about the risk assessment. The panel's delivered its findings which involved a number of comments that the work has been inadequate and there are deficiencies.

There's been an expert working group process where there's been obvious controversy between the experts as to these variables then the Ministry says to EpiX, you go away, you fix up what you think are the mistakes, and one person's mistake is another person's opinion in this area, you fix it up, you give us a result and then we'll make a decision based on that and when the Board asked to see what this new model is, you decline them. You request it under the Official Information Act and it's declined and you can't put any input into the final decision, the ultimate model, that ultimately counts, and the fact that it's derived from that expert working group process doesn't minimise the need to consult on the final decision that's going to take on what the variables on, it increases that because –

GLAZEBROOK J:
But aren't you always going to have that issue? Say, for instance, because all of the criticisms were actually foreshadowed in the EpiX, and you might say that wasn't the case but let's assume that it was for now, but all of the criticisms were foreshadowed in that EpiX report that was public.

MR COOKE QC:
Yes.

GLAZEBROOK J:
Then you could have had a situation where somebody is saying well I think it's this value and I think it's that value, surely the Director-General doesn't have to say well, I've picked this one now I have to consult yet again because the statute can't possibly be looking at that iterative process because you'd never stop and the whole idea is that you do this as soon as possible.

MR COOKE QC:
Yes, yes, but still there is the fact that having followed through an expert working group process, following on from a panel report what the Ministry are now saying is we're now going to have – form the model on which we're going to base the decisions and it's not only s 22, but actually s 22A.

GLAZEBROOK J:
Well, are they doing that or were they just, in accordance with the provision that we were taking to, really doing just a check on their qualitative analysis that they'd

already done Is this a totally new analysis that they are basing their decision on or is it merely just a check to the qualitative analysis that they've already done?

MR COOKE QC:

Well one can see from the actual s 22A decision paper how significant the updated modelling exercise was taken to have been, because all the answers to the concerns are identified by the updated model, the updated model, and it's inevitable, isn't it, that if the model says one in 1,227 years, it's a no-brainer, isn't it? So it's obviously going to be treated as decisive, so this is the decisive – purported to be the decisive conclusion, and as Justice White said in his descent, they couldn't just treat that as the last word without the Board being given an opportunity to comment on the proposed last word, and that's apart altogether from the fact that the s 22A determination appears to have been decided on the basis of it.

WILLIAM YOUNG J:

I don't want to go on and on about this, but would there have been anything that the Board could have said about the model prepared by EpiX that hadn't already been said, because it would it simply not be a re-going over of the arguments already had in relation to the imports.

MR COOKE QC:

No, because it's also the way you bring it together. So, for example, it's clear that Mr Glass presented this information to the expert working group and of course it was debated in that expert working group. But what EpiX Analytics did was choose some of it and not other aspects of it. So it's the very choice of some parameters and not other parameters and how you bring it together in a model that results in its output. So –

WILLIAM YOUNG J:

I sort of understand that but wouldn't, if you'd been given the opportunity to deal with it, wouldn't you have gone through all the alterations that were adverse to the position of the Board and gone back to the arguments as to what you would have said the proper input should have been.

MR COOKE QC:

You would have done that and you would have said things, as Professor Morris has said, such as you need to do a multi-point sensitivity analysis and –

WILLIAM YOUNG J:

Why hadn't that been said before, in relation to the earlier model? Or had it been? Because I thought there was a sensitivity analysis.

MR COOKE QC:

There was a sensitivity analysis of the earlier material but not of the EpiX Analytics model.

WILLIAM YOUNG J:

They say they did do a sensitivity report?

MR COOKE QC:

No, they don't say that, if I can take your Honours to that.

WILLIAM YOUNG J:

I thought they did, sorry.

MR COOKE QC:

If your Honours go to volume B, what they actually say is that the earlier models had been subject to a multi-point sensitivity analysis, not theirs. So B40.

GLAZEBROOK J:

Report of 14 December 2010 showed only the sensitivity analysis to the output to main drivers in the model. However, the earlier reports devote entire sections to a detailed discussion of multiple sensitivity analysis.

MR COOKE QC:

Are really reports on the MAF revised model and the reworked Neumann model developed entire sections, not their model.

GLAZEBROOK J:

Yes but they say they've done it on the main drivers. They've done sensitivity analyses on the other ones. I mean we're not – well, I mean the difficulty is – well, because you would only do sensitivity analyses usually on the main drivers of the model that are going to change it and if you've done earlier sensitivity analyses that show that the other variables don't change the models much, then it's not going to

make a difference. When you go to the final model, why would you do sensitivity analyses on figures that have been shown not to make a difference.

MR COOKE QC:

Well that's why a multi-point sensitivity analysis is appropriate and that's the point that Professor Morris made in his affidavit about if you change several of the parameters together they do make a big difference to the output and that's what the multi-point analysis, on the various parameters that EpiX had chosen, hadn't been done.

WILLIAM YOUNG J:

So is it page 6598?

MR COOKE QC:

I'm just reading from the affidavit of –

WILLIAM YOUNG J:

Is that para 91 is it?

MR COOKE QC:

93.

ELIAS CJ:

Where are we, sorry?

MR COOKE QC:

I'm on tab 40, page 598, paragraph 93.

GLAZEBROOK J:

That's where I was as well but where was the Morris criticism?

MR COOKE QC:

The Morris criticism, his is in volume B, at 44, at page 638, where at paragraphs 33 to 35, he talks about the sensitivity of the model to the parameters and then he goes through each of the parameters that are in question. Just by the way the comment that this was all put in by way of an affidavit in support of the interim release continuation, the subject matter of what was said in that affidavit is all in

Professor Morris' earlier affidavit. So his affidavit for the interim relief just brings together the material that's in his earlier affidavit so it wasn't, in itself, new.

GLAZEBROOK J:

Well what are the main drivers in the model that they're talking about in the report of – where's the report of 14 December 2010 which shows the main drivers in the model? Because what I don't understand is, if you have done those sensitivity analyses on the earlier models, and if you don't change the – because what we need to know is whether they've changed those parameters that they've done those sensitivity analyses on.

MR COOKE QC:

Well as I understand it they have. That's the problem with trying to compare all the models because they're reasonably complex. What's most important here is the final model. As Professor Morris explains if you alter the volume of trade that comes in, or the 2.6% figure –

GLAZEBROOK J:

So what did they say the main drivers of the model were in their report of 14 December 2010?

MR COOKE QC:

EpiX Analytics you mean?

GLAZEBROOK J:

Well, all I'm reading from is paragraph 93 of Zagmutt.

MR COOKE QC:

Yes. Well the answer is I'm not sure what that means.

GLAZEBROOK J:

Well, it's just does it actually – were those main drivers, the import_P and the proportion of ready-made cuts on the other aspects that have been – and if you're going to do sensitivity analyses to do this you don't take figures that are totally unrealistic, do you?

MR COOKE QC:

No, no.

GLAZEBROOK J:

So you wouldn't take the Glass figures to do a sensitivity analysis based on some of those, if you considered them to be totally unrealistic figures, and not –

MR COOKE QC:

Well, the whole point –

GLAZEBROOK J:

Well because this is what is done here, they take the Glass – don't they take the Glass figures and therefore say, well if you take those Glass figures, you would end up with something – with a much greater likelihood but if you've rejected the Glass figures, and that's already been consulted on ad nauseum and everybody's put their little tuppence worth in on those, why would you do a sensitivity analysis that would take those Glass figures as part of that sensitivity analysis?

MR COOKE QC:

The point of a sensitivity analysis is to work out how sensitive a model is to a change in parameter and a multi-point sensitivity analysis changes several of the variables to see what the change in the output is. So it's not a matter of just – you don't accept or reject the Glass data by doing it. By doing a multi-point sensitivity analysis you work out how sensitive your model is to changing the parameters.

GLAZEBROOK J:

But wouldn't you have done that with your earlier multi-point sensitivity analyses when you were looking at those other things because if you say it's totally unrelated to the figures, which I'm not totally certain it is because I think from memory when you're doing sensitivity analyses you actually take possible figures and do the sensitivity analyses at each point along the way.

MR COOKE QC:

Yes.

GLAZEBROOK J:

You don't take it from absolutely nothing –

MR COOKE QC:
Correct.

GLAZEBROOK J:
Anyway, leaving that aside, if you've done that already then you know how sensitive it is, don't you?

MR COOKE QC:
Well in response I say to that is if you see what Professor Morris says, if you change these key parameters in the model you do get very different results.

GLAZEBROOK J:
Well you do if you change them to totally – of course you're going to, if you change something to a totally unrealistic figure then you're going to get a huge difference in result, aren't you, but you can't say, well, that means the model is wrong.

MR COOKE QC:
No what it shows from that is that the model is sensitive to its assumptions and –

GLAZEBROOK J:
Well, but that's clear anyway, isn't it.

MR COOKE QC:
And that then works out, as the panel said, once it worked out it's sensitive to assumptions, then you need to go out and get the information to make sure that the model is accurate.

WILLIAM YOUNG J:
Where is the actual criticism by Professor Morris on the sensitivity grounds? Is it para 46 at page 641?

GLAZEBROOK J:
You were saying page 638, weren't you?

MR COOKE QC:
It's 638 and it goes for several pages.

GLAZEBROOK J:

And then it goes on to say – oh, I see, I've now found the 2.6 which I hadn't found before, that's at paragraph 48.

MR COOKE QC:

Yes so the heading deals with these particular parameters.

WILLIAM YOUNG J:

But weren't all of these, weren't these points equally applicable to the earlier versions of the model? Model versions 2 and 3? I mean weren't they points that had to be taken into account when models 2 and 3 were being looked at?

MR COOKE QC:

It is true that each of these models, the parameters were going to be decisive and important, yes, I accept that. And I think the key point I'm trying to make is the way you bring it together in a single model makes a big difference to the output and therefore if it's going to make a big difference you should consult on it. Unless your Honours have any further questions that's all I have to say.

ELIAS CJ:

No, thank you. Thank you counsel for your assistance and for a lengthy day. We will reserve our decision in this matter.

COURT ADJOURNS:5.01 PM